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(ii) Length: not more than 25 pages
(iii) One inch margin: Left, right, top and bottom;
(iv) Font type and size: 12 points Times New Roman or Arial
(v) Programme: MS word 97-2003
(vi) Use footnotes and not end notes
(vii) Citation style: Chicago or Turabian

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The Editor,
Eastern Africa Law Review,
P.O. Box 35093,
Dar es Salaam,
Tanzania

**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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Application of the UN Charter on Use of Force by and Against Non-State Actors: With Reflections from Africa and Asia

Kennedy Gastorn*

Abstract
This Article reflects upon some of the relevant aspects of the emerging jurisprudence in international law relating to the use of force by and against non-State actors. It analyzes the existing perspectives on the increasing incidences of acts of self-defense against non-State actors, in the context of Articles 2(4) and 51 of the UN Charter, including whether or not these provisions are relevant and adequate today to handle the current situations of crises. It also highlights positions and experiences from Africa and Asia in this regard, as largely reflected from the proceedings of the Asian-African Legal Consultative Organization (AALCO).¹ Finally, the article notes the emerging expansive notion of self-defence against non-State actors which does not fit any of the past paradigms, which has created a vacuum and a loophole in the treaty norm as well as the preemptory norm of customary international law on the prohibition of use of force. Ultimately the article analyzes the fundamental question relating to what extent the claims to self-defense against non-State actors and future attacks can be regarded as lawful or unlawful under international law and what may be the way forward.

1. Introduction
Under Article 2(4) of the UN Charter, threat or use of force against the territorial integrity or political independence of any State is prohibited.² This fundamental rule of international law has today rightly evolved to the stature of *jus cogens* or a norm of peremptory nature under international law.

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¹ Secretary General of the Asian-African Legal Consultative Organization (AALCO). Any views contained or expressed in this article are those of the author and are neither intended to, nor do they, necessarily represent the views of any other individual or body associated with AALCO or its Member States. The author is grateful for the assistance received from Amrita Chakravorty, Legal Officer, AALCO. The author can be contacted at: kennedy@udsm.ac.tz

² AALCO is an international intergovernmental organization established in 1956.

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¹ Also see 1987 Declaration of the Non-use of Force, Principle 7 of the Bandung Declaration, Principle 1 of the Friendly Relations Declaration, Principle 2 of Panch Shila.
As acknowledged in the Charter itself there are two exceptions to this prohibition. The first is the case of self defence under Article 51 of the UN Charter, and the second is the system of sanctions under Chapter VII of the UN Charter. The resulting widespread unilateral measures of threat or use of force under these exceptions, which has included such force being directed against the territorial integrity and political independence of States, has become a matter of great concern. The understanding of self-defense, its definition and the stretching of its claims to seemingly borderless lengths by some States has led to increase in debates on which are the cases where self-defense can be actually invoked. Furthermore, with a proliferation of actors in the world politics and an increase in non-State actors waging war on the States machineries, additional difficulties have added to the already complicated situation. Indeed, States have become more inclined to prevent the attacks from happening and have started to favor preemptive self-defense or attack and even preemptive wars.

The selection of Africa and Asia is topical for this article and a fitting one, partly because the region is currently facing an unprecedented brunt of instability and violability of international borders by lawful State actors and lawless non-State elements alike.\(^3\) Non-State armed groups are mobilizing international coalition support from States, challenging other neighboring States, grabbing land by force, setting up capitals, proclaiming statehood and practically transforming themselves into a new form of State from the ruins of defeated or failed States or a counter-State created by an authoritarian State’s collapse.\(^4\) Other non-State armed groups are waging open wars with third-party States from where they are based or operating. This has prompted use of force against or on the territory of another State, thereby becoming an issue between States. The debatable question is whether international law permits States to use armed forces on the territory of another State to

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ward off the threat of non-State actors, such as terrorist groups, even where they are neither hosted nor supported by that particular State.  

The choice of AALCO as a point of reference while reflecting on the use of force against non-State actors in the context of self-defense can hardly be over- emphasized. AALCO is the only intergovernmental legal body so far with a total of 47 Member States belonging to the two most populous continents of Africa and Asia. It is a forum for intergovernmental consultation on matters of common concerns to its Member States and also acts as an advisory body, providing assistance to its Member States in matters of international law in the light of their particular interests. Established in 1956, as a tangible outcome of the historic Bandung Conference held in Indonesia in April 1955, it was on 13 October 1980 accorded permanent observer status by the United Nations General Assembly. Since its inception, AALCO has worked on a wide range of international law topics relating to the use of force including the Legality of Nuclear Test in 1964 and Blockade of Gaza in 2010. AALCO’s current work-programme includes the Legal Aspects of Violent Extremism and Terrorism.

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6 See AALCO’s website at: [www.aalco.int](http://www.aalco.int)

7 Member States to AALCO are Arab Republic of Egypt; Bahrain; Bangladesh; Brunei Darussalam; Cameroon; Cyprus; Democratic People’s Republic of Korea; Gambia; Ghana; India; Indonesia; Iraq; Islamic Republic of Iran; Japan; Jordan; Kenya; Kuwait; Lebanon; Libya; Malaysia; Mauritius; Mongolia; Myanmar; Nepal; Nigeria; Oman; Pakistan; People’s Republic of China; Qatar; Republic of Korea; Saudi Arabia; Senegal; Sierra Leone; Singapore; Somalia; South Africa; Sri Lanka; State of Palestine; Sudan; Syria; Tanzania; Thailand; Turkey; Uganda; United Arab Emirates; Socialist Republic of Viet Nam and Republic of Yemen.

8 The current work-programme includes: Matters Relating to the Work of the International Law Commission; The Law of the Sea; The Environment and Sustainable Development; Expressions of Folklore and its International Protection; The Status and Treatment of Refugees; Violations of International Law in Palestine and Other Occupied Territories by Israel and Other International Legal Issues related to the Question of Palestine; Legal Protection of Migrant Workers; Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties; Violent Extremism and Terrorism (Legal Aspects); Establishing Cooperation Against Trafficking in Women and Children;
Due to constraints of time the objective of this article is not to provide a comprehensive account of international law on the use of force, but rather to focus upon the emerging jurisprudence in international law on use of force by and against non-State actors. Views of Member States of AALCO as derived from the proceedings of the Annual Sessions are discussed not only in the context of Articles 2(4) and 51 of the UN Charter, but also in the context of the existing broader scholarship on the subject matter. The article concludes that prohibition on the use of force is a component of the principle of *jus cogens*, and since Articles 2(4) and 51 are primarily premised on the inter-State conflicts, it may be stated that they are not sufficiently drafted to include force used by non-State actors not attributable to the State. International law on use of force in this regard has to adjust itself so that it may better suit the increasingly complex scenarios of intra-State conflicts.

2. Article 2(4) of the UN Charter

Article 2(4) of the UN Charter provides that “all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations”. The drafting history (travaux préparatoires) of this Article as well as scholars’ writings on the topic indicates that use of force meant ‘use of armed force’.\(^9\) Also this Article is generally seen as a comprehensive prohibition of the threat and use of force by States.\(^10\) It is intended to ban anything more than *de minimis* force.\(^11\)

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But, as pointed out by Shinya Murase, grey areas continue to exist within the ambits of the application of Article 2(4). The principle of non-use of force is primarily in the context of obligations of States to refrain from the use of force in their international relations (relation between States), against the territorial integrity or political independence of any State, and does not really provide any clarification upon the complex situations of interventions in civil wars. Therefore, it may be argued that humanitarian interventions may be permissible in exceptional circumstances, as long as they are not intended to deprive a foreign State of part of its territory.\textsuperscript{12} Some scholars view article 2(4) as only prohibiting conquest – that is not to use force aimed at “interfering with the territorial integrity or political independence of the state being attacked”.\textsuperscript{13} It is on such grounds that some writers are suggesting that Article 2(4) should be rewritten, as the current provision, as it stands, cannot tackle the warfare engendered by non-State terrorist organizations operating on individual basis.\textsuperscript{14}

3. Article 51 of the UN Charter

Article 51 of the UN Charter provides that:

\begin{quote}
Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.\textsuperscript{15}
\end{quote}

One of the most contentious issues with regard to use of force in self defence is the nature of the armed attack. Issues which may arise include when exactly the right to self-defense against a State can be

\begin{footnotes}
\item[12] Shinya Murase, note 10, at p. 256.
\item[13] More see Mary Ellen O’Connell, note 11, at p. 39.
\item[15] Article 51 of the UN Charter.
\end{footnotes}
said to have arisen (what should be the nature and intensity of the attack that can trigger a right to self-defense by another State), and also to a certain extent, in whom do such rights vest. Does a non-State actor’s terrorist bombing or suicide bombing rise to the level of an armed attack or whether it is simply a matter of domestic criminal law? The issue in this regard is whether under international law one may use armed force on the territory of another State to respond to a threat like that.\(^\text{16}\)

There are two views that exist on the right of exercise of self-defense. The first is that this right of States accrues only when the State concerned is actually exposed to an armed attack. There is no accepted definition of the term “armed attack” under international law. The Charter mentions it but does not define it. The ICJ in the case of *Oil Platforms* clarified an armed attack under Article 51 of the UN Charter as the most grave form of the use of force; but it did not elaborate the criteria of gravity that distinguishes armed attack from use of force.\(^\text{17}\) The second is that it may be used even on a ‘lesser use of force’, also known as preventive or pre-emptive self-defense.

On 27 June, 1986, as the ICJ pronounced its judgment in the Nicaragua case, for the first time in its history it gave a direct and elaborate ruling on the issues pertaining to the international law on the use of force, including on the conditions for the exercise of a State’s right of self-defense as part of the customary international law. The ICJ noted that not every use of force could rise to the level of “armed attack”. The “scale and effects” required for an act to be characterized as an armed attack necessarily exceed those qualifying the act as a use of force. Only in the event that the use of force reaches the threshold of an armed attack is a State entitled to respond using force in self-defense.\(^\text{18}\) Therefore, in the Nicaragua judgment the Court identified “scale and effect” as the criteria that distinguish actions qualifying as armed attacks and those that do not. It noted the need to “distinguish the gravest forms of the use of force (those that could constitute an armed

\(^{16}\) David Linnan, note 5, at p. 232.  
\(^{17}\) Kriangsak Kittichaisaree, note 9, at p. 168.  
\(^{18}\) Nicaragua Judgment (Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. USA*)) (1986), paras 191 and 195.
Application of the UN Charter on Use of Force

attack) from other less grave forms”. However, it failed to provide any further guidance in this regard, and the parameters of the “scale and effect” criteria remained unsettled beyond the indication that they need to be grave.

However, the Nicaragua judgment did distinguish between an armed attack and a ‘mere frontier incident’. In this regard the Court itself indicated in one of its later judgments that an attack on a single military platform or installation might qualify as an armed attack as well. At this juncture, it is necessary to examine the concept of anticipatory self-defence.

4. Anticipatory Self-Defense

Anticipatory self-defense refers to the resort to force in response to an imminent armed attack rather than an actual attack. The legal requirements for establishing self-defense by a State against an imminent armed attack find their modern antecedents in the Caroline incident of 1837. This incident preceded by some 50 years the first international elucidation of the prohibition on the use of force in Articles I and II of the Kellogg-Briand Pact of 1928. In the Caroline British forces based in Canada caused a pre-emptive attack against an American ship, called the Caroline. The ship was carrying American sympathizers with the rebels against British rule in Canada. It was also ferrying arms to insurrectionists. In this incident one of the British officers was arrested and charged with murder. The then US Secretary

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19 Nicaragua Judgment (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)) (1986).
21 Nicaragua Judgment (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)) (1986).
22 Oil Platforms Judgment (Islamic Republic of Iran v. The United States of America) (2003), paras 57 and 61.
of State Daniel Webster issued a letter to his British counterpart Lord Ashburton in defense of the act. The letter contained what a State claiming self-defense would have to prove. That formulation, popularly known as the Webster’s formulation, has since that time become canonical.

The US Secretary of State, Daniel Webster, replied saying that he recognized that the United Kingdom did not have to suffer an actual armed attack before resorting to anticipatory self-defense provided there was “a necessity of self-defense [which was] instant, overwhelming, leaving no choice of means and no moment for deliberation”. Daniel Webster also included in the letter the requirements of “proportionality” and “necessity” for a legitimate exercise of anticipatory self-defense.\(^{24}\) He wrote that even where the necessity of the use of self-defense might be justified, the use of the defensive forces must be proportional to the threat, since the “act justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it”.\(^{25}\)

The concept of self-defense has continued to evolve over time. Some scholars disagree that the Caroline is the best example to explain the concept of self-defense. Some of the prominent writers on the subject such as Shinya Murase\(^{26}\) and Dire Tladi\(^{27}\) have raised questions over the


\(^{25}\) D. Webster, note 24, at pp. 1129, 1138.

\(^{26}\) Shinya Murase that argues that a close look at the factual background of Caroline would reveal that the incident was in no way a typical case of self-defense as conceived in contemporary international law. One of the factors that separate this incident from the similar incidents of the contemporary scenario is that the American volunteers and suppliers helping the Canadian rebels had nothing to do with the United States government. See Shinya Murase, note 10, at p. 294.

\(^{27}\) Dire Tladi notes that the international law did not prohibit the use of force at the time of Caroline because war itself remained legal and appropriate when undertaken to defend rights in international law. So “the justification for the use of force, in particular on the ground of self-defense, was often advanced for political expedience and to secure the moral high ground rather than to provide a shield against a legal wrongfulness.” Furthermore, “the reference to the period of Caroline as the critical date for the customary international law said to lie behind the UN Charter of 1945 is anachronistic and indefensible”. Tladi adds that even if the Caroline did reflect customary law of 1842,
relevance of this case in guiding current debates over the applicability of the concept of self-defense. The relevance is questioned owing to the time and the international political environment in which this incident took place.

Indeed, the Caroline formulation was later used by the International Military Tribunals at Nuremberg and Tokyo cementing the legal status of anticipatory self-defense. The Caroline formulation never attained a concrete shape in the international jurisprudence. The present situation is, therefore, such that despite authorities frequently resorting to the Webster doctrine, the concepts, “instant”, “overwhelming”, “no choice of means”, and “no moment for deliberation” continue to be ambiguous and carry the potential of being misused in their application.

The strict articulation of the right in Article 51 seems to preclude a State’s use of force, until after an armed attack has already commenced, and not merely on the basis of threat of any use of force. Over the years, however, many authorities have regarded the right as encompassing the previously existing inherent right of self-defense under customary international law. Many people think this right includes a right to pre-emptive self-defense in the event of an imminent attack. The UN Charter too acknowledges the pre-existing customary right of self-defense; it states that "nothing in the present Charter shall


28 The IMT at Nuremberg held that the German invasion of Norway in 1940 was illegal in view of the fact that it was unnecessary to prevent an anticipated allied invasion. See, Onder Bakirciouglu, Self Defense in International and Criminal Law: The Doctrine of Imminence, Routledge, (2011), p. 139.

29 The Tokyo Tribunal held that Holland’s declaration of war on Japan, on 8 December, 1941, in the absence of an actual armed attack, was actually justified , for it was clear that Japan had laid out elaborate plans to attack the Netherlands East Indies. See, Onder Bakirciouglu, note 28, p. 139.

impair the inherent right of individual or collective self-defense."\textsuperscript{31} One practical problem of locating the anticipatory self-defense as permissible under Article 51, however, is the question of objective assessment of the imminence of the threat. Mahmoud Hmoud argues that:

\[\text{[W]hen the preemptive attack occurs before the “aggressive” attack itself, there is no way to make an objective assessment of the threat, leaving the matter to the “subjective” discretion of the defending state. This result is particularly troubling in dealing with terrorist threats, considering that imminence depends on the circumstances of each case and not necessarily on the timing of the terrorist attack.}\textsuperscript{32}\]

An increasingly vague and expansionist notion of self-defense has increasingly turned into a threat for international order and peace. Preemptive attacks have become preventive wars. Scholars state that in a world that is hard pressed to stop aggressive war, customary international law provides no clear guidelines for application of the doctrine of anticipatory self-defense. This ambiguity has worsened in the recent times, when the advent of modern weapons of mass destruction has virtually destroyed all room for the preparation of self-defense, in case an armed attack occurs. For example, the Atomic Energy Commission ("AEC") suggested in its First Report in December 1946 that preparation for atomic warfare in breach of a multilateral treaty or convention would, in view of the appalling power of the weapon, have to be treated as an "armed attack" within Article 51 of the U.N. Charter. The AEC suggested to the UN Security Council that “when a state violates the terms of this multilateral treaty or convention it should, be borne in mind that a violation might be of so grave a character as to give rise to the inherent right of self-defense recognized in Article 51 of the Charter of the United Nations."\textsuperscript{33}

\textsuperscript{31} Article 51 of the UN Charter.
The concept of the right to self-defense from the time of the cold war, and especially since the end of it has been enmeshed with complications and controversies, as there has been a proliferation of armed conflicts within States, and an unprecedented rise of the phenomenon known as terrorism. The weakness of State structures and institutions in many countries has heightened the challenges and risks of nation building, and sometimes tempted armed groups to try to seize and themselves exploit valuable assets. These civil conflicts are often fuelled by arms and monetary transfers that originate in the developed world and their destabilizing effects are felt in the developing world in everything from globally interconnected terrorism to refugee flows, the export of drugs, the spread of infectious disease and organized crime. As is widely recognized, UN peacekeeping strategies, crafted for an era of war between States and designed to monitor and reinforce ceasefires agreed between belligerents, may no longer be suitable to protect civilians caught in the middle of bloody struggles between States and insurgents. The challenge in this context is to find tactics and strategies of military intervention that fill the current gap between outdated concepts of peacekeeping and full-scale military operations that may have deleterious impacts on civilians.  

During WW1 a US Senator, Elihu Root, observed:

> whether that general acceptance which is necessary to the establishment of a rule of international law may be withdrawn by one or several nations and the rule be destroyed by that withdrawal so that the usage ceases and the whole subject to which it relates goes back to its original status as matter for new discussion as to what is just, convenient and reasonable.

These observations acquire renewed relevance in light of arguments recently made that Article 2(4) has been deprived of its legal authority by the frequency and impunity with which its terms appear to be

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violated under the claims of sovereign prerogative.\textsuperscript{36} The renewed relevance referred to above has to be looked into afresh in the era of liberalization of the use of force.

5. \textbf{Increasingly Expansive Notions of Use of Force in Self-Defense}

The world has today entered into an era of greater liberalization of use of force. This wave of liberalization has materialized in loosening of the framework for collective security, and in particular the dilution of the existing limitations. The collective security phenomenon can be seen in particular, firstly, in the broadening of the limits of the Security Council’s authorizations, and secondly in the expanding of the concept of self-defense, especially in cases of armed attack by and against non-State actors. The collective security phenomenon admits a number of exceptions.

The first exception is related to requirement of authorization of the UN Security Council to the use of force, which is otherwise prohibited in Article 2(7) of the UN Charter. While the UN Security Council may authorize the use of force, the Council itself does not have an international standing army under its control. Having its own army was considered to be too strong an encroachment on the State sovereignties. Instead the Charter envisages the use of force under the aegis of the UN through national forces being supplied to the Security Council by the UN Members by way of advanced agreement/s, as it explicitly so mentions under its Article 43.\textsuperscript{37} Article 48 of the Charter re-affirms the obligation of the Member States to carry out the decisions of the Security Council, and further provides that these decisions “shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are


\textsuperscript{37} Article 43(1) of the UN Charter:

“All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.”
members. The relation between the Security Council and regional arrangements or agencies is regulated by Chapter VIII of the UN Charter.

In the absence of any military enforcement capacity of its own, the Council adopted a model for military enforcement whereby it confers authority to willing States or organizations to apply such enforcement measures, by way of passing resolutions to that effect. This expansive practical implementation of the Council’s legal competence is today widely acknowledged by international lawyers. At the heart of the UN system of collective security was a commitment to universalism and the idea that it really was possible to constitute a community of States, or at least of peace-loving States, who would act forcefully only in the name of that community to counter aggressive actions. In joining the UN, States gave up their right unilaterally to resort to force other than in self-defense, and pledged to use force only in the name of the international community.

The Security Council’s record in providing clear military enforcements, in its resolutions, however, has been a mixed one. In its first military enforcement resolution tackling the issue of North Korea’s invasion of South Korea in the year 1950, UN Security Council Resolution 83, it was stated that “Recommends that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area”. This broad mandate had created some controversy over the decision of the participating forces to cross the 38th Parallel, separating North Korea from South Korea.

In the case of UN Security Council Resolution 678, which was made to authorize the liberation of Kuwait from Iraqi invasion, once again the reference to the broad terminology “to restore international peace and security in the area”, led to the later invocation of the Resolution by some States to undertake various military actions against Iraq. This was

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in response to the failure of Iraq in fulfilling its obligations relating to the decommissioning of the weapons of mass destruction, as was mandated by Resolution 678. These military actions later on culminated into the full invasion of the country in 2003. The UN Security Council resolutions were made with the aim of providing humanitarian intervention under the principle of responsibility to protect.

6. **Humanitarian Intervention under the Principle of Responsibility to Protect**

The inherent shortcoming in the functioning of the UN Security Council as the principal focal point for any intervention in the internal affairs of a State gradually led to the emergence of the principle of Responsibility to Protect or R2P. The R2P qualified the principle of non-interference in sovereign affairs even beyond what was formally allowed under the UN Charter within the Security Council’s authorization. After the R2P doctrine was endorsed at the 2005 World Summit there were many clarifications issued to emphasize the fact that “the responsibility to protect does not alter the legal obligation of Member States to refrain from the use of force except in conformity with the Charter”. However, in spite of such clarifications issued and explanations of the doctrine made, humanitarian interventions continued to take place outside of UN Security Council authorizations, attracting considerable criticism from the international community.

Responsibility to protect rests upon three pillars of equal standing: the responsibility of each State to protect its populations (pillar I); the responsibility of the international community to assist States in protecting their populations (pillar II); and the responsibility of the international community to protect (through the UN Security Council) when a State is manifestly failing to protect its populations (pillar III). It is the operations that take place under Pillar III of the doctrine (that is, operations undertaken when ‘a State is manifestly failing to protect

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40 Gary Wilson, note 38, at pp. 162-163.
its populations’) that have increasingly come to be known as instances of ‘humanitarian intervention’. However, it is important to note that the 2005 World Summit allowed humanitarian intervention only under the UN Charter within the Security Council’s authorization.

Despite the acknowledgement that collective responsibility to protect arises only when a State manifestly fails to protect its populations against mass atrocities, by the 2005 Outcome Document, under the specific authorization of the UN Security Council, also popularly called the ‘endorsed R2P principle’, the world has witnessed several expansive and sometimes contradictory claims of R2P. Such contradictory claims have contributed to the ongoing negotiation process among States about the definition, interpretation and application of the norm of R2P, adding to the current climate of confusion regarding its contents. For example, the Commission on Intervention and State Sovereignty (ICISS) acknowledged that the Security Council is the appropriate body to authorize military interventions, but if the Security Council rejects a proposal to protect or fails to deal with it within a reasonable time, the Commission proposed that the matter could be considered by the General Assembly under the Uniting for Peace Procedure.42 If that fails, it suggested that a regional

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42 The independent International Commission on Intervention and State Sovereignty (ICISS) was established by the Canadian government in September 2000 to respond to the challenge posed by the parallel operation of the general agreement internationally on the one hand that the international community cannot stand by in the face of massive violations of human rights, and the respect for the sovereign rights of States, on the other. After intense worldwide consultations and debate, the Commission produced its report, with the central theme of the “responsibility to protect,” underlining the primary responsibility of sovereign States to protect their own citizens from avoidable catastrophe – from mass murder, from large scale loss of life and rape, from starvation. But when they are unwilling or unable to do so, that responsibility must be borne by the broader community of States. The Commission had been formed in response to Kofi Annan's question of when the international community must intervene for humanitarian purposes. In the report of the ICISS it was proposed that when a State fails to protect its people – either through lack of ability or a lack of willingness – the responsibility shifts to the broader international community. It is important, however, to note that the central theme of the report was the rejection of the term “humanitarian intervention”. It had started to be regarded as both too discredited by abuse, and too much focused on the agents of intervention as opposed to its actual or supposed beneficiaries. Instead of a right to intervene, the ICISS preferred to talk of a responsibility to protect, as reflected in
organization could take action within its area of jurisdiction subject to seeking a Security Council authorization. The Commission furthermore warned that if the Security Council fails to discharge its responsibility to protect in conscience shocking situations crying out for action, it is unrealistic to expect concerned States to rule out other means or forms of action to meet the security emergency.\(^{43}\)

The Secretary-General’s 2009 report on the implementation of the Responsibility to Protect asks the UN members to “consider the principles, rules and doctrine that should guide the application of coercive force” and underlines that the “credibility, authority and hence effectiveness of the United Nations in advancing the principles relating to the responsibility to protect depend, in large part, on the consistency with which they are applied.” Therefore, the legitimacy of the Council authorized humanitarian interventions is linked to the consistency of its implementation of R2P. Let it be noted that the Council is a political and not a legal organ; therefore, it would not be wrong to expect that all its decisions on military enforcement measures would be made through political assessments on a case-by-case basis.

