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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.

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EDITOR-IN-CHIEF'S NOTE

I am delighted to introduce the second issue of Kampala International University Law Journal (KIULJ) of 2017. As usual, the objective of KIULJ is publication of current legal issues, high-quality and original research papers. In this issue, the journal continues to be vibrant, engaging and accessible to wide variety of readers and interests. It contains analysis of legal issues on variety of areas including corporate governance, armed conflict, sexual violence, judiciary, international organisations, corruption, Islamic law and analysis of recent Kenyan Supreme Court decision on presidential election.

The efforts of various people smoothed the editorial process and made this publication possible. The Board appreciates the efforts of anonymous reviewers who take time from their crowded schedules to provide valuable feedback on colleagues' work through which the quality of the articles contained in this issue significantly improved. I deeply appreciate the Board members' contributions and suggestions. The Journal continues to solicit articles which make substantial contribution to the development and clarification of legal issues from academic and practitioners either individually or collaboratively.

It is hoped that this second issue will help inform others about the journal and will consider submitting their work for publication. The Editorial Board welcomes comments towards improving the quality and accessibility of the journal in future volumes.

Kasim Balarabe

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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APPLICABILITY OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS TO CORPORATE GOVERNANCE DISPUTES IN UGANDA

By

Valentine Tebi Mbeli*

Abstract

This study explored the prospects of entrenching the mechanisms of alternative disputes resolution as part of strategic management plan in dealing with corporate governance disputes. It identifies the problems associated with court litigations vis-à-vis the potentials offered by ADR in mitigating some of these problems as the main reason behind the growing preference for ADR over litigation. While aligning with the views of other scholars in upholding ADR as a more efficient and effective way of dealing with disputes in general, the study focused on its usefulness in disposing corporate disputes. In acknowledgment of the fact that ADR is governed by an ambitious legal framework guided by a well-thought out policy rationale to deliver efficient, expeditious and cost-effective justice to the commercial community in Uganda, it also underscores the importance of observing fair and ethical standards by lawyers in dealing with clients. It also emphasises the need for improvements on the negotiating skills of advocates in a way as to ensure favourable settlements that might win the confidence of the public and make the system more attractive. Further, it canvasses that companies should demonstrate serious commitment by way of programmes, structures and policies geared toward ADR as preferred methods of resolving disputes.

Introduction

The dispersed pattern of corporate ownership, the system of concentrated control, and the daily convergence between a company and its pluralistic stakeholders makes a company an amalgam of divergent and potentially conflicting interests capable of generating issues of profound legal concern. Company directors are saddled with the responsibility of ensuring business success, but most fundamentally, they are also responsible for promoting the welfare of all corporate stakeholders. Corporate governance generally describes the system by which companies are directed and

controlled.[1] An effective corporate governance framework is that which recognises the rights of shareholders and stakeholders established by law or through mutual agreements and encourages active cooperation between corporations and stakeholders in creating wealth, jobs and sustainability of financially sound enterprises.[2]

Conversely, where the corporate governance framework fails to address the legitimate interests of its pluralistic stakeholders, the danger of disputes looms with the possibility that the company could be at the receiving end. For instance, a company that fails to monitor risks and address them timeously opens potential liabilities claims in both civil and criminal actions to members of the host communities or any affected persons. The result is an inverse relationship between corporate disputes and corporate performance. In criminal actions against a company, the company cannot be sent to jail, but when it is sentenced to a fine, this diminishes both the money available to pay wages and salaries of all employees and profits available to pay dividends to existing shareholders.[3] In addition to the time and cost implications of prosecuting and/or defending lawsuits against the company, there is also the hidden cost of cultivating a negative reputation of the company amongst its customers which in turn negates profitability taking in to consideration the fact that good reputation encourages brand loyalty.[4] Full-blown disputes are always bad news for a company.[5] They can lead to poor performance, scare investors, produce waste, divert resources, cause share values to decline, and in some cases, paralyse a company.[6] Based on these negative consequences, out-of-court settlements present far more favourable prospects of

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[1] Cadbury Committee, 1992

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

[3] Kirk, P. & Lockhart, P. 'Addressing Climate Change through Corporate Governance' Available at www.climatechnagelawrepert.com visited on 21/08/11.

[4] Siomkos, G. & Shrivastava, P. 'Responding to Product Liability Crises' (1993) Vol. 26 No. 5 Long Range Planning p. 73

[5] IFC cited by Sherman, D. Fogel 'Mediation and Arbitration: Alternatives to Litigation and Ways to Manage Conflict' (2011) p. 2

[6] Eric M. Runneson & Marie-Laurence Guy 'Mediating Corporate Governance Conflicts and Disputes' Global Corporate Governance Forum Focus 4 (Washington DC, International Finance Corporation, 2007) p.13

resolving corporate disputes with the view to nipping litigations in the bud or at least minimising full-blown disputes. In this regard, ADR mechanisms are seen to offer a corrective measure to the often-abused legal logic underlying litigations. This paper explores the viability of ADR mechanisms in resolving corporate disputes in Uganda.

Distribution of Corporate Powers as Precursor to Corporate Governance Disputes

The artificial personality of a company entails that the company can only carry out its business through the intervention of human beings described as its 'directing mind and will' and the 'very ego and centre of the personality of the corporation'.[7] The corporate governance structure is by and large a reflection of how the law and the company's articles of association provide for strategic management of companies. The main governing organs are the board of directors which provides leadership and control for the company and the general meeting of shareholders with oversight functions over the board. This is a pattern drawn from the Berle and Means modern corporation marked by divorcement of ownership from control.[8] The separation of ownership from control which characterises the modern corporation has a long standing controversial history trailing it. The subject of distribution of corporate powers is at the centre of this intellectual and judicial hairsplitting resulting in conflicting views and decisions. This controversy is rooted in the interpretation of Article 80 Table A of the English Companies Act of 1948, giving rise to two schools of thought namely; the minority and majority schools of thought.[9] The minority view maintains that shareholders can override the decisions of the board within their managerial competence. Thus, in *Marshall's Valve Gear Company Ltd v Manning, Wadle & Co Ltd,*[10] directors of a company declined to initiate a corporate action to vindicate rights of the company held in patent. Consequently, majority shareholders commenced proceedings on the ground that a decision to initiate a suit by the company was a management matter

[7] *Lennard's Carrying Co. Ltd v Asiatic Petroleum Co. Ltd* (1915) AC 705

[8] Berle, A. and Means, G. *The Modern Corporation and Private Property* (United States: Transaction Publishers, 1932) p. 18

[9] The classification of the two schools into majority and minority is based on a measurement of the weight of judicial authorities and scholarly opinions.

[10] (1970) A.C 1099

exclusively delegated to them under Article 80 Table A.[11] Neville J. held that majority shareholders had the right to control the actions of the directors on the proper construction of the articles.

The majority view on its part maintains that shareholders even if unanimous, cannot give directives to the directors on how the company should be run and that shareholders cannot overrule the decision of directors except by removing them or altering the articles.[12] This approach has been adopted by the corporate laws of most countries with the view to resolving the controversy surrounding the distribution of corporate powers. Few examples may be cited in support of this. In Nigeria, the law is to the effect that the business of the company is to be managed by the board of directors who may exercise all such powers of the company as are not by law or articles, required to be exercised by the members in general meeting'.[13] The board of directors acting within the powers conferred upon it is not bound to obey the directives or instructions of the members in general meeting.[14] Similarly, under the OHADA Uniform Act applicable to some 18 African countries,[15] the law gives the board of directors, wide powers to act in all circumstances on behalf of the company, subject to powers conferred on general meetings of shareholders by law.[16]

This pattern of distribution of powers has been described by legal scholars in various tones. While some describe it as endorsement of centralised corporate management,[17] others consider it to be a transmutation of separation of ownership from control from an economist's cliché into a legal reality.[18] These are

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[11] This decision was based on Article 80 Table A of the Companies Act of England, 1948, which was taken into successive Uganda Companies legislation verbatim.

[12] *Automatic Self-Cleansing Syndicate v Cunningham* (1906) 2 CH. 34 CA; *Gramophone and Typewriters*
Ltd v Stanley (1908) 2KB 89 at 98; *Shaw & Sons Ltd v Shaw* (1935) 2 KB 113 CA

[13] Section 63 (1) Companies and Allied Matters Act

[14] Section 63 (4) CAMA

[15] The 18-member states are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Ivory Coast, Mali, Niger, Senegal and Togo.

[16] Article 435 OHADA Uniform Act Relating to Commercial Companies and Economic Interest Groups

[17] Imbwaseh, AT. 'The Paradox of Distribution of Corporate Powers in Nigeria: Historical and Contemporary Perspectives' *(2005) Vol. 4. Benue State University Law Journal* 29

[18] Akanki, EO. (ed) *Essays on Company Law* (Lagos: University of Lagos Press, 1992) p. 115

all ways of heralding the significant efforts put in to resolve the controversy embedded in the distribution of corporate powers by way of statutory reforms in the applicable jurisdictions.

By contrast with the foregoing, the controversy is likely to continue to linger in Uganda having regard to the extant company legislation; the Companies Act, 2012. The Act, since its initial enactment in 1961 drawing from the English Companies Act of 1948 has undergone a series of amendments but the provisions on distribution of corporate powers have remained largely unaltered. Article 80, Table A of the English Companies Act, 1948 is replicated in the Act word verbatim thus:

> The business of the company shall be managed by the directors, who may pay all expenses incurred in promoting and registering the company, and may exercise all such powers of the company as are not by the Act or by these regulations, required to be exercised by the company in general meeting subject to these regulations and to the provisions of the Act and to such regulations being not inconsistent with these regulations or with the Act, as may be prescribed by the company in general meeting.

The foregoing provision is understood as laying down model articles of association which companies may adopt. Therefore, when adopted by a company, the word 'regulations' may be substituted with 'articles of association' without losing meaning. Sub (2) of the Article provides for the possibility of invalidating prior acts of directors by regulations of the company made in general meeting. This provision, even though commendable for enhancing shareholder participation and diffusing the overbearing powers of the directors, may lead to the unintended consequence of second-guessing the business judgment of directors. Nevertheless, the interpretation of Article 80 Table A by English courts over time has produced a gravamen of judicial authorities in favour of centralised company management thus providing a horizontally persuasive *stare decicis* for Ugandan courts.

Taken against the backdrop of powers to institute actions on behalf of the company; which powers ordinarily reside with the directors, it gives clear focus on how ADR mechanisms could be integrated into a company's conflict management plan. In line with the Rule in *Foss v Harbotle*[19] the general principle is that the proper plaintiff in an action for wrong done to the company is *prima facie*

[19] (1843) 2 Hare 461

the company.[20] Riding on the premise that directors have authority to act on behalf of the company, the power to institute or defend actions against the company should be placed within the managerial competence of directors subject to a few exceptions.[21] For this, ADR mechanisms can easily be pursued by directors as part of conflict management plan.

General Philosophy Underlying ADR Mechanisms

A proper conceptualisation of Alternative Dispute Resolution is by juxtaposition with the process of litigation. Alternative Dispute Resolution (ADR) simply refers to the means of settling disputes outside the courtroom. The term is employed to mean alternative to court and encompasses all other dispute settlement procedures generically called ADR.[22] The most common types of ADR are negotiation, conciliation, mediation and arbitration. In recent times, ADR mechanisms have opened a new vista in the process of dispute resolution indicating the need for a radical departure from the traditional process of taking lawsuits and going through the process of litigation.

Writers have pointed out the problems associated with litigations as a major factor that has promoted the option of ADR as a means of dispute resolution in corporate governance. Senyo[23] posits on this point thus:

> lawsuits which constitute the litigation process can be long, winding and cumbersome…. The litigation process is confrontational or adversarial in nature and destroys relationships. It lacks privacy and confidentiality as court trial processes are generally held in open court as a public hearing except in specific cases involving children and spouses in custody or divorce matters where the matter may be held in the Judge's chambers. The process is also expensive. Aside court fees, advocates or lawyers charge huge sums as representation fees and so on. The process is long and winding as lawyers exaggerate issues at stake and prolong the process through technical and procedural theatrics which is characteristic of the

[20] *Mokwe v Ezaeko* [2001] FWLR (Pt 74) 399

[21] The exceptions for which a personal action of a member can be entertained include violation of personal rights, delayed company meetings, illegality and ultra vires, wrong procedures, and fraud against the minority or company

[22] United Nations Conference on Trade and Development: Dispute Settlement International, Commercial Arbitration, (New York and Geneva, 2005) p.1

[23] Senyo, M. Adjabeng 'An Analysis of Dispute Resolution Mechanisms in the Corporate Governance Architecture of Ghana' available at www.mediation.com/article/adjabengS5.cmf visited on 30/12/2016

> litigation processes. It is obvious that the above limitations of litigation make it quite inappropriate for use in commercial disputes or disputes related to corporate governance…because when businesses fight, they lose money as clients and customers quickly move to competitor organisations to do business.

The above excerpt aptly captures the philosophy underlining ADR based on the technical and procedural hurdles attending to ligation processes. Litigation has a multiplier effect on the company and its constituencies with the corresponding consequence of negating corporate performance. This point has been illustrated in the context of corporate criminal liability. According to Kirk and Lockhart,[24] in criminal actions against a company, the company cannot be sent to jail, but when it is sentenced to fine, this diminishes both the money available to pay wages and salaries of employees and profits available to pay dividends to existing shareholders. There are also other long-term effects. Usually, markets are quick to respond to prolonged litigations. This basically comes as a result of uncertainty of outcome. This situation may cause share prices to decline based on the hysteria to quit the company. In the same vein, creditors may withhold credits to the company while in some cases irresponsible corporate behaviours may provoke boycotts. All these put together invariably negate corporate performance.

The fastest way of halting court proceedings is by reaching an early settlement to compensate victims through an ADR mechanism. This approach was adopted by British Petroleum (BP) on the wake of the oil spillage in the Gulf of Mexico in 2010 where the company agreed to a USD 7.8billion settlement to victims.[25] This move was initiated to avert a further whipping decline in the company's market value with shares plunging by as much as 20%[26] at some point following the catastrophic oil leak.

Even though seen by many as a modern approach to settling disputes, it requires clarity to point out that ADR mechanisms have always been used as a means of resolving disputes in traditional African societies. It would appear incontrovertible that the modern version we now have on the continent thought to be the brainwork of the West, is only a refined idea mined from Africa and

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[24] Kirk Patrick and Lochhart, P. op cit

[25] Werber, H.R 'BP Plaintiff Reach Gulf Oil Settlement' Available at http//www.google.com visited on 16/04/12

[26] The Guardian Alpha 'BP Shares Plunge' sourced from www.theguardian.com.business/2010 visited on 29/09/13

re-exported back to us. Judges and text commentators are in agreement with this. Using Uganda as a case study, His Lordship Justice Geoffrey W.M. Kiryabwire posits that mediation was introduced into the justice system in Uganda riding on the traditional belief that ADR was not a new phenomenon in the Ugandan Culture.[27] It is hardly contestable that before the advent of modern court systems, traditional African societies largely relied on these mechanisms to resolve disputes arising from interpersonal as well as communal transactions including commerce.

In the Ghanaian case of *Assampong v Kweku Amuaku & Others*[28] Deans, J. of the West African Court of Appeal had the following to say; '…. where matters in dispute between parties are by mutual consent, investigated by arbitrators at a meeting held in accordance with native law and custom and a decision given, it is binding on the parties and the Supreme Court will enforce such decision'.

Even though customary forms of ADR like mediation and negotiation have been able to survive the increasing complexities of the modern society, their relevance in contemporary commercial transactions concluded in line with modern standards and practices is gradually diminishing. Unlike customary forms of ADR which are principally based on the customs and traditions of groups of people and would ordinarily vary from one customary community to another, a positivist approach has been adopted by most countries in the form of legislating on ADRs.

Proponents and exponents have advanced some sound arguments in favour of the ADR mechanisms as against litigation. These include speedy and informal resolution of disputes with generally less stress, confidentiality and the avoidance of publicity, improved communication between parties thereby preserving or enhancing relationships between parties, high degree of party control, flexibility in that resolutions tailored to the needs and underlying concerns of the parties and ability to address legal and non-legal issues as well as providing for remedies unavailable through adjudicative processes.[29] Parties can also create own

[27] A paper given to The Global Corporate Governance Forum on Mediating Corporate Governance Disputes,
World Bank office, Paris – February 12, 2007

[28] (1932)1 WACA 192 at p. 201

[29] See Blaney McMurtry Advantages and Disadvantages of Dispute Resolution Process available at

process and craft own agreement. Legal and/or other standards of fairness can be used in crafting agreements leading to increased satisfaction and compliance with settlements when parties have directly participated in crafting agreements.[30] Furthermore, there is disclosure of information and truthfulness of communications which may assist in clarifying and narrowing issues, and fostering a climate of openness, co-operation, and collaboration, even if a settlement is not reached.[31]

While ADR mechanisms continue to survive on the strength of the foregoing merits, critics have found some suitable grounds of faulting the same. First, it is argued that it can be used as stalling tactic.[32] While this could be possible where the process is voluntary, it may not be the case where the process is mandated by law or contract. Moreover, there have been statutory interventions setting timelines and specific procedures which ADR proceedings must adhere to.[33] Another perceived fault in ADR processes lies with the worry that it does not produce precedents.[34] The exclusion of pertinent parties and its possible outcome of weakening final agreement, limited bargaining authority and little or no check on power imbalances between the parties are also considered to make the processes of ADR less attractive. However, these shortcomings weighed against the benefits of ADR especially in light of the time and cost implications of litigations can simply be taken to justify the need for improvement of the system rather than its abandonment. Therefore, how to make ADRs more effective in resolving corporate disputes remains a legitimate concern worthy of continuous academic investigation.

Nature of Corporate Disputes

The tendency has been to qualify as corporate disputes (or disputes directly related to a company's governance) mostly those involving the corporation's shareholders, board members, and senior executives.[35] Although they may also influence a

https://www.blaney.com/sites/default/files/other/adr_advantages.pdf visited on 18/11/16

[30] Ibid

[31] Ibid

[32] Ibid

[33] This procedure is discussed in the later part of this paper.

[34] Ibid

[35] See for instance Becker & Poliakoff 'Corporate Governance Disputes' available at www.becker-poliakoff.com/corporate-governance-disputes visited on 29/12/1016

corporation's governance and should concern the board, disputes involving employees, other than senior executives, traditionally fall into the field of labor disputes. Disputes involving the company's outside stakeholders (e.g., customers and suppliers) are traditionally addressed through commercial disputes.[36] This approach is premised on the fact that corporate governance revolves around the directors and as a result, corporate governance disputes are considered to be those directly linked to company management. This notwithstanding, the fact remains that there are hardly conceivable instances of corporate disputes whether actual or apparent that are unconnected with the exercise of directors' powers. For this reason, a corporate dispute can conveniently be defined in terms of its relationship with the business of a company. This covers a broad range of issues such as boardroom crises, disputes pertaining to shareholders rights; especially minority rights, creditors' concerns, employees' contracts, environmental and social rights of host communities, consumer protection and product quality liability claims and generally, disputes involving a company whether as principal or nominal party.

This paper adopts the broader approach considering that all such disputes are capable of negating the performance and reputation of the company. In that light, it ferrets the negative impact of potential corporate disputes while situating the relevance of the legal debate as regards the use of ADR mechanisms to fend off the myriad of problems associated with corporate disputes. Having articulated the general philosophy underlying ADR mechanisms, we may now proceed to establish the efficacy or otherwise of these mechanisms in resolving corporate governance disputes. The discourse that ensues focalises the debate within the broad context of corporate governance in Uganda.

ADR as a Means of Resolving Corporate Disputes

Company matters in Uganda ordinarily lie within the jurisdiction of the Commercial Division of the High Court of Uganda.[37] The court was established with the principal goal 'to deliver efficient, expeditious and cost-effective justice to the

[36] Eric M. Runneson & Marie-Laurence Guy: Mediating Corporate Governance Disputes (Washington:
International Finance Corporation, 2007) p.18

[37] The High Court Commercial Division was established with jurisdiction under Legal Notice No. 4 of 1996 and Instruction Circular No. 1 of 1996

commercial community and ultimately therefore to impact positively on the commercial and economic life of Uganda'[38]

As ADR mechanisms become increasingly entrenched in commercial and business transactions, corresponding statutory regimes keep emerging on the legal landscape with the view to adding some level of certainty and predictability to the traditional practice of settling disputes outside the courtroom. The commercial and business environments, greatly perceive this approach as a way of fostering long-term business relations through the amicable resolution of contractual and non-contractual disputes.

In Uganda, a plethora of legislative instruments have been put in place for proper applicability of the tripod ADR mechanisms of arbitration, conciliation and mediation. The Judicature Act[39] lays down the general legal framework on arbitration under the discretion of the court wherein matters could be referred to a special referee or arbitrator acting under the authority of the High Court.[40] The Civil Procedure Rules also provide for scheduling conference by the courts to sort out points of agreement and disagreement and possibility of mediation, arbitration and any form of settlement between parties to a dispute.[41] Specifically, the Arbitration and Conciliation Act[42] carries a policy rationale to regulate arbitration and conciliation procedures. The Centre for Arbitration and Dispute Resolution established under the Act[43] provides the institutional apparatus for effective dispute resolution processes.

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[38] See paragraph 2, Legal Notice No.6 of 1996

[39](Judicature Amendment Act, 2002)

[40] Ibid section 26

[41] Order 12 Rule I (1) Civil Procedure Rules. These Rules were made under the Civil Procedure Act, 1964 Revision, Cap 65, section 85. Section 85 was repealed by the Judicature Act, Act 11/1967, section 48, which saved '…Any Rules made thereunder relating to the High Court…with such modifications as the Rules Committee may consider necessary to bring them into conformity with the provisions of the Act….' Act 11/1967 was repealed by the Judicature Statute, Statute 13/1996, section 51, which again saved these Rules. '…subject to such modifications as the Chief Justice may direct in writing….' (See also Statutory Instruments under the Judicature Act Cap 13)

[42] Cap 4, 2000 (amendment Act, No.3, 2008)

[43]Section 67 of the Act establishes the Centre for Arbitration and Dispute Resolution as a body corporate having perpetual succession under a common seal with powers to among other things make Rules for recognition and enforcement of arbitral awards and all proceedings consequent or incidental to them. See section 71 of the Act.

Mediating Corporate Governance Disputes

Fundamental and considerable efforts have been made to encourage the use of mediation in resolving commercial disputes under which corporate disputes can be subsumed. This came first with the Judicature Act (Commercial Court Division) (Mediation) Rules[44], made pursuant to section 41 of the Judicature Act in exercise of the powers of the Rules Committee.[45] These rules were meant to apply specifically to civil actions filed or referred to the Commercial Division of the High Court. But they were later repealed and reenacted as the Judicature Act (Mediation) Rules, 2013 with a wider scope that covers all civil actions before the High Court in general.[46] The widened scope of the 2013 Rules now mean less difficulty in ascertaining which aspects of corporate disputes can be submitted to mediation. The practical import is that it whittles down the possibility of an argument tending to base corporate disputes on issues directly related to a company's governance thereby excluding disputes involving the pluralistic corporate stakeholders including employees, customers, and suppliers among others. The sum total effect is that all forms of corporate disputes are amenable to the provisions of the Rules for the simple fact that they qualify as civil actions.

Mediation is no doubt the most common technique of ADR used in resolving corporate governance disputes. In fact, the technique is so widely accepted that some would rather prefer to refer to it as 'effective dispute resolution'.[47] It is a process whereby parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of a contractual or other legal relationship.[48]There are practical examples of corporate governance disputes that can be resolved through mediation. These include disputes over the exercise of shareholder rights,[49] disputes between a corporation and its officers, and disputes between shareholders and the corporation.

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[44] No. 55 of 2007

[45]The Rules Committee is a statutory body consisting of the Chief Justice, Attorney General, Deputy Chief Justice, Principal Judge, Director of the Law Development Centre and two other members being practicing advocates. See section 40 (1) Judicature Act

[46] See Rule 2 Judicature (Mediation) Rules, 2013

[47] See for example Centre for Effective Dispute Resolution, CEDR Mediation Handbook: Effective Resolution of Commercial Disputes 4th Edition (London: CEDR, 2004)

[48] See Article 1 United Nations Commission on International Trade Law, 2002

[49] Robert McEwen v Gold Corp Inc. (2006) Can LII 35985 (ON SC)

A practical test of mediating corporate disputes in Uganda is the case of *K.M Patel &Anor. v United Assurance Company Ltd.*[50] The facts of the case were that, two Asian shareholders; the Patel brothers filed a minority petition against one of Uganda's largest private insurance companies (United Assurance) alleging a wrongful and illegal dilution of their 40% shares in the company through restructuring and sale without notice. United Assurance officials prayed the court to reject the case because it was based on false accusations and lacked proper grounds to petition. With the consent of both parties, the Commercial Court Justice Geoffrey Kiryabwire offered to mediate the case. The mediation was successful and led to a consent judgment in which the company bought out the two shareholders and settled the dispute.

Mediation is a consensual arrangement and that means parties to a particular transaction will have to consent to it as a dispute resolution methodology. Therefore, Rule 4 of the 2013 Mediation Rules which directs the courts to refer every civil action to mediation before proceeding to trial cannot be construed as a duty on the parties to accept to resolve their dispute through mediation. Consequently, while there is a clear duty on the court to seek an amicable resolution of a dispute instituted, the decision is that of the parties to accept or not. However, there could be instances where mediation becomes mandatory for parties to a dispute. For example, where there is a statutory obligation to refer the matter for mediation, the choice of the parties may become restricted as they are bound by statute. But this is not always the case as the law is more inclined to a soft tenor which simply provides that disputes 'may' be submitted to a mediation process.

Nevertheless, the court can effectively refer parties to a mediation process where there is an agreement between the parties adopting the same as a choice of dispute settlement. The mandatory use of mediation in resolving corporate dispute is also possible where there is a clause to that effect in the articles of association and/or shareholder agreements. The effect is that the court will stay proceedings where an action is brought in disregard of a mediation clause.

Procedure for Mediating Corporate Governance Disputes

A key point to note is that any dispute between a company and its members or other stakeholders may be subject to mediation

[50] Company Cause No. 5 of 2005 (Commercial Court)

at the request of the company or the other interested party. Usually there is written mediation request initiated when a party sends a written request to that effect to the other party. Apart from the party's decision, the Judicature Act Mediation Rules, 2013 equally impose a duty on the courts to *suo motu* refer every civil action to mediation before proceeding for trial.[51] The written request contains a brief summary of the basis for the request. The parties are required to participate in good faith. The company must be represented by a person authorised to act for that purpose. It is the same for the other party. Under traditional rules of mediation, the mediator is chosen jointly by the company and the other party subject to certain qualifications. The qualifications for eligibility to conduct mediation under the Rules are set out in Rule 9 and it states:
Mediation under these rules may only be conducted by—

a. a Judge;
b. a registrar;
c. a magistrate;
d. a person accredited as a mediator by the court;
e. a person certified as a mediator by CADER; or
f. a person with the relevant qualifications and experience in mediation and chosen by the parties.

The Rules give the court fourteen days after pleadings are completed to notify the parties of the commencement of mediation sessions.[52] A civil action referred to mediation is by the Rules required to be concluded within sixty days or an extended period not exceeding ten days.[53] This means mediation might take anywhere between two to three months as against traditional adjudication processes which sometimes linger for years.

By virtue of Rule 11, the registrar, magistrate or authorised court officer responsible for mediation in a court shall make arrangements necessary for mediation including—

a. setting dates for mediation hearings;
b. organising a suitable venue for mediation sessions;
c. organising exchange of the case summaries and documents by
d. parties; and
e. assisting with the general administration of mediation.

[51]Rule 4 (1)
[52] Rule 7 (1)
[53] Rule 8 (1) & (2)

A mediator is required to, within ten days after concluding mediation; submit to the registrar, magistrate or responsible officer in prescribed form, a report of that mediation[54]. In the normal course of mediation, parties thereto may resolve some or all of the issues. The parties are expected to enter into agreement setting out the issues on which they agree. The agreement which must be in writing and signed by the parties is then filed with the registrar, magistrate or authorised court officer responsible for mediation in the court. It is endorsed by the court as a consent judgment[55] with the implication that it becomes enforceable as any other judgment of court. But where there is no agreement on all the issues subject to mediation, the mediator shall refer the matter to the court to take the normal course of adjudication.

The cost of mediation including the Mediator's fee is borne by the parties. In the absence of an agreement to the contrary, personal costs such as party's own cost including lawyer's fees for preparing position statements, preparing and attending mediation sessions, expert fees (if necessary) are usually at each party's own costs but they can agree otherwise e.g. loser pays. The net effect is that the question of cost can be a subject of negotiation and agreement, and therefore an agreement favourable to both parties is a good starting point in encouraging mediation. If a mediation agreement covers cost, the court will enforce its terms. This emphasises the consensual nature of mediation as against litigation whereby courts have an inherent discretion to award costs. The question of who bears the cost is one major concern raised by skeptics who argue that there is little or no check on power imbalances between the parties making the processes of mediation less attractive.[56] The impact of this concern cannot be underrated especially in respect of corporate governance disputes where the company is most likely to be the stronger party.

Arbitrating Corporate Governance Disputes

Arbitration is one of the prominent ways of resolving corporate governance disputes. Like any other ADR mechanism, arbitration is largely consensual. To that end, it has been pointed out that: 'where a case has commenced in Court and it is established that the matter was meant for arbitration, the Court respects the

[54] Rule 15

[55] See generally Rules 16 (1-4)

[56] Blaney McMurtry 'Advantages and Disadvantages of Dispute Resolution Process' op cit

mandatory provision of the Act to this effect and will always order that the matter be referred to arbitration as provided for in section 5 therein'.[57] Thus, in the case of East African *Development Bank v Ziwa Horticultural Exporters Ltd*[58] it was held that: Section 6 (present section 5) of the Arbitration and Conciliation Act, provides for mandatory reference to arbitration of matters before court which are subject to an arbitration agreement; where the court is satisfied that the arbitration agreement is valid, operative and capable of being performed, it may exercise its discretion and refer the matter to arbitration.

The grounds upon which the court may refer a matter to arbitration were enumerated by the Supreme Court in *Shell (U) Ltd v Agip (U) Ltd*[59] as follows:

1. 1.There is a valid agreement to have the dispute concerned settled by Arbitration;
2. Proceedings in Court have been commenced;
3. The proceedings have been commenced by a party to the agreement against another party to the agreement;
4. The proceedings are in respect of a dispute so agreed to be referred;
5. The application to stay is made by a party to the proceedings;
6. The application is made after appearance by that party, and before he has delivered any pleadings or taken any other step in the proceedings; and

The party applying for stay was and is ready and willing to do all the things necessary for the proper conduct of the arbitration.

The foregoing notwithstanding, there have been some controversies on the question of whether an arbitration clause contained in the articles can override the law or take precedence over a statutory right to petition the court for a relief in the case of oppressive conduct on the minority and mismanagement. This issue was raised and determined in the Indian case of *Surendra Kumar & anor. v R. VIR & Ors,*[60] where the court held that where the conditions mentioned in the Companies Act are fulfilled, the

[57] Kakooza Anthony C. 'Arbitration, Conciliation and Mediation in Uganda: A Focus on the Practical Aspects' https://papers.ssrn.com visited on 20/11/17

[58]High Court Misc. Appln. No. 1048 of 2000 arising from Companies Cause No. 11 of 2000

[59] Supreme Court Civil Appeal No. 49 of 1995(Unreported)

[60] (1977) 47Comp Cas 276

shareholder will have the right to petition for a relief notwithstanding an arbitration clause in the articles of association. Similarly, in *O.P. Gupta v Shiv General Finance (P.) Ltd & Ors,*[61] it was held that where the articles of association provide for the disputes between the members of the company to be resolved by arbitration, such clause would not make it mandatory for the court to stay the petition, subject matter of which involves relief in the case of oppression and mismanagement.

This is an exceptional situation where the court will have to adopt a restrictive interpretation of the articles of association to defeat the invocation of arbitration clauses. This appears to be a departure from the principles of contract and the traditional role of the court in giving effect to the intention of parties to a contract. But the administration of the company is run by guidelines provided by the articles of association and the articles constitute a contract to be observed by the directors. Mismanagement and oppression of the minority is one sensitive aspect of corporate law where exceptions have been created to general rules in order to allow minority shareholders seek relief from the court. This appears to be one of those justified exceptions designed to restrict the applicability of arbitration clauses, thus allowing minority shareholders to pursue ligation against directors.

The above is seen as a strong mechanism for the protection of minority shareholders. It is, however, doubtful if the same approach is tenable in the Ugandan context taking into consideration the recent reforms in corporate governance introduced by the Companies Act, 2012. One of these reforms carries the policy rationale of discouraging the idea of court litigations and promoting the practice of amicable settlement of disputes. This is in particular of the minority alternative remedy to winding up in cases of oppression whereby an aggrieved minority is now expected to lodge a complaint with the Registrar of Companies by petition for relief instead of bringing a winding up petition on the ground of prejudicial and oppressive conduct of directors.[62] In the light of such

[61] (1977) 47 Comp Cas 279

[62] Section 247 Companies Act. The utility value of this provision is that it safeguards the interests of other stakeholders who otherwise would be made to pay for the sins of the directors when the company is wound up. As Farrar explains, this accounts for the seriously diminished importance of this relief, obviously due to the interests of other parties which vary from the small private companies to public companies of considerable sizes. See Farrar, J.H et al. Farrar's Company Law 4thedn (London: Butterworth's, 1998) Pp. 399-400

innovation, it is clear that the policy direction of the law on oppression of the minority is tailored in the same direction as alternative dispute resolution with the ultimate goal of ensuring out-of-court settlements. Therefore, Ugandan courts will be serving the broad ends of social policy by adopting a liberal and broad construction of arbitration clauses in articles of association even in cases of oppression on the minority.

It should be understood that the articles of association of a company would hardly cover all possible transactions involving the company and its stakeholders. More so, there is potential liability arising from non-contractual relations such as claims in torts, product quality liability and environmental rights encroachment. These are all litigation prone aspects of company activities which may not be covered by the articles of association but which can also be disposed by recourse to ADR mechanisms. In fact, all civil litigations involving a company can be mediated regardless of the absence of a mediation clause. In any case, mediation is a strong management tool in corporate governance. Part of the strategic management qualities of directors lie in the ability to avoid court litigations by seeking amicable settlement of disputes. This resonates with the views of some scholars maintaining that mediation is not only a conflict-management technique in corporate governance disputes,[63] but also a way of managing risks in a responsible manner.[64] The implication is that incessant conflicts involving a company could signal poor management for which top company management may be forced to resign.[65] It should, therefore, be a matter of considerable concern to shareholders, how corporate disputes are managed by directors. Requisition for the incorporation of the company's strategic plan on dispute settlement into the annual report laid before shareholders can contribute significantly in promoting the culture of mediating corporate governance disputes.

[63] Jan A. J.E Mediation as Management Tool in Corporate Governance in Arnold, I H ADR in Business:
Practice and Issues across Countries and Cultures (Kluwer Law International AH Aphen aan de Rijn: 2011) p. 68

[64] Ibid

[65] The recent resignation of MTN CEO Sifiso Dabengwa over a record fine imposed on the company by the Nigerian regulatory authorities provides refreshing evidence on this interconnect.

The Role of Corporate Ombudsman in Settling Corporate Governance Disputes

One key way through which corporate organisations are increasingly seeking efficient management of corporate governance disputes is by establishing ombuds offices. Review of success (of proliferating) ombuds offices suggests that this kind of offices are both a desirable and cost effective element in an efficient system of dispute resolution.[66] To begin with, there is an internal ombudsman being a neutral or impartial manager within an organisation who may provide informal and confidential assistance to managers and employees in resolving work-related concerns; who may serve as a counselor, informal go-between and facilitator, formal and mediator, informal fact-finder, upward feedback mechanism, consultant, problem prevention device and change agent, and whose office is located outside ordinary line management structures.[67] The role of the ombudsman emphasises its neutrality and insulation from management. However, review tends to show ombuds offices as appendages of management making the performance of these critical roles difficult if not impossible. Given the desirability of ombuds offices in the resolution of corporate governance disputes, there is good reason to suggest that the inculcation of a culture that promotes the neutrality thereof will be a good way of ensuring effective and timely resolution of disputes within corporate organisations.

It is also possible to have in place, an external ombuds mechanism to deal with disputes at initial stages thereby avoiding full-blown litigation. This service is mostly provided by government regulatory agencies on sectoral basis. An affordable and useful example on this is the Uganda Insurance Regulatory Authority. One of the functions of the Authority as provided by section15 (1) (f) is to provide a bureau to which complaints may be submitted by members of the public. The Complaints Bureau was established in 1998 and it has, over the period been responding to insurance clients' complaints and beneficiaries. Monitoring of these complaints represents a very useful source of information concerning reliability of companies and for holding insurer's responsible for their offered services. The Authority has taken cognisance of the fact that companies in difficulty delay claim

[66]Rowe, P.M. 'The Ombudsman's Role in Dispute Resolution System' Negotiation Journal, October, 1991 p. 353

[67] Ibid

payments or settle claims in an unfair manner. To resolve the complaints, the Insurance Regulatory Authority facilitates communication between insurers and complainants and ensures that insurers comply with the law, while responding promptly and fairly. By these, the Complaints Bureau performs some of the key functions reserved for an ombuds office.

The reforms introduced by the Companies Act, 2012 also carry some elements of external ombuds capable of engineering a new system of settling corporate governance disputes. This can be discerned from the minority alternative remedy to winding up in cases of oppression whereby an aggrieved minority is now expected to lodge a complaint with the Registrar of Companies by petition for relief instead of bringing a winding up petition on the ground of prejudicial and oppressive conduct of directors.[68] For most intents and purposes this innovation aligns with the fundamental idea of promoting the spirit of corporate enterprise by ensuring out of court settlements, which in a way circumvents extreme decisions likely to be taken by the courts such as pronouncing a winding up. This important role, therefore, resonates with the functions of the ombudsman; a role that is akin to mediation in its formal context.

Conclusion

ADR mechanisms such as mediation and arbitration are undoubtedly a cost effective and flexible way of resolving disputes involving corporate entities. These mechanisms have been systematically entrenched in the legal fabric of Uganda by way of statutory instruments. The minimum expectation is for these mechanisms to contribute significantly to the development of a system that promotes amicable resolution of disputes in the overall interest of corporate enterprises and their respective stakeholders. But there are some key factors inhibiting the successful development of the system. The single greatest obstacle is the unwillingness to embrace ADRs.[69] This may be attributed to both advocates and clients. Some advocates tend to seek multiple and sometimes frivolous adjournments in order to "milk the clients". To such advocates, mediation and other forms of dispute settlement would not serve their self-fulfilling prophecies and this is the category of lawyers that would prefer litigation than refer a matter

[68] Section 247 Companies Act, 2012

[69] Fienberg, Kenneth. R. 'Mediation: a Preferred Method of Dispute Resolution' (1989) Vol. 16 Issue 5 Pepperdine Law Review p. 20

to mediation. Clients are equally reticent to ADRs due to wrong counseling, ignorance or fear of dominance of corporate parties. To some companies, adoption of ADR techniques is seen as a sign of weakness. All these put together work to inhibit the smooth development and operation of alternative dispute settlement processes.

Based on these challenges, it is the considered view of this writer that more needs to be done to encourage and engender the culture of ADR in corporate dispute resolution processes. Beyond the observance of fair and ethical standards by lawyers in dealing with clients, much is also desired to be done in terms of improving on the negotiation skills of advocates in a way as to ensure favourable settlements that might win the confidence of the public and make the system more attractive. It also behooves on companies to demonstrate serious commitment by way of programmes, structures and policies pointing toward ADRs as preferred methods of resolving disputes.

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THE LEGAL REGIME FOR TAMING SEXUAL EXPLOITATION AND ABUSE DURING ARMED CONFLICT: A FEMINIST PERSPECTIVE

By

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Abstract

Sexual exploitation and abuse committed during armed conflict is an outright violation of the victims' human rights. It is grounded in the archaic ideology of patriarchy which thrives on domination of the weak genders, including women, by the strong genders in society. It is problematic to tame the vice of sexual exploitation and abuse because some of the perpetrators are the ones in charge of the operations in the armed conflict and cannot report their wrong doing. In other cases, for example the case of the United Nations peacekeepers, aid workers and the United Nations mandated forces, not much has been done because of lack of the machinery to deal with the perpetrators. Troop contributing countries are unwilling to report acts of sexual exploitation and abuse by their own forces, which complicate the situation of victims. Consequently, matters of sexual exploitation and abuse during armed conflict remain underreported, and unpunished. Only a few cases of sexual exploitation and abuse have been handled by the international criminal tribunals. These cases go to court because they occur largely in a situation such as genocide, which attracts international attention. Advocacy work, especially by the feminist researchers and scholars in the field of armed conflict has helped to bring to the limelight acts of sexual exploitation and abuse, and in some cases, helped to initiate investigations against perpetrators. This study is premised on an understanding that SEA during armed conflict has often been, and to a large extent continues to be underreported and its victims may not always be aware that it is a violation of their human rights. The main objective of the study is how to ensure that the problem of SEA in armed conflict is tamed, and if possible brought to a complete stop. The study ends by stating that stopping SEA during armed conflict is not possible. It, however, contributes to existing efforts advocating for respecting law in war, with a hope that acts of sexual exploitation and abuse during armed conflict can be minimised, if they cannot easily be stopped altogether. The study recommends further and deeper analysis of the problem by future researchers so that a lasting solution can be found to stop SEA during armed conflict.

Key words: Sexual exploitation and abuse, objectivation, subjectivation, ideology.

Introduction

Sexual exploitation and abuse (SEA) may be committed in times of peace or armed conflict.[1] SEA is, however, rampant during times of armed conflict.[2] Recent data increasingly confirm substantial variation in the forms of SEA, perpetrators and motives, especially when it takes place during periods of armed conflict.[3] It is one form of war atrocities. Buchowska[4] asserts that:

> From the contemporary legal perspective war atrocities have to be seen as mass violations of human rights. They affect all members of the society, regardless of their gender, age, skin colour, nationality or ethnic origin. Women, however, were and still are particularly vulnerable to all forms of such violations, in particular becoming victims of various forms of violence.

Much as SEA is largely committed against women and girl children, men and boys may, equally be targeted and victimised as the women and children. Rape, in particular causes severe injury for both women and men in terms of numbers. Rape is, however, essentially a crime committed against women, who suffer from particular after effects, including forced pregnancies that are not shared by men.[5] In some instances, SEA is perpetrated against

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[1] SEA, which is subset of 'sexual violence (SV)' or 'gender based sexual violence (GBSV)' is sometimes referred to as SV or GBSV, depending on the authors' background, and sometimes, preference of the terminology to use.

[2] N. Muna, 2009. The United Nations Reponses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers During Peacekeeping Missions. *Berkeley Journal of International Law*, (27) (1): 127-161, accessed at http://www.e-ir.info/2015/06/22/sexual-abuse-and-sexual-exploitation-in-conflict-situations-as-a-security-risk/, (accessed 10 October, 2017).

[3] K. T. Seelinger, 2014. Domestic Accountability for Sexual violence: the potential of specialised units in Kenya, Liberia, Sierra Leone and Uganda, in V. Bernard (Ed-in-Chief), Sexual Violence in Armed Conflict, *ICRC Review, ICRC, (96) 894 Summer*, citing D. K. Cohen, A. H. Green and E. J. Wood, 2013.Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward, United States Institute of Peace Special Report No. 323, United States Institute of Peace, Washington DC, 642.

[4] N. Buchowska, 2016. Violated or protected. Women's rights in armed conflicts after the Second World War, International Comparative Jurisprudence, (2): 72-80, accessed atwww.elsevier.com/locate/icj, (referenced 10 October, 2017).

[5] C. Chinkin, 1994. Rape and Sexual Abuse of Women in International Law, Symposium: The Yugoslav Crisis: *New International Law Issues, 5 EJIL*, 326-341, accessed at http://ejil.org/pdfs/5/1/1246.pdf, (referenced 11 October, 2017).

ethnic, religious or indigenous or groups of people from a particular place.[6]SEA may be perpetrated by members of forces party to the conflict (government and rebel forces equally), victims, and without exception, aid workers and peacekeepers or other United Nations mandated forces.[7] The case of victims, such as internally displaced persons being sexually exploited and abused by fellow internally displaced persons, however, must be distinguished from the wanton acts, for example of genocidiers such as was the case in the Rwanda genocide where Tutsi men were forced to commit various acts of sexual violence to their kin, and eventually killed by those who compelled them to commit SEA.[8] The conflicts in the former Yugoslavia, the Rwanda genocide, Cambodia, Myanmar, Sierra Leone, the Central African Republic, Syria, and the Republic of Mali have lifted the veil and brought to the limelight the suffering of women, men, boys and girls, as well as their families and whole communities, as a result of sexual violence'.[9]This, however, does not signify that SEA is a new phenomenon during armed conflicts, but it, previously had always not been brought to the fore. It is probable that acts of SEA could not be well reported because majority of the perpetrators are the ones responsible for the fighting, while others, such as the United Nations peacekeepers and other aid workers would lose their integrity, and future job opportunities. This article adopts a feminist perspective to identify and analyse the law and other practices aimed at stemming the vice of SEA during armed conflict situations.

The Problematique

SEA occurred in previous armed conflicts, and still is prevalent in a number of contemporary armed conflicts. It occurs quite often and without exception, on all continents. It is rooted in the patriarchal ideals of dehumanising victims, especially

[6] P. M. Bastick, K. G., R. Kunz, 2007. Sexual Violence in Armed Conflict: Global Overview and Implications for the Security, Geneva Centre for Democratic Control of Armed Forces, Geneva, Switzerland, 9, accessed at: http://www.essex.ac.uk/armedcon/story_id/sexualviolence_conflict_full[1].pdf, (10 October, 2017).

[7] V. Bernard (Ed.), 2014. Sexual Violence in Armed Conflict: From Breaking the Silence to Breaking the Cycle, *ICRC Review,* 427.

[8]World Report 2017: Nigeria| Human Rights, Watchhttps://www.hrw.org/world-report/2017/country-chapters/Nigeria.

[9] *Op. cit.* note 7.

women.[10]SEA has often been, and to a large extent continues to be underreported. Victims may not always be aware that it is a violation of their human rights. In times of armed conflict, state investigative machineries are usually put in abeyance, and perpetrators, who may be members of the fighting forces, humanitarian aid workers, or United Nations peacekeepers or other United Nations mandated forces, cannot voluntarily report their wrongdoing. In other instances, victims, may be too scared to report the act, or do not know where and when to report the matter to. The ever-enlarging scope of SEA, and methods of carrying it out, further complicates the already precarious situation of victims. When redress mechanisms are sought from the criminal law jurisdiction, victims do not get reparations; moreover, when trials are carried outside the locations where it was committed, victims may never get to know the outcome of the trials.

Terminologies Used

SEA is a broad terminology used by feminist scholars to bring to the limelight the outcries of its victims, especially women. It includes, but may not be limited to sexual violence—including rape, assaults, unsolicited sexual advances and gestures, sex trafficking, gender crimes, and domestic violence.[11] SEA equally includes the practice of taking sexual favours in return for money, food and other assistance by all the UN peacekeepers.[12]Further, SEA may include early or forced marriages, sexual exploitation of military combatants within the armed forces, aid workers by fellow

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[10] G. Gaggioli, 2014. Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law, International Review of the Red Cross (96)(894):503–538, accessed at https://www.icrc.org/en/download/file/12233/irrc-894-gaggioli.pdf, (referenced 10 October 2017), citing
Peter Maurer, ICRC President Calls for Action on Sexual Violence in Conflict, statement of 12 June 2014,
available at: www.icrc.org/eng/resources/documents/statement/2014/06-12-sexual-violence-statementmaurer.
htm.

[11] A. Ahmed, 2014. Women who Punish: Feminist Technocracy and Violence Against Women, Feminism and Legal Theory Project at 30: A Workshop on Geographies of Violence: Place, Space, and Time, accessed at HeinOnline (29 September 2017).

[12] R. Thakur, 2006. The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect 108 (Cambridge University Press, accessed at http://www.publicinternationallaw.in/node/136, (10 October, 2017).

aid workers, and sex slavery.[13]An armed conflict has been defined as 'the logical outcome of an attempt of one group to protect or increase its political, social and economic welfare at the expense of another group'. In case it is between two or more States, it is termed an international armed conflict. The case of non-international armed conflicts arises when it is between governmental forces and non-governmental armed groups or between such groups only. General conditions of an armed conflict were laid down in the Case of *Akayesu*[14], where the Trial Chamber quoting the ICTY Appeals Chamber in the Case of *Tadic*[15] stated:

> [A]n armed conflict exists whenever there is *[sic.]* protracted armed violence between governmental authorities and organised armed groups or between such groups within a State. [A]n armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organisation of the parties to the conflict. The term 'armed conflict' suggests the existence of hostilities between armed forces organised to a greater or lesser extent, which necessarily rules out situations of internal disturbances and tensions. For a finding to be made on the existence of an internal armed conflict, it will, therefore, be necessary to evaluate both the intensity and organization of the parties to the conflict. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until *[sic.]* in the case of internal conflicts, a peaceful settlement is reached.

The situations described in these cases are common in the contemporary times. It is probably true that prosecution of an armed conflict is part and parcel of human nature, much as behaviour in the armed theatre is not static and changes with time. An understanding and anticipation of the evolution of war remains a

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[13] A. McAlpine, M. Hossain and C. Zimmerman, Sex trafficking and sexual exploitation in settings affected by armed conflicts in Africa, Asia and the Middle East: systematic review, BMC International Health and Human RightsBMC series, accessed at https://bmcinthealthhumrights.biomedcentral.com/articles/10.1186/s12914-016-0107-x, (10 October, 2017).

[14] *The Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T.

[15] *Prosecutor v. Tadic*, *Case No. IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 70. 1995*, para. 116, 134.

necessity in providing oversight and predictions for the future on the prevalence of SEA, which is rampant in armed conflict situations.[16]

Within the course of this article, the term 'patriarchy' is used to mean the norm of the dominant hegemony, which portends that domination is right and whatever is done within the domain of the dominant ethos is right, alas, contrary to the feminist understanding. The term 'objectivation' is used to refer to the seeing and, or treating a person, usually a woman, as an object. In this context, the focus is primarily on sexual objectifivation and subjectivation of victims of SEA, which occur in the sexual realm. Objectivation of the victims of SEA enables the perpetrators of SEA to subject their victims to horrific acts, which ordinary sensible human beings would never do. Feminist scholars use the term 'SEA' to mean the wanton violation of a host of rules and prohibitions of international humanitarian law (IHL), human rights law and general criminal law principles and even public conscience to exploit and abuse the inviolable sexual rights of unsuspecting and defenceless victims. It is argued that SEA inflicts physical, psychological and social harm and even spiritual harm to the victims.

Feminist Perspective of SEA

Feminist social-legal theories, moral philosophies and related political movements advocate for social, political and economic equality between the sexes and genders.[17]Feminist paradigm identifies the arenas of oppression of 'weak' genders created by the 'stronger' and witty genders, and has a wealth of terminology to bring to light those oppressors. Terminologies, such as objectivation and subjectivation, which are tools of the ideology of patriarchy, are used in this article to identify the reason behind acts of SEA during armed conflict.

Feminists assert that objectivation and subjectivation of victims of SEA are domains of the ideology of patriarchy which thrive on unequal power relations in the social, economic, political and other arenas. Being an ideology, patriarchy has avenues through which it operates, including blindfolding the minds of perpetrators

[16] V. Bernard (Ed.-in-Chief), 2015. Tactics, Technologies, Tragedies: A Humanitarian Perspective on the Changing face of War in Humanitarian debate: law, policy, action: The Evolution of Warfare, *International Review of the Red Cross*, (97) (900):959, Geneva.

[17] S. Grimsley, 2017. 'Feminism defined', accessed at http://study.com/academy/lesson/feminism-history-ideology-and-impact-in-politics.html, (referenced 6 July, 2017).

to instead view their victims as 'the other things—objects and subjects' not being the 'other humans'. This view is, however, creates another form of the paradigm of contradictions. Perpetrators of SEA would not have sexually abused and exploited their victims, if the latter were not humans, they however, would do so because they get convinced, that those 'objects' or 'subjects', who in any case are their fellow humans, have less value, and targeting them does not offend any legal or moral values known to themselves as perpetrators of SEA. Feminist scholars out rightly do not find any value in the perpetrators' contestations. Consequently, they condemn those perpetrators as self-confessed criminals, and slaves of their deceptive conscience. According to the feminist perspective, those perpetrators do should not be absolved of their wrong doing in any criminal court of law, or even in a 'public court' much as they may attract some limited sympathies from their kindred in ideology.

This study resonates with the views of other scholars of the inhuman 'project' of objectivation and subjectivation of victims of SEA such as Nussbaum[18]who identifies seven features that are involved in the idea of treating a person as an object. These include: instrumentality, which is the treatment of a person as a tool for the objectifier's purposes; denial of autonomy, which is the treatment of a person as lacking in autonomy and self-determination; inertness, which is the treatment of a person as lacking in agency, and perhaps also in activity; fungibility, which is the treatment of a person as interchangeable with other objects; violability, which is the treatment of a person as lacking in boundary-integrity; ownership, which is the treatment of a person as something that is owned by another (can be bought or sold); and denial of subjectivity, which is the treatment of a person as something whose experiences and feelings (if any) need not be taken into account. Nussbaum's list may not be exhaustive of the features of objectivation. Langton adds three more features to Nussbaum's list: reduction to body, which is the treatment of a person as identified with their body, or body parts; reduction to appearance, which is the treatment of a person primarily in terms of how they look, or how they appear to the senses; and silencing, which is the treatment of a person as if they are silent,

[18] M. Nussbaum, 1995. 'Objectification', *Philosophy and Public Affairs*, 24(4): 249–291 in *Stanford Encyclopedia of Philosophy* , Feminist Perspectives on Objectification**,** First published Wed Mar 10, 2010; substantive revision Tue Dec 1, 2015, accessed at:https://plato.stanford.edu/entries/feminism-objectification/, (referenced 28 September, 2017).

lacking the capacity to speak.[19]The totality of all the identifiable features of objectivation is the subjection of an innocent, unsuspecting victim to the horrors of SEA, and for purposes of this article, during armed conflict.

The study asserts that SEA during armed conflict is committed, not because it is desirable or contributes to the success of the perpetrators, but because perpetrators wield superior power, rooted in the archaic ideology of patriarchy, and necessarily the 'objectivation' ideology. Adherents of that ideology take their victims by surprise; they first invite the latter's innocent and unsuspecting confidence, play the role of their 'saviour' and once that objective is achieved, descend on the them as if they were hungry wolves and abuse them sexually. At a later stage, the study provides examples of decided cases to demonstrate what actually happens during SEA in an armed conflict scenario.

Possible Motivations to Commit SEA in Armed Conflict

Perpetrators of SEA during armed conflict may well be behind times, living and influenced by the archaic ideology of 'war is hell' and 'the fog of war', the two of the most common colloquial expressions about war coined within the ambit of the ideology of patriarchy. They [patriarchs] argue: 'in times of war, the law is silent' (*silent leges inter arma*).[20] The ideology of patriarchy, is, however, no longer tenable or relevant in the contemporary contextual underpinnings of armed conflict. More humanistic and mind freeing ideologies, including feminism have come on board to discredit the ideology of patriarchy, which, they are convinced, is an oppressive ideology to those considered or designated weaklings.[21] Indeed, Marco, *et. al.*, give a contemporary argument:

[19]R. Langton, 2009. Sexual Solipsism: Philosophical Essays on Pornography and Objectification, Oxford: Oxford University Press, 228-229, accessed at *Stanford Encyclopedia of Philosophy*, Feminist Perspectives on Objectification, First published Wed Mar 10, 2010; substantive revision Tue Dec 1, 2015, (referenced 28 September, 2017).

[20] L. R. Blank and G. P. Noone, 2016. International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War, Concise Edition, Wolterd Kluwer, New York, United States of America, 3. This argument is derived from an old concept of the law of war attributed to Cicero (52 B C) in his publication, Pro Milone, where he used the maximum '*Silent enim legēs inter arma*' later rephrased as '*Silent leges inter arma*—'laws are silent in arms'.

[21] See Children and Armed Conflict: A Guide to International Humanitarian Law and Human Rights Law, New Edition, International Bureau for Children's Rights, Montreal, 2010; The Report cites United Nations Security Council resolution 1882, passed in August 2009, which further requested the listing of parties that commit

'there is law in war'. Their general argument is that there is 'law in war', and without exception to the circumstances of a particular situation.[22]This reasoning is probably based on Article 35 (1) of Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), of 8 June, 1977 which lays down the basic rule of conducting hostilities. It provides:

> (1) In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited; (2). It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering; and (3). It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

The same spirit of the law is well stated in the Martens Clause, 1889, and Article 3 common to the Geneva Conventions of 12 August 1949, which are discussed elsewhere in this article. The letter and spirit of the Martens Clause and Article 3 common to the Geneva Conventions and the views of Marco *et. al.*,' resonate well with the feminism ideology, which seeks to challenge the purported lawlessness during armed conflict situations, a scenario ordained by the social order of the ideology of patriarchy. It is permissible to argue that international humanitarian law in its nascent stage could have been devoid of feminist thinking and perspectives, because it governed conduct of hostilities where men were sole actors. In the Battle of Soferino, for example, Henry Dunant narrated how he saw men moving to the battle zones, who would perhaps be dead within hours…[23] [T]he summer sun rose on the front, a few miles in width,

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sexual violence against children. Sexual violence against girl children and women is another issue that has galvanised the international community, particularly the United Nations Security Council. Resolution 1820 expressed the Council's firm position on this issue calling for a comprehensive report from the Secretary-General. Resolution 1882, as mentioned earlier, made sexual violence against children a criteria that allows for the listing of parties that commit this grave violation in the annexes of the Secretary-General's Report on Children and Armed Conflict, accessed at https://www1.essex.ac.uk/armedcon/story_id/000911.pdf, also available at info@ibcr.org www.ibcr.org, (referenced 16 July, 2017).

[22] M. Sassoli, A. A. Bouvier and A. Quintin, 2011. How Does the Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law, 3rd Ed. Vol. 1, International Committee of the Red Cross, Geneva.

[23] P. Boissier, 1978. History of the International Committee of the Red Cross: From Soferino to Tsushima, Henry Dunant Institute, Geneva, 17.

where some three thousand men were killing each other in an almost unimaginable orgy of fury and violence.[24]Much as the women and children were not participants in armed conflicts, in a sense that they were not participating in the actual fighting, they were, certainly victims of the wraths of armed conflicts. They lost their fathers, husbands and friends during armed conflict. The law of Nations (international law) as it was then, was, however, rich with norms of law governing armed conflicts. Marco, *et. al.*, could therefore, have equally based their assertion of 'law in war' on the following quote:

> The Austrian Captain, Hazenfanz witnessed this human flood submerging his artillery battery, killing all in sight. Never in his long military carrier had he seen anything like it. With all his strength, he shouted: 'The law of nations! This is no way we fight![25]

Using the analogy of '[t]his is no way we fight it', the study provides the genesis of the age of enlightenment 'in war', where 'humanitarian law, 'customary and treaty law', together with its complementary, 'human rights law' and 'criminal law' during armed conflict, apply without exception. Building on this analogy, the study contributes to the feminist advocacy for respecting law in war. Previous feminist scholars have greatly contributed to the great success in improving the law of armed conflict to include strict prohibitions on SEA. Rape and other forms of SEA during armed conflict are now criminalised in international as well as national criminal law instruments. The feminist perspective has indeed, changed the world's views about SEA, expanding its scope, stigmatising and exposing it, when committed during armed conflict. Hitherto, that was not the case.

In 1994, in a document concerning human rights practices in Bosnia and Herzegovina, the United States Department of State noted that the Bosnian Serb armed militia employed rape as a tool of war to terrorise and uproot populations, against the rules of humanitarian law and human rights law. In 2000, in a Report on systematic rape, sexual slavery and slavery like practices during armed conflict, the Special Rapporteur of the United Nations Sub-Commission on Human Rights stated that 'the use of sexual violence is seen as an effective way to terrorise and demoralise members of the opposition, thereby forcing them to flee'.[26]SEA,

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[24] *ibid.,* 19.
[25] *ibid.*, 19.
[26] J. Marie-Henckaerts and L. Doswald-Beck (Eds.), 2005. Customary International Humanitarian Law: Volume II. Practice Parts I & II, Cambridge

hence, has no room in contemporary human conscience, where feminism, which advocates for equality of rights, is the victor ideology in the laws governing conduct of hostilities.

One of the feminist goals, located, particularly within the governance feminism strand, emphasises criminal enforcement of sexual violence and rape in war through international humanitarian law.[27]In contemporary times, feminism and its ideological foundations are becoming incrementally noticeable in actual legal-institutional power relations. Indeed, as feminist legal activism comes of age, it accedes to a newly mature engagement with power.[28]Within the ambit of international humanitarian law, feminism brings on board an understanding of legal power relations as highly fragmented and dispersed. It emphasises the politics—law distinction in order to work not only in the spectacularly legal domains of litigation, legislation, and policymaking, but also in personal pressure campaigns, consciousness raising, and highly discretionary legal moments such as prosecutorial charging strategy.[29]This forms the basis for feminist perspectives to find uncontested spaces to advocate against SEA during armed conflict situations. The jurisprudence developed by the International Criminal Tribunal for Rwanda (ICTR) in the cases of *Akayesu*, and *Nyiramashuko* demonstrates how feminism has penetrated the dominant ideology of patriarchy to criminalise rape and other kin forms of SEA in armed conflict.[30]Without fronting a feminist perspective in the investigations and the whole prosecutorial process, the ICTR could not have been able to find for instance, Nyiramsuhuko guilty of rape of fellow women. Feminist perspective do no accommodate spaces for escaping liability once the motivation for violating rights of others have been established.

Much as it is not disputed that through history, SEA has been identified and documented in armed conflict, its

University Press, 73- 74, accessed at http://www.cambridge.org (referenced 16 July, 2017).

[27] *ibid.,* 338.

[28] J. Halley, Describing Governance Feminism in J. Halley, P. Kotiswaran, H. Shamir & C. Thomas, 2006. From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism, *Harvard Journal of Law & Gender* (29): 340.

