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# LAW JOURNAL (KIULJ)

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## ABOUT THE JOURNAL

*Kampala International University Law Journal* is the official journal of the School of Law, Kampala International University. It is a peer-reviewed journal providing distinctive and insightful analysis of legal concepts, operation of legal institutions and relationships between law and other concepts. It is guided in the true academic spirit of objectivity and critical investigation of topical and contemporary issues resulting from the interface between law and society. The result is a high-quality account of an in-depth assessment of the strengths and weaknesses of particular legal regimes with the view to introducing reforms. In furtherance of the requirements of advanced academic scholarship, the Journal pays high premium on originality and contribution to knowledge, plain and conventional language, and full acknowledgment of sources of information among other things. It is superintended by a Board of respected academics, lawyers, and other legal professionals.

The Journal offers useful reference material to legal practitioners, international organisations, non-governmental organisations and the academia. It also provides multipurpose policy guide for the government.

The Journal is a biannual publication. Calls for articles and submission datelines are determined by the editorial board.

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## EDITOR'S NOTE

I am delighted to introduce Kampala International University Law Journal (KIULJ), a peer-reviewed publication of the School of Law, Kampala International University, Kampala, Uganda. The main objective of KIULJ is to implant and nurture the culture of research in the teaching staff members of the School of Law with the view to building a vibrant community of academics capable of contributing significantly to the development of the law through quality research and innovation. To that end, the Journal accepts for publication, high-quality research papers with clear evidence of originality.

This maiden edition is a compendium of selected articles addressing topical issues in the fields of commercial law, corporate governance, land law, human rights and international law. Whereas the editorial board and contributors to the Journal are majorly staff of the School of Law, Kampala International University, we are committed to continuously strive to develop and fine-tune the substance to enhance the quality, scope, and diversity of it to reflect cross-jurisdictional contents. The Journal also strives to combine academic excellence with professional relevance based on a strong law focus as well as multidisciplinary analysis of topical issues on areas relevant to or impacting on the operation of law.

We are particularly interested in research which focuses on the operation of the law through practice oriented analysis, the operation of law institutions and methodological approaches in assessing the law and its implementation. On that note, we shall periodically appeal to professional and corporate bodies, governmental and non-governmental organisations as well as the academia to submit articles and reviews which target the objectives of this Journal.

All papers must, however, be subjected to the Journal's double-blind review process first by the peers and by the Editorial Board. Only articles recommended to the Editorial Board by the respective assessors will be considered for publication. While the maiden edition is in print, efforts are being made to equally provide electronic versions and to have the Journal uploaded on the School of Law website.

The success of the publication of this maiden edition would not have been achieved without the unwavering support, commitment, and determination of the Dean of Law, Dr. Valentine Tebi Mbeli. The Journal owes him an incalculable debt.

Best wishes and thank you in advance for your contribution to the Kampala International University Law Journal.

**Kasim Balarabe**

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### Scope

Kampala International University Law Journal (KIULJ) is the official journal of the School of Law, Kampala International University, Uganda. It is a peer-reviewed journal providing an objective and industry focused analysis of national and international legal, policy and ethical issues. The Journal publishes well-researched articles that are in sync with sound academic interrogation and professional experience on topical legal, business, financial, investment, economic and policy issues and other sectors.

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# COLLECTIVE BARGAINING AS A CORPORATE GOVERNANCE TOOL FORINDUSTRIAL DEMOCRACY: THE NIGERIAN EXPERIENCE

***By***

***Valentine Tebi Mbeli****

## Introduction

Corporate governance is a relatively novel concept in academic circles. The term was first used in 1960 by Elles Robert to denote the structure and functioning of corporate polity[1]. Although academic efforts at formulating a theoretical basis for corporate governance is a recent initiative, the question of how best to manage corporate enterprises effectively is as old as the history of the company itself. A company is a team production entity with a long list of contributors of different resources, making it necessary to ensure the protection of the underlying interests of relevant stakeholders. These stakeholders are the shareholders, directors, employees, creditors, suppliers, customers, and host communities.

Whilst corporate governance discourses tend to focus on the interest of shareholders, it is becoming increasingly argued that increasing shareholders' wealth at the expense of other stakeholders can create moral hazards and companies can avoid this by adopting metrics that are important to both shareholders and other stakeholders[2]. Company employees are important stakeholders because their stake is critical to the wellbeing of the enterprise at large[3]. It is, therefore, widely acknowledged that

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[1]Elles, R. cited by Saswati, P.M. 'Corporate Governance : A Need for Adoption of Realistic Methods Rather than
Mere Theoretical Suggestions' Available at http://www.siv-go.org/index.php. visited on 15/02/13

[2]Garcia, M. *et al* 'Performance Metrics : Balancing the Needs of Creditors and Shareholders' (2010) *Towers Watson Research Ideas* p.1

[3] Brett, H.M. 'Strategies for Employee Role in Corporate Governance' (2011) 46 *Wake Forest Law Review* p. 1

employees are the backbone of the enterprise and the ones that can make and mar the business of the company[4].

Employee satisfaction contributes immensely in boosting the morale of workforce. This point is summarily captured in the aphorism 'a contented cow gives more milk'. A proper direction to this is embedded in principles of corporate governance formulated by the Organisation for Economic Cooperation and Development (OECD) which maintains that performance-enhancing mechanisms for employee participation should be permitted to develop in a corporate enterprise[5]. A key corporate governance tool for achieving this is by promoting a strong labour voice in the pursuit of legitimate demands for the furtherance of better working conditions by and for employees. The essence of this is expressed in the theory of industrial democracy.

The mechanism of collective bargaining stands out as a veritable tool for ensuring industrial democracy and peaceful labour relations between management and workforce. That notwithstanding, the legal status of a collective agreement which is the end product of collective bargaining remains open to debates owing to the common law position which maintains that collective agreements are only binding in honour only. It is against this backdrop that this article sets out to examine the mechanism of collective bargaining and its impact on industrial democracy in Nigeria.

## The Concept of Collective Bargaining in Corporate Governance

Corporate governance is a wide and encompassing term involving all sets of procedures and processes according to which a corporate enterprise is directed and controlled[6]. It is founded on the agency model that assumes a two-tier form of corporate control that is; managers and owners[7]. Corporate law generally

[4]Michalowicz, M. 'The Three Secrets of Extreme Loyal Employees' Available at www.openforum.com/articles/the3- se accessed on 08/10/13

[5]Business.Gov.in 'OECD Principles of Corporate Governance (2004)' Available at http://business.gov.in/corporategovernance accessed on 08/02/13

[6]OECD Web Pages Available at http://state.oecd.org/glossary... accessed on 08/02/13

[7]Dan, D. 'Rethinking the Agency Model of Corporate Governance and Global Regulations' Retrieved from

recognises shareholders as the principal and management as the agent. As agents, company managers are engird by a number of duties among which is the duty to protect the interest of employees[8]. Given the pragmatic daily convergence between employees and management, it becomes necessary to find a way of moderating the relationship between management and employees for industrial harmony to prevail. The legal relationship between employers and employees, gives rise to certain rights and obligations, which usually are set out in the individual's contract of employment. In addition to the rights and obligations spelt out in the contract of employment, certain terms are negotiated between management and trade unions on behalf of the employer and employees respectively. This is typically done through the mechanism of collective bargaining.

Collective bargaining is negotiation in which employees do not bargain individually, and on their own behalf, but they do so collectively through their representatives which in most cases is a trade union[9]. Collective bargaining is geared towards collective agreement with the aim to settling conflicting positions between employers and employees. In respect of corporate bodies, the deal is struck between management and trade unions for and on behalf of the enterprise and workers respectively.

The practice of collective bargaining is a fundamental feature of the corporate scene and a very important moderating instrument in labour relations. The effectiveness of workers' negotiating capacity largely depends on their ability to constitute themselves into a formidable force capable of exerting remarkable influence on the employer. The right to form trade unions[10] in Nigeria is a constitutional recognition of the vulnerability of employees, for the fact that they can hardly make any meaningful impact in terms of influencing management's decisions where they are not organised as a trade union with power of collective bargaining. Consequently, the Constitution guarantees the a fundamental right to form or join a trade union

http://citation.allacademic.com on 24/03/13

[8]Section 279 (4) Companies and Allied Matters Act Cap C20 Laws of Federation of Nigeria, 2004

[9]Opara, L. *et al* 'The Legal Effect of Collective Bargaining as a Tool for Democratisation of Industrial Harmony'
(2004) Vol. 3 No. 1 *European Journal of Humanities* p.1168

[10] See section 40 Constitution of Federal Republic of Nigeria, 1999 as amended

of one's choice and any denial of this right may be challengeable on the ground of unconstitutionality even where it purports to be by law[11]. This is to allow the achievement of individual potential through inter-personal relationships and collective action. The centrality of trade unions in the operationalisation of collective bargaining requires further elucidation.

**Trade Union as a Platform for Workers' Participation in Corporate Decision-Making**

The internal dynamics of large corporations recognises and legitimates centralised management both in terms of control and as regard corporate decision-making. This invariably requires a visibly strong and effective trade union with the recognition that corporate governance relates to all matters pertaining to labour including organising workers, collective bargaining and public policy advocacy. In a way, trade unions help in reinforcing worker representation in corporate decision-making. Trade unions, at the enterprise level and above, do more that simply bargain over wages. They negotiate over broader workplace terms and conditions affecting their members. They may also negotiate pension and health-care entitlements and the systems that govern their provisions[12]. These issues are often handled through workplace committee structures that report to the board, and whose negotiated outcomes frequently guide board decision-making[13]. A trade union is, therefore, central in any system of checks and balances that gives workers a voice in corporate decision-making, particularly on matters that affect the welfare of employees.

By virtue of section 2 (1) of the Trade Union Act[14], workers are allowed to constitute themselves for the purpose of functioning as a trade union, if they are registered as such. An application for registration of a trade union is made to the Registrar of Trade Unions in the Federal Ministry in charge of

[11]Kenen, E.A. 'An Appraisal of the Constitution of Federal Republic of Nigeria, 1999 as a Source of Labour Law and Relations' (2002) Vol.1 No. 1 *Benue State University Law Journal* p.206

[12]Committee on Workers' Capital Global Unions Discussion Paper 'Workers' Voice in Corporate Governance: A
Trade Union Perspective' September, 2005 p. 18

[13]Ibid

[14]Cap T14 Laws of Federation of Nigeria, 2004

Labour and Productivity[15].Once a trade union is duly registered, all its activities in reasonable contemplation or furtherance of trade disputes cannot ground a civil suit[16]. This provision accords trade unions substantial legal protection while pursuing demands that are in the legitimate interest of workers. By so doing, it insulates employees from victimisation by employers.

To ensure neutrality during collective bargaining, section 3 (3) of the Trade Union Act, excludes management staff from membership of trade unions. The policy rationale behind this provision is to avoid conflict of interest which may weaken the bargaining powers of trade unions. For example, during collective bargaining, management always stands on the side of the corporation and may want to influence trade unions to concede some of their demands thereby compromising the integrity and essence of trade unionism. This provision was considered in the case of *National Union of Petroleum and Natural Gas Workers v NNPC*[17], where the court held that:

> On the whole, I conclude that the best approach to the matter will be to take the case of a staff and to test it as separate claim. It is impossible to make a blanket ruling that the position held by certain staff will not lead to a conflict of loyalty…. A staff is a management staff only where he exercises executive authority as a matter which is determined by the staff's status, authority, powers, duties and accountability.

During collective bargaining between a trade union and management, both parties strive to strike a favourable deal for those they represent. It follows that a management staff who also doubles as a union member or leader will be walking a tight rope if he fails to satisfy both the interest of the company and that of the workers. The law is also meant to ensure that the employee party to a collective bargain should remain an organised association of such firmness that it can be able to act decisively concerning collective agreements and in the same spirit, represent its members effectively and ensure out-of–court enforcement of the terms of a collective agreement.

[15]Section 46 Trade Union Act, 2004
[16]Section 24(1) and (2) Trade Union Act, 2004
[17]Unreported Suit No. LD/13/82/232

Where a collective agreement is duly negotiated and implemented, it serves an important corporate governance purpose; that of ensuring industrial harmony. In this way, employees can also become a major component of the decision-making mechanism of a corporate enterprise. Thus, employees' attitude, opinion and level of satisfaction can easily be surveyed by management. This in turn boosts productivity and corporate performance. This form of participation is important as it aligns with the cardinal principle of industrial democracy that those affected by corporate decisions should participate in making such decisions.

The foregoing analysis makes it evident that the mechanism of collective bargaining is accordingly recognised under Nigerian law, but whether this mechanism is properly placed in terms of its legal framework so as to perform effectively the corporate governance functions highlighted above, remains a legitimate concern. This, calls for an examination of the legal status of collective agreements taking into consideration the fact that non-enforceability may weaken its potency.

## The Legal Status of Collective Agreements

At common law, collective agreements are considered ordinarily unenforceable or non-justiciable unlike every other agreement[18]. The effect of this is that a collective agreement which is the end product of extensive collective bargaining is merely treated as a gentleman's agreement which can only be binding in honour. This is based on the assumption that no contract is legally binding unless there existed at the time of making the contract, an intention to create legal relations. This principle is no doubt an important ingredient for the enforceability of contracts. Over the years, the principle has played a significant role in the formulation of a theoretical framework relating to the legal status of collective agreements, the result of which is evident in many court decisions maintaining that collective agreements cannot be enforced for want of intention to create legal relations.

[18]Iwunze, V. 'The General Unenforceability of Collective Bargaining under Nigerian Labour Jurisprudence: The
Paradox of Agreement Without Agreement' (2013) Vol. 4 No.3 *International Journal of Advanced Legal Studies & Governance* p.2

In *Dalrymble v Dalrymble*[19], Lord Stowell relied on this essential requirement, when he held that enforceable contracts must not be mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatsoever. The English case of *Ford v Amalgamated Union of Engineering and Foundary Worker*[20] appears to be more illustrative on this rule. In that case, the plaintiff in 1955 negotiated an agreement with 19 trade unions which *inter alia* provided that 'at each stage of the procedure set out in this agreement, every attempt will be made to resolve issues raised and until such procedure has been carried through, there shall be no stoppage of work or other unconstitutional action'. In 1968an application for injunction was brought to restrain two major industrial unions from calling an official strike contrary to the 1955 collective agreement. The main issue in the application was whether the parties intended the agreement to be legally binding. It was held that there was no intention that the agreement would be legally binding on the parties.

Another reason behind the non-enforceability of collective agreements at common law is based on the absence of privity of contract between individual employees and the employer, since a collective agreement is usually negotiated between management on the one hand and workers' union on the other hand[21]. This rule was considered in the case of *Dunlop Pneumatic Tyre Co. Ltd v Selfridge Ltd*[22], where the court held that:

> My lords in the laws of England, certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as for example under a trust, but it cannot be conferred on a stranger to a contract as a right in *personam* to enforce the contract[23].

There are well known exceptions to the doctrine of privity of contract. These include; agency, assignment of

[19](1811) 2 Hag. Con. 5 at 105
[20](1969) 1 WLR 339
[21]Iwunze, V. op cit p. 3
[22](1915) A.C 847
[23]At 853

contractual obligations, novation, contracts running with land, contracts of insurance, charter parties and trustees[24]. Obviously, the right of an individual employee to enforce a collective agreement entered between a trade union of which he is a member and his employer for his benefit is not one of the exceptions[25]. Thus in *New Nigerian Bank v Egun*[26], it was held that in the absence of privity of contract between the respondent employee and the appellant employer, the respondent could not claim under a collective agreement between his union and the appellant.

It is not clear what the situation would be if it is actually the workers' union seeking to enforce the terms and conditions of a collective agreement, for the reason that the privity defence will not avail the employer. Curiously, this position has not been tested by the courts. This is perhaps due to the fact that trade unions have been made to perceive their role as being restricted to out-of-court settlement of industrial disputes owing to the rigidity of the common law rule which insists on the presence of intention to create legal relations as the basis for non-enforceability of collective agreements. It is, therefore, believed that if this obstacle is cleared, the second obstacle may also cease to have relevance, where an action for the enforcement of a collective agreement is brought under the name of a trade union which is party to the agreement.

It has been pointed out that the rigidity of the twin common law rules of privity of contract and intention to create legal relations accounts for the non-enforceability of collective agreements. This position creates certain setbacks for employees, particularly the fact that it encourages employers to be nonchalant and insensitive to the need for ameliorating the working conditions of employees both as a matter of social welfare and responsible corporate citizenship. A hidden cost is that employees become less enthusiastic about the enterprise which may lead to turn-over squeeze. The non-implementation of a collective agreement can also induce the spirit of strikes, thus disrupting industrial peace which is the most cherished factor of corporate governance. More worrisome is the fact that strikes are

[24]See Sagay, I *Nigerian Law of Contract* (Ibadan: Spectrum Books, 1993) p. 489
[25]Iwunze, V. op cit p.3
[26][2011] 7 NWLR (Pt. 711) 1

capable of creating poor corporate reputations following outcries by employees and their unions.

**The Nigerian Experience**

Common law is an important source of labour law and relations in Nigeria. This is based on the country's colonial experience which had as a major consequence, the importation of English law, one of its components which is common law. Being a common-law jurisdiction, it is only natural that common law rules governing collective agreements could have permeated the Nigerian legal environment as a guiding compass for the courts when called upon to adjudicate on collective agreements. In that regard, Nigerian courts have systematically adhered to the common-law rule of non-enforceability of collective agreements on the bases of lack of intention to create legal relations and want of privity of contract. The Supreme Court of Nigeria considered the issue of privity of contract in the case of *Osoh & Ors. v Bank PLC*[27]. Here the appellants' employments were terminated by the respondent on the ground that the appellants' services were no longer required. The appellants contended that the termination of their employments was wrongful because under a collective agreement, between the appellants' trade union and the Nigerian Association of Bank Insurance and Allied Institutions (of which the respondent was a member), the respondent could only determine the appellants' employment on the ground of redundancy. The appellants also argued that under the same agreement, the respondent had wrongly computed the terminal benefits. The Supreme Court held that there was want of privity of contract between the appellants and the respondent and as such the appellants could not enforce the collective agreement against the respondent.

The foregoing decision of the apex court of the country clearly sets a judicial foothold for the non-enforceability of collective agreements in Nigeria. By this decision, the Supreme Court plainly recited the old common law folklore with employees being at the receiving end. This means that whilst collective bargaining is a mechanism coexisting with the right of workers to organise themselves into trade union, this right remains elusive as courts are not inclined to giving effect to it. Apart from the judicial reluctance to enforce collective

[27][2013] 9 NWLR (Pt. 1358) 1

agreements, certain institutional and political concerns may also be at play. This stems from the fact that most cases of non-implementation of collective agreements are recorded in the public service where the government is the employer. The political lukewarm is currently replicated in the disinclination to pursue reforms that can ensure the enforceability of this specie of agreements. The reasons for the persistent strike actions in the educational, health and other sectors of the public service can, therefore, attributable to the ineffectiveness of the mechanism of collective bargaining in addressing the problems of employees.

Having said that collective agreements are not enforceable in Nigeria as a general rule, it requires clarity to mention that there are some limited instances in which these agreements can be enforced as exceptions to the general rule.

**Exceptions to the Rule**

One of the instances where a collective agreement can be enforced is when the collective agreement is incorporated into the contract of employment of a worker. *Union Bank of Nigeria v Edet*[28], is an illustration of this line of reasoning by the courts. In that case, the respondent's employment was terminated with one month notice. He contended that under a collective agreement between his union and the appellant, he was supposed to be given three written warnings before his employment could be terminated and that the requirement of the agreement was not complied with by the appellant. In dismissing the claim, the Court of Appeal per Uwaifo J.C.A held that:

> Collective agreements, except where they have been adopted as forming part of the terms of employment, are not intended to give, or capable of giving individual employees a right to litigate over an alleged breach of their terms as may be conceived by them to have affected their interest nor are they meant to supplant or even supplement their contract of employment[29].

However, some criticisms have continued to trail this position, based on its inherent impossibility to operate.In this vein, Iwunze [30] argues that the Nigerian position that a collective

[28][1993] 4 NWLR (Pt. 287) 288
[29]At 291
[30]Iwunze, V. op cit p. 5

agreement is not enforceable by an individual employee unless it is incorporated into his individual contract of employment creates a rather impossible situation. This impossibility is to be found in a situation where a collective agreement postdates the employees' contract of employment. This problem arose in *Texaco (Nig) PLC v Kehinde*[31]. In that case, the employee's contract of employment commenced in 1981, yet the employee sought to claim under a collective agreement between the employer and his union entered much later after his employment had commenced. It was held that the claim was not maintainable because the collective agreement was not incorporated into the employee's contract of employment.

Apart from the challenge of incorporating collective agreements into contracts of employment for the reason that one usually pre-exists the other, another practical challenge lies in the unwillingness of the employers to incorporate such agreements. This is always done with the intention of avoiding liability that may arise from alleged breach. For an employee who is desperately in need of a job, pressing on the incorporation of collective agreements into a contract of employment may also be an unaffordable luxury. Moreover, ignorance on the part of new job seekers also plays into the hands of employers. Due to these practical challenges, employees remain vulnerable. For these reasons, the rule of privity of contracts as relates to collective agreements has been undergoing serious developments by way of reforms in other jurisdictions so as to make the position of employees more considerate. The position in other jurisdictions appears in the subsequent part of this work.

Another circumstance in which a collective agreement may be enforced by a Nigerian court is where one of the parties to it had already relied on it. The effect is that where an employer had placed reliance on the terms of a collective agreement in arguing his case, he would not be heard to say that the agreement upon which he has already relied is unenforceable by the employee because it is not incorporated into his contract of employment[32].

[31][2001] 6 NWLR (Pt. 708) 224

[32]See *Cooperative and Commerce Bank (Nig) Ltd v Okonkwo* [2001] 15 NWLR (Pt. 735) 114

Similarly, the doctrine of estoppel can be invoked against an employer, thereby allowing for the enforceability of a collective agreement. This happens where the provisions of a collective agreement have been acted upon by management in the past in a manner that suggests that it is binding such as taking benefit of it against the employees. Thus, in *Adegboyega v Barclays Bank of Nigeria*[33], Akibo Savage J held that where an employer acted on a collective agreement in such a way as to create the impression that it is binding, the agreement will be taken to have been impliedly incorporated into an individual employee's contract of employment. This is because the court will not allow a party to approbate and reprobate at the same time[34].

Under the Trade Disputes Act[35], the Minister in charge of Labour and Productivity may make an order specifying that provisions of a collective agreement or any part thereof be binding on the employer and workers to whom they relate. This is another exception to the common law rule against the enforceability of collective agreements. This is done on the deposit of three copies of the agreement with the Ministry[36]. This provision recognises collective bargaining as an important mechanism for resolving industrial disputes and is commendable on its face value. Where an order has been made by the Minister, any defaulting party may be guilty of a crime and upon conviction, liable to a fine of ₦100 or imprisonment of six months[37]. In the context of its intrinsic value, certain salient observation may be made about this provision. First, whereas there is an obligation on the employer to submit copies of a collective agreement to the Minister, there is no corresponding duty on the Minister to make an order that the agreement or part thereof should be binding on the parties thereto. This in a way creates room for lobby. The second issue lies with the penalty regime for non-observance of an order of the Minister. It is submitted that the miniscule ₦100 fine can hardly serve any meaningful purpose in terms of ensuring compliance. Thus, this fine should be reviewed upward.

[33](1977) 3CCHCJ 497
[34]See *Halshall v Brizell* (1957) Ch. 197
[35]Section 3 (3) Trade Disputes Act, Cap T8 Laws of Federation of Nigeria, 2004
[36]Ibid section 3 (1)
[37]Ibid section 3 (4)

Moreover, from the manner section 3 of the Trade Dispute Act is couch, it is doubtful if in addition to the non-observance of the order of the Minister sustaining a criminal charge, same can also ground a civil action for the enforcement of the collective agreement by an individual employee where his conditions of service are affected. This point appears not to have been tested by the courts. But it is obvious that resolving the issue in the negative will be to halt legitimate proceedings seeking to enforce collective agreements, thus making the position of employees almost as precarious as it has always been under common law.

Another salient point deducible from section 3 above is that it does not provide the relevant parameters which should be used by the Minister in deciding whether or not to order that a collective agreement should be binding on the parties. This means that such a decision is entirely based on the Minister's discretion, thus, paving way to arbitrariness. Moreover, it has been the traditional role of the courts to adjudge whether a contract is legally binding or not. In carrying out this functions, judges who are appointed to man the courts, by virtue of their training and practical experience, are well endowed with the ability of ascertaining the enforceability of contracts. It is doubtful if the Minister in charge of Labour and Productivity is better equipped to determine the enforceability of a contract than the courts. It is submitted that this role has been and continues to be better performed by the courts rather than an administrative officer of government. Interestingly, the Minister's order is capable of being enforced by the courts, which is an indirect enforcement of collective agreements. The question is what stops the courts from enforcing collective agreements originally?

**The Position in other Jurisdictions**

In England, the current position is that a collective agreement is enforceable if it is in writing and provides expressly that it is legally binding on the parties thereto[38]. This is reform in good course but it does not amount to foolproof result of the desired legal reform. This provision insists on the express stipulation in the collective agreement that it is legally binding. It is not even sufficient to state that the agreement is binding

[38]See section 179 (1) and (2) of the English Trade Union and Labour Relations (Consolidation) Act, 1992

*simpliciter* as it can be interpreted to mean 'binding in honour'. A major problem with this approach is that it tends to circumvent the cardinal rule that the intention to create legal relations can be implied from the language and words used in a contract and not necessarily express terms.

In the United States of America, courts have evolved certain theories which have become guiding rules for the enforceability of collective agreements. These rules have culminated into a consistent judicial attitude capable of circumventing the privity doctrine. The first rule is based on the theory of 'custom and usage'. This theory maintains that if an employee sues an employer for breach of the terms of a collective agreement, he is only saying that the terms of his employment, by custom and usage, equate to those bargained by the union[39]. The second theory is premised on the rule of agency. It stipulates that a trade union acts as agent of the principals who are members of the union so that whenever it bargains with the employer, it is in fact bargaining for its members[40]. This form of creative judicial activism is desirable in Nigeria as a way of ensuring better protection for corporate employees.

In Malaysia, collective agreements are absolutely legally binding and enforceable under the Industrial Relations Act. The position under the Act is that terms and conditions of a collective agreement are implied into a contract of employment between workmen and their employers, and employers are bound by the collective agreement unless varied by a subsequent agreement or decision of court[41].

A point to note is that where collective agreements are binding and legally enforceable, it makes employers more responsive to the working conditions of employees, the corporate governance effect of which is made manifest in harmonious labour relations. An enabling statutory framework and liberal judicial approach on collective agreements can, therefore, contribute significantly in maintaining inter-party dialogue and cohesive labour relations between employers and employees. It must be reiterated that inasmuch as collective agreements are

[39]Iwunze, V. op cit p. 6
[40]Gregory, C.O. 'The Enforcement of Collective Agreements in the United States: Current Problems' (1968) p. 160
[41]See section 17 (2) Industrial Relations Act, 1967

designed to settle industrial disputes among other things, they may also fuel industrial disputes where agreed terms and conditions are persistently violated by employers. This has been a recurring issue in Nigeria, where employees have had to embark on strikes as a result of the failure of employers to fulfill their promises under collective agreements.

This has reduced the mechanism of collective bargaining with its ensuing negotiations to a sort of tactical maneuver employed by employers to halt legitimate demands of employees. Unfortunately, this tactic is known to serve only short-term purposes as the long-run brings with it more tense labour disputes resulting to industrial actions such as strikes and picketing. In Nigerian public Universities and other higher institutions of learning, the strain in labour relations between trade unions such as the Academic Staff Union of Universities (ASUU) on the one hand and government on the other hand is largely due to failure on the part of the later to honour the terms of collective agreements. It is hard to imagine how this scenario will disappear from the system without mutations in the public/legal perception of collective agreements. This calls for a total paradigm shift from the current position which regards collective agreements as non-enforceable to that which gives binding force to these agreements and for courts to enforce them as if they were ordinary contracts.

## Conclusion

This article has carefully examined the mechanism of collective bargaining within the context of corporate governance. It posits that the mechanism serves certain important corporate governance purposes to wit; it helps in ensuring industrial democracy by providing an opportunity for employees to participate in corporate decision-making. It also ensures industrial peace by providing a platform for dialogue as a way of settling industrial disputes. Collective bargaining is also important in that it enables employers to improve the working conditions of employees as a way of guaranteeing job satisfaction, thereby, improving productivity. Negotiations under collective bargaining yield collective agreements between management and workers. That notwithstanding, is it obvious that the non-enforceability of collective agreements works to whittle down the import of embarking on collective bargaining

through negotiations. It is, therefore, submitted that the Nigerian position is anachronistic and somehow out of tune with the dictates of good corporate governance, and should as a matter of course be jettisoned in the interest of industrial democracy. By this, Nigerian courts are called upon to embrace the kind of creative activism that has been demonstrated in other jurisdictions such as the United States of America with the view to upholding and safeguarding the enforceability of collective agreements.

Finally, collective bargaining should be made an important component of corporate governance regulation. In this regard, companies should be made to include in their annual returns to the Corporate Affairs Commission, information showing their level of implementation of collective agreements. Where that has not been done, the annual returns should carry accompanying notes, stating and explaining reasons for non-implementation. This disclosure mechanism will enable the Corporate Affairs Commission to gauge the level of compliance with the terms and conditions of collective agreements and to direct the defaulting companies on the line of action to take as corrective measure.

# TENANCY BY OCCUPANCY: IS IT A TENANCY OR A TENURE?

## (The Incidences of Section 29 of the Land Act, CAP. 227)

By

***Sarah Banenya Mugalu****

### Introduction

Ownership of land is a much-prized aspect for many Ugandans. This is not only because land is the basis on which every human activity happens or even rotates but also due to the fact that Uganda is a subsistence agricultural economy or society making ownership or even access to land a matter of life and death. The Constitution of the Republic of Uganda, under Article 237, provides that land belongs to the citizens of Uganda who would hold it under four different tenures. The tenures are customary, freehold, mailo, and leasehold.

Much as the Constitution entrenches the radical title into the citizens of Uganda, it does not spell out how they are to exercise the powers and authority that go along with it; but that is another long argument outside the envisaged scope of this paper. These citizens, in whom the radical title to land is vested, do not all own land nor do they all have access to utilization of any land. The type of land ownership or occupancy that is of interest to this paper: the tenancy by occupancy which is provided for in the Constitution[1] but it also has its roots partly in the historical evolution of Uganda's land law and practice. These constitutional provisions are operationalized in the Land Act, more especially under section 29 thereof.[2]

The arguments advanced for or against a tenancy by occupancy are benchmarked against the common law understanding of a tenancy. Megarry describes a tenancy as a

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[1] Article 237(8) and (9) of the Constitution of the Republic of Uganda, 1995.

[2] Land Act. Chapter 227, Laws of Uganda was enacted in 1998.

periodical utilization of land determinable by the landowner or the law applicable or both.[3]

**Section 29 of the Land Act**

Section 29 of the Land Act (Cap 227)[4] introduces in the land law of Uganda but peculiar to land registered under the Registration of Titles Act, known as tenancy by occupancy. In the event that by October 8th, 1995 a particular piece of land was owned or held under customary tenure, then it is free from the perpetual tenancy created under Article 237 of the Constitution of the Republic of Uganda 1995 and Sections 29, 31, 33 and 34 of the Land Act.

Section 29 provides:

> *29. Meaning of "lawful occupant" and "bona fide occupant".*
>
> *(1) "Lawful occupant" means—*
>
> *a person occupying land by virtue of the repealed— (i) Busuulu and Envujjo Law of 1928; (ii) Toro Landlord and Tenant Law of 1937; (iii) Ankole Landlord and Tenant Law of 1937;*
>
> *a person who entered the land with the consent of the registered owner, and includes a purchaser; or*
>
> *a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.*
>
> *(2) "Bona fide occupant" means a person who before the coming into force of the Constitution had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more; or had been settled on land by the Government or an agent of the Government, which may include a local authority.*
>
> *(3) In the case of subsection (2)(b)—*

[3] Robert E. Megarry, David J. Hayton (1982), Megarrys' Manual of the Law of Real Property, 6th Ed., Stevens, London.

[4] a perpetual succession tenancy

*the Government shall compensate the registered owner whose land has been occupied by persons resettled by the Government or an agent of the Government under the resettlement scheme;*

*persons resettled on registered land may be enabled to acquire registrable interest in the land on which they are settled; and*

*the Government shall pay compensation to the registered owner within five years after the coming into force of this Act.*

*For the avoidance of doubt, a person on land on the basis of a licence from the registered owner shall not be taken to be a lawful or bona fide occupant under this section.*

*Any person who has purchased or otherwise acquired the interest of the person qualified to be a bona fide occupant under this section shall be taken to be a bona fide occupant for the purposes of this Act.*

S. 29 creates a lawful occupant and a bonafide occupant who are collectively known as tenants by occupancy. We will here consider them under two categories, the categorization follows the packaging or clustering within the parent section, having the first category dealing with section 29(1) and the second category dealing with subsection (2) of section 29.

**First Category**

Those who occupied (also inherited) by virtue of:

- the Busulu and Envujjo Law 1928;
- the Toro Landlord and Tenant Law 1937; and
- the Ankole Landlord and Tenant Law 1937
- those who purchased from, or entered with the consent of, the registered owner
- those who held land as Customary tenants on former public land but when the Uganda Land Commission granted leases over their land they were not compensated by the registered owner or their tenancy was not disclosed.

The first category or cluster is, according to Art. 237 of the Constitution and section 29 of the Land Act known as

**Lawful Occupants**.

**Second Category**

This category includes a person who had occupied and utilised or developed any land unchallenged by the registered owner of the land or the agent or representative of the registered owner twelve (12) years (before October 1983) or more before the 1995 Constitution came into force.[5]

This category also includes a person who had been settled on land by the Government or an agent of the Government, which may include a local authority. The law further recognized any person who has purchased or otherwise acquired the interest of the person qualified to be a bona fide occupant under section 29 who shall be taken to be a bona fide occupant for the purposes of the Land Act. This category of land occupiers is, according to Art.237 of the Constitution and section 29 of the Land Act known as **Bonafide Occupants**. The first and second categories are collectively known as tenants by occupancy.

**The Historical Underpinnings of Section 29 of the Land Act**

Section 29 carries or is loaded with a lot of Uganda's land law history running right from the 1900 land settlement under the 1900 Buganda agreement now known as 1900 Uganda Agreement.

S. 29(1) provides: "Lawful occupant means a person occupying land by virtue of the Busulu and Envujjo Law 1928[6]

The Busuulu and Envujjo Law of 1928 in a nutshell came about as a product of the peculiar or skewed land settlement under the 1900 Agreement.[7] Under the 1900 Buganda Agreement the Buganda Chiefs and notables were allotted and allocated land in measures of square miles. The word ***'Mailo'*** which denotes the peculiar tenure, mailo tenure in central Uganda came from the English word "mile". The local Baganda

[5] The 1995 Constitution of the Republic of Uganda came into force on the 8th October, 1995.

[6]Busulu means rent and Envujjo means tithe of the crops grown by the tenant payable to the mailo land owner as by law.

[7] The British Crown entered into agreement with the Regents of Buganda Kingdom outlining, inter alia, the governance of ownership and management of land in Buganda under Articles 15-17, thereof.

customized the English word 'mile' to fit into their Luganda language thus 'mailo' and consequentially 'mailo tenure'. Majorly, the concept behind this naming was due to the fact that the land allocations and allotment were made in measures of square miles.[8] A square mile is equivalent to 640 acres straddling over a pretty large area in relation to a peasant subsistence economy.

The lands so allotted were not vacant; they were occupied by hundreds and in some cases thousands of Baganda peasants (and some non-Baganda migrants). By a stroke of the pen these so many peasants became the tenants of the square mile (mailo) allottees. The Mailoallottee was eventually issued with a certificate of title under the Registration of Titles Ordinance.[9]The Registration of Titles Act (RTA) is the Torrens legislation in Uganda. Under the Torrens system of land registration the basic features are title by registration and indefeasibility of title. So the moment the mailoallottee was issued with a certificate of title, he was paramount over all other occupants of that land. The allottees' title is not only paramount but cannot be impeached except for fraud.[10] More to that, a certificate of title issued under the Torrens legislation is conclusive evidence that the person named therein is the registered proprietor.[11]

It followed from all the above tenets that the occupants of the land owned by a mailoallottee had no specific protection under the law. Some mailoallottees went ahead to evict the occupants whereupon the Protectorate Government came in to protect the occupants. The mode of protection was through the passing of the Busuulu and Envujjo Law, 1928, under which law the occupants were designated as tenants of the mailoallottee now mailo owner. The tenants under the 1928Busuulu and Envujjo Law, had a duty to pay Busuulu (rental) and Envujjo (tithe of the products of their respective pieces of land) to the mailo owner. The mailo owner would issue *Busuulu* receipts but

[8]Mugambwa John T (1987): The Legal Aspects of the 1900 Buganda Agreement Revisited, in the Journal of Legal Pluralism, pp. 243-274 at p.257.

[9] The Registration of Titles Ordinance Cap 205 is the present day Registration of Titles Act, Cap. 230 adopted from Australia by the colonial government to regulate land ownership.

[10] Section 64 RTA.

[11] Section 59 of the RTA.

also obliged to recognize and respect occupancy rights of the occupants.

The mailo owner also had a duty to recognize a successor in title to a deceased occupant but only after such successor was formally introduced to him or her. This introduction had to be done with payment known as "ekanzu" plus a cock.[12] The same formality applied in case the occupant sold part of his occupancy (kibanja) or completely assigned ownership of the occupancy to another (new) occupant. The occupancy rights were passed on to generations in this manner and the Busuulu and Envujjo payment also continued as an obligation on the part of the occupant (tenant) until 1975 when it was abolished by the Land Reform Decree. This landlord-tenant relationship in Buganda was replicated, although with slight legal modifications, in Toro and Ankole (Western Uganda).

Section 29(i)(a)(ii) and (iii) provides thus that a "Lawful occupant" also means: a person occupying land by virtue of the repealed Toro Landlord and Tenant Law of 1937 or repealed Ankole Landlord and Tenant Law of 1937

A similar set up of registered owners and peasant occupants existed in Toro and some parts of Ankole. The only slight legal difference is that in Ankole and Toro registered owners held the land under freehold tenure. Freehold tenure meant, legally, that the radical title is vested in the crown (colonial government) whereas with mailo tenure the radical title is vested in the individual mailo owner. According to Morris and Read under the Ankole and Toro Agreements private freeholds were granted to a few of the most senior chiefs but these grants were regarded as carved out of Crown land.[13]

The underlying reasons that led to enactment of the Busuulu and Envujjo law were no different from those that led to the enactment of the Toro Landlord and Tenant law, 1937; and the Ankole Landlord and Tenant Law 1937.The rights of the occupants (tenants) on the freeholds of Toro and Ankole were no different from their counterparts in Buganda. These tenants too

[12] 'Ekanzu' means, literally, a long white tunic worn by men, introduced then by Arab traders, given to the land owner as a sign of respect and promising allegiance to him as the landlord.

[13] Morris and Read (1961), Uganda: the development of its Laws, Sweet & Maxwell, London, p. 341

had to pay rent to the freehold owners. This rental payment just like Busuulu and Envujjo was abolished by the 1975 Land Reform Decree. The effect of the 1975 Land Reform Decree, inter alia, was the abolition of mailo and freehold and conversion of the same into leases for 99 years. Mailo and freehold owners became lessees on conversion. The radical title of mailo too was now vested in the State.

The occupants (tenants) much as they were relieved from payment of rent (annual) had their legal position on the land become precarious. They became tenants at sufferance. Some people argue that they actually became "squatters".[14] The term squatter, which is rather derogatory, still lingers on up to today. The tenants' position became precarious due to the fact that a lessee on conversion, as by law, could issue a three months' notice to the occupant, pay compensation for the occupant's developments on the land and the occupant had to vacate the land. That was the legal status until October 8th 1995 when the Constitution came into force.

The Constitution, under Article 237, not only recognized customary ownership of land as a tenure, for the first time in Uganda's land law history, but also resurrected the mailo tenure and freehold tenure from the "limbo" where they had been thrown by the Land Reform Decree of 1975 as leases on conversion. With this resurrection, the Constitution further attended to the shaky position of the occupants of registered land but who happen not to be the registered owners of the land which they occupy, thus the lawful occupants. This takes us to yet anothercategory of registered land who may be referred to as lawful occupants.

Section 29(i)(b) provides for land occupants who purchased from, or entered with the consent of the registered owner.

Still under the category of lawful occupant, is a person who purchased from the registered owner of the land. This provision envisages a land occupant, entering into a written or unwritten agreement with the registered owner, the later allowing

[14] In the case of Kampala District Land Board and another versus Babweyaka and others, Supreme Court Civil Appeal 2 0f 2007 (unreported), their Lordships observed that the term "squatters" is derogatorily used by land lawyers to refer to tenants by occupancy.

the purchaser to occupy land and utilize it in accordance with the sale agreement. Under this type of agreement, the type of development on the land would be specified and if not specified would be inferred from the conduct of the parties. According to Henry West, the construction of permanent houses would usually not be allowed by the mailo owner.[15] The fact of purchase was not the only way a person would gain occupancy of land. It could possibly come about as a gift *inter vivos* or just a mere consent of the registered owner to ones' occupancy of the land. This then takes us to yet another type of lawful occupant.

**Those who entered with the Consent of the Registered Owner**

A registered owner would allow any person of his choice to occupy and utilize a particular part of the land within a specified area. A person who entered on the land with the consent of theregistered owner is protected as a lawful occupant and can secure a certificate of occupancy. However, the developments by the tenant, allowed onto the land by the registered owner would determine whether one were a tenant for life, in fee or a licensee.

The Land Act architects did take care of a licensee[16] but did not take care of a tenant for life. A tenancy for life terminates with the termination of the natural life of the tenant and at that time the land reverts to the registered owner (read landlord). There are instances where licensees have claimed to be tenants by occupancy.[17] It is imperative, therefore, that courts should be vigilant to trace that somewhat mythical line between a tenant by occupancy and a contractual licensee who has utilised the land for many years.

Section 29(i)(c) gives a further angle to lawful occupant to include a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.

This type of land occupiers is to be found on land known as former public land which was under the control of the then

[15] Henry West, 1969, Mailo Land in Buganda, Oxford University Press.
[16] Section 29(6) Land Act.
[17] Kampala District Land Board & another versus Babweyaka & others, supra.

Uganda Land Commission.[18] This type of occupiers held land as customary tenants on former public land; but when the Uganda Land Commission (ULC) granted leases over their land to developers they (occupiers) were not compensated by the registered owner or their tenancy was not disclosed.

The Uganda Land Commission prior to the 1995 Constitution had authority to manage all land in Uganda according to the Land Reform Decree, 1975 (LRD). In so doing, the ULC had to manage such land in conformity with the Public Land Act, 1969. Under the LRD, all land in Uganda was vested in the Government of Uganda and the ULC managed it on behalf of the Government. So, with the exception of registered land (mailo, freehold and leaseholds) all the other land in Uganda was available for allocation to any applicant by the ULC.

In the event of an application for grant of a lease over public land, the applicant had to notify of the presence of customary tenants thereon to the ULC. The customary tenants would have to be compensated or even resettled when the land in issue was granted by ULC in leasehold to the applicant. There was a possibility that the customary tenants' interests were not disclosed at the time the ULC granted a lease over the land. The other possibility would be where the customary tenant was not compensated at the time of granting the lease by ULC. In the latter case, the customary tenant would continue occupying the land until such compensation. So the Land Act envisages that either scenario subsisted until the promulgation of the 1995 Constitution and thus designated these kind of land occupiers as lawful occupants.

As earlier stated, all the above land occupiers who fall under the first category are, by law, known as lawful occupants. We will now consider the second category.

**Second Category of Tenants by Occupancy:**

The Land Act, section 29(2) provides for a bona fide occupant. This category includes a person who had occupied and utilised or developed any land unchallenged by the registered owner of the land or the agent or representative of the registered

[18]Section 59 Land Act.

owner 12 years (before October 1983) or more before the 1995 Constitution came into force.[19]

With this type of bona fide occupants, the legislators envisaged an absentee land owner for years. In that intervening period a person in need of using the land would settle thereon for over twelve year without challenge from the registered land owner or the agent or representative of the registered owner. The twelve years computed by this provision of the law is not any twelve years, but twelve years before the coming into force of the 1995 Constitution. The law makers, in this type of land occupancy, borrowed and customized the common-law concepts of acquiescence and adverse possession to some extent.

First the concept of **acquiescence** means that a person gets onto the land, occupies it in the verily belief that it is part of his or her land adjacent thereto. Then the land owner gets to know about the occupiers' presence onto his or her land but does not object to such occupation. In other words, the land owner acquiesces with the intruder's continued occupation of the land; and thereafter the landowner is estopped from denying this fact. In the context of section 29(2) (bonafide occupant), the concept of **acquiescence** arises (and is borrowed) in that the registered owner did not challenge the continued occupancy of the land by the tenant. Challenge ought to have been done by the registered owner himself or herself or through an agent or representative. So, in this case, the registered owner acquiesced with the continued occupancy by the tenant and the tenant continued occupying in the verily belief that he or she had a right to so occupy.

The concept of **adverse possession** means that a stranger to land can claim ownership of it if he or she is in possession of that land for a period of twelve years and above. However, in the case of adverse possession, four factors must be satisfied and these are: possession of the whole parcel of registered land, not part of it; possessing it to the exclusion of all others including the registered owner (*animus posidendi*); the adverse possessor must have come to the land as an intruder or stranger; and possessing for over twelve years. So, **adverse possession** in the context of section 29(2) can be inferred in relation to the period of twelve

[19] The 1995 Constitution of the Republic of Uganda came into force on the 8th October, 1995.

years of the occupancy on the one part, having come onto the land as an intruder, and the intent of *animus posidendi.* Although the other factor of adverse possession, to wit, occupying the whole parcel of the land as registered (and not part of it) is missing or need not be satisfied, still the other factors as above mentioned are very visible in the ingredients that constitute a bonafide occupant under section 29(2).

This second category also includes a person who had been settled on land by the Government or an agent of the Government, which may include a local authority. The law further recognized any person who has purchased or otherwise acquired the interest of the person qualified to be a bona fide occupant under section 29(2) who shall be taken to be a bona fide occupant for the purposes of the Land Act.

The first category – lawful occupants, and the second category – bonafide occupants, are collectively referred to as "tenants by occupancy". It is the peculiar status given to them by the law which by far departs from tenancies as known under common law, that this paper treats them as perpetual tenancies.