The two initial notable examples that raised particular concerns about the scope of the UN Security Council’s role in this regard are one, the NATO air campaign in Kosovo, and two, the Iraq war. The NATO campaign Operation Allied Force in 1999 ignited a debate about the power of the Security Council under Chapter VII of the UN Charter, to retroactively validate previous non-authorized use of force. Security Council Resolution 1244 failed to question the way in which armed hostilities had been terminated in Yugoslavia. Instead it supported the situation attained by NATO’s unilateral use of force, which established the Kosovo Force (KFOR) and the UN Interim Administration in

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\(^{43}\) International Commission on Intervention and State Sovereignty, “Responsibility to Protect” (Ottawa: International Research Centre, 2001).
Kosovo. Four years later, in 2003, the United States and United Kingdom led invasion of Iraq. The Security Council’s response to it again gave rise to the issue whether the Security Council could build peace on prior unlawful force, and thus endorsing the consequences of illegal intervention.

More recently, the NATO-led Operation Unified Protector, launched on 19 March, 2011, with the purposes of bringing an end to the Libyan conflict, is an important illustration of the controversies surrounding the R2P regime. At the time of the Libyan conflict, that arose in February, 2011, as a part of the Arab uprising, and against the legitimacy of the regime of Colonel Muammar Gaddafi, the Security Council rose to the occasion, adopting a set of Resolutions under Chapter VII of the Charter, in order to bring an end to the violence. When the Libyan authorities failed to comply with its Resolution, the Security Council adopted Resolution 1973. The Resolution authorized Member States that had notified the Secretary General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary General, to take “all necessary measures...to protect civilians and civilian populated areas under threat of attack...while excluding a foreign occupation force of any form on any part of Libyan territory”.  

Following the adoption of the Resolution, the NATO-led Operation Unified Protector was launched, which was not a United Nations Mission. The NATO operation has been criticized by many for having been launched beyond the Security Council authorization, giving rise to a fear that R2P was and might be used for ‘political considerations’.

Further it may be noted that Libya continues to be unstable, and a political solution has not yet been reached. Various criminal, insurgent and armed groups operate throughout the country, undermining the

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political process and frustrating development and the establishment of a lasting peace.\textsuperscript{45}

Commentators are of the view that the Libyan case seems to have influenced the dynamics within the Security Council with regards to adoption of practices related to R2P, such that, in similar subsequent cases, the Council Members have not been able to achieve consensus on collective action under R2P’s third pillar.\textsuperscript{46}

Many authors are of the opinion that the early 1990 practice of authorized humanitarian interventions may not be repeated due to the inherent weaknesses in the collective security system as created in the UN Charter. Such weaknesses are visible more and more in the increasing deadlocks within the Security Council. For instance, the case of the failed 2006 attempt to authorize a humanitarian intervention in Darfur (Security Council Resolution 1706), as no States were willing to contribute troops for its implementation due to the lack of State consent from the Government of Sudan, is a good example in this regard.\textsuperscript{47}

Nevertheless, the so called unauthorized military interventions, in the face of UN Security Council inaction, and irrespective of their humanitarian justifications, have neither been acknowledged under the endorsed R2P principle nor have any accredited role under the three pillars of the R2P.

7. **Self-Defense against Non-State Actors**

With the exponential rise in intra-State conflicts, which are complex mires of conflicts with unstable governments and the rebelling non-State actors having no clear ideological alignment, and having affiliations with other States or also often capable of acting

\textsuperscript{45} Chia Jui Cheng, A New International Legal Order: In Commemoration of the Tenth Anniversary of the Xiamen Academy of International Law, Vol. 8 (Brill, Nijhoff, 2016), pp. 85-88.

\textsuperscript{46} A New International Legal Order: In Commemoration of the Tenth Anniversary of the Xiamen Academy of International Law, Vol. 8 (Brill, Nijhoff, 2016), p. 88.

independently, the international community’s understanding of the justification of self-defense as taken up by many States while interfering in such conflicts, has become more and more obscure. The fundamental question is to what extent the claims to self-defense against non-State actors and future attacks can be regarded as lawful or unlawful under international law.

7.1 Concept of Self-Defense Prior to 9/11 Attack

Historically self-defense applied to the inter-State attacks. Many scholars are of the opinion that in recent times as cases relating to the contentious relationship between the use of armed force and self-defense have come before the ICJ, it has failed to shed further light on the more controversial aspects such as how the traditional principle of self-defense would apply to the reality of the present conflicts that are characterized by State failure and violence perpetrated by non-State actors that are largely uncontrolled by any State. A lot of the modern-day conflicts have been described by various scholars, and aptly so, as implying a tangled web.48

One of the important cases in this regard is the 1996 conflict on the soil of the Democratic Republic of Congo, which quickly escalated into a conflagration of epic proportions, a “tangled web”, in which no fewer than six regional neighbours were involved, taking one side or the other. In 1996 an insurrection took place in the DRC by rebels, who were allegedly supported by Rwanda and Uganda, and which resulted in the toppling of the allegedly kleptocratic dictator, Mobutu SeseSeko Kuku Ngbendu wazaBanga, and the installation of Laurent Desire Kabila as the President on 17 May 1997. In 1998, after President Kabila attempted to remove all external forces in the DRC, another major rebellion against Kabila’s government began, with no fewer than six

48 Judge Kooijmans in his separate opinion in the case of Democratic Republic of Congo v. Uganda (2005, ICJ) emphasized on the complexity of the hostilities involved in modern day conflicts by stating that “Is it possible to extract from this tangled web one element, to isolate it, to subject it to legal analysis and to arrive at a legal assessment as to its consequences for the relations between only two of the parties involved?”. 
regional neighbours taking one side or the other.\textsuperscript{49} The Lusaka Ceasefire Agreement negotiated in 1999 by the United Nations (UN) failed to bring an end to the violence. Despite the ethnic nature of the various rebel groups, by 2001 the war in the DRC had the distinct character of a proxy war being fought between Uganda, Rwanda, and Burundi, on the side of the insurgency, and Angola, Namibia and Zimbabwe, backing President Kabila’s government. In January 2001, Laurent Desire Kabila was assassinated during a failed coup attempt and was succeeded by his son Major Joseph Kabila, the current President. As a consequence of these frequent hostilities, millions died and others were displaced. DRC had practically fragmented into several parts, each controlled by different, highly fluid, alliances of actors.

This chaos was still ongoing in 1999 when on 23 June 1999, the Democratic Republic of the Congo (DRC) filed in the International Court of Justice (ICJ) Registry Applications instituting proceedings against Burundi, Uganda and Rwanda “for acts of armed aggression committed in flagrant breach of the United Nations Charter and of the Charter of the Organization of African Unity”.\textsuperscript{50} In addition to the cessation of the alleged acts, DRC sought reparation for acts of intentional destruction and looting and the restitution of national property and resources appropriated for the benefit of the respective respondent States.\textsuperscript{51}

In its judgment of 19 December, 2005, on the question of the invasion of DRC by Uganda, the Court found that though in the period preceding August 1998, DRC had not objected to the presence or activities of Ugandan troops in its eastern border area, and had in fact also agreed to cooperate with the army of the other side in order to insure security and peace along the common border, the consent that had been given to Uganda was not an open-ended consent. It was limited, in terms of objectives and geographic location, to actions directed at stopping the

\textsuperscript{51} Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), \textit{Overview of the Case}. 
rebels who were operating across the common border. It did not constitute a consent to all that was to follow. The Court thereafter went on to reject Uganda’s claim that its use of force, where not covered by consent, was an exercise of self-defense, finding that the preconditions for self-defense did not exist. It stated that the unlawful military intervention by Uganda was of such magnitude and duration that the Court considered it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the United Nations Charter. The Court also held that Uganda had failed to show that the rebel attacks could be attributed to the DRC and hence, Uganda had not satisfied the requirements of Article 51 of the UN Charter. The Court also indicated that even if Uganda had been entitled to self-defense, its attacks had violated the requirements of necessity and proportionality. Some commentators, however, are of the view that in this case ICJ somehow struggled to reconcile its traditional self-defense doctrine with the conflicting, emerging State practice. They are of the view that deep structural flaws in international law were caused by the Court in its attempt to shoehorn its analysis into a legal framework that is ill-equipped to deal with the “tangled web” of facts and responsibilities. Some of these commentators have went on to suggest that the Court in this case failed to adequately address the conflict that involved non-State actors – especially when those non-State actors have gained control of territory due to the State’s weakness/failure. DRC in this case was a failed State whose government had weakened to the point that it could no longer provide public goods, such as territorial integrity, economic infrastructure and physical security. Despite acknowledging the fact that DRC no longer had full control over its territory, and was in fact a failed State, the Court did not address “the practical dilemma

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52 Also see the ICJ Advisory Opinion in Wall – on attacks not imputable to another state.
53 Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), 2005 ICJ, pp. 147 and 165.
that government failure creates for neighboring States, especially when the resulting political and security vacuum is exploited by groups with an anti-social agenda.”

In this case Justice Kooijman, in his separate opinion, implied by his statement that the Court’s reluctance to address the applicability of the international law on self-defense to non-State actors in control of ungoverned territory is most likely attributable to the fact that “the system of international judicial dispute settlement is premised on the existence of a series of bilateral inter-State disputes”. The ICJ, in particular, is not designed to adjudicate disputes that involve non-State actors, as only States can be parties to cases before the Court. The Court’s difficulty in applying a traditional self-defense analysis to a conflict involving non-State actors in control of territory is not judicial error. Rather, as the ensuing analysis demonstrates, this opinion is symptomatic of the profound uncertainties in this area of international law. It is far from clear how non-State actors can, or should, fit into a system that was designed to regulate disputes between States.

The next matter for consideration is whether the use of force by non-State actors can ever amount to an “armed attack”. This issue has been left unresolved since the time of the case of Military and Paramilitary Activities. Even in the Armed Activities case this matter was left unanswered. This uncertainty has been compounded by evolving State

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58 Stephanie A. Barbour and Zoe Salzman, note 54, at p. 64.
60 As has been explained in article above, the court had rejected Uganda’s claim of self-defense on the ground that Uganda had failed to show that the rebel attacks could be attributed to the DRC and hence, Uganda had not satisfied the requirements of Article 51 of the UN Charter. Further, it had held that the unlawful military intervention by Uganda was of such magnitude and duration that the Court considered it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the United Nations Charter. Therefore, the exact political dilemma of acting in self-defense against a non-State actor was not adequately addressed by the court. As a government failure creates many difficulties for neighboring States, especially when the resulting political and security vacuum is exploited by groups with an anti-social agenda. See Armed
practice that suggests that non-State actors can commit armed attacks within the scope of Article 51.\textsuperscript{61} Also, in the Oil Platforms case the ICJ had found that the United States had no right to self-defense, reasoning that attacks directed at another State do not entitle the accidental victim to self-defense.\textsuperscript{62}

In the Oil Platform case, Iran claimed that the United States had breached the "freedom of commerce" provision in the 1955 Treaty of Amity, Economic Relations and Consular Rights between the two countries by taking military action against Iranian offshore oil platforms in 1987 and 1988. The Court rejected this claim, finding that the U.S. actions against the oil platforms did not disrupt commerce...
between the territories of Iran and the United States. Despite rejecting Iran's claim, the Court, however, devoted a substantial portion of its opinion to a consideration of whether the U.S. actions against the oil platforms qualified as self-defense under international law. The events underlying the *Oil Platforms* case occurred during what became known as the "Tanker War," which was part of the 1980-1988 war between Iran and Iraq. During the Tanker War, Iran and Iraq attacked numerous military and commercial vessels of varying nationalities in the Persian Gulf, including vessels from neutral countries such as Kuwait. The result, as the Court noted, was that "neutral shipping in the Persian Gulf was caused considerable inconvenience and loss, and grave damage." These attacks were repeatedly condemned by the U.N. Security Council, and were the subject of a series of complaints by the United States and other neutral countries. In response to the attacks, Kuwait asked several nations, including the United States, to re-flag Kuwaiti vessels in order to ensure their protection. The United States subsequently placed eleven Kuwaiti vessels under U.S. registry, and began in 1987 to provide naval escorts to all U.S.-flagged vessels operating in the Gulf. Despite these efforts, numerous neutral ships, including re-flagged Kuwaiti vessels and U.S. naval escort vessels, were attacked during 1987 and 1988. Three days later, after concluding that Iran was responsible for the missile attack, 8 U.S. naval forces, in an effort to prevent further attacks, took action against two Iranian offshore oil platform complexes that it had determined were being used for offensive military purposes. That same day, the United States sent a letter to the U.N. Security Council, pursuant to Article 51 of the U.N. Charter, informing the Council that the United States had acted in self-defense.

In the Armed Activities case, the Court never ventured into dealing with the questions of whether by their scale and effects or cumulatively, the attacks allegedly suffered by Uganda rose to the threshold of armed attack, or whether or not Uganda was the intended victim of the attacks. No such analysis could ever be made by the Court because it had defined the concept of armed attack not to include attacks conducted by non-State actors—unless attributable to a State.
The Court in the Armed Activities case also, as per the judgment in the Military and Paramilitary Activities case, held that a State’s “assistance to rebels in the form of the provision of weapons or logistical or other support” did not constitute an armed attack because it did not meet article 3(g)’s definition of “sending” or “substantial involvement.”

Many scholars are of the view that the judgment in the Armed Activities case in many aspects negated the State practice in this regard. This means that State incursions into the territory of another State that provides a safe haven for irregular forces—so long as those incursions are proportionate, may be tolerated. The divergence between State practice and the Court’s approach in this case is illustrative of the Court’s struggle to apply a traditional self-defense analysis to the changing nature of armed conflict. In this regard Peter Hilpold states that Article 51 applies also to terrorist attacks. According to Peter Hilpold, the ICJ in Nicaragua case as well in the Wall Opinion case created a misleading impression that armed attacks by non-State actors not attributable to the territorial State are not covered under Article 51, and that Article 51 exclusively deals with inter-State relations respectively.

7.2 Concept of Self-Defense Post 9/11 Attack

In the pre-9/11 era, most of international lawyers believed that the attack must be attributable to a State in order for the self-defense to be used. There are numerous incidents of States relying on the right of self-defence to justify their forceful actions against other States on the

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64 See the description of the Turkish invasion of Iraq in pursuit of Kurdish-secessionist insurgents and several other incursions involving other States in Thomas M. Franck, Recourse to Force: State Action Against Threats and Armed Attacks (CUP, 2002), pp. 63-65. When Turkish forces entered Iraqi territory in the mid-nineties to attack Kurdish insurgents using Iraq as a base to attack Turkey, the Security Council did not respond to Iraq’s complaints.
65 Peter Hilpold, note 23, at p. 546.
66 Peter Hilpold, Ibid, at p. 547.
basis of the latter’s responsibility for the activities of non-State actors.\textsuperscript{67} A few of these examples include the US airstrikes in Bengasi and Tripoli, Libya after the allegedly Libyan agents attack to a Berlin discotheque in 1986, and the US missile attacks in Afghanistan and on pharmaceutical plant in Khartoum Sudan following the terrorist attacks to the US Embassies in Nairobi Kenya and Dar es Salaam Tanzania in 1998. Since before 9/11 terrorism, including cross-border terrorist actions, were largely considered as a national law enforcement issue, and armed responses for self-defense against terrorist groups in third countries were seriously criticized as violating norms of international law, assignability of such actions by non-State actors to States as a justification for any act of self-defense, remained the established rule.\textsuperscript{68}

In the Nicaragua case, the ICJ held that “if there was sufficient evidence of a persistent pattern of support for indirect aggression that would indeed qualify the victim to resort to military force in self-defense under Article 51”. Secondly, the attribution could be made on the basis of adoption of non-State actor’s actions as its own by the State. This would be done by virtue of Article 11 of Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001.\textsuperscript{69} An example of such adoption is Ayatollah Khomeini’s endorsement of occupation of US embassy in Tehran in the aftermath of the Islamic Revolution in 1979.

In the post-9/11 era the logic of attribution has substantially changed. The present situation is that acts of encouragement, support, planning, preparation or reluctance to impede such activities by non-State actors by the territorial State are also factors that would adequately justify an act of self-defense against that State. Partially, this change also seems to stem from older documents, such as the Declaration on Friendly Relations, which requires States to prevent their territory from being used for launching terrorist attacks on other countries (United Nations,

\textsuperscript{68} Peter Hilpold, note 23, at p. 545.
George Brandis argues that following the 9/11 attacks against the United States of America in 2001, the UN Security Council passed Resolution 1368, which implicitly affirmed the right of self-defence against non-State actors for the first time.\(^71\)

### 7.2.1 US Invasion of Afghanistan

On October 7, 2001, US invaded Afghanistan. The operation, Enduring Freedom, was based on Article 51 of the Charter. US attacked the Taliban-led Afghanistan because the Taliban harboured Al Qaeda and refused to hand them to US.\(^72\) Some scholars are of the opinion that Al Qaeda was not under effective nor overall control of Taliban. It is therefore improbable that the events of 9/11 could be attributed to Taliban. The artificiality of the link between a non-State actor (Al Qaeda) and a State (Afghanistan) has underscored the transformation of perception of the necessity of State attribution. Commentators point out that an overwhelming majority of States did in fact accept the legality of the use of self-defense as the justification for the invasion of Afghanistan.\(^73\)

Some scholars, like Tladi, on the other hand, have argued that nothing in Security Council Resolution 1368 supports the proposition that a State may use force in self-defense against non-State actors on the territory of an otherwise blameless State without that State’s consent.\(^74\) Tladi further argues that it is inaccurate to present the U.S. attack on Afghanistan, after 9/11, irrespective of its legality, as an illustration of the use of force in self-defense against non-State actors because U.S.

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\(^73\) Helen Duffy, The “War on Terror” and the Framework of International Law, (CUP, 2005).

\(^74\) Shinya Murase, note 10, at p 575.
attacked Afghanistan (the Taliban government) and not Al Qaeda (a non-State actor). US was not interested to make distinction between the terrorists who committed the acts and those who harbour them. Thus, the war on Afghanistan cannot be advanced on the basis of the proposition that a State can use force against non-State actors on the territory of another State without the latter’s consent.\(^75\) Others like Shinya Murase have argued on similar lines, stating that however large the scale and gravity of the 9/11 attack by a non-State actor (Al Qaeda), this attack cannot constitute attack in term of Article 51 of the UN Charter.\(^76\) In fact some scholars are of the firm view that statements in the UN Security Council Resolutions 1368 and 1373 of 2001 were of an outspoken emotional character due to the nature and the impact of the attacks of 9/11.\(^77\) Mary Ellen O’Connell also argues that the United States and the United Kingdom invaded Afghanistan after 9/11 in 2001 citing Article 51 of the UN Charter for self-defense after attributing the acts of Al-Qaeda to the Taliban government because of the close ties between the two. However, in 2002 when the Taliban fled, the armed conflict in self-defence became a counter-insurgency or civil war at the invitation of the new regime under Hamid Karzai.\(^78\)

### 7.2.2 2003 Iraq War

President Saddam Hussein led his forces into an inconclusive eight year war with Iran, in which he was backed by Western and Gulf powers. In the war’s aftermath he invaded Kuwait, the smallest and nearest creditor. As a consequence a 500,000 strong US-dominated coalition force assembled in Saudi Arabia for Operation Desert Storm. Saddam was forced out of Kuwait by the swift US-led First Gulf war in January-February 1991. Crippling UN sanctions, imposed originally in 1990 to drive Iraq out of Kuwait, were maintained to achieve additional goals which became ends in themselves: identification and destruction of

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\(^{75}\) Dire Tladi, note 27, at p. 575.

\(^{76}\) Shinya Murase, note 10, at p 293.

\(^{77}\) Peter Hilpold, note 23, at p. 546.

\(^{78}\) Mary Ellen O’Connell, note 11, at p. 53.
Iraq’s Weapon of Mass Destruction (WMD) program, payment of war reparations, and an end to Saddam’s brutal repression of Iraqi citizens.\textsuperscript{79} The feeling that after the collapse of the Soviet-style communism the moment had come to expand democracy was felt across the US political divide.\textsuperscript{80} After the 9/11 attack the Bush administration once again turned to Iraq. UNSC resolution 1441 adopted in 2002 had found Iraq to be in material breach of UNSC resolution 687 of 1991 that had given Iraq the “final chance to comply with its disarmament obligations under relevant resolutions of the Security Council”. The US and UK began pushing for a resolution specifically authorizing the use of force against Iraq pursuant to resolution 1441. However, these attempts failed to gain the approval of a majority of the Council.

When a US and UK led coalition launched a military intervention against Iraq on 20 March, 2003, both States sent letters to the President of the UNSC explaining the rationale behind their action. Both States referred to various UNSC resolutions as authorizing their actions.\textsuperscript{81} The main argument presented by the two intervening States was that the authorization to use force in response to Iraq’s intervention in Kuwait in 1990 provided a legal foundation for the use of force against Iraq in March, 2003.\textsuperscript{82}

The US also entered a self-defense claim:

The actions that coalition forces are undertaking are appropriate response. They are necessary steps to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area. Further delay would simply allow Iraq to continue its unlawful and threatening conduct.\textsuperscript{83}

\textsuperscript{81} These references included UNSC resolutions 678 (1990) and 687 (1991).
\textsuperscript{83} S/2003/351.
US was pursuing a self-defense argument, but did not claim to have been subject to armed attack carried out by Iraq. Rather it made a reference to the “threat” posed by Iraq. In fact many scholars are also of the view that over time the Security Council resolutions have legitimized the various post-intervention developments in Iraq.\(^{84}\)

US forces remained in Iraq under a Security Council Mandate until November, 2008, and thereafter under a bilateral security agreement specifying their withdrawal from the cities during 2009, and from Iraq by the end of 2011. When the last US combat units left in December of that year, having failed to build a nation, the official fiction was that they left behind a “sovereign, stable and self-reliant” Iraq. The Iraqi State is governed by a Constitution approved by a referendum in October, 2005, which disastrously transposed Lebanon’s power-sharing arrangements onto Iraq, intensifying ethnic and sectarian divisions.\(^{85}\)

### 7.2.3 2006 Israel Attack on Lebanon

In summer 2006, Israel attacked the positions of Hezbollah in Lebanon in retaliation for kidnapping of two Israeli soldiers, as a peak of mutual exchange of hostilities. Several Members of the Security Council – Argentina, Australia, Brazil, Canada, Denmark, Greece, Guatemala, Peru, Slovakia, Turkey, U.K., and the U.S. – acknowledged Israel’s right to self-defense in this case, in spite of Lebanon’s assertions that it did not endorse the cross-border attacks and hence did not take responsibility for them.\(^{86}\) Such a right of self-defense of Israel was recognized by the then Secretary-General Kofi Annan as well.

Such a wide recognition of Israel’s right of self-defense was unprecedented. This recognition was made despite the fact that Israel had advanced the same needle-prick theory that had been rejected so

\(^{84}\) See Ashok Swain, note 80. See also, for example, UN Security Council Resolution 1483 (2003) adopted on 22 May 2003 referred to the occupation status in Iraq, but not to the legality of the intervention. The resolution did not call for an end to the occupation either. Instead it encouraged the occupying powers to inform the Council at regular intervals of their efforts under this resolution.

