

ISSN 0012-8678

EASTERN
AFRICA
LAW
REVIEW

ISSUE NO. 2	VOLUME 42	DECEMBER	2015
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A JOURNAL OF LAW AND DEVELOPMENT

Published by University of Dar es Salaam School of Law,
University of Dar es Salaam

This issue was published in October 2017

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P.O. Box 35093,
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Price

Price per issue exclusive of postage is TShs. 15,000 (within Tanzania)
USD 20 (outside Tanzania)

Frequency of publication

The publication comes out biannually; June and December.

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Reflections on 'People Centered Principle' in the East African Community: The Current Legal Controversy

Petro Protas* and Theophil Romward**

Abstract

Addressing the causes for the collapse of the first EAC in 1977 was crucial to the founders of the current EAC. Concentration of power on major decisions in the hands of governmental institutions and not the citizens of Partner States was among the factors that led to the collapse of the former EAC. In an attempt to avoid similar mistakes, founders of the EAC enshrined the principle of 'People Centered Community' in the current Treaty for the Establishment of the East African Community as one of the operational principles. In this regard, the EAC Partner States commit themselves towards putting the people of the community at the center of regional integration process. However, this principle seems to be only on paper and not reflected in the actual practice by the EAC Partner States. Therefore, this Article examines the principle of people centered community as provided for in the EAC Treaty and how is reflected in actual practice by the Partner States and institutions of the community. It is argued in this article that the people centered community is vital towards practical achievement of the objectives of the community and that its full implementation not only guarantees the long survival of the community but also creates an avenue for people to appreciate and enjoy the tangible benefits of the integration. Finally, the Article offers recommendations on how best the principle can be operationalized by the EAC-Partner States.

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1. Introduction

The framers of the Treaty for the Establishment of the East African Community, 1999, (in short EAC) were very keen in trying to address various issues that caused the collapse of the former EAC in 1977.¹ One of those issues was lack of involvement of people in the whole process of regional integration in East Africa. In addressing this issue, the ‘people centered principle’ was enshrined in the EAC Treaty as one of the operational principles of the Community.² With this initiative, the community commits itself towards putting citizens of the Partner States at the center of the regional integration process. The people centered principle is an operational principle intended to guide the community towards practical achievements of the objectives set in the EAC Treaty.³ The people centered principle shows how serious the Partner States are committed towards addressing the question of non-involvement of people in the regional integration process.

However, this commitment seems to be less complied with as the practice by EAC Partner States and various institutions of the community reveal a different approach. People are made the observers of the process instead of being at the center as envisaged by the EAC Treaty. This Article examines ‘the principle of a people centered community’ as provided for in the EAC Treaty and how it is reflected in actual practice by the EAC Partner States and Institutions of the Community. The Article recognizes the importance of the principle in meeting the objectives set in the EAC Treaty. Therefore, it offers recommendations on how best the principle can be operationalized for achieving the objectives of the community.

¹ Joshua M. Kivuva, “East Africa’s Dangerous Dance with the Past: Important Lessons the New East African Community has Not Learned from the Defunct”, **European Scientific Journal**, 10(34), 2014, pp. 359-374, p. 359.

² Article 7 (1) (a) of the Treaty for the Establishment of the East African Community, 1999 (As amended on 14th December, 2006 and 20th August, 2007).

³ Khoti C. Kamanga and Ally Possi, “General Principles Governing EAC Integration,” In Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger Armin Cuyvers (eds.), **East African Community Law: Institutional, Substantive and Comparative EU Aspects**, Boston: Brill Nijhof, 2017, pp. 202-216, p. 205.

2. Regional Economic Integration in East Africa

Regional economic integration in East Africa is not of a newly born baby's age. It is older than the post-colonial East African sovereign states that form the East African Community. The formal integration has its roots from the British colonial times particularly with the construction of the Uganda Railway from 1896 to 1901.⁴ This was an early relationship between Kenya and Uganda which were under the British colonial power. Then Tanganyika was a German colony. Tanganyika joined the two other countries immediately after the First World War when she was transferred to British administration under the League of Nations mandate following the defeat of Germany in that war.⁵ This integration was developed to a postal union and ultimately to a customs union level.⁶ It worked under various institutions such as East African Currency Board, the Court of Appeal of East Africa, the East African Meteorological Department and the East African Posts and Telegraphs department serving on inter-territorial basis.⁷

To strengthen the integration, the East African High Commission (EAHC) was established in 1948 to deal with matters whose interests were common

⁴ Khoti C. Kamanga, "An Enquiry into the Achievements and Challenges of the East African Regional Integration," **African Review**, 43(1), 2016, pp. 51-74, p. 52.

⁵ Msuya W. Mangachi, **Regional Integration in Africa: East African Experience**, Cambridge:

Safari Books Ltd, 2011, p. 36. The author cites Articles 5 and 10 of the Trusteeship Agreement as approved by the General Assembly of the United Nations, in New York 13th December, 1949. Under these provisions of the Agreement the Mandate authorized Britain to constitute Tanganyika into a custom, fiscal or administrative Union or Federation with adjacent territories under his sovereignty or control and to establish common services between such territories and Tanganyika provided that such a constitution was not inconsistent with the Trusteeship Agreement.

⁶ Khoti C. Kamanga, "Some Constitutional Dimensions of the East African Co-operation," In **Constitutional Development in East Africa for Year 2001**, Kituo Cha Katiba Series, 2003, pp. 118-142, p. 120.

⁷ *Ibid.*

among the Member States in the Governors' meetings.⁸ The East African countries, namely Kenya, Uganda and Tanganyika, worked under the EAHC until 1961 when it lost its political legitimacy following independence of Tanganyika.⁹ It was replaced by the East African Common Services Organization (EACSO) in the same year. Attempts were made to form a political federation by the East African countries that is Kenya, Uganda and Tanganyika; they proved a failure.¹⁰ It is important to note that during colonial rule and the time before the union of Tanganyika and Zanzibar, Zanzibar distanced herself from Regional Integration initiatives in EAC. For example, she never associated herself with EAHC and EACSO.¹¹ That is why; the Article makes references to Tanganyika and later on Tanzania. This is due to the fact that Zanzibar is represented in the EAC by the government of the United Republic of Tanzania.

The EACSO members experienced serious problems that slowly culminated into deterioration of the integration. In 1966, the members witnessed the dissolution of the East African Currency Board consequently allowing each Member State to establish its own currency and central Bank.¹² Various Commissions were formed to address the problems in vain. Among the Commissions was the Commission under Professor Kjeld Philip "the Philip Commission" that was formed to inquire as to how the East African countries would maintain the integration. Basing on the Philip

⁸ Victor Umbricht, **Consolidated Report of the Mediator, Proposals for the Permanent and Equitable Division of Assets and Liabilities of the Corporation and the General Funds Services of the East African Community**, 1981, p. 5.

⁹ Kamanga, "Some Constitutional Dimensions of the East African Co-operation", *op.cit.*, p. 120.

¹⁰ Bhoke Munanka, **East African Legislative Assembly Report of the Select Committee on East African Federation**, 1974, p.3.

¹¹ Mahadhi J. Maalim, **The United Republic of Tanzania in the East African Community: Legal Challenges in Integrating Zanzibar**, Dar es Salaam University Press, Dar es Salaam, 2014, p. 3.

¹² Kamanga, "Some Constitutional Dimensions of the East African Co-operation," *op.cit.*, p. 127.

Commission's recommendations the East African Community was established in 1967.¹³

The 1967 Community lasted for ten years as it collapsed in 1977. Mistrust among the heads of state, centralization of the EAC corporations and services in Kenya,¹⁴ disproportionate sharing of benefits and lack of political will were some of the causes of the failure of the community.¹⁵ It is also documented that lack of popular participation and policies to address these shortfalls contributed to the collapse of the Community.¹⁶ The community was revived in 1999 when the original Partner States that is, Kenya, Uganda and the United Republic of Tanzania, (hereinafter referred to as Tanzania) signed the EAC Treaty in Arusha, Tanzania.¹⁷ Currently, the community comprises six Partner States after the accession of Rwanda and Burundi in 2007¹⁸ and South Sudan in 2016.¹⁹

One of the distinguishing features of the new EAC is that, it addresses itself to the reasons that precipitated the collapse of the former Community.²⁰ One of the reasons for failure of the former community was non-adherence to the people centered principle. Failure to adhere to the principle was one of the challenges. Another challenge that had been

¹³ Mangachi, **Regional Integration in Africa: East African Experience**, *op.cit.*, pp. 59-62.

¹⁴ Mangachi, *ibid.*, p. 109.

¹⁵ Peter Kimemi., "An Overview of the Performance of the East African Economies since 1985: Implications for the New Initiative on East African Co-operation", **African Sociological Review**, 4(1),2000, pp. 119-137, at p. 120.

¹⁶ Kamanga, "An Enquiry into the Achievements and Challenges of the East African Regional Integration," *op.cit.*, pp. 52 and 63.

¹⁷ Sangeeta, Khorana, Kato Kimbugwe and Nicholas Perdikis., "Assessing the Welfare Effects of the East African Community Customs Union's Transition Arrangements in Uganda," **Journal of Economic Integration**, 24(2), Centre for Economic Integration, Sejong University, 2009, pp. 685-708, at p. 686.

¹⁸ Wauna, Oluoch., "Legitimacy of the East African Community," **Journal of African Law**, 53, 2009, pp. 194-221, at p. 194.

¹⁹ Overview of East African Community, found at <http://www.eac.int/about/overview>, retrieved on 10th April, 2017.

²⁰ See the Preamble to the EAC Treaty.

complained of by Tanganyika and Uganda was Kenyan dominance of the Common Market during the colonial times.²¹

Under the EAC Treaty, the Partner States undertook to establish among themselves, a Customs Union, Common Market, subsequently a Monetary Union and ultimately a Political Federation to underpin the integration.²² The Partner States also agreed to remove obstacles to the free movement of persons, labour and services and ensure that the people of the Community enjoy the right of establishment and residence within the Community.²³ In order to remove the obstacles to free movement of capital, services and people, the Partner States agreed to conclude Protocols addressing the objectives to be achieved.²⁴ The Council of Ministers was tasked to determine the time at when the Protocols were to be concluded.²⁵

The Protocols are annexed with several Regulations that together form integral parts of the EAC Treaty.²⁶ A Protocol forms an integral part of the treaty as a fresh treaty in another form with the purpose of supplementing a Treaty.²⁷ This assertion is derived from definition of the Treaty given by Vienna Convention on the Law of Treaties, 1969. According to the Convention:

Treaty means an international agreement concluded between States in written form and governed by international law, **whether embodied in a single instrument or in two or more related instruments** and whatever its particular designation;²⁸ [emphasis added]

²¹ Mangachi, *Regional Integration in Africa: East African Experience*, *op.cit.*, pp. 51-53. Also, see Kamanga, “Some Constitutional Dimensions of the East African Co-operation,” *op.cit.*, p. 126.

²² Article 5(2) of the Treaty for the Establishment of the East African Community, 1999. Also, see Articles 75 and 76 of the EAC Treaty that govern the establishment of Protocols of a Customs Union and Common Market respectively.

²³ *Ibid*, Article 104(1) of the EAC Treaty.

²⁴ *Ibid*, Article 104 (2).

²⁵ *Ibid*.

²⁶ *Ibid*, Article 151(4).

²⁷ Kamanga and Possi, “General Principles Governing EAC Integration”, *op.cit.*, p. 215.

²⁸ Article 2 (1) (a) of Vienna Convention on the Law of Treaties, 1969.

Under the EAC framework, this position was illustrated by the East African Court of Justice (EACJ) in *The East African Law Society v. The Secretary General of The East African Community*.²⁹ In this case, the court held that the Protocols are negotiated under Article 151 (4) and therefore become integral part of the Treaty.³⁰ It is clear therefore that, reading the EAC Treaty only without regard to the Protocols and the Annexes made thereunder, one may be misdirecting himself. The Regulations contain the guidelines and procedures on how the provisions of the EAC Treaty and the Protocols should be implemented.

3. People Centered Community

The Partner States committed themselves to creating a people-centered Community. This implies that the Community is not only to be known but also owned by the EAC citizens for whose interest the Community was revived.³¹ People centeredness, therefore, denotes an approach of planning, running and implementing certain projects by incorporating the opinions and values of the people for whose interests the project is established.³² In this regard, people centeredness connotes the special glue that holds the Community and its people together. It, therefore, refers to the involvement of people in any activity that is expected to require their opinions. Without their opinions, the said activity loses its legitimacy. As noted in the introductory part of this Article, people centeredness is one of the principles upon which the EAC is based. This is gathered when reading Article 5 that entrenches the objectives of the Community³³ and Article 7 that covers the operational principles of the Community.³⁴

²⁹ EACJ Reference No. 1 of 2011.

³⁰ *Ibid*, p. 21.

³¹ Khoti C. Kamanga, "Progress, Prospects and Challenges of the East African Community," Occasional Papers, No. 2, 2012, p. 9.

³² John Raeburn and Irving Rootman, **People Centered Health Promotion**, England: John Wiley & Sons Ltd., 1997, pp. 3 & 137.

³³ Article 5(3) (d) of the EAC Treaty.

³⁴ *Ibid*, Article 7(a).

The principle aims at bringing mutual development to the people of the EAC Partner States. The Community may be made people centered through how its established organs such as the Summit, the Council, East African Legislative Assembly (EALA) and EACJ operate. For example, direct participation of Community citizens in electing their representatives in the EALA, the coverage of the representatives in the EALA, citizens' participation in negotiating various legal instruments and laws and even admitting new Members. Policy discussions in the Council and the whole process of law making may reflect the principle of a people centered community. While the Treaty provides for the principle of a people centered community, the issue is whether or not the principle is adhered to in practice. What takes place in practice is examined below.

3.1 Representation in the EALA

The EAC Treaty repeatedly makes the EAC a people centered Community. This implies that the Community citizens should be directly involved in the activities of the Community. This may include making decisions on various matters of the Community. However, it cannot be avoided that some matters of the Community, as it is in national matters, are technical and therefore need either professional people or those who are better placed to be able to comprehend those matters. It, therefore, it is not practical to involve all citizens in all matters. It becomes imperative to have representatives of the large population in some issues. For example, not all citizens of the Community can participate in the law making process in the EALA. Representatives are used in such a process. Since what these representatives to the EALA are discussing is for the benefit of the people of the community, the people should be the ones to decide who should be a member of EALA and who should not.

However, the situation in EAC is different though seemingly blessed by the EAC Treaty. Under the Treaty, it is the duty of the National Assembly of each Partner State to elect representatives to EALA.³⁵ These shall join

³⁵ *Ibid*, Article 50 (1).

the members from other Partner States in the Assembly. The members elected do not come from the members of the National Assembly³⁶ but must, among others, be qualified to be elected members of the National Assembly of that Partner State under its Constitution.³⁷

Moreover, the elected members represent as much as it is feasible, the political parties with representatives in the National Assembly, shades of opinion, gender and other special interest groups in the Partner State.³⁸ The procedures governing the election of the members are to be determined by the Partner States.³⁹ The representatives at community level are nominated by the political parties with representatives in the Partner States' National Assemblies and finally elected by the Members of Parliament (MPs) of the National Parliaments.⁴⁰ This creates a problem because the representation of different groups (gender, political parties, shades of opinion and other special interests groups) in EALA depends on whether it is feasible or not for National Assemblies of Partner States. It is submitted that the use of the word 'feasible'⁴¹ under this Article, offers room for flexible interpretation by the Partner States and hence susceptible for misuse. For example, in the 2017 election of EALA representatives from Tanzania, it was only political parties which dominated the process. This is contrary to what is envisaged by the EAC Treaty on the representation of different groups. These may be among those elected but not because they represent their groups, it is because they were nominated by their political parties.

³⁶ See Article 50(1) of the EAC Treaty and section 4 of the East African Legislative Assembly Elections Act, 2011.

³⁷ *Ibid*, Article 50(2) (b).

³⁸ *Ibid*, Article 50(1).

³⁹ See Article 50(1) of the EAC Treaty and section 12 of the East African Legislative Assembly Elections Act, 2011.

⁴⁰ *Ibid*.

⁴¹ According to **Cambridge Dictionary** the word 'feasible' has a meaning of 'the possibility that can be made or achieved or is reasonable'.

There is another problem in that, an EALA candidate should be qualified to be elected a member of the National Assembly of the Partner State. The problem arises because some Partner States have constitutions that require the Parliamentary candidates to be sponsored by a political party.⁴² This means that a person cannot contest for parliamentary election without a sponsorship of a political party. This requirement automatically excludes those groups mentioned in Article 50 of the EAC Treaty in favour of political parties' representatives. Addressing this problem depends on the wisdom of the Partner State to make rules that provide avenues through which these other groups would get an opportunity to represent the citizens in EALA without an attachment to any political party. The Partner States have taken advantage of their discretion to determine the procedure of electing EALA representatives by excluding the other groups from the process. This was noted by the EACJ in *Prof. Peter Anyang' Nyong'o and Others v. Attorney General of Kenya and Others*⁴³ where, among others, the court noted that:

The election rules provide in rule 4, that the National Assembly shall elect the nine members of the Assembly "according to the proportion of every party in the National Assembly". To that extent, there is partial compliance with Article 50. **However, the apparent absence of any provision to cater for gender and other special interest groups is a significant degree of non-compliance**, notwithstanding the discretion of the National Assembly in determining the extent and feasibility of the representation. [Emphasis supplied]

⁴² See Article 67(1) (b) of the Constitution of the United Republic of Tanzania, Cap. 2 of Laws of Tanzania. This is not a requirement either under Article 80 of the of the Constitution of Uganda, 1995 or Article 99 (1) (c) of the Constitution of Kenya, 2010. However, it is hardly possible for independent candidates to be nominated by the Political Parties for EALA representation. So, the problem that emanates from EAC treaty persists even in Kenya and Uganda that allow independent candidates.

⁴³ Reference No. 1 of 2006, [EACJ], p. 37.

The procedures determined by Tanzania, for example, in the 2017 election indicate that for one to be validly nominated as a candidate for the election he/she must be nominated in a transparent and democratic manner by the political party sponsoring him.⁴⁴ In practice not much initiatives were put in place to reach all members of political parties. Thus, denying opportunity for those with interest to contest for those posts. Therefore, this renders the process less democratic and transparent. It is submitted that, initiatives may include advertisements in credible media such as newspapers with wide circulation, local televisions and radios. These were not sufficiently utilized.

It is argued that the EAC citizens are not fully represented, for they are not directly involved in the Community affairs. This argument is based on the following grounds. Firstly, the citizens are isolated from the Community particularly on important activities such as electing the people who are to discuss and pass matters that directly affect the citizens themselves. The problem starts from the EAC Treaty itself. The EAC Treaty links the representative role of the MPs in National Parliaments to their citizens, with that of representing the same citizens at Community level. This is wrong because, it is expected that the MPs in Partner States should do what they were sent to do by their voters, which is to deliberate on developmental matters of their constituencies.

Whether the MPs do what their voters expect of them or not, that is another story which is not within the ambits of this Article. Electing people who should represent the citizens in other forums falls under the contemplation of neither the citizens nor the contestants themselves during the election campaigns. Experience in Tanzania indicates, for example, that it is very rare even to mention the community itself in the candidates' areas of

⁴⁴ Rule 5 of the Rules of Procedure for Nomination of Candidates for the Election of Ministers of the East African Legislative Assembly, 2017. These rules are made under Order 12, rules 4(1) and 8 of the Third Schedule of the Parliamentary Standing Orders, January 2016 Edition.

priority even though parties' election manifestations try to mention it.⁴⁵ This is the evidence that EAC is not in the hearts of the MPs that are mandated to elect the EALA representatives. This makes the political parties and members of the National Assemblies, who in actual sense are the images of their political parties, not the proper persons for nominating and electing EALA members on behalf of the people.

The situation under the European Union (EU) is different. EU is mentioned here because it is taken as a developed regional integration in the world and therefore worth citing as an example for other Regional Economic Communities (RECs) to learn. In EU, citizens are directly represented in the EU Parliament. Among the new changes brought by the Treaty of Lisbon, 2007 is to allow every EU citizen to participate in the democratic life of the Union.⁴⁶ This includes the use of universal suffrage in getting the representatives of the EU citizens in the EU Parliament. Additionally, the Lisbon Treaty promoted citizens' initiative by allowing them to participate in law making process and development of EU policies.⁴⁷ This is effected by giving a forum to the citizens of moving the European Commission on making legislative proposals.⁴⁸

Indeed, in the EU decisions are taken openly and as closely as possible to the citizens of the Union.⁴⁹ It is our humble opinion that, this is people centeredness worth emulating. The EU strives to make its citizens participate directly in the functioning of the Union through the established institutions of the Union. The institutions endeavour to make the functioning of the Union transparent and coherent, particularly the

⁴⁵ See CCM Election Manifesto, 2015, on page 167 and CHADEMA/UKAWA Election Manifesto, 2015 on pages 79 and 80.

⁴⁶ *Ibid*, Article 10(3).

⁴⁷ See Articles 10 (1) and (2) of the Treaty on European Union, Consolidated Version, 2012.

⁴⁸ European Commission, The European Citizens' Initiative, found at <http://ec.europa.eu/citizens-initiative/public/?lg=en&persons>, retrieved on 6th May, 2017.

⁴⁹ Articles 10 (1) and (2) of the Treaty on European Union, Consolidated Version, 2012.

Commission which is the policy making organ and originator of the Union bills.⁵⁰

Secondly, the EAC Treaty makes it clear that various political parties that are represented in the National Parliaments are among the groups to be represented in the EALA.⁵¹ It is pertinent to note here that, not all citizens are members of political parties. Even if all or the majority were members of political parties, representation through political parties would depend on the number of MPs a political party would have in the National Parliament. It follows, therefore, members with majority of representation in the National Parliament would dominate the seats in EALA. For example, in the recent election of EALA members in Tanzania, out of the nine members the ruling party, CCM, that has majority representatives in the house is represented by six members in EALA, *Chama cha Demokrasia na Maendeleo* (CHADEMA) represented by two members, Civic United Front (CUF) only one member, NCCR *Mageuzi* and ACT both with one representative in the Tanzanian Parliament are not represented in EALA.⁵² This being the case, some citizens, namely, those whose parties have minority representation in the National Parliament and those who belong to no political party at all can never be represented. It is hereby submitted that, the principle of people centeredness in the EAC is only paper based and not respected in practice.

It is argued that had the EAC Treaty not included the political parties with representatives in the National Assembly in the groups to be represented, it is our humble opinion that, all these problems would not have happened. Therefore, the problems start with the constitutive document "EAC Treaty" of the Community. It cannot escape the blame from the EAC citizens for denying them a voice in the Community affairs. This has led to complaints

⁵⁰ *Ibid*, Article 11.

⁵¹ Article 50(1) of the EAC Treaty.

⁵² Parliament of Tanzania, **Hansard**: Seventh Session – 1st Sitting on 4th April, 2017, p. 54. Found at <http://www.parliament.go.tz/hansards-list> retrieved on 25th April, 2017.

among the EAC citizens including filing cases before the EACJ on the mode of getting EALA representatives. *Prof. Peter Anyang' Nyong'o and Others v. Attorney General of Kenya and Others (supra)* is a good example. The EAC can pick a leaf not only from EU but also ECOWAS in whose constitutive document the principle is reflected. ECOWAS MPs must be directly elected by the Community citizens.⁵³ However, ECOWAS is passing through a transitional period where the MPs are elected from the members of the National Parliaments of the Member States.⁵⁴ The MPs elected during the transitional period are deemed to represent all peoples of the Community.⁵⁵ So, during the transitional period the situation in ECOWAS is equally not healthy. At least there is hope that when the provisions in the constitutive document are implemented people will be fully involved in the community activities.

3.2 Representation in the Council

The Council is one of the organs of the East African Community.⁵⁶ It is the policy making organ for the efficient and proper functioning of the community.⁵⁷ The functions and powers of the Council in the EAC include initiating Bills to the EALA, to make binding regulations, directives and decisions to the Partner States and all other organs of the community with exception of the Summit, EACJ and the EALA.⁵⁸ Just like in the EALA, the principle of 'people centered community' has been watered down in the Council as well. The divergence from the principle is revealed in both the composition and mode of representation.

⁵³ Article 7(1) (i) of the Protocol relating to the ECOWAS Parliament, 1994.

⁵⁴ *Ibid*, Article 7(1) (ii).

⁵⁵ *Ibid*, Article 2(2).

⁵⁶ Article 9 (1) (b) of the Treaty for the Establishment of the East African Community, 1999.

⁵⁷ *Ibid*, Article 14 (3) (a).

⁵⁸ *Ibid*, Article 14 (3) (b) & (c).

Divergence in Composition and Mode of Representation

Generally, the Council is made up of Ministers appointed in their respective countries to be responsible for EAC Affairs.⁵⁹ In other words, each EAC Partner State is required to designate one of its ministries to be responsible for matters pertaining to Regional Integration in East Africa. In Tanzania for example, matters concerning the East African Community have been merged together with those of foreign affairs. Now the ministry is known as the Ministry of Foreign Affairs and East African Cooperation.⁶⁰ It is crucial to note that, other ministers may be permitted to be members of the Council as determined by each Partner State.⁶¹ Lastly, the Attorney General of each Partner State also constitutes an important part of the Council.⁶²

Thus, a close examination of the composition and indeed mode of representation makes one realize that, all ministers appointed by their respective governments are the ones who sit in the Council. In that regard, they are representing the interests of their governments and not the people. What their governments command is what they should obey. Any divergence would lead to immediate replacement by appointment of a new minister for EAC Affairs in a particular Partner State. This is different from the practice that existed in the defunct EAC⁶³ in which there was the position of East African Ministers who were nominated by their Partner States and appointed by the Authority⁶⁴ to that post.⁶⁵ There were three, one from each Partner State. If they were holding other offices prior to

⁵⁹ *Ibid*, Article 13 (a).

⁶⁰ Welcome to Ministry of Foreign Affairs and International Cooperation, found at <http://www.foreign.go.tz/index.php/en> retrieved on 23rd April, 2017.

⁶¹ Article 13 (b) of the EAC-Treaty.

⁶² *Ibid*, Article 13 (c) of the EAC-Treaty.

⁶³ The East African Community of 1967 to 1977 established under the Treaty for East African Cooperation of 1967.

⁶⁴ Article 46 of the Treaty for East African Cooperation, 1967, the Authority was a principal executive authority of the Community and under Article 47 it was composed of the Presidents of Uganda, Tanzania and Kenya.

⁶⁵ *Ibid*, Article 49 (2).

their appointment, the 1967 EAC Treaty required them to resign from those offices and serve only as EAC Ministers.⁶⁶ Unlike the current members of the Council where their tenure of office is determined at the pleasure of their respective governments, it was not easy to remove EAC Ministers from office. The Treaty provided only three circumstances under which the EAC Ministers would cease to be ministers.⁶⁷ These included resignation by the respective minister, cessation of qualification to be appointed as an East African Minister and termination of the appointment by the Authority upon request by the nominating Partner State.⁶⁸ The relevant provision provided that:

Article 50 – Tenure of Office of East African Ministers

An East African Minister shall not be appointed for a fixed term but shall vacate his office upon the happening of any of the following events;

- (a) if he transmits his resignation in writing to the Authority and the Authority accepts his resignation;
- (b) if he ceases to be qualified for appointment as an East African Minister;
- (c) if the Authority terminates his appointment, which it shall do upon the request in writing of the Partner State which nominated him.

All the three East African Ministers were staying at the EAC-Headquarters in Arusha. Therefore, it is proper to say that for all purposes, the East African Ministers were the ministers of the community and representing the interest of the community and the people at large. This is different from

⁶⁶ *Ibid*, Article 49 (3).

⁶⁷ *Ibid*, Article 50.

⁶⁸ *Ibid*.

the current membership and representation in the Council. The current membership in the Council does not reflect the principle of people centered community enshrined in the current EAC Treaty.⁶⁹

4. The Law Making Process in the EAC

The law-making process under the EAC Treaty can either be initiated by the Council which submits a bill to the Assembly⁷⁰ or any member of EALA subject to the rules of procedure of the Assembly.⁷¹ Here, some problems that continue to undermine the principle of people centered community ensue. Firstly, the Council comprises Ministers that are appointed by the governments of the Partner States to represent their governments at the Community level. Some of these Ministers, in the first place, were elected by the citizens in the constituencies to represent the people's interests in the National Assembly and not otherwise.

So, when appointed to hold the posts of Ministers, they become accountable to another entity and not to their voters. They are therefore representing their appointing powers, the governments, in whatever they are doing including their role in the EAC Council. They are not EAC Ministers as it used to be under the defunct EAC.⁷² It is argued in this article that, it is hard to link the move behind the bills initiated by both the Council and EALA representatives with the interests of the citizens because they [the Council and EALA members] do not represent the citizens. It may be believed that the initiation of a law may be influenced by the interests of the political parties or governments, for no servant would wish to anger his boss by doing what is not in the interest of the boss.

⁶⁹ Article 7 (1) (a) of the EAC-Treaty.

⁷⁰ Article 14 (3) (b) of the EAC Treaty.

⁷¹ *Ibid*, 59(1).

⁷² See Articles 49 and 50 of the Treaty for the East African Cooperation, 1967.

Secondly, when bills are passed by EALA, they should be sent to the Summit for assent. The EAC Treaty empowers the heads of state to either assent to or withdraw the bill of the Assembly.⁷³ Reading closely, the EAC Treaty does not mention a Summit, it only mentions heads of state. If a head of state withholds assent to a resubmitted bill, after withholding the assent in the first submission, the bill lapses.⁷⁴

So, not the Summit that assents to the Bill, it is the heads of State. The Summit is the top-most organ of the Community consisting of the heads of state of the Partner States only.⁷⁵ It boggles the minds of the present authors as to why the framers of the EAC Treaty chose to copy and paste the assent system as known in municipal law-making systems. It is submitted here, if the Bill covers a matter not in the interest of a Partner State, it would not be assented to by that particular head of state. Thus, even if that particular matter were of great interest to the people of EAC it would still fail to make it through. The Community would be people centered if the law-making process were to be confined to the EALA and the Council as a policy organ that would be required to collect the views of the people before submitting the bill to the Assembly as is the case in EU.⁷⁶ However, since EALA and the Council are also not people centered the principle of people centered community lacks a forum from which it could be implemented. Apart from the EAC Treaty, the principle of people centered community is reflected neither in the Summit nor in the Council or EALA.

5. Admission of New Members to the Community

Apart from involvement of the citizens in the negotiations towards adoption and passing of policies and legislation, the citizens of the Community should be involved when some new countries aspire to accede

⁷³ Article 63(1) of the EAC Treaty.

⁷⁴ *Ibid*, Article 63(2) and (4).

⁷⁵ *Ibid*, Article 10(1).

⁷⁶ See Article 14 of the Treaty of the European Union, Consolidated Version, 2012.

to the EAC Treaty. This follows the reason that under the principle of people centered community, the Community is owned and run by the people themselves. This of course is in line with the principle of subsidiarity,⁷⁷ which requires that the decision making process ought to start from the lowest level of the governments of the Partner States to the Community.⁷⁸ This aims at keeping the relationship between the Community and the Partner States alive and thereby ensures the closeness of the citizens and the Community. Since the Community is a legal person, it is the people who constitute the Community and run the agreed activities of the Community through various organs established under the constitutive instruments.

It is of paramount importance that if the Community is to be really people centered, the people of the Community should be involved in various discussions as to whether the prospective new member should be admitted or not. As proposed somewhere in this article, the citizens' involvement may be through Partner States initiatives such as the use of local televisions and radios through which citizens of the Partner State may provide their views on the admission of a new member. This may also work in case of any policy to be adopted for the Community. Where citizens are actively engaged, the community would undoubtedly be felt at the national level.

It is very unfortunate that this has not been the practice in the EAC. All negotiations towards the adoption of policies and laws, as pointed out in this article, fall within the exclusive mandate of the Community organs particularly the Summit, the Council and EALA. For example, there is no evidence if there were efforts for EAC citizens to air out their views on the admission of Rwanda, Burundi and South Sudan. The EAC Treaty enjoins

⁷⁷ *Ibid*, Article 7(1) (d).

⁷⁸ Kamanga and Possi, "General Principles Governing EAC Integration," *op.cit.*, pp. 206-207. This part of the book comprehensively explains the principle of subsidiarity, how it works under EU, its scope and applicability under EAC and the shortfalls found under the EAC Treaty regarding the principle.

that the countries aspiring to join the EAC should, among others, adhere to the universally acceptable principles of good governance, democracy, the rule of law, human rights and social justice.⁷⁹ In other words, the prospective new members should clear their houses first before admission to the Community. For ease of reference, Article 3(3) (b) states:

Subject to paragraph 4 of this Article, the matters to be taken into account by the Partner States in considering the application by a foreign country to become a member of, be associated with, or participate in any of the activities of the Community, shall include that foreign country's:

(b) Adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice.

This Article shows how serious the Community is with regard to its fundamental and operational principles namely, democracy, rule of law, human rights observance and good governance.⁸⁰ If the Community's citizens enjoy and abide by the above mentioned principles, there is a good justification for the new member to observe the same prior to joining the Community.

Under the principle of people centered community, determining the state of human rights, democracy, social justice, rule of law and good governance should not fall within the confines of the organs of the Community only, as institutions. On the contrary, the community's citizens should be involved because of the very reason that, they are the ones to intermingle with new citizens who join the community. This was the concern when admitting South Sudan to the EAC. In the case of *Patrick Ntege Walusumbi and two others v. The Attorney General of the Republic of Uganda and five others*⁸¹ a group of Ugandan traders filed a case with the EACJ aiming at

⁷⁹ *Ibid*, Article 3(3) (b).

⁸⁰ *Ibid*, Articles 6 and 7.

⁸¹ Reference No. 8 of 2013, [EACJ].

blocking the Partner States from admitting South Sudan for various reasons.⁸² One, South Sudan, as a newly independent state, had to clear her house on human rights observance. This could be done through enforcing the court decisions on human rights. Two, the Ugandan traders who had supplied their products in South Sudan had not been paid. Although Ugandan traders in South Sudan were not successful in their claims, they sent signals that people's views should be taken into consideration when admitting a new member to the EAC.

6. Human Rights *vis-à-vis* People Centered Community

The EAC aims at widening and deepening cooperation among Partner States in political, economic, social, cultural, research, technology, security, defence and judicial affairs fields.⁸³ There is no doubt that, the beneficiaries of these initiatives by EAC Partner States are the common people in the community. To that effect, the EAC Treaty unequivocally states that cooperation among Partner States would accelerate economic development in the region and as a result the standard of living and quality of life of the people would be improved.⁸⁴ Among many strategies worked out to realize these objectives, was the adoption of the Protocol on the Establishment of the East African Community Common Market.

The Common Market Protocol encompasses four freedoms and two rights. The freedoms include free movement of goods,⁸⁵ services,⁸⁶ capital⁸⁷ persons⁸⁸ and workers,⁸⁹ as well as right of establishment⁹⁰ and residence.⁹¹

⁸² *Ibid.*

⁸³ *Ibid.*, Article 5 (1).

⁸⁴ *Ibid.*, Article 5 (3) (b).

⁸⁵ Article 6 of the East African Community Common Market Protocol.

⁸⁶ *Ibid.*, Article 16.

⁸⁷ Annex VI – The East African Community Common Market Schedule on the Removal of Restrictions on the Free Movement of Capital.

⁸⁸ Annex I - The East African Community Common Market (Free Movement of Persons) Regulations, 2009.

⁸⁹ Annex II – The East African Community Common Market (Free Movement of Workers) Regulations, 2009.

While enjoying these freedoms and rights, people want to see their rights being protected and guaranteed. Unfortunately, that is not the case. It is argued that, the area of human rights jurisprudence in the EAC legal framework is yet another huge divergence from the principle of ‘people centered community’. This is partly because of the fact that people in EAC cannot directly file applications concerning human rights violation in the EACJ.

No explicit powers have been vested in the EACJ to entertain issues concerning human rights.⁹² Therefore, this makes people feel not sufficiently involved in matters concerning their rights even if the matter arises out of implementation of the Treaty. What the court can do is to exercise its interpretative powers even though the matter at hand has elements of human rights.⁹³ This was a ruling in the case of *James Katabazi and 21 others v. Secretary-General of the East African Community and the Attorney General of Uganda*,⁹⁴ in which the High Court of Uganda granted bail to James Katabazi and others who were charged with treason. Immediately after the grant of bail, Ugandan Security Agents arrested them within the court premises. This was clearly a violation of the right to liberty and the Constitutional Court of Uganda ruled that the actions by the Security Agents were unconstitutional but the agents refused to release any of the suspects from custody. When the

⁹⁰ Annex III – The East African Community Common Market (Right of Establishment) Regulations, 2009.

⁹¹ Annex IV - The East African Community Common Market (Right of Residence) Regulations, 2009.

⁹² Article 27 (2) of the EAC-Treaty stipulates *inter alia* that human rights jurisdiction of the EACJ will be determined by the Council in future dates and shall be operationalized by concluding a protocol to that effect. See also Ally Possi, “Striking a Balance between Community Norms and Human Rights: The Continuing Struggle of the East African Court of Justice”, **African Human Rights Law Journal (AHRLJ)**, Vol. 15, No. 1, 2015, pp. 192 – 213.

⁹³ *James Katabazi and 21 others v. Secretary-General of the East African Community and the Attorney General of Uganda*, Reference No. 1 of 2007, [EACJ].

⁹⁴ *Ibid.*

matter was taken to EACJ, it was considered and decided in the light of breach of rule of law and fundamental principles of the EAC Treaty and not on the basis of human rights. The EACJ was of the view that:

It did not assume jurisdiction to adjudicate on human rights disputes, however it did not abdicate from exercising its jurisdiction of interpretation under Article 27 (1) of the EAC Treaty merely because the reference included allegation of human rights violation.

Similarly, in the case of *Plaxeda Rugumba v. The Secretary General of the East African Community and the Attorney General of the Republic of Rwanda*,⁹⁵ the EACJ did not direct itself to the question of human rights violations where Lieutenant Colonel, S. R. Ngabo was arrested and detained by the agents of the Government of Rwanda without trial for a period of five months. Instead, the EACJ declared that the detention without trial of Colonel, S.R. Ngabo amounted to breach of the fundamental and operational principles of the EAC Treaty especially Articles 6 (d) and 7 (2) which provide that Partner States are bound by principles of 'good governance and rule of law'. Thus, Rwanda breached these principles by detaining a person without trial contrary to the law.

From what has been stated above, it is clear that people in the EAC cannot raise human rights claims under the Treaty. This is so because the Partner States have not yet concluded a Protocol extending human rights jurisdiction to the EACJ.⁹⁶ The practice of the court has been merely to rely on other causes of action including the breach of fundamental and operational principles such as rule of law and good governance. The rationale for relying on the fundamental and operational principles is revealed in the case of *Attorney General of the Republic of Uganda v. Tom Kyahurwenda*⁹⁷ in which the EACJ maintained that the provisions of Articles 6 and 7 of the EAC Treaty which provide for fundamental and

⁹⁵ Reference No. 8 of 2010 and Appeal No. 1 of 2012, [EACJ].

⁹⁶ Article 27 (2) of the EAC-Treaty.

⁹⁷ Case Stated No. 1 of 2014, [EACJ].

operational principles are justiciable before the EACJ, national courts and tribunals. Furthermore, those provisions are at the heart of the community itself. Failure to enforce them amounts to a breach of the EAC-Treaty and impairment towards achieving objectives of the community.

It is submitted that absence of human rights regime in the EAC legal framework hinders people of the East African Community from raising human rights claims in the EACJ. It should be remembered that, there are a lot of claims on the violation of human rights in the region.⁹⁸ However, it is the same region which does not give access to its people to approach regional courts on claims involving violation of human rights. In that regard, people do not feel the impact of regional justice system and hence, the principle of people centered community is not honoured in practice.

7. Conclusion and Recommendations

This Article focused on ‘the Principle of People Centered Community’ as enshrined in the EAC-Treaty and its reflection in actual practice by the EAC-Partner States. It has shown that lack of popular participation was among the factors that led to the collapse of the defunct EAC in 1977. One of the ways of addressing the problem was incorporation of the principle of people centered community in the EAC-Treaty of 1999. The Article reveals further that, the principle is reflected in both the objectives⁹⁹ and operational principles of the Treaty. It also notes that, operational principles are meant to guide the community towards practical

⁹⁸ Legal and Human Rights Centre (LHRC), Tanzania Human Rights Report, 2015, found at <http://www.humanrights.or.tz/userfiles/file/TANZANIA%20HUMAN%20RIGHTS%202015.pdf> retrieved on 25th April, 2017. See also, UNMISS, Report on Violations and Abuses of International Human Rights Law and Violations of International Humanitarian Law in the Context of the Fighting in Juba, South Sudan, July, 2016, found at <http://www.ohchr.org/Documents/Countries/SS/ReportJuba16Jan2017.pdf> retrieved on 25th April, 2017. See also, the Human Right Watch Report, Burundi Events of 2016, found at <https://www.hrw.org/world-report/2017/country-chapters/burundi> retrieved on 25th April, 2017, which among other things the report covers incidences of killing done by Security Forces and Ruling Party Youths in Burundi.

⁹⁹ Article 5 of the EAC-Treaty.

achievement of the objectives set in the EAC Treaty. Therefore, including the principle of people centeredness among the operational principles shows how serious the EAC Partner States are, in addressing the reasons that led to the collapse of the former EAC. The same is reflected even in the slogan of the EAC which is 'One People, One Destiny'.¹⁰⁰ Indeed, the slogan recognizes the importance of the people towards reaching the destiny or objectives of the community.

Moreover, it has been argued in this Article that, the principle is largely reflected on paper but not in actual practice. In order to back up this argument, the Article has explored the practices of the Partner States and various institutions of the EAC such as the EALA, the Council and EACJ. Among other things, issues of law making within the organs of the community and how the same diverge from the principle of people centered community is discussed. The divergence on admission of a new member, representation in both the EALA and the Council and human rights vis-à-vis people centeredness have been examined. In all these discussions, it has been shown that there has been a complete divergence from the aim of creating the people centered community. People have been made the observers of most of the decisions and actions taken in the community instead of being active participants. This trend is not conducive for a community which aims at meeting its objectives.

On the basis of the arguments raised in this Article, the following recommendations are made. First, there should be more involvement of the people in many programmes and schemes of the community. The involvement should give a podium through which people in the community can air out their views. This may even be implemented by using local televisions and radios in the Partner States.

¹⁰⁰ East African Community: One People, One Destiny, found at <http://www.eac.int/> retrieved on 25th April, 2017.

Second, when admitting a new member to the community, it is important to first gather views of the people in the region. This means the views of both citizens from the applicant state and those of citizens of existing Partner States should be considered. This will add legitimacy and increase the support of the people towards integration process in the region.

Third, members of the EALA should be elected directly by the people themselves. Currently, members of EALA are elected in the National Assemblies of the Partner States. The process of getting them starts from their respective political parties and therefore, tends to represent their political parties instead of the people in the EALA. Thus, vesting the powers to elect members of EALA in the people will help to remove some elements of party supremacy and enable a true representation by the people.

Fourth, membership in the Council should as well be revisited. This should ensure that Council of ministers really represents the people and the community at large. Unlike the current trend where members of the Council represent the interests of their governments and not necessarily the people of EAC, it is important to revisit this arrangement even if it means to adopt the modality under the defunct EAC.

Right to health with focus on people with HIV and AIDS in Tanzania

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Abstract

This article seeks to explore the right to health with special focus on people with Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) in Tanzania. It adopts an historical analysis by firstly focusing on the general position of the right to health at the international level. The article later centres its discussion on the international instruments on the right to health to people with HIV and AIDS. Having highlighted international position of the right to health, the study concentrates its discussion by providing, albeit in summary, the evolution and development of Tanzanian health system. It informs the legal position of the health system and submits on how the right to health is reflected in the Tanzania constitution. It later sets a specific focus on the accessibility of the right to health to people with HIV and AIDS in the country.

1. Introduction

This article, which is informed by the PhD research findings of the author, reveals that immediately after the country was hit by an epidemic, policy

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and legal measures were taken by the government to contain the problem. Thus, the adoption of the HIV/AIDS Policy of 2001 which was operationalized by the Tanzania Commission of AIDS Act, 2001 (the TACAIDS Act) is one of the government's efforts to address challenges of the HIV and AIDS. It is submitted that, despite these policy and legal efforts to address the challenges brought by HIV and AIDS in the society, discrimination and stigmatisation of people infected with HIV and AIDS from their family members and general members of the society have persisted leading the government to enact the HIV and AIDS (Prevention and Control) Act, 2008 (the Prevention and Control of HIV and AIDS Act).¹ The article posits that, policy and legal measures taken by the government and the role played by private and Faith Based Organisations (FBOs) in bringing awareness on HIV and AIDs through public education and programmes on HIV and AIDS, testing and counselling for HIV, and health and support services for people with HIV and AIDS have laid the foundation in reducing the effects of the disease to the population. That aside, this article highlights general and major challenges affecting people with HIV and AIDS in the realisation of the right to health.