**Creation of Perpetual Tenancies**

The law designates these tenants by occupancy as tenants of the registered owner or the registered owner's successor in title, be it by way of purchase or inheritance. There is no time limit as to the duration for the tenancy thus making it perpetual. Further the law creates security of occupancy for the tenants by occupancy in several ways:

**First:** through provisions enabling the tenant to get certificates of occupancy which is registrable as an encumbrance on the title of the registered owner of the land.[20] A certificate of occupancy would act as an indicia of title for the tenant by occupancy over that particular area of the land he occupies over the registered owner's land.

Where a tenant by occupancy is desirous of getting a certificate of occupancy, he or she would apply to the registered owner for consent to process it through the established land management institutions.[21] In the event that the land owner

[20]Section 33 of the Land Act.

[21] The tenant's application has to be forwarded to the area land committee to adjudicate the land, and to the District Land Board to authorise issue of a

declines or neglects to grant the consent, the tenant by occupancy would appeal to the land tribunal. The land tribunal is by law clothed with authority to grant consent to the certificate of occupancy as if it were the owner of the land. With consent granted by the land tribunal the tenant by occupancy shall be granted a certificate of occupancy by the Recorder.[22] The language of the law to this effect is mandatory:

"Section 33(8) A grant of consent shall entitle the tenant by occupancy to be issued with a certificate of occupancy by the recorder, and the recorder shall, …. Issue a certificate of occupancy to the tenant by occupancy who presented the grant of consent to the recorder."

By the law overstepping the registered owner of land and granting powers to the land tribunal to grant consent, it amounts to a negation of the fundaments of the Torrens system of land registration as espoused in sections 59 and 64 of the RTA. Specifically that the certificate is conclusive evidence of title, and that the estate of the registered proprietor is paramount, respectively. It is a negation because, inter alia, this certificate of occupancy is registrable as an encumbrance on the title of the registered owner. Since it is not the type of encumbrance that can be withdrawn like a caveat, it literally makes the registered owner's title defeasible. This certificate of occupancy, as an encumbrance, would last on the title for as long as the tenancy lasts. As pointed out at the outset of this paper, a tenancy by occupancy, unlike other types of tenancies, including a lease, has no specified period or a period that is capable of being determined. Thus becoming a perpetual tenancy.

**Second:** provision enabling a tenant by occupancy to lodge a caveat on the title of the registered owner, which caveat does not lapse as long as the occupancy rights subsist.[23] Where a tenant by occupancy chooses to lodge a caveat on the title of the registered owner, such caveat would not lapse and will endure for as long as the tenancy by occupancy still endures. For example, if the tenant by occupancy dies, the successor in title to the

certificate by occupancy by the Recorder; section 33, sub-sections (2), (7), (8), and (9).

[22]Sub-section (8) of section 33.

[23] Sections 31 and 34 of the Land Act, as amended by the Land (amendment) Act, No. 1 of 2004

occupancy would enjoy protection of such caveat as if it were lodged by him or her. Additionally, in the event that the registered owner chooses to sell the reversionary interest to another person other than the tenant by occupancy, still the caveat will subsist. The change of ownership of the reversionary interest could be by way of grant or succession, still the caveat of a tenant by occupancy will endure irrespective of the changed reversionary owner.[24]

**Third**: Criminalising eviction of a tenant by occupancy if such eviction is done without a Court Order. Where one is convicted of illegal eviction of a tenant by occupancy he or she can be imprisoned.Securing a court order to evict a tenant by occupancy is a tedious exercise and the grounds upon which it can be issued are also onerous such that getting one is near to impossible. Amendment of the principal Act, ushered in section 32A which provides:[25]

> Lawful or bona fide occupants to be evicted only for non-payment of ground rent.
>
> 1) A lawful or bona fide occupant shall not be evicted from registered land except upon an order of eviction issued by a court and only for non-payment of the annual nominal ground rent.
>
> 2) A court shall, before making an order of eviction under this section, take into consideration the matters specified in section 32(1).
>
> 3) When making an order for eviction, the court shall state in the order, the date, being not less than six months after the date of the order, by which the person to be evicted shall vacate the land and may grant any other order as to expenses, damages, compensation, or any other matter as the court thinks fit.

**Fourth**: by being silent on the life span of a tenancy by occupancy, thus making it perpetual. There is no provision providing or intimating on the duration of a tenancy by occupancy just like the case for long term tenancies like leases. For example, the law clearly spells out that no lease would

[24]Section 35(8) of the Land Act, as amended by Act No.1 of 2010.
[25]Land (amendment) Act, No. 1 of 2010, section 2 thereof.

endure beyond 99years.[26]It follows therefore that a tenancy by occupancy can subsist and outlive a lease whose duration cannot last beyond 99 years.

**Fifth:** in the event that the registered owner wishes to sell the reversionary interest in land he or she shall give the first option of buying the interest to a tenant by occupancy.[27]The language of the law is mandatory requiring that the land owner shall not sell his or her land to any other person before giving the first option to the tenant by occupancy.

**Sixth:** in case the registered owner transfers the reversionary interest, a tenant by occupancy becomes a tenant of the transferee of the reversionary interest or lease in that case as by law.

It is for those reasons that I make the argument that S. 29 introduced and actually created a perpetual tenancy over land that happened to be registered by 8th October, 1995. Much as the Land Act Cap 227 came into force in 1998, it was only expounding on the tenements pronounced by the 1995 Constitution of the Republic of Uganda. The unregistered perpetual owner.

**Dilution or negation of the Torrens System of Land Registration**

This perpetual tenancy dilutes and almost negates the cardinal features of the Torrens system of land registration; to wit, title by registration and indefeasibility of title. Specifically, a tenant by occupancy does not appear on the certificate of title as a proprietor. By making this assertion, it should be noted that where a tenant by occupancy is issued with a certificate of occupancy, the certificate can be noted on the charges register of the title.[28] This being registered land, the cardinal feature is that a proprietor ought to be registered. However, this is not the case for a tenant by occupancy but he or she has proprietary interests in the land that are perpetual in nature. There is no mandatory requirement for a tenant by occupancy to obtain a certificate of

[26]Section 40 Land Act. (as amended by Act No. 1 of 2004).
[27]Section 35, ibid.
[28]The charges register is commonly referred to as the encumbrance page of the certificate of title.

occupancy; and the fact of not having one does not legally prejudice the interests of the tenant by occupancy.[29]

*Note: In case of a lease granted out of former public land, where there are tenants by occupancy within the meaning of S. 29 (1)(c); such lease would expire and revert to the district land Board, but the tenancy by occupancy would endure, and endure perpetually.*

The perpetual nature of a tenancy by occupancy can best be demonstrated in respect of one found on a lease granted out of former public land. A tenancy by occupancy on a lease on former public land, can outlive the duration of the lease. Where for example a lease was granted by the ULC in 1970 for 49 years and there was a customary tenant whose interest was not disclosed or compensated. This, hitherto customary tenant, is now a lawful occupant who can be issued with certificate of occupancy. The lease would expire in 2019 and the reversionary interest would revert to the respective District Land Board.[30] The tenancy by occupancy will outlive the lease and the tenant by occupancy will become a tenant of the District Land Board.

**The Legal and Social Implications of a Perpetual Tenancy**

Tenancies in their very nature are a creature of common law where the reversionary owners or a land lord or landowner exercises proprietary interest to create lesser interest in his or her land with the powers to terminate either by law or by agreement. Tenancies, including leases, are for a specified period or for a period that can be determined or is determinable by assessing the relationship between the landowner and the tenant. None of these features exist in a tenancy by occupancy, why, because it is an imposition of the law onto the land owner, and neither the law nor the land owner can determine its duration.

It is not surprising, therefore, that a new trend is developing where periodic tenants (monthly or yearly tenancies) refuse to vacate premises when their tenancies are terminated. At times, they even argue that they are entitled to be given an option to purchase! Why? It is because they imagine that after twelve years of occupying the same premises they are some sort of (the perpetual) tenants by occupancy.

[29]Section 31(9) land Act.
[30]Section 59 Land Act.

Another common occurrence is where several people collude and connive to concoct a tenancy by occupancy. They create a buyer and seller and in the middle of all this they plant some elderly person, 70 years and above who purports to have occupied the land since the 1960s and then he sells his occupancy rights to a purchaser. For example, in the case of *Joint Medical Store v. Kanakulya*[31] the defendant who fenced off the plaintiffs' two undeveloped plots of land over Christmas recess of 2009 (one plot under freehold and another under lease, but adjacent to each other) claimed that he bought the land in 1999 from an elderly man who apparently owned it since the 1960s. The defendants' supposed sale agreement of 1999 was drawn by a firm of lawyers whose chambers are situated in a building in the city centre (Kampala) which was built between 2003 and 2005. The supposed vendor he bought from never sought consent from the plaintiff (the registered owner of both plots of land since 1989) to sell to the defendant which omission is supposed to vitiate the transaction.[32]

This rather peculiar legal privilege conferred onto a tenant by occupancy, especially bonafide occupant 12 years before the coming into force of the 1995 constitution is not extended to a lessee on expiry of a lease. When a lease expires, the lessee becomes a tenant at sufferance occupying at the pleasure of the landlord. This tenancy at sufferance can be terminated any time without notice and no compensation is payable for developments on land. In *Daphine Negesa Musoke v. Samu Investment Limited*,[33] the plaintiff was the leasehold owner granted by ULC over former public land. When the lease expired in 2003, the Kampala District Land Board (successor in title of ULC) granted it to the defendant without the knowledge of the plaintiff who was in occupation of the land since expiry of the lease. The plaintiff lost the case in both the High Court and the Court of Appeal. The contention of Court was that the lease had expired and as such the lessee had no legal right on the property and is a mere trespasser. That the lessors' right to possession of land, in the event of an expired lease, is automatic.

[31]High Court Civil Suit 217 of 2010 (unreported)
[32]Section 34 Land Act.
[33]Court of Appeal Civil Appeal 85 of 2003,

## Conclusion

Ownership of land would make a lot of sense if it is registered, not only for the statistic of the country but also for the owner. In our case, registration of land under the RTA is, legally, a right in rem. A legal right and a conferment of an indefeasible title within the meaning of the Torrens system of land registration. However, in the event that registered land is encumbered with a tenant or tenants by occupancy, then the supposed indefeasibility of title is negated. It is instead the tenancy that becomes indefeasible irrespective of the fact that it is not registered. The law protects a tenancy by occupancy irrespective of whether it is noted on the register or not. The onerous provisions to secure a court order to evict a tenant by occupancy, under the Land Amendment Act, No. 1 of 2010, guarantee the perpetual nature of the tenancy. Given the fact that a tenant by occupancy can only be evicted for non-payment of rent, through a court process which lasts for nearly a year, it makes the venture very unattractive. It also means that the tenant by occupancy can cause environmental degradation but that by itself cannot be used as reason for eviction.

The fact that a tenancy by occupancy can outlive a lease, for example, leaves little room to argue that it is actually a tenancy as enumerated under the long-standing principles of landlord and tenant law or the law of tenancies. A tenancy by occupancy is only but a tenure save for the legislators cajoling the language of the statute to console but also comfort the registered landowners on whose land there happens to be tenants by occupancy occupying it. Call it a tenure and close the fallacy!!

# CONCEPTUALISING BELLIGERENT OCCUPATION UNDER INTERNATIONAL HUMANITARIAN LAW

***By***

***Kasim Balarabe****

## Introduction

International legal instruments and developed theories have made the ascertainment of commencement of belligerent occupation fairly if not sufficiently clear. These rendered denial arguments less likely or untenable in situations where the requirements or criteria exist. The instruments equally provided for the rights of the occupying and occupied powers and those of the occupied population. Similarly, limitations have been imposed regarding changes which can be introduced by the occupying power, the prohibition of annexation of a territory acquired through war and the relationship between occupying power and the occupied population regarding allegiance, forcible deportation, and collective punishment. Traditional and functional approaches equally provide basis upon which facts may be assessed to determining when occupation has commenced and the legal implications which necessarily follow. The law on commencement of belligerent occupation therefore, is fairly clear and settled.

With respect to the end of belligerent occupation however, the situation is hazy. Legal instruments and academic writings largely treated the issue as a question of fact determinable by the prevailing circumstances, hence no sufficient guide exists in the codes as to when belligerent occupation could authoritatively be considered to have ended. As fundamental in the life of a country as occupation is, this is an unfortunate situation which ought to have been addressed.[1] Although it is true that the end of occupation is a question fact, yet, there are identifiable features or situations, the existence of which have

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[1] This shall be the subject of next article on determining the end of belligerent occupation.

profound legal implications on the continued applicability of the law of occupation.

Factually, the control foreign forces exercise over an enemy territory determine the commencement of occupation. This customary rule is reflected in the provision of article 42 of the Hague Regulations annexed to the Fourth Hague Convention of 1907. The criteria under article 42 is that as soon as the enemy forces establish effective control in a foreign territory without the consent of the foreign State the rules of belligerent occupation become operational irrespective of the legality or otherwise of the use of force in the enemy territory. In other words, the law of occupation is *ius in bello* and its applicability is independent of the legality or otherwise of the use of force. In the separate opinion of Judge Kooijmans of the International Court of Justice in *Democratic Republic of the Congo v. Uganda* it was observed that:

> *"In particular, no distinction is made in the ius in bello between an occupation resulting from a lawful use of force and one which is the result of aggression. The latter issue is decided by application of the ius ad bellum, the law on the use of force, which attributes responsibility for the commission of the acts of which the occupation is the result. […]*
>
> "It goes without saying that the outcome of an unlawful act is tainted with illegality. The occupation resulting from an illegal use of force betrays its origin but the rules governing its regime do not characterize the origin of the result as lawful or unlawful."[2]

In this context, the distinction between *ius in bello* and *ius ad bellum* in International Humanitarian Law (IHL) and law of occupation is vital from both theoretical and practical perspectives. The civilian population in the occupied territory must at all times be protected irrespective of whether the occupation is legal or illegal. If the applicability of the law of occupation depended on the validity of the use of force by the occupier, the civilian population may be left without adequate protection. Because all that the occupying power is obliged to

[2] Separate Opinion of Judge Kooijmans in the *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo *v.* Uganda) International Court of Justice, Merits [2005] ICJ Rep. Paras 58 and 60 at p. 321 (*Armed Activities* case)

establish is that its action is justified under the circumstances and hence entitled to administer the territory in a manner consistent with its desires. But the law of occupation ensures that certain rules are observed by the occupying power and certain changes are not made and certain actions are not taken. The law puts limits to the powers exercisable by the occupying power.

**Historical Regulation of Belligerent Occupation**

The historical regulation of belligerent occupation can be traced fairly recently. Before the late nineteen century there appears to be no sufficient interest in regulating this situation. The main interests which generated attention for regulations are issues such as who has the right to wage war, concept of just war, war as obligatory or voluntary etc. Until the time when war may only be resorted to when all other means of settling disputes have failed, there was not a legally binding international instrument from which the actions of a belligerent occupier can be measured.

It is true that from historical perspectives, judicial decisions and legal writings have reflected on the concept and nature of belligerent occupation,[3] but not much attention was paid to it until the nineteenth century when it began to be developed as specialise part of the law of war. A graphic illustration of what occupation was considered to be from the ancient time to the nineteenth century can be seen in the work of Graber:[4] As far as the regulation of belligerent occupation is concerned, initially an occupier was regarded as having absolute ownership of the territory occupied. The occupier has the power to exercise all rights of ownership of the territory with the right to treat the inhabitants as desired.[5] There was no limitation to what can be undertaken as long as the occupier continued to have effective control over the territory.

However, this position was challenged by the writings of Grotius, Bynkershoek and Purfendorf which greatly impacted on the modern concept of occupation and in fact have laid the "foundation for the subsequent development of the law of

[3] See Graber, D,A., *The Development of the Law of Belligerent Occupation 1863-1914; A Historical Survey* (New York, Columbia University Press, 1949) at p. 14
[4] *Idem* at p. 13.
[5] *Ibid*

belligerent occupation."[6] Through this foundation, the law develops through practices and modifications to its current position.

History of occupation gained significance on account of the prolong nature and the extents of the Napoleonic wars and the two world wars.[7] The occupations flowing from these periods put to test the law as contained in The Hague Regulations in a number of occupations. These were notably the occupation of Dodecanese Islands by Italy in 1912,[8] when Italy subsequently ceded the Islands after First World War under the Lausanne Treaty of Peace 1923,[9] because as stated, it was initially conceived that military occupation of an enemy territory could lawfully confer title of sovereignty to the occupier over the territory.[10] Other notable occupations were Germany in occupied Belgium from 1914 to 1918 and British occupation of Basra in Iraq which ended in 1921.[11] Similarly other instances of occupations took place after the Second World War such as the British occupation of Libya from 1942 until after the war.[12] With this in mind, the history of belligerent occupation could be said to have developed in two phases:

1. The period from the late nineteenth century to the conclusion of The Hague Conferences 1899 and 1907; and
2. The period during and after Second World War.[13]

The nature of the obligations of the occupying power in each of these periods depended on the understanding of the

[6] *Ibid*

[7] Verzijl, J.H.W., *International Law in Historical Perspective*, (Vol IX, Alpen Aan Den Rijn: Sijthoff & Noordhoff 1978) at p. 150

[8] Dinstein, Y., *The International Law...*, at p. 9. Citing Benvenisti, *The International Law of Occupation* (Oxford, Princeton University Press 2004).., stated that "myriad aspects of the policy and practice of the Occupying Power were put to the test of the Hague Regulations and found wanting".

[9] *Idem*

[10] Verzijl, J.H.W., *International Law*..., at p. 151

[11] Wilson, A., *The Laws of War in Occupied Territory* (Transactions of the Grotius Society, Vol. 18, Problems of Peace and War, Papers Read before the Society in the Year 1932 (1932)), pp. 17-39 at p. 17

[12] Dinstein, Y., *The International Law*..., at p. 10 citing G .T. Watts, 'The British Military Occupation of Cyrenaica, 1942-1949',37 TGS 69-81 (1951)

[13] Goodman, D.P., 'The Need for Fundamental Change in the Law of Occupation', (1985) 37 Stanford Law Review at p. 1575-6

concept at the time;[14] from the unlimited powers of the occupying power to the recognition that certain actions may not be undertaken by the occupying power in the occupied territory. Nowadays, the rules on the powers and obligations of the occupying power are detailed and contained in international conventions notably, the Geneva Conventions.

Determining the existence of belligerent occupation is not dependent on the pronouncement of any particular institution, however, some factors such as judicial decisions and judicial pronouncements have assisted in this regard,[15] while the United Nations Security Council has also played a similar role.[16]

**The notion and nature of "Belligerent Occupation"**

The phrase belligerent occupation was a translation from the Latin phrase *occupatio bellica,*[17] which was initially regarded as the effect of war phenomenon where effective control of a territory fell to the enemy resulting from a fight.[18] This was because occupation was conceived to have an "inextricable" link with war among States (however, this conception was reversed

[14] Under the first phase the occupying power is required not to disrupt the existing local structures in the occupied territory whereas the practice of the second phase suggested that fundamental changes can be made in the occupied territory, although the Geneva Conventions did not substantially alter the law's traditional focus. See Goodman, D.P., "The Need for Fundamental Change..., at p. 1575-6

[15] See Dinstein, Y., *The International Law*…, at p. 11-2 citing ICJ in the *Armed Activities* case at 310; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, Advisory Opinion (2006) 43 ILM 1009 at 1031(*Separation Wall* opinion); *Prosecutor v.LubangaDyilo,* International Criminal Court, Pre-Trial Chamber (2007) 101 AJIL 841 at 843; ICTY in the following cases: *Prosecutor v. Rajic'* (ICTY, Trial Chamber) (1996) 108 ILR 142at 160-1; *Prosecutor v. Blaskic* (2000), 122 ILR 1 at 64; *Prosecutor v. Naletilic' et al* (ICTY, Trial Chamber, 2003), para. 587; Eritrea Ethiopia Claims Commission, Partial Award (Central Front), Ethiopia's Claim 2, (2004) 43 ILM 1275 at 1282; *Loizidou v. Turkey* European Court of Human Rights, Merits (1997) 36 ILM at p. 453-4.

[16] See United Nations Security Council Resolution [UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483] which called the United States of America and the United Kingdom of Great Britain and Northern Ireland in Iraq as "occupying powers".

[17]Dinstein, Y., *International Law* …, at p. 31.

[18]Benvenisti, E., *The International Law of Occupation*, (Oxford, Princeton University Press 2004) at p. 3. Benvenisti however argued that twentieth century history has shown that even the threat of force leading to the concession by the occupied government of effective control could amount to Occupation citing the German Occupation of Bohemia and Moravia in March, 1939.

by article 6 of the Geneva Convention IV).[19] The word "belligerent" is rarely used recently except in very limited circumstances,[20] probably because of the odious nature attached to it.

In establishing the existence or commencement of occupation, certain conditions are required to be satisfied. There are four conditions:

1. That the occupant should have physical control of the region;
2. That there should be full intention to exercise the rights of an occupant;
3. That the occupant has a complete power to use his authority continuously and repeatedly; and
4. That the authority is uncontested in the region.[21]

These conditions are cumulative and strict in nature and where situations exist creating doubt as to their clear existence, occupation has not commenced. Military manuals such as those of the United Kingdom, the existence of occupation centred on whether the control an enemy has on a territory is effective.[22] In other words, it is the level of effectiveness and not mere pronouncement that determines the existence or otherwise of occupation. Aside other arguments advanced which would follow later under functional occupation, legal experts have not completely dismissed the requirement of effectiveness as the legal yardstick. Of particular and specific reference, Benvenisti was of the opinion that occupation is the "effective control of a power (be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory".[23] Control of a foreign land accompanied by lack

[19]*Idem*. Article 6 GC IV provided that the Convention applies to situations of partial or total Occupation even if not met with armed resistance. Dinstein cited the example of German Occupation of Denmark in 1940.

[20] According to Benvenisti this could be because many Occupants are "reluctant to admit the existence of state of war or of an international armed conflict" or even a "failure to acknowledge the true nature of their activities on foreign soil".

[21]Waxel, Platon de, L'Armée d'Invasion et la Population. (Leipzig: 1874) at p. 77 (See Graber, D.A., *The Development of the Law...*, at p. 51.

[22] See UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, (Oxford, Oxford University Press 2004) at p. 275

[23]Benvenisti, E., *The International Law...*, at p. 4.

of consent on the part of the owner distinguishes the existence of belligerent occupation from another category of occupation termed, consensual occupation. Under the current law of armed conflict, occupation takes place only in international armed conflicts. However, one important question to draw attention from Benvenisti's comment is the idea expressed that even United Nations could, in certain circumstances be considered an occupying power.

The powers of the Security Council no doubt, are enormous and decisive pursuant to which force can be used against any State as long as authorisation had been issued under chapter VII. However, the preliminary question begging response is whether, in the first instance, the United Nations is bound by IHL with which to assess United Nations compliance or otherwise. It makes no point to term a situation as occupation if the supposed occupier is not obliged to respect the rules regulating the concept of occupation.

While several arguments have been canvassed for and against the obligation of United Nations to comply with IHL the conclusion subscribed to here is, undoubtedly, some of these rules have formed part of customary law binding and applicable to all irrespective of treaty obligations but three countervailing points must be noted.

Firstly, it is true that independent forces for the United Nations was envisaged by the UN Charter. However, decades later, the United Nations is yet to acquire one. It is accepted that when States have (voluntarily) contributed forces to a United Nations mission abroad, such troops are under the umbrella of the UN, the contributing States however, continue to maintain significant control over their contingents rendering argument as to the independence of the UN to determine absolutely course for the troops a hollow one. This does not however obviate the responsibility under treaties of the contributing States.

Secondly, if it is accepted that such forces are absolutely under the control of the United Nations and hence separate from their sending States, the problem of obligation becomes obvious. Notwithstanding the universality and relativity of IHL rules, to the extent IHL remains treaty rules exonerated the United Nations from obligation as such rules were negotiated and binding only *erga omnes partes*.

Thirdly, could it be said with certainty that the United Nations forces could be prosecuted for violation of IHL rules at the international level? No doubt United Nations forces in several missions such as those in Liberia, Congo, Bosnia and Haiti were alleged to have committed sexual offences such as rape and trafficking in women. Despite international outcry and calls for justice, it appears these troops enjoy the immunity being under an international organisation. As it stands currently, there exist no rules demonstrating the culpability of United Nations forces while on mission.

From this traditional conception of the notion of occupation, effective control of a territory is fundamental. This connotes "the degree of control" necessarily required to bring about belligerent occupation.[24] Such control occurs "when a party to a conflict enters a foreign territory and oust the local sovereign."[25] The ousting of the sovereign has to be in fact and it must be demonstrated that the ousted sovereign no longer exercises control over the territory due to the existence and exercise of power by the occupier. Occupation is "a specific situation where the armed forces of one or more States are for a certain period of time present in the territory of another State without the consent of the latter."[26] This stresses the non-permanence and non-consensual nature of occupation. However, history has demonstrated instances where States have annexed some occupied territories. Similarly, the current situation in the Palestine which presently, there seems to be no effective solution and which its possibility of ending is not near confirms and challenges this position. It is true that the occupation is non-consensual and it is characterised by crises frequently but demonstrated that occupation can run for a period never imagined or contemplated.

Walsh and Peleg conception focused on the occupied population as opposed to the displaced sovereign. According to

[24] Rubin, B., 'Disengagement from the Gaza Strip and Post-Occupation Duties' (2010) 42(3) Israel Law Review, at p. 534

[25] Goodman, D.P., 'The Need for Fundamental Change...,' at p. 1574

[26] Bothe, M., 'The Beginning and End of Occupation' in the Proceedings of the Bruges Colloquium, *Current Challenges to the Law of Occupation* (Collegium No. 34 Autumn 2006) at p. 26<http://www.coleurop.be/file/content/publications/pdf/Collegium%2034.pdf> accessed 15 July, 2015

them, occupation is "a *de facto* control, by a foreign military force, of a population which is ethnically, religiously, culturally, or nationally different from the occupant's population."[27] If this understanding is taken, it means that there cannot be occupation between States which share ethnic, religious or cultural characteristics. This indeed is doubtful. Take for example, the invasion of Kuwait by Iraq, where both countries are predominantly Muslims and Arabs with cultural affinities and historical relationships.

From the above positions, what appears derivable is that, a state of occupation exists when foreign forces are present in a foreign territory without consent and exert or exercise control or has the power to do so in respect of the governance and administration of that territory for a temporary period.

Purposes or motives for occupying another State's territory could be many such as "to implement territorial claims; to put pressure on an adversary to perform obligations under an already existing treaty; or else to negotiate a peace treaty; to prevent the use of occupied territory as a military base....; to protect a given area or section of the population against internal disturbances or against foreign attacks"[28] etc. As stated earlier, the legality or otherwise of an occupation is irrelevant to the application of IHL.[29]

There have been situations in the past where the main aim of the occupying power is to transform the occupied territory way beyond what was permitted in The Hague Regulations. Instances of this for example are the occupation of Germany after Second World War and Iraq after the regime of Saddam Hussein was ousted. Roberts termed this situation as "Transformative Occupation",[30] and Burke noted that "several orders of the Coalition Provisional Authority (CPA) were aimed at the

[27] Walsh, B., 'Human Rights Under Military Occupation: The Need for Expansion' (1998) 1 The International Journal of Human Rights, at p. 64

[28] Roberts, A., 'What is Military Occupation?'..., at p. 300

[29] See United States v. List 15 ANN (1948) Public International Law Cases at p. 637 ("International Law makes no distinction between a lawful and an unlawful Occupant in dealing with the respective duties of Occupant and population in occupies territory ... Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.").

[30] See Roberts, A., 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 AJIL at p. 580.

regulation of areas which could not be considered strictly necessary under the laws of occupation" citing complete revision of investment law and reorganisation of tax system as examples.[31]

There are instances where the occupying power has only certain military interest of a periodic nature and once such goals have been achieved, the occupying power is no longer interested in the continuance of such occupation. This for example involves a situation where foreign forces are in a State for the protection of a population which is being oppressed by its own State. In this light, Benvenisti proposed what he called 'Limited-Purpose Occupation' as a situation which arises where "the invading troops have no intention to remain in control over the area once the military goal of the invasion is achieved".[32] The Coalition's occupation of Southern and Northern Iraq and the Israeli occupation of Southern Lebanon were cited as examples.[33]

As a prerequisite, existence of coercion distinguishes *occupatio bellica* from *occupatio pacifica,*[34] and the law of occupation is only applicable to *occupatio bellica.* Further, as an *ius in bello* issue, occupation once established, its motive is irrelevant, the legality or otherwise of such situation is settled by the law applicable to the use of force in international law.[35]

By its nature, belligerent occupation is temporary,[36] it is the "intermediate phase before peace or sovereignty is restored" or pending the creation or establishment of a new

[31] Burke, N., 'A Change in Perspective...,' at p. 113
[32]Benvenisti, E., *The International Law* …, at p. 181
[33]*Idem*
[34]Dinstein, Y., *The International Law*…, at p. 35.
[35] See the *Armed Activities* Case at p. 310
[36] This was indicated clearly under article 6 of the Oxford Code. See Graber, D. A., *The Development of the Law*..., at p. 37; Pictet, J.S., *Commentary on the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (ICRC Geneva 1958) at p. 275; Benvenisti, E., *The International Law* …, at p. 5; Jennings, R.Y., 'The Government in Commission' (1946) 23 British Yearbook of International Law, at p. 133; UK Ministry of Defence, *The Manual of the Law*..., at p. 278; Imseis, A., 'Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion' (2005) 99 AJIL at p. 103; Article 3 of the Lieber Code which speaks about suspension of laws during occupation.

administration.[37] Being temporary therefore, it does not deprive the occupied power its statehood or sovereignty;[38] it only interferes with its power to exercise its rights.[39] Arai-Takahashi commented that "[t]he most obvious legal ramification of the termination of the occupation is that the territory which has been hitherto occupied will be restored to the displaced sovereign."[40]

Once a situation of occupation exists and effective control established, some authorities considered that a duty is imposed on the occupying power to establish a government in the occupied territory which must be for a limited purpose.[41] Others however posited that though it is preferable, no such duty exists, rather, what should be done depends on the facts and circumstances of each case.[42] The occupying power is however required to, in principle, allow normal life to continue as much as possible within the occupied territory,[43] and the responsibility for public order, safety and welfare is on the occupying power since

[37] Burke, N., 'A Change in Perspective: Looking at Occupation through the Lens of the Law of Treaties' (2008) 41 New York University Journal of International Law and Politics, at p. 109

[38]Imseis, A., 'Critical Reflections...,' at p. 103

[39]Pictet, J.S., *Commentary on the Geneva Convention...*, at p. 275

[40] Arai- Takahashi, Y., *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Leiden, Martinus Nijhoff Publishers 2009) at p. 16

[41] See for example US Department of the Army, Field Manual, *The Law of Land Warfare* 138 (FM 27-10, 1956) at paragraph 1362 {"Military government is the form of administration by which an Occupying Power exercises governmental authority over Occupied territory.") cited in Benvenisti, E., *The International Law….,* at p. 4 who also argued that the current position appears to be that such establishment of Government is an exception rather than the rule. See also Greenwood, C., 'The Administration of Occupied Territory' in Emma Playfair (ed) *International Law and Occupied Territory* (Oxford, Clarendon Press 1992) at p. 265; *Prosecutor v. Naletilic* et al. (ICTY, Trial Chamber, 2003), para. 21; UK Ministry of Defence, *The Manual of the Law*..., at p. 277 requires at least an arrangement for the administration of the territory to be made.

[42]Dinstein, Y., *The International Law*…, at p. 55 relying on the ICJ judgment in the *Armed Activities* case as a sounder opinion on the topic; see also *Tzemel Adv. Et al. V. (a)Minister of Defence, (b) Commander of the Ansar Camp* (Ansar Prison case), (Israeli High Court, 1982), (2003) 13 Israel Yearbook on Human Rights, pp. 360-64; Kelly, M.J., 'Iraq and Law of Occupation: New Tests for an Old Law' (2003) 6 Yearbook of International Humanitarian Law, at p. 130

[43] See article 43 of The HagueRegulations concerning the Laws and Customs of War on Land (annexed to Convention (IV) respecting the Laws and Customs of War on Land, 18 October, 1907 (Hague Regulations)

the *de facto* authority of the territory has passed to it.[44] The fact that control of the territory has passed to the occupier, it will be more reasonable for an effective government to be established which will see to the administration of the territory because allowing normal life to continue will require the continued existence of institutions and services necessary and these must be supervised or coordinated by an effective government.

Article 42 Hague Regulation requires not only effective control of an area but also the ability to exercise that authority.[45] This does not however meant stationing the troops in all the territories occupied,[46] it can be achieved for example by possessing the capacity to despatch troops within a "reasonable time to make the authority of the occupying power felt".[47] Some authors however considered physical presence of forces essential.[48] Physical presence, no matter how negligible the number, may demonstrates the *de facto* control of the occupying power. Where however fighting continues in a territory, such territory may not be considered as occupied.[49]

The existence of belligerent occupation confers rights and responsibilities on the occupier. As to the status of the occupier, some views have been expressed that the occupier is a trustee of the occupied territory,[50] because The Hague

[44] See article 43 of The Hague Regulations

[45] See also ICJ in the *Armed Activities* case at p. 310-1; British Military Manual 1956; 'Tzemel Adv. et al. v. (a) Minister of Defence, (b) Commander of the Antzar Camp (1983) 13 IYHR 360 at p. 363

[46]Dinstein, Y., *The International Law...*, at p. 44. See also Bluntschli, J.K., *Das Moderne Voelkerrecht*, (3rd edn Noerdlingen 1878) at p. 308-412

[47]*Idem* citing *Naletilic*' Case at p. 217. This is also the view taken by UK Ministry of Defence, *The Manual of the Law...*, at p. 276

[48] Graber, D.A., *The Development of the Law...*, at p. 51. See also Breau, S.C., 'The Humanitarian Law Implications of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' in Susan C. Breau and Agnieszka Jachec-Neale (eds), *Testing the Boundaries of International Humanitarian Law* (London, British institute of International and Comparative Law 2006) at p. 196.

[49] . Dörmann, K., and Colassis, L., 'International Humanitarian Law in the Iraq Conflict' (2004) 47 German Yearbook of International Law at p. 301.

[50] Wilson, A., *The Laws of War...*, at p. 38 available also at http://www.jstor.org/stable/743013 accessed on 20 July, 2015. Wilson observed that to ensure civilians in the occupied territory are protected, the military commander of the occupied territory should understand that he is acting as a trustee *pro tem*of the legitimate sovereign and concluded that "enemy territories in the occupation of the armed forces of another country constitute… a sacred

Regulations and GC IV "can be interpreted as putting the occupier in a quasi-trustee role".[51] Von Glahn shares the opinion that the rights of the occupying power in the occupied territory are temporary and exercisable on a "sort of a trusteeship basis".[52] Dinstein, however, considered trustee concept in the law of occupation to be wrong as no premise of "trust between enemies in wartime is warranted." It is however more in accord to consider an occupier as an administrator of public property since article 55 of The Hague Regulations treated the occupying power as "administrator and usufructuary" and tilts more towards protecting the interest of the displaced sovereign. In this light, Jennings pointed out that "the law of belligerent occupation is designed to serve two purposes": (i) the protection of "the sovereign rights of the legitimate government of the occupied territory" (assuming such government continues to exist) and hence the denial of sovereignty to the occupying power, and (ii) the protection of the inhabitants of the occupied territory from exploitation.[53]

Recently, States practice on the existence of occupation is demonstrating that States are reluctant in framing their actions in foreign States as occupation and hence reluctant in invoking the relevant rules applicable to situations of occupation.[54] This according to Dinstein could "possibly" be "due to the odium attached to belligerent occupation by the appalling Nazi and Japanese record"[55] while to Roberts it "may be because of a fear of having to apply the full range of the law on occupation", and because also the word 'occupation' has adverse connotation as it "is almost synonymous with aggression and oppression."[56]States try to justify the non-applicability of the law of occupation to

trust, which must be administered as a whole in the interests both of the inhabitants and of the legitimate sovereign or the duly constituted successor in title"; see also Sai, D.K., "American Occupation of the Hawaiian State: A Century Unchecked", (2004) 1 Hawaiian Journal of Law and Politics, at p. 70

[51] Roberts, A., 'What is Military Occupation?'..., at p. 295

[52] Gerhard von Glahn, *Law Among Nations* (4th ed., London, Macmillan Publishing Co.Inc. 1981) at p. 673

[53] Jennings, R.Y., 'The Government in Commission' at p. 135

[54]Benvenisti, E., *The International Law*…, at p. 5. According to him the occupants purport to annex or establish puppet government or simply refrain from establishing any form of government in the occupied territory. This is obviously a signal that the Occupier will not respect the law of occupation.

[55]Dinstein, Y., *The International Law*…, at p. 10

[56] Roberts, A., 'What is Military Occupation?'..., at p. 301

their actions by referring to some claims,[57] and also by using terms which appeared to be more humanitarian in nature though some of them are incompatible with the legal consequences of occupation.[58] Whether or not States recognise their actions as amounting to occupation:

> *"Occupation law remains an important backstop for the use of military force that leads to belligerent occupation both during and after an armed conflict. Even if an occupying force chooses not to comply with or even recognize occupation law, at least the government and relevant officials executing the action are on notice and can be held accountable for violations during a belligerent occupation."*[59]

Similarly, the rules as they existed in The Hague Regulations were not adhered to especially during the Second World War. This for example was acknowledged by a judicial decision in the *Justice* trial decided by the American Military Tribunal. The Tribunal was of the view that on the basis of the "undisputed evidence" before it, "Germany violated during the recent war every principle of the law of military occupation".[60] It was because of these series of non-compliance that a new set of rules were devised in 1949 when the Geneva Convention IV Relative to the Protection of Civilian Population in times of War ("GC IV") was adopted as a response to the experience of the war.[61] The section on the legal framework will look into this issue in more details.

Recent practice is pointing towards the vanishing of the traditional HR and GC IV concept of an "ousted sovereign".

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[57]Dinstein, Y., *The International Law*…, at p. 10 captured it quite correctly with respect to China dispatching troops to Tibet – by relying on 'old suzerain-vassal feudal relationship'; India relying on a claim that Goa is part of it when it militarily took it over and more recently the claim by Iraq for the invasion of Kuwait.

[58] Terms such as "protectorate, fraternal aid, rescue mission, technical incursion, peacekeeping operations ... liberation". (see Roberts, A., 'What is Military Occupation?'..., at p. 301

[59]Scheffer, D.J., 'Agora: Future Implications of the Iraq Conflict. Beyond Occupation Law' (2003) 97 AJIL, at p. 849

[60]*Justice* trial (Alstötter et al) (US Military Tribunal, Nuremberg, 1947), 6 LRTWC 1, 59. Cited in Dinstein., Y., *The International Law*…, at p. 10

[61]Benvenisti, E., *The International Law*…, at p. 59. At page 60 he cited as examples of disobedience to the HR by Germany, Italy and Japan with Italy annexing Ethiopia and Albania, Japan setting up puppets governments in Southeast Asia and Germany doing both.

Recently, sovereignty is more considered to be in the population of the occupied territory as opposed to mere State in its abstract form.[62]Attention is now focused on what the population of the territory desires and would better advanced their interests rather than the prescriptions of the ousted sovereign.

Regarding sovereignty, some authors have argued that with limited exception occupation does not affect sovereignty.[63] The UK Manual, 2004 for example, considered sovereignty to have just been suspended.[64] The Occupier only acquired *de facto* control of the territory while the ousted sovereign continues to retain title *de jure*.[65] The corollary to this is that the Occupying Power is prevented from considering the population of the occupied territory as its lawful subjects and should therefore not expect allegiance but obedience.

There is however the concept of *debellatio* which is to the effect that "[i]f one belligerent conquers the whole territory of an enemy, the war is over, the enemy State ceases to exist, rule on State succession concerning complete annexation apply, and there is no longer any room for the rules governing mere occupation."[66]*Debellatio* is "the extermination in war of one belligerent by another through annexation of the former's territory after conquest, the enemy forces having been annihilated".[67] Expression of this principle can be found in early writings and manuals. For example, article 33 of the General Orders Affecting the Volunteer Force[68] considered it lawful to issue a Proclamation following a "fair and complete conquest" that a conquered Country or district is now permanently part of the victorious Country such that the subjects of the conquered Country can be forced into the service of the victorious Country. Relying on the theory of State under international law, Kelson noted that "the principle that enemy territory occupied by a

[62]Benvenisti, E., *The International Law* …, at p. 183
[63]Dinstein, Y., *The International Law*…, at p. 49. See also UK Ministry of Defence, *The Manual of the Law*..., at p. 278
[64] UK Ministry of Defence, *The Manual of the Law*..., at p. 278
[65]Dinstein, Y., *The International Law*…, at p. 49
[66]Feilchenfeld, E.H., *The International Economic Law of Belligerent Occupation* (Washington, Carnegie Endowment for International Peace 1942) at p. 7
[67] Oppenheim, L., *International Law: Dispute* (5thedn. Longman, Green and Co. 1963) at p. 470-471
[68] United States Department of War, *General Orders Affecting the Volunteer Force: Adjutant General's Office,* 1863 at p. 70

belligerent in the course of war remains the territory of the State against which the war is directed, can apply only as long as this community still exists as a State within the meaning of international law."[69] However even under *debellatio*, it was argued that the right to self-determination of the people needs to be taking into consideration.[70] The doctrine of *debellatio* has however little relevance if any in view of the adoption of the Geneva Conventions and Additional Protocol I ("AP I"),[71] and *ius ad bellum* issue of acquiring territory through the use of force.[72]

It must be noted that since occupation is about exerting control on a territory of a foreign State, the concept is unknown to a non-international armed conflict.[73] Roberts had posited that "at the heart of almost all treaty provisions and legal writings about occupation is the image of the armed forces of a State exercising some kind of coercive control or authority over inhabited territory outside the accepted international frontiers of theirs State."[74] Article 1 of Brussels Code[75] which formed the basis of article 42 of the HR considered a territory to be "occupied when it is actually placed under the authority of the hostile army". Under these instruments "occupation extends only to the territory where such authority has been established and can be exercised." The territory referred to could cover any foreign territory for example that of a neutral country so long as it is not the territory of the Occupying

[69]Kelsen, H., *Principles of International Law* (1st Edn.New York, Rinehart & Company, Inc. 1952) at p. 75. This he argues that is because the States has been "deprived of one of the essential elements of a state in the sense of international law: an effective and independent government, and hence has lost its character as a State".

[70]Dinstein, Y., *The International Law*…, at p. 50

[71]Scheffer, D.J., 'Agora: Future Implications of the Iraq Conflict...', at p. 848; see article 6(3) and (4) of GC IV and article 3(b) of API

[72] See Ulrich-Meyn, K., 'Debellatio' in *Encyclopaedia of Public International Law* (Max Planck Institute for Comparative Public Law and International Law, ed. 1992) at p. 969

[73] See Gasser, H.P., 'Protection of the Civilian population', in Fleck, D., (ed) *The Handbook of Humanitarian Law in Armed Conflicts* (2nd edn, USA, Oxford University Press 2008) at p. 272.

[74]Roberts, A., 'What is Military Occupation?'..., at p. 293

[75]Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874.
<http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument> accessed 19 July, 2015.

Power and not necessarily enemy territory.[76] This seems to be the opinion earlier taken by Roberts that the common trait of military occupation is the intervention by the military and their exercise of control of a territory beyond their internationally recognised frontiers.[77] In this regard, Feilchenfeld asserts:

> *Section III of The Hague Regulations applies expressly only to territory which belongs to an enemy and has been occupied without the consent of the sovereign. It is, nevertheless, usually held that the rules on belligerent occupation will also apply where a belligerent, in the course of the war, occupies neutral territory, even if the neutral power should have failed to protest against the occupation.*[78]

However, the Occupying Power in occupied neutral territory "does not possess such a wide range of rights to the occupied Country and its inhabitants as he possesses in occupied enemy territory."[79]A Country ceases to be neutral as soon as it is attacked and resisted such attack.[80] With respect to allied territory however, several views have been expressed.[81]

An opinion however, had been expressed on the applicability of the law of occupation on liberation movements occupying the territory of another State but even here it was noted that due to their nature it may not always be possible to implement certain provisions.[82]

Debate recently taking shape is whether forces of the United Nations could be subject to the law of occupation. The conclusion which seems to be gaining ground is that where UN is involved in peace operations under chapter VI, which by its nature and guiding principles do not involve the use of force

[76] Kolb, R., 'Etude sur l'occupation et sur l'article 47 de la IVème Convention de Genève du 12 aout 1949 relative à la protection des personnescivilesen temps de guerre : Iedegré : d'intangibilité des droits enterritoireoccupé' (2002) 10 African Yearbook of International Law at 278-279 et seq.
[77] Roberts, A., 'What is Military Occupation?'..., at p. 300
[78]Feilchenfeld, E.H., *The International Economic* Law..., at p. 8
[79] Oppenheim, L., *International Law*, (7thEdn, New York, David Mckay Co., 1948-1952) at p. 241
[80] Roberts, A., 'What is Military Occupation?'..., at p. 262
[81] For a fuller discussion on the issue see Roberts, A., 'What is Military Occupation?'..., at p. 263.
[82] Roberts, A., 'What is Military Occupation?'..., at p. 255

except in self-defence, the law of occupation is not applicable,[83] whereas the situation may differ when UN is involved in peace enforcement or combat action and it may end up in belligerent occupation,[84]similar position exists where the central authority of the host State collapses.[85] It is not however within the confines of this paper to address this issue.

## Legal Frameworks Regulating Occupation

The law regulating occupation developed as part of the law of war.[86] Several legal instruments have been adopted over the years to provide for the regulation of occupation.

### *Lieber Code, 1863*

The first legal instruments embodying rules relevant to the law of occupation is the Lieber Code of 1863,[87] which sets the "embryonic normative measures"[88] of the law of occupation. However, it must be noted that the articles bearing on belligerent occupation are rather "illogically dispersed".[89] The purpose of the Lieber Code was to put together "new doctrines" which "were being introduced into the customs and usages of warfare and to incorporate them in a written code which will give them a greater degree of certainty and authority."[90] The articles on belligerent occupation constitute roughly one-third of the Code,[91]

[83] Others however, completely reject the applicability of IHL to United Nations. See Shraga, D., 'The United Nations as an Actor Bound by IHL' in L. Condorelli, A.M. La Rosa, S. Scherrer (Eds.), *Les Nations Unies et le DIH*, (Paris, Pedone 1996) at p. 325; Glick, R.D., 'Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces' (1995-1996) Michigan Journal of International Law, at p. 69.

[84]See for example Dinstein, Y., *The International Law*…, at p. 37; Ferraro, T., 'The Applicability of the Law of Occupation to Peace Forces' in *International Humanitarian Law, Human Rights and Peace Operations* (IIHL San Remo, 2008)at p. 122 and 124-125 ; Roberts, A., 'What is Military Occupation?'..., at p. 289-91

[85] Roberts, A., 'What is Military Occupation?', at p. 291

[86]Benvenisti, E., *The International Law*..., at p. 3.