\(^{85}\) Michael Burleigh, note 79 at p. 9.

many times in the past. The Israeli government made reference to the long series of terrorist attacks that it had suffered, put emphasis on the most recent one and asserted that they together amounted to an ongoing armed attack. This reaction of States reflected how the stance of an overwhelming number of States on the issue of self-defense had changed drastically after the 9/11 attacks.^[87]

Following the 2006 conflict, UN Resolution 1701 of 2006 was implemented. Under this resolution Hezbollah was forbidden from operating in the border area. United Nations Interim Force in Lebanon (UNIFIL) peacekeepers and Lebanese were deployed in the area to enforce this limitation. Israel was also forbidden from entering Lebanese territory under the resolution. However, in what appeared to be a clear erosion of the Resolution, tensions and conflicts between Israel and Lebanon continued to escalate after the 2006 war, and many analysts have even predicted war like situation in the absence of a settlement on the part of both sides.^[88]

### 7.2.4 The Conflict in Libya

Following an uprising in Libya against the regime of Colonel Muammar Qadhafi, the Security Council acting through resolution 1970 (2011), urged the Libyan authorities to act with restraint, imposed an arms embargo, a travel ban, an assets freeze on certain listed individuals and entities, and referred the situation to the International Criminal Court (ICC). After the Libyan authorities failed to comply with the mandates of the resolution, the Security Council acting through resolution 1973 (2011), authorized Member States that had notified the Secretary-General, acting nationally or through regional organizations,


and acting in cooperation with the Secretary-General, to take “all necessary measures to protect civilians and civilian populated areas under the threat of attack … while excluding a foreign occupation of any form on any part of the Libyan territory”.

Following this resolution the NATO led Operation Unified Protector was launched. This was not a UN mission. Rather it was carried out under the command and control of NATO and its Member States. Following the capture of Sirte by opposition forces, and Qaddafi’s death in October, 2011, the Security Council by resolution 2016 decided to terminate the authorization to take action to protect civilians and to end the no-fly zone.

Instability and other difficulties in Libya, however, continue to persist. Various criminal, insurgent and armed groups operate throughout the country, undermining political process, frustrating development and establishment of a lasting peace. The Libyan situation is also important for an additional reason that the Security Council has not been able to achieve consensus on collective action under R2P’s third pillar, since.89

7.2.5 Syria’s Seven Year Civil War

Taking the case of the unprecedented and most barbarous violence being committed on the Syrian soil, unlike in the Libyan case (mentioned above), where the Security Council adopted resolutions authorizing certain forceful measures, disagreement amongst the five permanent Members of the Security Council has prevented any such action to be taken in the Syrian context. In the absence of Security Council’s action, the General Assembly has been proactive, though commentators have been of the view that it is far from clear whether its strongly worded pronouncements have had the desired effect.90

Protests against the regime of President Bashar al-Assad began on 26th January, 2011, and subsequently quickly escalated across the country leading to hostilities which overtime rose to the level of an armed

89 Chia Jui Cheng, note 45, at pp. 85-88.
90 Chia Jui Cheng, Ibid, at p.89.
conflict. In September, 2014, U.S. with the support of Bahrain, Jordan, Qatar, Saudi Arabia and the United Arab Emirates launched air strikes against ISIS/Daesh targets in Syria. A number of these countries have submitted Article 51 letters justifying their actions. Nonetheless, the airstrikes, which the government of Syria was informed of in advance, but to which it never consented, continue until today. As a response to these actions, the UN Secretary General noted that “protecting Syrian people requires immediate action, but such action should be rooted in the principles of the UN.” Thereafter, he goes on to say “it is undeniable – and the subject of broad international consensus – that these extremist groups pose an immediate threat to international peace and security”.91

Many uncomfortable questions regarding the Syrian crisis remain unanswered. In fact the UN Security Council Resolution 2249 of 2015 confirms that ISIS/Da’esh constitutes a global and an unprecedented major threat to the international peace and security.92 Accordingly, resolution 2249 is forcefully cited by some scholars as a justification supporting the existence of the customary international law rule permitting self-defence against non-State actors whose acts are not attributable to a State.93

Reading the UN Security Council Resolution 2249 of 2015 critically reveals that this resolution simply calls upon States fighting the ISIS and other terrorist groups in Syria and Iraq to redouble and coordinate their efforts in preventing and suppressing them. It also calls the States to take all such measure in strict compliance with all the obligations under international law and in particular the UN Charter, international human rights, refugee and humanitarian law.94 Many scholars are of the

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91 “Secretary General Commends Climate Summit Participants’ National Action Plans, Global Commitment to Low-Carbon Pathway”, SG/SM/16187-ENV/DEV/1460 (23 September 2014).
92 Also see: Peter Hilpold, note 23, at p. 538.
94 Operative Paragraph 5 of the UN Security Council Resolution 2249 of 2015 reads “5. Calls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under
view that Resolution 2249 does not permit self-defense against non-State actors, whose acts are not attributable to the State. As observed by Peter Hilpold, this resolution is neither to be seen as a resolution of pure authorization nor primarily as a document specifying the criteria for self-defense in a specific case, this resolution lies somewhere in between and addresses Chapter VII as a whole.95

Russia joined the war on Assad’s behalf in 2015, turning the momentum in his favour. The “Friends of Syria” group, an alliance of mainly Western and Gulf Arab countries, including the US, the UK, France and Sweden, on the other hand, met in New York on 18 September 2017 on the sidelines of the UN General Assembly, and decided that they would not support the reconstruction of the country until there is a political transition “away from Assad”. Russia on the other hand cast its 10th veto of United Nations Security Council action on Syria since the war began in 2011, blocking a US-drafted resolution to renew an international inquiry into who is to blame for chemical weapons attacks in Syria on 16 November, 2017. In another sad turn of events veteran prosecutor Carla del Ponte signed off from the UN Syria investigation on 19 September 2017 by criticizing the UN Security Council and telling Syria’s ambassador his government had used chemical weapons.96

In the latest turn of events leaders of Russia, Iran and Turkey at a trilateral summit in the Black Sea resort town of Sochi, on 24

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95 Peter Hilpold, note 23, at p. 553.
96 The former Swiss attorney general, who went on to prosecute war crimes in Rwanda and former Yugoslavia, said in August she was resigning from the UN Commission of Inquiry on Syria because of a lack of political backing. Bidding farewell to the UN Human Rights Council, which set up the Commission of Inquiry six years ago, Del Ponte said she had quit out of frustration. See, “Syria Investigator Del Ponte Quits UN Inquiry Commission”, Reuters, 19 September, 2017.
November 2017, in a joint statement, called on the Syrian government and moderate opposition to “participate constructively” in the planned congress, to be held in the same city on a date they did not specify. However, the Syrian rebel groups have rejected Russia’s planned Sochi conference on Syria.97

8. Consent of the Territorial States in Use of Force against Non-State Actors

The requirement of consent from the territorial State before attacking the non-State actors in that territory is one of the debatable questions regarding the right of self-defense against non-States actors. As previously indicated, in principle, the attack must be attributable to a State in order for the self-defense to be used and justified. In case the attacks are not attributable to the State, then the consent of that State is required consistent with the principles of territorial integrity, equality of States and inviolability of State sovereignty. Absence of connectivity or attribution to the state, renders the acts of the non-State actors as a national law enforcement issue.

Daniel Bethlehem has proposed principles relevant to the scope of a State’s right of self defense against an imminent or actual armed attack by non-State actors. Relevant principles on consent include the following:

11. The requirement for consent does not operate in circumstances in which there is a reasonable and objective basis for concluding that the third State is colluding with the non-State actor or is otherwise unwilling to effectively restrain the armed activities of the non-State actor such as to leave the State that has a necessity to act in self-defense with no other reasonable available effective means to address an imminent or actual armed attack. In the case of a colluding or a harboring State, the extent of the responsibility of that State for aiding or assisting the non-State actor in its armed activities may be relevant to considerations of the necessity to act in self-defense and the proportionality of such action, including against the colluding or harboring State.

12. The requirement for consent does not operate in circumstances in which there is a reasonable and objective basis for concluding that the third state is unable to effectively restrain the armed activities of the non-State actor such as to leave the State that has a necessity to act in self-defense with no other reasonable available effective means to address an imminent or actual armed attack. In such circumstances, in addition to the preceding requirements, there must also be a strong, reasonable, and objective basis for concluding that the seeking of consent would likely materially undermine the effectiveness of action in self-defense, whether for reasons of disclosure, delay, incapacity to act, or otherwise, or would increase the risk of armed attack, vulnerability to future attacks, or other development that would give rise to an independent imperative to act in self-defense. The seeking of consent must provide an opportunity for the reluctant host to agree to a reasonable and effective plan of action, and to take such action, to address the armed activities of the non-State actor operating in its territory or within its jurisdiction. The failure or refusal to agree to a reasonable and effective plan of action and to take such action may support a conclusion that the state in question is to be regarded as a colluding or a harboring State.98

According to Bethlehem, the above principles apply to non-State actors located on the territory of a colluding, harboring or reluctant host. In other words, consent of such States can be dispensed with if such a territorial State colludes with or is “unwilling to effectively restrain the armed activities of the non-State actor” carrying out armed attacks against another State or if “there is a reasonable and objective basis for concluding that the third State [the territorial State] is unable to effectively restrain the armed activities of the non-State actor” operating in or from its territory”.99

The concepts of ‘unwilling’ and ‘unable’ and their criterion in relation to the countries being associated with hosting or colluding with terrorists remain controversial and debatable as to whether the same have now been recognized and accepted as forming part of the norms of customary international law. As it may be recalled, in 2008, when Russia attacked Chechen rebel forces in Georgia declaring that the host

State was unwilling or unable to prevent terrorist activities going on within its territory, even the US openly opposed this justification.\textsuperscript{100} Michael Glennon has argued that Bethlehem’s proposed principles will in fact substitute the \textit{opinio juris} of the powerful for the practice of all, and does not show how excluded weaker State’s consent can be inferred or why their failure to consent is not important. Actually, States have had a lot to say about whether they prefer being attacked. According to Glennon, before the formulation of these principles, it would have been necessary to first examine the empirical data to see what consensus actually exists by giving States a list of concrete, specific incidents in which force was used against non-State actors and then asking in which cases they believe the use of force to have been justified. The empirical approach may necessitate choosing more explicitly between a coercion-based system run by the powerful or a consent-based system run by the weak. This could produce a law that works instead of merely force used by powerful States against non-State actors located in less powerful States.\textsuperscript{101}

Mary Ellen O’Connel has also argued that the Bethlehem’s proposed principles are essentially based on misconception that the current international legal system is without clear principles on the use of military forces against the non-State actors. Also, judging from practice, there are only a few States that use military force against non-State actors on the territory of other States to counter terrorist threats. The question should then be why current rules are ignored by some military and government officials in a few States. Accordingly, proposing new rules instead of addressing noncompliance by a few, is addressing the problem of non-State actors from the wrong end.\textsuperscript{102}

In response to some comments on his proposed principles, Bethlehem admits that the topic of right of self-defense against non-State actors is a difficult area. He adds that:

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\textsuperscript{100} Peter Hilpold, note 23, at p. 549.
\end{flushright}
[T]here are both legal and practical problems with a conclusion that camps on the sovereignty of the reluctant host without regard to the threat emanating from non-State actors on its territory. The legal problem is that such a conclusion disregards the responsibility of the territorial State which arises as much [from] a failure to act as from conduct that is collusive. The practical problem is that no putative victim State faced with an imminent attack by a non-State actor located in the territory of another state that has failed to take effective action is likely to sit on its hands and be content to absorb the attack. It is likely to act.103


Deliberations of AALCO on this subject matter can be categorized into the following two points.

9.1 General Views on Use of Force in Self-Defense

It has been a persistent view of AALCO Member States at its forums that a rule outlawing the use of force is a preeminent norm emanating from the UN Charter and customary international law from which no derogation may be permissible.104 Jus cogens principles at AALCO are largely viewed as provisions which substantially further the rule of law in international relations.105 The non-use of force or threat to use force against other countries is also perceived as the most salient erga omnes recognized by UN as a true obligation that lies on the whole world.106 Indeed, all obligations of jus cogens norms, which deal with a problem of hierarchy of norms, have a character of obligations erga omnes, which are obligations whose breach concern the international

103 Daniel Bethlehem, note 97, at p. 584.
community as a whole, with every State being able to invoke the responsibility for the State violating such obligations.\textsuperscript{107}

Delegates at AALCO Sessions have often underscored the need for international law to clarify the notion of the right of self-defence which tends to encourage States to resort to the use of force and sanctions regime. Concerns were also raised on international customary law definition of the right of self defence, the vague manner in which the right of self-defence is defined in Article 51 of the Charter and the apparent changes which the concept has undergone. Moreover concern has been raised in relation to the indeterminate conditions of necessity and proportionality as the key requirements for the invocation of the right of self-defence.\textsuperscript{108}

In the context of international rivers at the Fourty-Seventh Annual Session of AALCO, for instance, the delegate of Pakistan was of the view that any action taken by a riparian State in its territory which resulted in damage to the territory of another State was an act of aggression whose proper remedy would not be compensation but the right of self-defence by employing force. The term ‘force’ was interpreted to mean ‘all forms of pressure’.\textsuperscript{109} But, in view of the delegate of India, the proposition advanced by Pakistan was far too exaggerated and was not at all supportable or maintainable by any authority or by State practice. The line of thought advanced by the Pakistani delegate is not supported by Article 2, clause 4, of the U.N. Charter relating to the prohibition of the threat or use of force relevant in the context of water rights. In India’s view, it would be too wide and dangerous a doctrine to apply the concept of aggression and the right of self-defence to the adjustment of water rights among co-riparian States.\textsuperscript{110} The majority view of the members was that notion of "force"

\textsuperscript{107} Yearbook of the International Law Commission 2006, Vol. 1, p. 240 (para 4) and 242 (para 27).
\textsuperscript{108} Proceedings of AALCO 38\textsuperscript{th} Annual Session, p. 83; Proceedings of AALCO 39\textsuperscript{th} Annual Session, p. 34.
\textsuperscript{110} Proceedings of AALCO 11\textsuperscript{th} Annual Session, Accra Ghana, January 1970, p. 239.
encompasses all aspects including military, economic forces and other forms.\textsuperscript{111}

There is a consensus at AALCO that unilateral use of force outside the parameters of Article 51 of the UN Charter contradicts Article 2(4) of the UN Charter which obliges all UN Members to refrain in their international relations from the threat or use of force.\textsuperscript{112} During the Thirty-Eighth Annual Session of AALCO held in Accra Ghana in April 1999, the delegate of the Islamic Republic of Iran recounted instances of resort to unilateral measures and use of force in the pretext of self defence in contravention of the principles and norms of international law as some of the contemporary problems facing international community in maintaining international peace and justice. The delegate called for the renunciation of the threat of use of force as the means of furthering national policy and strict adherence to the obligations of law.\textsuperscript{113} It is equally not proper to use force as a means to achieve diplomatic protections.\textsuperscript{114} As per the delegation of the Democratic People’s Republic of Korea (DPRK), due attention should also be given to establish an international legal regime demanding responsibility from some countries who are imposing unilateral sanctions or executing the use of force against other independent countries under the name of "counter-terrorism" or other unjustified excuses while pursuing politically motivated purposes.\textsuperscript{115} The President of the Thirty-Eighth Annual Session, Dr. P.S. Rao, noted the failure of the UN to prevent localized and regional armed conflicts and called for the renunciation of the use of force as a concept and as an idea to achieve ends of national policy.\textsuperscript{116} The delegate of the Islamic Republic of Iran echoed that, in

\textsuperscript{111} Proceedings of AALCO 47\textsuperscript{th} Annual Session, New Delhi (HQ), 2008, (Delegation of Islamic Republic of Iran), p. 144. Also see Alexandra Hofer, ‘The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?’, in Chinese Journal of International Law, Vol. 16, No. 2, 2017, 175-214 at p.183 – for the view that many legal scholars do not believe that economic coercion is prohibited under Article 2(4) of the UN Charter.

\textsuperscript{112} Proceedings of AALCO 47\textsuperscript{th} Annual Session, New Delhi (HQ), 2008, pp. 41-42.

\textsuperscript{113} Ibid at pp. 65-66.

\textsuperscript{114} Proceedings of AALCO 40\textsuperscript{th} Annual Session, New Delhi, (Delegate of Thailand), p. 52.

\textsuperscript{115} Proceedings of AALCO 47\textsuperscript{th} Annual Session, New Delhi (HQ), 2008, p. 45

\textsuperscript{116} Proceedings of AALCO 38\textsuperscript{th} Annual Session, p. 71.
principle, use of force as an instrument of national policy is prohibited under international law.\textsuperscript{117}

If on the one hand AALCO remains apprehensive of unilateral and excessive use of force by States under Article 51, on the other hand, it also continues to be concerned with the prevalent use of force by non-State actors against States. On this point the delegate of the Islamic Republic of Iran noted, Da'esh (or the so-called Islamic State in Iraq and Syria) has blatantly threatened the territorial integrity of several States while committing the most heinous acts ever known to man, crossing borders and even continents. Attempts made at the international level have remained at times futile and in this regard the adoption, by the UN Security Council, of resolutions 2170, 2178, 2199, 2249 and 2253 have been part of the steps taken in the international arena. Whereas these have been done with a view to preventing the flow of foreign terrorist fighters to conflict areas, hampering terrorists' illegal income and legitimating use of force against them, the prolongation of conflicts and the deterioration of the situation of the civilians in some areas, coupled with the multiplication of extremist groups have proved all the attempts made to that end, if not futile, inadequate.\textsuperscript{118}

AALCO is of the view that international law has to work towards removing vagueness and uncertainty presently surrounding the concept of use of force in self-defense, both in the treaty law as well as customary international law norm.

\section*{9.2 Prohibition of Use of Force in Cyberspace}

Prohibition on the use of force in cyberspace is another issue that AALCO continues to work on. This aspect is controversial partly because distinction between State and non-State actors in cyberspace is an even more obscure one, as compared to its kinetic counterpart.\textsuperscript{119} Yet

\textsuperscript{117} Proceedings of AALCO 38\textsuperscript{th} Annual Session, p. 120; Proceedings of AALCO 39\textsuperscript{th} Annual Session, pp. 68-69.

\textsuperscript{118} Proceedings of AALCO 55\textsuperscript{th} Annual Session, New Delhi, p. 99.

\textsuperscript{119} Proceedings of AALCO 55\textsuperscript{th} Annual Session, New Delhi, p. 163.
most cyber attacks are committed by individuals or non-State actors, much as not all cyber attacks are cyber warfare.\footnote{Proceedings of AALCO 54\textsuperscript{th} Annual Session, Beijing, p. 177.}

On the question of prohibition of ‘use of force’ under Article 2(4) of the UN Charter, there is no consensus as to the precise threshold at which cyber operations or activities would amount to an internationally wrongful threat or use of force. Similarly, the interpretation of Article 51 with a view to accommodating cyberspace activities is fraught with many difficulties and fewer convergences. It is difficult to universally determine when a ‘cyber attack’ could be considered as an armed attack for the purpose of ‘self-defense’ under Article 51 of the UN Charter.\footnote{Proceedings of AALCO 54\textsuperscript{th} Annual Session, Beijing, p. 186; Proceedings of AALCO 55\textsuperscript{th} Annual Session, New Delhi, (Delegate of India) p. 163.}

To some scholars, certain cyber activities may constitute use of force in the context of Articles 2(4) and 51 of the UN Charter. The view of these scholars is based on the ICJ advisory opinion in Legality of the Threat or Use of Nuclear Weapons that Articles 2(4) and 51 of the UN Charter prohibit the use of force regardless of the weapons employed.\footnote{Kriangsak Kittichaisaree, note 9, at p. 163.} The common cited examples of cyber activities that would constitute use of force include operations that cause catastrophic physical damage beyond mere economic losses, such as those operations that trigger a nuclear plant meltdown, open a dam above a populated area causing destruction, and those disabling air traffic controls resulting in airplane crashes.\footnote{Ibid.}

At the Fifty-Fifth Annual Session of AALCO the delegate of Islamic Republic of Iran was of the view that cyber-attacks can have ramifications as devastating as full-fledged air raids and can be launched either from the scratch by non-State actors or be sponsored or even designed and directed by States against other States. In either case, the principle of \textit{sic utere} as stipulated in the Trail Smelter arbitration case between the United States and Canada, reaffirmed later by the ICJ in the \textit{Corfu Channel} case, and well-established in international relations ever since, continues to apply. Therefore, States are obliged to
exercise due diligence with a view to preventing harm to other States originating from their territories and jurisdictions. This can, for instance, be done via the adoption and implementation of appropriate legislation.\textsuperscript{124}

At the same Fifty-Fifth Annual Session of AALCO, the People’s Republic of China was in disagreement with and disapproved the current practice of some States who are continuously advancing their cyber military capabilities, as well as exaggerating the issue of cyber attack by categorically describing it as cyber warfare, thereby invoking the provisions of the UN Charter on the threat or use of force, and advocating the application of \textit{jus ad bellum} and \textit{jus in bello} to those cyber attacks. According to China, as a responsible major country, these claims and actions have potential negative impacts on international peace and security, aggravating cyber arms race, affecting strategic trust between countries and increasing the risk of inter-state misperception and conflict.\textsuperscript{125}

Given the absence of international consensus and States practices on cyber warfare, some of AALCO’s Member States such as China do not agree with the above interpretation and application of the right of self-defense and the law of armed conflict to cyberspace, at this stage, and voice that a clearer international law position in this regard must be brought forth.

10. Conclusion

As rightly pointed out by the Australian Attorney-General, Senator the Hon. George Brandis QC, criminal and terrorist groups have access to weapons that allow them to spread violence on a scale previously reserved to States. “No longer can it be said, as were for centuries the assumption of international law and the law of war, that States have a monopoly on the tools of war.”\textsuperscript{126} Furthermore, writers such as Peter

\textsuperscript{124} Proceedings of AALCO 55\textsuperscript{th} Annual Session, Delhi (Delegate of India), p. 162.

\textsuperscript{125} Proceedings of AALCO 55\textsuperscript{th} Annual Session, Delhi (Delegate of People’s Republic of China), p. 159.

\textsuperscript{126} George Brandis, note 71.
Hilpold correctly point out that “terrorists do not reside in sovereignty-free areas”. In fact, at international level, there is even no consensus on the universal definition of terrorism. These factors, amongst many others, have fuelled the current debates on the application of the traditional doctrine of self-defense as it exists under Article 51 of the UN Charter or under customary international law, to non-State actors in the present day conflicts. Further, other issues associated with the concept of self-defense, such as necessity, armed attack, pre-emptive attack, and imminent attack; continue to lack clarity and consensus in their criterion.

The newly-expanded notion of self-defense against non-State actors today does not seem to fit in any of the past paradigms. The present intra-State conflicts present a situation of a tangled web, enmeshing three main actors – the non-State actor/s, the territorial State over which such actor/s is/are operating, and the intervening State/s. Within this mesh there are involved various legal issues which have made it increasingly difficult for international law to provide durable solutions. On the one hand there is the question of attribution of the conduct of the non-State actor to the territorial State in question, for the justifiability of the act of self-defense by the intervening State. On the other hand, there is the question of the said attack by the non-State actor rising to the level of an actual armed attack, or an actual ‘threat’ of an armed attack towards the intervening State, in order to justify its intervention in self-defense.

Addressing the former issue, it may be said that the task of formation of a real link between non-State actor/s and the territorial State is increasingly becoming an arduous, and to some extent, redundant one. As rightly stated by Bethlehem, and quoted in the Article above:

> the practical problem is that no putative Victim State faced with an imminent attack by a non-State actor located in the territory of another State that has failed to take effective action is likely to sit on its hands and be content to absorb the attack. It is likely to act.  