2. Protection of the Right to Health at International Level

Right to health is one of social economic rights protected by several international instruments. The World Health Organisation (WHO) Constitution which is binding upon all States Parties is the first international treaty to conceptualize a unique human right to health.² It states that:

[T]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social conditions.³

¹ Act No 28 of 2008. The Act enshrined provisions against discrimination and it made it punishable by law for anyone to discriminate people with HIV and AIDS.

² Grad F. P., The preamble of the constitution of the World Health Organization, **Bulletin of the World Health Organization**, Vol. 80, No. 12, 2002, at p. 981.

³ The preamble of the WHO Constitution 1946.

Other international human rights instruments such as International Covenant on Economic Social and Cultural Rights (ICESCR) in its article 12, article 25 Universal Declaration of Human Rights (UDHR), article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (CERD), article 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW) and article 24 of the Convention on the Rights of the Child of 1989 (CRC) provide for the right to health. Besides, regional instruments provide for the right to health. Right to health is found in article 11 of the European Social Charter (ESC), article 10 of the Protocol of San Salvador, article 16 of the African Charter on Human and Peoples' Rights (ACHPR) and article 14 of the African Charter on the Rights and Welfare of the Child (ACRWC), 1990. One of the main objectives of the African Union as stated in Article 3 (h) of the Constitutive Act of the African Union of 2001 is to promote and protect human and peoples' rights, such as the right to health, in accordance with the ACHPR and other relevant human rights instruments.

The UN Committee on Economic, Social and Cultural Rights (the ESCR Committee) has set four essential criteria of the right to health that are availability, acceptability, accessibility and quality.⁴ The four essential criteria help to ascertain the scope of the right to health. The ESCR Committee has not offered principled basis which justify its linking of these four essential criteria into the text of the right to health.⁵ Justification of this framework is nonetheless found from [I]ts role from an interpretative tool that contributes to an understanding of measures to

⁴ For thorough insight on the four essential criteria of the right to health read UN Committee on Economic, Social and Cultural Rights: The right to the highest attainable standard of health: Comment 14 (General Comments). UN Doc.E/C.12/2000/4.

⁵Tobin, P., **The Right to Health in International Law**, Oxford University Press, Oxford, 2012, at p. 158.

secure the effective implementation of the right to health and ensure its enjoyment is not illusory.⁶

The ESCR Committee states that accessibility in relation to health has four dimensions, namely, that health must be accessible without discrimination, be physically accessible, economically accessible, i.e., affordable and that health information must be accessible subject to confidentiality of personal health data.

The ESCR Committee emphasises that article 2 of the ICESCR is central to the understanding of the nature and extent of states' obligations under the various provisions of ICESCR.⁷ Article 2 of the ICESCR imposes two obligations, namely, obligation of conduct and obligation of result.⁸ The obligation of conduct requires state parties to the ICESCR to take action reasonably calculated to realise the enjoyment of a particular right.⁹ Meanwhile, the obligation of result requires state parties to the ICESCR to achieve a specified target as a measure of the standard of realisation of a particular right.¹⁰ Apart from imposing obligations of conduct and result, article 12 of the ICESCR can also be characterized in terms of three other types of obligations, namely, obligations to 'respect, protect and fulfil' the rights conferred therein.¹¹

This article holds the view that, despite the recognition of the right to health by both international and regional human rights instruments as well

⁶ *Ibid.*

⁷ UN Committee on Economic, Social and Cultural Rights: General Comment No 3 "The nature of states parties' obligations (art 2, para 1 of the Covenant)" (5th session, 1990) [UN Doc E/1991/23] para 1.

⁸ *Ibid.*

⁹ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, (22-26 January 1997) para 7.

¹⁰ *Ibid.*

¹¹ For thorough insight of states' obligations on the right to health see UN Committee on Economic, Social and Cultural Rights: "The right to the highest attainable standard of health", Comment 14 (General Comments). UN Doc.E/C.12/2000/4

as its acceptance at the World Health Organisation still the same is often seen as one of ‘second class’ rights, aspirational only and programmatic in nature in most countries, Tanzania inclusive.¹² The realisation of social economic rights, such as right to health, by state parties to international instruments demands for presence of an effective, responsive and integrated health system of good quality that is accessible to all.¹³ Also, most of international instruments and their interpretative documents require states parties to provide the right to health progressively basing on resource availability. According to the ESCR Committee while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the ICESCR is signed and ratified by a State Party.¹⁴ To achieve progressive realisation of the right to health States Parties to the ICESCR are obliged to fulfil their human rights obligations gradually, and where a particular state shows no progress, rational and subjective explanations has to be given.¹⁵

2.1 International Initiatives on the Right to Health to People with HIV & AIDS

The right to health includes the right to access health care services by people living with HIV/AIDS. The first attempt at the international level to advocate for human rights to health to people living with HIV/AIDS started in the year 1988 when WHO held a meeting in Oslo for an international consultation on Health Legislation, Ethics and HIV/AIDS. This meeting sought to address barriers which existed between people who were infected and those who were not infected and place actual barriers

¹² Hervey, T. K., the “Right to Health” in European Union Law in Hervey T. K., and Kenner, J., (editors), **Economic and Social Rights under the EU Charter of Fundamental Rights—A Legal Perspective**, Hart Publishing, Oregon 2003 at p. 194.

¹³ Hunt, P., and Beckman G., “Health System and Right to the Highest Attainable Standard of Health”, **Health and Human Right**, Vol. 10, No. 1, 2008, at p. 82.

¹⁴ UN Committee on Economic, Social and Cultural Rights: General Comment No 3 “The nature of states parties’ obligations (art 2, para 1 of the Covenant)” (5th session, 1990) [UN Doc E/1991/23], para 9.

¹⁵ Beckman, G., *et al*, “Health Systems and the Right to Health: An Assessment of 194 Countries”, **Lancet** 2008; Vol. 372: 2047–85 at p. 2048.

between individuals and the virus by preventing new infections through various measures such as the use of condoms.¹⁶ Consequently, on 13 May 1988 WHO passed a resolution on avoidance of discrimination in relation to HIV infected people and people with AIDS. Besides this WHO Resolution, other efforts to realize human right to health to people with HIV/AIDS include the United Nations Commission on Human Rights initiative which held its first international consultation on AIDS and human rights from 26-28 July, 1989 in Geneva. Also in May 1993, the United Nations Development Programme (UNDP) held Inter-country Consultation on Ethics, Law and HIV in Cebu (Philippines) and came up with a statement of belief. The Cebu statement of belief and the United Nations General Assembly Resolutions 45/187 of 1990 and 46/203 of 1991 committed its efforts to realize human right to health to people with HIV/AIDS. Through these fora the international community emphasized the need to promote and adopt measures to counter discrimination and to respect human rights to health to people with HIV/AIDS. Also the international community committed to recognize impacts of discriminatory measures by pledging that discrimination against people with HIV/AIDS drove HIV/AIDS underground, making it more difficult to combat, rather than stopping its spread.¹⁷

Apart from the measures described above, other measures have been taken at the international level to combat HIV/AIDS such as the second international consultation on HIV/AIDS and Human Rights meeting which was held between 23-25 September 1996 in Geneva organised jointly by the Office of the UN High Commissioner for Human Rights (UNHCHR) and the Joint United Nations Programme on HIV/AIDS (UNAIDS). The meeting culminated in the preparation of guidelines for UN member states on the application of international human rights law in the context of HIV/AIDS. These International Guidelines on HIV/AIDS and Human

¹⁶ Kinemo, R.E.J., “Human Rights for HIV/AIDS Victims in Tanzania”, at 3 Available on www.tzonline.org/pdf/humanrightsforhivaids.pdf Accessed 8 August 2016.

¹⁷ *Ibid.*

Rights, as they are officially known, were for the first time published in 1998, modified in 2002 and merged and consolidated into one document in 2006.¹⁸ The 2002 modified and 2006 consolidated Guidelines intended to capture new standards and developments in HIV related treatment and evolving international law norms on the right to health generally, and the right of access to HIV/AIDS related prevention, treatment, care and support specifically.¹⁹

That aside, the UN High Commission for Human Rights (UNHCHR) which was later referred to as United Nations Human Rights Council (UNHRC), have adopted a series of resolutions to monitor and promote the International Guidelines on HIV/AIDS and Human Rights. The adopted resolutions include the Resolution on the Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) (1997, 1999 and 2001) and the Resolution on Access to Medication in the Context of Pandemics such as HIV/AIDS, Tuberculosis and Malaria.²⁰

In the Africa region, the African Women's Protocol provides for women protection against gender inequality, sexual violence, early marriages and denial of inheritance.²¹ It obliges states parties to respect and promote the right to health of women, including sexual and reproductive health.²²

In the meantime, there are a number of AU declarations and other instruments addressing HIV/AIDS. The Abuja Declaration of 2001 categorically states that HIV/AIDS is an emergency on the African

¹⁸ Mubangizi J.C., & Twinomugisha, B.K., "The right to health care in the specific context of access to HIV/AIDS medicines: What can South Africa and Uganda learn from each other?" **African Human Rights Law Journal**, Vol. 1, 2010 at p. 110.

¹⁹ *Ibid.*

²⁰ See UN Commission on Human Rights Resolutions 1997/33, 1999/49 & 2001/51 and UN Commission on Human Rights Resolution 2003/29.

²¹ See Articles 3, 6 & 21 of the African Women's Protocol.

²² Article 14 (1) (d) & (e) of the African Women's Protocol.

continent and urged African leaders to place the response to HIV at the forefront and as the highest priority in their respective national development plans.²³ The Maputo Declaration, adopted two years after the Abuja Declaration further reaffirmed the commitment enshrined in the Abuja Declaration.²⁴ Accessibility of HIV/AIDS medicines is addressed by the Gaborone Declaration which, among others, commits African states to achieve universal access to prevention, treatment and care of HIV/AIDS by 2015 through the development of an integrated health care delivery system based on essential health package delivery close-to-client through proven effective drug combinations.²⁵ The Brazzaville Commitment on Scaling Up Towards Universal Access to HIV and AIDS Prevention, Treatment, Care and Support in Africa by 2010 (2006) and the Abuja Call for Accelerated Action Towards Universal Access to HIV and AIDS, Tuberculosis and Malaria Services in Africa (2006) have been adopted; and all these set specific timeframes or commit African leaders to the realisation of universal access to HIV/AIDS treatment.

At the sub regional level the SADC Health Protocol calls upon SADC member states to work in the protection and promotion of the right to health by harmonizing policies and guidelines related to control of communicable diseases, prevention and control of HIV and AIDS, as well as malaria and tuberculosis control.²⁶ Besides, the Maseru Declaration reaffirms the commitment of SADC Member States to the combating of AIDS as a matter of urgency by, *inter alia*:

²³ Mubangizi & Twinomugisha *op. cit.*, at p. 112.

²⁴ The Maputo Declaration on HIV/AIDS, Tuberculosis, Malaria and Other Related Infectious Diseases (2003).

²⁵ Article 2 (ii) of Gaborone Declaration on a Roadmap Towards Universal Access to Prevention,

Treatment and Care adopted 2nd Ordinary Session of the Conference of African Ministers of Health (CAMH2) Gaborone, Botswana from 10 – 14 October 2005.

²⁶ Articles 9 to 12 of the SADC Health Protocol.

increasing access to affordable essential medicines, including ARVs and related technologies, through regional initiatives for joint purchasing of drugs, with the view of ensuring the availability of drugs through sustainable mechanisms, using funds from national budgets.²⁷

3. General Overview of Tanzanian Health Care System

The Tanzania health care system has a long history dating back from the pre-colonial period when formal health care services were for the first time introduced in the country by several missionary organizations.²⁸ Health care provision in the country was later developed by the colonialists, i.e., Germans and British who colonised the country in different periods. Generally, colonial administration in East Africa established health care facilities in urban and raw material producing areas. Colonial health system aimed to first preserve health of the European Community, second, to keep the African and Asiatic labour force in good working condition, and third, to prevent the spread of tropical diseases.²⁹

Immediately after independence the government concentrated on the establishment of public health sector. However, the economic crisis which hit the country's economy in 1980s led to the establishment of private health sector. The structure also features traditional health sector which has been practiced in Tanzania for a long time even before independence.

3.1 Legal Protection of Right to Health in Tanzania

The right to health is not expressly enshrined in the Tanzania Constitution. However, the right can be implied under Article 11(1) in which the Government has a duty to ensure realization of the right to social welfare at times of sickness. The Article nonetheless reveals that,

²⁷ Article 2(g) of the Maseru Declaration on the Fight Against HIV/AIDS in the SADC Region (2003).

²⁸ Benson, J.S., "The impact of privatization on access in Tanzania", **Social Science and Medicine** Vol. 52, 2001, 1903–1915 at p.1904.

²⁹ Kimalu, P.K., *et al*, "A Review of the Health Sector in Kenya", Kenya Institute for Public Policy Research and Analysis(KIPPRA) Working Paper No. 11, 2004, at p. 23.

Article 11 falls under Fundamental Objectives and Directive Principles of State Policy (FODPSP) hence unenforceable before a court. Article 7 (2) of the Constitution categorically states that the provisions which fall under FODPSP are not enforceable by any court; and bars any court from determining ‘the question whether or not any action or omission by any person or any court, or any law or judgment complies with the provisions of this Part of this Chapter.’ The question that remains unanswered is whether the mere omission of the right to health in the Bill of Rights has rendered it completely impossible to enforce under the Basic Rights and Duties Enforcement Act, Cap. 3 [R.E. 2002].³⁰

It is understood that if one applies liberal interpretation of the Bill of Rights to include all rights and legal principles recognised by the Constitution, right to health can be enforced by courts.³¹ The use of liberal interpretation has developed to the so called implied doctrine. The doctrine entails the use of expressly justiciable rights to enforce the rights that are indirect or have to be read into the other existing rights. This may be useful in Tanzania where civil and political rights contained in the Bill of Rights may be used to enforce social economic rights such as the right to health which is not provided for in the Constitution.³² For instance, Article 14 of the Constitution which provides for the right to life if interpreted liberally, under implied doctrine, may be used to enforce the right to health. This has received a test in the case of *Joseph D. Kessy and Others v. The City Council of Dar es Salaam*.³³ In this case although the Constitution has not enshrined social economic rights, such as the right to health in its Bill of

³⁰ This is the Act of the parliament which provides for the procedure for enforcement of basic rights contained in the Bill of Rights of the Constitution.

³¹ Wambali, M.K.B., “Democracy and Human Rights in Tanzania Mainland: The Bill of Rights in the Context of Constitutional Developments and the History of Institutions of Governance”, Thesis Submitted to the School of Law, Faculty of Social Studies of the University of Warwick for the Degree of Doctor of Philosophy (Ph.D), March, 1996 and Resubmitted in August, 1997 at p. 174-176.

³² Ackson, T., “Justiciability of Socio-Economic Rights in Tanzania”, **African Journal of International and Comparative Law** Vol.23 No.3, 2015 at p 373.

³³ 63 Civ. Case no. 299 of 1988 (Dar es Salaam Registry) (unreported).

Rights provisions which are enforceable under the Basic Rights and Duties Enforcement Act, the High Court stated that endangering health of people through environmental pollution amounts to infringement of their right to life provided for under Article 14 of the Constitution.

Moreover, the 2014 Proposed Constitution includes the right to health under Article 51(1) which provides for everyone the right to health, clean and safe water. Article 51 (2) further requires state authorities to ensure that the right to health is easily accessible depending on the available State resources. Additionally, Article 53 (1) (e) of the Proposed Constitution provides for the child's right to health, and Article 55 (f) provides for the right to health to persons with disability. Also, Article 57 (f) provides for the right to health to women while article 58 (c) provides for medical care for old people. This is the first time the country has expressly enshrined right to health in its Constitution since independence.

3.2 Accessibility of the Right to Health by People with HIV and AIDS in Tanzania

Accessibility of the right to health under the health system in Tanzania was shaken after the first case of HIV was diagnosed in 1983. The effects of HIV/AIDS made the government to develop plans and strategies to control, prevent and treat HIV/AIDS and its related diseases.

To start with in the year 2001 the government developed the HIV/AIDS Policy which declared the disease as a national crisis which has spread relentlessly affecting all groups of people by destroying the most productive sections of the population particularly women and men between the ages of 20 and 49 years.³⁴ Although HIV/AIDS is one of the diseases

³⁴ United Republic of Tanzania, Prime Minister's Office, Tanzania Commission for AIDS (TACAIDS), the National Policy on HIV/AIDS, 2001 at 2.

for which the country has devised specialised programmes for medical care, the Government provides no financial assistance to sufferers.³⁵

In addition to the HIV and AIDS Policy, the government enacted the Tanzania Commission of AIDS Act, 2001 (the TACAIDS Act). The TACAIDS Act established the Tanzania Commission for HIV/AIDS (TACAIDS), an independent department which was put under the office of the Prime Minister.³⁶ TACAIDS was entrusted with several functions including formulating policy guidelines to respond to HIV/AIDS and management of consequences of the epidemic in the country.³⁷ Also the Commission has functions to develop strategic framework, control programmes and activities related to planning HIV/AIDS within the overall national multi-sectoral strategy.³⁸

It is submitted that despite the adoption of the HIV/AIDS policy and the enactment of the TACAIDS Act, 2001, still the epidemic has spread to all parts of the country and victims have faced stigma and discrimination from their family members and the general public. Realizing the problems connected with stigma and discrimination the government enacted the HIV and AIDS (Prevention and Control) Act, 2008.³⁹ The Act provides for the right to health to people with HIV and AIDS and the right of treatment of opportunistic infections based on available resources.⁴⁰ The Act placed obligations on the part of people with HIV and AIDS to protect others from infection.⁴¹ In realising the right to health to people with HIV and AIDS, the Act addressed aspects of Public Education and Programmes on

³⁵ Ackson, T., 'Disability benefits and workers with HIV/AIDS: Coverage issues and challenges in the United Republic of Tanzania', **International Social Security Review**, Vol. 61, No. 4, 2008, at p. 76.

³⁶ The TACAIDS Act, section 4 (1) and (2).

³⁷ *Ibid.*, section 5 (1) (a).

³⁸ *Ibid.*, section 5 (1) (b).

³⁹ Act No 28 of 2008.

⁴⁰ The HIV and AIDS (Prevention and Control) Act, 2008, section 33(1).

⁴¹ *Ibid.*, Section 33(2) (a).

HIV and AIDS, HIV Testing and Counselling and Health and Support Services.

3.2.1 Public Education and Programmes on HIV and AIDS

The HIV and AIDS (Prevention and Control) Act, 2008 has placed responsibilities on the Ministry of Health, health practitioners, workers in the public and private sectors and NGOs to disseminate information regarding HIV and AIDS.⁴² Additionally, the law has addressed the corresponding role of the Ministry of Health which is to use the available resources to develop and conduct training programmes of health practitioners on universal precaution measures on HIV/ AIDS and Sexual Transmittable Infections (STIs) and treatment procedures. It is insisted that such programmes should centre on ensuring prevention and control of HIV and AIDS to the public.⁴³

Tanzania has been implementing various programmes aimed at reducing the spread of HIV and AIDS. To begin with, the government adopted a programme to expose learners to life skills-based HIV and AIDS education. According to Tanzania Output Monitoring System for HIV and AIDS (TOMSHA) by December 2012 109,210 people were provided with HIV and AIDS education on prevention, problem solving, communications and decision making skills as well as sexual and reproductive health.⁴⁴ Additionally, different measures have been adopted towards increasing immunization coverage and introducing new options for Expanded Program in Immunization (EPI) vaccines, improving HIV surveillance and follow-up of neonates and ensuring universal access to Anti-Retroviral (ARVs). Also, measures have been adopted towards the increase of Voluntary Counselling and Testing (VCT) service and Behavioural Change Communication (BCC) which aims at facilitating the attainment of the

⁴² *Ibid.*, part III especially sections 7, 8 and 9.

⁴³ *Ibid.*

⁴⁴ The United Republic of Tanzania, Prime Minister's Office, Tanzania Commission for AIDS (TACAIDS), National HIV and AIDS Response Report 2012, Tanzania Mainland, August 2013 at p 9.

argets set by the National Strategy for Growth and Reduction of Poverty (NSGRP) II.⁴⁵

Other significant efforts towards provision of public education and programmes on HIV and AIDS include programmes related to distribution of condoms. In this respect, it is submitted that, on the basis of the report excerpted from TOMSHA research it is revealed that 8,216,984 male and 428,834 female condoms were distributed to end users for the period of 12 months ending December 2012.⁴⁶ Similarly, Medical Stores Department (MSD) continued to distribute condoms to public health care facilities as part of its functions of supplying essential medicines, medical facilities and equipment. Meanwhile, 68,413,356 condoms were distributed to end users through Social Marketing schemes for the period of twelve months ending December 2012.⁴⁷ The article notes that, through the application of the existing policy and legal framework in fighting HIV/AIDS such as the HIV/AIDS Policy, Tanzania Commission of AIDS Act, 2001 and the HIV and AIDS (Prevention and Control) Act, 2008 the government is expected to achieve its objectives of reducing HIV/AIDS rate of infection and national HIV prevalence. Lastly, it is submitted that as part of public education and programmes on HIV and AIDS the government through a circular number 2 of 2006 released by the Minister in the President's Office responsible for Public Service Management, directed all Ministries, Departments and Agencies (MDAs) to introduce prevention and care policies and programmes at public and private workplaces. TACAIDS report of August 2013 reveals that implementation of workplace programs on HIV and AIDS at the public sector could not be achieved as the same

⁴⁵ United Republic of Tanzania, National Strategy for Growth and Reduction of Poverty II (NSGRP II), Ministry of Finance and Economic Affairs July 2010 pp.74-75.

⁴⁶ United Republic of Tanzania, Prime Minister's Office, Tanzania Commission for AIDS (TACAIDS), National HIV and AIDS Response Report 2012, Tanzania Mainland, August 2013 at p 8.

⁴⁷ *Ibid.*

were impeded by budgetary constraints.⁴⁸ It further reported lack of information on HIV and AIDS programs in private sector workplaces.⁴⁹ That aside, private contractors display HIV and AIDS symbols and raise awareness on HIV and AIDS in their construction sites as part of their duty on HIV and AIDS public education. Private organisations, FBOs and CBOS such as Faraja Trust Fund of Morogoro, Engender Health, Population Service International (PSI) and Elizabeth Glaser Pediatric AIDS Foundation (EGPAF) have played a great role in bringing awareness to the society on the prevention and control of HIV and AIDS and have proven a great partner to government efforts in bringing awareness and public education of HIV and AIDS.⁵⁰

3.2.2 HIV Testing and Counselling

The HIV and AIDS (Prevention and Control) Act, 2008 provides for testing and counselling and prohibits compulsory testing. For the purposes of facilitating HIV testing the law allows every public health care facility, voluntary counselling and HIV testing centre which are recognized by the National AIDS Control Programme (NACP) to be HIV testing centre for the purpose of this Act.⁵¹ Private laboratory may only be testing HIV if it is allowed to do so by an order published in the government *gazette* by the Private Health Laboratory Board.⁵² Therefore, HIV testing must only be done in the centres authorised and established under this part of the Act. Such centres are designated HIV testing centres.⁵³ Thus, in performing HIV testing, the authorised health practitioners are required by the law to take measures that will ensure that the testing process is carried out

⁴⁸ United Republic of Tanzania, Prime Minister's Office, Tanzania Commission for AIDS (TACAIDS), National HIV and AIDS Response Report 2012, *op. cit.*, at p. 9.

⁴⁹ *Ibid.*

⁵⁰ Findings of interviews with Morogoro District Council Social Welfare Officers, Arusha District Council Health Secretary and Nurse Officers of Mt. Meru Hospital Arusha conducted between June 2016 and November 2016.

⁵¹ Section 13 (1).

⁵² *Ibid.*, section 13 (2).

⁵³ *Ibid.*, section 13 (4) & (5).

promptly and efficiently and further that the result of the HIV test is communicated to the person tested in accordance with the Act.⁵⁴

Despite the fact that the law enacts provisions for HIV testing it prohibits compulsory testing by making it illegal for a person to be compelled to undergo HIV testing.⁵⁵ Furthermore, it is made clear under the law that a person shall not be required to consent for HIV testing under any order of the Court, when requested to donate human organs and tissues, and if that person is accused or found guilty of sexual offences.⁵⁶ Thus, HIV testing may only be taken voluntarily by any Tanzanian and for a child or a person who is unable to comprehend the result, may only undergo HIV testing after the authorized testing centre receives a written consent of a parent or recognized guardian.⁵⁷

Besides provisions protecting the person from undergoing HIV testing without consent, the Act enacts provisions intended to protect an unborn child by requiring every pregnant woman and the man responsible for the pregnancy or spouse and every person attending a health care facility to be first counselled and offered voluntary HIV testing.⁵⁸ Also, with the spirit of protecting individuals attending health care facilities whether public, private or traditional and alternative centres, the law encourages all health practitioners, traditional and alternative health practitioners, traditional birth attendants and any other person attending patients to undergo HIV testing.⁵⁹

⁵⁴ *Ibid.*, section 13 (3) (a) & (b).

⁵⁵ *Ibid.*, section 15 (3). According to section 15 (7) of the Act any health practitioner who compels any person to undergo HIV testing or procures HIV testing to another person without the knowledge of that other person commits an offence.

⁵⁶ *Ibid.*, section 15 (4) (a) - (c).

⁵⁷ *Ibid.*, section 15 (1) & (2).

⁵⁸ *Ibid.*, section 15 (5).

⁵⁹ *Ibid.*, section 15 (6).

The law further enacts a provision to protect health information of the person who conducted HIV test by requiring the results to be confidential and be communicated to the persons tested only.⁶⁰ However, there are circumstances in which the results of HIV test may be released to a person not tested. For example when a tested person is a child, the results of the HIV test may be given to the parent or guardian. If established that a person tested is unable to comprehend the results, then the results can be released to his spouse or his recognized guardian. Further the law allows the HIV test results to be released to a spouse or a sexual partner of an HIV tested person. In certain situations the results may be released to the court.⁶¹

Since the law allows HIV testing and counselling, and since the passing of the Act the government through TACAIDS and other HIV and AIDS stakeholders has been involved in activities related to HIV testing and counselling which have played a great role in reducing further HIV infections, review of government documents reveals the improvement in HIV and AIDS control and prevention in the country which in one way or another can be linked with the legal entitlement of testing and counselling provided for in the Act. It has been shown in TACAIDS reports that through HIV testing and counselling by December 2012, a total of 1,135,390 people living with HIV and AIDS (PLHIV) were cumulatively enrolled in care and treatment services and out of this number 663,911 eligible adults and children living with HIV were cumulatively put on Anti-Retroviral Therapy (ART) and by August 2013 it was found that 432,338 were on ART.⁶² The report further reveals that the cumulative percentage on ART as of December 2012 was 58.4% (663,911/1,135,390) and by August 2013 those on ART was 84.2% (432,338/513,359).⁶³ Additionally, upon perusal of TACAIDS report it has been found that by

⁶⁰ *Ibid.*, section 16 (1).

⁶¹ *Ibid.*, section 16 (2) (a) – (d).

⁶² United Republic of Tanzania, Prime Minister's Office, Tanzania Commission for AIDS (TACAIDS), National HIV and AIDS Response Report 2012, *op. cit.* at p 10.

⁶³ *Ibid.*

December 2012 the cumulative number of children enrolled in care and treatment was 86,929 and out of this number a total of 50,980 of HIV positive children were put on ART which accounted for 7.7% of the cumulative number of all clients on ART in the country.⁶⁴

3.2.3 Health and Support Services for People with HIV and AIDS

The law mandates the government to use available resources in order to ensure that every PLHAs, vulnerable children and orphans are accorded with basic health care services.⁶⁵ Also, in protecting human rights to health to people living with HIV/AIDS (PLHAs) the law allows Community Based Organization (CBO), Private Organization and Faith Based Organisations (FBO) dealing with HIV and AIDS matters, after consultation with the local government authority, to provide prevention, support and care services to people living with HIV and AIDS.⁶⁶ Additionally, the Ministry of Health in collaboration with other ministries which are linked with health care provision is required to prepare programmes and conduct training for PLHAs in order to educate them on their survival needs - life skills after infection and guide them to form support groups aimed at providing palliative services and care.⁶⁷

The law requires a person infected with HIV having known his health status after being tested to immediately inform his spouse or sexual partner of the fact; and further take all reasonable measures and precautions to prevent the transmission of HIV to others.⁶⁸ From that perspective, such a person is obliged under the law to inform his spouse or his sexual partner of the risk of becoming infected if he has sex with such person unless that other person knows that fact.⁶⁹ Further, the law protects persons who open up to their spouses or sexual partners about their HIV status by making it

⁶⁴ *Ibid.*

⁶⁵ The HIV and AIDS (Prevention and Control) Act, 2008, section 19 (1)

⁶⁶ *Ibid.*, section 19 (2).

⁶⁷ *Ibid.*, section 20 (a) – (c).

⁶⁸ *Ibid.*, section 21 (1) (a) & (b).

⁶⁹ *Ibid.*, section 21 (2).

an offence for any person who abuses his spouse or sexual partner either verbally, physically or by conduct in connection with compliance with the provisions of the Act.⁷⁰

The government, in fulfilling its functions of providing health and support services to PLHAs, requires the Ministry of Health to ensure strengthening of sexually transmitted infections (STIs) services and creation of public awareness on STIs as far as it relates to transmission of HIV and AIDS.⁷¹ The Ministry of Health has the role of quantifying the requirement of condoms in the country and encouraging different stakeholders such as CBO and FBO to cooperate with the government in mobilizing financial resources required for procurement of condoms with a view to ensuring availability of condoms of standard quality circulating in the country.⁷²

From what has been seen above the legal framework on HIV and AIDS control and prevention is well established by the Act of Parliament. Essentially, apart from the above analysed provisions on the role of the government in the provision of health and support services for people living with HIV and AIDS, it is further clear under the law that public and private health facilities, FBOs, CBOs, health insurance and traditional and alternative health centres have an obligation of facilitating access to health care services to PLHAs without discrimination on the basis of their status.⁷³ Additionally, from that legal requirement, the Ministry of Health is further obliged, subject to availability of resources, to take necessary steps to ensure the availability of Anti-Retroviral Drugs (ARVs) and other health care services and medicines to persons living with HIV and AIDS and those exposed to risk of HIV infection.⁷⁴

⁷⁰ *Ibid.*, section 21 (3).

⁷¹ *Ibid.*, section 22 (a) & (b).

⁷² *Ibid.*, Section 23(1).

⁷³ *Ibid.*, section 24 (1).

⁷⁴ *Ibid.*, section 24 (2).

A broader sense of this legal analysis of the role of the government to provide health and support services to people living with HIV and AIDS, may be explained through the focus of the mandate of the Ministry of Health to regulate the care and treatment of HIV infected pregnant women, mothers infected with HIV while giving birth and measures taken to reduce HIV mother to child transmission.⁷⁵ Indeed, there are measures taken to prevent the mother to child transmission of HIV through involving trained and authorized persons to provide counselling services to HIV infected pregnant and breast feeding women as well as men who are responsible for their pregnancies or spouses as the case may be. There are also measures on monitoring, provision of treatment and applying measures necessary to reduce HIV transmission from mother to child through health care facilities and ensuring that prevention of mother to child transmission of HIV health services is parent friendly.⁷⁶

It is worthwhile to note that, with the foregoing legal provisions of the Act, the perusal of government reports, plans and strategies reveal that there is still a long way to go before achieving what is entailed and required of the law regarding health and support services for persons with HIV and AIDS. For instance, measures towards the Prevention of Mother-to-Child Transmission (PMTCT) of HIV in terms of the number of sites in the program increased since 2005, but still remain fairly low. Notably, upon review of the NSGRP II out of pregnant women who attended Antenatal Clinics (ANCs), only 37% were reached by PMTCT services during the first half of 2009.⁷⁷ By the year 2010 it was further reported that there were less than 600 counselling and testing centres (CTCs) for the whole country which contributed to more than 60% of adults remaining untested for HIV.⁷⁸ However, it has to be noted that after the setting of the National Strategy for Growth and Reduction of Poverty, (NSGRP) II operational

⁷⁵ *Ibid.*, section 25(1).

⁷⁶ *Ibid.*, section 25 (2) (a) – (c).

⁷⁷ United Republic of Tanzania, National Strategy for Growth and Reduction of Poverty II (NSGRP II), *op. cit.* at p. 15.

⁷⁸ *Ibid.*

targets in 2010 the perusal of TACAIDS report which was released in August 2013 reveals the increase of health care facilities providing HIV and AIDS care and treatment services from 700 in 2008 to 1,176 in 2012 out of 6,342 health care facilities across country.⁷⁹

4. Major Challenges in the Realisation of the Right to Health to People with HIV and AIDS

Accessibility of the right to health is generally impeded by many challenges. However, it gives special focus on six major challenges in the realisation of the right to health in Tanzania, namely, lack of the right to health provision in the constitution; budgetary constraint; health care inequalities; shortage of health professionals; shortage of essential medicines, medical facilities and equipment; and lack of accountability.

4.1 Lack of Constitutional Provision on the Right to Health

The first challenge in the realisation of the right to health is that it is not expressly provided for in the Bill of Rights of the Constitution making it difficult for its judicial enforcement. Enshrining the right to health in the constitution would facilitate people to enforce it under the Basic Rights and Duties Enforcement Act in case they see that the government has failed to fulfil its obligation, immediate or progressive, under international instruments. Relying on implied doctrine which is also dependent on the attitude of the judges towards statutory interpretation is not an efficient way of realizing the right to health through constitutional protection.

4.2 Budgetary Constraint

Budgetary constraint slows down realisation of the right to health in Tanzania. It has been revealed that the budget allocated to the health sector is limited. In the Abuja Declaration of 2001 members of OAU agreed to set at least 15% of their national budget to the health sector. Fifteen years after this Declaration still the government of Tanzania has failed to set 15% of

⁷⁹ United Republic of Tanzania, Prime Minister's Office, Tanzania Commission for AIDS (TACAIDS), National HIV and AIDS Response Report 2012, *op. cit.*, at p 13.

its budget to the health sector despite the increase of the amount of budget from year to year. Budgetary constraints have caused other challenges including failure to train more health professionals to solve the problem of shortage of health professionals, shortage of essential medicines, medical facilities and equipment. There is also shortage of health training colleges and health care facilities.

4.3 Inequalities in Health Care Services Distributions

Disparities in the distribution of health care facilities and services stand on the way to the realisation of the right to health. A study conducted in Tanzania on the geographical distribution of health care facilities has revealed that on the national average, most households live within 5 kilometres of a primary health care facility.⁸⁰ There are however, large variations in physical access between rural and urban households, between poor and poorer households, and between the accessibility of primary health care facilities and hospitals.⁸¹ Access to hospitals as between those in rural areas and urban areas differs. While rural residents have to travel a distance of 27 kilometres to reach a health services centre, urban citizens have to travel 3 kilometres.⁸² The disparities are compounded when comparing accessibility as between rich and poor households' capacity to afford payment of better health care services through health insurance and user fees payment. For instance, according to the National Bureau of Statistics census conducted in 2012 membership of NHIF and CHF was 509,068 which amount to around 3,000,000 beneficiaries throughout the

⁸⁰ Smithson, P., "Fair's fair: Health Inequality and Equity in Tanzania", Ifakara Centre for Health Research and Development and Women's Dignity Project, November 2006, at p. 25.

⁸¹ *Ibid.*, it is necessary to attend hospitals for more complex procedures, such as caesarean sections.

⁸² Mtei, G., *et al* "An Assessment of the Health Financing System in Tanzania", Report on Shield Work Package, Ifakara Health Research and Development Centre; Ministry of Health and Social Welfare, Tanzania and London School of Hygiene and Tropical Medicine May 2007, at 49.

country.⁸³ From these statistics it is revealed that above 85% of the Tanzania population do not have reliable means of health care financing making it difficult for the country to achieve universal health coverage.

Health inequalities are further witnessed in the distribution of hospitals and primary health facilities. In Morogoro and Arusha regions, the four councils visited, namely, Morogoro District Council, Morogoro Municipality, Arusha City and Arusha District Council do not have public hospitals at the level of District hospital.⁸⁴ While in Morogoro Municipality, Arusha City and Arusha District Council there are private and FBOs hospitals which are designated as District hospitals, in the Morogoro District Council there is no hospital at the level of District hospital be it public or private.⁸⁵ District hospitals have more specialised health workers and facilities as compared to primary health care facilities.

Disparities in the distribution of basic components of life such as health care facilities disproportionately affect poorer households and women in accessing the right to health.⁸⁶ Also, inaccessibility of the right to health and/or poor health care services is said to have a negative effect on a person's life expectancy.⁸⁷ Since more than 60 per cent of health care facilities are owned by the government inequality in geographical distributions of public health care facilities directly affects provision of public health care.

⁸³ United Republic of Tanzania Basic Demographic and Socio-Economic Profile: Key Findings, 2012 Population and Housing Census, Dar es Salaam, April, 2014, at p. 6.

⁸⁴ Findings of interviews with Morogoro District Council Social Welfare Officers, Morogoro Municipality Health Secretary, Arusha District Council Health Secretary, and Nurse Officers of Mt. Meru Hospital Arusha conducted between March 2016 and November 2016.

⁸⁵ *Ibid.*

⁸⁶ Smithson, *op. cit.*, at p. 25.

⁸⁷ Legal and Human Rights Centre, **Tanzania Human Rights Report 2008: Progress through Human Rights**, Legal and Human Rights Centre, April 2009 at p. 65

4.4 Shortage of Health Professionals

Shortage of health professional affects the realisation of the right to health to people with HIV and AIDS. Tanzania has acute shortage of medical health professionals in both public and private health care facilities. Most of health professionals prefer working in urban health care facilities due to poor working and living environment in rural areas.⁸⁸ The Health Resources Statistics issued by the Ministry of Health in 2013 have indicated that 69.34% of medical doctors are in urban areas, while the rural areas, where the majority of the population resides, shared only 30.66% of medical doctors.⁸⁹ Meanwhile, the 2011 Human Resource to Health Profile (HRH profile 2011) has revealed that over 90% of the medical specialists were working in urban areas.⁹⁰ The study further finds that while medical doctors and medical specialists are concentrated in the urban areas, the HRH profile 2012 reveals the existence of 1,868 assistant medical officers (AMOs), of which only 39% were working in urban areas while the remaining percentage were working in rural areas.⁹¹ From these findings it is clear that rural areas have a shortage of qualified health care professionals since medical doctors and specialist doctors are concentrated in urban areas. The total percentage of health care workers serving the rural population was 55%.⁹² Regions with zonal hospitals, i.e., Dar es

⁸⁸ United Republic of Tanzania, Ministry of Health and Social Welfare, ***Human Resource For Health And Social Welfare Strategic Plan 2014 – 2019***, Ministry Of Health and Social Welfare, Dar es Salaam, September 2014, at p. 13.

⁸⁹ United Republic of Tanzania, Ministry of Health and Social Welfare, *Human Resource for Health Country Profile 2012/2013*, 2013, p. 26, [Available on http://www.jica.go.jp/project/tanzania/006/materials/ku57pq00001x6jyl-att/country_profile_2013.pdf, accessed 26 August, 2016]

⁹⁰ United Republic of Tanzania, Ministry of Health and Social Welfare, Midterm Analytical Review of Performance Of The Health Sector Strategic Plan III 2009–2015, September 2013, at p. 85.

⁹¹ *Ibid.*

⁹² United Republic of Tanzania, Ministry of Health and Social Welfare, *Human Resource for Health Country Profile 2012/2013*, 2013, p. 26, [Available on http://www.jica.go.jp/project/tanzania/006/materials/ku57pq00001x6jyl-att/country_profile_2013.pdf, accessed 26 August, 2016].

Salaam, Kilimanjaro, Mbeya and Mwanza have more trained health workers.⁹³

Recently measures have been taken by the Ministry of Health through Primary Health Sector Development Programme (PHSDP) by increasing the number of candidates expected to graduate from health care institutions to 11, 192 per year in the year 2015/16 which has surpassed the targeted goal of having 10,000 health graduates by the year 2017.⁹⁴

While acknowledging the efforts of the government to address the shortage of health workers which includes training of health professionals and construction of health facilities and colleges the government, private and FBO hospitals and health centres should pay constant attention on the question of shortage of health professionals since the problem leads to poor health care services for the poor population who are depending solely on the overburdened health professionals. The government needs to improve working conditions so as to retain health professionals from leaving the country to western countries to seek better working conditions.

4.5 Shortage of Essential Medicines, Medical Facilities and Equipment

Information from MSD reveals the acute reduction of the budget supplied to it by the government. For instance in the year 2014/2015 the total budget set by the ministry to MSD was TShs. 70,500,000,000.00 and in the year 2015/16 budget was TShs. 29,250,000,000.⁹⁵ This shows a drop of about TShs. 40 billion in the period of two financial years. In the financial year 2014/15 MSD received TShs. 26,749,999,500.00 from donors contributing to its budget through basket fund while in the financial year 2015/2016 MSD did not receive funds from the basket

⁹³ *Ibid.*

⁹⁴ Speech of the Minister responsible for Health, Hon. Ummu Mwalimu (MP), on the estimates of revenue and expenditure for the financial year 2016/17 at pp. 14-15.

⁹⁵ Information perused from MSD documents on 28 November 2016.

fund.⁹⁶ The withdrawal of support by basket fund donors has largely affected the supply of essential medicines in the public health care facilities. This affects the accessibility of essential medicines by poor population especially those with HIV and AIDS.

4.6 Lack of Accountability and Transparency

Lack of accountability leads to acts of corruption in the health sector which results to poor access to the right to health to individuals, including people with HIV and AIDS. The impact of corruption can be seen relatively insignificant if one views corruption from junior public official holders such as nurses and hospital attendants who take bribes from patients in the queue to facilitate the patient to see the doctor, or the receptionist at the health care facilities who pays no or little attention to a patient or his/her relatives until bribed and the laboratory technologist or those in the x-ray and ultra sound sections who say there is no reagent or the machines are broken and if they are paid bribes they conduct investigations.⁹⁷ It is submitted that the effects of corruption in the community is more than these instances. The declining health sector is the outcome of lack of accountability in the public sector due to corruption and mismanagement of national resources. Corruption ranges from the informal payments that health workers ask their patients to grand corruptions conducted by public officials in the government which in turn cripples the government ability to provide the population with essential services such as the right to health.

For the past two decades the government has engaged in activities which have raised concerns on its commitment to issues of accountability and transparency. The radar transaction which involved the purchase of a civilian/military radar system from BAE Systems in the United Kingdom involved corrupt acts in which a Tanzanian middleman involved was

⁹⁶ Information perused from MSD documents on 28 November 2016.

⁹⁷ Muhondwa, E.P.Y., *et al*, Petty Corruption in Health Services in Dar es Salaam and Coast regions, *Sikika*, Dar es Salaam, 2010, at p. 58.

alleged to have been paid US\$12 million by the government officials.⁹⁸ The purchase of presidential Jet and the escrow saga in which it was alleged that the transfer of monies from the Tegeta escrow account from the Bank of Tanzania to Pan African Power Solutions (PAP) subjected the government to the total cost of 2.1bn revenue loss through failure to pay taxes and document forgery. These are just a few examples of corrupt practices leading to loss of public funds which could be directed to improve the health sector.⁹⁹ Indeed such practices have put the country into disrepute.

From the foregoing examples of lack of accountability on the part of the government Tanzania has failed to meet the crucial economic benchmarks for meeting the Millennium Development Goals to combat HIV/AIDS and its related diseases. Also these corrupt practices act as obstacles to meet the Abuja Declaration of 2001 which called upon members of the AU to set its budget to the health sector to 15% of the national budget. This is due to the fact that the money lost in lack of accountability and transparency could be used to improve various sectors of the economy such as health care provision.

5. Concluding Remarks

This article has examined the legal, policy and practical positions on the right to health with special focus on people with HIV and AIDS in Tanzania. It is submitted that the right to health is recognised by both international and regional instruments. Tanzania is a state party of important international and regional instruments providing for the right to health such as the Constitution of WHO, ICESCR and ACHPR. From this

⁹⁸ Peter, C.M., and Masabo, J., “Confronting grand corruption in the public and private sector: A spirited new initiative from Tanzania” **Namibia Law Journal** Vol. 1, No 2, July 2009, at pp. 55 and 56.

⁹⁹ Daily News reporter, ‘Billions Lost in Unpaid Taxes’, **Tanzania Daily News** (Dar es Salaam), 27 November 2014.

perspective, the article which is part of the author's PhD work, submits that Tanzania has not enshrined the provision of the right to health in its Constitution. This affects the general accessibility of the right to health as the same is not enforceable before the High Court under the Basic Rights and Duties Enforcement Act.

That notwithstanding, the article has acknowledged initiatives taken by the government to address the problems caused by HIV and AIDS. These include adoption of HIV and AIDS Policy and passing of the laws which criminalise discrimination and stigma to people with HIV and AIDS and provide for the states obligation to supply ARVs. Apart from the policy developed and laws enacted, other measures have been taken by the government to address the effects of HIV and AIDS through counselling and treatment as well as education on ways of prevention and control of HIV and AIDS. These initiatives have enlightened the youth and the general public on prevention and control of HIV and AIDS by creating understanding of actions to be taken to avoid further infection when one finds that he/she has been infected by HIV. The law further enacts provision on public education and counselling on how infected pregnant women may prevent mother to child transmission of HIV and AIDS.