[29] *ibid.,* 341.

[30] The cases of *Jean Paul Akayesu Case No. ICTR-96-4-A* and *Pauline Nyiramasuhuko, Case ICTR-98-42-A,* where court established that rape was used on a wide scale as a tool of genocide.

documentation gained attention in the 1990s following widespread assaults on women in armed conflict in the former Yugoslavia and in the Rwandan genocide. Assaults on women during armed conflict called for and prompted the United Nations interventions. In response, the United Nations Security Council adopted a number of resolutions, which recognised sexual violence as a tactic of war, called for accountability, and established monitoring mechanisms.[31]For example, in Resolutions 1325 (2000) and 1888 (2009), the United Nations Security Council reiterated deep concern that, 'despite its repeated condemnation of violence against women and children including all forms of sexual violence in situations of armed conflict, and despite its calls addressed to all parties to armed conflict for the cessation of such acts with immediate effect, such acts continue to occur, and in some situations have become systematic or widespread'.[32]On their part, Deschamps, *et. al.,* [33] aver:

> [I]n particular, the UN must recognise that sexual violence by peacekeepers triggers its human rights mandate to protect victims, investigate, report and follow up on human rights violations, and to take measures to hold perpetrators accountable. In the absence of concrete action to address wrongdoing by the very persons sent to protect vulnerable populations, the credibility of the UN and the future of peacekeeping operations are in jeopardy.

Indeed, the work of feminist advocates against SEA during armed conflict has helped to remind the United Nations to investigate and take action against the perpetrators. For example, detailed investigations and eventual prosecution of Nyiramasuhuko

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[31] J. Spangaro, C. Adogu, G. Ranmuthugala, G. P. Davies, L. Steinacker, *et. al.,* 2013. What Evidence Exists for Initiatives to Reduce Risk and Incidence of Sexual Violence in Armed Conflict and Other Humanitarian Crises? A Systematic Review. PLoS ONE 8(5): e62600. doi:10.1371/journal.pone.0062600, at 1.

[32] Resolution 1888 (2009), Adopted by the Security Council at its 6195th meeting, on 30 September 2009; S/RES/1888 (2009), Reissued for technical reasons on 22 June 2010, and Resolution 1325 (2000), Adopted by the Security Council at its 4213th meeting, adopted on 31 October 2000 accessed at http://www.un.org/womenwatch/daw/vaw/securitycouncil/S-RES-1888-(2009)-English.pdf, (referenced 16 July, 2017).

[33] M. Deschamps, H. B. Jallow & Y. Sooka, 2015. 'Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic' accessed at http://www.un.org/News/dh/infocus/centafricrepub/Independent-Review-Report.pdf, (referenced 16 July, 2017).

by the ICTR for the crime of rape was instigated by feminists who could not tolerate her purported evidence that a woman could not rape a fellow woman. Within the purview of the feminism ideology, the traditional concept of rape, and generally SEA, which was coined around the sexual relations between biological men and women at birth—the sexual gender relations, has been modified.[34]Rape and generally SEA now insinuate any acts leading to rape, or violation of the body of a person, particularly of women. The World Health Organisation[35] has described 'sexual violence' as:

> [A]ny sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home, and work…sexual violence includes rape, defined as physically forced or otherwise coerced penetration…even if slight…of the vulva or anus, using a penis or other body parts or an object.

The traditional conception of rape coined within the ambit of the ideology of patriarchy was largely championed by the religious communities of Europe, mainly the Christians, while sanctifying Christian marriages. 'Marriage' in Christendom meant the union of two people [woman and man] who promise to go through life alone with one another. In the case of *Corbet v. Corbet,* Ormrod J[36]held:

> [T]here had been a purported marriage in 1963 between a man and a male to female trans-sexual. Further that because marriage is essentially a union between a man and a woman, the relationship depended on sex, and not on gender. The law should adopt the chromosomal, gonadal and genital tests. If all three are congruent, that should determine a person's sex for the purpose of marriage. Any operative intervention should be ignored. The biological sexual constitution of an individual is fixed at birth, at the latest, and cannot be changed either by the

[34] See Traditional definition of rape: "the carnal knowledge of a female, forcibly and against her will, Accessed at https://www.justice.gov/archives/opa/blog/updated-definition-rape on 14 June, 2017 (referenced 13 October, 2017)..

[35] See K. T. Seelinger, 2014. Domestic accountability for sexual violence: the potential of specialized units in Kenya, Liberia, Sierra Leone and Uganda, in Vincent Bernard (Ed-in-Chief), Sexual Violence in Armed Conflict, *ICRC Review*, ICRC, (96)(894): 542.

[36]The Case of *Hyde v. Hyde and Woodmanse {L.R.) 1.P. & D., 130* and *Cobbet v. Cobbet (otherwise Ashley): FD 1 Feb 1970 [1971] P 83*.

natural development of organs of the opposite sex or by medical or surgical means. The marriage was, therefore, *void ab initio*.

In contemporary world, the whole landscape of rape as a concept of SEA has changed to include rape of men by fellow men—the silent victims, and women by women—the ideology of sexual relations changing from sex by birth to sex include sex by orientation. The latter has become prominent in communities where the lesbian and gay ideology is accepted by society, and thus protected by national laws, and general, the human rights legal paradigm. This, however, does not rule out the possibility of sex acts or engagements by orientation phenomenon in societies where lesbian and gay relations are abhorred and as such not recognised by national laws. In the latter cases, rape of women by fellow women or men by fellow women is seen as the most egregious and dehumanising act to human dignity. Sadly, it goes unpunished, because of the desire not to make such relations recognisable at law. Where it is punished, it is only glossed over as an offence against the order of nature.[37]

The Law Against SEA

The philosophy for this article is that there is no lacuna in terms of law, even during armed conflict. SEA is, and, has always been prohibited under the laws, customary and treaty law, governing armed conflict. The Preamble to the Charter of the United Nations explicitly provides: 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women'. It ensures that this aspect is respected by bestowing, under Article 39, on its most powerful organ; the Security Council, powers to establish existence of breach of the Charter provisions and at the same time prescribe the means to deal with the violations. It is not possible to flout the spirit and letter of the only known norm making treaty in the world, and go

[37]M. Kirby, The Sodomy Offence England's Least Lovely Law Export, Association of Commonwealth Criminal Lawyers Journal of Commonwealth Criminal Law: Inaugural Issue 2011; accessed at https://www.michaelkirby.com.au/images/stories/speeches/2000s/2011/2540-ARTICLE-JOURNAL-COMMONWEALTH-CRIMINAL-LAW.pdf (referenced 6 July, 2017): The author, quoting Leviticus, 20, 13, 'If a man ... lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon you', avers that the early history of England incorporated into its common law, an offence of 'sodomy' in the context of the provision of protection against those who endangered the Christian principles on which the kingdom was founded.

unpunished. The Charter clearly provides mechanisms to deal with its violators. In contemporary times, the United Nations Security Council has invoked its inherent powers under the Charter and established by its resolutions, mechanisms to deal with the most heinous crimes under the heading of SEA in armed conflict and other related environments such as in the cases of the former Yugoslavia, the Rwanda genocide, and the Sierra Leone.[38]

The United Nations Security Council has now established a Permanent International Criminal Court (ICC) to deal with on-going violations of international humanitarian law and human rights law, among others, during armed conflict.[39] By criminalising SEA and putting in place mechanisms to investigate, arrest, try and punish perpetrators of SEA, the United Nations Security Council has helped to tame, but not to stop, the behaviours of perpetrators of SEA. This is subsequently illustrated by selected incidences where perpetrators of SEA have been tried and convicted before international criminal tribunals (*ad hoc* and permanent) established by the United Nations Security Council. Those who escape the long arm of the criminal tribunals remain stigmatised and hiding in self-imposed exile such as members of the former Rwanda Armed Forces (The *Forces Armées Rwandaises)* (FAR) in the diaspora who

[38] The Statute for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (Adopted 25 May 1993 By Resolution 827); (as Amended 13 May 1998 by Resolution 1166); (as Amended 30 November 2000 by Resolution 1329); (as Amended 17 May 2002 by Resolution 1411); (as Amended 14 August 2002 by Resolution 1431); (as Amended 19 May 2003 by Resolution 1481); (as Amended 20 April 2005 by Resolution 1597); (as Amended 28 February 2006 by Resolution 1660); (as Amended 29 September 2008 by Resolution 1837); and (as Amended 7 July 2009 by Resolution 1877); The Statute for International Tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994 (Adopted by Security Council resolution 955 (1994) of 8 November 1994 amended by Security Council resolutions 1165 (1998) of 30 April 1998, 1329 (2000) of 30 November 2000, 1411 (2002) of 17 May 2002 and 1431 (2002) of 14 August 2002); and the UN Security Council, Statute of the Special Court for Sierra Leone, 16 January 2002, available at: http://www.refworld.org/docid/3dda29f94.html [accessed 16 July 2017] (As established pursuant to Security Council resolution 1315).

[39]The Rome Statute of the International Criminal Court: Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

fled Rwanda after the 1994 genocide. Others being looked for in connection with SEA during armed conflict include Joseph Kony, the Leader of the rebel Lords Resistance Army, a force that committed SEA in Uganda, South Sudan, the Democratic Republic of Congo and the Central Africa Republic.[40]Joseph Kony has since 2005 been on the list of the most wanted criminals by the International Criminal Court (ICC).[41]

Alongside the law created under the United Nations Charter, International humanitarian law has developed immensely and covers acts of SEA during armed conflict. International humanitarian law, otherwise known as the 'law of war' or 'law of armed conflict' has evolved through centuries, decades, months, weeks and days, and continues to evolve. This branch of the law governs the conduct hostilities by states and non-state actors. In so doing, it seeks to minimise suffering in war by protecting persons not participating and restricting means and methods of warfare.[42]For example, Article 35 of the Additional Protocol to the Geneva Conventions provides: '[I]n any armed conflict, the right of the parties to choose methods or means of warfare is not unlimited'. Effectively, Article 35 (1) of Additional Protocol I puts a limit on the means and methods of warfare to the extent that use of SEA in the former Yugoslavia and Rwanda genocide, Syria and elsewhere, was an out rightly prohibited means of warfare.

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[40] See The United Nations Security: Narrative Summaries of Reasons for Listing: In accordance with paragraph 59(d) of resolution 2127 (2013), the Security Council Committee established pursuant to resolution 2127 (2013) concerning the Central African Republic listed individuals and entities including the Lord's Resistance Army, which was listed on 7 March 2016 pursuant to paragraphs 12 and 13 (b), (c), and (d) of resolution 2262 (2016) as 'engaging in or providing support for acts that undermine the peace, stability or security of the CAR;' 'involved in planning, directing, or committing acts that violate international human rights law or international humanitarian law, as applicable, or that constitute human rights abuses or violations, in the CAR, including acts involving sexual violence…'.Accessed at https://www.un.org/sc/suborg/en/sanctions/2127/materials/summaries/entity/lord%E2%80%99s-resistance-army, (referenced 16 July, 2017).

[41] 'Five most wanted by ICC': 'Children have been affected the most acutely by this conflict, with thousands abducted, used as child soldiers and sex slaves', accessed at http://www.euronews.com/2015/07/17/five-of-the-worlds-most-wanted-for-crimes-against-humanity, (referenced 16 July, 2017).

[42]L. R. Blank and G. P. Noone, 2016. International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War, Concise Edition, Wolters Kluwer, United States of America, 1.

The reasons why such means continue to be used during armed conflict, only explain how the dominant and unbalanced power relations, for example, between genders; subject the weaker gender to wanton abuse of rights. That form of subjectivation is buttressed in the ideology of patriarchy, which motivates those who choose to go to war to assume that they are entitled to use any means at their disposal to achieve their objectives. Fortunately, IHL is inherently against violations and outrages to the dignity of human beings including SEA.[43]Within the development of IHL, steps were taken to make IHL an all-encompassing and exclusionary branch of the law, to be the only branch of international law applicable during times of armed conflict. For example, the Martens Clause, first inserted in the preamble to the 1899 Hague Convention (II) provided:

> [U]ntil a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.

In principle, the spirit and letter of the Hague Convention II of 1899, is reiterated and restated the Geneva Conventions of 1949 and their Additional Protocols of 1977. Article 1 common to the Geneva Conventions provides: '[T]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'. This implies that even in situations not covered by the Geneva Conventions, IHL would apply in the same manner, it was envisaged to apply under the Martens Clause. The same spirit is incorporated in Article 3 common to the Geneva Conventions of 1949, which provides:

> [T]o this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: *a)* violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; …*c)* outrages upon personal dignity, in particular humiliating and degrading treatment.

Much as IHL is held to be the *lex specialis* (a specialised branch of the law applicable during armed conflict), it is not the only law applicable in such circumstances. Human rights law, international criminal law and even refugee law may provide further

[43] Article 3 common to the Geneva Conventions, 1949.

insights towards protection of victims of SEA during armed conflict. These branches of the law, were probably least developed at the time of the negotiation of the Geneva Conventions, or being developed more or less at the same time, and there was no time to cross undertake referencing by the negotiators of the Conventions.[44]It suffices to note that the Geneva Conventions of 1949 were negotiated at the backdrop of the immediately previous experiences of the World War I &II. They, therefore, addressed the situation as it was then. The minds of their negotiators of the Conventions could have been biased by their own experiences of the immediately preceding world wars. That explains why a scheming through of the Geneva Conventions reveals that they specifically govern conduct of hostilities and other aspects associated with international armed conflict. Apart from the common Article 3 to the Geneva Conventions, which expressly provides for circumstances on a non-international armed conflict, other provisions relate to cases when the armed conflict is between the High Contracting Parties, who are necessarily States.

It is, possible, therefore, that the negotiators of the Geneva Conventions did not foresee the prevalence that non-international armed conflicts would take in the decades following the adoption of the Conventions.[45]The logic being that during the First and Second World Wars, States fought against other States and not non-state actors as is the case in majority of armed conflicts.[46]That, however, did not mean that non-international armed conflicts were unknown to them, but they must, rather not have been their main subject of concern at that time. In order to cater for the eventualities, or the vivid gaps in the negotiated Geneva Conventions, the drafters of the Geneva Conventions crafted Article 3 common to the Geneva Conventions in the language and style it appears. The Article requires the High Contracting Parties and other players to comply with its provisions, in the circumstances it proscribes. The Article, in essence criminalises SEA in armed conflict, without limitation, but may be specifically referred to in cases of non-international armed conflicts.

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[44] The Universal Declaration of Human Rights, was adopted in 1948, while the United Nations Refugee Convention was adopted in 1951.

[45] L. Cameroon, B. Demeyere, J.M Henckaerts, E. L. Haye and H. Niebergall-Lackner, 2015. The Updated Commentary on the First Geneva Convention—a new tool for generating respect for international humanitarian law, *International Review of the Red Cross*, (97)(900),1209-1226, 1211.

[46] For example in Syria, the Democratic Republic of Congo and Cambodia.

Building on the provisions of the Geneva Conventions, and their predecessor treaty, Hague Convention of 1898, the International Committee of the Red Cross (ICRC) and legal experts in the subject of international humanitarian law came up with the Additional Protocols I &II to the Geneva Conventions of 1949. The intention was to expound on the provisions of the Conventions and cater for any gaps that were vivid while interpreting provisions of the Conventions. The Additional Protocols appear more explicit and clearer on matters that remain vague in the Conventions. For example, Article 75 of the Additional Protocol I to the Geneva Conventions in regard to SEA provides:

> In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: *a)* violence to the life, health, or physical or mental well-being of persons, in particular: i) murder; ii) torture of all kinds, whether physical or mental; iii) corporal punishment; and iv) mutilation; *b)* outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; *c)* the taking of hostages; *d)* collective punishments; and *e)* threats to commit any of the foregoing acts.

Article 76 of the Additional Protocol I on protection of women provides:

> [W]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault. [P]regnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority. [T]o the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.

In regard to SEA, Articles 75 and 76 of the Additional Protocol I expand the scope of application of the law from the hitherto anticipated players, the fighting forces to include civilians perpetrators of SEA. This provision provides the basis for holding accountable non-military commanders, the civilians for acts of SEA committed under their command and control. Article 50 of the Additional Protocol I defines a civilian as: 'any person who does not belong to one of the categories of persons referred to in Article 4 A 1), 2), 3) and 6) of the Third Convention and in Article 43 of this Protocol'. In particular, Article 43 of Additional Protocol I defines '[A]rmed forces':

> [T]he armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

This definition, excludes non-military personnel from being held accountable for acts of the members of the armed forces. Article 75, cited, however, fills this gap, and civilians wielding authority are now amenable to prosecution for SEA. Indeed, some of them such as Akayesu and Nyiramsuhuko, have been prosecuted for committing or directing commission of SEA in their individual capacities. They can also be prosecuted for failing to prevent its commission. The Additional Protocols equally have explicit protection of women against SEA. In regard to non-international armed conflict, Article 4 to the Additional Protocol II to the Geneva Conventions improves on the spirit and letter of the previous instruments and provides:

> [A]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. [I]t is prohibited to order that there shall be no survivors. [W]ithout prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever: a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; b) collective punishments; c) taking of hostages; d)

> acts of terrorism; e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; f) slavery and the slave trade in all their forms; g) pillage; h) threats to commit any of the foregoing acts.

The above provisions in IHL treaties on prohibition of SEA are supplemented upon by various international human rights instruments. The International Covenant on Civil and Political Rights (ICCPR) in Article 7 prohibits torture and cruel, inhuman or degrading punishment.[47]The African Charter on Human and Peoples' Rights (also known as the Banjul Charter) is intended to promote and protect human rights and basic freedoms on the African continent.[48]Under the Banjul Charter, [E]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his [her] legal status. All forms of exploitation and degradation of man [and woman], particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right. Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained. Article 3 of the European Convention on Human Rights, provides that there are no exceptions or limitations on the right to the protection of human rights and fundamental freedoms. The Convention prohibits torture, and inhuman or degrading treatment or punishment.[49]

Undoubtedly, today, civilians are liable to be investigated for commission of SEA during armed conflict. Count no. 13 in the Case of *Prosecutor v. Jean Paul Akayesu,* charged Akayesu with rape punishable under Article 3 of the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such

[47] Accessed at http://www.cirp.org/library/ethics/UN-covenant/ on 16 July, 2017, is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966, and in force from 23 March 1976.

[48] Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986).

[49] Accessed at http://www.echr.coe.int/Documents/Convention_ENG.pdf, (referenced 6 July, 2017).

Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994.[50] The charge against Akayesu, in regard to SEA *inter alia* stated:

> [B]etween April 7 and the end of June, 1994, hundreds of civilians (hereinafter 'displaced civilians') sought refuge at the bureau communal. The majority of these displaced civilians were Tutsi. While seeking refuge at the bureau communal, female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises. Displaced civilians were also murdered frequently on or near the bureau communal premises. Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.

Another civilian, Nyiramsuhuko, a woman, was equally charged with SEA related crimes in case of *The Prosecutor v. Pauline Nyiramasuhuko, and others.* The ICTR Trial Chamber found Nyiramasuhuko guilty of: crime against humanity (rape) and a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (outrages upon personal dignity) pursuant to Article 6(3) of the Statute for failing to prevent and punish rapes perpetrated by *Interahamwe* at the Butare Prefecture Office in May and June 1994.[51]At the time of events alleged in the charge, Pauline Nyiramasuhuko was the Minister of Family and Women's Development in the Rwanda Interim Government headed by Jean Kambanda. As such, she was a prominent figure in the Butare Prefecture. She, in concert with others, ordered the extermination of Tutsi community and their accomplices. In particular, she ordered for rape of Tutsi women and girls, who she lured to her office, purportedly for protection against genocidiers. Considering that women are not likely to order men to rape other women, Nyiramasuhuko would naturally raise the defence of duress at her trial. Feminists, would, however, not accept such a defence, where the most egregious offences whose ingredients amount to SEA had been committed under her immediate supervision.

[50] Case *No. ICTR-96-4-T (Judgment)*.
[51] Case *No. ICTR-98-42-A (Judgment of 14 December 2015)*.

In regard to the defence of duress, the Canadian Supreme Court, in the Case of *R. v. Ruzic*, held:

> [A] person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is[*sic*], sexual assault with a weapon, threats to a third party or causing bodily harm, or aggravated sexual assault.[52]

At all material times when SEA was committed in her presence, Nyiramsuhuko was a party to the actions. She conspired with other genocidiers, including her own son, Arsène Shalom Ntahobali, who was jointly charged with by the ICTR to ensure that the genocide ideology which was crafted by the regime she served was executed to its logical conclusion. Nyiramasuhuko stands out of the crowd, though, in the negative sense, as probably the first woman to be convicted of rape of fellow women by an International Criminal Court. Her conviction sends a clear message to other women who would wish to violate the rights of their fellow women by ordering men to sexually assault them. After Nyiramasuhuko's conviction, that has become a 'no go area'.

Perpetrators of SEA During Armed Conflict

Previous researchers have identified a plethora of perpetrators of SEA during armed conflict. These include, members of armed forces party to the conflict—government forces and non-sate actors, United Nations peacekeepers, aid workers, and, sadly, the civilian entangled in armed conflict. In regard to United Nations staff, aid workers and forces, SEA is a wanton abuse of the United Nations Code of Conduct, which *inter alia* provides: '[T]he UN expects that all peacekeeping personnel adhere to the highest standards of behaviour and conduct themselves in a professional and disciplined manner at all times'. Explicitly, United Nations staff and forces from troop contributing countries who execute the United Nations mandate in peacekeeping and enforcement operations are enjoined to respect local laws, customs and practices; treat host country inhabitants with respect, courtesy and consideration; and act

[52] *2001 SCC 24, [2001] 1 S.C.R. 687*.

with impartiality, integrity and tact.[53]SEA by United Nations staff, aid workers and forces (Blue helmets and the United Nations mandated forces), equally offends the provisions of the Charter of the United Nations, which is the bedrock treaty of all human rights instruments in the world.

The United Nations High Commissioner for Refugees (UNHCR) report on sexual exploitation of children and young girls, established that agency workers from national and international NGOs as well as United Nations agencies stationed at Guinea, Liberia and Sierra Leone were reportedly the most frequent sex exploiters of children, often using the very humanitarian aid and services intended to benefit the refugee population as a tool of exploitation.[54]Most of the allegations were leveled at male national staff, who traded humanitarian commodities and services, including oil, bulgur wheat, tarpaulin or plastic sheeting, medicines, transport, ration cards, loans, education courses, skills training and other basic services, in exchange for sex with girls under the age of consent. The practice appeared particularly dominant in locations with large established aid programmes.[55]

The former Secretary General, Kofi Anan, equally condemned sexual exploitation by Aid Workers. Taking into account the General Assembly's resolution 57/306 of 15 April, 2003, he directed an 'Investigation into sexual exploitation of refugees by aid workers in West Africa. Based on the information obtained, he promulgated a Bulletin on SEA. The scope of the

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[53] Conduct in UN Field Missions, accessed at https://conduct.unmissions.org/ (referenced July, 2017). The United Nations mandate, specifically bestowed on the United nations Security Council in Article 39 of the Charter of the United Nations, 1945 is to: 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'.

[54] Sexual Violence & Exploitation: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone based on Initial Findings and Recommendations from Assessment Mission 22 October - 30 November 2001, (2002), Report of UNHCR and Save The Children-UK, p.4, available at: http://www.savethechildren.org.uk/sites/default/files/docs/sexual_violence_and_exploitation_1.pdf.

[55] Sexual Violence & Exploitation: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone based on Initial Findings and Recommendations from Assessment Mission 22 October - 30 November 2001, (2002), Report of UNHCR and Save The Children-UK, p.4, available at: http://www.savethechildren.org.uk/sites/default/files/docs/sexual_violence_and_exploitation_1.pdf, (referenced 12 October, 2017).

Bulletin covered, all staff of the United Nations, including, staff of separately administered organs and programmes of the United Nations and United Nations forces conducting operations under United Nations command and control. The Bulletin prohibited them from committing acts of sexual exploitation and sexual abuse, and imposed upon them a specific duty of care towards women and children in the course of duty.[56] These efforts are supplemented by other United Nations pronouncements. For example, paragraph 9 of the United Nations Security Council Resolution, Resolution 1325 (2000):

> [C]alls upon all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls, especially as civilians, in particular the obligations applicable to them under the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977, the Refugee Convention of 1951 and the Protocol thereto of 1967, the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and the Optional Protocol thereto of 1999 and the United Nations Convention on the Rights of the Child of 1989 and the two Optional Protocols thereto of 25 May 2000, and to bear in mind the relevant provisions of the Rome Statute of the International Criminal Court.

Paragraph 10 of this Resolution:

> [C]alls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict.[57]

It suffices to note, however, that on their own, Security Council resolutions are not legally instruments, but have a compelling force which cannot be ignored by those they target. They equally dissuade the targeted audience from continuing with the shameful acts of SEA, which they remain prone to commit and actually still commit. There have been other initiatives such as the 'naming and shaming' and outright condemnation of SEA concepts, by the United Nations Security Council. All these are efforts directed towards stopping acts of SEA during armed conflict. A common statement usually issued by the United Nations is: '[T]he United Nations condemns, in the strongest terms, all acts of sexual

[56] Refer to ST/SGB/2003/13, Secretary General's Bulletin: special measures for protection from sexual exploitation and sexual abuse, the United Nations, 9 October, 2013.

[57] Adopted by the Security Council at its 4213th meeting, on 31 October 2000.

exploitation and abuse committed by peacekeepers or any other United Nations personnel'.[58]

The statement commits to maintain a follow up so that perpetrators of these abhorrent acts are brought to justice.[59]Indeed, some of the United Nations mandated forces, who perpetrate SEA could have been followed and punished. It is, however, difficult for victims of SEA to make a follow up and know whether or not this happened, especially when peacekeepers, aid workers or any other United Nations mandated forces have been withdrawn from the armed conflict are and are back in their countries. The main weakness with the United Nations framework is that, unlike troop contributing countries, it does not have specific jurisdiction over the perpetrators who operate under its mandate. Unfortunately, troop contributing States are not willing to admit that their forces commit SEA while on peacekeeping operations. In the result, SEA during armed conflict remains underreported, and largely unpunished.

The presumption in all these cases has always been that victims of SEA are only civilians entangled in the armed conflict. An independent study undertaken by Muzurana and Donnely indicated that female aid workers are sexually assaulted by their male counterparts, but the former are not specifically protected against those acts of SEA.[60] The same study pointed out that acts of SEA against the female aid workers are underreported, and therefore, no much attention is paid to them. The study by Muzurana and Donnely contributes towards the understanding of the plight female aid workers face in the field and requires the practice to stop.[61] Overall, acts of SEA in armed conflicts are committed by very many players and against various categories of victims.

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[58] See for example, Press Realise by the United Nations Security Council, Security Council Condemns 'In the Strongest Terms' All Acts of Sexual Abuse, Exploitation by Un Peacekeeping Personnel, SC/8400, 31 May 2005, accessed at http://www.un.org/press/en/2005/sc8400.doc.htm, (referenced 10 November, 2017).

[59]Note to Correspondents on the investigations into allegations of sexual exploitation and abuse against peacekeepers deployed in the Central African Republic (05.12.2016) accessed at https://minbane.wordpress.com/tag/humanitarian-agencies/, (referenced 14 October, 2017).

[60] D. Muzurana, P. Donnley, 2017. STOP the Sexual Assault Against Humanitarian and Development Aid Workers, May, 2017, accessed at http://fic.tufts.edu/publication-item/stop-the-sexual-assault-against-humanitarian-and-development-aid-workers/, (referenced 14 October, 2017).

[61] *Ibid.*

Conclusion

This study set out with a presumption that SEA during armed can be tamed, probably through law. An analysis of the issues related to SEA during armed, however, revealed that it is not easy to tame. It is committed in a very hostile environment of the armed conflict, where reporting mechanisms are closed to the outside world. The study established that SEA inflicts physical, psychological, social and spiritual harm to the victims. Perpetrators of SEA, when identified, however, cannot be absolved of their wrong doing in any criminal court of law, or even in a 'public court' much as they may attract some limited sympathies from their kindred in ideology. SEA during armed conflict is committed, not because it is desirable or contributes to the success of the perpetrators, but because perpetrators wield superior power, rooted in the archaic ideology of patriarchy, and necessarily the 'objectivation' ideology. It is not easy to stop SEA during armed conflict because it is largely committed in circumstances which prevent prompt and on-spot investigations that would lead to prosecution of many perpetrators. The reasons why SEA continues to be committed during armed conflict explain how the dominant and unbalanced power relations, for example, between genders; subject the weaker genders to wanton abuse of rights. This study has contributed to an understanding that SEA during armed conflict is difficult to tame, and pointed out a few examples where courts have convicted perpetrators. Its findings are, however, not exhaustive. The study recommends further and deeper analysis of the problem by future researchers so that a lasting solution can be found to stop SEA during armed conflict.

APPOINTMENT OF HEADS OF SUPERIOR COURTS OF RECORDS IN NIGERIA: BETWEEN MERIT, SENIORITY AND POLITICS

By

Joseph Jar Kur*

Abstract

The question of who heads a court of record in Nigeria is more than a head line but has valid issues as to whether the appointment should be based on merit, seniority or should be cloth with political connotations. These arguments call for resolutions between established tradition and content of written law. The paper has appraised the relevant factors and call for the depolarisation of the exalted office of the Chief Justice of Nigeria and indeed any head of court of record in Nigeria for purposes of enhancing professionalism. The paper calls for absolute insulation of the judiciary from politics and calls for amendment of certain constitutional provisions namely, sections 231 (1), 238 (1), 250 (1), 256 (1), 261 (1), 266 (1) 254 (A), 271 (1), 276 (1) and 281 (1) so as to strip the President/Governors of the power of appointing Heads of Court of Records. The power of appointment of the various Heads of Courts should be the Supreme powers of the National Judicial Council (NJC) in accordance with the provisions of section 153(1) and 158(1) of the Constitution as well as the true spirit of the rule of law and independence of the Judiciary. Also, the provision of section 5, Part II of the Third Schedule to the Constitution which include the Attorney-General of the State from being a member of the State Judicial Service Commission should also be amended in the true spirit of clothing the judiciary with its independence as far as appointment and discipline of judicial officers are concerned. This paper however is limited to the criteria of appointment of Heads of Courts of Records in Nigeria.

Introduction

This paper focuses on the appointment of heads of courts of records in Nigeria. The question that the paper seeks to answer is that, should the appointment be based on criteria of merit, seniority or other political considerations of ethnicity, religion, god fathers, luck, chance, federal character or simply professionalism and competency of the person to be appointed. The discourse also happens to coincide with perceived fear of about a constitutional logjam and conspiracy theories of the Buhari led administration not willing to confirm the appointment of Justice Walter Samuel Nkanu Onnoghen, as the substantive chief Justice of Nigeria, after he

served as the Acting Chief Justice pursuant to Section 230(1) of the 1999 constitution and was the most senior justice of the Supreme Court. Another coincidence is the enactment of the 2014 revised National Judicial Council´s guidelines and procedural rules for the appointment of judicial officers of the superior courts of records in Nigeria, which rules have not only spelt out better merit based guidelines but call for nomination of Private legal practitioners for appointment as Supreme and Court of Appeal Justices as well as the position of Chief Justice of Nigeria. While the name of Justice Onnoghen has finally been sent to senate and indeed sworn in as the substantive Chief Justice of Nigeria, the Hon Chief Justice of Nigeria at the swearing in ceremony vowed to insist on preserving the independence of the judiciary. It is he who wears the shoes that knows where it pinches impliedly, this topic cannot be more apt than now and call for proper discourse of the subject matter with a view to proffering suggestions to the polity for a better administration of justice and if possibly avoidance of similar quagmires eminent in the future.

Appointment is the act of assigning a job or position to someone. It is synonymous with nomination, selection, designation, election and engagement. In the context deployed here, reference is made to the power of the President of the Federal Republic of Nigeria or the Governor of a state to appoint a person to head a court on the recommendation of the National Judicial Council subject to the confirmation of Senate or State House of Assembly. The express provisions here relating to appointment of who heads a particular court in Nigeria and these involves the three arms of government namely, the legislature, executive and the judicial arm itself through the instrumentality of the National Judicial Council.

Superior Courts of Records in Nigeria

Superior Court of Record refers to those Courts presided over by judges trained in law where there is, a statutory duty to record same for public access, proceedings leading to their judicial pronouncements. The Superior Courts of record in Nigeria are listed in the Constitution namely, the Supreme Court of Nigeria; the Court of Appeal; the Federal High Court; the High Court of Federal Capital Territory, Abuja; High Court of a State; the Sharia Court of Appeal of the Federal Capital Territory Abuja; Sharia Court of Appeal of a State; the Customary Court of Appeal of the Federal

Capital Territory Abuja; Customary Court of Appeal of a State[1] as well as the National Industrial Court[2]which is listed as one of the superior courts of records by inserting immediately after the existing section 6(5)(c) CFRN, a new paragraph "(cc)" that recognises the National Industrial Court" as one of the Superior Courts of records.

Heads of Superior Courts of Records in Nigeria

Heads of Superior Courts of Record here is referred to the offices of the Chief Justice of Nigeria; President of the Court of Appeal; Chief Judge of the Federal High Court; Chief Judge of the High Court of the Federal Capital Territory; Grand Kadi of the Sharia court of Appeal of the Federal Capital Territory; President of the Customary Court of Appeal of the Federal Capital Territory; President of National Industrial Court; Chief Judge of the State High Court; Grand Kadi of the Sharia Court of Appeal; President of the Customary Court of Appeal of a State. By virtue of the constitutional provisions establishing these offices, the appointment of these Heads of Courts is vested in the President of the Federal Republic of Nigeria on the recommendation of the NJC in respect of the federal courts subject to confirmation by the senate. The Constitution equally vests the appointment of Chief Judges of State High Courts, Presidents of Customary Courts of Appeal, Grand Kadi of the Sharia Court of Appeal under the authority of Governors of the various States on the recommendations of the NJC subject to the confirmation by the State Houses of Assembly.

Merit

The word merit is a noun expressing the quality of being particularly good or worthy, especially so as to deserve praise or reward.[3] The term merit constitutes a desirable trait or ability belonging to a person or (sometimes) an object. Merit here denotes earned or deserving position. To borrow the lingual of Court that decided cases are based on the merit here implies that from all material facts placed before the Court, the Court has reached its Judgment based on the most persuasive evidence. Applying this principle to appointment of who is qualified to head a court, only persons who are qualified, suitable and have distinguished

[1] Section 6(5A-I) of the Constitution 1999 (as amended).
[2] Section 2 of the Constitution (Third Alteration) Act, 2010.
[3] Cambridge English Dictionary. p.1011.

themselves in character and conduct that are to be considered for the position of leading other justices as heads of court.

Seniority

Seniority is preferential status, principle or right. It is the status of being older or senior[4]. Leaning on history, the legal profession is anchored on the tradition of seniority which is principally based on when a person is enrolled and called to the Bar of the Supreme Court for purposes of practice. The profession recognises seniority and thrives on seniority[5]. The concept of seniority at the Bench must, however, be distinguished from that of seniority at the Bar. Seniority at the Bench is based on who first got appointed on a given Bench. It simply means the length of experience on the Supreme Court Bench[6] as the case may be. There exist several arguments for and against the use of seniority in appointment of Judges as heads of Courts. The proponents of Seniority principle anchor their arguments on career building and motivational factors on the job description, while opponents of appointments on seniority base their argument that, seniority enthrones mediocrity which in turn breeds corruption and ineptitude.[7]

Politics

Politics in the larger perspective relates to activities associated with governance of a country, area, or profession. It relates to the process of making decisions which apply to all members of each group. In the narrower sense, it refers to achieving and exercising positions of governance. Politics is manoeuvres or diplomacy between people, groups or organisations especially involving power, influence or conflict. Politics in the appointment of who heads a court is statutorily provided and codified although the necessary provisions are open ended as much reliance is made to bear on such issues as geo-political areas, sectional interest, tribes, religion and in some instances god fatherism. These

[4] See Black's Law Dictionary 8th Edition.

[5] Chief Yemi Okulaja (2015) Nigeria: Legal Profession operates on Seniority. www.dailytrust.com assessed 2nd March, 2017.

[6] Obo Effanga, Facts and Conspiracy Theories about CJN Appointment. Punch Newspaper of 27/02/2017. P. 4.

[7] Nsobundu Chuks "Make Chief Justice of Nigeria appointment according to law and not seniority"www.thenigerianlawyer.com. Accessed 2nd March, 2017.

extraneous factors that have crept into the appointment of Judges and by extension, heads of courts are alien to the administration of Justice[8]. Politics of judicial appointment here refer to the issue of how and when people get to the Bench of superior Courts and eventually become the most seniors and heads of such courts. The procedure is that, whenever there is vacancy for instance in the Supreme Court, it is often filled (by quota) or geo-political representation. However, the traditional and more often procedure adopted is by elevation from the Court of Appeal. But that doesn't stop a person from being appointed straight to the Supreme Court without having been in the Court of Appeal (For instance, Justice Niki Tobi from Delta State, was a professor of law and Dean at the University of Maiduguri, when he was appointed as High Court Judge but got accelerated promotion to the Supreme Court).

Another instance is the appointment of Dr T.O. Elias who was a senior lecturer at University of Lagos, when he was appointed the Attorney General of the Federation and thereafter appointed the Chief Justice of Nigeria in 1973 and has remained one of the best Chief Justices. Justice Elias was appointed above serving justices of the Supreme Court. Another instance of appointment to the Supreme Court is the case of Justice Dr Augustine Nnamani who was neither a magistrate nor a high court judge, he was appointed to the Supreme Court and is acclaimed to be one of the best supreme justice until his sudden death while in service.

Another instance again is the appointment of Justice Uloko, who became the chief judge of Plateau State not by virtue of his being a serving judge but as the Attorney General of the state after the exit of Hon Justice Alfred Obi-Okoye.Similarly, to get to the Court of Appeal, the traditional route is for a high court judge to be elevated to it. Beyond the above stated is the effect of or the twist of coincidence. You may wish to add 'luck', 'chance' or 'god father', to wit, are a few examples[9].

[8] Afe Babalola (2017) Appointment of Chief Justice of Nigeria: Matters arising. www.vanguardngr.com. Assessed 2nd March, 2017.

[9] Obo Effanga, Op. Cit. P 6-8.

Who Qualifies to be Appointed to the office of Heads of Superior Courts of Records in Nigeria: Office of the Chief Justice of Nigeria and Chief Judge of a State Under the 1999 Constitution in focus.

The answer to the above question can be found in the applicable sections of the 1999 CFRN (as amended). The Constitution provides for the office of Chief Justice of Nigeria[10] thus "*the appointment of a person to the office of Chief Justice of Nigeria (CJN) is made by the President on the recommendation of the National Judicial Council (NJC) subject to confirmation by the Senate."*[11] The Constitution further provides that "*a person shall not be qualified to hold the office of Chief Justice of Nigeria or of a Justice of the Supreme Court, unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of not less than 15years"*[12].

The constitution merely prescribes the qualification of being a legal practitioner of not less than fifteen years post Bar call and has not restricted the person to be so appointed whether, from the roll of justices of the supreme court or from outside of the bench. The provisions therefore give room for possible manoeuvring the process of appointing the Chief Justice either from the Supreme Court bench or even the possibility of appointing a private legal practitioner to the office of chief justice of Nigeria. The private legal practitioner to be so appointed is nowhere defined in the constitution and, the question whether the said legal practitioner to be appointed should be based on meritorious practice of litigation is nowhere mentioned or referenced. Equally, whether the legal Practitioner should be a senior at the legal profession Bar is neither mentioned. The constitution has equally not stated that the appointment of the Chief Justice of Nigeria nor any other head of court should reflect nor take cognisance of federal character indices. It also does not provide that the appointment of the CJN or indeed any other head of court should be based on the seniority of appointment to the bench of the Supreme Court nor from the roll of justices of the court. The provisions of the law are clear and unambiguous and cannot be contradicted by any other interpretation other than the literal rules of interpretation.

[10] See Section 230 (2) (a) 1999 CFRN.
[11] See section 231 supra.
[12] See s. 231 (3).

Irrespective of these clear provisions, quagmires do exist with reference to subsection four which provide that, *"if the office of the chief justice of Nigeria is vacant...until the person holding the office has resumed those functions, the president shall appoint the most senior justice of the supreme court to perform those functions"* It is worthy of comment here that it is subsection four that has introduced the issue of seniority[13] for the first time and by extension the inference of appointing an acting chief justice amongst the serving justices. The necessary implication without doubt is that, the 1999 constitution is silent as to whether a person to be appointed a CJN must be a serving justice. It equally mean that, any ranking justice can be made a CJN and it equally means that any qualified person can be made a CJN. Similar provisions exist with reference to other superior courts of records under the constitution in Nigeria.

With regard to the President of the Court of Appeal, the Constitution provides thus *"the appointment of a person tothe office of a Justice of the Court of Appeal shall be made by the President on the recommendation of the National Judicial Council subject to confirmation of such appointment by the Senate"*[14]. Section 238 (4) provides that, "if the Office of the President of the Court of Appeal is vacant... until the person holding the office has resumed those functions, the President shall appoint the most Senior Justice of the Court of Appeal to perform those functions. Section 250 (1) provides that, *"the appointment of person to the office of Chief Judge to the Federal High Court shall be made by the President on the recommendation of the National Judicial Council, subject to confirmation of such appointment by the Senate*". While Section 250 (4) provides to the effect that, "*If the office of the Chief Judge of the Federal High Court is vacant...until the person holding the office has resumed those functions, the President shall appoint the most senior Judge of the Federal High Court to perform those functions*".

With respect to state superior courts of record, the appointment of Chief Judges and Presidents of Customary Courts of Appeal are equally statutorily provided. Under Section 271(1) the Constitution provides thus: "*The appointment of a person to the office of Chief Judge of a state shall be made by the Governor of the State on the recommendation of the National Judicial Council subject to confirmation of the appointment by the House of Assembly of the State*." While Section 271(4) provide that, *"if the office of*

[13] Section 231(4).
[14] See s. 238 (1).

chief judge of a state is vacant...then until a person has been appointed...the Governor of the state shall appoint the most senior judge of the High Court to perform those functions".

Section 281 of the 1999 Constitution provides for the appointment of a President and Judges of the Customary Court of Appeal of a State thus, *"The appointment of a person to the office of President of a Customary Court of Appeal shall be made by the Governor of the State on the recommendation of the National Judicial Council, subject to confirmation of such appointment by the House of Assembly of the State*." Section 281(4) provides that,

> If the office of the President of the Customary Court of Appeal of a State is vacant or if the person holding the office is for any reason unable to perform the functions of the office, then until a person has been appointed to and has assumed the functions of that office, or until the person holding the office has resumed the functions of that, the Governor of the State shall appoint the most senior Judge of the Customary Court of Appeal of the State to perform those functions.

While commenting in similar vein on the Appointment of state Chief Judge and President of Customary Court of Appeal with reference to Benue State, Ijohor,[15]opined that, by the operation of Section 271(1) of the Constitution, the appointment of a person to the office of Chief Judge is made by the Governor of a state on the recommendation of the NJC subject to confirmation of the appointment by the House of Assembly of the State and that the Constitution is silent as to whether a person to be appointed as the Chief Judge of a State must be a serving Judge; he submits that any person who is qualified to hold the office of a Judge of a High Court of a State can be made a Chief Judge and that a person who is not a serving Judge at all can be made a Chief Judge.

He submits that to cure this deficiency, section 271(3) of the Constitution should be amended so that no one is in doubt that when the office of the Chief Judge becomes vacant, only serving Judges would be appointed to fill such vacancy.[16] He further suggests that since it shown by experience in other States of the Federation that the person to fill the vacancy should be chosen amongst the first three most senior Judges. If the most Senior Judges

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[15] Ijohor, A.A "Appointment of Judicial Officers to the Superior Courts of Benue State" in Valley of Decisions (Being Essays in Honour of Justice Iorhemen Hwande)(Ibadan:Safari Books Ltd) p.344.

[16] Ibid.

are for one reason or the other not recommended, then the next in line should be and where he is also not recommended then the third in line should be recommended. A situation where a junior Judge is made a Chief Judge over and above all his seniors must be condemned.[17]

As regards the appointment to the office of the President of the Customary Court of Appeal, he observed that by virtue of S. 281(3) the person should be either a Legal Practitioner in Nigeria and who is so qualified for a period of not less than ten years and in the opinion of the NJC he has considerable knowledge and experience in the practice of Customary Law otherwise, this may create a scenario where a person can be made President of the Customary Court of Appeal even when he is not a lawyer but, the NJC is of the opinion that he has considerable knowledge of and experience in the practice of customary law.[18]

The learned writer called for constitutional amendment so that only lawyers who have been so qualified on such terms are made Presidents of the Customary Court of Appeal. Worthy of significance is the fact that in Benue State, the House of Assembly in its wisdom has taken care of this problem. Under section 6 of the Customary Court of Appeal Law 2006, a person can only be made a Judge of the Customary Court of Appeal, if he is amongst other things, a legal practitioner in Nigeria and has been so qualified for a period of not less than ten years.[19]The entire process of who appoints can thus be summed that the President of the Federal Republic of Nigeria on the recommendations of the NJC appoints all the mentioned heads of courts subject to confirmation by the Senate. While at the state level, Governors appoint heads of courts on the recommendation of the NJC subject to confirmation by the state House of Assembly.

The Constitutional responsibility for the appointment, punishment and removal of judicial officers as well as that of a head of court of record in Nigeria, is vested in the National Judicial Council[20] (NJC) which is one of the Federal Executive Bodies created by virtue of section 153 of the Constitution. The philosophy for the establishment of NJC is to insulate the judiciary from the whims and caprices of the Executives; hence guaranteeing the

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17 Ibid.
18 Ibid.
19 Ibid.
20 Third schedule to the constitution of Nigeria,1999

independence of this arm of government, which is a *sine qua non* for any democratic government, the NJC was created and vested with enormous powers and functions which the erstwhile Advisory Judicial Committee (AJC) it replaced.

With respect to the appointment of heads of courts, the provisions of paragraph 21 of part one of the third schedules to the 1999 Constitution (as amended) provides thus:

The National Judicial Council shall have the power[21] to:

(a) Recommend to the President from among the lists of persons submitted to it by –

i. The Federal Judicial Service Commission, persons for appointment to the offices of the Chief Justice of Nigeria, the justices of the Supreme Court, the President and Justices of the Court of Appeal, the Chief Judge and Judges of the Federal High Court, and

ii. The Judicial Service Committee for the Federal Capital Territory, Abuja, persons for appointment to the offices of the Chief Judge and Judges of the High Court... the Grand Kadi... and the President and Judges of the Customary Court of Appeal of the Federal Capital Territory.

(c) Recommend to the Governors from among the list of persons submitted to it by the State Judicial Service Commission persons for appointment to the offices of the Chief Judges of the State...Grand Kadi... and President and Judges of the Customary Court of Appeal of the State.

Politics of Appointment: An X-ray of some Select Judicial Cases

A. The then Governor of Rivers State, Hon Rotimi Ameechi, rejected the recommendations of the NJC to appoint Hon. Daisy Okocha as the Chief Judge (CJ) of Rivers State on the ground that the recommendations of the NJC was Advisory and not mandatory. His position was that in his exercise of the powers conferred on him by the Constitution[22] he was not compelled to accept the said nomination. The then Governor went ahead to appoint and swear in Hon. Justice P.N.C. Agumagu (President of Customary Court of Appeal of Rivers State) as CJ of the State. The NJC refused the appointment and suspended the CJ for accepting the said

[21] Section 153 of the Constitution.

[22] Section 271 supra.

appointment without the recommendation of the NJC. The NJC went ahead to appoint Hon. Justice Daisy Okocha as "Administrative Head" with powers to assign cases to other judges of the High Court. This move led the then Governor to issue a directive to the Judiciary staff not to take directives from the Administrative Head with a threat to dismiss anyone who disobeys the directive. This chaos led to the shutdown of the Judiciary in Rivers State from 20th August 2013 to 31st May, 2015.This led to the intervention by the Court in the case of Governor of Rivers State & Ors v. National Judicial Council & Anor[23] where the learned trial Judge held that there is no requirement under Section 271(1) of the 1999 Constitution (as amended) that only a serving Judge of the High Court of a State or the most senior Judge of the State High Court is eligible to be recommended by the National Judicial Council to the Governor of a State for appointment to the office of Chief Judge of a State.

B. According to the learned trial Judge: *"The Provision of paragraph 21 of the 3rd Schedule to the Constitution does not empower the NJC to make its choice of nominee for the office of the Chief Judge of a State based on seniority of Judges of the High Court of Rivers State."(emphasis mine to buttress the constitutional provision as opposed to the Benue State Customary Court of Appeal law provision made by the State House of Assembly)*

On the specific question whether or not, the Rivers State Judicial Service Commission was, bound to nominate only Judges of the High Court of Rivers State to the National Judicial Council for recommendation to the Governor for appointment to the office of Chief Judge of Rivers State, the trial Judge held further that, *"the Constitution does not curtail or limit the power of the State Judicial Service Commission; to choose only candidates from Rivers State High Court when performing its constitutional function in advising the 1st defendant on a suitable candidate.*"[24]

A. Another scenario here in issue is the removal of Justice Ayo Salami from office as President of the Court of Appeal on the 11th August, 2011; After Salami's removal, the late Justice Dalhatu Adamu was appointed Acting President of the Court of Appeal by then President Goodluck Jonathan

[23] Unreported Suit No. FHC/PH/CS/421/2013.

[24] Adangor Z op. Cit.

in August 2011. He held the office of President of the Court of Appeal in an acting capacity for 15 months. After 15 months, as Acting President of the Court of Appeal, the name of late Justice Dalhatu was not eventually recommended to President Goodluck Jonathan for nomination as the substantive President of the Court of Appeal by the NJC; rather, the name of Justice Zainab Bulkachuwa was recommended by the NJC to President Jonathan to the Senate on March 19, 2014 for confirmation.

B. Another episode relates to the scenario of Justice Mariam Aloma Mukhtar who could have become the Chief Judge of Kano State many years ago. But when she inched towards being the CJ there, it was alleged that the 'powers that be' in the state were reportedly not comfortable with the possibility of her heading the state judiciary then a conspiracy ensured wherein they got her elevated to the Court of Appeal. Although she missed the chance of being (a mere) state CJ, Mariam Mukhtar also got elevated again to the Supreme Court. Some people think she was equally promoted upstairs so that she might not become President of the Court of Appeal. While marking time and progressing gradually in the Supreme Court, time and chance worked for her as some older justices retired and behold, she became the first female CJN.

C. Back in the 1990s in Cross River State, then Chief Judge, Edem Koofreh, having held the office for several years was nearing retirement. A certain Justice Emmanuel Effanga was the next most senior judge to Koofreh. As he neared taking over on the imminent retirement of Koofreh, there was grapevine feed of elevating Justice Effanga to the Court of Appeal which he reportedly was not agreeable to. Justice Effanga stayed back in the Cross-River State High Court until he later succeeded Koofreh as chief judge. Another point to note is that quota system appointing judges to the superior Bench if one come from a state or geopolitical area where there are many qualified people to choose from, it would take you a longer time to make it to higher courts than your colleagues from areas with fewer qualified persons. This means that by the time one makes it up there, your contemporaries from the 'less-endowed' states who already have been on the Bench become your seniors and

they would, naturally, head the Bench before you or you may even retire on account of age, before the younger ones. This could explain why for many years JSCs from the South did not emerge the CJN, especially as no highest-ranking JSC was ever side-stepped in the appointment of the CJN[25].

D. The politics of appointment also trailed in the submission and delayed submission and confirmation of Justice Onnoghen as the substantive Chief Justice of Nigeria which many critics deployed the unnecessary conspiracy theories. Justice Onnoghen was appointed Acting Chief Justice of Nigeria on November 9, 2016. Onnoghen's appointment as acting CJN did not just happen. He was the most senior justice of the Supreme Court at the time. He was equally recommended by the NJC to be appointed CJN on October 11, 2016 following the long-established tradition of the Supreme Court to appoint the most senior justice as the CJN. Instead of appointing Justice Onnoghen as the substantive CJN, the President rather appointed him in an acting capacity which appointment has a window period of three months within which a new CJN must be appointed. The delay in submitting the name of Justice Onnoghen to the Supreme Court for confirmation sparked a media war and propaganda which in turn heated up the judicial polity for the reason that no one from the southern part of Nigeria had been appointed to serve as the CJN since Justice Ayo Irikefe left in 1987.

To address the longstanding advocacy for reforms in the mode of appointment of judicial officers by citizens and various organisations, the NJC, announced **new extant Guidelines and Procedural Rules for the appointment of judicial officers of all Superior Courts of Records in Nigeria 2014**. Under the Rule 4(i) candidates for elevation to the higher Bench must have the following criteria:

(a) Good character and reputation, diligence and hard work, honesty, integrity and sound knowledge of law and consistent adherence to professional ethics as may be applicable;

(b) Active, successful practice at the Bar, including satisfactory presentation of cases in court as legal practitioner either in private or as a legal officer in any public service;

[25] Ibid.

(c) Satisfactory and consistent display of sound and mature judgment in the office as a Chief Registrar or Chief Magistrate;
(d) Credible record of teaching law, legal research in reputable university and publication of legal works, and in addition to any of the above;
(e) In the case of appointment of a candidate to the office of Kadi of a sharia court of Appeal, knowledge of Arabic language and grammer. rules provide that, upon compliance with Rules 1 – 4 of these rules, the chairman of the Judicial Service Commission/committee shall advice or as the case may be, recommend to the National Judicial Council by a memorandum which shall conclude with a clear declaration that the NJC Guidelines and Procedural Rules have been complied with strictly and fully.

Rule 6 provide further that:

1. Every candidate/Judge, Justice/Chief Judge/Legal Practitioner, who has been shortlisted shall undergo interview to be conducted by the NJC to ascertain his or her suitability for the judicial office.
2. the mode of interview shall be determined by the council.
3. .....
4. A candidate who is unsuccessful at the interview shall not be recommended for appointment by the council.
5. A candidate once rejected on the ground stated in Rule 4(4)(ii) shall not be represented to the council for at least another two years or such period as the council may direct.

The question that begs for answers is whether these provisions are sufficient for the appointment of persons to the sensitive position of Judicial office who may in no distance would became a head of Court? Whether these new rules advocate a better and more merit based, competitive and transparent process than the old? In what way would the process be a safeguard of judicial office from being politicised, or from being vulnerable to high-profile lobbying or even institutional nepotism? Perhaps, in an attempt to remedy the tainted process of nominating persons for vacancies for judicial offices, NJC disclosed that it will henceforth advertise[26] to fill vacancies through the introduction of more

[26] See section 231 (1), 238 (1), 250 (1), 256 (1), 261 (1) and 266 (1) of the 1999 Constitution.

stringent measures to make sure that only honest, hardworking, untainted, best minds with and high moral standards lawyers become Judges[27].Succinct as these guidelines may be, certain questions call for further interrogation such as; what does good character and reputation, diligence, hard work, honesty, integrity and sound knowledge of law mean? Who determines and what are the objective standards of prescription? Why equate reputation and integrity when integrity is a self-seeking reflection and evaluation thus becoming highly subjective. What is the basis or yardstick for assessing good character? What again does active and successful practice at the Bar means? Is it same with continuous and consistent legal practice? What does rule 4(i)(d) mean by university? Does that include research institutions or it excludes? Again, what constitute reputable university within the context of the expression? Who and what is the definition of an untainted lawyer?

Appointment of Heads of Courts of Record: Comparative Approach

Comparative lessons exist with a view to providing an overview of the various approaches taken by some member states to these matters and identify best practices from a rule of law perspective. In the United States where Nigeria copied the presidential system of government, the Chief Justice presides as the head of the United States Federal Court system. The Chief Justice is one of nine Supreme Court Justices; the other eight are the Associate Justices of the Supreme Court of the United States.

The Chief Justice is the highest judicial officer and doubles as Chief administration officer. The Chief Justice leads the business of the Supreme Court and presides over oral arguments. When the Court renders an opinion, the Chief Justice-when in the majority, decides who should write the Court's opinion. The United States Constitution does not explicitly establish the office of Chief Justice, but only presupposes its existence with a single reference[28] where it provides to the effect that, "when the President of the United States is tried, the Chief Justice shall preside".[29] Beyond this

[27] 2014 Revised NJC Guidelines and Procedural Rules for the appointment of Judicial Officers of All Superior Courts of Records in Nigeria.

[28] Per Justice Mahmoud Mohammed "Judges Now to be appointed in Advertisement". Thisday Newspaper 15/05/2015.

[29] Article 1, section 3, clause 6.

mention, nothing more is said in the Constitution regarding the office including any distinction between the Chief Justice and Associate Justices[30] of the Supreme Court, who are not mentioned in the Constitution. The Chief Justice is usually nominated by the President of the United States and confirmed to sit in the Court by the United States Senate. While the Chief Justice is appointed by the President, there is no specific constitutional prohibition against using another method to select the Chief Justice from among those Justices, properly appointed and confirmed, to the Supreme Court. The necessary implication of the United State process is that, there is no autonomous body like the NJC that recommends for any appointment, and there exist no process that permits the Justices to select their own Chief Justice.[31]

This procedure and processes enabled three Associate Justices to receive promotions to Chief Justice namely, Edward Douglas (1910), Harlan Fiske Stone (1914) and William Rehnquist (1986) and when Bush nominated John Roberts as Chief Judge, Roberts had never been in the Court. The general criteria for selecting Supreme Court Justices in the US are based on highly professional qualifications (as lower court judges, legal scholars or private practitioners). The nominees are evaluated by the American Bar Association's Standing Committee on the Federal Judiciary; Integrity and Impartiality and other issues are the determining factors. There are other considerations too (as President Barrack Obama did in 2009, when announcing his nomination of Judge Sonia Sotomayor to the Court, said,) *"such as "mastery of law," the "ability to hone in on the key issues and provide clear answers to complex legal questions" and "a commitment to impartial justice.*" The President added that additional requisite quality was "experience" which he explained was experience being tested by obstacles and barriers, by hardship and misfortune, experience, persisting and ultimately, overcoming those barriers. It is experience that can give a person a common touch and a sense of compassion, an understanding of how the world works and how ordinary people live. And that is in a way a necessary ingredient in the kind of justice we need in the Supreme Court.

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30 Ibid.

31 Note that it is Associate Justices of the Supreme Court of United States and not Associate Justice of the United States.

A president, as well, may consider additional factors when the Supreme Court vacancy to be filled is that of the Chief Justice. Besides requiring that a candidate be politically acceptable, he should also have excellent legal qualifications and enjoy a reputation for integrity, a president might be concerned that his nominee has proven leadership qualities necessary to effectively perform the task specific to the position of Chief Justice. Such leadership qualities, in the President's view could include administrative and human relations skills, with the latter, especially important, in fostering collegiality among the Court's members.

The President also might look for distinction or eminence in a Chief Justice nominee sufficient to command the respect of the Court's other justices and as well enhance public respect for the Court. A President, too, might be concerned with the age of the Chief Justice nominee, requiring, for instance, that the nominee be at least of a certain age (to ensure an adequate degree of maturity and experience relative to the other justices) but not above a certain age (to allow for the likely ability to serve as a leader on the Court for a good number of years.

In India, there exists no specific provision in the Constitution for appointing the Chief Justice, who, as a result, is appointed like the other judges.[32] However, conventionally, the outgoing CJI recommends the name of the senior-most Judge (i.e. by date of appointment to the Supreme Court) for appointment by the President of India, as his successor. Notwithstanding, this convention has been breached on a few occasions, when during the tenure of Prime Minister Indira Gandhi, she got Justice A.N. Ray appointed as CJI, superseding three Judges senior to him.[33]

Comparatively, in Nigeria, the criteria, procedure and safeguard as to the appointment of who to head a court is constitutionally provided. Although, the constitution of Federal Republic of Nigeria (FRN) provides that "the state social order is founded on ideals of freedom, equality and justice"[34] and further provides for the independence, impartiality, and integrity of courts of law, but in practice, the independence of the judiciary arm of government is more mythical than real in Nigeria. The theoretical independence, impartiality and integrity of courts are mostly tainted

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[32] Todd E "Choosing a Chief Justice: Presidential Prerogative or job for the Court?" (2006) Journal of law and politics 22:231.

[33] Seniority as Norm to appoint India's Chief Justice is a Dubious Connection. http://www.lexsite.com/services/network/scba/history.shtml accessed on 9/9/2017

[34] Section 7

due to the influence and most a times usurpation by the ever-powerful Executives and the Legislatures.

The judicial experience in Nigeria shows an arm of government without constitutional or statutory independence either in terms of substantive independence, personal independence nor internal independence. An example is the case in respect of Ayo Salami's removal and suspension as President of the Court of Appeal, which was connected to his refusal to bow to pressure from the former CJN, Justice Katsina Alu, to throw out a petition relating to the gubernatorial elections in Sokoto State. It was alleged that Justice Katina Alu did not want the Governor's election to be nullified by the Appeal Court Tribunal so that the Governors removal will not undermine the Sultanate interest but which the then Justice Salami did not succumb.

The deductions from the foregoing provisions of the constitution show that, the framers of the Nigerian Constitution, like all makers of constitutions in a presidential system of government, provided for separation of powers with checks and balances to regulate powers within the arms of government. But the implication of this on the practice in Nigeria is that, it is practiced flexibly with the potential harm of jeopardising the very essence of the independence of the judiciary. Indeed, the 1999 constitution has in terms of appointment of heads of courts has not guaranteed a substantial level of independence but has virtually placed the judiciary at the feet of the executive branch of government.

Issues in the appointment of who heads a court of record in Nigeria; Appointment of the Chief Justice of Nigeria in perspective

The question of whether the appointment of a person to the exalted office of Head of a Court of Record in Nigeria should be guided by the question of either merit, seniority or other considerations that will call into interplay of politics, can only be answered within the confines of the constitution of Nigeria. Noteworthy is the fact that even the Extant Revised NJC Guidelines and Procedural Rules for the Appointment of Judicial Officers of all superior courts of Records in Nigeria, 2014 (although a subsidiary guideline) have equally failed to reference on the matter.