[87] Instructions for the Government of Armies of the United States in the Field, 1863 (known as Lieber Code, 1863)

[88]Dinstein, Y., *The International law*…, at p. 8

[89]Verzijl, J.H.W., *International Law*...*,* at p. 152

[90]Mallison, W.T. and Jabri, R.A., 'The Juridical Characteristics of Belligerent Occupation and the Resort to Resistance by the Civilian Population: Doctrinal Development and Continuity' (1973-1974) 42 George Washington Law Review, at p. 192

[91] Graber, D. A., *The Development of the Law*..., at p. 15

which demonstrated the importance attached to the law of occupation even at that time, taking cognizance of the position before it. This is however, notwithstanding the criticisms level against the Code.[92] This giant stride marked what is known as "the beginning of the recognition of occupation as a definite state in military operations",[93] and which clearly stipulated the martial law as applicable law in the occupied territory as distinct from the law applicable in the occupying power's territory.[94] It has often been said that Lieber Code emphasised more on the rights of the occupying power rather than those of the occupied population.[95] Striking however is the Code's recognition of the temporary nature of belligerent occupation,[96] that the occupying power has only *de facto* sovereignty, and that the inhabitants of the occupied territory owe only a duty of obedience to the occupying power.[97]

**International Declaration Concerning the Laws and Customs of War, 1874**

In 1874, the Russian Government sponsored the conclusion of the Brussels Project of an International Declaration Concerning the Laws and Customs of War, 1874.[98] It was the first attempt to codify the laws and usages of war at the international level. The Declaration was inspired by the Lieber Code and its provisions served as improvement on the Lieber Code.[99]Article 2 of the Brussels Declaration for example provided that:

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[92] For such criticisms see the following works: *The War of the Rebellion-Official Records of the Union and Confederate Armies*, 1899, Series II, VI, 41-43; Bordwell, P., *The Law of War between Belligerents* (Chicago 1908) at p. 74; Holland, Thomas E., *The Laws of War on Land*. (Oxford 1908) at p. 71. (See Graber, D.A., *The Development of the*…, at p. 18).

[93] Conner, Jacob Elon, 'The Development of Belligerent Occupation, (1912) 4 Bulletin of the State University of Iowa, at p. 5

[94]Mallison, W.T. and Jabri, R.A., 'The Juridical Characteristics of Belligerent Occupation...,' at p. 192. Article 4 of the Lieber Code defined martial law as "simply military authority exercised in accordance with the law and usages of war. Military oppression is not Martial Law; it is the abuse of the power which that law confers."

[95]*Idem* at p. 193

[96] See articles 1, 2 and 29.

[97] See article 26.

[98] Also known as Brussels Code

[99]Holland, Thomas E., *The Laws of War on Land*. (Oxford 1908) at p. 75 (see Graber, D.A., *The Development of the Law*…, at p. 20 and 28)

*The authority of the legal power being suspended, and having actually passed into the hands of the occupier, he shall take every step in his power to re-establish and secure as far as possible, public safety and social order.*

Article 3 provided that: *With this object, he will maintain the laws which were in force in the country in time of peace, and he will only modify, suspend or replace them by others if necessity obliges him to do so.* Art. 36 contained: *The population of occupied territory cannot be forced to take part in military operations against its own country*. Art. 37 is to effect that: *The population of occupied territory cannot be compelled to swear allegiance to the hostile Power.*

In the above articles, the nature of occupation, powers and responsibility of the Occupying Power and the rights of the occupied population are clearly demonstrated. Curiously also, almost one-third of its articles contains directly or indirectly provisions relevant to occupation. The Code was considered "imminently proper to serve as basis for instruction to be given by belligerent to their armies" by the Institute of International Law.[100] There were however problems in the implementation of this Declaration by States and the Institute of International Law prepared and adopted what is known as the Oxford Code.[101]

**The Oxford Code**

The Oxford Code is somewhat similar to the Brussels Code except in its arrangement and simplification which were intended to further understanding and application by soldiers.[102] The Oxford Code was subsequently sent to States by the Institute urging them to instruct their armies using manuals similar to its provision.[103]

**The Hague Convention on the Laws and Customs of Land Warfare, 1899**

In 1899, on the invitation of the Russian Government, an international conference was held in The Hague which *inter alia* was to discuss a revision of the Brussels Code in a way most

[100] Graber, D. A., *The Development of the Law*…, at p. 27.
[101] See *Idem* at p. 28-9.
[102] *Ibid* at p. 29
[103] *Ibid* at p. 30.

acceptable to States.[104] In furtherance to that, The Hague Convention on the Laws and Customs of Land Warfare was adopted. Examinations of its provisions depicted a close adherence to the Brussels Code.[105] With the adoption of this Convention and in terms of application, some States[106] have acted in accordance with The Hague Conventions 1899, but many failed to comply. The failing States cited curious reasons for not doing so. This necessitated the need to revise the laws and customs of warfare "either with a view of defining them more precisely or of laying down certain limits for the purpose of modifying their severity as far as possible."[107] It was in this regard that The Hague Convention on the Laws and Customs of Warfare, 1907 was negotiated but with respect to the law of belligerent occupation, only few amendments were made.[108]

**Hague Convention on the Laws and Customs of Warfare, 1907**

Provisions on the law of occupation have been codified in particular in Articles 42-56 of the 1907 Hague Regulations. The entire provisions of The Hague Regulations have generally been considered as a reflection of customary law binding on all states.[109] The aims of The Hague Regulations were among others "to strike a balance between" the interests of the occupier, the

[104] *Ibid* at p. 30

[105] *Ibid* at p. 32.

[106] For example England, France and Russia (see Graber, D. A., *The Development of the Law*…, at p. 34)

[107] *Deuxième Conférence Internationale de la Paix, la Haye, 15 Juin-18 Octobre 1907* (see Graber, D. A., *The Développent of the Law*…, at p. 34)

[108] Graber, D.A *The Development of the Law* …, at p. 34

[109] See *Judgment of the Nuremberg International Military Tribunal* 1946 (1947) 41 AJIL 172 at 248-9; see also *Separation Wall* opinion at p. 1034-5; *Armed Activities* case at p. 317; *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, Advisory Opinion of 8 July 1996, (1996) lCJ Rep p. 256, para. 75 *Nuclear Weapons* opinion) all cited in Dinstein, Y., *The International Law...*, at p. 5; See also, e.g., von Glahn, G., *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (University of Minnesota Press 1957) at p. 10-12. Municipal courts have also regarded the Hague Regulations as codified customary international law. Morgenstern, F., 'Validity of Acts of the Belligerent Occupant', (1951) 28 British Yearbook of International Law, at p. 292. All cited in Benvenisti. E., *The International Law*…, footnote 8

local population and the displaced Sovereign.[110] Both the 1899 Hague Conventions and 1907 Hague Regulations took the view that "military occupation occurs in the context of war" where the hostile armed forces of one State directly controls the territory of another State.[111]

Under article 42 a "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army" and "occupation extends only to the territory where such authority has been established and can be exercised".[112] This article not only provided for what should be considered as a belligerent occupation but also the extent of its geographical coverage. It provided a "simple factual basis for determining what an occupation is."[113] Because the provision establishes occupation on the basis of the absence of *de jure* sovereign, it had however been suggested that this definition should be modified so as to clearly demonstrate that occupation is not only the absence of *de jure* sovereign title but also absence of such other modes of acquiring title or interest in a territory such as lease, trusteeship or mandate.[114]

The temporary nature of occupation, the non-passage of *de jure* sovereignty and a framework regulating the power of the occupying power were provided for under article 43 HR which states that: *[t]he authority of the legitimate power having passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.*

This provision is "the gist of the law of occupation."[115] This is because the provision "protects the international

[110]Zwanenburg, M., 'Substantial Relevance of the Law of Occupation for Peace Operations' in *International Humanitarian Law, Human Rights and Peace Operations* (IIHL Sanremo, 2008) at p. 142.
[111] Roberts, A., 'What is a Military Occupation'..., at p. 251
[112] Article 42 of the Hague Regulations
[113] Roberts, A., 'What is a Military Occupation'..., at p. 252
[114] Ronen, Y., 'Illegal Occupation and its Consequences' (2008) 41 Israel Law Review p. 201 at p. 202
[115]Benvenisti, E., *The International Law...*, at p. 7. Opining the position that the encapsulated provision resulted from the prescriptive efforts "by national courts, military manuals, non-binding international law instruments and many legal scholars in the nineteenth century.

personality of the Occupied State, even in the absence of effectiveness."[116] The effect of the article is that the only legitimate interest of the occupying power is the security of its forces and maintenance of public order[117] and it does not empower the occupying power to transform the occupied State. Occupation law is premised towards confining the occupying power to the "humanitarian objectives that essentially preserve the status quo."[118]

Although considered fundamentally important, The Hague Regulations did not expressly provide for instances where occupation would be deemed ended. It left it to speculations and assumption on what would come within the purview of article 42.

**Geneva Convention IV, 1949**

Recognising the inadequacy of Hague Regulations in regulating occupation, the disobedience by States to observe and respect it and coupled with instances where administration of occupied territories was not strictly in conformity with the contemplation of the HR,[119] GC IV was adopted in 1949. Under GC IV a revolutionary position was taken not only to clarify but to also to extend the body of law from the traditional conception to a more realistic position. This effort culminated into among others, the adoption of common article 2 in the Geneva Conventions.[120]

Provisions relevant to occupation are contained in articles 47 to 78 while as a sign of continuity of protection to the civilian population, article 154 GC IV stated that it is supplementary to The Hague Regulations. On the definition of occupation, GC IV avoided establishing its existence only in the context of war. Under article 2 of the conventions, the conventions apply even is situations which met no resistance,[121]

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[116]Dumberry, P., 'The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom's Claim to Continue as an Independent State Under International Law' (2002) 2(1) Chinese Journal of International Law, at p. 682

[117]Benvenisti, E., *The International Law*…, at p. 28

[118]Scheffer, D.J., 'Agora: Future Implications of the Iraq Conflict...', at p. 851

[119] See also Roberts, A., 'What is a Military Occupation'..., at p. 252 citing occupation of Czechoslovakia and Denmark as examples.

[120]*Idem*

[121] See Benvenisti, E., *The International Law...*, at p. 4. According to him, the rationale being that a potential conflict of interest exists between the Occupant

or even situation where a state of war is rejected by one of the belligerents. Similarly, occupation could also occur from foreign domination that is not the result of armed conflict.[122] The conventions are designed to apply to *de facto* international armed conflict and by obviating the need for the determination of an aggressor.[123]

**Additional Protocol I, 1977**

Another major development was the conclusion of Additional Protocol I to the Geneva Conventions in 1977.[124] Through its article 1(3) it supplements the GCs and it applies in situations mentioned under article 2 of the Conventions. Article 1(4) extended the applicability of laws relating to international armed conflict to situations where people are fighting against colonial domination, alien occupation, and racist regimes in the exercise of right of self-determination. According to Roberts, what article 1(4) does "is to close a tiny technical loophole left by common article 2 of the Geneva Convention by making a little clearer what was already widely accepted", the applicability of the law of occupation to territories not belonging to a High Contracting Party.[125] Regarding the end of occupation the only addition provided by the Protocol is that which is contained under article 3(b) which extended the position taken by article 6(3) of GC IV. Article 3(b) rather than retaining the one year rule, provided for the applicability of the Protocol until the end of the occupation. This is more realistic considering the dimension of recent occupations where occupation could last for decades and in some instances yet no feasible solution or likelihood of its ending is in sight. The Geneva Conventions have been considered as reflecting the position of customary law by the

and the Occupied with respect to the administration of the occupied territory. Seegenerally article 42 HR and article 2 GC IV.

[122]Vité, S., 'L'applicabilité du droit international de l'occupation militaire aux activités des organisations' internationales (2004) No, 853 RICR, at p. 11

[123]Mallison, W.T. and Jabri, R.A., 'The Juridical Characteristics of Belligerent Occupation...,' at p. 189

[124]Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977

[125] Roberts, A., 'What is a Military Occupation'..., at p. 254

Ethiopia-Eritrea Claims Commission but whether AP I is also considered customary international law is arguable.[126]

**Some Types of Occupation**

This section briefly discussed some most prominent types of occupations in history. The aim is to further clarify the applicability of the law of occupation and the implication with respect to when such occupations could be considered to have ended.[127]

***1. Belligerent Occupation***

This type of occupation is known in Latin as *occupatio bellica*.[128] The distinguishing characteristics of this type of occupation were stated by Roberts who adapted the definition contained in Graber.[129] He stated that a belligerent occupation is one that is "(a) by a belligerent State, (b) of territory of an enemy belligerent State, (c) during the course of an armed conflict, and (d) before any general armistice is concluded."[130] By these characteristics, the existence of an armed conflict between at least two States is a fundamental requirement and such conflict must not have resulted to the conclusion of a peace treaty. In other words, the occupation of a territory must have resulted during the state of enmity between the parties. The territory occupied however needs not be that of any of the States in conflict. This is because the term belligerent occupation is also used "to cover wartime occupations of neutral territory.[131] This opinion is shared by Kolb.[132] In terms of the applicability of the law, there is no ambiguity that the law of occupation regulates

[126] As rightly noted by Dinstein, the "Israel Supreme Court of Israel has expressly acknowledged that several of the Protocol's provisions enshrined customary international law" in among others the "Targeted Killings Case and Fuel and Electricity Case. See Dinstein, Y., *The International Law...*, at p. 8

[127] For a detailed analysis of different types of occupation see Roberts, A., 'What is a Military Occupation?'..., at p. 261. Roberts cited 17 types of Occupation.

[128]Which according to Roberts, A., 'What is a Military Occupation?'..., at p. 261 in the past this Latin word carries a more extreme meaning to imply acquisition of sovereignty.

[129] Graber, D.A., *The Development of the Law...*, at p. 5.

[130] Roberts, A., 'What is a Military Occupation'..., at p. 261

[131]*Ibid*

[132]SeeKolb, R., 'Etude sur l'occupation et sur l'article 47…,' at pp. 278-279

this type of occupation.[133] In fact an author asserted it to be the only occupation recognised by international law.[134]

As noted, article 42 HR (from article 1 Brussels Code) considered a territory "occupied when it is actually placed under the authority of the hostile army." The word "actually" was the equivalent of the Latin word *de facto* as opposed to *de jure*.[135] The sovereignty of the territory continues to be intact such that only its administration changes. This signifies the temporary nature of occupation until a treaty on the final status of the territory is concluded. Article 41 of the Oxford Code elaborated it further to consider such territory to be occupied "following its invasion by enemy forces, the State which is driven out has ceased, in fact, to exercise regular powers there, and the invading State finds itself the only one capable to maintain order".[136] Von Glahn summarised the control test for the existence of occupation opining that from a legal point of view, the existence of occupation is predicated on the control and exercise of power or the ability to exercise such power in the whole of the territory within a reasonable time by an occupant.[137]

The use of force or the exercise of power against the occupied State as noted, is an important element in establishing belligerent occupation which means there is no occupation when there is a valid consent. The "concept of consent does not square with the legal institution of military occupation" because it is "opposed to the concept of 'hostile' army" expressly stated under article 42 of the HR.[138] Although motive of the occupation is irrelevant in the application of the law of occupation, belligerent occupation has "military or security objectives" it was therefore "not designed to win the heart" of the population.[139]

Another important issue on the existence of belligerent occupation is whether proclamation needs to be given by the

[133] Roberts, A., 'What is a Military Occupation'..., at p. 262
[134] von Glahn, G., *The Occupation of Enemy Territory*... at p. 27
[135] Graber, D.A., *The Development of the Law...,* at p. 47
[136] Institut de Droit International, "Réglementation de Lois et Coutumes de la Guerre. Manuel des Lois de la Guerre", (1881-1882) 5 Annuaire de l'Institut de Droit International, at p. 166 (see Graber, D.A., *The Development of the Law*..., at p. 53)
[137] von Glahn, G., *The Occupation of Enemy Territory*... at p. 29
[138] Ferraro, T., 'The Applicability of the Law of Occupation...,' at p. 122.
[139]Dinstein, Y., *The International Law*… , at p. 35.

Occupier. It must be stated that there is no obligation in the law that such proclamation must be given. However, it was suggested that such proclamation be issued as a notice to the inhabitants "about the new legal regime".[140] This will enable the population to properly adjust itself to the military and security needs of the occupying power. Belligerent occupation once established must also be maintained.[141] It will be deemed ended with the loss of effective control of the territory.

### *2. Non-Belligerent Occupation*

As the name suggests, this is the opposite of belligerent occupation. It would therefore be deemed to exist when it failed to meet the criteria for the existence of belligerent occupation. A view has been expressed that there would seem to be no reason why the criteria for the ascertainment of the existence of occupation in belligerency should be different from a non-belligerent occupation. This was on the basis that the fundamental indicator of the existence of belligerent occupation is effective control of the territory in the hands of the enemy forces. However, since existence of consent in the presence of the foreign forces in a territory negatives belligerent occupation, non-belligerent or pacific occupation is to be determined on the basis of the arrangement governing the presence or continued presence of such foreign forces.[142]

There are several reasons for the existence of this type of occupation and some of them for example are to ensure compliance with international obligations on the part of the occupied power; this may be for the purposes of extracting

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[140] *Idem* at p. 48; article 1 of the Lieber Code; See UK Ministry of Defence, *The Manual of the Law...*, at p. 276. See however Graber, D.A., *The Development of the Law...*, at p. 50 where the Institute of International Law in 1877 considered notification to an occupied region of the beginning of occupation as compulsory. This was incorporated under article 42 of the Oxford Code prepared by the Institute. See also Breau, S.C., 'The Humanitarian Law Implications...,' at p. 196 where it was considered that notification is essential. See also Roberts, A., 'What is a Military Occupation'..., at p. 257

[141] Halleck, H.W., *International Law* (1st edn, San Francisco I86I) pp. 777-789. See also Dinstein, Y., *The International Law*…, at p. 44 quoting Hyde, C., *International Law Chiefly as Interpreted and Applied by the United States*, vol. Ill, 1881 (2nd edn, 1945); UK Ministry of Defence, *The Manual of the Law...*, at p. 276

[142] Kelly, M.J., 'Non-Belligerent Occupation' (1998) 28 Israel Yearbook on Human Rights, at p. 17-18

reparation or adequate guarantees for the future while the holding of the territory is serving as security and in order to be able to supervise whatever arrangement for the reparation put in place.[143] Examples of this was the occupation of France by German forces arising from a Peace Treaty following the conclusion of Franco-Prussian war of 1871 and British Occupation of Egypt in 1882.[144]

Regarding the powers available to the foreign forces in this type of occupation as well as the occupation which resulted from foreign intervention, Robin observed:

> *... in cases of occupation by way of intervention, the powers of the occupant are, in general, more extensive than they are in cases of occupation by way of guarantee. Often, to be specific, occupations for the purpose of intervention admit of a certain interference in the administration of the occupied country; a fact which may be explained by the very purpose of these occupations (i.e., to restore order). But they have no fixed rule: their extent varies with the circumstances attending the occupation. Sometimes the result is tantamount to placing the government of the Occupied State in a position of tutelage and giving to the Occupant what is apparently supreme authority; and sometimes, on the other hand, the occupying state confines itself to taking care of police matters and the re-establishing of order.*[145]

The above position is justifiable since the law of occupation does not apply to a situation where consent exists as well as where no effective control of a territory is with the foreign forces. Recently, non-belligerent occupation by way of intervention have taken place in Kampuchea "Cambodia" (where Vietnam justified intervention on the request of Cambodian people); Afghanistan (where Soviet claimed to have been requested to intervene by the 'Afghan Government'); Grenada (where US was invited by the Organisation of Eastern Caribbean States); and Panama (which intervention overthrew the government of Noriega).

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[143] *Idem* at p. 18

[144] *Ibid* at p. 19-20

[145] Robin, R., *Des Occupations Militaires En Dehors Des Occupations De Guerre* (Washington, Carnegie Endowment for International Peace 1942) pp. 27-40 and 228-38 (extracts translated). (see Kelly, M.J., 'Non-Belligerent Occupation'..., at p. 18-19

The difficulty however is ascertaining whether in fact, such intervention was with the true consent of the foreign country. Even if there was consent whether it was issued by the authority empowered to do so under the laws of the country. The claim of consent or request for intervention seems to be a convenient way for the occupier to escape the stricter application of the law of occupation hence States find it easy to brand their action as intervention. Benvenisti stated that "many occupants of the last two decades have claimed that they were invited by the territory's lawful government to assist it in quelling illegal opposition forces".[146] These so-called interventions have been denounced by the United Nations as a violation of the UN Charter on sovereignty, territorial integrity, and political independence.[147]

In this type of occupation, the mandate of the Occupying Power is:

> *... to create conditions which would enable the civil branch to assume ascendancy in the affairs of civil government and to preserve peace and order in the meantime. In attaining this end the force was to utilize the laws in force in the territory at the time of the arrival of the occupying force, supplemented by the military orders that were necessary to secure order. These military orders do not have the status of legislation in the sense that they are only in effect until civil administration is resumed.*[148]

### *3. Armistice Occupation/Consensual Occupation*

Another type of occupation could be such that resulted from an armistice concluded between enemies.[149]This is referred

[146]Benvenisti, E., *The International Law*…, at p. 159.

[147]See United Nations General Assembly Resolution (UNGA Res ES-6/2 (14 January 1980) UN Doc A/RES/ES-6/2 on Soviet Intervention; UNGA Res 34/22 (14 November 1979) UN Doc A/RES/34/22 on the situation in Kampuchea; UNGA Res 38/7 (2 November 1983) UN Doc A/RES/38/7 on the situation in Grenada; UNGA Res 44/240 (29 December 1989) UN Doc A/RES/44/240 on Effects of the military intervention by the United States of America in Panama on the situation in Central America

[148] Kelly, M.J., 'Non-Belligerent Occupation'..., at p. 22-23

[149]Benvenisti, E., *The International Law*..., at p. 3. Citing the agreement between the Allied and Germany over the control of Rhineland in 1918. Dinstein also cited instances of Occupation involving the territories of some Allied territories (France, Belgium, the Netherlands or Greece) by the other Allied Countries (like US and UK) with the agreement of the former for the purposes of liberating them from Nazi.

to as armistice occupation. An Armistice occupation is the occupation of enemy territory resulting from war pending the conclusion of a peace treaty.[150] Where armistice is concluded, it could be general or local, and it may involve a temporary or complete cessation of hostilities.[151] The occupation is sometimes referred to as "mixed occupation, or *occupatio mixta – bellica pacifica*..." Examples of this are the occupation of Western Thrace by the Allied in 1918 and occupation of part of Hungary by Serbian troops from 1918 to 1921.[152]

The applicability of HR and GCs to armistice occupation has been widely accepted but that some modifications might be incorporated in such agreements.[153] Some are however of the view that the occupation being consensual is not governed by the law of occupation.[154] One of the proponents of this view is Stein who notes that:

> *Section III appears to apply expressly only to the typical case of a belligerent occupation where one belligerent has overrun a part of the territory of the opposing enemy belligerent, where the fighting is still in progress and no armistice agreement has been concluded. Section III did not give rise to any generally accepted rules which would govern other types of occupation, such as the occupation continuing after or effected by virtue of an armistice agreement.*[155]

This argument may be accepted when it stops at the non-conclusion of armistice between the belligerents. The requirement that fighting must be in progress before occupation subject to the HR and GCs could be established is overlooking history as well as current situation. Strictly speaking, there is no fighting presently taking place in the Occupied Palestinian Territory. In any case, The Hague Regulations and Geneva Convention do not require fighting to be in progress before occupation could exist.

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[150] *Idem* at p.48.
[151] Roberts, A., 'What is Military Occupation?'..., at p. 266
[152] *Idem*
[153] *Ibid* at p. 267
[154] Dinstein, Y., *The International Law*…, at p. 36.
[155] Stein, E., 'Application of the Law of the Absent Sovereign in Territory Under Belligerent Occupation: The Schio Massacre' (1947-1948) 46 Michigan Law Review at p. 347

The position taken by the previous British and United States manuals may be more in line with the international conventions. These manuals considered Section III of The Hague Regulations to apply not only to a belligerent occupation *stricto sensu* but also to any type of armistice occupation, except such as may have been modified by the provisions of the armistice agreement.[156] Even in this situation however, since the conclusion of the armistice was effectuated by force which tainted the validity of the consent, it is suggested that Hague Regulations should apply.

With respect to consensual occupation, however the situation may be different. This is because military forces of a State could be in the territory of another State in pursuance to an agreement. Where such exist, the relationship is governed by such agreement and not law of occupation.[157] This situation is however likely to vary depending on the circumstances.[158] Some authors have gone further to say that even if such forces exert some elements of "authority over society of maintaining public order, they do not *ipso facto* become occupations."[159]

Although the prevailing view is that the law of occupation does not regulate consensual occupation, there could be a dramatic change of events which could have a decisive effect on the applicable law to such situation. In other words, a consensual occupation can turn to a belligerent occupation and becomes subject to the law of occupation. This may happen in several instances for example where the troops outlived the given consent; or they went beyond the consent or there is dramatic/fundamental change of circumstances;[160] or where the agreement for the stationing of the troops was obtained by duress,[161] or situation where the competence of the central government granting the consent is in doubt arising from the loss

[156] See British Army Manual of Military Law, Amendments (No. 12) (1929) para. 286; US War Department Basic Field Manual, Rules of Land Warfare, para. 265d(1940) 29 (FM 27-10)
[157] UK Ministry of Defence, *The Manual of the Law*..., at p. 275
[158] Roberts, A., 'What is a Military Occupation'..., at p. 277
[159] *Idem* at p. 298
[160] Dinstein, Y., *The International Law*…, at p. 31. See also the *Armed Activities* Case at p. 292. The case of South Africa in Namibia was cited by Roberts as example.
[161] Roberts, A., 'What is Military Occupation?'..., at p. 298

of effective control of most of the State territory.[162]Sassòli had however expressed doubt on whether "simple disappearance of legal basis for a foreign military presence makes the law of armed conflicts applicable".[163] A situation would be considered occupation if "an identifiable foreign military command structure" exists and "actually exercising authority in the territory".[164]

Considering the rising relevance of self-determination principle, what could be said of a situation where consent was given by the central government against the will of its population or where by agreement it was decided by both the foreign State and the host Government that the conflict is internal? Roberts had given a graphic illustration of this situation typical of Afghanistan, he stated:

> *Take, for example, a deeply divided and weak country, facing civil war. It has an unpopular government with a clear external ideological orientation, which invites in a sympathetic superpower ally. That ally then largely dominates indigenous political developments, and there are even allegations that it had complicity in the assassination of the embarrassingly unpopular head of the government which had invited it in. It also gets deeply involved in counter-insurgency operations against the regime's opponents.* [165]

In situations like this, Roberts concluded that "[t]he international element in such conflicts appears to be so marked that the better developed body of international law governing international armed conflicts and occupations may well be viewed as applicable."[166]

States are at liberty to conclude agreements with other States however with respect to the agreement at issue, article 7 GC IV provided that it shall not adversely affect the situations of protected persons as regards the rights conferred by the Convention and such persons shall benefit from the concluded agreements so long as the Convention is applicable to them except where the agreement provided for a more favourable

[162] Arai- Takahashi, Y., *The Law of Occupation* …, at p. 9
[163]Sassòli, M., 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) EJIL at p. 689.
[164] Roberts, A., 'What is a Military Occupation'..., at p. 277
[165] Roberts, A., 'What is a Military Occupation'..., at p. 278
[166]*Idem*

measure. Similarly, article 47 GC IV guarantees the protection of the rights of protected persons by obliging the non-deprivation in whatever circumstance of the benefits of the Convention. An agreement concluded by the threat or use of force is void.[167]

As Consensual Occupation can come into effect at the beginning, it could also come afterwards.[168] This situation takes place where an initial occupation was belligerent[169] but subsequently a genuine and effective consent was given to the 'previous' occupying power. A very recent example is the case of Iraq in 2004. According to Bothe article 47 of GC IV does not exclude this possibility.[170]

### *4. Occupation in "Denial"*

Discussion under this section is not intended to create a separate category type of occupation but to discuss the recent practice of States in typical occupation situations where due to some reasons, the States are not willing to recognise their actions in foreign States as amounting to occupation. Discussing this issue is considered important because denying the existence of occupation is a tendency which "is not likely to disappear".[171]

The denial has a long history and examples of this situation are the practice of Japan in the so-called republics where though Japan was party to the Hague Conventions but refrained from invoking or indicate its willingness to respect them.[172] Israel has consistently denied the applicability of the Geneva Convention to the Occupied Palestinian Territories though it had agreed to apply the humanitarian provisions of the Conventions. Iraq in the 90s had rejected that its invasion in Kuwait is a case of occupation, Indonesia refused to accept that it actions in East Timor amounted to Occupation and similar position was taken by the Soviet Union in the case of Afghanistan and by China in Tibet.[173]

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[167] Article 52 of the Vienna Convention on the Law of Treaties, 1969

[168] Bothe, M., 'The Beginning and End...,' at p. 31

[169] Bothe termed this situation as "supervening consent" (see Bothe, M., "The Beginning and End...,' at p. 31

[170] Bothe, M., 'The Beginning and End...,' at p. 31

[171] Benvenisti, E., *The International Law*…, at p. 6

[172] *Idem* at p. 63

[173] See Benvenisti, E., 'The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective' at p.

The IHL approach to occupation is that it is factual and predicated on the existence of control exerted or exercised over a territory and this determination is not dependent on the acceptance or proclamation of the occupying or occupied Power. If the situation which exists is that of occupation on the basis of criteria discussed, responsibility for the observance of that law is by that fact imposed on the occupying power.

**Scope of Occupation**

This section briefly introduced the extent to which rights of belligerent occupation can be exercised temporally and geographically. This is important because, the HR merely provided that a *territory* "is considered occupied..." without defining the term *territory*. Ascertaining the scope of such territory considered occupied as well as the time when such occupation has come in place is fundamental to the application of the law of occupation.

Territory has been taken to embrace "all the land, internal waters and territorial sea, and the airspace above them, over which a party has sovereignty."[174] The geographical scope of occupation has been limited by article 42 HR to only areas where effective control is established thereby excluding areas where intense fighting is still taking place, occupier's territory as well as situations of mere invasion where the invading forces are only bound by the rules relating to conduct of hostilities.[175] The definition "is closely intertwined with the question of the scope of application *ratione materiae* of the law of occupation".[176]

**Temporal Scope**

On the basis that there can be no two sovereign in a single territory, earlier treatises considered the commencement of occupation when a part of a territory comes under the power of the enemy.[177] This effectively means that successful effective

12<www.tau.ac.il/**law**/members/benvenisti/articals/amos.doc>accessed on 16 July, 2015

[174]Aust, A., *Modern Treaty Law and Practice* (Cambridge, Cambridge University Press 2007) at p. 48.

[175]Schwarzenberger, G., 'The Law of Belligerent Occupation: Basic Issues' (1960) 30 *Nordisk Tidsskrift Int'l Ret*, at p. 20

[176] Arai- Takahashi, Y., *The Law of Occupation*..., at p. 6

[177]Bluntschli, J.K., *Das Moderne Voelkerrecht*…, pp. 303-307 (see Graber, D.A., *The Development of the Law...,* at p. 52)

control of a territory by an enemy activates the application of the law of occupation and the situation continues with the continuance of effective control.[178] Similar criteria applies regarding the end of occupation "elle s'oriente au même critére: le droit d'occupation cesse d'être appliqué des que les forces étrangéres n'exercent plus leur autorité sur le territoire en question."[179]

Temporally, there are two theories on when occupation commences: the traditional theory and the functional theory. Traditionally, invasion phase and actual occupation have been distinguished. It was considered that the law of occupation does not apply during the invasion phase of the hostility as the troops do not have effective control of the territory.180 Hence invasion is only considered as a prelude to belligerent occupation.181 It was defined as:

> *[o]occupation of foreign territory during the course of on-going war, and where effective and continuing control over held areas has not yet been established. The enemy government's administration remains in a state of disorganisation, with no new military administrative structure on behalf of the Occupying Power to replace it. Martial law governs.*[182]

Under the traditional theory, a situation will only be characterised as that of occupation when the enemy forces are in the position to exercise such control as would be sufficient to

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[178] Arai- Takahashi, Y., *The Law of Occupation*... at p. 16 that the Hague Regulations "takes a purely factual approach to the temporal scope of application of the law of Occupation."

[179]Kolb, R., 'Etude sur l'occupation et sur l'article 47…' at p. 289

[180] This seems to be the view of Dinstein at p. 38-45 citing the following: US Department of the Army, Field Manual, *The Law of Land Warfare* 138 (FM 27-10, 1956); *Hostages trial* (List *et al*.) (US Military Tribunal, Nuremberg, 1948) 8 LRTWC 34, at p. 55-6; *Prosecutor v. Naletilic'* et al (ICTY, Trial Chamber, 2003), (IT-98-34) para. 217; *Prosecutor v. Tadic* (ICTY, Trial Chamber) (1997) 36 ILM 908 at 925; Schwarzenberger, G., *The Law of Armed Conflict (vol. 2) International Law as applied by International Courts and Tribunals)* (London, Stevens & Sons. 1968) at p. 184. See also Roberts, A., 'What is a Military Occupation'..., at p. 256

[181]Mallison, W.T. and Jabri, R.A., 'The Juridical Characteristics of Belligerent Occupation...,' at p. 188

[182] Gerson, A., 'War, Conquered Territory and Military Occupation in the Contemporary International Legal System' (1977) 18( 3) Harvard International Law Journal, at p. 528

enable them discharge all the obligations imposed by the law of occupation in the occupied territory.[183] This theory places reliance on the wording of article 42 HR and it viewed occupation from the perspective that the enemy government in the occupied territory has been rendered incapable of exercising its authority in the area occupied and the occupying power is in a position to substitute its authority for that of the former government.[184] Article 42 HR was therefore not considered operational during the invasion phase.[185] Under the functional theory (also known as flexible approach occupation), only some level of control over the enemy territory is required to be established.[186]

Functional occupation was on the basis of the wording of article 6(1) of GC IV. Which provided that the "Convention shall apply from the outset of any conflict or occupation mentioned in Article 2". This provision according to the proponents of the theory is wider than article 42 HR probably because it has not been restricted by the conditions present in article 42.[187] Under the theory, advancing troops could be considered to be in situation amounting to occupation once they are in a foreign territory and have come into contact with the civilian population.[188] Functional occupation is predicated more on humanitarian concerns and has the objective of ensuring that no gap exist between the invasion phase and the commencement of occupation during which civilians falling into the hands of foreign forces find themselves without legal protection.[189]

Several views have been expressed on the difference between invasion and occupation. In this respect, the opinion of a

[183] Current Challenges to the Law of Occupation <http://www.icrc.org/web/eng/siteeng0.nsf/html/Occupation-statement-211105> accessed 15 July 2015. See also ICRC's Commentary to article 6 GC IV; *Prosecutor v. Rajic'* (ICTY, Trial Chamber) (1996) 108 ILR 142 at p. 161

[184] See UK Ministry of Defence, *The Manual of the Law*..., at p. 275.

[185] Gerson, A., 'War, Conquered Territory and Military Occupation...,' at p. 533

[186] Current Challenges to the Law of Occupation <http://www.icrc.org/web/eng/siteeng0.nsf/html/Occupation-statement-211105> accessed 15 July 2015. see also ICRC's Commentary to article 6 GC IV

[187]Pictet, J.S., *Commentary on the Geneva Convention*..., at p. 60; Roberts, A., 'What is a Military Occupation'..., at p. 253.

[188]*Idem*

[189]*Ibid*. See however a contrasting view taken by the UK Ministry of Defence, *The Manual of the Law*..., at p. 276

French writer Longuet,[190] American Military Manual of 1914,[191] and Oppenheim have been noted.[192]Longuet was of the view that invasion merely "supposes that an army has penetrated enemy territory, but that it is not yet uncontested mistress of any part of the territory".[193]Longuet considered that occupation replaces invasion "when the defending troops, despairing of holding their lines, retreat to seek new battle-fields further".[194] According to American Military Manual 1914 a territory is merely invaded when there are still resistance,[195] while to Oppenheim, invasion must be coupled with holding temporary possession of the enemy territory.[196] Indeed article 6(1) of GC IV had removed any doubt with respect to the treatment of civilian on the difference between invasion and occupation since the Convention applies from the outset of conflict or occupation under article 2 common to the Geneva Conventions.[197]

Functional occupation finds support in the decisions of a trial chamber of ICTY in *Prosecutor v. Naletilic´and Martinovic´* where it was posited that under the HR actual control or authority of a territory is required whereas under GC IV, law of occupation applies as soon as individuals fall into the hand of the occupying power.[198] Most military manuals however, adopted article 42 HR definition.[199]

As little detailed as the commencement of occupation is, there is no much support however regarding its ending as per treaty provision. Article 6(3) of GC IV merely stated that the Convention shall cease to apply one year after the "general close of military operations" and that a number of provisions (containing some right which Kolb describes as "le noyau dur

[190] In Longuet, F., *Le Droit Actuel de Ia Guerre Terrestre* (Montpellier 1900) at p. 120
[191] See Graber, D.A., *The Development of the Law...,* at p. 68
[192] Oppenheim, L., International Law, vol II (1st ed. London1906) at p. 169.
[193] Graber, D.A., *The Development of the Law...,* at p. 68
[194]*Idem*
[195]*Ibid*
[196]*Ibid*
[197]Mallison, W.T. and Jabri, R.A., 'The Juridical Characteristics of Belligerent Occupation...,' at p. 189
[198]*Prosecutor v. MladenNaletilic and VinkoMartinovic*, (Judgment) ICTY IT-98-34-T (31 March 2001) paras. 219-221.
[199] See for example British and United States Military Manuals

d'ordre public de la Convention"[200]) will continue to apply until the end of the occupation. The continued applicability of these provisions is for the purpose of protecting the population of the occupied territory's vital rights.[201] Determining the general close of military operation is a question of fact and it referred to in an armed conflict when the last shot was fired,[202] or as suggested the final end of all fighting between and among all the parties in the conflict.[203] The provision of article 6(3) of GC IV has been subject of criticisms. For example, it was considered that:

> *Article 6(3) of the Fourth Convention of 1949 was a special ad hoc provision for certain actual cases, namely the occupation of Germany and Japan after World War II. There is no reason to continue to keep in force such provisions designed for specific historic cases. In 1972 the majority of government experts expressed a wish to abolish these time limits.*[204]

Indeed, if the law is to be effective it needs to be in tune with developments taking place. It is true that certain historical facts are relevant in assessing situations and could provide further support for the future but since IHL is a unique category of law which is predicated on the protection of lives, it needs to consistently position itself in line with current circumstances. However, the one year rule was not without justification. The ICRC's Commentary on GC IV stated that:

> *One year after the close of hostilities, the authorities of the occupied State will almost always have regained their freedom of action to some extent; communications with the outside world having been re-established, world public opinion will, moreover, have some effect. Furthermore, two cases of an*

[200] Kolb, R., 'Etude sur l'occupation et sur l'article 47...,' at p. 315.

[201] Gasser, H.P., 'Protection of the Civilian...,'at p. 283. (Dinstein, Y., *The International Law* …, at p. 281

[202] This is the opinion of the Rapporteur of Committee III in the Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-A p.815. (see Pictet, J.S., *Commentary on the Geneva* Convention..., at p. 62

[203] *Ibid*. according to Pictet, it was considered that one year after the close of hostilities, the authorities of the Occupied State will almost always have regained their freedom of action to some extent; communications with the outside world having been re-established, world public opinion will, moreover, have , some effect."

[204] Bothe, M., Partsch, K.J. and Solf, W.A., *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (The Hague, Martinus Nijhoff Publishers 1982), at 59, para. 2.8.

> *occupation being prolonged after the cessation of hostilities can be envisaged. When the Occupied Power is victorious, the territory will obviously be freed before one year has passed; on the other hand, if the Occupying Power is victorious, the Occupation may last more than a year, but as hostilities have ceased, stringent measures against the civilian population will no longer be justified.*[205]

The ICJ has had the opportunity to interpret the one year rule in the *Separation Wall* opinion and it focussed on the "military operations leading to the occupation". The ICJ concluded that since the military operations leading to the occupation of West Bank have ended long time ago only such provisions as have been stated under article 6 are applicable to the OPT and not the entire GC IV.[206] In its assessment, the Court seemed to have been misguided by taking the position that the one year commences upon the general close of military operations leading to the occupation which seems to be not in line with the wording and the intention of the provision. This view was criticised that the Court has committed "the most serious error":[207]

Article 6 in fact provides that insofar as occupied territories are concerned, application of the Convention "shall cease one year after the general close of military operations," not on the "general close of military operations leading to the occupation," as asserted by the Court.[208]The problem is "[a] premature celebration of the general close of military operations poses a danger to the civilian population, inasmuch as it reduces the scope

of protection that the population enjoys under the Convention"[209]. This may however be supplemented by the application of human rights law in the territory.[210]

If the ICJ's opinion is considered accurate the effect is that it would result to an undesirable consequence for the inhabitants of any territory subject to prolonged military

[205] See Pictet, J.S., *Commentary on the Geneva* Convention..., at p. 63.
[206] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep para. 125
[207]Imseis, A., 'Critical Reflections...,' at p. 105
[208]*Idem* at p. 106
[209]Dinstein, Y., *The International Law*…, at p. 283
[210]*Idem* at p. 282

occupation,[211] because it will deprive them of the full range of protection provided under IHL.[212] Relying on article 31 of the Vienna Convention on the Law of Treaties on the interpretation of treaties, Imseis commented:

> *On its face, the ordinary meaning of the terms of Article 6 reveals that it is concerned with the existence or nonexistence of military operations per se as the test governing the continued applicability of the whole of the Convention in such circumstances. It does not encumber itself with additional qualifiers on the existence of military operations that would necessarily circumscribe (in this case, temporally circumscribe) the applicability of the Convention in toto, such as "leading to the occupation."*[213]

The one year rule does not however, apply to parties to AP I,[214] which under its article 3(b) took a different position analogous to the intention of article 42 HR.[215]Article 3(b) provided for the continued applicability of the Convention and the Protocol until the termination of the occupation. The "abrogation of the "one year after" rule may reflect in part the proper desire of the international community to maintain the full applicability of the law on occupations to areas occupied by Israel since 1967."[216] The additional Protocol I did not provide for a determinant of when the occupation will end.

**Geographical Scope**

Regarding the extent of the space in the foreign territory, the hostile army can only exercise authority over the territory they occupy and over which the inhabitants are vanquished or reduced to submission.[217] Similarly, the occupation of principal towns of a province does not include possession of towns and forts in the province except where the intention is to appropriate the whole territory which is not under the control of the enemy.[218] Occupation is about effective control in land areas and once that is secured it extends to the adjacent "maritime areas

[211]Imseis, A., 'Critical Reflections...,' at p. 103
[212]*Idem* at p. 107
[213]*Idem* at p. 106
[214] UK Ministry of Defence, *The Manual of the Law...*, at p. 278
[215] Arai- Takahashi, Y., *The Law of Occupation*:..., at p. 17
[216] Roberts, A., 'What is a Military Occupation'...,' at p. 272
[217] Graber, D.A., *The Development of the Law...*, at p. 42-3.
[218]*Idem* at p. 43

and suprajacent airspace",[219] but it is excluded from being applied to "land areas cut off from the occupied territory" like such lands which are inaccessible.[220] While on internal and territorial waters, article 88 of the 1913 Oxford Manual of Naval War posited that occupation "exists only when there is at the same time an occupation of continental territory..."[221] Under this therefore, there is no occupation of internal or territorial waters except where there exist at the same time occupation of land in the occupied territory.

A closely related question is whether having supremacy over the airspace of a State could amount to occupation. It would be considered that the control over air space fail short of the requirement of actual control.[222] It is true however that in this age of modern technology where a State has the capacity to dispatch and station aircrafts in space could have potential effect on the control of what goes around on land, it would be difficult to establish a limit and the nature of the actual control such a State has over a territory. There is however a view which holds that the law of occupation extends to wherever the power of the occupant reaches which may therefore include the space but this was considered a vague statement.[223]

The scope and limitations of the powers of the occupier has been described under article 43 HR:

> *The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.*

The limitations under this article extends not only to the institutions established by the occupying power but also to the national institutions of the occupied State otherwise the article will be "almost meaningless as a constraint upon the occupant" as this will empower the Occupier to "operate through extraterritorial prescription of its national institutions."[224] This is

[219]Dinstein, Y., *The International Law*…, at p. 47.
[220]*Idem* at p. 46
[221]*Ibid* at p. 47
[222] Gasser, H.P., 'Protection of the Civilian...,' at p. 274
[223] Graber, D.A., *The Development of the Law...,* at p. 52
[224]Benvenisti, E., *The International Law....,* at p. 19

notwithstanding the territory subject to occupation was not initially that of a recognised State under international law.

The above position is necessary since the main objective of GC IV is the protection of civilians against the effects of war as opposed to military operations.[225] An interesting argument is that of Israel which though had ratified GC IV since 6 July, 1951 considers that the Convention is not applicable *de jure* to the Occupied Palestinian Territories on the basis that the wordings of article 2(2) of GC IV applies only to a territory of a High Contracting Party of which neither the West Bank nor Gaza satisfied the requirement.[226] This argument was rejected by the ICJ in its advisory opinion in 2004 when it posited that the Convention is applicable to such territories irrespective of their prior status before the conflict and subsequent Israel's occupation.[227] What activates the application of the Convention is the existence of armed conflict between High Contracting Parties whether or not a state of war is recognised by one of them and that a territory is occupied in the course of such conflict,[228] which the situation in the OPT has satisfied.

**Occupation in Disputed Territory**

Instances abound where invasions and occupations were carried out in territories whose status are not clearly settled, or may even occur in territory subject to "competing claims".[229] This type of situation is very contentious and complex. From a historical perspective, disputes relating to a territory have often preceded or accompanied military occupations especially in the 21st century.[230] Instances of this are for example the Kashmir, Spratly Islands, and Nagorno-Karabakh. An interesting example is that of the claim by Japan against the Soviet Union of the islands of Habomais, Shikotan, Kunasir, and Iturup which came

[225]Momtaz, D., 'Israel and the Fourth Geneva Convention: On the ICJ Advisory Opinion Concerning the Separation Barrier' (2005) 8 Yearbook of International Humanitarian Law, at p. 348

[226]Sassòli, M., and Bouvier, A., *Un droit dans La guerre?*Vol. 1 (Geneve, CICR 2003) at p. 10S8.