The article has addressed various challenges facing the society in the realisation of the right to health. These challenges are general to the whole health sector. They range from lack of a constitutional provision of the right to health to the lack of accountability on the part of general public officials which in turn has negative effects on different sectors, health sector inclusive.

From the foregoing discussion the article recommends for the need of the government to enact the provision of the right to health in the constitution; increase the budget allocated to the health sector which in turn will address other challenges facing the sector such as construction of health care facilities in the rural areas. Besides, the government should employ health professionals who should be posted to rural areas to solve the problem of

shortage of health professionals in those areas. The article further recommends for the need of the government to address the problem of lack of accountability in the state's undertakings which is undermining all sectors, health sector inclusive. Stern measures should be taken to deal with public officials involved in corruption. The article holds the view that if the country remains 'accountability and transparency void,' it will always fail to allocate at least 15% of the national budget to the health sector as agreed in the Abuja Declaration of 2001. Thus, with the budgetary constraints in the health sector the government will continue failing to address health challenges caused by HIV and AIDS as well as addressing the problem of supply of essential medicines to cure diseases arising from HIV and AIDS.

Jurisprudential Value of *Tanga Fresh v. Fair Competition Commission (FCC)* in the Law of Mergers & Acquisitions in Tanzania

Goodluck Temu^{*}

Abstract

The Fair Competition Act of Tanzania regulates and controls, among others, mergers and acquisitions of business entities. This Act, together with its regulations, establishes a framework which requires proposed mergers and acquisitions amounting to eight hundreds millions Tanzanian shillings or more to be notified to the Fair Competition Commission before being consummated. The notification requirement enables FCC to ascertain the impact of the proposed transaction on effective competition in the market. Any transaction whose effect is to lessen effective competition to the detriment of consumers is likely to be blocked. FCC has dealt with a number of mergers and acquisitions cases. One of the cases is that of *Tanga Fresh v. FCC*¹, in which Tanga Fresh merged with its two competitors in Tanga region without first being cleared by the FCC. This is the first merger case to be determined by the Tribunal. The Tribunal delivered a well-reasoned opinion which set important precedents that are very essential in understanding the law on mergers and acquisitions in Tanzania. This article attempts to discuss those precedents in detail. Some of the aspects discussed in this article include definition of the term merger, elaboration on the failing firm doctrine, effects of admissions in inquisitorial proceedings, rules of natural justice, breach of standstill obligation or gun jumping and factors which a competition authority should take into account in mergers and acquisitions analysis.

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¹ Tribunal Appeal No 5 of 2014, Fair Competition Tribunal, Dar es Salaam.

1. Introduction

The Fair Competition Act of Tanzania² regulates and controls, among others, mergers and acquisitions of business entities. The Act intends to avoid situations where mergers and acquisitions of firms create or strengthen positions of dominance in the markets.³ Uncontrolled mergers and acquisitions may lead to abuse of dominance in markets where dominant firms dictate on the nature, quality and pricing of supplies due to lack of effective competition. This would be contrary to the very object of the Act, which is:

to enhance the welfare of the people of Tanzania as a whole by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Tanzania in order to: (a) increase efficiency in the production, distribution and supply of goods and services; (b) promote innovation; (c) maximise the efficient allocation of resources; and (d) protect consumers.

The procedures for regulating mergers and acquisitions are provided for in the Fair Competition Act of 2003, the Fair Competition Commission Procedure Rules⁴ and the Fair Competition (the Threshold of Notification of Merger) Order.⁵ Section 11 of the Fair Competition Act read together with the Fair Competition Commission Rules of Procedure and the Fair Competition (Threshold of Notification of Merger) Order establish what can be termed as notifiable and non-notifiable mergers. A merger must be notified to the Commission if it involves a turnover or assets that are above threshold specified by the Commission.⁶ The Threshold Notification Order under its order 2(1) requires any firm to notify the Commission of any intended merger if it has a threshold of or above eight hundred million (800,000,000)⁷ Tanzanian shillings. As mentioned above, this control aims at avoiding creation of market dominance which is likely to be easily

² Act No. 8 of 2003.

³ S. 11(1) of the Fair Competition Act, No 8 of 2003.

⁴ GN No 73 of 2013.

⁵ Order of 2007 as amended by GN No 93 of 2009.

⁶ Section 11(12) of the Fair Competition Act, No 8 of 2003.

⁷ Equivalent to 350,000 USD, at exchange rate of 7th April 2017.

abused. Ideally, markets ought to have many firms competing with each other in providing for the best to customers. Any form of monopoly is likely to disadvantage consumers. In this regard, Cassey says:

...Mergers change market structure by reducing the number of independent firms in the market. They also result in the merged entity having a larger market share than each of the two merging firms before the merger. Thus some mergers can result in a dominant firm (where none existed before the merger) or/and it can increase the merged entity's market power. Both can be detrimental to consumers if the merged entity abuses its dominant position or exercises its market power. Merger controls are put in place to prevent such situations from arising....⁸

Similarly, Moritz Lorenz has explained why it is important to have mergers and acquisitions controlled. In his book on competition law, he says:

...The main aim of merger control is to prevent mergers leading to the creation or reinforcement of a dominant position and thus depriving consumers of benefits resulting from effective competition such as low prices, high-quality products, wide selection of goods and services, and innovation. Mergers may impede effective competition by altering the market structure in such a way that companies on a relevant market are more likely to coordinate and raise their prices. Another detrimental effect to competition may be a reduction of the companies' abilities and/or incentives to compete which may result in higher prices or a lack of innovation. Therefore the most important goal of merger policy is to avoid the creation of a market structure that would

⁸ Cassey Lee, **Model competition laws**, p. 40 in Paul Cook, Raul Fabella & Cassey Lee, **Competitive Advantage and Competition Policy in Developing Countries**, Edward Elgar, UK/US, 2007.

significantly facilitate coordination of market behaviour between different market players....⁹

It is within this context that the Fair Competition Commission (FCC) comes in to control mergers and acquisitions. Generally, no merger will be approved if it has a material effect of distorting competition in the market.¹⁰ Since when it started its operation in 2003, the FCC has dealt with several merger and acquisition applications. While some applications were approved, others were not. Some mergers were never notified in accordance with the law. One such case is that of Tanga Fresh which gave rise to the case of *Tanga Fresh v. Fair Competition Commission*.¹¹ This case is important because it sheds some light on mergers and acquisitions creating jurisprudential lessons. The matter started at the FCC and went up on appeal to the Fair Competition Tribunal whose decision is final.¹²

2. *Tanga Fresh v. FCC*

2.1 Factual Background

Tanga Fresh (the appellant), a company that deals with dairy business, was aggrieved by the FCC findings that it had contravened the provisions of the law on merger notification. In 2011 while conducting an awareness program in Tanga region, FCC was informed by stakeholders that the appellant had acquired two companies dealing with dairy products business in Tanga region. These were Morani Dairy Company Limited and International Food Processors Limited (the two companies). These two companies were involved in collecting milk from Tanga farmers and processed dairy products. The effect of this acquisition was to throw the two companies out of the market. After acquiring the two companies the appellant remained the major producer of dairy products in the region.

⁹ Moritz Lorenz, *An Introduction to EU Competition Law*, Cambridge University Press, UK, 2013 at pg. 242.

¹⁰ See Section 11-13 of the Fair Competition Act.

¹¹ Tribunal Appeal No 5 of 2014, Fair Competition Tribunal.

¹² Section 61(8), *ibid*.

After getting the information as narrated above, the respondent, FCC, conducted an investigation to satisfy itself whether or not there was contravention of section 11 (2) of the Fair Competition Act on merger notification. After the investigation the respondent formed an opinion that the appellant breached competition rules by failing to notify the Commission on its takeover of the two companies. In 2012 FCC issued a statement of its case to Tanga Fresh, and in 2013 it submitted its provisional findings. It is at this stage that the appellant was invited to respond, which it did and applied for leave for oral hearing as well. At the time of hearing of the matter, the appellant admitted taking over the two companies and asked for a settlement. On the day scheduled for settlement discussions, the appellant applied for extension of time. Since then, it resorted into pursuing political options by seeking assistance from prominent politicians. Finally Tanga Fresh abandoned the case. Even after being reminded by FCC, the appellant did not proceed with the case. Consequently FCC proceeded to make the findings that Tanga Fresh:

- (a) Failed to make merger notification as required by section 11 (2), (5) and (6) of the Fair Competition Act together with the Threshold Notification Order
- (b) Contravened the provisions of section 11(1) and (6) in that it strengthened a position of dominance in the market.

Based on the above findings, Tanga Fresh was fined to pay 5% of its annual turnover of audited accounts. This was TShs 460,945,000/= ¹³ derived from the total annual turnover of TShs 9,210,900,000/= ¹⁴ of its audited accounts of the year 2009. Tanga Fresh preferred an appeal to the Fair Competition Tribunal against such fine.

¹³ About 206,000 USD based on exchange rates of 7th April 2017.

¹⁴ About 4,126,000 USD based on exchange rates of 7th April 2017.

2.2 Grounds of Appeal

In its appeal the appellant raised the following grounds of appeal:

- (a) That there was contravention of principles of natural justice as the appellant was not given the right to be heard. This, according to Tanga Fresh, caused miscarriage of justice;
- (b) That FCC erred in law by holding that the appellant had admitted the offences;
- (c) That FCC was wrong in holding that there was merger between the appellant and the two companies;
- (d) That FCC erred in law by holding that the two companies were still in business at the time the appellant acquired them;
- (e) That FCC erred in fact and in law by finding that the appellant was in contravention of the law without proof of acting negligently and with intention to contravene the law; and
- (f) That the Commission was wrong in holding that the appellant's actions were in contravention of the law.

On the other hand, FCC strongly and successfully opposed the appeal. It advanced six grounds to challenge Tanga Fresh's memorandum of appeal. FCC's grounds, with its very detailed submissions, were aimed at convincing the Tribunal that FCC's findings should not be overturned.

2.3 General Findings

After a detailed analysis of submissions made by both parties, the Tribunal was of the unanimous opinion that the appellant had actually contravened the provisions of the Fair Competition legislation on merger notification as claimed by the Commission. The Tribunal was satisfied that the transaction between the appellant and the two companies was a notifiable merger. That being the case the appellant had a duty to make notification of that transaction to the Commission. The appellant did not do so. The penalty imposed by FCC was thus upheld.

In arriving at its decision the Tribunal was assisted by the rich and valuable submissions of counsel.¹⁵ The very well-reasoned opinion of the Tribunal carries jurisprudential value in the following areas, namely, definition of the term merger, elaboration on the failing firm doctrine, effects of admissions in inquisitorial proceedings, rules of natural justice, breach of standstill obligation or gun jumping and factors which a competition authority should take into account in mergers and acquisitions analysis. Each of the areas is discussed below.

3 Jurisprudential Value of *Tanga Fresh v. FCC*

3.1 Merger defined

One notable ground of appeal by the appellant was that its transaction with the two companies was not a merger. It maintained that merger, as defined by **Oxford English Dictionary** has the impact of joining two businesses or organisations into one. What it did, in its opinion, was not merger. It was simply acquiring of business premises and equipment.

FCC on the other hand, maintained that the word ‘merger’ was not a plain English word. It is an economic term which has to be defined and understood in that context. Thus a question as to whether a transaction amounts to a merger or not is determined by the ‘control test’. If the appellant would have gained control over the two companies after such acquisition, the transaction would amount to merger.

In deciding this issue, the Tribunal made reference to the definition section of the Act. Under section 2, merger is defined as:

An acquisition of shares, a business or other assets, whether inside or outside Tanzania, resulting in the change of control of a business, part of a business or an asset of a business in Tanzania”.¹⁶

¹⁵ Mr. Mwita Waissaka and Justice John Mkwawa (Retired), for the appellant and Dr. Deo Nangela, for the Commission.

¹⁶ Section 2 of the Fair Competition Act No 8 of 2013.

Further, the word acquisition is defined in relation to shares or assets to mean “acquisition, either alone or jointly with another person, of any legal or equitable interest in such shares or assets but does not include acquisition by way of charge only”.¹⁷

It should be remembered that Tanga Fresh’s main argument was that a mere acquisition of assets and business premises cannot amount to a merger. However, having internalized the above definitions and submissions from parties, the Tribunal found, first, that a merger includes an acquisition. This finding was supported by Recommended Practice for Merger Notification and Review by International Competition Network (ICN).¹⁸ According to ICN a transaction in which a firm acquires assets of another firm is universally recognized as a merger. What the appellant did was to purchase assets that were used by the two companies for production of dairy products. The appellant argued that the assets were few and thus it could not amount into a merger. To that argument the Tribunal was of the view that once such transaction exceeds the gazetted threshold (i.e., 800 million Tanzanian shillings) it amounts to a merger that is notifiable. The transaction between the appellant and the two companies in itself, without including costs of acquired assets exceeded 800 million Tanzanian shillings and therefore this was a notifiable merger. In this regard, the Tribunal, observed:

...we must say with emphasis that we totally agree with the submission by the respondent’s counsel that in Tanzania not all mergers are subject to the notification procedure. It is only those that meet a certain criteria or threshold. So, it doesn’t matter as to whether the appellant acquires few assets or whole assets of the company as the appellant tries to allege on the basis of the amount of assets acquired that they were few. Once it is proved on the affirmative that the transaction in

¹⁷ *Ibid.*

¹⁸ International Competition Network, **Recommended Practice for Merger Notification and Review**, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf> (accessed on 7th April 2017).

question was a merger as defined under section 2 as is the case in this appeal, FCC should be notified...in this appeal, the total combined value of the merger in question is TShs.11,068,422,500/= which is beyond the notification threshold...

Two, a merger is an economic term. The Tribunal also made a very significant finding regarding contextual definition of the term ‘merger’. It observed that it was wrong to consider its plain meaning (simply joining two businesses to become one). It should rather be given its economic meaning similar to what is given to other economic terms such as ‘competition’, ‘market’ and ‘dominant position’ within competition law jurisprudence. This, it is submitted, is the correct approach as supported by many other authors and sources. One should not be mistaken to consider the word ‘merger’ in its plain meaning of joining two or more firms or organisations. It should be economically defined, to include any transaction that results into change of control of ownership. On this point, John Coates says:

...The concepts “mergers and acquisitions” (M&A) and “restructuring” **are primarily used as business terms, not as legal terms of art.** They are not sharply defined, instead referring to fuzzy sets of similar transactions. As commonly understood by practitioners and used in this chapter, the core of M&A is a deliberate **transfer of control and ownership of a business organized in one or more corporations....**¹⁹
(Emphasis supplied)

Thus, mergers would include transactions such as assets and stock purchases.²⁰ For instance, the author gives an example of a merger that is

¹⁹ John C. Coates IV, **Mergers, Acquisitions and Restructuring: Types, Regulation, and Patterns of Practice**, Discussion Paper No. 78/1, Harvard Law School, July 2014, pg. 2 accessed at https://dash.harvard.edu/bitstream/handle/1/20213003/Coates_781.pdf?sequence=1 (accessed on 7th April 2017).

²⁰ *Ibid*, pg. 4.

completed by way of stock purchasing.²¹ In that example, AT&T's attempted acquisition of T Mobile from Deutsche Telekom in 2011 by way of stock purchase.²² Article 2.1 of the agreement between the two parties read:

Upon the terms and subject to the conditions set forth in this Agreement, at the Closing, Seller will cause Holding to sell, convey, assign, transfer and deliver to Purchaser, free and clear of all Encumbrances, and Purchaser will purchase, acquire and accept from Holding, all of Holding's right, title and interest in and to the Company Shares (including, for the avoidance of doubt, the payment of the Cash Consideration and issuance of the Purchaser Shares to Seller, the "Transaction").²³

Such transaction, though did not attempt to join two companies into one, was nevertheless considered as a merger since it involved change of control of ownership. It is on this ground that the US Department of Justice moved to block that merger in 2011.²⁴ The approach of considering change of control in determining a merger is also acceptable and applicable within the European Union. According to the European Union Merger Regulations, a merger will be consummated where:

... the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, **whether by purchase of securities or assets, by contract or by any other means**, of direct

²¹ *Ibid*, pg. 4.

²² *Ibid*.

²³ Stock Purchase Agreement, by and between DEUTSCHE TELEKOM AG and AT&T INC, March 20, 2011, accessed on 7th April 2017 at <https://www.sec.gov/Archives/edgar/data/732717/000119312511072458/dex21.htm>.

²⁴ Edward Wyatt, **U.S. Moves to Block Merger Between AT&T and T-Mobile**, New York Times, August 31st. 2011 also available at <http://www.nytimes.com/2011/09/01/technology/us-moves-to-block-merger-between-att-and-t-mobile.html> (accessed on 7th April 2017). See also James Steward, **Antitrust Suit Is Simple Calculus**, New York Times, September 9th, 2011 also available at <http://www.nytimes.com/2011/09/10/business/att-and-t-mobile-merger-is-a-textbook-case.html> (accessed 7th April 2017).

or indirect control of the whole or parts of one or more other undertakings...²⁵
(Emphasis supplied)

3.2 ‘Failing Firm Doctrine’ Explained

In its appeal, the appellant raised failing firm doctrine as its defence for its failure to comply with merger regulations. This doctrine allows a merger to be cleared if the target firm has failed to conduct business and would thus exit the market. It was the appellant’s case that the two companies were no longer in operation and thus that merger was justified on grounds of failing firm doctrine. In discussing this doctrine, the Tribunal observed that a party may only rely on it successfully if it proves the following factors, namely:

- (a) That the failing firm would in the near future be forced out of the market because of financial difficulties if it is not taken over by another undertaking,
- (b) That there is no less anti-competitive option other than the proposed merger and
- (c) In the absence of merger the assets of the failing company would inevitably exit the market.²⁶

The doctrine of failing firm is therefore a concept that offers for a lesser evil. With it, authorities will be prepared to clear a merger in an attempt to save the assets of the failing firm from complete exit from the market. On this point Joshua R. Wueller says:

...when a company is on the verge of collapse and the “bankruptcy [attorney] is sharpening her scythe, readying

²⁵ The Council of European Union, The Official Journal of European Union, **COUNCIL REGULATION (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)**, 2004, Article 3(2). See also Moritz Lorenz, **An Introduction to EU COMPETITION LAW**, Cambridge University Press, UK, 2013 at pg. 245.

²⁶ See detailed discussion of these elements in Ignatious Nzero, **Interpretation and Application of the Failing Firm Doctrine in Merger Regulation in South Africa and The US: A Comparative Analysis**, 2014 (77) *THRHR*.

herself for the role of the Grim Reaper,” the firm may have no choice but “to merge, acquire or be acquired, or choose to sell loss-making divisions in order to enhance the firm’s viability and profitability.” The failing firm doctrine is a narrowly tailored defense for these sorts of companies that are facing antitrust scrutiny from courts and federal regulatory agencies...²⁷

Thus, if there is a buyer other than the acquiring company willing to buy without having to compromise competition regulations, such merger will not be cleared. Thus, according to *Citizen Publishing Co. v. United States*²⁸ the doctrine would fail unless it is proved that the company acquiring the failing company was the only purchaser. At page 138, the US Supreme Court observed:

...The failing company doctrine plainly cannot be applied in a merger or in any other case unless it is established that the company that acquires the failing company or brings it under dominion is the only available purchaser. For if another person or group could be interested, a unit in the competitive system would be preserved and not lost to monopoly power...²⁹

USA has been very clear and consistent in controlling mergers that would lessen competition in its markets. Section 7 of the Clayton Act clearly provides:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity

²⁷ Joshua R. Wueller, **Mergers of Majors: Applying the Failing Firm Doctrine in the Recorded Music Industry**, 7 *Brook. J. Corp. Fin. & Com. L.* 589 (2013, pg. 590.

²⁸ 394 U.S. 131 (1969).

²⁹ Ibid, pg.138.

affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly...³⁰

The failing firm doctrine, however, comes as a defence to provisions like section 7 of the Clayton Act. *International Shoe v. FTC*³¹ illustrates this position. In 1921, International Shoe acquired all stocks of W. H. McElwain Company. Both companies were involved in shoe making business. The effect of this transaction was to make International Shoe to own W.H. McElwain Company, hence, purportedly lessening competition between them. The reason behind this acquisition was bad economic situation McElwain was facing. McElwain had reached a point that it could no longer pay its debts; nor was it able to deliver its orders. It was under these circumstances that the doctrine of the failing firm came into play. US Supreme Court held that such defence justified the merger and was not in violation of section 7 of Claytons Act. At page 302 of the judgement,³² it noted that:

...In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure, with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser) not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public, and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act. To regard such a transaction as a violation of law, as this court suggested in *United States v. U.S. Steel*

³⁰ §7 Clayton Act, 15 U.S.C. § 18.

³¹ 280 U.S. 291 (1930).

³² *International Shoe Co. v. FTC* 280 U.S. 291 (1930).

Corp., would seem a distempered view of purchase and result....

The above words, according to Blum, have become the hallmark for the doctrine.³³ Thus, if the ultimate goal of the acquiring firm is not to lessen competition but to save the failing firm from exiting the market, the doctrine applies. It is also important to note that there has to be proof that there is no likelihood of the failing firm's survival.³⁴

In the Fair Competition Act of Tanzania, failing firm is recognized as an exception to which merger may be cleared, its effects on competition notwithstanding. Section 13(1) of the Act reads as follows:

The Commission may, upon the application of a party to a merger, grant an exemption for that merger, either unconditionally or subject to such conditions as the Commission sees fit, if the Commission is satisfied in all the circumstances that paragraph (a) and either paragraph (b) or (c) applies.

Paragraph (a) reads "...the merger is likely to create or strengthen a position of dominance in a market"³⁵ while paragraph (c) provides that "...in the case of a merger resulting in the change of control of a business, the business faces actual or imminent financial failure and the merger offers the least anti-competitive alternative use of the assets of the business".³⁶

Thus, from the Act, the doctrine applies if:

- (a) Such merger is likely to create or strengthen dominant position in the market;

³³ Marc P Blum, "The Failing Company Doctrine", **16 B.C.L. Rev. 75 (1974) pg. 81.**

³⁴ See details in Organisation For Economic Co-Operation And Development (OECD), **Policy Roundtables: Failing Firm Defence**, Paris, 1995 .

³⁵ Section 13 (1) (a), Fair Competition Act No 8 of 2003.

³⁶ Section 13 (1) (c), *Ibid.*

- (b) That such merger does result to the change of control of business;
- (c) That the business [targeted firm] faces actual or imminent danger;
- (d) The merger offers the least anti-competitive alternative use of the assets of the business; and
- (e) In the absence of merger, the assets of the failing company would inevitably exit the market.

3.3 Effects of Admission in FCC Inquisitorial Proceedings

Normal courts deal with admissions every day. Section 19 of Evidence Act of Tanzania defines it as:

a statement, oral, electronic or documentary, which suggests any inference as to a fact in issue or relevant fact and which is made by any of the persons and in the circumstances hereinafter mentioned.³⁷

Sarkar defines it as concession or voluntary acknowledgment made by a party or someone identified with him in legal interest of the existence of certain facts which are in issue or relevant to an issue or in the case.³⁸ It is generally an admission of certain facts or truths. Generally, when a certain fact has been admitted by a party to a case, there will be no need of further proof. This is also true for judicial admissions.³⁹ No further proof is required when a party to a case has made admission during judicial proceedings.⁴⁰ This is provided for in section 60 of the Evidence Act which reads:

No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing or

³⁷ Section 19 of Evidence Act of Tanzania, 1967 as amended by Section 43 of Electronic Transactions Act 2015, Act No 13 of 2015

³⁸ Sarkar, S.K., and Ejaz Ahmad, (1999), **Law of Evidence**, Vol I, 14th edtn, Ashoka Law House, New Delhi pg. 261

³⁹ Admission or acknowledgements of certain facts during judicial proceedings.

⁴⁰ William J Giacomo, Admissions: "What They Are and How They Can Impact Litigation", **Peace Law Review**, Vol 32, Issue 2 spring 2012.

which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

Proceedings in the Fair Competition Tribunal are governed by the Fair Competition Act and the Fair Competition Tribunal Rules of 2012.⁴¹ These laws do not explicitly deal with admissions. However, in the *Tanga Fresh* case the Tribunal in its reasoning explained the issue of admissions. It was the appellant's contention that the respondent, FCC, wrongly concluded that it had admitted to have committed the offence. It argued that at no particular time did it admit to have contravened the provisions of the law. However, the Tribunal found out that the appellant had already accepted the Commission's provisional findings. This was so because it had opted for settlement and took efforts to find political intervention at least to lessen the penalty it would have suffered.⁴² According to the Tribunal the appellant had made an admission which it could not take back.

The effect of the Tribunal's finding is that the rule stopping a party from recanting its admission is applicable within the FCC and Tribunal's proceedings as well. A party will not be allowed to refute what it has already admitted in the proceedings of the Commission or Tribunal. This is even more important when a party had already made a settlement⁴³ option with the Commission. It may not take back its proposition as it would be

⁴¹ GN No 219 of 2012

⁴² See Tribunals reasoning from page 30-41.

⁴³ Settlement is one of the options of resolving the dispute within FCC. If a party is in breach of competition rules, it is given an option for settlement. This enable the party and FCC to discuss the penalty to be suffered, and most likely it will be lesser than what the party would have paid but for that settlement. See Rules 19(6) and 21 of Fair Competition Commission Procedure Rules of 2013, GN No 73 of 2013. See Also Goodluck Temu, "Reflections on Enforcement of Fair Competition Rules in Tanzania", **Eastern Africa Law Review, Issue No 2, Volume 41, December 2014, pg. 105.**

prevented by the principle of estoppel unless such an admission was of such a nature that the other party had not acted upon it.⁴⁴

3.4 Rules of Natural Justice: Right to be Heard Explained

What constitutes rules of natural justice has so far not been exhaustively explained. In *Abbott v. Sullivan*⁴⁵ Sir Raymond Evershed MR noted that “the principles of natural justice are easy to proclaim, but their precise extent is far less easy to define”.⁴⁶

However, Parker, J., in *R v. Manchester Legal Aid Committee Ex parte R A Brand & Co Ltd*⁴⁷ quoting words of Roche, J., observed:

It is sufficient to say that whereas it is sometimes contended that the principles of natural justice are vague and difficult to ascertain, fortunately the principles of British justice have been authoritatively laid down; and they at all events extend to the assertion of this principle, that where judicial functions, or quasi-judicial functions, have to be exercised by a court or by a board, or any body of persons, it is necessary and essential in the words of LORD LOREBURN in *Board of Education v. Rice*, which have already been cited, **that they must always give a fair opportunity to those who are parties in the controversy to correct or to contradict any relevant statement prejudicial to their view. In other words those principles of British justice proceed upon the basis that both sides have a right to be heard.**⁴⁸ (Emphasis supplied)

According to Wade & Forsyth, broadly, natural justice means the natural sense of what is right and wrong.⁴⁹ It has been technically equated with

⁴⁴ *H Clark (Doncaster) Ltd v Wilkinson*, 1 1965 ALL ER 934 at pg. 936

⁴⁵ [1952] All ER 225.

⁴⁶ *Ibid* pg. 229.

⁴⁷ [1952] 1 All ER 480.

⁴⁸ *Ibid*, pg. 486.

⁴⁹ H.W.R. Wade and C.F. Forsyth, **Administrative Law**, 10th Edition, Oxford University Press, Oxford, London, 2009 at pg. 371.

fairness.⁵⁰ In administrative law, rules of natural justice are basically two, namely, that a man may not be a judge in his own cause and that a man's defence must always be fairly heard.⁵¹ These are commonly referred to as the rule against bias and the right to be heard, respectively.

The essence of having rules of natural justice is to maintain procedural fairness. There are certain procedures to be observed before someone's rights or liabilities are determined. Each man needs to be treated fairly in relation to his case. All and every procedure adopted by any judicial and quasi-judicial body must aim at furthering justice. This may never be achieved in the absence of observing rules on natural justice. As it was held in *Spackman v. Plumstead District Board of Works*,⁵² a decision made in contravention of these rules is not a decision at all.⁵³ Stressing on the importance of these rules, Bradley, Ewing and Knight held:

...The aim of the procedure rules is to protect the fairness and openness of the inquiry process: the rules are enforceable in the courts, and the requirement to observe them exists alongside duties at common law derived from the principle of natural justice. If a particular inquiry is not governed by statutory rules of procedure, there is in any event a duty to observe common law rules of natural justice or fairness.⁵⁴

These rules are also enshrined in the Constitution of the United Republic of Tanzania. They are contained in the famous Article 13⁵⁵ which generally provides for equality before the law. Of relevance is Article 13(6) (a) which provides for right to be heard. The Article provides that:

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² (1885) 10 App Cas 229.

⁵³ *Ibid.*, pg. 240.

⁵⁴ A W Bradley, K D Ewing and C J S Knight, **Constitutional and Administrative Law**, 16th Edition, Pearson Education Limited, Edinburg, United Kingdom, 2015, pg. 609.

⁵⁵ The Constitution of the United Republic of Tanzania of 1977, 2005 Edition.

when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned.⁵⁶

It is on these grounds that the appellant, Tanga Fresh, alleged that it was not given the right to a fair trial.

The basis of the appellant's case was that it was not provided with a transcript of oral presentation as directed by rule 22(9) of the FCC Rules of Procedure.⁵⁷ The roots of rule 22(9) can be traced from rules 16 to 20.⁵⁸ Essentially, when the Commission has formed an opinion that there is breach or likelihood of breach of competition rules, it issues a preliminary finding to the accused/respondent.⁵⁹ The respondent has a right to make his reply in writing.⁶⁰ There is also an opportunity for settlement as provided for by rule 21.⁶¹ According to rule 22, the respondent may file an application to make oral representation on the preliminary findings. However, this can only be done after he has filed his written response.⁶² The purpose is to give the respondent further opportunity to orally defend its case before the Commission. It is after this oral hearing that its transcript may be given to the respondent to confirm its accuracy and identification of any confidential information. Since it was not provided with this transcript, the appellant said its right to be heard was infringed. Accordingly, the appellant said, this would have affected the Commission's determination of any new evidence as per rule 23.

⁵⁶ Article 13(6) (a), *Ibid.*

⁵⁷ GN No 73 of 2013.

⁵⁸ *Ibid.*

⁵⁹ Rule 19(3), *Ibid.*

⁶⁰ Rule 20, *ibid.*

⁶¹ GN No 73 of 2013.

⁶² Rule 22(1), *Ibid.*

In its finding, the Tribunal did not agree with the appellant. It was of the firm opinion that the appellant was fully given right to be heard. Essentially, the Tribunal maintained that FCC, being an inquisitorial body, has its own rules of procedure. Thus, procedural fairness is checked against adherence to such rules and not otherwise. It noted at page 37:

...Fair hearing must be limited to the rules of particular platform. FCC being an inquisitorial body, has its own procedural rules. In the whole world, every administrative body is the master of its own procedure and need not assume the trapping of a court as it was held by the Supreme Court of Canada in the case of *Knight v Indian Head School Division*⁶³...Here the requirements of procedural fairness were satisfied. Every opportunity in terms of FCC Procedure Rules was given to the appellant who had to say what it (appellant) wanted to say in terms of FCC Procedure Rules as clearly proved by the quoted part of the respondent's provisional findings.⁶⁴

The essence of this finding is to provide qualifications upon which procedural fairness rules are applicable within FCC. In an adversarial system, each party must be given opportunity to be heard. Failure to observe that provides a fertile ground for appeal. However, in an inquisitorial system where the procedures are structured or staged, rules of natural justice are observed as provided by the institution's guiding rules of procedure.

Accordingly, there is fair hearing within FCC, if the following rules are observed. First, rule 12(3) requires parties to be provided with statement of a case stating facts of the case and relevant provision. This is done after the Director of Compliance has been satisfied that the alleged behaviour harms or is likely to harm competition. Second, the respondent must be given

⁶³ 1 S.C.R. 653

⁶⁴ Page 37 of *Tanga Fresh v FCC decision*.

provisional findings in accordance with rules 19(3) & (4). This enables the respondent to know the findings of the Commission and marshal its defence. Third, the respondent will be given an opportunity to respond, in writing and later on orally in accordance with rules 21 & 22.

The importance of these procedures is well explained by the Tribunal on page 35 of the decision where it observes:

...the processes enunciated in the FCC Procedure Rules were meant to ensure that the appellant was well informed of the allegations against it, the evidence relied upon, the reasons for proposed findings, and, appropriately prepare the defence if any, is afforded time to be heard in defence of its case as well as opportunity to settle the matter should be [sic] unequivocally admit the allegations. To this Tribunal, these processes fully satisfy the requirement of procedural fairness, as enunciated in the FCC Procedure Rules...⁶⁵

With these rules which are well structured within the FCC Procedure Rules, the respondent is given an opportunity to make and defend its case. Right to be heard may not exactly follow the structure common to adversarial hearing. Suffice is to give the respondent an opportunity to say what ought to be said.

3.5 Breach of Standstill Obligation/Gun Jumping in Merger Regulations

Standstill obligation and gun jumping are two interrelated concepts in merger regulations. Standstill obligation requires parties not to consume any notifiable transaction unless it has been cleared by the relevant competition authorities or the deadline for such clearance has passed (*de facto* clearance).⁶⁶ In the European Union, such an obligation is found in

⁶⁵ Page 35, *Ibid*.

⁶⁶ Rastko Petaković, **The Merger Control Review**, Sixth Edition, Law Business Research, 2015 accessed at <https://www.karanovic-nikolic.com/knviews/Pages/2015/09/09/The-Merger-Control-Review---Serbia-Chapter.aspx> on 19th April 2017.

Article 7(1) of European Union Merger Regulations.⁶⁷ In Tanzania, such an obligation is enshrined in section 11(1) & (3) of the Fair Competition Act of 2003.⁶⁸ Standstill obligation enables the responsible competition authority to carefully examine the transaction in question. It will conduct a study to see its impact on effective competition and consumers' welfare, and form an opinion whether such transaction (merger) should be cleared or not. Breach of the standstill obligation may have far fetching impact on competition in the markets. This is the reason why competition authorities act sternly when such a breach is recorded.

On the other hand, an act of business firms of consummating merger transactions without first being cleared by competition authority is known as gun jumping. It may include actual completion of a merger transaction or taking of actual steps towards such transaction.⁶⁹ It also includes any prohibited practices, such as price fixing or market allocations between companies that are contemplating merger.⁷⁰ In their article, Slaughter and May observe:

...It should be noted that gun-jumping does not arise simply when two parties complete a transaction before it has been approved by the Commission. It can arise if steps are taken prior to formal completion. Where the Commission has jurisdiction over a transaction, the parties should observe the "standstill" restrictions which prevent them from closing. In these circumstances, the parties to the transaction should be careful not to take steps which might be regarded as implementing the transaction...⁷¹

⁶⁷ COUNCIL REGULATION (EC) No 139/2004, Official Journal of the European Union, L 24/1.

⁶⁸ Act No 8 of 2003.

⁶⁹ Slaughter and May, **Gun-jumping and the EU Merger Regulation**, EU Competition & Regulatory Newsletter: Legal and policy developments at the EU level, Issue 16, 15 – 21 April 2011, accessed <https://www.slaughterandmay.com/media/1535967/eu-competition-and-regulatory-newsletter-15-apr-21-apr-2011.pdf> on 19th April 2017.

⁷⁰ James R. Modrall and Stefano Ciullo, "Gun-Jumping and EU Merger Control", [2003] **E.C.L.R.**, 424.

⁷¹ *Ibid*, pg. 2.

Breaching the standstill obligation or gun jumping has always attracted serious consequences. Two recent cases decided by the European Commission are briefly discussed to illustrate the two concepts. The first is *Marine Harvest/Morpol case*.⁷² Marine Harvest ASA is a Norwegian company listed on Oslo and New York Stock Exchanges. It produces farmed salmon and white halibut and offers a wide range of value added products of various seafood species to different parts of Europe, Asia and America. It had acquired shares from Morpol ASA, a Norwegian producer and processor of salmon. Morpol produces farmed salmon and offers a broad range of value added salmon products, such as smoked, marinated, fresh and frozen salmon products. It carries out salmon farming and primary processing activities. In effect, Marine Harvest had merged with its competitor in the same market (horizontal merger) by acquiring 48.5% of its shares. The European Commission considered this a violation of notification requirement as required by Article 4(1) of EU Merger Regulations⁷³ and violation of standstill obligation as required by regulation 7(1) of the same Regulations.⁷⁴ For these two offences, it was fined 10,000,000⁷⁵ Euros for each offence.

The second case, similar to Marine Harvest, is *Electrabel / Compagnie Nationale Du Rhone (CNR)*.⁷⁶ Here, Electrabel, a Belgium electrical company acquired shares in CNR, an electricity company in France. CNR was a competitor of Electrabel. Electrabel acquired 49.97% of CNR shares and 47.92% of CNR voting rights. The impact of this transaction was to give Electrabel controlling powers over CNR. This was done without notification to and clearance by the competition authority. As a result,

⁷² Case No COMP/M.7184.

⁷³ COUNCIL REGULATION (EC) No 139/2004, Official Journal of the European Union, L 24/1.

⁷⁴ *Ibid.*

⁷⁵ About 24 billion Tanzanian shillings.

⁷⁶ Case No COMP/M.4994.

Electrable was fined 20 million⁷⁷ Euros for contravening provisions of regulations 4(1) and 7(1) of the European Union Merger Regulations.⁷⁸

In Tanzania, in the Tanga Fresh the Tribunal considered and decided the measures which a competition authority can take in case a merger has been consummated in contravention of standstill obligations or in case of gun jumping.

First, the authority may take any measures that are likely to mitigate any possible negative impact caused by such merger. In the Tribunal's own words:

...where a merger is implemented in violation of standstill obligation (as the merger in question) (the so called "gun jumping"), the Competition Authority should take measures with a view to ensuring that any negative impact on effective competition in the market arising from the implemented transactions are allayed to the extent possible and in any event are not protracted or rather prolonged...⁷⁹

Second, in a situation where there is a violation of standstill obligation, but no decision has been taken the competition authority may take interim measures in addressing that merger. Such may include any decision to restore or maintain conditions that continue to promote competition until when such authority has made its decisions. For instance, the authority may require the acquiring firm not to exercise its voting powers pending its decision. Another interim measure may be in the form of restricting the acquiring business to maintain *status quo*, i.e., the situation before merger.⁸⁰

⁷⁷ About 48 billion Tanzanian shillings.

⁷⁸ COUNCIL REGULATION (EC) No 139/2004, Official Journal of the European Union, L 24/1.

⁷⁹ Tanga Fresh v. FCC, pgs. 49-50.

⁸⁰ *Ibid*, pg. 50.

Third, if a merger has already been implemented and it appears to be anti-competitive, the authority has powers to order restructuring with a view of promoting effective competition. Such restructuring may include merger dissolution, disposal of shares, disposal of assets etc.⁸¹

Fourth, the authority may still clear a merger that did violate standstill obligations subject to agreed commitments submitted by parties.⁸² This option appears to be an alternative where merger dissolution becomes impractical. Such commitments may include any measures aimed at maintaining effective competition. Thus, they may include agreement against price fixing, commodity hoarding, quality compromise etc. All these are done to ensure that a consumer does not have to suffer as a result of that merger.

3.6 Factors to be Considered by Competition Authorities in Merger and Acquisition Analysis

Though merger and acquisition analysis not in issue, the Tribunal at pages 52-56, discussed factors that may have to be considered by the competition authority in merger analysis. These factors will assist the authority to reach a decision as to whether such merger should be allowed or not. The Tribunal elaborated such factors to include:

One, the likelihood of the impacts of such merger on consumers. A competition authority is likely to block a merger which is likely to harm consumers. The Tribunal notes that the aim of merger review is to protect competition so that mergers do not harm consumers. In other words, a merger is more likely to be cleared if it is not going to harm consumers through lessening of competition in markets.

⁸¹ *Ibid.*

⁸² *Ibid.*, pg. 50-51.

Two, the competition authority would consider the impact of such merger on the state of competition. Competition authorities will also study to find out to what extent is the proposed merger likely to lessen competition. The higher the chances of lessening competition the lower the possibility of approval by the authorities. In its own words again, the Tribunal observes:

...we would also say it is implicit that the basic merger analysis relies on understanding the effects that a merger may have on the expected state of competition in a market. A central concept of any competition test is therefore a comparison of competition with and without the merger. The competitive situation without the merger is what is sometimes referred to as the “counterfactual.”⁸³

Three, the competition authority would take into account the form of merger under consideration. Mergers are basically of two types, namely, horizontal mergers and non-horizontal mergers. A horizontal merger involves firms that are competitive in the same level of production or distribution of goods or services in the same relevant market. On the other hand, a non-horizontal merger includes vertical mergers - involving firms that operate at different but complementing levels (e.g., manufacturer and distributor) and conglomerate mergers involving firms operating in different markets without any vertical relationship (e.g., A transporting company acquiring a supermarket).

According to the Tribunal, while non-horizontal mergers are likely to be cleared easily, horizontal mergers are not. This is so because there is a chance that non-horizontal mergers may increase efficiency in competition. On the contrary, horizontal mergers are more likely to lessen competition [by creating monopolies], thus their chance of approval is low. On this point the Tribunal said:

⁸³ *Ibid*, Pg. 53

...horizontal mergers are normally formed simply to dominate the market and thus be able to reap the advantages of monopoly power. The monopolist would buy its competitor in order to lessen competition. When operating alone, the monopolist may not do research for enhanced efficiency, may also wish to cut down the level of production to create scarcity and ultimately increasing price. Monopoly price is unreasonably high which is detrimental to the household income and the consumer welfare in general. This explains why horizontal mergers are always put under strict scrutiny by competition authorities before they are approved.⁸⁴

4. Conclusion

Being the first merger case to have been decided by the Tribunal, Tanga Fresh has turned out to be a significant decision on the law of mergers and acquisitions in Tanzania. It has set out precedents on some key issues relating to mergers and acquisitions. Through this case, the operation of FCC as the quasi-judicial body at first instance, and later on as a party to a proceeding (at appellate level) has been put into practice. Suffice is to say that with this decision, important rules as discussed in this paper have been set that are fundamental to operation of law on mergers and acquisitions in Tanzania. One such rule use of the inquisitorial approach. The Tribunal discussed with approval the inquisitorial operational nature of FCC. This is uncommon to many quasi-judicial bodies which have been moulded in the adversarial system. To the largest extent, FCC conducts investigation, hears the accused and finally makes a decision. Through all this, FCC maintains an inquisitorial approach. The proceedings may only take adversarial system at an appellate stage where FCC appears as a party (either as an appellant or respondent). At any rate, a detailed examination and analysis of this approach is necessary. This, however, is not the objective of this article. It is enough to note that the Tribunal approved this

⁸⁴ *Ibid*, pg. 54

approach as long as FCC observes its own rules of procedure which give the accused an opportunity to make and defend its case.

International Criminal Justice at Domestic Level in Kenya: Reality on the Ground

*Gift Joseph Kweka**

Abstract

The primary duty to prosecute international crimes is vested in states. This duty is effectively discharged where a domestic criminal justice system is empowered to prosecute such crimes. In this regard enactment of good laws that reflect international crimes as contained in international instruments is imperative. It is noted that, over the years Kenya had a rather sketchy legislative framework for the prosecution of international crimes. War crimes were the only international crimes that were prohibited through implementing legislation related to the Geneva Conventions. The Genocide Convention had not been implemented and crimes against humanity which have mainly developed under the body of customary international law without independent convention were also not prohibited in any domestic law. As such, crimes against humanity and the crime of genocide had no domestic law until the implementation of the Rome Statute of the International Criminal Court in 2008. This article analyses legislative framework for the prosecution of international crimes in Kenya before and after the enactment of Rome Statute. This analysis of prosecution of international crimes before domestic courts in Kenya brings to the fore the ordinary crime approach in prosecuting international crimes.

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1. Introduction

In line with article 5 (1) of the Rome Statute of the International Criminal Court (ICC), core international crimes are limited to such conducts which are so serious and grave that they bring about concern to the international community in general.¹ Based on the two elements, the article has limited international crimes to only four that is; crime of genocide,² war crimes,³ crimes against humanity⁴ and the crime of aggression.⁵ This limit is also consonant with the International Law Commission (ILC) position which has restricted its definition of international crimes in the Draft Code to those offences which have the ability to disturb or interfere with international peace and security.⁶ As such other transnational crimes like the crimes of piracy⁷ and terrorism have been left out from the purview of “core international crimes” at international level.⁸ This is different when

¹ Rome Statute of the International Criminal Court United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 2187 U.N.T.S. 90, entered into force July 1, 2002. Herein after referred to as the Rome Statute of the ICC.

² *Ibid.*, article 5(a).

³ *Ibid.*, article 5(b).

⁴ *Ibid.*, article 5(c).

⁵ *Ibid.*, article 5(d).

⁶ The Work of the International Law Commission 7th edition, volume I, 2007, p. 96.