128 Daniel Bethlehem, note 98, at p. 584.
Therefore, it may be stated that seeking the prior consent of the territorial State (wherein the non-State actor is operating) before acting in self-defense may be considered to be a pre-requisite only where the territorial State is not colluding, harboring or is reluctant in the said act, in one way or the other. That situation, practically, may be an extremely difficult one to envisage, as in most cases where a situation of civil war has arisen, the logical precursor to it has been the fact that the State machinery has in fact been “unable” to thwart it. Therefore, it may be said that the second issue, that of the said attack by the non-State actor rising to the level of an actual armed attack, or an actual ‘threat’ of an armed attack towards the intervening State, for the act of self-defense to be justified, remains the most relevant issue presently.

There can surely be no strict definition or standard of ‘necessity’ and ‘proportionality’, but there can be some parameters set to define them – a question that has been persistently evaded by the international policy and decision makers. For example, in the case of Democratic Republic of Congo v. Uganda, where instead of addressing the practical dilemma that government failure creates for neighboring States, the court instead condemned the intervention of Uganda within Congo on the premise that Uganda had failed to show that the rebel attacks could be attributed to the DRC. The harrowing reality today is that the international community continues to accept justifications of “a long series of terrorist attacks” as an “armed attack”\(^{129}\) (or other justifications that have sometimes been termed as “needle prick” justifications under international law), or a vague threat by a State (or a non-State actor) as a justification to attack it.\(^{130}\) International law has to endeavor to set more clear and specific parameters as to what may amount to an ‘armed attack’, or ‘a threat’ of an ‘armed attack’. For example, when exercising an act of armed self-defense, States have basically two options: to attack only the part of the country that is used by a given non-State actor or to attach the whole of territory based on the necessity and proportionality principles. This is also an important factor while considering the justification of an act of self-defense.

\(^{129}\) Israel’s justification of its attack on Lebanon in 2006.
\(^{130}\) Self-defense claim entered by the US while invading Iraq in 2003.
Then there is also the increasing number of incidents of acts of self-defense under Common Defense Pacts or even by individual States. Many times that also operates under the mandate of “Responsibility to Protect”; however, not always necessarily so under the mandate of the UN Security Council. Such Common Defense Pacts such as those under the African Union (AU) or even the North Atlantic Treaty Organization (NATO), or the acts of individual States rarely operate as per strict resolutions of the UN Security Council.

Judging on the increasing number of incidents and practice of various powerful States, it is tempting today to believe that what international law allows today is preemptive self-defense, as opposed to preventive self-defense.\textsuperscript{131} If on the one hand armed actions on the part of non-State actors situated in weak States, with no effective State control over them, may be an actual threat to the neighboring countries calling for self-defense actions under state responsibility or otherwise, there may also be situations on the other hand where third-party States may exercise illegitimate use of force for political objectives in the internal matters of a State, in the name of ‘self-defense’. The concepts of ‘unwilling’ and ‘unable’ and their criterion remain controversial and debatable as to whether the same are part of the existing norms of customary international law. If constraining the present applications of use of force in self-defense within the cage of the traditional doctrine may be inappropriate, also giving liberty to States to use this justification to advance national interests, would cause as much damage, if not more.

The use of force in self-defense against non-State actors, such as terrorist groups, is alien to the established concept of self-defense in international law under the UN Charter. Self-defense has traditionally been conceived as an inter-State institution.\textsuperscript{132} Yet, there is prevalent use of force by non-State actors against States and vice versa. For instance, the terrorist organization of Da'esh has attacked and threatened the territorial integrity of several States, crossing borders


\textsuperscript{132} Shinya Murase, note 10, at p. 290; Kriangsak Kittichaisaree, note 9, at p. 175.
and even continents. At the same time, there is no global consensus on the comprehensive definition of terrorism. This lack of consensus has complicated the war on terror and prompted uncoordinated unilateral actions. It has also compounded counter-measures to combat terrorism, as to some, of late, it has become more a ruse to wage war and aggression than genuinely combating terrorism. This trend has resulted in branding certain developing countries for ideological reasons as terrorist States and that they actively involve themselves in spreading international terrorism. Thereupon, unilateral, unlimited, covert and overt use of force is being sought to be institutionalized and systematized in international relations in the name of combating international terrorism.\footnote{Proceedings of AALCO 26-30th Annual Session Report, p. 299.}

Furthermore, cyber warfare remains the severest form of confrontation between States in this regard much as most cyber-attacks are committed by non-State actors. There is a need for consensus as to the thresholds for cyber activities to constitute a threat to or use of force and become an armed attack to trigger the right to self defence.

Modern-day wars that are increasingly being necessitated by the requirements of self-defense and responsibility to protect, and which in theory are acutely necessary to protect the interest of the intervening State in the former, and to preserve and revive the territorial State in the latter; have in reality destroyed the sovereignty and self-reliance of the States mired within the woes of civil wars, leaving them in a state of dilapidation and political and economic instability, which might take several years of recovery. Under the UN Charter the use of force within the inter-relationship of States, in this case whether it be under self-defense against non-State actors, terrorists, or under the doctrine of Responsibility to Protect, has been squarely placed under the auspices of the UN Security Council, in accordance with Chapter VII of the UN Charter, and the core UN principles. Indeed, the UN Security Council is a political body, having its limitations. Therefore, it falls upon the international community, including the international and regional organizations to uphold the principles of the UN Charter in order to tackle the present situation in this regard.
As Asian and African countries are becoming important poles in the process of moving towards global multi-polarity, it is also now on them to formulate the theoretical and practical premises on which the rights and responsibilities of different States may be balanced in this regard, and the sanctity of the UN Charter, including fundamental principles of non-use of force, sovereign equality, and non-interference in other’s domestic affairs maintained. This should be the commitment of AALCO.
Legal Framework of Electronic Banking in Tanzania: Challenges and Prospects

Charles Ishengoma Kato *

Abstract

This article explains the legal framework of electronic banking focusing on the legal challenges and prospects in Tanzania. As in other countries, Tanzania has witnessed the rapid development of electronic banking; however, its legal system does not adequately address the challenges brought about by such development. Tanzania has enacted cyber legislations namely, the Electronic and Postal Communications Act (EPOCA), National payment System Act, 2015, Electronic Transaction Act, 2015 and Cybercrimes Act, 2015. One would have expected these pieces of legislation to address challenges brought by developments in science, technology and innovation (STI) in the country’s banking sector; but they do not. It is against this backdrop that this article discusses the legal challenges facing electronic banking in Tanzania. Experience has been drawn from international Instruments and from other countries which have enacted comprehensive electronic funds transaction laws. Finally, the article recommends that the developments in science, technology and innovation (STI) in any sector, including the financial sector, should go hand-in-hand with the enactment of relevant laws to address the attendant challenges and protect the users.

1. Introduction

Advances in science, technology and information (STI) have generally changed the way the contemporary world runs and operates its activities. Such developments in STI have improved services offered by banks through electronic banking channels such as automated teller machines (ATMs), internet banking, electronic banking at point-of-sale and personal computer (PC) banking.1 The use of STI in any sector, including electronic banking, needs comprehensive law in place to

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ensure the country does not become, *inter alia*, a haven of cybercrimes, particularly in the hypersensitive financial sector. It is, therefore, important to enact effective and comprehensive legislation guiding electronic banking on pertinent issues such as liability in the event of unauthorised transaction and frauds between banks and customers.²

2. Analysis of Laws Guiding Electronic Banking

Generally, the laws in Tanzania do not match with the rapid developments in the electronic banking sector. That is so primarily because they fail to address the challenges brought about by technological advancements.

2.1 The Electronic and Postal Communications Act (EPOCA)

In 2010, Tanzania enacted the Electronic and Postal Communications Act (EPOCA). This law provides for offences related to electronic communications (sections 116-124), SIM³ card (sections 125-137) and other offences related to postal communication (sections 138-150). Yet, the Act does not comprehensively and specifically address the issues of electronic banking. Electronic banking channels such as ATMs, electronic fraud at the point-of-sale, internet banking and personal computer banking have not been adequately covered. In fact, the Act only considers issues arising from communications, which limits its application in the financial sector.

2.2 The National Payment System Act, 2015

This law has weaknesses, which affect the protection of banks and customers and the general development of electronic banking in Tanzania. The following are its weaknesses.

The first weakness is that the relationship between the bank or financial institution and the customer is based on an agreement between the parties and not on any statutory instrument. In this regard, a cardholder enters into contract with the card issuer and the contract serves as the

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³ Subscribers Identification Module.
primary instrument governing the cardholders’ relationship with the card issuer. The main legal consequences in the use of payment instruments arise from contractual terms and conditions, which are not freely negotiated; rather they are unilaterally enforced by the issuer of the card. Yet, section 51 (2) of the Act states that a payment provider shall provide a consumer with terms that are transparent, fair and legible, in a comprehensive language and explicitly state the rights and obligations of the parties.

The serious weakness here is that, the law does not clearly explain what constitutes a comprehensive language. It needs to state explicitly that the terms of the contract must be in a language which is known to the customers and not just refer to comprehensiveness, which remains vague. Such stipulation is important in Tanzania where many people know the Kiswahili language but many banks provide terms in English, a linguistic paradox that banks ought to untangle. Moreover, the terms and conditions governing the relationship between a consumer and a bank are, in some countries, subject to comprehensive, specific and explanatory statutory regulations whose primary objective is to ensure consumer protection. Using the law to insist on the universally accessible language in regulating terms for electronic banking transaction would safeguard the interests of many customers by ensuring that the terms are in a language they are familiar and comfortable with, for example, plain Kiswahili in the context of Tanzania.

In addition, section 51(2) (b) & (c) requires a payment system provider to provide a consumer with:

(b) complaints handling and dispute resolution mechanism; and

(c) full disclosure of relevant information for the use of electronic payment service including price of product and service.

The above section is very general. The section does not explicitly detail the party’s rights and obligations. In this regard, what are the rights and obligations of the parties? And how are these terms amended? All these vital questions lack adequate guidance under section 51 of the Act.
In the US, on the other hand, section 1963(c) of 15 U.S.C stipulates:

[A] Consumer contracts with an institution for an electronic fund transfer service, the institution must provide a disclosure of terms and conditions of the service, including the consumer’s liability for unauthorised transfers, fees imposed by the institution, the consumer’s right to have errors resolved and the institution’s policy regarding release of information to third parties about the consumer’s account.

Banks or financial institutions are not allowed to amend the terms and conditions without informing the customer. In this regard, the law provides that the customer should be given a prior notice of 21 days before the change takes effect. This requirement applies only to cases in which changes, in substance, affect the interest of the customer, for example, change in fees. Here the bank has ample time to ensure that the customer is informed before effecting the change in fees. The law provides room for the customer to consult the bank or financial institution in case of a problem before the enforcement of the changes.

In the United Kingdom (UK), the Banking Code, 2008 also does not allow the bank or financial institution to make terms based on take-or-leave-it basis. In other words, customers have to be involved and share their views on the process of making or establishing the terms. In fact, this clause constitutes a contract between the banks or financial institutions and the customers, with one of the basic elements of contract being a provision for free negotiation and agreement between the parties. The Code also requires the bank or financial institution to avail all important information to the customer. This requirement gives customers an opportunity to make informed decisions.

In addition, the Code has allocated loss liability between the bank or financial institution and the customer. It says that the customer shall not be liable for fraud except when the bank or financial institution proves that the customer was totally negligent. Finally, the Code requires the bank or financial institution to treat the customer fairly. This clause binds the bank or financial institution to ensure, in all circumstances, it treats customers fairly.

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4 U.S.A section 1963 (c) of 15 U.S.C.
5 See section 12 of UK Banking Code.
The Republic of Rwanda, in this regard, provides a good example in relation to language. Specifically, Article 16 of Regulation No.07/2010 of the National Bank of Rwanda on Electronic Fund Transfers and Electronic Money Transactions states:

**Article 16 Terms and Conditions**

A bank or other payment service provider providing any type of electronic fund transfer shall have standard terms and conditions in relation to the carrying out of such electronic fund transfers which must be communicated to the Central Bank.

The standard terms and conditions shall be in writing in Kinyarwanda and either one of French or English, in clear, readily understandable and user friendly manner. (Emphasis added)

This article mentions the language to be used. In fact, the law does not only mention the ‘understandable language’, but also explicitly mentions them. The advantage of mentioning the languages explicitly is that they become statutory requirements, hence obligatory. In addition, Article 27 of the Rwandan law provides a greater protection to the customers. It stipulates:

No agreement in writing between a customer and a bank or other payment service provider may contain any provision that constitutes a waiver of any right conferred or cause of action created by this Regulation and nothing in this Regulation shall prohibit any agreement, which grants a customer more extensive rights, or remedies or greater protection than those contained in this Regulation.

In case there is a conflict in any written agreement with regard to electronic banking, this law shall prevail. More significantly, the law provides for minimum rights, as such, the parties are allowed to agree on more extensive rights or remedies or greater protection.

In Bangladesh, by virtue of Article 17 of the Regulation on Electronic Fund Transfer, 2014 the terms and conditions are also exhaustive. As is the case of Rwanda, the banks or financial institutions in Bangladesh are statutorily required to disclose to the customers all the terms and conditions applicable to the customers. The terms and conditions have been detailed explicitly in the law to guide the bank or financial
institution. These terms include the liability of the customer in the event of loss or following an un-authorised transaction. If a loss occurs, a customer is duty-bound to report the loss or misuse of his/her account to the bank or financial institution. In case of any amendment of terms and conditions, the bank or financial institution must give prior notice to customers.

As in Rwanda⁶ Article 27 of the Bangladesh Regulation on Electronic Fund Transfer, 2014 provides adequate protection for customers.

Usually the contract terms are negotiated before their documentation. The negotiations do favour more the stronger contracting party than the weaker customers, who are normally poor, illiterate and inexperienced in the banking business. In consequence, the banks exploit such loopholes to defend their interests at the expense of those of their clientele. Consequently this vulnerable customer remains unprotected and is at the mercy of the banks or financial institutions. Simply put, the banks seize this opportunity to escape liability by inserting into the contracts clauses which absolve them of any liability. Thus, it is recommended that Tanzania should consider introducing provisions like those of the US, the UK, Rwanda and Bangladesh to safeguard the interests of the customer from unfair contracts or deliberate ploys by the banks and financial institutions to escape liability.

The second weakness of the Act relates to the basis of liability in case of the bank’s or financial institution’s failure to make an electronic fund transfer. Such failure is basically amounts to breach of contract. In Tanzania, this falls under section 48 of the National Payment System Act, 2015.⁷ However, the law does not fully provide liability in the event of failure to make an electronic fund transaction. It simply states that, the payment system provider shall immediately pay the customer upon receipt of fund in the settlement account. If a person contravenes the section, then he /she shall be liable for fifteen percent per day of the funds delayed to be transferred into the customer’s account.

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⁶ Article 27 of Regulation No.07/2010 of the National Bank of Rwanda on Electronic Fund Transfers and Electronic Money Transactions (quoted earlier in this article).
⁷ Act No.4 of 2015.
This section is inadequate as it lacks clarity because, sometimes, the payment system provider might have good and reasonable ground, which made the payment to the customer impossible. Such situation which amounts to an exception should be explicitly stated in the law.

Whereas the liability in the event of failure to make electronic fund transaction in Tanzania is not adequately addressed in this Act, in the United States, section 1693(h) (a) (2) of the Electronic Fund Transfer Act (1978) provides that:

A financial institution shall be liable to consumer for all damages proximately caused by...

(1) the financial institution’s failure to make an electronic fund transfer, in accordance with the terms and conditions of an account, in the correct amount or in a timely manner when properly instructed to do so by the consumer.

This liability is based on contract. This section underscores the bank’s duty to comply with its customer's instructions, particularly the amount and payment time terms. The specification of these two terms does not exclude the banks’ liability for failure to comply with other material terms, such as the payee's identity. Neither does it preclude the bank’s liability for the complete failure to make a credit transfer for a customer.

In fact, a financial institution is rendered liable for failure to make transactions if a consumer has sufficient funds in his/her account that are not subject to any legal process or other encumbrance restricting a transfer (15 U.S.C. (s.1693 (h)(a)(l)(A) and (B))). On the other hand, the financial institution shall not be liable if the consumer has insufficient funds, so long as such insufficiency does not result from the bank’s failure to credit, in accordance with the terms and conditions of an account, a deposit of funds to the consumer’s account which would otherwise have provided sufficient funds to effect the transfer (15 U.S.C. (section 1693h(a)(2)).

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Third, the National Payment System Act, 2015 recognises the electronic cheque, but it does not clarify in which manner it should be administered. Instead, it leaves this duty to the central bank, the Bank of Tanzania (BoT), under section 22. This problem necessitates the amendment of the Act to guide BoT on some vital conditions that need to be adhered to during prescribing the manner in which electronic cheques shall be administered. As a matter of fact, the process of law enactment involves a large scope of presentation and debate. Thus, this process has high possibility of producing a good law for guiding this area rather than leaving it only to BoT with a small representation of stakeholders to air their views.

Although in Tanzania under the National Payment System Act, 2015 [section 22 (1)], the law empowers BoT to prescribe the manner in which an electronic cheque shall be presented for payment, in India the situation is different. Apart from enacting Procedure Guidelines for Cheque Truncation System (CTS), 2010, India also has in place the general guidance that the banks or financial institutions have to follow when presenting electronic cheques as stipulated in the law. The law does not leave this important issue hanging as is the case in Tanzania.

In addition, Tanzania can also learn from the Seychelles National Payment System Act, 2014. Section 33 of this Act is more explicit and elaborate than the Tanzania National Payment System Act, 2015\(^9\) in respect of electronic cheques. In the Seychelles, the law does not end at recognising the electronic cheque but also explains different issues pertaining to its features and administration. All these aspects are lacking in the Tanzania National Payment System Act, 2015.

Fourth, the current risk allocation under this Act remains vague. Under this precarious situation, the most affected party is the customer because banks exploit this loophole to escape liability through the terms and conditions they unilaterally make. For example, the general terms and conditions of banks such as CRDB\(^10\) shift their liability to the

\(^9\) Act, No.4 of 2015.

\(^10\) Co-operative Rural Development Bank (CRDB) –Tanzania.
customers in any event of loss even those caused by the banks themselves.\footnote{See Lukumay, Z, “Electronic Banking; It’s Legal Basis in Tanzania”, PhD Thesis, UDSM (2011) and Article 17 (c) of CRDB Terms and Conditions for Operation with CRDB Bank [http://crdbbank.co.tz/General-Terms and Condition (accessed on 06/07/2018)].}

Whereas in Tanzania the liability in the event of allocation of loss in electronic banking is not certain as discussed earlier, the Australian Electronic Funds Transfer Code of Conduct (EFTCC), 2002 does not differ from that obtaining in the US. It treats a cardholder as not liable for losses occurring after he/she has notified the issuer that her credit card has been misused, stolen, is lost or that security of the codes forming part of the access method have been breached. Similarly, the liability in the event of loss between the customer and the bank in the UK is certain and predicable under the law. Section 12 of the UK Banking Code, 2008 states:

A customer should be liable for losses incurred up to the point where the customer notifies the bank, subject to a financial limit and the bank would be liable for loss thereafter. Where gross negligence on the part of either party could be proved, then that party should be liable for the full amount of the loss.

Fifth, dispute resolution is one of the mechanisms for protection of customers. In this regard, customers will have confidence in an electronic payment system, particularly when it embodies a clear, fair, transparent, less expensive mechanism for dispute resolution. As already discussed in this article, there are many challenges banks and their customers face in Tanzania. Customers and banks are bound by contractual terms that banks unilaterally make to safeguard their own interests. Thus the absence of a good and clear procedure in electronic banking in this area shifts serious problems to the customers. Section 51 (1) empowers the Bank (BoT) to prescribe consumer protection requirements, with sub-section 2 of the National Payment System Act, 2015 stipulating that the payer shall provide a consumer with the complaints handling procedure and dispute resolution mechanism. However this lacks clarity.
As such, the law should not leave the central bank to prescribe the consumer protection requirement unilaterally. These mandatory requirements should be explicitly stated in the law. Although customers must comply with section 51 (1), the question revolves around how electronic banking customers are protected under these circumstances. On the other hand, providing direct legal provisions on dispute handling procedures would help the customers. Indeed, a comprehensive law that involves many people of different interests in its enactment process can cover most loopholes the banks exploit to rip off clients. Thus, it is erroneous to leave it to BoT’s discretion to set the requirements without being guided by a binding law.

Overall, a legal framework for the protection of consumers is one of the means for protecting consumers transacting business in electronic form. Even the Law of Contract Act,\textsuperscript{12} the Fair Competition Act,\textsuperscript{13} the Electronic and Postal Communication Act, 2010\textsuperscript{14} and Electronic Transaction Act, 2015\textsuperscript{15} do not have adequate and efficient mechanisms for resolving disputes pertaining to e-banking transactions. The mentioned pieces of legislation, first, do not establish specific agencies to investigate complaints received from consumers and secondly, lack important details when it comes to electronic banking.

Whereas in Tanzania there is no good and clear procedure for dispute resolution in electronic banking, in the US, the law provides good and clear procedure for mediating such cases. In the US, a dispute resolution mechanism is available under section 15 U.S.C. (s.1693 (f). This section allows the customer to lodge an official complaint whether oral or in written form. The bank or financial institution is given 10 days to determine whether an error or mistake has been made or not. When they find an error has been committed, the customer may be recredited provisionally with interest where applicable, pending an investigation of the matter. The law also requires the banks and financial institutions to conclude such investigations within forty-five days and the customer must properly be informed. The forty-five days

\textsuperscript{12} Cap. 345 [R.E. 2002].
\textsuperscript{13} Cap. 285 [R.E, 2002].
\textsuperscript{14} Act No.3 of 2010.
\textsuperscript{15} Act No.13 of 2015.
include 10 days of the determination of error. If the customer is not satisfied with the bank’s or financial institution’s decision he or she may take the matter to court [15 U.S.C. (s.1693 (m))].

Under this set-up in the US, banks are comprehensively guided by the Act on how to handle disputes and the timeframe for resolving the resultant dispute. The law also gives an alternative that complaints may be lodged either orally or in writing. This flexibility is important to ease the complaint lodging procedure. In addition, the law allows the bank or financial institution to re-credit provisionally the customer once it determines that there is an error over his or her complaint under investigation. This provision protects the interest of the customer as it gives him/her an opportunity to continue spending his money as he/she had planned while waiting for a full investigation to be concluded. In short, this mechanism eliminates the financial disturbance as provisional payments will cover the gap. In Tanzania, on the other hand, there are no such guides to help the court or banks. In the absence of guides the banks do what they feel like doing as there are no lawful binding restrictions. Indeed, it is better for Tanzania to insert these provisions into its laws to safeguard customer’s interests, who often finds himself or herself in a weak bargaining position in the absence of legal sanctuary.

Sixth, the Act does not fully address the issue of extra and high transactional costs under section 51(2) (c). Evidently, there are many electronic banking customers who complain about the unpredictability and uncertainties of transactional costs.16 This weakness serves as deterrent towards the effective adoption of electronic banking in Tanzania as customers lose hope and distrust such e-transactions.

Seventh, another weakness refers to minimum sanctions both financial and imprisonment term enshrined in this Act. Sections 31, 34(4), 35(2), 35(2), 44(2), 46(4), 47(2), 48(2) and 53(2) take away the discretional power of the court to assess the appropriate level of sanction and

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imprisonment after taking into account the prevailing situation of the commission of the offence. After all, each offence has its own merit and environment and this has a direct bearing on the penalties and sanctions the courts can impose. In this regard, the law has outlawed the essence of mitigation, which the court that dispenses justice needs. Tanzania can thus learn from other countries which have enshrined maximum penalties for electronic cybercrimes. The Kenya National Payment System Act, 2011, Uganda Computer Misuse Act, 2011, Zambia National Payment Act, 2010, Seychelles National Payment System Act, 2014, Jamaica Clearing and Settlement Act, 2010, US Electronic Fund Transfer, 1978 and the UK Computer Misuse Act, 1990, are some of the cases in point. These legislations provide maximum penalties for electronic cybercrimes. They state for example; a person who contravenes any section- commits an offence and shall be liable, on conviction, to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding three years, or both. The absence of minimum sanctions gives the court discretionary power to assess the appropriate level of sanction and imprisonment.