[227]*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, Advisory Opinion, [2004] ICJ Rep para. 101

[228]*Idem* para. 95

[229] Roberts, A., 'What is a Military Occupation'..., at p. 279

[230]*Idem*

under the control of Soviet Union in 1945.[231] Japan had consistently maintained the Soviet Union to be in occupation of these territories, a claim which the Soviet considered baseless and regarded the islands of having formed part of its territory.[232] When for example Kuril Island was invaded by the Russian Forces in August, 1945, the entire population of the Island consisting of 17, 000 people were expelled until 1946.[233]

Another instance is that of Falkland Islands between United Kingdom and Argentina. Argentina considered its invasion and occupation of Falklands in April, 1982 as reclaiming its national territory which it laid claims since 1863 but which is rejected by the inhabitants and is considered by the United Kingdom as its self-governing overseas territory.[234] The central question is whether the law of occupation applies to these types of territories. It must be noted that this is somewhat a complex situation especially the fact that answering this question involves both *ius ad bellum* and *ius in bello* issues. Some would argue that The Hague Regulations and Geneva Conventions are not applicable to these territories on the ground that they are not a territory of a hostile State or the territory of a contracting party.[235] This view is however, no longer tenable in the light of the ICJ Advisory Opinion in the *Wall* Case as posited above. In this complex situation, it would be most appropriate if the State exercising actual control is prevented "from challenging the applicability of the law of occupation on the basis that its control remains within its territorial boundary".[236]

It is true that neither the Geneva Conventions nor Additional Protocol I provided for a solution with respect to the final status of a disputed territory. Article 4 of AP I merely provided that "...Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question." AP I left the final status of a disputed territory subject to occupation to be determined by

[231] *Ibid*
[232] *Ibid*
[233] See <http://en.wikipedia.org/wiki/Kuril_Islands> accessed on 3 August 2015.
[234] See <http://en.wikipedia.org/wiki/Falkland_Islands> accessed on 3 August 2015.
[235] Roberts, A., 'What is a Military Occupation'..., at p. 279. This was also the view of Israel in the *Wall* Case
[236] Arai- Takahashi, Y., *The Law of Occupation*:..., at p. 8

other means. This is appropriate because IHL is not a law for the settlement of *ius ad bellum* issues; it is about providing protection to individuals. Hence the above article could be described as a measure necessary to ensure that persons in such territories are not left without protection under the circumstances, this is notwithstanding the unsettled question on the status of the territory. Under IHL however, the law is settled that territorial sovereignty cannot be acquired by the occupying power on the basis of its *de facto* control and in any case, the relevance of self-determination cannot now be forgotten; the civilian population in these territories have a right to prior consultation on the future of the territory.[237]Until final status of the territory is decided, relevant provisions of the law of occupation should continue to apply.

## Conclusion

This article attempts to briefly discuss the concept of belligerent occupation under IHL through the prisms of perspectives by notable authors in the field. It traces belligerent occupation's historical legal regulation and the various legal regimes through which the international community have made efforts to regulate the unfortunate situation where force is used against or in the territory belonging to another State. The different types of occupation and the manner in which these occur suggested that a clear understanding of the situation is required such that situation or certain individuals in a State are not left without adequate legal protection. It is hope that this modest clarification of the concept, its nature and legal regulation will further advance the understanding of those who are interested in specializing in IHL and specifically on the law governing belligerent occupation.

[237]See *Western Sahara,* International Court of Justice, Advisory Opinion [1975] ICJ Rep. 12

# "DON'T TREAT THEM LIKE ANIMALS": ANIMAL WELFARE IN UGANDAN AND NIGERIAN REGULATORY PARADIGMS

***By***

***Tajudeen Sanni****

## Abstract

*In countries where certain human rights are considered privileged luxuries, it is considered a given in official circles that animal rights should take backstage. In Uganda and Nigeria, animal welfare laws dating back to colonial period are essentially about prevention of cruelty to animals viewed in a restricted way and are not couched in terms of a comprehensive set of animal rights. Prevention of cruelty against animals, in its restricted sense, is only an aspect of several rights animals should enjoy particularly under the relevant international instruments to which both countries are parties. The provisions of Ugandan Animals (Prevention of Cruelty) Act, cap 220, 1957 and Part 7 of Nigerian Criminal Code dealing with cruelty against animals are phrased in almost identical terms and do not reflect animal rights in a comprehensive manner. It is within this limited matrix that the regulatory authorities operate. Even at that, the institutional framework provided by Ugandan Animals (Prevention of Cruelty) Act, for example, does not form an organized paradigm that is well constituted to deal with cruelty against animals. The Act refers to 'authorised officers" and defines that to include, among others, any administrative officer, a term that can refer to officials in any ministry or government agencies. The Act also refers to the position of minister but does not define which minister is in charge of cruelty against animal. The minister of Environment, by law in Uganda as in Nigeria, is the supervisory minister for animals in ecological context particularly wild animals. The minister of Agriculture, also by law in both countries, deals with animal related issues. So who of these two ministers is obliged to act in roles provided by the Act? The convulated institutional and regulatory paradigms is one of the reasons there is problem of enforcement of relevant animal laws in both countries. The more serious reason is that poor animal welfare governance as reflected in law and practice in many countries is down to a more serious issue of poor official attitude to animals which seems to suggest that animals may not really have rights. This paper will discuss these regulatory paradigms and make relevant suggestions not only on the*

*regulatory paradigms but also on the need for a more comprehensive animal rights system in both countries.*

## Introduction

Animals are important members of the ecosystem and cases concerning them are the subject of screaming headlines globally. From the fella who kills the neighbour's cat to the cowboy whose starving cow is tied up outside in the scorching sun. Cruelty to animal comes in different forms: it may be one of Simple Neglect, Gross Neglect, Intentional Abuse, Animal Hoarding, Organized Abuse, or Animal Sexual Assault. A number of international principles, codes, and laws focusing on animal welfare have been established, and a growing number of countries like Uganda and Nigeria have animal welfare legislations covering unwholesome practices, for example the internationally recognised 'three Rs' and 'five freedoms'. Animals (Protection against Cruelty) Act and the Criminal Code Act are dwell on animal welfare for Uganda and Nigeria respectively. Conspicuous provisions on animal welfare and rights are not reflected anywhere in the respective countries' constitutions.

Animals, particularly sentient ones, deserve justice being entitled to a treatment in accordance with their dignity. Mistreatment of animals is unjust, not only that it is wrong of us to treat them in unjust way, but also that they have a right, a moral entitlement, not to be treated in that way. It is unfair to them, to use the wordings of a scholar.[1]

In many developing countries, poverty, resource scarcity, and education all factor into the way animals are treated. In some cultures, certain animals may be accorded holy status, while other species are subject to extreme indifference and neglect. Economic systems and human values that place efficiency and profit above animal welfare lead to the in humane practices

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[1] Nussbaum, M. (2006). Frontiers of Justice. MA: Belknap Press

found in factory farming;[2] thus, animal welfare issues cannot be viewed in isolation from culture, values, and economic conditions all of which affect how animals are perceived and treated. Developing countries like Uganda and Nigeria are increasingly coming under pressure to harmonize international standards set by developed countries, such as to improve their delivery of veterinary services as a prerequisite for entering the competitive arena of international trade in animals and animal products.[3]Animal welfare issues go beyond trade, it is more about the God-given dignity of the animals. It is against above, that this paper discusses animal welfare law in Uganda and Nigeria.

**So, what is Animal Welfare?**

Animal welfare is about stewardship of animals to their best use and humane practices, while setting the value of the animal relative to its benefit for mankind,[4]and to itself *The American Veterinary Medical Association* describes animal welfare as "a human responsibility that encompasses all animal well-being, including proper housing, management, nutrition, responsible care, humane handling, and when necessary humane euthanasia." Animal welfare reflects the belief that animals have the right to be handled humanely and to live a life free of pain; however, animal welfare advocates do not believe that animals should have rights equal to those of humans.

Animal welfare means how an animal is coping with the conditions in which it lives. An animal is in a good state of welfare if (as indicated by scientific evidence) it is healthy, comfortable, well nourished, safe, able to express innate behaviour, and if it is not suffering from unpleasant states such as pain, fear, and distress. Good animal welfare requires disease prevention and veterinary treatment, appropriate shelter, management, nutrition, humane handling and humane

[2]Rahman, S. A., Walker, L., and Ricketts, W. (2005). Global perspectives on animal welfare: Asia, the Far East, and Oceania. *Rev. Sci. Tech. 24*, 597-612.
[3]Brückner, G. K. (2004). Working towards compliance with international standards. *Rev. Sci. Tech. 23*, 95-107.
[4]Jill Montgomery; Animal Welfare and Animal Rights: A War of Words with Casualties Mounting

slaughter/killing. Animal welfare refers to the state of the animal; the treatment that an animal receives is covered by other terms such as animal care, animal husbandry, and humane treatment.[5]

## International Accepted Guiding Principles for Animal Care and Use

In 2002, the World Organisation for Animal Health (OIE) created a permanent Working Group on Animal Welfare, whose first task was to develop a set of guiding principles to serve as the philosophical foundations of all OIE work on animal welfare. These principles were adopted by the International Committee of OIE member countries during the 72nd General Session in May 2004 and are now included in the OIE Terrestrial Animal Health Code.[6] The guiding principles are the following;

- That there is a critical relationship between animal health and animal welfare.
- That the internationally recognized 'five freedoms' (freedom from hunger, thirst, and malnutrition; freedom from fear and distress; freedom from physical and thermal discomfort; freedom from pain, injury and disease; and freedom to express normal patterns of behavior) provide valuable guidance in animal welfare.
- That the internationally recognized 'three Rs' (reduction in numbers of animals, refinement of experimental methods and replacement of animals with non-animal techniques) provide valuable guidance for the use of animals in science.
- That the scientific assessment of animal welfare involves diverse elements which need to be considered together, and that selecting and weighing these elements often involves value based assumptions which should be made as explicit as possible.

[5] OIE (The World Animal Health Organisation) Definition of Animal Welfare. Available at; http://www.oie.int/index.php?id=169&L=0&htmfile=chapitre_1.7.1.htm.
[6] Sec. 7 of the code

- That the use of animals in agriculture and science, and for companionship, recreation, and entertainment, makes a major contribution to the wellbeing of people.
- That the use of animals carries with it a duty to ensure the welfare of such animals to the greatest extent practicable.
- That improvements in farm animal care can often improve productivity and hence lead to economic benefits.

## The Role of the Animal Welfare System in Dealing with Animal Abuse

In addition to the many programs and policies developed to improve standards of care and wellbeing for animals, animal welfare proponents also work to end animal abuse as was in the Case of *Noah v. The Attorney General.*[7]In this Case Court of Israel reviewed the practice of force-feeding geese to produce the fatty liver used in the production of foie gras. Foie gras is a French delicacy usually served as an appetizer on toast and is controversial because of the treatment of the geese and ducks from which it is obtained. The birds' livers are enlarged to ten times their normal size by pumping food into their stomachs through a metal tube inserted down their throats. After a few weeks of this treatment the birds can be slaughtered and the liver served as foie gras.

The case was an appeal by "Noah", a coalition of animal protection organizations. Noah wanted the court to annul the regulation that permitted force-feeding, on the grounds that the regulation contravened legislation prohibiting cruel treatment or abuse of animals. The court agreed that the entire practice, not just the method, was cruel and obnoxious. Force-feeding led to cuts and lesions in the birds' throats and ruptured their digestive systems and made many of the birds not to be able to walk and stand. The learned judges acknowledged that humans may use animals and, in particular, use them for food, but they split on how to define the purpose of force-feeding geese.

Animal abuse takes different forms. It can be divided into two major categories: abuse that occurs as a result of

[7]HCJ 9232/01, 215 (Israeli Supreme Court Aug. 11, 2003), available in English at http://elyon1.court.gov.il/files_eng/01/320/092/S14/01092320.s14.pdf

negligence (failure to act properly) or harm that results from deliberate acts. The lines are sometimes blurred between what is intentional and what is not, and cases are decided case by case basis. In *R. v Higgins*[8] a man was angry because a cat knocked over a trashcan. The man grabbed a broom and chased the cat around the house, ultimately hitting the cat with enough force to break the animal's leg. The court found that the man did not know that hitting a cat with a broom could result in the injury, and he was acquitted on the basis that the element of wilfulness was not met.

In R. *v Heynan*[9], the defendant was a hunting guide who left two dozen horses in a pasture in Alberta claiming to have checked on them a few times, but a nearby farmer became sufficiently alarmed at their condition to call the SPCA. An investigator found three horses had died of starvation and others were severely emaciated. Snow and ice on the ground had prevented the horses from obtaining enough to eat and no supplemental feed had been provided for them. The court found that the defendant was incredibly naïve to think that horses would have adequate food in an unattended pasture over the winter, but since he genuinely and honestly held this belief the element of wilfulness had not been met. Every State now has felony laws against animal cruelty, but they vary tremendously from state to state in the acts they designate as felonies, and in the punishment, they impose for those crimes.

In the case of neglect, abuse can be the result of ignorance, such as when a pet owner didn't recognize that a pet needed veterinary treatment; or when it is the result of behaviour that a person should have known would cause harm to animals but allowed to continue. Abuse can also be a product of overt cruelty to animals. Deliberate acts of cruelty include torture, beating or maiming animals as well as activities such as dog or ram fighting, which result in severe pain, injury and death to the animals involved. Deliberate acts of abuse warrant the most severe penalties, not only because of their shocking nature and the immediate harm they inflict, but also because there are well

[8][1996] 144 APR 295 (NfldProv Ct).
[9] [1992] 136 AR 397 (Alta Prov.Ct.)

established connections between abuse to animals and violence against people.

## Types of Animal Cruelty

The types of animal cruelty recognized across the globe today are as follows:

### *Simple Neglect*

This involves failure to provide adequate food, shelter, water, or veterinary care to one or few animals, usually due to ignorance. This form of animal cruelty is the most common around the world today.[10] The most common example of simple neglect found everywhere today is the case of dog owners chaining their dogs around the neck without a dog belt and most times the dog is kept stagnant at the backyard for hours if not days without proper shelter.

### *Gross Neglect*

It can also be called wilful, malicious or cruel neglect. It is important to make a distinction between simply failing to take adequate care of animals and intentionally or knowingly withholding food or water needed to prevent dehydration or starvation. Gross neglect is therefore the intentional act of withholding food or water from an animal or group of animals.[11]A typical example of this type of cruelty is the case of people throwing away their sick dogs callously, some leaving their dogs out in the cold or rain.

### *Intentional Abuse*

Cases of intentional cruelty are the ones of greatest concern to the general public and the ones more likely to involve juvenile offenders. There is legitimate fear that the individuals

[10]Randour, M. l. (2004). "Including Animal Cruelty as a Factor in Assessing Risk and Designing Interventions" Conference Proceedings, Persistently Safe Schools, *The National Conference of the Hamilton Fish Institute on School and Community Violence*, Washington DC.

[11] Lockwood, R. (2006).Animal Cruelty Prosecution: Opportunities for early response to crime and interpersonal violence. *American Prosecutor Research Institute*; Alexandria. Va. 39; 110-121.

involved in violent acts against animals present a danger to the public. Intentional animal abuse is often seen in association with other serious crimes including drug offenses, gang activity, weapons violations, sexual assault, and domestic violence and can be one of the most visible parts of an entire history of aggressive or antisocial behaviour. Such cases are often easier to prosecute than neglect or hoarding cases since the effects of the crime on the victim may be easier to document and the intentionality of the offense is more clearly recognized.[12]

### *Animal Hoarding*

This is the accumulation of a large number of animals and failing to provide minimal standards of nutrition, sanitation and veterinary care; to act on the deteriorating condition of the animals; and to recognize or correct the negative impact on the health and well-being of the people in the household.[13]Examples of animal hoarding cases are: the transportation of large numbers of animals in an in-humane way, the keeping of birds and other animals in a very poor and unconducive environment, pigs and other animals kept to starve to death at livestock farms etc.

### *Animal Fighting and Cockfighting*

"Blood sports" such as dog fighting and cockfighting have been singled out for special attention in the anticruelty laws of the United States and the United Kingdom since their inception in the 19$^{th}$century.[14] A glance at the Constitution of the Federal Republic of Nigeria also reveals this act as a crime. This act involves the setting of two or more dogs, cocks or any other animal in a fight circle and allowing them to brutally kill each other for the sole purpose of entertaining the spectators.

### *Animal Sexual Assault (Bestiality)*

Bestiality is defined as an affinity, attraction, or sexual attraction by a human to non-human animals. This act of using an animal for the purpose of sex is as awful and nasty as it sounds and despite the fact that most people believe this to be a sin

[12] Ibid @4
[13]Arluke, A., and Lockwood, R. (Eds) (1997). Society and Animals, Special Theme Issue: Animal Cruelty, *Washington Grove*, 54; 112-134.
[14] ibid@4

committed against nature, the issue of bestiality has been raising alarm across the globe including Uganda and Nigeria. For example, in Uganda, "any person who has carnal knowledge of an animal commits an offence and is liable for imprisonment for life".[15] In 2011 San Francisco Chronicle one of the largest news outlets in California had the picture of a man making love to a dog on its headline. There have been screaming headline in some African countries of similar practice

## The Law Relating to Animal Welfare in Uganda and Nigeria

### *The Animals Prevention of Cruelty Act*

This is, in the main, a regulatory law that seeks to control who may possess or sell certain animals and the living conditions under which animals must be kept. The law provides for criminal penalties, civil penalties, and revocation of permits for violations of the Act.

**Offences of cruelty -** Any person who cruelly beats, kicks, ill-treats, overrides, overdrives, overloads, tortures or infuriates any animal, or causes or procures, or being the owner, permits any animal to be so used, or by wantonly or unreasonably doing or omitting to do any act, or causing or procuring the commission or omission of any act, causes any unnecessary suffering, or being the owner, permits any unnecessary suffering to be so caused to any animal; kills any animal in an unnecessarily cruel manner, commits an offence of cruelty within the meaning of this Act and is liable on conviction to a fine not exceeding one thousand shillings or to imprisonment for a period not exceeding three months or to both such fine and imprisonment.[16]

The Act further provides a penalty for any person who permits any animal of which he or she is the owner or which is in his or her possession or under his or her control to be at large in any public place while the animal is suffering from any contagious or infectious disease[17]; sells, or offers or exposes for sale, or gives away or causes or procures any person to sell or

[15]Penal Code Act, Uganda, S. 145(b)
[16]Animals (Prevention of Cruelty) Act, Cap 220, S. 3
[17]Ibid, S. 5.

offer or expose for sale or give away, or knowingly is a party to the sale or offering or exposing for sale or giving away of any grain or seed which has been rendered poisonous except for bona fide use in agriculture commits an offence and is liable on conviction to a fine not exceeding one thousand shillings.[18]*However the penalties levied at a person who contravenes animal welfare is low. These penalties serve as a deterrent but One thousand shillings and imprisonment of the term not exceeding three months is so light for a person or an incorporated company to feel the punishment taken. This will be useful because any person participating in the welfare of animals' operations will take rules serious for the fear of such harsh penalties.*

**Experiments on living animal;** the experiment shall be performed only with a view to the advancement by new discovery or physiological knowledge or of knowledge that will be useful in saving or prolonging life or alleviating suffering; shall be performed by or under the direction of a licensed person; the animal shall during the whole of the experiment be under the influence of some anaesthetic of sufficient power to prevent the animal feeling pain;[19] experiments may be performed as to the use of anaesthetics by a licensed person giving illustrations to lectures in medical schools, hospitals, colleges or elsewhere, if the experiments are in his or her opinion necessary for the due instruction of the persons to whom the lectures are given with a view to their acquiring physiological knowledge or knowledge which will be useful to them for saving or prolonging life or alleviating suffering.[20]*There are no requirements for protocol review by an ethics committee. The absence of legal and ethical framework and committee to review protocols that involve animals in research and education leaves major gaps in the* protection *of the animals involved. The lack of institutional animal ethics committee promotes the outsourcing of animal research to unregulated institutions.*

[18]Ibid, S. 8
[19]Ibid, S. 13
[20]Ibid, S. 13(2)

**Powers of Minister to grant and revoke licenses.** The Minister, who is not defined as a specific minister, may license any person whom he or she thinks qualified to hold a license to perform and to direct the performance of experiments under this Act. A license granted by the Minister may be for such time as he or she may think fit and shall be revoked by the Minister on his or her being satisfied that the licensed person has caused pain to any animal in contravention of this Act or that for any other reason the license ought to be revoked.[21]*The Act vests too much power in hands of the minister. The power of the minister is hardly checked giving him or her absolute control over the granting of permits and licenses. The Act giving arbitrary powers to the minister poses a risk of corruption in matters concerning animal welfare. There is a need to lessen powers of the minister by putting in place inter-ministerial committee such that the* minister *should have only powers to introduce regulations prescribing threshold for state participation. The powers of the minister need to be curtailed or adequate checks provided to avoid the occupier of that position being corrupted. The Act further does not stipulate the time frame in which licenses shall be held. This posse a major risk to animal welfare as the licensee is likely to take advantage of the uncertain permit to endanger animal welfare principles.*

The Act grants some powers to a so called 'authorised officer' and defines same in a way too open to accommodate every Tom, Dick and Harry in government

***Penal Code Act, CAP 120***

**Injuring animals -** Any person who willfully and unlawfully kills, maims, or wounds any animal capable of being stolen commits an offence. If the animal in question is a horse, mare, gelding, ass, mule, camel, bull, cow, ox, goat, pig, ram, ewe, wether, or ostrich, or the young of any such animal, the offender commits a felony and is liable to imprisonment for seven years; and in any other case the offender commits a misdemeanour.[22] The law do not make specific reference to poultry. Yet it is now widely accepted that all vertebrates

[21]Ibid, S. 14
[22]Penal Code Act, S. 334(1)and (2)

(mammals, birds, reptiles, amphibians, and fish) are sentient in that they have the capacity to feel pain, to experience distress and suffering, to experience both positive and negative feelings.[23] The European Union officially recognised animals to be 'Sentient Beings' in 1997.

**Communicating infectious diseases to animals -** Any person who wilfully and unlawfully causes, or is concerned in causing, or attempts to cause, any infectious disease to be communicated to or among any animal or animals capable of being stolen commits a felony and is liable to imprisonment for seven years.[24]

**Unnatural offences -** Any person who has carnal knowledge of an animal; or permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence and is liable to imprisonment for life.[25]

**Animal Welfare in Nigeria - Legal Framework**

Nigeria has a number of laws concerning the wellbeing of animals as discussed below:

***Penal Code Act Chapter 53 LFN (Abuja)***

The law stipulates that, whoever has carnal intercourse against the order of nature with an animal, shall be punished with imprisonment for a term of which may extend to fourteen years and shall also be liable to fine.[26] It further provides that, whoever commits mischief by killing, poisoning, maiming or rendering useless an animal or animals shall be punished with imprisonment for a term which may extend to three years or with fine or with both.[27]

[23] Dr. Barry Bousfield and Dr. Richard Brown; Animal Welfare; Volume No.1, Issue No.14, Nov.2010; Veterinary Bulletin-Agriculture, Fisheries and Conservation Department Newsletter
[24] Penal Code Act, S. 337, CAP 53 Laws of the Federation of Nigeria (Abuja)
[25] Ibid, S. 145
[26] Ibid, S. 284
[27] Ibid, S. 329

### *Nigerian Criminal Code Act*

Any person who cruelly beats, kicks, ill-treats, over-rides, over-drives, over-loads, tortures, infuriates, or terrifies any animal, or causes or procures, or, being the owner, permits any animal to he so used; or by wantonly or unreasonably doing or omitting to do any act. or causing or procuring the commission or omission of any act, causes any unnecessary suffering, or, being the owner, permits any unnecessary suffering to be caused to any animal; or conveys or carries, or being the owner, permits to be conveyed or carried any animal in such manner or position as to cause such animal unnecessary suffering; or willfully without any reasonable cause or excuse administers, or causes or procures, or, being the owner, permits such administration of, any poisonous or injurious drug or substance to any animal, or willfully without any reasonable cause or excuse causes any such substance to be taken by any animal; or subjects, or causes or procures, or, being the owner, permits, to subjected, any animal to any operation which is performed without due care and humanity; or causes. or procures, or assists at the fighting or baiting of any animal, or keeps, uses, manages, or acts or assists in the management of, any premises or place for the purpose, or partly for the purpose, of fighting or baiting any animal, or permits any place to be so kept, managed or used, or receives or causes or procures any person to receive money for the admission of any person to such premises or place, is guilty of an offence of cruelty and is liable to imprisonment for six months or to a fine of fifty naira, or to both such imprisonment and fine.[28]

An owner shall he deemed to have committed cruelty if he shall have failed to exercise reasonable care and supervision in respect of the protection of the animal therefrom: such a person is not liable to imprisonment without the option of a fine. *However, to avoid doubt, the Act need to stipulate the punishment eligible to such persons upon conviction because when its left open, the levy institution is likely to give a lesser punishment that may not be deterrent for further offences.*

When the owner of any animal is convicted of an offence of cruelty under the last preceding section, it shall he lawful for

[28]Criminal Code Act, S. 495

the court, if the court is satisfied that it would be cruel to keep the animal alive, to direct that the animal be destroyed, and to assign the animal to a suitable person for that purpose. Any reasonable expenses incurred in destroying the animal may be ordered by the court to be paid by the owner, and thereupon shall be recoverable in like manner as a fine.[29]

When a person in charge of an animal or vehicle is arrested it shall be lawful for any police officer to take charge of such animal or vehicle and to deposit the same in a place of safe custody until the termination of the proceedings or until the court shall direct such animal or vehicle to be delivered to the person charged or to the owner, and the reasonable costs of such detention, including the reasonable costs of any veterinary treatment shall, in the event of a conviction in respect of the animal, be paid by the owner, and such costs may be recovered in like manner as a fine.[30]

**Institutional Framework in Uganda**

***Department of Animal Resources***

The department is under the auspices of ministry of agriculture, animal industry and fisheries. It is entrusted with responsibilities in all areas of animal health, including national animal disease prevention and eradication programmes. Key objective of the department is; to investigate and control animal diseases, protect humans against communicable diseases from animals to humans, control vectors such as tsetse flies, ticks among others, certify and enforce compliance of veterinary regulations, promote the development of apiculture and sericulture.

**Key functions:**

1. Formulate and review policies on animal control diseases; disease communicable from animal to man.
2. Formulate strategies for controlling new and emerging animal diseases in the country.
3. Formulate and enforce laws/ regulations on animal health.

[29]Ibid, S. 496
[30]Ibid, S. 498

4. Formulating strategies for controlling the spread of animal epidemic; sporadic and epidemic diseases in the country.
5. Monitor the outbreak and prevalence of animal diseases communicable from animals to man in the country as well as in the neighbouring countries.
6. Examining laboratory samples from the districts as a technical support for animal disease surveillance and control.
7. Ensuring availability of technical infrastructure such as laboratories, animal quarantine stations, animal holding grounds, stock routes, cattle dips, animal crushes among others.
8. Collect, collate, retrieve- process and disseminate veterinary epidemiology data.
9. To advise the district authorities and decision makers on effective and efficient animal disease control strategies.
10. To collaborate with research and international organization on animal disease

**Institutional Framework in Nigeria**

***Department of Agriculture (Tress and Crops) Fisheries, Livestock, Land Resources, Fertilizer, Food Reserve and Storage and Rural Development***

The Department is currently the sole institution responsible for handling, management, and control of animal abuse under livestock sector. The Department is under the auspices of Federal Ministry of Agriculture and Rural Development of Nigeria whose functions are to execute an agricultural transformation agenda, focus on agriculture as a business, utilise the transformation of the agricultural sector to ensure food security. Although institutions have been established, nowhere in the Acts does the introduction and interpretation of these institutions appear.

**Gaps Requiring Attention**

***Inappropriate Sanctions for Offences:***

In the legal instruments, there is a mismatch between the gravity of an offence and the severity of the sanction. The penalties for unprofessional behaviour and breaches of law are

often paltry compared with the negative outcomes associated with the offence. For example, a farmer who knowingly moves an animal during quarantine is subject to a maximum penalty of only 2 currency units (equivalent to US$20), even if the animal in question is an HPAI-infected bird, the movement of which could have dire consequences. Fines should be revised and made commensurate to the gravity of offences to help deter potential offenders.

### *Lack of Specific Attention to Poultry:*

Most policies and laws do not make specific reference to poultry issues, and poultry farmers' needs are not disaggregated from those of farmers in other subsectors. For example, the meat policy does not differentiate poultry meat from beef, the local government meat ordinance elaborates slaughter and meat conveyance processes for cattle but not for poultry, and there are no specifications for the slaughter of poultry. Although poultry is implicitly referred to in the definitions of "animal" and "livestock", there is a lack of specific reference to poultry as a form of livestock. This reduces the visibility of the subsector, especially during planning and prioritization for resource allocation.

### *Unclear Definitions and Concepts:*

Definitions of terminology such as "bird", "migratory birds" and "caged/ornamental birds" are currently unclear; it is important to clarify all terms and concepts so that policy-makers, implementers and key stakeholders have a common understanding of what they mean. A list of definitions should be appended to all policy and legal documents for the livestock sector.

### *The Officers are not Defined in the Act:*

The Uganda's Animal (Protection against Cruelty) Act provides for an "authorised officer" to mean any administrative officer, any police officer, any veterinary officer, and any officer of the game and fisheries departments, any chief of or above the rank of sub county chief or any other person appointed by the

Minister to be an authorised officer.[31] The section does not provide roles and responsibilities of such officers and un defined officers are associated with bureaucratic practices, delay in decision making as well as overlapping and in some cases conflicting mandates. Therefore, one can argue that undefined officers mean no body.

***No Animal Protection Ranked in the Constitutions of Uganda and Nigeria:***

The constitutions of these two countries are silent about animal protection moreover the recognition of animal protection in the constitution reflects a level of socio-political engagement with animal welfare issues at national level.

***No Designated Committee to Review or Monitor Protocols using Animals in Research.***

The absence of legal and ethical framework and committee to review protocols that involve animals in research and education leaves major gaps in the protection of the animals involved. Uganda and Nigeria have adopted initiatives that support research and development work; however, unlike developed countries, there are no policies and legal frameworks in place to support the initiatives. The lack of institutional animal ethics committee promotes the outsourcing of animal research to unregulated institutions

## Recommendations

1. Increment of years and fines to deter further commission and omission of animal abuse; If offenders are detected with sufficient frequency and punished with appropriate severity, then they will be less likely to commit a particular offence as they will perceive that the costs of violation outweigh the perceived benefits. Importantly, the issue of infringement fines is likely to create a steady flow of revenue for the Directorate of Animal Resources. This may in turn facilitate greater detection of animal abuse by providing more resources for inspection. In other words, infringement fines for animal welfare offending, much like

[31] Section 1 of the Act

speeding fines, can serve a dual purpose of discouraging non-compliance and financially sustaining enforcement and detection operations.

2. Specific punitive laws should be provided for corporate bodies that deal in the breeding and animal business at large. Like in Uganda, there is Uganda Society for the Protection and Care of Animals (USPCA). These entities have a strong financial base that makes it easy for them to indemnify the general deterrence fines in the laws without recognising any impact in the punishment. Higher infringement fines are highly likely to devolve animal abuse upon commission and omission by the corporate entities.

3. Recognition of animal protection in the constitution. Nigeria and Uganda should adopt constitutional provisions that provide a basis for the protection of animals, so that animal welfare principles are explicitly established. Incorporating animal protection into the constitutions has both ethical and practical reasons;
   i. Firstly, there must be recognition of the status of animals and the importance of animal protection objectives. These are already internationally recognised by consensus and morality, and should be reflected in the fundamental governing principles of nations.
   ii. Secondly, practical problems arise when other constitutional objectives take precedence over animal ethics and protection because these are not included in the constitution. For example, Germany has traditionally been a strong supporter of animal protection. However, in the case of animal experimentation, particular problems arose in the past because freedom of research was included in the German constitution, whereas animal protection was not. In 1994, a researcher filed a suit after he was denied permission to perform a particularly cruel research on primates and court ruled in his favour. Furthermore, German constitutional court ruling in 1999 stated that the principle of welfare balance in the area of animal protection (e.g. when in conflict with fundamental laws

such as scientific and educational freedom, artistic) could only function when animal protection had constitutional ranking.

4. There is a need to establish strict policies and guidelines regarding the use of animals in research and education in Uganda and Nigeria. Animals in laboratories are failed by the regulatory bodies set in place to protect them. Millions of animals are tested on without any relief from pain or basic care. Many medical schools are eliminating animal testing because of the inadequacy of the law yet good science and good animal welfare go hand in hand. If an animal is suffering stress and pain it could affect the results of the research. So, it makes good scientific sense to house animals in the best possible conditions and make sure they get the possible care from experienced and skilled carers. A designed committee to review and monitor protocols using animals need to be established and rendered powers in the law to promote sourcing of animal research to regulated institutions licensed. It is important that Uganda and Nigeria develop systems to inspect animal facilities and review research practices to ensure that animal welfare issues are addressed in all institutions and facilities dealing with animals. Provision should also be made in the statutes for regular monitoring and evaluation of the current systems. The institution should have capacity and/or authority to perform self-inspections or enforce regulations on animal welfare.

5. The specific minister responsible for animal welfare in general should be specified by amendments of the relevant laws of the two countries.

## Conclusion

Animal welfare as highlighted above is an issue that demands urgent attention. Animals are supposed to be respectable members of the ecological race[32]Practises that inflict

[32] Ecological, Ethological and Ethically Sound Environments for Animals: Towards Symbiosis. Journal of Agricultural Ethics,2,323-47

great pain on these animals can thus not be overlooked simply because they have nobody to speak for them. Combating the menace of Animal Cruelty is a Journey that must be undertaken and everybody including the Government, NGOs and even Culture has a major role to play in this. Animal welfare issues, domestic and wildlife related, need to be urgently addressed through policy and legal frameworks and supported by community awareness of, education about, and participation in, animal welfare issues. A very widespread consensus, among philosophers and many other people, is that we should do more for animal welfare. As **Mahatma Gandhi** said; *"the greatness of a nation and its moral progress can be judged by the way its animal is treated"*[33] It is therefore recommended that governments of countries like Uganda and Nigeria should review their animal cruelty laws and see to their proper implementation. That way, phrases like, "Don't treat me like animals will have no place in society" because even animals do not deserve to be badly treated.

[33] Michael C. Appleby; What Should We Do About Animal Welfare?

# CORPORATE GOVERNANCE AND ETHICAL STANDARDS IN BUSINESS: THE UGANDAN EXPERIENCE

***By***

***Jimmy Walabyeki****

**Abstract**

*Ethics in corporate governance is very important as it gives companies focused and purposeful management, and a competitive edge in business. This is the first installment of a study of legislation and other literature relating to ethics and governance specific to Uganda. In this research the factors affecting good business ethics is considered, as well as the opportunities arising from good ethical practices. The study's findings indicate that there are several factors affecting ethics in corporate governance in Uganda. These include the company's internal environment, and the external environment because the company does not operate in a vacuum. Factors in the external environment include the socio-political, cultural and market environments, and the legal environment as well as regulatory environment. The main factors affecting good business ethics in Uganda are in the context of the socio-political environment. This study contributes to the drive by policy-makers towards promoting good corporate governance by drawing attention to the main factors affecting good business ethics in Uganda.*

**Keywords:** Ethics, corporate governance, Uganda

## Introduction

There is no standard definition of corporate governance. However, it has been defined to mean the systems by which companies are governed and controlled.[1] On the other hand Ethics refers to that which is good or right in human interaction, and it involves 'self', 'good', and 'other'.[2] Thus, one is said to have acted ethically if he considers not only what is good for

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[1]Report of the Committee on the Financial Aspects of Corporate Governance: The Code of Best Practice (Cadbury Code) (1992).

[2]King Code of Corporate Governance for South Africa p. 51.

him, but also what is good for *others*.[3] Business ethics refers to the ethical values that determine the interaction between a company and its stakeholders,[4] who include the customers, suppliers, and employees among others. In recent times, corporate governance has become a subject of great importance and discourse, because there have been corporate collapses brought on due to ethical failure. Examples of ethical issues in corporate governance include misreporting, excessive remuneration[5], concealment of revenues, taking bribes, conflicts of interest, and insider trading among others. This article seeks to show that ethics is important in corporate governance, and explores the factors that influence the practice of good governance.

**The Importance of Business Ethics**

Good business ethics firstly, promotes the company's profitability. The reason is that a greater attention to morality attracts customers or clients, because of a good reputation, and this in turn, leads to a higher profit,[6] when they purchase the company's goods or services. On the other hand, unethical practices manifesting in fraud result in financial loss to enterprises.[7] Financial loss may be incurred because 'unethical behavior may lead to an increase in operational, legal, marketing and public relations costs'.[8]

Secondly, business ethics boost the production process because it leads to better utilization of resources, environmental protection, cleaner production and energy conservation.[9] It also

[3]*Ibid.*
[4]*Ibid.*
[5]Business Ethics Presentation on Slide share available on http://www.slideshare.net/y4ss1r/business-ethics-14811885?next_slideshow=1 accessed on the 5th August 2015.
[6]Birungyi Cephas Kagyenda, Business Ethics, *Wealth Creation Journal* Vol. IV 2007 p.8.
[7]Leo Kibirango, 'Business Ethics- A Necessity' *Sustainable Wealth Creation Journal* Vol. IV 2007 p. 6.
[8]See also John Graham, The Role of Corporate Culture in Business Ethics p. 389 available at http://www.cutn.sk/Library/proceedings/mch_2013/editovane_prispevky/44.%20Graham.pdfon 31st July 2015.
[9]Jane Gitau, Ethics in Business - A Foundation for Economic Growth, *Sustainable Wealth Creation Journal* Vol. IV 2007 p. 11 citing Dr. Maggie Kigozi.

'lead[s] to happier suppliers of services such as raw material and packaging'[10] because suppliers will be assured that they will be paid. The production process is also boosted because good ethics attracts good and talented employees to work in the company,[11]which will in turn lead to increased productivity of the company. In this respect, it encourages persons with high ethical standards to work in a way that is consistent with their sense of right and wrong. Pressuring people to work contrary to their convictions places them in a place of a great deal of emotional stress, hereby decreasing their work output levels. In addition, good ethics provide multiple channels of feedback,[12] because the stakeholders trust the company. Feedback is useful to a company because it enables the company to address issues that if addressed adequately, could improve the company's performance.

Thirdly, is that it attracts capital. The reason is that the practice of good ethics attracts investments at much lower costs because fraud and corruption are checked out altogether.[13] It also promotes trust between companies, and so encourages business partnerships and alliances[14] which increases the accessibility to capital. From the above, it is clear that it is in a company's best interests for the company's officials to practice good ethics, for the sustainable success of its business.

**Factors Affecting Company's Ethical Practices**

Company officers do not operate in a vacuum. The Environment in which the company operates can affect the ethical environment within the company. Environment means the surrounding circumstances, background, or context in which the

[10]Ibid.

[11] 'Ethical business practices A Cadbury Schweppes case study' available at: http://businesscasestudies.co.uk/cadbury-schweppes/ethical-business-practices/the-importance-of-ethics-in-business.html##ixzz3XY9pRLiM accessed on the 17th April 2015.

[12]Birungyi Cephas, *Supra* p.8.

[13]Jane Gitau,*Supra* p. 10 citing Charles Muchene, the Country Leader Price waterhouse coopers by 2005.

[14]*Business Ethics* p. 32 available at http://www.google.co.ug/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fhighered.mheducation.com%2Fsites%2Fdl%2Ffree%2F0070921989%2F226745%2Fferrell_sampleCH02.pdf&ei=kbUwVZm2M6ep7Abhx4CwBw&usg=AFQjCNEwKtLUsFSzl566sHUXSc39p0eLXQaccessed on 17th April 2015.

company's officers operate. These may be internal environment factors and the external environment. The former includes the company's internal environment and the latter includes the market environment, the socio- political environment, and the legal and regulatory environment. The discussion will commence with the internal environment.

### a. Ethics and the Company's Internal Environment

This has to do with whether or not a company has a culture of integrity and transparency. Where the corporate culture fosters integrity, then there is likely to be greater application of business ethics in the company. Where for example transparency is promoted in the company, unethical practices are unlikely to thrive. The degree of internal supervision of management by the board is also critical towards determining whether there is a culture of ethical business practices. Research studies have shown that where there is poor management oversight by the board of directors, corporate scandals are more likely to thrive.[15] This means that poor corporate governance enables the company's management to make unethical decisions.[16] Thus, where there is good corporate governance, the management of the company will ensure that there is transparency, and accountability.[17]

Also, the performance philosophy within the company affects the ethical climate of the company. The performance philosophy refers to the emphasis placed by the company's

[15]Hoffman, Rowe, The Ethics Officer as Agent of the Board: Leveraging Ethics Governance Capabilities in the Post Enron Corporation Business and Society Review 112:4 , 553- 572 cited in p.2. Yasemin Zengin Karaibrahimoglu, Burcu Guneri Cangarli, *Do Auditing and Reporting Standards Affect Firms' Ethical Behaviours? The Moderating Role of National Culture* Journal of Business Ethics 2015 available at http://download.springer.com/static/pdf/439/art%253A10.1007%252Fs10551-015-2571-y.pdf?originUrl=http%3A%2F%2Flink.springer.com%2Farticle%2F10.1007%2Fs10551-015-2571-y&token2=exp=1438333007~acl=%2Fstatic%2Fpdf%2F439%2Fart%25253A10.1007%25252Fs10551-015-2571-y.pdf%3ForiginUrl%3Dhttp%253A%252F%252Flink.springer.com%252Farticle%252F10.1007%252Fs10551-015-2571-y*~hmac=060637490e4302656d2fb8925925421d9645defd06a1b33fc1b340e2d3df15ff accessed on the 30th July 2015.

[16]*Ibid.*

[17]*Ibid.*

management on the employees, as to where their energies ought to be expended. Where the culture is geared towards individual performance and profits, poor ethics will thrive. On the other hand, where good corporate citizenship is emphasized in addition to profit, better ethical standards will be observed. Two examples involving Enron, and Wall-Mart will suffice in to illustrate this point. With respect to Enron, its internal culture was to reward individual raw talent.[18] that increased the company's profits. This gave opportunity for fraud to thrive, because the company's employees were put under pressure to deliver results at all costs regardless of the means they applied to achieve their targets. Every year there was a compulsory laying off of employees so there was overwhelming pressure to perform. On the other hand, is Wall-Mart, the world's largest company, in terms of revenues and number of employees, whose core values are devotion to customers, and valuing team results more than individual results.[19] It is not surprising that Wall-Mart has survived longer in business it is opined, largely because of its corporate culture in this regard.

### b. Ethics and the Company's External Environment

The external environment includes the market environment, the socio-political environment, and legal and regulatory environment.

### c. The Socio-Political, Cultural and Market Environments

Culture is 'a set of societal values that drive institutional form and practice' [20] or 'the collective programming of the mind

[18]Justice Geoffrey Kiryabwire, 'Business Ethics in Uganda: time to walk the talk?'*Capital Markets Industry Journal* July- December 2011 p. 34.

[19]*Ibid*.See also Alexander Crofoot Wal-Mart: Rolling Back on Ethics available at http://www.neumann.edu/academics/divisions/business/journal/Review2012/Crofoot.pdf accessed on the 3rdSeptember 2015 where that author notes that Walmart has also been the center of ethical controversies. However, it is opined that compared to Enron, Walmart has fared better although it is by no means perfect.

[20] Salter and Niswander, "Cultural Influence on The Development of Accounting Systems Internationally, a Test of Gray's (1988) Theory", *Journal of International Business Studies*, Second Quarter, 1995 p.149 cited in Cigdem Solas, Sinan Ayhan, The Historical Evolution Of Accounting In China: The Effects of Culture *Spanish Journal of Accounting History* No.7 (December 2007) p.149.

which distinguishes the membersof one human group from another',[21] and it provides the cognitive terms for individuals within a group and society preconditions for human behavior.[22]The culture of the society in a particular country may have an impact on corporate culture of a company, because it has a direct impact on the behavior of individual directors or management of the company. The socio-political environment includes the moral state of the society, and attitude of the political leadership towards promoting and upholding ethics in the society. Where a society is characterized by poor morals like corruption, company officials are more likely to practice poor ethics.[23] In Uganda over the years there has been a decline in the morals of society especially manifesting in personal and corporate greed[24], materialism, [25] short-term gains mentality,

[21] Hofstede, G. 1980. Culture's consequences: International differences in work-related values. London:
Sage Publications cited in Nigel Finch, Testing The Theory Of Cultural Influence
On International Accounting Practice *Allied Academies International Conference* p.27.

[22]Gao, Simon S. – Handley Schachler, Morrison.: The Influence of Confucianism, Feng Shui and Budhism in Chinese Accounting History, Accounting, Business & Financial History, Volume 13, 1 March 2003,
(Çevrimiçi) www.taylor andfrancis.metapress.com/index/0L0UJH89A2LYRMBQ.pdf,03.06.2006cited in CigdemSolas, Sinan Ayhan, The Historical Evolution Of Accounting In China: The Effects of Culture *Spanish Journal of Accounting History* No.7 (December 2007) p.151.

[23]See Simeon Wanyama, 'Corporate Governance and Accountability in Uganda : An Analysis of Stakeholder Perspectives' (2006) ( Phd Thesis at the University of Dundee) at p. 103.

[24]Justice Geoffrey Kiryabwire, *Supra* where that author mentions criminal greed, cultural tradition (at p. 33) , failure to observe the basic principles of good corporate governance, and corporate ethical behavior (p. 34).

[25] Haji Ahmed Ahmed, 'Ethics? What's it? ' *Wealth Creation Journal* Vol. IV 2007 p.25 at 28. See also Lajul Wilfred, *Impact of African Traditional Ethics on Behaviour in Uganda*, in MAWAZO: The Journal of Humanities and Social Sciences, Makerere University, Vol. II No. 1 April 2011, (p.131) Makerere University Printer, Kampala, who argues that in Uganda moral decline is manifested by the use of the end justifying the means, and the use of Machiavellian theories which state that politics ought not be subjected to morals or else leaders will be weak. He also argues that in Uganda people who amass wealth are seen to be heroes, while those who amass wealth slowly are considered fools. H also argues that allegiance to families may encourage corruption because decisions may be made in the interests of tribal allegiance as opposed to the best interests of the corporation. Simeon Wanyama, *supra* at p. 14 notes that tribal allegiances ' may lead

the pressure to deliver and absence of a sufficient number of good role models.[26] It can, therefore, be inferred from this that company officials are more prone to unethical practices today than before. Also, where there is a poor ethical culture in society, it affects the regulators' ability and willingness to give oversight of companies and the different players in the economy. Similarly, it affects the ability of different gatekeepers to play their watchdog role effectively since they themselves will be inclined to act unethically, being part of the society.