⁷ High Seas Convention of 1958; United Nations Convention on the Law of the Sea. Sundberg J.W.F., “The Crime of Piracy,” in Bassiouni M.C., *International Criminal Law: Sources, Subjects and Contents*, Vol I, 3rd ed, Koninklijke Brill NV, Laiden, The Netherlands, 2008, p. 813. Although the crime of piracy is one of the oldest crimes recognized under international law, the attitude by main actors in international law made it difficult for it to be categorized as a crime of international concern that requires a special mechanism to have it addressed. There exists a difference of views between the British who wanted international law and its mechanism to address it and the Scandinavians who wanted the normal criminal procedure to address brought a drift. Therefore piracy has remained a crime under international law mainly dealt with the criminal law of states.

⁸ Werle G., *Principles of International Criminal Law*, op. cit. The scope of the term international crimes is different when elaborated under regional instruments like the Protocol on Amendment to the Protocol to the Statute of the African Court of Justice and Human Rights (Protocol Amendment) which has an expansive definition as shown in chapter four of the thesis.

the term international crimes is defined under regional instruments like the Protocol on Amendment to the Protocol to the Statute of the African Court of Justice and Human Rights (Protocol Amendment).⁹

Kenya is one of the African countries which had a rather negative experience of international crimes being perpetrated in its territory. These crimes have been committed even during colonial period as accounted for in the books by Elkins¹⁰ and Anderson.¹¹ After independence, elections in Kenya had features of internal unrests. It is reported that, at least 3,000 people were killed in clashes during the 1992 and 1997 elections.¹² The situation worsened in the 2007 elections.¹³ The notorious *Mungiki*¹⁴ and other militia groups like the Sabaot Land Defence Force (SLDF)¹⁵ found a platform to perpetrate violence as organized and fuelled by politicians and businessmen.¹⁶ The violence is reported to have started as a spontaneous reaction to the election results and later came to be more organized, targeting rivals who fought back to counter the attacks.¹⁷ The police's excessive use of force also did not aid the situation. These attacks resulted in the commission of a number of crimes against humanity calling for

⁹ Adopted by the Twenty-Third Ordinary Session of the Assembly, Held in Malabo, Equatorial Guinea 27th June 2014 Article 3 (1). Ibid Article 28a (4)-(13).

¹⁰ Elkins, C., **Britain's Gulag: The Brutal End of Empire in Kenya**, London, Jonathan Cape, 2005.

¹¹ Anderson, D., **Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire**, London, Weidenfeld and Nicolson, 2005.

¹² Cheeseman, N., "The Kenyan Elections of 2007: An Introduction," **Journal of Eastern African Studies**, 2 (2008) 2, p. 170.

¹³ It was expected that the President would move constitutional reforms including creating the post of the prime minister and further ensure the 50/50 allocation of ministerial and key civil service positions among the allied political parties.

¹⁴ This militia openly stated its support for Uhuru Kenyatta in the 2002 elections.

¹⁵ Human Rights Watch, "Turning Pebbles" Evading Accountability for Post-Election Violence in Kenya, 2011, p. 12. This militia is reported to have committed attacks prior and after the elections.

¹⁶ Kriegler and Waki Reports on 2007 Elections, p. 54.

Available at http://www.kas.de/wf/doc/kas_16094-1522-2-30.pdf [Accessed 25 May 2016].

¹⁷ *Ibid.*, p. 8-10.

accountability before domestic courts. For domestic courts to prosecute international crimes it presupposes the existence of a good legislative framework.

Legislative framework to prohibit the commission of international crimes in Kenya is traced from a number of international conventions to which Kenya is a party.¹⁸ Some of the conventions have been domesticated as shall be shown in the subsequent parts of this article. Kenya, a common law country, was traditionally a dualist country and therefore needed to domesticate international conventions for them to have effect before domestic courts. However, this has been changed since the new constitution was passed. The 2010 Constitution has transformed Kenya into a monist state making international laws directly applicable without a need of domesticating them.¹⁹ This position has changed the traditional understanding that in most cases only civil law countries would automatically belong to the monist school.²⁰

Prior to 2008, available law that directly dealt with international crimes was the Geneva Conventions Act.²¹ This law catered for only a selection of

¹⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31 entered into force Oct. 21, 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force Oct. 21, 1950; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950; and Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force Oct. 21, 1950; the Convention on the Prevention and Punishment of crime of Genocide, 78 U.N.T.S. 277 (1951); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, U.N. Doc. A/39/51 (1984), entered into force on June 26, 1987; Rome Statute of the International Criminal Court United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court U.N. Doc. A/Conf.183/9.

¹⁹ The Constitution of Kenya article 2(5) and 2 (6).

²⁰ Mapunda B.T., "Treaty Making and Incorporation in Tanzania", **Eastern Africa Law Review**, Vol 28-39, 2003, at pp. 156 – 170.

²¹ Chapter 198 of 1972 [R.E 2012].

one category of international crimes, i.e., war crimes.²² Other international crimes particularly the crime of genocide and crimes against humanity did not feature in any existing laws. The International Crimes Act of 2008 has changed this by including all the 3 core international crimes. Therefore, in Kenya, existing penal laws are applicable and have been used to prosecute international crimes particularly crimes against humanity perpetrated before 2008.²³ The approach adopted therefore is to prosecute international crimes as ordinary crimes. The analysis hereafter begins with the existing penal laws and thereafter those laws that have prohibited international crimes. The second part of the article gives an account on domestic prosecution of international crimes in Kenya using the ordinary crime approach.

2. Approaches in Prosecution of International Crimes before Domestic Courts

There are two approaches in prosecuting international crimes before domestic courts. International crimes before domestic courts can be prosecuted based on the hard mirror theory or soft mirror theory. Hard Mirror Theory is based on the foundation that all domestic prosecutions of international crimes must be analogous to their prosecution as piloted before international courts.²⁴ This position requires the provisions criminalizing international crimes at national level to be the same as those under international law. There is no room for using any existing laws that fall short of what international instruments have prescribed in terms of the definition of the core international crimes.²⁵

²² There are other war crimes that have not been catered for under the Act a selection was made thereof.

²³ This is with reference to the 2007 post-election violence cases such as *Republic v. Joseph Lokuret Nabanyi*, Criminal Case No. 40 of 2008, [2013] eKLR; *Republic v. Mosobin Sot Ngeiywa and Japheth Simiyu Wekesa* Kitale HRCC No.19 of 2008; *Republic v. Ben Pkiech Loyatum Eldoret* HRCC No. 5 of 2008.

²⁴ Heller K.J., "A Sentence-Based Theory of Complementarity," **Harvard International Law Journal**, Volume 53, Number 1, 2012, p. 85 at 88.

²⁵ Xavier P., "The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?", 88 **International Review of the Red Cross** 2006, p. 375 at 390.

The theory is based on the presumption that every state has incorporated or transformed international instrument to become part of domestic law.²⁶ Countries that adhere to the monist approach (especially in case of self-executing treaties), this may not be an issue because a treaty becomes part of domestic law without the need for passing an Act of parliament.²⁷ For dualist countries, the lack of special status to international treaties poses difficulty to the theory. Treaties are required to be incorporated or being made part of domestic law before they can be invoked before a domestic court. In case a country has not passed the necessary legislation incorporating a treaty, such treaty cannot be used before domestic court.²⁸ States will therefore be unable to adhere to the strict requirement of the theory.²⁹

On the other hand, the soft mirror theory is more relaxed compared to the hard mirror theory. It recognizes the domestic prosecution of international crimes under what is referred to as the “ordinary crime approach.”³⁰ The ordinary crime approach is the tactic of prosecuting international crimes in domestic courts using the existing penal laws which have not incorporated international crimes.³¹ Here, the prosecution of such crimes does not make reference to international crimes. The conduct being prosecuted under the ordinary crime approach is analogous to the one prohibited under

²⁶ Heller K.J., “A Sentence-Based Theory of Complementarity,” *op. cit.*, p. 89.

²⁷ Aust A., **Modern Treaty Law and Practice**, Cambridge, United Kingdom, Cambridge University Press, 2013, p. 163; Mapunda B.T., “Treaty Making and Incorporation in Tanzania”, **Eastern Africa Law Review**, Vol 28-39, 2003, at 156 – 170.

²⁸ *Ibid.*

²⁹ Materu F.S., **The Post-Election Violence in Kenya: Domestic and International Legal Responses**, The Hague, Netherlands, T.M.C Asser Press, 2014, p. 91. The use of ordinary criminal law to prosecute international crimes is argued to be an indication of inability and unwillingness of states to prosecute international crimes thereby triggering the admissibility of cases before the ICC.

³⁰ Heller K.J., “A Sentence-Based Theory of Complementarity,” *op. cit.*, at 97 and 98.

³¹ Materu S.F., *op.cit.*, p. 91.

international instruments.³² The main difference is on the caption of the crime in question, and the elements that need to be proven to establish guilt or innocence of the accused. Example, instead of mass murder being prosecuted as crime against humanity, under the ordinary crime approach, prosecution of such conducts would be brought under the charges of multiple counts of murder.³³

International tribunals have supported this approach.³⁴ It has to be noted that the sentences handed down upon conviction on the ordinary crime approach may be equivalent or higher than the one contained in an international instrument.³⁵ What is clearly lacking when using the soft mirror theory is the labelling of the crime as one belonging to a special group of core international crimes. To this effect, the moral guilt that is normally attached to international crimes is absent. Hence, for as much as the theory allows the prosecution of international crimes as ordinary crimes, it is still desired that states adopt legislative framework to enable them prosecute international crimes as such.³⁶

³² Stahn C., ‘Sentencing Horror or Sentencing Heuristic’? A Reply to Heller Sentence Based Theory of Complementarity,’ in Schabas W., McDermott Y. and Hayes N., (eds) **The Ashgate Research Companion to International Criminal Law: Critical Perspectives**, Routledge, New York, USA, 2016, p. 358. The aim of having complementarity regime under the ICC is not for the ICC to change national justice systems to reflect that of the ICC. The principle recognizes that the ICC and national criminal justice systems have a shared obligation to which the latter has the primary position to discharge.

³³ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, 10 February 2006, p. 37. The ICC has stated that the conduct must be substantially the same as the one to be prosecuted before the ICC.

³⁴ The ICTY has affirmed that there is neither treaty obligation nor norms of customary international law that prohibit the prosecution of war crimes as ordinary crimes. See Materu F.S., *op. cit*, p. 93.

³⁵ *Ibid*, p. 93.

³⁶ Heller K.J., “A Sentence-Based Theory of Complementarity,” *op. cit*, p. 98. “incorporating the Rome Statute into domestic law is necessary to avoid “impunity gaps”: situations in which effective prosecution is impossible, because a state’s national criminal law fails to include an ordinary equivalent to an international crime, contains an inadequate range of modes of participation, or makes available overly broad defences. Others offer a more

Kenya has employed the soft mirror approach as shall be shown in the following parts of this article. There has been no prosecution of international crimes before Kenyan domestic courts based on the hard mirror theory due to retrospectively applicability of the Act that implemented international crimes in Kenya. By the time international crimes were perpetrated in Kenya, the implementing law had not come into force. The only way that was proposed to prosecute international crimes as international crimes was by the establishment of a Special Tribunal.³⁷ This was however rejected.

2.1 Prosecuting International Crimes in Kenya: The Ordinary Crime Approach

The cases reviewed in the following paragraphs reveal the prosecution of international crimes related to the 2007 post-election violence as ordinary crimes. There is therefore no mention of any international crime i.e. crimes against humanity in the decisions of the courts because such prosecutions were never based on charges of crimes against humanity. The main law that has been used is the Penal Code of Kenya. The International Crimes Act has not been used in any of the analyzed cases. It is noteworthy that, there have been acquittals for many cases brought for trial relating to the 2007 post-election violence although some of the perpetrators have been convicted.³⁸ *R v. Peter Kipkemboi Ruto*³⁹ is one case where the accused has been convicted for murder in relation to the 2007 post-election violence killing and was sentenced to death by Kenya's Court of Appeal in

conceptual argument, claiming that the greater expressive value of a conviction for an international crime justifies, encourages states not to prosecute ordinary crimes even if the practical consequences of the two prosecutions would be the same.”

³⁷ See information available at <http://www.hrw.org/news/2009/03/25/establishing-special-tribunal-kenya-and-role-international-criminal-court> [Accessed 28 May 2015].

³⁸ A Progress Report To The Hon. Attorney-General by the Team on Update of Post-Election Violence Related Cases in Western, Nyanza, Central, Rift-Valley, Eastern, Coast And Nairobi Provinces March, 2011, Nairobi, ICC-01/09-79-Anx1 16-09-2011 2/84 EO PT.

³⁹ [2010] eKLR.

Nakuru.⁴⁰ Other cases include *Republic v John Kimita Mwaniki*⁴¹ where the accused was charged and convicted of murder contrary to section 202 as read with section 203 of the Kenyan Penal Code. From the facts of the case, it is apparent that the accused did not perpetrate the crime alone. However, the other perpetrators were not brought before the court under a joint charge.⁴² And from the records thus far, nothing reveals that they have been prosecuted on separate charges.

Other murder cases where the accused were convicted include; *Republic v. Mosobin Sot Ngeiywa and Japheth Simiyu Wekesa*,⁴³ *Republic v. Ben Pkiech Loyatum*,⁴⁴ *Mosobin Sot Ngeiywa and Japhet Simiyu Wekesa v. Republic*⁴⁵ and *Republic v James Omondi & 3 others*.⁴⁶ On the other hand, in the case of *Republic v. Andrew Mueche Omwenga* the charge of murder was reduced to manslaughter and upon conviction the accused was sentenced to 10 years imprisonment.⁴⁷

In the case of *Republic v. Edward Kirui*⁴⁸ the judges ordered a retrial where the accused was initially acquitted for crimes charged.⁴⁹ This is a case where a police officer was charged for murder of two persons. The case shows the desire to ensure all those who perpetrated the crimes irrespective of their official capacity are held accountable. It must be noted that, all of

⁴⁰ Information available at <http://africajournalismtheworld.com/2015/02/20/kenya-peter-kipkemboi-ruto-sentenced-to-death-for-pev-killing/> [Accessed 9 July 2015].

⁴¹ Criminal Case No. 116 of 2007, [2011] eKLR.

⁴² *Ibid.* p. 18. The court affirmed “Robert, Geoffrey, Supe, Mathayo, Elijah and Peter (of Mengiso)” made good their escape.

⁴³ Kitale 811/30/2008 Kitale HRCC NO. 19 OF 2008.

⁴⁴ Eldoret HRCC No. 5 of 2008.

⁴⁵ Criminal Appeal No. 105 of 2013. The Court of Appeal at Eldoret confirmed the decision of the High Court upholding the conviction of the two accused. Accuse 1 all four counts while accused 2 three counts.

⁴⁶ Criminal Case No. 57 of 2008, [2015] eKLR. James Omondi alias Castro, Wycliffe Walimbwa Simiyu alias Zimbo and Paul Otieno alias Baba were convicted. The fourth accused was acquitted.

⁴⁷ Nakuru HRCC No. 11 of 2008.

⁴⁸ Criminal Appeal No. 198 of 2010, [2014] eKLR.

⁴⁹ HC.CR.C. No. 9 OF 2009.

these cases have been prosecuted as ordinary crimes, no one has been prosecuted for international crimes before any Kenyan domestic court. The prosecutions so far have been few compared to the number of cases which ought to be prosecuted.

3. Legal Framework

3.1 The Penal Code Chapter 63 [R.E 2012]

The Penal Code is Kenyan principal legislation addressing different forms of criminal conducts.⁵⁰ It is the oldest penal law that came into force in 1930. The law can and has been used to prosecute international crimes under the ordinary crime approach. In this regard, ordinary penal law is used to prosecute international crimes. This practice does not however result in the prosecution of international crimes but rather the prosecution of ordinary crimes. For example, the 2007 post election violence cases were prosecuted under this law.⁵¹ The law lists different types of crimes whose *actus reus* is akin to some of the *actus reus* under different headings of core international crimes but they lack the required *mens rea* and contextual element to qualify them as international crimes. These include crimes such as murder,⁵² assault,⁵³ different forms of sexual offences,⁵⁴ offences against liberty⁵⁵ and offences against property.⁵⁶ The provisions under this law do not reflect any category of international crimes as provided for under different international instruments including the Rome Statute. What is criminalized is analogous conduct with different material and mental element.⁵⁷ Hence, whenever the Penal Code is used to bring

⁵⁰ Chapter 198 of 1972 [R.E 2012].

⁵¹ *Republic v. Joseph Lokuret Nabanyi*, Criminal Case No. 40 of 2008, [2013] eKLR; *Republic v. Mosobin Sot Ngeiywa and Japheth Simiyu Wekesa* Kitale 811/30/2008 Kitale HRCC NO. 19 OF 2008; *Republic v. Ben Pkiech Loyatum* Eldoret HRCC No. 5 of 2008.

⁵² Penal Code, Chapter XIX.

⁵³ *Ibid.*, Chapter XXIV.

⁵⁴ *Ibid.*, Chapter XV and the Sexual Offences Act of 2006.

⁵⁵ *Ibid.*, Chapter XXV.

⁵⁶ *Ibid.*, Division V.

⁵⁷ The *actus reus* of murder, for example, remains the same. However, the qualification to make it one of the core international crimes is what is not provided for under the definition.

charges to prosecute those who have perpetrated international crimes, the practice is understood in terms of prosecuting international crimes as ordinary crimes.⁵⁸

Individual criminal liability akin to that under international instruments befalls on direct perpetrators or those who aided, abated, counseled, procured or even attempted the commission of prohibited conduct.⁵⁹ There is no corporate liability for commission of crimes listed under the Penal Code. Punishment under the Kenyan Penal code ranges from death penalty to conditional or unconditional imprisonment for a certain term, imprisonment for life, compensation and fines.⁶⁰ For example, a person who is convicted of murder or manslaughter is liable to suffer death or imprisonment for life.⁶¹ This severity of punishment is enough to acknowledge that the prosecution of international crimes as ordinary crimes under the Penal Code does impose a punishment that is equivalent or even higher than that provided for under the body of international criminal justice particularly the Rome Statute of the ICC.⁶² Therefore, the Penal Code offers a tool that can be used to bring charges for international crimes under the ordinary crime approach ascribed to by the soft mirror theory. However, it is still desirable that, international crimes are prosecuted as international crimes before domestic courts. This will ensure that the severity of international crimes is reflected in the prosecutions. The moral guilt associated with such gross human rights violations is achieved when international crimes are prosecuted as such.

⁵⁸ Materu F.S., *op.cit*, pp. 91 and 92.

⁵⁹ Kenya Penal Code, Chapter 63 part V. The law also provides for liability of corporations and other legal entities which fall out of the scope of the ICC Statute.

⁶⁰ *Ibid.*, Chapter V.

⁶¹ *Ibid.*, section 204 and 205. Attempted murder is punishable by imprisonment for life while manslaughter is punishable by imprisonment for 14 years.

⁶² The punishment under the Rome Statute does not go beyond imprisonment for life.

3.2 Geneva Conventions Act Chapter 198 of 1968 [R.E 2012]

The Act is the implementing legislation for the body of international humanitarian law and the four Geneva Conventions to which Kenya is a party. The law is an old body of domestic legislation providing for the criminalization of war crimes. The Geneva Conventions Act is a very short piece of legislation with eight sections. However, the Act contains schedules which form the bulk of the provisions of the four Geneva Conventions. Most of the Geneva implementing laws adopted this approach, namely of a few provisions and schedules of the conventions. Uganda⁶³ and Tanzania⁶⁴ have adopted this approach.

The Act provides for universal jurisdiction for grave breaches as contained under the Geneva Conventions.⁶⁵ There is no reproduction of the content of the conventions detailing grave breaches, a mention of the sections in a manner as to provide for cross reference has been adopted. It is, however, important to point out that, no provision of the Act has ever been invoked to assume universal jurisdiction for war crimes committed in other countries. While European countries were active prosecuting international crimes committed in Africa under universal jurisdiction,⁶⁶ countries like Kenya, which ought to prosecute war crimes, have never assumed

⁶³ The Geneva Conventions Act, Cap.363 16 October 1964.

⁶⁴ *Ibid.*, section 204 and 205. Attempted murder is punishable by imprisonment for life while manslaughter is punishable by imprisonment for 14 years.

The punishment under the Rome Statute does not go beyond imprisonment for life.

The Geneva Geneva Conventions Act (Colonial Territories) Order in Council, 1959. The applicability of this law is subject to the reception clause under the Tanganyika Order in Council of 1920.

⁶⁵ Geneva Conventions Act, Section 3. The section makes reference to the relevant articles of the Geneva Convention providing for grave breaches which form part of the law in terms of schedules.

⁶⁶ Reydam, L., "Belgium's First Application of Universal Jurisdiction: The Butare Four Case," **Journal of International Criminal. Justice**, 2003, p. 428 – 436. The author has given a background to the cases, summary of the trial and assessed the merits and shortcomings of the cases.

jurisdiction. This passiveness is partly ⁶⁷ attributed to the limited legislative framework that had existed over the years on international crimes.

The Kenyan legislation made along the lines of the Geneva Conventions Act also contains sections which provide for notice of trial,⁶⁸ legal representation,⁶⁹ appeal,⁷⁰ reduction of sentence and custody.⁷¹

3.3 The International Crimes Act Number 16 of 2008

Kenya signed the Rome Statute on 11th August 1999 and ratified the same on 15th March 2005. It took Kenya three years to implement the Statute. The International Crimes Act enacted in 2008 is a legislation implementing the Rome Statute of the ICC. The law became operational on 1st January 2009. It is important to point out that, it was necessary for Kenya to enact an implementing legislation because it was adhering to the dualist school on the applicability of international law at domestic level.⁷² The Act has two objectives, namely, to provide legislative framework for the punishment of international crimes as contained in the Rome Statute and to enable Kenya to cooperate with the ICC.⁷³

The International Crimes Act is a comprehensive legislation reflecting the provisions of the Rome Statute of the ICC. Majority of the provisions under the law are geared towards enabling the government of Kenya to fully cooperate with the ICC. Parts III- VII of the Act cater for different things on cooperation including but not limited to arrest and surrender,

⁶⁷ The exercise of universal jurisdiction must be provided for under relevant provisions of domestic laws for the offences to which the courts seek to prosecute. The country has to also have the ability to prosecute and enforce sentences upon conviction.

⁶⁸ *Ibid.*, Section 4.

⁶⁹ *Ibid.*, section 5.

⁷⁰ *Ibid.*, section 6.

⁷¹ *Ibid.*, section 7.

⁷² The Constitution of Kenya, 2010 article 2(5) and 2(6) provide that the general rules of international law and any treaty ratified by Kenya shall form part of the law of Kenya.

⁷³ International Crimes Act 2008.

evidence gathering and enforcement of penalties.⁷⁴ Further, the law has provided under part IX provisions regulating the possibility of the ICC to sit and hold proceedings in Kenya.⁷⁵ Part X deals with request of assistance to the ICC.⁷⁶ This enforces the principle of complementarity and the role the ICC can play in assisting domestic courts. On the strength of this part the Attorney-General (AG) or the Minister⁷⁷ is empowered to seek assistance on the investigation or trial proceedings of international crimes in Kenyan courts.⁷⁸ The assistance so requested is on anything the ICC may lawfully provide including:

- (a) the transmission of statements, documents, or other types of evidence obtained in the course of an investigation or a trial conducted by the ICC; and
- (b) the questioning of any person detained by order of the ICC.⁷⁹

It is interesting to note that, immediately after the interpretation section, the law provides for a section stipulating that, the law is binding on the Government.⁸⁰ This provision is inspired by the fact that, what the law does, is putting in place provisions which the Government of Kenya has agreed on the international plane. Moreover, it predominantly provides for obligations which the Government has to discharge with respect to cooperation with the ICC.

The following sub part is an analysis of selected provisions of the International Crimes Act 2008.

3.3.1 Selected Provisions of the International Crimes Act 2008

3.3.1.1 Definition and Jurisdiction over International Crimes

⁷⁴ The International Crimes Act, 2008.

⁷⁵ *Ibid.*, section 161-167.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, section 2(1)(b). The Minister under the Act “means the Minister for the time being responsible for matters relating to national security.”

⁷⁸ *Ibid.*, section 168.

⁷⁹ *Ibid.*, section 170 (a) and (b).

⁸⁰ *Ibid.*, section 3.

The definition of international crimes is similar to what is provided for under the Rome Statute. The law has adopted specific provisions for each offence linking them to the definition under the Rome Statute.⁸¹ When reading the International Crimes Act provisions providing for crimes against humanity, the law has made recognition that, the Rome Statute may not have adequately captured conducts amounting to crimes against humanity. The provision thus allows the understanding of crimes against humanity to follow what other conventions and customary international law provide. This position could be attributed to the lack of independent convention catering for crimes against humanity.⁸²

The Act has provided for limited universal jurisdiction. The provisions on jurisdiction require a nexus between the offence and the Republic of Kenya. As such the law has provided for territorial jurisdiction,⁸³ nationality jurisdiction,⁸⁴ passive personality jurisdiction⁸⁵ and jurisdiction based on the citizenship of the victim of a country involved and allied with Kenya in an armed conflict.⁸⁶ The connection with Kenya is not required for cases where a person has committed international crimes elsewhere with no connection with Kenya but appears to be within Kenyan territory.⁸⁷ This shall enable Kenya to effectively discharge the duty placed upon it by international instruments to ensure the perpetrators of international crimes are prosecuted. This is subject to availability of other infrastructure needed for effective prosecution.

⁸¹ *Ibid.*, section 6(4).

⁸² The ILC is currently developing a specific convention for crimes against humanity under special rapporteur Prof. Sean Murphy.

⁸³ *Ibid.*, section 8(a).

⁸⁴ *Ibid.*, section 8(b) (i). This provision extends to cover persons who are not citizens of Kenya but are employed by GOK on civilian or military capacity. On the other hand, jurisdiction can also be assumed where the perpetrator is a citizen or was employed by the country that was involved in armed conflict with Kenya. This is enumerated under section 8(b)(ii).

⁸⁵ *Ibid.*, section 8(b)(iii).

⁸⁶ *Ibid.*, section 8(b)(iv).

⁸⁷ *Ibid.*, section 8(c).

3.3.1.2 Punishment

Punishment for international crimes, i.e., war crimes, genocide and crimes against humanity prescribed under the law depends on whether the offence is one of intentional killing or not. Thus, if a person is convicted of an offence that contains *mensrea* such a person will be sentenced to death.⁸⁸ On the other hand conviction on any other offence will attract a punishment of imprisonment for life or lesser term.⁸⁹ Imposing of death penalty is a modification from what the Rome Statute provides. Under the Rome Statute, the highest punishment is imprisonment for life.⁹⁰

Kenya has maintained the provisions of the Penal Code with regard to intentional killing. Therefore, death penalty is a possible penalty when a person is convicted for any international crime amounting to intentional killing. This position could affect the ability of Kenya to be authorized by the ICC⁹¹ to carry prosecution of international crimes that were not prosecuted by the Court. This scenario is analogous to that of Rwanda. Rwanda could not receive transfer of cases from the International Criminal Tribunal for Rwanda (ICTR) until it abolished death penalty.⁹²

While the above sentences are applicable to proceedings conducted before domestic courts, the Act has provisions that enable Kenya to act as a state of enforcement of sentences issued by the ICC.⁹³ The serving of sentences in Kenya may be a subject of further conditions as the minister may deem fit.⁹⁴

⁸⁸ *Ibid.*, section 6(3)(a); Kenya Penal Code, section 204 sets out the punishment for murder.

⁸⁹ *Ibid.*, section 6(3)(b).

⁹⁰ Rome Statute of the ICC, article 77.

⁹¹ *The Prosecutor v. Germain Katanga* Decision Pursuant to article 108(1) of the Rome Statute.

⁹² Organic Law No. 66/2008 of 21 November 2008 modifying and complementing Organic Law No. 31/2007 of 25/07/2007 relating to the Abolition of the Death Penalty, Official Gazette of the Republic of Rwanda, 1 December 2008.

⁹³ The International Crimes Act, 2008, section 134.

⁹⁴ *Ibid.*, section 134 and 135.

3.3.1.3 Immunity of State Officials

Immunity of state officials is a very alive issue when dealing with individual accountability for the commission of core international crimes. When reference is made to state officials' immunity it attaches to two concepts i.e. functional immunity (*ratione materiae*)⁹⁵ and personal immunity (*ratione personae*)⁹⁶ which have been born out of the rule of state immunity. It is a well settled position that state officials enjoy immunity from courts of foreign state for violations of international law.⁹⁷ When reference is made to state officials who enjoy immunity *ratione personae* under international law, it includes heads of states, heads of governments and other members of government like ministers of foreign affairs.⁹⁸ This form of immunity is absolute while functional immunity is lifted in event a state official has perpetrated international crimes.

The immunity of state officials has been waived by the Rome Statute. The provisions of the Act have maintained the same position in relation to surrender of persons to the ICC. Section 27 provides that:

The existence of any immunity or special procedural rule attaching to the official capacity of any person shall not constitute a ground for (a) refusing or postponing the execution of a request for surrender or other assistance by the

⁹⁵ Van ALebeek R., **The Immunity of States and their Officials in International Law and International Human Rights Law**, Oxford University Press, New York, United States, 2010, 2-3. Functional immunity protects state officials from the jurisdiction of foreign courts for certain conducts performed by them on their official capacity in the discharge of state duties. These conducts cannot be taken to have been done on their personal capacity.

⁹⁶ *Ibid*. This provides immunity to state official during their term in office and covers all conducts.

⁹⁷ *Arrest Warrants Case (Democratic Republic of Congo v. Belgium)* Judgement ICJ Reports 2002, p. 3. The Court concluded that there was no existence of customary international law rule that stripped away the immunity of state officials before foreign national courts. The principles laid down in the Nuremberg, Tokyo, ICTY, ICTR and ICC did not establish a new rule of customary international law.

⁹⁸ Van ALebeek R., **The Immunity of States and their Officials in International Law and International Human Rights Law**, 187 and 188.

ICC; (b) holding that a person is ineligible for surrender, transfer, or removal to the ICC or another State under this Act; or (c) holding that a person is not obliged to provide the assistance sought in a request by the ICC.⁹⁹

Following this provision, state officials' immunity will only be maintained pursuant to section 62 which provides for instances where the request to surrender is in conflict with obligations to another state.¹⁰⁰ The section is analogous to article 98 of the Rome Statute. Immunity of state officials is still maintained for all proceedings before Kenyan courts when reference is made to the law. Therefore, those officials (not Kenyan) who enjoy immunity under customary international law cannot be prosecuted in Kenya when universal jurisdiction is exercised.

The Constitution of Kenya article 143 (4) has limited immunity of president from criminal prosecution before Kenyan courts to the extent that the same has been waived by an international treaty.¹⁰¹ Therefore, the President of Kenya can be prosecuted before domestic courts in Kenya for charges on any of the core international crimes because such immunity has been waived under the Rome Statute.¹⁰² The president of Kenya does not enjoy immunity from prosecution before domestic courts in relation to core international crimes. This is a departure from the position that is available in other East African countries such as Tanzania¹⁰³ and Uganda.¹⁰⁴

The Rome Statute implementing legislation has provided Kenya with the missing link in the availability of substantive laws on international crimes. The law has provided for the three core international crimes and their punishment. Domestic courts in Kenya are therefore now able to utilize

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ The Constitution of Kenya, 2010, article 143 (4).

¹⁰² Rome Statute article 27.

¹⁰³ Constitution of the United Republic of Tanzania, article 46.

¹⁰⁴ The Constitution of Uganda, article 98 (5).

this law to prosecute the perpetrators of international crimes before the High court.¹⁰⁵

4. Accountability for International Crimes and the Proposed International and Organized Crimes Division

Accountability for crimes that would qualify to be international crimes has been very limited since colonial period. Those loyal to colonial powers and the colonialist who perpetrated different forms of crimes against humanity¹⁰⁴ were not prosecuted.¹⁰⁵ Impunity was normal and could not be questioned. Other political related crimes perpetrated during the 1992 election were also not addressed. However, international crimes perpetrated during the 2007 post-election violence caught the attention of many and the call for accountability has been voiced by those who desire to see justice being done.

As of March 2015, the Director of Public Prosecutions of Kenya tendered a report which revealed that there were “6,000 reported cases and 4,575 files opened” in relation to crimes committed during the 2007 post-election violence.¹⁰⁶ The report is yet to be made public. However, the number of cases reveals the overwhelming nature of the magnitude of cases that need redress. International crimes committed in absence of armed conflict no matter how small the scale may be when compared to international crimes perpetrated during armed conflicts, they usually shock the prosecution, investigation and judiciary. Normally, the justice system is challenged on how best to tackle the many cases which were never anticipated, where victims depend on them to see justice being rendered.

¹⁰⁵ The International Crimes Act, article 8 (2).

¹⁰⁴ Elkins C., *op. cit.*, pp. 5-49. The assaults against Mau Mau supporters as mounted by the Governor and Colonial office has far reaching consequences leading to the detaining of around 1.5 million civilians who were subjected to different forms of inhuman treatments.

¹⁰⁵ *Ibid.*

¹⁰⁶ Information available at

<http://m.news24.com/kenya/MyNews24/Full-State-of-the-Nation-address-by-president-Uhuru-Kenyatta-20150326> [Accessed 9 June 2015].

The court system in Kenya comprises of Supreme Court,¹⁰⁷ the Court of Appeal,¹⁰⁸ High Court,¹⁰⁹ and subordinate courts which include Magistrates' Courts, Kadhis Courts, Court Martial, and any other Courts or local Tribunals established by an Act of Parliament.¹¹⁰ The judiciary in general has undergone major changes following the adoption of the new Constitution which called for the renewal of the judiciary in 2010.¹¹¹ The process of bringing about changes in the judiciary started with the passing of laws particularly the Judicial Service Act¹¹² and Vetting of Judges and Magistrates Act.¹¹³ The process of vetting under the named law aims at ensuring that the judiciary is working properly and its independence is guaranteed through tackling the problem of rampant corruption and ineffectiveness among magistrates and judges. Other changes are notable in areas such as recruitment of more judicial officers and staff, building and refurbishment of more courts and adoption of modern management practices with support from government and development partners.¹¹⁴ These changes aimed at addressing pressing issues such as inadequate prosecutors and judicial officers resulting in backlog of cases.¹¹⁵ Despite these short comings, Kenyan courts have never been in a state that they are incapable of functioning.

¹⁰⁷ Constitution of Kenya, article 163.

¹⁰⁸ *Ibid*, article 164.

¹⁰⁹ *Ibid*, article 165 and 162. The High Court has several Divisions including the Industrial Court, Environmental and Land Division, Civil Division, Family Division, Commercial Division, Criminal Division, Judicial Review Division and Constitution and Human Rights Division.

¹⁰⁹ *Ibid*, article 162 (2)(b).

¹¹⁰ Information available at <http://www.judiciary.go.ke/portal/page/about-the-judiciary> [Accessed 3 February 2014].

¹¹¹ Constitution of Kenya.

¹¹² No. 1 of 2011 R.E 2012.

¹¹³ Chapter 8B 2011 R.E 2012.

¹¹⁴ Performance Management Directorate, "Judiciary Case Audit and Institutional Capacity Survey," The Judiciary, Republic of Kenya, 2014, p. 3.

¹¹⁵ *Ibid*.

However, to bring about efficacy in the investigation and ultimate prosecution of international crimes before Kenya's domestic courts, there have been efforts to establish the International and Organized Crimes Division (IOCD) within the Kenyan High Court.¹¹⁶ These efforts are made pursuant to section 8 (2) of the International Crimes Act.¹¹⁷ The Division will have jurisdiction far and beyond the ICC crimes.

In order to effectively prosecute international crimes before the proposed IOCD, the Judicial Service Commission's report made an innovative proposal. It proposed for a Special Prosecutor pursuant to article 157(12) of the Constitution and an independent prosecution unit under the office of the DPP exclusively responsible for the prosecution of international crimes.¹¹⁸ The Unit has been established.¹¹⁹ The mandate of the unit is limited to core international crimes i.e. genocide, war crimes and crimes against humanity.¹²⁰ The independent unit is headed by the Special Prosecutor assisted by other prosecutors employed under the Unit. This will enable the utilization of skilled personnel in the field.

In preparing for the launching of the IOCD, training has been conducted on Judiciary personnel, Prosecutions under the DPP office and Office of Criminal Investigation.¹²¹ It is however important to note that, since the proposal was tendered in 2012, no IOCD has been established to date. It is

¹¹⁶ *Ibid.*, the Judicial Service Commission (JSC) engaged a committee to seek information on the viability of establishing the International Crimes Division in 2012.

¹¹⁷ Number 16 of 2008.

¹¹⁸ Judicial Services Commission, "Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in the High Court of Kenya," 30 October 2012

¹¹⁹ Information available at <http://www.odpp.go.ke/index.php/international-crimes-division.html> [Accessed 16 July 2016].

¹²⁰ *Ibid.*

¹²¹ Interview transcript. The Director of Public Prosecutions and the Director of Criminal Investigations have been at the fore to ensure that those working under them receive training on investigation and prosecution of international crimes. The two offices work together to bring about the effective prosecution of international crimes.

only in January 2015 that the Judiciary has affirmed the commitment to establish it coming July 2015.¹²² However, up to September 2016, it is yet to be established. This reveals the lack of political will to ensure that the perpetrators of international crimes are held accountable.

The IOCD is a necessary step in ending impunity to international crimes in Kenya. The AG of Kenya stated that the delay in the establishment of the Division has crippled Kenya's ability to prosecute international crimes on behalf of the ICC in Kenya (absence of appropriate institution).¹²³ Contrary to what the AG has stated, Kenya is not expected to prosecute international crimes on behalf of the ICC; it is fulfilling its primary obligation of ending impunity to international crimes.¹²⁴

5. Challenges in the Prosecution of International Crimes in Kenya under the Ordinary Crime Approach

The prosecution of international crimes before domestic courts, even under the ordinary crime approach, comes with its challenges. Reflecting on the few cases related to international crimes perpetrated during the 2007 post-election violence that have been prosecuted as ordinary crimes, Kenya has faced and still faces a number of challenges as the victims yearn for justice. The absence of legislative framework at the time international crimes were committed inhibited the application of hard mirror theory on the prosecution of international crimes.¹²⁵ As stated in the previous part, the absence of a specialized division of the high court specifically dealing with the prosecution of international crimes is inhibiting effective measures to bring accountability. Therefore, on top of these main crippling factors,

¹²²Information available at <http://www.wayamo.com/?q=projects/international-and-organised-crimes-division-icd-kenyan-high-court> [Accessed 15 June 2015].

¹²³ Kenya Citizen TV, 12, May 2015.

¹²⁴ Judicial Services Commission, "Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in the High Court of Kenya" (JSC Report), 30 October 2012.

¹²⁵ This theory requires international crimes to be prosecuted as international crimes.

there are notable challenges in the prosecution of international crimes in Kenya.

5.1 Lack of Political Will to Prosecute International Crimes

Following the failure to implement recommendations to establish a special Tribunal for the prosecution of post-election violence, the Kenyan government has displayed reluctance to bring about accountability by retributive justice. This could be attributed to the fact that those who hold high office, i.e., the president and vice president are also alleged to have perpetrated crimes during the post-election violence. The refusal by parliament to pass Constitution Amendment to set up a tribunal for prosecuting international crimes in Kenya shows the lack of political will. Even after the recommendations by the JSC to establish an IOCD, the trend is almost the same. Three years down the line, the Division has not been established. In the words of the AG “If it was up to me, two years ago, it would have been ready.”¹²⁶ There is therefore no priority to ensure that the IOCD is established.

Further, the 2015 March report of the DPP which was supported by the President indicates that PEV cases cannot be prosecuted, hence the government ought to look for “restorative approaches”. This is yet another sign of unwillingness to invoke retributive justice.¹²⁷ Judging Kenya on the threshold of Western justice may not be ideal. The country can decide the best mechanism of addressing international crimes as it deems appropriate to bring about accountability. A similar position was taken by Rwanda which established the *Gacaca* courts to hear and determine international crimes.¹²⁸

¹²⁶ Kenya Citizen TV, 12, May 2015. The IOCD was supposed to be up and running by June 2014.

¹²⁷ Sh10 billion fund has been promised to achieve the proposed restorative justice. Information available at <http://www.capitalfm.co.ke/news/2015/03/uhuru-apologises-for-past-atrocities-much-to-kiplagats-delight-2/> [Accessed 16 June 2015].

¹²⁸ “Kagame calls for equality in international justice”, **The New Times** (Kigali), 24 September 2012. “This home-grown solution through our Gacaca court process, has served us better

5.2 Poor Investigation of Criminal Cases

Investigation of crimes in Kenya is entrusted to the Criminal Investigation Department (CID). Reports from the DPP have consistently indicated difficulty in conducting investigation of crimes perpetrated during the 2007 post-election violence. As of 2013 a new team was set to carry out the investigation of approximately 4,000 cases out of which only 1,500 cases were considered to be eligible for trial before the IOCD.¹²⁹ Even with the new team, difficulties still persisted. The March 2015 report from the DPP has indicated that difficulties still existed in the investigation of such cases.¹³⁰ Cases like *Republic v. Joseph Lokuret Nabanyi*¹³¹ and *Republic v. Stephen Kiprotich Leting & 3 Others*¹³² were dismissed due to the lack of sufficient evidence. In the case of *Stephen Kiprotich* the Court stated:

One would have expected the police to place before court evidence of the Accused having been part of the gang that pre-arranged to commit this offence. That, however, was not the case. The evidence on record does not show, leave alone suggest, the involvement of the Accused in any pre-arranged plan to execute any or any unlawful act... I know that it is an undoubtedly difficult thing to prove even the intention of an individual and therefore more difficult to prove the common intention of a group of people. But however difficult the task is, like any other element of crime, the prosecution must lead evidence of facts, circumstances and conduct of accused persons from which their common intention can be gathered. In this case there is absolutely no evidence of the raiders and/or

than any other system could.... We have been able to strengthen the rule of law in our country, particularly through universal access to quality justice, so that citizens are not hindered by financial constraints or long distances to judicial centers.”

¹²⁹Information available at <https://thehagueetrial.co.ke/article/new-team-investigate-kenyas-pending-pev-cases> [Accessed 17 June 2015].

¹³⁰Information available at <http://m.news24.com/kenya/MyNews24/Full-State-of-the-Nation-address-by-president-Uhuru-Kenyatta-20150326> [Accessed 9 June 2015].

¹³¹ Criminal Case No. 40 of 2008, [2013] eKLR.

¹³²Nakuru High Court Criminal Case No. 34 of 2008.

any of the accused having met to arrange the execution of any or any unlawful purpose. There is absolutely no evidence to show that the Accused and/or others had a pre-arranged plan to attack Kimuli, Rehema and/or Kiambaa farms and kill their residents... In this case, without placing any evidence on record, the prosecution wants me to find that the Accused had a common intent with the murderers of the deceased and were part of that joint enterprise. That cannot be... I have to point out the shoddy police investigations in this case so that blame is placed where it belongs... The judiciary is being accused of acquitting criminals and unleashing them to society... I do not want to dismiss those complaints off hand. But what I know is that courts acquit accused persons if there is no evidence against them. In our criminal jurisprudence: out of 100 suspects, it is better to acquit 99 criminals than to convict one innocent person. Because of that our law requires that for a conviction to result the prosecution must prove beyond reasonable doubt the case against an accused person.¹³³

The trend of poorly investigated cases was sharply contrasted with the experience the court had on a high level case of *Republic v. James Omondi & 3 others*. The court stated:

More often than not courts have made pronouncements decrying the shoddy manner in which criminal cases are investigated. In the present case, the police acted with utmost professionalism... The case was investigated by senior and experienced investigators. The combination of this effort is evident in the quality of evidence that was produced before this court. It is the hope of this court that the investigations conducted in this case should serve a template on how investigations should be conducted with a view to resolving cases involving serious crimes. Maybe the high profile of the victim of this crime may have prompted the police to marshal their best resources in resolving the case. That should not be the case. Each serious crime should

¹³³ *Ibid.*

be accorded the professionalism that was shown in this case.¹³⁴

The *Stephen Kiprotich* decision has shown the court's concern on the lack of professionalism in the investigation of crimes in Kenya. Even though that was a general remark, the case specifically dealt with crimes perpetrated during the post-election violence which as reports have revealed, constitute one or more category of crimes against humanity.

In 2011 the AG stated that "time had lapsed since the crimes were committed that is why it has been difficult to gather evidence".¹³⁵ Questions that arise out of this are the following: what can be drawn from the Hissene Habre trial that convicted him decades after the crimes were committed? How did the Extraordinary African Chambers manage to gather evidence for crimes committed 3 decades prior to its formation? The submissions are just a reflection of lack of commitment to ensure thorough investigation is conducted and prosecutions commenced. This brings back the issue of lack of political will in the search for justice. Victims have continued pressing the government to bring about the investigation and prosecution of those claimed to have perpetrated international crimes during the conflict as stated by the prosecutor of the ICC Fatou Bensouda.¹³⁶

The investigation of international crimes is not similar to the investigation of ordinary crimes. When investigators are faced with over 4,000 complaints to investigate and if the investigators are not well trained and

¹³⁴ Criminal Case No. 57 of 2008 [2015]eKLR, p. 10.

¹³⁵ Kenya National Assembly Official Record (Hansard) 23 November 2011.