2.3 The Electronic Transaction Act, 2015

In 2015, Tanzania enacted the Electronic Transaction Act, 2015.17 Generally, the shortcoming of this legislation is that it fails to address specifically the issue of electronic banking as shown below.

First, the definition of electronic signature is not broad enough under the Act. It does not categorise the types of electronic signature. A good lesson can be drawn from the South Africa Electronic Communication and Transaction Act, 2002 (ECTA). This South African Act has two categories of electronic signature, namely electronic signature and advanced signature (section 1 of ECTA). This categorisation is not only important but also necessary, especially when there are issues of authenticity of electronic signature at stake before the court. In South African they have also established under section 37 an organ with a responsibility of recording and keeping advanced electronic signatures of all people. This organ helps to clear doubt in court when an electronic signature is the matter at hand through an officer from the

17 Act No. 13 of 2015.
authorised organ. This categorisation helps to curb the habit of dishonest people with many signatures who disown their own signatures when there is a dispute.

Tanzania can also learn from the EU Electronic Signature Directives (1999). The directives provide two types of electronic signatures, simple or ordinary and advanced signature. While the advanced signature needs to be registered under the Certification Authority to make it admissible in a court of law, the ordinary one is not covered under Article 5(1) of the Directives. Tanzania can also incorporate these provisions from South Africa (ECTA) and the EU Electronic Signature Directive into the country’s legislation to remove uncertainties surrounding ordinary electronic signatures, which are currently admissible in court without taking into account that a person may have different signatures. As such, a person’s signature must be registered and categorised as is the case in South Africa. Doing so would remove ambiguity in determining who signed electronic banking documents or the actual owner of the documents or signatures. Tanzania’s laws must also make it mandatory for every person to register his or her signature for verification purposes during a dispute.

Furthermore, Tanzania can learn from the India Information Technology Act, 2000 which amended Indian Evidence Act, 1872 under section 73A. This Indian law requires the electronic signature to be proved by certifying authority established under section 17 of the Act. Although Tanzania’s law has established the certifying Authority under section 33 of Electronic Transaction Act, 2015 this is not a legal requirement in the country. In addition, notarisation, acknowledgement and certification appear to lack ample support from the Tanzania Electronic Transaction Act, 2015. Section 10 (a) does not put enough conditions regarding notarisation, acknowledgement and certification of electronic document before they become admissible before the court.

Overall, the issue of an electronic signature, which affects electronic banking, remains vague. Such vagueness and the legal implications it engenders demand that the law in Tanzania be amended by drawing an example from South Africa. The UK and Australia also have a similar
scope of definition as that of South Africa. More importantly, section 10 (b) of Tanzania Electronic Transaction Act, 2015 allows the admissibility of printouts once certified. The law also does not define or even state what constitutes a printout, whether it is an original or a copy. In this regard Makulilo\textsuperscript{18} questioned:

\begin{quote}
What is a copy of a computer printout when the former is held to be original; similarly it can be further asked: what is a copy of a computer printout when the former is held to be a copy? ...These are important questions since they trigger the application of the best evidence rule. If care is not exercised, there is always the danger of categorising computer printouts as primary evidence or secondary evidence as the case may be.
\end{quote}

Tanzania can also learn from India, where following the enactment of the Indian Information Act, 2000, the Banker’s Book Evidence Act, 1891 was amended. The amendment stipulates conditions for printouts which are glaringly absent in Tanzania’s law. Section 2A of the Indian Act states:

\begin{quote}
A printout of entry or a copy of printout referred to in sub-section (8) of section 2 shall be accompanied by the following, namely: —

(a) a certificate to the effect that it is a printout of such entry or a copy of such printout by the principal accountant or branch manager; and

(b) a certificate by a person in-charge of computer system containing a brief description of the computer system and the particulars of—

(A) the safeguards adopted by the system to ensure that data is entered or any other operation performed only by authorised persons;

(B) the safeguards adopted to prevent and detect unauthorised change of data;

(C) the safeguards available to retrieve data that is lost due to systemic failure or any other reasons;

(D) the manner in which data is transferred from the system to removable media like floppies, discs, tapes or other electro-magnetic data storage devices;
\end{quote}

\textsuperscript{18} Makulilo, A.B., “Admissibility of Computer Printout in Tanzania: Should it be Any Different than Traditional Paper Documents”? LLM (Information and Communication Technology Law), University of Oslo 2006 [https://www.google.com/search?=865PW2=OSLO+University (accessed April, 2018)].
(E) the mode of verification in order to ensure that data has been accurately transferred to such removable media.

With regard to the problem of original document in electronic form, the Tanzania Electronic Transactions Act, 2015 under section 20 (1) provides that where the written law requires a person to produce document or information, that requirement is met if, that document is in electronic form, with all circumstances of its formation requiring consideration, that is, at a time when electronic information was sent and the methods of generating the electronic form coupled with the assurance of maintenance of integrity. The conditions mentioned in the law, however, are very general because there is lack of specific important issues in the law to guide the court. In fact, the law, as it stands, fails to alert the court to directing itself to pertinent issues such as the integrity of the information from the time the document was first generated in its final form as a data message.

Tanzania can learn from South Africa, where the law requires the assessment of information by considering when it was first produced in its last form. Section 14 of the ECTA\textsuperscript{19} states:

Where a law requires information to be presented or retained in its original form, that requirement is met by a data message if -

(a) the integrity of the information from the time when it was first generated in its final form as a data message or otherwise has passed assessment in terms of subsection (2); and

(b) that information is capable of being displayed or produced to the person to whom it is to be presented.

Implicitly, the South Africa ECTA is elaborate and Tanzania can pick some pertinent points to improve its legislation particularly as other requirements enshrined in the South Africa ECTA are also found in Tanzania’s law which have not been discussed here.

As was the case with the National Payment System, 2015,\textsuperscript{20} this Electronic Transactions Act, 2015 provides minimum instead of

\textsuperscript{19} Electronic Communication and Transaction Act (ECTA), 2002 of South Africa.
maximum penalties and sanctions. Minimum penalties and sanctions take away the discretionary power of the courts in dispensing justice and outlaw mitigation process. In this aspect Tanzania can learn from Rwanda Regulation No.07/2010 of the National Bank of Rwanda on Electronic Fund Transfer and Money Transactions, Uganda Electronic Transaction Act, 2011 and Jamaica Electronic Transaction Act, 2007. What is learnt from the above pieces of legislation is that, the court should not be tied up by legal technicalities provisions which, in essence, may obstruct the dispensation of justice.

On the whole, the area of electronic evidence under the Act is controversial. And yet, the Act is intended to guide electronic evidence, including electronic banking evidence; however, it lacks a mechanism for achieving such an objective because the issue is not to recognise electronic evidence, but to have a mechanism in place for its determination and enforcement.

2.4 The Cybercrimes Act, 2015

Just like the Electronic Transactions Act, 2015, the Cybercrime Act, 2015 does not specifically address the issue of electronic banking. In fact, the Act needs refinement to facilitate the fight against cybercrimes in Tanzania’s banking sector. The following are its weaknesses. To begin with, the Act imposes only minimum financial and custodial sanctions, a situation which prevents a court from exercising its discrestional powers in balancing aggravating and mitigating factors during the sentencing proceedings on a case-by-case basis. Yet, it is a cardinal rule that in administering justice, the court must deliver justice according to circumstances of each case. In other words, by imposing minimum sentence, the Act ties the court with technicalities when making decisions rather than being tied up by justice. This is contrary to the country’s Constitution (The Constitution of United Republic of Tanzania) which under Article 107A (e) requires the court to dispense

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20 Act No.4of 2015.
21 Act No.13 of 2015.
22 Act No.14 of 2015.
23 Cap..2 [R.E.2002].
justice without being tied up by technicalities provision which may obstruct the dispensation of justice.

All references to minimum sanctions both financial and the imprisonment term turn such pieces of legislation into bad law. There is a need to reconsider such laws. Maximum rather than minimum penalties should be introduced. There are many examples of countries, as already discussed which have maximum sanctions and penalties for cybercrime offences, for example, Kenya, Uganda, Zambia, South Africa, Seychelles, Jamaica, the UK, and the US.

Second, there is a weakness in the cybercrime investigation procedures. In Tanzania, as explained earlier, the main law governing investigation does not cover the online environment cyberspace. For example, the Criminal Procedure Act\textsuperscript{24} still guides the collection of tangible evidence and, thus, it becomes difficult to operate in an electronic transaction environment. The Cybercrime Act, 2015,\textsuperscript{25} among other things, regulates the investigation of electronic transactions. However, as discussed earlier, this law does not explicitly detail issues pertaining to electronic banking; rather it guides electronic transactions in general. In short, the law is too general to bring out the desired results. In fact, it gives excessive power to the police in part IV of the Act. Indeed, section 31 confers excessive discretionary power upon police officers in-charge of a police station or law enforcement officer of a similar rank to execute the search and seizure of property without judicial oversight. The law stipulates that, with reasonable ground, a police officer in-charge of a police station or law enforcement officer of a similar rank may issue an order authorising a law enforcement officer to enter premises to search and seize a device or a computer system. Paradoxically, reasonable ground is not even defined in the Act. The court, therefore, lacks guidance at the very least on what constitutes reasonable ground, hence treading in a blind alley. This anomaly amounts to a serious infringement of privacy since such excessive powers are compounded by the absence of sufficient and robust

\textsuperscript{24}Cap. 20 [R.E.2002].
\textsuperscript{25}Act, No.14 of 2015.
procedural safeguards in the Act. To make matters worse, Tanzania has no data protection law and, therefore, there is a possibility that the banking data would not be safe in case an unfaithful police officer decides to disclose the data obtained to the culprits.

In Australia, on the other hand, under the Australia Crime Act, 1914 the police have first to seek such permission from the court. Apart from seeking this permission, section 3E of the Act stipulates the conditions requiring consideration before a search and seizure police acts in Australia:

(a) [An] Investigating officer must demonstrate that there are reasonable grounds for suspecting that there are or there will be within next 72 hours any evidential materials on the premise.
(b) [An] Investigating officer must show sufficient evidence that the person whose premises are to be searched possess evidential materials.
(c) [An] Investigating officer are required to state the officer to which the warrant relates, describe the premise and the kind of evidential materials to be searched, the time at which the warrant expires and warrant execution time.

Similarly in the US, the investigating officer also needs to seek a warrant from neutral or disinterested judge before making a search and seizure; as is the case in Australia. The grounds for such search and seizure must constitute reasonable or probate cause for them to be legally permissible (USA Guidelines for Search and Seizure of Computer, 2009). In Carroll v. United States,26 the court defines probable cause as follows:

Probable cause been established as being that ‘a person of reasonable caution could believe that the search may be evidence of crime: it does not demand any showing that such a belief be correct or more likely true than force.

Later, in Beck v. Ohio,27 the court expressed probable cause in the following words:

Thus, the reasonable belief of a prudent man is being used as a parameter in the USA to evaluate the reasonableness and legitimacy of the probable cause

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which arises during crime investigation and require the issue of search warrant.

Unlike in Tanzania, countries such as Australia and the US let the investigating officer obtain the judicial warrant first before resorting to any search and, second, the officer must have a legally permissible ground for conducting such a search.

Examples from the US and Australia underscore the importance of setting conditions in Tanzania’s Cybercrimes Act, 2015,\(^{28}\) which presently allows the search to be carried out without judicial oversight. Moreover, it does not set any limit to the search and seizure. This *lacuna* provides a loophole for unfaithful officers when entering banking premises to search and seize without limits. This liberty can endanger the privacy and security of banking data if these data fall in the hands of untruthful and corruptible people. They can steal the customer’s money as there is a possibility of getting the credentials of the bankers and customers. In this regard, Tanzania can also learn from the Uganda Computer Misuse Act whose section 28 requires a police officer to seek a court order before any search and seizure of digital evidence. Even the UK Computer Misuse Act, 1990 under section 14 compels the police to seek warrant from the court first.

Although the law can allow the search and seizure of digital evidence by police without a warrant this should be conducted in exigent situations and the law must set such conditions. On the one hand, allowing the search and seizure without a court warrant may result in the breach of the principle of privacy. On the other hand, some circumstances do not need a warrant as waiting for warrant might compromise the dispensation of justice. This has been a practice even in Australia and the US. These countries have legal precedents of requiring officers to obtain such warrants. In other words, there are strong mitigating factors as stipulated under the appropriate law as was the position in the case of *Cupp v. Murphy* United States Supreme Court upheld a murder conviction notwithstanding a challenge that the

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\(^{28}\) Act No.14 of 2015.
evidence upon which guilt was based was obtained in violation of the United States Constitution. The court held that:

In view of the station-house detention upon probable cause, the very limited intrusion of scraping the defendant’s fingernails for blood and other material, undertaken to preserve highly evanescent evidence, did not violate the Constitution. Justice Stewart wrote for the majority. Based on this decision, it is permissible for police officers to conduct a limited search on a defendant when they believe that the defendant is likely to destroy evidence, provided that the search is limited to vindicating the purpose of preserving evidence.

Similarly, the exigent circumstances doctrine was introduced in case of *United States v. David.*29 In this regard, the court cited the following parameters for consideration when examining circumstances under which the police can search and seize data without judicial oversight:

(a) The degree of urgency involved;
(b) The amount of time necessary to obtain a warrant;
(c) Whether or not the evidence is about to be removed or destroyed;
(d) The possibility of a danger;
(e) Trail;
(f) Information indicating the possessor of the contraband knows the police are on the trail;
(g) The ready destructibility of the contraband or how easy the evidence is to destroy.

This doctrine should also be embodied in Tanzania’s Cybercrimes Act, 201530 to guide the police and the courts. These exceptional conditions can strengthen and make this law fair as it will provide room for justice and equity for the accused persons who could otherwise have suffered had they come across distrustful police officers vested with this unlimited power. Contrary to US and Australia, Tanzania’s Cybercrimes Act, 201531 has no exceptions in this regard. In general, the Act confers excessive discretionary power upon police officers in-

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30 Act No.14 of 2015.
31 *ibid.*
charge of a police station or law enforcement officer of a similar rank to execute the search and seizure of property without judicial oversight.\textsuperscript{32}

The Tanzanian law does not enshrine the right of electronic data protection and privacy. Thus, the country should amend or enact new legislation to incorporate the exigent circumstances doctrine by picking a leaf from the US and Australia.

3. Conclusion
Against the backdrop of inadequacies in relevant laws cybercrime in Tanzania’s electronic banking is on the increase. Though the Tanzania government has enacted laws to combat such crime, they still have weaknesses which make them not only inadequate but also ineffective to control and address electronic banking challenges pertaining to the rights of parties and obligations for both banks and customers.

The rapid development of STI in banking has established an urgent need to amend/enact laws to support its development whilst protecting users. In this regard, Tanzania should learn from international instruments and national laws of countries such as the UK, the US, Australia, Rwanda and Uganda. Their robust legal frameworks ought to be taken into account when amending policies and laws pertaining to Tanzania’s electronic banking albeit with some modifications amenable to the local context and its particularities.

\textsuperscript{32} See section 31 of Cybercrime Act, 2015 (Act No.14 of 2015.)
Examining Consequences of Committal Proceedings on The Accused’s Right of Pleading to Information in Mainland Tanzania

J. H. K. Utamwa*

Abstract
The major purpose of this article was to examine the effects of committal proceedings on the accused’s right of pleading instantly to information before the High Court of Tanzania. The article which examined the practice of committal proceedings in Mainland Tanzania and the right to plead instantly before the High Court was based on both field research and documentary review. The research looked at hurdles facing the right of an accused person to instant pleading to information before the High Court due to committal proceedings. The study found that committal proceeding are not useful, hence their abolition in some jurisdictions like Kenya. Although committal proceedings were introduced for a significant objective of promoting the accused’s fair trial, they unnecessarily impede the accused’s fundamental right to plead instantly as one of elements of fair trial preserved under article 13 (6) (a) the Constitution of the United Republic of Tanzania, 1977, Cap. 2 [R.E. 2002]. They especially affect four pleas, namely the plea of guilty, autrefois acquit, autrefois convict and pardon. Upon the subsequent introduction of preliminary hearing, they also became superfluous. The use of both processes unnecessarily aggravates the negative effect on the accused’s right to plead instantly. Indeed, committal proceedings violate the Constitution. The paper recommends that, committal proceedings should be abolished. Cases triable by the High Court should be filed directly to it for early pleas of the accused and inquiry of pleas. The High Court should attend the cases on a daily basis without waiting for special sessions to avoid needless delay of the accused’s right to plead instantly. Improvements of relevant laws should consider various factors like international instruments and best practices in Kenya and Zanzibar with necessary modifications.

1. Introduction
The law on criminal procedure is very significant in dispensing criminal justice. It ensures fair trials. The major statute of criminal

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procedure in Mainland Tanzania is the Criminal Procedure Act 1985, (The CPA). It prohibits the High Court of Tanzania (the High Court) from taking cognisance of any committal case unless committal proceedings are conducted by a subordinate court and the accused is committed to it for trial. Committal proceedings were intended for promoting fair trial. However, there are complaints that they do not meet their objective. They inter alia, impede the accused’s fundamental right to plead instantly to the information before the High Court. They also violate the Constitution of United Republic of Tanzania, 1977 (the Constitution). This article investigates these grievances. It examines the practice of committal proceedings in Mainland Tanzania and studies the right to plead instantly before the High Court. It also evaluates hurdles facing that right due to committal proceedings. It further proposes a way forward. It is argued that, though committal proceedings were introduced for a significant objective of promoting the accused’s fair trial, they unnecessarily impede his right to plead, especially where the pleas of guilty, autrefois acquit, autrefois convict and pardon apply. These pleas are hereinafter called the selected pleas. The subsequent introduction of preliminary hearing also rendered committal proceedings superfluous, hence unconstitutional and liable to be abolished. The article is based on both field research and documentary review. This article covers five High Court zones in Mainland Tanzania as its study area.

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3 Cap. 20, [R. E 2002].
4 Section 178 of the CPA, ibid. A committal case in this study means a criminal case involving a committal offence. A committal offence means an offence triable by the High Court upon committal proceedings being conducted.
5 Cap. 2 [R. E. 2002].
6 Personal interviews with 102 respondents of different experiences were conducted between 1/1/2015 and 30/11/2017. They were divided into six groups, i.e. 7 Key Informants (persons who know well an institution or community for long time), 21 persons experienced in legal matters, 20 Court Clerks, 30 persons charged with committal offences, 5 Persons knowledgeable on the Zanzibar Legal System and 15 respondents interviewed on ad hoc questions only. The groups are hereinafter called the first, second, third, fourth, fifth and sixth group respectively. The first group included the Chief Justice of Tanzania (the Chief Justice), the Principal Judge, the Director of Public Prosecutions (DPP), the Chairman of the Law Reform Commission of Tanzania (LRCT), the Inspector General of Police (IGP), and the Chairman of the then Judicial System Review Commission. The second group involved 4 Justices of the Court of Appeal of Tanzania (the Court of Appeal), 11 Judges of the High Court of Tanzania (the High Court), 3
2. The Practice of Committal Proceedings in Mainland Tanzania

Committal proceedings are proceedings held by subordinate courts for committing an accused to the High Court for trial. It is apposite to trace their background for understanding them better. Before 1969, a subordinate court conducted preliminary Inquiry under the Criminal Procedure Code, 1945 (the former Code). This was also for committing the accused to the High Court for trial. The court could read the charge to the accused and hear evidence. It could then commit him in case of sufficient evidence. Otherwise it could discharge him. Preliminary inquiry was replaced by committal proceedings in 1969 for delaying cases. The CPA repealed the former Code in 1985. It did not however, change the procedure for conducting committal proceedings.

Major and relevant aspects of the procedure for conducting committal proceedings are these: They are conducted in cases triable by the High Court or where the DPP advises that it is unsuitable for a subordinate court to try it. A magistrate also conducts committal proceedings where the offence before him is chargeable under the Economic and Principal Resident Magistrates, 4 State Attorneys and 3 registered advocates in Mainland Tanzania. Members of the third group were randomly picked from selected High Court Zones. The fourth group entailed remandees and prisoners in Nzega, Urambo and Uyui prisons in Tabora Region. The fifth group involved the Chief Justice of Zanzibar, two Judges of the High Court of Zanzibar, the Registrar of the High Court of Zanzibar and one advocate registered in Zanzibar. The sixth group included the Registrar of the Court of Appeal, the Registrar of the High Court with his Deputies and Resident Magistrates in charge of some Magistrates’ courts. The interviews were conducted face to face or by telephone where it was impracticable to reach the respondents timely. The article is authored in fulfilment of the requirement for the degree of Doctor of Philosophy (laws) of the University of Dar es Salaam.

The registries were Dar es Salaam, Dodoma, Mwanza, Mtwara and Tabora sampled from the 14 registries. They represented the eastern, central, northern, southern and western parts of Mainland Tanzania respectively.

Section 2 of the CPA, op. cit.

Sections 219, 221, 224-226 of the former Code.

Ibid.


See section 396 of the CPA, loc. cit.

Sections 242 and 244, of the CPA,
Organised Crimes Control Act, (the EOCCA). Upon the accused’s arrest or completion of investigation, he is brought before the subordinate court together with the charge against him. The magistrate reads over and explains the charge to him without asking him to plead. He may then commit him in remand or release him on bail if the offence is bailable. The head of the investigation sends the “prosecution papers” to the DPP or his representative. If the DPP finds sufficient evidence upon studying the papers, he causes the information to be drawn up. The information and three copies of the papers are submitted to the High Court. The Registrar of the High Court delivers the copies to the subordinate court which causes the accused to appear before it. When he appears, the court delivers to him or his counsel copies of the information, prosecution papers and the notice of trial. The documents are then read to the accused. The court commits the accused to the High Court for trial. It also informs him of his right to a copy of the record of committal proceedings freely and gives the same to him.

The CPA does not clearly show the purposes of committal proceedings. However, since they replaced preliminary inquiry for delaying cases, one of their objectives was to speed up committal cases. Another
objective was to inform the accused before trial, of the charge and prosecution evidence through witnesses’ statements instead of their testimony as it was in the abolished preliminary inquiry.\(^{27}\) This was for affording him an effective preparation of his defence.\(^{28}\) The general objective was thus, to promote the accused’s right to fair trial. This general objective attracts a review on the right to plead instantly as one of the elements of fair trial.

3. **Reviewing the Right to an Instant Plea in Mainland Tanzania**

Before considering the right to an instant plea before the High Court, it is advisable to review the right generally and the selected pleas.

3.1 **An Outline of a Plea**

The significance of the right to plead instantly in Mainland Tanzania has been underscored by courts. In *Regina v. Rajabu s/o Ramadhani*,\(^{29}\) the High Court observed that, an arrested accused should be promptly produced before a competent magistrate. This should apply even where investigation of the case is incomplete so that his plea can be taken promptly. In case he pleads guilty, he should be sentenced without being remanded unnecessarily. If he pleads not guilty, a date for trial may be fixed and witnesses summoned for testifying.\(^{30}\) Recently, it further emphasized that, the right to plead is fundamental in promoting fair trial.\(^{31}\)

The CPA does not define the term “plea.” It is however, described as a formal response of the accused to a criminal charge.\(^{32}\) A plea is taken upon the accused being arraigned before a competent court to try the

\(^{27}\)Ibid. See also the Msekwa Commission Report, *op. cit*, at 193.

\(^{28}\) The Msekwa Commission Report, *ibid*.

\(^{29}\) 2 T. L. R. (R) 49, pp. 50.

\(^{30}\) Though the court considered a case triable by a magistrates’ court, its guidance is useful for promoting fair trial even before the High Court, especially where selected pleas apply. The case of *Zephirine Galeba v. The Attorney General*, Miscellaneous Civil Application No. 21 of 2013, High Court of Tanzania, at Dar es Salaam (unreported), *the Galeba Case*, also advocated for the same procedure. See also interview with the Chairman of the LRCT on 26/1/2016, in Dar es Salaam.