Traditionally, the question of who becomes the CJN is not premised on constitutional provisions but rather on tradition of seniority and ethnic balancing and not on the 1999 constitution. The

criteria of who to be appointed the chief justice is provided by section 231(1) of the constitution while the qualification for appointment of same is provided by section 231(3); *the makers of the constitution did not make seniority or tradition one of the qualifications for appointment. Rather, the provision of section 231(4) referenced "seniority'' only with reference to the appointment of a person in notional acting appointment. Additionally, elementary rules of interpretation of statutes make it abundantly clear that, section 231(4) of the constitution does not govern the appointment of a substantive chief justice. It is the further submissions of the writer, the office of the CJN is not promotional position or reward to long stay on the bench but rather it is an appointive position which is based on the provisions of section 231(1).*

Another issue of importance is that of the independence of judiciary as well as that of the National Judicial Council, as stipulated under section 21 of Part 1 of the third schedule, particularly as it relates to the power of the council to appoint who heads a particular court. The discourse is seen from the perspective of an independent judiciary being one of the cornerstones of democracy; threat to that independence haven surfaced in Nigeria rapidly in recent days, the recent tactical meddling in the appointment of the Chief Justice of Nigeria is one such incidences.

The Judiciary has, in real sense, not been independent as it ought to be in Nigeria over the years despite a clear-cut constitutional guarantee of independence. The constitution provides that; *the state social order is founded on ideals of freedom, equality, and justice: the independence of the judiciary, impartiality and integrity of courts of law and easy accessibility thereto shall be secured and maintained.* While this provision is commendable, it is important to observe that this provision is of the fundamental objectives of Directive principle, itself being a non-justifiable provision under the constitution of Nigeria. The necessary implication is that, it becomes anachronistic that this provision is inserted under this head and being so, it means that, the constitution itself after providing for independence of the judicial arm renders such independence unenforceable. It is thus within the established framework that the role of the NJC and JSC, is viewed as it relates to the constitutional and institutional prerequisites for insulating Judges from the external influences of those who wield power.

The NJC is constitutionally regulated and composed of perceived people of honour. Under the third schedule, part 1 of the constitution, the NJC is comprised of the following members –

(a) The Chief Justice of Nigeria
(b) The next most senior Justice of the Supreme Court
(c) The President of the Court of Appeal
(d) Five retired Justices selected by the Chief Justice of Nigeria from the Supreme Court or Court of Appeal
(e) The Chief Judge of the Federal High Court
(f) Five Chief Judges of States to be appointed by Chief Justice of Nigeria from among the Chief Judges of the States and of the High Court of the Federal Capital Territory, Abuja in rotation to serve for two years
(g) One Grand Kari to be appointed by the CJN
(h) One President of Customary Court of Appeal to be appointed by the CNJ
(i) Five members of Nigerian Bar Association at least one of whom shall be a Senior Advocate of Nigeria

While the State Judicial Service Commission is regulated under the third schedule Part II and comprises of the following: The CJ of a State, the A.G of a State, the Grand Kadi of the Sharia Court of Appeal, The President of the Customary Court of Appeal, two members who are legal practitioners of good standing, two other persons not being legal practitioners who are of unquestionable integrity.

NJC is an executive body established by the Federal Government of Nigeria in accordance with the provision of section 153 of the 1999 Constitution (as amended) to protect the Judiciary of Nigeria from the whims and caprices of the executive. Its sole responsibility is promoting legal professionalism. While section 153 statutorily constitute the NJC, section 158 (1), states that in exercising its powers to make appointments or to exercise disciplinary control over persons, it shall not be subject to the direction or control of any other authority or person. The core value and intent of section 158 (1) of CFRN 1999 is to preserve the independence of the Judiciary in both its subjective and objective sense of direction. In support of this view, the Court of Appeal in *Manuwa v. National Judicial Council*[35] held that the purport of section 158 (1) CFRN 1999 is that the NJC shall remain independent

[35] (2013) 2 NWLR (pt 1337) 1 pp 24-26.

and shall not be influenced by any person or authority while exercising its powers to make appointments or exercise disciplinary control. According to the Court, the independence of the NJC in respect of appointments starts from the point of recommendation to either the president or Governor as the case may be and during this process, no authority or person can interfere by giving directives or exercising any form or control over the Council.

The vesting of this onerous power on the NJC can be justified on the ground that apart from the peculiar advantage which the Council has by virtue of the calibre of its membership to assess the performance and industry of judges, the Council is also seized of all relevant materials and information on all judicial officers and is placed in the best position to make informed recommendations to the state Governors[36] as well as to the President.

However, as succinct as the foregoing powers are appraised, the role played by the Attorney General of the Federation (AGF)[37] in the Salami saga following his uncanny role in the continued suspension of the then President of the Court of Appeal (Justice Isa Ayo Salami as he then was) when he played the proverbial black sheep by waving the word "Subjudice" as a magic wand capable of scaring away a perceived enemy of the government in power. According to Adoke, "until all the pending litigations are disposed of, President Jonathan will not reinstate the suspended PCA"[38]. In reaction, the NBA/NEC (Nigerian Bar Association and National Executive Council)[39] considered the recent NJC recommendation to the president of FRN to recall the Hon. Justice Isa Ayo Salami back to the office of the president of the court of Appeal of Nigeria and condemned the refusal of the president to do so on the pretext of pendency of litigations in court "NBA/NEC considered the decision was made in bad faith as there was pending litigation when the original decision to suspend him was taken".

Flowing from the foregoing facts as presented, the role of the executive in negating the recommendation of the NJC to the president amount to an unusual interference with the Judiciary contrary to the independence of the judiciary, separation of powers, rule of law, checks and balances that exist in the functions of the three arms of government. Independence of the judiciary which is

[36] Adangor op.cit p75.
[37] Mohammed Bello adoke SAN, the then AGF chose to play 'the black sheep' Vanguard Newspaper of 06/06/2012.
[38] Ikechukwu Nnochir "Jonathan v Salami: why Adoke.
[39] Per J.B. Daudu SAN, NBA National President.

the cornerstone of the rule of law demands that the judiciary should not be subservient or subordinated to the executive arm of government in terms of the appointment, discipline and removal of judicial officers[40].

Other subterranean issues for consideration here include the fact that, if NJC is an executive body established by the Federal Government as stipulated by the constitution, why then do recommendations of the body are subjected to the executive discretions? Secondly, if the legislative powers of the Federal Republic of Nigeria are vested in the National Assembly and, the two Houses, namely, Senate and House of Representatives appoint and remove their respective leaders, namely, the Senate President and speaker of House of Representatives under their established rules, procedures and privileges without recourse to any other organ of government, why then would the NJC not appoint their respective Heads of Courts in accordance with the established rules.

Thirdly, if the president and Governors, respectively, gain legitimacy upon election without recourse to either legislative or judicial approval, why would the judiciary not is allowed to appoint the respective heads of Courts? Providing positive and affirmative answers to these questions as they relate to appointment of Administrative heads of their Courts as opposed to removal or discipline of the said Heads of Court is a sure way of Curtailing Politics out of appointment of the most qualified person as Head of a Court of record. I state with all vehemence that politics be left for the political arena and jettisoned out of the judicial appointment. This may look like a far cry just like separating water from oil and being inside the river and expecting to remain dry. The reality that stare us in the face is the unwritten rule that no one becomes a CJN or a CJ except he is 'acceptable' to the president or Governor as the case may be despite the NJC guidelines and constitutional provisions.

Another quagmire is the call for nomination of private lawyers for appointment to the Supreme Court bench and by extension the appointment of private lawyers to the office of Chief Justice of Nigeria. From a legalistic view, proponents and agitators for this transformation or change Mantra cannot be faulted. This

[40] Lord Denning, what Next in Law (Landon: Butterworth 1982) p.310 see also NWabreze B.O. Military rule and Constitutioalism in Nigeria (Lagos: spectrum Law publications, 1992) p. 23.

view is supported by section 231 (3) of the CFRN 1999 which provide thus: "A person shall not be qualified to hold the office of Chef Justice of Nigeria or of a justice of the supreme court, unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of not less than fifteen years".

Pursuant to this agitation, the then acting and now CJN, Walter Onnoghen wrote to the Nigeria Bar Association (NBA), requesting that it nominates eligible members of the Bar for consideration into the Apex Court bench. The NBA in response forwarded names of Nine[41]eligible candidates to the acting CJN for appointment as justices of the Supreme Court. The call has raised divergent views affecting the profession and the judiciary, while others see nothing wrong in the appointment, adding that in Britain, only those who are Queen's Counsel (QC), an equivalent of Senior Advocate of Nigeria (SAN) are appointed into the High Courts. Others hold the view that the development would improve legal scholarship reasoning and that the blend or regular justices with those from the Bar would enrich adjudication at the Apex Court. While others agree that, it is not just unfair but demeaning and unjustifiable of Appeal Court Justices, some of whom have spent decades in the judiciary from high Court to the Appeal Court only to be told that a lawyer who has not held any judicial post is preferable. This, undoubtedly, will affect their dedication, morale and commitment as there is no guarantee of their promotion to the Supreme Court since lawyers can be appointed from the Bar.

While many justices of the higher courts are however, opposed to the new proposal although choosing not to express their opposition publicly,[42] have decided to block the idea by not recommending the selected lawyers to the National Judicial Council (NJC) using the extant Revised NJC Guidelines for the appointment of Judicial officers of all superior Courts of Record in Nigeria 2014 which require justices of the Supreme Court and the Court of Appeal to write an assessment for whoever seeks appointment into the appellate Courts[43].

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[41] Dr. Olisa Agbakoba SAN, Anthony Ikemefuna Idigbe, SAN, Yunus Ustas Usman SAN, Baatunde Fagbohunlu SAN, Miannaya AjaEssien SAN, Awa Uma Kalu SAN, Professor Awalu Hamish Yadudu, Tajudeen Oladoja and Ayuba Giwa.

[42] Tobi Soniyi "Disquiet among Judges over proposals appointment of Lawyers to S'Court" Thisday Newspaper of 16th March, 2017.

[43] Pursuant to Rule 3(1) a and particularly (b) which provide "except a sitting Judge supports a lawyer's application for appointment as a Judge, his application will fail".

While I do not see anything wrong in appointing private lawyers from the Bar to the Bench, I make bold to call for caution in that, it will create a wrong impression contrary to the tradition of the legal profession that any Senior Advocate in Nigeria is better suited than a serving High Court Judge or a justice of the Court of Appeal and more knowledgeable, as judge of the High court cannot be automatically appointed straight to the Supreme Court. Comparatively, there exist professors and PhD holders that join the Bench at the courts below and have risen by dint of hard work to the Supreme Court. What then stops the SANs from applying to join the Bench at the Courts below?

Secondly, I make bold to assert that, as far as Heads of Courts of Records are concerned, appointing someone from the Bar to Bench whether to the Supreme Court or court of Appeal is different from appointing him or her to a leadership position while on the Bench. Purposeful interpretation of sections 231 (1) of the 1999 constitution and the Rules of NJC, one (not necessarily based on seniority) must first become a justice of the Supreme Court before he or she is appointed the Chief Justice of Nigeria and mutatis mutandis be appointed the president of the Court of Appeal or Chief Judge of the Federal High Court or State High court or President of the National Industrial Court (NIC) as the case may be.

Observations

The 1999 constitution (as amended) is lacking exhaustive procedure and criteria for the appointment of who head a court of record in Nigeria. There are substantive and procedural loopholes in the constitutional provisions relating to such. Emphasis on meritocracy are relegated to mediocrity and technocracy as well as quota systems and federal character. The constitution therefore, needs to strengthen the conditions of appointment with clear provisions that tilt towards merit than seniority as presently enshrined.

The constitution further needs to provide subtle procedures to be followed in the appointment of substantive Head of court and clear procedure for the appointment of Acting Head of Court in deserving instances. The promulgation of the 2014 Revised Guidelines for the appointment of judicial officers in Nigeria has ushered in more challenges than prospects. The guidelines have not clearly spelt out desired merit criteria creditably as done in the United States of America. Aside, it is doubtful if guidelines can alter

or contradict constitutional provisions as envisaged under the supremacy provisions of Section 1(1) of the constitution 1999. The guidelines have in several paragraphs contravened and contradicted the provisions of the 1999 constitution (as amended) and have ended up creating new problems, among which is Rule 4 (4) (e) of insertion of knowledge in Arabic language and grammar for candidate to the office of Grand Kadi (being Head of a Court) and kadis of a Sharia Court of Appeal. This provision is akin to amending constitutional provisions and adding an additional educational requirement where the constitution have not so provided for that, a person to be appointed to the sharia court of Appeal shall be knowledgeable in Arabic (a qualification not prescribed by the constitution).

Recommendations

1. There is the need to amend the provision of section 231 (1), 238 (1), 250 (1), 256 (1), 261 (1), 266 (1) 254 (A), 271 (1), 276 (1) and 281 (1) of the Constitution of Nigeria 1999 (as amended) to strip the President/Governors of the power of appointing the Heads of Courts of Records. The power of appointment of the various Heads of Courts should be vested in the National Judicial Council as the apex and supreme authority established for the appointment and discipline of judicial officers. The exercise of the power should however be subject to the recommendations of the Federal/State Judicial Service Commissions. This amendment will no doubt create the desired effect intended in the provisions of section 153(1) and 158(1) of the Constitution as well as promote the true spirit of the rule of law and independence of the Judiciary.
2. The provision of section 5 Part II of the Third Schedule to the Constitution which include the Attorney-General of the State as a member of the State Judicial Service Commission should also be amended in the true spirit of clothing the judiciary with its independence as far as appointment and discipline of judicial officers is concerned.

The 2014 Guidelines and Procedural Rules for the appointment of Judicial officers of all superior courts of Records should be made an integral part of the Constitution so as to give it the desired force of law beyond been a mere guideline which provisions cannot supersede the provisions of the Constitution.

THE LIABILITY OF COBAC FOR PREJUDICE CAUSED TO INDIVIDUALS BY ITS ACTS OR OMISSIONS IN CAMEROON: REFLECTIONS ON A LEGAL VACUUM

By

Kelese George Nshom (PhD)*

Abstract

In its administrative function, the Central African Banking Commission (COBAC) has the power of prior authorisation which manifests through the conformity opinion it gives prior to the approval of credit and microfinance institutions as well as their directors and auditors. In the exercise of this power, it ma y commit faults likely to cause prejudice to actors of the banking system. Unfortunately, the Central African Economic and Monetary Community (CEMAC) law is silent on the question of its liability. The CEMAC Court of Justice is also silent on the issue, even if it has once recognised that COBAC committed a fault in the exercise of its function. This paper questions whether the silence of the law could be considered as attributing immunity to COBAC. The author, based on comparative law, demonstrates that despite the legal vacuum, there are possibilities of committing this community organ. However, it is difficult to implement its liability because it lacks legal personality, thus, the necessity for the CEMAC legislator to confer on COBAC a legal personality so as to clarify the issue of its liability.

Key words: duties – liability – acts – omission – prejudice

Introduction

Born on 16 October 1990 with the aim of reinforcing the supervision exercised on credit institutions in the member states of the Central African Economic and Monetary Community (CEMAC),[1] the Central African Banking Commission (COBAC)[2] is assigned three main missions, which are administrative, jurisdictional and regulatory (Kalieu 2002; Njoya 2009; Yangbo 2015 and Kalieu 2017). These missions are laid down generally in articles 7 *bis* of the 1990 Convention creating it and regulated in

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[1]Communauté Economique et Monétaire de l'Afrique Centrale.

[2] Commission Bancaire de l'Afrique Centrale.

greater detail by the Convention of 17 October 1992 on the Harmonisation of Banking Regulation in Central African States.

The administrative function of COBAC consists principally of issuing conformity opinions for the approval of credit institutions, their senior staff and banking middlemen (Kelese 2014 and Souop 2015). Before any credit institution commences business, it must seek and obtain accreditation. [3] The same holds for banking middlemen[4], directors and auditors recruited by the credit institution.[5] Even after creation, if the credit institution intends to extend its activities or operations beyond those authorised initially or to modify its initial capital, it must seek and obtain the authorisation of COBAC.[6] In the same way, if the credit institution decides to recruit new auditors, the latter must be approved by COBAC. Its administrative function is also seen at the level of withdrawal of approval where such withdrawal is not a disciplinary measure.[7] Thus, as administrative organ, its functions are subject to review which may lead to its liability.

The jurisdictional function of COBAC arises as a consequence of control carried out on credit institutions. In fact, the main mission of COBAC is to control and supervise banking activities (Kalieu 2002), to ensure that they conform to legislative and regulatory prescriptions by the competent authorities or organs.[8] To guarantee the effectiveness of the control, COBAC is endowed with the power of sanctions (Ngassam 1999). By virtue of this power, it can mete out disciplinary sanctions as prescribed in article 13 of the annex to the 1990 Convention[9] or designate a provisional administrator or liquidator as the case may be.[10]

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[3] Article 8 of the annex to the 1990 Convention and article 12 et seq of the annex to the 1992 Convention.

[4] Articles 43 and 44 of the annex to the 1992 Convention.

[5] Article 8 of the annex to the 1990 Convention and article 12 et seq of the annex to the 1992 Convention.

[6] Article 8 of the annex to the 1990 Convention; article 9 of the annex to the 1992 Convention.

[7] Article 17 of the annex to the 1992 Convention.

[8] Article 7 *bis* of the 1990 Convention and article 1 of its annex; articles 38 and 39 of the annex to the 1992 Convention.

[9] Warning, blame, prohibition from carrying out certain operations or other limitations on activities, revocation of statutory auditor or auditors, immediate suspension or dismissal of directors, and withdrawal of licence.

[10] Articles 14-16 of the annex to the 1990 Convention.

The regulatory function of COBAC manifests when it plays the role of the legislator. The law empowers it to adopt rules which ensure liquidity and solvency of credit institutions and generally their financial equilibrium. As such, it defines plans and accounting procedures of credit institutions and prescribes prudential ratios such as those of liquidity, coverage and division of risks.[11] COBAC is also competent to adopt rules relating to conditions of taking shares in credit institutions; conditions under which credit institutions may accept shares and grant loans to its shareholders, administrators and directors; and management norms which credit institutions must respect to guarantee liquidity, solvency and the equilibrium of their financial situation.[12] This initial domain of competence of COBAC has been extended since 2002 to include regulation and control of microfinance activities.[13] Since 2008, it is empowered to determine the categories of credit institutions and their minimum capital, legal form and authorised activities, [14] a domain hitherto reserved for national monetary authorities.[15] It is for this reason that in 2009, COBAC adopted two regulations dealing with the matters above mentioned.[16]

From the various missions assigned to COBAC, it is clear that the latter owes some duties to perform. A duty is a legal obligation that is owed or due to another and that needs to be satisfied: an obligation for which somebody else has a corresponding right (Garner 2004). In law, duties are imposed by contract, statute or court. Duties imposed on COBAC are statutory. Any person who has a duty to perform should be answerable to the

[11] *Ibid*, article 9.

[12] Article 32 of the annex to the 1992 Convention.

[13] Règlement nº 01/02/CEMAC/UMAC/COBAC du 13 Avril 2002 relatif aux Conditions d'Exercice et de Contrôle de l'Activité de Micro Finance dans la CEMAC.

[14] Règlement nº 02/08/CEMAC/UMAC/COBAC portant attribution de Compétence à la COBAC pour la Détermination des Catégories des Etablissements de Crédit, de leur Capital Social Minimum, de leur Forme Juridique et des Activités Autorisées.

[15] Article 10 of the annex to the 1992 Convention.

[16] Règlement COBAC R-2009/01 du 1er Avril 2009 Portant Fixation du Capital Social Minimum des Etablissements de Crédit et Règlement COBAC R-2009/02 du 1er Avril 2009 Portant Fixation des Catégories d'Etablissements de crédit, de leur Forme Juridique et des Activités Autorisées.

person to whom he owes the duty, that is, the person who has the right to have the obligation performed.

To whom does COBAC owe its duties? This question is pertinent because it is only by determining the person to whom COBAC owes its duties that one can know the person to whom it is answerable. To answer this question, we must observe that COBAC is mandated by the member states of CEMAC to perform its duties. In a classical agency relationship where the agent owes its duties only to the principal, one would vividly conclude that COBAC owes its duties to CEMAC states. Consequently, it should be answerable to them. This conclusion may be misleading since the relationship between the states of CEMAC and COBAC is not a classical agency relationship.

COBAC is mandated by the states to ensure the regulation and control of the activities of credit institutions so as to protect the public, members of which deal with the credit institutions as customers. The duty to ensure a sound banking system and therefore, the protection of customers is owed to the latter and COBAC should be accountable to them either as individuals or collectively. If customers suffer injury or prejudice as a result of dysfunction of credit institutions or their collapse resulting from failure by COBAC to perform its duties, obviously the victims should hold it liable (Haoua 2014). However, the question that lingers on is whether COBAC is accountable under CEMAC law, to individuals for loss caused to them by its acts or omissions. The issue is hard to determine because the basis of determining the liability of COBAC for acts and omissions occasioning harm and prejudices to individuals is not well situated, captioned, outlined or discussed. This is so whether in banker/customer relationship which is based on contract, criminal law, or tortuous liability.

In addition, the question is a difficult one to determine because COBAC is a public authority and public bodies have extensive powers to act for the public benefit but often have limited resources. They take decisions but if those decisions are wholly unreasonable, they may be corrected by judicial review, that is, by public law remedies (Kidner 2006). The most difficult issue is whether failure by a public body provides a private right of action to someone harmed (or not benefited) by the decision. In principle, such a positive right of action should be accorded by statute. The question of the liability of public authority has been a controversial

issue, raising debates in both doctrine (Markesinis et al. 1999; Wright 2001; Fairgrieve et al. 2002; Fairgrieve 2003; Harlow 2004; Todd 2005 and Bailey 2006) and case law,[17] even in countries with advanced legal and judicial systems. The debate has been more acute when it concerns bodies with powers of regulation and supervision such as central banks and banking commissions. In fact, in France, the *Conseil d'Etat* has admitted the liability of the State for the fault of the Banking Commission, but insisted that the fault must be a heavy one.[18] The liability of the Bank of England has equally been admitted in England but the major problem has always been the elements on which it should be predicated. In 2003, the House of Lords laid down some elements which would determine such liability notably, the act or omission must be done in bad faith; the claimant must have the *locus standi* to sue; and the act or omission must be the cause of the claimant's loss.[19]

The problem is equally posed in the CEMAC sub region as concerns the liability of COBAC for its acts or omission. In reality, CEMAC legislation has no harmonious and explicit rules relating to the liability of COBAC (Njoya 2009). With this vacuum created by CEMAC legislative texts, this write-up questions whether COBAC is not liable for its acts or omissions. In other words, does the silence of the law create immunity in favour of COBAC?

This question is of great significance because the possibility of committing COBAC is a deterrent or dissuasive mechanism against the latter's negligence, failure to act or abusive decisions and can act as guarantee for its better functioning. The silence of the law has left researchers pondering on the controversial

[17] *Home Office v. Dorset Yacht Co* [1979] AC 1004; *Yuen Kun Yeu v. Attorney General of Hong Kong* [1988] AC 53; *Murphy v. Brentwood District Council* [1991] 1 AC 398; *Anns v. Merton London Borough Council* [1978] AC 728; *X (minors) v. Bedfordshire County Council* [1995] 2 AC 633; *Stovin v. Wise* [1996] AC 923; *Barret v. Enfield London Borough Council* [2001] 2 AC 550; *Phelps v. Hillingdon London Borough Council* [2001] 2 AC 619; *Corringe v. Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057; *D v. East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373; *Brooks v. Commissioner of Police of the Metropolis* [2005] UKHL 24, [2005] 2 All ER 489.

[18] CE, arrêt du 30 novembre 2001, affaire *M. et Mme Nicolas Z. et autres c/ Commission Bancaire (Ministre de l'économie, des finances et de l'industrie)*.

[19] *Three Rivers District Council v. Bank of England* (N° 3) [2003] 2 AC at 191-196.

issue (Kalieu 2002, Njoya 2009, Haoua 2014 and Sunkam 2015). In fact, despite the silence of the law, the liability of COBAC may be implied from the fact that its decisions are subject to judicial review. However, the question of compensation for damage caused by its acts or omissions is unsettled. Case law has made a little progress in this perspective by admitting the fault of COBAC but the question of compensation for injury caused to individuals or third parties as a result of its fault is left unanswered.[20] Through a comparative analysis, this write-up demonstrates that as a hybrid organ, there are some instances where COBAC would possibly be held liable for damage caused to individuals by its acts or omissions (I), though there are practical obstacles or difficulties in putting in place the liability of COBAC (II).

I. Determination of the liability of COBAC towards individuals

Prejudice caused to individuals by COBAC, whether through action or inaction, raises an indispensable problem of its liability, but laws governing this organ are silent on this issue. Nevertheless, authors have envisaged the possibility of committing COBAC, for instance, where a bank which obtains its approval enters into liquidation shortly thereafter (Kalieu 2002 and Haoua 2014). Our reflections go beyond that and examine the possible grounds on which COBAC may be committed (A) and the conditions of its liability (B).

A. Possible grounds for the liability of COBAC

In discussing the liability of COBAC, it is pertinent to point out that COBAC has statutory powers and statutory duties; a distinction therefore must be made between the two.[21] The absolute distinction between statutory duty and statutory power is that the former gives rise to possible liability, the latter not, or at least not doing so unless the exercise of the power involves some positive act creating some fresh or additional damage.[22] Analysis here takes into

[20] *Tasha Loweh Lawrence c/ CEMAC, Secrétariat Exécutif*, Arrêt nº 001/CJ/CEMAC/CJ/05 du 7 avril 2005. *RDJ-CEMAC* 00: 33-34.

[21] Power and duties, as concepts, have interlocking relationship and are not fortuitous.

[22] Lord Wilberforce in *Anns v. Merton London Borough Council*, House of Lords [1978] AC 728.

consideration statutory powers, statutory duties and the question of who may initiate action against COBAC.

The liability of COBAC for its poor functioning is implied from the fact that it owes a duty to the public and in principle, any person who fails in its duty should be accountable for any consequent damage. Its liability may also be drawn from the general principles of administrative responsibility (responsibility of administrative public authority). Members of the public, therefore, may seek redress if they suffer prejudice as a result of the malfunctioning or prejudicial decisions of COBAC. Unlike in CEMAC community where liability of COBAC is only implied, in the European community, the liability of the community for acts or deficiencies of community institutions is expressly consecrated.[23] The Treaty of the European community has put in place a regime of extra contractual responsibility whereby, community institutions can be arraigned before the European Community Court in case they, by their action or deficiency, cause prejudice to individuals (Vandersanden and Dony 1997).

Nevertheless, if one were to infer the liability of COBAC from its duty owed to the public or general principles of administrative responsibility,[24] it will be necessary to distinguish between its jurisdictional function and administrative function. In the exercise of its disciplinary powers consequent on control effected on credit institutions, COBAC is an administrative court. As such, it is pertinent first and foremost to state that its liability is inadmissible when COBAC exercises its disciplinary powers, that is, pronounces sanctions against credit institutions or their staff. In fact, as the CEMAC Court of Justice (CCJ) stated in *Tasha Loweh. Lawrence c/ COBAC*,[25] COBAC cannot be arraigned before another court as defendant for decisions taken in the exercise of its disciplinary powers. It cannot be party to a proceeding where it is purportedly

[23] Articles 178 and 215(2) of the treaty.

[24] This is unlike in private relationship where the determinants and basic pattern of liability strictly require that the damage to the plaintiff must be caused by a kind of harm recognised as attracting legal liability.

[25] Arrêt nº 003/ADD/CJ/CEMAC/CJ/02 du 16 Mai 2002, *JURIAFRICA* : 872-874. See also, *Tasha Loweh Lawrence c/ Décision COBAC D-2000/22 et Amity Bank Cameroon PLC, Sanda Oumarou, Anomah Ngu Vivtor*, Arrêt nº 003/CJ/CEMAC/CJ/03 du 3 Juillet 2003. *JURIAFRICA* : 861-864 ; *Juridis Périodique* 69 : 60-64.

committed for have meted out a disciplinary sanction. This decision was confirmed by the same court later in 2011.[26]

The position adopted by the CCJ guarantees the immunity of COBAC when it pronounces disciplinary sanctions. The question that remains unanswered is whether this immunity subsists even when the content of the decision is faulty. French authors have envisaged the possibility of committing the French Banking Commission acting as an administrative court, if the prejudice arises from the content of its decision which has become *res judicata*, especially when it delayed in judging or lost some documents (Gavalda and Stoufflet 1990). On the contrary, the French *Conseil d'Etat* has held that even if the Banking Commission delays in judging, it is not faulty and consequently, the state is not liable.[27] The immunity of the Banking Commission as an administrative court was emphasised by the Marseille administrative court in *Banque phoceenne*,[28] contrary to legal literature in France which advocates for the liability of the state for the poor functioning of the public service of justice (Chapus 1999). This reduces the question of liability for jurisdictional powers to wholly academic.

Despite the immunity of COBAC in the exercise of its jurisdictional powers, its disciplinary decisions can be set aside by the CCJ. The latter since its creation in 2000,[29] has absolute powers to control disciplinary decisions of COBAC. The control of their regularity can be validly ensured by the CCJ as court of appeal at last instance by virtue of article 4 of the Convention governing the Court as amended in 2009. During such control, the court may set aside sanctions that are not motivated, illegal, faulty, unreasonable, or that are taken in contravention of the required procedure, etc.

Given that the CCJ may set aside a disciplinary decision of COBAC, what becomes of the victim who has suffered damage and whose position probably might have changed? The law does not stipulate the consequences of such an outcome. But is restitution not possible? This question is worthwhile given that an appeal against

[26] *Banque atlantique du Cameroun – COBAC – Autorité Monétaire du Cameroun – Amity Bank Cameroon PLC c/ Arrêt nº 010/CJ/CEMAC/CJ/09 du 13 novembre 2009*, Arrêt nº 012/2011 du 31 mars 2011. *RDJ-CEMAC* 01 : 81 et seq.
[27] C.E. 26 février 1982, D. 1982, I.R. 333.
[28] 3e Ch., 1er décembre 1988, JCP 89, édition E, 15480.
[29] See Convention du 2000 Régissant la Cour de Justice de la CEMAC révisé en 2009.

sanctions by COBAC does not suspend their execution, except for withdrawal of approval whose deadline for enforcement is prolonged in case of any appeal.[30] The position as it stands does not offer such remedy to the victim, meaning COBAC still remains irresponsible even when decisions whose execution has commenced are set aside. This position could be questioned! In fact, the compensation principle warrants that the victim should be put back to the position he was if the damage was not caused (*restitutio in integrum*). In principle, COBAC in this circumstance should be held liable to compensate for such injury. In the case of *Tasha*, the CCJ admitted that COBAC by dismissing Tasha Loweh Lawrence as manager and board chair of Amity Bank, acted *ultra vires* thereby committing a fault,[31] but failed to rule on the liability of COBAC for committing that fault.

If the liability of COBAC is seemingly impossible in case of prejudicial disciplinary sanctions, it is normal that as a hybrid organ, it should be committed before the competent court for its prejudicial acts or omissions during the exercise of administrative powers, based on the principles governing the liability of public authority. However, this would depend on the time the issue is raised and the decision contested.

Concerning the time, the issue is raised, the solution depends on whether it concerns rejection of approval or acts or omissions during control missions. As concerns the former, the major issue is whether COBAC can be liable to the applicant for refusing approval. The solution to this problem may vary depending on who the applicant is; whether it is a potential credit institution or staff. If it is the former, the possibility of committing COBAC is unlikely, given that the applicant does not yet have a legal personality and also that it does not suffice to have a good file for an accreditation to be granted; COBAC has other criteria to be satisfied. The obligation imposed on COBAC to ensure good functioning of the banking system gives it elastic and discretionary powers. Refusal of approval may, therefore, be justified on several grounds and it will be difficult for an aspirant to commit COBAC, especially when it is

[30] Articles 13 and 18 of the annex to the 1990 convention.

[31] Arrêt nº 003/ADD/CJ/CEMAC/CJ/02 du 16 Mai 2002. *JURIAFRICA* : 872-874. See also, *Tasha Loweh Lawrence c/ Décision COBAC D-2000/22 et Amity Bank Cameroon PLC*, Arrêt nº 003/CJ/CEMAC/CJ/03 du 3 Juillet 2003. *JURIAFRICA:* 861-864; *Juridis Périodique :* 60-64.

acting within its discretionary powers (Kelese 2014) or its refusal is considered as a policy decision. This is obvious because public authorities enjoy *de facto* immunity from liability for policy decisions. Policy decisions cannot give rise to liability since they are non-justiciable in the sense that they are not suited to the judicial process (Leyland and Gordon 2005). English courts have held that no duty of care could arise in respect of a policy decision unless it was *ultra vires* or made in bad faith.[32]

Nevertheless, if it is difficult for an aspiring credit institution to commit COBAC before a competent court due to the above reasons, the same cannot be said of refusal of accreditation of managers or auditors of already existing institutions. An existing credit institution may recruit new managers or auditors, but they must be approved by COBAC.[33] If such approval is refused by COBAC and the persons concerned believe that the refusal is unjustified, they can petition the CCJ to set aside the decision. In this case, we imagine that if due to refusal the persons concerned suffered loss, they may besides asking for the annulment of the decision denying accreditation, claim compensation for damage suffered.

Having dismissed the possibility of committing COBAC for rejecting applications for approval in the exercise of its discretionary powers and for disciplinary sanctions meted out as a jurisdictional organ, the question whether it can be committed by depositors if a credit institution validly authorised by it runs into difficulties shortly afterwards, still remains undetermined. In this regard, an eminent author has opined that COBAC should be liable to the depositors if a credit institution runs into difficulties shortly after the approval was accorded (Kalieu 2002). Such liability could be predicated on negligence; perhaps COBAC was negligent in the study of the application or control of banking activities. For instance, in a claim against the Bank of England by the depositors of BCCI which collapsed in 1991, one of the allegations was based on the Bank's decision to grant a full licence to BCCI in 1980, its failure

[32] *Barret v. Enfield London Borough Council* [2001] 2 AC 550; *Rowling v. Takaro Properties Ltd* [1988] AC 473; *DHSS v. Kinnear* (1984), The Times, July 7; *Ross v. Secretary of State for Scotland* 1990 SLT 13; *Onrho Plc v. Tebbit* [1991] 4 All ER 973; *Danns v. Department of Health* (1995) 25 BMLR 121.

[33] Article 8 of the annex to the 1990 Convention; articles 18 et seq of the annex to the 1992 Convention.

subsequently to revoke that licence and various other acts and omissions in its supervisory role up to BCCI's collapse in 1991 (Steyn, Hutton, Millet and Gray 2000; Steyn, Hope, Hutton, Hobhouse and Millett 2001).[34]

Detection of banking difficulties is incumbent on COBAC and it does that through its numerous controls carried out in credit institutions. For control to be effective the rules governing it must be well defined; the controller must be independent from the controlled and must be responsible when it fails in its mission. Though regional legal instruments guarantee the independence of COBAC, the question of its liability arising from control is not addressed. Nevertheless, a public authority may be answerable even without text. In fact, the obligation of public authorities to compensate, even without text, damage caused by the exercise of their diverse activities or where they have made use of their prerogatives of "*puissance publique*", has been consecrated in administrative law (Chapus 1999). Thus, if COBAC fails in its control mission and a credit institution runs into difficulties and consequently depositors suffer damage, it should be liable. This position is justified not by breach of duty but by the concept of dependence or reliance on statutory power.

As to breach of duty, COBAC owes a positive duty of care to act in detection and prevention of banking crises. Any person who fails to perform a positive obligation is answerable to the person who has the right to have that obligation performed. This is not predicated on liability arising from the obligation to do or not to do as provided for by article 1142 of the Civil Code,[35] but on breach of a statutory duty (Street 1968). In fact, in case of breach of statutory duty, the tortfeasor is liable even without any proof of damage by the victim (strict liability). This implies that if this principle were to be applied to COBAC, it would be liable just for failure to act even if there is no damage. Thus, the victims would recover at least nominal damages. Nominal damages in law are awarded where the court decides in the light of all the facts that no damage has been

[34] *Three Rivers District Council and Others v. Governor and Company of the Bank of England* on *www.publications.parliament.uk/pa/ld200001/ldjudgmt/jd010322/three-1.htm*.

[35] Article 1142 of the Civil Code provides that "*any obligation to do or not to do is resolved in damages in case of non-performance on the part of the debtor*."

sustained[36] or where the plaintiff fails to prove the loss suffered.[37] The function of nominal damages is to mark the punishment where no real damage has been suffered; they are given only in respect of torts actionable *per se* or in case of breach of statutory duty (Street 1968). Unfortunately, this principle of private law is not applied in case the duty is placed on public authority. COBAC, therefore, can only be committed based on the concept of dependence or reliance on statutory power.

The principle in England is that a statutory power could never generate a common law duty of care unless the public authority had created an expectation that the power would be used and the plaintiff had suffered damage from reliance on that expectation. An English court has suggested that:

> there will be cases in which the plaintiff's reasonable reliance will arise out of a general dependence on an authority's performance of its function with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of a plaintiff. Reliance or dependence in this sense is in general a product of the grant (and exercise) of powers designed to prevent or minimize a risk…recognized by the legislature as being of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection.[38]

The wide spread assumption that statutory power will be exercised, may affect the general pattern of economic and social behaviour, based on the expectation that the exercise of statutory powers will ordinarily prevent certain kind of risks from materialising. As such, it is necessary to discern a policy which confers a right of financial compensation if the power has not been exercised (Kidner 2006). Such a policy may be inferred if the power was intended to protect members of the public from risks against which they could not guard themselves.[39]

In fact, given that COBAC plays the role of the police in detecting and preventing banking difficulties, customers rely on it for their protection. Thus, it is possible for customers to demonstrate or argue that the role played by COBAC lulls them into a false state of dependence on the former so that they do not take steps to protect

[36] *The Mediana* [1900] A C 113 at 116; *Neville v. London Express Newspaper Ltd* [1919] A C 368 at 392.
[37] *T.J. Solomon v. J.D. Pickering & Co. Ltd* [1926] 6 n. L. R. 39.
[38] Mason J. in *Sutherland Shire Council v. Heyman*, 157 CLR 424, 483.
[39] *Ibid*.

themselves. This is more imminent as the customers of the bank are not given the opportunity to initiate early warning procedures in view of preventing such crises.[40]

The liability of COBAC may even be extended beyond the administrative domain. A renowned author has suggested in France that the liability of the State could even be extended beyond the domain of administrative action so that it could be committed for legislative acts and international conventions ratified (Chapus1999). In this perspective, COBAC is also a legislative organ and may be made liable on the basis of its regulatory acts and the tort of negligence.

Who can initiate action against COBAC for compensation? This is a pertinent procedural question because to be able to initiate action in court, the plaintiff should have the required legal status. The answer to this question will depend on the situation on the ground and the nature of the decision contested. Where the damage suffered is personal and individual, the individual may take action. The difficulty arises where the injury is collective like in case of collapse of a credit institution. Who can initiate action if such a credit institution is under legal administration or redress or under liquidation? In principle, in such a situation the creditors of the institution are represented by the receiver and he should act on their behalf. This opinion is contrary to the position adopted by French case law. In a famous case in France, the administrative court of Nice held that the receiver was not qualified to initiate action against the state to compensate damage caused by the Banking Commission,[41] a decision further confirmed by the supreme administrative court (Conseil d'Etat).[42] A similar decision was arrived at by the same court in 2001.[43] The situation in France may be justified by the fact that the banking system is stable but in the CEMAC zone the collapse of credit institutions is frequent. That is why we think the receiver should be given powers to initiate action

[40] The power to initiate early warning procedures in view of preventing crises in the CEMAC sub region is reserved for shareholders and auditors (sections 157-8 of the OHADA Uniform act on Commercial Companies and EIG).

[41] See faillite de la Banque Martinon de Nice, Tribunal administratif de Nice, le 10 décembre 1971.

[42] CE, 23 novembre 1979: D. 1980, I.R., 378.

[43] CE , 31 novembre 2001, M. *et Mme Nicolas Z. c/ Commission Bancaire (Ministre de l'Economie, des Finances et de l'Industrie)*.

against COBAC. This is very pertinent because, even though FOGADAC created within CEMAC is designed for remedial and preventive interventions to compensate depositors after bank failure, it acts under strict control and supervision of COBAC. Nevertheless, for COBAC to be liable, conditions of liability have to be determined.

B. Conditions for the liability of COBAC

For COBAC to compensate any damage caused by it, the conditions for its liability should be clear. Since there is no text establishing such conditions, we imagine that the ordinary conditions of liability will apply. Hence, there must be a fault, prejudice or damage and the fault of COBAC must have caused prejudice to the party seeking redress.

Talking about fault, it must first and foremost be noted that the fault of COBAC may arise from acts or omissions. In any case, the fault must be well established.[44] Generally, the action of COBAC can give rise to its liability in about three situations: first, where it has taken a decision that causes prejudice to an individual; second, in case provisional administrators and liquidators appointed by it cause prejudice to a third party; and third, where another organ or institution of CEMAC acting directly under the instructions and control of COBAC causes damage to a third party.

The first hypothesis envisages a situation where COBAC has actually taken a decision that causes prejudice to an individual, for instance, where it has acted *ultra vires* or in disregard of the prescribed procedure. This was the situation in *Tasha Loweh Lawrence*, where COBAC was reproached for acting beyond its competence.[45] In that case, the plaintiff was claiming damages from COBAC for having dismissed him as the chairman, managing director and board chair of Amity Bank Cameroon, when it had no powers to do so.

Concerning provisional administrators and liquidators, it should be recalled that COBAC is empowered to appoint a provisional administrator when a credit institution is having management problems and a liquidator when the credit institution

[44] *Tasha Loweh Lawrence c/ CEMAC, Secrétariat Exécutif*, Arrêt nº 001/CJ/CEMAC/CJ/05 du 7 avril 2005. *RDJ-CEMAC* 00 : 33-34.
[45] *Ibid*.

no longer has approval (after withdrawal of accreditation) or exercises banking activities without approval.[46] These provisional administrators and liquidators appointed by COBAC act under its control and COBAC should be accountable for any prejudice caused to a third party by them if they act within their power of attorney.

COBAC would be liable where another organ or institution of CEMAC acting directly under its instructions and control causes damage to a third party. This is imminent because there are community institutions and organs that act on the instructions of COBAC and under its strict surveillance, for instance, the Deposits Guarantee Fond (FOGADAC).[47] Its interventions in credit institutions, both preventive and curative, must be authorised by COBAC which ensures strict supervision of such interventions (Feudjo 2011 and Kelese 2017). If the members of FOGADAC act within the instructions given by COBAC, the latter should be liable for any prejudice caused by them to third parties. Nevertheless, a simple fault will not suffice; the fault must be a heavy one[48] given the technical nature of the control.

Talking about inaction, COBAC may be reproached for being simply negligent. This is the situation, for instance, where failure to act promptly caused the bankruptcy of a credit institution and third parties believe that the situation would have been rescued had COBAC acted fast. This was the case of MALJOURNAL in France where the Banking Commission was found liable because, upon brief on-the-spot checks in an institution, it discovered serious irregularities and simply addressed a warning to directors; it did not come back for thorough verification and control before the institution ran into insolvency after thirteen months (Njoya 2009).

Actions predicated on negligence are taken where harm is caused to a person by acts or omissions of another; whether the harm in question is personal injury, damage to property, or economic loss (Leyland and Gordon 2005). Unlike in private relationships where a plaintiff would be required to prove negligent breach of a duty of

[46] Articles 14 and 15 of the annex to the 1990 Convention and articles 28 and 99 of the 2014 Regulation on treatment of credit institutions in difficulties.

[47] See the 2009 Regulation creating FOGADAC and the 2009 Regulation on its organization and functioning.

[48] CE, 31 novembre 2001, *M. et Mme Nicolas Z. c/ Commission Bancaire (Ministre de l'Economie, des Finances et de l'Industrie)*.

care, here the plaintiff would rather be required to prove the negligence of COBAC to exercise statutory power.

Concerning prejudice, the plaintiff must prove the existence of damage; the damage must be certain and special. Nonetheless, to receive compensation, the plaintiff must establish a grievous causal link between the fault and the prejudice. This is what the plaintiff failed to establish in *Tasha*.[49] In that case the CCJ held that if dismissing Mr Tasha from his function was a fault committed by COBAC, the prejudice alleged by the plaintiff was, nevertheless, not the consequence of the fault. In addition, the plaintiff must not be in a position which denies him the right to compensation.[50] The fault must be the proximate cause of the damage and the third party must not have been contributorily negligent. To these conditions can be added special ones as those enumerated by the House of Lords in England.[51] There are: the act or omission must be unlawful; the act or omission must have been done with the required mental element; the act or omission must be done in bad faith; and the claimant must have the *locus standi* to sue. In any case, even if the above conditions are met, attempts to commit COBAC may encounter some difficulties.

II. Difficulties committing COBAC for damage caused to individuals

The impossibility of committing COBAC with respect to certain decisions has been highlighted. In fact, COBAC cannot be committed for rejecting approval based on policy reasons or for disciplinary decisions. However, there are other difficulties which obstruct the actual putting in place of the liability of COBAC. These difficulties relate to its legal nature (A) and the payment of damages if actually it is committed (B).

A. Difficulties relating to the legal nature of COBAC

This concerns its legal status and powers. In fact, COBAC does not have a legal personality but exercises statutory powers.

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[49] *Tasha Loweh Lawrence c/ CEMAC, Secrétariat Exécutif*, Arrêt nº 001/CJ/CEMAC/CJ/05 du 7 avril 2005.

[50] This may be a situation of illegitimacy, precarity, acceptance of risk, etc. It should be noted that some of these reasons for exoneration, for instance, acceptance of risk are not applicable here.

[51] *Three Rivers District Council v. Bank of England* (Nº 3) [2003] 2 AC at 191-196.

Neither the Convention of 5 July 1996 instituting the Monetary Union of Central Africa (UMAC)[52] as amended in 2009 nor the Convention of 16 October 1990 creating COBAC and its annex which organises the functioning of this supervisory and regulatory organ, endow it with a legal personality. This personality is only recognised on CEMAC[53] and BEAC[54] and other technical institutions or organs of CEMAC.

The concept of legal personality designates the aptitude to enjoy rights and to incur liabilities. Legal personality is acquired in several ways. It may be through registration with a public official like in the case of corporations. This is the mechanism adopted by the OHADA legislator as corporations acquire legal personality upon registration in the Trade and Personal Property Credit Register.[55] It may also be acquired through legislative enactment. This is the case with a legal entity created for public service or utility. Within the context of CEMAC community law, such legislative enactment may be a treaty, convention or regulation adopted by the community legislator, which is the Conference of Heads of States.

The CEMAC legislator has conferred legal personality on some of the community organs some of which function under the control of COBAC such as FOGADAC[56] but has not done so for COBAC itself. One would wonder if it was intentional or a kind of legislative forgetfulness. In fact, it is illogical that an organ deprived of legal personality controls one that is endowed with such personality. Whatever the case, lack of legal personality entails consequences. In private corporations, the absence of legal personality has effects usually arising from lifting or sifting the veil of incorporation. Lifting the corporate veil entails treating the rights or liabilities or activities of the corporation as those of its members or shareholders (French et al. 2008). Applying this to COBAC, it

[52] *Union Monétaire de l'Afrique Centrale* founded by a Convention of 5 July 1996.
[53] Article 35 of the additional act to the CEMAC Treaty, relating to the institutional and judicial system of CEMAC as amended in 2009.
[54] Article 5 of the articles of agreement (statuts) of BEAC.
[55] Section 98 of the Uniform Act on Commercial Companies and Economic Interest Groups.
[56] Article 2 du Règlement nº 01/09/CEMAC/UMAC/COBAC du 20 Avril 2009 portant création d'un Fonds de Garantie des Dépôts en Afrique Centrale (FOGADAC).

would imply that its lack of legal personality entails that its rights, liabilities or activities could be treated as those of its members. This is not the case since members of COBAC can only be held personally liable in criminal matters.[57]

It must be stated here that the effect of lack of legal personality is not the same for private entities and public entities. For private entities, it exposes its members directly to the public and they can be held personally liable for any act purportedly done in the name of the entity. For public entities, their members in this situation enjoy *de facto* or real immunity, except in case of a criminal offence. In the case of COBAC, the law expressly provides for the immunity of its members. [58] It is this immunity of the members that COBAC relied upon to argue against the claim for damages brought against it by Tasha Loweh Lawrence. Though the action never prospered, it was thrown out by the CCJ on other grounds and not based on immunity of the members of COBAC[59]. Their immunity though qualified, protects members of COBAC against prosecution and permits them to exercise their functions without any fear or favour.

Does the fact that COBAC lacks legal personality imply immunity? It may seem so since only artificial or natural persons can be party to proceedings before the court. However, in a State where the rule of law prevails, lack of legal personality for an institution like COBAC should not entail lack of control or better still, immunity (Kenmogne 2004). In such a state therefore, an institution of that standing should be accountable for its wrongful acts or omissions irrespective of its legal status.

Another consequence of lack of legal personality is that COBAC cannot have personal property which can act as a general guarantee to its judgment creditors. Deprived of legal personality, it has no existence and consequently cannot own property. This makes the situation more complicated as the enforcement of judgement in reparation of damage against it becomes hypothetical, thus the necessity for the situation to be clarified (Sunkam 2015; 2017).

Nevertheless, keeping aside the debate on the legal personality of COBAC, some solutions could be adopted pending the clarification of the situation by the CEMAC lawmaker. First, the

[57] See the annex to the 1990 Convention.
[58] Article 6(1) of the annex to the 1990 Convention.
[59] *Tasha Loweh Lawrence c/ CEMAC, Secrétariat Exécutif*, Arrêt nº 001/CJ/CEMAC/CJ/05 du 7 avril 2005. RDJ-CEMAC 00: 33-34.

theory of reality of legal personality could be applied to impose liability on COBAC. According to this theory, legal personality is a reality and its existence must be recognised even in the absence of law, to all entities that have collective interest distinct from those of its members and operate within a minimum organisation. Within this framework, it is the will of the entity that counts. This conception received judicial blessing in France in 1954 when the *Cour de Cassation* held that, groups endowed with the possibility of collective expression for the defence of licit and dignified interest and are legally recognised and protected, have legal personality.[60] This recognition by the court of legal personality is explained by the punctual necessity to defend legitimate interest (Sarah 2010; Lagarde 1974; Paillusseau 1993 and Baruchel 2004). This is the case with COBAC, which acts for the collective interest of the public. Considered as such, the absence of legal personality expressly consecrated by law should not constitute an obstacle against imputing liability on COBAC.

Second and the most recommended solution is to attribute or recognise on COBAC a "derivative" or "assimilated" personality. This would mean that its legal personality be derived from or assimilated to that of another organ or institution of CEMAC. In this perspective, the legal personality of COBAC could be discerned or derived from that of BEAC. This is justified by the fact that COBAC is a powerful arm of BEAC and some organs with legal personality placed under BEAC are controlled by COBAC. The major question to be determined now is how can an institution or organ which lacks legal personality controls or supervises one endowed with such personality? This is a defect or vice of form which creates a complicated situation. For this reason, the personality of COBAC should be assimilated to that of BEAC.

On the nature of its powers, COBAC exercises statutory powers. The question of liability for exercise of statutory powers has always raised debates. In the English case of *Anns v. Merton London Borough Council*,[61] it was held that the local authority owed a duty of care and thus, liable to the plaintiff. This decision has now been overruled by the House of Lords in *Murphy v. Brentwood District Council* [1991] 1 AC 398. In fact, there are several limitations on

[60] Civ. 28 janvier 1954, D. 1954, Jur. 217, note Lavasseur, JCP, 1954.
[61] House of Lords [1978] AC 728; [1977] 2 All ER 492.

the liability of public bodies in negligence as illustrated by *X v. Bedfordshire CC*[62] and *Stovin v. Wise*.[63] For example, in *Stovin v. Wise*, Lord Hoffmann said in relation to the exercise of statutory powers that, in addition to the decision of the public body being unreasonable, there must be 'exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised'. Further complications and limitations in this perspective are brought by the absolute distinction in law between policy and operational decisions (Bailey 2006), statutory duty and statutory power – the former giving rise to possible liability, the latter not, or at least not doing so unless the exercise of the power involves some positive act creating some fresh or additional damage (Kidner 2006). The above complications demonstrate the difficulty that may arise in causing COBAC as a public body to compensate damage caused in the exercise of its statutory powers or even in negligence. The above difficulties equally may be encountered if COBAC is condemned to pay damages.

B. Difficulties relating to payment of damages by COBAC

It has just been stated that COBAC lacks legal personality and consequently, does not have its own personal property which can guarantee the payment of judgment creditors. Who then can assume liability if it is actually committed? This question coupled with the fact that community organs are immune from forceful execution may frustrate any attempts to recover damages from COBAC.

As to who should make good the damage caused by the acts or omissions of COBAC if it is committed, some researchers have opined that both the State and BEAC may be responsible (Kenmogne 2004). With respect to BEAC, this is possible by virtue of the fact that it is BEAC that provides the functional budget of COBAC.[64] It is also one of the specialised institutions and the right hand of BEAC and its personality may be derived from that of the latter.

[62] House of Lords [1995] 2 AC 633; [1995] 3 All ER 353.
[63] House of Lords [1996] AC 923; [1996] 3 All ER 801.
[64] Article 5 of the annex to the 1990 Convention.

With respect to the State, it may be responsible based on agency theory if we consider COBAC to be the agent of the countries of CEMAC. However, it is difficult to apply this theory to COBAC for two main reasons. First, COBAC is the agent of the states of CEMAC but its relationship with the states drifts away from an agency relationship in that as a regional authority, it is an agent that controls the acts of the principal. Second, since COBAC represents states and not a State like is the case in France where the Banking Commission represents the state or England where the Bank of England represents the United Kingdom, it is not certain whether one State can be made to pay damages for prejudicial acts of COBAC. Even if all the states should be made to pay such damage, there is still a major obstacle – whether the states are jointly liable or jointly and severally liable to the victim. One researcher has advocated for joint and several liability of the states (Kenmogne 2004). Nevertheless, given these difficulties, the solution in favour of holding BEAC to compensate any damage caused by COBAC is preferable.

Another difficulty relating to the liability of COBAC is that, even if it is declared liable, such liability will have effect only if the organ designated to compensate the damage is willing to do so. This is because as a public organ, forceful execution cannot be ordered against COBAC since community institutions enjoy immunity from execution. Immunity here means any exemption from a duty, liability or service of a process, especially such exemption granted to a public official or governmental unit (Garner 2009). Immunity from execution by analogy is the exemption granted to some debtors as a result of their legal status. This implies the protection of their assets against forceful execution (Langmi 2013). Immunity is a defence to tort liability which is conferred upon an entire group or class of persons or entities under circumstances where considerations of public policy are thought to require special protection for the person, activity or entity in question at the expense of those injured by its tortuous act (Garner 2009).

The immunity of community organs is consecrated by statute and has been reaffirmed by case law. The community lawmakers since 1998 have held that the state or public and community organs have immunity from execution. Section 30 of the Uniform Act on

simplified recovery procedure and measures of execution[65] provides that "*compulsory distraint and preventive measures shall not apply to persons enjoying immunity from execution*." The provision establishes the principle according to which enforcement measures cannot be taken against the state, public entities and persons enjoying immunity from execution. The additional act on the regime of rights, immunities and privileges accorded to the community, members of its institutions and personnel,[66] expressly consecrates the immunity of community institutions. It states that, the community enjoys in all matters, jurisdictional immunity and immunity from execution, except it expressly renounces it in a particular case notified by the first official (authority) of the organ concerned.[67] The property and belongings of the community, wherever they are found irrespective of the holder, are exempted from search, confiscation, requisition, expropriation, and any administrative, judicial and other coercive and execution measures.[68] Even if COBAC is not mention in this act, it is covered under the umbrella of the community.

Some of the reasons advanced for granting immunity to public entities are that such debtors are always credit worthy; they are presumed always solvent and it is of no moment ordering forceful execution against a debtor who can always pay its debts (Pougoue and Teppi 2005), and that such forceful execution will be contrary to rules of public accountability which govern public entities (Kenfack 2010). To the two reasons above, we could add the sacrosanct principle of continuity of public service.

The CCJA is in line with this principle of immunity. It held in 2005 that forceful execution could not be ordered against a state entity even if it is governed by private law.[69] From the above, it is clear that forceful execution cannot be ordered against the state or public or community institutions and thus COBAC. Therefore, whether it is BEAC or the states to support damage caused by

[65] Adopted at Libreville on 10 April 1998.
[66] Acte Additionnel nº 6/99/CEMAC-024-CCE.02 du 17 décembre 1999, relatif au Régime des Droits, Immunités et Privilèges Accordés à la Communauté, aux Membres de ses Institutions et à son Personnel.
[67] *Ibid*, article 11.
[68] *Ibid*, article 12.
[69] *Aziablevi Yovo c/Société Togo Télécom*, CCJA, arrêt nº 045/2005 du 7 juillet 2005.

COBAC, they have immunity from execution except they waive it. As such, for damages to be paid after the judgment of the competent court, it will depend largely on the will of the authority which is designated to do so.

Is there any remedy available to the judgment creditor if COBAC is actually held liable to pay damages? The Uniform Act on simplified recovery procedure provides a temperament to the principle of immunity. It states that "*any unquestionable debts due for payment belonging to public corporations or enterprises, regardless of their form and mission, may equally be compensated with unquestionable debts due for payment belonging to any person owing them, subject to reciprocity*."[70] Unfortunately, this exception seems to apply only to state corporations and enterprises. Even if it were to apply to other public entities including COBAC, it will still be difficult to implement given that COBAC does not deal with individuals as does state enterprises. Consequently, there will be no debts from third parties to be garnished.

Conclusion

The question of the liability of COBAC is a complex one. The complexity stems from the silence of the CEMAC legislator which appears to have been corroborated by the CCJ. Analyses in this write-up demonstrate the circumstances under which COBAC may commit faults leading to its liability. The CCJ admitted the fault of COBAC but failed to rule on its liability either to individuals or to credit institutions it controls. This has created a legal vacuum making the question of liability of this community organ for its acts or omissions an issue of speculation by legal writers. This study demonstrates the complexity in any attempts to commit COBAC which stems from the nature of its powers and decisions as well as its legal status. With the various difficulties in committing COBAC, the issue of its liability remains far fetch. The major obstacle in this direction is its lack of legal personality. In order to facilitate the possibility of committing COBAC, the legislator should endow it with legal personality. Pending such a time that the CEMAC lawmaker would carry out reforms in this direction, the CCJ should play its role as the community Supreme Court to clear the air on

[70] Section 30(2) of the Uniform Act on Simplified Recovery Procedure and Measures of Execution.

doubts relating to the liability of COBAC. Generally, CEMAC regulations need to be amended to take better account of the risks to the stability of domestic banks assets. The institutional independence of the board of COBAC needs to be strengthened through greater diversification of its members. The authorities should equally consider establishing a dedicated sanction committee within the COBAC. This could facilitate its independent management.

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AN APPRAISAL OF THE ROLES OF THE UNITED NATIONS SECURITY COUNCIL IN THE PROSECUTION OF INTERNATIONAL CRIMES BY THE INTERNATIONAL CRIMINAL COURT

By

Fon Fielding Forsuh PhD*

Abstract

The primary objective of this paper is to highlight the shortcomings of the roles played by the United Nations Security Council (UNSC) in the prosecution of international crimes by the International Criminal Court (ICC). The Rome Statute creating the ICC grants the Council powers to initiate proceedings, defer same and obliges it to cooperate with the Court. The UNSC referrals have been inconsistent and its deferral has raised a lot of controversies which have had negative repercussions on the credibility and legitimacy of the Court. Also, the degree of cooperation provided to the Court by the UNSC has been inadequate to assist the Court to effectively prosecute those responsible for committing international crimes. This paper therefore examines the UNSC and the ICC as institutions which have the same mission, which is to maintain world peace and security. To achieve the afore mentioned mission, this paper argues for a strict application of the law and effective cooperation between the Council and the Court.

Key words: prosecution, crimes and security.

Introduction

The fight against impunity for international crimes has been characterised by the creation of international judicial bodies, ranging from *ad-hoc* to a permanent International Criminal Court, to prosecute those responsible for committing such crimes. In order to address the wide spread violation of International Humanitarian Law (IHL), genocide and ethnic cleansing that occurred in former Yugoslavia and Rwanda, the United Nations Security Council (UNSC) setup the International Criminal Tribunals for Yugoslavia[1] and Rwanda.[2] Making use of its powers under Chapter VII of the

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[1]The International Criminal Tribunal for Yugoslavia was set up by United Nations Security Council (UNSC) Resolution 827 of 25th May 1993.

[2] The International Criminal Tribunal for Rwanda was set up by UNSC Resolution 955 of 8th November 1994.

United Nations Charter (UNC),[3] the UNSC set up the afore mentioned tribunals as subsidiary organs in order to restore and maintain peace. As *ad-hoc* tribunals, their jurisdictions are limited to the countries where the crimes were committed and did not extend to the whole international community. The desire to improve and make the sanctioning of international crimes universal, inspired the creation of the International Criminal Court (ICC) whose jurisdiction is permanent and far more extensive as compared to *ad-hoc* tribunals. Unlike the *ad-hoc* tribunals that were created as UNSC subsidiary organs to maintain peace and security, the ICC was created through agreements of several states.[4]

The jurisdiction of the ICC covers four categories of international crimes[5] that may be committed in state parties, by nationals of state parties anywhere, in states that have been referred to the Court by the UNSC and states that have submitted themselves to its jurisdiction.[6]

The purpose underlying the prosecution of international crimes by the ICC is to fight against impunity and maintain international peace and security. This is a mission which cannot be achieved by the Court alone, as the UNSC have important roles to play, since its mission is also the maintenance of international peace

[3] Article 39 of Chapter VII of the UNC authorises the UNSC in case of any threat to world peace and security, to take all measure necessary for the maintenance of world peace and security.