¹³⁶ Mkawale S., "PEV victims want leaders investigated," 22 January 2015, available at <http://standardgroup.co.ke/entertainment/pulse/article/2000148727/pev-victims-want-leaders-investigated> [Accessed 17 June 2015].

equipped, such investigations may never bear fruits.¹³⁷ This being the case, special training and expertise are required.¹³⁸

5.3 Reluctance of Witnesses to Testify

The Report by the DPP has indicated that, most witnesses are not willing to testify on post-election violence cases due to fear of reprisal. The Witness Protection Authority (WPA) has been established and is currently carrying out its functions within Kenya.¹³⁹ The Authority is all out to ensure that witnesses who come under its protection are effectively protected.

In order to qualify for witness protection, a person must lodge an application for such protection. Such application may also be lodged by a related person, an intermediary, a legal representative, a parent or legal guardian, public prosecutor or law enforcement agency. There is therefore no way a witness can be protected without prior application and assessment by the Agency. Since the office of the DPP has indicated witnesses are reluctant to testify, it needs to disseminate information about the protection measures that can be accorded to the witnesses in case of any threat they may face. If such information is availed to them, it may ease such reluctance. Further, protection measures ought to be requested and granted to witnesses at the investigation phase of international crimes. Thus far, the Witness Protection Authority holds routine awareness forums especially targeting the stakeholders like the police, the Directorate of Criminal Investigations, Ethics and Anti-Corruption Commission, Office of the Director of Public Prosecutions and the Judiciary. The Agency also conducts awareness campaigns through mass media especially radio and

¹³⁷ Human Rights Watch noted that most investigators were not trained enough to conduct the investigation of PEV cases.

¹³⁸ Training is already underway and the established international crimes division under the Office of Director of Public Prosecution is a step to ensure specialization.

¹³⁹ Witness Protection Act, Chapter 79, 2006; Witness Protection (Amendment) Act, 2010; The Witness Protection Regulations, 2011; Witness Protection Rules Legal Notice No. 224, 2015 and Witness Protection (Amendment) Act, 2016 (Act No. 45 of 2016).

television in order to reach the general public, to make them aware of the existence of the agency and the services that the agency offers. It must be noted that, the problem of witnesses' fear of reprisal and their protection is not one that is unique to Kenya. Other countries like Uganda and Rwanda, even international courts face a similar challenge.

6. Conclusion

The legal framework for the prosecution of international crimes in Kenya has greatly improved. Prior to 2008, the country had a very limited legal framework with the Geneva Conventions Act as the only instrument addressing core international crimes. After domesticating the Rome Statute through enactment of the International Crimes Act, Kenya has a very comprehensive law on all core international crimes. Despite the presence of this legislation, it has not been possible to prosecute perpetrators of crimes against humanity committed during the 2007 post-election violence under the heading of crimes against humanity. This has mainly been attributed to the principle of non retrospective application of law. As such, crimes against humanity have been prosecuted as ordinary crimes as shown in section four (4) of the article. While the practice of prosecuting international crimes as ordinary crimes addresses the issue of impunity for international crimes, there is still the lack of evidential weight that is normally attached to core international crimes.

Forfeiture of Criminally Acquired Property in Tanzania: Some Reflections on Historical and Socio-Economic Factors

*Abdulrahman O.J. Kaniki**

Abstract

Forfeiture of criminally acquired property, popularly known as asset recovery, is considered to be an effective mechanism of addressing serious and organised crime within national boundaries and across international frontiers. When carried out as expected, the mechanism has an impact of depriving criminals of their ill-gotten wealth thereby striking them at a point where it hurts most. Tanzania has a legal and institutional framework that deals with forfeiture of criminally acquired assets. However, having this framework is one thing and letting it to operate is another thing altogether. This paper focuses, albeit briefly, on efforts made to have a legal and institutional framework that is supportive and acts as a vehicle towards effective ill-gotten asset recovery in the country. It adopts a historical and socio-economic approach. The paper comes up with one main conclusion that despite some elaborate provisions of the law with some national and international dimensions, there is under-utilisation of the legal and institutional framework in place to deal with the issue of recovering proceeds of criminality. So far there are very few decided cases in which courts ordered forfeiture of proceeds and instrumentalities of crime. Whereas the paper attempts to outline some of the factors, which cause the under-utilisation of the framework in place, it leaves room for further studies in future on what should be done to address the situation.

1. Introduction

This paper looks at asset recovery, whereby criminally acquired assets are forfeited. The paper focuses on efforts made to have a legal and institutional framework in Tanzania that is supportive and acts as a vehicle towards effective ill-gotten asset recovery. In doing so, an historical and socio-economic approach is adopted. Most states the world over, Tanzania included, are suffering from massive swindling of wealth through criminal

activities that are perpetrated by criminals within national boundaries and across international boundaries.¹ Criminals who gang up into organised and networked groups take advantage of liberalised market economy together with technological innovations in terms of ease and fast communications to amass huge profits with less risky activities within and across national frontiers. The exact value is difficult to determine with accuracy. However, the United Nations Office on Drugs and Crime [UNODC] has estimated that between \$1 trillion and \$1.6 trillion are lost each year to various illegal activities.²

It is further estimated that corrupt public officials in developing and transition countries loot as much as \$40 billion each year, concealing these funds overseas where they are extremely difficult to recover.³ This figure is equivalent to annual GDP of the world's 12 poorest countries, where 240 million people live.⁴ In fact criminals always ensure that they conceal their profits from crime.⁵ One way of concealment is through channeling those assets into the financial system either locally or in foreign jurisdictions. Through such concealment, a massive cross-border flow of the global proceeds from criminal activities takes place thereby jeopardising socio-

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¹⁴⁰ Kaniki, A.O.J., "Transnational Crime and National Security: Issues and Options for Tanzania," **NDC Journal**, National Defence College-Tanzania, First Edition, July 2015, pp.25-37, at p.26.

² UNODC and World Bank, **Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan**, World Bank, Washington, DC, June 2007, p.10.

³ See Brun, J.P., *et al.*, **Asset Recovery Handbook: A Guide for Practitioners**, World Bank, UNODC, 2011.

⁴ Greenberg, T.S., *et al.*, **Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture**, The World Bank, Washington, D.C., 2009, p.7.

⁵ Lord Steyn notes in one of UK's leading asset recovery cases *R. v. Rezvi* [2003]1 AC 1099, 1146 that:

It is a notorious fact that professional and habitual criminals frequently take steps to conceal their profits from crime. Effective but fair powers of confiscating the proceeds of crime are therefore essential.

economic wellbeing of citizenry and posing a serious threat to security and stability of most developing and transition countries.

2. Conceptual Outlook of Asset Recovery

2.1 Definition and Rationale

Asset recovery is a recent concept, which has earned its prominence in the wake of efforts taken to curb serious and organised crimes that are profit-driven. The concern is that law enforcement machinery should ensure that criminals are deprived of their proceeds and instrumentalities of criminality so that crime does not pay. No one should be allowed to benefit from criminal activity. Benefit from crimes is considered to be against the general sense of justice.⁶ It is in this line of argument that several definitions that are given by authors on the term “asset recovery” have that bearing. The following attempts are to that effect. According to Piotr Bakowski, asset recovery refers to the seizure of property, without compensation, related to criminal activity.⁷ UNODC, too, defines “asset recovery” as a term used to describe efforts by governments to repatriate to the country of origin proceeds of crime hidden in foreign jurisdictions.⁸ Matthew Hitchcock Fleming is of the view that asset recovery means the process through which criminals are deprived of the proceeds and/or instrumentalities of crime.⁹

⁶ Ulfsdotter, I., “Sweden’s Forfeiture Regime in a Time of Change – A Comparative Study of Swedish and Australian Law Regarding Forfeiture of Unexplained Wealth”, Master’s Thesis, Faculty of Law, Lund University, 2012, p.14.

⁷ Bakowski, P., “Asset Recovery for Arab Countries in Transition,” Library Briefing, Library of the European Parliament, 16/05/2013.

⁸ UNODC, **Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime**, United Nations, Vienna International Centre, Vienna, Austria, September 2012, p.1.

⁹ Fleming, M.H., “An Examination of the Means of Establishing the Efficacy of Asset Recovery and Anti-Money Laundering Policies”, PhD in Public Policy Thesis, University College London, January 2008, p. 9. Source: <http://discovery.ucl.ac.uk/1444207/1/u591509.pdf>, accessed on 25th January, 2017.

Gathering from what is stated above, it may be argued that asset recovery is the process through which serious and organised crime activities are disrupted by depriving criminals of the proceeds and instrumentalities of crime through confiscation/forfeiture. The process encompasses a number of stages namely, identifying and tracing the proceeds and instrumentalities of crime; restraining them to avoid their dissipation; linking them to criminal activity and its perpetrators, confiscating them from perpetrators, and returning them to their true owners.¹⁰

2.2 Origins and Evolution of Asset Recovery

Asset recovery, which is effected through forfeiture, has a long history. Historically, forfeiture actions traced their way back to Roman law although some academics argue that they originated in Biblical times.¹¹ It is generally accepted that the origins and evolution of modern forfeiture laws in common law countries go back to the ancient English law of *deodand* (from *deo dandum* in Latin meaning ‘given to God’). Practices of *deodand* featured prominently during the medieval England especially after Julius Caesar’s invasion of Britain in 43A.D when England became a Roman province.¹² Under the *deodand* practices, a person’s property was the object of forfeiture to the Crown when the property was the instrument of a human fatality. The property was figuratively “given to God” even though the Crown confiscated the title.¹³ There was a strong belief that the Crown represented God. This was owing to the then existing legal order of linkage between church/religion and the state, where rulers were seen as a

¹⁰ Gray, L., K., *et al.*, “Few and Far: The Hard Facts on Stolen Asset Recovery”, World Bank, Washington, DC, 2014, p.15. Source: <http://star.worldbank.org/star/publication/few-and-farhard-facts-stolen-asset-recovery>, accessed on 28/10/2016.

¹¹ For some discussion on this aspect, see Van Jaarsveld, I.L., “The History of *in rem* Forfeiture-A Penal Legacy from the Past” **Fundamina: A Journal of Legal History**, (2006), Vol. 2, No.2, pp. 137-147, p.141.

¹² *Ibid.*

¹³ Krane, J.A., “Civil Forfeiture and the Canadian Constitution”, LL.M Thesis, Graduate Department of the Faculty of Law, University of Toronto, 2010, p.11.

combination of priest, magic man and king. The reason for “giving the property to God” is that such property that caused death or great injury was considered to have committed an offence against God. Put in other words, if the king’s subject died, an amount equal to the value of any inanimate object that was responsible directly or indirectly for the death had to be forfeited to the crown. In principle, what *deodand* required was that property should be forfeited if it violated the law¹⁴ and had to be redistributed in some way in the community either through charitable donations or masses for the victim’s soul.¹⁵ *Deodand* practices also required that where one of the king’s subjects was murdered and unfortunately the murderer was not identified, the local community had to pay the Crown the fine.¹⁶

As time went by, other forms of common law forfeiture were developed alongside *deodand*. These were forfeiture resulting from conviction for a felony such as treason and statutory forfeiture. Under forfeiture for felony, the estate of the criminal was forfeited to the crown upon conviction of a felony.¹⁷ The reason behind was to totally strip a convicted felon of his right to own property or transmit the same to an heir. Such person’s property was regarded as being corrupted by his crime. This was regarded as breaching the King’s law and therefore amounted to denial of the right to own property.

¹⁴ *Ibid.*, pp.141-144. See also Schwarcz, S.L and Rothman, A. E., “Civil Forfeiture: A Higher form of Commercial Law”? (1993) **Fordham Law Review**, pp. 289-291; Amani, N.P., “Civil Forfeiture in Tanzania: A Panacea for Recovering Illicitly Acquired Property by Politically Exposed Persons (PEPs)?,” **Eastern Africa Law Review**, Issue No. 2, Vol.41, December, 2014, pp.125-155, at p.133.

¹⁵ Stahl, M.B., “Asset Forfeiture, Burdens of Proof and the War on Drugs,” **Journal of Criminal Law and Criminology**, Vol. 83, No. 2, 1992, pp. 274-337, at p.295.

¹⁶ Friedman, D., “Asset Recovery: An Overview,” in Smith, I. and Owen, T. (Eds.), **Asset Recovery: Criminal Confiscation and Civil Recovery**, LexisNexis UK, London, 2003, pp.1-32, at p.2.

¹⁷ Jaarsveld, *op cit.*, pp.141-144.

Regarding statutory forfeiture, property used or acquired in violation of customs or revenue laws were to be forfeited. An example of such laws was the Navigation Laws of 1660, which required goods to be shipped in English ships. Any violation resulted in forfeiture of both the goods and the ship.¹⁸ The action was *in rem* against the object, and the owner had to file a claim to contest the forfeiture. Moreover, an “act of an individual seaman without the knowledge of the master or owner, could result in forfeiture of the entire ship.”¹⁹ This harsh result was justified as a penalty on the ship’s owner for negligently choosing his crew.²⁰

It would, however, be noted that *deodand* had over time lost much of its religious significance and by the nineteenth century, *deodand* forfeitures simply became another source of crown revenue. This was the situation until their ultimate abolition in 1846 when the UK Parliament introduced the Fatal Accidents Act.²¹ The Act allowed compensation to be awarded by a court to a deceased family for a wrongful death. Equally, the forfeiture of the property of a person convicted of a felony died away and the coming into force of the Forfeiture Act 1870 and the development towards a situation where forfeiture could only be undertaken to items that were immediately connected with a specific crime, not those representing the benefit from the crime.²² It is argued that these two English common law types of forfeitures, namely *deodand*, which involved the forfeiture of the value of property linked to death of one of the King’s subjects and forfeiture of the property of a person convicted of a felony withered away

¹⁸ Gordon, J.E., “Prosecutors who Seize too Much and the Theories they Love: Money Laundering, Facilitation, and Forfeiture,” **Duke Law Journal**, Vol.44, 1995, pp.744-775, at pp.746-747.

¹⁹ *Austin v. United States*, 113 S. Ct. 2801, 2807 (1993).

²⁰ *Ibid.*

²¹ The Fatal Accidents Act, 9&10 Vict.c.93 (1846) was commonly known as Lord Campbell’s Act.

²² Her Majesty’s Crown Prosecution Service Inspectorate, *et al.*, **Joint Thematic Review of Asset Recovery: Restraint and Confiscation Coursework**, Criminal Justice Joint Inspection, London, March 2010, p. 2.

with the rule of absolute monarchy.²³ One of the key factors that led to the decline of such types of forfeiture upon separation of church and state was the rise of private property and the consequential interests of state interference.²⁴ It was through legislative innovation that the common law protections of private property have given way to public interest legislative techniques designed to recover unlawfully acquired property. This qualification of the ordinary protections of private property was not similar to the original notion of ‘asset stripping’ of a convicted felon, which essentially involved the forfeiture of the felon’s right to own property *per se*.²⁵ Rather it introduced a new concept of asset recovery on the basis that property derived from the proceeds of crime was not in fact the property of the criminal.

All in all, it may be argued that the early forfeiture practices that went through the English common law jurisprudential development form a foundation of modern forfeiture laws that operate today especially in most former British colonies, including Tanzania.

3. Turning Crime into a Rewarding Economic Enterprise

All over the world there are relentless efforts by criminals to turn crime into a rewarding economic enterprise. One of the reasons behind is generally to acquire wealth and power that derives from possession of wealth.²⁶ It has been stated that:

Today, crime is seen as a business enterprise and individuals are drawn into it as a means of personal enrichment. Massive wealth is acquired through illicit means which, as a result, affects the socio-political and economic fabrics of the society.

²³ Friedman, *op cit*.

²⁴ *Ibid*.

²⁵ *Ibid*.

²⁶ Palmer, M.J., “White Collar Crime: Crime in Australia”, Paper Presented at The First National Outlook Symposium, Australian Institute of Criminology, Canberra, 5&6 June 1995, p.4. Source: www.aic.gov.au/events/aic%20upcoming%20events/1995/outlook95.html, accessed on 3rd April, 2017.

The gap between the rich and poor widens as the minority rich individuals take control of the major means of the economy while the majority are left to languish in poverty.²⁷

Criminals who gang up in organised syndicates with transnational characters are mainly attracted to continue committing crimes because they are able to enjoy the proceeds of their crimes and evade the legal consequences of such crimes either through lack of jurisdiction, complications involved in investigation, bribing government/law enforcement officials so that they do not take legal actions against them or otherwise. This enables them to maintain their power and cover their bad reputation in the society, thereby keeping them flourishing at the expense of the public peace.²⁸ This explains why there are continued global efforts to ensure that criminals do not profit from their criminal activities. It is very important to note that depriving criminals of their ill-gotten gains is tantamount to disrupting and dismantling their criminal organisations. Indeed, seizing the instrumentalities of crime prevents others from using the infrastructure in place.²⁹ In the last analysis, the goal underlying most criminals' conduct, that is greed for material gain, is frustrated. Hence confiscation of proceeds of crime has compensatory and deterrent effect. That is so because economic gain is the motive behind most criminal offences. If that gain cannot be realized; engaging in criminal activities becomes useless.

Penal laws, which involve punishments, have been in place since time immemorial. However, much as punishments are meted out in one way or the other, practice shows that most criminals retain the benefit in monetary

²⁷ Amani, *op cit*, p.127.

²⁸ Mganga, B.E.K., "Confiscation of Proceeds of Crime: The Law and Practice in Tanzania," **National Prosecutions Service Journal**, Issue No. 002 April-June 2013, pp.14-15, at p.14.

²⁹ According to UNODC, **Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime**, Publishing and Library Section, United Nations Office, Vienna, September 2012, at p.3, the term "instrumentalities," means the assets used to facilitate crime, such as a car or boat used to transport narcotics.

terms or otherwise from criminal activities while victims are left feeling let down by the criminal justice system. It has, so far, been proved that imprisonment and the imposition of suspended sentences as well as fines alone have failed to be a sufficient deterrent compared to the potential economic gains criminals stand to amass.³⁰ After all imposing custodial sentences is costly and criminals regard it as a temporary inconvenience. In fact the enormity of revenues derived from some crimes diminishes the deterrence capacity of traditional penal sanctions.

Therefore dispossessing criminals of assets they criminally acquired is undoubtedly a milestone towards addressing crime and criminal activities. While part of the wealth remains in the respective countries, the rest crosses borders and is hidden in foreign multi-jurisdictions. Such wealth is hidden in banks located in the financial havens. In this respect the most hit are developing countries, where there have been massive looting of public resources by public officials and private individuals from their respective countries. Such massive resources are stashed in foreign banks for their private ends while citizens continue to grapple with abject poverty.

4. Tanzania is not Spared

Tanzania is not spared from what has befallen other countries. Grand corruption and abuse of power that take place in high levels of the political system have recently featured prominently at the expense of national wealth.³¹ Grand corruption is also done by private individuals in the

³⁰ See Shaidi, L.P., “Tanzania Penal System: Retribution or Correction of Offenders,” **Eastern Africa Law Review**, Vols. 35-40, December, 2009, pp.171-195, at p.172. The author argues that the effectiveness of the deterrence theory is highly questionable especially on the notion that the criminal and his crime are the products of society.

³¹ For some detailed analysis of the drivers and consequences of grand corruption in public finance in Tanzania over the period of rapid economic growth from the end of the 1990s, see Gray, H.S., “The Political Economy of Grand Corruption in Tanzania,” **African Affairs**, 114/456, 2015, pp.382-403. Downloaded from <http://afraf.oxfordjournals.org/by David Irwin> on November 18, 2015. See also Amani, N.P., “Civil Forfeiture in Tanzania: A Panacea for Recovering Illicitly Acquired Property by Politically Exposed Persons (PEPs)?” *op.cit.*, pp.125-155.

country. A number of corruption scandals that were recently reported or unearthed raise eye brows. It is on record that the country has so far lost billions of shillings through corruption related scandals. Examples of such scandals are abound; including the Radar Equipment bought from UK's BAE Systems,³² the External Payment Arrears [EPA] scandal, the Richmond saga,³³ Alex Stewart (Assayers),³⁴ Bank of Tanzania Twin Towers³⁵ and VIP Lounge at JNIA.³⁶ The most recent one is the Tegeta

³² The money used to buy the Radar Equipment, i.e. USD 39,970,000, was recovered to the tune of 29.5 million pounds as *ex gratia* for the benefit of the people of Tanzania.

³³ See Parliament of Tanzania, **Hansard - Parliamentary Debates**, 6th February, 2008, pp.41-105 and 7th February, 2008, pp.43-99. The Richmond scandal concerned fraud and corruption in connection with a contract with American firm Richmond Department Company.

³⁴ *R. v. Basil Pesambili Mramba & Two Others*, Criminal Case No. 1200 of 2008, The Resident Magistrates' Court of Dar es Salaam, at Kisutu. In this corruption related case, former Minister for Finance, Basil Mramba, former Minister for Energy and Minerals, Daniel Yona, and former Permanent Secretary and the Treasury, Gray Mgonja, were taken to court for their involvement in wrongfully granting tax exemptions to the UK gold auditing company Alex Stewart (Assayers) Government Business Corporation, causing a Sh.11.7 billion loss to the Government of Tanzania. The trial court found Basil Mramba and Daniel Yona guilty and sentenced them to a three year jail term. The court however, did not order the two accused to pay the government Sh.11.7 billion for the loss caused. Nor did the High Court, on appeal by both prosecution and defence, order the two accused to pay the government this amount of money as compensation. (See *Basil Pesambili Mramba & Another v. R.*, Consolidated Criminal Appeals No. 96 of 2015 and No.113 of 2015, In the High Court of Tanzania, Dar es Salaam District Registry, at Dar es Salaam, Unreported).

³⁵ See *Amatus Joachimu Liyumba v. The Republic*, Criminal Appeal No.56 of 2010, The High Court of Tanzania (Dar es Salaam District Registry) at Dar es Salaam (Unreported), where the appellant who was the Director of Administration and Personnel [DAP] in the Bank of Tanzania [BoT] was charged and convicted by the trial court with two offences namely abuse of office and occasioning loss to a specified authority c/ss. 96(1) and 284(A)(1) of the Penal Code, Cap.16, [R.E.2002], thereby causing the Government of Tanzania to suffer loss of USD 153,077,715.71. He appealed to the High Court but his appeal was dismissed in its entirety. However, no compensation order was made against the accused/appellant.

³⁶ The Parliamentary Public Accounts Committee (PAC) proposed thorough investigation on the Chinese Company Sonangol International Ltd (CSIL), amid suspicions that the company has swindled the Tanzanian government. The move came as the Controller and Auditor General (CAG) report revealed that the company signed the Memorandum of Understanding (MoU) with Tanzania Airport Authority (TAA) and agreed to construct VIP Lounge at Julius Nyerere International Airport (JNIA) from 2006 to 2012, but it constructed the lounge below

Escrow Account scandal, which involved payment of 122 million USD. The scandal raised hot debates in the 2014/2015 Parliamentary sessions where Members of Parliament argued that the payment was shrouded in fraud, corruption and gross negligence.³⁷ Going by various sources of information, it is apparent that the country is losing a big amount of money through criminal activities, including corruption-related scandals and possibilities of recovering the same are very slim.³⁸

4.2 A Brief Historical Development of Asset Recovery Regime in Tanzania

5.1 Crime Situation Prior to Mid 1980s in Relation to Asset Recovery

Prior to the mid 1980s crime was traditionally treated as a local or national issue, and investigation and prosecution of crime were considered to be confined within national boundaries. The relative absence of transborder organised crime was due to the society's underdevelopment, in particular of infrastructure and communication systems, and its relatively low level of involvement in international trade.³⁹ As such the law enforcement machinery in the country could easily handle any situation. Generally speaking, a traditional mode of life prevailed in the country such that there was less vulnerability brought by organised crime as a global phenomenon. The most disturbing organised crimes of the time in the country included stock theft, the killing of witches, armed robbery, poaching and the

the agreed standard. See Nelson Kessy, "PAC wants probe on Chinese firm," *Guardian on Sunday*, 1st February, 2015. Source: <http://www.ippmedia.com/frontend/index.php?1=76927>.

³⁷ See Parliament of Tanzania, **Hansard - Parliamentary Debates**, 28th November, 2014, pp.64-328 and 29th November, 2014, pp.2-28.

³⁸ See Amani, **op cit.**, at pp.125-126 who recapitulates this ugly fact by stating that: In the recent past, Tanzania has witnessed a strong wave of corruption and illicit acquisition of assets allegedly by politically exposed persons who amass colossal sums of illicit money and deposit the loot in their offshore bank accounts. While this costs the government so dearly, efforts to retrieve illicit assets become largely limited....

³⁹ Bagenda, P.M., "Tanzania," in Gastrow, P. (Ed.), **Penetrating State Business-organised Crime in Southern Africa**, Volume 1, Institute for Security Studies Monograph No.86, 2003, pp. 74-93, at p.75.

cultivation of cannabis.⁴⁰ Putting it in other words, the crime pattern, as Mwema points out, was largely dominated by ordinary traditional offences such as simple thefts, sporadic incidents of armed robberies, simple forgeries and the like.⁴¹

5.1.1 Legal Framework in Place

The legal framework that was in place was tailored to fit the situation. It was to a large extent able to address the crime that was mainly traditional and local in nature. It would be appreciated that traditionally, the masterpiece of legal regime for defining crimes and prescribing their punishments in Tanzania has been the Penal Code⁴² and the most significant procedural law has been the Criminal Procedure Act.⁴³ Regarding matters related to evidence, the Evidence Act⁴⁴ has been the main source. Other laws that have supplemented the traditionally known masterpieces in the penal legal regime, but seen to be of limited use have included the Extradition Act, 1965,⁴⁴ the Fugitive Offenders (Pursuit) Act, 1969,⁴⁵ the Witness Summonses (Reciprocal Enforcement) Act, 1969⁴⁶ and the Economic and Organised Crime Control Act, 1984.⁴⁷

⁴⁰ The cultivation of cannabis (bhang) was mainly for local business and consumption. The local market was a factor for the flourishing of the business. According to figures obtained from Tanzania Police Force Headquarters, Criminal Statistics Section, 25,752 cases on cannabis fields destroyed by law enforcement agencies and being in possession of cannabis sativa countrywide were reported over in 1971-1985. There was a steady increasing in numbers of the reported cases countrywide over time.

⁴¹ Mwema, S.A., "Current Situation and Countermeasures against Money Laundering: Tanzania's Experience," 117th UNAFEI International Seminar Participants' Papers, Resource Material Series No.58, pp.428-436, at p. 428.

⁴² Cap. 16, [R.E. 2002].

⁴³ Cap. 20, [R.E. 2002]. This Act repealed and replaced the Criminal Procedure Code, Cap.20.

⁴⁴ Cap. 6, [R.E. 2002].

⁴⁴ Cap. 368, [R.E. 2002].

⁴⁵ Cap. 57, [R.E. 2002].

⁴⁶ Cap. 67, [R.E. 2002].

⁴⁷ Cap.200, [R.E. 2002]. This Act was enacted to repeal and replace the Economic Sabotage (Special Provisions) Act, 1983.

From what has been stated above, criminal law remained almost wholly territorial. Nobody would expect that organised criminal syndicates would one day go beyond the national boundaries with such dramatic force and speed. By then offences committed abroad were not a concern of national authorities, which were correspondingly, not willing to assist the authorities of other state to bring offenders to justice. Moreover, the legal framework of that time was largely capable of addressing these offences, which to a large extent revolved within and around the national boundaries. Although such laws namely, the Extradition Act, 1965,⁴⁸ the Fugitive Offenders (Pursuit) Act, 1969,⁴⁹ the Witness Summonses (Reciprocal Enforcement) Act, 1969⁵⁰ were in place, they were not actively operational. They were purposely enacted to facilitate the extradition of criminals and to follow in hot pursuit as well as secure witnesses across national boundaries. Given the traditional and local nature of crime by that time, these laws seemed to be dormant.

Notwithstanding the fact that some criminal offences such as stock theft, which was committed extensively in many parts of the country for economic gain generated proceeds of crime, the situation was not all that alarming. Economic gains accruing out of criminal activities did not raise much concern. As such there were no legal provisions seeking for forfeiture of proceeds and instrumentalities of crime. The Judicial System Review Commission of Tanzania, 1977 has stated in its report that there was no general power in a court to order the forfeiture of any instrument or article used in the commission of an offence or which is subject matter of the offence.⁵¹ This means that forfeiture of proceeds and instrumentalities of crime could not be undertaken. The Commission aptly puts it in one of the issues it raised:

⁴⁸ Cap.368, [R.E. 2002].

⁴⁹ Cap. 57, [R.E. 2002].

⁵⁰ Cap. 67, [R.E. 2002].

⁵¹ See The United Republic of Tanzania, **The Report of the Judicial System Review Commission**, Government Printer, Dar es Salaam, 1977, p.233, paragraph 14.1.

Under the existing law,... a taxi driver who uses his taxi to convey stolen property or property reasonably believed to have been fraudulently or otherwise unlawfully obtained is entitled to have his taxi back after the end of the case.⁵²

The Commission then recommended as follows:

We have carefully considered the issue of whether or not it is desirable in the interests of justice and the community to grant to our courts a general power to order forfeiture of property used in, or in connection with, the commission of a crime. We have reached the settled view that such a power should be granted to our courts [as] a matter of urgency.⁵³

However, it would be noted from the foregoing that the Commission's concern all along was property used in, or in connection with, the commission of a crime. There was no mention at all on proceeds of the crime. Moreover, the envisaged property used in, or in connection with, the commission of a crime appeared to be simple. According to the Commission's report, instrumentalities of crime of that time mainly included:

Real and personal property and choses in action, e.g. a bank account intended to be used for paying accomplices or informants, *et cetera*; a hide-out, e.g. alarm house; a bunch of skeleton keys; a jemmy; a flick knife; a motor-vehicle; radio equipment; etc.⁵⁴

Despite the fact that criminals somehow benefited from criminally acquired assets, economic gain consideration did not feature much in the minds of members of the Commission. This gives a true reflection of what was transpiring during that time to stakeholders responsible for addressing crimes in the country. They were traditionally preoccupied by and concentrated only on crimes and not proceeds accruing therefrom.

⁵² *Ibid.*, paragraph 14.2.

⁵³ *Ibid.*, paragraph 14.4.

⁵⁴ *Ibid.*

It may be argued that the enactment of the Economic and Organised Crime Control Act, 1984⁵⁵ and the Criminal Procedure Act, 1985⁵⁶ reflected much on the Commission's concern, calling for forfeiture provisions which limited to property used in, or in connection with, the commission of a crime. The two Acts have forfeiture provisions, which empower the court to issue an order to the effect that the property used in, or in connection with, the commission of a crime is either destroyed, disposed of or dealt with in any manner the court may specify.⁵⁷ All in all, there were no enactments throughout the period before early 1990s that had provisions on forfeiture of proceeds of crime. Neither did any law enforcement agency take stock of effects of proceeds of crime thereby coming up with mechanisms of addressing them.

5.2 Late 1980s Economic Reforms and their Impact on Crime

Economic reforms that started from mid 1980s have prompted the country to shift from state controlled mechanisms to an open market economy. In the process, the country's policies, legal and regulatory frameworks on investment have been adjusted to cope up with the newly established economy. The market economy led to the growth of Tanzania's trade and investment regionally and internationally under the attendant drivers namely, general process of globalisation and improved communications technology.⁵⁸ Globalisation has brought impacts to every aspect of life. It has eventually caused the world economy to undergo a profound transformation in terms of intensified trade, investment, financial transactions, information technology, capital and commodity mobility and

⁵⁵ Cap. 200, [R.E. 2002]. This Act was enacted to repeal and replace the Economic Sabotage (Special Provisions) Act, 1983.

⁵⁶ Cap. 20, [R.E. 2002].

⁵⁷ Section 23 of the Economic and Organised Crime Control Act, 1984, Cap. 200, [R.E. 2002] and section 351 of the Criminal Procedure Act, 1985 Cap. 20, [R.E. 2002].

⁵⁸ Kaniki, A.O.J., "Proliferation of Counterfeit Products in Tanzania: A Threat to Human Security," **The Tanzania Lawyer: Journal of the Tanganyika Law Society**, Vol. 1 No.2, 2014, pp. 42-73, at pp.42-43.

cooperation in security. All this has turned the world into a global village. As a result of globalisation many countries including Tanzania have inevitably opted for open market or liberalised economies in order to boost trade and become more competitive in the global marketplace.

5.2.1 Emergence of Transnational Crime in Tanzania

Criminals have taken advantages of opening up of the economies to commit transnational criminal activities in the country. With liberalisation of the economy and its attendant globalisation a number of crimes of cross-border nature have begun to emerge. This has been the case since the country has now been connected directly to the world economy. Putting it in other words, the increasing trade and cross-border activities in Tanzania have stimulated transnational crime. On the same note, new communication systems and digital technology have made dramatic changes in ways of life. Eventually, the improved communications technology has as well shaped the way transnational organised criminals use network structures to run their operations effectively and efficiently across the globe. As a matter of fact, organised criminal groups in Tanzania and beyond increasingly exploit information and communications technology to support operational activities. Such operations include sophisticated intelligence operations for gathering information on soft targets, reducing the groups' vulnerability, and identifying individuals they can corrupt for their objectives. In the course of such operations, the groups also make use of the information technology to commit identity fraud in order to sneak through the national boundaries.⁵⁹

Apart from globalisation of the economy and improved communications technology, porous borders have facilitated the escalation of crime situation in the country. The country's position on the East Coast of Africa

⁵⁹ Kaniki, A.O.J., "Proliferation of Counterfeit Products in Tanzania: A Threat to Human Security," *op cit.*, p.55.

makes it a strategic location for widespread transnational crimes. The fact that Tanzania is bordered by eight countries, namely Kenya, Uganda, Rwanda, Burundi, the DRC, Zambia, Malawi and Mozambique complicates the matter. Vast and highly porous borders are among the favourable conditions for the commission of transnational crime in the country. This observation is supported by the following facts:

- i. Security weakness within the borders, which makes it easy for criminals to criss-cross the borders with impunity.
- ii. Inadequate number of law enforcement personnel with insufficient resources.
- iii. Inadequate marine patrol vessels in the Indian Ocean and the lakes.
- iv. Few official entry and exit points such as Namanga, Horohoro, Sirari, Mtukula, Kigoma, Tarakea, Songwe and Tunduma, etc., along the borders with neighbouring countries but with several unofficial entries and exits [*panya routes*] that allow cross-border criminal activities to take place.

Corruption is another tool which facilitates the commission of transnational crime. By the mid 1990s, corruption in Tanzania was so rampant in all sectors of the economy as well as in politics.⁶⁰ Through corruption, transnational criminal groups co-opt government officials to compromise the ability of law enforcement, regulatory, or other agencies that are directly responsible with interdicting or eradicating such criminal groups. According to Horwood there is a large scale movement of men from East Africa and the Horn towards South Africa through smuggling, alleged corruption and complicity of national officials.⁶¹ Peter on his part

⁶⁰ See Heilman, B. and Ndumbaro, L., "Corruption, Politics, and Societal Values in Tanzania: An Evaluation of the Mkapa Administration's Anti-Corruption Efforts," **African Journal of Political Science** (2002), Vol.7 No.1, pp.1-19. Source: www.embamex.sre.gob.mx/kenia/images/stories/pdf/ajps007001002.pdf; accessed on 27th February, 2017.

⁶¹ Horwood, C., **In Pursuit of the Southern Dream: Victims of Necessity, Assessment of the Irregular Movement of Men From East Africa and The Horn to South Africa**, International Organisation for Migration (IOM), Geneva, 2009, p.9.

points out drug trafficking as among the notable serious and organised crimes where high level corruption takes place.⁶²

An increased number of immigrants has also had a share in the emergence of transnational crime in Tanzania. The opening up of the market economy under the banner of trade liberalisation has seen the country experiencing a massive influx of foreigners coming in the country for various purposes, including investment. It needs to be appreciated that immigration has been taking place since time immemorial. Balzer argues that the number of immigrants has been increasing the world over due to the following facilities:

- i. Transportation systems have improved and expanded dramatically, particularly airline and automobile travel; international tourism and business travel are at record levels;
- ii. Communication systems have improved and expanded most notably satellite and fiber optic telephone and television transmission, fax transmission, and computer information storage, processing, and transmission;
- iii. Reduction or elimination of many trade and travel restrictions between different parts of the world;
- iv. Expansion of world trade which has brought stronger participation by the economies of various regions of the world, making the world economic interdependence now a basic fact of life; and
- v. Population increase, resulting in more crowding, more areas of poverty, disease, and hunger, and

⁶² See Peter, C.M., "Combating Organised Crime in Tanzania," in Goredema, C. (Ed.), **Organised Crime in Southern Africa: Assessing Legislation**, Institute for Security Studies-Monograph 56, June 2001.

large movements of people across national borders.⁶³

The cumulative effect of these conditions is more people, more opportunities, more effective movement of people and information across national borders⁶⁴ and more opportunities and possibly reasons for committing crime. Among the people migrating, whether legally or illegally entering the countries, are criminals. Tanzania, being part of the globe, has been at a receiving end; grappling with all these kinds of people most of whom came under the umbrella of investment. It is therefore no wonder that the country has witnessed a drastic increase in total volume of criminal incidences, as Table 1 below indicates:

Table 1: Reported cases over the period between 1976 – 2015

Offences	1976-1985	1986-1995	1996-2005	2006-2015
Armed Robbery	2,313	5,795	10,107	11,569
Motorcycle Theft	339	861	98,125	24,607
Motor Vehicle Theft	91	1,861	2,037	3,686
Theft	6,233	68,718	101,305	135,047
Counterfeiting Banknotes	139	4,138	5,791	6,431
Stock Theft	16,239	39,843	59,498	24,479
Goods Smuggling	348	9,494	4,477	867
Cannabis Sativa(Bhang)	18,079	26,359	37,877	63,491
Unlawful Possession of Government Trophy	972	2,627	6,089	8,230
Total	44,753	159,696	325,306	278,407

Source: Tanzania Police Force Headquarters Criminal Statistics Section.

⁶³ Balzer, A.J., “International Police Cooperation: Opportunities and Obstacles,” **Policing and Eastern Europe: Comparing Firsthand Knowledge with Experience from the West**, College of Police and Security Studies, Slovenia, 1996. Source: <https://www.ncjrs.gov/policing/int63.htm>, accessed on 13th January, 2017.

⁶⁴ *Ibid.*

With new developments, however, the view that law enforcement and criminal justice machinery could easily handle any criminal situation in the country no longer held water. Eventually with rapid economic growth and global integration, crime in Tanzania and elsewhere has now been internationalised. It has acquired global characteristics. As such criminal activities are now being carried out without respecting national boundaries or sovereignty. In this regard Mr. Robert Manumba, former Director of Criminal Investigation in Tanzania, observed:

As you all know, crimes of today have assumed an internationalised character. The nature, form and pattern of crimes have drastically changed from traditional to new forms. This therefore pre-supposes that we as Law Enforcers have to accommodate such changes by keeping abreast with all the techniques relevant to counter these new patterns of crimes. Lagging behind is tantamount to declaring victory to the criminals.⁶⁵

The bottom-line here is that with technological advancement, communication improvement and porous borders, Tanzania has witnessed the emergence of new types of crimes in the country. To say the least, the nature, form and pattern of crime have drastically changed from traditional to new forms that are transnational. The country started witnessing serious and organised criminal activities including trade in illicit drugs, firearms trafficking, terrorism, trafficking in human beings, cyber crimes in the form of dissemination of obscene materials, hacking, theft from banks and financial institutions using ATM and Master Cards, grand corruption, smuggling, commercial poaching in game reserve areas and national parks, illegal logging, illegal fishing at high seas within EEZ, drug trafficking and abuse, human trafficking, illicit trade in small arms and light weapons, money laundering, fraud, the manufacture of fake bank notes, tax evasion, counterfeit goods and pharmaceuticals, major and serious frauds on the

⁶⁵ See a speech he made as Guest of Honour at a Closing Ceremony of Basic Finger Prints Course and Crime Scene Investigation Course on 14th November, 2003 at Dar es Salaam Police College. Manumba was by then Deputy Director of Criminal Investigation.

public revenue, embezzlement, misappropriation and theft of public funds and other malpractices.⁶⁶ Some of these serious and organised criminal activities came with a shock. They were alien to the traditional way law enforcement agencies used to deal with ordinary and local criminality. Law enforcement agencies were taken unawares, especially to activities related to cyber crime.

The transnational criminal groups exploited the country's strategic geosition, the gap created by unlimited opening up of the economy, the sophistication of those involved in the commission of the crime, the lack of technical capacity and capability to detect the crime, and ineffective or absence of appropriate legislation essential to deal with such type of crime. In Tanzania transnational crime began to be more pronounced than in the past hence posing a threat to the country. Tanzania was used as a transit and destination point mainly in drug trafficking, human trafficking, money laundering, car theft, etc.

Criminal organised groups or individuals, who are now highly sophisticated in terms of capacity and capability, well coordinated and technologically conscious, adapt and take advantage of changes that occur in the societies. They are currently becoming increasingly mobile and often take deliberate advantage of internal borders and, indeed, they are disregarding the borders between countries.⁶⁷

⁶⁶ Some of these serious and organised criminal activities are discussed by Feleshi, E.M., "Prosecution-led Investigation in Tanzania: The Role of the National Prosecutions Service in Criminal Investigations," **National Prosecutions Service Journal**, Issue No. 002 April-June 2013, pp.4-8, at p.6.

⁶⁷ Kaniki, A.O.J., "Transnational Crime and National Security: Issues and Options for Tanzania," *op cit.*, at p.26.

5.2.2 Wealth Amassing through Criminal Activities

Criminal groups have taken advantage of liberalised market economy together with technological innovations in terms of easy and fast communications to realise huge profits with less risky activities. The situation could be better explained as a scramble for wealth amassing through criminal activities. Criminals are ensured that they can continuously exploit any available opportunity to commit crimes that generate massive economic gains. They have turned crime into a rewarding economic enterprise. Armed robbery is a typical example, which illustrates the point. Armed robbery incidents caused great shocks in the country. There has been a sharp rise in bank robberies involving indigenous Tanzanians who colluded with foreigners from neighbouring countries as key players. It is, for instance, in records that between years 2001 and 2005, five major bank robbery incidents were reported, where billions of money were stolen. In all these incidents, local criminals had teamed up with foreign accomplices to commit the crimes.⁶⁸ Crime analysis shows that armed robbery incidents are among the serious offences through which criminals realise huge profits. Table 2 sheds some light:

⁶⁸ Mapunda, A.S., "Crime Trends in Tanzania," in REDET, **The Tanzania Police Force and Transition to Democracy**, REDET Workshop Papers 1, Dar es Salaam University Press, Dar es Salaam, 2008, pp.134-145, at p.135.

Table 2: Armed Robbery Cases Reported to Police Stations from 2001 to 2015

Year	Reported cases	Value of Property (TZS)
2001	1,047	3,112,933,891
2002	1,237	2,197,101,149
2003	1,111	1,973,305,882
2004	1,175	10,782,645,314
2005	1,080	2,441,029,339
2006	1,028	2,407,559,998
2007	977	3,249,572,344
2008	1,031	6,368,159,780
2009	1,409	9,654,477,126
2010	1,332	3,930,770,108
2011	1,271	3,550,619,348
2012	1,215	5,660,077,875
2013	1,266	6,330,762,174
2014	1,127	8,347,211,386
2015	913	7,169,631,863
Total	17,219	77,175,857,577

Source: Tanzania Police Force Headquarters Criminal Statistics Section.

Organised criminal groups have exploited the country's strategic geo-position, the gap created by unlimited opening up of the economy, the sophistication of those involved in the commission of the crimes, the lack of technical capacity and capability to detect the crime, and ineffective or absence of appropriate legislation essential to deal with such type of crime. In addition, they took advantage of border-control weaknesses and poor regulatory frameworks to operate across the borders less interruptedly. The

country had thus to grapple with both criminal activities, which are traditionally treated as local or national issues on the one hand and those which are transnational in nature on the other hand. The case of *Nuridin Akasha alias Habab v. Republic*,⁶⁹ leaves a history in the country of impounding a huge amount of drugs which were imported into the country in July, 1993.⁷⁰

Basing on what has been discussed above, the following observations are made. First, there was lack of specific provisions in the existing legal framework or absence at all of the penal law to criminalise the new emerging and modern crimes. Second, lack of necessary skills to detect and investigate such kind of new crimes on the part of law enforcement machinery complicated the matter. The country was seen as a soft target for organised criminal syndicates to operate with impunity. Third, criminals took advantage of such loopholes to commit various economic and financial crimes which enabled them to amass enormous illicit wealth. Liberalisation of the economy gave rise to the mushrooming of capital intensive economic undertakings in the form of real estates, hotel industry, banking and financial institutions. Most of such kind of economic activities were facilitating money laundering since they were a result of the financial returns directly or indirectly flowing from new emerging or modern crimes. The absence of strong financial intelligence mechanisms in the country enabled dirty money to be infiltrated into investments. One such investment was the MERIDIAN BIAO bank, which had offices in Tanzania, Zambia and in other countries in the world. This bank was opened by suspected criminals from Malaysia and after operating for some time, it wound up its activities abruptly leaving several account holders in

⁶⁹ [1995] T.L.R. 227 [CA].