\(^{31}\) The *Galeba Case*, *ibid*.

case. It marks the beginning of his fundamental right to be heard.\(^{33}\) It can also operate as a defence to the charge even before the prosecution adduces evidence against the accused.\(^{34}\) However, before the accused pleads, the substance of the charge must be read and explained to him.\(^{35}\) It is read in the language understood by him.\(^{36}\) The court must satisfy itself that the accused has understood the substance of the charge before it asks him to plead.\(^{37}\) The plea must be pronounced by the accused himself and recorded by the court as approximately as possible in his own terms.\(^{38}\)

A plea is also the beginning of the accused’s right to defend himself.\(^{39}\) It is the determinant of the course to be taken by the court in testing the accused’s guilt. If he pleads guilty he is convicted and sentenced promptly.\(^{40}\) In case he pleads not guilty, he puts himself into a trial.\(^{41}\) Taking the plea is the first thing that a trial court does when the accused is arraigned.\(^{42}\) It is taken as soon as the charge is read and explained to the accused, hence his right to plead instantly.\(^{43}\) Taking the accused’s

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\(^{37}\) *Republic v. Masoud Peter @ Ngeleja Doto*, Criminal Appeal No. 205 of 2014, High Court of Tanzania at Tabora (unreported).


\(^{40}\) *Republic v. Masoud Peter @ Ngeleja Doto*, loc. cit, following *Republic v. Waziri s/o Musa* 2 T. L. R. (R) 30.


\(^{42}\) See Chipeta (1988), op. cit, p. 23 and *Hassan Junanne @ Msingwa v. Republic*, Criminal Appeal No. 290 of 2014, Court of Appeal of Tanzania, at Tabora (unreported).

plea instantly is therefore, a significant step in criminal justice. On account of its importance, different countries have enacted laws underlining the accused’s right to plead instantly.44

3.2 The Right to Plead Instantly as a Fundamental Right

The right to plead instantly to a charge or information is one of the elements of fair trial.45 A fair trial essentially means a trial by an impartial court according to regular procedures whereby the accused’s constitutional and legal rights are respected.46 It is globally recognised as one of human rights.47 It entails more other elements also called “the basic fair trial criteria.”48 Human rights were incorporated into the Constitution of Tanzania in 1984 through the Bill of Rights.49 Article 13 (6) (a) of the Constitution therefore, enshrines the right to fair trial as one of human rights.50 The right to plead instantly, as an element of fair trial, is hence a fundamental right.51 The rule requiring the accused to plead instantly therefore, should be broadly and liberally interpreted for the sake of promoting the right to plead instantly effectively.52 The

44 See for example, sections 275 (1) of the CPA, op. cit, 274 of the Criminal Procedure Code, Cap. 75 (of Kenya), and 250 of the Criminal Procedure Act, No. 7 of 2004 (of Zanzibar).
45 See Mussa Mwaikunda v. Republic, A trial without giving an accused the right to understand the charge and plead is a nullity. See Bizabigomba s/o Tieyeri v. Republic,
50 Kabula d/o Luhende v. Republic Criminal Appeal No. 281 of 2014, Court of Appeal of Tanzania, at Tabora (unreported).
51 See the Galeba case.
52 It is a trite and important judicial principle that, where basic rights and freedoms are involved, a liberal approach to rules of practice and procedure should be invoked for affording a full entitlement of such rights. See Judge in-charge, High Court Arusha and the Attorney General v. N. I. N. Munuo Ng’uni [2004] TLR. 44, pp. 58.
broad and liberal interpretation should include the following aspects: that the accused is entitled to be brought before a competent court as soon as it is practicable after his arrest. The charge or information should also be read and explained to him, and his plea recorded as soon as he appears before the competent court. It is this broad interpretation which effectively promotes the right to plead instantly as a fundamental right and an element of a fair trial.

Apart from the right to plead instantly, the accused has the liberty to choose a plea. His counsel (if any) may only advise him before pleading. Common pleas in various jurisdictions include the selected pleas. The right to plead cannot be derogated unless there are sufficient grounds to do so. In Mainland Tanzania for instance, an unjustified failure to take the accused’s plea renders the trial a nullity. However, where the derogation does not cause injustice, it may be curable.

3.3 Examining the Selected Pleas

Selected pleas can be understood better by discussing them separately. A plea of guilty for example, is a confession by the accused that he committed the offence charged and is ready for conviction and sentence. It must be unequivocal. It signifies the accused’s waiver of

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53 See LCHR’s Report, op. cit, p. 4-11 basing on article 9 (3) of the ICCPR, op. cit.
54 This proposed broad interpretation of the right is also in line with the guidance in Regina v. Rajabu s/o Ramadhani, and the Galeba case.
56 See Richardson, (2006), op. cit, p. 396.
57 Such jurisdictions include England (see Richardson, (2006) ibid, p. 395 and Hampton, loc. cit, p. 184-187), Kenya (see Kiage, op. cit, p. 89.), Zanzibar (see Sections 213 (2), 214 (1), 213 (4) and 260 of the Criminal Procedure Act) and Uganda (see Sections 63, 65 and 62 of the Trial on Indictments’ Act, Cap. 23).
61 This is a plea of guilty that does not result from ignorance, fear, menace, duress or any seducing factor. See Hampton, loc. cit, p. 184.
the requirement that the prosecution must prove the charge.\textsuperscript{62} It also waives his right to defence.

The proper procedure for recording a plea of guilty has been elaborated by courts.\textsuperscript{63} The charge or information is read over and explained to the accused in the language he understands. Ingredients of the offence are made clear. He is asked to plead thereto. If he pleads guilty, the court records his own words and enters a plea of guilty provisionally. The facts of the case are read and he is given an opportunity to reply.\textsuperscript{64} In reading the facts, all the pertinent exhibits must be brought to his attention.\textsuperscript{65} If he disputes the facts, the court changes the plea to a plea of not guilty. It also records a plea of not guilty if the facts do not establish any offence.\textsuperscript{66} In case he admits them, the court re-confirms the plea of guilty and records it accordingly. It then finds him guilty if the facts constitute the offence charged or a lesser offence. It convicts him and passes the sentence. Violating this procedure warrants quashing the proceedings and setting aside the sentence for an unfair trial.\textsuperscript{67} An accused may plead guilty for various reasons including avoidance of torments of trial.\textsuperscript{68} Another reason is soliciting lenient sentences


\textsuperscript{63} See Masoud s/o Peter @ Ngeleja Doto v. Rep, following Republic v. Waziri s/o Musa, supra.

\textsuperscript{64} A conviction based on a plea of guilty entered without reading the facts of the case to the accused and giving him the opportunity to reply to the facts is incurably erroneous. It offends the right of fair trial and must be quashed. See Joseph Mahona @ Joseph Mboje @ Magenbe Mboje v. Republic, Criminal Appeal No. 541 of 2015, Court of Appeal of Tanzania at Tabora (unreported), (the Mahona case).

\textsuperscript{65} The Mahona case, ibid.

\textsuperscript{66} Chipeta (2009), op. cit, p. 43-44, Odoki, op. cit, p. 104 and section 33 (1)-(3) of the EOCCA.

\textsuperscript{67} The Mahona case.

since a plea of guilty is a good mitigating factor.\textsuperscript{69} A plea of guilty is beneficial not only to the accused, but also to the government, the court and the public. It achieves the purpose of criminal law promptly since it amounts to a confession.\textsuperscript{70} Criminal law intends to curb crimes by trying and sentencing criminals. Objectives for sentencing include maintaining law and order.\textsuperscript{71} The plea of guilty also avoids wastage of time, costs of the trial, inconveniencing witnesses and costs for keeping the accused in remand prison where he is not bailed out. It further supports the constitutional requirement of finalizing cases punctually.\textsuperscript{72} Owing to its advantages, England established a scheme to encourage pleas of guilty.\textsuperscript{73} Ungrounded suspension of a plea of guilty thus, sacrifices its benefits and offends the accused’s fundamental right to plead instantly.

The pleas of \textit{autrefois acquit} means that, the court should not test the accused’s guilt for having been properly charged and acquitted of the same offence and facts.\textsuperscript{74} By pleading \textit{autrefois convict}, the accused objects to the charge on the ground that he was arraigned, tried, convicted and sentenced.\textsuperscript{75} These two pleas also apply in other jurisdictions like Kenya and Uganda.\textsuperscript{76} They underline the rule against

\textsuperscript{69}Swalehe Ndungajilungu v. Republic, Criminal Appeal No. 84 of 2002, Court of Appeal of Tanzania at Mwanza (unreported).
\textsuperscript{70}Saidi Hatibu v. Republic, op. cit.
\textsuperscript{72} Article 107A (b) of the Constitution, op cit, requires courts not to delay cases unreasonably.
\textsuperscript{74}R v. Absolom s/o Mohanga and Wilson s/o Wasike [1957] 1 EA 660 and Chipeta (2009), op. cit, p. 46-47.
\textsuperscript{75}Chipeta, (2009), ibid.
\textsuperscript{76}See Kiage, op. cit, p. 89 and R v. Absolom s/o Mohanga and Wilson s/o Wasike, ibid. (for Kenya). See also section 61 of the Trial on Indictments’ Act, \textit{op. cit}, and Odoki, \textit{op. cit}, p. 105 (for Uganda).
double jeopardy. The rule restricts putting a person under peril twice for the same offence for which he was charged and acquitted or convicted.\textsuperscript{77} International instruments also underscore this rule.\textsuperscript{78} These pleas are equivalent to the doctrine of \textit{res judicata} in civil proceedings.\textsuperscript{79} The doctrine prohibits courts from entertaining determined suits between the same parties and same subject matter.\textsuperscript{80} Where the accused raises either of the pleas, the court inquires into it.\textsuperscript{81} If it confirms it, the court dismisses the charge and discharges him.\textsuperscript{82} Otherwise, the court asks him to plead.\textsuperscript{83} Any unreasonable suspension of the two pleas thus, denies the accused’s right to plead and exonerate himself from double jeopardy promptly. Other consequences on the two pleas are similar to those resulting in suspending the plea of guilty discussed before.

A plea of pardon signifies that the accused was previously charged, convicted and sentenced, but was pardoned for the offence.\textsuperscript{84} He cannot be re-tried with the same offence and facts.\textsuperscript{85} Where he raises the plea, the court inquires into it. If it confirms it, the court will not ask him to plead and the case ends.\textsuperscript{86} If the plea is not proved, the court asks him to plead.\textsuperscript{87} The plea also applies in other jurisdictions like Uganda and Zanzibar.\textsuperscript{88} It is advantageous since it saves public funds for keeping...
convicts in prison. They also get opportunities to perform their economic activities outside prisons. Any ungrounded postponement of this plea thus, derogates its benefits and violates the accused’s right to an instant plea.

3.4 The Right to an Instant Plea Before the High Court of Tanzania

The CPA directs that, upon reading and explaining the information to the accused, the High Court shall require him to plead instantly. In case he pleads not guilty, preliminary hearing is conducted and the trial follows. If he stands mute, a plea of not guilty should be entered. He can offer a plea of guilty which shall be recorded by the High Court and he may be convicted and sentenced. The plea must however, be unequivocal. The procedure for recording it is like the one narrated above. The accused may plead *autrefois acquit* or *autrefois convict*. He can also offer a plea of pardon. The plea derives its legitimacy from article 45 (1) (a) of the Constitution which vests powers to the President for prerogative of mercy.

Where the prosecution objects to the plea of *autrefois acquit* or *autrefois convict* or pardon, the court makes a trial for purposes of

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President powers to pardon convicts. Section 259 (1) (b) of the Criminal Procedure Act, op. cit, also underlines the plea of pardon.

89 Section 275 (1) of the CPA.

90 Sections 192, 279 and 283, ibid. The practice however, requires an accused to plead not guilty twice before the trial commences. He firstly pleads before preliminary hearing is conducted. Secondly, he pleads soon before the trial commences by taking the prosecution evidence. See Emmanuel Malahya v. Republic, Criminal Appeal No. 212 of 2004, Court of Appeal of Tanzania, at Tabora (unreported) and Cheko Yahya v. Republic, Criminal Appeal No. 179 of 2013, Court of Appeal of Tanzania at Tabora (unreported).

91 Sections 281 (1) and 283, of the CPA.

92 Section 282, *ibid*.


94 See *Masoud s/o Peter @ Ngeleja Doto v. Rep*, op. cit, following *Republic v. Waziri s/o Musa*.

95 Section 280 (1) (a), of the CPA.

96 Section 280 (1) (b), *ibid*.

97 An example of pardons is the recent release of 8,157 prisoners and 61 convicts sentenced to death, effected on 9 and 10/12/2017 respectively. See the Daily News newspaper (Tanzania), 11/12/2017 “Prisoner’s release documents signed,” p. 1.
In verifying the plea of *autrefois acquit* for example, the accused has to adduce evidence by *inter alia*, producing a certified copy of the court order that signifies the acquittal. The prosecution may also adduce evidence in refuting the plea. If he does not sustain the plea, the court requires him to plead. If he sustains it, the information is dismissed. This procedure applies to both subordinate courts and the High Court. It is envisaged that, the same procedure of inquiry should apply to the pleas of *autrefois convict* and pardon.

However, the accused’s right to selected pleas before the High Court faces challenges due to the requirement for conducting committal proceedings as shown beneath.

### 4. Hurdles Caused by Committal Proceedings to Selected Pleas

The above discussion hinted that committal proceedings pose challenges against the selected pleas before the High Court, hence the need to consider how they affect them.

#### 4.1 How Committal Proceedings Impede Selected Pleas Before the High Court

The law prohibits the accused from pleading before a subordinate court. He pleads before the High Court upon committal proceedings being conducted and upon being committed to it for trial. He cannot therefore, offer any plea instantly before the subordinate court. His

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98Section 280 (2) of the CPA and *DPP v. Christopher Kikubwa and another*, It is however, envisaged that, this kind of a trial is in the form of an inquiry since no witness testifies as in a full trial.

99 He must also prove that, he was the same person in the previous trial, the issue in that trial is substantially the same to the issue in the subsequent trial and that the previous trial was conducted by a competent court. See *DPP v. Christopher Kikubwa and another*,

100 Ibid.

101 Ibid.

102 Ibid.

103 This is because no other procedure for inquiry into these pleas is provided by written law.

104 See section 245 (2) of the CPA.

105 Section 275 (1) *ibid.*

106 The prohibition thus, offends the accused’s fundamental right to fair trial. This is because he cannot be promptly brought before the competent court, being the High
rights to appear, to plead and to be tried before the High Court as a competent court to try committal offences is restricted and suspended to give room for committal proceedings first. \(^\text{107}\) This course is legally unjustified since the High Court has statutory jurisdiction to try all offences under the Penal Code and others. \(^\text{108}\) It also has unlimited jurisdiction to try criminal and civil matters. \(^\text{109}\)

Section 245 (3) of the CPA purports to justify the prohibition against pleading instantly before a subordinate court. It is suggestive that the prohibition is based on the fact that, the matter before the subordinate court is not the accused’s trial. The trial will be in the High Court if it will be so decided. The section also presupposes that, the charge is read to him while the decision to prosecute him has not been made yet. This purported justification is unrealistic for the following grounds: at the stage of reading the charge for the first time to the accused before a subordinate court, he may be under arrest. \(^\text{110}\) The charge against him is usually known since it is read to him. \(^\text{111}\) He may also be remanded pending committal proceedings. \(^\text{112}\) This is thus, a very advanced stage of the process for prosecuting him since stern steps against his liberty may be taken at that stage. \(^\text{113}\) The prosecution is also ordinarily in possession of preliminary evidence against him at that stage. \(^\text{114}\) This evidence suffices for taking him before the High Court for pleading instantly. In the USA the entitlement of the accused to the rights related

\(^\text{107}\) Sections 178 read together with 245 (2) of the CPA.
\(^\text{108}\) See Section 164, ibid.
\(^\text{110}\) See section 245 (1) of the CPA.
\(^\text{111}\) See section 245 (2), ibid.
\(^\text{112}\) See section 245 (4), of the CPA.
\(^\text{113}\) His liberty is protected under article 15 (1) and (2) of the Constitution, op. cit.
\(^\text{114}\) Committal cases are filed in subordinate courts after collection of preliminary evidence like the statement of the complainant, the accused’s cautioned or extra-judicial statement, evidence related to his mental examination where necessary and the sketch map. See guideline No. 2 (a) of Mwongozo Kuhusu Utaratibu Mpya wa Ufunguaji wa Kesi za Jinai, wa Mwaka 2012, (Guidelines on the New Procedure for Filing Criminal Cases, of 2012), Government Notice No. 296 of 2012. The guidelines are made by the DPP under section 18 (1) of the National Prosecution Service Act, No. 27 of 2008.
to his prosecution commences immediately after his arrest or filing of the charge. This is a better practice for promoting the right to plead instantly.

Actually, committal proceedings not only suspend the accused’s plea, but also unnecessarily delays it when the case is pending before a subordinate court for committal proceedings. The trend is attributed to some reasons including lack of powers by subordinate courts to manage the cases and control the delays. Their role is passive. Their powers are limited to conducting committal proceedings and committing the accused to the High Court for trial only. They cannot make any order against the prosecution as they used to do in conducting the abolished preliminary inquiry discussed earlier. This applies even where the prosecution has scant evidence or it conducts itself with laxity. Some prosecutors take advantage of the situation and cause adjournments of cases for insufficient reasons. The reasons include unwarranted incompletion of investigations, unjustified lack of police case files and total absence prosecutors. The prosecutors thus, take control of the proceedings, which is an improper course. Once a case is filed in court, the court must take the control. Courts have final constitutional mandate for administering justice.

Indications of such delays are numerous. Perusal of court records for example, conspicuously shows the delays. The record for the Asafu case for instance, indicates that the case took a decade from its filing in the subordinate court to the acquittal by the High Court. Such delay

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115 Israel and La FAVE, op. cit, p. 466.
116 See the Galeba case.
117 Director of Public Prosecution v. Elizabeth Michael Kinemeta @ Lulu, Application No. 6 of 2012, Court of Appeal of Tanzania at Dar es Salaam (unreported).
118 See Republic v. Kija Jinasa and 14 others, Miscellaneous Criminal Revisions Consolidated Files Nos. 29-45 of 2017, High Court of Tanzania, at Tabora (unreported) hereinafter called the Jinasa Case and Republic v. Shabani Donasian and 10 others, Miscellaneous Criminal Revisions No. 1-11 of 2017, High Court of Tanzania, at Tabora (unreported), henceforth the Donasian Case.
120 See the Galeba Case.
121 Articles 4 (2) and 107A (1) of the Constitution, and the Galeba case.
122 See the Asafu case.
could not have occurred save for the requirement to conduct committal proceedings.\textsuperscript{123} Table 1 below also resulted from a review of various committal case records. It demonstrates the average periods of the needless delays between various stages of committal cases.

### Table 1: Average Number of Days Consumed Between Various Stages of Committal Cases

<table>
<thead>
<tr>
<th>S/N</th>
<th>Stages of Committal Cases Considered</th>
<th>Average Number of Days Consumed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Between filing Charge in subordinate Court and Filing Information in the High Court.</td>
<td>558</td>
</tr>
<tr>
<td>2</td>
<td>Between filing Information in the High Court and conducting committal proceedings by subordinate Courts.</td>
<td>66</td>
</tr>
<tr>
<td>3</td>
<td>Between conducting committal proceedings on one hand and taking plea and conducting preliminary hearing (by the High Court) on the other.</td>
<td>317</td>
</tr>
<tr>
<td>4</td>
<td>Between filing charge in subordinate courts and taking the accused plea by the High Court.</td>
<td>895</td>
</tr>
<tr>
<td>5</td>
<td>Between filing information in the High Court and taking plea by it.</td>
<td>357</td>
</tr>
<tr>
<td>6</td>
<td>Between filing charges in subordinate courts and conducting committal proceedings by them.</td>
<td>604</td>
</tr>
</tbody>
</table>

*Source:* Author of this paper upon studying 71 case records randomly selected from the five selected High Court zones.

There are many other indicators of the needless delays. The Chief Justice for instance, openly remarked that committal proceedings delay

\textsuperscript{123} Previously, the subordinate court had conducted committal proceedings and committed the accused to the High Court which conducted preliminary hearing. The Court of Appeal nullified the proceedings of both courts. It ordered committal proceedings to be re-conducted for the irregular committal order. Committal proceedings were re-conducted; the accused re-committed to the High Court, hence the trial and acquittal. The Court of Appeal did not however, mention any injustice caused by the said irregularity.
murder cases. These are some of committal cases. Judges and Magistrates’ meetings also resolved that, committal proceedings delay cases and need a review. The Deputy Attorney General and the IGP indicated that the utility of committal proceedings is questionable. A Judge also remarked that, delay of cases pending committal proceedings contributes to prison congestions. Advocates as well, complained against unnecessary delays in murder cases. The Msekwa Commission recommended for the abolition of committal proceedings for delaying cases unnecessarily. Some magistrates make stern orders dismissing committal cases and discharging accused persons for needless delays though the law does not empower them to do so. There are rampant complaints by accused persons against unnecessary delay of their cases pending for committal proceedings before subordinate courts. The media repeatedly reports such complaints.

124 See Mwananchi Newspaper (Tanzania), 2/2/2013, “Ucheleweshaji kesi za mauaji bado changamoto.” (i. e. Delay of murder cases is still a challenge), p. 2.
125 See Judges’ meeting held between 10 and 12/11/2014, at Malaika Hotel in Mwanza and the General Meeting of Judges and Magistrates Association of Tanzania held in Mwanza, at Gold Crest Hotel on 13/11/2014. The author of this paper was participant and observer in both meetings.
126 The remarks were made in the Meeting of Judges at Malaika Hotel, ibid.
128 They complained at the Law Day Ceremony on 4 February 2015 in Arusha. See Nipashe Newspaper (Tanzania) “Majaji, mawakili wapigania haki za wananchi” (i. e. Judges and advocates fight for citizens’ rights), 6/2/2015, p. 21.
129 See the Msekwa Commission Report, op. cit, p. 182.
130 Republic v. Mohamed Salum @ Maulid and others, Preliminary Inquiry No. 12 of 2010 the Court of Resident Magistrate of Dar es Salaam, at Kisutu, Republic v. Salum Rajabu Kingazi, Criminal Case (Murder) No. 9 of 2011, Court of Resident Magistrate of Tanga, at Tanga. See also interviews with the Principal Resident Magistrate in-charge of the Resident Magistrate Court of Dar es Salaam, at Kisutu and another Principal Resident Magistrate of the same court, on 29/1/2015, in Dar es Salaam. Both respondents belong to the second group.
131 See for example, Republic v. Leonard Abdalah, Preliminary Inquiry No. 4 of 2010, Court of Resident Magistrates of Dar es Salaam, at Kisutu, (delayed for 17 months before a nolle prosequi was entered), Republic v. Emanuel Mark Sirengo, Preliminary Inquiry No. 11 of 2010, the Court of Resident Magistrate of Dar es Salaam, at Kisutu,(delayed for more than 21 months before a nolle prosequi was entered) and Republic v. Nduimana Jonas and 2 others, Criminal Sessions Case No. 41 of 2002, High Court of Tanzania at Tabora (unreported). See also interviews with all the thirty respondents of the fourth group. See note 5 above.
Examining Consequences of Committal Proceedings

The prohibition from pleading instantly is thus unnecessary. Owing to this reason the Galeba case proposed a scheme whereby an accused can indicate his plea immediately when he appears before a subordinate court. If he pleads guilty, a subordinate court should promptly dispatch him to the High Court for reconfirming his plea and necessary orders.

The effect of suspending the right to plead can be understood better by discussing each of the selected pleas separately. Regarding the right to plead guilty the effect is obvious. As shown before, the accused willing to plead guilty cannot do so as soon as he appears before a subordinate court. He can do so before the High Court later. This is after the subordinate court has conducted committal proceedings and has committed him to it for trial. The accused may be remanded pending committal proceedings where bail is not granted for any reason. Even where he is granted bail, he still has to attend to court regularly though willing to end the case by pleading guilty. His liberty is also needlessly curtailed for mandatory bail conditions that restrict his movements. This trend underscores the significance of the guidance by the High Court highlighted above. The benefits of a plea of guilty discussed earlier cannot therefore, be achieved timely due to committal proceedings.