[4] In this light, the General Assembly of the United Nations at its fifty-second session decided to convene the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court, which subsequently held in Rome, Italy, from the 15th June to the 17th of July 1998. On the 17th of July 1998, plenipotentiaries of 160 states adopted the Rome Statute creating the International Criminal Court with its seat at the Hague-Netherlands. This Statute went into force on the 1st of July 2002 after the deposit of the 60th ratification by a state party, which enabled the ICC to start functioning to fulfil its mission of prosecuting and sanctioning international crimes.

[5]According article 5 of the Rome Statute of 1998, the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.

[6] To this effect, it therefore follows the traditional grounds for jurisdiction relating to the principles of Territoriality (Ratione Loci), Nationality (both Active and Passive) and protective. See to this effect Fon Fielding F, (2016), "The International Criminal Court and War Crimes: A Critical Appraisal", PhD Thesis, Department of English Law, Faculty of Laws and Political Science, University of Yaoundé II, Soa. Pp. 205-211.

and security. The UNSC plays significant roles in the prosecution of international crimes by the ICC in that it is empowered to initiate proceedings[7], defer proceedings[8] and cooperate[9] with the court to effectively carry out its mission. The Council's roles in the afore mentioned areas have been very controversial because in terms of referrals, the Council has been viewed as playing double standards. As regards deferrals, the Council has not applied the standards required by law in instances it has had to manage, and has refused a deferral which can be deemed to be an inappropriate decision as examined below. As concerns cooperation with the Court, the Council has not accorded the required degree of cooperation needed by the court to achieve its mission. All these have had a negative impact on the credibility of the ICC as it has not been able to effectively prosecute and sanction those responsible for committing international crimes. In this light, this paper will examine the UNSC and the ICC as institutions which have the same mission, which is to maintain world peace and security, and examine the roles the Council has so far played in the prosecution of international crimes by the ICC.

I. Mandates of the UNSC and the ICC

Both the ICC and the UNSC have different mandates which at the end of the day have similar objectives which are to ensure and maintain world peace and security. This therefore implies that both institutions are supposed to function in sound collaboration, with the UNSC playing very significant roles.

A. The Mandate of the UNSC

This is the primary and the most powerful organ of the UN created to carry out its central mission of ensuring peace in the world.[10] It is with the purpose of keeping peace in the world that five great powers[11] in the world were given permanent seats at the UNSC under article 23 of the United Nations Charter (UNC) as countries best able to perform the function of keeping peace. In granting this organ the powers required to fulfil its central mission, article 24 of the UNC makes its primary responsibility to be the

[7] Article 13 of the Rome Statute of 1998.
[8] Ibid, article 16.
[9] Ibid, article 87.
[10] As provided for in article 1 of the United Nations Charter (UNC) 1945.
[11] USA, Russia, China, France and Britain Known as the P-5. Added to these five powers are non-permanent members whose membership are rotatory.

maintenance of international peace and security and that members of the United Nations are supposed to accept and agree to carry out the decisions of the UNSC.[12] Of particular relevance to international criminal justice, once the Security Council has determined under Chapter VII, article 39 of the UNC that a threat to world peace exists, article 41 empowers the Council to decide on measures to ensure peace. The measures to be decided upon according to this article are measures not involving the use of armed force, but it may call upon the members of the UN to apply other measures[13] among which can involve making use of international criminal justice which the ICC is at the helm. In certain instances where the measures provided for in article 41 cannot achieve peace, the UNSC is empowered by article 42 of the UN Charter to authorise the use of force.

B. The Mandate of the ICC

Being a judicial institution charged with the prosecution of international crimes, the ICC like the UNSC, does this with the aim of maintaining world peace and security. That is why the Rome Statute in its preamble recognises a relationship between the aims of justice and maintaining peace and security.[14] Moreover, the Statute affirms that grave crimes must not go unpunished[15] not only because they shock the conscience of humanity, but because they threaten the peace, security and well-being of the world.

II. The Various Roles of the UNSC in the Prosecution of International Crimes by the ICC

The UNSC plays significant roles in the various stages of the prosecution of international crimes by the ICC. It has the powers to initiate proceedings, defer same, and to cooperate with the ICC so as to permit it function effectively.

A. Initiation of proceedings

The trigger mechanism which the UNSC employs to initiate proceedings at the ICC is through referral of cases to the Court. This

[12] Article 25 of the UNC Op. cit.
[13] Measures like complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication and the severance of diplomatic relations.
[14] The preamble of the Rome Statute of 1998, Para. 3.
[15] Ibid, Para. 4.

is an important role played by the Council because it permits the Court to extend its jurisdiction to non-state parties. In spite of this, the Council's practice in this area has been inconsistent.

1. UNSC Referral of cases to the ICC

This is one of the mechanisms[16] which permits the court to exercise its jurisdiction. This is when the UNSC refers cases to the prosecutor acting pursuant to Chapter VII of the United Nations Charter[17]. It may occur in a situation where the UNSC receives information on the commission of crimes that fall under the jurisdiction of the ICC and determines under article 39 of Chapter VII as constituting a threat to world peace and security. Security Council's referrals would most likely concern countries that are not party to the ICC thereby enabling the ICC to assert its jurisdiction over states that are not party to the Rome Statute. A good example is when the Security Council adopted Resolution 1593 referring the situation in Darfur to the Prosecutor in 2005.[18] Worthy of note is the fact that Sudan is not a party to the ICC and has not consented to its jurisdiction. Based on information provided by international Non-Governmental Organisations (NGO's) like Amnesty International,[19] an International Commission of Inquiry on Darfur was established to inquire into the violations perpetrated in Darfur. This Commission wrote a report[20] which resulted in a referral for prosecution before the ICC, pursuant to article 13(b) of the Rome Statute.

Like the situation in Darfur, in February 2011, the UNSC unanimously by Resolution 1970 referred the situation in Libya since February 15, 2011, to the ICC. As a result of this referral, on

[16] Other methods involve voluntary state referrals (article 14(1) Rome Statute and initiation by the prosecutor making use of his *pro prio motu* powers (article 15 Rome Statute).

[17] Article 13(b), ibid.

[18] This referral was based on the massive perpetration of genocides, crimes against humanity, war crimes by the regime in power under the leadership of Omar Al Bashir.

[19] According to Amnesty International, since 2003, 400,000 civilians have died as a result of both premeditated and indiscriminate attacks, and more than 2 million civilians have been forced to flee from their homes. See Amnesty International, Eyes on Darfur. Available at URL: http://www.eyesondarfur.org/crisis.html. Accessed on 14-07-2011.

[20] International Commission of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, January 25, 2005, available at http://www.icc-cpi.int/library/cases/Report _to_UN_on_Darfur.pdf. Accessed on 05-07-2011.

June 27, ICC judges issued arrest warrants for Libyan leader Muammar al Gadhafi, his son Sayf al Islam al Gadhafi, and intelligence chief Abdullah al Senussi, having found reasonable grounds to believe that they were responsible for crimes against humanity, including murder and persecution.[21] In his application for the warrants, filed on May 16, the Prosecutor alleged that Gadhafi "conceived and implemented, through persons of his inner circle" such as Sayf al Islam and Al Senussi, a plan to suppress any challenge to his absolute authority through killings and other acts of persecution executed by Libyan Security Forces.

2. Inconsistency in the use of powers of Referral by the UNSC

This power of referral is granted to the UNSC by both the Rome Statute[22] and the UNC[23] to use as a measure to ensure its mission of maintaining world peace and security. This therefore implies that the UNSC is supposed to refer cases involving international crimes committed around the globe without any form of discrimination. But the Council's practice in the exercise of this power has been inconsistent and has affected the credibility and legitimacy of the ICC. This is because the Council has been selective in its referrals. This can be explained by the fact that the two countries[24] that have been referred to the Court by the Council were done on important basis which include the fact that war crimes and other international crimes were committed therein. But there are countries, whose nationals are involved in committing crimes, or in which such crimes were also committed and the Council did nothing to bring such countries under the jurisdiction of the Court knowing fully well that the Court cannot have jurisdiction since they are not state parties. Examples include countries such as Syria and Sri Lanka which are situations that have not been addressed by the UNSC.[25]

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[21] Congressional Research Service (CRS) Report, "International Criminal Court Cases in Africa: Status and Policy Issues", July 22, 2011, P. 8.
[22] Article 13(b) of the Rome Statute.
[23] Article 41 of the UNC.
[24] Sudan and Libya.
[25] Some examples include the non-referral of those responsible for crimes committed during the joint USA and British invasion of Iraq and crimes committed in the long-standing Israeli-Palestine conflict over the Gaza Strip. See Fon Fielding F, "The International Criminal Court and War Crimes: A Critical Appraisal", Supra, pp. 255-260.

In Darfur for instance, the Council followed a credible process for making its referral. It began by issuing a presidential statement expressing deep concern over the humanitarian crisis in April 2004, and condemned the violence by all the parties to the conflict in Resolution 1547 adopted in June 2004. It further adopted Resolution 1556 in July 2004 determining that the situation in Sudan constituted a threat to international peace and security, indicating that there was criminal responsibility for the violence being committed, and urged the Sudanese government to investigate and prosecute those responsible. It finally established a Commission of Inquiry by Resolution 1564 in September 2004 whose report[26] led the Council to refer the Situation in Darfur in March 31, 2005 by Resolution 1593. This procedure being an appropriate and credible one has not been followed by the Council in a situation like that of Syria in which massive war crimes have been committed.

In Syria, several war crimes have been committed by both government forces and insurgents which have as well constituted a great threat to world peace and security needing the UNSC to take an action under article 41 of Chapter VII of the UN Charter. The Syrian government under Bashar Assad has allegedly used the military to attack insurgents, activists, protestors and any parties in opposition to the government. In this violent crackdown, thousands have reportedly been killed.[27] An estimated number of more than 70,000 people have been killed since a revolt against President Bashar Assad began in March 2011 and both government forces and insurgents have reportedly been involved in the killings.[28] Added to this, thirteen cross regional states issued a joint statement on the situation in Syria at the 19th Regular Session of the Human Rights Council in March 2012 stating that the situation in Syria should be referred to the ICC.[29] Worthy of note is the fact that no move has

[26] The commission released its lengthy report in January 2005, finding that war crimes and crimes against humanity had occurred in Darfur, and recommending that the Security Council refer the situation to the ICC under article 13(b) of the Rome Statute.

[27] AMICC, Syria and the International Criminal Court, October 17, 2012.

[28]Reuters, Both Sides in Syria Commit War Crimes Including Murder, Torture, UN Says, Monday February 13, 2013.

[29] UN Human Rights Council, Debate on the follow up to the 17th Special Session – Report of the International Commission of Inquiry on the Syrian Arab Republic, 12 March 2012, Joint statement by Austria on behalf of 13 states (Belgium, Botswana, Costa Rica, Croatia, France, Ireland, Liechtenstein, Maldives, New Zealand, Norway, Slovenia, Switzerland, Austria). Available at: http://www.unmultimedia.org/tv/webcast/2012/03/austria-follow-up-to-17th-

been taken by the Security Council to refer this situation to the ICC in spite of the fact that Syria has refused to uphold several UN resolutions calling for cessation of hostilities. Since Syria is not a party to the Court, it would only require a UNSC referral under article 13(b) of the Rome Statute to assert its jurisdiction. But it would seem that both the Court's credibility and the Security Council's authority are limited by the influence of some great nations who make up the permanent members of the Security Council. Mention was made of the fact that the UN would refer the situation in Syria to the ICC for justice to be meted out but Russia vehemently said it will veto any UNSC Resolution to refer any war crimes committed in Syria. It has manifested this by going against most of the UN's decision regarding Syria. This has seriously hindered the ICC's and UN's development as regards war crimes committed in Syria.

As concerns Sri Lanka, a UN panel of experts concluded that up to 40,000 civilians were killed at the conclusion of the conflict between the government of Sri Lanka and Tamil rebels in 2008-2009, with war crimes probably having been committed by both sides to the conflict.[30] This panel recommended the appointment of a commission of inquiry to inquire into violations in Sri Lanka which was not done by the Security Council. Coupled with this, was an effort at the Council to make an ICC referral, despite the continuing failure of the government to launch an adequate domestic investigation.[31]

By leaving out these countries and knowing that they cannot be subject to the jurisdiction of the ICC, the UNSC referral

special-session-31st-meeting.html. Accessed 13-11-2013. Several reasons were advance to support the referral of the situation in Syria to the ICC and the Commission on inquiry concluded that widespread, systematic, gross human rights violations amounting to war crimes and crimes against humanity may have been committed in Syria and the Syrian Government had done nothing to address these violations. See UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 22 February 2012, UN Doc A/HRC/19/69.

[30] Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka (31 March 2011).

[31] Moss, L. "The UN Security Council and the International Criminal Court: Towards a More Principled Relationship", *International Policy Analysis*, Friedrich-Ebert-Stiftung, March 2012, p. 11. Another good example are the war crimes committed by Israeli forces against Palestinians in the Gaza Strip leading to the death of many civilians which the UNSC has taken no step to refer to the ICC since Israel is not a state party.

can be perceived as discriminatory or partial and has a negative impact on the credibility and independence of the ICC in the prosecution of international crimes.

B. Deferral of Proceedings

This power is granted to the UNSC by article 16 of the Rome Statute to the effect that the Council may, in a resolution adopted under Chapter VII of the UNC, request the Court to defer (namely not commence or proceed with) an investigation or prosecution for a renewable period of twelve months.[32] It therefore recognises the ability of the Security Council to suspend the activities of the ICC with regard to a specific situation or case, when it is considered that the suspension is necessary for the maintenance of international peace and security.

1. Circumstances under which deferral can be used

Article 16 of the Rome Statute requires that any resolution by the Security Council requesting a deferral of ICC proceedings be adopted pursuant to Chapter VII of the UN Charter, meaning that the Security Council must be acting to maintain or restore international peace and security. It has been argued for example that the exercise of this power might be appropriate in situations where a precarious, but realistic peace has been achieved and proceeding with an immediate investigation or prosecution by the ICC would threaten such conditions.[33]But it would appear inconsistent with the purpose of article 16 of the Rome Statute to request a suspension of ICC proceedings in a case where a government is attempting to coerce a deferral (or a complete amnesty from prosecution) in exchange for disarming or even engaging in peace negotiations.[34] Worthy of note is the fact that nothing in the Rome Statute prevents the Security Council from dealing with a peace and security situation in other ways that do not involve requesting an article 16

[32]This power is exercised over proceedings commenced either by state voluntary referrals, the prosecutor by its *pro prio motu* powers and the UNSC referrals.

[33] Keller, M. L. (2008), "Achieving Peace With Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms", 23 *Connelly Journal of International Law*, pp. 209-243. Cited from War Crimes Research Office (WCRO), The Relationship Between the International Criminal Court and the United Nations, International Criminal Court Legal Analysis and Education Project August 2009, Washington College of Law, P. 32.

[34] Kenneth Roth, (2008), "Workshop: The International Criminal Court Five Years On: Progress or Stagnation?", 6 *Journal of International Criminal Justice*, pp. 763-767. Cited from War Crimes Research Office (WCRO), Ibid.

deferral while the ICC is conducting proceedings related to the same situation. If the institution of proceedings by the ICC leads to threats of retaliation by a nation's government, the Security Council may determine under Chapter VII, article 39 of the UN Charter as a threat to world peace and security and take measures provided for in article 41 of the same Charter to handle it.[35]

2. Controversy and abuse in the use of power of deferral

This is one of the most controversial powers that the Rome Statute grants to the UNSC and can significantly affect the credibility and legitimacy of the ICC. This is because it codifies the rights of the Security Council which is a political body to interfere with the functions of the ICC which is a judicial institution. But even though it gives such a right to the Council, its exercise is strictly reserved for cases where the Council finds it important for the maintenance of world peace and security. But, the question is to know whether this restriction has so far been respected by the UNSC.

The use of this power by the UNSC has not been in line with the requirements of restoring a precarious, but realistic peace that has been achieved which might be jeopardised by an ICC prosecution. This is because there has been as abuse in its use and has had a negative impact on the credibility and legitimacy of both the UNSC and the ICC. Moreover, UNSC resolution for deferral has not been passed for a case which actually needed deferral whereas peace was at stake.

The abuse of the power of deferral was done at the behest of the USA that is a permanent member of the Security Council which in July 2002, threatened to veto a routine extension of the United Nations (UN) peacekeeping mission in Bosnia unless UN peacekeepers were granted permanent blanket immunity from the ICC's jurisdiction.[36] This was to make sure that peacekeeping forces who were US nationals should not be tried by the ICC for any war crimes they could have committed in their mission. This led to the adoption of Resolution 1422 which was purportedly under the UNSC's power of deferral in article 16 of the Rome Statute. This

[35]These measures may include complete or partial interruption of economic relations, severance of diplomatic relations and using the presence of peacekeeping forces.

[36] Moss, L. "The UN Security Council and the International Criminal Court: Towards a More Principled Relationship", Supra, p. 4.

Resolution provided immunity to all UN peacekeepers from non-state parties to the ICC for a renewable period of one year. It was further renewed for a second year by UNSC Resolution 1487 in 2003.[37]

These Resolutions can be criticised for the fact that for a Security Council Resolution to be adopted under article 16 of the Rome Statute, there must be the necessity for the maintenance of world peace and security. Moreover, there should be an investigation and prosecution underway. This seemed dubious in this case because there was no investigation and prosecution underway by the ICC. It was merely a move by the USA to shield its nationals from eventual ICC investigation and prosecution in the event where they committed war crimes or any other crimes within the jurisdiction of the Court.

Unlike the cases with UNSC Resolutions 1422 and 1487 which granted a purported deferral under article 16, a demand for a deferral resolution was refused with respect to restoring peace in Darfur which was a clear case for deferral. An ICC arrest warrant issued against President Omar al-Bashir of Sudan[38] created serious security issues in the Country. The African Union (AU) criticised the arrest warrant[39] and recognised it as an impediment to its regional efforts to foster peace and reconciliation processes in Sudan, and that the ICC failed to appreciate the effects its actions were having on these efforts.[40]

Giving priority to the security situation in Darfur Sudan upon the issuance of the arrest warrant by the ICC, the AU's Peace and Security Council (PSC) issued a communiqué in March 2009, in which it lamented that this decision came at a critical moment in the ongoing process to promote lasting peace in Sudan.[41] Through that same communiqué, the PSC requested the UNSC to exercise its powers under article 16 of the Rome Statute to defer the indictment

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[37] For more information on the US interest as regards Resolution 1422(2002), see Stan, C. (2003), "The Ambiguities of Security Council Resolution 1422(2002)", *European Journal of International Law*, Vol. 14, No 1, pages 85-104.

[38] *Prosecutor v. Omar Hassan Ahmad al-Bashir*, Case No ICC-02/05-01/09.

[39] The African Union considered the arrest warrant against an active president as violation of presidential immunity.

[40] Plessis, M, Maluwa, T and O'Reilly, A. "Africa and the International Criminal Court", Chatham House, Supra, P. 4. See also New African, "The AU Case", August/September, 2009, p. 73.

[41] African Union Peace and Security Council. 2009, Statement on the ICC arrest warrant against the President of the Republic of Sudan, Omar Al Bashir, PSC/PR/Comm.(CLXXV). 5 March, Addis Ababa, Ethiopia.

and arrest of Al Bashir. When the UNSC did nothing, the PSC expressed regrets and on the 3rd of July, 2009, at the 13th Annual Summit of the Assembly of Heads of State and Governments held in Sirte, Libya, the AU decided not to cooperate with the ICC in facilitating the arrest of al-Bashir. They called on all member states to comply with the decisions of the AU and any failure to comply will be backed by sanctions.[42] The decision of the UNSC in not granting the deferral is criticised here because a precarious but realistic peace was about to be achieved by the AU and a continuous prosecution by the ICC constituted a threat to such conditions. But when it concerned the demand for deferral by the US, the UNSC went on to react whereas the deferral was for the selfish interest of the USA. We can conveniently conclude that the demand for deferral by the AU was not granted because the AU does not have the influence of the US which is a permanent member of the UNSC and the peace and security of the African continent can only be considered when a great nation's interest is at stake.

Taking a look at the position of the AU as to peace, the decision of the ICC as regards Sudan posed a serious threat to its internal security. When the arrest warrant against al-Bashir was issued, the Sudanese government became very uncooperative in spite of the obligation of cooperation imposed on her by Resolution 1593 which referred Sudan to the ICC. The government responded to the ICC arrest warrant against Bashir by expelling aid agencies and threatening NGOs and peacekeeping troops.[43]In the same connection, the outgoing commander of the hybrid UN-AU Peacekeeping Mission in Darfur (UNAMID), General Martin Luther Agwai, reportedly stated that the decision to pursue Bashir had been a "big blow" for UNAMID and the peace process in Darfur.[44] Supporting the AU initiative, the then UN Secretary-General Ban Ki-moon, who has maintained a neutral position on the ICC's actions in Sudan, has nonetheless argued that the international

[42] Murithi, T. (2013), "The African Union and the International Criminal Court: An Embattled Relationship?", The Institute for Justice and Reconciliation, Policy Brief, Number 8, March, p. 3. See also War Crimes Research Office (WCRO), The Relationship Between the International Criminal Court and the United Nations, pp. 23-27.

[43] Congressional Research Service, International Criminal Court Cases in Africa: Status and Policy Issues, p. 29.

[44] U.N. News, "Press Conference by United Nations Force Commanders in Darfur, Democratic Republic of Congo," August 6, 2009. Cited from CRC, ibid. note 149.

community must seek to balance peace and justice in dealing with the conflict in Darfur. He expressed the view that the expulsion of aid organisations was detrimental to relief and peacekeeping operations in Darfur.[45]

C. Cooperation With the ICC

The success of the ICC in the prosecution of international crimes depends on effective cooperation from states and international organisations. This is because it has no police force or a standing army of its own and cannot take judicial actions such as executing arrest warrants.[46] It relies on the full cooperation of these entities in areas such as assistance in investigation and evidence gathering, arrests, transferring accused, and executing judgments. In this connection, an effective cooperation from the UNSC will be very essential since it has powers to initiate and defer proceedings at the ICC so as to meet its mandate of maintaining world peace and security like the ICC. But it has been noticed that the Council has not accorded the required degree of cooperation to the Court even though it is under an obligation to do so.[47]

1. UNSC referred cases and cooperation with the ICC

The cooperation required by the ICC is all-dimensional in that it needs the cooperation of both large and small states, be it European, Asian and African which are either state parties or not[48] to effectively prosecute international crimes. Since states, whether party to the Rome Statute or not, are all essentially members of the UN agencies, when the UNSC refers cases to the ICC, it involves all UN member states. In other words, it involves the obligation to cooperate by both state parties and states not party to the ICC. Moreover, by virtue of article 25 of the UNC, all decisions made by the UNSC are binding upon all UN member states. In this connection, UNSC referrals are viewed as the most appropriate method of initiating proceedings involving the commission of international crimes in the territories of non-state parties.

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[45] Ibid.

[46]Cogan, J. K. (2002), "International Criminal Court and Fair Trial-Difficulties and Prospects", *Yale Journal of International Law*, pp. 111-119.

[47]Article 87(6) of the Rome statute. See also the Negotiated Relationship Agreement between the International Criminal Court and the United Nations (Relationship Agreement) of October 2004, article 3.

[48]Wenqi, Z. (2006), "On Cooperation by States Not Party to the International Criminal Court", *International Review of the Red Cross,* Vol. 88, Num 861, p. 88.

In spite of the afore mentioned obligations, states have not complied with the provisions of the law which has constituted a serious setback on the activities of the ICC and the UNSC did little or nothing to ensure an effective cooperation in its referred cases. This is because in the two cases that the Council has referred to the Court, it has not taken an effective move to assist the court to prosecute those indicted.

(a) The UNSC Referral of Darfur (Sudan) to the ICC

Looking at the case concerning the Darfur region of Sudan that was referred to the ICC by UNSC Resolution 1593, arrest warrants were issued against several individuals[49] including the Sudanese president Omar al-Bashir. Resolution 1593 clearly directs the government of Sudan to fully cooperate with the Court, but it has refused to arrest and surrender the accused person to the ICC. Even when President al-Bashir travelled to member states,[50] he was not arrested and surrendered to the Court. When the Council was notified of all these instances of non-cooperation, it failed to take any action.

A Resolution like this one referring Sudan to the ICC is believed to be taken by the Council as a measure to maintain world peace and security under Chapter VII, article 41 of the UNC. When such a measure is taken in the interest of the international community by a world agency such as the UNSC, cooperation becomes an obligation on all states whether party to the ICC or not. But the Security Council from the wordings of its Resolution delimited the degree of cooperation which might account for the reason why the ICC never received the requisite cooperation to carry out its mandate in Sudan. Paragraph 2 of Resolution 1593 states that only the government of Sudan and the other parties to the conflict are under the obligation to cooperate with the ICC and all other states are merely urged to cooperate. This means that, on the one

[49] Those concerned were Ahmed Muhammad Harun, governor of Southern Kordofan state, and Ali Muhammad Ali Abd-Al-Rahman (Ali Koshayb), a Janjaweed militia. See The *Prosecutor v. Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb)*, Case No ICC-02/05-01/07. Summonses to appear were also issued to Bahr Idriss Abu Garda, Abdallah Banda Abakaer Nourain, and Saleh Mohammed Jerbo Jamuson. See *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09. Decision on the Confirmation of Charges.

[50] Kenya, Chad, Malawi and South Africa.

hand, the international community has mandated the ICC to exercise jurisdiction, but that, on the other hand, states that are not party to the Statute of Rome, except for Sudan, have no obligation to cooperate or support the ICC in fulfilling this task.[51] In order to strengthen the ICC in this situation, the Council would have made cooperation an obligation for all states since it is a matter that threatens world peace and security.

Moreover, another issue that seriously weakens the ICC's mandate in Darfur is contained in paragraph 7 of Resolution 1593 which bars the UN from paying any costs for investigation and prosecution in Darfur and requires that only parties to the ICC pay the cost.[52] This makes the charge very heavy on the Court as it has got many cases to investigate and prosecute which weigh on its budget. The Council's action in this case is contrasted with the *ad hoc* tribunals which were established under the Security Council's Chapter VII powers and were paid for by all members of the United Nations. Both the Security Council referral to the ICC and *ad hoc* tribunals were and are measures adopted for the maintenance of world peace and security. Therefore, the UNSC should bear the financial responsibility when it chooses to make a referral as provided for in article 115 of the Rome Statute.[53]This practice by the Council not to give financial support to the Court with its referrals have made it to be described as obtaining justice on a cheap.[54] If the Court is to fulfil its mandate, it is imperative that it has the appropriate financial cooperation and support of the United Nations when the Security Council makes a referral.

(b) The UNSC Referral of Libya to the ICC

The UNSC's inadequate cooperation with the ICC can also be seen with the situation of Libya that was referred to the Court by

[51] Heyder, C. (2006), "The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status", *Berkeley Journal of International Law*, Vol. 24, Pp. 654-655.

[52] This is the same issue with UNSC Resolution 1970(2011) which referred Libya to the ICC. Paragraph 8 stipulates that all costs resulting from the respective investigations be borne by the parties to the Rome Statute and voluntary contributions.

[53] This position is further codified by Article 13(2) of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations.

[54] Mistry, H and Verduzco, D. R. "The UN Security Council and the International Criminal Court", International Law Meeting Summary, with Parliamentarians for Global Action, Chatham House. 16 March 2012, p. 7.

Resolution 1970 of 2011as a measure under Chapter VII, article 41 of the UNC to ensure the maintenance of world peace and security. This referral was based on evidence that war crimes and crimes against humanity were committed in Libya as Libyan forces fired on peaceful protestors in Tripoli and in the eastern city of Benghazi, killing at least 300 people. This led to the issuance of several arrest warrants against former Libyan leader Muammar al Gadhafi, his son Sayf al Islam al Gadhafi, and his intelligence chief Abdullah al Senussi.[55] Up till when Gadhafi was captured and murdered, he and the other accused were never arrested and surrendered to the ICC. Resolution 1970 required Libyan authorities to cooperate fully with the ICC as provided for by article 86 of the Rome Statute and the Security Council is to ensure this cooperation as an obligation under article 87 of the same Statute.[56]In spite of this, the Council took no measures to cooperate and support the works of the ICC in this regard, but instead took measures in hindering its mandate therein.

The absence of effective cooperation with the ICC in this case can be attributed to the fact that the Security Council imposed certain conditions aimed at limiting and circumscribing exactly who is to be covered by the jurisdiction of the court. This can be seen from the wordings of paragraph 6 of Resolution 1970 (2011), which is intended to extend Court's jurisdiction to Libyan nationals, but exclude all other nationals of states that are not party to the Rome Statute.[57]

The Resolution also imposed an arms embargo and a travel ban on designated Libyan officials, and an asset freeze on designated officials and entities. When the ICC was informed about this, it received little cooperation from the Security Council when it sought to access information on the implementation of the Council's sanctions on Libyan nationals of whom some had been indicted by the ICC. This was an uncooperative move by the Council given the fact that like the Council the ICC had also ordered that assets of indicted individuals be frozen as a precautionary or interim

[55] *Prosecutor v. Saif Al-islam Gadhafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11.

[56]This is also an obligation under Article 2(2) of the Relationship Agreement between the ICC and the UNO of 2004.

[57] UN Security Council Resolution 1970 (February 26, 2011), UN Doc. S/RES/1970, available at www.icc cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf . Accessed 12-07-2015.

measure.[58] When the Court requested cooperation from the Council on the measures taken by states, the Council did nothing forcing the Court to submit individual requests of cooperation to each UN member state to locate the assets.[59]

D. The impact of ineffective cooperation on the credibility of the ICC

The jurisdiction of the ICC is very wide when compared to that of the ICTY, ICTR and the SCSL which are *ad hoc* tribunals having temporal jurisdiction. The credibility of the ICC is attributed to the fact that it is an international Court that was created through an agreement by many states with the signing of a multilateral treaty as opposed to that of *ad hoc* tribunals that were created through the authorisation of the UNSC as its subsidiary organs. The establishment of the ICC raised expectations among many people and especially victims that justice will be done whenever and wherever serious international crimes are committed.[60]But given the fact that the ICC neither has a police force nor a standing army and prisons, it cannot execute arrest warrants and even enforce imprisonment terms. That is why cooperation from states and the UNSC which has been made an obligation in articles 86 and 87 of the Rome Statute is very important for the Court to effectively prosecute international crimes.

When states and the UNSC do not cooperate, persons against whom international arrests warrants have been issued by the ICC remain at large and the credibility of the Court is seriously put to question. The Court is seriously handicapped because the successful investigation and prosecution of accused persons can only be done when they are arrested and brought to the seat of the Court in The Hague. This makes the Court to be looked upon as a toothless bull dog which cannot meet the mission for which it was

[58]The freezing of assets can contribute to reduce the capacity of individuals to continue committing crimes and to escape prosecution. It can also be used to meet reparation payments for victims when an accused is convicted from war crimes even though payment would most appropriately be done by the Trust Funds for Victims (TFV). Freezing of assets as a mode of cooperation is provided for in article 93(1)(k) of the Rome Statute.

[59] Mistry, H and Verduzco, D. R. "The UN Security Council and the International Criminal Court", Op. Cit, p. 9.

[60] Cecile, Aptel. "Domestic Justice Systems and the Impact of the Rome Statute", Discussion Paper Prepared for the Consultative Conference on International Criminal Justice September 9–11, 2009, United Nations Headquarters, New York, p. 1.

created. States are under obligation to cooperate no matter the accused involved.

E. Inaction by the UNSC towards non-cooperating States

As all state party are obliged to cooperate, the obligation of non-state party to cooperate with the ICC arises either from the way proceedings has been initiated at the Court or from an *ad hoc* agreement between such a state and the ICC to cooperate with the latter. So, when a case concerning a non-state party is referred by the UNSC to the ICC, any case of refusal by such a state to cooperate with the ICC is referred to the UNSC for actions to be taken as provided in article 87(5)(b) of the Rome Statute in order to enforce cooperation. The Security Council has authority to deal with it in accordance with the UN Charter. If necessary, the Security Council may even consider taking appropriate sanctions against the state(s) concerned in order to force them to cooperate. The authority of the UNSC to sanction cases of failure to cooperate comes from its resolutions referring non-state parties to the ICC. Such resolutions which are adopted by virtue of Chapter VII of the UN Charter are binding on all UN member states including the USA, China and Russia that equally have obligations to cooperate with the ICC. Thus, the Council is supposed to establish a follow-up support mechanism to ensure that effective cooperation is provided to the Court.

It should be understood that when the UNSC takes any action in accordance with Chapter VII of the UN Charter, whether referring a case to the ICC or not, it is for the maintenance of world peace and security. When it takes such an action, it creates obligations for states and has the responsibility to make sure that states fulfil their obligations. With regard to cases referred to the ICC by the UNSC, it equally has that responsibility to ensure that states referred, and other states fully cooperate with the ICC to investigate and prosecute perpetrators, but this has not been the case. In the two cases referred to the ICC by the UNSC,[61] the Council has taken no significant step to ensure that states fulfil their obligations to cooperate whereas Resolution 1593, for instance, makes cooperation by states concerned an obligation and urges all other states to cooperate. Even when the ICC notified the UNSC of

[61]The situation concerning Sudan Referred to the ICC by Resolution 1593 and the Situation in Libya referred to the ICC by Resolution 1970.

instances of non-cooperation by states in their failure to give effect to ICC arrest warrants arising out of the referral of the situation in Darfur,[62] the Council failed to take any action. This has seriously accounted for the inability of the ICC to prosecute those involved in international crimes committed in the Darfur region of Sudan till date. The lack of progress in the situation in Darfur has caused ICC Prosecutor Fatou Bensouda, to voice her frustration that the UN has done little or nothing to secure the arrest of President Bashir who is still at large.[63]

Added to the fact that after referring a case to the ICC, the UNSC does nothing to ensure the full cooperation of states, it has also made the investigation of the ICC difficult in relation to the case of Libya which it also referred to the Court. It did this by not fully cooperating with the Court when it sought to access information on the implementation of the sanctions the Council had imposed against Libyan nationals, of whom some had been indicted by the ICC. The sanction imposed by the Council involved the freezing of assets of Libyan nationals.[64]The assets of individuals eventually found guilty before the ICC are crucial to provide reparations to victims. The freezing of assets[65] is believed to contribute to reducing

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[62] See *Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, Decision informing the United Nations Security Council about the lack of cooperation by the Republic of Sudan, Pre-Trial Chamber I, 26 May 2010, ICC-02/05-01/07-57. *Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, Pre-Trial Chamber I, 27 August 2010, ICC-02/05-01/09-109. *Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision Informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's Presence in the Territory of the Republic of Kenya, Pre-Trial Chamber I, 27 August 2010, ICC-02/05-01/09-107. *Prosecutor v Omar Hassan Ahmad Al Bashir,* Decision Informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, Pre-Trial Chamber I, 12 May 2011, ICC-02/05-01/09-129.

[63]Fatou Bensouda, "Statement to the United Nations Security Council on the Situation in Darfur, the Sudan,Pursuant to UNSCR 1593 (2005)," speech delivered to the Security Council, December 13, 2012, available at www.icc-cpi.int/iccdocs/PIDS/statements/UNSC1212/UNSCDarfurSpeechEng.pdf . Accessed 23-06-2015. See also Ephrem Rugiririza, "Uganda and Djibouti Referred to the UN for Non-Cooperation on Bashir Arrest: An Appeal in Vain by the ICC?", JusticeInfo.Net, 13-07-2016.

[64] Mistry, H and Verduzco, D. R. "The UN Security Council and the International Criminal Court", International Law Meeting Summary, with Parliamentarians for Global Action, Chatham House, 16 March 2012. P. 9.

[65] Freezing of assets requested by the Court in Article 93 of the Rome Statute.

the capacity of individuals to continue committing international crimes and to escape prosecution. The ICC in the Libyan case referred to it by the UNSC ordered that assets of indicted individuals be frozen as a precautionary/interim measure which the UNSC had done. The Court requested cooperation from the UNSC[66]on the measures taken by states which was seemingly denied, forcing the Court to submit individual requests of cooperation to each UN member state to locate the assets[67] and such cooperation was not granted and the Security Council did nothing about it.

Conclusion

The creation of the ICC was perceived by many as a new era in the fight against impunity for international crimes. This can be explained by the fact that unlike the *ad hoc* international criminal tribunals, it is a treaty based institution created by agreement from several nations in guise to make its jurisdiction very extensive. Its establishment has also created significant expectations among many people and especially victims that justice will be done whenever and wherever serious international crimes are committed. For these expectations to be met, the ICC needs the effective collaboration of states and international organisations to effect certain important aspects like executing arrest warrants, investigation and enforcing judgments. The roles played by the UNSC in the prosecution of international crimes by the ICC are very important. These roles can permit the prosecutions of the ICC meet the purpose of justice if all cases are treated equal, in the sense that UNSC referrals should focus on all areas where crimes are committed, deferrals follow the principles of the law and the Council cooperates effectively with the Court.

[66]In line with article 87(6) ibid.
[67] Mistry, H and Verduzco, D. R Op cit. P. 9.

INTERNATIONAL TAX ARBITRATION AND PETROLEUM DISPUTE RESOLUTION: A CASE STUDY OF UGANDA

By

Mukalere Hope Mwagale* / Tajudeen Sanni (PhD)**

Abstract

Uganda's estimated petroleum reserve capacity is currently 6.5 billion barrels, of which no less than 1.4 billion barrels are projected to be recoverable. The blocs in the Albertine Graben in western Uganda were initially jointly licensed to Anglo-Canadian, Heritage Oil and the Anglo-Irish company, Tullow Oil. Heritage sold their stake to Tullow for US$ 1.5 billion.A Production Sharing Agreement between Heritage Oil and Gas and the Uganda Government was the root of a dispute where Government, through its tax organ, the Uganda Revenue Authority issued capital gains tax assessments for Heritage Oil and Gas company that it insisted was not meant to pay. The Government instituted a suit in the Tax Appeals Tribunal to recover unpaid taxes resulting from the transaction. The company on the other side rushed to the High Court. When both the Court and Tribunal ruled in favour of the Government, the Oil Company lodged a case in the International Court of Arbitration, which also ruled in favour of the Government. The dispute is a pointer in the direction of what is the appropriate forum for arbitration in Uganda. The research addresses the effectiveness of international tax arbitration in as far as petroleum tax dispute resolution is concerned, with specific reference to enforcement of arbitral awards. The research finds that there are several international instruments on international tax arbitration and focused on the New York Convention and the United Nations Commission on International Trade Law (UNCITRAL), which Uganda has domesticated. The research found that the major challenges to enforcement of arbitral awards in Uganda are: public policy due to conflict between domestic public policy and international public policy; the doctrine of arbitrability where problems arise when a matter that is arbitrable in one jurisdiction fails the test of arbitrability in Uganda, due to differences in legal frameworks; the scope of the courts' control of arbitral awards, where court is to determine the validity of an arbitration agreement as a pre-requisite to referring a matter to arbitration; and national and political bias. It is recommended, amongst other things, that the stakeholders should fasten the operationalization of the Petroleum Authority of Uganda and this should work hand in hand with Center for Alternative Dispute Resolution and the Tax Appeals Tribunals to promote arbitration in the settlement of petroleum tax disputes. Further, the Arbitration and Conciliation Act should be amended and specifically provide that any dispute should be

referred to arbitration in case of existence of an arbitration clause in a contract or an arbitration agreement. Finally, the laws governing the petroleum upstream, midstream and downstream sector need to be amended to make provision for the settlement of petroleum tax disputes through arbitration.

Introduction

Dispute resolution is an essential part of a functioning constitutional legal system.[1] It is well known that the traditional formal dispute resolution mechanisms are riddled with a number of inefficiencies[2], and in most cases, there is need for a more effective means of resolving disputes in particular contexts, hence the birth of alternative dispute resolution mechanisms.

One genus of international disputes that has not received much attention is the resolution of international petroleum tax disputes.

The term arbitration is defined as a determination of a dispute by one or more independent third parties rather than by a court. Arbitrators are appointed by the parties in accordance with the terms of the arbitration agreement or in default of court.[3] International tax arbitration is the referral of disputes to an independent foreign venue to resolve the same based on agreement, rather than litigation.[4] Effectively, the determinants of international tax arbitration which make it preferred for dispute resolution in tax matters is its contribution to public interest, doctrine of sovereignty, globalization, allocation of tax revenues, and enforcement of arbitral proceedings.

The complexity of international petroleum tax practice calls for special regulatory framework in drafting the clauses of such agreements, to protect tax payers on one side, and prevent tax

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[1] Yitzhak Hadari, Compulsory Arbitration in International Transfer Pricing and Other Double Taxation Disputes, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1483621 (last visited March. 20, 2015). See also Ojijo. (2012) Legal Rhetoric. Principles, Presumptions, Rules, Tests, and Maxims of Laws. Kampala. P. 467

[2] Totaro, Gianna., "Avoid court at all costs" The Australian Financial Review Nov. 14 2008. (April 19, 2010)

[3] Jonathan Law, Elizabeth A Martin, Oxford Dictionary of Law. 7th Ed.

[4] A. Christian, Your Own Personal Tax Law: Dispute Resolution under OECD Model Tax Convention, 17 Williamette. J. Int'L & Dispute Resolution (2009)

evasion on the other.[5] This is specially heightened in cases where the tax subject is a matter of national economic importance, like natural resource exploitation[6]. A further complexity arises due to the unequal power relations between multinationals and the taxing authorities, who are predominantly in least developed countries[7]. This is further compounded by the complex nature of these agreements, and their novelty in as far as lingua and legalese are concerned in their negotiation.[8] A significant feature of international arbitration is the fact that a number of legal systems may be relevant in the disputes.[9] In such an instance, issues such as the law applicable to determine the capacity to enter into the arbitration agreement; the law applicable to the arbitration agreement itself; the law applicable to the arbitration proceedings (lex arbitri); the law applicable to the dispute itself (lex causae); and the law applicable to the enforcement of the award, would have to be deliberated upon.[10]

Background

Globally, countries have already added arbitration clauses to newly negotiated tax treaties.[11] Within the EU, the Arbitration Convention protects taxpayers in transfer pricing disputes, and the ECJ is called upon to decide tax treaty conflicts under recent tax treaties. The ICC proposed a model arbitration provision. Without doubting the ability of international tax arbitration, it has in practical terms played a significant role in resolving tax disputes[12]. There are

[5] See Allison D. Christians, *Tax Treaties for Investment and Aid to Sub-Saharan Africa*, 71(2) BROOK. L.REV. 639, 641 (2005)
[6] Id
[7] Supra note 5 above
[8] Jean-Philippe Chetcuti, *The EU Tax Arbitration Convention*, at 6.6, http://www.inter-lawyer.com/lex-e-scripta/articles/eu-tax-arb-conv.htm#_Toc518052897 (last visited March. 10, 2015)
[9] Jumoke Akinjide-Balogun, Oil and Gas arbitration. Seminar On "International Commercial Arbitration in the African Sub-Region: Meeting the User's Need" http://www.akinjideanco.com/oil gas. html accessed 20th March 2015
[10] Ibid
[11] *See* OECD, *Guidelines for Conducting Advanced Pricing Arrangements Under the Mutual Agreement Procedure ("MAP APAs")*, *available at* http://www.oecd.org/dataoecd/10/10/38008392.pdf (last visited March. 10, 2015).
[12] Natalia Cruz; International Tax Arbitration and the Sovereignty Objection: The South American Perspective, Tax Notes International 2008.

emerging new approaches to resolving tax disputes, including mandatory binding arbitration clauses in income tax treaties[13].

Many developing countries are reluctant to resort to international petroleum tax arbitration as most fear that the Government is abdicating its right to determine tax disputes – an incorrect perception in our view. The reason why most developing countries are skeptical of international tax arbitration is political in nature as sovereignty of states is not compromised in any manner by this process.

An even more serious question is whether the petroleum tax arbitration rules are in public interest. Many authors e who have looked at this question have suggested that the tax arbitration rules are better designed to serve the international business community than serve the public interest[14]. The result is that the international business community now can bypass the domestic administrative and judicial procedures normally available for resolving tax disputes and instead move into a secret forum outside the scrutiny of the taxpaying public.

Heritage Oil & Gas Limited entered into a Production Sharing Agreement (PSA) for petroleum exploration, development and production with the Government of the Republic of Uganda (the Government) on 1st July 2004. The agreement contained an arbitration clause to the effect that any disputes stemming from the agreement which could not be settled amicably within sixty days would be referred to arbitration in accordance with the United Nations Commission for International Trade Law (UNCITRAL) Arbitration Rules[15].

Heritage Oil & Gas Limited sold its interests under the agreement to Tullow Uganda Limited under a sale and purchase agreement and a supplemental agreement thereto. As a result of the sale, and under the authority of the Income Tax Act, (ITA), Uganda Revenue Authority issued tax assessments for Capital Gains Tax which the company appellant objected to and consequently filed a claim before the Tax Appeals Tribunal, which proceedings were

[13] See for instance, 2010 OECD Model Tax Convention on Income and Capital Flow, Article 25; available at http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/model-tax-convention-on-income-and-on-capital-2010_9789264175181-en accessed on March 12, 2015

[14] Jean Phillippe; The EU Tax Arbitration Convention at page 606

[15] Heritage Oil & Gas Limited v Uganda Revenue Authority Civil Appeal No. 14 of 2011

stayed pending Arbitration in accordance with the Arbitration clause in the Production Sharing Agreement.

Legal Issues Arising

Despite several positive attributes and widespread use, arbitration does not provide a definitive answer to all international petroleum tax disputes[16]. In Uganda, following the dispute between the Ugandan government with Heritage Oil and Tullow Oil, the regime of international petroleum tax arbitration has raised eyebrows, due to the specific application of arbitration in this case, which has led to general disapproval of international legal dispute resolution.

The manner and style of resolution of the conflict has raised issues as to whether arbitration as a whole is bad for the resolution of tax disputes involving powerful multinational corporations and developing countries like Uganda and whether it is possible for arbitration to be restructured and applied in ways that are beneficial to developing countries. This is especially relevant given the fact that the procedures are complex, the practice novel to Uganda, and the subject matter emotive.

The manner in which Uganda was dragged to international legal fora to solve a dispute of its natural resource preempts the skewed power relations between poor countries and rich transnational corporations, and makes known the fact that international petroleum tax arbitration is subject of global power plays which are beyond the province of law. This also reveals the glaring fact that there are no specific rules governing arbitration in petroleum dispute resolution in Uganda. The Production Sharing Contract between Uganda and Heritage Oil Limited specifically states that any dispute arising under the Agreement, if not settled within 60 days shall be referred to arbitration in accordance with the UNCITRAL rules.[17]

Further, whereas the laws in Uganda have addressed various fields of arbitration and taxation, international petroleum tax arbitration is relatively recent, unaddressed and controversial. The laws used for international tax arbitration are the general laws applicable to arbitration and the major law on petroleum, the Petroleum (Exploration, Development and Production) Act, provides no rules on petroleum arbitration. This lacuna necessitates

[16] Id.
[17] Article 26

a critical analysis of the law relating to international petroleum taxation in Uganda, from a comparative perspective, so as to ensure protection of the tax payer. In this vein, the objectives of this study are: to examine the legal framework on International tax Arbitration; to determine the appropriate forum for arbitration in the petroleum industry in Uganda; and to establish the challenges/obstacles to effective enforcement of arbitration awards in Uganda.

The Theory of Arbitration

There are four arbitration theories which help to understand the nature of arbitration: the contractual theory; the jurisdictional theory; the mixed or hybrid theory; and the autonomous theory.[18] This paper centered on the mixed /hybrid arbitration theory because it is an amalgamation of the other three arbitration theories. It states that an arbitral award falls half way between being a judgement and a contract. An arbitrator does not perform the public function and an award is not a contract. The parties, agreeing on arbitration, create private jurisdiction and set its limits. By agreeing on Arbitration, parties agree not to go to court. The arbitration agreement is treated as being similar to an exclusive jurisdiction clause, in that the decision- making powers of the municipal courts are substituted for the arbitrators. Both contractual and jurisdictional elements of arbitration are at play.

Despite being closest to the nature of arbitration, the theory has still been criticised for not being able to provide a basis for the reform of arbitral law. Nevertheless, the research found that this is the best theory that can counter the weaknesses of the theory of globalisation especially through the contractual and autonomous theories that make states welcome the idea of international tax arbitration thus aiding the resolution of petroleum tax disputes.

The Concept of International Arbitration in Tax Disputes

The "Arbitration Convention"[19] represents a valuable precedent which merits consideration in framing the appropriate terms for international arbitration provisions in general.

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[18] A. Samuel, Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, US, and West Germany, 1989. Schulthess Polygraphischer Verlag, Zurich, P. 33

[19] Gary B. Born, International Commercial Arbitration, 187, 197, 217 (2009); Julian M. Lew, Loukas A. Mistelis & Stefan M. Kröll, Comparative International Commercial Arbitration 1-10 to 1-11, 6-1 to 6-6 (2003) Convention on the

Yves argues that arbitral disputes relating to tax measures fall into two main categories: (1) claims that a tax measure violates the investment protections contained in an investment treaty between an investor's home State and a host State; and (2) claims that a tax measure breaches an investor's rights under a contract with a host State or entitles it to compensation or indemnification under a contract with a state enterprise.[20] The advantages include the desire to avoid the uncertainties and local practices associated with litigation in national courts, the desire to obtain a quicker, more efficient decision, the relative enforceability of arbitration agreements and arbitral awards (as contrasted with forum selection clauses and national court judgments), the commercial expertise of arbitrators, the parties' freedom to select and design the arbitral procedures, confidentiality and other benefits.[21]

The International Bar Association (IBA)'s Rules on the Taking of Evidence in International Commercial Arbitration, revised in 2010[22] blend common and civil systems so that parties may narrowly tailor disclosure to the agreement's particular subject matter. This has been argued by Sherby to be the leading advantage of international tax arbitration.[23]

Some salient features of international tax arbitration include: Anchoring on a treaty[24], exhaustion of the mutual agreement

Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"), June 10, 1958, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

[20]Yves Dezalay & Bryant G. Garth, Dealing In Virtue: International Commercial Arbitration And The Construction Of A Transnational Legal Order 9-10, 124, 198 (1996)

[21] Sachs, Klaus. "CMS Guide to Arbitration: Foreword". CMS Legal. Retrieved 1 March 2015.

[22] Yves Dezalay & Bryant G. Garth, Dealing In Virtue: International Commercial Arbitration And The Construction Of A Transnational Legal Order 9-10, 124, 198 (1996)

[23]Eric Sherby, "*A Different Type of International Arbitration Clause*," *Int'l Law News* (American Bar Association) Winter 2005 at 10.

[24]Brian J. Arnold & Michael J. McIntyre, International Tax Primer, second edition, at 6. See also at 105

procedure[25], consent based[26], no independent right of initiation[27], and the rule of exhaustion of local remedies.

Enforceability of International Petroleum Tax Awards

The New York Convention is by no means necessarily the most favorable enforcement regime. Prevailing parties should consider whether local law or multilateral or bilateral treaties provide a more attractive alternative. Doing so is specifically contemplated by the New York Convention, which states:

> The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.[28]

For purposes of enforceability under the NYC, it would appear that the proper place where an award should be made is at the place of arbitration, as properly determined.**[29]** The bindingness of an award must derive from a national system, a *lex loci arbitri*, which in turn defines the *lex arbitri*.**[30]** This ensures the continued link between the award and the rest of the arbitral proceedings. As Mann puts it, the award:

> …is no more than a part, the final and vital part of a procedure which must have a territorial central point or seat. It would be very odd, if possibly without the knowledge of the parties or even unwittingly, the arbitrators had the power to sever that part

[25]Barin, Babak; Little, Andrew; Pepper, Randy (2006). The Osler Guide to Commercial Arbitration in Canada. The Netherlands: Kluwer Law International. p. 34. ISBN 90-411-2428-4.

[26]Bukar, B., Mandatory and Other Forms of Arbitration Under Some Selected Oil, Gas And Investment Legislations in Nigeria, Oil, Gas & Energy Law Intelligence, February 2008 at http://www.ogel.org/journal-advance-publication-article.asp?key=224 (last visited on 18th April, 2015)

[27] Jackson H. Ralston, International Arbitration From Athens To Locarno 153-154; John L. Simpson & Hazel Fox, International Arbitration: Law And Practice 1 (1959)

[28] New York Convention Article VII(1), June 10 1958, 9 U.S.C. & 201, 330 U.N.T.S. 38

[29] Article V (1) (e); English Arbitration Act 1996, S.2

[30] Paulsson, J., Arbitration Unbound: Award Detached from its Country of Origin. (Supra) pp.360-361

from the preceding procedure and thus give a totally different character to the whole.[31]

The legal framework for International tax arbitration

It is said that tax matters are a subsidiary factor concerning financial decisions, but once the non-tax barriers are eliminated, tax consequences increase in importance.[32] These consequences give rise to disputes that have in turn given more importance to tax arbitration especially in the petroleum industry.

The New York Convention

Historically, many international organizations have attempted to ensure the enforceability of arbitral awards through multilateral treaties, beginning with the Geneva Protocol of 1923[33] and followed by the Geneva Convention of 1927.[34] While the Geneva Treaties are essentially historical remnants today,[35] they remain the building blocks of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention).

To rectify the deficiencies in the Geneva Treaties, the United Nations Economic and Social Council in 1956 drafted a multilateral convention to provide for a more "pro-enforcement" arbitral process that would further protect the integrity of international arbitration awards.[36] For example, the Geneva Treaties apply only to commercial claims, but the New York Convention can apply to both commercial and noncommercial matters.[37] Also, unlike the Geneva Treaties, the New York Convention allows for

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[31] Mann F., Where is an Award Made? (1985) 1 Arbitration International 107

[32] Arnold Brian J and Harris Neil H. "Colloquium on NAFTA and Tradition: NAFTA and the Taxation of Corporate Investment: A View From Within NAFTA". New York University Tax Review. Summer, 1994. 49 Tax L Rev. 529, (Lexis-nexis) pages 1,2.

[33] Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 157

[34] Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301

[35] The New York Convention specifically states that "the Geneva [Treaties] **...** shall cease to have effect between Contracting States." Convention on the Recognition and Enforcement of Foreign Arbitral Awards,June 10, 1958, art. VII(2), 21 U.S.T. 2517,
2521, 330 U.N.T.S. 3, 44

[36] Elise P. Wheeless, *Article V(1)(b) of the New York Convention,* 7 EMORY INT'L L.REV. 805, 806 (1993).

[37] However, parties to the New York Convention can opt for the "commercial reservation," allowing application to only commercial claims.

the enforcement of an award in a noncontracting country.[38] As a result, the New York Convention "confers legitimacy upon awards granted in any state, whether or not a contracting state, and whether or not the parties are subject to the jurisdiction of different contracting states."[39] A conference at the United Nations headquarters in 1958 ultimately produced the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, popularly known as the New York Convention. The New York Convention has been hailed as the "cornerstone of current international commercial arbitration."[40]

Defenses to enforcement under the New York Convention

Article V of the New York Convention distinguishes five grounds on which an award can be refused. Grounds for refusal include: (1) incapacity of the parties; (2) improper notice of the appointment of the arbitrator or of the arbitration itself;[41] (3) lack ofjurisdiction, i.e., " the award deals with a difference**...** not falling within the terms of the submission to arbitration";[42] (4) procedural irregularities;[43] and (5) an invalid award based on the ground that the award was not "binding on the parties, or has been set aside or suspended by a competent authority of the country in which.., that award was made."[44]

United Nations Commission on International Trade Law (UNCITRAL)

Pursuant to Article 35(1) of the Model Law, any award is to be recognised as binding and enforceable, subject to the provisions in Articles 35(2) and 35(6). Reciprocity of the enforcement of awards is not a condition of enforcement under the Model Law, nor is the presentation of the arbitration agreement.

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[38] NewYork Convention,Art. I(1), 21 U.S.T. at 2519, 330 U.N.T.S. at 38.
[39] Cindy Silverstein, *Iran Aircraft Industries v. Avco Coiporation: Was a Volation of Due Process Due?,* 20 BROOK. J. INT'L L. 443, 454 (1994).
[40] ALBERTJ. VAN **DEN** BERG, THE **NEW** YORK ARBITRATION CONVENTION OF 1958 **1** (1981).
[41] New York Convention art. V(l)(b)
[42] *Id.* art. V(l)(c)
[43] *Id.* art. V(1)(d)
[44] *Id.* art. V(l) (e)

The grounds on which recognition can be refused[45] reflect those listed in the New York Convention.

The UNCITRAL system may be the only one capable of ensuring that the arbitral proceedings are not unnecessarily disrupted. This is evident under Article 16 (3) of the Model Law. Regardless of its short falls, the UNCITRAL Model Law is by far the basic law on which most countries, including Uganda, have modeled their laws on arbitration.

The Appropriate Forum for Arbitration in Uganda

Uganda was a British colony and thus English legal system and law are predominant in Uganda. The laws applicable in Uganda are statutory law, common law, doctrines of equity and customary law when it does not conflict with statutory law.[46] The United Nations Commission on International Trade Law (UNCITRAL) came up with the UNCITRAL Arbitration Rules of 1976, the UNCITRAL Conciliation Rules of 1976 and the UNCITRAL Model Law on International Commercial Arbitration. These UNCITRAL documents coupled with the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) of 1958 are the bedrock of the Arbitration and Conciliation Act of Uganda.[47]

1. The Arbitration and Conciliation Act

The Ugandan *Arbitration and Conciliation Act*[48]was enacted to amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards, to define the law relating to conciliation of disputes and to make other provision relating to the foregoing.[49] Its provisions on arbitration apply to both domestic arbitration and international arbitration.[50]

The Act establishes the Centre for Arbitration and Dispute Resolution (CADRE).[51] This Centre is charged with *inter alia*: to make appropriate rules, administrative procedure and forms for effective performance of the arbitration, conciliation or Alternative

[45] Article 35(6) of the Model Law
[46]*Judicature Act*, Cap 13, Laws of Uganda.
[47] Cap 4, Laws of Uganda
[48]Ibid
[49] Ibid, Preamble
[50] Ibid, S. 1.
[51] *Ibid*, s. 67.

Dispute Resolution process; to establish and enforce a code of ethics for arbitrators, conciliators, neutrals and experts; to qualify and accredit arbitrators, conciliators and experts; to provide administrative services and other technical services in aid of arbitration, conciliation and alternative dispute resolution; to facilitate certification, registration and authentication of arbitration awards and conciliation settlements; to avail skills, training and promote the use of alternative dispute resolution methods for stakeholders; and to do all other acts as are required, necessary or conducive to the proper implementation of the objectives of the Act.[52]

The Act provides that when seized of an action in a matter in respect of which the parties have made an arbitration agreement referred to in section 39,[53] the court is to, at the request of one of the parties, refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed.[54] This points to the autonomy of the arbitration agreement as it was in Power and City Contract Vs LTL Project (PVT) Ltd[55]where Hon. Justice Stephen Musota held that such a clause to refer a dispute to arbitration is a contract with an enduring and special effect and that it has a binding effect on the parties thereto.

The Act also has provisions on the enforcement of an arbitral award rendered pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention").[56]

Arbitration in Uganda has the potential to boost international tax arbitration. It is important to point out that CADRE in Uganda plays a more active role in domestic arbitration. International tax arbitration would however require minimal

[52] Ibid. s.68

[53] S. 39(1) is to the effect that a "New York Convention award" means an arbitral award made, in pursuance of an arbitration agreement, in the territory of a State (other than Uganda) which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") adopted by the United Nations Conference on International Commercial Arbitration on 10th June, 1958. ss. (2) thereof further states that an award is be treated as made at the seat of the arbitration, regardless of where it was signed, dispatched or delivered to any of the parties.

[54] S. 40.

[55] HCMA No. 0062 of 2011

[56] Part 4 (ss. 45-47).

intervention by the institution especially in areas of making appropriate rules, administrative procedure and forms for effective performance of the arbitration, establishing and enforcing a code of ethics for arbitrators. This is because where Parties to an international arbitration choose the applicable rules, CADRE would seem to interfere if it imposed the Ugandan rules on the process even if one of the parties is Ugandan. Uganda can therefore come up with a transnational tax arbitration framework and streamline its domestic framework with the same so that the CADRE can be more efficient, especially in terms of international tax arbitration.

2. The Tax Appeals Tribunal Act

The Uganda Revenue Authority Act mandates the Uganda Revenue Authority to make tax assessments and to collect tax. In the case of K. M. Enterprises and Others Vs Uganda Revenue Authority,[57] it was stated that the mandate of the URA to collect tax in accordance with the laws of Uganda cannot be fettered or overridden by an agreement. It is in this vein that Article 14 of the Production Sharing Contract between Uganda Government and Heritage Oil provides that taxes would be paid in accordance with the laws of Uganda.

The Constitution of the Republic of Uganda makes provision for Parliament to make laws to establish tax tribunals.[58] In pursuit of this mandate, Parliament enacted the Tax Appeals Tribunals Act.[59] There are established tax appeals tribunals consisting of a chairperson and four other members as appointed in accordance with the Act[60] which are mandated to review any taxation decision in respect of which an application is properly made.[61]

The rules of procedure under the Tax Appeals Tribunal are governed by the Tax Appeals Tribunals (Procedure) Rules, 2012 which provide that the rules shall apply to all proceedings of the tribunal,[62] subject to Section 22 of the Tax Appeals Tribunals Act. The Rules were made pursuant to the Tax Appeals Tribunals Act.[63]

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[57] HCCS No. 599 of 2001
[58] Article 152 (3)
[59] Cap 345, Laws of Uganda
[60] Section 2, Tax Appeals Tribunals Act, Cap 345
[61] Ibid Section 14
[62] Rule 2 of SI No. 50, 2012
[63] Section 22(3), Tax Appeals Tribunal Act, Cap 345, Laws of Uganda

The case of Heritage Oil and Gas Ltd Vs Uganda Revenue Authority[64]points out the fact that there is no provision under the Tax Appeals Tribunals Act allowing the Tribunal to refer proceedings before it to arbitration. In fact, independence of the Tribunal is emphasized. It appears the parties only have an option of appealing to the High Court after the decision has been made by the Tribunal.[65] This option of appeal was examined in the case of URA Vs Bank of Baroda- India.[66]

The above is a clear indication that the statute on the tax appeals Tribunals in Uganda does not aid tax arbitration at all and at the moment cannot be the right forum for petroleum tax arbitration unless it is amended to make provision for it. This would be the best option as a forum for petroleum tax arbitration because tax is a technical area that needs a lot of expertise.