⁷⁰ About 1,147,591 kilogrammes of mandrax drugs valued at well over US\$8,994,000 or well over TZS 4,997,500,000/= were impounded.

dilemma.⁷¹ The bank also wound up its activities in Zambia under similar circumstances.

5.2.3 The Need for New Laws to Supplement the Existing Ones

It is apparent that Tanzania, being part of the globe, is a target to different types of transnational crime. This is an indicator that there is a paradigm shift from the way crime was understood. Putting it in other words, there is a sharp shift from what crime was traditionally perceived. It would be appreciated that crime was traditionally treated as a local or national issue, and investigation and prosecution of crime were considered to be confined within national boundaries. Consequently, criminal law remained almost wholly territorial. However, with the emergence of transnational crime, the same has now assumed international characters. The country therefore, felt the need to adjust its law enforcement techniques to fight the new threat. It is apparent that penal legislation was in place. As stated earlier on, the penal legal regime was mainly traditional and effective to deal with local or national issues. However, with the emergence of new forms of crime which are transnational in nature, new laws have had to be enacted to supplement the traditional penal laws.

This explains why Tanzania has from the early 1990s onwards enacted several laws directly addressing criminal activities that are perpetrated by criminals within national boundaries and across international boundaries with a view to supplementing those which were in place. Evaristo Longopa puts it in the following words:

Combating criminality through enactment of new legislation to curb emerging crimes is prevalent in Tanzania. This is owing to the fact that new crimes emerge with time. Again, old crimes become sophisticated according to development attained by a particular

⁷¹ Mwema, *op cit.*, p.429. See also Makame, L.E., “The Law of Money Laundering and its Trend in the Banking Industry: The Case Study of Tanzania”, LL.M. Dissertation, University of Dar es Salaam, Dar es Salaam, 2003, p.118.

society in terms of economic, social or cultural and technological development.⁷³

More importantly, the fact that criminals continued to retain and enjoy the fruits of their crimes even after their criminal activities are detected called for the new law to deprive them of such proceeds of crime through forfeiture. Therefore, an appropriate machinery to trace and seize such assets which were hidden in and outside the country had to be established. The enactment in 1991 of the Proceeds of Crime Act⁷⁴ and the Mutual Assistance in Criminal Matters Act,⁷⁵ was to that effect. These two Acts are the main pieces of legislation to govern asset recovery regime in Tanzania.

The Proceeds of Crime Act⁷⁶ is aimed at ensuring that crime does not pay. It is designed to underscore that criminals cannot benefit from their ill-gotten wealth. That is achieved by depriving the criminals of the profits and instrumentalities of their crimes. The Act has forfeiture and confiscation provisions, which primarily suppress criminals' profit making and prevent the re-investment of that profit in further criminal activity. In order to facilitate the forfeiture, the Act, read together with the Mutual Assistance in Criminal Matters Act,⁷⁷ provides a mechanism for tracing, freezing and confiscating the proceeds of serious crimes committed against laws of Tanzania. The objects and reasons for enactment of the Proceeds of Crime Act, as contained in the Bill are:

... to introduce a new law fashioned to provide the most effective weaponry so far against major crime. Its purpose is to strike at the heart of major organised crime by depriving persons involved of the

⁷³ Longopa, E., "Cracking Down Criminality and Erosion of Banker's Confidentiality Obligation in Tanzania," **Eastern Africa Law Review**, Issue No. 2, Vol.41, December, 2014, pp.1-31, at p. 5.

⁷⁴ Act No.25 of 1991 Cap. 256 [R.E.2002].

⁷⁵ Act No.24 of 1991 Cap. 254 [R.E. 2002].

⁷⁶ Cap. 256 [R.E.2002].

⁷⁷ Cap. 254 [R.E. 2002].

profits and instrumentalities of their crimes. By so doing it will suppress criminal activity by attacking the primary motive, profit- and prevent the re-investment of that profit in further criminal activity....

Furthermore, the Bill, when taken together with the Mutual Assistance in Criminal Matters Bill, is expected to enable freezing and confiscation orders made by courts in the United Republic to be enforced abroad, and orders made in foreign countries in relation to foreign offences to be enforced against assets located in Tanzania.

The Mutual Assistance in Criminal Matters Act⁷⁸ provides for mutual assistance between Tanzania and foreign countries, on reciprocal basis, to facilitate the provision and obtaining of such assistance by Tanzania and to provide for matters related or incidental to mutual assistance in criminal matters. Assistance is mainly sought in relation to evidence and the identification and forfeiture of property. Both Acts came into operation on 1st May, 1994.⁷⁹

6. Asset Recovery: An Uphill Task

It should, however, be noted that recovery of illegally acquired public assets by a few individuals has not been easy. Such individuals who are criminals have powerful networks. For such assets to be recovered there has to be in place adequate legal and institutional frameworks. Tanzania has a conviction-based forfeiture system, which may be instrumental in asset recovery process. It means that confiscation and forfeiture orders must be preceded by conviction of an accused.¹⁰⁰ Indeed, the orders are in addition to any punishment the court may impose for an offence.

⁷⁸ Cap. 254 [R.E. 2002].

⁷⁹ See GN No.298/1994.

¹⁰⁰ See sections 9 and 14 of the Proceeds of Crime Act, Cap.256 [R.E.2002], which provide that conviction is one of the preconditions for the forfeiture order to be issued by the court.

All this is aimed to ensuring that the convict is denied enjoyment of the fruits of his criminal acts. It also serves as a deterrent and shows the state resolve to suppress the conditions that lead to unlawful activities. Indeed, the Proceeds of Crime Act,¹⁰¹ the Prevention and Combating of Corruption Act, 2007,¹⁰² and other related pieces of legislation have elaborate provisions regulating confiscation of criminal proceeds.

Challenges relating to Asset Recovery in Tanzania

Practice has shown that despite elaborate provisions of the law with some national and international dimensions, there is under-utilisation of the legal and institutional framework in place to deal with the issue of recovering proceeds of crime. There are a number of factors that cause under-utilisation of the legal and institutional frameworks. Among them are the following:

(a) Long and Cumbersome Procedures

As already noted earlier on, Tanzania has a conviction-based forfeiture system. It means that forfeiture orders must be preceded by conviction of an accused.¹⁰³ Such orders are in addition to any punishment the court may impose for an offence. From a practical point of view, criminal investigations and prosecutions take long thereby making the state bear costs of maintaining assets subject to preservation pending application for forfeiture orders. At times, the state incurs more costs than the value of the asset itself. Things get worse when in the end the court does not grant forfeiture orders.

(b) Unfamiliarity with Forfeiture Laws by Some Law Enforcement Officials

¹⁰¹ Cap.256 [R.E.2002]

¹⁰² Act No.11/2007.

¹⁰³ See sections 9 and 14 of the Proceeds of Crime Act, Cap. 256 [R.E.2002], which provide that conviction is one of the preconditions for the forfeiture order to be issued by the court.

The enactment of laws on asset recovery in Tanzania is a recent phenomenon. As noted above, despite the fact that the Mutual Assistance in Criminal Matters Act and the Proceeds of Crime Act were enacted in 1991 and came into operation in 1994, these and other laws that were enacted later on are still unfamiliar to some of the law enforcement officials. The fact that the enactment of the Mutual Assistance in Criminal Matters Act and the Proceeds of Crime Act in 1991 was largely engineered by developed countries in the UN and the Commonwealth contributes to the unfamiliarity. These laws are uniform in all commonwealth African countries. They are not homegrown but imposed and dictated to developing countries, including Tanzania, by developed countries, which have a bigger say in the UN and the Commonwealth platforms.¹⁰⁴ As such it is no wonder that some of them, out of unfamiliarity, do not invoke the provisions of these laws in order to apply for forfeiture orders before courts of law. This state of affairs has resulted into having majority of investigators who lack skills and knowledge on detecting and investigating asset recovery cases. As a result, it is no wonder that there have been insufficient collection and gathering of relevant information, which could assist in revealing of hidden assets either within or outside the country.

(c) Inadequate financial investigative skills and capacities

Financial investigation, which means the collection, analysis and use of financial information by law enforcement organs, has meaningful contribution to the recovery of illicitly acquired assets. As opposed to ordinary criminal investigation, financial investigation enables a financial investigator to have access to financial data sources, such as credit

¹⁰⁴ It should be made clear that the Mutual Assistance in Criminal Matters Act was a Commonwealth Secretariat draft, adopted by the Commonwealth Ministers of Justice conference and uniformly domesticated in the Commonwealth countries. More developed Member States of the Commonwealth take advantage of such laws to pursue their interests. Similar efforts have been made by the United Nations, which has also a “Model Treaty” on the subject.

reference data, tax records, records held by banks and financial institutions, etc. Such sources are instrumental in gathering and collecting evidence leading to asset recovery. They are instrumental because they reveal profiles of targeted suspects in relation to their economic activities.

(d) Insufficient Cooperation Among States

Regional efforts and international cooperation are necessary in effecting asset recovery. This stems from the reality that while part of the proceeds may remain in the country, the rest may cross the national boundaries. As such mutual assistance between two countries is inevitably required. However, the fact that nation states jealously safeguard their jurisdictions¹⁰⁵ over criminal justice matters has produced a world where criminal justice policies, institutions, procedures and laws vary widely and deeply between the many countries of the world. This has eventually been a snag to effective asset recovery. It needs to be understood that effective international responses are affected by insufficient cooperation among states, weak coordination among international agencies; and inadequate compliance by many states.

(e) Inadequate Resources

Asset recovery is a very long and demanding process. It involves the following stages: first, tracing and identifying the criminally acquired assets through institution of investigation, second, freezing and seizure of the assets, third, confiscation or forfeiture of identified criminally acquired assets and fourth, returning of the assets to the rightful owners. In all these

¹⁰⁵ The dual notions of national sovereignty and exclusive state jurisdiction over criminal law matters, which continue to be supported by the United Nations Charter and by international law in general, still feature prominently in the development of modern criminal justice systems, whereas national borders are becoming increasingly obsolete and irrelevant to criminal activities.

stages, physical and financial resources are required. However, budgetary constraints render asset recovery ineffective.

7. Conclusion

This paper has examined, with an historical backdrop, the development of asset recovery globally and in Tanzania. The paper has shown that the origins and evolution of forfeiture law worldwide has a long history. The main purpose of having such kind of discussion was to raise conceptual and contextual understanding of the asset recovery regime in an historical and socio-economic perspective. Moreover, the paper has underscored that the evolution of crime in Tanzania as necessitated by a number of factors such as economic reforms, globalisation, improved communications technology and porous borders has inevitably necessitated for adopting asset recovery regime. This regime signaled one major milestone towards curbing serious and organised crime in the country and elsewhere. However, application of asset recovery regime has not been to its expectations due to a number of factors, some of which were addressed by this paper. As a result there has been under-utilisation of the legal and institutional framework in place. This, it is argued, is a legal and practical puzzle that defeats the purpose of having national legislation and international instruments aimed at forfeiting criminally acquired property. There is a need for further future studies aimed at addressing this drawback.

Legal Regulation of Mobile Money Transfer Service in Tanzania

*Clara Mramba** and *N.N.N. Nditi***

Abstract

This paper examines the need for legal regulation of mobile money transfer services in Tanzania. It notes that mobile money transfer services are supposed to be regulated by two institutions, namely, the Bank of Tanzania – on the financial aspect – and the Tanzania Telecommunications Regulatory Authority – on the telecommunications aspect. It is pointed out in this paper that the two institutions ought to work in collaboration in order to protect the consumers of the services. It is observed that there is no legal framework to regulate mobile money transfer services in Tanzania and hence the need for such legal framework in order to protect consumers of such services.

1. Introduction

This paper examines legal regulation of mobile money service in Tanzania. Two institutions, namely, the Bank of Tanzania (BOT) and Tanzania Communications Regulatory Authority (TCRA) have the responsibility of regulating mobile money transfer with a view to, among others, protecting consumers.

Indeed, mobile money service has made life easy and enabled people to avoid queues at the bank halls and in paying utility bills. The service assists in providing quick and fast money to those who are far away or are unbanked. As for bank customers introduction of the mobile money service has enabled bank account holders to access their accounts with their mobile phones and do all the transactions anywhere in the world.

Unfortunately, fraudsters have not spared those using mobile services. It is common knowledge that fraudulent Sim swap is prevalent in the country

and this practice has caused loss of millions of money to a lot of people through mobile money. In spite of the advantages alluded to above the financial viability of the service needs to be monitored. At the moment the service remains unregulated and that is dangerous for the sustainability of the economy of the country.

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Mobile money transfer service¹ requires the integration of at least two major business industries in the country, namely, the telecommunication industry on the one hand and the banking industry on the other. In Tanzania the two industries are regulated separately. While the former is regulated by the Tanzania Communications Regulatory Authority² the latter is regulated by the Bank of Tanzania (BOT).³ Lack of integration leaves consumers of the service at crossroads when a problem arises in the mobile money service.

In Tanzania, as at 30th June 2016 the banking industry had forty one fully fledged commercial banks, three financial institutions and twelve community banks.⁴ Some of these

¹ A Mobile Money Transfer is the exchange of funds from one party to another through a brokered service provider. Building on that definition, a Mobile Money Transfer is the use of a mobile handset device to either initiate and/or complete the transaction. Traditionally, Money Transfers have been performed at brick and mortar locations and kiosks. By using a mobile infrastructure, service providers can access a new revenue stream by accessing this new service delivery channel. There is currently a vast Diaspora of technology based models for the delivery of Mobile Money Transfer (MMT) solutions ranging from SMS to native applications; however, success in enabling these services is not simply a function of purchasing and plugging in the required components. Establishing a MMT service that works is a balance of technology and understanding the underlying processes to enable quick, efficient, and secure transactions to end user ecosystem. (<http://www.mobile-financial.com/blogs/introduction-mobile-money-transfers> retrieved on 13th June 2013 at 5.20pm).

² Tanzania Communications Regulatory Authority Act, 2003 and the Electronic & Postal Communications Act, 2010.

³ The Bank of Tanzania Act, 2006.

⁴ BOT, "Directory of Financial Institutions Operating In Tanzania" (PDF). [Bank of Tanzania \(BOT\) June 2016.](#)

institutions engage in mobile money service provision. On the other hand as of August 2014 there were approximately 14 companies licensed to use Network Services by the Tanzania Communications Regulatory Authority.⁵ Four of these companies operate the mobile money transfer service to date.⁶

Mobile money service may take any one of the following forms.⁷ The first is that done between the mobile telecom operators. Under this form customers can send and receive money within and outside their network service provider.⁸ In this case the money transferred to the user of a different service provider will not affect the wallet of the one receiving, rather he will need to cash and deposit it into his own account. There is no interoperability.⁸ The second form is when the banks, upon being licensed and given the code by Tanzania Communications Regulatory Authority, allow their customers to use mobile money service such as checking the balance, getting notification when there is deposit or withdrawing from their accounts or any other activity in their account.⁹ Under this scenario

⁵ [http://www.TanzaniaCommunicationsRegulatoryAuthority.go.tz/index.php/licensing/licensed-operators/2-Tanzania Communications Regulatory Authority/39-network-services-licences](http://www.TanzaniaCommunicationsRegulatoryAuthority.go.tz/index.php/licensing/licensed-operators/2-Tanzania%20Communications%20Regulatory%20Authority/39-network-services-licences).

⁶ Airtel Tanzania Limited-*Airtel Money*, MIC Tanzania Limited (Trading as TiGO) - *TiGO Pesa*, Vodacom Tanzania Limited-*M-Pesa* and Zanzibar Telecommunication Company Limited (ZANTEL)-*Ezy Pesa*.

⁷ Operator-Centric Model, Bank-Centric Model, Collaboration Model and Peer-to-Peer Model.

⁸ Mobile-to-Mobile transfer model represents the ultimate adoption of Mobile Money Transfer services. In this model, consumers would be able to send funds from their mobile handset to their friends and family. Receivers would be alerted through their mobile handset of an incoming funds transfer. The transaction would be completed on the handset, and funds would be immediately decremented from the sender's account and credited in the receiver's account. Mobile-to-Mobile represents a significantly high level of consumer adoption.

⁸ Interoperability means the ability of the inter-network heterogeneous exchange of information. In case of mobile service, in case one sends money from a different network if the networks are interoperable the mobile wallet of the one receiving will be affected by the amount sent. That is yet to happen now in our country as one needs to withdraw that money from an agent and deposit it again to his account of a different operator that causes higher charges to consumers as every transaction is charged.

⁹ NMB Mobile service, PESA FASTA

mobile telephone operators enter into partnership relations with banks for provision of the mobile money service. The third form is where there is a combination of the two and more, in which the mobile telecom operators and banks enter into a partnership in which money can be transferred from the mobile wallet of the mobile telephone customer holding a bank account with the respective bank to his account and *vice versa*. This transfer can either debit or credit the bank account depending on whether the money is transferred from the bank to the mobile phone or the other way round. The same transfer also affects the balance of the mobile wallet directly as well. In this regard, today, a mobile phone has evolved from being a mere device for communication to a banking tool. In this sense the mobile phone is practically used as a teller/ATM of the banks. Such transfers of money through the mobile service have got attendant risks to customers of losing their money or facilitating anti-money laundering practices in the country. Apart from the risks alluded to above there are problems connected with the use of mobile services. Tanzania is a third world country; while it cannot run away from technological developments sweeping across the world, it is handicapped due to many reasons including poverty; as new technology is expensive. In addition there is the problem of illiteracy as technology needs highly qualified personnel to manage. There is also the problem of poor infrastructure. Most of the time new technology takes a poor country unawares and it is forced to adapt to keep up with the globalization phenomenon. With that situation service providers and customers find themselves in a confusing legal environment towards solving problems when they arise as the service stands unregulated.

This paper looks at the present regulatory regime of the mobile money service in the country with a special focus on telecommunication companies and banks. The licensing requirement for banks and telecommunication service providers will also be considered.

The business of deposit taking and money withdrawal is a primary domain of banks and other financial institutions. The Bank of Tanzania Act, 2006 gives a clear distinction between a bank and a financial institution. It

defines a bank as “an entity that is engaged in the banking business” and banking business is defined in section 3 to mean:

The business of receiving funds from the general public through the acceptance of deposits payable upon demand or after a fixed period or after notice, or any similar operation through the frequent sale or placement of bonds, certificates, notes or other securities, and to use such funds, in whole or in part, for loans or investments for the account of and at the risk of the person doing such business;

The Act defines a “financial institution” in section 3 to mean:

an entity engaged in the business of banking, but limited as to size, locations served, or permitted activities, as prescribed by the Bank or required by the terms and conditions of its licence.

The business of banking ran by banks and financial institutions is regulated by the Bank of Tanzania which puts strict compliance guidelines to safeguard customer funds.

In the recent years financial transactions have also been assumed by mobile phone operators¹⁰ who are regulated by a different regulator, the Tanzania Communications Regulatory Authority (TCRA). Unfortunately, TCRA regulates telecommunication services only and thus leaving the financial aspect of mobile business by the mobile operators unregulated. As pointed out above movement of money has a double effect in the mobile wallet and bank account at some point. This, of course, affects the liquidity of both the mobile operator and the bank. It becomes eminent that mobile money transactions need to be monitored and regulated properly for the sustenance of the economy.

¹⁰ The primary business of the mobile phone operators is the provision of the telephony services and other value added services not that of deposit taking and allowing withdrawals.

Mobile money service has brought into the Tanzanian financial inclusion most of the formerly unbanked population. This necessitates proper regulation of both industries by both regulators in collaboration with each other. Such collaboration may create a stronger economic environment as it will ensure that the players operate in a safe and sound manner, and that they operate in such a way that they can absorb risks that arise in their operations. While the cost of effective supervision is high, the cost of poor or no supervision at all may be even higher thus jeopardising the country's financial position. That being the case a strong and effective regulation is essential for maintaining stability and public confidence in the financial system. Strong and effective regulation is imperative because today a large population in the country depends on the mobile money service.

While mobile money service is relied on by many people, there are already reported incidences of incompleteness of transactions such as in the bill payments and customers getting stranded as to who they should approach for customer service/help desk to get the service they have already paid for. This brings chaos and disturbance to customers as they do not get value for their money.

In addition there are incidences of fraud in which a SIM card¹¹ is being swapped fraudulently¹² to a fraudster, who in effect gains access to a SIM card of another person and through a mobile service steals money from the bank account of the customer registered in the mobile money service.

¹¹ SIM card” means Subscriber Identity Module which is an independent electronically activated device designed for use in conjunction with a mobile telephone to enable the user of the mobile telephone transmit and receive indirect communications by providing access to telecommunication systems and enabling such telecommunication systems identify the particular Subscriber Identity Module and its installed information(section 3 of the Electronic and Postal Communications Act, 2010.).

¹² The fraudster gets the username, password, and mobile no. in some fraudulent manner and places request to replace the SIM and executes the unauthorized Banking transaction after getting the new SIM card. (<http://cybercrimevigilance.blogspot.com/2013/01/sim-swap-fraud.html>).

Again in this incidence the customer is likely to be rejected by the bank on the ground that the money was withdrawn through the mobile service. On the other hand the mobile service provider is likely going to insist that the money was never deposited with them and that the bank is responsible for the money stolen. This has been a practice and a number of customers' funds have been taken away without any recourse to their refunds. It is time now that the service were regulated to bring about a better and more sound economic environment.

2. Regulatory roles of the Bank of Tanzania in the Mobile Money Service

The principal functions of the Bank of Tanzania are well outlined under section 5 of the Bank of Tanzania Act, 2006. Firstly, the Bank is enjoined to exercise the functions of a central bank¹³ and, without prejudice to the generality of the foregoing, to formulate, implement and be responsible for monetary policy, including exchange rate policy, to issue currency, to regulate and supervise banks and financial institutions including mortgage financing, development financing, lease financing, licensing and revocation of licenses and to deal, hold and manage gold and foreign exchange reserves of Tanzania.¹⁴

Secondly, the Bank has the responsibility to compile, analyse and publish the monetary, financial, balance of payments statistics and other statistics covering various sectors of the national economy.¹⁵ Thirdly, in the pursuit

¹³ The entity responsible for overseeing the monetary system for a nation (or group of nations). Central banks have a wide range of responsibilities, from overseeing monetary policy to implementing specific goals such as currency stability, low inflation and full employment. Central banks also generally issue currency, function as the bank of the government, regulate the credit system, oversee commercial banks, manage exchange reserves and act as a lender of last resort. (<http://www.investopedia.com/terms/c/centralbank.asp>) Central banks also manages money supply and oversee commercial banks in their respective countries (https://en.wikipedia.org/wiki/Central_bank).

¹⁴ Section 5(1) of the BOT Act, 2006.

of its objectives and in the performance of its tasks, the Bank is endowed with the status of being autonomous and accountable as provided for under subsection (3) of section 5 of the Bank of Tanzania Act.

Apart from the principal functions, the Bank has been given regulatory and supervisory functions with respect to clearance system¹⁶ and settlement system¹⁷ as outlined under section 6 of the Bank of Tanzania Act, 2006, which provides:

6.-(1) The Bank shall–

- (a) regulate, monitor, and supervise the payment, clearing and settlement system including all products and services thereof; and
- (b) conduct oversight functions on the payment, clearing and settlement systems in any bank, financial institution or infrastructure service provider or company.

(2) The Bank may–

- (a) participate in any such payment, clearing and settlement systems;
- (b) establish and operate any system for payment, clearing or settlement purposes; and
- (c) perform the functions assigned by or under any other written law for the regulation of payment, clearing and settlement systems.

¹⁶ “clearing system” means a set of procedures whereby banks or financial institutions present and exchange data or documents relating to funds or securities transfer to other financial institutions at a clearing house and includes a mechanism for the calculation of participants’ bilateral or multilateral net positions with a view to facilitating the settlement of their obligations on a net or gross basis (section 3 of the BOT Act, 2006).

¹⁷ “Settlement system” means an arrangement established and operated by, or under the control of the Bank for the discharge of payment obligations and settlement obligations between settlement system participants (section 3 of the BOT Act, 2006).

From subparagraph (b) of subsection (1) of section 6 it appears that the Bank of Tanzania has been given power to conduct oversight functions on the payment, clearing and settlement systems in any bank, financial institution or infrastructure service provider or company. Mobile money operators and companies are probably included under that section. However, the Bank of Tanzania is yet to make regulations under section 70 for operationalization of its powers.

The Minister responsible for financial matters in the country is vested with powers to make regulations necessary or desirable to give effect to the provisions of the Bank of Tanzania Act. Such regulations must be published in the *Government Gazette* to take effect. However to date, nothing has been done with regard to the mobile money service that involves banks and mobile phone operators.

The primary objectives of supervision and regulation of banks and financial institutions by the Bank are to maintain the stability, safety and soundness of the financial system and to reduce the risk of loss to depositors.¹⁸ The Bank of Tanzania despite being aware of the fact that mobile phone operators, although not licensed to do banking business as required by law,¹⁹ take deposits from the general public,²⁰ for unknown reasons has kept mute on this. The Bank of Tanzania should have reacted to this as soon as it became aware of the practice to maintain the stability, safety and soundness of the financial system and to reduce the risk of loss to depositors.²¹ The objective to maintain the stability, safety and

¹⁸ Section 5 of the Bank and Financial Institutions Act, 2006)

¹⁹ Section 4, Section 6 and section 7 of the Bank and Financial Institutions Act, 2006)

²⁰ This is one of the permissible activities to the licensed banks and financial institutions under sections 24-25 of the Bank and Financial Institutions Act, 2006)

²¹ This could be achieved by excersing powers under sections 31-35; impose special duties as per sections 43-44; protect rights of depositors(section 53) and exercise power of seizure under section 58 impose default fine (section 66)of the Bank and Financial Institutions Act, 2006) in addition to those vested by the BANK OF TANZANIA Act, 2006 mentioned above.

soundness of the financial system and to reduce the risk of loss to depositors is jeopardized due to non-regulation of the mobile money service.²²

Section 6(2) of the Banking and Financial Institutions Act, 2006 criminalizes accepting of deposits from the general public by any person who has not been licensed by the Bank of Tanzania to engage in banking business. And, section 65 of the same Act clearly empowers the Bank of Tanzania to carry out investigations to satisfy itself about the legality of the activities of such person. Unfortunately, to the best of our knowledge the Bank of Tanzania is yet to satisfy itself about the legality of the transactions of mobile money service providers.

2.2 Regulatory Roles of the Tanzania Communications Regulatory Authority in the Mobile Money Service

The Tanzania Communications Regulatory Authority (TCRA) is the telecommunication regulatory authority in the country established under section 4 of the Tanzania Communications Regulatory Authority Act, 2003.

TCRA has been enjoined to perform the following duties:²³

- (a) Promote effective competition and economic efficiency;
- (b) Protect interests of consumers;
- (c) Protect the financial viability of efficient suppliers;
- (d) Promote the availability of regulated services to all consumers including low income, rural and disadvantaged consumers;
- (e) Enhance public knowledge, awareness and understanding of the regulated sectors including

²² While the BANK OF TANZANIA Governor is vested with the power to issue guidelines under section 71 of the Bank and Financial Institutions Act, 2006).

²³ Section 5 of the Tanzania Communication Regulatory Authority Act, 2003.

- (i) The rights and obligations of consumers and regulated suppliers;
- (ii) The ways in which complaints and disputes may be initiated and resolved;
- (iii) The duties, functions and activities of the Authority.

Under section 6 of the same Act,²⁴ TCRA has further been vested with, among others, the following functions:

- (a) To perform the functions conferred on the Authority by sector legislation;
- (b) Subject to sector legislation -
 - (i) to issue, renew and cancel licences;
 - (ii) to establish standards for regulated goods and regulated services;
 - (iii) to establish standards for the terms and conditions of supply of the regulated goods and services;
 - (iv) to regulate rates and charges;
 - (v) to make rules for carrying out the purposes and provisions of this Act and the sector legislation;
- (c) to monitor the performance of the regulated sectors including in relation to -
 - (i) levels of investment;
 - (ii) availability, quality and standards of services;
 - (iii) the cost of services;
 - (iv) the efficiency of production and distribution of services, and
 - (v) other matters relevant to the Authority;
- (d) to facilitate the resolution of complaints and disputes;
- (e) to disseminate information about matters relevant to the functions of the Authority;

²⁴ TCRA Act, 2003.

- (f) to consult with other regulatory authorities or bodies or institutions discharging functions similar to those of the Authority in the United Republic of Tanzania and elsewhere.

On the other hand the Electronic Postal and Communications Act, 2010 (EPOCA, 2010) has further elaborated and strengthened the functions and duties of TCRA by establishing its licensing obligation to the operators.²⁵ Through these powers TCRA is enjoined to issue unique codes to the telecommunication operators for the operation of the mobile money service.²⁶ Not only that, but it goes further and provides some unique codes to the banks (which are basically regulated by the Bank of Tanzania) for the purpose of providing mobile money service.²⁷ In using these unique codes, the banks use the platforms of the mobile telephone operators to provide mobile money services to their bank customers who are also using the mobile telephone service. This may happen even without any communication between the mobile telephone operator and the banks in some services. The mobile phone operators are not capable of establishing if their customers are enrolled in the mobile banking service. In this regard the telephone mobile operators' network and that of the banks are connected in a way that access to the simcard²⁸ is the access to the bank

²⁵ Section 4 of the EPOCA, 2010.

²⁶ Airtel Money code: *150*60#; TiGO Pesa code: *150*01#; M-Pesa code: *150*00#

²⁷ These may be in the form of Internet banking, sim-banking and mobile banking services. There are services like NMB Mobile (this has been one the earliest mobile banking service in the country) and there is also CRDB Sim-Banking just to mention a few. NMB Mobile Code:*150*66#; and CRBD Simbanking code:*150*03#; these are given by the TCRA.

²⁸ "SIM card" means Subscriber Identity Module which is an independent electronically activated device designed for use in conjunction with a mobile telephone to enable the user of the mobile telephone transmit and receive indirect communications by providing access to telecommunication systems and enabling

account of the customer by use of the PIN (password) that is originally set by the customer when enrolling with the service. Because of illiteracy of most customers on the risks associated with the use of the service, thieves use fraudulent ways to get the information of the customer to access their accounts online. This has been happening and many people from villages to towns have lost millions of money on such kind of incidences. The problem arises when the customer needs to recover his lost money. He would not know who to face; the bank or the mobile phone operator? If he goes to the bank he will be told that his money was stolen through his mobile phone and that they are not responsible. If he tries to approach the mobile phone operator the reply will be that the operator has no access to his bank account and after all he deposited the money with the bank and thus he should claim the money from the bank where he deposited the money. This is so because the service is not regulated; no one wants to take ownership of the problem and dodges it through blaming another while the customers are losing their money.

2.3 Challenges Experienced in the Mobile Money Service

The main challenges in the mobile money service in the country are the sim swap frauds and the incompleteness of transactions due to poor service which are discussed below.

2.3.1 Sim Swap Frauds

Sim Swap fraud²⁹ occurs when a fraudster, using social engineering techniques, dupes the victim's mobile phone operator into porting the victim's mobile number to a SIM in the possession of the fraudster and so starts receiving any incoming calls and text messages, including banking one-time-pass codes, which are sent to the victim's phone number. Sim swap porting is a common request and is therefore relatively easy for professional fraudsters to perpetrate.

such telecommunication systems identify the particular Subscriber Identity Module and its installed information.

²⁹ <http://www.finextra.com/community/fullblog.aspx?blogid=6358>

The fraudster can then perform transactions over a range of banking services such as internet banking; and when the bank tries to verify the transaction via the mobile, by either a voice call or SMS, the fraudster is able to confirm it and the transaction is authorised.

SIM Swap fraud is a type of Spear Phishing (targeted) attack. It is more complex than Phishing (duping) and is particularly insidious. The bad news is that a fraudster has decided to target an individual and has sufficient knowledge of the individual's personal details to be able to carry out these attacks. Also, because the attack is typically cross channel, individuals will not intuitively deduce that they are under attack. How many people would immediately suspect that their bank account was under attack if they suddenly stopped receiving calls on their mobile, for example? The fraudster gets the username, password, and mobile number in some fraudulent manner and places request to replace the SIM and executes the unauthorized banking transaction after getting the new SIM card.

In simple steps the *modus operandi* of sim swap fraud can be demonstrated as follows.³⁰ The fraudster needs to get One Time Password (OTP) and prevent the SMS alert from the bank to your registered mobile to carry out his fraudulent online transactions. The steps are:

1. Fraudster requests your Mobile service provider for replacement of SIM card citing reasons like loss of SIM or Mobile Handset etc. with fraudulent documents/information obtained from the customer by fraudulent manner.
2. The Mobile service provider deactivates the SIM and issues a new SIM; the delivery of which is taken by the fraudster on some pretext.

³⁰ <http://cybercrimevigilance.blogspot.com/2013/01/sim-swap-fraud.html>

3. Fraudster uses your username, password and OTP received in the new SIM.
4. Executes transaction/s, gets the SMS alert from Bank in the new SIM.
5. All this time, the real SIM holder is not aware of the transactions happening in his bank account.
6. During this time of cyber robbery, the SIM of real owner gets deactivated or the mobile will not get signal or the mobile will simply not work.

With the service being unregulated it will be a nightmare to curb down this problem. In a country like Tanzania it is not easy for a person to be alerted that his bank account is being accessed through his mobile phone. Surprisingly, most of the time the customers give away their passwords to fraudsters just because they, fraudsters, introduced themselves as working with either the mobile company or the bank.

Despite all that, it is the duty of TCRA as mentioned earlier to educate the public and generally protect the Tanzanian population. And, since money is involved, it is the duty of the Bank of Tanzania to ensure financial stability and protection of depositors. In this regard the Bank of Tanzania and TCRA have not shown how they use their regulatory powers to regulate this service.

2.3.2 Incompleteness of Transactions

This usually occurs in bill payments using the mobile money service. It has been a trend these days that you can purchase almost everything either online or through your phone.³¹ In accessing this service there may be more than two persons involved. These may be the mobile operator/bank on the one side and the utility bill provider on the other side. Sometimes there is a middle person who puts together the two. Mostly, it appears that a person pays for the service but does not get a reference number for the

³¹ Payment for LUKU, DStv, DAWASCO, Air and bus ticketing, fuel-refilling at petrol stations, supermarkets shopping and many other.

service paid for because the transaction for one reason or another, unknown to the customer, was not complete. In such a situation it is not clear whether the customer should approach the mobile phone operator/bank or the utility bill provider. Usually customers are not aware that a middle person is involved. Money was deducted from his mobile wallet, but did not reach the utility provider because it is hanging somewhere. Customers are being sent back and forth without resolution and most of the time they lose their money. There is a need to have proper guidance on how these services should be offered and avenues for customer complaints to resolve disputes when they occur. At the moment there is no such avenue.

2.4 The Impact of the Mobile Money Business in the Economy

Mobile money service is a very potential tool for the economic development of the developing countries due to the increased financial inclusion of the unbanked sector of the population in these countries. The faster money moves the better is the economy. It has been noted by one writer that, the full potential of mobile money has not yet been realized.³² That is so because 2.5 billion people in developing countries still lack a viable alternative to the cash economy and informal financial services. 1.7 billion of them have mobile phones, but the mobile money industry has found it challenging to launch and scale services for the unbanked because many policy and regulatory environments are not genuinely enabling.³³

The digital financial inclusion environment and a cash-lite economy would enable customers of small businesses to keep electronic records of their transactions, banks would use the ubiquitous distribution networks of third parties to deliver credit products, third parties would play a role in educating consumers, and microfinance institutions (MFIs) would have access to a new group of customers that are already using digital

³² Simone di Castri, “GSMA – Mobile Money for the Unbanked, Mobile Money: Enabling Regulatory Solutions”, Annual Report, February, 2013.

³³ Ibid.

transactions. But to achieve this there must be tailored Know Your Customer (KYC) procedures and other efforts to ensure this occurs. Due to the interaction of the services between the telecommunication industry and the banking industry, it is important now that regulators of the industries join hands to enable sustainability of the service for the growth of the economy. This is so because their regulation will enable driving innovation into mobile financial services and building inclusive, secure, and efficient financial sectors.

The potential of mobile money in the developing countries is clear because of the following reasons. First, there were 5.9 billion active mobile connections worldwide in 2012. The number of GSM mobile connections doubled in the last four years in Africa and South East Asia, and more than tripled in South Asia. The total number of unique mobile subscribers is 3.2 billion (46% of the world's population) and it is forecast to grow to 4 billion in five years.³⁴

Secondly, out of the 2.5 billion people in the world who still lack access to the financial system,³⁵ 1.7 billion have mobile phones.³⁶ Thirdly, Mobile Number Operators (MNOs) are much more experienced than banks in building and managing large, low-cost distribution networks in un-served areas. The largest MNO in a developing country has 100–500 times more airtime resale outlets than banks have branches.³⁷ In addition mobile

³⁴ "GSMA Announces New Global Research that Highlights Significant Growth Opportunity for the Mobile Industry," Press release, 18 October. 2012, <http://www.gsma.com/newsroom/gsma-announces-newglobal-research-that-highlights-significant-growth-opportunity-forthe-mobile-industry>.

³⁵ The Global Financial Inclusion (Global Findex) Database, <http://econ.worldbank.org>.

³⁶ CGAP, GSMA, and McKinsey & Company "Mobile Money Market Sizing Study." The figure is reported in Mark Pickens (2009), "Window on the Unbanked: Mobile Money in the Philippines," CGAP Brief. Available at http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2012/06/br_mobile_money_philippines_d_30.pdf.

³⁷ Claire Alexandre, Ignacio Mas, and Dan Radcliffe. (2010), "Regulating New Banking Models that can Bring Financial Services to All," Bill & Melinda Gates Foundation paper, August 2010. Available at http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1664644.

money transactions have begun to represent significant proportions of national GDP – 60% in Kenya, 30% in Tanzania and 20% in Uganda.³⁸ The potential growth of the service calls for its regulation so that it becomes a grace not disgrace to the economy of a country.

3. Conclusion

It has been pointed out above, that while the laws are clear on the functions, duties and powers conferred on the regulators, namely the Bank of Tanzania with regard to the banking business and the Tanzania Telecommunications Regulatory Authority, with regard to the telecommunication industry, neither regulator seems to be much concerned with mobile money service. Since the mobile money service has to do with money one would expect the Bank of Tanzania to be primarily involved in its regulation. With regard to the communication part, TCRA has been empowered to issue licence; however, such licence does not cover monetary transactions. This being the case it seems there is a grey area. It is submitted that the grey area should be addressed by the Bank of Tanzania in collaboration with the Tanzania Communications Regulatory Authority.

³⁸ Posted by: [Wayan Vota](#) on June 3, 2013.

Tags: [DfID](#), [Financial inclusion](#), [GSMA](#), [M-KOPA](#), [M-PESA](#), [Mobile Enabled Community Services](#), [Mobile Money](#), [Mobile Phone](#), [Somaliland](#), [Technology Salon](#)

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Legal Dimension on Protection of Outstanding Universal Value Properties in Tanzania: A Dilemma for Development Activities in the Selous Game Reserve

*Evaristo E. Longopa**

Abstract

This paper examines the legal status of the Selous Game Reserve (SGR) as one of the properties with Outstanding Universal Value (OUV) status in the World Heritage List (WHL) in relation to ongoing economic activities within it. The article articulates existing national and international legal framework for management of the Selous Game Reserve. It demonstrates that Tanzania has obligations under international law to ensure sustainable management of wildlife resources. The ongoing activities in the Selous Game Reserve put Tanzania into a dilemma due to the fact that national legislation somehow permits developmental activities while international law is against such activities in SGR. It is recommended that Tanzania should adhere to its international obligations under the World Heritage Convention in order to ensure sustainable management of the Selous Game Reserve and promote tourism in the Southern corridor.

Introduction

Tanzania is endowed with diverse natural and cultural resources which are important nationally and globally.¹ These resources are protected under, mainly, municipal laws. The laws cover such aspects as national parks, game reserves, forest reserves, wildlife resources, game controlled areas and archeological sites. Some of these resources are recognised and protected by international law. These are considered to be protected not only for the benefit of the State in which they are located but also for the

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¹ See United Republic of Tanzania, **The Wildlife Policy of Tanzania**, Dar es Salaam, Ministry of Natural Resources and Tourism, 2007, pp.4-7.

whole humankind. These resources are regulated by, among others, the Convention concerning Protection of Cultural and Natural Heritage of 1972 which was adopted under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO).² They are known as Properties of Outstanding Universal Value (OUV). Their recognition at the international level is due to their unique nature and the value they hold from science or conservation perspectives. Such properties are managed as world heritage; and such management requires State Parties to adhere to agreed international legal principles to ensure enjoyment of international recognition.

1. Protection of Natural Heritage in Tanzania: An Overview

What amounts to a natural heritage has been categorically stipulated under the Convention concerning Protection of the World Cultural and Natural Heritage of 1972. The Convention defines natural heritage to mean anything that falls within any one of three main categories, namely, (a) natural features consisting of physical and biological formations or groups of such formations; (b) geological and physiographical formation and precisely delineated areas constituting habitat of threatened species of flora and fauna; and (c) natural sites or precisely delineated natural areas. These must have an outstanding universal value from the aesthetic or scientific point of view or science or conservation or natural beauty point of view.³ A natural heritage may fall under any of these categories or a combination of them.

Tanzania is a State Party to the 1972 Convention concerning the Protection of Cultural and Natural Heritage; and has a number of resources which form part of the World Heritage List. In total, Tanzania has seven protected areas which are inscribed in the World Heritage List. Three of them are

² On 2nd August 1977, Tanzania ratified this Convention wholesale without any kind of reservation.

³ Article 2 of the Convention concerning Protection of World Cultural and Natural Heritage, 1972.

natural sites, namely, the Serengeti National Park (1991), the Selous Game Reserve (1982), and Kilimanjaro National Park (1987). In addition there are cultural sites, namely, the ruins of Kilwa Kisiwani and Songo Mnara (1981), the Stone Town of Zanzibar (2000) and Kondoa Rock-Art Site (2006); there is yet another site which is a mixed site, namely, Ngorongoro Conservation Area (NCA).⁴ In 2010, the Ngorongoro Conservation Area (NCA) was categorized as mixed site enjoying both natural and cultural heritage site's values. The changes from natural site took into account recognition of the cultural aspects due to its rich history, palaeontological and archeological characteristics.⁵

2. Criteria and the Process of Inscribing Properties in the World Heritage List

Properties to be inscribed in the World Heritage List (WHL) need to meet the set criteria adopted by the World Heritage Committee upon considering a number of applications by the State Parties to the Convention. There are a total of ten main criteria for inscribing any property to the WHL either as a natural or cultural heritage. These criteria include that the property should:

⁴ <http://whc.unesco.org/en/statesparties/tz> as visited on 19th January 2017.

⁵ Olenasha, William, "A World Heritage in the Ngorongoro Conservation Area: Whose World? Whose Heritage?" in Stefan Disko and Helen Tugendhat, **World Heritage Sites and Indigenous Peoples' Rights**, IWGIA, Forest People Programme and Gundjeihmi Aboriginal Corporation, Copenhagen-Denmark, 2014, pp. 195-197. See also <http://whc.unesco.org/en/list/39> as visited on 19th January 2017.

(i) represent a masterpiece of human creative genius; (ii) exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design; (iii) bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared; (iv) be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history; (v) be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change; (vi) be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance. (The Committee considers that this criterion should preferably be used in conjunction with other criteria) ; (vii) contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance; (viii) be outstanding examples representing major stages of earth's history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features; (ix) be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals; and (x) contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those

containing threatened species of Outstanding Universal Value from the point of view of science or conservation.⁶

The inclusion of Selous Game Reserve in the World Heritage List was based on criteria (ix) and (x) of these criteria. Selous Game Reserve is renowned for being home of extraordinary populations of large mammals, including African elephant (*Loxodonta Africana*), black rhinoceros (*Diceros bicornis*) and wild hunting dogs (*Lycaon pictus*). It also includes one of the world's largest known populations of hippopotamus (*Hippopotamus amphibius*) and buffalo (*Syncerus caffer*).⁷

Inscription in the World Heritage List requires that a property should meet one or more of the criteria set out by the World Heritage Committee. The inscription of a property which meets the criteria for inclusion in the World Heritage List is within the mandate of the State Party to initiate. It is the State Party which is mandated to submit an inventory of the property forming natural heritage on suitability for inscription. The inventory should include documentation about location of the property and its significance.⁸ The nomination of the property for inscription is addressed fully in the Guidelines. The State Party intending to nominate any natural heritage property to be included in the WHL ought to include initial preparatory work to establish that a property has the potential to justify Outstanding Universal Value, including integrity or authenticity, before the development of a full nomination dossier.⁹

The nomination should include identification of the property; description of the property; justification for inscription; state of conservation and factors affecting the property; protection and management; monitoring;

⁶ See Article 11 (2) and (5) of the World Heritage Convention and Paragraph 77 of the Operational Guidelines for Implementation of the World Heritage Convention.

⁷ UNESCO World Heritage Centre-IUCN, Reactive Monitoring Mission Selous Game Reserve (United Republic of Tanzania, 02 to 11 December 2013, pp. 7-10)

⁸ Article 11 (1) of the Convention.