Where there is a lack of political will against corruption there will be an environment in which good ethical practices in business are discouraged, while on the other hand, bad ethical practices go unchecked or are given occasion to thrive. On the other hand, where there is strong political will to fight bad ethics, good ethics in corporate governance will be encouraged to thrive.[27] It has been observed that in Uganda there has been a lack of a sufficient political will to fight corruption,[28] which it is opined, encourages bad ethics in corporate governance in the country. With respect to the marketing environment, the environment in which the companies carry out business is also important, for example in an environment where bad competition practices are allowed there will be a great deal of unethical practices allowed to be perpetuated.[29]

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to conflicts between acting in the best interests of the company or institution where one works, or fulfilling the tribal, clan or family expectations. Some officials may end up in unethical practices in order to raise money to satisfy these expectations'.

[26]Jane Gitau, *Supra*at p. 11 citing Charles Muchene, the Country Leader Price water house coopers by 2005.

[27]Justice Geoffrey Kiryabwire, *supra* p. 37. See also Birungyi Cephas *supra* p.7 where that author discusses cultural attitudes concerning eating beef, dogs and western countries who have zero tolerance for corruption. That author also suggests that poverty may contribute to increased corruption in a society.

[28]Simeon Wanyama, *supra*at p.176 footnote 136.

[29]Kimera Henry Richard, *Competition Regimes in the World- A Civil Society Report* ( Uganda) ( CUTS International) p. 297.

### d. The Legal and Regulatory Environment

The legal and regulatory environment includes the legislation regulating corporate governance and legal reprisals or liability resulting from the abuse of those laws and regulations. A key factor closely related to the risk of liability is the efficiency of the legal system, because if the legal system is characterized by swift penal action against errant directors or managers, there will be a deterrent against bad ethical practices. This is more so where there is lack of rule of law, and in this respect the environment may not be very favorable in Uganda since there are concerns about a massive case backlog in the courts of judicature, which may hinder the effectiveness and efficiency of the legal system especially in the handling of commercial disputes.

## Conclusion

Ethics in business is important but factors both internal and external to the company have the effect of increasing the likelihood of unethical practices being perpetuated within the company. Any measures to improve the practice of ethics in corporate governance ought to take into account the above threats to ethical practices. The next article will address measures that may be taken to addresses these hindrances to good ethics, in the context of Uganda.

# CORRUPTION AS A CRIME AGAINST HUMANITY: ANY JUSTIFICATION?

***By***

***Abdulkareem Azeez****

**Abstract**

*Corruption is an ageold menace having devastating impact on global peace, economic development and progress. It covers a wide range of practices which is bordering on law, economics, security, religion, morality and above all, survival! Corruption impeaches good governance, rule of law, harmony, peace, progress and development. According to the World Bank, more than one trillion dollars is paid in bribes every year and the cross-border flow of proceeds from corruption, criminal activities and tax evasion is estimated at 3.61 trillion dollars every year or the equivalent of 32.5 percent World's Gross Domestic Product. Similarly, the African Union (AU) estimated that corruption costs African economies in excess of 148 billion dollars a year which represents 25 percent of Africa's Gross Domestic Product. The cumulative effects of this are slow but painful death of millions of lives who ought to be beneficiaries of the stolen funds. Notwithstanding the overwhelming effect of corruption, it is not listed as one of the crimes against humanity in the Rome Statute. This paper therefore is an attempt to examine the meaning and effect of corrupt practices with a view of justifying the inclusion of corruption as a crime against humanity.*

**Keywords: Corruption, Crime, Humanity, Bribes, Peace & Good Governance**

## Introduction

The idea of including the offense of corruption as a crime against humanity may sound interestingly astonishing especially when viewed against the backdrop of universal jurisdiction. However, a detailed examination of corruption, its effects vis-à-vis the effects of the offences that constitute crimes against humanity may provide the necessary nexus on why the argument that corruption should be accommodated as a crime against humanity might be, perhaps plausible.

Whereas, there are local, regional, and international legal instruments[1] put in place to regulate and punish corrupt practices, the enforcement mechanisms have not been thorough and the overall effects of corruption have been mischievously underestimated. Like any of the offenses which constitute crimes against humanity, corrupt practices are universally odious and the perpetrators should be considered as *hostis humanigeneris* (An enemy of all humankind).[2]

This troubling practices in most cases flourishes where the criminal justice system and governance are weak, where decision-making is unaccountable and access to decision-makers is dependent on restricted social networks, where earning does not correspond with the basic needs of life and where government control and enforcement of the existing laws are weak[3]. In few instances, corrupt acts are a response by individuals to a culture that stress economic success as an important goal but nevertheless strongly restricts access to opportunities; it flourishes in a culture that encourages display of affluence without any regard as to how the wealth has been obtained.[4]

The scope of this research is to examine corruption from the specific perspective of fraud, extortion, embezzlement, bribery and abuse of public property or office for private gain. In the same vein, the research will demonstrate using specific examples how the offense of corruption can be accommodated within the general purview of crimes against humanity on one

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[1] Almost each country has laws put in place to regulate corruption, from the National, Regional and International level. For instance The Independent Corrupt Practices Commission (ICPC) Act 2000 and the Economic and Financial Crimes Commission (Establishment) Act 2004 in Nigeria, African Union Convention on Preventing Corruption adopted by the Heads of State & Government of the AU on 12th July, 2003 and United Nations Convention Against Corruption, New York, 2004 (UNCAC)

[2] David Luban (A Theory of Crimes Against Humanity" Georgetown University Law Center 29 Yale Journal of International Law, 2004 @ Page 8

[3] Corruption and Bribery- Poverty and Economic Development Impacts. Online at http://www.controlbae.org.uk/back [Accessed: 27 April, 2014]

[4] Daniel T. "The Cause of Corruption: A Cross- National Study". Journal of Public Economics76, (No. 4, June) 2000 @ p399-457

hand and within the specific meaning of extermination and other inhumane act as defined by the statute on the other hand.

**Corruption and its Effects**

Corruption is a global challenge which cut across all systems and regimes. It does not dispose itself to any coloration in the forms of religious denominations, political system, age, or gender. Corruption is found in political, social, religious, and economic systems. Each country suffers one form of corruption or the other.[5] It is a pervasive global threat which continuous to be a major concern for all organizations of all sizes across all regions and in virtually all sector[6]. It is a cancer in Africa as well as around the world because it siphons off resources that should be used to lift people out of poverty[7].

To define corruption, it is crucial to note that there are as many definitions as there are many societies, countries and institutions dealing with the problem of corruption. This is so because what is regarded as corruption depends on the actors, profiteers, initiators, how and where it takes place[8].Therefore, the meaning of corruption varies from country to country depending on the legal and or moral standards or acceptable norms of a given society or country[9]. However, this writer's choice of definition is influenced by the features of economic crime as published by the global economic crime survey 2014. They are asset misappropriation, procurement fraud, bribery and corruption, cybercrime, and accounting fraud.[10]

[5]Lipset S.M and Gabriel S.L. Corruption, Cultures and Markets. In Lawrence E. H.and Samuel P.H. (Eds.) Culture Matters. New York: Basic Books, 2008, @ p112. See also Abdulkareem Azeez "The Role of Religious Leaders in the Fight Against Corruption" A Paper Presented at the Law and Religion Conference, Stellenbosch South Africa May, 2014

[6] PWC "Global Economic Crime Survey 2014" Available on www.pwc.com/economi-srime-survey Accessed on Thursday 26th March, 2015

[7] Ben Wolfgang "Joe Biden Urges African Nations to Tackle Corruption" The Washington Times, Monday August 2014. Accessed on Thursday March 26, 2015

[8] Corruption: The dimension and implications for development in Nigeria. Online at http://www.proshareng.com//articles/1929 [Accessed: 4 May, 2014]

[9]Ganizani Gwai. Definitions of Corruption. Online at http://www.tigweb.org/youth [Accessed: 4 May, 2014]

[10] PWC "Global Economic Crime Survey 2014" Available on www.pwc.com/economi-srime-survey Accessed on Thursday 26th March, 2015

In Nigeria for instance, section 2 of the ICPC[11] Act defines corruption to include, bribery, fraud, and other related offences while the EFCC[12] has powers to investigate and prosecute offences such as advance fee fraud, money laundering, counterfeiting, illegal funds transfers, futures and market fraud, fraudulent encashment of negotiable instruments, fraudulent diversion of funds, computer fraud, contract scam, forgery of financial instruments and issuance of dud cheque.

In Zambia, corruption is defined as the soliciting, accepting, obtaining, giving, promising or offering of gratification by way of bribe, or other personal temptations of inducement or misuse or abuse of a public office for private advantage or benefit.[13] The summary of the above definitions therefore is that corruption includes any conduct, action or behaviour that departs from legitimately established laws, procedures, and practices.

Flowing from the above, it is apt to consider the various dimensions in which corruption emanates. Corruption comes in different dimensions; ranging from bribery, diversion of public funds, tax evasions, selling justice for money, sales and leakage of examination questions, lecturers selling marks for sexual favours, police extortion of motorists, favouritism in bidding process and appointments, admissions through connections, over invoicing and falsification of documents, immigration officers collecting money to issue passports, money laundering, forgery and counterfeiting, illegal trade in arms, misappropriation and misuse of public funds, violation of office oath, political patronage, divide and rule techniques and looting of public funds.[14]

The above points were re-echoed by Michael Adegbola[15] when he says, corruption covers a wide range of social misconduct which include: fraud, extortion, embezzlement,

[11]The Independent Corrupt Practices Commission (ICPC) Act 2000.

[12] The Economic and Financial Crimes Commission (Establishment) Act 2004

[13] The Zambian Anti-Corruption Act 1996 (No: 42)

[14] El-Rufai N.A. Is Liberal Democracy Encouraging Corruption and Corrupt Practices: The Privatization Process in Nigeria?. The Nigerian Social Scientist Vol. 6 (No. 2) 2003.

[15] The Role of Religious Leaders in Combating Corruption: The Christian Perspective available at michael-adegbola.blogspot.com Thursday 16 January, 2014

bribery, nepotism, influence peddling, bestowing of favours on friends without due regards to procedure, rigging elections, abuse of public property, the leaking of official government secret, sales of expired and defective goods like drugs, food, electronics and spare parts to the public. The prevailing atmosphere for corruption to strive therefore is that of deceptiveness, fraudulent impressiveness and the false pretensions and counterfeit appearances.

**Key Drivers and Effects of Corruption**

In discussing the key drivers of corruption, I will adopt the five key drivers provided by Lawrence Cockroft[16] in his book[17] and will reproduce same verbatim:

1. The size of the 'unrecorded economy'. In many countries, from Russia to Nigeria, unrecorded transactions amount to at least 40% of GDP, constituting a vast reservoir from which corrupt payments can be made without trace.
2. The system of 'political finance' by which huge sums of money, often gained corruptly are invested in the political process with the expectation of a corruptly gained reward once power is secured or re-secured. This is easily discernible in most political systems from the United States to India.
3. The role of organized crime in securing political support and cover for trading operations ranging from drugs to counterfeit pharmaceuticals- a recognized practice from Italy to Thailand.
4. The role of national and international companies in the 'mispricing' of products which enable a large chunk of profits to be moved to havens where tax is low or non-existent- a common phenomenon in Russia to Peru.
5. The system by which illegally and corruptly gain products such as oil, timber, and rare minerals transit from the illegal sector to the legal sector such as timber from Cambodia or counterfeit drugs in South East Asia[18].

[16] A development economist and former Chair of Transparency International

[17] "Global Corruption, Money, Power and Ethics in the Modern World" Published by University of Pennsylvania Press, February 24, 2015

[18] See also Laurence Cockroft "Corruption: A Global Problem or African Cancer" September 7, 2012. Available on www.africanarguments.org Accessed on March 26, 2015

The effect of the above five key drivers in any economy or society is always catastrophic. It impedes economic growth by discouraging foreign and domestic investment, taxing, and dampening entrepreneurship, lowering the quality of public infrastructure, decreasing tax revenues, diverting public talent into rent seeking and distorting the composition of public expenditure. It reduces governance capacity, weakens political institutions and citizen participation in politics and lower quality government services and infrastructure such as clean water, good roads, hospital, and basic needs of life[19].

Michael Johnston in his article[20] opined that extensive corruption threatens the basic notion of a fair return to investment, risk, and work. It undermines basic property rights, the court, police, banking, and currencies. It creates an environment where contracts cannot be readily enforced, assets cannot be protected, regulatory processes become tools of self-enrichment and the basic safety of persons and property is not assured. Corruption erodes the institutional capacity of government as procedures are disregarded, resources are siphoned and public offices are bought and sold.[21]Because of corruption, nearly 1.2 billion people in the world do not have guaranteed access to water and more than 2.6 billion are without adequate sanitation with devastating consequences for development and poverty reduction. Equally, in 2008, it was estimated that 8.795 million deaths of children under the age of five occurred worldwide and at least 140,000 of them are corruption related.[22]

Corruption creates unemployment and according to a recent study, it was found that 10% increase in the unemployment rate would increase the suicide rate by 1.47% which means the increase in unemployment would lead to an additional 128 suicides per month in the United States[23]. If this is happening in the United States, one can only imagine what other countries especially those with developing economies are going

[19] Eric C., Frances C., and Bertram S. Corruption and Poverty: A Review of Recent Literature Final Report, Management System International, 2003.
[20] Poverty and Corruption. Forbes News 22 January, 2009
[21]ManojBala "Effects of Corruption on Society" Hubpages 21st September, 2014
[22] Supra
[23] Dean Baker "The Human Disaster of Unemployment" Sunday Review, The New York Times, May 12, 2012

through. In the same vein, there were an estimated 289,000 global maternal deaths in 2013, out of which 62% (179,000) is from Sub-Saharan Africa due to complications during pregnancy and childbirth.[24]

According to the Nobel Prize winning economist, Amartya Sen 'There is no such thing as a political food problem. While drought and other naturally occurring events may trigger famine condition, it is government action or inaction that determines its severity"[25]. As a result of corrupt practices, there have been spontaneous factory collapses in Dhaka, Bangladesh resulting in 1129 deaths in 2013[26]. Corruption by itself is dangerous but when combined with poverty and lack of basic needs of life, is disastrous.[27]

**Crimes against Humanity and its Features**

The phrase "Crime Against Humanity" has acquired enormous resonance in the legal and moral imaginations of the post-World-War II and suggests offenses that aggrieve not only the victims and their own communities but all human beings regardless of their community and that, these offenses cut deep violating the core of humanity that we all share and distinguishes us from other being.[28]The features or characteristics of the offenses that constitute crimes against humanity in all the existing legal instruments[29] are similar with few distinctions. For the purpose of this research, the definition of crimes against humanity as provided under the Rome Statute and ICTR will be adopted. Article 7 of Rome Statute which is *impari materia* with Article 3 of ICTR Statute, provides:

> *For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a*

[24]Ludovica Laccino" Top Five Countries With Highest Rates of Maternal Mortality" IBT Times Co, Ltd, May 6, 2014
[25] Supra
[26] Joel Gill "Death By Corruption" Geology for Global Development, January 27, 2014
[27] Supra
[28] David Luban" A Theory of Crimes Against Humanity" 29 Yale Journal of International Law Page 4
[29] Nuremberg Charter, Tokyo Charter, ICTY Statute, ICTR Statute and Rome Statute

*widespread or systematic attack directed against any civilian population with knowledge of the attack:*

*a. Murder*
*b. Extermination*
*c. Enslavement*
*d. Deportation or forcible transfer of population*
*e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law*
*f. Torture*
*g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparative gravity*
*h. Persecution against any identifiable group or collectively on political, racial, national, ethical, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court*
*i. Enforced disappearance of persons*
*j. The crime of Apartheid*
*k. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*

*2. For the purpose of paragraph 1:*

*a. "Attack directed against any civilian population" means a course of conduct involving the multiple commissions of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;*
*b. Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access of food and medicine, calculated to bring about the destruction of part of a population;*

My approach to this discussion is to provide a general requirement or ingredients for the offense of crime against

humanity and subsequently focus or zero down my argument on the offense of extermination and inhumane act.

On the meaning of crimes against humanity, the Trial Chamber, in *Prosecutor v. Bagosora & Others*[30] states that for an enumerated crime under Article 3 of the ICTR to qualify as a crime against humanity, the prosecution must proof that there was a widespread or systematic attack against civilian population on national, political, ethnic, racial or religion ground. That, Crimes against humanity consist of two layers. The first layer (General Element) is to the effect that a crime against humanity must be committed as part of widespread and systematic attack against any civilian population on national, ethnic, racial or religion ground. The second layer list six specific underlying crimes plus one residual category of 'other inhumane acts' which qualify as crimes against humanity when committed in the context of widespread and systematic attack against any civilian population on any of the enumerated discriminatory grounds.

The ingredients of the offense were clearly outlined in the decided case of *Prosecution v. Ntagerura & others*[31]. The Chamber explained in the Semanza judgment that in connection with crimes against humanity, the prosecutor must prove:

a. That there was an attack
b. That the attack was widespread and systematic
c. That the attack was directed against civilian population
d. That the attack was committed on national, political, ethnic, racial or religion ground
e. That the accused acted with the knowledge that his act (s) formed part of the attack.

Similarly, in *Prosecution v. Akayesu*[32] the court ruled that crimes against humanity can be broken down into 4 essential elements:

a. The act must be inhumane in nature and character causing great suffering or serious injury to body or to mental or physical health
b. The act must be committed as part of widespread or systematic attack

[30] ICTR Trial chamber, December 18, 2008 @ paragraph 2165
[31] ICTR Trial Chambers, February 25, 2004 Paragraph 698
[32] ICTR Trial Chambers September 2, 1998 Paragraph 578

c. The act must be committed against numbers of the civilian population
d. The act must be committed on one or more discriminatory grounds of national, ethnic, racial or religion grounds.

I shall therefore provide a clear guidance on the meaning of each ingredient of the offence:

**a. On the Meaning of 'Attack'**

The attack envisages under the statute need not be violent or committed during armed struggle. This position was given judicial approval in *Prosecutor v. Kamuhanda*[33] where the court held that an attack committed on specific discriminatory grounds need not necessarily require the use of armed force; it could also involve other forms of inhumane treatment of the civilian population. In Akayesu[34] an attack may be non-violent in nature, like imposing a system of apartheid, extermination, or exerting pressure on the population to act in a particular way. Similarly, in Compare Semanza[35] the court held that the prosecution did not have to prove the existence of an armed conflict and the statute does not require that the crimes be committed in the context of armed conflict.

From the above judicial authorities and pronouncements, an attack therefore need not involve the use of violence or armed forces. Suffice to say that extermination, exertion of pressure or inhumane treatment against a civilian population will qualify as an attack.

**b. On the Meaning of 'Widespread and Systematic'**

The court in *Prosecutor v. Muvunyi*[36] ruled that, in accordance with customary international law, the twin element of widespread or systematic should be read disjunctively and not as cumulative requirements. The point therefore is, the prosecution would have discharged the legal burden if he was able to prove either widespread or systematic attack.On the meaning of 'widespread' the trial chamber in *Prosecutor v. Seromba*[37] said

[33] ICTR Trial Chamber January 22, 2004 Paragraph 661
[34] Supra @ Paragraph 581
[35] ICTR Appeal Chamber, May 20, 2005 Paragraph 269
[36] ICTR Trial Chamber, September 12, 2006, Paragraph 512
[37] ICTR Trial Chamber December 13, 2006 Paragraph 356

widespread may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims while 'systematic' may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources. Also, in *Prosecutor v. Muhimana*[38] the concept of a "Systematic" attack within the meaning of Article 3 of the statute refers to a deliberate pattern of conduct but does not necessarily require the proof of a plan. For the prosecution to discharge this burden, it has to be shown that there was a deliberate pattern of conduct with or without the proof of premeditation.

### c. Who are 'Civilian Population'?

The trial chamber in *Prosecutor v. Kayishema & Others*[39] opined that because crimes against humanity may be committed inside and outside the context of an armed conflict, the term civilian must be understood within the context of war or as well as relative peace. Thus, a wide definition of civilian population is applicable and in the context of situation where there was no armed conflict.

On whether the crime has to be committed against the entire people, the court in *Prosecutor v. Bisengimana*[40] held that the term "Population" does not require that crimes against humanity be directed against the entire population of a geographical territory or area.[41] The crucial points to note are that the offense can be committed when there was no armed conflict and not necessarily against the entire population.

### d. On Parties

The parties basically are the category of people who are capable of committing the offence. In *Prosecutor v. Kayishema*[42] the court held that crimes against humanity are instigated or

[38] ICTR Trial Chamber, April 28, 2005 Paragraph 527
[39] ICTR Trial Chamber, May 21, 1999 Paragraph 127-29
[40] ICTR Trial Chamber April 13, 2006 Paragraph 50
[41] See also Prosecutor v. Kamubanda, Trial Chamber, January 22, 2004 Paragraph 669, Prosecutor v. Kajelijeli, Trial Chamber December 1, 2003 Paragraph 875-876.
[42] Supra @ Paragraph 125-26

directed by a government or by any organization or group. The crime can be committed by State and Non-State actors.

The above ingredients are the general requirements on what constitute crimes against humanity. I shall proceed to narrow down my argument to a specific offense of extermination, examine the meaning of extermination, the ingredients of the offense and argue why corruption should be accommodated within the meaning of extermination.

**Extermination**

The Appeal Chamber in *Prosecutor v. Seromba*[43] recalls that extermination as a crime against humanity under Article 3(b) of the statute is the act of killing on a large scale. The Appeal chamber stresses that in the jurisprudence of both ad hoc tribunals, the necessary *actusreus* underlying the crime of extermination consist of any act, omission, or combination thereof which contributes directly or indirectly to the killing of a large number of individuals. The crime of extermination requires proof that the accused participated in a widespread or systematic killing or in systematically subjecting a widespread number of people to a condition of living that would inevitably lead to death and that the accused intended by his acts or omissions this result.[44] The most important point to note here is that the accused by his act or omission created a condition of living that would inevitably lead to death and that the accused is aware of such repercussion.

**Elements of Extermination**

In *Prosecutor v. Kayishema & Other*[45] the trial chamber defined the requisite elements of extermination as:

i. The actor or accused participates in the mass killing of others or in the creation of condition of life that lead to the mass killing of others through his act(s) or omissions
ii. Having intended the killing or being reckless or grossly negligent as to whether the killing would result

[43] ICTR Appeal Chambers, March 12, 2008 Paragraph 189
[44] Prosecutor V Ntakirutimana ICTR Appeal Chamber, December 13, 2004 Paragraph 522
[45] Supra @ Paragraph 144

iii. Being aware that his act(s) or omission(s) forms part of a widespread or systematic attack against any civilian population on national political, ethnic, racial or religious ground.[46]

The prosecution as a matter of law must established the above elements before the court can grant conviction on a charge of extermination. Therefore, for anyone to argue successfully that corruption should be accommodated under the offense of extermination, he must be able to demonstrate convincingly that corruption has the above elements.

**The Justification**

***i. The first element is that there was a mass killing or creation of condition of life that lead to the mass killing of others through his act(s) or omissions.***

The trial chamber in *Prosecutor v. Ndindabahizi*[47] held that extermination may be committed less directly than murder, as by participation in measures intended to bring about the death of a large number of individuals but without actually committing a killing of any person. The implication of this decision is that, it will be sufficient for the prosecution to simply establish that the accused put in place measures designed or intended to bring about death of large number of individuals without actually committing the killing. In a more elaborate and comprehensive form, the court explained that extermination includes the intentional infliction of conditions of life, inter alia, the deprivation of access to food and medicine calculated to bring about the destruction of part of a population.[48] It means therefore, that anyone who steals or diverts resources meant for provision of clean water, building or equipping the health facilities, allows the procurement of fake and counterfeit drugs to be administered to innocent civilian population would have succeeded in creating a condition of life intended to bring about the death of the prospective beneficiaries.

[46] See also Prosecutor v. Bagilishema Trial Chamber June 7, 2001 Paragraph 89
[47] ICTR Trial Chamber July 15, 2004 Paragraph 479
[48] See Prosecutor v. Kunawal & Others Case No IT-96-23/1-A June 12, 2002 @ paragraph 94. See also, Article 7(2)b of Rome Statute

***ii. The second element is that the accused must have intended the killing or being reckless or grossly negligent as to whether the killing would result.***

This is an objective test which requires a reasonable man's test approach. Any reasonable man will know or ought to have known that stealing or diverting money or resources meant for food, medicine, water, electricity, creation of jobs opportunities or negligently accommodating the smuggling of fake and counterfeit drugs, ignoring the procurement rules and allowing substandard building or construction materials to be used etc. will or ought to have known that the overall effect of such act or omission will be slow but painful death of the civilian population caused in most cases by malnutrition and poverty; high maternal mortality rates due to complications during delivery and inadequate medical facilities, disease like typhoid due to lack of clean water, accidents due to bad roads and so many more.[49]

***iii. The third element is that the accused must be aware that his act(s) or omission(s) forms part of a widespread or systematic attack against any civilian population on national political, ethnic, racial, or religious ground.***

The element of widespread and systematic attack has been discussed above under the general requirements of crimes against humanity. What was not discussed was whether the attack against the civilian population was on national political, ethnic, racial or religious ground. To answer this query, the court in *Prosecutor v. Blaskic et'al* provided an elaborate explanation that:

> *It would also take into consideration the existence of a political objective and an acknowledged policy or plan pursuant to which the attack is perpetrated or an ideology in the broad sense of the word that contemplates the destruction, persecution or weakening of a community, the preparation and use of significant public or private resources and the participation of high political or military authorities.*[50]

[49] See Adigun V A.G Oyo State (1987) 1 NWLR Pt53. P678 @ 720 Per Eso JSC
[50] See Prosecutor v. Blaskicet'al Case No IT-96-23-1-A June 12, 2000 Paragraph 203

The third requirement would have been fulfilled where a government by its policy or programmes impoverishes the people by siphoning the resources meant for the socio-economic development of the people or by its policy condone, refuse or neglect to fight corruption. It is therefore safe to conclude that based on the above analysis, the offense of corruption satisfied the essential element of extermination as a crime against humanity and should be treated as such.

**Inhumane Acts**

The other omnibus clause is the Inhumane Act which is the general provision and can accommodate any other crime of the same family with crimes against humanity. In *Prosecutor v. Bagosore*[51] the crime of inhumane act is defined as a residual clause for serious act which are not otherwise enumerated in Article 3 of the ICTR statute. They must be similar in gravity to the acts envisaged in Article 3 and must cause mental or physical suffering or injury or constitute a serious attack on human dignity.

As to what constitutes inhumane act, the court in *Prosecutor v. Muvunyi*[52] held that the crime of other inhumane acts encompasses acts not specifically listed as crimes against humanity but which are nevertheless of comparable nature, character, gravity, and seriousness to the category of crimes in sub article a-h of Article 3. The inclusion of a residual category of crimes in Article 3 recognizes the difficulty in creating an exhaustive list of criminal conduct and the need for flexibility in the law's response. The *mens rea* required for inhumane acts is the intent to inflict serious bodily or mental harm upon the victim and the knowledge that the act or omission is part of a widespread or systematic attack.[53]

The legal burden on the prosecution to prove that the accused's act or omission constitute inhumane acts is the establishment of intent to inflict serious bodily or mental harm upon the victim and the knowledge that the act or omission is

[51] Supra @ Paragraph 2218
[52] Supra @ Paragraph 527
[53]See also Muvunyi Supra @ Paragraph 529 where it was held that the act or omission must deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity.

part of a widespread or systematic attack. Accommodating corruption as part of inhumane act is simple because the accused knew or ought to have known that the effect of stealing from the national treasury or condoning and encouraging massive corrupt practices will mean subjecting the civilian population to perpetual state of penury where the populace could not afford basic need and necessity of life.

What can better explain mental harm than the agony of families who lost their loved ones to building collapses as a result of shoddy procurement process and the use of substandard building and construction materials; millions of jobless youths because the funds meant for creating employments have be siphoned to the offshore accounts; the mental torture of losing wives and potential mothers to maternal mortality; the mental frustrations of jobless graduates after long years of studying with the contemplation and the eventual commission of suicide; the unimaginable mental harm of a patient realizing that his illness was as a result of taking substandard and counterfeit drugs, the pain of losing parents to road accidents caused by bad roads and the mental agony of living in a perpetual darkness because they cannot afford electricity amongst others?.

Categorizing corruption as part of inhumane act is the least the international community could do to salvage millions of victims of this brutal act from the blood sucking leaders who will stop at nothing in milking dry the innocent but vulnerable civilian population.

## Conclusion

Why would countries like China and Vietnam punished the offense of corruption with death penalty?[54] Why would the African Union and the United Nations went through the huddles of putting in place measures to curb corruption? Because corruption is not only dangerous but deadly. Corruption is murder, extermination, inhumane and crime against humanity.

Due to unchecked corrupt practices, the cure for AIDS, Cancer, unemployment, maternal mortality, the mission to the Mars has become a myth. In fact, the next Bob Marley, the next Malcolm X, Ben Cason, Nelson Mandela are trapped in a village

[54] Zachary Keck "China Overwhelmingly Supports Death Penalty for Corrupt Officials" The Diplomat November 7, 2014

somewhere in the so called Third World due to corrupt leadership.

Similarly, the biggest untapped resources are not beneath the earth surface, they are on earth. They are the very people whose future have been stolen by the injustices of the world, they are the people whose dreams have been dashed by corrupt leaders, they are the people who do not have what to eat, where to sleep, means of survival, who could not afford basic human needs like clean water, electricity, food, hospital, and education.

Corruption kills and murder people every day. And we need to deal with it as a form of murder, inhumane act, and deliberate extermination of innocent lives. When funds for hospitals are diverted to the private purse of some corrupt individuals, how many people die from preventable illnesses? When a school which should have been built, and equipped ends up in the pocket of some arrogant villain, how much human potential, future leaders, future doctors, lawyers, teachers, politicians are being sacrificed? When procurement laws are being violated with impunity, how many markets, industries, schools, residential houses are destroyed by that one greedy action?[55]

Corruption has killed more people than the entire offenses under crimes against humanity! Corruption is murder and deliberate extermination of civilian populations; it is *hostishumanigeneris* and must be treated as such.

[55] African Holocaust "Corruption is a Cancer" available on www.africanholocaust.net

# RIGHT TO ACADEMIC FREEDOM: ITS PLACE UNDER UGANDA CONSTITUTION

***By***

***Ojo Obalowose****

**Abstract**

*The whimsy absence of express provisions of law on the right to academic freedom in Uganda constitution and other subsidiary laws becomes a precursor to grave violation of this right not only by the state, but also by private individuals and other entities. Aside copious absence of these laws in the Constitution, paucity of knowledge that these rights exist amongst beneficiaries, and the apathy* expressed *by the judiciary and legislative organs in this direction is worrisome. Those who seem to be aware of the existence of these rights question its legality and applicability. The cumulating of these odds has endeared victims of such violations to take succor on a larger platform through an international instrument under the aegis of "Kampala declaration on social responsibility and intellectual freedom," which clearly sets out these rights. It is upon these parameters that the scope of this work shall be built as it sets out the right of all stake holders, which includes teachers, lecturers and professors in universities or other academic institutions, and a cursory analysis of legislative and statutory lacuna thereto.*

## Introduction

The right to academic freedom refers to the right of professors, teachers and lecturers in universities or higher institutions of learning to speak freely and express their intellectual wish or opinion on political, social, and economic issues without fear of persecution, harassment, sanctions or loss of position.[1] Also according to Professor M. Mazrui[2], the right to academic freedom is a sub- right to education and free speech/freedom of expression.

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[1](1940), Statements on Academic Freedom

[2] Academic freedom in Africa

The right to education and freedom of expression are provided for in the constitution[3] and other international human right instruments,[4] as "human rights", and further recognized as essential in the realization of other rights[5] which are social, political, and economic in nature. In that respect, Veriavaght and Coomans posited that such rights as the right to choose work and take part in leadership and decision making in one's country or society can only be exercised meaningfully once a minimum level of education has been achieved.[6] It is also regarded as a veritable tool for the development of human right culture and fundamental freedoms as a means of stimulating development.

According to article 1 of the Kampala Declaration on Intellectual Freedom and Social Responsibility, everyone has the right to education, and participate in intellectual activities. In the bid to give credence to importance of education, the committee on economic, social, and cultural right posits that education is one of the best investments a State could foray into. However, the importance of education is not only practical, hence a well-educated, enlightened and active mind would be able to wonder freely and widely as it becomes the source of joy and rewards of human existence.

Legal standard on the right to education is predicated on two basic spectrums, access to education on the basis of equality, non-discrimination and freedom to choose the kind of institution and content of education so desired.[7] The right' is all encompassing as it braces for education in all its forms, such as primary education, secondary education, technical, vocational and higher education.[8]The words of Mazrui is highly instructive in construing the right to academic freedom, according to him "the essentials of academic freedom are firstly that universities have freedom to decide what to teach and to some certain levels, who to teach; secondly, freedom for academics to prioritize research and the manner of conducting such research, to publish

[3] Article 30 of the 1995 Constitution of the Republic of Uganda
[4]Kampala Declaration on Intellectual Freedom
[5] Article 30 of the 1995 Constitution of the Republic of Uganda
[6]Veriavaghts E &F Coomans the Right to Education in Heynsseels, Social, Economic Rights in South Africa 2005.
[7] Circle of Rights, Economic, Social and Cultural Rights Admission.
[8] Paragraph 8-16 UNSCSCR

research determinations and to publish their scholarly views, thirdly, freedom of expression for academics".

On the other hand, the Committee on Economic Social, and Cultural Rights also alluded to the fact that the right to academic freedom is the right of individual academics to do research, publish and disseminate knowledge through teaching. It also vests the right in academic institutions such as universities, to demand a certain amount of autonomy to be accorded to them for its realization. The right also seeks to indemnify academic staff against persecution, harassment or intimidation resulting from their intellectual work and opinions. This is ensured by guaranteeing job security and prohibition of arbitrary dismissal or removal, except for reasons of proven misconduct and incompetence. Even in this context, disciplinary proceedings for dismissal or removal are required to be in accordance with duly set out procedures, for example, a fair trial before a duly constituted body of academic peers.

Given that the preceding paragraphs attempted to put in perspective what the right to academic freedom entails, the debate is, to what extent is this right(s) guaranteed under the Uganda constitution. The submissions of R. Holden[9]readily comes to fore in a literature on academic freedom as a human right in Africa;

> *It is something of a paradox, amidst the growing volume of literature on human rights in Africa, that none deals with the specific question of academic freedom as a right. This is even more puzzling given the serious infringements the right has suffered in most African countries in the post-independence er*a.

At this juncture, it becomes expedient to take a cursory glance at the historical development of academic freedom in a number of selected jurisdictions.

**Historical Development**

A peep at the European experience; particularly the case of medieval academic, shall give us a throwback on how it all evolved. European traditions recognized the fact that the ability of institutions of higher education to conduct research for the

[9]Academic Freedom in Africa. R. Cohen et al (Eds) on human rights and governance in Africa.

common good depends upon the freedom to search for truth and clarification. Prior to the 19th century, America did not consider institutions of higher education a center of research and scholarship, rather, the role of this institution of higher education was to pass received wisdom onto the next generation. Nowadays, academic freedom is considered as a basic human right in universities across the globe and consequently enshrined in many nations' constitution, as well as U.N Universal Declaration on Human Rights. However, 'university' as a concept and a centre for research and learning, the principle of academic freedom as an essential element for such institution, finds its genesis in Europe.

The university institution in Europe could be considered as the cradle of academic freedom. This development was a spontaneous movement and not the result of planning.[10]Students gathered around teachers or resorted to famous schools attached to cathedrals in centers known as studia. Formalization of powers and duties of these new institutions started with the famous *Authentica Habita* also known as *privilegium scholasticum,* was a law issued by roman emperor, Frederick Barbarossa at the diet of Roncaglia sometime around November 1158. It was an Edict intended to protect traveling scholars. This law was incorporated into the "corpus iuris" (body of civil law) and today takes the form of the fundamental charter of the medieval university.

In the late 19th century, the German notion of academic freedom consisted generally of three concepts: Lehrfreiheit, Lemfreihet and freiheit der wissenschaft. Lehrfreiheit, or freedom to teach, embodied the notion that professors should be free to conduct research and to publish findings without fear or reprieve from the church or state. The other concepts include the authority of the individual professor to determine the content of courses and lectures and the rights of students to determine the course of their studies for themselves. These concepts became a model for other institutions. The American tradition of academic freedom evolved from this German theory.

Between 1870 and 1900, many American college graduates migrated to German universities for advanced learning and upon their return, contended that the German concept of

[10]Nieruszowsku (1966) 16 Ed.

academic freedom should be entrenched into the United States academic policies. However, some scholars of higher education viewed academic freedom and university as an ancient concept that originated in Europe and later spread round the world. Others look towards Islamic world where cities like Damascus, Baghdad and Cairo witnessed the establishment of learning centers in the 19th century, which could be described as universities. Other cities like Cordoba, Fes, Kairouan, Isphahan, Samarkand, and Timbuktu also represented centers where institutions of higher education were established, which in the Islamic world of the 19th century; the mosque represented a center of higher learning. In Christianity, universities during the 12th and 13th centuries came under the authority of the pope and enjoyed liberties that protected them from the tyranny of the kings. Yet the European history tells a lot about intellectuals who were either tortured or killed because their ideas were considered threatening.

The nature of academic freedom in the Islamic world of the 19th centuries took the form of research, publications, and discoveries. Hence, bookshops began to crop up all over Muslim entities by the 19th and 20th centuries. The proliferation of books became a precursor to emergence of early libraries.

**Pre-colonial Period**

African pre-colonial society practiced a system of traditional education which evolved in a number of stages which were linked to an individual physical development, ranging from infancy to puberty. The level of education acquired at a particular time and the age of teachers was linked to the physical and cognitive development of a person and the roles they played in the community as they progress. Education was acquired mainly through institutions common to many pre-colonial African societies, such as games, storytelling, apprenticeship, and initiation practices. Thus, individual growth and knowledge is resonated via communal settings with various numbers of teachers at each specific stage of a person's development.

Taking into consideration the nature of African society, founded on the embers of communal setting, academic freedom is not guaranteed hence moral and communal institutions guide teachings. However, this is without prejudice to traditional education which was well developed in some part of Africa such

as Cairo, and Timbuktu in Mali,[11] University of Al.Azhar in Cairo, Egypt and University of Sankore in Mali were models of the African citadel of learning. It is worth to note that dating back to 12th century; the University in Timbuktu, Mali was revered for its good academic structure and planning. The academic curriculum braced for both the orthodox teaching and the Islamic doctrine. Its curriculum are graded into four levels, firstly the primary degree level, which requires the memorization of the holy Quran, learning the Arabic language, communication and writing skills and learning the basics of other academic disciplines. Secondly, there was the secondary degree level which introduced students to various strands of Islamic knowledge virtually all known science subjects are taught including physics, chemistry, and mathematics. The third and fourth level is referred to as the superior degree level in which advanced studies and research work were undertaken. The entire learning process revolved round the Islamic religion and its matrix, award of degrees in addition to academic excellence is dependent on the ability of students to demonstrate the mastery of Islam both in character and learning.

It is delightful to note that, the University was a conglomeration of autonomous institutions managed by teachers with whom students associates. Teachers were at liberty to express themselves within the purview of their academic rights and freedom, amidst an advanced research- based and good library organization.

**Colonial and Post-Colonial Universities**

African universities established during the colonial and post-colonial era could not create administrative upsets as most of their ideas are fashioned after the pre-colonial universities. They were autonomously managed institutions run by both academics and none academic staff. Although some school of thought opined that most colonial universities were established for the purpose of providing skills to African nations who in turn serve the colonial masters based on the skill acquired.

At the earlier years of independence in most African countries, there were established universities. Some were prior to

[11] WB Harvey; Freedom, University, and the Laws. The Legal Status of Academic Freedom in the Universities of Black Africa (1976) 22

independence while others came up thereafter. The likes of universities of Dar es Salaam, Tanzania, Nairobi, Kenya and Makerere in Uganda fall within these categories. The modus operandi of these universities was predicated on the ideals of institutional autonomy where academic freedom is guaranteed. Alluding to this fact, the statute establishing former university of East Africa, clearly stated that the object of the University was to preserve academic freedom and in particular, the right of a university or a university college, to determine who may teach, what may be taught, how it shall be taught and who may be admitted to study therein.[12] Unfortunately, this clause was in a whimsical manner omitted in the statutes setting up successive universities in East Africa.

The universities were state institutions and financially dependent on the state for their up keep. This dependency becomes the potent weapon for servitude. It is easier for authorities to whittle down the autonomous powers of the university in a bid to fostering its own agendas. They view the university as an established organ created subject to their whims and caprices for needs and development of the country. In this regard, it is the view of many leaders as exemplified by the former president of Tanzania, Julius Nyerere that:

> *The university colleges which comprise this university cannot be an island, followed with people who live in a world of their own, looking on with academic objectivity or indifference at the activities of those outside. East Africa cannot spend millions of pounds, cannot beg and borrow for the university, unless it plays a full and urgent task of East Africa even if it were desirable, we are too poor in money and educated man power to support an ivory tower existence for elite. Our problems will not wait. We must, and do demand that this university take on active part in the social revolution we are engineering.*

The former President of Kenya, President Jomo Kenyatta shared same sentiments. These expressional believes has in no small measure decimate, the sanctity of the citadel of higher learning where robust debate and cross pollination of ideas and superior arguments should hold ways over primordial and political sentiments for sustainable development. This orientation

[12] Currie & J de wall the bill of rights handbook (2005) 370-371

without doubt in my mind, were the cradle of pictorial psycho which by overt tapestry culminated into despotic leadership in most African countries. As a result of this incursion, university became a circus for academic puppetry where individual ideology and policy are determined by the authority. For those who insist on their academic freedom and rights are often treated as renegades and outlaws. One will not forget in a hurry the perversion suffered by Dr. Farouk Ibrahim of University of Khartoum, Sudan for teaching DARWINISM; according to them, such teachings offends the content and tenets of the Islamic religion. This is just one amongst legion of cases of human right abuses that has become the rubber stamp of the academics. Uganda academic environment has not fared better from the treachery and travesty that pervades the academic horizon within the east African sub region.

The political instability, upheavals and restiveness become a major debacle that fester the embers of human right abuses in the country. The draconian regime of military dictator, Idi Amin Dada of Uganda in the 1970's earned the country a sobriquet of "the land of blood". Human right abuses at this period attained a notorious proportion all over Africa, if not the world. According to a classic personality study carried out by Godfrey E.N. Nsubuga[13] in a book titled the Person of Idi Amin, he describes him thus; "Amin was a mixture of melancholic and choleric temperaments. He possessed extreme swinging moods. Joyous moment would suddenly change to dreary and tantrum moments. He was good at swimming, boxing, shooting, and rugby…he was a soldier by any description". Makerere University which was one of the foremost universities in Africa, renowned for its proven academic astute and integrity, became a victim of a bizarre leadership enmeshed in warped human right abuses.

In August 1976, troops led by the Minister of Education in a sinister manner, invaded Makerere Campus, and arrested students who boycotted lectures in reaction to certain academic anomaly that became the hall mark of a despotic regime. They were not only arrested but also subjected to torture. The government of Milton Obote (1980-85) brought some respite into

[13] Person of Idi Amin, a Classic Personality Study, Godfrey E.N Nsubuga

governance as against the Idi Amin's cabal. However, the face-off between Mahmood Mamdani, a Professor in the Department of Political Science, and the Obote's government, was testamentary to the depravity suffered by the academic. This trajectory was sequel to a paper presented in a conference, criticizing government policy on creation of national parks, which according to him, was an infraction on the right of peasants to agriculture. It run against the mill of logic when a society and its institution is christened as "free" and "democratic" only to be an amalgam of authoritarianism.

However, it is worth noting that one should not be oblivious of the fact that academic freedom has also been implored as a potent instrument for abuse. As much as academic freedom is intended to foster free exchange of ideas within comity of scholars, it also requires that the custodian and beneficiaries of these rights must discharge their responsibilities in line with the ethics of their professional calling. Erudite scholars have also posited that although, the context and content of the challenges to academic freedom differ between countries, however, they all center on the challenges of institutional autonomy, ideological controls, internal governance and intellectual authority. It was further noted that the forces that seek to erode academic freedom emanates from the State, civil society and the academia itself, where transformation are often driven by globalization.

In Western democracies, public prosecutions of academics who express unpopular or unorthodox views are rare; however, it is not unusual for pressures and threats to be directed at perceived non-conformist. It suffices to say that America despite its advancement could not be insulated from the trajectory woe tale associated with the quest for academic freedom. In April 1995, a five to four decision by the Supreme Court denied the Board of Higher Education of New York City the right to dismiss a Professor for having invoked the Fifth Amendment against incriminating himself with communist party membership. The majority of the court condemned at the outset the practices of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment.

On the State level, the Illinois State Circuit Court declared in March that the Broyles law, requiring teachers to swear that they are not communist, was constitutional.

In May, the New Jersey Commissioner for Education ordered the Newark Board of Education to respect the cases of three teachers who have pleaded the Fifth Amendment. These and more have further laid credence to the fact that factors militating against academic freedom are global phenomenon.

From the human rights perspective, Rajagopal in one of his write up contend that "to say that something is a human right is to assert …. that protecting such a right does not depend on the national legal system, but on international law". Therefore, various international treaties, general comments, declarations, pacts and agreements for the protection of academic freedom are relevant; in spite they are more of persuasive canon.

Effort to drive home this cardinal principle paid off through creation of different international legal framework for the protection of academic freedom. To mention but not limited to the following are: draft UNESCO Declaration On Academic Freedom (DDAF), world congress on education for human rights and democracy held in march 1993, UNESCO recommendation concerning the status of higher education teaching personnel, 11th March 1997, while the non-legal framework was advanced by "Lima" Declaration on Academic Freedom and Autonomy of Institutions of Higher Education adopted by the World University Service in 1988.

The Dar es Salaam Declaration on Academic Freedom and Social Responsibility of Academic proclaimed in 1990 by the Staff Association of the Institution of Higher Education in Tanzania was an illuminating factor towards achievement of this laudable objective. This Declaration was adopted by delegates of the staff associations of institution of higher education in Tanzania, on the 19th April 1990. The preamble to the Dar es Salaam Declaration noted that the constitution of Tanzania provides for the right to education and the right to opinion and expression, which rights, according to the Dar Declaration, includes academic freedom.

Kampala Declaration on Intellectual Freedom and Social Responsibility 1990 was adopted on the 29th of March 1990.

(KDIFSR) its cardinal principle was centered on giving every intellectual the right to conduct intellectual activities such as research and teaching, free from any interference provided such activities are within the precinct of best global practice.

The grillage between the independence of institutions on one hand, and their accountability to the State on the other has heck the determination on where rights under academic freedom begins and ends. It can also be difficult to explain the distinction between "academic freedom" and "free speech rights, both are related but possessed distinct legal concepts. The right to academic freedom co-exists with constitutional rights although courts have recognized the relationship between the two.