The Petroleum Supply Act[67] the primary law for the downstream petroleum sector in Uganda provides that disputes between holders of permits or licenses, or between such holders and the Commissioner may be submitted by the parties involved to the Petroleum Committee for non-binding mediation.

The midstream petroleum sector is governed by the Petroleum (Refining, Conversion, Transmission and Midstream Storage) Act and it provides[68] that a licensee shall negotiate in good faith to reach an amicable settlement of a dispute concerning a contractual matter that arises or submit the dispute to the Authority.[69] The statute concerning the upstream petroleum sector has no provision on alternative dispute resolution.[70]

It is clear that the legal framework on petroleum in Uganda offers no provision to support arbitration of petroleum tax disputes. The national policies have nothing on the same.[71]

[64] High Court Civil Appeal No. 14 of 2011
[65] Section 27 (3) of the Tax Appeals Tribunals Act
[66] HCT-00-CC-CA-05-2005
[67] Section 40, Petroleum Supply Act No. 13 of 2003.
[68] Section 85 (1)
[69] Section 85 (2)
[70] Petroleum (Exploration, Development and Production) Act, No. 3 of 2013
[71] National Oil and Gas Policy for Uganda, February 2008 & the Energy Policy for Uganda, September 2002, Ministry of Energy and Mineral Development.

1. Public Policy

Public policy is one of the grounds for setting aside arbitral awards that a national court may consider of its own initiative. However, courts have adopted a different approach to public policy, especially with regard to national public policy. In fact, international public policy plays an important function not only in the exclusion of the application of some national rules but it can also influence the decision of arbitrators when fundamental notions of contractual morality or basic interests concerning international trade are involved.[72] It is meant to protect interests, which cross borders, and is applicable in international cases.[73]To this extent, specific domestic public policy may not be applicable to international commercial arbitration.

2. The Doctrine of Arbitrability

Arbitrability is also one of the grounds for setting aside arbitral awards that a national court may consider of its own initiative. Arbitrability refers to the determination of the type of disputes that can be settled through arbitration and those that are the domain of the national courts. It deals with the question of whether specific classes of disputes are barred from arbitration because of the subject matter of the dispute.[74] Courts often refer to "public policy" as the basis of the bar.[75] The problem arises when a matter that is arbitrable in one jurisdiction fails the test of arbitrability in a different jurisdiction.

[72] Harmathy, A. 'New Experiences of International Arbitration with special emphasis on legal debates between parties from Western Europe and Central and Eastern Europe'. Electronic Journal of Comparative Law, vol. 11.3 (December 2007), p. 12. Available at http://www.ejcl.org [Accessed on 15/06/2015]
[73] Adeline, C., 'Transnational Public Policy in Civil and Commercial Matters'. *Law Quarterly Review*, 128 pp. 88-113, 2012
[74] Laurence Shore "Defining 'Arbitrability'-The United States vs. the rest of the world", *New York Law Journal,*
2009, available at http://www.gibsondunn.com/publications/Documents/Shore-DefiningArbitrability.pdf, [Accessed on 15/06/2015].
[75] Ibid, page 1

3. Scope of Court's Control of Arbitral Awards

In the Ugandan case of *East African Development Bank vs Ziwa Horticultural Exporters Ltd*[76] it was observed that: "Sec. 6[77] of the *Arbitration and Conciliation Act*, provides for mandatory reference to arbitration of matters before court which are subject to an arbitration agreement; where court is satisfied that the arbitration agreement is valid, operative and capable of being performed, it may exercise its discretion and refer the matter to arbitration." This shows the Ugandan courts' support for arbitration although at the risk of such discretion being misused. Under section 5(1) of the Ugandan Act on Arbitration and Conciliation, the Court should exercise its discretion to satisfy itself that the arbitration agreement is valid, operative and capable of being performed.

4. National and Political Bias

The fact that recognition and enforcement procedures are left to the municipal courts and laws has been criticised because of the national and political bias in the forum place which is especially strong when the party against whom the enforcement is sought is the state itself or one of its nationals. Such a situation would be worsened if the subject matter of the dispute is something that greatly contributes to the revenue of the country, for example, issues to do with energy and natural resources.

5. Institutional Capacity

There exists a problem on the capacity of existing institutions especially the CADRE to meet the demands for international commercial arbitration. There is still much more needs to be done in order to enhance their capacity in terms of their number, adequate staff and finances to ensure that they are up to task in facilitating international commercial arbitration.

Findings

This paper has been concerned with international tax arbitration and petroleum dispute resolution. In essence, it examined the extent of effectiveness of international tax arbitration and how it can reduce petroleum tax disputes. To achieve this, the main

[76] High Court Misc. Appln. No. 1048 of 2000 arising from Companies Cause No. 11 of 2000

[77] (present sec. 5)

objectives of the research were to examine the legal framework on international tax arbitration; to determine the appropriate forum for arbitration in the petroleum industry in Uganda; and to establish the challenges/obstacles to effective enforcement of arbitration awards in Uganda.

As regards the first objective, the research found that there are several international instruments on international tax arbitration and focused on the OECD Model Tax Convention, the EC Arbitration Convention, the New York Convention and the United Nations Commission on International Trade Law (UNCITRAL). The research also found that Uganda has domesticated the New York Convention and the UNCITRAL Model law in the Arbitration and Conciliation Act, Cap 4, Laws of Uganda and thus the research noted these as the most important legislation on international tax arbitration for Uganda.

On the second objective, the research found that there are basically two places where petroleum tax arbitration can take place in Uganda. The first is at the Centre for Arbitration and Dispute Resolution as established by the Arbitration and Conciliation Act. However, it is important to point out that CADRE in Uganda plays a more active role in domestic arbitration. International tax arbitration would however require minimal intervention by the institution especially in areas of making appropriate rules, administrative procedure and forms for effective performance of the arbitration, establishing and enforcing a code of ethics for arbitrators. Trite to note is that where Parties to an international arbitration choose the applicable rules, CADRE would seem to interfere if it imposed the Ugandan rules on the process even if one of the parties is Ugandan. Uganda can therefore come up with a transnational tax arbitration framework and streamline its domestic framework with the same so that the CADRE can be more efficient.

The alternative place to petroleum tax arbitration according to the research, are the Tax Appeals Tribunals as established by the Tax Appeals Tribunals Act of Uganda. It was found that there is no provision under the Tax Appeals Tribunals Act allowing the Tribunal to refer proceedings before it to arbitration. In fact, independence of the Tribunal is emphasized. This is a clear indication that the statute on the tax appeals Tribunals in Uganda does not aid tax arbitration at all and at the moment cannot be the right forum for petroleum tax arbitration unless it is amended to make provision for it. The research noted however that

this would be the best option as a forum for petroleum tax arbitration because tax is a technical area that needs a lot of expertise.

On the last objective, the research found that the major challenges to enforcement of arbitral awards in Uganda are: public policy due to conflict between domestic public policy and international public policy; the doctrine of arbitrability where problems arise when a matter that is arbitrable in one jurisdiction fails the test of arbitrability in Uganda, due to differences in legal frameworks; the scope of the courts' control of arbitral awards, where court is to determine the validity of an arbitration agreement as a pre-requisite to referring a matter to arbitration; and national and political bias.

Recommendations

The research recommends the following to improve the performance of international tax arbitration in order to solve petroleum tax disputes:

It is noteworthy that the Centre for Arbitration and Dispute Resolution (CADRE) makes available to individuals and their legal counsel, at no charge, pre-drafted model arbitration and mediation clauses for inclusion in their contracts. This is a positive step towards helping parties avoid difficulties that may arise if they were to have their subject matter declared non-arbitrable when the dispute has already arisen. A harmonized legal and institutional framework would go a long way in ensuring that arbitrability does not become a hindering factor in conducting petroleum tax arbitration and subsequently enforcing the arbitral awards in Uganda. The Tax Appeals Tribunal can have a harmonized legal instrument of operation with CADRE when it comes to petroleum tax arbitration to maximize the performance of the institutional framework in Uganda where the two institutions can share expertise.

One of the impediments to be overcome in using international tax arbitration in fostering effective enforcement of arbitral awards is harmonizing what entails public policy as a ground for setting aside arbitral awards in international commercial arbitrations. This way the issue of conflict of laws would be avoided and petroleum tax disputes would be resolved faster.

Uganda needs to develop legal institutions that are not dependent on existing public institutions (which often are either nonexistent or unreliable) that are capable of operating independently of existing public institutions and that, preferably, are

allowed to operate with a promise that national governmental and judicial institutions will not interfere unduly with their independent operation and decisions. This would make tax arbitration smoother and more predictable, which would attract the players in the petroleum industry to consider it over litigation as a way of resolving tax disputes.

The Tax Appeals Tribunals Act needs to be amended to make provision for the Tribunal to refer proceedings before it to arbitration. This would foster the resolution of petroleum tax disputes through arbitration.

Since parties to an international arbitration choose the applicable rules, CADRE would seem to interfere if it imposed the Ugandan rules on the process even if one of the parties is Ugandan. Uganda can therefore come up with a transnational tax arbitration framework and streamline its domestic framework with the same so that the CADRE can be more efficient, especially in terms of international tax arbitration.

More resources and good will should be channeled into arbitration of tax disputes as this is a looming problem with the development of the petroleum sector. The CADER should receive more revenue and staff in order to carry out its tasks effectively and efficiently.

The laws governing the petroleum upstream, midstream and downstream sector need to be amended to make provision for the settlement of petroleum tax disputes through arbitration. This is because leaving the powers entirely to the parties to petroleum contracts makes the system weak. This gives leeway for parties to abandon arbitration and opt for litigation. There should be more certainty to encourage the development of arbitration of tax disputes in the industry.

The scope of courts' control on arbitration should be reduced. The Arbitration and Conciliation Act should be amended and specifically provide that any dispute should be referred to arbitration in case of existence of an arbitration clause in a contract or an arbitration agreement. The need for application to court for the reference should be declared irrelevant by the statute and the need to determine the validity of the agreement should be left to the domain of the arbitrator and not court to avoid abuse of discretion by the courts and finally, the stakeholders should fasten the operationalisation of the Petroleum Authority of Uganda and this should work hand in hand with CADER and the Tax Appeals

Tribunals to promote arbitration in the settlement of petroleum tax disputes.

Conclusion

The fact that Uganda domesticated the basic laws on international arbitration like the UNCITRAL Model law and the New York Convention, does not translate into efficiency of arbitration in the country. The system is riddled with challenges especially arbitrability which is a big problem due to difference in legal regimes and the fact that the lex arbitri and lex loci arbitri have to be in harmony for enforcement of arbitral awards to occur. The most important concern about whether Uganda is really ready for tax arbitration points to the forum for arbitration in the petroleum industry in Uganda. It has been observed that there is a lot of uncertainty on the forum and this can only be cleared with help of several amendments in the legislation. What is definite is that for arbitration to be efficient in the settlement of petroleum disputes in Uganda, the first step is to make it mandatory.

STATUS OF PIRATES: COMBATANTS UNDER INTERNATIONAL HUMANITARIAN LAW OR CRIMINALS UNDER HUMAN RIGHTS LAW?

By

Kasim Balarabe*

Abstract

The purpose of this article is to clarify whether under current international law, pirates are to be treated as combatants or criminals. It also considers implications of treating pirates as combatants. Under international law, piracy is a private act perpetrated by private individuals for private gains and accordingly pirates are considered as criminals. They are required to be treated under human rights rules applicable in peacetime. International law rules applicable to the repression of piracy are contained in the United Nations Convention on the Law of the Sea (UNCLOS), 1982. Under UNCLOS every state has the right to arrest, capture and prosecute pirates under its domestic law. UNCLOS did not consider pirates as combatants. Combatant is a status under the laws of war which is to be determined by the application of certain rules and criteria. These rules and criteria are contained in the Geneva Conventions of 1949 and their Additional Protocol I. The rules apply only when an armed conflict exists while the status is available only if a conflict is international. Currently, the status is restricted to regular armed forces, resistance movements and militias belonging to the armed forces who have complied with obligation to distinguish themselves and carry their arms openly, and persons participating in levée en masse (civilians who took up arms against the invading forces). Combatants are entitled to directly participate in hostilities and have right to be treated as prisoners of war if captured. Currently, international law does not view acts of piracy as acts of armed conflict and pirates do not satisfy combatant status criteria hence laws of war do not apply. Analysis of Security Council resolutions which authorized the use of all necessary means to repress piracy demonstrated that pirates are still considered as criminals and are to be treated under human rights rules applicable in peacetime. Treating pirates as combatants would be counter-productive and would defeat the purpose of the fight against piracy because it would entail giving them the right to participate in hostilities, the right not to be prosecuted for taking up arms and the right to be treated as prisoners of war with all its attendant consequences.

Introduction

Pirate attacks against vessels continue to be of concern to the international community. Over a period of time, the international

community has made several attempts to combat the menace ranging from the recognition of universal jurisdiction to arrest and prosecute pirates,[1] enacting domestic legislation to criminalize piracy, to the recent Security Council resolutions authorising "all necessary means" against pirates in the context of Somalia.[2] The authorisation to use "all necessary means" including military operations against pirates posed many questions on how pirates are to be treated under international law. Questions such as whether pirates are to be treated as combatants under the laws of war or criminals under the law enforcement paradigm become of global interest. Answers to this question require identifying whether acts of piracy amount to an international armed conflict and whether pirates have satisfied the criteria for combatant status.

The existence of an armed conflict situation is a question of fact and the law applicable depends on whether the conflict is international or non-international. Combatant status is only available in an international armed conflict.[3] International armed conflict exists whenever there is a resort to armed force between States while non-international armed conflict exists when there is protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.[4] Situations short of non-international armed conflict are not governed by the laws of war; they are to be treated under the laws applicable in peace-time.[5]

Under the laws of war, "combatant" is a status accorded to certain categories of privileged individuals if they satisfy the

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[1] *United Nations Convention on the Law of the Sea Convention* art. 105 (1982) *available at* http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

[2] Security Council Resolution 1816, para. 7(b), U.N Doc. S/RES/1816 (Jun. 2, 2008); Security Council Resolution 1838, para. 3, U.N Doc. S/RES/1838 (Oct. 7, 2008); Security Council Resolution 1846, para. 10(b), U.N Doc. S/RES/1846 (Dec. 2, 2008); Security Council Resolution 1851, para. 6, U.N Doc. S/RES/1851 (Dec. 16, 2008)

[3] Robert Kolb and Richard Hyde, AN INTRODUCTION TO INTERNATIONAL LAW OF ARMED CONFLICT, 69 (2008)

[4] *Prosecutor v Tadić,* Case No ICTY-94-1-AR72, para. 70 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (Oct. 2, 1995)

[5] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, art. 1(2) (1977), *available at*. http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument

relevant criteria. The criteria are contained in The Hague Regulations,[6] the Geneva Convention III,[7] and Additional Protocol I to the Geneva Conventions.[8] Generally the following are considered combatants: members of the regular armed forces; members of militia or volunteer corps and resistance movement if they belong to a party to a conflict and if they fulfil certain conditions; and persons forming part of *levée en masse.* An individual who is not a combatant is a civilian under the laws of war,[9] and if such person commits crime, the crime will be treated under the law applicable in peace-time. However, a State has formulated a third category status called "unlawful combatant".[10] This status however, is not sanctioned by the laws of war.

Recognition as a combatant, entitles the person to certain rights and privileges. These include the right to carry arms, to participate in hostility,[11] kill and be killed without warning, the right to capture enemy forces and detain them as prisoners of war and if captured the right to be treated as a prisoner of war[12] and to be released and repatriated at the end of the hostilities.[13] Combatants may neither be tried nor imprisoned for merely participating in hostility unless such an individual has committed an offence

[6] *The Hague Regulations annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land*, art. 1&2 (1907), *available at* http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6

[7] *Geneva Convention (III) relative to the Treatment of Prisoners of War,* art. 4(A)(1-3, 6) (1949), *available at* http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument

[8] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts,* art. 43 (1977), *available at* http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument

[9] Ibid. *A*rt. 50(1)

[10] "Persons who belong to an armed group, but do not fulfil the (collective or individual) requirements for combatant status". Knut Dormann, *The Legal Situation of Unlawful/Unprivileged Combatants*, 849 INTERNATIONAL REVIEW OF THE RED CROSS, 45-75 (March 2003)

[11] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, art. 43(2) (1977) *available at* http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument

[12] *Geneva Convention (III) relative to the Treatment of Prisoners of War*, art. 5 (1949), *available at* http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument

[13] *Geneva Convention (III) relative to the Treatment of Prisoners of War,* art. 118-119 (1949) *available at* http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument

recognised under the laws of war.[14] Combatants are however under obligations to comply with laws and customs of war.[15]

The definition and nature of piracy do not permit the situation to amount to armed conflict and pirates do not satisfy the criteria for combatants' status: this is because pirates are not considered armed forces of any State; they do not fall under any of the categories of combatants recognised under the laws of war; they do not direct their attack against any State forces; and pirates do not fall under any of the usual recognised definition of armed group in a non-international armed conflict.[16] These facts render the laws of war not applicable to pirates. Pirates are simply private civilians using violence for private gains.[17]

Presently, there is no legal provision at the international level pointing towards treating pirates as combatants. The relevant international instruments applicable to piracy situations such as the Convention on the High Seas and United Nations Convention on the Law of the Sea treat pirates simply as criminals liable to capture and prosecution either under universal jurisdiction principle, relevant international law or domestic criminal law.

The United Nations Security Council resolutions adopted in the context of Somalia and which authorised "all necessary means" to be taken against pirates require such measures to be consistent with international law governing actions against piracy and other obligations under international law including the laws of war.[18] The resolutions did not confer the status of combatants to

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[14] Bin Haji Mohamed Ali and Another v. Public Prosecutor (1969) 1 A.C. 430 *available at* http://www.icrc.org/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/383128666c8ab799c1256a1e00366ad3!OpenDocument. Also H. Lauterpacht (ed.) L. Oppenheim, INTERNATIONAL LAW: A TREATISE, 7th Edition, Vol. II, 575 (1952).

[15] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, art. 44 (1977), *available at* http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument

[16] Douglas Guilfoyle, *The Laws of War and the Fight Against Somali Piracy: Combatants or Criminals?,* 10(1) MELBOURNE JOURNAL OF INTERNATIONAL LAW 141 (2010) *available at* http://www.austlii.edu.au/au/journals/MelbJIL/2010/6.html)

[17] *United Nations Convention on the Law of the Sea*, art. 101 (1982) available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

[18] Security Council Resolution 1816, para. 7(b), U.N Doc. S/RES/1816 (Jun. 2, 2008); Security Council Resolution 1838, para. 3, U.N Doc. S/RES/1838 (Oct. 7, 2008); Security Council Resolution 1846, para. 10(b), U.N Doc. S/RES/1846 (Dec. 2, 2008); Security Council Resolution 1851, para. 6, U.N Doc. S/RES/1851 (Dec. 16, 2008)

pirates, but emphasised the need for States to cooperate with one another in repressing piracy through capture and prosecution. There is distinction between the use of force authorised by the Security Council against Somalia pirates and recourse to force under the laws of war. The use of force under the resolutions is for policing purposes and does not confer any status to the pirates other than that of criminals under criminal law.[19] Such use of force is required to comply with the principles of legality, necessity and proportionality.[20]

This article on the status of pirates, analyses relevant international law provisions including resolutions of the Security Council in order to clarify whether pirates are to be treated as combatants or criminals and which laws should govern their treatment.

Piracy

Piracy has for long been considered a crime against humanity and States have struggled to combat the crime through different means and methods. Generally, States have considered piracy as a crime subject to universal jurisdiction; some States have enacted domestic legislation criminalising it and providing for its prosecution and recently, a multinational coalition approach is being undertaken to combat the crime.

Definition and Nature

The current legal framework for the repression of piracy is the United Nations Convention on the Law of the Sea (UNCLOS) which defined piracy and provides for actions that may be undertaken to repress it. It has been defined as:

a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

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[19] Douglas Guilfoyle, *The Laws of War and the Fight Against Somali Piracy: Combatants or Criminals?,* 10(1) MELBOURNE JOURNAL OF INTERNATIONAL LAW 141 (2010) *available at* http://www.austlii.edu.au/au/journals/MelbJIL/2010/6.html)

[20] United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Principles 4,5,8,9,10 (1990) *available at* http://www2.ohchr.org/english/law/firearms.htm

i. on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
ii. against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).[21]

Several States have adopted legislation defining it with some expanding or incorporating the above definition. Differences in the definition have implications among others on the ingredients necessary for the establishment of the offence as well as the jurisdiction in the prosecution of pirates. For the purposes of this memo, the definition contained in UNCLOS is adopted because is it considered as a reflection of customary international law.[22]

The elements of the crime of piracy are the following:

1. the acts must have been committed on the high seas or any other place outside the jurisdiction of any state. Acts committed within the territorial jurisdiction of a State are governed by the domestic laws of the coastal state and are not subject to universal jurisdiction.[23] The prevailing view which seemed to have been adopted by the Security Council and which is in consonance with State practice is that pirates who have escaped to territorial waters after having committed piratical acts are subject to the jurisdiction of the coastal State, unless otherwise consented to, the doctrine of "reversed hot pursuit" does not apply.[24]
2. the act must be committed by a private ship. This connotes the essential private nature of piracy. Warships and

[21] *United Nations Convention on the Law of the Sea*, art. 101 (1982) available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf
[22] Martin D. Fink and Richard J. Galvin**.** *Combating Pirates off The Coast of Somalia: Current Legal Challenges*. LVI NETHERLANDS INTERNATIONAL LAW REVIEW 367, 369, 2009
[23] Ibid. p. 371.
[24] Ibid. p. 372.

Government aircrafts used by pirates they are for such time considered private.[25]

3. a second ship is required. In the hijacking of *Achillo Lauro* in October 1985 by four members of the Palestine Liberation Front, the failure to satisfy the second ship rule rendered the situation not that of piracy.[26]
4. the motive for the acts must be for private ends. It must be self-enrichment as opposed to furthering any governmental or ideological policy or pursuit of a political power. [27] This requirement was included in the definition to differentiate between acts of insurgency in which insurgents solely attack vessels of the government they sought to overthrow.[28] The United States Supreme Court in the case of *United States v. The Brig Malek Adhel*[29] considered piratical act as act of aggression which is without the sanction of public or sovereign authority.

An important test which will differentiates public acts and acts of piracy is whether such acts were authorised by a state or could be attributed to a state. This is because acts which have no state sanction or involvement are regarded to be in pursuance of a private end and hence will be regarded as acts of piracy.[30] Pirates make no distinction among vessels.[31]

Pirates as private actors and piracy as being for private ends, their status and treatment are regulated by the laws applicable in combating piracy: relevant provisions in the Convention on the High Seas, the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA).

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[25] *United Nations Convention on the Law of the Sea Convention* art. 102 (1982) *available at* http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

[26] Martin D. Fink and Richard J. Galvin**.** *Combating Pirates off The Coast of Somalia: Current Legal Challenges*. LVI NETHERLANDS INTERNATIONAL LAW REVIEW 367, 374, 2009

[27] Ibid.

[28] Robin Geiß and Anna Petrig, PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN 61 (2011)

[29] *United States v. The Brig Malek Adhel*, 43 U.S. 2 How. 210, 210 (1844).

[30] Robin Geiß and Anna Petrig, PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN 61 (2011)

[31] Sergei Oudman, *Piracy Jure Gentium & International Law*, (Feb. 24, 2010), *available at* http://www.e-ir.info/?p=3290

Status of Pirates under International Law

This section identifies the laws applicable to pirates and their status under international law.

Relevant International Instruments

International instruments relevant to the repression of piracy are the Convention on the High Seas 1958, the UNCLOS 1982 and SUA 1988. The rules contained in the Convention on the High Seas were adopted without modification by UNCLOS. SUA was designed to suppress criminal activities committed against ships which threatened the safety of maritime navigation. In this section only UNCLOS and SUA will be considered.

Convention on the Law of the Sea 1982 (UNCLOS)

UNCLOS generally provides details on the rules applicable to the high sea and the rights and duties of States with respect to the high sea. Specific rules applicable to piracy are contained in articles 100 to 107 and 110. These rules are therefore to ensure safety of maritime activities and not to regulate how hostilities are to be conducted. The UNCLOS approach to piracy and its repression is in the context of law enforcement. Pirates are treated as private criminal individuals subject to arrest and prosecution in domestic courts.

The provisions commenced with the recognition of the common duty of all States to cooperate in the repression of piracy.[32] Pirates are considered as enemies of mankind, and with this status, every State has the universal jurisdiction, on the high seas, to arrest them seize the ship and the property onboard and prosecute the pirates in its domestic courts in accordance with its legislations.[33] This underscores the obligation of every State to contribute to the fight against a common enemy and not against an enemy of a specific or particular State. The obligation is contextually on the application of relevant laws in the arrest and prosecution of pirates. The terms and language used in the provision above are typical to

[32] *United Nations Convention on the Law of the Sea Convention* art. 100 (1982) *available at* http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf
[33] Ibid. art. 105

law enforcement paradigm and its enforcement must be undertaken with extreme caution.[34]

Warships, military aircrafts and other ships or aircrafts clearly with identification mark as having been authorised by a government are in principle the only means to be used in seizing pirates' ships.[35] The use of military means must however be seen in context and the unique nature of the situation. Most States do not have naval police or police specially trained for high sea law enforcement operations. The use of military means seems not only logical but necessary. The commentary to article 45 of Law of the Sea Convention 1956 which has similar provision with article 107 UNCLOS states that pirates are to be treated "with great circumspection, so as to avoid friction between States" hence it was considered suitable for warships and military aircrafts to be used.[36]

Similarly, interpretation of the use of military means in pirate arrest and seizure must take cognizance of other UNCLOS provisions regulating the treatment of pirates. International law as reflected in UNCLOS does not authorise or allow for the sinking of pirates' ships, and does not also expressly permits attacks against pirates.[37] This further underscores the criminal status of pirates as opposed to combatants which international law allows engaging and elimination in armed conflict situations. Treating pirates as combatants will render several provisions of UNCLOS including the definition contradictory and redundant.

Additionally, undertaking law enforcement is not confined exclusively to the Police. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF) defined a law enforcement officer to include:

> …all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. In countries where police powers are exercised by military authorities, whether uniformed or not, or by State

[34] Ibid. art. 106

[35] Ibid. art. 107

[36] International Law Commission, *Articles concerning the Law of the Sea with commentaries*, 11 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1956, *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/8_1_8_2_1956.pdf

[37] Robin Geiß and Anna Petrig, PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN 69 (2011)

security forces, the definition of law enforcement officials shall be regarded as including officers of such services.[38]

International law therefore did not prohibit the use of military or paramilitary forces in law enforcement operations. Further confirming the law enforcement nature of the situation, seized ships used by pirates may continue to retain their nationality.[39]

The conclusion is that, since piracy becomes a subject of national and international concern, it has been recognised as a serious crime and pirates have always been treated as criminals subject to arrest and prosecution. Although combating piracy is done through military means and methods, it does not convert the status of pirates from criminals to combatants.[40] "It is still a reaction against an international criminal offence and must legally be dealt within that legal framework."[41]

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (SUA)[42]

This Convention is relevant in ascertaining the status of persons who have committed certain acts it sought to proscribe. The status of persons who have committed acts falling under article 3[43]

[38] United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, (1990) *available at* http://www2.ohchr.org/english/law/firearms.htm

[39] *United Nations Convention on the Law of the Sea Convention* art. 104 (1982)

[40] Martin D. Fink and Richard.J. Galvin**.** *Combating Pirates off The Coast of Somalia: Current Legal Challenges*. LVI NETHERLANDS INTERNATIONAL LAW REVIEW 367, 388, 2009

[41] Ibid.

[42] *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (2008), *available at* http://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf

[43] Article 3 provides:

1. Any person commits an offence if that person unlawfully and intentionally:

(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

of SUA is essentially that of criminals and the treatment is to be in accordance with human rights rules in peacetime. The Convention requires persons who have committed any of the offences to be brought before a court for prosecution.[44] Pirates' acts are essentially of a nature similar to the offences proscribed under the article. Treatment of pirates is therefore analogous to the treatment of criminals under SUA and this makes human rights rules in peacetime applicable.

The preamble to the Convention also makes reference to terrorism, its impacts, including terrorism aboard or against a ship and the call for the elimination of its underlying causes.[45] Response to a question whether piracy could be linked to terrorism depends on the analysis of each situation. In terms of substantive offence, there is however an important distinction between piracy and terrorism. Terrorism requires the existence of political or ideological motive while piracy is for private ends. This however, does not mean that terrorism cannot be waged from the sea as practice has shown.[46] Maritime terrorism has been used by Al Qaeda, both prior to and after the September 11 attacks.

There is currently no evidence showing a link between piracy and terrorism. During an expert meeting on combating piracy in Rome a conclusion was reached on this matter that, "[t]here is to date no evidence of a link between piracy and terrorism in Somalia. This is confirmed by all major institutions and entities operating in the region."[47]

Piracy therefore continues to be treated under human rights rules applicable in peacetime and pirates continue to be treated as criminals and not combatants.

(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
(f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
(g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

[44] *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, arts. 5 and 10 (2008), *available at* http://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf

[45] Ibid. preambular paras. 4, 8,9 and 10, (2008), *available at* http://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf

[46] The terrorist attack in Mumbai in 2008 came from the Sea.

[47] Istituto Affari Internazionali, *Report of the Conference on Addressing the Resurgence of Sea Piracy: Legal, Political and Security Aspects, Rome*, p. 4 (Jun. 16, 2009), *available at* http://www.iai.it/pdf/DocIAI/iai0916.pdf

Combatant Status under the Laws of War

Combatant is a special status under the laws of war which is accorded to certain privileged individuals. It entitles them to some rights and privileges as well as subjects them to the obligations of observing some rules in the conduct of hostility. The category of persons entitled to this status is restricted and in a given situation, determining who is considered a combatant requires examining whether the law of war has become applicable.

Applicability of the Laws of War

Laws of war are applicable only when an armed conflict situation exists. Additionally, where a situation qualifies as armed conflict, the conflict must be classified for the purposes of identifying the relevant status to be accorded to those caught or affected by it. This is because combatant status is only available in an international armed conflict.[48]

Existence of Armed Conflict

Existence of armed conflict is a question of facts to be determined on a case by case basis. There is no treaty provision defining what would amount to an armed conflict; however there are judicial decisions of international tribunals which provided criteria. According to these tribunals, international armed conflicts exist whenever there is a resort to armed force between States while non-international armed conflicts exist when there is protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.[49] Situations short of non-international armed conflict are not governed by the laws of war; they are to be treated under the laws applicable in peacetime.[50]

International Armed Conflict

Article 2 common to the Geneva Convention states that:

> "…, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two

[48] Robert Kolb and Richard Hyde, AN INTRODUCTION TO INTERNATIONAL LAW OF ARMED CONFLICT, 69 (2008)

[49] *Prosecutor v Tadić,* Case No ICTY-94-1-AR72, para. 70 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (Oct. 2, 1995)

[50] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, art. 1(2) (1977), *available at*. http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument

> or more of the High Contracting Parties, even if the state of war is not recognized by one of them.[51]
>
> The ICRC commentary on the provision explains that:
> Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims.[52]

The existence of international armed conflict activates the application of relevant international law rules applicable between the parties such as the Geneva Conventions and Protocol 1Additional to the Geneva Conventions. It is only when this type of conflict exists, those involved would need to be classified as either combatants or civilians.

Non-International Armed Conflict

The International Criminal Tribunal for the former Yugoslavia (ICTY) states that a non-international armed conflict exists when there is a "protracted armed violence between governmental authorities and organized armed groups, or between such groups within a State."[53] Thus, in the view of the ICTY, for there to be a non-international armed conflict:

- non-state armed groups must carry out protracted hostilities; and
- these groups must be organised.

There are two key treaty provisions which set thresholds for identifying the law applicable in a non-international armed conflict:

- Common Article 3 to the 1949 Geneva Conventions; and
- Article 1 of 1977 Additional Protocol II to the 1949 Geneva Conventions.

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[51] For instance, *Geneva Convention (III) relative to the Treatment of Prisoners of War,* art. 2 (1949), *available at* http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument

[52] International Committee of the Red Cross, *Commentary on the Four Geneva Conventions of 1949*, *available at* http://www.icrc.org/ihl.nsf/COM/375-590005?OpenDocument

[53] *Prosecutor v Tadić,* Case No ICTY-94-1-AR72, para. 70 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (Oct. 2, 1995)

The threshold varies depending on which of the provisions is applied. Generally, article 3 common to the Geneva Conventions has a lower threshold and does not require the involvement of government forces in the conflict or the control of a territory by an armed group as opposed to the provision of article 1 of Protocol II. A war of national liberation is considered as international armed conflict.[54]

Criteria for Combatant Status

Combatants are generally belligerents recognised under the laws of war. It is a status which affords the privilege of taking direct part in hostilities. The criteria for determining persons entitled to the status and how they are to be treated can be found in the Hague Convention (IV), the Geneva Convention (III) and the Protocol 1 Additional to the Geneva Conventions. All persons recognised as belligerents under The Hague law are also recognised as combatants under the Geneva law and as such only the Geneva Convention and Additional Protocol I will be analysed here.

Generally, combatant status has been restricted to the following category of individuals:

1. a member of the armed forces of a party to an international armed conflict,[55] who respects the obligation to distinguish himself/herself from the civilian population;
2. a member of another armed group,[56] who belongs to a party to the international armed conflict and who fulfils as a group the following conditions:
    i. being under responsible command
    ii. wearing a fixed distinctive sign
    iii. carrying arms openly
    iv. respecting the laws and customs of war, and who also at the individual level, respects the obligation to distinguish himself/herself from the civilian population;

[54] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts,* art. 1 (4) (1977), *available at* http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument

[55] *Geneva Convention (III) relative to the Treatment of Prisoners of War,* art. 4(A)(1) (1949), *available at* http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument

[56] Ibid art. 4(A)(2)

3. a member of another armed group,[57] who is under a command responsible to a party to the international armed conflict and subject to an internal disciplinary system, under the condition that this member respects, individually, at the time of capture[58] the obligation to distinguish himself/herself from the civilian population:[59]

i. while engage in an attack or a military operation preparatory to an attack

ii. in exceptional situations (for instance, in wars of national liberation) by carrying arms openly

(a) during each military engagement, and
as long such a person is visible to the enemy while engaged in a military deployment preceding the launching of an attack in which such a person is to participate.

4. civilians participating in a "*levée en masse*": these are civilians in a non-occupied territory who took up arms to resist the invading forces without having had time to form themselves into regular armed unit provided they carry arms openly and respect the laws and customs of war.[60]

A person who is not a combatant is considered a civilian and his/her treatment will be in accordance with laws applicable to civilians.[61] However a third category known as "unlawful combatant" has been recently argued.

"Unlawful Combatant" Theory[62]

Recently, the Government of the United States of America has formulated a third category referred to as "unlawful combatant"

[57] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts,* art. 43 (1977), *available at* http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument

[58] Ibid. art. 44(5)

[59] Ibid. art. 44(3)

[60] *Geneva Convention (III) relative to the Treatment of Prisoners of War,* art. 4(A)(6) (1949), *available at* http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument

[61] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts,* art. 50(1) (1977), *available at* http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument

[62] "Persons who belong to an armed group, but do not fulfil the (collective or individual) requirements for combatant status". Knut Dormann, *The Legal Situation of Unlawful/Unprivileged Combatants*, 849 INTERNATIONAL REVIEW OF THE RED CROSS, 45-75 (March 2003)

in the context of war against terror. It defines an unlawful combatant as:

i. a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

ii. a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.[63]

Unlawful combatant theory was formulated during the war on terror campaign against Taliban and Al-Qaeda in Afghanistan. Because of the unique nature of the conflict, the way it was fought and the parties involved, the United States Government considered some captured individuals not entitled to the status of combatant or its treatments on the basis either they belong to a party not eligible for the status or their failure to satisfy some obligations necessary for the status such as distinguishing themselves from the civilian population.

Unlawful combatant theory effectively denies certain rights and privileges available to a regular combatant such as the right to be treated as a prisoner of war, the right not to be prosecuted or imprisoned on account of taking part in the hostility and the right to be repatriated after the conflict. In some situations, also, the United States Government has adopted the method of "targeted killing" against some persons it has characterised as terrorist.

Rights and Privileges of Combatants

There are rights and obligations flowing from the recognition of combatant status. Generally, the effect of the status is in two folds: first, combatants are entitled to immunity from prosecution under criminal law for taking direct part in the hostilities unless and until they have committed offences recognised

[63] *United States of America, Military Commissions Act* Sec. 948a, (2006) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s3930enr.txt.pdf

under the laws of war.[64] Combatants are entitled to directly participate in the hostilities, to kill and be killed without warning.[65] This sharply distinguishes the paradigm of hostilities from the paradigm of law enforcement. In law enforcement warning must be given unless the circumstances do not permit and even in such situations the force used must be strictly necessary to subdue the suspected criminal.[66]

Secondly, combatants have the right to capture enemy combatants and detain them as prisoners of war (POWs) and conversely, if they are captured to be treated as POWs[67] and to be released and repatriated at the end of the hostilities.[68] The law of war has provided a regime for the treatment of POWs which failure to observe and respect exposes the violating State to liability.[69] Combatants must however, observe the obligation of distinguishing themselves from the civilian population, carry their arms openly and comply with laws and customs of war.[70]

Pirates and Combatant Status

Acts of piracy situations fall short of the requirement for the existence of an international armed conflict. Pirates are not *de*

[64] Robert Kolb and Richard Hyde, AN INTRODUCTION TO INTERNATIONAL LAW OF ARMED CONFLICT, 203 (2008); Bin Haji Mohamed Ali and Another v. Public Prosecutor (1969) 1 A.C. 430 *available at* http://www.icrc.org/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/383128666c8ab799c1256a1e00366ad3!OpenDocument. Also H. Lauterpacht (ed.) L. Oppenheim, INTERNATIONAL LAW: A TREATISE, 7th Edition, Vol. II, 575 (1952).

[65] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, art. 43(2)

[66] United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, (1990) *available at* http://www2.ohchr.org/english/law/firearms.htm. Principle 4 provides that "Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result." Principle 5 states that "Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; (b) Minimize damage and injury, and respect and preserve human life; (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment.

[67] *Geneva Convention (III) relative to the Treatment of Prisoners of War*, art. 5.

[68] Ibid. art. 118-119

[69] Ibid. art. 12-125

[70] See section on criteria for combatant status

facto or *de jure* agents of any government, they have never claim to be and no single State has recognised or adopt pirates' actions as its act or acknowledge that it had instructed them. Similarly, attributing pirates' acts to a State even in the context of Somalia doesn't seem to be likely at the moment. Pirates are mostly not motivated by any political reason. Again, pirates do not have any specific State or its forces as a target. Laws of war regulating international armed conflict do not therefore apply.

Additionally, international law currently views piracy as being motivated by private ends and pirates are considered as private actors. This position together with the requirement of arresting, prosecuting and treating pirates as criminals under domestic criminal law do not provide reasonable ground to suggest that pirates can be treated as combatants.

Whether fight against pirates qualifies as non-international armed conflict depends on whether the requirements for the existence of non-international armed conflict have been met. There is however, no combatant status in non-international armed conflict.

Pirates' mode of operation demonstrated the use of violence to subdue a vessel and its crew and the Security Council Resolution 1838[71] has pointed to the heavier weapons pirates use and growing sophistication in the organisation and method of attack they adopt. The situation would only qualify as non-international armed conflict when the violence is protracted or its level of intensity has reached the threshold and when the group has organised themselves along military lines with clear chain of command as held by the ICTY. The existence of political or ideological motive needs to be shown which will have the effect of characterising it as a non-piratical act. Where the situation qualifies as non-international armed conflict assuming it is taking place in a State's territory, the rule under article 3 common to the four Geneva Conventions[72] as minimum must be observed and Protocol II

[71] Security Council Resolution 1838, preamble para. 4, U.N Doc. S/RES/1838 (Oct. 7, 2008)

[72] In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion

Additional to the Geneva Convention may become applicable depending on the situation.

Under the current nature and practice of pirates, it is difficult to reach a definite conclusion that the situation has reached a level of being qualified as non-international armed conflict. The current practice demonstrated that when an encounter takes place between pirates and naval forces, it's usually sporadic, brief and involve only small-scale fire.[73]

Implications of Treating Pirates as Combatants

Treating pirates as combatants would be counter-productive and defeats the purpose of UNCLOS provisions and the concept of universal jurisdiction. The status would accord pirates the right to use force and fire arms lawfully, kill, capture, detain enemy combatants and would not be subjected to criminal prosecution unless they have violated the laws of war. Similarly, if pirates are captured, they will not be prosecuted for merely participating in hostilities, they will not be imprisoned but must be detained in a camp and be treated as POWs with all the rights and privileges and they must be repatriated at the end of hostilities. This would be absurd.

Arguments that pirates may be treated as combatants emanated from the recent Security Council's resolutions adopted in

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or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

[73] Douglas Guilfoyle, *The Laws of War and the Fight Against Somali Piracy: Combatants or Criminals?,* 10(1) MELBOURNE JOURNAL OF INTERNATIONAL LAW 141 (2010) *available at* http://www.austlii.edu.au/au/journals/MelbJIL/2010/6.html)

the context of the worsening situation in Somalia and the proliferation of piratical acts off the coast of Somalia. Whether these resolutions have this intention requires their analysis.

Status of Pirates under Security Council Resolutions

The frequent and sophisticated cases of piracy off the coast of Somalia and around the Gulf of Aden prompted the international community through the United Nations Security Council to adopt several resolutions aimed at repressing and combating acts of piracy and prosecuting pirates. From June, 2008 to October, 2011 the Security Council has adopted 10 resolutions on piracy, nine relate to the situation in Somalia[74] (according to the Security Council the situation constitutes a threat to international security in the region) and one relates to the Gulf of Guinea.[75]

Regarding the situation in Somalia, several of the resolutions contained terms which could be interpreted to mean the authorization to use of force in the fight against piracy. This generates debates on how pirates should be treated. Analysis of these resolutions however, demonstrated that the intention of the Security Council is to apply a "graduated response" within the context of law enforcement commencing with arrest and prosecution of pirates to using only the necessary force depending on the circumstances. Although enforcement is by military and naval forces in and around Somalia, there was no intention by the Council to apply the laws of war on pirates.

The first issue is whether the adoption of the resolutions under Chapter VII of the United Nations Charter could be interpreted to mean the authorisation to use military means and laws governing conduct of war in the fight against piracy. Indeed, all the resolutions relating to piracy off the coast of Somalia were unanimously adopted under Chapter VII of the UN Charter.[76] These

[74] Security Council Resolution 1816, U.N Doc. S/RES/1816 (Jun. 2, 2008); Security Council Resolution 1838, U.N Doc. S/RES/1838 (Oct. 7, 2008); Security Council Resolution 1846, U.N Doc. S/RES/1846 (Dec. 2, 2008); Security Council Resolution 1851, U.N Doc. S/RES/1851 (Dec. 16, 2008); Security Council Resolution 1897, U.N Doc. S/RES/1897 (Nov. 30, 2009); Security Council Resolution 1918, U.N Doc. S/RES/1918 (Apr. 27, 2010);Security Council Resolution 1950, U.N Doc. S/RES/1950 (Nov. 23, 2010);Security Council Resolution 1976, U.N Doc. S/RES/1976 (Apr. 11, 2011);Security Council Resolution 2015, U.N Doc. S/RES/2015 (Oct. 24, 2011).

[75] Security Council Resolution 2018, U.N Doc. S/RES/2018 (Oct. 31, 2011).

[76] See for instance Security Council Resolution 1816, preamble para. 14, U.N Doc. S/RES/1816 (Jun. 2, 2008); Security Council Resolution 1838, preamble para. 14,

must however be seen from the context, the contents of the resolution and the intention of the Security Council.

In all the resolutions, the Security Council has affirmed or reaffirmed "that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982, sets out the legal framework applicable to combating piracy…"[77] Although the Security Council acted under Chapter VII it did not see the fight against pirates as case of armed conflict against a non-state actor."[78] There is nothing in the resolutions which suggest that the situation off the coast of Somalia amounted to or have reached a level similar to an armed conflict. The conclusion is that mere authorisation under Chapter VII does not make a situation to fall under the law of war.

The second issue is whether the authorisation to use "all necessary means" or "the necessary means" or "necessary measures" contained in the resolutions amounted to the authorisation to have recourse to the laws of war and the use of military force in that context.

Indeed, resolutions 1816, 1838, 1846, and 1851 dealt with the fight against piracy on the high seas or similar acts in the territorial sea of Somalia. Each authorises states to use 'all necessary means' or 'the necessary means' to this end, in accordance with the international law governing action against pirates, as set out in the UNCLOS.[79] Thus, it has been suggested that the resolutions "authorise only the use of *existing powers* under the 'laws of peace' or extend the reach of those powers to Somalia's territorial waters"

U.N Doc. S/RES/1838 (Oct. 7, 2008); Security Council Resolution 1846, preamble para. 16, U.N Doc. S/RES/1846 (Dec. 2, 2008); Security Council Resolution 1851, preamble para. 14, U.N Doc. S/RES/1851 (Dec. 16, 2008)

[77] See for instance Security Council Resolution 1816, preamble para. 5, U.N Doc. S/RES/1816 (Jun. 2, 2008); Security Council Resolution 1838, preamble para. 5, U.N Doc. S/RES/1838 (Oct. 7, 2008); Security Council Resolution 1846, preamble para. 5, U.N Doc. S/RES/1846 (Dec. 2, 2008); Security Council Resolution 1851, preamble para. 5, U.N Doc. S/RES/1851 (Dec. 16, 2008)

[78] Martin D. Fink and Richard.J. Galvin**.** *Combating Pirates off The Coast of Somalia: Current Legal Challenges*. LVI NETHERLANDS INTERNATIONAL LAW REVIEW 367, 376, 2009

[79] Security Council Resolution 1816, para. 7(b), U.N Doc. S/RES/1816 (Jun. 2, 2008); Security Council Resolution 1838, para. 2, U.N Doc. S/RES/1838 (Oct. 7, 2008); Security Council Resolution 1846, para. 10(b), U.N Doc. S/RES/1846 (Dec. 2, 2008); Security Council Resolution 1851, para. 6, U.N Doc. S/RES/1851 (Dec. 16, 2008). Resolution 1816 was for a period of six months. Authorisation was renewed in resolution 1846 for 12 months which was also renewed for another 12 months by resolution 1897.

and that they "do not authorise recourse to force governed by the laws of war".[80]

Similarly, reference to international humanitarian law by resolution 1851 which states that:

> …States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law.[81]

does not automatically makes International Humanitarian Law (IHL) applicable in the absence of armed conflict situation.[82] An opinion has been expressed that:

> The provision appears to be a savings clause included out of abundance of caution. If pirates were also insurgents, or were defended or supplied by insurgents, then any foreign intervention force under *Resolution 1851* might find itself involved in an internal armed conflict where IHL would apply. In such cases, international counter-piracy forces on land might be 'considered forces intervening in an otherwise internal conflict at the invitation of the [territorial] government'.[83]

Further, the Reports of the United Nations Secretary General pursuant to these resolutions confirmed the applicability of human rights laws as opposed to laws of war in guiding the "actions of States in all phases of counter-piracy operations, including the apprehension, detention and prosecution of suspected pirates, as well as the imprisonment of convicted pirates."[84]

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[80] Douglas Guilfoyle, *The Laws of War and the Fight Against Somali Piracy: Combatants or Criminals?,* 10(1) MELBOURNE JOURNAL OF INTERNATIONAL LAW 141 (2010) *available at* http://www.austlii.edu.au/au/journals/MelbJIL/2010/6.html)

[81] Security Council Resolution 1851, para. 6, U.N Doc. S/RES/1851 (Dec. 16, 2008).

[82] Douglas Guilfoyle, *The Laws of War and the Fight Against Somali Piracy: Combatants or Criminals?,* 10(1) MELBOURNE JOURNAL OF INTERNATIONAL LAW 141 (2010) *available at* http://www.austlii.edu.au/au/journals/MelbJIL/2010/6.html)

[83] Ibid.

[84] See for instance United Nations*, Report of the Secretary-General pursuant to Security Council Resolution 1950*, para. 72 (2010) *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/544/11/PDF/N1154411.pdf?OpenElement

Similarly, the authorisation to deploy naval vessels and military aircrafts in repressing piracy in some of the resolutions although prompted military response to an essentially a criminal act, it is justified primarily on the basis that the means are best suited for the situation,[85] and must be viewed in the context of the reaffirmation by the Council that UNCLOS continues to be the legal framework applicable to combating piracy except that the resolutions authorised applying UNCLOS beyond its geographical scope to include Somalia territorial waters and lands.

The authorisation for the use of all necessary means in repressing piracy cannot also be viewed from outside the context of the resolutions as the resolutions restricted the measures only with respect to Somalia and with the consent of the Transitional Federal Government of Somalia, the resolutions not constitute nor can they be interpreted as forming part of customary international law.[86] This position is confirmed by the Security Council Resolution 2018 adopted in the context of Gulf of Guinea, where no reference was made to Chapter VII and no necessary measures were authorised to be undertaken.[87]

The subsequent resolutions adopted by the Security Council required States to criminalise piracy in their domestic legislations and to prosecute pirates in their domestic courts.[88] This further confirms the law enforcement nature of the fight against piracy under international law. The Council specifically states the law enforcement nature of fight against piracy in resolution 2015.[89] The conclusion is that the Security Council resolutions do not change the enforcement regime provided by UNCLOS with respect to the treatment of pirates as criminals under law enforcement paradigm. The resolutions merely reiterated the use of force in a manner consistent with law enforcement and extended the operation of UNCLOS to the areas under the jurisdiction of Somalia.

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[85] Please refer to the section on the status of pirates under international law above.

[86] See for instance Security Council Resolution 1816, para. 9, U.N Doc. S/RES/1816 (Jun. 2, 2008); Security Council Resolution 1838, para. 8, U.N Doc. S/RES/1838 (Oct. 7, 2008).

[87] Security Council Resolution 1018, U.N Doc. S/RES/1018 (Oct. 31, 2011)

[88] Security Council Resolution 1976, paras. 13 and 14, U.N Doc. S/RES/1976 (Apr. 11, 2011) and Security Council Resolution 2015, para. 9, U.N Doc. S/RES/2015 (Oct. 24, 2011)

[89] Security Council Resolution 2015, para. 10, U.N Doc. S/RES/2015 (Oct. 24, 2011)

Pirates and the Use of Force

Law enforcement officials may have recourse to force only when all other means of achieving a legitimate objective have failed.[90] Similarly, the amount of force to be used must be proportionate to the threat posed.[91] The UNCLOS provisions relating to arrest and the Security Council resolutions also seemed to have recognised the use of force as a matter of necessity only.

In the enforcement of UNCLOS provisions, use of reasonable force may be necessary depending on the situation in order to stop, seize a vessel and arrest persons on board.[92] This may become more justifiable where the situation demonstrated the use of force by the pirates themselves. International Tribunal for the Law of the Sea in the M/V "Saiga" (No. 2) Case, where the issue centred on the "use of force in the boarding, stopping and arresting of the Saiga" pointed out that the "the use of force must be avoided as far as possible".[93] The Tribunal referring to the *I'm Alone* and *Red Crusader* cases, stated that:

> [t]he normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force.[94]

Similarly, Security Council resolutions 1816, 1846, 1851 and 1897 authorising all necessary means could be interpreted to mean force may be used consistent with international law in repressing piracy. This is so especially when in preambular paragraph 4 of resolution 1838 the Security Council noted the use of heavier weaponry by the pirates and the growing sophistication of their organisation. Taking this to mean pirates could be engaged

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[90] United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Principles 4 (1990) *available at* http://www2.ohchr.org/english/law/firearms.htm

[91] Ibid. Principles 5

[92] *United Nations Convention on the Law of the Sea Convention* art. 105 (1982) *available at* http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

[93] Robin Geiß and Anna Petrig, PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN 69 (2011)

[94] International Tribunal for the Law of the Sea, *The M/V "Saiga*" (No. 2) Case *Saint Vincent and the Grenadines v. Guinea*, Judgment, para. 156 (Jul. 1, 1999)

as combatants will however defeat the aim of the resolutions which consistently affirmed the applicability of UNCLOS in repressing acts of piracy. The authorisation cannot therefore be taken to mean the use of force beyond what is allowed under UNCLOS.[95]

Conclusion

From the time of it conception, piracy has always been recognized as a crime under international law and pirates as enemies of mankind. International law has for a long time recognised the rights of every State to universal jurisdiction in the prosecution of pirates. The international legal framework for repressing piracy has been the United Nations Convention on the Law of the Sea. Provisions relevant to piracy in UNCLOS were drafted essentially within the law enforcement perspective. Pirates are required to be arrested and prosecuted under domestic laws operating in peace time. There is no international instrument authorising or recognising pirates as combatants.

The definition and nature of piracy do not provide a ground upon which to conclude that pirates may be treated as combatants. Under the laws of war, combatant is a status which is restricted to certain category of individuals and which entitled those recognised to some rights and privileges and these are at variance with the intention of the international community in the fight against piracy.

Recently, the United Nations Security Council has adopted several resolutions in the fight against piracy authorising all necessary means to be used including the deployment of naval vessels and military aircrafts but none of these resolutions provided for the treatment of pirates as combatants. The resolutions specifically reaffirmed the applicability of UNCLOS in dealing with pirates. Reasonable force may however be used depending on the circumstances but the rules relevant to the use of such force in peacetime must be observed failure of which will expose the State violating to international responsibility. Pirates are not combatants but criminals and their treatment must be in accordance with human rights rules applicable in peacetime.

[95] Robin Geiß and Anna Petrig, PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN 76 (2011)

ROBIN HOOD APPROACH TO SOLVING THE MENACE OF CORRUPTION: THE NIGERIA VERSION

By

Abdulkareem Azeez*

Abstract

One of the greatest unresolved challenges facing humanity in the twenty- first century is the issue of corruption. Several attempts have been made to unraveled the mystery behind the insatiable urge to accumulate wealth and steal from the public treasury at the expense of trust, standards and collective survival. Millions of people have prematurely lost their lives due to corrupt practices as exhibited by their leaders in both private and public capacity. Against this background, the Robin Hood philosophy of forcefully taking or stealing from the rich for the benefit of the poor with a view of providing the poor with the basic needs of live is akin to the recent development in Nigeria wherein there is a proposed economic amnesty bill for treasury looters. The proposed bill emanating from the House of Representatives seeks to pardon the treasury looters as long as the proceeds of the loots are invested in Nigeria. Whereas, the proponents of the bill are of the view albeit erroneously that passing the bill into law will aid in the fight against corruption and by extension improve the economy, it appears the proposed bill is just another way of legalizing, institutionalizing and rewarding corrupt officials in Nigeria. This article therefore is an attempt to interrogate the proposed bill and the philosophy behind it with a view of critiquing the bill while proposing a more better and practical ways of fighting corruption in Nigeria without compromising standards.

Introduction

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. It is found in political, social, religious and economic systems. Each country suffers one form of corruption or the other[1].

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[1] Lipset S.M and Gabriel S.L. 2008. Corruption, Cultures and Markets. In Lawrence E. H.and Samuel P.H. (Eds.) Culture Matters. New York: Basic Books, 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 and Published by African Sun Media ISBN1919985638

It is one of the greatest challenges in the twenty-first century and one of the silent killers.

In Nigeria, corruption has played a very devastating role in destroying the institutions and the economy of the country. Thousands of people are dying daily as a result of the impact of corrupt practices. This emanates in form of building collapse due to using substandard building materials at construction sites, maternal mortality rates due to siphoning the resources meant for the health care delivery; unemployment as a result of bad governance influenced by employing family members to do a job they are not qualified for and many others.

Nigeria as a former colony of the British was said to be free of corrupt practices prior to the coming or the arrival of the colonial masters[2]. It has been argued that African societies prior to the coming of the colonial masters were free of corrupt practices. That, corruption is alien to the pre-colonial African nations which were founded on strong ethical moral values, agreed principles and social justice that guided human interactions[3]. It was further alleged that colonialism introduced systemic corruption on a grand scale across much of sub-Saharan Africa via the repudiation of indigenous values, standards, checks and balances and superimposing of western structures which destabilized the hitherto well-run bureaucratic machinery across the pre-colonial Africa[4]. That, indirect rule turned leadership in Africa into corrupted enterprise where instead of holding power in trust for the people, the rulers held powers in trust for the colonial masters; that, individuals without character were promoted as warrant chiefs by the British authorities who turned government to an antagonistic platform for forcefully extracting obedience from the people. This was made possible with the support of the colonial established police system[5]. The police system during colonization were established to primarily crush any civilian opposition. Its engagement with the populace was founded on the need to enforce colonial laws on forced taxation,

[2] In the South-West of Nigeria for instance, the communal ways of doing things does not give room to corrupt practices. The community is aware of what an individual earns and anyone who appears to be living above his means can be easily noticed and appropriate steps taken mostly by the council of elders.

[3] Philips O. Okolo and Akpokighe O. Raymond "Corruption in Nigeria: The Possible Way Out" Global Justice of Human Social Science for Political Science, Vol. 14, Issue 7, 2014

[4] Ibid @ page 2

[5] Ibid @ page 4

segregation and quelling of anti-colonial uprisings. And most people who do not want to be harassed must pay their way through.[6]

While this writer may agree with some of the above-mentioned points, placing corruption squarely at the doorstep of the colonial masters is to presume that the pre-colonial African society were people without independent and rational thinking of good and bad; people who do not understand what is good for them or people who could be manipulated to commit crimes. Whereas, it may be argued that some of the people were compelled to so act and perhaps for the sake of argument, we can pretend that the excuse is valid, it therefore means that corruption especially in Africa in general and Nigeria in particular ought to have ended after independence from the colonial masters, since the latter has no political control technically speaking over the former upon independence. But corruption still exist even on a greater scale after independence. A plausible argument perhaps could be that most of the countries in Europe and America are aiding and abetting corrupt practices in Africa by allowing the stolen funds to be 'invested' in their economy[7].

The above position is justified by the revelation on the former Nigerian president Sani Abacha who was estimated to be worth $20 Billion at the time of his death and different corrupt cases in the post-independent Nigeria and evidence of their 'investments' in Europe and America[8]. In South Africa for instance, Jacob Zuma was found to have unduly benefited from the taxpayers' money in the infamous Nkandla debacle. In Congo, Joseph Kabila and his family are among the richest people in the continent owing their wealth to diamond mining. Uhuru Kenyatta, the president of Kenya and son of Jomo Kenyatta was on the Forbes list of the richest men in Africa. Jomo Kenyatta openly grabbed vast tracts of land from the British when Kenya attained independence. Paul Biya in Cameroom is also amongst the richest people in Africa and corrupt dealings have been synonymous with his name. In Zimbabwe, top government officials are notorious for their lavish lifestyles. Money

[6] Ibid @ page 7

[7] Most of the African leaders' especially past and present Nigeria head of states have off shore account where the stolen funds are being transferred. A case study is Former President Sani Abacha

[8] The case of the former petroleum minister who was alleged to have stolen twenty billion dollars is a good example; the case of the former police chief, Tafa Balogun convicted of corrupt practices is another one.

has been stolen from the government coffers without any apology or remorse[9].

Therefore, the post-independence Africa is worse in terms of corrupt attitudes and practice compared to what was obtainable during the colonial era. Most of the post-independence African leaders are guilty of stealing from the national treasury of their respective states and deposited the looted funds in their offshore accounts while contributing to the economic growth and development of the receiving countries and leaving their own people impoverished.[10]

Meaning, Forms & Effect of Corruption

Whereas there is no universal acceptable definition for corruption, it has been defined by different scholars within a particular context. Corruption is the diversion of resources from the betterment of the community to the gain of individuals at the expense of the community[11]. It is an abuse of public office for private gains.

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[12]. 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[13]. It comes in form of limiting the payment of taxes, avoiding costly regulations, obtaining contracts at inflated prices, getting undeserved concessions and privatization of government properties for individual private gains[14].

Corruption is a serious barrier to effective mobilization and allocation, it diverts resources away from activities that are vital for poverty eradication, economic and sustainable development[15]. Corruption therefore is principally a governance problem that translates into a failure of institutions and a lack of capacity to

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[9] Rita T. M. Kufandererwa "Corruption is Africa's Greatest Foe" MyNews 24, January 25, 2017

[10] Conor Gafey "Nigeria's Ex-Oil Minister Charged With Money Laundering Over 2015 Election Scandals" Newsweek Saturday 4th June, 2017

[11] Phillips O. Okolo & Akpokighe O. Raymond Supra @ page 4

[12] PWC "Global Economic Crime Survey 2014" Available on www.pwc.com/economi-srime-survey Accessed on Thursday 26th October, 2017

[13] Abdulkareem Azeez "Corruption as a Crime Against Humanity: Any Justification? KIULJ 2017

[14] Susan Rose-Ackerman "The Challenge of Poor Governance & Corruption" Law & Political Sciences, Yale University, 2004

[15] Swiss Agency for Development & Cooperation (SDC) "Fighting Corruption" SDC Strategy, 2006

manage society by means of a framework of social, judicial, political and economic checks and balances[16].

Any society where corruption thrives, some of the common feasible features would be, giving and receiving bribes, inflation of contracts, kickbacks and payment up fronts for nonexistence contract, abuse of public property and privileges, lodging government funds in private accounts, selling examination marks for sex or other considerations, adulterated products and allowing substandard items into the market, misappropriation and embezzlement of funds, money laundering by public officials with the help of proxies and general abuse of public office for private gains among others[17].

Moreover, the negative impact of corruption on development cannot be over emphasized. Evidence from across the globe and especially in Nigeria confirms that corruption disproportionately impacts the poor. It hinders economic development, reduces social services and diverts investment in infrastructure, institutions and social services. It fosters an anti-democratic environment characterized by uncertainty, unpredictability, decline in moral values and disrespect for constitutional institutions and authorities. It reflects a democracy, human rights and governance deficit that negatively impact on poverty and human security[18].