⁹ Paragraphs 120 to 123 of the Guidelines.

documentation; contact information of responsible authorities; and signature on behalf of the State Party.¹⁰ It is on this role played by the State Party towards inscription of the property as an OUV which makes the Convention refer to the consent of the State Party.¹¹

The next step is the registration of the nomination. This is done by the World Heritage Secretariat which checks the completeness of the nomination documents and registers the nomination.¹² Normally, evaluation of the property by advisory bodies follows and in cases of natural heritage the mandate is vested in the International Union for Conservation of Nature (IUCN). The Advisory Bodies may recommend for inscription without reservation, not recommend or propose deferral and referral of the nomination.¹³

Another step is for the World Heritage Committee to make a decision guided by the recommendation of advisory bodies. The decision may either be to inscribe or not to inscribe in the World Heritage List, to defer or refer.¹⁴ Any decision to inscribe the property in the list entails adopting a Statement of Outstanding Universal Value for the property including identifying criteria upon which the property is inscribed, as well as the assessments of the conditions of integrity and for cultural and mixed properties authenticity. It should also include a statement on the protection and management in force and the requirements for protection and management for the future. The Statement of Outstanding Universal Value forms the basis for the future protection and management of the property.¹⁵

¹⁰ See Paragraph 130 of the Guidelines.

¹² See Paragraphs 140 -142 of the Guidelines.

¹³ Paragraph 143, 145, and 149-151 of the Guidelines.

¹⁴ Paragraph 153 of the Guidelines

¹⁵ Paragraphs 154 and 155 of the Guidelines.

A State Party to the Convention's expression of willingness through submission of a property nomination for inclusion in the World Heritage List is evidence that such State is fully aware and ready to be bound by the provisions of the Convention and its attendant regulations and guidelines. It is clear that undergoing this rigorous process prior to inscription of the property is not done only as a matter of procedure but rather a need to acquire international legal protection and recognition for benefit of the State Party and the world at large.

That is why Kameri-Mbote argues that:

Member states to this Convention can seek to have nationally important cultural, historical or natural sites recognised and listed as internationally important. Once the sites are added on the World Heritage List, they qualify for support from the international fund set under the convention to facilitate preservation. It is noteworthy that State sovereignty is not infringed upon at all because the procedure, though international [sic] devised, is voluntary.¹⁶

3. Legal Framework for Protection of the Selous Game Reserve (SGR) Heritage Site

4.1 International Legal Framework for Protection of the Selous Game Reserve

Under international law, the Selous Game Reserve may be regulated by three main international legal instruments, i.e., the Convention on Biological Diversity (CBD) of June 1992, the Convention on International Trade on Endangered Species (CITES), 1973 and the Convention concerning the Protection of the World Cultural and Natural Heritage of 1972 (World Heritage Convention) with its guidelines. The CDB and

¹⁶ Kameri-Mbote, P (2005), "Sustainable Management of Wildlife Resources in East Africa: A Critical Analysis of Legal, Policy and Institutional Frameworks," *IELRC Working Paper No. 5*, Geneva, International Environmental Law Research Centre, p. 11. See <http://www.ielrc.org/content/w0505.pdf> accessed on 26th January 2017.

CITES are most appropriately applicable legislation in the sustainable management of the Selous Game Reserve as a protected area under the municipal and international law. However, in respect of management of the Selous Game Reserve from a natural heritage perspective the World Heritage Convention is the most appropriate law.

The primary duty on identification, protection, conservation, presentation and transmission to the future generations of the cultural and natural heritage is entrusted to a State Party.¹⁷ A State Party is called upon to apply its resources to ensure protection of natural heritage with a possibility of obtaining international assistance and co-operation in terms of financial, artistic, scientific and technical assistance.¹⁸

Accordingly all State Parties recognize that such heritage constitutes a world heritage whose protection is the duty of the international community as a whole. Further, State Parties undertake to give their assistance in the identification, protection, conservation and presentation of the natural heritage if the State in whose territory the heritage is situated so requests.¹⁹ This provision is important for two main reasons. First, it recognizes the status of the heritage to be internationally legal protected property. Both municipal and international legal regimes would apply to the property. Second, every State Party accepts the obligation to take part in the processes of protection, conservation and preservation of the natural heritage.

Further, the Convention creates a trust fund for the protection of the World Cultural and Natural Heritage of Outstanding Universal Value designated as the World Heritage Fund.²⁰ A State Party like Tanzania may request for financial assistance from the Fund for a World Heritage situated in that

¹⁷ Article 4 of the World Heritage Convention.

¹⁸ *Ibid.*

¹⁹ See Article 6(2) of the Convention.

²⁰ Article 15 of the Convention.

particular state's territory.²¹ Such request must contain information which defines the operation contemplated, the work that is necessary, expected cost, the degree of urgency and the reasons why the resources of the requesting State do not allow it to meet all the expenses.²² An experts' report should support the request for financial assistance. Where the request is for addressing natural calamities it is categorized as a request that requires utmost urgency and must be accorded the highest priority from the Committee's reserve fund for contingencies.²³

The Convention stipulates the forms of international assistance from the Fund to include studies concerning the artistic, scientific and technical problems raised by the protection, conservation, preservation or rehabilitation of the heritage; provision of experts, technicians and skilled labour to ensure carrying out correctly of approved work; training of staff and specialists in sustainable heritage management; supply of equipments which the State concerned does not possess or is not in position to acquire; low interest or interest free loans that may be repayable on long-term basis; and in exceptional cases and for special reasons granting of non-repayable subsidies.²⁴ Kameri-Mbote argues that the incentives are the international recognition gained from enlisting the sites on the World Heritage list and the financial assistance accorded to members. This approach has been extremely successful in enlisting state support for conservation measures of sites of recognized international importance.²⁵

International assistance on a large scale would be dealt with in a different manner. It requires that detailed scientific, economic and technical studies

²¹ Article 19 of the Convention.

²² Article 21 (1) of the Convention.

²³ Ibid, Article 21(2) of the Convention.

²⁴ Article 22, *ibid*.

²⁵ Kameri-Mbote, P (2005), Sustainable Management of Wildlife Resources in East Africa: A Critical Analysis of Legal, Policy and Institutional Frameworks, *IELRC Working Paper No. 5*, Geneva-Switzerland, International Environmental Law Research Centre, p. 11. It is found at [http:// www.ielrc.org/content/w0505.pdf](http://www.ielrc.org/content/w0505.pdf) accessed on 26th January 2017.

must precede such large scale international assistance. Article 24 of the Convention caters for the large scale international assistance in protection of natural heritage. The guiding principle is that only part of the cost of work necessary should be borne by the international community. A State Party is obliged to contribute a substantial share of the cost to undertake each programme or project unless the resources of that State Party do not permit.²⁶ Further, State Party is required to report to the General Conference of UNESCO on legislative and administrative provisions adopted and all other pertinent actions taken to ensure that natural heritage are well protected, conserved, preserved or rehabilitated.²⁷

3.2 Domestic Legal Framework for Selous Game Reserve World Heritage Site

There is an extensive legislative framework with bearing to protection of natural heritage in Tanzania. These laws range from the Constitution, framework environmental law and sector legislation.

The Constitution of United Republic of Tanzania is the fundamental law of the land which provides an overall framework for the management of natural heritage in Tanzania. Though not detailed on natural heritage protection, the Constitution has a number of provisions relevant to natural heritage protection. For instance, the Directive Principles of State Policy requires the state authority and all its agencies to be obliged to direct their policies and programmes towards ensuring that the laws of the land are upheld and enforced, and that activities of the Government are conducted in such a way as to ensure that the national wealth and heritage are harnessed, preserved and applied for the common good.²⁸

²⁶ Article 25, *ibid*.

²⁷ Article 29 of the Convention.

²⁸ See Article 9(b) and (c) of the Constitution of United Republic of Tanzania, Cap. 2 [R.E. 2002].

This part of the Constitution sets the ground for inclusion of the protection of natural heritage. The Directive Principles set a guide as to what the State intends to address in the whole process of governance of the State. They form an important part of the Constitution and, indeed, they are the spirit and core of the Constitution. The negative side of the Directive Principles is that they are not justiciable.²⁹ Inclusion of issues on protection of natural heritage in the part on fundamental objectives and directive principles of State policy cannot render them meaningless. On this point Kabudi argues that:

the fundamental objectives and directive principles of state policy remain to be significant both to the constitution and in the development a new culture of constitutionalism and accountability in Tanzania, especially after the recent re-introduction of pluralism in politics.[sic]³⁰

More relevant and pronounced provisions of the Constitution on the protection of the natural heritage are those covered under Part III of Chapter two of the Constitution under the Bill of Rights. The Constitution imposes a duty on every person to protect the natural resources of the United Republic, the property of the state authority, all property collectively owned by the people, and also to respect another person's property.³¹ This duty is a mandatory obligation to all persons without any exception. The Constitution states further that:

all persons shall be required by law to safeguard the property of the state authority and all property collectively owned by the people, to combat all forms of waste and squander, and to manage the

²⁹ Article 7(2) of the Constitution states that "The provisions of this Part of this Chapter are not enforceable by any court. No court shall be competent to determine the question whether or not any action or omission by any person or any court, or any law or judgment complies with the provisions of this Part of this Chapter."

³⁰ Kabudi, P.J (1995), "The Directive Principles of State Policy versus Duties of the Individual in East African Constitutions," **Law and Politics in Africa, Asia and Latin America**, Vol. 28, No. 3 (3. Quartal 1995), pp. 272-303, at p.302. It was sourced at <http://www.jstor.org/stable/43110638> on 22nd January 2017.

³¹ Article 27(1) of the Constitution of United Republic of Tanzania, Cap 2 R.E. 2002.

national economy assiduously with the attitude of people who are masters of the destiny of their nation.³²

It has been argued that “this provision of the Constitution implements the public trust doctrine as the protection of natural resources is accommodating the perception that resources will be managed and preserved for the benefit of citizens generally.”³³ According to Takacs fish, wildlife and wilderness areas might easily fall under the protections of the Public Trust Doctrine (PTD) because they are scarce resources naturally suited for public use.³⁴

Another relevant legislation is the Wildlife Conservation Act (WCA).³⁵ The Act provides for a number of aspects pertinent to development activities within the SGR. It states that all animals in Tanzania shall continue to be public property and remain vested in the President as a trustee for and on behalf of the people of Tanzania.³⁶ This recognises PTD which mandates the Sovereign (State) to manage the resources for the benefit of the Tanzanian citizens. Generally, PTD requires that property subject of the trust must be used for a public purpose and held available for use by the general public; the property should not be sold; and that the property must be maintained for particular types of uses.³⁷

³² Article 27(2) of the Constitution, Ibid.

³³ Longopa, E., “Climate Change in EAC: Addressing the Rights of Local Communities through Constitutions,” **Nyerere Law Journal**, Vol. 1(2014), p. 14.

³⁴ Takacs, D., “The Public Trust Doctrine, Environmental Human Rights and the Future of Private Property”, **New York University Environmental Law Journal**, (2008) Vol.16, p. 716.

³⁵ Act No. 5 of 2009.

³⁶ Section 4 of the Wildlife Conservation Act, No. 5 of 2009.

³⁷ See Kameri-Mbote, P., “The use of the Public Trust Doctrine in Environmental Law”, **Law, Environment and Development Journal**, (2007) Vol. 3, No. 2, p. 199; and Madan B. Lokur, “Environmental Law: Its Development and Jurisprudence”, A Green Law Lecture delivered on 3rd July 2006, p. 16. http://assets.wwfindia.org/downloads/green_law_lecture___july_3__2006.pdf as accessed on 19th January 2017.

The game reserves, Selous Game Reserve inclusive, contain restrictions on the entry; possession of weapons; protection of vegetation against felling, cutting, burning, injuring or removal as well as prohibition of hunting without permission in writing from the Director of Wildlife.³⁸ Any of these violations would attract punishment ranging from custodial sentence of not less than one year or fines not less than one hundred thousand shillings.³⁹

The Wildlife Conservation Act also restricts other development activities within the game reserves. For example, cultivation of crops and grazing livestock are outlawed activities under the Act.⁴⁰ Apart from these activities, mining of any kind is prohibited as a general rule.⁴¹ This law prohibits any person from collecting sand, prospecting and mining in a game reserve. The prohibition ensures that environmental problems like land degradation and erosion are minimized to a great extent.

However, the prohibition of mining activities in the game reserves in Tanzania is not absolute. The law permits a number of exceptions to this general rule. In exceptional circumstances, prospecting or mining activities related to mining or prospecting of oil, gas or uranium is permissible.⁴² This can only be possible when four pre-conditions exist, namely, Environmental Impact Assessment (EIA) has been conducted in accordance with the provisions of the Environmental Management Act; protection cost has been paid by an investor; the concession fee has been paid; and the Government is the initiator of such undertaking.⁴³

Furthermore, WCA categorically states that any physical development in wildlife protected areas, the wildlife management areas, the buffer zone,

³⁸ Sections 15(1) and (2), 17, 18 and 19 of the Wildlife Conservation Act.

³⁹ *Ibid.*

⁴⁰ Sections 20(1) (c) and 21 of the Wildlife Conservation Act.

⁴¹ Section 20 (2) of the Act

⁴² See Section 20(3) of the Act, *Ibid*

⁴³ See the proviso to the Section 20(3) of the Wildlife Conservation Act, *ibid.*

migratory route or dispersal area must be preceded by an EIA study.⁴⁴ Such projects cannot commence unless EIA certificate has been issued by the Minister for Environment. This applies to mining development which is undertaken by a person or organization either in the private or public sector.

The scope of EIA requirement in the WCA is to the effect that any impact on wildlife must be included and it should contain a statement of the existing or anticipated economic impacts to the conservation of wildlife including an account of the species, communities and habitats affected and extent of threat. There must also be a statement on whether rare, endangered or endemic species and their habitats are or may be affected; a list of alternatives, including action and mitigation measures to adverse effects which may be taken to remove or lessen adverse impacts; and recommendations for subsequent action.⁴⁵

WCA also recognizes application of international agreements on wildlife resources to which Tanzania is a signatory. Application of such agreements entails strict observance of the rights and obligations to Tanzania as a State Party to the conventions. As such, Tanzania must respect and fulfill its obligations under international law on various aspects relating to sustainable management of SGR. According to WCA, all wildlife resources which are protected under international law are accorded the same status in Tanzania if they are found in, or migrate to or through Tanzania.⁴⁶ We have noted that some of the international agreements pertinent to management of natural resources in the Selous Game Reserve are the CBD, CITES and the World Heritage Convention.

The law requires the Minister responsible for wildlife to initiate and prepare legislative proposals for purposes of implementing the agreements,

⁴⁴ Section 35 of the Act.

⁴⁵ See Section 35(5) of the Act.

⁴⁶ Section 94(2) of the Wildlife Conservation Act.

and identify appropriate measures necessary for the implementation of the agreements where the United Republic is a party to an international or a regional agreement relating to the protection and management of wildlife and its habitats.⁴⁷ The Wildlife habitats envisaged by WCA include the Selous Game Reserve.

The Land Act is another piece of legislation with bearing to conservation in the game reserves. It provides for three categories of land: general land, village land and reserved land.⁴⁸ Under section 6(1), the reserved land covers, among others, the land reserved, designated or set aside under the provisions of the Forest Act, the National Parks Act, the Ngorongoro Conservation Area, the Wildlife Conservation Act and the Marine Parks and Reserves Act. The Selous Game reserve is recognized within section 14 of the WCA as envisioned in the Land Act.

The Land Act articulates another category of reserved land which is designated as hazardous land. Hazardous land may include “land specified by the appropriate authority as land which should not be developed on account of its fragile nature or of its environmental significance.”⁴⁹ Indeed, land declared to be game reserve like the Selous Game Reserve may be covered under this part of the law due to its importance in environmental conservation issues.

Further, the Land Act explicitly excludes all resources which may either be part of natural or cultural heritage from the Granted Right of Occupancy (GRO). It stipulates that GRO does not confer rights to remove any kind of flora or fauna naturally occurring or present on the land or any palaeontological or archaeological remains found on the land.⁵⁰

⁴⁷ Section 94(4) of the Act.

⁴⁸ Section 4 (4) of the Land Act, Cap. 113 [R.E. 2002].

⁴⁹ See section 7(1) (f) of the Land Act, Cap. 113 [R.E. 2002].

⁵⁰ Section 22(2) of the Land Act (emphasis supplied).

Moreover, the Environmental Management Act (EMA) addresses the protection of natural heritage in Tanzania under different provisions. First, the Act recognises applicability of sector laws relevant to protection of particular natural heritage like forests and wildlife legislation.⁵¹ Such laws cover wildlife and forest resources conservation. These laws cover the Selous Game Reserve, as well.

Second, the Act provides for the need to protect biological diversity in Tanzania and it empowers the Minister to make regulations including those relevant to:

identification of the components of biological diversity important for conservation and sustainable use, having regard to any international standards applicable to Tanzania; the promotion of protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings; and procedures for the establishment of a system or system of protected areas or areas where special measures need to be taken to conserve biological diversity.⁵²

The third and most important is the recognition of the need to protect cultural and natural heritage in Tanzania within EMA. The Act recognises that special attention is required in the protection of natural heritage in sustainable environmental management in Tanzania.⁵³ These issues entail requiring all activities which may have adverse impact on environment to observe the precautionary principle. All such activities would require conducting an Environmental Impact Assessment (EIA) study prior to the implementation of such activities.⁵⁴ Development activities like mining exploration or exploitation, hydro-electrical power generation and supply,

⁵¹ Sections 63(1) and 65(2) of the Environmental Management Act, Cap. 191 [R.E. 2002].

⁵² See Sections 66(3) (d) and 67(2) (d) and (m) of the Environmental Management Act.

⁵³ Section 73 (1), *ibid*.

⁵⁴ Section 81 (1) and 3rd Schedule to the Environmental Management Act and Reg. 4 and 1st Schedule of the Environmental Impact Assessment and Audit Regulations, GN. No. 349 of 4th November 2005.

i.e., laying transmission lines as well as construction of road infrastructure might have negative impact on the conservation of Selous Game Reserve.

The fourth aspect is on applicability of sustainable development principles. EMA calls for any person, court or tribunal exercising powers under the Act to observe and be guided by the principles of sustainable development, namely: the principle of eco-system integrity; the principle of international co-operation in management of environmental resources shared by two or more states; and that the environment is the common heritage of present and future generations.⁵⁵

4. Current Legal Issues on Selous Game Reserve as an OUV Property

The Selous Game Reserve (SGR) is the largest protected conservation areas of Tanzania located in the South East of Tanzania. SGR comprises vast areas mostly undisturbed open woodland and floodplains, grasslands, riverine forests and major expansive *miombo* woodlands. SGR has an iconic status as one of the few remaining vast uninhabited areas in Africa with a high degree of naturalness.⁵⁶ As a result, SGR has unique natural ecosystems and biological diversity.

Enjoyment of the OUV status for SGR depends on strict compliance with the World Heritage Committee Guidelines including integrity and authenticity and must have an adequate protection and management system to ensure its safeguarding.⁵⁷ As such, all activities undertaken in the property must focus on sustainable conservation of the natural site. Activities with likely adverse impacts are not welcome in a property inscribed as a World Heritage Site. Whenever the state of conservation

⁵⁵ See Section 5(3) (c) and (g) ; and section 7(3)(a) of the Environmental Management Act.

⁵⁶ UNESCO World Heritage Centre-IUCN, Reactive Monitoring Mission Selous Game Reserve (United Republic of Tanzania, 02 to 11 December 2013, pp. 7-10.

⁵⁷ See Paragraph 78, *Ibid.*

deteriorates and there is urgent need to take immediate actions to ameliorate the natural heritage site, the World Heritage Committee is empowered to list the property in a List of World Heritage in Danger. For property to be placed under the List of World Heritage in Danger the following conditions must be met, namely: the property is on the World Heritage List; the property is threatened by serious and specific danger; major operations are necessary for the conservation of the property and that assistance under the Convention has been requested for the property.⁵⁸

The World Heritage Committee Guidelines recognize that bio-physical processes and landform features should be relatively intact. These areas should be in a pristine state except for limited human activities, including those of traditional societies and local communities, which are consistent with the OUV status of the area and where they are ecologically sustainable.⁵⁹ Protection and management of such properties should ensure that their Outstanding Universal Value, including the conditions of integrity and/or authenticity at the time of inscription, are sustained or enhanced over time.⁶⁰

The main challenges currently facing SGR include poaching and large scale development projects.⁶¹ These activities are related to exploration and extraction of minerals, oil and gas, and large infrastructure plans. It has been observed that:

The genesis of the problems of poaching elephants and the launching of anti-poaching operations to curb the vice in the country commenced in 1965, when the government permitted hunting of wildlife in game reserves starting with the Selous

⁵⁸ Paragraph 177 of the Operational Guidelines.

⁵⁹ Paragraph 90 of the Operational Guidelines for Implementation of the World Heritage Convention.

⁶⁰ See Paragraph 96 of the Operational Guidelines for the Implementation of the Convention.

⁶¹ UNESCO World Heritage Centre-IUCN, Reactive Monitoring Mission Selous Game Reserve (United Republic of Tanzania, 02 to 11 December 2013, pp. 8, 11-16.

Game Reserve. As a result of increasing exponentially of poaching activities which led the government to launch a number of anti-poaching operations like *Operation Uhai* in 1989 and *Operation Tokomeza* in 2013 respectively.⁶² [sic]

Indeed, permitting access to the property in form of hunting activities contributed significantly for illegal hunters to permeate into the game reserve for search of ivory and rhino horns.

Apart from the hunting activity there is the Mkuju River Project (MRP), one of the large scale development activities, which is likely to adversely impact on the sustainable conservation of SGR. Although MRP is outside the boundaries of the SGR, since the MRP is for exploitation of Uranium such project is likely going to adversely affect SGR.⁶³ Tanzania considers Mkuju River Project as a crucial project towards achieving its development goals. Indeed, Tanzania has resolved to hasten the industrialization process through exploiting its comparative strategic advantages. One of such advantages is availability of natural resources in abundance including uranium. To achieve the objective of the development goals there must be strategic interventions including implementation of the Mkuju Uranium Project.⁶⁴

The modification of SGR's boundaries accommodated conditions necessary for conservation of the area. Such modifications included:

⁶² Majamba, H.I., "Public Trust Doctrine: Emerging Trends in Combating Illegal Ivory Trade in Tanzania", **Eastern Africa Law Review**, (2014) Vol. 41, Issue No 2, pp.32-63, at p. 40.

⁶³ The modification of the boundary was officially accepted during the 36th World Heritage Committee meeting in Saint Petersburg, Federal Republic of Russia in June 24th to July 6, 2012.

⁶⁴ See Ministry of Finance and Planning, "*National Five Year Development Plan 2016/2017 to 2020/2021 - "Nurturing Industrialization for Economic Transformation and Human Development"*", Dar es Salaam, Ministry of Finance and Planning, (2016) pp. 28, 32, 107 and 108.

provision of additional valuable wildlife forest area to compensate for the excised area of SGR for inclusion in the property; ensure enhanced and effective protection of the Selous-Niassa corridor; **not to engage in any mining activity within the SGR World Heritage property after exclusion of the Mkuju River mining site**; ensure that investors contribute to the Protection Fund provided for under WCA; and **not to undertake any development activities in SGR and its buffer zone without prior approval of the WHC**.⁶⁵ (Emphasis supplied)

Accordingly the decision of World Heritage Committee (WHC) to approve boundary modification was done in an exceptional and unique manner.

The United Republic of Tanzania was obliged to ensure that environmental management and monitoring plan is implemented; economic and social needs of the local population and workers are respected and that social conditions in and around SGR, in particular the Mkuju River Mining site, are subject to monitoring; and that the mining activity and processing of the uranium is carried out corresponding to state of art of international standards and adherence to International Atomic Energy Agency (IAEA) rules governing the processing of uranium materials.⁶⁶

It is expected that Tanzania would have in place adequate and effective legal and institutional framework to monitor the environmental management relating to this peculiar category of mining activities. Currently, Tanzania has a number of legislative instruments touching on environmental management and issues of radioactive materials.⁶⁷ It has

⁶⁵ See Paragraph 7 (a) to (f) of the WHC Decision 36 COM 8B.43 -Examinations of Minor Boundary Modifications of Natural, Mixed and Cultural Properties already inscribed on the World Heritage List.

⁶⁶ Paragraph 9, *Ibid*.

⁶⁷ The laws includes: The Mining (Radioactive Minerals) Regulations, 2010 GN No. 407 of 22nd October 2010; the Atomic Energy (Radiation Safety in the Mining and Processing of Radioactive Ores) Regulations, 2011 GN No. 369 of 4th November 2011; the Atomic Energy (Packaging and Transport of Radioactive Minerals) Regulations, 2011, GN No. 368 of 4th

also a number of institutions. However, Tanzania lacks adequate capacity in terms of equipment, trained personnel and funding to deal with monitoring of radioactive minerals, and expertise to deal with issues related to the uranium mining in the country.⁶⁸ It has been further observed that “National Environmental Management Council (NEMC) does not have adequate experience in uranium mining regulation and operations, does not have specialists in the field of nuclear physics or atomic energy and related sciences, does not have facilities and equipment required to monitor radioactive minerals mining projects....”⁶⁹

The inability to monitor uranium processes and the likelihood of adverse environmental impacts on the property has made international community not to support any such development activities in SGR. There have been consistent WHC’s urge to Tanzania to stop mining activities in the Selous Game Reserve over the years since 2012. It reiterated its utmost concerns on Tanzania’s continuance to advance development projects within the SGR and its buffer zone without approval of WHC.⁷⁰

Under the World Heritage Convention, compliance is done through two main ways. The first is through the periodic reporting mechanism by the State Party. Such report must be sent to UNESCO General Conference through the World Heritage Committee and must include legislative and

November 2011; the Mining (Safety Occupational Health and Environmental Protection) Regulations, 2010 GN No 408 of 22nd October 2010; and the Environmental Impact Assessment and Audit Regulations, 2005 GN No. 349 of 4th November 2005.

⁶⁸ Ministry of Finance and Planning (2016), *National Five Year Development Plan 2016/2017 to 2020/2021 - “Nurturing Industrialization for Economic Transformation and Human Development”*, Dar es Salaam, Ministry of Finance and Planning, pp. 107 and 108.

⁶⁹ Rosa Luxemburg Stiftung and Legal and Human Rights Centre (2014), *Uranium Mining Impact on Health & Environment*, Dar es Salaam, Rosa Luxemburg Stiftung and Legal and Human Rights Centre, p.13.

⁷⁰ WHC Decision 37COM 7B.7 of 2013; Decision 38 COM 7B.95; and Decision 39 COM 7A.14.

administrative actions taken in the implementation of the Convention and state of conservation of World Heritage sites in its territory.⁷¹

Such periodic reporting aims at providing an assessment on application of the Convention; assessment on the maintenance of on OUV of World Heritage Site over a period of time; to provide up-dated information about the World Heritage properties to record the changing circumstances and state of conservation of the properties; to provide a mechanism for regional co-operation and exchange of information and experiences between States Parties concerning the implementation of the Convention and World Heritage conservation. It is assumed that state reporting is crucial for more effective long term conservation of the properties in the World Heritage list, as well as to strengthen the credibility of the implementation of the Convention.⁷²

The second mechanism is through the reactive monitoring which is usually done by the Secretariat or advisory bodies to the Committee on the state of conservation when there is a threat to properties inscribed on the World Heritage List. It is one of the procedural requirements prior to deletion of the property from the World Heritage List.⁷³ State Parties are invited to provide information to the Committee when they undertake or authorize any major restoration operation or activity within the protected property which may affect its OUV status. Such communication should be prior to drafting the basic documents or making the decisions for activity whose effects may be irreversible. Reactive monitoring would include indication of threat or improvements in the property since the last reactive report; follow-ups on the recommendations of the previous missions; and any threat or damage to or loss of OUV, integrity or authenticity of the property for which it was inscribed.⁷⁴

⁷¹ Section 29 of the World Heritage Convention and Paragraph 199 of the Operational Guidelines.

⁷² Paragraph 201 and 202 of the Operational Guidelines, 2015.

⁷³ See paragraph 169, *ibid*.

⁷⁴ Paragraphs 172-174 of the Operational Guidelines

In 2013, WHC/IUCN Reactive Monitoring Mission visited the Selous Game Reserve. The mission recommended that:

Tanzania should consolidate domestic capacity and use external expertise to ensure comprehensive and independent monitoring and compliance of the complex mining operation at MRP, Tanzanian first uranium site especially of quantitative and qualitative water monitoring points beyond the mining concession area; ensure full risk preparedness and establish clear response mechanisms in case of possible future contamination incidents associated with extractive activities outside its (SGR) boundaries; and the State Party should inform the WHC in case In-Situ Leaching (ISL) is considered as extraction technique in addition to or in alternative to open pit mining.⁷⁵

Uranium deposits suitable for in situ leaching (ISL) occur in permeable sand or sandstones, confined above and below by impermeable strata, and which are below the water table. Use of ISL has the potential of causing significant adverse impacts especially surface contamination and damage to soils and contamination of ground water, i.e., aquatic ecosystems.⁷⁶ It is argued that the risk of such contamination has the potential to impact the regional economy, animals, and vegetation. Therefore, acidic ISL operations should remain under strict surveillance both during the ISL process and during the subsequent decommissioning and reclamation of the site. In some cases it will be necessary to restore the contaminated groundwater. If residual soil or groundwater contamination will remain at the site, long term monitoring programmes must be established to ensure

⁷⁵ UNESCO World Heritage Centre-IUCN, Reactive Monitoring Mission Selous Game Reserve (United Republic of Tanzania, 02 to 11 December 2013, pp.5 and 25. Other joint UNESCO-IUCN Reactive Monitoring Mission visits to the Selous Game Reserve as World Heritage Property were done on 2-9 June 2007 and 23-30 November 2008.

⁷⁶ International Atomic Energy Agency (2001), **Manual of Acid in Situ Leach Uranium Mining Technology**, Vienna-Austria, International Atomic Energy Agency, pp.221-241.

that the contamination does not spread into uncontrolled aquifers or areas.⁷⁷

Furthermore, it is reported in the **Manual of Acid in Situ Leach Uranium Mining Technology** that ISL field operations should proceed with strict controls against spills and leaks of production and leaching solutions onto the site ground. The solutions recovered from the recovery wells should be collected into portable receptacles and returned to the recycling system. Prior to leaching, a baseline survey of the site should be conducted. During the leaching process as well as following completion of leaching, additional radiation environmental control and sanitary surveys should be carried out.⁷⁸ We have demonstrated that currently Tanzania lacks adequate mechanisms to deal with uranium mining surveillance and monitoring as well as expertise for ensuring strict controls are in place.

The Reactive Monitoring mission specifically requested to be informed on the ISL in SGR due to the fact that extensive use of chemicals as an extraction method though might reduce risks to employees, the method may have devastating effect especially to water resources both surface and underground water courses. Tanzania complies with reporting mechanisms. It confirmed that no mining permits were issued in the property; increased capacity and efforts in combating poaching resulting in stabilization of the situation in the property; strengthening the fight against environmental and wildlife crimes; increased bilateral efforts including an agreement on trans-boundary Niassa-Selous Ecosystem signed with Mozambique as well as efforts to address illegal trade including China; ongoing stakeholder consultations on possible addition of new areas to the property at the western boundary and the creation of a buffer zone; appointment of an inter-ministerial team to monitor the MRP uranium mine and efforts to establish baselines for water monitoring; and

⁷⁷ Ibid. p. 221.

⁷⁸ Ibid. p.223.

confirmation on In-Situ Leaching (ISL) at MRP with no approval for ISL being granted at the moment.⁷⁹

Further, Tanzania noted that EIA Study would be undertaken at Stiegler's Gorge and that Kidunda dam EIA would be submitted to National Environment Management Council and shared with WHC. It reiterated its commitments to comply with 2013 Reactive Mission report including Desired State of Conservation for the removal of the property from the List of World Heritage in Danger (DSOCR).⁸⁰

The international community is vehemently against the extraction of uranium at SGR as reflected in the World Heritage Committee decision of 2016 on the status of SGR as OUV under the World Heritage List. The Committee expressed its utmost concern about:

- a) the ongoing lack of clarity in terms of the extraction method, water monitoring and disaster preparedness as regards the Mkuju River Project (MRP), b) the ongoing Stiegler's Gorge dam project **despite a high likelihood of serious and irreversible damage to the Outstanding Universal Value (OUV) of the property**, c) the lack of submission of a complete Environmental and Social Impact Assessment (ESIA) on the Kidunda dam project, which seems to have been extended in its scope and therefore could have **a higher impact on the integrity of the property**, d) **the legal possibility of mineral exploration and exploitation in the property and the overlapping mining and prospecting licenses, despite the commitment made by the State Party to not engage in any mining activity within the property, in line with the established position of the Committee that mining and oil and gas exploration and exploitation are incompatible with World Heritage status**, e) the lack of reported progress in creating

⁷⁹ <http://www.unesco.org/en/list/199/documents> - state of conservation report of Selous Game Reserve (United Republic of Tanzania), 2016.

⁸⁰ *Ibid.*

opportunities for local communities to participate in decision-making and benefit-sharing, including in Wildlife Management Areas (WMAs).⁸¹

As such the World Heritage Committee called upon Tanzania to undertake Strategic Environmental Assessment (SEA) to comprehensively identify the cumulative impacts of mining, the potential **Stiegler's Gorge and planned Kidunda dam projects, agriculture and associated infrastructure, such as road building, both within the property** as well as in important wildlife corridors and dispersal areas that are critical for maintaining the OUV of the property, and further **urged the State Party to abandon any plans for the different development projects which are incompatible with the World Heritage status of the property.**⁸² Conducting SEA would be in line with section 105 of EMA which calls for the Ministry responsible for water, energy or minerals to undertake SEA whenever there is discovery of mineral resource or petroleum before specific details are planned or a hydro electric power station or major water project is planned.

5. The Role of International Law and the Effect of its Non-Observance

International law plays a significant role in the sustainable management of natural resources. Tanzania being a State Party to the World Heritage Convention is obliged to adhere to the provisions of the Convention. The adherence to the Convention is of great importance to Tanzania in ensuring sustainable management of SGR. Currently, it can access international assistance from the Fund and other donors for management of the SGR to maintain its integrity and authenticity. Any implementation of development activities with likelihood of adverse impacts to environment of SGR leading to deterioration of important qualities of OUV status is not welcomed.

⁸¹ See Paragraph 9 of the World Heritage Committee-Selous Game Reserve (United Republic of Tanzania) (N 199bis) Decision 40 com 7A.47 (**Emphasis added**).

⁸² See Paragraph 10, *ibid*.

The question as to whether the State Party can freely engage in development activities in natural heritage with OUV status has been subject of consideration in international dispute resolution bodies. For instance, in the case of *African Network for Animal Welfare (ANAW) v. The Attorney General of the United Republic of Tanzania*¹⁴³ the Court observed that:

Tanzania was in breach of the Treaty for the Establishment of the East African Community, 1999 particularly violation of Article 5(3) (c), 8(1) (c), 111(2) and 114(1) of the Treaty. The issues of the reference (environment) are today the subject of wide debate across the world, including environmental protection, sustainable development, environmental rule of law and the role of the State in policy formulation in matters relating to the environment and natural resources. This has necessitated by the desire to balance on the need to protect the Serengeti ecosystem for sake of future generations and whether the road has potential for inflicting irreparable damage to the environment. As such a declaration to issue that initial proposal or the proposed action by Tanzania to construct a road of bitumen standard across the Serengeti National Park is unlawful and infringes the EAC Treaty is granted; grant of a permanent injunction restraining United Republic of Tanzania from operationalizing its initial proposal or proposed action of constructing and maintaining a road of bitumen standard across the Serengeti National Park subject to its right to undertake such other programmes or initiate policies in future that would not have negative impact on the environment and ecosystem in the Serengeti National Park.⁸⁴

This decision prompted the United Republic of Tanzania to appeal to the Appellate Division on the ground that the trial court erred in law in enforcing Articles 111-114 of the EAC Treaty when those Articles are yet to be negotiated, agreed, signed and ratified by all Partner States through an Appropriate Protocol. The Appellate Division of the East African Court

⁸³ *African Network for Animal Welfare (ANAW) versus the Attorney General of the United Republic of Tanzania*, Reference No. 9 of 2010 (Judgement dated 20th June 2014).

⁸⁴ See Paragraphs 85 and 86 of the judgement.

of Justice (EACJ) in its Judgement dated 29th July 2014 had this to say in respect of the matter:

...There can be no bar or fetter whatsoever against the Court's carrying out its duty to interpret the provisions of the Treaty; apply them; and ensure that Partner States adhere to and live by the objectives, duties, undertakings and standards which they, as full-fledged Sovereign States, did directly, deliberately, freely and voluntarily assume under the provisions of their Treaty – a Treaty which, even Counsel for the Appellant readily admits, was negotiated, signed and duly ratified by all the Partner States.⁸⁵

The EACJ decision reiterated the need for a State Party to an international legal instrument to respect its international obligations within its territory to ensure that the spirit of international law is upheld. In the instant case, the Treaty for Establishment of the East African Community has provisions that suggest that particular Chapters of the Treaty would be supplemented by the adoption of negotiated, signed and ratified Protocols. Tanzania invited the Court to rule that absence of such Protocol being in force exonerates it from any liabilities arising out of the Treaty on such Chapters. EACJ clearly reiterates the position of international law that where a State Party freely consents to be bound by a treaty by signing and ratification, that state is obliged to honour its obligations in accordance with agreed principles of international law.

It may be argued that a strong case can be made against any development in the Selous Game Reserve with potential of causing adverse impact on the environment within SGR. In the current situation, Tanzania is a State Party to the World Heritage Convention 1972. Thus, it is a breach of international law for Tanzania to undertake any activities which adversely affect the status of Selous Game Reserve as OUV Heritage Site.

⁸⁵ Paragraph 23 of the judgment of *the Attorney General of the United Republic of Tanzania versus African Network for Animal Welfare (ANAW)*, Appeal No.3 of 2014, EACJ Appellate Division.

Tanzania might freely cede some of its sovereignty over the Selous Game Reserve through the process of inscription of the SGR as a Natural Heritage Site under UNESCO. It is possible for Tanzania to invoke permanent sovereignty over the natural resources (PSNR) on SGR in order to allow implementation of development activities which are objected by the international community. Such a move would trigger deletion of SGR from the World Heritage List thus denying Tanzania's access to international financial assistance. In the long run, the tourism sector will be completely impaired as the World Heritage Site status plays a significant role in attracting tourists.

The Vienna Convention on Law of Treaties, 1969 is an illustrative instrument in respect of conflict between municipal law and international law where the State is party to international Convention. First, the State Party is required to observe and implement the international obligations in good faith. The Treaty provides that "every treaty is binding upon the parties to it and must be performed by them in good faith."⁸⁶ This is called the principle of *Pacta sunt servanda*.

Simply stated, a State Party is obliged to perform its international obligations in a manner that does not waterdown the spirit of that particular international legal instrument. *Pacta sunt servanda* is, indeed, the oldest principle of international law which underlies every international agreement. It has been observed that:

It is not hard to see why this is so. In the absence of a certain minimum belief that states will perform their treaty obligations in good faith, there is no reason for countries to enter into such obligations with each other.⁸⁷

⁸⁶ Article 26 of the Vienna Convention on the Law of Treaties, 1969. This is reported in *United Nations Treaty Series* (UNTS), Vol. 1155, p. 332.

⁸⁷ Shaw, M. N., (1986), *International Law (2nd Edition)*, Cambridge, Grotius Publications Limited, p.459.

Tanzania's ratification of the World Heritage Convention is evidence that it is willing to be bound and adhere to all the aspects articulated within the Convention.

Second, presence of a requirement prohibiting State Party to invoke its municipal legislative or administrative framework to evade its international obligations is equally important. Article 27 of the Vienna Convention provides restrictions not to use its municipal law as excuse not to perform an aspect which is regulated by international legal instrument to which that State Party entered freely by signing and ratifying or acceding to the Convention. At this juncture, Tanzania can neither invoke the Constitution of the United Republic of Tanzania nor the WCA that permit mining of uranium, petroleum or natural gas on the game reserves to validate activities that are against the World Heritage Convention. Peter argues firmly that:

...such agreements and treaties are not useless. They are valid undertakings and the government is bound by its commitments to others...the mere fact that an international agreement is not incorporated into our municipal law does not absolve the government of the duty to adhere strictly to its undertakings under that agreement. International agreements are serious and important instruments in guiding international intercourse and thus they should not be taken lightly. It is therefore, important to remind governments of their cardinal duty to respect international undertakings. In the Tanzanian context it is important for the government to incorporate all its international undertakings and particularly those on protection of environment into domestic sphere so as to make execution smooth. This will also indicate sincerity of the government in making these undertakings on behalf of its people.⁸⁸

There is no doubt that Tanzania is under legal and moral obligation to respect, promote and observe tenets of international law relating to conservation of world heritage sites to which it voluntarily accepted to be

⁸⁸ Peter, C.M., *Human Rights in Tanzania: Cases and Materials*, Koln, Stiftung Koppe Verlag, 1997, p.155.

bound and respect. It is without a flicker of doubt that conducting development activities within the Selous Game Reserve on pretext of permission given by the municipal law, namely, the WCA 2009 is a clear violation of international law.

In the long run, such adamancy to continue exploration, mining and hydro–electric power generation in SGR would result into removal of the property from the World Heritage List. Such deletion may hamper conservation efforts for absence of international assistance and impact on tourism sector which contribute significantly to the Gross Domestic Product (GDP).

6. Concluding Observations

Legal protection of World Heritage properties calls for concerted efforts at both national and international levels. Such properties are protected under municipal and international law. Tanzania is obliged to respect and implement its obligations under the World Heritage Convention. These obligations include maintaining the SGR to its required integrity and authenticity. It entails maintaining SGR intactness without disturbances to ecology and ecosystem by restricting development activities within the SGR.

We have noted that development activities within SGR have caused great concerns. Implementation of treaty obligations in management of SGR is still wanting as the government has not ceased the exploration and implementation of other development activities in the pretext of legal permission under municipal law. According to international law, municipal legislative and administrative regimes are not permitted to act as a hindrance to the furtherance of objectives of international legal instruments.

Operationalization of the uranium mining in Tanzania at MRP at a time when there is conspicuous shortage of experts, facilities and equipment for

surveillance and monitoring of the impact of uranium extraction is not desirable at all. It is of paramount importance to develop capacity in terms of expertise and securing important facilities and equipment for monitoring and surveillance of the uranium mining processes prior to active mining operations in order to address environment issues.

Administration of Mob Justice in Tanzania: Wither the Law Enforcement Machinery?

*Abdulrahman O.J. Kaniki **

Abstract

This paper seeks to give an overview of the extent to which mob justice has permeated the fabrics of the nation. So far mob justice has been an order of the day. This is notwithstanding the fact that the country has a sound administration of criminal justice system. A survey of statistics on reported mob justice cases at police stations over the past twenty years namely, a period from year 1996 up to 2015, shows that mob justice is a countrywide problem. It has spread throughout the country. The paper has also noted that there is reluctance on the part of citizens to come forward and expose perpetrators of the malpractice thereby making it difficult for the law enforcement machinery to deal with them. The paper comes up with a number of recommendations aimed at remedying the situation.

1. Introduction

In the recent past it has been normal to see, hear or read about a suspected person having been brutally killed or burnt to death or subjected to severe injuries after an angry mob had mercilessly beaten him up.¹ The so called angry mob does so under the umbrella of what is commonly known as mob justice. Just like in many developing countries, Tanzania is suffering from mob justice, which is a growing concern. Mob justice claims lives of many Tanzanians most of them in their youthful age. It poses a threat to human security. In addition the mob sometime destroys property of a person alleged to have committed a crime as a way of revenge. Destruction

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¹ Hardly a day passes without an occurrence of such kind of incidents.

of property often happens when a person alleged to have committed a crime is before the mob, under police custody or still at large.² Such incidents have become common and spread throughout the country thereby posing a human security threat.³ Learning from what transpires at the mob justice crime scene, it is inferred that members of the mob have one thing in common, namely beat to kill or grievously harm. This explains why punishments meted out to victims of the mob justice are always harsh, brutal and torturous. It is so argued because some individuals are exposed to imminent danger of losing their never-replaceable dear lives only through mere allegations that need to be proved beyond reasonable doubt before courts of law. Under the circumstances, the criminal justice system is not given room to function at all. On the contrary, the mob establishes a parallel short cut kind of “justice system” which, if not checked, gradually turns the country into a state of lawlessness where only the fittest survive. It needs to be understood that:

Public disgrace and shaming of people who are termed as “offenders” is not only outside of the social and legal sanction, it also fuels an anarchist (and not in good way) and regressive mindset. During a mob formation, there is absolutely no regulation of unruly behaviour of each participant and this can

² See **The Citizen**, 4 February 2016, at p.9, where an angry mob from Kazilamuyaga and Kyota villages, Kimwani Ward, in Muleba District, on 3rd February, 2016, destroyed food crops and burned eight houses belonging to fellow villagers accusing them of having a hand in the murder of councillor Sylvester Muliga. Similarly, it was reported in **Daily News**, March 11, 2016 at p.2 that Police in Kagera were investigating an incident where one person was killed by unknown people and eight houses were burnt in what seemed to be retaliation. On March 5, 2016, Albert Emmanuel went missing. After a thorough search his body was recovered after three days. It had bruises. Consequently, a mob took the law into its hands and slashed down a three hectare banana farm and set ablaze eight houses which belonged to seven family members whom they connected them with the death of the deceased. On July 17, last year, five people from same family were lynched through mob justice in Kyerwa district and their bodies set ablaze, accusing them to have killed a businessman two days earlier. Over 300 people who conducted the search surrounded the suspect, his father, his two brothers and a two and a half month old infant, lynched them before pouring petrol on their bodies and set them ablaze!