132 See for example, Mwananchi Newspaper (Tanzania) “Watuhumiwa wamvaa Mwanasheria Mkuu” (i.e. Suspects confront the Attorney General), 2/1/2013, p. 5 and Tanzania Daima Newspaper (Tanzania) “Mtuhumiwa kesi ya Dr. Ulimboka atoa siri nzito” (i.e. the Suspect in Dr. Ulimboka’s case exposes a serious secrecy), 6/1/2013, p.1.

133 See sections 245 (2) and 275 (1) of the CPA.

134 In Republic v. Denis Emmanuel, Criminal Session Case No. 89 of 2013, High Court of Tanzania at Dar es Salaam (unreported) and the Republic v. Said Abdallah @ Dunga and Omary Mahiga @ Gungolo, Criminal Session Case No. 40 of 2010, High Court of Tanzania at Dar es Salaam (unreported) for example, the records show that, the accused persons admitted the commission of the respective committal offences before the subordinate courts. However, the courts did not take their pleas of guilty for want of powers. They thus, had to wait in remand prison for committal proceedings and for being committed to the High Court for trial.

135 Section 148 (6) (a) and (b), of the CPA, loc. cit, requires a court granting bail to order the accused surrender his passport or other travelling documents and to restrict his movements to a particular locality.

136 See Regina v. Rajabu s/o Ramadhani, op. cit. The case underscored the need to produce the accused before a competent court for an instant plea.
Consequences on the pleas of *autrefois acquit* and *autrefois convict* are also clear. Committal proceedings deny the accused’s right to avoid double jeopardy promptly. The cases of *Republic v. Leonard Abdulah* and *Republic v. Masoud Said Juma and 5 others* demonstrate better this tragic situation. In the former case, the accused was produced before a subordinate court pending committal proceedings. He complained that he had been re-charged for murdering the same person. The magistrate promised to make a follow up the matter. However, the case was further adjourned without any solution. The DPP entered a *nolle prosequi* 3 months thereafter. Actually, the complaint amounted to either of the pleas though the accused, as an unrepresented layman could not expressly say so. Had the accused been promptly produced before the High Court, his plea could have been punctually inquired into and he could be discharged timely upon proving it. In the latter case, accused persons had been previously charged with the offence of murder, tried and acquitted before a Resident Magistrate with Extended Jurisdiction (RMEJ). They were re-arrested and re-charged with the same offence and facts before a subordinate court to wait for committal proceedings. Complaints by the accused persons based on their previous acquittal made the magistrate to make a ruling observing that the DPP was abusing the court process. The DPP entered a *nolle prosequi* few days thereafter. Nevertheless, the accused persons had remained in remand for a year pending committal proceedings despite their acquittal. The subordinate court could neither receive their plea of *autrefois acquit* nor inquire into it for want of powers. Generally therefore, the accused’s right to plead *autrefois acquit* or *autrefois convict* is restricted like the right to plead guilty discussed above. The accused is subjected under a similar situation to that of an accused that is willing to plead guilty.

The effect of committal proceedings on the plea of pardon is also notable. The accused’s right to plead to a charge before a subordinate court pending for committal proceedings, is restricted like the right of an accused entitled to plead the other selected pleas discussed above.

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137 Preliminary Inquiry Case No. 4 of 2010, Court of Resident Magistrate of Dar es Salaam, at Kisutu.
138 Preliminary Inquiry Case No. 16 of 2016, Court of Resident Magistrate of Tabora, at Tabora.
Examining Consequences of Committal Proceedings

He cannot enjoy the benefits of the pardon. He is also put under similar situation to accused persons entitled to the other selected pleas. Committal proceedings also contradict article 45 (1) (a) of the Constitution which provide for the presidential powers of pardoning.

4.2 Assessing the Justification for Existence of Committal Proceedings

Owing to the above discussed effects of committal proceedings on the selected pleas, it is incumbent to make an important test. This is to inquire if they are the only means for promoting fair trial by informing the accused of the charge and evidence against him before trial, for him to effectively prepare defence. This is the major objective for committal proceedings as shown earlier. The test is intended to verify if their existence in justified.

The law currently necessitates conducting both committal proceedings and preliminary hearing in a committal case. This co-existence is hereinafter called “the dual procedure.” Preliminary hearing was introduced in 1985 through the CPA when it was enacted to repeal the former Code. It was initially recommended by the Msekwa Commission to replace committal proceedings for delaying cases. However, the legislature adopted preliminary hearing and retained committal proceedings too. Preliminary hearing is mainly governed by the CPA though it does not define it. It is however, described as a pre-trial hearing of a criminal case not amounting to an actual trial, and aimed at finding out disputed and undisputed matters so as to promote a fair and expeditious trial. It is conducted by a trial court in the presence of the accused and his counsel (if any) when he pleads not

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139A subordinate court conducts committal proceedings and commits the accused to the High Court for trial. The High Court in turn, conducts preliminary hearing before it tries the case.

140It was introduced through section 192 of the CPA.


142See section 192 of the CPA, loc. cit. Other laws governing it are the Accelerated Trial and Disposal of Cases Rules 1988, Government Notice No. 192 of 1988 (The Accelerated Trial Rules), section 35 of the EOCCA, op. cit, and case law.

143Emmanuel Malahya v. Republic.
The prosecution narrates facts of its case. The accused is asked which facts he admits. The court records matters agreed in a memorandum which is signed by both sides and the court. Facts in the memorandum are deemed proved and need no formal proof unless the court directs otherwise. Undisputed exhibits are admitted in evidence. This process reduces the number of witness, costs and time of trial, hence promotes fair and expeditious trials.

To perform the test mentioned above efficiently, a comparative evaluation between the usefulness of both processes is necessary. Their utility can be detected by considering their respective legislative purposes and their corresponding benefits according to the practice. The major purpose of committal proceedings was highlighted above. It is also obvious that, in conducting preliminary hearing before the High Court, the information is read and explained to the accused who pleads to it. The facts of the case are read to him. Other documents containing the prosecution evidence are also read. The accused therefore, understands the charge and evidence against him before trial through preliminary hearing like in committal proceedings. The purpose of preliminary hearing is thus, like committal proceedings, to promote fair trials. Hence, both processes serve the same objective through almost a similar method.

The practice however, shows that preliminary hearing serves more significant objectives than committal proceedings. It ascertains undisputed matters, reduces the number of witnesses, costs and time of trial. It also involves making the memorandum of matters agreed which avoids unnecessary introduction of new matters. The memorandum further avoids calling unnecessary witnesses since its contents need no proof. Preliminary hearing therefore, not only promotes fair trials, but

144 Rule 3 of the Accelerated Trial Rules.
145 Rule 5, ibid.
146 Ibid, and section 192 (3) of the CPA.
147 Section 192 (4) of the CPA, ibid, and Mathayo Lendita v. Republic, Criminal Appeal No. 54 of 2004, Court of Appeal of Tanzania at Arusha (unreported).
149 Section 192 of the CPA.
Examining Consequences of Committal Proceedings

also speeds them up. Its other advantages are that, it is conducted by the High Court as a competent trial court for effective case management and for the trial. In conducting preliminary hearing the accused exercises his fundamental right of pleading instantly to the information. He can thus benefit from any of the selected pleas promptly. The High Court can also make orders curbing unnecessary delays by dismissing the charge and discharging or acquitting the accused. These advantages are not attainable in committal proceedings since they are conducted by subordinate courts which lack the requisite powers, hence delaying the accused’s right to plead instantly. Preliminary hearing is also positively recommended in Uganda for advancing fair and expeditious trials effectively. The above discussed Msekwa Commission’s recommendation to replace committal proceedings by preliminary hearing was thus, commendable.

Some statutory factors also negate the existence of committal proceedings. The fact that some cases can be tried without prior committal proceedings is one of them. The exception that a witness can testify before the High Court though his statement was not read in conducting committal proceedings is another negating factor. England abolished its committal system that barred an accused from pleading instantly before magistrates’ courts in cases triable by the Crown Court. Reasons for the abolition included the need to expedite

150Section 192 of the CPA and Bizabigomba s/o Tieyeri v. Republic.
151Republic v. Vianne John, Criminal Session Case No. 191 of 1989, High Court of Tanzania at Bukoba (Unreported) following DPP v. Matemane Masamba and Another, Criminal Appeal No. 90 of 1991, Court of Appeal of Tanzania at Mwanza (Unreported). The holding was also based on section 264 of the CPA which empowers the High Court to control its own practice
152Odoki, op. cit, p. 188-189 and Musa, op. cit. p. 325.
153Sections 178 read together with section 93 of the CPA, op. cit, for example, permit the DPP to file information in the High Court without prior committal proceedings if he obtains a prior presidential sanction.
154See section 289 (1)-(3) of the CPA, ibid. What the prosecution needs is only to give a reasonable written notice to the accused on the intention to call such witness stating the name, address and the substance of the intended evidence.
cases by having instant pleas before the Crown Court as the competent trial court.\textsuperscript{156}

The view negating the existence of committal proceedings is further vindicated by the fact that, most of committal cases end by pleas of guilty at the first day when accused persons appear before the High Court for plea taking.\textsuperscript{157} Table 2 hereunder tells the trend better.

<table>
<thead>
<tr>
<th>S/N</th>
<th>Results of Cases</th>
<th>Total Number of Cases Ending with Such Results (Out of 1004)</th>
<th>Percentage of Cases With Such Results</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Pleas of Guilty</td>
<td>683</td>
<td>68%</td>
</tr>
<tr>
<td>2</td>
<td>Pleas of Not Guilty</td>
<td>65</td>
<td>6.5%</td>
</tr>
<tr>
<td>3</td>
<td>Nolle Prosequi</td>
<td>196</td>
<td>19.5%</td>
</tr>
<tr>
<td>4</td>
<td>Abating Charges for deaths of accused</td>
<td>22</td>
<td>2.2%</td>
</tr>
<tr>
<td>5</td>
<td>Orders for Inquiry Into Accused State of Mind</td>
<td>38</td>
<td>3.8 %</td>
</tr>
</tbody>
</table>

Source: Author of this paper upon examining 1004 committal case files randomly collected from the five High Court zones.

Table 2 shows that, a larger percentage (68\%) of such cases are determined at that stage through pleas of guilty. The Principal Judge also noted that, 75-80\% of cases can be determined at this stage through among other things pleas of guilty.\textsuperscript{158} These cases could have thus, been determined earlier save for the requirement to conduct committal proceedings in which needlessly suspend the accused’s right to plead instantly.

A comparison between practices in Mainland Tanzania and some purposively selected jurisdictions, also testifies against committal proceedings. The selected jurisdictions are Kenya, Uganda and

\textsuperscript{156} Ibid.
\textsuperscript{157} See the Jinasa Case, op. cit and the Donasian Case.
\textsuperscript{158} See paragraph 6 (iv) of the Waraka wa Jaji Kiongozi No. 5 wa 2005, (i.e. The Principal Judge’s Circular No. 5 of 2005).
Zanzibar because they have almost similar criminal justice systems to that of Mainland Tanzania. Legal systems of all these jurisdictions were influenced by the British colonial powers. Though Zanzibar is part of the United Republic of Tanzania, is considered as a different jurisdiction for her different legal system.

In Kenya for example, magistrate’s courts used to conduct committal proceedings for committing accused persons to the High Court for trial. Accused persons could not plead before them. The system was abolished for delaying cases needlessly. Currently cases are filed directly in the High Court of Kenya and the accused instantly pleads to the information. Fair trial is achieved without prior committal proceedings. Magistrates’ courts in Zanzibar also conducted preliminary inquiry for committing accused persons to the High Court for trial. Accused persons could not plead before such courts. The system was abolished in 2004 for delaying cases. Cases are currently filed directly in the High Court of Zanzibar. An accused before it can

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160 Zanzibar has her own executive, legislature and judiciary. See article 4 (2) of the Constitution, op. cit. She only shares Union Matters with Mainland Tanzania as provided for under article 4 (3) and item No. 21 of the schedule to the Constitution.
162 Vide the Amendment Act No. 5 of 2003. See also Lumumba, ibid.
164 Though there is no longer requirement for disclosing the prosecution evidence through committal proceedings, the accused is entitled to it under the Constitution of Kenya. See Republic v. Kamlesh Mansuklal Damji Pattni @ Paul Pattni, (2003) Criminal Case No. 229 of 2003, High Court of Kenya, at Nairobi (unreported), (also discussed in Lumumba, op. cit, at 92-93).
166 Interviews with the Chief Justice of Zanzibar and all the respondents of the fifth group. See note 5 above. Actually, section 399 of the Criminal Procedure Act (of Zanzibar), repealed provisions governing preliminary hearing.
167 Interviews with the Chief Justice of Zanzibar and all the respondents of the fifth group, ibid.
plead instantly. The current system promotes fair trial better than before.\textsuperscript{168}

There is a contention that, the Zanzibar’s system may not work in Mainland Tanzania.\textsuperscript{169} It is based on the grounds that Zanzibar has a smaller territorial size and population than Mainland Tanzania.\textsuperscript{170} Nevertheless, these dissimilarities do not matter because Mainland Tanzania has more High Court registries, Judges and RMEJ than Zanzibar.\textsuperscript{171}

In Uganda magistrates’ courts conduct preliminary proceedings for committing accused persons to the High Court for trial.\textsuperscript{172} Accused persons do not plead before them. Magistrates have a passive role like in Mainland Tanzania. They only rubberstamp the committal process.\textsuperscript{173} The High Court of Uganda conducts preliminary hearing.\textsuperscript{174} Its procedure is like the one applying in Mainland Tanzania save that in Uganda; it applies to represented accused persons only. The Ugandan committal system is thus, inadequate.\textsuperscript{175} It is like the one applying in Mainland Tanzania.

It is therefore evident that in Mainland Tanzania, committal proceedings needlessly impede the accused’s right to plead instantly. They have been rendered superfluous upon the introduction of

\textsuperscript{168} Ibid.  
\textsuperscript{169} Interview with the Registrar of the High Court of Zanzibar on 26/7/2016 as respondent of the fifth group.  
\textsuperscript{170} Ibid.  
\textsuperscript{171} The High Court of Zanzibar has one registry with only 8 Judges. See interview with the Chief Justice of Zanzibar, on 26/11/2017, in Tabora. The situation is different in Mainland Tanzania. By June 2015 there were 75 Judges and fourteen High Court registries to file committal cases. See interview with the Registrar of the High Court on 10/6/2015. There is also a good number of Judges and RMEJ though some more are still needed. See Interviews with the Chief Justice (of Tanzania), op. cit. It is intended to have a High Court registry in each Region soon. See Speech by Mohamed Chandé Othman, Chief Justice, at the Law Day Ceremony in Dar es Salaam on the 4/2/2015, p. 14. There were also 41 RMEJ by 23 December 2016. See the Criminal Procedure (Extension of Jurisdiction) Order, 2015, Government Notice No. 514 of 2015.  
\textsuperscript{172} Odoki, \textit{op. cit}, p. 177-178 and section 168 (1)-(5) of the Magistrates Courts Act, Cap. 16.  
\textsuperscript{173} Musa, \textit{op cit}, p. 317-324.  
\textsuperscript{174} Odoki, \textit{loc. cit}, p. 188-189.  
\textsuperscript{175} Ibid, p. 322 and \textit{Uganda v. Yonasani Lule and six others,} M. B. 17 of 1969.
preliminary hearing. Objectives of committal proceedings are achievable in a better way in preliminary hearing. In fact, preliminary hearing can promote fair trial better without committal proceedings. The dual procedure is thus, a duplication of processes that aggravates the effect on the accused’s right to plead instantly. The existence of committal proceedings is not thus, justifiable. They violate the Constitution which enshrines the accused’s right to fair trial that embodies the right to plead instantly.

4.3 Way Forward
Owing to the above discussed effects on the accused’s right to plead instantly, a viable remedy is required. Adopting the practices in Kenya and Zanzibar which abolished their respective committal systems without affecting the right to fair trials is workable. Besides, adoption of foreign laws is one of viable ways for improving local laws. The view to abolish committal proceedings in Mainland Tanzania is supported by various factors including those discussed earlier. Firstly, the introduction of preliminary hearing rendered them redundant. Preliminary hearing was recommended by the Msekwa Commission to replace committal proceedings for delaying cases. Their objectives are achieved better through preliminary hearing. The abolition will automatically eliminate the unnecessary dual procedure which aggravates the delays of the accused’ right to plead.

Moreover, various developments subsequent to the introduction of committal proceedings make them unnecessary. They could be significant in 1969 following few High Court registries. The few registries were manned by few Judges. This could necessitate retaining the accused in a subordinate court by a holding charge

177 The introduction of committal proceedings fitted the circumstances of Tanzania by then (i. e. 1969). See Bomani, op. cit, p. 205. There were only 4 High Court Registries in 1962, and 4 others were added in 1987. See Mwalusanya, J. L., “The Judiciary in Tanzania,” unpublished Booklet, Dare es Salaam, 1988, at 18 and 49. There were thus, only 4 registries in 1969 when committal proceedings were introduced.
178 In 1969 there were only ten Judges of the High Court. See Mwalusanya, ibid.
pending committal proceedings since it was difficult to file every case in the few High Court registries.\textsuperscript{179} Currently there are many High Court registries, Judges and RMEJ deployed all over the country.\textsuperscript{180} These Judicial Officers can properly manage cases filed in the High Court directly without prior committal proceedings. More other High Court registries will be added.\textsuperscript{181} Geita, Kigoma and Mara Regions will have their own registries soon.\textsuperscript{182} Construction of registries for Kigoma and Mara Regions is progressing.\textsuperscript{183} This development makes it easier to file the cases directly in the High Court than before.\textsuperscript{184}

Other developments include the incorporation of Human Rights in the Constitution in 1984.\textsuperscript{185} Tanzania also ratified various international instruments that enshrine fair trial. They include the African Charter on Human and Peoples' Rights, 1981,\textsuperscript{186} and the ICCPR.\textsuperscript{187} This necessitates the promotion of human rights which embody the right to fair trial and pleading instantly. Changes that Tanzania has undergone in political, economic, social and legal spheres attract amending the law in justice administration.\textsuperscript{188} Retaining committal proceedings which unnecessarily violate the accused’s fundamental right to plead instantly, is therefore, inconsistent with all the above listed changes.

\textsuperscript{179} Interview with the IGP on 31/3/2015 in Dar es Salaam and five respondents of the second group. See note 5 above.
\textsuperscript{180} See note 170 above.
\textsuperscript{181} Ibid.
\textsuperscript{182} See the Chief Justice statement in Mwananchi Newspaper (Tanzania) “Majaji 14 wanolewa Mahakama ya mafisadi.” (14 Judges prepared for the Economic and Corruption Court), 4/7/2016, p. 3.
\textsuperscript{183} Interview with the Registrar of the High Court on 16/12/2017, op. cit.
\textsuperscript{184} Interviews with five and one respondents of the first and second group correspondently. See note 5 above.
\textsuperscript{185} Articles 12-32 of the Constitution for example, enshrine various human rights and duties. Article 13 (6) (a) specifically preserves the right to fair trial, including the right to plead.
\textsuperscript{186} Article 10 of the Charter enshrines the accused’s right to fair trial. See also Director of Public Prosecutions v. Daudi Pete [1993] TLR 22, p. 34.
Filing cases triable by the High Court directly to it without firstly conducting committal proceedings will thus, ensure that the accused promptly exercises his fundamental right to an instant plea, hence prompt benefits of selected pleas. This discussion calls for the following conclusion and recommendations.

5. Conclusion and Recommendations

5.1 Conclusion

It has been established that although the major objective for committal proceedings was to promote the accused’s fair trial, that objective has not been realized. The proceedings unnecessarily impede the accused’s fundamental right to plead instantly as one of the elements of fair trial preserved in the Constitution. Upon the subsequent introduction of preliminary hearing, they have become superfluous. The dual procedure unnecessarily aggravates the negative effect on the accused’s right to plead instantly. Committal proceedings, thus, violate the Constitution.

5.2 Recommendations

The above alluded to situation calls for legal remedies including the following:

5.2.1 Committal proceedings should be abolished.
5.2.2 Cases trouble by the High Court should be filed directly to it for an early plea of the accused and inquiry of any of the selected plea he offers.
5.2.3 The High Court should attend the cases on a daily basis without waiting for special sessions to be approved by the Chief Justice under section 179 of the CPA for avoiding needless delays in taking the accused’s pleas.
5.2.4 Improvements of all the relevant laws should consider various factors like relevant international instruments and best practices in other jurisdictions like Kenya and Zanzibar with necessary modifications.
An Examination of the Efficacy of International Efforts in Facilitating Recovery of Criminally Acquired Assets in Tanzania

Abdulrahman O.J. Kaniki*

Abstract
It is so far well understood that days of a nation state addressing crimes single handedly have long gone. This makes it imperative that international efforts cannot be in any way under-estimated. Criminals nowadays respect no borders in committing serious and organised crime. It thus means that international efforts to fight against crime should conspicuously be made. Among the efforts is international cooperation, which is essential for the successful recovery of assets that have been transferred to or hidden in foreign jurisdictions. Nation states should assist each other to accomplish this mission. Therefore cooperation in law enforcement among various agencies the world over is inevitable. The inevitability thereof buttresses itself from the reality that it is through cooperation among countries that exchange of information can be effected and above all capacity-building, mutual legal assistance as well as joint investigations can be undertaken. This paper seeks to examine the efficacy of international efforts that facilitate asset recovery in Tanzania. The main concern is to explore the effectiveness of opportunities that are in place at international, regional and sub-regional levels for the asset recovery process. Some of the challenges in the form of limitations or barriers that arise in the course of attempting to recover assets in foreign jurisdictions and what minimum steps may be taken to address them are also looked into.

1. Introduction
This paper ventures on examining the effectiveness of international efforts geared to facilitate recovery of illegally acquired assets in Tanzania. The world has shrunk into a global village such that whatever takes place in one area sends signals to another area. Crime has now been turned into a very lucrative and well paying enterprise. As such criminals use any available forum to make sure that they commit serious and organised crimes less interruptedly and also to hide proceeds and instrumentalities of crime within national and across borders. They employ very sophisticated means to realise all these. It is

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in this line of arguments that international efforts are sought in order to dismantle criminal syndicates and their ill-fated activities and secondly, to fully recover their proceeds and instrumentalities of crime. The international efforts are mostly called for in terms of cooperation and assistance among countries, especially in recovery of national wealth that has been looted and hidden in abroad. To what extent those efforts feature or reflect in the legal regime and hence in the asset recovery process in Tanzania is the main concern of the paper.