The cost of corruption can be quite severe as it may raise the marginal tax rate of firms, decrease business activity, raise the marginal costs of public funds, make certain governmental projects economically unviable and undo the government ability to correct externalities leading to inefficient outcomes[19]. These are some of the implications of allowing corruption to thrive unchecked in any society. The overall effect of such practices cannot be quantified[20].

The Robin Hood Approach/Principle

At a time of public anxiety over crime, the 18th century was perceived to be an ever-increasing crime wave to the extent that even at the midday or in the most open space in London, persons are

[16] Ibid @ page 8
[17] Phillips O. Okolo & Akpokighe O. Raymond Supra @ page 6
[18] Arne Disch Et'al "Anti-Corruption Approaches: A Literature Review" Joint Evaluation Report, Study 2, 2008
[19] Benjamin A. Olken & Rohini Pande "Corruption in Developing Countries" August 2011
[20] Yomi Kazeem "The Most Fascinating Details in United States' 54 Pages Case Against Nigeria's Corrupt Ex-Oil Minister" Quartz Africa of July 19, 2017

stopped and robbed. In the second quarter of the 18th century, property theft accounted for forty-four percent of newspaper reports and it was believed that London experienced the most criminal activity in history[21]. This perhaps explains the existence of over two thousand (2000) criminal biographies which were published during the late 17th and early 18th centuries[22].

Amidst these criminal controversies and climate of panic and danger was a man named Robin Hood who was believed to be stealing from the rich in order to assist the poor. Perhaps the most famous outlaw of all time, Robin Hood of Sherwood Forest represents the standard model of the noble bandit. The details of the legend vary from source to source, but most of the important aspects of his character are always the same[23]. The most famous aspect of his character was that he would distribute his loot among the poor, who formed his support base and aided him. He is always portrayed as being noble, fair and courteous, despite being labeled a criminal, as he adhered to a moral code that was seen as being more just than the law of the authorities. He represented one of the commoners who struck back against the immoral, rich elite that oppressed them. He was not depicted as a violent criminal to be feared, but a symbol of justice and integrity[24].

The hub of this research is not to dig deeper into the life of Robin hood but to identify his principle and connect it with the challenges of corruption especially with the proposed law by the Nigeria House Representatives on giving amnesty to the nation's looters as long as the proceed of the loots are invested in Nigeria. Such proposal though not akin completely to the robin hood principle, it provides a resemblance of legalizing and sanctifying stolen funds as long as it is used for a project beneficial to the people.

The Proposed Economic Amnesty Bill in Nigeria

Amidst the war against corruption by the administration of President Buhari is a proposed bill sponsored by a member of the House of Representatives which seeks to give looters immunity to any form of probe, inquiry or prosecution after fulfilling some

[21] Stephen Basdeo "Robin Hood the Brute: Representatives of the Outlaw in the 18th Century Criminal Biograpgy" Law, Crime and History, 2016
[22] Ibid @ Page 4
[23] Jenna Bowley "Robin Hood or Villain: The Social Constructions of Pablo Escobar" Honors College Paper 103, 2013
[24] Ibid @ page 11

conditions[25]. The proposed law was being promoted by Hon. Linus Okorie, a member of Parliament representing Ebonyi Peoples Democratic Party (PDP) who canvasses for full and complete amnesty for suspected looters of public treasury and shield them from any probe, inquiry, prosecution and such individuals shall not be compelled to disclosed the source of their looted funds as long as they invest their 'wealth' in the Nigeria economy[26].

The Bill is titled "A Bill for an Act to Establish a Scheme to Harness Untaxed Money for Investment Purposes and to Assure Any Declarant Regarding Inquiries and Proceedings Under Nigerian Laws & Other Matters Connected Therewith". The Bill seeks to allow all Nigerians and residents who have any money or assets outside the system or have acquired such money or assets illegally to come forward, within a timeframe to declare same, pay tax or surcharge and compulsorily invest the funds in any sector of the Nigerian economy and in return be granted full amnesty from inquiry and prosecution[27]. It proposes that 25% of the looted money will be paid as tax which is to be shared by the three tiers of government and 30% invested in agriculture, and the rest can be invested in any choice sector of the economy[28].

In return for such declaration, the Bill proposes a total and comprehensive amnesty for all declarants from all otherwise repercussions under Nigerian laws and further provides that such declarations shall be inadmissible in evidence against the declarant except in matters of national security. Outside the exception on the grounds of national security, no declarant shall be required to state the source(s) of the assets or income declared[29].

While the Bill was read for the first time in the green chamber on June 14, 2017, the proponents are of the view that the bill will provide a workable solution to reverse capital flight that has been bedeviled the Nigerian economy and initiate a reverse flow through resultant repatriation. It is estimated that with the quantum of resources to be declared and invested in the Nigerian economy, micro and macro-economic stability would result and in turn

[25] Mr. Ezenwa Nwagwu "Amnesty Bill For Treasury Looters Self Serving and Anti People" Vanguard Online Newspaper, July 6, 2017

[26] James Emejo "Law-Maker Opposes Bill Seeking Amnesty For Looters" Thisday Newspaper of Friday 25th August, 2017.

[27] Editorial of Vanguard Newspaper of July 19, 2017

[28] Section 4 and 5 of the proposed Bill

[29] "Proposed Bill Would Grant Full Amnesty to Treasury Looters" Daily Trust Newspaper, July 28, 2017

empower massive economic growth and prosperity within a short time[30].

Whereas, the reasons given prima facie may appear promising, the corrupt track records of some of the proponent suggests otherwise. Proposing such a bill in a country where mindless treasury looting has led to mass poverty, a landscape littered with abandoned projects, worrying unemployment, non-payment of workers salary and an economy shackled with infrastructural deficit is not only self-serving and illegal but also a violation of Nigeria's obligation under the United Nations Convention against Corruption[31]. It is more worrying that the lawmakers who are constitutionally mandated to champion legal reforms are now proposing laws that will institutionalize corruption and destroy the economy.

Whereas the Robin Hood approach is taking from the rich and given to the poor, the Nigeria version of economic amnesty is taking from both rich and poor, invest it in Nigeria and reap the profit! This latter approach is contrary to logic and common sense. A good analogy perhaps at this juncture is the banking sector. When a loan is applied for and granted upon certain terms and conditions, the borrower is expected to pay certain percentage as interest and at the end of the agreed duration, he shall pay the amount borrowed. But in the case of the proposed economic amnesty, the looter will be entitled to the capital (the amount stolen), profit therefrom as long as he invests in Nigeria and above all, immune from criminal liability! This indeed is a deadly and unreasonable proposal even from economic perspective.

Conclusion

In a country where millions of people are in jail for petty crimes, our lawmakers are proposing an economic amnesty for elite criminals, an indirect way of rewarding those who have succeeded in impoverishing the populace of basic necessity of live. In fact, contemplating such a bill clearly shows how morally bankrupt we are as a nation and how unserious we are as a country in the global fight against corruption. While countries like China and Vietnam rewards corrupt officials upon pronounced guilt with a death

[30] Ibid

[31] Nigeria is a state party to the United Nations Convention Against Corruption and what some members of the lower house are attempting is to say the least an affront on our commitment in the fight against corruption at the national, regional and international level.

penalty[32]; at a time when South Korea removed a sitting president on the sole basis of corruption[33], our Nigerian lawmakers are proposing some form of legislative soft landing to corrupt officials as long as the proceed of the loot is invested in the economy.

If the bill is passed into law, what it means is that, it is legally acceptable and sanctioned to steal and loot the national treasury as long as such loots are invested in the country. The simple analogy of such troubling proposal is akin to robbing a bank and investing the looted fund in the transportation sector. Does that change the fact that money was stolen? What would happen to the supposed beneficiaries of the looted funds? Assuming the stolen funds are meant to cater for the health sector, how many pregnant women would have died as a result of child labour complications? How many sick people would have lost their lives because the resources meant to provide health related services for them have been stolen? While substantial numbers of Nigerians are living disastrously below subsistence levels which in itself is an enormous tragedy, it would be an unpredictable mistake and a prima facie injustice for the lawmakers to exploit the mandate given to them by the people to oppress same people they claimed to be representing. Perhaps, our dear lawmakers must know that 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[34]. Our honorable lawmakers by virtue of their constitutional mandates must or ought to have known that corruption is a crime under the Nigeria laws and proposing another legislation to protect corrupt officials will be in violation of both national and international laws[35]. A thief is a thief and there is no need of calling a spade a spoon. The reward for stealing should be punitive such as in china and South Korea with a rider that the stolen funds be compulsorily

[32] Nectar Gan "China Raises Corruption Threshold For Death Penalty" South China Morning Post 19th April, 2016

[33] Anna Fifield "South Korean President Removed From Office Over Corruption Scandal" Washington Post March 10, 2017

[34] Abdulkareem Azeez "Corruption as a Crime against Humanity: Any Justification? supra

[35] The Independent Corrupt Practices Commission (ICPC) Act 2000, The Economic and Financial Crimes Commission (Establishment) Act 2004 and United Nations Convention Against Corruption respectively.

confiscated and perhaps such individuals should be barred from occupying any elective offices and not being promoted to the rank of an investor. Investing stolen funds in the country and receiving the profits from such 'investment' is not only a mockery of the alleged war against corruption that this present administration is known for, but also amount to a genuine tragedy deliberately inflicted on the masses by their elected representatives through the instrumentality of the law.

Corruption is in all its ramifications is akin to deliberate murder of the prospective beneficiaries of the stolen funds[36], it is a deliberate extermination of civilian populations who should have benefited from the project whose resources were stolen. The least some of the lawmakers pushing this heinous agenda could do is to support the president in his campaign promise of fighting corruption and not institutionalizing it. Corruption should be treated as a crime against humanity, it is a *hostis humani generis* and must be treated as such. The earlier we begin to collectively treat corruption as a serious crime, the better for our present generation and those generations yet unborn.

The starting point is the introduction and teaching our elected leaders ethics. Ethics is a branch of philosophy that deals with morality and should be a compulsory discipline for our leaders. A code of ethics that addresses the limitation of power, accountability, effectiveness and justice should be made mandatory for all public office bearers, this will go a long way in reducing their urge for stealing peoples' wealth[37].

Finally, the proposed bill therefore is brought in bad faith and represent a mockery of the war against corruption in Nigeria. It is recommended therefore that the pro-people in the both legislative houses should reject the temptation of passing the bill into law. Rather, they should initiate a bill where the punishment for any corrupt public officials upon a fair trial by a court of competent jurisdiction will be a death penalty. It is the firm belief of this writer that once few politicians have been sentenced and executed for stealing from the national treasury, it will send a clear signal to others who are harboring the same intent of stealing from the people they sworn to protect and serve.

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[36] When resources meant for public use are stolen, for instance on construction of roads or building, anyone who dies as a result of bad roads or building collapse are victims of corrupt practices

[37] Rita T. M. Kufandererwa "Corruption is Africa's Greatest Foe" MyNews 24, January 25, 2017

CORPORATE CRIMINAL LIABILITY AS A CATALYST FOR EFFECTIVE ANTI-CORRUPTION WAR IN NIGERIA

By

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Abstract

One of the focal points of campaign in the build up to the Nigerian presidential elections in 2015 was the promise of anti-corruption fight. This is because corruption has been one of the challenges of Nigeria's development as the country has been persistently listed as being among corrupt countries in the world.[1] According to former President Olusegun Obasanjo, corruption is a cankerworm that has eaten deep into the fabric of the Nigerian society.[2] Usually, in cases of corruption which has to do with bribery especially when large capital is involved, corporations are usually involved either as offeror of bribe, facilitator of bribe or are used to syphon funds illegally acquired through corrupt activities. A cursory look at the anti-corruption fight of the present administration and of past administrations in Nigeria will show that the focus has been on individuals who are involved in corruption to the exclusion of the corporations involved. Yet, as stated earlier, it is almost impossible where large amount of money is involved for corrupt acts like bribery to be done without involving companies. However, most times the companies are not prosecuted or at best prosecuted for other offences. Thus, the question is whether there are limitations or defects in Nigeria's anti-corruption legislation or whether the lack of or inadequate prosecution of companies for charges of corruption is as a result of some other factors. Therefore, this paper examines the Nigerian legal framework on corruption with a view to identifying limitations if any to an effective anti- corruption fight. The paper argues that there is the need for reforms of the Nigerian anti-corruption legislation in order for the country's anti – corruption war to be effective.

Introduction

There have been incidences of bribery and corruption in Nigeria involving corporations. Yet, there is a dearth of cases

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[1] According to Transparency International's Corruption Perception Index, Nigeria has been consistently ranked number 136 in 2015 and 2016. See https://www.transparency.org/cpi2015 September, 2017.

[2] President Olusegun Obasanjo's address at the formal signing into law of the Anti-Corruption Act on 13th June, 2000 in Abuja.Nigeria

involving the criminal prosecution of corporations for corruption. For example, international oil and gas company Halliburton admitted having bribed certain top government officials in Nigeria through its subsidiary KBR in order to secure contract for the construction of the liquefied natural gas plant in Bonny Island, South of Nigeria. Halliburton has since been convicted in the United States after it admitted the bribe.[3] However, Nigerian companies indicted in the Halliburton saga have not been prosecuted.[4] Similarly, the criminal charges against construction company Julius Berger Nigeria P.L.C. which served as a conduit through which the bribe was paid were dropped and it entered into a plea bargain agreement with the government and gave up about twenty six million dollars to the coffers of the government.[5] The resort to plea bargaining is probably because of the limitations inherent in the existing legal framework with respect to prosecuting corporations.

More than seventy-five companies were indicted in the House of Representatives Adhoc Committee Report on fuel subsidy fraud in 2012. The report showed high level of corruption between public officials and corporations mainly limited companies in Nigeria.[6] The Economic and Financial Crimes Commission which is the main anti-corruption regulator in Nigeria commenced the prosecution of companies and individuals indicted in the fuel subsidy fraud and curiously got its first conviction after five years in January 2017. Thus, *Ontario Oil & Gas* was convicted together with its chairman and managing director in a #1.9 billion oil subsidy fraud case. However, the prosecution and conviction was for offences of *conspiracy, theft e.t.c* which are lower offences compared to corruption; this is likely because of the limitations in the existing anti-corruption legislation for prosecuting corporations.

[3] The Company paid about 1.7billion dollars in fine and settlement while Albert Stanley, its erstwhile executive was sentenced to two and half year's imprisonment. See www.huffingtonpost.com/.../albert-stanley-halliburton-kbr-bribery-sent accessed on 27 March 2014.

[4] Companies like Malabo oil, Headway Eng. Ltd, Strategic Ind. Ltd and others. See Vanguard Newspapers 14th November 2012.

[5] Sunday Trust Newspapers, 26th December 2010.

[6] House Report Resolution No (HR.1/2012) Laid on Wednesday, 18th April 2012

The Limited Liability Company/Corporation

The origin of the idea of a corporation dates to medieval times in Europe.[7] It started with the Greeks and later extended to the Romans.[8] Under the Roman Empire,[9] trade, religious and charitable entities were allowed to own properties and were recognised as having an identity separate from that of the individual members. It has been suggested that one of the reasons for creating the artificial person is in order to confer legal immortality thereby ensuring perpetual succession.[10] Another reason is to facilitate the holding of property. In medieval England, one purpose was the holding of property for the church and local government boroughs.[11] Thus, the limited liability company was created to take care of the organised group. The medieval English law felt there was a need for certain groups to have a legal existence that could survive the individuals.[12] Boroughs and colleges were the first set to be treated as corporations aggregate[13]and this could only be created with the consent of the monarch expressed through a royal charter. Trading guilds and some commercial groups were then granted the royal charter and this assisted the traders in monopolising their trade or business.[14] This practice laid the foundation of modern corporations and incorporation.

This practise has since evolved and has been given statutory recognition in Nigeria by virtue of section 37 of the

[7] Linus Ali, *Corporate Criminal Liability in Nigeria* (Lagos Malthouse Press, 2008), 16

[8] S Williston, *History of the law of Business Corporations Before 1800* (1908)2 cited in Ali at 16.

[9] Anca Iulia Pop "Criminal Liability of Corporations-Comparative Jurisprudence," (Submitted in partial fulfilment of the requirements of the King Scholar Program, Michigan State University College of Law, 2006),8-9.

[10] William Blackstone *Commentaries on the Laws of England* (1765) vol 1, 455 cited in Amanda Pinto and Martin Evans Corporate Criminal Liability (London, Sweet & Maxwell, 2003),6

[11] P Lipton, A Herzberg and M Welsh, *Understanding Company Law* 15th Edition (Australia, Thomson Reuter, 2009), 4.

[12] Ali, at 32.

[13] Ibid.

[14] The East India Company was incorporated in1600 by Queen Elizabeth I and granted the monopoly of bringing goods from the Mediterranean into England. See Amanda Pinto & Martin Evans Corporate Criminal Liability (London, Sweet & Maxwell 2003),7

Companies and Allied Matters Act 2004 (C.A.M.A)[15] which provides:

> As from the date of incorporation mentioned in the certificate of incorporation, the subscriber of the memorandum together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum capable forthwith of exercising all the powers and functions of an incorporated company including the power to hold land and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in case of its being wound up.

Furthermore, CAMA in section 38 (1), equates the company to the status of a natural person as it provides that a company shall have all the powers of a natural person in furtherance of its authorised objectives. Thus, an incorporated company/corporation is treated as a distinct person in the eyes of the law, separate from its owners. These statutory provisions have been given judicial recognition in a long line of cases.[16]

Can a Corporation be Criminally Liable?

The idea of the criminal liability of a corporation determines the extent to which a corporation as a legal person can be liable for acts and omissions constituting violations of the criminal law; but which in reality are the acts and omissions of the natural persons it employs.[17] Although, the very idea of corporate crime and criminality might seem contradictory because of the fact that a corporation can only be formed for lawful purposes; therefore, it might be argued that the idea of a corporate crime will be *ultra vires* the powers of a corporation. However, corporate criminality is not only confined to a corporation incorporated to achieve an illegal purpose. The idea of corporate criminality revolves around a corporation which is incorporated for a valid and legal purpose but

[15] It must be noted that the Nigerian company jurisprudence is essentially statutory and the main legislation regulating it is the Companies and Allied Matters Act, Cap C2O, L.F.N 2004

[16]Ramachandani v. Ekpeyong (1975)5SC 29, Marina Nominees Ltd v. F.B.I.R (1986) 2 NWLR,20, 48 Delta Steel (Nig) Ltd v. American Computer Technology Incorporated (1999) 4 NWLR, 597, 53, Nigerian Bank for Commerce and Industry v. Integrated Gas (Nig) Ltd (1999) 8 NWLR 613, 129

[17] Akanbi, Khairat Oluwakemi, "Corporate Criminality: Towards Regulating Coprorate Behaviour Through Criminal Sanctions" Journal of Contemporary Legal and Allied Issues IFJR Part2 (May-August) 2014 358

which in the course of its legitimate activity commits acts or omissions which are violations of the criminal law. Further, the fact of recognition of the legal personality of a corporation itself is a justification for the recognition of corporate crime.[18] By recognising the legal personality of a corporation, it means the corporation is a *rights and duties* bearing entity; so, its acts and omission to perform some duties might constitute responsibility for a crime.

The idea of corporate crime and criminality has also been questioned when it relates to the traditional notion of crime as mainly street crime; this might also make the idea seem strange.[19] In fact, the word corporate crime was probably influenced by Sutherland's White' Collar Crime[20], which he described as a crime committed by a person of respectability and high social status in the course of his occupation.[21] However, corporate crime differs from white collar crime because the focus of corporate crime is organisational as opposed to individual liability of white collar crime. Another difference is the use of corporate resources and the beneficiary from the crime. The direct beneficiaries of corporate crimes are not usually the employees or agents who commit the crime; rather it is the shareholders whose investments are affected by corporate decisions. In white collar crimes, the direct beneficiaries are usually the perpetrator of the crime.[22] Yet, a particular crime can satisfy both the definition of white collar crime and that of corporate crime. For example, some criminal acts can both help to achieve organisational goals and at the same time benefit an individual member of the company, nevertheless; as stated earlier the motivation for corporate crime is organizational and not personal. A corporation upon incorporation becomes a part of the society and thus a party to the social contract existing in the society.[23] Therefore, the corporation should behave in ways that conform to the accepted norms and standards of the society. The fact

[18] Kathleen F. Brickey, "Perspectives on Corporate Criminal Liability" Washington University in St. Louis Legal Studies Research Paper Series No12-01-02 http://ssrn.com/abstract=1980346 accessed on 29/02/12.

[19] Slapper G and Tombs S *Corporate Crime* (Great Britain, Longman 1999) 3.

[20] E Sutherland, "Is White Collar –crime Crime" *American Sociological Review* vol.10 (1945):132.

[21] Sutherland's exposition on white collar crime challenged the stereotyped perception of crime as mainly street and perpetuated by persons of lower class in the society.

[22] Also, a major feature of corporate crime is its complexity because it can involve more than one actor and committed over a period of time.

[23] Ali, pp 56-57

of incorporation means that the corporation assumes the individualistic nature of responsibility and thus should be criminally responsible when they commit acts which are criminal in nature. According to Mr. Justice Turner in the preliminary ruling on the Herald of Free Enterprise case:[24]

> Since the nineteenth century there has been a huge increase in the numbers and activities of corporations whether nationalised, municipal or commercial whose activities enter the private lives of all or most of 'men and subjects' in a diversity of ways. A clear case can be made for imputing to such corporations social duties including the duty not to offend all relevant parts of the criminal law.

The Basic Ingredients of a Crime

Generally, the basic ingredients of crime are the *actus reus* and the *mens rea* and this applies to corporations as well. Therefore, before a corporation can be said to have committed a crime, the twin ingredients of *actus reus* and *mens rea* must be present. However, there are offences which do not require a proof of the mens rea and these are known as strict liability offences.[25]

Actus reus simply means the act or omission that constitutes the crime or the forbidden act. It is the external element of a crime.[26] The *actus reus* of every crime is different, that is why, in some crimes, it is the physical act or conduct that will constitute the *actus reus*. While in some others, it is the omission to do an act.[27] With respect to the physical act, the action must be voluntary[28] because without the voluntariness, the act itself is defective.[29] Thus, in order for a corporation to be guilty of a crime, these ingredients

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[24] *R v. Alcindor and others, P & O European Ferries (Dover) Ltd* (1991), 93, Cr. App. R. 72 at 82

[25] See Akanbi, Khairat Oluwakemi "Perspectives on the Legacy of Salomon v. Salomon on the Nigerian and Malaysian Company Laws. Legal Network Series, 1LNS (A) Ivii; 1-28 http://www.newcljlaw.om/public/default.asp?page=subscription.

[26] C.M.V. Clarkson, H.M. Keating and S.R. Cunningham *Criminal Law Texts and Materials, 6th edition, (London, Sweet and Maxwell, 2007),* 77.

[27] Omission to act will apply when the law has placed a duty to act on a person.

[28] Voluntariness here is not the same with the intention; rather it explains that the actor is blameless. For example, the act probably occurred as a result of automatism.

[29] Clarkson and Keating at 78.

must be present.[30] It is relatively easy to accept that a corporation has the *actus reus* of an offence, especially if the offence is one that requires an omission to perform a duty. In fact, the recognition of a corporation as a legal person presupposes that it can do certain acts. After all, legal personality is recognition of an entity as capable of bearing rights and liabilities.

Mens rea simply means the guilty mind[31] or the mental element of an offence. It is the intention that precedes the commission of a crime. Words like recklessness, negligence and intention have been described as constituting *men srea.*[32] Blame and responsibility are used to explain the *mens rea.* That is why children and the insane are usually said to lack the *mensrea* to commit an offence.[33] It has however proved to be the main challenge to corporate criminal liability; after all, a corporation actually has no physical body. It seems difficult therefore to attach the mental element necessary for criminal responsibility to it.[34]

Corruption

Corruption has been described as conducts violating established norms in order for selfish gain at the expense of the public.[35] It therefore includes acts of embezzlement, conversion of public funds and bribery[36]. The Nigerian anti-corruption legislation did not define corruption, rather definition of specific offences like accepting gratification, concealing offences relating to corruption e.t.c.

Bribery as an indication of corruption has been of global concern with international initiatives to curb its menace. An example is the Organisation for Economic Cooperation and

[30] However, a corporation can be guilty of a strict liability offence which does not require the proof of a mental element.

[31] Guilty mind here means legal guilt and not moral guilt. See *Yip Chiu-cheng* (1994)2 ALL ER 924, SHC 78 PC.

[32] It is recognised under the Nigerian criminal law jurisprudence as evidenced in the Criminal and Penal Codes and Section 36(12) of the 1999 Constitution.

[33] Clarkson and Keating at 108.

[34]The basic features of criminal law are the *actus reus* and *mens rea* because *actus non facit reum, nisi mens sit rea*. Besides, it can be argued that since a corporation can be liable for civil wrongs requiring *mens rea*, there is no reason why it cannot be liable for criminal offences.

[35] Chukwuemeka,E; Ugwuanyi, BJ; and Ewuim, N; "Curbing Cooruption in Nigeria: The Imperatives of Good Leadership"A.R.R. vol. 6(3) No 26 July 2012, 348.

[36] Ibid

Development (O.E.C.D) Convention on Combating Bribery of Foreign Public Officials in International Trade Practices which is intended to criminalise bribe in international business dealings. The O.E.C.D Convention was signed in 1997 to enhance the global fight against corruption in international business irrespective of where the offence is committed. It however introduced the principle of "functional equivalence" which urged member states to adopt whatever measures that will be effective in the light of the different criminal justice system.[37] As stated, in cases involving bribery and corruption especially when large amount of capital is involved, corporations are usually involved either as offeror of bribe, the facilitator of bribe or are used to syphon funds illegally acquired through corrupt activities.

Also, there is the joint OECD/AFDB initiative to support African countries in their fight against bribery of public officials in business transaction and to improve corporate integrity and accountability.[38] There is also the African Union Convention on Preventing and Combating Corruption 2003 which seeks to address corruption in both the private and public sectors across the continent.[39]

The Nigerian Anti-Corruption Legal Framework

1. The Corrupt Practices and other Related Offences Act

The main anti- corruption legislation in Nigeria is the Corrupt Practices and Other Related Offences Act (ICPC Act).[40] It establishes the Independent Corrupt Practices and Other Related Offences Commission which is the body charged with the investigation and prosecution of corruption and other related offences stated with the Act.[41]

Although the ICPC Act is the main anti-corruption legislation in Nigeria, it in fact recognises the existence of other legislations on corruption. Thus, Section 61(1) provides that prosecution for an offence under the ICPC Act *or under any other*

[37] http://www.imf.org/external/np/gov/2001/eng/091801.pdf www.oecd.org/corruption/oecdantibriberyconvention.htm

[38] www.oecd.org/corruption/regionalanti-corruptionprogrammes.htm there is also a Regional Anti-Corruption Programme for Africa which is a joint initiative of UNECA and the African Union Advisory Board on Corruption. See www.uneca.org/publications/combating-corruption-improving-governance-africa

[39] www.business-anti-corruption.com/anti-corruption-legislation/african-union-c

[40] No 5, 2000 Cap C31 L.F.N 2004.

[41] Part 4, ICPC Act.

law[42] prohibiting bribery and corruption will be deemed to be done with the Attorney General's consent. Therefore, the ICPC Act gives prosecutors an alternative and a wider platform to prosecute bribery and corruption. It creates offences involving both the giving and receiving of bribe.

Section 8 creates the offence of official corruption and provides that it is an offence to corruptly ask for, obtain or receive or agree to obtain or receive any form of benefit for oneself or for another person in relation to the discharge of official duty of a public official. Section 9 also makes it an offence of official corruption for a person to give or attempt or promise to give any benefit to a public officer in order for a favour or disfavour to be done by that public officer. It is immaterial whether such benefit was given or promised to be given through an agent or not.[43] In addition, section 10 also provides that, it shall be an offence to ask for or receive or agree to receive any benefit of any kind whether for oneself or for another person in relation to anything to be done or omitted to be done by a public official. This provision of section 10 is different from the provisions of sections 8 and 9 because section 10 creates a strict liability offence while sections 8 and 9 require a mental element.

Apart from official corruption created in sections 8, 9 and 10 above, The ICPC Act also creates a general offence of bribery which also captures both the giving and receiving of bribe. Section 17(1) A provides that any person who corruptly accepts or agrees or attempts to accept any consideration or gift for himself or for another person as a reward or inducement for doing anything is guilty of an offence. Section 17(1)B provides further that any person who corruptly gives or agrees or attempts to give any consideration or gift to an agent as a reward or inducement shall be guilty of an offence. Also, section 23(1),(2) and (3) places a duty on any person from whom bribe or gratification has been requested, or to whom bribe has been given to report to the commission or a police officer.[44]

Thus, the ICPC Act creates various types of bribery offences which include official corruption and bribe in relation to private business dealings. However, there are no provisions in the ICPC Act on offences by a corporate body. It must be noted however that section 2 defines the word "person" to include natural persons

[42] Emphasis is mine.
[43] Section 9(2)c.
[44] Section 23(1) (2) and (3).

and anybody of persons both corporate and incorporate. It can thus be argued that the ICPC Act is applicable to both natural and corporate persons. Also, some of its provisions are appropriate to corporations. For example, the provision of section 9 which makes it an offence to give or promise or attempt to give benefit to a public official in return for a favour is appropriate for a corporation. This is because section 9(2) a, and b provides further instances of such favour or disfavour that is likely to be given by the public officer in return. It includes when the giver is seeking a contract, license, employment, permit or any business transaction with the government.[45] It is not surprising therefore the admission by international firm *Halliburton* that it gave two million, four hundred thousand dollars in bribe through some companies to some public officials in Nigeria.[46]

In addition, the provisions of section 13 which makes it an offence to receive the proceeds of a felony or misdemeanour outside Nigeria can apply to instances when banks are used as conduit through which bribe is transferred outside the country. However, the challenge is that the provisions of sections 8 and 9 require a mental element for criminal liability. Yet, the Act is silent on how to determine the mental element of a corporate body in respect of a crime. Therefore, it becomes impossible to prosecute a corporation for the offences in sections 8 and 9.

Another limitation of the ICPC Act is in respect of sanctions. The sanctions are inadequate as corporate sanctions. This is because imprisonment and fine are the only sanction recognised under the Act. Clearly, a corporate body cannot be imprisoned. Although, both the Criminal Procedure Code and the Criminal Procedure Act provide that a fine can be imposed in lieu of imprisonment.[47] Nevertheless, there is the need for other sanctions beyond fine and imprisonment.

[45] Section 18 also makes it an offence to bribe a public official as opposed to the offence of official corruption.
[46] Vanguard Newspaper, May 27th, 2003.
[47] Section 382 Criminal Procedure Act and section 305 Criminal Procedure Code.

2. Criminal Code

The Criminal Code (CC)[48] is the main criminal law legislation applicable in the southern part of Nigeria.[49] It provides for the offence of official corruption in section 98. Section 98 creates the offence of official corruption as when a public official corruptly asks for, receives or attempts to receive a benefit or property for himself or for another person in exchange for a favour. Section 98A provides further that it is an offence for a person to corruptly give or promise to give a public official any benefit or property in exchange for a favour by the public official. Thus, sections 98 and 98A apply only to when a public official asks for or is given bribe.

In addition, section 98B provides that it is an offence for any person to corruptly receive or ask for any benefit for himself or for another person in respect of any favour to be done by a public official. So, section 98B applies to when a person who not being a public official receives or asks for bribe in order to influence the decision of a public official.

Generally, the application of the provisions of sections 98, 98A and 98B to corporations is inadequate because of the following reasons. First, sections 98, 98A and 98B do not create specific offences by a corporation. Although, it can be applicable to a corporation because the definition of a person in section 1 of the Code includes all kind of corporations; nevertheless, there should have been more definite provisions on official corruption by corporation because of its peculiarity as an artificial entity. Also, the word *corruptly*[50] as used in sections 98, 98A and 98B requires a mental element. However, there is no provision in it on how to determine the mental element of a corporation being an artificial body.

In addition, it seems that a corporation was not in contemplation when the Criminal Code was being enacted. This is because the only sanction for violating the provisions of sections 98, 98A, and 98B is a term of imprisonment without an option of fine. Clearly, a corporation cannot be imprisoned. Although, section 382 of the Criminal Procedure Act[51] provides that a fine can be imposed

[48] Cap C38, L.F.N 2004.

[49] It must be noted however that each state in the southern part of Nigeria has domesticated the Criminal Code as its laws. An example is the Criminal Code Laws of Lagos State.

[50] Emphasis is mine.

[51] Cap C41, L.F.N 2004.

in lieu of imprisonment. An option of fine would have been included as a sanction in sections 98, 98A and 98B if a corporation was in contemplation of the Criminal Code.

Another limitation is that the offence as provided in sections 98, 98A and 98B is limited to official corruption and does not apply to bribe given or accepted in respect of private transactions. This is inadequate for prosecuting corporations because corporations can engage in corrupt activities in private transactions and not necessarily in official corruption alone.

Finally, the application of the Criminal Code is limited to the southern part of Nigeria. Thus, the Criminal Code is not adequate for prosecuting corporations because corporate activities and criminality can be international in nature.

3. Penal Code

The Penal Code is the main criminal law legislation applicable in the northern part of Nigeria.[52] It creates different offences of bribery and corruption in sections 115 to 122. Section 115 provides that it is an offence for a public officer to accept or attempt or agree to accept any gratification for himself or for another person as a reward or motive for doing an official act. Also, section 116 provides that it is an offence for any person who is not a public officer to accept or attempt or agree to collect gratification as a motive or reward for inducing a public officer to perform an official act. In addition, section 117 provides that it is an offence for a public officer to aid or abet a person to accept gratification under section 116. Section 118 provides that it is an offence for a person to give gratification in the circumstances mentioned in sections 116 and 117 above.

Apart from the bribery offences stated above, section 119 creates the offence of official corruption. It provides that it is an offence for a public officer to accept any valuable without adequate consideration from any person which he knows is involved in a transaction by a public officer. Similarly, section 120 provides that it is an offence to offer a public officer any valuable without adequate consideration when the giver is involved in a transaction before the public officer. Also, section 122 provides that it is an offence for a public officer to dishonestly receive unauthorised money or any property in his capacity as a public officer.

[52] States in the northern part of the country has domesticated the Penal Code as state laws. An example is the Penal Code Laws of Kwara State.

However, unlike the Criminal Code, the Penal Code also extends liability to a person who is not a public officer and who is not the giver of bribe to a public officer. Section 121 provides that it is an offence for a person who is knowingly a beneficiary of a corrupt transaction notwithstanding that the person did not take active part in the transaction. Thus, the Penal Code creates wider offences than the Criminal Code. It in fact extends liability to a beneficiary of a corrupt transaction who did not take part in the transaction.

Nevertheless, its application to corporations is inadequate. This is because it does not create a specific offence by a corporation/corporate body. Although, it can be applicable to a corporation because the definition of a person in section 5(1) of the Penal Code includes all kind of corporations, nevertheless, there should have been more definite provisions on corporations because of its peculiarity as an artificial entity.

In addition, the offences in sections 115, 116, 118, 119, 120, 121 and 122 require the proof of a mental element. [53] Yet, there is no method of determining the corporate *mens rea* under the Penal Code. Also, it provisions on sanctions are inadequate. Fine and imprisonment are the only sanctions provided in respect of the above offences. Clearly, a corporation cannot be imprisoned. Although a fine can be imposed in lieu of imprisonment,[54] however, a fine can only be effective as a corporate sanction if it is in the nature of equity fine.[55] Thus, although the provisions of the Penal Code on bribery and corruption are wider than that of the Criminal Code, it is inadequate for holding corporations criminally liable for corruption.

4. The Money Laundering Act

The Money Laundering Act[56] (MLA) is also one of the legislations enacted to tackle the menace of corruption in Nigeria. As earlier noted, the ICPC Act is mainly focused on the offence of bribery and related offences. Therefore, the Money Laundering Act focuses on the prevention and punishment of laundering funds gotten through illegal trade in narcotics which is also a form of corrupt act. It also has the mandate to empower the National Drug

[53] However, only section 118 creates a strict liability offence for a public officer who aids or abets the commission of the offence under section 116.
[54] Section 305 of the Criminal Procedure Code.
[55] Equity fine is not yet recognised under the Nigerian criminal jurisprudence.
[56] Cap M18 L.F.N 2004.

Law Enforcement Agency to place surveillance on bank accounts since most proceeds of money laundering and other corrupt practices pass through banks as financial institutions.[57]

Thus, the main offence created in the Act is the offence of money laundering. Section 14 defines money laundering as when a person transfers or converts, aids or collaborates with another person to transfer or converts resources or property derived from illegal trafficking in psychotropic substance and narcotic drugs with the intent to conceal or disguise the origin.[58] The MLA does not provide for specific offences by corporations. Also, money laundering is defined loosely to apply to both natural and corporate persons. The Act however provides in section 17 that when a corporate body commits an offence under the Act, such corporate body and any of its official who instigated the commission of the offence shall both be liable. However, a challenge in applying the MLA to a corporate body is that the offence created in section 14 requires the proof of a mental element. Yet, there are no provisions on how to determine the mental element of a corporation in respect of crime in the MLA. Thus, like under the ICPC Act, it is practically impossible to prosecute a corporation for violation of the provisions of section 14 of the MLA. However, it is more definite with respect to sanctions as section 17 (2) provides that a corporate body guilty of an offence under the Act shall be wound up and have its assets forfeited to the Federal Government of Nigeria.

Another limitation in the MLA is its ambiguity with respect to its territorial application. The provisions of the Act are unclear in this aspect. There are some inconsistencies in the Act. First, the offence of money laundering is defined loosely in section 14 (1) and does not specify whether the word "person" as used in the Act is limited to a citizen or resident of Nigeria or a corporation incorporated in Nigeria. Secondly, section 14 (2) provides further that a "person" shall be liable under the Act not withstanding that the various acts constituting the offence was committed in different countries.

The implication of the above provisions of section 14 (1) and (2) is that any person including a corporation of whatever nationality that commits the offence anywhere in the world is liable

[57] Money laundering is defined in section 14 as when proceeds in illicit drug traffic are disguised in order to hide its illicit source.

[58] It is the view of this writer that the definition of money laundering in the Act is limited as it does not apply to transfer of funds which are not the proceeds of illegal trade in narcotics.

under the MLA. For example, it means that a German citizen or corporation who launders money in America can be liable under the MLA. Clearly, this cannot be the intention of the parliament. In contrast, section 2 places a duty on banks or financial institutions to report transfer of funds or securities more than 10,000 dollars to or from Nigeria to the Central Bank of Nigeria with the particulars of the parties involved in the transaction. Section 6 also places a duty on a bank or other financial institutions to place surveillance on any suspicious transaction of a corporation involving more than 2 million naira or its equivalent especially where there appears to be no lawful justification for it. Therefore, based on the provision of sections 2 and 6, any transfer of funds between any two countries outside Nigeria is not governed by the MLA even if such transfer is done by Nigerian citizen or resident. Thus, the correct interpretation will be that the territorial jurisdiction of the MLA is limited to when any part of the transaction took place in Nigeria. However, there is need to clear the ambiguity created in section 14(1).

5. Advanced Fee Fraud and Other Fraud Related Offences Act

The Advanced Fee Fraud and Other Fraud Related Act create offences pertaining to advance fee fraud and related offences.[59] It also creates the offence of laundering funds through illegal activity. Section 7 provides that it is unlawful to conduct or attempt to conduct a financial transaction with funds which is a proceed of an illegal activity with intent to conceal the source and ownership of the fund or with intent to avoid a lawful transaction. Thus, the definition is wider than that given by the Money Laundering Act. It covers the transfer of funds gotten through an illegal activity. Therefore, transaction involving funds which are proceeds of bribery comes under the AFF Act.

There are no specific corporate offences in the AFF Act; however, there are provisions in the AFFA Act which refer to a corporation/ corporate body. For example, section 10 provides that when an offence under the Act is committed by a corporate body and it is proved that the offence was committed with the connivance of an officer of such corporate body, both the corporate body and the officer will be liable. Also, section 7 (3) creates a specific offence by a financial institution who fails to discharge its duties with due diligence.[60] However, a challenge in applying the AFF Act

[59] Cap A6 L.F.N. 2004.

[60] A financial institution is a corporate body.

to a corporate body is that the offence of money laundering as defined in section 7 requires the proof of a mental element. Yet, the Nigerian criminal laws have not developed the means of determining the mental element of a corporate body. Therefore, the AFF Act is inadequate for prosecuting corporations.

With respect to sanctions, the AFFA has more sanctions that are suitable for the corporate offender. Fine, winding up and restitution are sanctions recognised under the Act. For example, section 7 (2) A provides that a corporate body which launders funds shall be liable upon conviction to a fine in the sum of 1million naira or forfeiture of its assets worth 1million naira. Also, section 11 provides that in addition to any other sanction imposed, restitution order may be made against a person convicted. Similarly, section 10 states that the court may order that a corporate body convicted under the Act be wound up and its assets forfeited to the Government.

Conclusion and Recommendations

Generally, Nigeria has a robust legal framework for corruption. However, the legal framework is inadequate for holding corporations criminally liable because of the following reasons.

Firstly, there are four legislations on bribery and corruption in Nigeria as discussed but none of the legislation is comprehensive and adequate for prosecuting corporations for corruption. The provisions of both the Criminal Code and the Penal Code are inadequate for prosecuting a corporation for corruption because the offences under both the Criminal and Penal Code requires the proof of a mental element. Yet, both legislations are silent on how to determine the mental element of a corporate body. Also, imprisonment without an option of fine is the only sanction provided in the Criminal Code. In addition, the corruption offences created under both legislations are inadequate and applies only to official corruption. It does not apply to bribery and corruption in private business transactions.

However, the ICPC Act which is the main anti-corruption legislation in Nigeria constitutes an improvement on both the Criminal and Penal codes; this is because the bribery offences under the ICPC Act are wider than that of the Criminal and Penal codes. The ICPC Act meant to be a holistic anti-corruption legislation creates various types of bribery offences applicable to both natural

and corporate persons.[61] In addition, it is of wider territorial application and applies to international corruption when either party to the act is a citizen or resident of Nigeria.[62]

Yet, the ICPC Act has its limitations and is inadequate for prosecuting corporations. Offences of giving and receiving bribe in sections 9 and 8 require the proof of a mental element and there is no way yet to determine the mental element of a corporation under the Act or any criminal legislation in Nigeria. Although, section 10 creates a strict liability offence without the need for a mental element, however, even if a corporation is convicted under section 10, the corporation may not be adequately sanctioned. This is because the provisions on sanctioning are inadequate as only imprisonment and fine are the sanctions recognised under the ICPC Act.

In the same vein, both the Money Laundering Act and Advanced Fee Fraud Act are inadequate for prosecuting corporations. This is mainly because of the challenge of determining the mental element of a corporation as the offences require the proof of a mental element. In addition, it is submitted that the Money Laundering Act is unnecessary and only represents a duplication of law as the Advanced Free Fraud and Other Related Offences Act gives a wide definition of money laundering offence to mean transfer of funds gotten through illegal activity. Thus, the offence of money laundering created under the Money Laundering Act as transfer of funds gotten through trade in narcotic drugs is superfluous. Trade in narcotic drugs can be accommodated under the Advanced Fee Fraud and Other Related Offences Act.

As stated, another limitation inherent in all the legislation is that of inadequate corporate sanctions. All the legislations discussed above do not have adequate and suitable corporate sanctions that can achieve the goals of sanction. Fine is the major sanction common to all the legislations but fine can be most effective as a corporate sanction if it is in the nature of equity fine and this is still alien to the Nigerian criminal jurisprudence.[63] Apart from fine, other corporate sanctions like community service, corporate probation and adverse publicity should be introduced. Although section 10 of the Advanced Fee Fraud Act provides for

[61] The ICPC Act also treats conspiracy and attempt to commit any offence as if the offence itself was committed, see section 26.

[62] See sections 66, 24 and 13 of the ICPC Act.

[63]See Robert Baldwin, Martin Cave and Martin Dodge *Understanding Regulation: Theory, Strategy and Practice* 2nd edition, (London, Butterworths, 2011)

winding up as a sanction, it is however submitted that winding up should be rarely used as a corporate sanction. This is because the ultimate goal is not to stifle corporate growth but rather to ensure that corporations behave in acceptable ways.

Thus, there is a need for the reform of the Nigerian legal framework for anti-corruption for an effective anti-corruption fight. Specifically, the reforms should target developing a model for determining the mental element of a corporation/corporate body and developing suitable corporate sanctions that will achieve the ultimate goals of sanctions. It is also recommended that the Money Laundering Act should be abolished as it is unnecessary and merely constitutes a duplication of the law.

In addition, although Nigeria is a signatory to some anti-corruption legislation like the United Nations Convention against Corruption and the African Union Convention on Converting and Preventing Corruption. Yet, international conventions are usually of little effect in Nigeria as they are inoperative unless domesticated by the National Assembly of Nigeria.[64] Prompt domestication of such conventions will also boost the Nigerian anti-corruption fight.

[64] Section 12 1999 Constitution of Nigeria.

REGULATORY RESPONSE TO THE IMPACT OF THE GLOBAL FINANCIAL MELTDOWN ON ISLAMIC FINANCE IN NIGERIA

By

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Abstract

This research examines the impact of the Global Financial Meltdown (GFM) on Islamic finance in Nigeria. It examines the law which enabled Islamic finance in the country and the various efforts made to effectuate the law. It compares the performance of the Lotus Capital Halal Investment Fund with the Nigerian Stock Exchange All Shares Index (NSE-ASI) during the GFM. It also reviews the response of the regulatory authorities to the impacts. It finds that the crisis had both negative and positive impacts on Islamic finance in Nigeria. It concludes that while the negative impact was not adverse comparatively, the positive set the stage for the takeoff of full-fledge Islamic financial system in the country.

Introduction

All through the period of the struggle for the official reestablishment of Islamic ways of life in Nigeria[1] since attainment of independence in 1960 to 1986, demand for the establishment of Islamic Banking and financial system was not separated from the general demand for full application of Islamic law. The earliest trace of the nations' relationship with modern Islamic finance was its becoming a member of the Organization of the Islamic Conference in 1986[2]. Events took a dramatic turn when in 1991, provisions for Profit and Loss Sharing (Islamic) banking reared its head into Banks and other Financial Institutions Act. However, nothing serious was

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[1] The word reestablishment is used here against the background of the fact that the present northern Nigeria and beyond was governed under Islamic system of government in the Sokoto Caliphate for a century (1804-1903) before the British colonial incursion into the territory in 1862, see Abdulqadir I. A., "Constitutionality of Islamic Banking in Nigeria", in Ahmadu M. L., Mansur I. S. and Mohammed Isah (eds.) Contemporary Issues in Islamic Jurisprudence, (Benin: Rawel Printing Press, 2009), p. 94.

[2] Although Muslim Bank of West Africa operated in Lagos in 1963 before its license was later revoked by Chief Obafemi Awolowo as Finance Minister, efforts to lay hands on its activities even at the CBN ws abortive.

heard of it again until in 1999, when former Habib Nigerian Bank limited (now merged in Platinum Habib Bank) introduced its interest-free banking window.

By the close of 2003, Nigerian Muslims took real practical steps on the establishment of Islamic Banking and finance outfit by placing application with the Central Bank of Nigeria for operating license for a full-fledged Islamic bank under the auspices of Jaiz International[3].

While the operating license was being awaited, some Muslim members of the National Assembly moved a motion at the House of Representative on Wednesday, 25 May, 2005 for a resolution of the House to urge the Federal government to effectuate the nation's membership of Islamic Development Bank.[4] This was to facilitate the Bank's investment in the Islamic banking system in Nigeria.[5] As the motion was undergoing a heated debate, hinged on religious bigotry, the federal government on June 8, 2005 endorsed the nation's membership of the world financial institution, subscribing to 250 units of its shares.[6]

Unfortunately, issuance of the operating license was caught up in the Nigerian financial policy or politics of the Central Bank of Nigeria banking reform of 2004-2005. The reform required banks to capitalize to N25 billion (79,468,514.57 USD) from N2 billion (6,357,481.17 USD)[7] stipulated at the time of filing the application[8]. In the middle of the policy/political intrigues on the

[3] Jaiz International plc was incorporated on 1st April 2003 as a public limited company with an authorised share capital of =N= 2.5 Billion (US $18.5 Million) with main objective of being an investment holding company to set up non-interest institutions such as Islamic Bank, Takaful, Pension Fund Administration etc., see Jaiz International Plc at http://www.jaizinternationalplc.com/ accessed 13th November, 2010.

[4] See Ibanga Isine, "Reps Suspend Debate on Nigeria's Membership of Islamic Bank," *The Punch,* Thursday, 26 May, 2005, 1-2.

[5] One of the crucial responsibilities of IDB is to be closely associated with the establishment and development of Islamic banks by way of assistance in the mobilisation of new and additional resources in member countries, see, Islamic Development Bank, *30th IDB Annual Report 1425H (2004-2005)* 93.

[6] See Kabiru, Y., "FEC approves Nigeria's membership of IDB," *Daily Triumph,* Thursday, 9 June, 2005, 1-2.

[7] Conversion done on line at Xe Universal currency converter, www.xe.com at USD1 = N314.59k, live rates at 10/01/2017.6,357 04.48 local time (+1 GMT).

[8] This author have criticized the policy, elsewhere, for contravention of the constitutional policy of categorization of the Nigerian banks and the Central Bank Governor's arrogation of legislative powers to himself illegally, see Abdulqadir, I. A., (Il)Legality of the 2004 – 2005 Reform of the Nigerian Banking Sector, paper

take-off of the Islamic financing in Nigeria, Lotus Capital[9] took the courageous step of floating a Halal Fund at the peak of the Global Economic Meltdown, in July 2008. The fund is not only the first acclaimed Shariah compliant investment fund[10] to be managed publicly in Nigeria but is also the only platform available for assessing the market impact of the global economic crisis on Islamic financing in the country[11].

The economic meltdown brought Islamic financing to the front burner of the Nigerian financial system as a desired alternative. Foreign investors began to take interest in Jaiz International and its capital requirement. Muslims groups formed themselves into cooperative societies and Islamic Micro Finance institutions. The Central Bank of Nigeria thus rose to the occasion to regulate the growing interest in the emerging financial system by issuing a Draft Framework for the Regulation and Supervision of Non-Interest Banks in Nigeria in March 2009 and eventually granted operating license in 2011.

This paper therefore examines the impact of the economic crisis on Islamic financing (IF) in Nigeria and the response of the law thereto. It is presented in five parts starting with this introductory part. The second part examines the state of Islamic

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accepted for publication in the University of Maiduguri Law Journal, 2010 (in press), p. 14

[9] Lotus Capital was established in June 2004 as a full-service, ethical investment management boutique specializing in Shari'ah compliant Asset Management, Private Wealth Management and Financial Advisory Services, see http://www.lotuscapitallimited.com accessed 9th November, 2010.

[10] The author has not been able to assess the level of Shariah compliance of the products of the company as discussion is still on to get data from its operators. Thus, reliance is only placed on the 1st Annual Report of the Fund which does not provide any evidence of the compliance, not even a certification by its Shariah Board, see Lotus Capital Limited, *Lotus Capital Halal Investment Fund Annual Report and Accounts, 2009.*

[11] Although deposits were earlier taken and funds raised for investment by Habib Bank and Jaiz International, however, while the former could not show how it invested in Shariah compliant products, see Abdulqadir I. A., "Interest-free Window of the Defunct Habib Nigeria Bank: A Test-run for Islamic Banking System in Nigeria", *Confluence Journal of Jurisprudence and International Law,* 3:1, 2010, pp. 144-148; the latter was precluded from doing so by the Central Bank of Nigeria for reason of fear of depletion of the fund before the issuance of operating license, see Jaiz International, "Re: Update on the Proposed Jaiz Bank" issued on 16th November, 2006, available at http://www.jaizinternationalplc.com/capital_raising.html accessed 14th November, 2010.

finance in Nigeria before the economic crisis. The impact of the crisis on the financial system is looked into in part three while part four deals with the legal response to it. It ends in part five with conclusion.

IF in Nigeria on the Eve on the Economic Crisis

The earliest interaction of the Nigerian financial system with modern Islamic financial system is the indirect consequence of the nation's becoming a member, in 1986, of the OIC, which has Islamic Development Bank (IDB) as one of its specialized institutions[12]. However, like the requirement in all countries of the world, there was the need for legal backing for the emerging system to be integrated into the mainstream of the nation's financial system. As will be shown later however, the legal instrument is not sufficient for a takeoff of the system without the people's readiness and, to a great extent, political will from the government.

1. The Enabling Law

Banks and other Financial Institutions Act 1991[13] became the first law to give recognition to the Islamic financing in the name of Profit and Loss Sharing (PLS) Banks. While Section 9 (2) of the principal Act recognized PLS banks as one of the categories of the Nigeria Banks, Section 66 of the amended Act[14] defined PLS bank as a bank which transacts investment or commercial banking business and maintains profit and loss sharing account.

In recognition of the peculiarities of this new banking system, the law made provisions for a number of exceptions to facilitate its smooth operations. Chief among these exceptions is the non-applicability of the need to display the interest rate in the banking premises of a PLS bank. The law provides:

> Every bank shall display at its offices its lending and deposit interest rates and shall render to the Bank information on such rates as may be specified, from time to time, by the Bank, **provided that the provisions of this subsection shall not apply to Profit and Loss sharing banks.**[15]

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[12] See OIC, Specialized Institutions and Organs, at http://www.oic-oci.org/page_detail.asp?p_id=65 accessed on 14th November, 2010.

[13] Cap. B3, Laws of the Federation of Nigeria (LFN), 2004.

[14] Decree No. 38, 1988.

[15] S. 23(1) BOFID, 1991 Cap. B3, LFN, 2004; emphasis mine and reference to "Bank" as opposed to "bank" in the law relates to the Central Bank of Nigeria and any other bank respectively, see S. 61 thereof.

This provision presumes the payment or taking of interest on deposits or loans as a necessary practice of banks and thus mandated the display of the interest rates. Its exemption of PLS banks from the practice therefore sets a solid foundation for Islamic banking system. Similar provisions of the Act empowered the Central Bank Governor to further exempt PLS banks from its provisions as he may think fit.[16]

2. Efforts to Effectuate the Law

Several efforts were made by investors in financial system like banks, private finance houses and Muslim groups to give effect to the provisions of the enabling law. Many of the efforts were aborted because there were no clear guideline from the banks regulators, the CBN, on its licensing, security of foreign investors' funds and its Shariah Compliance requirements. Of all the Islamic finance initiatives introduced during the GFM, only the activities of Lotus Capital were capable of being used to test the impact of the financial crises on Islamic finance in Nigeria. Some of those efforts are hereunder reviewed.

3. Habib Nigeria bank Interest-free window

Former Habib Nigeria Bank attempted to take advantage of the Islamic banking enabling law by applying for provisional operating license in 1992 to operate profit and loss sharing banking. However, due to what one of its former Managing Director described as lack of commitment on the part of the wealthy members of the Nigerian Muslim Community, it was only able to secure approval from the Central Bank to operate interest-free banking window in 1997.[17] It eventually operated the window between October, 1998 and December, 2005 when it merged to become Platinum Habib Bank.

Throughout that period, there was no evidence of the bank's investment of the deposits received in any Shariah compliant investment product. This is aside the fact that a number of the terms and conditions published in the window's operation manual[18] offend

[16] See S. 52 BOFID, 1991 as amended.

[17] See Bello, F., "Emerging opportunities for Divine Banking in Nigeria," paper presented at the first orientation seminar on Islamic Banking and Finance in Nigeria, held on 25 November, 2000 in Kano-Nigeria, p. 15.

[18] See Habib Nigeria Bank Ltd., *Non-interest Based Banking- Guide to Participation,* (Kaduna: HNB, 1999).

Shariah principles[19]. Furthermore, the window did not enjoy the prominence it enjoyed before the merger. Thus, it cannot be used to test the impact of the GFM.

4. Jaiz International Plc.

Jaiz International Plc. was incorporated on 1st April 2003 as a public limited company with an authorized share capital of 2.5 billion naira (7,946,851.46 USD)[20]. It is an investment holding company proposing to set up non-interest institutions such as Islamic Bank, Takaful, Pension Fund Administration. It raised N2.5 billion through Initial Public Offer of its shares which was oversubscribed by 120%[21] and deposited N2 billion with the Central Bank in December, 2003, as was then required, in support of its application for operating license for full-fledge Islamic bank[22].

As mentioned above, Jaiz's application was caught-up by banking reform which requires N25 Billion capital for all banks. While it was taking steps to meet up with the new requirement[23] it was precluded by the CBN from investing the existing fund in Shariah compliant products. The reason according to the Managing Director of the company is the CBN's fear of depletion of the fund before the issuance of operating license[24]. Only in June 2011 was the bank granted operating license by the CBN and for this reason too, the fund with Jaiz International cannot be used to run market impact test of the GFM.

5. Lotus Capital Limited

Lotus Capital was founded in June 2004 as a full-service, ethical investment management company specializing in Shari'ah compliant Asset Management, Private Wealth Management and

[19] See Abdulqadir I. A., Interest-free window, p. 150.
[20] Compare the current USD equivalent with $18.5million it was in 2006.
[21] See Jaiz International Plc., Capital Raising at http://www.jaizinternationalplc.com/capital_raising.html accessed on 11th January, 2017.
[22] See Jaiz International Plc. *Annual Report and Accounts, 2004,* p. 4
[23] Including attraction of foreign investment, Private Placement of =N=10 Billion (US $ 31,787,405.83 Million) and making another Public Offer of =N=13 Billion (US $ 41.323,627.58 Million), see n.20.
[24] See Jaiz International, "Re: Update on the Proposed Jaiz Bank" issued on 16th November, 2006, available at http://www.jaizinternationalplc.com/capital_raising.html accessed 11th January, 2017.

Financial Advisory Services. It is duly registered with the Securities and Exchange Commission (SEC) as Fund Managers, Corporate Investment Advisers and Issuing House. Its products include Lotus Capital Halal Investment fund (medium to long term Unit Trust Scheme), Lotus Hisab (Short term investment and savings account builder), Lotus Capital Hajj Investment (Hajjii) and Lotus Ta'alim, (long term plan for future education of children or wards). It invests in screened stock, real estate and asset backed investment.[25]

Lotus Capital Halal Investment Fund was lunched for business in the middle of the storm of the Global Financial Meltdown on July 1, 2008. The performance of this product within eighteen months of operation, i.e. between the above date and the financial year ended December 31, 2009 provides the platform for assessing the impact of the financial crisis on Islamic finance in Nigeria.

6. Islamic Cooperative Societies

More than a decade ago, one of the routes adopted by the Nigerian Muslims for accessing credit facilities in Shariah compliant manner is through setting up of Islamic Multipurpose Cooperative Societies (IMCS). The societies offer products like *qard hasanah* (interest free housing and emergency loan), *Murabahah* (commodity sales), *Mudarabah* (entrepreneurial financing) and *Musharakah* (Business partnership) amongst others. In Kwara State alone, not less than twenty (20) Islamic Cooperative Societies have registered with the Ministry of Commerce and Industry. The growth in number of the societies leading to creation of union of the societies, increase in their membership strength and transformation of some of them to become Microfinance bank particularly within the last two years is traceable to the impact of GFM.

The Impact of GFM on Islamic Financing in Nigeria

GFM impacted both positively and negatively on Islamic financing in Nigeria. The Market Impact Assessment (MIA) conducted through the Lotus Capital Halal Investment Fund revealed a negative impact. On the other hand the increase in the

[25]See Lotus Capital Limited, at http://www.lotuscapitallimited.com/index.php?option=com_content&view=article&id=38&Itemid=32

popularity of the financial system and the resultant growth in its demand are seen as positive index[26]. But before we examine the impact on IF, a general outlook of how the Meltdown affects the entire Nigerian economy will be relevant.

Impact on Nigerian Economy

GFM impacted negatively on the Nigerian economy through the following indirect factors:

1. Reduction in foreign direct investment as a result of withdrawals and withholding of foreign portfolio investments (in order to service financial problems at home)[27].
2. In the first half of the year 2009 the size of non-performing assets on the balance sheets of the deposit taking banks resulting from their exposure to the capital market and oil and gas sector through marginal borrowing/lending (Nigeria's own "sub-prime" lending) from previous years was significant[28].
3. Decline in demand for petroleum product and consequently, reduction in earnings from the oil sector on which the nation's export is significantly dependent: 99% of FX and 85% of local revenues are directly derived from activities related to export of oil which was at the center of the financial crises[29]. For instance, the price of Nigeria's

[26] See Lotus Capital Limited, *Lotus Capital Halal Investment Fund Annual Report and Accounts, 2009,* p.11.

[27] Mtango, E. E. E. (2008) "African Growth, Financial Crisis and Implications for TICAD IV" GRIPSODI-JICA joint seminar: *African Growth In The Changing Global Economy* paper presented by Ambassador of Tanzania and Dean of the African Diplomatic Corps in Japan retrieved from www.google.com on 24/11/08; see also Mobolaji E. Aluko, The Global Financial Meltdown: Impact on Nigeria's Capital Market and Foreign Reserves, Nigerian Village Squire October 24, 2008 at http://www.nigeriavillagesquare.com/articles/mobolaji-aluko/the-global-financial-meltdown-impact-on-nigerias-capital-market-and-foreign-reserves.html accessed 14/8/16.

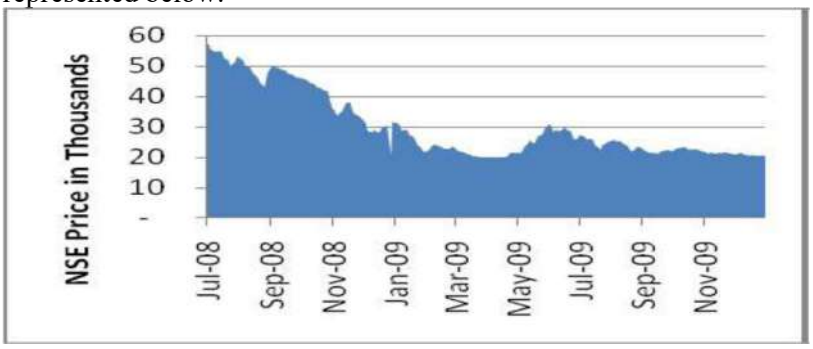
[28] See Lotus Capital Limited, *Lotus Capital Halal Investment Fund Annual Report and Accounts, 2009,* p.11.