³ Human security means protecting people against any act or omission that interferes with their fundamental rights and freedoms.

lead to extreme miscommunication between them. The exact details of whatever is happening around the mob participants can be very unclear due to the unchecked rage and sentiments. This can lead to huge injustices and unnecessary assaults on innocent people. While it is true that rage and anger is useful in initiating important revolutions, it needs to be in adequate doses which can be channelized in positive ways.⁴

Let it be underscored that since time immemorial, human being's life is regarded as a priceless gem, which needs to be highly valued and jealously guarded. This well established norm is now increasingly jeopardised by the mob justice culture which has permeated the fabrics of the society. A mere alarm is enough to end one's life on the strength of an allegation of committing a crime. This is an indication of a paradigm shift where people nowadays value property more than lives of their fellow human beings. One sociologist once cautioned that:

How a society treats its offenders is an index of its basic attitude towards human personality; if, for instance, we ill-treat our thieves, we show only too clearly what we put first, property or people.⁵

In Tanzania, a modern country with well established legal system and functioning law enforcement machinery, there are still some people who unceremoniously usurp sacred powers of administering justice through mob justice. This is done in total disregard for individual's rights of liberty, dignity and personal security which have been entrenched in the Constitution. Through such uncalled for approach, safety and security of citizenry are put at jeopardy by a few people.

2. Understanding Mob Justice

The term "mob justice" has no legal definition so far. This explains why various attempts have been made to give hand-maiden definitions, depending on one's perspective. According to Paul N. Ng'walali and

⁴ Momin, *op cit*.

⁵ Jones, H., **Crime in a Changing Society**, Penguin Books Ltd., Middlesex, England, 1965, p.11.

James N. Kitinya, mob justice is the practice whereby a mob, usually several dozens or several hundred persons take the law into their hands in order to injure and kill a person accused of wrongdoing.⁶ The authors who take medico-social approach argue that mob justice is a social, public health and legal problem, counting about 13% of all the forensic autopsy cases performed at the Department of Forensic Medicine.⁷ Phillip Leo Chalya, *et al.*, who adopt this definition by their fellow medical professionals argue that mob justice is a practice that poses a social, public health and legal problem in most developing countries, including Tanzania.⁸ Similarly, Hussein Mtembwa argues that:

Mob justice refers to several dozens or several hundred persons who take the law into their bare hands in order to injure and/or kill a person accused of (criminal) wrongdoing. It is a disturbance of the peace by several persons, assembled and acting with a common intent in executing unlawful enterprise in violence (sic) and turbulent manner. It sometimes goes further to the destruction of property of the person alleged to have committed a crime.... A person alleged of the crime is not afforded the right to be heard or to be

⁶ Ng'walali, P.N. and Kitinya, J.N., "Mob Justice in Tanzania: A Medico- social Problem," **African Health Sciences**, Vol.6 No.1 March 2006, pp.36-38, p.36.

⁷ *Ibid.*, p.37.

⁸ Chalya, P.L., *et al.*, "Mob Justice as an Emerging Medico-legal, Social and Public Health Problem in North-Western Tanzania: A Need for Immediate Action," **Tanzania Journal of Health Research**, Volume 17, Number 1, January 2015. See also Adu-Gyamfi, E., **Implications of Mob Justice Practice among Communities in Ghana**, Public Policy and Administration Research, Vol.4, No.7, 2014, pp.87-96, who argues at p.87 that practice of mob justice continues to attract a lot of attention globally particularly in developing countries in the face of global efforts to promote human rights. He goes on to argue that the increase of mob justice continues to take over our airwaves and make newsworthy headlines. This illegal chain, he argues, has engrossed and engaged various reactions from security agencies, human rights bodies and activists, renowned radio commentators, criminologists, clergy, traditional rulers and a section of general populace.

punished after being proved guilty, a habit that renders supremacy of the courts and/or laws impossible.⁹

Marrien Sibanda, a South African national, defines mob justice as a loose aggregate of individuals pursuing an informal justice.¹⁰ Sibanda goes on arguing that mob justice is ultimately mob injustice. It indicates sheer disregard for the Constitution, the rule of law and the criminal justice system.¹¹

Robin Glad, Åsa Strömberg and Anton Westerlund, who undertook a qualitative research regarding vigilante justice in modern Uganda, give an explanatory definition of mob justice. They state that mob justice can be explained as a situation where a crowd of people, sometimes several hundred, take the law into their own hands, act as accusers, jury and judge and punish an alleged criminal on the spot. This procedure often ends up with the victim being beaten to death or seriously injured.¹²

Ernest Adu-Gyamfi who researched on implications of mob justice practice among communities in Ghana defines mob justice as the situation when an irritated mob takes justice into their own hands to deal with suspected criminals and commonly ends with brutalities and loss of lives.¹³ He explains it more by saying that it is a condition where the irate mob takes upon themselves to illegally dispense justice without giving the suspect the right to defence. This frequently results in spanking of

⁹ Mtembwa, H., "Mob Justice in Tanzania: Rough Justice?", **The Justice Review, 60th Anniversary of the Universal Declaration of Human Rights and its Applicability in Tanzania: 1948-2008**, Volume 7 No.2, 2008, pp.67-76, pp. 68-69.

¹⁰ Sibanda, M., **Contextualising the Right to Life and the Phenomenon of Mob Justice in South Africa**, LL.M Mini-Dissertation, North-West University (Mafikeng Campus), South Africa, March 2014, p.3.

¹¹ Ibid.

¹² Glad, R., *et al.*, **Mob Justice- A Qualitative Research Regarding Vigilante Justice in Modern Uganda**, The Final Essay for a Bachelors Degree in Social Work, Department of Social Work, University of Gothenburg, Sweden, 2011, p.3.

¹³ Adu-Gyamfi, *op cit.*, p.88.

suspected robbers to death; stripping suspects' nude and lynching them with stones, till suspects die and occasionally setting them ablaze.¹⁴

Gathering from what is stated by the above authors mob justice may be defined as an instant outburst of uncontrolled and blood-thirsty group of people who take the law into their own hands against a person alleged to have committed or is about to commit a crime. It is a situation in which a group of angry citizens assemble instantly in disordered manner and act violently to anybody in sight who was named a thief, bandit and such like. The group brutally and mercilessly very severely beats up a suspected person who is alleged to have committed theft, robbery, burglary or housebreaking, murder and other offences. The mob always feels that a suspected criminal deserves the harshest punishment no matter how trivial the alleged crime is, if at all any. To put it in other words, it is a state of lawlessness ingrained in the society because an irate mob ensures that criminals are subjected to torture to the extent of succumbing to death or sustaining grievous bodily harm.¹⁵

3. Administration of Mob Justice

Normally the mob, a group of angry people, administers beatings to the suspected person or persons indiscriminately. As such the victims are forced to meet their death unpeacefully. If they luckily happen to survive death, they are, however, left unconscious or in critical conditions. Outwater, A., and her co-researchers explain in their research report that burning is often used for repeat offenders, whom the community fears could resurrect and return for revenge.¹⁶ Then it disperses leaving victims

¹⁴ *Ibid.*

¹⁵ According to **Black's Law Dictionary**, the term "mob" means an assemblage of many people, acting in a violent and disorderly manner, defying the law, and committing, or threatening to commit, depredations upon property or violence to persons. Similarly, **Shorter Oxford English Dictionary** refers to mob as the disorderly and riotous part of the population, the rabble; a tumultuous crowd bent on lawlessness.

¹⁶ Outwater, A.H., *et al.*, "Community Violence in Dar es Salaam, Tanzania: A Mixed Methods Study," **African Safety Promotion Journal**, Vol.11 No.1, 2013, pp.25-38, p.32.

burning beyond recognition or even to ashes! In this connection Mchome, S.M., argues as follows:

A new phenomenon of torture has arisen in our society.... This phenomenon is commonly known as **mob justice** because it is done not by a single person, but by a group of people. This phenomenon which is more common in Dar es Salaam city (for thieves and bandits) and Mwanza and Shinyanga regions (for witches) comprises persistent beatings with stones, sticks, iron bars, bricks, **ejusdem generis**, or necklacing (where a tyre is put on somebody's neck, doused with fuel and set ablaze). Many suspects have been victims of this type of torture and many have also died.¹⁷

A similar situation has been experienced in other countries.¹⁸ Nkoma, S., argues on what happens to suspected criminals under the unshakable grips of unruly mobs in Malawi. She says that:

Suspected criminals are frequently spanked to death; stripped naked and lynched with stones, till suspects die and occasionally setting them ablaze as has been the trend in many parts of the country.¹⁹

A similar story is told by Syed Mehd Momin on how mob justice is administered to a victim of mob justice in Bangladesh. He states that:

The killing of a 13-year-old boy -most probably falsely-accused of trying to steal a rickshaw shocked the nation and launched protests across Bangladesh. The group of men who attacked Samiul Alam Rajon filmed their sickening assault and posted it on social media, where it went viral in the country. The video shows the men brutally beating and torturing the boy as he begs for his life, laughing and taunting him as he screams and cries. Stills from the 28-minute video,

¹⁷ Mchome, S.E., "Due Process of Law: The Rights of Suspects and Accused Persons," in Peter, C.M. and Juma, I.H. (Eds.), **Fundamental Rights and Freedoms in Tanzania**, Mkuki na Nyota Publishers, Dar es Salaam, 1998, pp.155-168, p.164.

¹⁸ Mob justice practice is not only experienced in Tanzania. On the contrary, it exists in several countries in Africa and other continents such as Asia and South America.

¹⁹ Nkoma, S., "Mob justice is not justice," **The Nation**, Online, November 28, 2015, Malawi.

which are still circulating in local media, show a terrified Rajon cringing, at times tied to a fence. At one point, the attackers apparently tell him to walk away. When he tries, another shouts: 'His bones are OK. Beat him some more.' An autopsy found 64 serious injuries on the boy's body, which was disposed in a nearby dump after the beating.²⁰

In view of the above, it may be argued that mob justice is not justice at all. It is a torturous moment mankind experiences without any sign of amnesty. What cruel situation members of the mob create but at the expense of their fellow human-beings!

The administration of mob justice is also characterised by the following features. At the moment the victim is cornered, there is no much questioning. The mob administers an instant justice spontaneously, using weapons at hand namely, fists, feet, sticks, stones, pieces of bricks, iron bars, dousing him with petrol and setting him alight and the like, thereby ending his life. Apart from reported cases at police stations, a number of medical studies are to that effect. Phillip Leo Chalya, *et al.*, state in relation to this argument that:

Stoning and burning were the most frequent methods used in executing mob-justice in the present study. This observation agrees with other studies (Adinkrah, 2005;²¹ Ng'walali & Kitinya, 2006²²). In this study, objects such as stones, iron bars, sticks, bricks as well as flame burn were the most common weapons through which mob justice was inflicted. A better knowledge of the type of weapon or means through which mob justice is inflicted is of great importance for medico-legal purposes. Also, understanding interpersonal relationships and socioeconomic factors that contribute to mob violence is of paramount importance.²³

²⁰ Momin, S.M., *op cit.*

²¹ Adinkrah, M., "Vigilante Homicides in Contemporary Ghana," **Journal of Criminal Justice**, 2005, Vol.33, pp. 413-427.

²² Ng'walali, P.N. and Kitinya, J.N., *op cit.*

²³ Chalya, P.L., *et al.*, *op cit.*

Members of the mob have no sign of amnesty on the body of the victim. The mob unceremoniously assumes responsibility of punishing the alleged or suspected wrongdoer or offender, if at all he is the one. To what extent the punishment is suitable or not in the circumstances and the wrong alleged to have been committed is none of the mob's concern. There is no proportionality between the offence alleged to have been committed and the punishment awarded. It is only one punishment namely killing that members of the mob prefer. This is regardless of the offence alleged to have been committed. The fact that there is no respect to human rights, rule of law and due process of administration of criminal justice by the mob, one does not wonder why that is the state of affairs. The late Hon. Mr. Justice Augustine Saidi, former Chief Justice of Tanzania, once stated in the case of *R. v. Anyambalile*:²⁴

In Tanzania as in many African countries there is a deep rooted prejudice and contempt in the minds of the people against thieves, so that the serious beating or even killing of thieves is not taken as an offence.

This is deep rooted but legally wrong mentality, so to speak. The victim can suffer death punishment despite that he was alleged to have committed simple assault or pick-pocketing. Had the suspected person been taken to a police station and later on charged in court, proper and befitting punishment would have been meted out against him if found guilty of the offence.

4. An Overview of Mob Justice in Tanzania: A Statistical Survey

Mob justice is a countrywide problem. It has spread throughout the country. This indicates that the mob justice culture has entrenched itself within the fabrics of the country. A survey of statistics in respect of reported mob justice cases at Police stations shows that no part of the country is spared by the menace. Some people continue to arbitrarily take the law into their own hands thereby creating a threat of gradually turning

²⁴ [1970] HCD n. 285.

the country into a state of lawlessness. The present study has analysed statistics available at the Tanzania Police Force Headquarters Criminal Statistics Section on reported mob justice cases at Police stations over the past twenty years, namely, a period from year 1996 up to 2015. From 1996 up to 2005 a total of 6,039 cases were reported compared to 10,394 cases reported from 2006 up to 2015. This is an increase of 4,355 cases, which is equivalent to 72.1%. Whereas from year 1996 to 2005 six thousand two hundred and sixty seven (6,267) persons were killed as a result of mob justice, from 2006 to 2015 ten thousand six hundred and ninety five (10,695) persons were killed. This is an increase of 4,428 persons, which is an equivalent to 70.7%, as the following Table 1 below illustrates:

Table 1: Statistics of Cases of Mob Justice as Reported at Police Stations over the Past Twenty Years from 1996 to 2015 in Tanzania

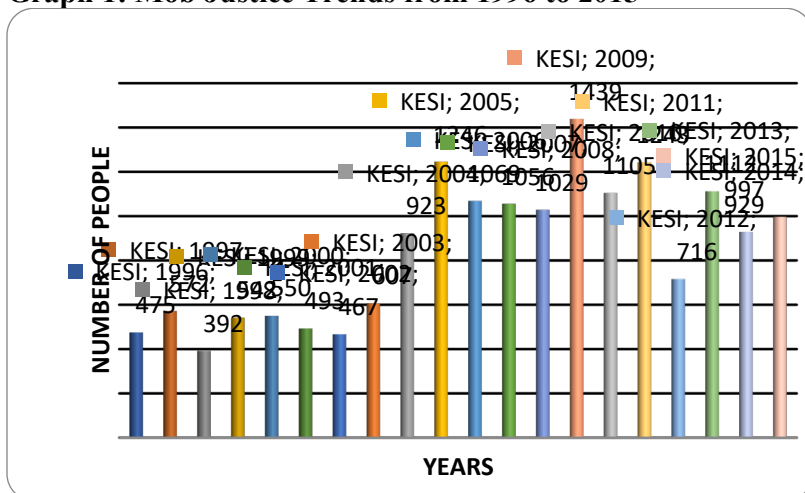
Period	1996 -2005	2006 -2015	Difference	%
Number of Cases	6,039	10,394	4,355	72.1
Number of Persons Killed ²⁵	6,267	10,695	4,428	70.7

Source: Tanzania Police Force Headquarters Criminal Statistics Section

Patterns and trends indicate that there was an increase of incidents of mob justice during the period under review. This shows that mob justice has entrenched itself in our societies. Both urban centres and rural areas are affected. It is a problem which is real and that needs much to be done to get rid of it. The following graph 1 illustrates on mob justice trends:

²⁵ It would be noted that numbers of persons killed differ with those of reported cases because sometimes one mob justice incident can cause deaths of more than one person.

Graph 1: Mob Justice Trends from 1996 to 2015



Source: Tanzania Police Force Headquarters Criminal Statistics Section

From the records it is apparent that types of offences, which appear frequently as causes for mob justice killings include petty theft, cattle theft, witchcraft, breaking, unlawful possession of property which is suspected to have been stolen or unlawfully acquired, such as motorcycle, Television, bicycle, etc.; armed robbery, robbery with violence, rape, theft of motorcycles, theft of motor vehicles, conflicts between peasants and pastoralists, disputes over land and the like. Looking at these types of offences, it would appear that most of them are property related. It is an indication that some people within our societies value property more than human life. This inference is supported by the study carried out by Phillippo Leo Chalya, *et al.* on mob justice as an emerging medico-legal, social and public health problem in North-Western Tanzania where a total of 234 cases were involved. Findings of the study indicated that the most common

reason for mob justice was theft/robbery in 63.2% of cases.²⁶ This reminds us of one sociologist who argues that:

How a society treats its offenders is an index of its basic attitude towards human personality; if, for instance, we ill-treat our thieves, we show only too clearly what we put first, property or people.²⁷

Most of members of the society who administer mob justice have the feeling that victims of such injustice are not human beings but “thieves.” This implies that to them, a thief does not qualify to be a human being. He is an object and hence his life is worthless. One old taxi driver who participated in causing a “thief’s” brutal demise was heard saying: “...We got him....He was not human. He was a thief and he got what he deserved”!²⁸

On the legal requirement of sending thieves to the Police, he retorted “What for? It is a waste of time”!²⁹

So far mob justice has been made to look like a norm rather than an exception.³⁰ Some people in the communities are fearless. They courageously assault their fellow citizens simply because of criminal allegations against them. This is notwithstanding the fact that the country has a sound administration of criminal justice system. Mob justice is a barbaric, primitive and inappropriate act! Citizenry must note that much as

²⁶ Chalya, P.L., *et al.*, *op cit.*

²⁷ Jones, H., **Crime in a Changing Society**, Penguin Books Ltd, Middlesex, England, 1965, p.11.

²⁸ Source: Karume, F., “Commentary: How Corrupt, Failed Criminal Justice System Fuels Mob Killing,” **The Citizen** (Tanzania), February 21, 2014.
[<http://www.thecitizen.co.tz/News/How-corrupt--failed-criminal-justice-system-fuels-mob-killing> (accessed 22/2/2016)].

²⁹ *Ibid.*

³⁰ Concerned Citizen, “Mob Justice in Chanika, who is to blame?”, **Sunday News**, 10/1/2016, p.4.

all the people would wish to protect themselves and their property, mob justice cannot be a vehicle towards fulfilling that wish. Rather the practice is an affront to maintenance of law and order, adherence to upholding the principles of natural justice, due process, the rule of law and good governance. Eventually the practice jeopardises the state of human security which the state vows to protect at any cost through its state apparatuses. One of such apparatuses is the Tanzania Police Force.³¹

The number of cases sent to court in the period between 1996 and 2005 was 2,326 compared to 3,051 cases under the period from year 2006 to 2015, an increase of 725 cases, which is equivalent to 31.2%. The conviction rate of cases sent to court from year 1996 to 2005 was 13.2% compared to 17.2% of cases tried in court between 2006 and 2015, which is an increase by 4%, as the following Table 2 indicates:

³¹ According to section 5(1) of the Police Force and Auxiliary Services Act, Cap.322, [R.E.2002], the Tanzania Police Force, just as is the case with other police forces/services worldwide, is established in Tanzania to perform the following duties:

- Maintenance of law and order.
- The preservation of peace.
- The protection of life and property.
- The prevention and detection of crime.
- The apprehension of offenders.
- The enforcement of all laws and regulations with which it is charged.

Table 2: Mob Justice Cases taken to court between 1996 and 2015

	1996 - 2005	2006 - 2015	Difference	Percentage
Reported cases	6,039	10,394	4,355	72.1%
Cases sent to Court	2,326	3051	725	31.2%
Convictions	308	525	217	70.5%
Acquittals	112	146	34	30.4%
Cases Still under Investigation	3,713	7,343	3,630	97.8%
Pending cases	1,906	2,380	474	24.9%
Conviction rate	13.2%	17.2%	4.0%	29.9%
Acquittal rate	4.8%	4.8%	0%	-0.6%

Source: Tanzania Police Force Headquarters Criminal Statistics Section

From the above statistics only a few cases involving perpetrators of mob justice were sent to court. Out of the few cases that were sent to court very few of them secured convictions. One of the reasons behind such state of affairs is poor cooperation from citizens on mob justice investigation. They are reluctant to act as witnesses. In most cases people do not come forward and disclose the names of suspects who take part in mob justice. In other words, witnesses do not cooperate with the police.³² In most cases immediately after meting out the punishment the mob disperses. This being the case, in most cases only a few arrests are effected and witnesses do not

³² See Concerned Citizen, “Mob Justice in Chanika, who to blame”, **Sunday News**, 10/2/2016, p.4. See also Commonwealth Human Rights Initiative, **The Police, The People, The Politics: Police Accountability in Tanzania, 2006**, A Report by Commonwealth Human Rights Initiative. *Source:* www.humanrightsinitiative.org.

come forward to give evidence. When the police appear at the scene of crime, they only find the dead body of the victim or if he is alive, he is unconscious such that he cannot even speak or identify any of those who assaulted him. Members of the public cannot escape a share of blame on their failure to cooperate in the operationalisation of criminal justice system generally and the police performance in particular. It has been observed in relation to this unfortunate fact that:

Where mobs take direct action against criminals, those concerned consider themselves to be law-enforcers. There is no sense of solidarity with the police since they are not at the start of the event...³³

This explains why investigators and prosecutors encounter difficulties in dealing with mob justice cases due to uncooperative nature of witnesses and the public at large. As a result there are failures in investigation and prosecution due to lack of enough evidence to establish who specifically committed the crime. Eventually it is no wonder that the charges are withdrawn and/or accused are acquitted by trial courts. It should be noted that criminal cases must be proved beyond reasonable doubts. A court of law cannot base its decision on suspicion but on evidence.

5. Reasons Behind Administration of Mob Justice: Wither the Law Enforcement Machinery?

The issue of taking the law into the hands of a few persons, whose effect is to grievously harm or kill the wrongdoers, draws, mixed feelings among members of the public. There are two lines of thought in this context. The first one is that of people who totally support the move and those who completely condemn the same. The second line of thought calls for relevant law enforcement machinery to take measures which will ensure

³³ Tanner, R.E.S., **Crime in East Africa: Homicide in Uganda 1964**, The Scandinavian Institute of African Studies, Uppsala, 1970, p. 73.

that banditry and other serious crimes are contained. The first line of thought is of the view that bandits, thieves and others deserve instant beating and burning them to death. The reasons they advance to back up administration of mob justice include:

- (a) Bandits are dangerous people in that when they forcefully enter into houses of victims, they make away with not only property found therein but also innocent and never replaceable dear lives of owners of the property and other members of households found in sight.
- (b) Law enforcement machinery namely the police, judiciary and prisons departments do not handle bandits properly. That is to say, an arrested bandit may escape police custody through aid of police. Likewise he can be released through court bails. The bandit, if found guilty and imprisoned, can escape prison custody under assistance of prison corps.
- (c) In addition, imprisonment terms served by bandits are relatively very short compared to injury suffered by innocent citizens. The effect of meting out short imprisonment terms is that soon after completing serving jail terms, they return to “normal schedule” of terrorising ordinary citizens. Ernest Adu-Gyamfi, who studied about the implications of mob justice practice among communities in Ghana argues in this connection that:

A further reason for mob justice is the perceived public unhappiness with the system of criminal retribution. Even though the limits and extents of punishments for offences are statutorily prescribed and defined, they are very fundamentally subject to the discretion of the court. When judges exercise their discretion to impose minimal sentences in hideous offences, people become disgruntled and dismayed. With this discontent, mob justice becomes the paramount option to impose retribution commensurable to the particular offence.

However, it is hard to believe that instant justice deters criminals.³⁴

- (d) Some bandits are ex-policemen and soldiers who know very well how to use firearms and other defensive mechanisms. They are a threat. So whenever cornered, the only solution is to eliminate them through killing.
- (e) Beating them to the extent of just wounding or maiming them gives them chances of recovering through medical treatment. When fully recovered, prosecuted, convicted and served imprisonment sentences or acquitted on technical grounds or due to insufficient evidence tendered in court against them, they return to the system as free people hence go on with banditry and other serious offences.
- (f) Burning a bandit or a thief to death or otherwise is a way of revenge by those persons who, in previous occasions, fell victims of banditry or stealing. So, when and wherever it happens that a suspected person is apprehended, those who previously were robbed of their property join hands with the current sufferers and find it the right time to revenge. They beat him thoroughly well and then set him on fire.
- (g) That the government through its departments charged with custody of lives and property of its citizens has failed to fight banditry and other criminal acts. Most of laws are outdated, relevant bodies are ill equipped and the like, such that the duty of fighting banditry becomes tough. Mob beatings and killings serve as a way of “helping” the government in preventing and controlling crime in the country which has become rampant.

It is apparent that most of the reasons advanced by supporters of mob justice, as stipulated above, reflect to a great deal perceived loss of confidence by a section of the public at large on law enforcement

³⁴ Adu-Gyamfi, *op cit.*, p. 89.

machinery. Some members of the public are discontent with how police, prosecution, the judiciary and prisons departments deal with the whole issue of banditry and other serious criminal offences which are a threat to them. How far these reasons hold water before the eyes of law, is the question. Is mob justice the proper way of dealing with offenders? Should the law of the jungle be allowed to replace the ordinary laws existing in the country which is committed to principles of rule of law and good governance? Any civilised modern society cannot allow such a primitive and barbaric way of addressing criminality to operate. In short mob justice is not an acceptable way of seeking justice. It has been correctly stated by one author that:

Be as it may, ‘mob justice’ is nothing but the violation of the doctrine of presumption of innocence and constitution. With ‘mob justice’, people are being punished under the influence of emotion, where justice [is] rarely, or not at all observed: suspects are punished on a mere alarm, without [being] given the opportunity to be heard, and often the punishment appears to be much more greater than the offence committed.³⁵

No matter what kind of reasons may be advanced, it remains a reality that mob justice is not the best option to deal with a few elements in the society who are said to be thieves in the society. Mob justice results in a barbaric way of treating crime and offenders. It takes us back to the days when primitive justice prevailed. That is about 2300 BC when the Code of Hammurabi operated. One of the glaring examples is the Hammurabi’ Code of 1875 BC which spelt out the principle of “an eye to an eye” and “a tooth to a tooth”. During those days public wrongs were harshly treated such that punishment had to fit the crime without considering the criminal himself.

³⁵ Possi, A., “Criminal Justice in Disrepute: An Overview of Treatment of Accused Persons and Convicts in Tanzania,” **The Open University Law Journal**, Vol.1, No.1, July 2007, pp.83-97, p.89.

In a country like Tanzania where there is well established criminal justice system and respect for rule of law, law enforcement machinery is highly needed and should be there to stay. Even those who allege to have lost confidence in the machinery still need protection from it. Challenges that face the machinery cannot make some few members in the public to come up with a blanket statement that the machinery has totally failed to operate. Otherwise the country would turn into an anarchic state, which would be ungovernable. Let those pro-mob justice members re-cultivate culture of taking and sending suspects to relevant body, namely the police. This is the most proper way of handling suspects. It should be noted that stepping into shoes of entrusted law enforcement machinery unceremoniously is just a short-term solution. It does not end criminality in Tanzania and elsewhere in the world. Nor is it true to give blanket statements that law enforcement machinery have failed to deal with criminals such that members of the public should take over. The proper way is to give cooperation to the law enforcers and chart out ways on how best they can efficiently carry out their entrusted responsibilities. Blaming is not the best option at this momentous time. Therefore all participants to the mob justice are liable for the resulting deaths of victims of the mob attacks. Members of the public should take note that whoever takes part in the administration of mob justice does so at his own risk.

6. Position of the Law *vis-a-vis* Mob Justice

In view of the foregoing discussion, does the law allow mob justice and mob killings to take place? In other words, does the law bless mob beating and burning to death suspects? The position of the law is that the mob should not take the law into their hands. Mob justice is an offence punishable by law. Every member of the mob is criminally responsible for the criminal act committed to the suspected person. All of them are regarded as parties to offence because their common intention to “punish” the victim joins them all.

As a matter of fact, when mob beating is effected, it is not necessary that members of the mob sit together prior to the attack to come into an

agreement that they should do the same. Normally each participant goes to the scene and simultaneously joins the crowd and starts beating. Their common intention is normally inferred from the surrounding material circumstances.³⁶ These include their gathering and joining the beating, absence of any suggestion among themselves that they should take the victim to the relevant and responsible authority dealing with such a person. It was once stated in the case of *Okute Kaliebi and Another versus Republic*³⁷ that:

Where several persons together beat another, then though each may have a different reason, and though some may join the beating later than others, it is plain that all have what the law call common intention, which does not necessarily connote any previous concerted agreement between them.

On this note, it was held in the case of *Republic versus Usumau s/o Mpangani*³⁸ that since death or grievous bodily harm was a probable

³⁶ See the case of **Mhina Mndolwa @ Mhina and Another v. The Republic**, Court of Appeal of Tanzania at Tanga, Criminal Appeal No.49 of 2007 (Unreported), where the Court stated that:

The doctrine of common intention is invoked where two or more people set out or are intent to commit an offence and in the process of prosecuting the intent one or some of them commit the actus reus constituting the criminal offence. The commission of the offence is imputed to them all. A member of the group would escape being implicated only if there is evidence that he dissociated himself, before the offence was committed, from the act constituting the offence. We may say that the above is a paraphrasing of section 23 of the Penal Code, Cap. 16 of the Laws which reads:-

23. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose each of them is deemed to have committed the offence.

³⁷ (1941) 8 EACA 78. See also the case of *Mikaeri and Four Others v. Republic* (1941) 8 EACA 84.

³⁸ (1967) HCD 390.

consequence of the attack upon deceased and the attackers acted with a common purpose, accused is liable for the death even though he may not himself have struck the fatal blow. This means that each person is responsible for any act in furtherance of common intention.

Deducing from what is stated above; the law on penal responsibility holds all members of the mob criminally liable without exception. It is so far a reality that administration of mob justice equally means commission of crime. Thus, there is no way mob justice can be left to exist. It must be strongly condemned. Members of the mob have no right whatsoever to attack any person alleged to have committed any crime. By beating up any suspected person, they break the law.

7. Effects of Mob Justice

It cannot be denied that effects of mob justice are far reaching. It is very dangerous to resort to mob justice as an option to prevent crime. For, by doing so it is total manifestation that members of the community openly and grossly disregard the existing laws which deal squarely with such persons falling victims of the mob beatings and killings. Such disregarding of the law has the effect of weakening and undermining the country's legal system and institutions that are entrusted to enforce those laws. In the long run, the country may become chaotic due to lawlessness.

Secondly, there is a possibility of mistaken identity in the administration of mob justice. Provided that the mob is disorganised, disorderly, riotous, and tumultuous, cornering wrong persons can occur. Imagine that a person is running away seeking rescue after having been found committing adultery. There is no doubt that fooling around with other people's wives or husbands is a social evil. But committing adultery is not a crime. It is a civil wrong which has to be dealt with according to civil part of the law. So it is a fact that when such a person happens to pass across the mob, he may be beaten up or killed whereas, before the law, he had committed no criminal offence. This is very dangerous not only for the victims but also to members of the mob violence themselves as potential victims. The effects

of lawlessness, which is created by members of the mob justice will target even themselves.

Thirdly, mob justice can be used to fix innocent people. It may transpire that there are some misunderstandings existing between two parties. To ensure that one suffers out of the misunderstandings, the other party can name him a thief, bandit and the like in a shouting voice, the result of which people could assemble and start beating him even to death notwithstanding that he is in fact innocent. In 1995 one resident of Magomeni in Dar es Salaam escaped death from the mob after being called a thief whereas he was not. A misunderstanding in a love affair could have cost his life. Long live people who happened to know him who raised voice that he was not a thief!³⁹

All in all, administration of mob justice by members of the public poses a threat to human security. Such kind of self styled way of meeting justice ends in very serious consequences and is a matter to be worried about. In most cases lives of innocent people or people who are alleged to have committed offences are put at stake. All the people around are potential victims of the mob justice. If a mere alarm raising is enough to risk one's dear life, who then is so far immune from such uncontrolled behaviour?

³⁹ See **Majira** tabloid, Issue No. 424 of March 2, 1995. It is reported in **Habarileo** tabloid, August 13, 2013 and **Daily News**, August 14, 2013, p.6 that a mere misunderstanding by two lovers ended tragically when one of them was butchered by a mob after his partner called for help accusing him of being a thief. A woman visited her lover, a businessman in Magazini suburb, Mpanda town in Katavi Region. But, when the man was now accompanying the lady from his home, a misunderstanding ensued, resulting in the woman shouting that the man standing beside her was a thief. A group of people came to "rescue" of the lady armed with crude weapons. When the man saw that the mob was charging towards him, he tried to run into his house for safety but they caught up with him before he could get in. The group disappeared after killing the man.

8. Mob Justice in Tanzania: A Human Rights Violation

This section of the study explains briefly on how mob justice in Tanzania violates human rights. It attempts to argue that whether knowingly or not, members of the mob contravene a number of basic and fundamental rights to which the victim of the mob justice is entitled. However, before outlining those rights, the study gives a brief anatomy of the Bill of Rights in Tanzania. The aim is to briefly enlighten on when the Bill of Rights came into operation and what it mainly entails.

With the entrenchment of the Bill of Rights in the United Republic of Tanzania Constitution 1977 in 1984 as per the Fifth Constitutional Amendment,⁴⁰ Tanzania had made a step forward towards not only respecting but also creating an avenue for her citizens to be able to realise human rights. According to the Constitution (Consequential, Transitional and Temporary Provisions) Act 1984,⁴¹ with the Bill of Rights coming in force in March 1988, all basic rights and freedoms which are also referred to as political civil liberties as provided for under Part III of Chapter One of the United Republic of Tanzania Constitution 1977 are guaranteed.⁴² Section 5(1) of the Act provides that:

With effect from March, 1988 the courts will construe the existing law including customary law with such modifications, adaptations and exceptions of the Fifth Constitutional Amendment Act No.15 of 1984, i.e., the Bill of Rights.

Before March 1988 Tanzania did not have a bill of rights which provides for basic rights which include freedom of assembly and association, freedom of movement, freedom of expression, and freedom of religion. Other rights are the right to work; the right to live; equality before the law; personal freedom; the right to participate in Government; the right to

⁴⁰ See the Fifth Constitutional Amendment Act No.15/1984.

⁴¹ Act No.16/1984.

⁴² This part covers Articles 12 – 32 of the Constitution.

acquire and own property and the right to a fair remuneration. These are the rights and freedoms which have to be enforced subject to laws of the land. All Tanzanians are entitled to enjoy these rights and freedoms. These are natural rights and freedoms bestowed on them by the fact that they are human beings. Mob justice does not conform to what the Bill of Rights provides. In fact it is an affront to better enjoyment of the fundamental rights. Among the most infringed fundamental rights by irate mobs are the following:

(a) The Right to Life

It needs to be appreciated at the outset that the right to life, as Peter, C.M., correctly argues, is the most important of all human rights.⁴³ There is no doubt therefore that had there been no right to life, it would be meaningless in having any other human right. This is the mother of all rights. The United Republic of Tanzania Constitution 1977 provides under article 14 that:

Every person has a right to live and subject to law, to protection of his life by the society.

The fundamental importance of the right to life got an interpretative treatment from the South African Constitutional Court in the case of *S. v. Makwanyane and Another*.⁴⁴ The Court interpreted the right to life as

... an antecedent to all other rights in the Constitution. It is not life as mere organic matter that the constitution cherishes but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values.⁴⁵

Thus any attempt to take away life defeats the very essence of all human rights. It has been strongly stated that:

⁴³ Peter, C.M., **Human Rights in Tanzania: Selected Cases and Materials**, Rudiger Koppe Verlag, Koeln, 1997, at p.25.

⁴⁴ [1995] 6 BCLR 665 (CC) par 326.

⁴⁵ *Ibid*.

... the primacy of the right to life is based on recognition that without this right, other human rights are meaningless.⁴⁶

In view of the above discussion, it is apparent that mob justice, whose result is killing, violates the very mother of all rights that is the right to life.

(b) Presumption of Innocence

The violation of the right to life as perpetrated by irate mobs goes hand in hand with violation of other basic rights, which are well established and have an upper hand in the administration of criminal justice system in the country. Presumption of innocence, as provided under Article 13(6)(b) the Constitution of the United Republic of Tanzania is violated. The phrase presumption of innocence has been defined as a conclusion or inference as to the truth of a person being not guilty, harmless, or knowing nothing of evil or wrong.⁴⁸ The presumption of innocence is in fact a fundamental principle underlying the criminal law and enforceable under the Bill of Rights as enshrined in the Constitution of the United Republic of Tanzania.⁴⁹ Thus under this basic right, a person is presumed to be innocent until he is proved guilty by a competent court through a due process. The burden of proving guilt is entirely on the prosecution. The standard of proof is beyond reasonable doubt. The accused does not have the duty to prove his innocence. This is so because the presumption of innocence always remains with a suspected person until he is proved guilty by a court of law.

As already noted above, the mob normally instantly subjects the victim to death without giving him the chance to prove his innocence. As such

⁴⁶ Holt, N.J.(Jr), "Human Rights and Capital Punishment: The Case of South Africa," **Virginia Journal of International Law**, Vol. 30, 1989-1990, pp.273-318, at p.283.

⁴⁸ Mnyasenga, T.R., "Locating the Scope and Application of the Right to Presumption of Innocence in Tanzania," **International Journal of Law, Education, Social and Sports Studies**, Vol.2, Issue 4, 2015 (Oct-Dec), pp. 73-93, at p. 74.

⁴⁹ *Ibid.*

presumption of innocence which is normally afforded by law to a person alleged to have committed crime is never considered. The fact that the irritated mob dispenses justice the way it deems fit which is totally contrary to the existing criminal justice system, the victim is instantly condemned and punished. The act is so instant because at the time of assembling, members of the mob unceremoniously assume forthwith roles of arresting officers; investigators; prosecutors; judges and prisons officers who execute punishments. Within a few minutes all those roles are played in entirety! Presumption of innocence is out of question since no one is interested in such principle. The victim is not given chance to give his side of the story. Had he been given such opportunity the truth might have been known. Neither does proof beyond reasonable doubt of the allegations levelled against the suspect is entertained. The mob does not respect this basic right at all. As a result, an individual's fundamental right to presumption of innocence is blatantly violated. It has been noted that:

Public disgrace and shaming of people who are termed as "offenders" is not only outside of the social and legal sanction ,it also fuels an anarchist (and not in good way) and regressive mindset. During a mob formation, there is absolutely no regulation of unruly behaviour of each participant and this can lead to extreme miscommunication between them. The exact details of whatever is happening around the mob participants can be very unclear due to the unchecked rage and sentiments. This can lead to huge injustices and unnecessary assaults on innocent people. While it is true that rage and anger is useful in initiating important revolutions, it needs to be in adequate doses which can be channelized in positive ways.⁵⁰

(c) Rules of Natural Justice

Rules of natural justice, which advocate fair trial, are as well violated by violent mobs. When mob justice is administered, there is no respect at all, by members of the crowd when meting out justice, for rules of natural

⁵⁰ Momin, *op cit.*

justice as enshrined under article 13 of the Constitution.⁵¹ It means that the right to be heard, the rule against bias and the right to know reasons for the decision do not feature before irate mobs. This is because a victim of mob justice is condemned to death unheard by the crowd. The High Court discourages this practice. It had stated in the case of *R.v. Phillimon*⁵² that to allow an aggrieved person to take the law into his own hands would make him a judge in his own cause which is contrary to natural justice.

All in all mob justice undermines the right to life as enshrined in the Constitution. Its administration shows a total disregard of the very Constitution, rule of law and criminal justice system. To say the least, mob justice is a total violation of human rights and an impediment to access to justice.

9. Conclusion

It is totally wrong to address criminality through mob justice. No civilised country in the world ever regards mob justice as justice. Historically speaking, mob mentality has been known to spread havoc rather than bring a positive change in society.⁵³ It is injustice which should be condemned with high tones. Mob justice is a clear manifestation of an existing barbarity within a society. It is indiscriminate, a blatant mockery of justice and should be discouraged at any cost.⁵⁴ Let it be noted at the outset that lawlessness cannot be left to flourish in the country where rule of law

⁵¹ Peter, C.M., *op cit*, p. 428, defines “rules of natural justice” as follows:

Rules of natural justice are about fairness and justice in the society. They address how judicial, administrative and other organs are to function in the process of reaching a fair decision in determination of any issue before them. These rules of fair-play in the administration of justice are regarded as universal and rules of the wise. They are an integral part of the doctrine of rule of law.

⁵² [1973] LRT n. 73.

⁵³ Momin, S.M., “Mob justice is no justice,” **The Independent**, 27 July, 2015, **Bangladesh**.

⁵⁴ See Editorial, **Daily News**, February 12, 2008, p.4.

prevails. All Tanzanians, including those who are alleged to be criminals, need protection from the state. On this point, Mchome, S.M., states:

...[I]t is important to follow the law, as we all hate criminals and accept that punishment is the only best way to deal with them, we still have to abide by the requirements of the rule of law. The reason is very simple, in that, “if the law cannot protect the worst of us it can hardly protect the best of us,” and that it is our duty to change the conditions that breed the worst of us rather than committing crimes against them.⁵⁵

It is through law that the state can provide protection to the citizenry. Therefore all Tanzanians must abide by the laws of the land. The need for all Tanzanians to live within the ambits of the law cannot be over-emphasised. It is the law, which prescribes on how to punish wrongdoers and not otherwise.

To conclude, mob justice operates outside the law, undermines the Constitution and the rule of law and therefore is punishable under the law. This means that whoever takes part in the perpetration of it does so at his own peril.

In view of the above, the following recommendations need to be considered:

(i) Respect for Law Enforcement Machinery

Respect to all law enforcement machinery, namely police, prosecution, the judiciary and prisons departments should take an upper hand amongst Tanzanians. Let no one pretend to assume responsibility of carrying out duties which ought to be undertaken by either departments. The mob has no right and mandate at all to step into the shoes of these departments.

⁵⁵ **Mchome**, S.E., *op cit.*, p.165.

Accordingly, citizenry should let administration of criminal justice system to take its course.

(ii) Law Enforcement Machinery Adherence to Codes of Conduct

Members of the law enforcement machinery should stick and adhere to their codes of conduct. Socio-economic hardships which hit many Tanzanians should never be taken as an excuse for a few of them to involve themselves into malpractices which automatically erode their confidence to members of the public they serve. A few bad elements should never be left unpunished. Let administrative and disciplinary actions be taken forthwith against those who happen to go astray.

(iii) Penal Legislation should be Reviewed

Penal legislation should be revisited in order to come up with a proper version that fits the situation. The version should take cognizance of the following arguments: first that so far some members of the public are not happy with the lenient punishments meted out; and two, that modern penology emphasises more on correction than deterrence of offenders.⁵⁶

(iv) Legal Education should be Encouraged

Legal education to the masses should be encouraged. Such education will raise awareness especially on the administration of criminal justice system and understand how government operates through its law enforcement machinery. Members of the public will, among other things, know or be reminded that mob justice also means mob crime; a pick-pocket to be released on bond at police station or bail in court is a constitutional right. All this is done according to law. In so doing a law enforcement machinery cannot be said to have failed to perform its duty. It in fact executes one of

⁵⁶ See Shaidi, L.P., "Tanzania Penal System: Retribution or Correction of Offenders," **Eastern Africa Law Review**, Vols. 35-40, December, 2009, pp.171-195, who argues at p.172 that the effectiveness of the deterrence theory is highly questionable especially on the notion that the criminal and his crime are the products of society.

its responsibilities namely, observing and enforcing constitutional rights. All in all, an existing ignorance gap will be bridged and members of the public who support mob justice shall know that the practice is illegal and contrary to the laws of the land.

(v) Working Conditions should be Improved

The government should go on improving working conditions of its law enforcement machinery. Working facilities and emoluments should be improved to the realistic standards. This will minimise chances of gross inefficiency, malpractices, negligence and such other evils which move members of the public to lose confidence over the law enforcers.

(vi) The Need for Cooperation

Cooperation as opposed to confrontation between members of the law enforcement machinery and the citizenry is highly needed if the rule of law has to operate fully. Citizens should not remain passive onlookers while mob violence takes place. They should be sensitised so that they see the bad side of taking the law into their own hands. The need for cooperation in this endeavour cannot be overemphasised. Daniel Jay Baum, a Canadian national, says that:

It is co-operation, not confrontation that police want. They have no choice. They cannot hide from the community they are intended to serve. If they are to be effective, they must be responsive. The volume of their work requires this.⁵⁷

It is high time that everyone built a sense of law abiding responsibility. Normally law abiding citizens leave maintenance of law and order to the law enforcement agencies. Moreover, they become whistle-blowers and witnesses against those people who take part in mob justice so that legal actions are taken against them.

⁵⁷ Baum, D.J., **Discount Justice**, Burns & MacEachern Limited, Toronto, 1979, p. 49.