**Recommendation and Conclusion**

It should be noted that no matter the mix, the need for academic freedom cannot be overemphasized. Uganda should take all necessary steps in facilitating the domestication of the Kampala declaration on intellectual and social responsibility with particular emphasis on "academic freedom" into its constitution. Inspiration should be drawn from Dar declaration which extends its right to free speech to include right to academic freedom.

In conclusion, the wordings of Prof. A Mazrui is highly instructive:

> *The right to academic freedom is a sub right to right to education and freedom of expression, the constitution generally provides for the right to freedom of expression on all sorts of topics in all sorts of settings and the right to education. Academic freedom on the other hand addresses rights within the educational context of teaching, learning, and research both in and outside the classroom for individuals at private as well as public institution.*

# MARITIME SURVEILLANCE AND ENFORCEMENT PRIVITISATION GALORE IN NIGERIA: A COMPROMISE OF STATE SOVEREIGNTY

***By***

***Ariyoosu D. Adeyemi (Ph.D)* and Abdulkadir O. Abdulrazaq (Ph.D)*****

**Abstract**

*The freedom to participate in seaborne trade is one of the most vital engines motivating global economic progress and development in recent times. Coastlines, territorial waters, high seas and ports depend, to a large extent, on security in the world maritime domain. However, the serious threats posed to global order by the international terrorism, piracy, oil theft and bunkering, to mention but a few, have given rise to overriding and all important national security concerns among the port states. In response to these challenges, some states have increased their strategies with the establishment of maritime security enforcement forces such as the United States Coast Guard (USCG) in the United States, Nigerian Maritime Administration and Safety Agency (NIMASA) in Nigeria, Malaysian Maritime Enforcement Agency (MMEA) in Malaysia, etc. to address the problem. Conversely, Nigerian government has changed the policy and firmed out enforcement and surveillance activities in the entire Nigerian maritime domain to a private security company. This aim of this paper is to investigate the issue of privatising enforcement and surveillance mechanisms in maritime sector with a view to determining the appropriateness or otherwise of such privatisation. It has been found that privatization of the enforcement and surveillance mechanisms in maritime sector is ill-intentioned and inherently inimical to good governance and likely to do the nation more harms than good. The paper concluded that the issue of maritime enforcement and surveillance goes beyond the activities of private security company, and besides, the policy usurps the constitutional powers of the legislature which established maritime security forces through the legislature. It therefore recommended that concession of maritime enforcement and surveillance to private security company should be revisited to ensure partial privatization rather than total privatization.*

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## Introduction

Maritime commerce is, no doubt, significant in the world's economic development. The international shipping industry, for a very long time in the world's history, has always been playing major roles in the world trade and economy. In fact, it has been asserted that 95% of the world's cargo is being transported through maritime trade. In the United States of America, for example, more than half of all importations of six million containers are through sea with over two billion dollars' worth of cargo entering ports daily. The above estimation almost represents the impact of shipping business in all the countries with advantage of the seas like Nigeria, U.S.A, Malaysia, Indonesia, Australia, Brazil, to mention but a few. No doubt, world trade is largely depended on maritime transport;[1]hence maritime industries contribute in no small measure to the world's economy. As could be expected of any other business enterprises, the issue of Asymmetric security threats has been a serious challenge to the world's fleet.[2] These range from high sea robbery, piracy, terrorism, oil theft,[3] etc. which at long-run affects the progress of the international economy. Importantly, apart from the provision of security personnel designated to maintain peace and order as well as the enforcement and surveillance on the high seas by various governments of coastal states, shippers have also been engaging the services of the private security companies as guards to their ships in the cause of navigating through seas. The services often render by private security companies to shippers include tracking of ships, safeguarding the ships and crew, recovery of hijacked ships,

[1]Hong, N, "Maritime Trade Development in Asia: A Need for Regional Maritime Security Cooperation in the South China Sea", in W. Shicun and Z. Keyuan (eds), *Maritime Security in the South China Sea: Regional Implications and International Cooperation,* (Ashgate Publishing Ltd, England, 2009) 39.

[2]Xu, K, Myth and Reality: The Rise and Fall of Contemporary Maritime Piracy in the South China Sea, in W. Shicun and Z. Keyuan (eds), *Maritime Security in the South China Sea: Regional Implications and International Cooperation,* (Ashgate Publishing Ltd, England, 2009) 84-85.

[3] Ibid at 41.

negotiation for shippers in case of hostage, etc. Although, countries like Australia, Malaysia, Indonesia, Singapore and even U.S are averse to the strategy on the strength that the policy would aggravate the volatile ocean like straits of Malacca[4]and bring about proliferation of weapons.[5]The strait of Malacca is considered volatile because of series of unrest which have been recorded in the realm. In its supposed bid to follow suit of the practice that is mainly adopted by shippers, Nigeria government engages the services of a private security company for the purpose of maritime enforcement and surveillance - the move that is antithetical to the spirit of the establishment of navy and probably the first world ever.

It is against the above background that this paper examines the concept of privatisation and its goals in economic drive of a given country. The paper also considers the suitability of privatisation in maritime sector especially in the light of restless realm[6] which maritime domain has been classified in recent times. The paper takes into account the constitutional responsibility of the Nigerian navy and concludes that privatising enforcement surveillance of the country maritime domain usurp the functions of the navy. It argues that the practice has no semblance in maritime practice and depicts a weak state.

## Position of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) on Maritime Surveillance

Broadly speaking, a coastal state like Nigeria is jurisdictionally competent, and has the exclusive right, to

[4]Liss, C, "The Privatisation of Maritime Security- Maritime Security in Southeast Asia: Between a Rock and a Hard Place?" *Working Paper No.141* February 2007 <www.arc.murdoch.edu.au/publications/wp/wp141.pdf> *accessed on 6 July, 2014.*

[5] Pines, D. L,"Maritime Piracy: Changes in U.S. Law Needed to Combat This Exceptional Threat to National Security"<http://.www.orks.bepress.com/daniel_pines/2>accessed on 12 February 2014.

[6] Murphy, M.N, "Lifeline or Pipedream? Origins, Purposes, and Benefits of Automatic Identification System, Long-Range Identification and Tracking, and Maritime Domain Awareness", in Herbert-Burns .R, Bateman S, Lehr P, *Lloyd's MIU Handbook of Maritime Security,* (United States of America: CRC Press, 2009), 13. See also Shicun .W and Keyuan .Z, "Maritime Security in the Southern China Sea: Cooperation and Implications", in Shicun .W and Keyuan .Z, (ed), Maritime Security in the South China Sea: Regional Implications and the International Cooperation (Ashgate Pubishing Ltd, England, 2010) 3.

undertake surveillance and enforcement activities within its maritime domain pursuant to the Law of the Sea Convention.[7]This right to undertake surveillance and enforcement activities may extend up to twelve Nautical Miles from the baseline. In the exercise of such sovereign right, a coastal state enjoys the following exclusive rights with regard to undertaking monitoring and surveillance activities:

i. the economic exploitation and exploration of its Exclusive Economic Zone (EEZ); and[8]
ii. the exploitation of the sea bed and indeed sedentary species on the continental shelf.[9]

It needs be emphasised that all states, by implication, have rights to undertake surveillance and monitoring in the high seas which the coastal state must give due regard.[10] However, other states must not interfere with the exercise of the freedom of the high seas by vessels flying a foreign flag. The above supposition and exercise of power of sovereignty gives coastal state jurisdiction to legislate domestic law for the purpose of carrying out surveillance, monitoring and enforcement activities within its maritime domain.

It is generally observed that since the end of World War, the issue of traditional maritime threats which is a major role of navy has greatly reduced the world over, but non-traditional or asymmetric threats are on the rise yearly. Asymmetric threats often use methods, technologies and perspectives that are significantly different from those common with regular forces and their target is to exploit weakness of the state against which they fight.[11] On the strength of asymmetric threats arising from maritime waters which are affecting shippers, states like United States, Singapore, Malaysia, Nigeria, Australia, etc. have established a sort of coast guard for surveillance and monitoring

[7] See the United Nations Convention on the Law of the Sea (UNCLOS), 1982, Article 2.

[8] Ibid, Article 56. These activities include exploitation and exploration of living and non-living marine resources which may extend up to 200 nm from the baseline.

[9]Ibid, Article 56. This may possibly extend beyond 200 nm from the baseline in certain circumstances.

[10] Ibid.

[11] Carrillo, J. A, *etal*, "Changing Asymmetric Threats Require New Responses", Taylor, P.D, (ed), Perspective on Maritime Strategy: Essays from the Americas" (United States of America, Naval War College, 2008) 16.

activities. Specifically, Malaysia establishedMalaysian Maritime Enforcement Agency[12] while Nigeria on its part established Nigerian Maritime Administration and Maritime Agency.[13] These two agencies are empowered under the respective Acts that establish them to carry out surveillance and enforcement of law activities at their respective maritime domain with the assistance of other security forces, but the changing dimension in the case of Nigeria with regard to privatisation of same has been a major concern which is threatening the administration and security in the maritime domain.

**Navy and Security of Maritime Commerce**

The transportation of over fifty thousand large ships to cross the oceans with 60 percent of all petroleum produced, almost 80 percent of world commerce and more than eleven million passengers every year, makes the sea a means and scene of new threats.[14]It has been stated that the function of navies the world over is the protection of maritime commerce and foreign policy.[15]Hence, in spite of the deployment of navies from the protection of maritime domain, coupled with the increasing interdependence of economies, indicates that maritime realm is now more complex than ever. For this reason, it becomes expedient that emerging countries like Nigeria strengthen their navies in order to count on them in the event of aggression from asymmetric threats and offering freedom and security at seas. It is important to stress that equipping the Nigerian navy with necessary machineries rather that assigning its roles to a private security outfit will defeat the purpose and intendment of the provision of the Constitution of the Federal Republic of Nigeria 1999 (as amended). For the avoidance of doubt, the Constitution provides that:

> *The Federation shall, subject to an Act of the National Assembly made in that behalf, equip and maintain the armed forces as may be considered adequate and effective for the purpose of;*

[12] Malaysian Maritime Enforcement Agency Act (MMEA) 2004, Section 6.
[13] Nigerian Maritime Administration and Safety Agency Act (NIMASA) 2007, Section 1.
[14] Carrillo, J. A, *etal*, "Changing Asymmetric Threats Require New Responses", Taylor, P.D, (ed), Perspective on Maritime Strategy: Essays from the Americas", (United States of America, Naval War College, 2008) 16.
[15]Ibid at 15.

***a.*** *defending Nigeria from external aggression;*

***b.*** *maintaining its territorial integrity and securing its borders from violation on land, sea and air.*[16]

## A Brief Chronological Account of Privatisation in Global Perspective

Historically, privatisation appears to have emerged as a counter action or movement against the development of government in the Western world on the one hand, and dissatisfaction with public service delivery strategy, on the other.[17] This postulation is a move that has mainly given rise to two different meanings of privatization. First, privatization is said to connote 'any shift of the production of goods and services from public to private' or a 'shifting into non-governmental hand, good and services that are being produced by the government.'[18]Secondly, privatization is conceptualized as a paragon shift of activities or control from the government to the private sector.[19] Hence, the government is divested of the control and ownership, thereby making the investors to assume control and management of such enterprises.

Interestingly, it has been asserted that privatization is a nebulous and incomprehensible idea that evokes serious political reactions. Little wonder then, the furious response often expressed over the concept is largely due to both the political and ideological foundations of the concept. Sometimes, response to the idea of privatization in a given jurisdiction is determined by economic and political position in the world's economy. This is because where, in the world view, privatisation would affect economic development; the response will likely be against such

[16]Constitution of the Federal Republic of Nigeria 1999 (as amended), Ssection 217 (2) (a) and (b).

[17]Eteyibo, E, "Privatization in Nigeria, Social Welfare, and the Obligation of Social Justice", *Journal of Economics*, 2(1): 37-44 (2011), p.37. See also R. K. Kevin, *Privatization and the Federal Government: An Introduction*, (December 28, 2006) <www.fas.org/sgp/crs/misc/RL33777.pdf> *accessed on 17 December 2013.*

[18]Bendick, M. Jr., "Privatizing the Delivery of Social Welfare Services: An Idea to be Taken Seriously," in S. B. Kamerman and A. J. Kahn (eds), *Privatizationand the Welfare State* (Princeton University Press, Princeton, 1989) 98.

[19]Eteyibo, E, "Privatization in Nigeria, Social Welfare, and the Obligation of Social Justice", *Journal of Economics*, 2(1): 37-44 (2011) 12.

arrangement by a state government.[20] It is against this backdrop that a scholar observed that the 'more dependent a nation is on foreign investment, the greater the probability that privatization will raise the prospect of diminished sovereignty and excite the passions of nationalism'.[21] It is opined that such passions in certain instances are mixed with issues of national security. Privatisation of maritime monitoring and enforcement to a private individual through his company calls for many questions than answer.

### *i. Privatisation in Nigeria*

As it is the case with most developing countries, Nigeria as a country began its privatization programme in the late 1980s with the main objectives of attracting more investment, opening up the country's economy to international market forces, attaining macro-economic stability, promotion of economic growth, building a broader tax base system, reducing the nation's fiscal deficits, subsidies and public sector borrowing, to mention but a few. The committee for the implementation of the privatisation process was inaugurated on the 27th August, 1988[22] and was vested with powers to supervise and monitor the implementation of the privatization and commercialisation programme. This committee was mandated to privatize 111 public enterprises while 34 were to be commercialized. Although the activities of the committee were later truncated, it had succeeded in privatising 88 enterprises.[23]

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[20] Ibid.

[21] Starr, P,*The Meaning of Privatization,*(Princeton University Press, Princeton,*1989)*.37.

[22] Note that the Committee commenced actual privatization early in 1989 with the shares of Flour Mills of Nigeria, African Petroleum, National Oil and Chemical Company, and United Nigeria Insurance Company being issued in the market.

[23] See Eteyibo, E, "Privatization in Nigeria, Social Welfare, and the Obligation of Social Justice", *Journal of Economics,* 2(1): 37-44 (2011) 37. In the scheme of things, there are two chapters in Nigeria's privatization program. The legal framework for the first chapter was provided by the Privatization and Commercialization Decree No. 25 of 1988, which was introduced by the then head of state, Ibrahim Badamosi Babangida (1985 – 1993) as part of the Structural Adjustment Program. The Decree established the Technical Committee on Privatization of Public Companies (TCPC), which was made up of eleven members drawn from both the public and private sectors, and had as its first chairman Hamzad Zayyad. The second chapter, which was more or less an extension of the economic policy initiated and vigorously pursued by the Babangida administration (in the first chapter) began on the 20th of July 1998

The above process of privatisation regime continued in its wax when President Olusegun Obasanjo announced the desire of the Federal Government of Nigeria to divest through privatisation and commercialisation concerning almost 100 state-owned enterprises in the area of manufacturing, production, infrastructure, financial sectors, etc. which include sectors like cement, machine tools, vehicle, sugar mills, telecommunications, ports, power, airways, etc. While one cannot deny the obvious that some of the privatised enterprises like telecommunications, hotels, etc. were successful, substantial number of them, like power supply, oil marketing and refinery, air transport and vehicle assemblage could not make it as their privatisation have been realistic thereby subjecting the populace to a situation of helplessness. Up till the recent time, apart from buying at exorbitant price, petrol is still unavailable in Nigeria and majority of Nigerians cannot boast of two hours uninterrupted power supply in a day. All these have greatly affected economic well-being of average Nigerian citizens. Although, throughout the gamut of privatisation process as exemplified above, port security monitoring and surveillance was never part of the arrangement and in fact the government, in its effort to ensure adequate maritime security and safety, established the Nigerian Maritime Administration and Safety Agency through an Act of National Assembly.[24] However, in what appears self-serving and ways of satisfying political cohorts, government has, in recent time, privatized monitoring and surveillance in maritime domain to a private security company.

### *ii. Maritime Security and Privatisation Galore in Nigeria*

It is not an understatement to state that it is counter-productive for a nation to be pursuing or embark on 'privatisation for the sake of privatisation'. Undisputedly, developed nations might adopt privatisation as a matter of policy but same is dicey for developing nations whose teeming population is wallowing in abject poverty. Privatisation as a policy may prove to be a tremendously effective mechanism for growth economically, it is imperative that other non-market variables like national security (maritime security in this instance), enforcement and surveillance

with the signing of the Public Enterprises Privatization and Commercialization Act of 1999.

[24] Nigerian Maritime Administration and Safety Agency Act, 2007.

are considered in evaluating whether a given nation should privatise its public utilities and indeed the extent of such privatisation. The principles and characterisation of maritime security's privatization must not assume awry dimension of the peculiar political and social problems confronting developing economies like Nigeria. For this reason, as a matter of urgency, Nigerian government needs not to throw caution into the winds in divesting its public enterprises like maritime security. It has been argued that privatisation generally may be a good policy; conversely, there is a strong case that it could be made inappropriately as in the case of moral inappropriateness[25] of privatising maritime security to ex-militants. Therefore, it is submitted that privatising a public enterprise which may eventually offer employment opportunities to thousands of the citizens without considering the security implications is socially unjust.

The principle of social justice makes it an obligation on the government to promote a level playing ground for every citizen to maintain a minimum social standard for his living. The government should pursue economic and social policies that promote the quality of life which makes life to be meaningful and worthy of living to every member of the society. These obligations almost have no limitation because it places enormous responsibilities on the government and limits what the government could do with public resources. Hence, the idea of giving huge amount to a crony in the name of security surveillance in maritime domain is baseless. It goes without saying that government is under obligation to use public resources and funds justly, fairly and judiciously. This means that the principle of social justice prohibits government from divesting state-owned enterprises as long as this will undermine the general interest of its citizens.

### *iii. Privatising Maritime Security: A Compromise of State Sovereignty*

The level of insecurity in maritime domain is on the rise despite high deployment of navy. For example, Arabian Peninsula and Somali remain problematic, regardless of unprecedented presence of navy force. Of all 439 attacks that

[25] Ibid.

occurred at the high seas in 2011 alone, 236 was reportedly happened in African vicinity and this represents 53% the world over.26 Also, there was economic loss to shippers in 2011 as a total of US$159.62 million was paid as ransom to secure the release of 31 ships hijacked by attackers.27This is apart from US$12 million which was paid for the release of M/V Zirku (a Kuwait oil vessel) that was held for 73 days.28 Notwithstanding the record and economic loss, privatisation of maritime surveillance poses a lot of danger.

It is observed that the role of private security companies does not involve enforcement of the law and surveillance activities as is the case in the Nigerian situation. Despite the engagement of these private security companies by shippers, South-East Asia government, International Maritime Organization (IMO), etc. are strongly opposed to the activities of the private security companies in their maritime domain as this was considered likely to escalate the already volatile region[29] and the same thing is applicable in the United States on the fear of proliferation of weapons.[30] According to them, private security companies carry weapons in the course of safeguarding the ships of their hirer based on the agreement between them and where shot out ensues between them and pirates, it could be disastrous.

More so, the exigency of weapons being carried by private companies brings about infiltration of the region with weapons thereby threatening their sovereignty over the

[26] See the International Maritime Bureau, *Piracy and Armed Robbery at Sea: Annual Report, 2011* (London: International Chamber of Commerce, 2012). See *The Economic Cost of Somali Piracy, 2011*, One Earth Future Foundation Working Paper, 2012, <http://oceansbeyondpiracy.org/sites/default/files/economic_cost_of_piracy_2011.pdf> accessed on 17 December 2012)10-11.

[27]The vessels hijacked include Irene SL, a Greek flagged vessel and Samho Dream, a South Korean oil tanker.

[28]See the International Maritime Bureau, *Piracy and Armed Robbery at Sea: Annual Report, 2011* (London: International Chamber of Commerce, 2012)..

[31] Liss, C, "The Privatisation of Maritime Security- Maritime Security in Southeast Asia: Between a Rock and a Hard Place?" *Working Paper No.141* February 2007 <www.arc.murdoch.edu.au/publications/wp/wp141.pdf> *accessed on 6 July, 2014.*

[30]Pines, D. L,"Maritime Piracy: Changes in U.S. Law Needed to Combat This Exceptional Threat to National Security" <http://.www.orks.bepress.com/daniel_pines/2>accessed on 12 February 2014.

straits.[31]In fact, the dimension of the Federal Government of Nigeria on the issue is worrisome. Maritime surveillance and enforcement have been firmed out to Global West Vessel Specialist Agency (GWVSA), a private security company. The perspective of engaging private security company on maritime security has been misunderstood and misapplied in Nigeria. Although, private security companies in maritime domain is not a new phenomenon because private company like Glenn Defense Marine (Asia) was established as far back as 1946.[32] The emergence of private security companies in recent time in the region was sequel to the September 11 2001 attack. Even still, what is obtainable in some part of Asia and other jurisdictions like Australia could not be regarded as privatisation of surveillance and enforcement of maritime security. It is on record that South-East Asia homes important sea-lane like the straits of Malacca and criminal activities like piracy, hijacking, kidnapping, etc and these have brought about security concern to governments and shippers. For this reason, shippers who wish to increase their security in the cause of traversing seas engage the services of private security companies to avert any ensuing fraud and other maritime insecurity. For example, Exxon Mobil was attacked in 2001 and the company was forced to close down business for four months. The same thing goes for Supper Ferry 40 in which more than 100 people lost their lives to an attack.[33]Some private security companies, like Hart, are based in U.S and U.K and some of them do not even have permanent staff; hence shippers' client-based agreement is the fulcrum of its operation. Some of the companies are owned by ex-military personnel unlike Nigerian ex-militant. The private security companies render services like tracking of their clients' ships, training of crew, provision of security personnel to escort ships, investigation and recovery of missing or hijacked ship, negotiation with attackers in the case of kidnapping and hostage of crews, etc.

[31]Ibid. See also Hong, N, note 2 above at 43.
[32]Liss, C, "The Privatisation of Maritime Security- Maritime Security in Southeast Asia: Between a Rock and a Hard Place?" *Working Paper No.141* February 2007 <www.arc.murdoch.edu.au/publications/wp/wp141.pdf> *accessed on 6 July, 2014.*
[33] Ibid.

The privatization of maritime surveillance and enforcement to a private security company is not the solution to maritime and port insecurity. Rather, government needs to exhibit some kind of expansion and modernization of its maritime agencies. It was maintained that Navy as a government agency would have essential roles to play in safeguarding the nation's maritime zones and should therefore device a strategy to increase security, especially with regard to traditional security threats, while internal security should be the business of the police.[34]The questions that need to be asked with respect to privatisation of maritime and port security in Nigeria are captured as follows:

- Since the government has privatised port and maritime surveillance and enforcement, what would now constitute the constitutional roles of the Nigerian Navy and the likes in that regard?
- In the case of traditional maritime security threat from other state, what roles can private outfit play to subvert the threat?
- Does a private security outfit capable of protecting national security arising from port and maritime borders?
- Is it wise and reasonable for a government to concede its national security to private individual?
- Would privatising maritime security in the hand of private individual not amount to the country compromising its sovereignty to such individual?

The scheme of private security company controlling the entire maritime domain is a compromise of state sovereignty and would worsen the instability being witnessed in the maritime domain. If the policy embarked upon by the Nigerian government is allowed to continue, it would not only have adverse effect on the shipping business in Nigeria as the spate of asymmetric threats is likely to increase. It will also affect the economy of the nation as well as aggravating international instability. Expectedly, private security company will not be able to withstand the exigency of maritime security thereby making the domain to become centre for trade of illicit drugs and arms,

[34]Bateman, S, "Naval Balance in South-East Asia- Search for Stability", *Jane Defense Weekly*, (11th May, 2005). Malaysia, Philippine and Singapore have long established maritime agencies with the navy responsible for the sea.

safe havens for terrorist organizations and breeding grounds for bio-terrorism activities.[35]The Nigerian government needs to share the experience from countries like Australia, United States of America, Malaysia, etc. which appeared more bounded with seas and whose maritime domain is much higher. The government must also avert seeing security and surveillance in port and maritime domain as a way of compensating political cronies as this will spell a doom for the entire country, because it is a matter of national security that must not be compromised.

## Engaging Private Security Company in Maritime Domain: A Depiction of Weak State?

A state has been said to be a political association that establishes sovereign jurisdiction within a given territorial boarders and thus exercises authority through agencies and institutions.[36]States are established for the common good of the people and benefit of the community. Hence, this value of the state is reinforced by its capacity to provide essential service that will promote common good for the people.[37] However, the question that comes to mind is: Does Nigeria state has the capacity to render all these services for the common good of the people? This paper analyses the issue of privatization of maritime security enforcement *vis-à-vis* state's responsibility. On the main responsibilities of state, a scholar observed as follows:

> *Nation-states exist to provide a decentralized method of delivering political (public) goods to persons living within designated parameters (boarders). They organize and channel interests of their people, often but not exclusively in furtherance of national goals and values. They buffer or manipulate external forces and influences, champion the local or particular concerns of their adherents, and mediate between the constraints and challenges of their international*

[35]Ottaway, M. and Mair, S, "State at Risk and Failed States: Putting Security First", *Policy Outlook, Carnegie Endowment for International Peace: Democracy and Rule of Law Project* (2004). See also S. Patrick, "Weak States and Global Threats: Fact or Fiction"? , *The Washington Quarterly*, Volume 29 (2) 2006.

[36] See Akume, A.T. and Dahida, D.P., "External Intrusion and the Failed State Question: Is Nigeria Really a Failed State?" *Centre Point Journal*, Vol.16 (1) 2013, p.124.

[37] Ibid.

> *arena and the dynamism of their own internal economic, political, and social realities.*[38]

Therefore, the inability of a state to provide certain essential means of livelihood is the highest show or act of irresponsiveness and indeed a depiction of weak state. Transition from orderliness to disorderliness and stability to chaos are depictions of weak state. Rotberg was right when he demonstrated the characteristics of weak states as follows:

> *Tensely, deeply conflicted, dangerous, and contested bitterly by warring factions; civil wars that afflict failed states are rooted in ethnics, religious, linguistic, or other inter-communal enmity; failed states cannot control their borders; regimes prey on their own constituents; there is the growth of criminal violence that tends to weaken state authority to control; other essential political goods are provided only in limited quantities; flawed institutions; deteriorating or destroyed infrastructures. Equally, when a state has failed or is in the process failing, the public facilities become increasingly decrepit and neglected; corruption flourishes; such failed states offer unpatrolled economic opportunity only for a privileged few with access to state power; there is declining real national and per capital levels of annual GDP; the stat cannot shelter its own from or during climate challenges resulting in disasters, food shortages and widespread hunger; A states loses legitimacy.*[39]

It is on record that at the end of the Cold War, securitisation of Africa continent took new dimension that was characterised by large number of specialised private companies rendering police and military services that were hitherto the preservation of the state.[40] This development represents the existence of a terrain of African weak regimes thereby changing

[38] See Rotberg, R.I.,"Failed States, Collapsed States, Weak States: Causes and Indicators", Rotberg, R.I., (ed), *When States Fail: Causes and Consequences,* (Princeton University Press, New Jersey, 2004). See also See Akume, A.T. and Dahida, D.P., "External Intrusion and the Failed State Question: Is Nigeria Really a Failed State?" *Centre Point Journal,* Vol.16 (1) 2013, p 125.

[39] Ibid at p. 127-128.

[40] S.J. Ndlovu-Gatsheni S.J and Ojakorotu,V, "Surveillance Over a Zone of Conflict: Africom and the Politics of Securitisation of Africa", *The Journal of Pan African Studies*, Vol .3 (6) 2010, p.95. See also R.K Kevin Kosar, R, Privatization and the Federal Government: An Introduction December 28, 2006.<atwww.fas.org/sgp/crs/misc/RL33777.pdf>*accessed on 17 December 2013.*

the focus of state leaders *vis-à-vis* their responsibilities.[41]Customarily, the means to violence and recourses are within the exclusiveness of the state and this differentiates it from other social formations. What is even more worrisome is that privatization of security happened in accordance with traditional mercenary activities taking a corporate form and fishing in the troubled waters of Africa. The 9/11 terrorist insurgence specifically had far reaching impact on global security architecture and shaping of global politics. Rita Abrahamsen and Michael C. Williams while making their report in Sierra Leone noted that:

> *While the recent conflict (1991-2002) provides the immediate context for the expansion of private security provision, the use of private security has a long history in Sierra Leone. As early as 1936 the Sierra Leone Selection Trust, a De Beers subsidiary, was allowed to field a private 'security force' of 35 armed men to patrol its diamond concession in the Kono area. Much later, in April 1995, the Strasser government hired the South African Executive Outcomes to fight the Revolutionary United Front (RUF), an arrangement that was continued by President Kabbah until January 1997. Both the extraction of Sierra Leone's mineral wealth and the survival of its elite have thus historically been crucially dependent on the involvement of international private security actors, a relationship which continues, albeit in different ways, in the current post-conflict situation.*[42]

Ironically, the issue of maritime monitoring and surveillance by private security company appears to be an extreme display of weak Nigerian state, but what its weakness requires is not enforcement and surveillance of maritime sovereignty by political crony; hence the humanitarian rehabilitation in this regard will spell doom for the country. This kind of arrangement has been said to be a dangerous phenomenon if conceptualised from a security perspective. Therefore, the idea of private security company carrying on enforcement activities in maritime is not more than survival technique.

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[41] Ibid.

[42]Bendick, M, Jr., " Privatisation the Delivery of Social Welfare Services: An Idea to be Taken Seriously", in Privatising and the Welfare State, Sheila B. Kamerman and Alfred J. Khan, (eds), (Princeton University Press, Princeton) 98.

Taking a cue from the United States, much of the debate in recent time over law enforcement privatisation has been centred on prisons and from the information available from the Department of Justice, approximately 1.5 million prisoners or 7% of total prison population is serving different sentences.[43] The supporters of Rick Scott, the Florida governor, believed that privatisation has the benefits of reported cost savings outweighing the possible limitations, but critics have pointed out that privately run prisons reduce essential services to inmates so that they can maximise profits and in some occasions similar to "a historically racist practice'' of the old Confederate South.[44]

## Conclusion

It has been established in this paper that privatisation as a policy might be good for developed nations but concession of the entire maritime domain to the control and monitoring of a private security company poses danger and it is a compromise of state sovereignty. It has been established also that the Nigerian situation is informed as a way of satisfying political cohorts because it has not been done in the best interest of the public. It has also been shown that privatization does not always lead to cost savings or better service. In some cases, private firms have had significantly higher cost overruns than government agencies in the performance of services. In other instances, private firms have performed work that has been criticized as being grossly inadequate. Privatization of the Nigerian maritime domain has been shown as ill-intentioned and inherently inimical to good governance and likely to do the nation more harms than good. Privatisation of maritime surveillance and enforcement should therefore be discouraged and even if such privatization is inevitable, then the government should control it by ensuring partial privatisation rather than total privatization.

[43] See Neighborhood watch programs, security services, and police privatization <http://www.policeone.com/Officer-Safety/articles/5634628-Neibourhood-watch-programs-security-services-and-police-privatisation/> accessed on 25 September 2014.
[44] Ibid.

# DERIVATIVE ACTION AND CORPORATE MALFEASANCE IN UGANDA

***By***

***Sani Abdulkadir****

**Abstract**

*A Company is an independent legal entity where members invest their resources in order to benefit from the profit deriving from. In the same vein, the management of a company assume managerial powers as contained in the articles of association of the company. The separation of ownership from control creates a serious agency question, that the possibly of conflict of interest which manifests in a plethora of ways including misappropriation of company funds. This mostly affect the minority shareholders who do not have powers to change the decisions or to challenge the actions of the directors of the company. Derivative action is a mechanism whereby the minority views can be heard and action can be taken on how the activities of the directors can be reviewed in situations of corporate malfeasance. This article explains a derivative action where a minority shareholder can assume power to challenge the directors of the company. In this article the writer examines the wrongdoing of the management in a company as well as examines the duties of a director in a company. Causes of corporate malfeasance are also highlighted and instance where it is appropriate for a derivative action supposed to have been taken by a member on behalf of the company. Doctrinal method was used in this article whereby text books, case law and the Ugandan companies Act was consulted.*

## Introduction

Derivative action is the legal mechanism which allows a minority shareholder to change the balance of power within the corporation (at least temporary) on the company's behalf.[1] In other words, it is statutorily prescribed remedial device which can be utilized to outwit the powerful majority in order to give

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[1]Talbot, E., Critical company law, Oxford: Routledge-Cavendish (2008), p. 197.

succour to the weak minority in a company. This is possible because the device of derivative action affords opportunity for a (minority)member to be subrogated in the position of the company to remedy a wrong done to a company.

Of all the remedies for addressing corporate malfeasance, it stands out in several ways;

i. It ensures that wrong against the company do not go un-redressed;
ii. It avails members, in whose interest the company must be run;, and
iii. It avails non-members, e.g., officers. This means that the action can still survive where there is unholy collusion between membership and management. This can be fought and won by a member, but the fruits of the judgment will normally go to the company[2].

As the Company is a legal person with all the powers of a natural person of full capacity, why must it require the 'help' of a third party in order to remedy a wrong done to it? It is simple. If a third party commits wrong against the company, the collegiate board may not have difficulty pressing an action to remedy the wrong. It is a different kettle of fish if the wrongdoers are the ones in control, either through possessory rights of management (de facto control), or economic rights of ownership (de jure control), in the Company. Where this happens, as oftener of the case, the question turns on ''who will bail the cat?'' The law provides that a member or other class of persons should bail the cat. This explain why derivative action operates as an exception to the general rule in *Foss v. Harbottle*[3] that an individual shareholder could not be heard to complain about an irregularity regarding the conduct of the company's affairs if there is a constitutional facility affording its ratification (otherwise known as the proper plaintiff principle).

Derivative action displaces the application of the proper plaintiff principle. Thus, under the law [4] a member may bring an action in the name of or on behalf of the company or intervene in an action to which the company is a party, in order to prosecute, defend or discontinue the action. But this subject to statutorily

[2] Abbot, et al, Business Law, 7th edition, London: Continuum (2002) p, 422.
[3] (1843) 2 Hare 401.
[4] Section 173. Companies Act 2012 Laws of Uganda

permitted circumstances.[5] In addition to the permitted circumstances under the Companies Act, further permitted circumstances have been added by the Ugandan courts. It states that the rule in *Foss v. Harbottle* will not apply where the interest of justice demands.[6] The interest of justice exception, it is submitted, imports that where the grouse of a dissenting shareholder falls outside the statutorily permitted circumstances, the court of law and equity might still disregard the *Foss v. Harbottle* rule and permit an otherwise incompetent action. Thus, the minority is not allowed to bring an action about a thing which has been properly confirmed by the majority of shareholders. The justification for the rule is the need to preserve the right of the majority to decide how the Company's affairs shall be conducted. The above case laid the following rules;

a. The will of the majority shareholders is supreme, and it should prevail over the minority.
b. The Court will not interfere with the internal management of companies so long as companies are within its powers.
c. The company is a separate legal entity independent from the members who compose it. And thus, if a wrong is done to it, the company is the proper person to bring an action for the same.

**Corporate Malfeasance**

Corporate malfeasance[7] means any want of duty, whether in the form of acts or omissions, on the part of corporate management[8] whose acts or omissions are capable of attracting the sanction of the law (in this case the companies act). It can also be seen as incompetent or dishonest management or administration of a company. Corporate malfeasance can be classified into two. The first bordered on compliance matters like notices[9] return filing[10] or registrations[11] required to be made to

[5] Section 174. Ibid
[6] Edokpolo & Co Ltd V. Semo-Edo Industry Ltd (1984) 7 SC 119.
[7] In this paper corporate malfeasance is used interchangeably with other expression, like misbehavior, maladministration or wrongdoing.
[8] Within the context of this paper simply means executive team, senior management or officers.
[9] Section 43, Companies Act Laws of Uganda 2012.
[10] Section 44, Companies Act particularly (1), (2), (3), and (4).
[11] Section 44 (5 and 6)

the registrar of company by companies while second are grave acts of illegality, fraud, and breach of duty. Whatever may be the degree of its occurrence, corporate malfeasance chiefly emanates from unwholesome acts and omissions of corporate management, who are entrusted with corporate managerial powers. For example, the English Cadbury Report[12] and the US Tread Way Report[13] revealed that top managements and boards were deceitful, untrustworthy, and unreliable. Consequentially, corporate malfeasance had led, and will continue to lead, to total and near corporate collapses, except effective remedial controls are put in place (like derivative action).

As pointed earlier, corporate malfeasance means corporate wrongdoing which can occur in one of the two main categorized degrees. The degree of corporate malfeasance which can, and do occur are considered below before that, it is important to consider the general code of conduct which the law trust upon managers of Ugandan companies. These codes, which do not specifically tell what to do, appear to set the stage for corporate malfeasance.

**The Reality of Corporate Malfeasance**

The law recognizes corporate malfeasance as an event in corporate life with a probability of occurrence. It thus prescribes a general code of conduct to superintend the acts of the corporate(s) officers or registrar of company. In fact, any case of corporate malfeasance will be either a managerial breach of duty under the Companies Act or under the Companies' constitutional documents. The duties include trusteeship duties[14] in respect of corporate money, property, and powers but they are not trustees of a debt due to the company;[15] agency duties[16] under contractual situation. As between the corporate officers in, and as between the corporate management(s) off, of different

[12] Report of the committee on the financial aspects of corporate governance known as ''Cadbury Report''

[13] Committee on Sponsoring Organizations of Tread way Commission Internal Control – Integrated Framework (AICPA, New York, Sep. 1992).

[14] Section 198, Companies Act Laws of Uganda

[15] See, Re lands Allotment Co (1984) 1 Ch 616, where it was recalled that '' ever since joint stock companies were invented directors have been held liable to make good moneys which they have misapplied upon the same footing as if they were trustees.

[16] Section 198, Companies Act Laws of Uganda 2012

companies, the approach to the duties cannot expectedly be similar. This brings to the fore, and lends credence to, theories X and Y assumptions propounded by McGregor.[17] In order words, there will always be those who will do their work; and there will always be others who will pursue self-interest goals at the expense of the company and bent only on feathering their own nests. In this paper, only the core duties are examined.

**Duties of Directors**

***i. The Fiduciary Duties***

As against the company, a Director has a fiduciary duty and must observe utmost good faith towards the company in any transactions with or on behalf of the company.[18] Thus, in order to preserve the assets of the company, further its business and promote its objects, the Director shall act in what he believes to be the best interest of the company as a whole.[19] A fiduciary is "a person, who agrees, undertakes, to act for, on behalf of, in the interest of, another person in a legal or practical sense''[20]

Always, the directors stand in fiduciary relationship towards the company. However, the director with the company shall owe fiduciary duty to a particular shareholder under certain circumstances.[21] Thus, the director and the company owe a fiduciary duty to a particular shareholder where the director is specifically acting as agent of that particular shareholder whether or not dealing in the company's securities; and where the director is not specifically acting as an agent, but the shareholder (or any other person) was dealing with the securities of the company. [22] This submission is based on the maxim *lex nil frustra facit;*[23] (b) the fact that the shareholder (and any other person) depends on the directors for information and advice creating a relationship of confidence; [24] and it is trite to state that the directors represent the mind and brain of the Company. Under the common law, the

[17] The human side of enterprise, New York: McGraw Hill, 1960, pp. 47SS
[18]Section 198.
[19] Ibid
[20] Hospital Product Ltd v. United State Surgical Corporation (1984) 156 CLR 41.
[21] Ibid
[22] Osunbor, O, A., ''THE COMPANY DIRECTOR: His appointment, powers and duties'', Essay on company law, Ed.: Akanki, E.O. p. 130.
[23] The law does not act in vain.
[24]Colman v. Myers (1977) 2 NZLR 225.

duty can be owed to individual shareholder if it is shown that there was a special factual relationship between the directors and the shareholder in the particular case.

The components of this duty include (a) the duty to act bona fide in the interest of the company;[25] (b) the duty to exercise power for the purpose for which it is specified and not for a collateral purpose; and (c) the duty not to fetter their decision by acting as mere puppets on the instructions of another.[26] This latter duty must be kept in proper perspective as cases arise where the company will enter into a contract and the directors agree to exercise their powers in a way such as to ensure the proper execution of the contract. But the decision to enter into such a contract must be taken in good faith as far as the interest of the company are concerned. Were it not so, it would make companies unreliable contracting parties. This will deprive them the chance to go into commercially beneficial long contracts.[27]

As regards (a) above, it is owed to the company, but where the company is receding into insolvency, the interest of creditors becomes ripened.[28] To test the *bonafide* duty of the director, it has been held that the question will always turn on whether the director honestly believed that this act or omission was in the interest of the company. The test is as to the director's state of mind.[29] This stance of the law is to exclude the courts from second-guessing the decision of the directors as to where the best interest of the company lie. However, it means the company can expect little result from this aspect of directors' duties, if the directors, as they often do, stray from the duty of promoting the interest of the company for the members. This is why it is said that this aspect of the duty is ''vague and the possibility of enforcement is remote, for the duty is owed by the directors to the company and the company alone''.[30]

Apparently mindful of the above uncertainty, it has been submitted that this "takes into account after shareholder'' has subscribe to the Article of Company, the Companies Act

[25] Section 198 Companies Act 2012 Laws of Uganda
[26] Ibid
[27] Ibid
[28] See West Mercia Safety wear Ltd v. Dodd (1988) BCLC 250
[29] Regentcrest Plc v. Cohen (2001) BCLC 80
[30] Thorne J. Prentice D., (Eds), Butterworths company law guide 4th Edition London: LexisNexis (2002), p.212.

embodies the ''Enlightened Shareholder Value'' (ESV) approach. The duty to take into account these factors is what injects and infuses the "enlightenment" into the shareholder value principle. The enlightenment is needed by the directors, not the shareholders. Thus, if the company is a going concern, meaning shareholders' interests are well taken care of, it will not do the members any good if the company has dissatisfied customers, faces an antagonistic government or regulatory agency and has angry pressure groups bumping into its annual general meetings. This pluralistic precept helps the directors to manage the affairs of the company in a socially responsible way. Hence, there is a nexus between corporate social responsibility and the attainments of shareholders' interest. The ESV approaches is preferred,[31] as it synchronized the company with the society, and entitles members of the society the demand that the business of the company be conducted in a way that's protect the interest of all stakeholders.[32] It is submitted that this is akin to socializing the company (a private property), and making capitalism less capitalistic.

Further, the ESV provision has been criticized as likely to result in paper trail. [33] Thus, in order to stave off likely claims for breach of this duty the directors will not only monitor the basis of their deliberations, decisions and actions, they will also have to establish appropriate processes where they have delegated their powers. Also, company secretaries will pay particular attention to the wording of board decisions in order to show that the various factors have been taken into account. In the same vein, chambers [34] agrees that paper trail is indeed a real danger when he states that the conduct of boards and board committee meetings the content of agenda papers and the drafting of minutes will be adopted so that it will be possible, retrospectively for companies to show that their managers had regard to the factors when making decisions. This will be critical for publicly held companies where greater risk of derivative action exists. However, Lord Goldsmith understandably disagrees, stating that directors will not be "subject to a breach if

[31] Section 193, has veiled reference to enlightened shareholder value.
[32]See Dodds, M., "For whom are managers trustees?'' (1931-32) 45 Harv L Rev 1162.
[33] Smerdon op cit
[34] Chambers op cit

they cannot demonstrate that they have considered every element; and it will be for the person who is asserting breach of duty to make that case good".[35] The differing positions remain academic conjunctures as to the probable effects of the provision. However, it may afterwards be construed by the courts. It is submitted that where the directors are not careful to observe the ESV provision, the risk for them is that any member pursuing a claim for alleged breach of fiduciary duty can, evidentially, draw attention to any apparent failure to take into account the factors. Having done so, the onus shifts on the erring director for rebuttal. Hence, both positions are not without merits. In any case, the provision keeps the directors on their toes, so that chances for corporate maladministration are much reduced.

### *ii. Conflicts of Duties and Interest*

A director must not place himself in a position where his duty to the company and his personal interests conflicts, and in particular he shall not make any secret profits or achieve other unnecessary benefits in the course of managing the affairs of the company or in applying the property of the company.

To escape liability, the director concerned must disclose his interest fully.[36] The disclosure is before the general meeting.[37] When is disclosure said to be effectively made? On this question, it has been held that "a man declares his interest, not when he states that he has an interest, but when he states what his interest is".[38] However, it is submitted that this requirement is likely to be circumvented following the neutralizing provision in Companies Act[39] which allows directors to retain unnecessary benefits or gifts which are made after the transaction has been completed in form of unsolicited gift as a sign of gratitude, provided he declares it before the Board (not the general meeting in this case) and that fact shall also appear in the minutes book of the directors. This is a subtle way of sanctioning post-transaction secret benefits. The disclosure must be precedent to making the

[35] The ICSA Companies Act 2006 Handbook, London: ICSA Publishing, 2007,p. 10.
[36]Section 218 Companies Act, Laws of Uganda 2012.
37 Section 217 Ibid.
[38] Per Lord Cairns in Imperial mercantile credit association v. Coleman (1873) LR 6HL. 189.
[39] Section 218 Companies Act, Laws of Uganda

secret profit, otherwise the conflicted director must account and no subsequent disclosure will relieve him from liability.

Further, there is a continuing duty not to fall in breach of this aspect of the duty even after cessation of employment with the company. That is the director may be accountable and can be restrained from misusing the information receive by virtue of his previous position. Based on the law that generally contracts in restraint of trade are void, this provision must be viewed with caution, especially where the cessation of employment was not prompted by the desire to exploit a corporate opportunity which emerged while working for the company; or where the company was not actively pursuing any business opportunity with the particular client. Where this is the case, it would be an unlawful restraint of trade to inhibit a former employee, since ''directors, no less than employees, acquire a general fund of knowledge and expertise in the course of their work, and it is plainly in the public interest that they should be free to exploit in a new position. Thus, if the bona fide interest of a director's action is in place, he is entitled to compete with his former principal without falling foul of the law, provided the particular transaction was not one which the company was maturing at the time of the director's employment.

### *iii.* ***Duty of Care and Skill***

The good faith duty underpins all other duties of the director, and this is very much emphasized under the duty of care and skill.[40] Under the common law low standard was used to test a director's knowledge. Thus in *Re City Equitable Fire Insurance Co Ltd.*[41] it was stated that the standard of skill expected of the director is "no greater skill than might be reasonably be expected of a person of the director's knowledge and experience; while the standard of care expected was "such care as an ordinary man might be expected to take on his own behalf''[42] The common law standard, it is submitted , is today inappropriate, both as regards executive directors who are paid large sums of money for the expertise which they profess they can bring to the business, and the non-executive directors who, as economic owners, wield and

[40] Section 198 Ibid
[41] (1995) 1 CH P.407
[42] This approach was adopted by Nigerian Supreme Court in Shonowo v. Adebayo (1969) 1 All NLR 170

exert influence on the direction and management of the affairs of the company. This justifies the shift from the subjective to objective standard of care.