[29] See Abdul Adamu, The Effects of Global Financial Crisis on Nigerian Economy, *Social Science Research Network, retrieved from* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1397232&http://www.google.ca/url?sa=t&source=web&cd=1&ved=0CBUQFjAA&url=http%3A%2F%2Fpapers.ssrn.com%2Fsol3%2FDelivery.cfm%2FSSRN_ID1397232_code515373.pdf%3Fabstractid%3D1397232%26mirid%3D1&rct=j&q=Abdul%20Adamu&ei=uK3gTPf6KMfMhAfiwuj7DA&usg=AFQjCNFgYQnBkZU60LZMgzSIZ50t1Tcm3Q

light sweet crude appreciated to as high as $147 in mid-2008, it subsequently declined sharply and ended 2008 below $45 per barrel[30]. This forced the Federal Government of Nigeria to reduce the 2009 budget revenue estimate to $45 per barrel from over $60 per barrel.

The Nigerian Capital Market was worse hit by the meltdown. Nigeria's stock market index is the Nigerian Stock Exchange's All-Share Index (NSE-ASI), which provides a picture of the financial health of 233 listed equities. It started the year 2008 at 58,580 (with a market capitalization of N10.284 trillion), and went on to achieve its highest value ever of 66,371 on March 5, 2008, with a market capitalization of about N12.640 trillion[31].

Equity market performance in the 18 month period from July 2008 to December 2009 was abysmal. The NSE-ASI declined inexorably by about 70% over the period from 57,047.27 points as at July 1, 2008 to close at 20,561.15 as at December 31, 2009. In terms of capital decline, the Nigerian capital market lost about N3.38 trillion, or about 26.7% between March 5 and October 24 2008 alone[32]. The poor performance of the market is graphically represented below:



Source: Nigerian Stock Exchange

Three key factors were identified as being responsible for the poor performance of the market. First, as at early 2008, the intrinsic values of most stocks in the capital market (even with optimistic assumptions) were far below their market prices.

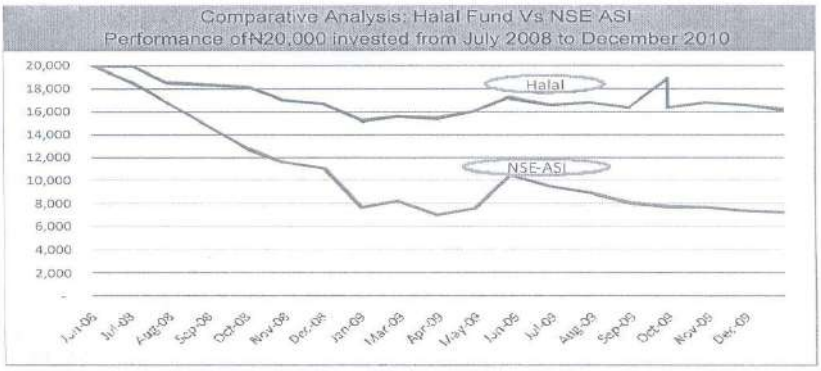
[30] See Lotus Capital Limited, *Lotus Capital Halal Investment Fund Annual Report and Accounts, 2009,* p.11.
[31] See Mobolaji E. Aluko, The Global Financial Meltdown, n. 26.
[32] See Sanusi Lamido Sanusi, The Nigerian Banking Industry: What Went Wrong and the Way Forward, Convocation Lecture delivered at the Convocation Square, Bayero University, Kano, on Friday 26 February, 2010, p.2.

Secondly, concerns about the economy as a result of the financial meltdown had overtaken the positive outlook and investor confidence, which underpinned the sustained rally in previous periods. Lastly, the excessive liquidity from bank margin loans that had driven demand for, and prices of stock was no longer available.

Impact on Lotus Capital Halal Investment Fund

Composite benchmark of the Halal Fund is the NSE-ASI which, as shown above, declined by 63.96% over the 18-month period from 57,047.27 points in July 1, 2008 to 20,561.15 in December 31, 2009. This translated into decline in the value of the Halal Fund by 20%. The Fund opened at N1.00 and closed at N0.80 over the same period[33]. Despite this decline, however, the Fund was rated to have out-performed its benchmark by almost 45%.

The graph below shows the value, as at December 31, 2009, of a N20,000 investment made on July 1, 2008 in the Lotus Capital Halal Fund. The performance of the Fund's benchmark, NSE-ASI, assuming the same minimum investment of N20,000, is shown on the same graph for comparative purposes.



Source: Lotus Capital Limited.

[33] See Lotus Capital Limited, *Lotus Capital Halal Investment Fund Annual Report and Accounts, 2009,* p.11.

In the above graph, the NSE-ASI investment of N20,000 continued on a straight steep decline from July 2006 to as low as less than N8,000 (>40%) by January 2009. It steeped to its lowest in April 2009 to about N7,000 (65%) and flip-flopped between that period to appreciate to a little above N10,000 (50%) in June 2009. It then embarked on steeping down digressively to close at a little above N7,000 by December, 2009.

On the other hand, the Halal Investment Fund of the same amount at the same period showed more resilience even in its decline. It steeped to its lowest in January 2008 to close at a little below N16,000 (80%) as against NSE-ASI's N8,000 (40%) in the same month. It then picked up progressively to reach N18,000 (90%) in September 2009 before going down again to close at N16,000 (80%) in December 2009.

Bearing in mind that there is hardly any domestic mortgage market for there to be a sub-prime mortgage portfolios that were spun off into securitized instruments and subsequently offered as investments and set off the global financial crisis in the UK and the USA it is difficult to attribute the above scenario to direct impact of GFM. The impact could at best qualify as what *The Economist*[34] and El-Said and Ziemba[35] referred to as second round effect.

Lotus Capital maintains that her investment philosophy is to optimize total returns of investors by seeking high quality investments whilst adhering to the strictest code of ethics in line with our Islamic finance investment philosophy. Yet it was difficult to ascertain the level of her investments' Shariah compliance, especially as there was nothing on the face of its annual report to show certification of its Shariah Board.

The reason for the marginal loss of Lotus Capital in the period under review, which is an 'impressive performance' when compared with other public managed funds and the NSE-ASI, may not be unconnected with the position of Umer Chapra's view on the operations of Islamic Financial System. According to the scholar, the way the Islamic financial system has progressed so far is only partly, but not fully, in harmony with the Islamic vision. It has not been able to fully come out of the straitjacket of conventional

[34] *The Economist*, "Middle East finance: Shine comes off Islamic banks", September 24, 2009.

[35] El Said A., and Ziemba R., "Stress-testing Islamic Finance", Roubini Global Economics, May 10, 2009.

finance[36]. He asserted that the use of equity and PLS modes has been insignificant, while that of the debt-creating sales- and lease-based modes has been predominant. As at December 31 2009, the Halal Fund of Lotus Capital was 34% invested in equities, 14% in Asset-Backed Investments and 52% in cash and other liquid assets[37].

Moreover, even in the case of debt-creating modes, all Islamic banks and branches or windows of conventional banks do not necessarily fulfill the conditions laid down by the *Shari'ah.* They try to adopt different legal stratagems *(hiyal)* to transfer the entire risk to the purchasers (debtors) or the lessees[38]. The two leading English cases of *Islamic Investment Company of the Gulf (Bahamas*) *Ltd v. Symphony Gems NV & Ors*[39] and *Beximco Pharmaceuticals Ltd. & Ors v. Shamil Bank of Bahrain EC*[40] are unequivocal evidences of how *murabahah* was used just as *hiyal* for an illegal contract of loan at interest and further testimony to the assertion.[41]

This result of the assessment of the impact of GFM on Lotus Capital is comparable, in a way, with the comparative survey conducted by Maher and Jemma on the impact of the crisis on Islamic and conventional banks in eight countries.[42] The two results confirm the resilience of Islamic finance and its profitability

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[36] See Chapra, M. U., *The Global Financial Crisis: Can Islamic Finance Help Minimize the Severity and Frequency of Such a Crisis in the Future?,"* Paper presented at the Forum on the Global Financial Crisis. Jeddah: Islamic Development Bank on October 21, 2008, p. 17.

[37] Lotus Capital Limited, Annual Report 2009, p. 12.

[38] Chapra, M. U., *The Global Financial Crisis,* p. 17

[39] (2002) WL 346969 (QB Comm. Ct 13 February 2002).

[40] [2004] EWCA Civ 19 (Court of Appeal, Civil Division); [2004] All ER (D) 280 (Jan); for a detailed critique of this case, see Abdulqadir I. A. and Zainudin Bin Jaffar, "Islamic Financial Services: The Way Forward for the Financial Regulatory Authorities", *University of Ilorin Law Journal,* 2006:1, pp. 156 – 162 and Engku Rabiah Adawiah bt Engku Ali, "Constraints and Opportunities in Harmonisation of Civil Law and Shariah in the Islamic Financial Services Industry", [2008] 4 MLJ i at p. xxix.

[41] See Abdulqadir I. A., "Islamic Banking Dispute: Between Judicial Pluralism and ADR", paper presented at the International Conference on Islamic Banking and Finance: Cross Border Practices and Litigation, Organised by the International Islamic University Malaysia (IIUM) and University of Wisconsin, USA, held at IIUM on 15-16 June, 2010, p. 15

[42] Including Saudi Arabia, Bahrain Kuwait UAE, Qatar, Jordan, Turkey and Malaysia, see Maher Hasan and Jemma Dridi, "The Effect of the Global Crisis on the Islamic and Conventional Banks: A Comparative Study", *IMF Working Paper WP/10/201,* September, 2010.

throughout the period of the crisis. However, unlike the case in the survey, no data is available in case of Lotus Capital to examine its credit and asset growth and its external rating. In the former, Islamic Banks' credit and asset growth were at least twice higher than that of Conventional Banks during the crisis, suggesting a growing market share going forward and larger supervisory responsibility. External rating agencies' re-assessment of Islamic Banks' risk was also generally more favorable or similar to that of Conventional Banks[43].

Positive impact of the GFM

The most important impact the GFM had on Islamic finance in Nigeria is the greater awareness it brought to the alternative financial system. The financial system has become more popularized and this, in effect, put more pressure on the financial regulatory authorities to facilitate the take-off of full-fledge Islamic banking and financing in the country. At the heat of the GFM, governor of the CBN expressed the readiness of the Bank to the development of an Islamic bank in Nigeria particularly in response to the global financial crisis which had exposed the deficiencies in the conventional banking system[44].

While the take-off of the full-fledge bank was being awaited, several Muslim organizations found a middle course in Islamic cooperative societies. The number of such societies grew significantly within the period of the GFM. For instance, a total number of twenty Islamic cooperative societies was registered with the Kwara State Ministry of Commerce and Industry between 2004 and 2009 and twelve (12) i.e. 60% of them were registered between 2008 and 2009 alone[45]. Also, Al-Burhan Cooperative society of the University of Ilorin-Nigeria which registered in 2004 had

[43] Ibid., at p. 33.

[44] See Sanusi Lamido Sanusi, "Islamic Solution to the Global Economic Meltdown", paper presented at Ramadan Seminar organized by Movement for Islamic Culture and Awareness (MICA) on 29 August, 2009

[45] Al-Halal Muslim Workers MCS (2008), At-Taqwa MCS, Kwara Polytechnic (2008), Al-Barka MCS, Okekura, (2008), Al-Amanah MCS, Ilorin-South (2008), An-Nur MCS, Egba/Otte (2009), Halal MCS, Idofian (2009), Iman MCS, Ministry of Health (2009), Al-Amanah MCS, CAILS Ilorin (2009), NATAIS MCS, Ilorin-West (2009), Fithat MCS, Ode Alausa (2009), Al-Barka MCS, Oko Erin (2009) and Iwajowa MCS, Ilorin East (2009); source: Al-Barka Trust Fund, in charge of coordinating the registered Islamic Cooperative Societies in Kwara state towards formation of Islamic microfinance bank, www.albarkatrustfund.org

membership strength of 165 members with 102 members (61.82%) joining between 2007 and 2010.

In April 2010, Al-Barka Cooperative Society belonging to The Muslim Congress (TMC) in Lagos State became Al-Barka (Islamic) Microfinance Bank. According to its chairman, the bank was set up in response to the increasing demand for alternative micro credit products by the less privileged members of the society against the conventional banking practices.

The number of seminars, workshops and conferences both national and international on Islamic banking and finance related themes also increased significantly. While such conferences were held in the average of one in a year since around 2000[46], not less than ten (10) of them were held between 2009 and 2010[47]. These were aside from Radio and television programmes sponsored by Muslim Organizations and corporate bodies on the subject-matter. However, with these positive impacts come a greater regulatory responsibility and legal response.

Legal and Regulatory Response to the Impact

In response to the above-mentioned impact of GFM on Islamic finance in Nigeria both on the existing products and the growing demand, the CBN on March 2009, acting under its statutory powers, issued a Regulatory framework for the practice of Islamic financial system in the country[48]. The enabling statute provides in part that "In addition to any of its power under this Act, the Bank may: …. (b) issue guidelines to any person and any institution under its supervision"[49].

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[46] IIBI, "4th Annual Islamic banking and Insurance Conference in Nigeria" *New Horizon*, June/July, 2004.

[47] These include International conference on Islamic banking and finance organized by the Department of Islamic law and Islamic Research and Training Institute 6-8 October, 2009, a workshop organized by Lotus Capital on December, 2009? Another one was organised by Crescent University Abeokuta on April, 2010 and that of the Muslim Lawyers' Association of Nigeria on September, 2010 amongst others.

[48] See CBN, "Draft Framework for the Regulation and Supervision of Non-Interest Banking in Nigeria", Circular No.: BSD/Dir/Gen/NIB/01/008 published on 4 March, 2009 available at www.cenbank.org/document/bsdcirculars.asp?beginrec=21&endrec=40> (accessed: 12 March, 2016).

[49] See S. 33 (1) (b), CBN Act, 2007; see also Sections 57 (2), 61 (1) (a), 66 and 23 91) Banks and other Financial Institutions Act, 1991 as amended (Cap. B3, Laws of the Federation of Nigeria (LFN) 2004) for similar powers.

The covering circular to the framework is self-explanatory:

> In response to the increasing number of investors, banks and other financial institutions desiring to offer Non-interest products and services, the CBN has developed the attached draft framework for the regulation and supervision of Non-interest banks in Nigeria[50].

The sixteen paragraphs document covers areas including licensing requirements, the proposed banking models, the financial instruments, corporate governance, Shariah supervision, business standards, Audit and Accounting and Prudential requirements, risk management and combating of money laundering and financial terrorism. It also acknowledged the need for Shariah compliant investment outlets like Islamic Capital Market for the effectiveness of the prospective system and words were given to facilitate same[51]. The draft framework was meant to be an exposure draft to elicit comments, suggestions and inputs from the stakeholders. To that effect, the author and some other individuals, under the auspices of Al-Barka Trust Fund submitted a memorandum containing some observations and suggestions including the following:

1. The need to require the Memorandum and Articles of Association of the Non-Interest banks to establish the office of Shariah Advisory/Supervisory Committee.
2. Undesirability of issuing license for non-interest banking window of conventional banks in Nigeria until such window or full-fledge Islamic bank has been operated as a pilot project. This position was based on research findings of the authors of the memorandum on earlier licensed window.
3. Guide to Bank Charges issued by Bankers' committee should be scrutinized by the CBN Shariah Council to avoid the current unfair charges of the conventional banks.
4. Appointment of members of Shariah supervisory committee should be subjected to the approval of the CBN through its own Shariah Council. Mechanism should also

[50] See CBN, Draft Framework for the Regulation and Supervision of Non-Interest Banks in Nigeria, circular No.: BSD/DIR/GEN/NIB/01/008 issued on March 4, 2009.

[51] see Abdulqadir I. A., Islamic Banks' Participation in Deposit Insurance Scheme: A Legal Appraisal, paper accepted for publication in the *Nigeria Deposit Insurance Corporation Quarterly,* February, 2010, p. 17.

be put in place to ensure that the activities of the committee are periodically subjected to the CBN and other regulatory bodies' examinations.

5. The need to have the Shariah Council of the CBN as an in-house unit within the CBN and not outsourced.
6. The need to correct the impression created in the draft framework that the use of the word "Islamic" as part of the registered or licensed name of a non-interest bank is totally prohibited when Section 34 (1) (a) of BOFIA 1991 (as amended) only subjects its use to prior approval of the CBN governor.
7. The need to facilitate Shariah Compliant investment instruments proposed to be floated as liquidity assets to meet the CBN liquidity ratio and make it prerequisite to the take-off of the Islamic banking operations in the country.
8. The need to rework profit equalization reserve in a way that injustice against the bank partners who cease to be partners but part of whose profit share has been contributed to the reserve[52].

The former CBN Governor, Sanusi Lamido Sanusi was of the view that the financial crisis provided scholars, lawmakers and bankers opportunities to re-assess Islamic finance. it made the CBN to embark on extensive capacity building through collaboration amongst various stakeholders to develop cognate expertise in non-interest banking[53]. The final Framework, which took cognizance of the above suggestions, was issued in January 2011 and was amended in June 2011 in response to religious sensitivity of some of its provisions. It has remained the major working tool for the operation of Islamic banking in Nigeria.

Conclusion

Since Nigeria became a member of OIC and the subsequent recognition given to PLS (Islamic) banking by BOFIA in 1991 none of the various efforts made to operate the financial

[52] Al-Barka Trust Fund, Re: Draft Framework for the Regulation and Supervision of Non-Interest Banks In Nigeria, Memorandum Reference No.: ATF/IL/COOP/006/1430 dated 22/03/1430AH (18/03/2009)

[53] One of such capacity building workshop was organized by the CBN for its staff on 18-19 October, 2010 in collaboration with Islamic Financial Services Board of Malaysia at Sheraton Hotels Abuja.

system provides a platform for market impact assessment of GFM except the Lotus Capital Halal Investment Fund. Although the fund lost 20% of its investment during the crisis, yet a comparison of the loss with that of its benchmark NSE-ASI shows that the fund was more resilient even in adversity. Aside from this negative impact, GFM brought a number of positive impacts on Islamic finance in Nigeria including improved awareness of the financial system, increase in the number and membership of Islamic cooperative societies and growing pressure on the regulatory authorities to facilitate the take-off of the banking system. The pressure has also elicited legal and regulatory framework from the authorities which has been appropriately reacted to by the stakeholders. The eventual issuance of the framework thus becomes a major response to the impact of GFM in Nigeria and the CBN, through it, set the stage for Islamic financial system in the Nigeria by complementing the existing law on its operations.

'AQIQAH AND NAMING CEREMONY UNDER ISLAMIC LAW: PRINCIPLES AND PRACTICE IN THE NORTH-CENTRAL NIGERIA*

By

Nimah Modupe Abdulraheem Ph.D**

Abstract

The experience of having a child is an important event in the life of a Muslim. As such, 'Aqiqah and naming ceremonies are milestone event in the life of a Muslim child in this world and in the Hereafter. Thus, 'Aqiqah is comprised of the religious and spiritual rites to be observed at the birth of a new baby. These are complimented by ceremonies which have been affected by a range of cultural variations across ethnic divides. The general concern of this work is whether the contemporary practices of 'Aqiqah and naming ceremonies are not at variance with the precinct of Islamic principles on the subject. This paper therefore examines the Shariah requirements of 'Aqiqah and naming ceremonies under Islamic law with a view to ascertain the validity of contemporary 'Aqiqah and naming ceremonies in Northern Nigeria. It explores the extent to which the present-day Muslims conform to the basic Islamic tenets or otherwise in matter of 'Aqiqah and celebration of naming generally using selected cultures, including the yoruba component part of the North-central as case studies. It concludes by offering suggestions to the Muslims to follow and adopt the style of the Holy Prophet (SAW) and his early followers in this matter

Introduction

The word 'Aqiqah literally means cutting. As a religious term, it means slaughtering a goat on the seventh day of a child's birth.1 It may also be described to mean the baby's head at birth or the animal that is slaughtered when the baby's hair is cut.2 Islam as

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[1] Abdullah NasihUlwan, Child education in Islam, 2004, P. 48.

[2] Ahmad IbnNaqib al-Misri-Reliance of the TravellerA Classic Manual of Islamic Sacred Law, 1999, Amana Publications, U.S.A., J. 15.

a religion sets out rules and regulations guiding the entire human conducts. It therefore laid down rules and regulations for the celebration of 'Aqiqah. However, for the fact that adherence to Islam cut across many different cultures and traditions with varying norms, the uniformity of the ways 'Aqiqah is observed vary according to the individual groups and tradition as long as it does not offend the principle and ethics of the religion as laid down by the Qur'an and Sunnah. In spite of these variations, there are certain cultural norms regarding the issue that are common in most contemporary Islamic societies especially, in North-central Nigeria. There is therefore the need to draw a distinction between pure Shariah stipulations and cultural appendages that have in recent time so heavily coloured our ceremonies that they are being mistaken for pure Shariah. Against this background, this paper examines the Shariah requirements on issue of 'Aqiqah and the practice of naming ceremonies in the present-day North-central Nigeria, including its Yoruba speaking area. The paper in addition examines the cultural and current variation introduced into the matters with a view to examining the extent to which the current Islamic societies in Northern-central Nigeria conform to the Shariah guidelines or otherwise. At the end, the paper offers positive suggestions and recommendations that will enhance strict compliance with Islamic principles.

Marriage in Islam

The word *'Aqiqah* literally means cutting. As a religious term, it means slaughtering a goat on the seventh day of a child's birth.[3] It may also be described to mean the baby's head at birth or the animal that is slaughtered when the baby's hair is cut.[4] Islam as a religion sets out rules and regulations guiding the entire human conducts. It therefore laid down rules and regulations for the celebration of *'Aqiqah*. However, for the fact that adherence to Islam cut across many different cultures and traditions with varying norms, the uniformity of the ways *'Aqiqah* is observed vary according to the individual groups and tradition as long as it does not offend the principle and ethics of the religion as laid down by the *Qur'an* and *Sunnah*. In spite of these variations, there are certain

[3] Abdullah NasihUlwan, Child education in Islam, 2004, P. 48.

[4] Ahmad IbnNaqib al-Misri-Reliance of the TravellerA Classic Manual of Islamic Sacred Law, 1999, Amana Publications, U.S.A., J. 15.

cultural norms regarding the issue that are common in most contemporary Islamic societies especially, in North-central Nigeria. There is therefore the need to draw a distinction between pure *Shariah* stipulations and cultural appendages that have in recent time so heavily coloured our ceremonies that they are being mistaken for pure Shariah. Against this background, this paper examines the *Shariah* requirements on issue of '*Aqiqah* and the practice of naming ceremonies in the present-day North-central Nigeria, including its Yoruba speaking area. The paper in addition examines the cultural and current variation introduced into the matters with a view to examining the extent to which the current Islamic societies in Northern-central Nigeria conform to the Shariah guidelines or otherwise. At the end, the paper offers positive suggestions and recommendations that will enhance strict compliance with Islamic principles.

Marriage in Islam

Islamic scholars have defined marriage from different perspectives. According to Fyzee as cited by Opeloye, marriage is a contact for the legalization of intercourse and procreation of children.[5] Another author see marriage as the bond that connects a man and woman who have the desire to live together and establish an Islamic family based on the injunction of Allah.[6] According to them, marriage is a social institution that is as old as human race. It is a relationship between a man and woman which is recognized by custom and law and which involves certain rights and duties both in the case of the couples and the children born out of it.[7]

Religiously, marriage is a duty imposed on mankind. The Qur'an says: *"And marry those among you who are single and of virtuous one among your slaves, male or female, if they are in poverty God will give them the means out of His Grace. For God encompasses all and He knows all things."*[8]

The position may however change as the circumstance of a Muslim changes. For instance, it is *Madub*, (laudable) where a

[5] Opeloye M.O. The Qur'an and the Bible Common Themes for Peaceful Co-Existence, 2014, Spectrum, Ibadan, P. 164.

[6] Al-Fiqhul-MuyassanuMinal-Quriani was-Sunnah. Simplified Islamic Jurisprudence Based on the qur'an and Sunnah Vol. 2. Compiled and Translated by Muhammad M. Abdul-Fattah. Reinay Y. Shakeir (ed) Dar Al-Manarah, Egypt 1425/2004, p. 699.

[7] Ibid.

[8] Quran 24:3.

Muslim guarantees his full control over his carnal and financially capable to pay the dowry as well as capable of fulfilling the obligations associated with marriage. In this case, the act is rewardable if a Muslim carries it out but attracts no punishment if he keeps off from the injunction. This is because one of the primary objectives of marriage in Islam is to facilitate an orderly and organized continuity of man progeny.[9] It is *Wajib* (obligatory), and indeed a duty which a Muslim must fulfill if he is not capable of restraining himself from falling prey of adultery and he is capable of coping with the financial responsibility. It may be *haram* (prohibited), where the man can control himself and getting married will make him to seek for means of maintenance in an unlawful way. It is *Makruh* (disapproved) where there is no call for it.[10]

Marriage in its religious sense has also been viewed as a basis of society. It is view as sacred covenant which leads to the uplift of man and for the continuance of human race.[11] One of the basic objectives of marriage in Islam is the need for procreation[12] in an orderly and legitimate way. This is a basis of human civilization and a means of perpetuating human race.[13] As such, Almighty Allah created two both sexes for all creature for the purpose of procreation and to perpetuate the entire world. The Qur'an eloquently testifies to this as follows: *"Glory be to Him who created spouses from among things He grow from the earth among yourselves and from among other things you know not"*

Position of Children in the Family

After marriage, the next important social interest that emanates out of it is the burning passion on the part of the couples to have children of their own[14]. Hence, the birth of a child in a family is considered a blessing[15] essential to strengthen the marriage bond, for perpetuation of the line of descent and for enlarging the community of Muslim as encouraged by the Holy Prophet. *"Marry*

[9] Ambali M.A. The Practice of Muslim Family Law in Nigeria, 2nd Edition, 2003, Tamaza, Zaria, p. 146.
[10] Ibid.
[11] Charis Waddy, The Muslim Mind, (1976, Longman, New York), p. 63
[12] Q4:2, Q25:74,Q42:49
[13] Quran 30:21.
[14] Abdullah Nasih 'Ulwan, Child Education in Islam P. 21.
[15] 30:21

the loving and fertile woman, as I shall take pride in your abundance".[16]

It is the desire of every couple after celebration of marriage to have children and make the home pleasant and happy. The urge is greater on the path of women than the men. This is of course natural, as after marriage every woman waits patiently to receive the fruits of her womb and to rise to the status of a mother. Couples who are not blessed with a child after marriage are looked upon as lacking the blessings of Allah, and this sometimes lead to divorce since inability to have a child is usually regarded as the fault of the woman.[17]

Islam gives the understanding that when a woman is pregnant, she enjoys through the whole period of pregnancy, the status of a person who fasts, prays during most of the nights, obey Allah and fights for Him, as well as unquantifiable reward she receives from Allah for the pain she endures during childbirth. When the child is born and she feeds the baby with breast milk, she gets reward for every sip of the milk she feeds the baby with and even when she wean the child.[18] In essence, children in the family are glad tidings from God and allurements of this world,[19] a source of satisfaction and a great bounty that calls for gratitude.[20] They are a source of great joy and delight, they make life sweet, bring more sustenance into the family and give hope to the parents.[21] When Allah blesses the couple with the fruits of the womb, the couples as well as the society are expected to carry out certain duties. These duties form the basis of discussion of the next sub-heading.

Shariah Requirements on the Birth of a Child.

i. Preparation to Receive the Baby

Every parent is expected to prepare appropriately and get set to welcome the birth of a new baby. This should be done by ensuring that the conditions for the birth of the child are safe. For

[16] Abu-Dawud, Hadith 2050, available @ http://Sunnah.com accessed on 26/1/2017

[17] Hakim Abbas, System of Islamic Education, 2012, New Delhi, P. 4.

[18] Akhlaq Hussein, Muslim Parents Their Rights and Duties 2002, Imran Book Depot New Delhi, p. 45.

[19] Quran 18:46

[20] Children in Islam their Care, Upbringing and Protection. Al-Azhar University in Cooperation with the United Nations Children Fund (UNICEF), 2005, P.96

[21] Muhammad Ali-al-Hashim, The Ideal Muslimat, 2005, International Islamic Publishing House, Riyadh, P.233

instance, the delivery of a child should take place at a properly equipped medical center or hospital with the aid of qualified medical staff. It is the responsibility of the father to ensure that the child is safe from the risk of infections during delivery from non-sterilized tools, or the risk of suffering any physical disability. Certainly, dangerous consequences may follow child delivery administered by quacks or unqualified medical practitioner.[22] A pleasant reception should be granted to all children irrespective of their sex. The Holy Qur'an reprimands those who rejoice at the birth of male children but expressed sadness and dissatisfaction when female children are born.[23]

ii. Glad Tidings / Congratulatory Messages

When a new baby is born, Islam recommends that a Muslim should give glad tidings to his fellow Muslim brother and make him happy. The Qur'an speaks volumes of glad tidings in many verses[24]

Similarly, it is on record that when the Prophet was born, a female slave, *Thuwaybah* gave glad tidings of his birth to his uncle, Abu-lahab, who was her master, and said to him, *"Abdullahi* has been given a boy tonight." *Abu-lahab* set her free out of happiness with the news. For this, Allah rewarded him for that as He let him drink after his death from the little hollow between his thumb and his other finger.[25] To further buttress this point, it was reported that *As-Suhayli* mentioned that *Al-Abass* said, "I saw *Abu-lahab* in the worst state, in my dream a year after his death; he said: 'I have never been in comfort since I left you, except that the punishment becomes less painful every Monday."[26]

Where a Muslim for any reason misses giving glad tidings to his fellow Muslim on the arrival of a new baby, he should visit them to congratulate them and pray for the parents and the well-being of the new born baby. This is commendable so as to identify with the happiness and joy of the parents. Apart from this, it also creates and strengthens the atmosphere of love among Muslims. Glad tidings and congratulatory messages must be extended to

[22] Children in Islam, their care, upbringing and protection, p. 17.
[23] Q16: 58 – 59.
[24] Q19: 7, see also Q11: 69 – 71, Q3: 39, Q3:45, Q15:53-55, Q37:101, Q37:112, Q51:28, Q14:39.
[25]Abdullah Nasih 'Ulwan, Child Education in Islam P. 38.
[26] That is the day the Prophet was born and was given glad tiding and he was happy about it.

parents of the new born baby irrespective of sex.[27] In some families, birth of a girl is regarded as a great scourge and not always welcome. However, Islam has made it clear to us that the birth of a daughter and her proper upbringing is not only a challenge to the parents but a glad tiding of obtaining tremendous divine reward.[28] Similarly, the Prophet said: *"In which home a daughter is born who is not buried alive like the days of ignorance and is not looked upon as inferior, and a son is not given preference over her, Almighty Allah will grant such people paradise*.[29]

It is also commendable to offer gifts to the parents of the child to strengthen and promote friendship and love among Muslims. However, care must be taken not to take this as obligatory and engage in extravagance spending[30] on the purchase of the gifts as it is the case with many Muslims in the contemporary days, especially among women.

iii. Adhan and Iqamah

It is recommended that when the baby is born, the call to prayer *(adhan)* is given in its right ear and the call for preparation of prayer *(Iqamah)* in its left ear.[31] The importance of this is that the first word he or she hears declares the greatness and majesty of Allah to his or her hearing. Also, the words of testimony are those that a man recites when he embraces Islam. The child is therefore inaugurated and introduced to the fold of Islam from cradle.[32] Apart from this, the *Adhan* and the *Iqamah* distance Satan away from the child. This in effect forestalls temptation by Satan and ensures strong and unblemished faith in the child.[33]

iv. Tahneek

It is also recommended to practice *Tahneek* on the newly born baby. This is the practice of chewing date and applying it to the mouth of the baby. Where date is not available, it is allowed to use any other sweet things like honey in order to fulfil the *Sunnah*

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[27]Abdullah Nasih 'Ulwan, Child Education in Islam P. 38.
[28] Islamic Guide for upbringing of children. www.alahazatnetwork.org accessed on 15/9/2016.
[29]Sahih Bukhari Book 78, hadith 640. See also Q81:8-9
[30] Abd'AllahNaaseh Al-wan,The upbringing of children in Islam Pp. 32 – 32.
[31] Ahmad IbnNaqib al-Misri ,Ahmad IbnNaqib al-Misri-Reliance of the Traveller A Classic Manual of Islamic J15.
[32] Abd'Allah,Abd'AllahNaaseh Al-wan,The upbringing of children in Islam P. 33.
[33] Ibid, P. 33.

on the newly born baby. Apart from this, it is beneficial to the child as the veins and muscles of the child are strengthened and the jaws and mouth are made active. When this practice is fulfilled, it becomes easier for the child to suck milk from the mother's breast.[34] This is also a practice that is well complied with in Northern Nigeria. Traditionally, in some part of North-central Nigeria, especially, in Ilorin community, there is a special bath given to the child after delivery. This is done to prevent the child from having body odour in the future. Some families use hot water while some are known for using cold water. at times certain concoction (herbs) are prepared in bathing the baby for protection and for making the baby healthy. Experience have shown that where a cold water family mistakenly uses hot water to bath the baby, the baby automatically becomes unhealthy until certain herbs are prepared and used to bath the baby regularly for some period before he or she regains his or her healthy condition.

v. 'Aqiqah

'Aqiqah comprises of three major things, i.e. slaughtering of animal, shaving of the baby's hair and naming of the child on the seventh day of his or her birth.[35]

a) Slaughtering of Animal

It is also *Sunnah Mustahib* (recommended) to slaughter two sheep for a baby boy, while a sheep is slaughtered for a baby girl on the seventh day of the baby's birth. Some scholars have also recommended two goats for a baby boy and one goat for a baby girl. This act must not be interpreted to mean preference of a boy over a girl. It is a mere recommendation and it is just because the Prophet practiced it.[36] The Prophet was reported in a tradition narrated by Tirmidhi that when he was asked about *'Aqiqah* he ordered two sheep for a baby boy and a sheep for a girl.[37] It is however permitted if anyone slaughters one goat or one sheep even for a male child.[38]*Nafi* reported that: *"Whenever any of the household of 'Abd*

[34] Ibid P. 33.

[35] Sunan Ibn Majah, Hadith3165. According to Ibn Majah, *'Aqiqah* is performed on the seventh day, if it is not possible, then it could be performed on the fourteenth or twenty-first-day. See comment (b) at P. 275

[36] Ibid, P. 41.

[37]Sahih Bukhari Hadith 5472.

[38]Abd'AllahNaaseh Al-wan,The upbringing of children in Islam P. 41.

Allah B. Umar suggested 'Aqiqah, he sacrificed a sheep on behalf of his children, whether male or female"[39]

On the type of animal to be slaughtered for the baby, Islam recommends that any animal such as goat, ram or sheep which is valid for any sacrifice in Islam is also good for *'Aqiqah*. The person to slaughter the animal for the baby should be the father or anyone that is obliged to support the child,[40] although there is no harm if the animal is slaughtered by anyone else. The bone of the animal must not be broken but to be cut at joints. This requirement is just a sign of good health and strength for the child, there is no harm if the bone is broken[41]. It is recommended to distribute the meat to the poor and the needy. It may also be cooked in the sauce and invite others for the feast. There is no harm if the parents of the baby eat out of the ram.[42] In this regard Imam Malik said:

> …if someone makes an 'Aqiqah for his children, the same rules apply as with all sacrificial animals- one-eyed, emaciated, injured or sick animas must not be used, and neither the meat nor the skin is to be sold. The bones are broken and the family eat the meat and give some it away as sadaqah. The child is not smeared with any of the blood.[43]

On the legitimacy or otherwise of '*Aqiqah*, the popular opinion is that '*Aqiqah* is *Sunnah* and it is recommended but not compulsory[44]. If a father has a baby born to him and he is financially capable, he can implement the *Sunnah,* for seeking reward from Allah and for strengthening his relationship with relatives and friends. It was reported that "*'Aqiqah* of *Hasan* and *Husein b. Abi Talib* took place"[45] Similarly, it was reported that when the Prophet (May peace and blessings of Allah be with him) was asked about *'Aqiqah,* he replied: *I have no liking for 'aquq* (disobedience). He disliked the name and said: *"When a child is born to anyone, and he desires to offer a sacrifice on its behalf, he may"*[46]

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[39] Muwatta Imam Malik, Hadith1044

[40] Ahmad Ibn Naqi,Ahmad Ibn Naqib al-Misri-Reliance of the Traveller A Classic Manual of Islamic, J15.

[41] Ahmed IbnNaqib,Ahmad IbnNaqib al-Misri-Reliance of the Traveller A Classic Manual of Islamic J. 15 and Abd'AllahNaaseh Al-wan,The upbringing of children in Islam P. 41

[42] Ibid, P. 41.

[43] Muwatta Imam Malik, Traslated by 'Aisha 'Abdulrahman et al, 1982, Diwan press, England, P.232

[44] Ibid.

[45] Muwatta Imam Malik, Hadith 1046

[46] Ibid, hadith 1042

Thus, the fact that the Prophet did it does not mean that it is prescribed but only recommended. It was further argued that if it was obligatory, it would have been stated in the *Shariah* injunction and the Prophet would have prescribed it to the *Ummah* without giving them any excuse for not doing it.[47] Imam Malik further said: *"What we do about the 'Aqiqah is that if someone makes an 'Aqiqah for his children, he gives a sheep for both male and female, the 'Aqiqah is not obligatory but it is desirable to do it"*[48]

b) Shaving of the baby's hair

It is recommended to shave the hair of the baby on the seventh day of the birth, this is irrespective of whether the child is a male or female. It is *Mustahib* (commendable) to give silver in *sadaqah* equal to the weight of the child's hair to the poor and the needy. History has it that *Fatimah*, the daughter of the Holy Prophet gave out silver as *sadaqqah* equal in weight to the hair on the heads of *Hasan* and *Husein*.[49] The importance of shaving the hair on the head of the baby is to provide the child with strength and open up the pores of his or her skin. It is also stated that it is beneficial to the eyes – sight, the hearing and the sense of smell.[50] Similarly, the *sadaqah* that is given for the weight of the hair of the baby is another means of assisting the poor and the needy. Hence, a sign of promoting love and peaceful co-existence among Muslims. It must be noted that the entire hair on the baby's head must be shaved. Islam prohibits parents to shave one part and leave the other part of the head as obtained among some Fulani dialect in some part of Northern Nigeria.

c) Naming of the Child

Naming of children in Islam is recognized as part of '*Aqiqah*. This is done to distinguish children from one another and to recognize and identify them by their names.[51] Naming in Islam is not as simple as one may think it is. This is because Islam lays down certain guidelines to be followed on the naming of the new born baby. The Prophet (SAW) said in one of his tradition that: *"Every child is in pledge for his 'Aqiqah which should be slaughtered for*

[47]Abdullah Nasih 'Ulwan, Child Education in Islam P. 48.
[48] Muwatta Imam Malik, Traslated by 'Aisha 'Abdulrahman, P.232
[49]Muwata-Imam Malik, Hadith 1043
[50]Abd'AllahNaaseh Al-wan,The upbringing of children in Islam P. 34.
[51] Ibid

him on the seventh day, the child's head should be shaved and he should be given a name".[52]

This hadith should not be interpreted to indicate that a child must be named on the seventh day. A newly born baby can be named on the day of his birth, as the Prophet also approved the naming of the child on the day he was born. Abu Musa narrated that: *"A boy was born to me and I took him to the Prophet who named him Ibrahim, did Tahnik for him with a date, invoked Allah to bless him and returned him to me"*[53]

The above hadith indicates that a baby can be named on the first, second or on the seventh day or any time before or after the *'Aqiqah*. Parents must pay great attention to selecting names for their new born baby by selecting beautiful names. The Prophet said: *"You will be called on the Day of Judgment by your names, and your fathers names, so choose nice names"*[54]

It is *Sunnah* to give the child a good name such as *Muhammad, Abdul-rahman* or any other names of any Prophet or other good names. The prophet in another tradition said: *"The most beloved names to Allah are Abdullahi and Abdulrahman"*[55]

The above hadith should not be construed to mean that other names that have the prefix of '*Abd'* or '*Ubaid'* are not allowed. The main reason for the desirability of the above two names is that they indicate enslavement to Allah[56]. It is also desirable to name the child even if he dies before he is being named.[57] Parents should avoid names that are meaningless which will be a subject of ridicule to the child or affect his dignity and personality.

The Prophet in this regard is reported to have said:

> Keep the names of Prophets, the most desirable names by Allah are Abdullahi and Abdul-rahman, and names that depicts honesty such as Haarith (Planter) and Hammam (thoughtful). The most disliked names are Harb (war) and Murrah (battle)[58]

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[52] Sunan Abu Dawud, Hadith 2838, Ibn Majah, Hadith 3165, Sunnan An- Nasai, Hadith 4225.

[53] Sahih Bukhari, Hadith 6198. See also Sunan Abu Dawud, Hadith 4951.

[54] Abu-Dawud,Hadith 4948 Abu Dawud regarded the Hadith as *Daif* because Abi Zakariyyah did not see Abu Ad-Darda from whom he claimed to have collected the Hadith.

[55] Sunan Ibn Majah, Hadith 3728.

[56] See the comments of Ibn majah on the Hadith at P. 46.

[57] Ahmad IbnNaqib,Ahmad IbnNaqib al-Misri-Reliance of the Traveller A Classic Manual of Islamic J15.

[58] Sunan Abu Dawud, Hadith 4950. See also Sahih Bukhari, Hadith 6186, see also Sahih Bukhari, Hadith 6205 for the most dislike name by Allah.

In another tradition, the Prophet is reported to have said: *"Give a child a name that is meaningful, lovely and good. On the day of resurrection, a person will be called by his name and the names of his parents".*[59]

The Prophet used to change ugly and derogatory names to beautiful and admiring ones[60]. It was on record that a daughter of *Umar* was called *'Asiyah* (disobedient) and the Prophet changed it to *Jamilah* (beautiful)[61]. It was also recorded that Zainab used to be called "Barrah" (good or righteous) and it was said that she was praising herself. So the Messenger of Allah changed her name to Zainab[62]. He also changed the name of a man called *Harb* (War) to *Silm* (Peace),[63] Hazn to Sahl[64], Al-As to Aziz[65] and Asram to Zur'ah.[66]

Parents are also commanded to avoid names that are symbolic to Allah. It was reported that "When *Hani* came to the Prophet in *Madinah* with his people, he used to be called *Abdul-Hakam.* So, the Prophet called him and said to him "Verily, Allah is the *Hakam* and has the *hukm* (Judgment), why then are you called *Abdul-Hakam?* He said, my people resort to me whenever they differ in opinion, and I issue judgment, and they accept my judgment. So Allah's Messenger said "How nice, do you have children? He said I have *Surayh*, *Muslim and Abdullah*, Allah's Messenger asked, who is the eldest? He said *Shurayh*. Allah's Messenger said "Then you are called *Abu Shurayh".*[67] Similarly, Parents should avoid names that indicates submission to gods other than Allah such as, *Abdul-Uzza, Abdun-Nabi, Abdul-Hussayn* and similar names.[68]

Islam also prohibits names that indicate softening, similarity to girls' names and amour, such as *Huyam, Nihad, Sawsan, Mayyadah, Nariman, Ahlam* and so on, so that a child may acquire a sense of good personality and distinct character as well as

[59] Sunan Abu-Dawud, Hadith 4948
[60] See Sahih Bukhari, Hadith 6190 and 6191. See also Sunan Abu Dawud, Hadith 4954.
[61] See Sunan Ibn Majah, Hadith 3733. See also Sunan Abu Dawud, Hadith 4952.
[62] Sunan Ibn majah, Hadith No 3732. See also Sunan Abu Dawud, Hadith 4953.
[63]Abdullah Nasih 'Ulwan, Child Education in Islam P. 42.
[64] Sunan Abu Dawud, Hadith 4956.
[65] Sunan Abu Dawud, Hadith 4956.
[66] Sunan Abu Dawud, Hadith 4954.
[67] Sunan Abu Dawud, Hadith 4955.
[68]Abdullah Nasih 'Ulwan, Child Education in Islam P. 43.

names that signified bad omen or bad character and ugly names like '*Awar* (one-eyed), *Aral* (lame) or similar names.[69] The Qur'an provides as follows:

> "O ye who believe! Let not some men among you laugh at others, it may be that the (latter) are better than the (former) nor let some women laugh at others, it may be that the (latter) are better than the (former) nor defame nor be sarcastic to each other, nor call each other by (offensive) nicknames seeming is a name connoting wickedness (to be used of one after he has believed and those who do not desist are (indeed) doing wrong.[70]

In his remark on the above quoted verse, Yusuf Ali is of the opinion that an offensive nickname may amount to defamation. As such, it is not allowed to use offensive nicknames or names that suggest some real or fancied defect.[71] Using these offensive names or nicknames causes the person pain and amounts to bad manners that is not acceptable in Islam[72].

The Prophet said: *"Name yourselves after the Prophets and the most beloved names to Allah are Abdullahi and Abdul-Rahman and the most truthful of them are, Harith and Hammam, and the ugliest of them are Harb and Murrah"*[73]

Similarly, the Prophet also warned Muslims to refrain from names that suggest good fortunes such as *Af-lah* (successful) Najeeh (sucessful) *Riba'ah* (beneficial) and *Yas-ar* (ease). This is because if anyone calls a person by this name and such a person is absent from the place, the answer that the person "is not here" signifies that such good fortune is not present in that place. The Prophet, regarding this, warned as follows: *"... do not give your sons the names of Yas-ar, Najeeh or Af-lah. You will ask for them. If they are not there, the person replying would say "not here"*[74]

In another tradition, the Prophet was quoted to have said: "*If I live- If Allah wills- I will forbid the names Rabah (profit), Najih (saved), Aflah (successful and Yasaar (Prosperity)*[75]*"*

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[69] Q 49:11.
[70] Q49:11. See also Sunnah Ibn Majah, Hadith 3741.
[71] Yusuf Ali, The Glorious Qur'an, comment 4930.
[72] Sunan Abu Dawud, Hadith 4962
[73] Sunan Abu Dawud, Hadith 4950.
[74] Sunan Abu-Dawud, Hadith 4958 and 4959
[75] Sunan Ibn Majah, Hadith3729. Sunan Abu Dawud, Hadith 4960.

vi. Kuniyah

It is also recommended to give a child *Kuniyah* (nicknames) e.g. Aisha was given *Ummu Abdullahi*[76], *Abu-Hurairah*, *Abubakar* etc. This at times cultivate the feeling of self- reliance and nobility and sense of confidence on the child.[77] It is also recommended for a Muslim to be given *Kuniyah* before he has a child. The prophet is reported to call young men by *Kuniyah* even when they have no child.[78] However, the Prophet forbade Muslims from calling themselves by his *Kuniyah* but encouraged them to call themselves by their names[79]. For instance, the Prophet forbade Muslims from using as *Kuniyah Abu Qasim* when their name is actually Muhammad. He however allowed them to use *Abu Qasim* as *Kuniyah* when their child's name is *Qasim*.

vii. Naming and Celebration (*Walimah)* of Birth in Selected Cultures

a) Naming of a Child

Prior to the seventh day of the birth of a child, a newly born baby in some culture in North-central Nigeria, is referred to as *Tumfulu* or a stranger, the one who has just arrived among the Yoruba speaking area.[80] This is because according to the Yoruba mythology, such a guest may decide to stay or go back depending on the nature of treatment he or she is given. He or she is referred to as *Jariri* among the Hausas, *Sukaewarae* in Fulani speaking parts of the state. Also *Ni-kpanti* in Bissan language of Borgu, *Gusaibi* in *Larus* of Shagunu, *Egiboborongi* among the Nupes, *Maku* among the Kambaris, all of Borgu local government area of Niger state. In contemporary North-central Nigeria, naming ceremony is among the rites performed for a newly born baby. It is an event that is usually performed in various ways and styles depending on the culture and affluence of the father of the child. It is at this event that a newly born baby is given both Islamic and other cultural names for recognition forever. At times, cultural names are given according to the prevailing circumstances surrounding the birth of a child. At another time, a newly born baby is named based on the family

[76] Sunan Ibn Majah, Hadith 3739

[77] Abd'AllahAbd'AllahNaaseh Al-wan,The upbringing of children in Islam P. 37.

[78] Sunan Ibn Majah, Hadith 3740. See also Sahih Bukhari, Hadith 6203.

[79] Ibid, Hadith 3735. See also Sahih Bukhari,Hadith 6188, 6189 and 6196

[80] Taiye Aluko, Naming Ceremony in African Independent Churches- A cultural Revolution, http://www.google.com.ng accessed on 10/1/2017

profession, in which case, the name given to the child bears resemblance with the family profession[81]. For instance, *Odewale* (The return of the hunter) or *Ayantunde* (the return of the drummer) for the families whose professions are hunting and drumming respectively. As long as these names did not offend the tenet of Islamic faith, they seem to be acceptable.

In Ilorin community and elsewhere in Yoruba speaking areas of North-central Nigeria, new babies receive native names in addition to the recognized Muslim names. In such a case, a child may have as many names as desired by parents and relatives. In truth, these names when completely pronounced may not be at variance with the prescribed rules for naming. The reality however is that several of these names have two or more syllables which permits shortening of the names. It is in this circumstance that many of such names lose their recognition in Islam. For instance, "*Ayomide"* is a two-syllable name which means "my joy has arrived." However, each syllable of the name has a complete meaning *"Ayo"* means joy, while *"Mide"* means has arrived. Either of the short form could be chosen depending on the parents' preference. Accordingly, where *"Ayo"* is the preferred short form (as largely the case in this environment), when the name is called and the person is not at home or is not present, it follows that others will answer "not here" which simply indicates that Joy is not here. This is therefore contrary to the Prophetic tradition which stipulates that names that suggest good fortunes should be avoided.

Islam forbids Parents to give their children names that indicates submission to gods other than Allah. This therefore goes to say that Muslim of the contemporary days should avoid names that are not in conformity with Islamic faith. These include such names in Yoruba language as *Ogunbunmi* (gift from god of iron), *Ogunmayowa* (Joy from god of Iron), *Fabiyi* (Gift from god of wisdom), *Ogunwale* (Return of god of iron or god of iron recarnated) *Awolade, Awoyale, Awobiyi* (Cultist assisted birth), *Sangobunmi* (A gift from the god of thunder), *Osunfunke* (goddess of the river (*osun)*) gives me to treasure) *Oyabunmi* (A gift from the goddess from the river (*Oya)* e.t.c. This is because these names either emanated from or have something to do with paganism. As such, not in conformity with Islamic faith.

Similarly, nicknames are also common in the North-central part of the country but these take different form depending on the

[81] Ibid.

context for giving the names. For instance, the Hausas give their child nicknames such as *Maigida* (Landlord), *Laadi* (A child born on Sunday). *Fari* (bright white light) used for a fair complexioned child, *Gambo* (A child born before the twins) etc. Also, in Ilorin community, where a child is named after a grandparent, aged teacher or benefactor, the child will be given a nickname as a sign of respect and also to avoid the disrespectful use of the name at play grounds or elsewhere. It is also a sort of training and respect for elders as people in authority. There are also instances where nicknames emanate from younger wives in the extended family who are not expected to slam the names of their little grooms or sisters' in-law. They produced names such as *Eyinafe* (used for females with white and beautiful set of teeth)*, Idileke* and *Ayiluko* are (used for females that are robust in stature)*, Opelenge* (used for females that are slim in stature)*, sisi-ile iwe (*used for secondary school- aged girls)*, Akewusola* (used for a male that attend Qur'anic school)*, Akowe* (used for secondary school-aged boys) e.t,c. As long as these names did not go contrary to Shariah injunctions, they seem to be acceptable.

Similarly, in some cultures in Niger state, a child is named in accordance with the circumstances surrounding his or her birth. For instance, the *'Kamukus'* of *Marige* local government and the *'Kamberis* of *Borgu* local government area of Niger state give their children names like *Aradu* (Thunder), *Amachi* (old woman), *Bisallah* (The one that is born on Sallah day), *Hadari* (Rain), *Duhu* (Darkness), *Bawa* (Slave)[82] among others. It could be seen, that all of these names except *Bisallah* run contrary to injunctions of the Qur'an and Hadith. The names must therefore be avoided by Muslims. However, the Hausas of *Borgu* would rather give their children names such as *Na- Allah* (*Abdullahi* or man of God), *Tarana* (A female child born in the afternoon), *Tasalla* (A child born on Sallah day), *Harichi* (A child born when the sun is rising), *Dan-Azumi* (A child born during fasting period), *Dan Dare* (A child born in the night), Mamu (Blessig), *Gagare* (Sturbon child)[83] among others. All of these names except the last one are acceptable in Islam because they complied with Shariah stipulations. Similarly, the *Laru* of *Shagunu* give their children traditional names like *Shuwamu*

[82] These names were received by a respondent (who agreed to be named), Malam Yusuf Omar of Borgu local government area of Niger state in an informal interview carried out by the researcher on 13/1/2017

[83] Ibid

(Pious man or man of God), *Kiya* (Beauty), *Kokoi* (Born tough), *Azage* (*Mujahid*), *Agalu* (Vulture),*Gubibi* (Born small), *Laila* (Born in the night of majesty)[84] and so on. All of these names seem to be acceptable in Islam except *Kokoi* and *Agalu* which are offensive in the sight of Islamic faith and must be avoided by Muslims. In the like manner, offensive names are prohibited and not acceptable in Islam. This is therefore to say that, in the present Hausa community, names like *Kurumi* (Deaf), *Maikafo* (Blind), *Dangurugu,* (cripple) should be avoided by Muslims.

b) Celebration (*Walimah)* of Birth

It is to be noted that this aspect of human life is recognized in the various cultures of the Muslim state today in North-central Nigeria with little variation of cultural and traditional styles. Generally. *'Aqiqah* is usually conducted in line with *Shariah* regulations mentioned above. There is however not denying the fact that some aspects of *'Aqiqah* celebration are based on cultural inclination of the people. After the conduct of *'Aqiqah* proper in line with the *Sunnah* of the Prophet (usually) refer to as *Suna* in some local parlance, celebration follows mostly in grand style depending on culture and tradition of the people as well as affluence of the father of the child. For instance, in Hausa community a child, male or female is given name on the seventh day of birth based on the Islamic injunctions. Before the seventh day, the father of the child buys ram and some kolanuts. He also buys cloth for mother and the new born baby. He sends some token like two hundred naira and some kolanuts to the parents of the mother of the child. In return, the mother's side also bring *Walimah* cake and some other baked things to the father of the child. Some, in addition to baked things include some amount of money. The kolanuts is shared among neighbours, friends and relatives. In the morning of the seventh day, the ram will be slaughtered by the invited Mallam[85], the name of the child will be mentioned by the father. The Mallam and the father joined the crowd to announce the name of the child, prayers will be held and the visitors disperse. The Barber shaves the head of the baby and he is paid a token. In some place, a mat is added to the cash payment. The women distribute the uncooked meat to the

[84] Ibid

[85] This is local variation of Mualim (teacher or cleric) usually officiating religious functions

friends, neighbours and relatives. Afterwards, the celebration continues till sun set.[86]

Following an oral interview conducted by the researcher, a respondent who agreed to be named[87] is of the opinion that the naming ceremonies in *Borgu* local government area of Niger state are almost the same in terms of number of days, merriments and the naming of the child itself. While on the seventh day, which is the day of the naming ceremony, some fathers distribute kolanuts, sweet, date palms to their kins and friends to help in the merriments. Some on other hand add palm wine and '*Burukutu'* (local beer) known in South Africa as '*Incomboti'.* The provision of the beer or palm wine is however contrary to the injunction of *Shariah*.[88] Apart from this, differences also occur in term of attendance. For instance, the law of *'Shagunu'* in *Borgu* local government area of Niger state prohibits the mother –in- law from attending the naming ceremonies. In fact, it is almost a taboo.[89]

In the same vein, naming ceremonies in Ilorin community is similar to what operates in other part of the north, particularly, as regards the *Shariah* requirements with little variations. For instance, it is not uncommon cultural aspects of celebration of naming found in Ilorin community especially, among the women to see the mother of the new born baby after the pronouncement of the name (*suna)* of the child to change from one gorgeous dress to another in the presence of the two-family members, friends and other relatives. The mother of the baby together with her friends amidst drumming, dancing and singing of the traditional song (*'waka*' song) round the families' members who will in turn spray them with money as part of the ceremony to welcome the new born baby. Material gifts and money are presented to the mother by the family members, friends and well-wishers. The father on the other hand sometimes gathers friends and male members of the family as well as well-wishers, entertain them while playing music to make the place "bubbling." No alcoholic drink or prohibited foods are acceptable or served in the community while this ceremony goes on. The celebration lasts

[86] Traditional Ceremonies of Hausa Community in the light of Islam, Sokoto state University, Sokoto, available at httt://www.google.ng , accessed on 10/1/2017

[87] Mallam Yusuf Omar of *Borgo* local government area of Niger state

[88] See Q2:219, Q5:90-91

[89] This information was received by a respondent, Malam Yusuf Omar of *Borgu* local government area of Niger state in an informal interview carried out by the researcher on 13/1/2017

for hours as it takes place from morning till sun set. However, economic conditions has therefore press some people to allocate certain number of hours for the ceremony, usually ranging between 4 – 6pm. In Yoruba speaking part, naming of a child is usually done very early in the morning and goes with various objects as each culture demands.[90] After the naming, the celebration also continues till sun set.

Conclusion

This paper examines the Shariah requirements of *'Aqiqah* and naming ceremonies under Islamic law with a view to ascertain the validity of contemporary *'Aqiqah* and naming ceremonies in Northern Nigeria. It particularly examines the extent to which the present-day Muslims conform to the basic Islamic tenets or otherwise in matter of *'Aqiqah* and celebration of naming generally using selected cultures as case studies. The work confirms that adherents of Islamic faith cut across various cultures. As such, there is no uniformity in the ways *'Aqiqah* is observed. The paper therefore concludes that whatever methods and style adopted by any culture or tradition in the celebration of *'Aqiqah* and naming ceremonies, Muslims must ensure that it conforms to Shariah stipulations and guidelines. The paper therefore recommends that the present–day Muslims should follow and adopt the style of the Holy Prophet (SAW) in matters of *'Aqiqah* and naming ceremonies. It is the belief of this work that when this is done, it will go a long way in reducing the extravagance spending associated with Muslim ceremonies.

[90]Ibid

IMPLEMENTATION AND ENFORCEMENT OF RULE 55 OF CUSTOMARY INTERNATIONAL LAW IN NON-INTERNATIONAL ARMED CONFLICT: OBLIGATIONS OF REBEL GROUPS IN NORTH-KIVU DEMOCRATIC REPUBLIC OF CONGO

By

Mugombozi Akonkwa Felicite *

Abstract

Rule 55 of Customary International Humanitarian Law (CIHL) is biding all states as a norm of 'jus conges'. There is practice which recognizes that a civilian population in need is entitled to receive humanitarian relief essential to its survival, in accordance with International Humanitarian Law (IHL). Both parties to conflict, International or Non-International are obliged to achieve that obligation. In situations of armed conflict, the responsibility for the civilian population well-being lies with all of the parties to conflict. If they are unable or unwilling to meet the basic needs of the affected population within their control, they are obliged to allow and facilitate the impartial provision of assistance. Failing to perform that obligation, parties to conflict should engage their responsibility. The violation of the 'obligation to allow or facilitate humanitarian relief can amounts to breach of International Humanitarian Law. According to Rule 139 CIHL, Armed groups must respect International Humanitarian Law. The responsibility of Non-States actors, in this case rebel groups, is not determine by any treaty in IHL. However, The UN Security Council and states practices have addressed violations of International Law by non-state armed groups on numerous occasions. Therefore, member of rebel groups might be prosecuted for denial of humanitarian access as a war crime, crime against humanity or genocide under national or international tribunals and courts. In Democratic Republic of the Congo, the court of appeal and military tribunals and courts have jurisdiction to prosecute individual members of rebel groups for the denial of humanitarian assistance and access. For the implementation of the Rule 55 the conflict in North Kivu, DRC government should prosecute individual responsible of the denial of humanitarian assistance and access. When she is unable or unwilling to do so, the International Criminal Court prosecutor will investigate and prosecute them thus the Rule 55 will be effective in the non-international armed conflict in DRC, in general and North Kivu, in particular.

Key Words: Customary International Law, Humanitarian access, International Humanitarian Law, Rebel groups, Rule 55.

Introduction

The paper gives the general overview of the crises in North Kivu/DRC (1), the study discusses the general concept of Humanitarian assistance focusing on rule 55 CIHL(2), the obligations of non-States actors (rebel groups) in the implementing the contents of rule 55 of CIHL and actually, their prosecution for the denial of humanitarian assistance (3) and the conclusion and recommendations (4) for the better implementation of International Humanitarian law in a situation of Non international armed conflict, Indeed in Eastern DRC, North Kivu.

Background to the Problem of Humanitarian Assistance in North Kivu

From 1993, DRC has been a theatre of conflict.[1] North Kivu, one of his provinces has been the focal point of war and a multitude of armed groups were generated.[2] As a consequence of presence of armed groups and war, the eastern part of DRC still having many challenges on humanitarian matter. According to the Office for the Coordination of Humanitarian Affairs (OCHA) (2008) there are 1.3m IDPs in the DRC[3]. Therefore, displacement renders populations more vulnerable and makes them key candidates for a humanitarian response. For instance, in 2012, thousands of families have fled their homes in the DRC eastern province of North Kivu due to renewed fighting in April 2012, it implicated an urgent need basic aid such as food, water, shelter and healthcare, OCHA (2012).[4]

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[1] Attacks of rebel groups reported by Human Right Watch on December 16, 2014. See also number of rebel groups in DRC, Reported by Pole institute, Goma February 2016.