**Degree of Corporate Malfeasance**

Corporate malfeasance can be categorized into two degrees, first and second degree cases.

i. First degree cases; the cases falling under this category border on compliance matters (which require return of filings or registrations to be made to the companies act by company i.e. Memo and Article). It is submitted that default in this duty is the result of failure to appreciate the corporate governance role of the information required to be filed or registered. At times the consequence of failure or breach of this duty is so negligible or insignificant that companies blatantly disregard, neglect to obey or refuse to comply with it. For instance, where a company alters it share capital, it is under duty to give notice to the registrar of companies within one month of such any alteration, and any default attracts a daily fine in which the default continues.[43] The Ugandan case is worrisome, when viewed against the hard stance of the English jurisdiction. In England, failure to discharge the duty relating to compliance matters can be a ground for disqualifying one from directorship for not less than five years[44].
ii. Second degree cases; the cases under this category are so fundamental that they put at risk the future of the company as a going concern and ultimately trigger rigorist remedies (like derivative action). They include ultra vires or illegal acts (like political donations),[45] procedural defects, expropriation of corporate property and fraudulent negligence to mention a few. An example of procedural defect can be seen where, a manager in breach of his duty of care, enmeshes himself in acts of impropriety, thereby utterly disregarding the procedure of the company. Thus, where the managing director improperly and in disregard of guidelines grants loan facility to a customer of the respondent bank, this would amount to breach of care and

[43] Section 71 companies Act Laws of Uganda 2012.
[44] (*Grundy v. Briggs* (1910) 1Ch 44
[45] See section 3 of the English Company Directors Disqualification Act 1986. .

skill. Also it is an act of corporate malfeasance where the directors grossly undervalued the assets of the company, caused the company to sell the land to one of their own, and four years later moved the company to repurchase the same property at 28 times the amount it was sold.[46] Showing the courts distaste for unconscionable acts as this, Vincelott J. retorted that ''to put up with foolish directors is one thing; to put up directors who are foolish that they make a profit of $115,000 odd at the expense of the company is quite another''. The case would be different if no fraud or personal benefits are shown. [47] What the degree of occurrence of any case of corporate malfeasance, the minority is not left helpless, having regard to derivative action remedy.

**Reason for Persistent Cases of Corporate Malfeasance**

Corporate malfeasance has become a common feature of corporate life, and it can be discoverable from many factors which include fraud and failure of corporate governance; shareholder passivity; and statutorily issues, among others. Only two are considered here.

i. Fraud and failure of corporate governance; corporate governance refer to the conduct of the corporate management, which requires an overriding commitment to a positively rewarding culture that permeates all aspects of board and management conduct. It is increasingly a culture of transparency and accountability within the corporate system through the adoption of value-based internal code of conduct, which guide and direct the action of the management and staff. Where this non-existent, fraud will take the Centre stage. Fraud is any illegal acts characterized by deceit, concealment or violation of trust, the purpose of which is to make a gain or to cause another or to expose another to a risk of loss. Fraud are perpetrated by individuals and companies to obtain money, property or services; to avoid payment or loss of service; or to secure personal or business advantage. As at 1996, fraud is said to

[46] Daniels v. Daniels (1978) Ch 565.
[47]Pavlides v. Jensen (1956) Ch 565.

have cost business more than $10 billion globally on a yearly basis.[48]

ii. Statutory issues; the distribution of power provision under the companies act states that powers of management reside in the board of directors.[49] Thus, the corporate management of Uganda is not bound to obey the directions or instructions of the owners (acting in general meeting).[50] There is no problem with this provision, which is targeted at institutionalizing a Berle-Means corporation[51] in Uganda.

**Derivative Action**

Derivative action is an action which a member, director, officer or any other proper person[52] commences in the name, or intervenes (for the purpose of prosecuting, defending or discontinuing) on behalf, of the company, because the latter could not take steps to remedy a wrong done to it. It is derivative because the power of the applicant is derived from the power of the company.[53] It is founded on the wisdom that it would be improper to allow corporate malfeasance by directors to escape sanction because they control the management of the company. Specifically, it is used to remedy wrongs done to the company, where the wrong doers are the ones in control and will not remedy it. To keep it within bounds and discourage abuse, conditions or grounds must be met before it can be allowed by the court.

**Grounds for Commencing Derivative Action**

Apart from the permitted circumstances and how the interest of justice exception, there are conditions which must met before derivative action can be commenced. One of the foremost grounds is leave or permission to commence or intervene. Before

[48] Sherwin, D., Head of fraud Investigation and Risk Management at the accountants Ernest & Young, London, quoted in: ''Business Hit by Rampant Fraud'', Sunday Times, 19 May, 1996, p.29.

[49] Section 52, Companies Act Laws of Uganda 2012.

[50] Section 53 Ibid

[51] A company is said to be a Berle Means corporation if it has diffuse and dispersed shareholders base such that there is no one shareholder weathering sufficient voting power to direct and control the activities of the company. In such a case, ownership is said to be distinct and separate from control.

[52] Subject to the discretion of the Court.

[53] It should not be lost on us that on the basis of the **proper plaintiff principle,** the company, as a distinct legal person difference from its members, is the proper plaintiff to remedy a wrong done to it.

leave is granted the applicant must meet other conditions considered below:

*i.* ***Fraud on the Minority***

It has been held that fraud in this context goes beyond fraud and illegality at common law, but includes fraud in the wider equitable sense of an abuse or misuse of power by the directors.[54] Generally, fraud on the minority has been said to lie in the use the controllers make of their power of control. A clear case is where the majority used its voting power not in order to promote their group interests to the disadvantage of the minority.[55] It is not every breach of duty that amounts to a fraud on the minority.[56] The law requires that in the case of allege fraud on the minority, a personal action rather than derivative action is appropriate if proved.

*ii.* ***Wrongdoer Control***

The court must be satisfied that the wrong doers are the ones who are in control, and will not take necessary action. Wrong doer control is said to exist ''if the wrong doer has a majority of the votes or the majority has actually approved a fraud on the majority, or the company has otherwise shown that it is not willing to sue''.[57] It is submitted that under the companies act de facto as well as de jure control will meet the wrong doer control test. This is because the board of directors,[58] irrespective of the quantum of their shareholdings in the company, can block the action from being brought by means of manipulation of their position in the company.[59]

*iii.* ***Notice to the Company***

The Companies Act requires as a condition proof that reasonable notice has been given to the company (of course represented by the directors) of the applicant's intention to apply to the court for a derivative action. What is reasonable notice is

[54] Estmanco (Kilner House) Ltd V. Greater London Council (GLC) (1982) 1 All ER 437.
[55] Ibid.
[56] Daniels V. Daniels (supra).
[57] Russell V. Wakefield Waterworks Co. (1875) LR 20 Eq 474.
[58] Companies Act does not distinguished between Executive and Non-Executive Directors.
[59] Orojo, J.O,. Company Law and Practice in Nigeria, 5th edition, Durban: Lexis Nexis (2008) p.270.

not defined under the companies act. However, it is submitted that the derivative action is a special matter, and will fall under the category of issues of which special notice of 28 days would be required. By analogy, a minimum of 28 days' notice must have been served on the company.

In fact, the English Company Law Commission proposed 28 days' notice but this proposal was rejected as the requirement of notice was not in the Companies Act. In its place, a two-stage process was provided. The first stage is ex parte application stage in which the evidence filed by the claimant is expected to disclose a prima facie case for giving permission, otherwise the court must dismiss the application and may make any consequential orders, e.g. as to costs. At the second stage, the court considers evidence from the company, i.e., the company is put on notice.

Without doubt, the English provision is preferred because it enables the court to discover and dismiss unmeritorious claims and removes it from the manipulative schemes of directors who may be directly affected. To make derivative action an effective remedial tool for corporate malfeasance in Uganda, the directors must not be given any room (through the requirement of notice) to compromise the action, which if done will weigh against the interests of the company.

*iv.* ***Good Faith and Interest of the Company***

Doubt must not be cast on the merits of the application. Thus, good faith will not avail if the applicant participated in the wrong of which complaint is now being made. Further the action must be in the interest of the company. Hence, a member who seeks to pursue a claim in order to settle personal scores with the management or for professional benefit cannot be said to be acting in the interest of the company.

*v.* ***Standing***

An applicant for leave to commence, or to intervene in an action on behalf of the company must be registered holder or beneficial owner, whether present or former, of a security in the company; a director or an officer, whether present or former of the company; the Registrar of Companies Act or any other person who in the discretion of the court is a proper person to make an application for derivative action. An officer is defined as

including a director, manager, or secretary.[60] It is submitted that the secretary, manager, etc. can be a qualified applicant for derivative action, either as an officer or as a proper person, to bring a derivative suit. Proper person, it is submitted, will include persons to whom shares have been transferred or transmitted by operation of law will fall within this category.

**Implications for Malfeasant Directors**

Where the directors commit, or one of them commits, corporate wrong and derivative action is successfully pursued to remedy that wrong, the implications can be very serious for the wrongdoing director. This places derivative action as a special remedy. Thus, it could imply that the erring directors could be made to pay damages, or rendered to account of profits or compelled to restore the property or amenable to removal from directorship or the erring director could even face summary dismissal. Take a case where the directors made a loan to one of their own which was not approved by, and subsequently resulting in a loss to, the company. They could be made to refund the loan and to pay damages resulting from the loss.

**Conclusions**

In order to complement derivative action as a remedy against corporate malfeasance, it is suggested that the position of the minority should be strengthened by ensuring that the minority has a voice in the management of the company at the highest level and the Authority responsible in registering a Company in Uganda, hear and enforce the minority rights. This will tackle the disproportionately unfavourable pattern of ownership and control in Ugandan companies which make it difficult to comply with the structural devolution of powers under the companies act. Once the devolution of powers section under the Companies Act is flouted, it opens the floodgate of acts of corporate malfeasance, because, more often than not, corporate ownership and control become locked in one entity instead of two separate entities.

[60] The Ugandan companies Act does not define officers of a company, however officers means Director, Manager or Secretary.

# DISQUALIFICATION OF COMPANY DIRECTORS UNDER NIGERIAN LAW: AN OVERVIEW

***By***

***Valentine Tebi Mbeli PhD***

## Introduction

The principal object of corporate law is to ensure that companies are organised and controlled in a way as to promote the spirit of the corporate enterprise in furtherance of the ultimate ends of economic and social policy. In corporate governance debates, one major thematic area is that relating to the separation of ownership from control which has led to a constant search for appropriate legal rules that can best ensure business survival. In answering the question of how best to manage a company for sustainable growth, a key focus area is the company's human capital strategy which is a lead indicator of corporate success[1].This invariably recognises the role directors play as drivers of corporate success.

This accounts for the rule imposing an omnibus duty on the directors to promote the purposes for which companies are formed in such a manner as faithful, diligent, careful and skilful directors would act in similar circumstances[2]. In order to protect company investors together with its pluralistic stakeholders from incompetent and dishonest directors[3], corporate law has also laid down certain grounds upon which persons putting in for directorships could be disqualified from serving as directors. The policy rationale behind these minimum qualification standards is to ensure that those appointed to serve as directors are capable of taking up and discharging the responsibilities that are normally associated with company management.

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[1]Asian Development Bank 'Corporate Governance Principles for Business Enterprises' Available at http://www.adb.org/documents/brochures/corporate-governacne visited on 17/11/011

[2]See for example Companies and Allied Matters Act, Cap C20 Laws of Federation of Nigeria, 2004 Section 279(3)

[3] Brian, K. 'Restrictions and Disqualification of Directors' Available at http://www.lawlibrary.ie/viewdo. Accessed on 31/08/13

The purpose of law in this regard is to provide a general measure of control and criteria for appointing directors, setting out certain conditions which must be satisfied under pain of disqualification. The aim of this article is to identify and analyse the grounds of disqualification of directors and their implications for effective corporate governance in Nigeria. Precursory to this, the article briefly examines the concept of director in order to bring clarity and context to the discussion.

**Meaning of Director**

The business of a company is managed by directors who are expected to act collectively as a board[4]. The word "director" is not defined under the Companies and Allied Matters Act as such, but the interpretation section of the Act is capable of being construed as giving a functioning meaning that suits the legal purposes of the word director. The Act simply provides that "director includes any person occupying the position of director by whatever name called and includes any person in accordance with whose directions or instructions the directors of the company are accustomed to act"[5]. The Act, is in this regard, inspired by the common law position according to which any person occupying the position of director by whatever name called is considered as such[6]. Therefore, it is possible for someone to be director though described as manager or governor[7]. The difference remains entirely that of nomenclature.

Nevertheless, section 244(1) of the Companies and Allied Matters Act appears more explicit on the meaning of director even though at the same time contradicting the interpretation section (section 567). It provides that "Directors of a company registered under the Act are persons duly appointed by the company to direct and manage the business of the company". On the one hand, the explicitness of this section rests with the fact that it stresses on "due appointment'' as the basis for which a person can be considered director. On the hand, the contradiction lies in thefact that it would ordinarily be interpreted

[4]Farrar, J.H and Hannigan, BM. Farrars' *Company Law* (London: Butterworth's, 1998) p. 329
[5] Section 567 of the Act
[6]See Browne Wilkinson V.C in *Re Lo Line Electric Motors Ltd* (1988) Ch 477 at 488
[7]Farrar, J.H op.cit p.229

to exclude shadow directors who are persons in accordance with whose directions and instructions directors are accustomed to act on the ground that they are not duly appointed.

However, the contradiction is resolved by section 245(1) which provides that without prejudice to section 244, directors shall include persons in accordance with whose directions and instructions directors are accustomed to act. This approves of the concept of shadow directorship. Implicit in the foregoing narrative is the view that the interpretation section cannot be used against section 244 and by extension, both sections ought to be given a combined reading. This is a functional approach which ensures that a person performing the functions of a director does not escape liability by pleading lack of due appointment[8].

The scope of application of the restrictions or disqualifications to act as director also extends to shadow directors. Thus, in *Re Gasco Ltd*[9], it was held that a shadow director was restricted after a liquidator found no books or records in the company. Two other directors who had acted honestly and responsibly were not. Similarly, in *Re Vehicle Imports*[10], a company accountant was held to be a shadow director and was restricted following liquidation of the company. The law in this regard presumes that the same standards of care, skill and diligence should be observed by shadow directors as if they were duly appointed. For instance, if in the course of liquidation, it is found that a person who gave instructions and directions to the duly appointed directors, did so as to perpetrate fraud against the company, the said person can be made subject to the same disqualifications as the duly appointed directors. This rule, however, is not meant to affect persons giving advice in purely professional capacity as section 245(3) of the Act shields such persons from liability.

**Grounds of Disqualification of Directors**

To begin with, there are two major reasons for disqualifying certain persons from serving as directors of

[8]Yagba, T.A.T; Kanyip, B.B. and Ekwo, S.A. *Elements of Commercial Law* (Zaria: Tamaza Publishing Ltd,
1994) p. 13

[9] (Unreported) H.C McCracken J. 5/02/2001

[10]Unreported) H.C Murphy J. 23/11/2000

companies and from being otherwise concerned with the conduct of companies' affairs. The first reason is based on the principle of directors' duties. This requires persons vying for the position of director to understand that the statutory and fiduciary duties of directors are personal responsibilities. It is on this ground that minors and mentally incapacitated persons are disqualified from serving as directors. The second and perhaps more important reason for disqualification is to protect the public against those whose dispositions portray them as actual or potential danger to the business environment. The disqualification of insolvent, fraudulent and bankrupt persons is anchored on this view. We can now examine these grounds in some material details.

### a. Disqualification on the Ground of Age

It must be pointed out at the onset that the imposition of minimum age limit for directors is a statutory innovation. At common law, a director was not bound to give continuous attention to the affairs of the company. His duties were intermittent in nature and performed at periodic board meetings and meetings of committees of which he is member and even at that, he could only attend meetings when he reasonably could be able to do so[11]. This position which encouraged the practice of passivity of directors gave rise to the view that directors were part-time officers of the company with no positive duties to attend board meetings or take active part in the conduct of its affairs. Based on this, a minor could be appointed as company director with no expectations in terms of managerial ability. In Marquis of Bute's case (*Re Cardife Savings Bank*)[12], Marquis of Bute was appointed president of a bank at an infant age of six months and he was able to attend only one board meeting in 38 years.

In the commercial world of today, this common law position would hardly be justified weighing against the enormous responsibilities associated with the management and control of companies. It is saying the obvious that a company would not reasonably expect to run its business efficiently if the directors were not sensitive to the personal nature of their fiduciary and statutory obligations and their roles as drivers of corporate

[11]Re City Fire Insurance Co. Ltd (1925) Ch.407 at 429
[12](1812) 2 Ch.100

success. The same would not be expected where directors are not fully committed to the realisation of corporate goals.

The foregoing concerns have contributed significantly in pitching public legal perception against the common law rules. The favoured approach is that of more realistic criteria for selecting directors based *inter alia* on competence as a way of ensuring corporate performance. The reason is that directors, especially executive directors are now expected to exercise their duties under normal contractual principles and therefore are to give exclusive attention to the affairs of the company[13]. The complexities involved in company management attest to the demanding roles of directors in ensuring business success. Without a minimum qualification requirement, the concept of directors' duties becomes elusive.

In response to the concerns highlighted above, modern company legislation has taken a swift departure from the old common law position as evident in statutory rules setting out minimum qualification requirements which prospective directors must satisfy. First is the prohibition of persons under a given age from serving as directors. The age limit varies from country to country. In the UK, the age limit is fixed at sixteen years[14], while in Nigeria, it is eighteen years[15]. The variations work in line with the economic and social realities of respective countries thus ruling out the possibility of uniformity.

However, the philosophical bases for age requirement remain the same. First is to make sure that a person who is ineligible or disqualified must not be appointed director or consent to such appointment. Second, a person so appointed must not be allowed to act as director. Third, a company must not knowingly, allow an ineligible or disqualified person to serve or act as director. In line with these admonitions, an important question becomes what are the legal implications of appointing a minor as director? Under the 2006 Companies Act of the UK, such appointment is void[16]. Implicit in this provision is the assumption that the acts of a person so appointed will not legally

[13] Yagba, T.A.T et al. p.263
[14] See section 157(I) Companies Act, 2006
[15] Section 257(I) (a) of the Companies and Allied Matters Act
[16] Section 157 (4) U.K Companies Act,2006

bind the company for the reason that the law treats the appointment as if it had never existed or happened.

Even though designed to circumvent the violation of laid down rules, the above position appears excessively harsh in relation to *bona fide* outsiders dealing with the company through such a director. Indeed, it has the potential of resuscitating the doctrine of constructive notice thought to have been abolished in *Royal British Bank v Turquand*[17]. Before the abolition of this doctrine, it used to be law that anyone having dealings with a company is deemed to have notice of its documents filed with the Company Registry. What came to be known as the rule in Turquand's case states that "when a person deals with a company in a transaction that is inconsistent with the registered documents, he can enforce the transaction against the company despite any irregularity of internal management". This rule raises and settles the issue of why knowledge of whether a director has been duly appointed or not should not be imputed to an outsider dealing with the company in good faith.

By contrast with the UK, the Nigerian corporate law has, in addition to express abolition of the doctrine of constructive notice under section 68 of the Act, raised a presumption in favour of any person dealing with the company that those described as directors have been duly appointed[18]. This position is more realistic, tenable and just as it allows creditors and other interested persons, right to enforce against the company, transactions entered into with those described as directors whether duly appointed or not. This is based on the reasoning that it would be impossible for a person dealing with a company to ascertain if those held out by the company as directors have been duly appointed or not. The Uganda Companies Act[19]bears a similar but more eloquent stance on this. It states "The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his or her appointment or qualification".

Section 250 of the Companies and Allied Matters Act captures the philosophy underlying this approach. It provides that where a person not duly appointed acts as director on behalf of

[17](1856) 6 E&B 327
[18] See section 69 and 244 (2) of the Act
[19]See section 191Uganda Companies Act, 2012

the company, he shall be personally liable but where it is the company which holds him out as director, then the company shall be liable. This is based on the rule of estoppel which is to the effect that a person should not be allowed to deny a state of affairs created by him after an innocent party relies on that representation leading to the alteration of his legal position.

Another critical area regarding appointment of ineligible or disqualified directors is the concern of minority shareholders. Before delving fully into this issue, we must first of all align with the observation that corporate democracy is exhibited through the economic wealth of shareholders[20]. This reasoning validates the power of the majority in capital to appoint the entire board of directors. But this has to be done in line with the minimum age requirement. As a minority shareholder remedy in case of violation, section 244 (3) of the Act provides that both the company and the person not duly appointed may be restrained by any member from acting unless or until he is duly appointed. This provision guards against situations where majority shareholders may want to appoint their infant children and cronies as directors against the wish of the minority.

In England, there is window period for a person to be appointed director pending the attainment of the statutory age limit. The appointment remains valid but the person so appointed does not assume office until he attains the statutory age[21]. An appointment made under this provision cannot be reversed or challenged by the minority other than seeking an order restraining the person appointed from acting as director before attaining the prescribed age. This window period is defensible on the ground that it makes corporate investments more attractive to 'angel investors' who may be willing to provided seed capital for business take-off under circumstances that guarantee future family control. That said, there is no reason to suggest that this mechanism can be able to make any significant difference on the Nigerian business landscape in terms of propelling corporate investment. Therefore it may not be necessary treading this path.

[20] Imbwaseh, A.T "A Critical Examination of Cumulative Voting as a Tool for Addressing the Pluralistic
Interests in Public Companies (2006) Vol. 1F.N.L.J p.134
[21]Section 157 (2) U.K companies Act, 2006

### b. Disqualification on the Ground of Mental Incapacity

A key principle guiding the appointment of directors is that persons aspiring for directorship should be capable of understanding the task of running a company in all relevant ramifications. This requires sound mental ability. On that note, the Act prohibits lunatics and persons of unsound mind from serving as directors[22]. Section 258(1) (d) further instructs that the office of a director shall be vacated when the director becomes of unsound mind.

Whilst section 257 (1) (b) deals with situations where a person may not be appointed director *ab initio*, section 258 (1) (d) covers situations where a person already appointed director may become disqualified from continuing to hold such position[23]. The law is flexible to allow the company remove such a director by ordinary resolution[24].

### c. Insolvent Persons

Company law is generally aimed at safeguarding the market for investment capital. This also forms a strong legal basis for the rule disqualifying insolvents for serving as directors. Section 253 (1) of the Act captures this philosophy thus:

> If any person, being an insolvent person acts as director of a company or directly or indirectly takes part or is concerned in the management of any company, he shall be guilty of an offence and liable on conviction to a fine of ₦500, or to imprisonment for a term not less than six months or more than two years or both.

The penal tenor of this provision is indicative of the seriousness attached to prudent management of companies for sustainability and profitability. Section 567 of the Act defines an insolvent to mean any person in Nigeria who, in respect of any judgment, Act or court order against him, is unable to satisfy execution or other process issued thereunder in favour of a creditor, and the execution or other process remains unsatisfied

[22] Section 257(I) (b) of the Act

[23] Dugeri, M. "Can Company Directors ever be removed Without the Requisite Notice?" Available at www.linkedin .com/pulse/2001411 171430.visited on 12/03/15

[24] Section 262 (I) of the Act

for not less than six weeks. This provision appears to be fraught with some conceptual issues requiring clarification. Whereas insolvency generally connotes inability to pay ones' debts as the fall due[25], disqualification of directors on the ground of insolvency is conceived as a measure of curbing instances of persons taking refuge under the corporate form of business to shield their inefficiencies. According to Farrar[26], it prevents directors who shelter behind the corporate form and who having driven a company into insolvent liquidation and promptly set up a business immediately thereafter and start the whole cycle again. It is inappropriate to extend this disqualification principle to cover inability to pay debts generally, and most especially debts that bear no affinity to business insolvency. The Act seems, therefore, to have taken the disqualification philosophy beyond its known traditional aim of ensuring business survival. Text commentary can be cited in support of this contention. According to McTeer[27], the disqualification rule *prima facie* provides an opportunity for penalising company directors who abuse the privilege of limited liability by preventing them from dealing through limited liability companies.

Disqualification on the ground of insolvency offers protection to the business environment by using past records of directors to gauge their sincerity and managerial aptitude. It ought to be limited to cases of insolvent liquidation of companies and not to all debt situations. As envisaged by the Act, inability to satisfy a court judgment or order amounts to insolvency for which the judgment debtor may be disqualified from serving as director. It, therefore, seems to be immaterial that the debt is completely unconnected with company management.

It may require more depth on the theoretical foundation of insolvency to firmly establish its misapplication to disqualification of directors under Nigerian law. This can better be achieved by drawing a contrast between insolvency and bankruptcy. Insolvency simply refers to the financial state of a person, whereas bankruptcy is the term for which a person is

[25]Osborn, P.G. A concise law Dictionary 5th Edn (London: sweet and Maxwell, 1964) pp 170-17

[26] Farrar, J.H. P.344

[27] McTear, W. Et at "Insolvency –Implications for Directors" Available at www.mw-w.com>Home>services for Business > services for director. Visited on 14/03/16

declared bankrupt by a court of competent jurisdiction for inability to pay his debts[28]. Insolvency is simply a term which describes the financial condition or state when a person can no longer meet his debt obligations[29]. It is possible that the state of insolvency could be temporary and fixable.[30]

Even though the central feature of both insolvency and bankruptcy lies with inability to pay debts, the two remain distinguishable in that whilst the former describes the financial condition of the debtor, the latter is a definite legal position taken by the court by declaring the debtor bankrupt. Thus, insolvency does not necessarily lead to bankruptcy, but all bankrupt legal entities or persons are deemed to be insolvent[31]. It is clear from this analysis that the two concepts are distinct and attract separate implications.

Under English law, one instance when disqualification of director is automatic is the case of an undischarged bankrupt[32]. In Nigeria, this is also a ground of automatic disqualification for those already holding the office of director[33]. This is legally defensible as bankruptcy itself is a definite legal position declared by the court. On its part, insolvency as a ground for disqualification is not a rule of automatic application under English law. It applies subject to certain conditions and in accordance with laid down procedures. The relevant provisions are found in the Companies Directors Disqualification (CDD) Act, 1986. The operating provision states that:

> *when a company becomes insolvent, defined to encompass liquidation, administration and administrative receiver (collectively referred to as the office holder) and that the conditions mentioned in the Act are satisfied in respect of a person who has been a director of that company, then the office holder is to report the matter to the Secretary of State[34].*

In practice, the report is made to the Disqualification Unit of the Insolvency Service which is an executive agency of

[28] GoodmanLaw "What is the Difference between Insolvency and Bankruptcy?" Retrieved from www.goodmanlaw.com.au.FAQ on 14/03/16
[29] Ibid
[30] Ibid
[31] Ibid
[32] Farrar. pp 346-347
[33] Section 258 (I) (b) of the Act
[34] Section 6(2) and of (3) CDDA, 1986;

the Department of Trade and Industry[35]. Following the report of the office holder, the Secretary of State may apply to the court for a disqualification order. Alternatively, the Secretary may direct the application to be brought by the official receiver[36]. The conditions which must be satisfied for a disqualification order to be made are:

i) the person is or has been a director of a company which has become insolvent; and

ii) his conduct as a director of that company either taken alone or together with his conduct as director of any other company or other companies makes him unfit to be concerned in the management of a company.[37]

The conditions stated above highlight two salient points of divergence with the Nigerian law. First, the disqualification applies to persons who are or have been concerned with a company that has become insolvent. The implication is that in considering insolvency as a ground for disqualification, the relevant financial condition is that of an insolvent company and not that of the director concerned therewith. This is unlike the Nigerian position where the personal debt situation of a person seeking to be director is taken into consideration. Secondly, being a director of an insolvent company cannot of its own secure a disqualification order as there is further need to show that the person is unfit to be concerned with a company.

In *Secretary of State for Trade & Industry v Gray*[38], the Court of Appeal in England emphasised this point when it held that the question of whether a director's conduct makes him unfit is to be determined by reference to the matters and evidence in the application for a disqualification order being sought. It is not a question of whether a director is unfit at time of the hearing but rather whether his conduct as set out in the application for disqualification order had fallen below appropriate standard[39]. It, therefore, requires the court taking a retrospective look into the conduct of that person when he was director of a company that

[35] Farrar J.H et al op cit. P. 348
[36] Ibid
[37] Section 6(i) CDDA, 1986; see also Secretary of State for Trade & Industry v Ivens (1997) 2 BCLC334.
[38] (1995) BCLC 2070 (1995) BCC554
[39] Farrar p.358

has become insolvent. The reason is that a person could well be a director of an insolvent company, but had observed such standards that would not permit a holding against him for being unfit to be director.

There are statutory guidelines set out in the CDD Act, to help courts in deciding whether a person is unfit to be director. The relevant rules are set out in Part II of the Act which applies when the company has become insolvent[40]. It requires the court to have regard to the following:

i. the extent of the director's responsibility for the causes of the company becoming insolvent;
ii. the extent of the director's responsibility for any failure by the company to supply any goods or services which have been paid for, in whole or in part;
iii. the extent of the director's responsibility for the company entering into any transaction at an undervalue or giving any preference which is liable to be set aside;
iv. the extent of the director's responsibility for any failure by the directors to comply with the requirements of the Insolvency Act 1986 in relation to creditors' meeting; and
v. any failure by the director to supply any statement of affairs or attend meetings or to co-operate with any office holder under the Insolvency Act 1986.

The foregoing standards contain an inherently futuristic utility value of protecting the public against unfit directors as much as help strengthen the legal position of director's duties to companies under their management and control. With this, directors are bound to be more circumspect, diligent and prudent in the management of company affairs.

In England, a disqualification order may be granted in any of the circumstances that have been stated above. The effect of a disqualification order is that it disqualifies the affected person from acting as director, liquidator, and receiver or in any way, whether directly or indirectly from taking part in the

[40] Sections 9 (1) CDD Act, 1986

promotion, formation or management of a company. The period for the disqualification order is set out by the court in the disqualification order and this depends on the seriousness of the breach subject to a maximum period of fifteen years[41]. It is a criminal offence to act in breach of disqualification order. The penalty for this can be in form of imprisonment or a fine or both[42]. This is one point where there is a confluence between the Nigerian Law and that of England as section 253(1) of the Companies and Allied Matters Act makes it an offence where an insolvent person acts as director. This provision is, however, ineffective due to lack of proper procedural guidelines on how insolvency. The position under the English law is more practical and since the coming into force of the CDD Act in 1986, over 5,000 disqualification orders have been made[43].

In England, once a disqualification order has been validly made by the court, court officers are required to provide the Secretary of State with the details and a register of all disqualification orders is kept and available for public inspection.[44] With this mechanism in place, it is easy to identify those disqualified from acting as directors on the ground of insolvency upon filing of notice of particulars of directors with the Registrar of Companies.

The comparative analysis presented above shows that the provisions of the Nigerian Companies and Allied Matters Act are grossly inadequate in meeting up with the challenges posed by insolvency in relation to directors' disqualification. This is mainly as a result of a poor conceptual foundation leading to misapplication of rules. The position under English law gives a clear focus and direction as to the purpose of directors' disqualification, the appropriate indices to be applied and how to apply them in a realistic manner. The English CDD Act, 1986, can, therefore, be of immense use in giving direction to a legislative reform in Nigeria on the thematic issue of disqualification of directors on the ground of insolvency. It is about time the Nigerian legislature enacts a comprehensive Insolvency Act to deal with situations of business insolvency and

[41] Sections 3 (5), 2 (3) (a), 5 (5) CDD Act
[42] Section 13 CDD Act, 1986
[43] Farrar J.H et al. Op cit p.348
[44] Section 18 (2) (4) CDD Act, 1986

directors' disqualification among other things instead of lumping this important subject under the Companies and Allied Matters Act as it is currently the case. Kenya, South Africa and Uganda are fellow common law African countries that have adopted this dichotomy.

### d. Persons Convicted of Certain Offences

The court is allowed to make a disqualification order against a person where he is convicted of an offence in connection with the promotion, formation and management of a company. This power is derived from section 254 of the Act. It states "where a person is convicted by a High Court of an offence in connection with the promotion, formation and management of a company...the court shall make an order that, that person shall not be director of or in any way whether directly or indirectly, be concerned or take part in management of the company for a specified period not exceeding ten years.[45]

From the above provision it is clear that for a person to suffer disqualification under this head, the substantive offence must have been an indictable offence, defined by the seriousness of its penalty and triable by the High Court. The controversy, however, does not completely and there. The reason is that the topic "disqualification of directors" is a statutory provision which has its home in company law, but whose scope and impact range more widely into the field of criminal law.[46]

A disqualification order is an accessory penalty or a consequential order based on a conviction and whereupon, a person subject thereto, is prohibited from serving as a company director. A fundamental issue to resolve here is the nature of the disqualification, that is, whether it is automatic or not. There are two opposing schools of thought on this issue. The first is of the opinion that the operation of the disqualification follows automatically upon conviction.[47]This view is based on section 160 (1) (b) of the Irish Companies Act, 1990 which states that

[45] Section 254 (1) (a) (ii)

[46] O'Connell, K. "Deemed Disqualification orders following a Defendant Conviction on Indictment for any indictable offence in Relation to a Company or involving Fraud or Dishonesty" Being a paper presented at the 10th Annual National Prosecutors' Conference, Dublin Castle Conference Centre, Saturday 23 May, 2009, p.1

[47] See for instance, Murray, B. Cited by O'Connell, K. Op.cit p. 1

"where a person is convicted on indictment of any indictable offence in relation to a company...he shall be deemed for the purpose of this Act, to be subject to a disqualification." The automatic aspect of this provision has been affirmed by the Central Criminal Court on the case of *DPPv Duffy*.[48]

The second school of thought emphasises the discretionary nature of consequential disqualification orders following criminal convictions. That is to say such disqualifications do not arise automatically[49]. This view is supported by Section (1) of the UK CDD Act, 1986, which provides that the court may make a disqualification order against a person convicted of an indictable offence in connection with the promotion, formation and management of a company.

A point to make at this juncture is that the nature of disqualification of directors on the ground of conviction for an indictable offence is basically a matter of statutory construction, and is bound to vary from one jurisdiction to another. Therefore, whether which of the two schools of thought should prevail, is a matter to be decided by reference to the relevant statutory provisions. This consensus is important since the laws of all countries cannot be at one on a given issue. In Hong Kong, the equivalent provisions are discretionary[50]. On the other hand disqualification follows automatically in Australia.[51] Similarly, in New Zealand, disqualification is automatic.[52] This also appears to be the feature of South African Companies Act.[53]

The position under Nigerian law is that a person having been convicted by a High court for any offence in connection with a company shall be restraint from acting as director.[54] The use of the word "shall" in this provision suggests that the court is mandated to make a disqualification order. In a way, this can be construed for an automatic power of disqualifications as a disqualification can either be triggered by an application from the

[48]CCC Bill No. CC 0035/008 McKechnie J.23 March 2009.
[49] O' Connell, K. Op.cit p.3
[50] See section 168E of the Hong Kong Companies Ordinance
[51] Section 206B of Australia's Corporation Act, 2001
[52] See section 382 (1) of New Zealand Companies Act, 1993
[53] Section 69 Companies Act, 2008
[54] Section 254 (1) (a) (ii) of the Act

prosecuting authority or any of the persons named under section 254 (4) of the Act[55]

The mandatory tenor of section 254 (1) (a) (ii) of the Act makes it clears that the court is not at liberty to exercise discretion where an application for a disqualification order has been properly made. In that case, the court would have no involvement whatsoever with it. It follows directly as a matter of law.[56]

It is, however, not clear from this provision if the court can, of its own motion make a disqualification order as a result of failure by an interested person to move the court in that regard. One possibility flowing from the phraseology "the court shall make an order that the person shall not be director" is that a court can*suo motu*, make a disqualification order. But there will be many cases in which this interpretation may not be satisfactory considering also the possibility of a counter argument that the provision was intended to apply when an application has been duly made and power of the court activated. For purposes of clarity and certainty, there is need for the legislation to be rewarded. An example of a clearly warded legislation in this regard is section 160 (3) of the Irish companies Act, 1990 where the operating words are that "the court may, of its own motion or as a result of an application, make a disqualification order...." This is a good statute book for Nigeria to take a page from.

**e. Fraudulent Persons**

The relevant provision on disqualification on the ground of fraudulent trading is section 254 but this section also makes cross-reference to section 506 of the Act. The combined reading of the two sections is to the effect that a court may make a disqualification order against a person if in the course of winding up, it appears that he has been guilty of an offence whether he has been convicted or not; or any business of the company has been carried out in a reckless manner or with intent to defraud creditors of the company or creditors of any other person for any fraudulent purpose. An application for a disqualification order here can be made by the official receiver, or the liquidator or any

[55] The persons named under this section include the official receiver, liquidator, member or creditor of the company

[56] DPP v Duffy (Supra)

creditor or contributory of the company.[57] Although this appears to be a belated measure akin to "treatment after death" of the affected company, its mission is to circumvent future occurrences and to keep the investment environment safe from directors with fraudulent tendencies.

Interestingly, this ground for disqualification (fraud) has been lumped in the same section as disqualification on the ground of conviction under the code-name "restraint of fraudulent persons.[58] But an important mark of distinction remains perceivable from the two in that while a conviction is necessary for a disqualification order to be made under section 254 (i) (a), it is not necessary for one to be convicted for him to be disqualified on the ground of fraud. Therefore, once it appears that a person has indulged in fraudulent trading such a person can be disqualified from further acting as director even if he has not been convicted for fraud.

As a matter of practice, an application for a disqualification order based on fraud remains an allegation which must be proved by evidence. The court will not proceed to granting an order without hearing from both parties especially as the right to fair hearing is constitutionally guaranteed any accused person who is also presumed innocent until the contrary is proven.[59]

What amounts to fraud for the purpose of a disqualification order is not defined by the Companies and Allied Matters Act. But evolving case law tends to suggest that fraud could be construed when directors use their powers not in the character of the act or transaction giving rise to the claim. In *Nsirim v Onuma Construction Co.(Nig) Ltd*,[60] the use of company's equipment by the directors to mould blocks for another company was held by the Supreme Court to amount to fraud on the company. The basis for this decision is that the directors acted in a manner that was inconsistent with their duties

[57] Section 506 (1) of the Act

[58] Section 254 (1) (a) deals with disqualification on the ground of conviction while sub (a) (i) deals with disqualification on the ground of fraud. The consequences of the two are dealt with under subsection (ii)

[59] See Section 36(1) and (5) Constitution of Federal Republic of Nigeria, 1999 as amended

[60] (2001) FWLR (pt.44) 405

more so with the fraudulent intent to derive certain gains or advantage.

What must be clarified is the fact that the above decision was brought in terms or section 300(d) of the Companies and Allied Matters Act which allows minority to, on the ground of fraud, institute an action against the directors as an exception to the rule in *Foss v Harbottle*.[61] That notwithstanding, the decision is instructive as it provides a major inroad for navigating cases of disqualification of directors on the ground of fraud. The possibility is that the court will come to the conclusion that fraud has been committed against the company where there is a breach of duties by directors with the intent of reaping some benefits.

It is of interest to note that a transaction giving rise to a claim of fraud on the company occasioned by directors can be redressed by a declaratory order or injunction.[62] The effect is that disqualification is not automatic in relation to a director whose conduct has been adjudged fraudulent by the court. Such a person can only be disqualified on the basis of a separate action in an application for a disqualification order, and for which the previous decision of court can be tendered as exhibit.

Failure of the persons enumerated by law (official receiver, liquidator, member or creditor)to institute an action for a disqualification order will thus mean that a person found to have committed fraud against a company may enjoy some impunity. This rather strange position, apart from its ineffectiveness in ensuring compliance by directors, has come close to encouraging corporate fraud by directors. It is submitted that there is no persuasive reason as to why the court upon finding a director guilty of fraud should not proceed to make a disqualification order against such director, preferring it to be the subject matter of another litigation process. This problem presents a strong ground for amending the Companies and Allied Matters Act to allow the court entertaining actions brothering on the fraudulent conduct of directors to make disqualification orders for a specified duration. This will avoid multiplicity of proceedings and also ensure that prompt and sustainable judicial measures are taken to guard against predatory management of companies by self-serving directors.

[61] (1843) 2 Hare
[62] Section 300 (d) of the Act

## Share Qualification

One major theme of modern corporate capitalism is the divorcement of ownership from control.[63] Therefore, those that manage and control companies may be different from those having beneficial interests therein. What this means is that it is possible for a person not being a shareholder of a company to be appointed to serve as director of the company. This is so because there is no provision of law in Nigeria relating to the pre-condition for one to be a shareholder to make him eligible for appointment as director. In other words, there is no share requirement for appointment as director. However, the articles of association of a company may provide that an individual cannot be appointed director unless he holds a certain number of shares in the company.[64]Until so fixed, no shareholding qualification is required.

A share qualification is usually justified on the ground that it ensures that the directors have a personal commitment to the company and its wellbeing.[65] But Farrar[66]argues that managerial commitment is more likely to be ensured by their remuneration packages than by any miniscule share qualification requirement designed to induce a sense of ownership. None of these opposing views has undergone any specific imperial verification to warrant its being superior to the other. However, the latter view seems to be the prevalent position in Nigeria in view of the fact that the model articles laid down under Parts I,II,III, and IV of Table A, First Schedule to the Act do not make provision for share qualification.

The above notwithstanding, it is permissible for the articles to make provision for share qualification and if the company's articles impose a share qualification, it becomes a strong ground for disqualification in respect of defaulting directors. To that end, section 251(2) of the Act states that "it shall be the duty of every director who is by the articles of the company required to hold a specific share qualification, and who

[63] Berle, A.& Means, G. *The Modern Corporation and Private Property* Revised edn (1968, p.18)
[64] Section 251 (1) of the Act
[65] Re North Australian Territory Co. Archer's Case (1892) 1 ch 332 at 337, per Lindley MR.
[66] Farrar, J.H & Hanningan, B.M op.cit p.327

is not already so qualified to obtain his qualification within two months after his appointment".

The office of director is to be vacated after a director fails to comply with this provision within its statutory time frame.[67] Continuing to act as director in breach of a share qualification clause in the articles of the company attracts penalty by way of a daily fine of ₦50 for the period covering the breach.[68] Unfortunately, the penal posture of this provision appears too weak to serve any meaning purpose. Is submitted that the penalty be reviewed upward.

**Conclusion**

The law on disqualification of directors in Nigeria is geared towards ensuring a reliable and vibrant business environment that is attractive to both local and foreign investors. The grounds on which a person may be disqualified from serving as director are tied to the strategic role the directors play in corporate governance; that of ensuring corporate success. Apart from age and mental considerations which are not associated to the previous conduct of those sought to be disqualified as directors, other grounds under the Act are directly linked to previous directors' conduct. These grounds include insolvency, bankruptcy, fraud and previous conviction for offences relating to the promotion, formation and management of a company.

Despite that these mechanisms have been in place for a long time now, one cannot say with a degree of certainty that the Nigerian business environment has made good use of the rules to free the corporate scene from unethical directors. In addition to the lukewarm attitude towards initiating judicial proceedings for the disqualification of directors, is the problem of statutory loopholes mostly as a result of improper delineation of the scope and extent of the provisions relevant to disqualification.

For the purpose of reckoning with the intended objectives of the disqualification provisions of the Act, there is need for the legislature to step in and lay down elaborate rules, delineating the scope and extent of the relevant provisions. It also requires statutory clarity on instances when disqualification is automatic in which case the requirement of initiating a judicial

[67] Section 251(3) of the Act
[68] Section 251(5) of the Act

process for a disqualification order with its attendant inconveniences may be avoided. For example, where a person is convicted for fraud or other offences relating to the management of a company, there is no reason why disqualification should not be pronounced by the court.

# IMPROVING MECHANISMS FOR THE IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

***By***

***Kasim Balarabe****

*The problem of respect for the law is not primarily related to the adequacy of the rules themselves, but is mainly the result of a lack of political will on the part of the Parties to armed conflicts to adhere to the law.*[1]

## Introduction

Although war is a phenomenon which exist from time immemorial and regulating the relationship between communities, societies and modern States, the law responding to it took shape from the second half of the 19th century following the recommendation by Geneva Businessman, Henry Dunant. The idea conceived by Henry Dunant was the establishment of an organisation sanctioned by international agreement inviolable in character to provide care and assistance to the wounded and sick. This suggestion followed Dunant's witnessing the battle of Solferino involving French forces, Italian Forces and Austrian forces in 1859. Since then, a number of international legal instruments have been adopted expanding the scope and operation of the law applicable to armed conflict situations as well as the persons and objected protected by the law. These international legal instruments however, largely were adopted pursuant to observations and experiences after major wars such as the need to protect prisoners of war after First World War, the need to protect civilian population after Second World War, the need to protect the natural environment and the requirement of observing minimum rules in non-international armed conflicts as well as the prohibition of certain means and methods of warfare.

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[1]Jacob Kellenberger, 'Striving to Improve Respect for International Humanitarian Law', in Iihl (ed.), *Strengthening Measures for the Respect and Implementation of International Humanitarian Law and Other Rules Protecting Human Dignity in Armed Conflict: Challenges and Prospects* (Sanremo: IIHL, 2004). p. 19

These wars have served as stepping stone in the development of rules applicable to armed conflict situations.

Notwithstanding the progress made, International Humanitarian Law ('IHL') continues to suffer violation in many international and non-international armed conflicts including by the most developed States.[2] The two major conflicts in the 1990s (in the former Yugoslavia and Rwanda), the conflict between Eritrea and Ethiopia, Allied forces in Afghanistan and Iraq, the Lord's Resistance Army in Uganda, civil wars Syria, Yemen and fight against the Islamic State and its affiliates such as the Boko Haram in Nigeria are typical examples of the growing challenges being suffered by IHL.

The changing nature of warfare in both international and non-international armed conflict in the recent past is significantly undermining the efficacy of IHL. Serious violations occur in situations where armed groups and other non-state actors consider their successes to be premised on not respecting the law thereby adopting methods of warfare inimical to the philosophy and purpose of IHL. Typical examples of this can be seen in Al-Shabab in Somalia, and Boko Haram in Nigeria.in these situations, there has been deliberate targeting of civilian population, terrorizing the civilian populations, rape, torture and other acts amounting to war crimes, crimes against humanity and genocide.

Recent conflicts have witnessed the involvement of new actors; fragmentation in weak or failed States; growing overlap between political and private aims; an increasingly sophisticated technology employed by both States and non-state actors; asymmetrical warfare; an uncontrolled availability of large quantities and categories of weapons; outsourcing of military functions to private security companies, involvement of military in humanitarian work and increasing involvement of civilians in armed conflict.[3]These new phenomenon continue to complicate the nature of armed conflict and the response of the law, their

[2] Such as the treatment of prisoners by the United States forces in Abu Graib prison in Iraq.

[3]Kellenberger, 'Striving to Improve Respect for International Humanitarian Law'. p. 18

recurring nature works to validate the assertion that "past wars are among the causes of new wars".[4]

War has been prohibited by both international[5] and domestic law but this prohibition is yet to result to ending the occurrences of war and war continues to be a sad reality necessarily warranting the continued existence of IHL.

IHL being unique in its rules, compassionate and humane in its operation is aimed at protecting victims of war by ensuring the observance of its fundamental principles of necessity, distinction, proportionality, precaution and above all, that of humanity. IHL balances the concept of military necessity and the protection of war victims in that while recognising the right of belligerent to wage war, neutralise opponents, and destroy objects equally requires respect and consideration for humanity. It protects civilian population during armed conflicts, persons deprived of their liberty, sick, and wounded as well as those under military occupation. It comes into play "when rules and structures are breaking down" and "when humanitarian standards are in jeopardy".[6] IHL was specifically designed to fit into this inhumane and illegal situation, to bring into being precisely defined rules balancing military needs with respect for humanity.

The success of IHL rests on the extent to which its rules are implemented in armed conflict situations. In this light, several international legal instruments notably, the four Geneva Conventions and their Additional Protocols and The Hague Regulations have provided for mechanisms designed to ensure that IHL functions as intended and provide the needed protection to war victims.

This article analyses the existing implementation mechanisms and their weaknesses, providing suggestions for their improvement as well as other possible mechanisms the law should take into consideration in future treaties.

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[4]Ibid. p. 17

[5] See Art. 2(4) of the United Nations Charter.

[6]Maria Teresa Dutli, 'The Importance of National Implementation of International Humanitarian Law', in Iihl (ed.), *Strengthening Measures for the Respect and Implementation of International Humanitarian Law and Other Rules Protecting Human Dignity in Armed Conflict: Challenges and Prospects* (Sanremo: IIHL, 2004).p. 187.

**Mechanisms for the Implementation of IHL**

Generally, implementation is said to encompass "all measures that must be taken to ensure that the rules of law are fully respected".[7] In the context of IHL, implementation refers to such measures designed to monitor and ensure observance and compliance with its rules.[8]Series of mechanisms for the implementation of IHL exist, however, most of them have not recorded much achievements while some of have been described as "inherently insufficient and in some cases even counter-productive."[9]Numerous challenges continue to exist. Some of these stemmed from the difficulty of concluding any international agreement imposing stricter obligations on the part of States. Consequently, the end result and final outcomes of international conventions sometimes are weak or vague, rarely would a strong mechanism finds its way into an international instrument.

The greatest weakness lies in the fact that IHL operates in an anarchic international society; there is no central authority with power to enforce its provisions.[10] The entire system of implementation is voluntary in nature and relies on the goodwill of parties.[11] Similarly, most of its implementation mechanisms are normative; while they impose obligations, they failed to prescribe sanctions in the event of non-compliance.[12]

Notwithstanding the current state of the law, the failure to agree on stronger mechanisms should not be an obstacle to improving the existing ones. States and relevant actors acting in good faith and with sincerity of purpose could positively transform the existing mechanisms. This comes in the light of the

[7]Commonwealth Secretariat, *1999 Meeting of Commonwealth Law Ministers and Senior Officials: Port of Spain, Trinidad and Tobago, 3-7 May 1999 : Memoranda* (Commonwealth Secretariat, 2001).

[8]Alexandre Faite and Umesh Kadam, 'Implementation of International Humanitarian Law in Japan: The Icrc Perspectives', <http://www.adh-geneva.ch/RULAC/pdf_state/ICRC-perspective.pdf>, accessed 17 January 2012.

[9]Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War* (2nd edn., 1; Geneva: ICRC, 2006). p. 271

[10]Rüdiger Wolfrum and Dieter Fleck, 'Enforcement of International Humanitarian Law ', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd edn.; Oxford: Oxford University Press, 2008), 675-722.at p. 675

[11]Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Oxford-Portland-Oregon: Hart Publishing, 2008). p. 284

[12]Ibid. p. 285

view that the biggest problem is not the rules but the lack of respect for them.[13] That even where no mechanisms exist, States should be guided by the general principles of IHL and the famous Marten's clause.

Broadly speaking, mechanisms for IHL implementation are both general and specific. They are general because the international laws governing other aspects such as state responsibility are applicable and specific because express provisions in IHL treaties have prescribed measures for its implementation. The mechanisms are for the prevention, control and suppression of IHL violation. The operation of the mechanisms is in three phases: during peacetime, during armed conflicts and after armed conflict situations. The sections below consider the existing mechanisms.

### 1. Obligation to Respect and Ensure Respect

The first and most important mechanism is the obligation flowing from article 1 common to the Geneva Conventions; obligation to respect and ensure respect. This obligation encompasses two aspects: the obligation to respect which requires the good faith implementation of IHL by the parties and the obligation to ensure respect which relates to the States' actions with respect IHL violations, or potential violations by the conflicting parties. The obligation to respect is equally in two folds; obligation not to encourage a party to armed conflict to violate IHL and obligation not to take any action which would assist in such violations.[14] These apply in all circumstances,[15]in both international and non-international armed conflicts.

Obligation to ensure respect involves the exercise of due diligence by third States with respect to violations or potential violations. The responsibility of ensuring the protection of victims of war and moderating means and method of warfare is on the States parties to the Geneva Conventions and their protocols. Although this obligation arose from States' consent as expressed in the treaties, the Geneva Conventions have been held

[13]Kellenberger, 'Striving to Improve Respect for International Humanitarian Law'. p. 19
[14]Ibid.p. 21
[15]Michel Veuthey, 'Implementing International Humanitarian Law: Old and New Ways', in B.G Ramcharan (ed.), *Human Rights Protection in the Field* (Leiden: Martinus Nijhoff Publishers, 2006). p. 90

to have acquired the status of customary law, applicable irrespective of treaty obligations.[16] States parties are obliged to, not only respect, implement and comply with the rules but to also to ensure respect and compliance of third States found violating the rules.[17]The obligation to respect and ensure respect is fundamental and central to the implementation of IHL and it is customary in nature.[18]

As strong as this obligation is, the major problem of IHL implementation stemmed from the States themselves especially those involved in armed conflict.[19]This implementation mechanism is decentralised and hence counter-productive.[20]Lack of political will to implement or enforce the treaties regarding the obligation to respect is the major problem on the part of States.[21]Similarly, where violation is taking place, third States often react differently; either by taking sides on political grounds or by taking a stand on the basis of their understanding of the reason for the conflict, States rarely act in repressing the violations.[22]

The effectiveness of this mechanism largely depends on the willingness of the States. States must be willing to act in good faith and must strive to shun political interest in favour of humanitarian protection. States must refrain from mixing *ius ad bellum* with *ius in bello*issues when human lives are at stake. Furthermore, because the central problem is the lack of political

[16] See for example *Eritrea/Ethiopia Claims Commission, Partial Award-Prisoners of War, Ethiopia's Claim* 4, The Permanent Court of Arbitration (2003) para. 32

[17] See Geneva Conventions, common art. 1

[18]*Case concerning the military and paramilitary activities in and against Nicaragua* (Nicaragua v. United States of America), International Court of Justice, (Merits) ICJ Report vol. 14, Para. 220. The ICJ reaffirmed the importance of common article 1 in its Advisory Opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice, Advisory Opinion (2006) 43 ILM 1009*, para. 158:

[19]Marco Sassòli, 'Possible New Mechanisms Enhancing Compliance with International Humanitarian Law ', in Iihl (ed.), *Strengthening Measures for the Respect and Implementation of International Humanitarian Law and Other Rules Protecting Human Dignity in Armed Conflict: Challenges and Prospects* (Sanremo: IIHL, 2004).p. 57.

[20]Sassòli and Bouvier, *How Does Law Protect in War*.p. 271

[21]Sassòli, 'Possible New Mechanisms Enhancing Compliance with International Humanitarian Law '.p. 57

[22]Sassòli and Bouvier, *How Does Law Protect in War*.p. 272

will, a monitoring mechanism should be established which should require States to periodically report to an international monitoring body on their respect and implementation.[23] The logic here is to create political will because States do not want to be ridiculed. If the reporting becomes mandatory similar to other human rights treaties, States would either have to report violation or be subjected to questioning by the treaty monitoring body.[24] Armed groups should equally be empowered through a protocol to report. This, not only binds such groups but equally will serve as an opportunity to compel States to respond to such groups submissions.[25]

### 2. Dissemination

The identical provision of articles 47/48/127/144 of the Geneva Conventions is to the effect that the High Contracting Parties have agreed to disseminate the provisions of the conventions as widely as possible in their State and to also include the provisions in both military and civilians' trainings in order to make the rules known to both the armed forces and the populations.

This undertaken includes but not limited to the following:

i. Training the armed forces: this involves including IHL rules in the military manuals, rules of engagement, military practical, regular training, as well as the inclusion of human rights law;[26]
ii. Training the police;
iii. Inclusion of IHL into the university curriculum;
iv. Dissemination in civil society and to persons such as journalists, politicians, diplomats and judges.[27]

Dissemination in civil society is essential considering for example the role of civil society organisation in the conclusion of special agreements with armed groups under article 3 common to

[23]Sassòli, 'Possible New Mechanisms Enhancing Compliance with International Humanitarian Law '.p. 58
[24]Ibid.
[25]Ibid.
[26]Sassòli and Bouvier, *How Does Law Protect in War*.at p. 276
[27]Kolb and Hyde, *An Introduction to the International Law of Armed Conflicts* at p. 286

the Geneva Conventions.[28]Similarly, if civil society is sensitized as they were in human rights law, effective advocacy on the need for respecting IHL principles will be ensured. Furthermore, since obligation for respecting IHL is not only on governments but also individuals including rebel fighters, dissemination of the rules in the larger society in peacetime could positively contribute to respecting the rules by the population and ensuring compliance during hostility.[29] Wider knowledge will equally assist in holding government accountable in the event of violation.[30]

If the state has put this measure in peacetime, it will be relatively easy to control violations in war situation. If the entire population knows the rules, such knowledge may influence the behaviour of armed groups, may minimize child recruitment and may assist the population to know their roles during armed conflicts. However, the major weakness here is the lack of a monitoring body that can investigate the extent to which this obligation has been implemented. The fact that ICRC overseas the implementation, such a body is not in the position to coerce or compel a State, it can only persuade or advise and its observations are not always known by the public.

Other steps required to be taken by States include:

i. Translating IHL rules into local languages for better understanding.[31]
ii. Incorporating IHL treaties into domestic laws where such is required by the Constitution of a State.[32]
iii. Enacting domestic legislation on IHL rules such that will provide for penal sanctions where IHL is violated and the

[28]Dieter Fleck, 'Priorities and Open Challenges to Improve Implementation and Enforcement of Humanitarian Protection', in Iihl (ed.), *Strengthening Measures for the Respect and Implementation of International Humanitarian Law and Other Rules Protecting Human Dignity in Armed Conflict: Challenges and Prospects* (Sanremo: IIHL, 2004).*)* at p. 71

[29]Maria Teresa Dutli, 'The Importance of National Implementation of International Humanitarian Law', ibid.at p. 189

[30]International Committee of the Red Cross, 'Improving Compliance with International Humanitarian Law: Icrc Expert Seminars ', (Geneva, October, 2003).p. 6

[31]See Geneva Conventions, common arts. 48/49/128/145, and Protocol I arts. 80 and 84

[32] See Protocol I, art. 80

use of emblem and distinctive signs to avoid misuse or abuse.[33]

Providing for penal sanctions is specifically required regarding grave breaches.[34] The obligations for enacting domestic legislation arises out of the general obligation of States parties to take necessary measures for the execution of IHL.[35] National legislation is also particularly important in the enforcement of such provisions in the Geneva Conventions or Protocol I which are not self-executing.[36]

iv. Training of qualified personnel under article 6 and 82 of Protocol I.[37]

Similar to other normative obligations on the State parties, there is no mechanism for ensuring compliance at the international level and States don't seem to be interested in being subjected to scrutiny on the measures they have put in place or for the implementation of their obligations. When it was proposed that there should be an obligation on States to report to an international commission on the application of national measures such proposal was rejected.[38] To make the law effective, the ICRC, whose role it is to ensure monitoring of the implementation of IHL, should devise appropriate ways of engaging States authorities in disseminating IHL knowledge. The ICRC should reinforce its existing mechanisms and vigorously conduct national and international trainings for military personnel, relevant government officials, civil society and non-governmental organisations.

## 3. International Committee of the Red Cross

The International Committee of the Red Cross (ICRC) is an independent, neutral intermediary and impartial humanitarian

[33]Sassòli and Bouvier, *How Does Law Protect in War*. at p. 278-9. See also Geneva Convention I arts. 53–54; Geneva Convention II, art. 43–45

[34] For the grave breaches provisions see Geneva Conventions, arts. 50/51/130/147,; Protocol I arts. 11(4) and 85.

[35] See Protocol I, art. 80

[36]Toni Pfanner, 'Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims', *IRRC*, 91/874 (2009).at p. 282

[37]Sassòli and Bouvier, *How Does Law Protect in War*.at p. 279

[38]Pfanner, 'Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims', (at p.283)

international organisation. It has mandate under the Geneva Conventions to monitor respect and compliance of IHL by belligerents and armed groups. The ICRC does among others, visit and interview prisoners of war[39] and civilian internees without witnesses,[40] provide relief to war victims,[41] offer its services especially in non-international armed conflicts[42] and its good offices to facilitate the institution of hospital[43]and safety zones[44] as well as search for missing persons.[45]ICRC is an important mechanism in the implementation of IHL. The major obstacle however, is that the findings of ICRC are not public. It cannot testify in court against a violating party. The ICRC considers its continued neutrality can only be ensured if its findings remain confidential. Although there is logic to that especially in the light of international anarchical system but equally, the knowledge that ICRC findings can be made public could deter some violations by a party. States do not want to have their image dented and do not want to be seen to be violating rules they willingly have accepted. The ICRC should consider under extreme circumstances, the possibility of making public findings which seriously are incompatible with the spirit and purpose of IHL.

Although the ICRC has been undertaking an excellent job, an identified area where IHL violations mostly occur in recent conflicts is non-international armed conflicts. The ICRC's role needs to be "reinforced and accepted by all parties to today's armed conflicts, Government and Non-State Actors" alike.[46]The ICRC should continue to vigorously pursue the conclusion of special agreements with armed groups as well as encouraging them to issue unilateral declarations or develop and abide by their internal code of conduct which ensures respect for IHL.

[39] Geneva Convention III, art. 126
[40] Geneva Convention III, art. 143
[41] Geneva Convention III, arts. 59 and 61
[42] Geneva Conventions art. 9/9/9/10 and common art. 3
[43]Geneva Convention I, art. 23.
[44]Geneva Convention IV, art. 14
[45]Geneva Convention III, art. 123; Geneva Convention IV, art. 140.
[46]Veuthey, 'Implementing International Humanitarian Law: Old and New Ways'.at p. 98

## 4. Cooperation with the United Nations

Another important mechanism of ensuring respect for IHL in armed conflicts is that the High Contracting Parties to Protocol I have undertaken to act jointly or individually in cooperation with the United Nations in situations of serious violation of IHL.[47]The United Nations Security Council has the mandate of maintaining international peace and security under the United Nations Charter and is empowered to act on behalf of member States when the necessity for doing so arises in the context of international peace and security. While it is not difficult to point instances where the United Nations or its Security Council appeared to be powerless in executing its responsibilities, there were instances where the Council had demonstrated its capacity to ensure the repression of international crimes and prevent impunity. The establishment of the two *ad* hoc tribunals in the 1990s: the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda, the United Nations through the Security Council has played important role regarding the repression of IHL violations. There is however, an interplay of international politics in the operation of international law.

The Security Council is however a political body and sometimes acts in accordance with the political interests of its members notably the permanent five. The existence of veto power on the part of the permanent five greatly undermines the capacity of the Security Council to act if the issue at stake is incompatible with the political interest of any of the five members. Unfortunately, also, despites Security Council's role in maintaining international peace and security, there were situations where forces of the United Nations have been alleged to have committed serious violations of IHL; rape.

To be effective, the UN must undergo legal and political reforms. The exercise of veto on fundamental humanitarian issues of concern to the global world is inconsistent with the legal and moral obligations of the United Nations. The United Nations must consistently ensure that mechanisms are in place to monitor its forces and provide for individual reporting system in the event of a violation. The original idea of the United Nations

[47] Protocol I, art. 89

having and maintaining its standing forces must be realised. The idea of States contributing forces on occasional basis must be jettisoned, the United Nations must function as intended in this context for responsibility to be apportioned and appropriate redress mechanisms be put in place. Members of the UN should individually and collectively continue to support the UN with adequate resources in accomplishing its role of maintaining international peace and security. Similarly, UN forces should be adequately empowered to not only prevent and suppress IHL violation but to also arrest and surrender persons alleged to have committed serious violations to the appropriate repressing mechanisms.[48]

### 5. International Fact-Finding Commission

This mechanism was established pursuant to article 90 of Additional Protocol I (AP I). The Commission is composed of experts ready to assist in the efforts to improving compliance with IHL, "both through fact finding as well as by assisting with reconciliation efforts through it's good offices' function."[49]Presently, the formal competence of the Commission "extends only to situations of international armed conflict", it has however expressed its willingness to extend such services to situations of non-international armed conflicts.[50]

The major weakness of this mechanism is that consent of the parties to the conflict is required before it can act. Since its establishment in 1991 and despites the commitment and willingness of the Commission to offer its expertise and to act, no single case has yet been referred to it. The reason is largely due to the fact that parties to conflicts are unwilling to consent to such investigation.[51]Addressing this problem requires the improvement of the Commission's institutional and other means.[52] In this regard, the Security Council could use it power to authorise the Commission to act and can also mandate the

[48]Veuthey, 'Implementing International Humanitarian Law: Old and New Ways'. at p. 101.
[49]International Committee of the Red Cross, 'Improving Compliance with International Humanitarian Law: Icrc Expert Seminars '.at p. 10
[50]Kellenberger, 'Striving to Improve Respect for International Humanitarian Law'.at p. 22
[51]*Ibid.*
[52]Dieter Fleck, 'Priorities and Open Challenges to Improve Implementation and Enforcement of Humanitarian Protection', ibid. at p. 70

State involved to cooperate with such investigation similar to what it did in Sudan. Alternatively, the Commission could formulate procedural rules under it powers which will provide for the submission of an optional declaration or the conclusion of a special agreement with States recognising the competence of the Commission to act in the event of international or internal armed conflict.

Furthermore, in internal armed conflict, the ICRC or any other competent organisation could facilitate the conclusion of a special agreement between the state and the armed group for the implementation of IHL and a provision recognising the competence of the Commission to investigate violation could be incorporated. This will not only help ensure compliance but will also have a fundamental impact in the minds of those prosecuting the war that failure to comply means risking prosecution for war crimes or crimes against humanity.

### 6. Meeting of the High Contracting Parties

This is under article 7 of AP I and is meant to provide a platform upon which problems associated with the implementation of the Conventions and Protocols can be discussed by States parties. The depositary may call for this meeting once a state party requested. The weakness is the States may be so politically inclined and may not initiate. However, Switzerland being the depository and a State party can take such initiative on its own. Switzerland has once voiced out its position during one of such meetings regarding violations by Israel.53If this mechanism works, there will be an opportunity to consider issues or problems associated with violations by a State(s) and sanctions may be imposed on such State(s).

### 7. National Committees for The Implementation of International Humanitarian Law

The purpose of national committees "is to advise and assist the government in implementing and spreading knowledge of IHL".[54]The ICRC and other international actors such as the

[53]Veuthey, 'Implementing International Humanitarian Law: Old and New Ways'.at p. 97

[54]International Committee of the Red Cross, 'National Committees for the Implementation of International Humanitarian Law',

Intergovernmental Group of Experts for the Protection of War Victims have advocated for the setting up of these committees and at present there are several of them operating in the territory of member States.[55]

The major weakness is that there is no obligation on the member states to establish it.[56]While States should continue to be encouraged, the mechanism effectiveness depends on being in a position "to evaluate existing national law in the light of the obligations created" under the various IHL instruments; being able to make useful "recommendations for further implementation"; being in a position to monitor the application of the law, and in cases of non-compliance being in a position to ensure that such is remedied.[57]For the committee to be effective, the depository and the ICRC should continue to engage and facilitate member States to establish such permanent standing committees and not on *ad hoc* basis.[58] The ICRC should work closely with the membership to build their capacity and to monitor their responses to IHL issues similar to the functions being served by the UNHCR working with governmental authorities in the context of refugee protection.

### 8. ICRC Advisory Service on IHL

This mechanism is aimed at encouraging and supporting States and national committees in the implementation of IHL.[59] The Service utilises lawyers and local experts through a decentralized network and deals with issues beyond the legal field to include generating political will.[60] It has the capacity to respond to different and specific requirements of States political and legal systems.[61]

The weakness however, like other mechanism is, there is no obligation on States to accept the Advisory Service's

<http://www.icrc.org/eng/assets/files/other/national_committees.pdf>, accessed 13 December, 2016

[55]Ibid.

[56]Ibid.at p. 1

[57]Ibid.

[58]Dutli, 'The Importance of National Implementation of International Humanitarian Law'.at p. 194

[59]Ibid.

[60]Ibid.

[61]Ibid.

recommendations. Similarly, ICRC's role in conflicts and its policy of non-disclosure does not provide the opportunity for this mechanism to expose violating States. The Service should continue to engage States constructively through regular interaction and training.

### 9. Repression: Criminal Courts and Tribunals and the Implementation of IHL

Several articles in IHL treaties seek to ensure that violators are held accountable especially the grave breaches which provides for the trial and punishment of violators irrespective of their nationality or the place where the crimes were committed.[62]Through this, the concept of universal jurisdiction has been recognized and promoted.

The establishment of *ad hoc* tribunals (ICTY and ICTR) for the prosecution of war criminals has played a tremendous role in the enforcement of IHL norms. Indeed, a critical development after the Nuremberg.[63] Through their roles the notions of individual criminal responsibility, war crimes, crimes against humanity and genocide have been firmly entrenched. The tribunals have equally served as catalyst in enabling other States to prosecute war criminals emanating from those conflicts in their domestic courts. This for example has been done in Denmark, France, Germany, and Switzerland.[64] The successes of the tribunals might have also played a role in convincing the international community of the importance of such institutions in ensuring respect of IHL at the international level which may have led to the establishment of the International Criminal Court.[65]

However, the major weaknesses of the *ad hoc* tribunals are that they have geographical and time limitations coupled with the fact that it takes a long time to finally dispose a case. Although a permanent International Criminal Court has been established, and its mere existence could help in preventing the commission of serious violation of IHL in future conflicts, its

[62] See Geneva Conventions, common arts. 49/50/129/146
[63]Dutli, 'The Importance of National Implementation of International Humanitarian Law'.at p. 192
[64]Ibid.
[65]Ibid.

procedure is selective and its system is still primitive.[66]The ICC is also a treaty based institution applicable only on the State parties. To address impunity, two approaches need to be adopted:

1. The utilisation of universal jurisdiction by States to prosecute those who have committed international crimes;
2. The Security Council needs to be proactive. With the referral of two situations to the ICC; Sudan and Libya, the Security Council could do more if only its political considerations and interests could give way to the effective protection of human lives. The Security Council legitimacy could be enhanced for example where it promptly acts in situations where serious IHL or human rights violations are reported irrespective of the political or diplomatic relationship between a permanent member and the State involved.

Since ICC's jurisdiction is on complimentary basis, States should be encouraged to enact appropriate legislations dealing with same issues and to remove all obstacles capable of preventing effective adjudication. Similarly, States should as a matter of special interest and in furtherance to their obligation under article 80 AP I continue to update their legislations on penal sanctions to include such developments on related crimes as may have taken place at the international level or in the courts of other member states. This will ensure that the principle of legality is respected in all circumstances. This may also send strong signals to would-be violators that respecting the law would be the only option. Until there is an end to impunity, violations of the law will continue to occur.[67]

## 10. Other Suggestions

Although there is relatively appreciable level of confidence in the existing mechanisms if they can be improved upon and abide by, it is worth mentioning that some other suggestions for the establishment of new ones were made. Some of the proposals include the following:

[66]Dieter Fleck, 'Priorities and Open Challenges to Improve Implementation and Enforcement of Humanitarian Protection', ibid.at p. 72

[67]Maria Teresa Dutli, 'The Importance of National Implementation of International Humanitarian Law', ibid.at p. 188

1. Developing a system which will have either *ad hoc* or periodic reporting power as well as the institution of an individual complaints procedure.[68]Individual complaint procedure will be helpful in internal conflicts especially where the State is the violator and where international organisations may be denied access hence no effective investigation can be conducted.[69]Individual complaint procedure will fill this gap.

2. In the several conferences organised by the ICRC for example in Pretoria, Mexico City, Bruges and Kuala Lumpur participants have shown great enthusiasm for regional cooperation.[70] This is because compliance will be best ensured if considered collectively or at regional level.[71]Regional cooperation is important as it will collectively mobilise necessary political will, military and financial means required to prevent, or repress IHL violations. Regional organisations such as the African Union, European Union, ECOWAS, SADC, EAC should be encouraged to have monitoring and compliance of IHL functions in their areas with mechanisms to ensure the detection of early warning signs and be properly equipped to act.

3. Similarly, it was suggested that a committee of States or of independent IHL experts be established "to serve as a '*Diplomatic Forum'* for addressing situations of humanitarian law violations" as well as creation of the office of a High Commissioner for IHL.[72] The High Commissioner should be empowered in the same way the counterpart in human rights has been. This will create an enabling environment for the United Nations to effectively discharge its obligation through monitoring, evaluating and responding to situations in good time.

4. Another mechanismis that members States should ensure due diligence in their sale of arms to States and armed groups. States should enact appropriate legislations to ensure the

[68]Jacob Kellenberger, 'Striving to Improve Respect for International Humanitarian Law', ibid.at p. 23
[69]Dieter Fleck, 'Priorities and Open Challenges to Improve Implementation and Enforcement of Humanitarian Protection', ibid.at p. 73
[70] See for example International Committee of the Red Cross, 'Improving Compliance with International Humanitarian Law: Icrc Expert Seminars '.
[71]Ibid.
[72]Kellenberger, 'Striving to Improve Respect for International Humanitarian Law'.at p. 23

scrutiny of all intended sales of armaments. The purpose is to ensure that arms are not sold to a State or armed groups with a record of IHL violation. This will assist the state in ensuring that their export trading is not in breach of their obligations under any IHL instruments.[73] The adoption of the Arms Trade Treaty (ATT) in this light is a welcome development.

5. Another option is for the human rights treaty bodies to continue to look into the issues of IHL violations within their human rights treaty mandates such as for example addressing violation of right to life, deprivation of liberty etc. in the context of armed conflict.

6. States could also exert diplomatic pressure on violating States and could make public denunciation of violations through the individual or collective actions of other States, regional or international organisations.[74]

7. Another way is to engage the services of media[75] and other local and non-governmental organisations in disseminating IHL rules.

8. *Ad hoc* independent monitors may be agreed upon by parties to a conflict.[76]In internal conflict, efforts should gear toward engaging armed groups through the conclusion of special agreements under common article 3 and encouraging them to issue unilateral declarations where special agreement is not possible. Where situations permit spiritual leaders[77] in the society could be utilised in disseminating IHL.

If States could observe their obligations in good faith, certainly problems of IHL violations will significantly reduce.

## Conclusion

Numerous mechanisms for the enforcement of the rule of IHL exist. Regrettably some of these mechanisms are ineffective, redundant, or counterproductive. The respect for IHL is fundamental in conflict situations for several reasons including

[73]International Committee of the Red Cross, 'Improving Compliance with International Humanitarian Law: Icrc Expert Seminars '.at p. 7
[74]Ibid.
[75]Roy W. Gutman, 'Spotlight on Violations of International Humanitarian Law. The Role of the Media', *IRRC*, 38/325 (1998). pp. 619–625
[76]Veuthey, 'Implementing International Humanitarian Law: Old and New Ways'. at p. 95
[77]Ibid.

the need to protect persons who do not or no longer directly participate in armed conflict and to ensure that even in the most extreme circumstances such as war, the observance of the rule of law is equally important if not a fundamental requirement. The existing mechanisms need to be appropriately reinforced, States must respect the obligations they have undertaken under the various IHL treaties and international legal instruments and armed groups must be encouraged and properly informed about IHL rules. Violations of IHL by any belligerent is certainly of no advantage to such a belligerent. Rather it dented the image and recognition which such a belligerent might have had before the violation.

# INTRODUCING THE TEACHING OF AFRICAN LEGAL JURISPRUDENCE IN THE 21ST CENTURY: THE KIU APPROACH

***By***

***Abdulkareem Azeez****

**Abstract**

*One of the consequences of colonial rule in substantial part of Africa was the Received English Law. This law was not only alien to the cultural orientation of the African people but significantly compromised the cherished traditional African Justice System, by subjecting amongst others, the customary rules to 'validity' test. The colonial approach of planting the United Kingdom legal system* intothe *colonized territories without considering the cultural values and peculiarities of the indigenous people has caused* huge *historical legal imbalances.This research will review the traditional African justice system prior to the arrival of the received English law; during colonialism and in the post-colonial era with particular emphasis on the 21st century law teaching at Kampala International University. The research will recommend a unified approach aimed at* marrying *the inherited legal system with the traditional Africa justice system with a view of bringing out an efficient and acceptable legal system which will reflect the needs and values of the African people.*

**Introduction**

In the olden days, Africa, education was undertaken by practice.[1] The concept of knowing and doing was well established. Whatever degree of proficiency a person wanted to attain in a vocation, craft or trade, he had to undergo varying periods of practical instruction and training within the complexities of his own familial and social system. For instance, the son of a fisherman spent his mornings by the seashore swimming in the surf until he became proficient in swimming

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[1] David Kimble "A Political History of Ghana" 1963

and diving as in walking and running. Therefore, the education of an African child by the African system is a preparation and practical training for the life that lies before it[2]. Unfortunately, this form of education is deemed to be informal and usually discarded by the 'revered' formal education which is predominately literary. Students' heads are being filled with stuff which they do not understand, much less apply.[3]

This article will adopt the doctrinal method of research in analyzing the pre and post-independence legal education in Africa with specific reference to KIU as a case study and thereafter recommend ways of tackling the hurdles facing the teaching of legal education in the 21st century Africa. The article will conclude by providing a workable merger between the inherited legal system and the indigenous traditional African justice system with a view of providing an acceptable legal system which reflect the yearnings and peculiarities of the people of Africa.

**Pre- Independence Africa Legal System**

The use of customary law systems as part of the delivery of justice services to the poor and vulnerable people in African countries was the practice prior to the coming of the colonial masters. It was a flexible legal system which evolves as communities evolve, inexpensive, accessible and speedy. Its proceedings are easily understood by users of the system and it provides communities with a sense of ownership in contrast to formal legal systems that are perceived as alien to a considerable number of people in Africa.[4]

Prior to the Europeans' arrival in Africa, there appeared to be no formal system of legal education that produced 'legal professionals' as the term is presently understood[5]. Inheritance, ownership of moveable or immovable property, status of individual rules of behavior and morality were matters irrevocably settled by the customary law with which everyone was familiar

[2] Samuel O. Manteaw "Legal Education in Africa: What Type of Lawyer Does Africa Needs? McGeorge Law Review, Vol. 3, 2008
[3] Ibid @ 951
[4]Minneh Kane et. al "Reassessing Customary Law Systems As A Vehicle For Providing Equitable Access To Justice For The Poor" Arusha Conference, New Frontiers of Social Policy, December 12-15, 2005
[5] Samuel O. Manteaw supra @ p910

with from childhood and litigation regarding such matters was almost inconceivable.[6]

Traditional legal systems and customary laws in African polyethnic societies formed part of a functioning, coherent and consistent totality of the African way of life. The role of legal professionals was not litigation. Rather, they performed public interest services and used mediation to resolve disputes andmaintain balance and harmony between parties and in the community at large. Such legal professionals include Chiefs, Elders and people with law related responsibilities or functions.[7]

Traditional courts are a useful and desirable mechanism for the speedy resolution of disputes given their nature as an easily accessible, inexpensive simple system of justice. Some of the advantages of the traditional African justice system include:

- Accessibility: These exist in almost every area of jurisdiction which is within reach of most inhabitants. People do not have to travel long distance to conventional courts.
- Cost: Traditional Courts are cheaper in terms of court levy which in turn makes access to justice affordable.
- Familiarity with the law: Traditional courts apply customary laws which consist of rules and customs of a particular group or community. Ordinary people understand it and relate to it much more than the largely imported common law or the statutory law applied in regular courts. This encourages popular participation in the exposition of the law.
- Simplicity and Informality: The procedure in traditional courts is simple, flexible and expeditious. The procedure allows for the parties to present their cases and have their witnesses give their version of events. This informality makes these courts user friendly and public participation makes the process popular in the sense of regarding it as their own and not something imposed from above[8].
- Language: The language of the court is invariably the local language of the parties before it, with no risk of distortion through interpretation makes the courts attractive to the users and give greater satisfaction to the parties. Unlike when

[6] Ibid
[7] Ibid @ p910
[8] See Bekker J.C "Seymour's Customary Law in Southern Africa" Juta, 1989 @ p29

translations in formal courts are required, the proceedings are usually long and turgid, quite often, the translations are hopelessly inaccurate and invariably they do not capture the nuances of the speaker's mother tongue[9].

Colonization changed this state of affairs significantly. It introduced formal legal education and legal representation and compounded Africa's plural legal system. Though, it provided useful juridical patterns for contemporary African legal systems, colonization and the legal education it introduced focused on litigation to the detriment of other useful roles that lawyers could perform.[10]

**African Legal System During Colonial Era**

During the colonial period, the European powers introduced their own metropolitan law and systems of courts into Africa. Indigenous laws and procedure were in some cases allowed to co-exist to the extent that they were compatible with European notions of international justice and morality.[11]

The British colonial administrator introduced a system of courts patterned after the British system. An organized legal profession able to apply English laws and procedure thus became necessary. Despite the need for legal education institutions, virtually no steps were taken to establish local training facilities and legal education in Africa during the colonial period. According to W.L Twining, this was not an accident, colonial policy deemed it more important to train Engineers, Doctors and Agriculturalists than lawyers because Africans who wished to read law were regarded as preparing for a career in politics and it would be self-destructive for a colonial government to encourage the production of politicians.[12]

Since there was no form of formal legal education in the colonized African countries, the only way an African could become a lawyer was to journey to London, join the Inns of

[9] The Harmonization of the Common Law and Indigenous Law: Traditional Courts and The Judicial Functions of the Traditional Rulers- South African Commission, Discussion Paper 82, May 1999
[10] Samuel O. Manteaw supra @ p912
[11] Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems- Penal Reform International, November 2000
[12] Samuel O. Manteaw supra P914

Court and acquire English qualifications. Only the rich could embark on such a quest to attain legal education. As a result, in the colonial era, British expatriates, Asians and West Indians heavily patronized and dominated the legal profession in African colonies. This can be seen in the statistics that, of the one hundred lawyers in Tanganyika (Now Tanzania) in 1961, only one was African; out of over three hundred qualified lawyers in Kenya, less than ten were Africans and out of about one hundred and fifty lawyers in Uganda, only twenty were Africans.[13]

The African legal profession composed largely of wealthy foreigners who had little interest in public interest law as opposed to the practice in the pre-colonial times. The profession's focus as influenced by British legal education curricula was on private practice representing rich and commercial clients and litigating cases. This seems to have facilitated the profession's loss of touch with local realities and with the needs and aspirations of the poor majority. More importantly, there were grave inadequacies in the London legal training that prepared these lawyers for practice in Africa. Because the English trained lawyers did not study the customary laws of African countries as part of their education notwithstanding that customary laws was and still is a very important part of the African legal system.[14]

According to L.C.B Gower, because African lawyers were trained exclusively as barristers, the focus in African law was and continues to be litigation. Not even the dramatic increase in local training initiatives during independence era could change the profession's fixation on litigation and private practice[15]. Similarly, in the word of Grady Jessup, the law courses of early curricular design did not reflect the needs of the society and the training of lawyers was based on doctrinaire teaching geared to an adversary setting catering for litigation for the fortunate few at the cost of social injustice to the deprived many.[16]

[13] Ibid p915
[14] Ibid p917
[15] See Centre For Human Rights, University of Pretoria: The 6th All African Human Rights Moot Court. Available on http//www.chr.up.ac.za
[16] Grady Jessup "Symbiotic Relations: Clinical Methodology-Fostering New Paradigms in African Legal Education" Vol. 8, Clinical Law Review pp 377-387, 2002

## Post- Independence Africa Legal System

In the era immediately following independence, there was significant scholarship on the need, processes and character of legal education in Africa. Policymakers, politicians and academics all saw the need for training legal professionals who could assist in the transformation of African legal systems and aid in the development of Africa[17].

The British political and legal order has the culture of democratic haggling, literary argumentation and verbal disputations which are regarded as disrespectful by feudal and aristocratic political despot. The failure of the British legal order can be explained by the fact that it is an alien legal system which had ceased to be very relevant in regulating post-colonial, socio-economic relations in a state with religious and nation-state cleavages and a poor culture of political determinism[18]

Unlike India, which has moved away from the British legal system and had established a social justice system which has visibly propelled India to gain acceleration in the right directions, the East Africa jurisprudence has not yet emerged[19]. The popular Lord Denning committee recommended among others that African countries should not admit lawyers to local practice merely on the basis of British qualifications; it suggested requiring additional practices training in local laws and procedure. The committee further recommended the establishment of a law school in Dar-Es-Salaam to serve East Africa[20]. Therefore, in Africa, a law degree does not alone qualify one to practice as a lawyer. A further period of postgraduate practical learning is required.

Most of the problems facing the 21st century African legal education are lack of legal clinics to teach skills and sensitize students to local needs and aspirations; over reliance on lectures; scarce legal aids support services and a lack of

[17] Samuel O. Manteaw Supra @ p906
[18] Prof. Dr. Emmanuel Omoh Esiemokhan" The Failure of the Colonial Legal System in Nigeria. A Rhapsodic Passacaglia on a Legal Theme" FocusNigeria.com October 12, 2011
[19] Ibid
[20] See Lord Denning Report

perspectives on African juridical and philosophical value system as they relate to the global legal system.[21]

The type of justice offered by the formal courts may be inappropriate for the resolution of disputes between people living in rural villages or urban settlements where the breaking of individual social relationships can cause conflict within the community and affect economic cooperation on which the community depends[22]. This is because most rural communities are dominated by multiple relationships, that is, relationships based on past and future economic and social dependence which intersect ties of kinship.[23]

Whereas, the functions of law are to act as instruments of social engineering, social regulation and social change. Under the formal system, law was and is being used as an instrument of legal control, legal manipulation, and legal punishment of those who challenged the status quo[24]. The post-independence police laws and military ethics still reflect the colonial punitive way of dealing with political mal-contents. The surveillance system and marking down potential 'trouble-makers' still form the system of law enforcement in most post-colonial African States.[25]

Whilst traditional and informal law involves restitution, reconciliation between the parties and rehabilitation of the offender. By contrast, the emphasis under the formal system is on the punishment of the offender by the state and any fines paid are to the State. The victim is relegated to the status of witness and ignored as far as his or compensation needs are concerned.

**The KIU Approach**

Over the last three decades, the price of legal education has increased approximately three times faster than the average household income. This erects a formidable economic barrier to becoming a lawyer and restricts the career choices of qualified

[21]Muna Ndalo "The Democratic State in Africa: The Challenges for Institution Building" 16 Nat'L Black L.J 70, 78 (1998)
[22] Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems- Penal Reform International, November 2000
[23] Ibid @ p22
[24]Prof. Dr. Emmanuel Omoh Esiemokhan supra
[25] Ibid

but indigent students[26]. Kampala International University is one of the accredited private universities in East Africa licensed amongst others to teach law. Understanding the expensive nature of acquiring university education and the poverty level within the region, the management of the university as part of its corporate social responsibility designed a yearly scholarship scheme for five thousand qualified but indigent students. This scheme covers all the faculties, schools, and colleges within the university[27]. This single initiative by KIU is an attempt not only to alleviate poverty but bring qualitative university education to the qualified but indigent and less privileged future leaders.

**The Challenges of Teaching Law at KIU**

It is imperative to state from the onset that using KIU as a case study is just for convenient purpose because virtually all the challenges discussed hereinunder are perfect reflections of what is obtainable in our law teaching faculties in Africa. Just as there is more to practicing law than knowing the content of specific areas of law, there is more to teaching than knowing the content that must be conveyed. In other disciplines, teachers study educational theory and continue to develop their teaching skills through continuing education but most law teachers or professors do not come to the classroom with such background[28]. They were employed without any teaching history and there was no effort whether at the individual or faculty level to train the trainers. What this means is that, most law school teachers or professors have little or no practice experience and no particular training or qualification in education.

The problem is compounded with the overwhelming use of socratic method to the exclusion of many other effective alternatives. One of the challenges of solely adopting this method of teaching is that it provides little or no feedbacks on the performance of the students which in turn negatively affects

[26] Law School Leadership in the 21st Century; Meeting The Global Challenges- 2nd Annual African Law Deans Forum Held Between 10th – 11th 2013 @ University of Nigeria, Enugu, Nigeria.

[27] See Yudaya Nangozi "KIU to offer 5000 more scholarship" The Observer, 17th November, 2014

[28] Linda S. Anderson "Incorporating Adult Learning Theory into Law School Classrooms: Small Steps Leading to Large Results" Appalachian Law Journal, Vol. 5, Spring 2006 @ P127

creativity and innovation[29]. This method of teaching makes the classroom an extremely professor-centered activity. Similarly, the choice about the appropriate teaching method in most cases is a reflection of our own comfort level as teachers rather than a method created to take care of the students' need and international best practice. As teachers, seeking out the diverse ways in which we teach can only strengthen our own understanding not only of the material we teach but also of the best way to communicate particular kinds of information and skill[30]. Encouraging teaching styles which test ideas, discuss concepts, question assumptions and contribute to students' experience will be much more rewarding[31]. Adopting such approach will produce a law graduate who understands how laws are created, implemented and changed; the contextual underpinnings of the operation of law both domestically and globally.

Another challenge is the student-lecturer ratio. In most cases, the lecturer is overwhelmed because of the number of students he is expected to teach. Teaching a class of hundred students will certainly reduce if not eliminate the chances of the lecturer getting to know his students and provide a one-on-one feedback where necessary. It is therefore important for the university to work with the available man-power and logistics in other to improve the learning outcomes.

In the context of the constantly evolving needs of the global employment market, it is essential that students are equipped to be flexible, adaptable and prepared to take responsibility for their own learning and their own continuous personal and professional development. This places a responsibility on teachers and tutors in higher education to develop teaching environment which encourage students to take a more proactive role in articulating and striving towards self-determined learning goal[32]. This will enhance and develop a form

[29] Paul Bateman "Towards Diversity in Teaching Methods in Law Schools: Five Suggestions from the Back row" QLR Vol. 17:337, 1997.
[30] Ibid @ p31
[31] Ibid @ P7
[32] Karen Hinett " Developing Reflective Practice in Legal Education" UK Center for Legal Education, University of Warwick, 2002

of collaborative learning aimed at increasing students' independent and enhance confidence[33].

**Solutions**

A law school can best achieve excellence and have the most effective academic program when it possess a clear mission, a solid plan to achieve that mission and the capacity and willingness to measure its success or failure. Absent a defined mission and the identification of attendant student and institutional outcomes, a law school lacks focus and its curriculum becomes a collection of discreet activities without coherence. Although, most of the law schools have on paper, a clear mission, they in most cases lack the yardstick of measuring their successes and failures.

Similarly, if a law school does not review its performance, it can easily be deluded about its success; the effectiveness of its pedagogical methods, the relevance of its curriculum and the value of its services to its constituencies[34]. Therefore, a law school that fails to review students' performance or its performance as an institution or that uses the wrong measures in doing so has no real evidence that it is achieving any goals or objectives. And a law school that lacks evidence of achievement invites demands for accountability from all the stakeholders and well-wishers.

**Recommendations**

African legal education should be reform to focus on local challenges, beginning with extensive reform of domestic law schools, curricula and administration in order to meet domestic developmental needs; stimulate vibrant interest in perspectives on African law as it relates to the global legal order and fix basic structural problems. Critical to reform are perspectives on African law as it relates to the present global order. Do international politics and international law have an African angle? Do African value system drive African legal education? Is African legal education influenced by a peculiar African demand for ordered change and development?

[33] Ibid @ P54

[34] Roy Stuckyet'al "Best Practices for Legal Education" A Vision and A Road Map" Published by Clinical Legal Education Association. United States, 2007

Whereas law curricula should seek to adapt indigenous philosophical jurisprudence and values to African needs, the global economy and international issues, it is imperative for Africa to develop institutions that enhance indigenous values and facilitate democratization, good governance, development, modernity and rule of law.[35]

In a developing continent like Africa, any system of legal education should aim at producing lawyers Africa needs, well trained lawyers who are alive to demands of globalization with a globally competitive posture and who are in touch with local realities, needs and aspirations[36]. The Ghana example should be emulated where the World Bank, Ghana Judicial Service and the National House of Chiefs have initiated a project that seeks to re-empower the chiefs to settle domestic disputes.[37]

Given the need to train African lawyers, the African legal education system must deal with crucial policy issues regarding curricula reform. Such issues might include specialization, acquiring practical skills, using legal clinics to teach skills and sensitizing students to local needs and aspirations reducing over- reliance on lectures, increasing public interest sensitivity, changing the litigation and provide practice focus of African legal education, increasing the number of courses offered, addressing geopolitical needs, pupilage inadequacies, dysfunctional institutions for globalization needs, stimulating a vibrant interest in perspective on African law as it relate to the global legal order and improving learning resources.[38]

## Conclusion

Traditional African justice systems in the post-independence Africa have contributed immensely in the dispensation of justice. A clear strength of customary law system is that they represent laws that originate from and with the people in the most direct sense. The tribunals are accessible and familiar with the local populace. The remedies they offer are often restorative and they encourage mediation and reconciliation as

[35] Samuel O. Manteaw supra p938
[36] Ibid p939
[37] See Ghana News Agency, September 23, 2005
[38] Samuel O. Manteaw supra p940

opposed to the largely adversarial approach of the formal judicial system.[39]

What we need in Africa are not courts of law but courts of justice. Therefore, the main concern should be which system provides the most appropriate solutions in what type of cases and how each system's comparative advantages can be enhanced and disadvantages minimized rather than whether a predilection for things old or new, borrowed or home grown can be exposed.[40]

Conclusively, if those concerned with justice reform in Africa wish to have any real impact on improving access to justice for the majority, then the vital role played by traditional and informal mechanisms in providing justice for the majority of people living outside town centres needs to be acknowledged. They will also need to seek to broaden understanding of how and where these forums operate and to pursue policies which take full account of their existence.[41]

[39]Minneh Kane et. al supra @ p27

[40] Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems- Penal Reform International, November 2000 @ pg5

[41] Ibid