[2] Jackson Stearns (2012), North Kivu, the background to conflict in North Kivu Province of eastern Congo, Rift valley Institution,1vSt Luke, London. 5

[3] Population Movements in Eastern DR Congo, OCHA DRC, July 2008

[4] OCHA, DRC: Aid workers need access and funding in Noth Kivu, June 2012

In addition, UNICEF report (2015), add the picture of crisis in North Kivu. It seems that in Beni territory[5], 45000 people have been displaced due to the operations against the ADF/NALU militia of Uganda, and that in two days. In Masisi, more than 1,200 persons have been displaced due to the insecurity caused by FDLR, Nyatura and Raia Mutomboki armed groups. Due to Sukola 2 operations and the targeting of the population by armed groups, schools were closed in the groupements of Busansa, Binza, Gisiri, Tongo and Kibirizi in Rutshuru. [6]

According to the United Nation Office for the coordination of Humanitarian Affairs (OCHA) report (2016), due to the armed attacks between the armed forces of DRC (FARDC) and armed groups in southern and eastern DRC a total 1.8 million of Internally Displaced persons (IDP).[7] Unfortunately, in this insecure part of the world, humanitarians[8] are not excluded. As of October 2009, the United Nation Office for the Coordination of Humanitarian Affairs (OCHA) reported attacks against humanitarians, such as murders, abductions, and theft of vehicles and other assets. 108 attacks were recorded.[9]

Recently, The USAID report, violence, restricted humanitarian access, poor infrastructure, forced recruitment into armed groups and reduced access to agricultural land contribute to the deterioration of humanitarian conditions in Eastern DRC.[10] For instance two staff of the international Non-governmental organisation solidarities international were abducted in Lubero territory on May 2016.[11] As Damian Lilly and Alex Bertram have argued in that, it is difficult to support that displacement does not cause humanitarian need on a large scale, at least in the acute phase as people are displaced and before they are assisted.[12]

According to UNOCHA, Humanitarian access concerns humanitarian actors' ability to reach populations affected by crisis,

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[5] North Kivu province has 6 territories: Beni, Lubero, Rutshuru, Walikale, Masisi, nyiragongo and three cities Goma as a capital province, Beni and Butembo. See also Maps of North Kivu Province-IPS

[6] UNICEF, DRC: humanitarian Report, January- March 2015

[7] UNOCHA, DRC Humanitarian situation Report, May-June 2016.

[8] Humanitarian is a person who seeks to promote human welfare

[9] UNOCHA, DRC/ North Kivu: humanitarian access seriously hampered by insecurity, 20 October 2009.

[10] USAID, Democratic Republic of the Congo-Complex Emergency, June 29,2017

[11] UN Children's Fund, DRC Humanitarian Situation Report, May-June 2016.

[12]Damian Lilly and Alex Bertram, (December 2008), Targeting humanitarian assistance in post-conflict DRC, *in* www.odihpn.org Visited 15th September 2017

as well as an affected population's ability to access humanitarian assistance and services. Access is therefore a fundamental pre-requisite to effective humanitarian action.[13] Full and unimpeded access is essential to establish operations, move goods and personnel where they are needed, implement distributions, provide health services and carry out other activities, and for affected populations to fully benefit from the assistance and services made available.

Rule 55 of Customary IHL

Rule 55 provides:' The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.'[14] That rule was establish as one of 161 rules of customary international law[15] therefore, the rule 55 is applicable to both International armed conflict[16] and Non-international[17] armed conflicts.[18]

In international armed conflict, there are specific rules aim to ensure the rapid and unimpeded passage of all relief personnel and objects to civilian populations in need of humanitarian assistance. These include Articles 17, 23, and 30 of the Fourth GC, as well as Articles 54, 70, and 71 of AP I. Customary IHL rules are also applicable. Article 17 recommends that agreements between the

[13]OCHA, OCHA on message: Humanitarian Access, August 2009.

[14] ICRC, Rules on Custom International Humanitarian Law available on http://www.icrc.org accessed on 19th September 2017

[15] ICRC press release No. 05/17 17 march 2005,' Customary law study enhances legal protection of persons affected by armed conflict', available on http://www.icrc.org accessed on 19th September 2017

[16] See Article 2 common to Geneva Conventions and Article 1 API. The International Criminal Tribunal for the former Yugoslavia (ICTY) proposed a general definition of international armed conflict. In the Tadic case, the Tribunal stated that "an armed conflict exists whenever there is a resort to armed force between States". (ICTY, The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70)

[17] See Article 1(2) of APII, Customary international law, rule 8.

[18] Jean-Marie Henckaerts and Louise Doswald-Beck, (2005) *Customary International Humanitarian Law,* Volume I, Rules, Cambridge University Press, Newyork, P. 193. Another 2 volumes, Volume I. Rules, Volume II. Pratice (2 parts), Cambridge University Press, 2005

parties to the conflict be reached to authorize the passage of religious and medical personnel, as well as medical equipment to the concerned areas. Article 23 of Geneva Convention four stipulates that each state party to GC must allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians.[19] States shall also permit free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases"[20]. The state shall fulfil this obligation for civilians of another state, adversary or not.

Under Additional Protocol I, in addition, provides free passage of all relief consignments, equipment and personnel. Article 70 (2) of AP I provides that all States (i.e., not only the parties to the conflict) must "allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel, even if such assistance is destined for the civilian population of the adverse Party." This provision is applying to the whole civilian population, not only to some specific categories of goods.

The obligation to allow and facilitate access of humanitarian relief to civilians in need is also supported by military manuals[21] , many practitioners' manuals [22] and United Nations Security Council Resolutions. In the United Kingdom government strategy on the protection of civilians in Armed conflict (2009), the obligation to allow and facilitate access of humanitarian relief to civilians in need is one of primordial elements of protection of civilians in armed conflict.[23]

In addition, the UNSC resolution 1894 (2009), the United Nations provides in paragraph 14 that the importance for all parties

[19] Art 23 GCIV 1949

[20] Art. 23 GC IV 1949.

[21] See, e.g., the military manuals of Argentina ("allow"), Australia ("allow"), Canada ("allow" and "facilitate" in case of siege warfare), Colombia ("allow"), Germany ("permit"), Italy ("accept"), Kenya ("allow and facilitate"), Netherlands ("have to give" and "facilitate"), New Zealand ("allow"), Russian Federation ("give all facilities"), Switzerland ("all necessary facilities"), United Kingdom ("allow", "all necessary facilities" and "guarantee") and United States ("agree" and "facilitate"). By Jean-Marie Henckaerts and Louise Doswald-BECK, (2005) Op. Cit., P.194

[22]Swiss Federal Department of foreign Affairs (2014), 'Humanitarian Access in situations of armed conflict', practitioner's Manuel, Version2. See also United Nations (2006), Humanitarian Negotiations with armed groups, A manual for practitioners.

[23] Ministry of Defence, UK government strategy on the protection of civilians in armed conflict (2009). On www.fco.gov.uk visited 15th September 2017

to an armed conflict should cooperate with humanitarian personnel in order to allow and facilitate access to civilian populations affected by armed conflict.[24]For the conflict between Armenia and Azerbaijan, the UN Security Council, for example, has called for unimpeded access for humanitarian relief efforts in Iraq and in all areas affected by the conflict.[25]

There is no express rule in treaty IHL regulating the practical provision of humanitarian relief in NIACs. Practically, Additional Protocol II requires that relief actions for the civilian population in need be organized but does not contain a specific provision on access of humanitarian.[26] However, the obligation to allow free passage of relief is providing in many instruments applicable in non-international armed conflict as military manuals and others official documents.[27]

Moreover, the Rome statute of International Criminal Court, under its article 7 define extermination as including "the intentional infliction of conditions of life, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population".[28] Furthermore when committed as part of a widespread or systematic attack directed against any civilian population, termination could constitute a crime against humanity.[29]

States have own legislation on extermination matter. In the 'Re Yamashita' case, the United States of America Supreme Court held that an army commander can be charged for not controlling the operation of the members of his command by 'permitting them to commit large extermination of a large part of civilian population of Batangas Province.[30] In Hamdan V. Rumsfeld case, the court qualify the obligation to allow humanitarian access as an elementary consideration of humanity.[31]

Nevertheless, even if customary law provides that parties to armed conflict (NIAC and IAC) must allow and facilitate rapid

[24] UNSC Resolution1894 (2009), see also resolutions: 2139 (2014), Res. 822 (., § 445), Res. 853 (, § 448) and Res. 874 (, § 449).
[25] See UNSC Resolutions 688 (1991) and 706 (1991).
[26] Jean-Marie Henckaerts and Louise Doswald-BECK, (2005), *Op. Cit*., P. 196
[27] *Ibid* cfr note 16
[28] ICC article 7
[29] Ibid, art 7
[30] Case IN re yamashita (1946) 327 US1.
[31] Case Hamdan V. Rimsfeld (2006) 542 US 507

and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control, practically both parties to conflict, sometimes are not respecting that rule. The United Nations in particular has called for respect for this rule. The UN Security Council, for example, has called on the parties to numerous conflicts, such as those in Afghanistan, Angola, between Armenia and Azerbaijan, Bosnia and Herzegovina, Burundi, Democratic Republic of the Congo, Georgia, Kosovo, Liberia, Somalia and Yemen, to provide unimpeded access for humanitarian assistance.[32] For instance, in the resolution 1794 (2007), for a situation in DRC, The UNSC demanded that all parties concerned grant immediate, full and unimpeded access by humanitarian personnel to all persons in need of assistance, as provided for in applicable international law.[33]For a situation in Liberia, the UNSC called upon the Government of Liberia and all parties, particularly armed rebel groups, to ensure unimpeded and safe movement for the personnel of United Nations humanitarian agencies and non-governmental organizations.[34]

Recently, in unanimous adopting resolution 2258 (2015), The UNSC renews authorization for passage of humanitarian aid in Syria.[35] In addition, parties to conflict must respect and protect humanitarian relief personnel and objects as well[36] by ensuring the freedom of movement of authorized humanitarian relief personnel. The importance for humanitarian organizations to have unimpeded access in times of armed conflict to civilian populations in need, in accordance with the applicable rules of international humanitarian law was outlined on 26th International Conference of the Red Cross and Red Crescent.[37]

Customary IHL also requires humanitarian relief personnel and objects to be respected and protected and parties to the conflict to ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted. The ICRC has called on

[32] Jean-Marie Henckaerts and Louise Doswald-BECK, (2005), *Op. Cit*., P.195
[33]UNSC Resolution 1794(2007) Par. 16-17
[34] UNSC Resolution 2046 (2012)
[35] UNSC Resolution 2258(2015)
[36] Jean-Marie Henckaerts and Louise Doswald-BECK, (2005), *Op. Cit*., P.195
[37] 26th International Conference of the Red Cross and Red Crescent, Res. II

parties to both international and non-international armed conflicts to respect this rule.[38]

According to Additional Protocol I the obligation to allow passage of humanitarian relief is not only by the parties to the conflict but by each State party to the Protocol.[39] Adopted in 1991 by the UN General Assembly, the guiding principles on Humanitarian Assistance stipulates that neighbours' states to the affected countries should facilitate the transit of humanitarian assistance.[40]

For instance in the UNSC Resolution 1296 (2000), the UN Security Council called upon "all parties concerned, including neighbouring states, to cooperate fully" in providing access for humanitarian personnel.[41] Earlier, in 1994, the Security Council had called upon States bordering Rwanda to facilitate transfer of goods and supplies to meet the needs of the displaced persons within Rwanda.[42] Recently, in March 2017 the report of advisory commission on Rakhine state states that the Myanmar government and the Rakhine State government should allow full and unimpeded humanitarian access to all areas affected by recent violence. The government, assisted by international partners, should ensure adequate assistance to all communities affected by the violence.[43]

For the humanitarian relief actions to take place, the consent of parties is required. Both Additional protocols I and II mention that requirement. According to the 26th International Conference of the Red Cross and Red Crescent in 1995, parties to a conflict should accept impartial humanitarian relief operations for the civilian population when it lacks supplies essential to its survival.[44] Therefore, what could be the responsibility of armed groups by violating the rule 55? Or what could happen if the rebel

[38] Additional Protocol I, Article 71(4)
[39] Additional Protocol I, Article 70(2)
[40] UN General Assembly, Res. 46/182
[41] UN Security Council, Res. 1296(2000)
[42] UN Security Council, Statement by the President by Jean-Marie Henckaerts, Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict, in international Review of red cross, in volume 87, Number 857, March 2005. P. 14
[43] Advisory commission on Rakhine State, (March 2017) interim report and recommendations, available http://www.rakhinecommission.org accessed 19/9/2017
[44] 26th International Conference of the Red Cross and Red Crescent

group refused to fulfil the obligation of allowing for humanitarian access to civilians in need within the territory on its control?

Obligations of Rebel Groups to Conform to International Humanitarian Regulations

1. The Binding Nature of IHL on Non-State Actors

Under IHL, it is evident that armed groups have limited rights.[45] This is realized the comparison between the limited numbers of provisions of Additional Protocol II which is applicable to non-International Armed Conflict and provisions of 4 Geneva Conventions and Additional Protocol I applicable to International Armed Conflict. States have refused to recognise armed groups under international law with the fear that recognizing the right could be legitimating armed groups actions. However, there are in fact good legal policy reasons for binding non-State actors to IHL, also viewed from the perspective of States.[46] Actually, the international community, it is generally accepted, also by the UN Security Council, that non-State armed groups are bound by IHL. The UN Security Council Resolution 1882 (2009) on Children and Armed Conflict condemned all violations of applicable international law involving the recruitment and use of children by all parties to an armed conflict.[47] 'All parties to armed conflict' does not distinguish States and non-states actors, as well as both are parties to the conflict.

However, the question would be non-states actors are bound by the four Geneva Conventions when they have not signed them.[48] Armed groups can be bound by IHL conventions because treaties can create obligations for third parties, an argument that is based on Article 35 of the 1969 Vienna Convention on the Law of Treaties (VCLT)[49]. Non-State actors are also bound by IHL by reason of their

[45] Cedric Ryngaert, Non-State Actors and International Law in institute of International Law, K.U.Leuven, 2001-2008, p.4

[46] Cedric Ryngaert, Op.Cit, P.5

[47] UN Security Council Resolution 1882 (2009). See also the role of the UN Security Council in relation to the application of IHL and human rights to armed non-State actors: A. Constantinides, 'Direct human rights obligations and accountability of armed groups in Security Council practice', forthcoming in Human Rights and International Legal Discourse (2010).

[48] According to the Article 2(1) of VCLT 1969, Only States can sign treaty. Therefore, they are achieving their obligation by 'good faith'

[49] Article 35 VCLT 1969

being active on the territory of a Contracting Party.[50]As Antonio Cassese argued, the other reason could be the theory of 'principle of legislative jurisdiction' pursuant to which the agreements which a State enters into are automatically binding on all (non-State) actors within its jurisdiction.[51] Hence, all armed groups active on a State territory, consented to be bound or not, become subject to IHL.

In addition, the binding character of human rights obligations for armed groups is based on their being, like governments, in a vertical position of power: those groups, exercising territorial control, serve as (quasi-)governments and rule over their 'citizens' (the inhabitants of the territory).[52] The argument is many of these entities control territory and population the way traditional state would: ensuring public safety, offering public service, and raising taxes. Moreover, the argument is that the binding character of IHL for armed groups could be based on the fact that non-State actors are also bound by international criminal law. Some more serious violations of international humanitarian law qualify as grave breaches or international crimes to which international criminal responsibility attaches. This responsibility is individual and not collective.[53]

2. Obligation of Rebel Groups/Non-State Actors under Rule 55

In situations of armed conflict, the responsibility for the civilian population's well-being lies with all of the parties to conflict. If they are unable or unwilling to meet the basic needs of the affected population within their control, they are obliged to allow and facilitate the impartial provision of assistance.

Failing to perform that obligation, parties to conflict should engage their responsibility. The violation of 'obligation to allow or

[50]The Challenges of Transnational and Non-State Armed Groups', November 2007, p. 32. by Cedric Ryngaert, Op.Cit, P.10

[51] A. Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts', 30 International and Comparative Law Quarterly 416, 429 (1981) by Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen, International Law and armed non-states actors in Afghanistan available at http://www.corteidh.or.cr accessed on 1 October 2017

[52] by Cedric Ryngaert, Op.Cit, P.14

[53] Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen, International Law and armed non-states actors in Afghanistan available at http://www.corteidh.or.cr accessed on 1 October 2017

facilitate humanitarian relief' is include in the facts of breach to international Humanitarian Law. Therefore, State is responsible for "all acts committed by persons forming part of its armed forces". This rule is an application of the general rule of State responsibility for internationally wrongful acts, whereby a State is responsible for the behaviour of its organs.[54]

According to rule 139, Armed opposition groups must respect international humanitarian law[55]. The responsibility of Non-states actors, in this case rebel groups, is not determine by any treaty IHL[56]. However, The UN Security Council has addressed violations of international law by non-state armed groups on numerous occasions.[57] For example, In a report on emergency assistance to Sudan in 1996, the UN Secretary-General stated that: Any attempt to diminish the capacity of the international community to respond to conditions of suffering and hardship among the civilian population in the Sudan can only give rise to the most adamant expressions of concern as a violation of recognized humanitarian principles, most importantly, the right of civilian populations to receive humanitarian assistance in times of war. In addition, the Special Rapporteur of the UN Commission on Human Rights stated that the Sudanese People's Liberation Army was responsible for the killing and abduction of civilians, looting and hostage-taking of relief workers committed by "local commanders from its own ranks".[58]Moreover, international criminal law

[54] Rule 149. Responsibility for violations of International Humanitarian Law, see also art. 3 of Hague Convention 1907 and Article 91 of Additional Protocol I.

[55] Rule 139 Customary International Humanitarian Law. According to Article 4(A) 2 GC III. The armed group must be under responsible command, caring armed openly, wearing a distinctive singe. See the case Malesia Osman V. Prosecutor.

[56] Marco Sassò, State responsibility for violations of international humanitarian law, in IRRC June 2002 Vol. 84 No 846 401.

[57] For example, in a resolution on the crisis in Guinea-Bissau, the Security Council called 'upon all concerned, including the Government and the Self-Proclaimed Military Junta, to respect strictly relevant provisions of international law, including humanitarian and human rights law, and to ensure safe and unimpeded access by international humanitarian organizations to persons in need of assistance as a result of the conflict'. By F. Schwendimann, The legal framework of humanitarian access in armed conflict, in IRRC, Volume 93 Number 884 December 2011 P. 1004. See also, UNSC Res. 1216 (1998), 21 December 1998, para 5. See also UNSC Res. 1478 (2003), 6 May 2003, para. 8; UNSC Res. 1649 (2005), UNSC Res. 1674 (2006), 28 April 2006 para. 22; UNSC Res. 1794 (2007), 21 December 2007, para. 17; UNSC Res. 1936 (2010), 5 August 2010, preambular para 14.

[58] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Interim Report

prohibits certain conduct and holds individual perpetrators accountable for violations of these rules.

Under International customary law, denial of humanitarian assistance and access could constitute the basis of several crimes.

3. Consequences

This examines the consequences available where there is denial of humanitarian assistance amounts to crime under international law. Most importantly this will lead to prosecution for failing at this obligation.

a) War Crimes

Under certain conditions, the denial of humanitarian assistance and access to civilians in need may constitute the war crime.[59] Responsible individuals must be prosecuted in national or international courts. According to the DRC Military penal code, Article 585, war crimes are all violations of laws and customs of war.[60] DRC military tribunals and courts have jurisdiction to trail war criminals. This jurisdiction could be personal, temporal, territorial and materiel. Therefore, every member of any rebel group can be tried and convicted for the violation of humanitarian law, indeed, humanitarian access rules in North Kivu DRC conflict. Following acts that are prohibited as war crimes could involve the denial of humanitarian assistance and access: wilful killing or violence to life and person; torture or inhuman treatment; or wilfully causing great suffering, or serious injury to body or health. These acts also constitute grave breaches according to the GC and AP I.[61]

The UN Secretary-General has identified violence against humanitarian personnel as among the most severe and prevalent constraints to humanitarian access, unfortunately many humanitarian personnel have been violated and kidnapped in North Kivu. Recently in June 2017, Red Cross workers have been

[59]F. Schwendimann, The legal framework of humanitarian access in armed conflict, in IRRC, Volume 93 Number 884 December 2011.

[60] Art. 585, DRC penal military code. See also the definition provide in law no 08/98 of 31th October 1998 on definition of war crimes, crime against humanity and genocide.

[61] Swiss Federal Department of foreign Affairs (2014), 'Humanitarian Access in situations of armed conflict',Handbook on the international Normative Framework, Version2.

kidnapped between Kirumba and Beni while on a humanitarian mission.[62] Therefore, the Kidnapping of humanitarian personnel could constitute a fact of denial of humanitarian assistance meanwhile, in my view a war crime.

In the case Prosecutor v. Sesay, Kallon and Gbao, The Special Court for Sierra Leone convicted three militia leaders of war crimes for having directly targeted humanitarian workers and peacekeepers.[63] In The case Kakado Barnaba, the military tribunal of Bunia convicted for War crime kakado Barnaba for attacking civilians' objects.[64] Though attacks launch to humanitarian personals and their vehicles which are civilians' objects could constitute a war crime.

The 1994 UN Convention on the Safety of United Nations and Associated Personnel and its Optional Protocol create a regime of compulsory trial or extradition for trial for certain offences against persons carrying out activities in support of UN operations.[65] Starvation is prohibited under International Humanitarian Law.[66] Under national legislation, Starvation of civilians as method of warfare constitutes a war crime.[67] In one report on the Democratic Republic of Congo, World Food Programme stated that conflict in North Kivu claimed the lives of million people, mainly through starvation and preventable or treatable disease.[68] Actually those responsible of those fact, members of armed groups, when it's the case, should be tried before national court or international court.

b) Crimes Against Humanity

Acts committed as part of a widespread or systematic attack directed against any civilian population could constitute a crime against humanity. According to the ICC Statute, those acts include murder, extermination, torture, persecution, and other inhumane

[62] DRC: red Cross, workers kidnapped in North Kivu June 7, Gardaworld, 16 June 2017.
[63] case Prosecutor v. Sesay, Kallon and Gbao
[64] Case Kakado Barnaba, Military Tribunal of Bunia RP 071/09, 009/010 and RP 070/010 (2010)
[65] ICRC, Study on Customary International Humanitarian Law, Volume II: Practice, Part 1, pp. 1174-1235.
[66] Articles 54 API and 14 APII. see also rule 53 CIHL
[67] ICRC, Study on Customary International Humanitarian Law, Volume II: Practice, Part 1, pp. 1174-1235.
[68] World Food Programme, Democratic Republic of the Congo, Available on http:// www1.wfp.org visited 20th September 2017

acts.[69] Many acts constituting crime against humanity could include the denial of humanitarian assistance and access when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.[70] Therefore, deprivation of food and medicine done in the purpose of destruction of a part of population[71] could constitute a crime against humanity, meanwhile, the denial of humanitarian access could be a crime against humanity. It also clear that if civilians die as a clear result of the unlawful denial of humanitarian assistance and access, then it is arguable that the denial constitutes murder. Therefore, individuals responsible can be prosecuted in national and international courts.

Under DRC law, crimes against humanity is proscribe at article 165 of military penal code.[72] It state that crime against humanity are graves violations of International Humanitarian Law committed against all civilians before or during conflict.

Recently, in July 2017 one rebel warlod Ntabo Ntaberi sheka was arrested for crime against humanity by rape and attacks against Humanitarian Vehicles between July 30 and August 2, 2010.[73] Actually, DRC courts and tribunals have convicted many individuals, from armed groups and armed force for crime against humanity.[74] However, International tribunals and courts can prosecute individual for crime against humanity. In the case Prosecutor v. Radisla v Krstic, The ICTY found that blocking aid convoys was part of the "creation of a humanitarian crisis as a prelude to the forcible transfer of the Bosnian Muslim civilians"[75] and established the individual responsibility of accountable persons.

In addition, DRC has ratified the ICC Statute in 2002, therefore it has jurisdiction of trailing those individuals responsible

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[69] Rome Statute, Art. 7(1)(b) and Art. 7(2)(b).

[70] F. Schwendimann, The legal framework of humanitarian access in armed conflict, in IRRC, Volume 93 Number 884 December 2011.

[71] ibid

[72] Art 165 Military Penal Code of DRC. See also article 169 which,in fact provides the same provisions with the article 7(1)of ICC Statute.

[73] News 24, DRC warlord accused of crimes against humanity surrenders available on http://www.news24.com accessed 21th September 2017

[74] See cases Waka lifumba , lemera and Mniraguha alia kAZUNGU in ASF, recueil de jurisprudence congolaise en matiere de crimes internationaux: Edition critique, Avocats sans Frontiere, December 2013.

[75]Prosecutor v. Radisla v Krstic, Case No. IT-98-33, Judgement, 2 August 2001, para. 615.

for crime against humanity in DRC[76]. Therefore, when established, members of rebel groups could appear before ICC for crime against humanity.

c) Genocide

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups, as such: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.[77] The latter has reproduced the substance of the crime of genocide according to article 2 of the UN Convention on the prevention and punishment of the crime of Genocide.

In DRC, according to the constitution article 153 which provides that international conventions and treaty, ratified shall be apply in internal courts, the definition of genocide still the same with the provision of articles 5 and 6 of the Rome Statute. In the case Mputu muteba 'affaires de kimbaguistes' the judge applied articles 5 and 6 of Rome Statute for the definition of genocide and art 77 of the same Statute for penalty.[78]

Pursuant the hand book on humanitarian access in armed conflict, Genocide may be committed during armed conflict or in other situations.[79] For the denial of humanitarian assistance and access to constitute genocide, the denial must amount to one of these acts: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life and must be directed against national, ethnical, racial or religious groups in the purpose of destroying them in whole or in part. Therefore, in extreme cases, the denial of humanitarian assistance and access might constitute genocide and rebel groups' member responsible of it might be trial before National courts and tribunals or international tribunals, actually ICC.

[76] See the case Thomas Lubanga, Bosco Ntaganda and Germain Katanga before ICC.

[77] Art 6 of the Rome Statute

[78] Case Mputu Muteba, affaire des Kimbanguistes, TGI de Kinshasa, R.P 11.154/11.155/11.156 of 11 December 2011

[79] Swiss Federal Department of foreign Affairs (2014), Op. Cit. P. 54

Conclusion

The rule 55 of customary international humanitarian law is biding all states as a norm of 'jus conges'. There is practice which recognizes that a civilian population in need is entitled to receive humanitarian relief essential to its survival, in accordance with international humanitarian law. Both parties to conflict, international or non-international are obliged to achieve that obligation. In situations of armed conflict, the responsibility for the civilian population's well-being lies with all of the parties to conflict. If they are unable or unwilling to meet the basic needs of the affected population within their control, they are obliged to allow and facilitate the impartial provision of assistance.

Failing to perform that obligation, parties to conflict should engage their responsibility. The violation of 'obligation to allow or facilitate humanitarian relief' is include in the facts of breach to international Humanitarian Law. According to rule 139, Armed opposition groups must respect international humanitarian law[80]. The responsibility of Non-states actors, in this case rebel groups, is not determine by any treaty IHL[81]. However, The UN Security Council has addressed violations of International Law by non-state armed groups on numerous occasions. Therefore, member of rebel groups might be prosecuted for denial of humanitarian access as a war crime, crime against humanity or genocide under national or international tribunals and courts.

In Democratic Republic of the Congo, military courts and tribunals and International Criminal Court have the jurisdiction to prosecute individual members of rebel groups for the denial of humanitarian assistance and access in the context of armed conflict.

For the implementation of rule 55 the conflict in North Kivu, DRC government should prosecute individual responsible of the denial of humanitarian assistance and access. When she is unable or unwilling to do so, the International Criminal Court prosecutor should investigate and prosecute them thus the rule 55 will be effective in the non-international armed conflict in DRC, in general and North Kivu, in particular.

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[80] Rule 139 Customary International Humanitarian Law. According to Article 4(A) 2 GC III. The armed group must be under responsible command, caring armed openly, wearing a distinctive singe. See the case Malesia Osman V. Prosecutor.

[81] Marco Sassòli, Op. Cit.

SOME REFLECTIONS ON THE SUPREME COURT DECISION IN THE KENYAN PRESIDENTIAL ELECTION PETITION: A CRITIQUE OF THE HOLDOVER DOCTRINE

By

Valentine Tebi Mbeli Ph.D *

Abstract

The decision of the Supreme Court of Kenya nullifying the 2017 presidential election has generated a great deal of political debate and intellectual hair-splitting. One of the key concerns is that the constitutional provisions on the term of office of President may have been entangled by the holdover principle. This paper analyses the concept of holdover of presidency in the light of the transformation agenda of the Constitution of the Republic of Kenya, 2010. It sets the stage and provides focused direction that legal research may follow in addressing some of the salient issues budding on the sides of the decision of the Supreme Court, mainly; its interplay with key constitutional provisions on the term of office of the President. The technicalities emanating from this decision and the consequential implications for the presidential term of office as revealed by this paper indicate sharp inconsistencies that pertains the danger of an unintended extension of presidential term. In that breath, the paper canvasses for an amendment of the Constitution targeted at streamlining the provisions on holdover with those on presidential term in order to eliminate inbuilt ambiguities and inconsistencies for the furtherance of the broader ends of true democracy and good governance.

Key terms: Holdover, presidential term, election petition, temporary incumbency.

Introduction

'Beauty lies in the eyes of the beholder' is a popular expression used to describe the subjectivity of human valuation of whether or not something is attractive. Broadly speaking, it is used to express the fact that not all people have the same opinion about what is attractive. This adage is applicable with equal force in gauging the reaction of parties to lawsuits vis-à-vis the ensuing court decision. In the context of litigation, therefore, it may be said that 'justice lies in the hands of the beholder'. This is particularly true with election petitions where court decisions are usually received with mixed feelings with the loser typically crying foul. Where the decision is appealable, it gives some hope of relief to the losing party

who may explore the possibility of getting a favourable decision on appeal. This may not be the case where the decision emanates from the highest court in the judicial hierarchy of a country-the Supreme Court.

The Supreme Court is mostly regarded as an appellate court with powers to hear and determine appeals from the court of appeal. In a limited number of cases, however, the court may be constitutionally empowered to entertain cases at first instance. Such is the case with presidential election petitions where the Supreme Court enjoys unfettered exclusive original jurisdiction.[1] The court's decision is final and binding on the parties to the suit but more importantly, it lays down precedent which all other subordinate courts must follow in line with the doctrine of *stare decisis*. Against this background, the Supreme Court and the judiciary at large play a critical role in strengthening democratic institutions and upholding the principles of democracy by ensuring that elections are conducted in strict compliance with the provisions of the law. This gives rise to the popular notion that election results must be a true reflection of the sovereign will of the people and the fountain of a legitimate government. The Supreme Court of Kenya's decision nullifying the August 2017 presidential election must, therefore, be construed in line with these fundamental rudiments of constitutional democracy.

To the progressives, the decision which is first of its kind in Africa is believed to be a major milestone in consolidating the ideals and tenets of democracy making the Kenyan Supreme Court a reference point for judicial reformation of political dogmas. To the conformist it is a political decision and to that extent, it has been described by the enraged incumbent President, 'a judicial coup'. Consequently, the decision has become the focal point of most political debates in Africa and the world at large. These debates have mostly taken a political dimension thus obviating certain basic legal issues. One of these issues is the concern that the decision may have created a constitutional crisis by extending the presidential term for a period of sixty days contrary to the understanding that the office of president should be held for a specific term. The question therefore is; could the Supreme Court have averted this controversy

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[1] Article 140 (1) Constitution of the Republic of Kenya, 2010

in the light of the extant provisions of the Constitution? This paper intends to join this vibrant conversation from the unique angle of clarifying certain cloudy issues budding on the sides of the otherwise plausible decision of the Supreme Court arising from identifiable gaps and inconsistencies in the Constitution.

Presidential Election and the Construction of Terms

Presidential elections in Kenya are governed by the Constitution and the Elections Act.[2] Chapter IX, Part II of the Constitution dealing with the structure and principles of the National Executive lays down the authority of the President, functions of the President and election of the President among other things. Article 136 (2) (a) envisages a presidential term of five years renewable once.[3] It is not specifically stated that the presidential term is five years. The current understanding that the presidential term is fixed at five years is largely a matter of construction. The law simply provides for the holding of presidential elections on the 'second Tuesday in August in every fifth year'.[4]

It should be pointed out that the post-election violence of 2007 and 2008 necessitated electoral reforms most of which were ushered in by the 2010 Constitution. However, the election date conundrum has turned out to be key interpretation debate under the same Constitution.[5] The date has been so controversial that a faction of the Grand Coalition Government even drafted a constitutional amendment. The Constitution of Kenya (Amendment) Bill 2011 sought to change the election date set in the Constitution of Kenya 2010. In particular, amendments were sought of articles 101, 136, 177 and 180[6] which set the election at the 'second Tuesday in August' to a date that allows the tenth Parliament to exhaust its 'unexpired time' as at August 2012.[7]

The 2013 presidential election which brought President Uhuru Kenyatta to power was the first to be conducted under the

[2] Cap 7, 2012

[3] This construction is gathered from the combined reading of article 136 (2) (a) and article 142 (2)

[4] See also articles 101, 177 and 180

[5] Shihanya Ben Constitutional Implementation in Kenya, 2010-2015: Challenges and Prospects" FES Kenya Occasional Paper, No. 5 p. 27

[6] These provisions deal with the election of members of Parliament, President and Vice President, members of County Assembly and the election of County Governors and Deputy Governors respectively.

[7] Ibid

2010 Constitution, but this election did not quite comply with the Constitution in terms of the election date of second Tuesday of the month of August. The election indeed took place in March after President Kabaki, in consultation with the Independent Electoral and Boundaries Commission (IEBC) leadership decided that the election be held in March. The matter was referred to the High Court for decision. Unfortunately, the Court ruled in favour of March 4, 2013 which date was upheld by the Court of Appeal.[8]

The complexity came as a result of the 2007 post-election violence that delayed the swearing in of Mwai Kibaki until December 30, 2008. Based on the five (5) year presidential term rule, elections ideally should have been held in December 2012. This means that the election date of second Tuesday of the month of August in the fifth year was not feasible as it would have led to a premature end to President Kibaki's tenure. Besides, there was a subsisting coalition between President Kibaki and Prime Minister Raila Odinga created to end the 2007 post-election violence. The Court was, therefore, of the view that elections could only hold in August if for any reason, the coalition failed. On the other hand, the election could equally not hold in December 2012. Some of the reasons cited were logistical but also, it was the opinion of the Court that parliament should be allowed to serve its full five-year term ending on January 14, 2013 and that elections should be held sixty (60) days later. Uhuru Kenyatta was sworn in as President of Kenya in April 2013. Since the Constitution provides for the holding of elections in the second Tuesday of August in the fifth year, elections had to be held in August 2017 less than four and half years into the supposed five-year term. This has somehow created a parallel operationalisation of two important constitutional provisions relating to presidential election; that of election date and the presidential term proper. The first presidential election conducted under the 2010 Constitution failed to comply with the election date set out in the Constitution for obvious reason that the election which preceded it was marred by violence that occasioned delays in the swearing in of the president-elect. The reasonable expectation this time is that the effective alignment of the Constitution as regards election date and presidential term will take full effect from the August 2017 election as the resultant term will last until August,

[8] John Harun Mwau & 3 Others v. Attorney-General & 2 Others [2012], HC Constitutional Petition No. 65 of 2011

2022. But this could equally turn out to be an elusive aspiration except electoral timelines are adhered to.

Constitutionally, a presidential term begins running from the date on which the President was sworn in and ends on the date the next president is sworn in.[9] This position of the law appears to be vague and ambiguous as it does not say in specific terms when the mandate of an incumbent president comes to an end thus opening itself to variations in interpretations. On the face of it, the provision appears to endorse a situation whereby the incumbent president stays in office until the next president is sworn in. This line of thinking drew a chain of opinionated support after President Kibaki's second term in office, where a six month extension was contemplated owing to an anticipated delay in general elections.[10] The major argument advanced was that the Constitution does not contemplate power vacuum thus 'the incumbent stays in office until the president-elect is sworn in'.[11] It has, however, been cautioned that the incumbent president would, during such period have limited powers such that he cannot make public appointments[12].This argument draws its strength partly from the constitutional provision dealing with temporary incumbency.

The exercise of presidential powers during temporary incumbency is derived from article 134 of the Constitution that provides:

(1) A person who holds the office of President or who is authorised in terms of this Constitution to exercise the powers of the President—
   a) during the period commencing on the date of the first vote in a presidential election, and ending when the newly elected President assumes office; or
   b) while the President is absent or incapacitated, or at other times contemplated in Article 147(3), may not exercise the powers of the President specified in clause (2).

(2) The powers referred to in clause (1) are—
   a) the nomination or appointment of the judges of the superior courts;

[9] Article 142 (1) of the Constitution

[10] See Alex Ndegwa Why President Kibaki may Get Six More Months available at http://www.standardmedia.co.ke/business/2000046242/why-president-kibaki-may-get-six-more-months visited on 19/09/17

[11] Lands Minister James Orengo cited by Alex Ndegwa ibid

[12] Ibid

b) the nomination or appointment of any other public officer whom this Constitution or legislation requires the President to appoint;
c) the nomination or appointment or dismissal of Cabinet Secretaries and other State or Public officers;
d) the nomination or appointment or dismissal of a high commissioner, ambassador, or diplomatic or consular representative;
e) the power of mercy; and
f) the authority to confer honours in the name of the people and the Republic.

Temporary incumbency in the context of article 134 (1) (a) is more or less a transition period and limitation of the powers of president is generally conceived as a means of ensuring a smooth transition to the next administration. It can, therefore, not be subjected to a use that tends to negate well-established principles of democracy such as the one on fixed terms of office.

The fact that presidential powers are curtailed during temporary incumbency is morally and legally defensible. The issue of the triggering event leading to the temporary incumbency and how each event affects the exercise of presidential powers, however, remain debatable. Construed in the widest context, temporary incumbency spells the danger of validating the somewhat unintended consequence of extending a presidential term. This contention has been raised against proposed delay in general election leading to an elongation of the term of office of the President on the ground that 'it is illegal because they are trying to extend the president's term, which is fixed.[13] This creates yet another constitutional interpretation debate.

By declaring that the President shall remain in office until the next president is sworn in, the Constitution of Kenya invariably endorses the doctrine of holdover. Although it could be argued in favour of the holdover principle that the Constitution ought to be interpreted in a way as to ensure that vacuum does not occur in the office of the president. This may be conceded subject to the caveat that it is construed within the strict meaning of a presidential term. In that regard, it stands debatable whether this interpretation can be extended to cover situations where a presidential election is nullified creating the necessity for a fresh election. At the moment, this debate has generated strong divergence of opinion in a way that

[13] Central MP Gitobu Imanyara

suggests a complex situation that has the increasing impact of polarizing the Kenyan political landscape. The gist of the argument has been to canvass views to either support or reject presidential holdover during the sixty days pronounced by the Supreme Court for a fresh election to be conducted. On the sidelines of this debate are those who maintain that the nullification of the election reverted the presidency to *status quo ante*- the pre-election position, such that the incumbent president remains in office not under the temporary incumbency but in substantive capacity. In all these arguments, one may easily perceive that there are certain gaps, inconsistencies and incongruities in the constitutional framework relating to the presidential term *vis-à-vis* the election date puzzle.

Presidential Election Petition under Kenyan Law

Election petition constitutes an integral part of an electoral process as it gives the courts the opportunity to scrutinise and possibly review any impermissible unfairness in the electoral process. By so doing, the courts have the mandate of ensuring that elections are conducted in strict compliance with the law. It is truistic that the Kenyan electoral process is fully constitutionalised and the courts have the jurisdiction to step in on any aspect of election law. Basically, there are four avenues via which courts can be involved in electoral matters to wit; judicial review for constitutional validity, criminal jurisdiction over electoral offences, disputed return petition and judicial review of electoral administration or activity.[14] It is a settled principle of law that the validity of an election or return may be disputed by petition addressed to the Court having jurisdiction to entertain such petition.

The Constitution of Kenya provides that a person may file a petition in the Supreme Court challenging the election of the President-elect within 7 days following the declaration of the results of the presidential election.[15] The Supreme Court is mandated by law to hear and determine the petition within fourteen days.[16] This appears to be an unfairly imbalance procedural equation. The principle of law which says, 'justice delayed is justice denied' ought to be balanced with that which says 'justice hurried is justice buried' to allow the court sufficient time to conduct a thorough hearing. The

[14] Graeme Orr "Judicial Review of Electoral Affairs" AIAL National Administrative Law Forum, Canberra, July 2011p. 1

[15] Article 140 (1)

[16] Article 140 (2)

fourteen-day timeframe for determination of the presidential election petition could be precipitous to miscarriage of justice given that it deprives parties to the suit of the necessary time to assemble relevant facts upon which to base their claims. The Court itself may incur costly mistakes as it engages the marathon proceedings. This time needs to be revisited in the interest of justice and democracy.

Where the Supreme Court finds for the petitioner, a fresh election must be conducted within sixty days after the determination.[17] This constitutional provision has been heralded by many as being 'transformative' and one of 'the best' in Africa for the reason that it minimises delays encountered in determining election petitions.[18] These delays could sometimes precipitate speculation, tension and even violence leading to loss of lives and property. That notwithstanding, there is still a need to work out a more realistic time frame for the resolution of presidential election disputes.

The Constitution provides for different time intervals for the swearing in of the president-elect depending on whether or not an election petition was filed. Where there is no petition challenging the results of the polls, swearing in of the president-elect takes place on the first Tuesday fourteen days after the declaration of the results.[19] Where a petition is filed but the court upholds the results of the polls, swearing in takes place on the seventh day following the decision of the Court[20]. Where the Supreme Court determines the election of the President-elect to be invalid, a fresh election must be held within sixty days after the determination as provided for by article 140 (3). A pertinent question is whether article 142 (1) which states that 'The President shall hold office for a term beginning on the date on which the President was sworn in, and ending when the person next elected President…is sworn in' can be invoked to allow the incumbent president to remain in office during the sixty days of a fresh election? There appears to be a striking divergence in opinion on this crucial question. A discussion on the practical implications resulting from these opposing views can best be situated in the context of the aftermath of the Supreme Court decision nullifying the 2017 presidential elections to which this paper now turns.

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[17] Article 140 (3)

[18] Femi Falana "Electoral Justice in Kenya and Nigeria" Sahara Reporters, online version available at http://saharareporters.com/2017/09/10/electoral-justice-kenya-and-nigeria-femi-falana visited on 19/09/17

[19] Article 141 (2) (a)

[20] Article 141 (1) (b)

The Supreme Court Decision and its Implications

On August 8th, 2017, Kenya held its second presidential election under the 2010 Constitution. The election was largely adjudged to be free and transparent by international elections observers. In all 19, 646,673 people registered for the election. In exercise of its mandate under Article 138 (10) of the Constitution, the IEBC as returning officer for the Presidential election declared Uhuru Kenyatta, the winner of the election with 8,203,290 votes as against frontline opposition Raila Odinga's 6,762,224 votes.[21] Aggrieved by the results of the polls, Raila Odinga, the leader of the strongest opposition party and runner up in the elections filed a petition[22] at the Supreme Court, challenging the results of the election. The petition was based on the grounds that the conduct of the election violated the principles of a free and fair election as well as the electoral process set out in the Constitution, electoral laws and regulations and that the respondents committed errors in the voting, counting and tabulation of results; committed irregularities and improprieties that significantly affected the election result; illegally declared as rejected unprecedented and contradictory quantity of votes; failed in the entire process of relaying and transmitting election results as required by law; and generally committed other contraventions and violations of the electoral process. It was also the petitioner's case that the electoral process was marred by improper influence, corruption, misconduct and undue influence. The petitioners sought among other reliefs, a declaration that the presidential election held on August 8th, 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared results invalid, null and void. This was the main issue for determination by the court. By a majority of four with two members dissenting, the Court found for the petitioners that the irregularities and illegalities were substantial and significant thus affecting the integrity of the election and that Uhuru Kenyatta was not validly declared President. The Court, therefore, declared the election results invalid, null and void and went ahead to order the IEBC to organise and conduct a fresh presidential election within

[21] Kenya Law 'Presidential Petition 1 of 2017' available at kenyalaw.org/caselaw/cases/view/140716/ visited on 12/11/2017

[22] Raila Odinga & Stephen Kalonzo Musyoka v IEBC & Ors Presidential Petition No. 1 of 2017

sixty days in strict conformity with the Constitution and the applicable election laws.[23]

In curing some of the blatant abuses of democratic principles and processes, this decision appears to have equally reignited the interpretation debate on the presidential term, precisely whether the temporary incumbency contemplated under article 134 of the Constitution can be extended to cover the period of sixty days during which a fresh presidential election is to be conducted. One argument is that since the Supreme Court did not specifically order President Uhuru Kenyatta to vacate office on the day the president-elect was to assume office, it implies that the Court intended the incumbent to remain in acting capacity. This argument seems to revolve around the fact that the Supreme Court did not find Kenyatta guilty of involvement in electoral malpractice. On that note, Falana posits that:

> Sequel to the annulment of his election Mr. Kenyatta ought to have been ordered by the Supreme Court to vacate office since he lacks any legitimate claim to continue to occupy the Presidency of Kenya. But fortunately for him, he was not found to have been directly involved in the electoral malpractice which led to the annulment of the presidential election. For that reason, he shall remain in office as President in an acting capacity pending the emergence and swearing of a new President produced by the fresh election pursuant to sections 134 and 142 of the Constitution.[24]

On the one hand, the argument is that Mr. Kenyatta remained in office because the Supreme Court did not make a consequential order that he vacates office. Whilst this may be morally tenable, it would be legally indefensible to place the decision on the somewhat compassionate ground of non-culpability rather than the true spirit and intent of the Constitution. Another dimension hinges on the view that the Constitution does not contemplate power vacuum. The question is whether the two viewpoints can sustain a justification for allowing the president extra time in office after an election has been nullified. The view here is that the mere fact that President Kenyatta was exculpated from wrongdoing is arguably insufficient to allow him in office for the period of sixty days if not so authorised by the Constitution. Besides, the Court's decision was firmly based on the assessment of the law relating to the organisation of the election by the IEBC rather

[23] At page 177
[24] Falana Femi op cit

than the findings of fact on the conduct of a presidential candidate. At best, the pronouncement of the Court which maintained that President Kenyatta was not involved in electoral malpractice could be said to have been collaterally made without the intention of making it the basis of the Court's decision even though it flags up a legitimate concern of a possible inducement, cause or reason why the IEBC may have acted the way it did.

The Supreme Court Decision and the Presidential Term Conundrum

When an election is nullified, the basic implication is that it is treated as having not produced any valid legal consequences. In other words, it is void and of no effect. This is the guiding principle of law upon which the Supreme Court had to order for a fresh election within sixty days.

From the assessment of the law, it can be discerned that had the election been validly held, the President-elect would have been sworn in on the first Tuesday following the fourteenth day after the day of the declaration of the results[25] or on the seventh day following an unsuccessful action challenging the outcome of the polls. In any case, the electoral law allows a certain window period within which election disputes can be settled and for other post-election logistics to be put in place for a smooth and effective transition. This window period ought to operate within stipulated timelines and not exist in perpetuity.

Considering that there is no limitation on the number of times election results may be legally contested in court, a situation where the fresh election ordered by the Supreme Court ends in similar circumstances as the previous one or where by fate, the election is nullified again is best left to wandering imagination. The possibility flowing from this illustration is that Kenya may not witness the swearing in of a president elected in line with democratic prescriptions in the likely event of annulment of the fresh election. With the incumbent as principal beneficiary, this could as well create an incentive to thwart the electoral process. It must be reiterated that the major reason behind limitation of time for determination of presidential election petitions is to eliminate delays in the process in order to allow for an effective functioning of the constitutional principles governing elections for continuity and

[25] Article 141 (2) (a)

consistency. The scenario painted above could be anathema to the realisation of this important objective.

It is a golden rule of constitutional democracy that the authority of the president is derived from the people. This authority is entrusted to the president by the people in exercise of their sovereign and democratic will for a fixed duration referred to as a presidential term. It does not fall within the reasonable contemplation of the rules of democracy that in entrusting the president with a mandate, a bonus period of whatever duration or description can be extended. It may, therefore, amount to term elongation for the President to spend time above the constitutionally stipulated limit in office based on the nullification of the presidential election. This is not only inconsistent with the spirit of constitutionalism but also antithetical to the fundamental principle of democracy based on fixed presidential terms. In effect, it translates to 'giving the incumbent president a second bite at the cherry' at the time when the game is over thereby suppressing the sovereign will of the people.

In the absence of constitutional clarity as it stands, article 141 (1) (b) of the Constitution could be interpreted in restrictive terms as having laid down a maximum duration of one month which the incumbent must remain in office following an election. This comes in after exhausting the seven days duration for filing a petition, two weeks period for the hearing and determination of the petition and one week for the swearing in of the President-elect. If this approach is adopted, then by necessary implication, the incumbent President ought to vacate office on the seventh day following the decision of the Supreme Court resolving that the election was invalid same being the day a new president should have been sworn in had the election been declared valid. This can be considered deemed vacancy for want of better terminology. The effect is that once this is settled, the next thing will be to activate article 146 of the Constitution dealing with vacancy in the office of the President.

Broadly speaking, this constitutional provision contemplates vacancy arising from death, resignation, impeachment and incapacity. Article 146 (1) (c) further states that vacancy may occur "under any other provision of the Constitution". The implication of this provision is that the list of triggering factors relating to vacancy is not exhaustive. This brings yet another constitutional debate of which other factors may occasion vacancy in the office of the President. This constitutional provision has not

been tested by the courts and even the search lights of analysts have failed to beam on it and as a result, it has been reduced to a cosmetic dressing of the Constitution on the issue of vacancy. It requires a comprehensive and insightful analysis of the relevant provisions of the Constitution relating to the entire process of election, term of office and swearing in of a new president to be able to identify the practical relevance of this provision. One area that can possibly be tested in court is that of interpreting the relevant constitutional provisions to extend their operational facets on vacancy to include a situation where a presidential election is invalidated. But an express legislative stipulation would be more desirable for better clarity and certainty in determining the extent to which the holdover doctrine is applicable in cases of that nature.

The Holdover doctrine after Term Expires

Term and tenure are in the strict sense not synonymous. There is a distinction between the term of office and tenure of the incumbent and as such, the term of an office, as fixed in the Constitution or statute creating the office, is not to be confused with the tenure of the officer.[26] Benson[27] graphically illustrates this point as follows:

> The term of the office is a fixed period, which can in no manner be shortened or lengthened by the officer. The death of the officer does not shorten it, nor does his holding over lengthen it. The term is the same regardless of the tenure of the incumbent. The term of office ends with the expiration of a fixed time, although the tenure may continue until the qualification of the officer's successor. "The latter is within the control of the parties, and may be longer or shorter, according to circumstances; but the former is not. The term remains …always the same, and is not subject, in its duration, to the wishes or agreements of any persons whomsoever; while the tenure of an incumbent may always be terminated by his resignation and its acceptance. During one term, there may be several tenures, but there cannot be several terms in one tenure.[28]

The period between the expiration of a term and the qualification of the successor is as much a part of the incumbent's term of office as the fixed statutory period, when the law provides

[26] State v. Young (La.), 68 So. 241
[27] Benson T.B Officer Holding over after Expiration of Term The Virginia Law Register, New Series, Vol. 1, No. 6 (Oct., 1915) P. 419
[28] ibid

that he shall hold until his successor qualifies. By term of office here is meant the incumbent's term or tenure and not the fixed term of office.[29] The result is, there is a tenure for a fixed term, and if, at the end of that period, owing to the failure of the body charged with the duty of supplying the office by election, or for any other cause, no successor has been elected and qualified, the incumbent holds over by the paramount right of tenure which the constitution supplies until he is superseded by a duly qualified successor who shall have been elected in the manner provided by law. After the expiration of the fixed term the tenure or title of the officer is by the continuing and superior authority and approbation of the Constitution.[30]

At common law, it seems an officer has the right to hold over in the absence of statutory provision.[31] Whether or not, as a general principle of the common law, officers are entitled to hold over beyond their prescribed terms without some express provision is not settled upon authority, although the view adopted by the American courts seems to be that, in the absence of any restrictive provision, the officer is entitled to hold over until he is superseded by the election of another person in his place.[32] Even though there may be a constitutional provision that pegs a term of office at a certain limit, the court is of the view that that does not prevent one who holds an office from holding over after the expiration of his term until his successor is elected and qualifies. Thus, in *State v Harrison*[33] the Court held that:

> while we concede that the constitutional inhibition imposes an absolute restraint against the creation of a term of office by the legislature of longer duration than four years, and that it prohibits a legislative tenure, or right to hold by legislative authority, for a longer period than four years by virtue of one election or appointment, it by no means follows that the constitutional provision under which offices of legislative creation may be held after the expiration of the term fixed, and until a successor is elected and qualified, is rendered inoperative. The right to hold over is derived from the same Constitution that imposes the limitation upon the General Assembly. The constitutional provision which adds to the fixed term a contingent right to hold over until a successor shall have been elected and qualified applies, in express terms to officers

[29] Chadduck v. Burke, 103 Va. 694, 698, it is said
[30] State v. Harrison, 113 Ind. 234, 3 Am. St. Rep. 663, 6
[31] Benson T.B op cit p. 416
[32] State v. Harrison supra
[33] supra

provided in this Constitution or in any law which may be hereafter passed.

Holdover generally describes a situation where a public officer whose term has expired or services have been terminated is allowed to continue holding his office until his successor is appointed or chosen and has qualified. It is to prevent a hiatus in the government pending the time when a successor may be chosen and inducted into office.[34] There are three rules generally applicable to holdovers. First, where the law provides for it, the office does not become vacant upon the expiration of the term if there is no successor elected and qualified to assume it. Incumbent will holdover even if beyond the term fixed by law. Second, where the law is silent, unless holdover is expressly or impliedly prohibited, incumbent may holdover. Third, where the Constitution limits the term of a public officer and does not provide for holdover, holdover is not permitted[35]. The list is not exhaustive on when a holdover is permissible. Recently, in an opinion of the Attorney General of Texas, it was maintained that a holdover would not be allowed when the office holder(s) has already been removed from office.[36]

The applicability of the holdover doctrine may be impeded by many factors. First, the integrity of an election is a major determinant to the effective operation of the doctrine. Where an election is conducted in line with the dictates of the law and democratic norms, litigations are minimised thus allowing for a smooth transition in which holdover is only a natural process. In the US, there have been contested elections and really fiercely fought elections with a lot of bad feelings. What those have always produced, with one pretty big exception, is the peaceful transition of power. That exception, of course, is 1860, where much of the white South said that they wouldn't accept Abraham Lincoln's election as President, and that resulted in a civil war.[37] This is unlike in Africa where elections are usually characterised by violent disputes and prolonged court ligation. Even though Kenya has taken a major step ahead in shortening the duration for determining presidential election petitions, the danger of a prolonged tenure of office of the

[34] PUBLIC OFFICE AND OFFICERShttp://www.angelfire.com/me4/francute/publicof.htm visited on 23/09/17

[35] Ibid

[36] See opinion of the Attorney General of Texas, Opinion No. GA-0175

[37] Beverly Gage in an Interview granted PBS NEWSHOUR October 20, 2017

President ensuing from annulation of an election remains a living threat to the applicability of the holdover doctrine.

Another factor that is considered key to the effective operation of the doctrine is the duration for determination of petitions. This has already been alluded to in the context of the Kenya Constitution where the law provides for a cumulative period of three weeks for filing and determination of presidential election petitions. This may not exactly be the case with other African democracies with lengthier duration[38] giving the office holder enough time to savour a tenure that is not supported by the will of the people as democracy entails.

Another major challenge is the culture of not accepting defeat which is typical of African political actors. This is what has resulted many times in post-election violence leading to loss of lives and property. Under such circumstances the applicability of the holdover principle may not serve its conceptually designed purpose of preventing power vacuum and facilitating smooth transition. That being the case, the holdover doctrine may only be suitable in true democracies. Even at that, it can be moderated by a restrictive provision in the Constitution.

Such is the case with Philippines where the presidential holdover is constitutionally not allowed and, therefore, the former president whose term has already expired has no right of holdover. No extensions are allowed, not even in hold over capacity. Thus, if no president assumes office after the election, the former president is not allowed to continue discharging the functions of the presidency.[39] The relevant constitutional provision is section 7 (4) which states:

> Where no President and Vice-President shall have been chosen or shall have qualified, or where both shall have died or become permanently disabled, the President of the Senate or, in case of his inability, the Speaker of the House of Representatives shall act as President until a President or a Vice-President shall have been chosen and qualified

By virtue of the foregoing provision, the presidential term is strictly limited and no extension is allowed. Consequently, in the event of an election failing to produce a president, the constitutional

[38] In Nigeria for instance, election petitions are determinable within one hundred and eighty days

[39] The Philippine Government available at http://www.google.com/amps/s/tamayoasbc.wordpress.com/2014/08/02/the-philippine-government/amp/ visited on 24/09/17

provisions on vacancy and presidential succession become automatically applicable. A provision of this nature is desirable in the Kenyan Constitution for the purpose of giving true meaning to democratic ideals and principles. Perhaps the corporate law approach to the holdover doctrine could add as persuasive guide to the desired reform.

What lessons are there to learn from Corporate Law?

Corporate law is, in many ways, similar to constitutional law especially on the conceptual notions underpinning the separation of powers. The organic structure of a corporate organisation shares much in common with the pattern of division of powers within a constitutional framework. In that breath, the relationship between cabinet and parliament which is theoretically conceived as a means of ensuring checks and balances is ideologically analogous to the relationship that exists between the board of directors and general meetings of shareholders.

Corporate law equally bears close affinity to constitutional law on the subject of tenure of elected officials. Corporate law typically provides for a one-year tenure running from one annual general meeting to the other. A question of considerable importance that has arisen over time in the context of tenure of office of an elected director has been; if a general meeting is not held in time, can the directors continue till the meeting is held? This question was resolved in the negative in the Indian case of *B.R. Kundra v Motion Picture Association*[40] where the New Delhi High Court held that directors cannot prolong their tenure by not holding a meeting in time. According to the Court, directors due to retire … must vacate office at the latest on the last day on which an annual general meeting ought to have been held.

A similar position was taken in *Krishnaprasad Jwaladutt Pilani v Colaba Land And Mills Co. Ltd.*[41] Here, the application before the Court was by the Colaba Land and Mills Co. Ltd. and the circumstances in which it was made are these. On April 14, 1955, the annual general meeting of the company was held for the year 1954. The financial year of this company, which was a public company, ends on December 31. At that meeting Jayantilal N. Patel retired by rotation and being eligible for re-election was re-elected as a director. The annual general meeting for the year 1955 was held

[40]

[41] AIR 1960 Bom 312, 1959 29 CompCas 273 Bom

on March 29, 1956. At that meeting V. J. Pilani retired by rotation and being eligible for re-election was re-elected. The annual general meeting for the year 1956 was not been called to the date of the application. The period for holding that meeting was extended by the Registrar up to March 31. Even so that meeting was not held. Nor has the annual general meeting for the year 1957, but some directors who ought to have vacated office during this time remained in office on the basis that no general meeting was held. In respect of this, the Court held 'In our judgment it speaks of directors who till the date of the actual calling of the meeting continued to be directors... A person who is to cease to be a director by retirement at the expiry of a stated time cannot claim to have escaped such retirement simply because an annual general meeting has not been called as required by law within that time'.

Where the law does not lay down any substantive rule as to the tenure of the office of an office holder, it is not only a specific section which has to be considered. The tenure of office has to be ascertained not merely from one section but from the language of a combination of relevant provisions read together. Therefore, in the context of the tenure of the office of an elected director it is extremely difficult to see how that tenure of office can be extended simply by not calling the annual general meeting and taking shelter under the language of a single provision of the law, which does not lay down any substantive provision relating to the tenure of the office of an elected director.[42]

In Canada, *quo warranto* proceedings[43] have been successfully used to remove from office, directors who are illegally occupying and exercising their offices[44] as an exception to the 'holdover' doctrine.

In the United States, the general rule is that at the end of a statutory term, the office becomes vacant, and must be filled by a new appointment.[45] The only exception to this rule is where parliament specifically authorises holdover where a director may remain in office until a successor is appointed and qualifies.

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[42] Ibid

[43] Quo warranto is a medieval Latin phrase for "by what warrant?" used to require a person to whom it is directed to show what authority he has for exercising some right or power he claims to hold.

[44] See Supreme Court of Canada decision in Ghimpelman v. Bercovici, [1957] S.C.R. 128

[45] United States v Eckford's Executors 42 US (1How) 250

However persuasive the principles of law developed by the courts in dealing with cases of holdover by directors may be in shaping an understanding of the conceptual considerations involved in dealing with offices that are subject to specified terms, a presidential term presents a case for distinction. By its very nature, presidential elections are highly sensitive and capable of resulting in circumstances that can make or mar the destiny of a country. One could easily imagine the devastating consequences of a situation where in addition to nullifying the presidential election, the Supreme Court went ahead to order the vacation of office by Mr. Kenyatta. In fact, this could straightforwardly have resulted in a crisis. However, the situation can be addressed by an explicit constitutional stipulation in order to take away a matter of such profound sensitivity from the realm of conjecture and speculation.

Conclusion

This paper carefully examined certain salient aspects of the Supreme Court of Kenya decision nullifying the August 8, 2017 presidential election. The discussion focused on the decision as relates to the issue of term of office of the president, particularly if it resonates with the principles of democracy enshrined in the Constitution. The technicalities emanating from this decision and the consequential implications for the presidential term of office as revealed by this paper indicate sharp inconsistencies with the principles of democracy stemming from the danger of extension of presidential term. This largely results from an isolated understanding of article 132 of the Constitution which contemplates a presidential holdover in a rather vague and ambiguous tenor that fails to strike a reconciliation with other provisions relating to commencement and end of term of the president. In view of these irreconcilable differences, the Constitution may be construed in a way that appears to approbate and reprobate or even self-contradictory, having set timelines for the swearing in of the President-elect and at the same time according the holdover doctrine an open-ended applicability status. This portends great danger to democracy especially in situations where election results are nullified as it is the instant situation. Considering that election petitions may be endless in the number of times they are instituted, the holdover doctrine could be transformed into an engine for self-perpetuating oligarchies. An amendment of the Constitution targeted at streamlining the provisions on holdover and presidential term is highly desirable for the elimination of inbuilt ambiguities

and inconsistencies and for the furtherance of true democracy and good governance.