2. Why International Efforts to Combat Crime are Necessary?

The fact that days of a nation state addressing crimes single handedly have long gone makes it imperative that international efforts cannot be in any way under-estimated. Criminals nowadays respect no borders in committing serious and organised crime. It thus means that international efforts to fight against crime should conspicuously be made. Among the efforts is international cooperation, which is essential for the successful recovery of assets that have been transferred to or hidden in foreign jurisdictions.\(^2\) It is required for the gathering of evidence, the implementation of provisional measures, and eventual forfeiture of the proceeds and instrumentalities of organised crime.\(^3\) In fact international cooperation is inevitable since transnational crime operates globally. As such law enforcement agencies and other actors should be relying more and more on each other in this shrinking world. It has been cautioned that:

Transnational crime is constantly evolving and growing, like a virus. Criminal groups have embraced today’s global economy and the sophisticated technology that goes with it. Only concerted, as opposed to fragmented, efforts will combat these groups. Corruption itself has international dimensions; organized crimes, such as money laundering and drug trafficking, usually manifest themselves through corruption. Monies embezzled or illicitly obtained in one country are usually laundered through a network of transfers and camouflage. Only an effective international cooperation can unravel such syndication. Forceful collective action is

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\(^3\) Ibid.
needed to sever the links between organized crime, corruption and similar anti-social activities. Experience has shown that these issues are clearly beyond the control of individual states; they demand international collaboration. These crimes are increasingly becoming sophisticated and well financed; and many countries, especially those in Africa, do not have the capacity, finance or technology to effectively counter it. Only a centrally coordinated approach to fight the menace can have the desired result.4

Basing on what is stated above, no single nation can boast that it can stand alone and successfully serious and organised crime. In fact days of a nation state addressing crimes single handedly have long gone. This ugly fact makes it imperative that international efforts cannot be in any way under-estimated. Nation states should join hands and jointly fight the crime, which respects no borders in the world over. Reasons behind opting for international cooperation are recapitulated as follows:

It is fundamentally incorrect to think that any single state can productively combat TOC, regardless of its strength and resources. Moreover, it is often impossible to identify, capture, and prosecute international offenders without the active assistance of foreign governments. This is especially hard to accomplish in a context of lacking multilateral legislation and cooperation, as national laws vary greatly on the treatment of organized criminal groups and drug traffickers specifically.....Sensitive issues of sovereignty, state monopoly of the use force domestically, and legal jurisdiction perpetually complicate such cooperation.5

What is needed is better coordination, optimal use of resources and constantly learning from each other. All these put into consideration, countries should expect to render each other formal cooperation in terms of extradition, exchange of intelligence, information and evidence, law enforcement liaison networks and sharing of skills and capabilities through, inter alia, undertaking joint training courses on law enforcement and criminal investigations among countries.6

5 Driscoll, J., “Improving U.S. Strategy on Transnational Organized Crime,” International Affairs Review, Volume XXIII, Number 1, Fall 2014, pp.84-103, p.89.
Therefore regional and multinational cooperation in law enforcement among various agencies the world over is inevitable. The inevitability thereof buttresses itself from the reality that it is through cooperation among countries that exchange of information can be effected and above all capacity-building, mutual legal assistance as well as joint investigations can be undertaken. Therefore, the international cooperation should enable countries the world over to conduct joint training and regular meetings to strategies on how to address the transnational crime; enable effective exchange of intelligence, information and evidence as well as carry out of joint intelligence-led operations to combat, disrupt and defeat criminal enterprise at global level. It should as well enable to strengthening the capacity of states through technical assistance. Given the complexities of transnational crime, no country world over can stand alone and fight effectively this kind of crime. This explains why international cooperation among law enforcement and other actors is very important in these days to combat transnational crime, most of which generate illegal proceeds. In view of what is stated above, the following discussion goes into detail.

It is along the above submission that this paper is set to give an appraisal of international efforts in facilitating asset recovery, taking Tanzania a case study. The purpose is to explore avenues that may enhance cooperation among states the world over. Some of the challenges in the form of limitations or barriers that arise in the course of attempting to recover assets in foreign jurisdictions and what minimum steps may be taken to address them are looked into. It is within those lines of arguments that this paper calls for an enhanced cooperation to effectively address asset recovery issues at global levels among nations. It needs to be underscored that Tanzania and any other country cannot operate in isolation in a bid to effect asset recovery, as a way of addressing serious and organised crime, most of which are transnational in nature. Transnational criminal networks are well organised such that no nation can fight against transnational crime

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single handedly. Putting it in other words, given the complexities of transnational crime, no country the world over can stand alone and fight effectively this kind of crime. Even world superpowers such as the United States appreciate this reality. John Driscoll, an American national submits that:

International criminal groups and networks are not constrained by the borders to which states limit the extension of the use of force, jurisdiction, or legislative authority. Prosecutors combating an international criminal group must regularly work in and with several different countries to build a single case. The criminal law enforcement institutions in the United States, however, are not historically designed for this; they have been constructed with the explicit goal of operating within their national boundaries. Therefore, a shift in strategy is required away from U.S. federal and unilateral efforts towards international and multilateral initiatives to combat TOC.  

Therefore cooperation in law enforcement among various agencies the world over is inevitable. The inevitability thereof buttresses itself from the reality that it is through cooperation among countries that exchange of information can be effected and above all capacity-building, mutual legal assistance as well as joint investigations can be undertaken. It is along those lines of arguments that asset recovery may be effected or facilitated at regional and international levels.

3. **Difficulties Experienced in Asset Recovery at Global Level**

It needs to be understood at the outset that whether at domestic or global level, asset recovery is not an easy undertaking. It is among the tedious assignments among law enforcement agencies (LEAs). This is because criminals are so smart such that they ensure that before committing serious and predicate offences, they study the environment and take all precautionary measures. One of the common characteristics of criminals the world over is that they are ready, and always attempt, to deceive anybody, institution or law enforcement officer who track or trace their proceeds of crime. Thus it is no wonder that at times when required to do so or otherwise they are ready to provide altered,

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The examination of the efficacy of international efforts is complex and often multijurisdictional. Moreover, with rapid advancement in science and technology, it becomes very easier for them to transfer funds faster using means undetectable in attempts to fraudulently conceal the assets. A click of a button of a telephone, computer, facsimile or any other gadget befitting the cyber world can move funds from one location to another at different jurisdictions within a fraction of seconds thereby making recovery efforts more difficult. The transfer of the illicit funds to other countries is meant for laundering purposes, using all possible means such as tax havens, corporate vehicles, financial transfers and the like. As a result, it becomes more difficult for investigation to take place. To say the least, asset recovery, which involves international dimensions, is a very complex and often multijurisdictional undertaking thereby making it difficult to address without combined regional and international efforts.

4. Some Salient Features of the International Legal Framework on Asset Recovery

This part of the paper dwells, albeit briefly, on the international legal framework of asset recovery. It highlights only on those pertinent issues that should mainly be in place in order to secure assets recovered or subject to forfeiture but, which are in foreign jurisdictions. It needs to be born in minds that each country has its own legal system, which is not necessarily be same of another country. The framework is significant in facilitating asset recovery in the sense that it is of global application to states that are parties thereto.

In view of the above, international cooperation is an instrumental tool in facilitating illicitly acquired assets. The reason behind is that normally criminals prefer to transfer their illicit assets to foreign jurisdictions in order to hide them and avoid detection. Thus

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international efforts are highly needed by victim states in order to retrieve them.

It is on this premise that the centre of many international instruments under the auspices of the United Nations that have relevance to asset recovery is to urge members states to promote effective international cooperation. Putting it in other words, the United Nations, which has responsibility of maintaining international peace and security, is one of the important avenues through which the international cooperation in prevention and combating of transnational crime can be realised. It is no wonder that it has come up with various international instruments, which urge states parties to cooperate in fighting crime. Moreover, the provisions of the instruments urge states parties to regard cooperation on asset recovery should be a shared responsibility. They in addition provide modalities of cooperation among states in respect of asset recovery. These are the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention),11 the United Nations International Convention for the Suppression of Financing of Terrorism of 1999,12 the UN Convention against Transnational Organised Crime (UNTOC)13 and the United Nations Convention against Corruption (UNCAC).14 There are also regional and sub-regional instruments catering for African Union (AU) and Southern African Development Community (SADC) both of which Tanzania is a member state. These are the African Union Convention on Preventing and Combating Corruption (AU Convention against Corruption)15 and the Southern African Development Community

11 Vienna Convention was adopted on 20 December 1988 and entered into force on 11 November 1990, in accordance with Article 29(1).
12 The Convention was adopted by the UN General Assembly on 9 December, 1999. The Convention has been signed by 132 states, and, as of April 30, 2003, it was in force among 80 states.
13 UNTOC was adopted on 15 November 2000 and entered into force on 29 September, 2003.
14 UNCAC was adopted by the UN General Assembly on 31 October and was open for signature for all States from 9 to 11 December 2003 in Merida, Mexico, and thereafter at the Headquarters of the United Nations in New York, until 9 December 2005. The Convention entered into force on the 14 December, 2005.
15 AU Convention against Corruption was adopted by the Assembly of the AU in Maputo, Mozambique on 11 July 2003 and entered into force on 5 August 2005.
Protocol against Corruption (SADC Protocol against Corruption),\textsuperscript{16} respectively.

All the above cited international and regional instruments contain provisions relating to the identification and tracing, freezing, seizing and forfeiture of proceeds and instrumentalities of crime. The following discussion goes into detail by outlining some salient features of those provisions.

(a) \textbf{United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention) of 1988}

The international legal framework urges states parties to promote effective cooperation and any other required assistance to facilitate asset recovery.\textsuperscript{17} In this endeavour, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention) of 1988 calls for the criminalisation of all acts related to dealing with narcotic drug or psychotropic substances. It therefore requires each party state to the Convention to take measures to establish as criminal offence under its domestic any acts amounting to drug trafficking and abuse. Such acts include production, manufacturing, sale, distribution, transport, import, export, purchase, possess, etc., of narcotic drug and psychotropic substances.\textsuperscript{18} Vienna Convention of 1988 was the first international instrument to provide for forfeiture of all proceeds or property equivalent to the proceeds derived from drug-related offences and instrumentalities thereof.\textsuperscript{19} It provides comprehensive measures against drug trafficking ranging from detection, seizure to forfeiture of proceeds of drug related crime. It urges each state party to adopt such provisions in its domestic law and empowers its competent authorities to enforce them. In connection

\textsuperscript{16} SADC Protocol against Corruption was adopted in Blantyre, Malawi on 14 August 2001 and entered into force on 6 July 2006.

\textsuperscript{17} See Art.55 of UNCAC, Art.13 of UNTOC, Art.19 of the AU Convention and Art. 8(4) of the SADC Protocol.

\textsuperscript{18}The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention) of 1988, Art. 3.

\textsuperscript{19} \textit{Ibid.}, Art. 5.
therewith, the Convention has extradition and mutual legal assistance provisions aimed to facilitate effective asset recovery process among states parties.\textsuperscript{20} Shehu sums it up by stating that:

The UN responded to the growing concerns of its member states on the proliferation of transnational criminal activities by strengthening institutional frameworks through a number of global agreements and initiatives. The 1988 United Nations Convention against the Illicit Traffic of Narcotic Drugs and Psychotropic Substances (the Vienna Convention) set the path for a new generation of legal instruments prescribing this “dispossession” model, by prescribing confiscation of crime proceeds. Article 5 of the Convention sets out confiscation measures but related to drug offences only. Article 7 provides for mutual legal assistance, while articles 8 and 10 make provisions for transfer of proceedings in criminal matters, as well as international cooperation. These provisions, though pertinent to the recovery of the proceeds of crime, are not sufficient for the recovery of the proceeds of illicit enrichment.\textsuperscript{21}

In view of what has been stated above, it is apparent that the Convention is limited to drug related offences as predicate offences only. As such the functional cooperation sought among states parties is only confined to the fight against local and international drug trafficking. This was not without reasons. It was necessary for the United Nations to come up with a single and distinct Convention on fighting drug trafficking, given the escalation of the drug war in the 1980s. It is argued that this decade was characterised by a policy shift—largely led by the United States—towards global repressive, law enforcement-led measures aimed at combating drug trafficking.\textsuperscript{22} It was this “internationalisation” of the war on drugs that led to the adoption in 1988 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.\textsuperscript{23}

\textsuperscript{20} Ibid., Art. 6 and 7.
\textsuperscript{21} Shehu, A.Y., “Key Legal Issues and Challenges in the Recovery of the Proceeds of Crime: Lessons from Nigeria,” \textit{International Law Research}; Vol.3 No.1; 2014, Published by Canadian Centre of Science and Education, pp.186-201, p.188.
\textsuperscript{23} Ibid., pp. 195-196.
(b) United Nations International Convention for the Suppression of Financing of Terrorism of 1999

Similarly, the United Nations International Convention for the Suppression of Financing of Terrorism of 1999 requires countries the world over to provide international cooperation to the greatest degree in a bid to have effective and efficient asset recovery process. As its title indicates, the Convention is designed to criminalise acts of financing terrorism. In order to ensure the greatest degree of cooperation among the states parties with respect to the offences set out in the Convention, the Convention contains detailed provisions on mutual legal assistance and extradition. Regarding mutual legal assistance, the Convention envisages that states parties undertake to give each other the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set out under the Convention. According to article 12 of the Convention, request for legal assistance may not be refused on the grounds of bank secrecy. The reason behind is that:

Criminals increasingly abuse bank secrecy, by which is meant all aspects of the confidentiality of customers’ accounts, not just secret or numbered bank accounts. More and more exceptions are being made for those cases, such as drug trafficking and money laundering, where the serious nature of the crimes outweighs the otherwise legitimate interest of an individual in keeping his financial affairs private.

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24 The Convention was adopted on 9 December 1999 and entered into force on 10 April 2012.
25 It is a Convention that is aimed at cutting off funding for terrorist activities.
Regarding freezing, seizing, and forfeiting terrorist assets, the Convention requires each state party to take appropriate measures for the identification, detection and freezing or seizure of any funds used or allocated for the purposes of committing the offences set out in the Convention and for the forfeiture of funds used or allocated for the purposes of committing such offences and the proceeds derived from such offences. Where it is established in the course of implementing those appropriate measures that assets were derived from or have been transferred to a third party who acted innocently or in good faith, rights of such third party shall be protected. That is to say such assets shall not be forfeited.

(c) United Nations Convention against Transnational Organised Crime of 2000

It would be noted that the foregoing two conventions are confined to specific predicate offences namely, drug trafficking and terrorist financing related offences, respectively, in a bid effect asset recovery. The United Nations Convention against Transnational Organised Crime of 2000, which was signed in Palermo, Italy hence the Palermo Convention, later adopted the concept of asset recovery to the widest range of predicate offences by requiring states parties to establish measures under domestic law to enable confiscation of proceeds and instrumentalities of crimes under the Convention. It should be born in minds that the United Nations made a step forward when it came up with the United Nations Convention against Transnational Organised Crime (UNTOC), which was signed in Palermo, Italy, in December 2000. The signing of the instrument was a major step in global cooperation to fight international crime. In fact it was a clear manifestation that the international community was determined to

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29 Ibid.
30 The Palermo Convention, Art.12.
31 Tanzania has ratified the Convention and all the protocols thereto on 24th May, 2006. Those protocols, which supplement the Convention, are Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; Protocol against the Smuggling of Migrants by Land, Sea and Air and Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their parts and Components and Ammunition.
answer a global challenge with a global response, as so argued Kofi A. Annan, former UN Secretary-General:

Criminal groups have wasted no time in embracing today’s globalized economy and the sophisticated technology that goes with it. But our efforts to combat them have remained up to now very fragmented and our weapons almost obsolete. The Convention gives us a new tool to address the scourge of crime as a global problem. With enhanced international cooperation, we can have a real impact on the ability of international criminals to operate successfully and can help citizens everywhere in their often bitter struggle for safety and dignity in their homes and communities.”32

The Convention and the protocols thereto are the main tools available to the international community to fight against transnational organised crime. It encourages cooperation among states to assist each other in obstructing the activities of criminal nature, and improve international cooperation in investigation, apprehension and prosecution of suspects. Under the Convention, each state party is urged to take necessary measures to implement the Convention, including legislative and administrative measures in accordance with fundamental principles of its domestic laws, to ensure the implementation of its obligations under the Convention. The Convention requires each state party to take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable forfeiture of proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds; and property, equipment or other instrumentalities used or destined for use in offences established in accordance with this Convention.33 It has been remarked regarding this Convention that:

Likewise, the United Nations Convention against Transnational Organized Crime (TOC - the Palermo Convention), which covers “organized crime activities”, including corruption, obstruction of justice and money laundering also advocate confiscation, thus, providing the legal framework for countries to develop the necessary domestic legal measures for asset recovery. The importance of this Convention was underscored by Kofi Annan (former Secretary General of UN) when he stated that “criminal groups have wasted

32 See Foreword to the Convention at p. iv.
33 UNTOC, Art. 12.
no time in embracing today’s globalized economy and the sophisticated technology that goes with it. But our efforts to combat them have remained up to now very fragmented and our weapons almost obsolete. The Palermo Convention gives us a new tool to address the scourge of crime as a global problem. With enhanced international cooperation, we can have a real impact on the ability of international criminals to operate successfully, and help citizens everywhere in their often struggle for safety and dignity in their homes and communities”.[Remarks by Kofi Annan, UN Secretary-General at the signing of the UN 2000 Convention in Palermo on 12 December 2000.]

Specifically, Article 12, paragraph 7 of the TOC provides that ‘States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation’ to the extent consistent with domestic law and the nature of the proceedings.34

(d) United Nations Convention against Corruption

The United Nations Convention against Corruption (UNCAC) came with even more broader terms by emphasising effective cooperation among states parties and providing a framework under Chapter V that enables facilitation of recovery of stolen assets. In fact UNCAC is considered to be the main international treaty that addresses the issue of stolen funds and the ways of recovery of the same.35 The convention’s wording is the broadest of international treaties in terms of its coverage and scope of corruption and recovery of stolen assets.36 As a matter of fact, UNCAC has introduced a new framework that broadly engages the international community in the asset recovery process, with emphasis on the return of the stolen assets to the victim states. In order to ensure compliance, the Convention requires states parties to afford one another the widest measure of cooperation and assistance in this regard.37 It has been argued that:

Acknowledging the serious problem of grand corruption and the need for improved mechanisms to combat its devastating impact, the international community introduced a new framework to facilitate the tracing, freezing, forfeiture, and return of assets stolen through corrupt practices and hidden in

34 Shehu, op cit.
35 Kingah, S., “The Effectiveness of International and Regional Measures in Recovering Assets Stolen from Poor Countries,” University of Botswana Law Journal, Volume 13, December 2011, pp.3-26, p.14
36 Ibid.
37 UNCAC, Art. 51.
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foreign jurisdictions. The United Nations Convention against Corruption (UNCAC), which entered into force in 2005, introduced this innovative framework in a chapter dedicated to asset recovery.\textsuperscript{38}

The Convention encompasses four main aspects namely prevention, criminalisation, international cooperation and asset recovery. It enjoins states parties to establish comprehensive domestic regulatory and supervisory regimes to prevent money laundering. Countries that have ratified the UNCAC are required to criminalise the offence of bribery, embezzlement, misappropriation or other diversion of property by a public official, and laundering of the proceeds of crime; however, criminalisation of illicit enrichment, is left to the discretion of the states.

The Convention further obligates each state party to take, to the greatest extent possible within its domestic legal system, such measures necessary to enable forfeiture of proceeds or assets the value of which corresponds such proceeds and instrumentalities of crime.\textsuperscript{39} Thus each state party should take such measures as may be necessary to enable identification, tracing, freezing or seizure of assets and instrumentalities of crime for the purpose of eventual forfeiture.\textsuperscript{40}

The Convention calls for return of assets from the requested states to the requesting states. In fact it declares under Chapter V that return of assets subject to forfeiture or forfeited ones is a fundamental principle of the Convention.\textsuperscript{41} The return of the assets obtained through crime, as enumerated above, is regarded as a fundamental principle. As such states parties are obliged to provide each other with highest level of aid and co-operation in this regard. Therefore they have no any other


\textsuperscript{39} UNCAC, Art. 31(1) and (2).

\textsuperscript{40} \textit{Ibid.}

\textsuperscript{41} See article 51 of the Convention where it is provided that:
The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.
option but mandatorily cooperate and assist each other to the extent that they facilitate asset recovery. And the same should be rendered in all stages that are involved in the asset recovery process. In this endeavour, law enforcement agencies need to strive to obtain two important international asset recovery orders namely, preservation and forfeiture orders. This is pursuant to article 54, which states that each state party must take measures to:

(i) permit its authorities to give effect to an order of forfeiture issued by a court of another state party;

(ii) order forfeiture by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorised under its domestic law;

(iii) allow forfeiture of property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

(iv) permit its authorities to freeze or seize property upon an order issued by a court or competent authority of a requesting state party concerning property when there are sufficient grounds for taking such actions that are eventually subject to forfeiture;

(v) permit its authorities to freeze or seize property upon request when there are sufficient grounds to taking such actions regarding property eventually subject to forfeiture;

(vi) permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of forfeiture; and

(vii) permit its competent authorities to preserve property for forfeiture, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

As can be noted above, most of the orders envisaged under article 54 of the UNCAC are preliminary in nature aimed to restrain or preserve a property pending a forfeiture order. The orders prevent the property from being dissipated or dealt with in any manner prejudicial to the
forfeiture order, which is issued as final in the asset recovery process. The envisaged measures aimed to enhance cooperation and assistance also include allowing forfeiture of such assets without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.\textsuperscript{42}

It would be noted that UNCAC provides mechanisms for asset recovery through international cooperation. One of the mechanisms is mutual legal assistance. The requesting state asks the requested state to assist it in the recovery of assets within the territory of the requested state. In order to ensure that mutual legal assistance is effectively rendered, states should enforce foreign freezing or forfeiture orders.\textsuperscript{43} In this endeavour, UNCAC under article 55 requires each state party to submit the request for forfeiture over predicate offences to its authorities; submit the order of forfeiture issued by a court of the requesting state party; and take measures to identify, trace and freeze or seize proceeds of crime, property, and the like, for forfeiture by the requesting state or by themselves.\textsuperscript{44}

However, whereas UNCAC advocates for unhindered cooperation and assistance in asset recovery process, many countries still maintain a condition of dual criminality. That is to say, an act or omission through which assistance is sought by the requesting state to the requested state should constitute an offence to both states. Otherwise all the good intention of the UNCAC and other conventions has to prove futile. The Convention emphasises on removal of bilateral agreements between states parties as a pre-condition for mutual legal assistance or any other form of cooperation; and that where such treaties are still needed, then the Convention itself should be taken as a sufficient treaty.\textsuperscript{45} In the same vein, states parties are obliged to allow their competent authorities to grant either preservation or forfeiture orders based on evidence provided by the requesting states.\textsuperscript{46} In view of the UNCAC spirit on

\textsuperscript{42} UNCAC, Art. 54(1)(c).
\textsuperscript{43} The SADC Protocol, Art. 8(5).
\textsuperscript{44} UNCAC, Art. 55(1) and (2) read together with articles 31 and 54.
\textsuperscript{45} UNCAC, Art. 55(6).
\textsuperscript{46} See Articles 54 and 55 (1) (a) & (b) of UNCAC and Art.13 (1) (a) of UNTOC.
mitigating the rigour of stringent dual criminality condition, it is advised that parties states should, as a matter of urgency, review their respective domestic laws in order to harmonise them with their international obligations.

(e) **African Union Convention on Prevention and Combating Corruption**

Apart from cooperation taking place at international level, regional efforts to deal with transnational crime gain more prominence nowadays the world over. The reason behind is that regional groupings create avenues for addressing matters of critical importance. Moreover, they form base of committing and mobilising resources for optimal use in dealing with issues that are unique and common within the region. Africa as a region has a convention that calls AU member states to cooperate and assist each other in preventing and combating corruption namely, the African Union Convention on Prevention and Combating Corruption (the AU Convention against Corruption). The Convention, whose operation covers all member states of the African Union, has provisions that cover recovery of corruptly-acquired assets. It is set to achieve the following objectives:

(i) To promote and strengthen the development in Africa by each state party, of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors;

(ii) To promote, facilitate and regulate cooperation among the state parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption and related offences in Africa;

(iii) To coordinate and harmonise the policies and legislation between State Parties for the purposes of prevention, detection, punishment and eradication of corruption on the continent;

(iv) To promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights; and
(v) To establish the necessary conditions to foster transparency and accountability in the management of public affairs.47

In view of the above objectives, it is argued that the Convention is aimed to provide coordinated mechanism to prevent and combat corruption and related offence effectively. In order to ensure that this aim is achieved, it adopts a broader approach to asset recovery. It has been argued by Snider and Kidane that:

The AU Corruption Convention's approach to asset recovery is broader and envisages high-level corruption and movement of wealth that has a direct impact on a nation's economy. For example, the AU Corruption Convention does not use the term forfeiture, which connotes purposefully penalizing the offender. Instead, the AU Corruption Convention uses the term "repatriation of proceeds of corruption," a term which suggests the accumulation of wealth in foreign countries and the returning of such wealth to its rightful location. The purpose of repatriation does not appear to be merely punishing the offender or reimbursing investigation costs but also includes regaining national wealth. The AU Corruption Convention makes the remedy of "repatriation of proceeds" available with or without extradition, further suggesting that asset recovery in the AU Corruption Convention context is not a mere criminal punishment. Such provisions are consistent with the AU Corruption Convention's focus on development and good governance.48

In view of the above, the Convention makes it mandatory to each party state to adopt such legislative measures necessary to enable its competent authorities to search, trace, administer and freeze or seize the proceeds and instrumentalities of corruption pending a final judgment; forfeiture of proceeds or property, the value of which corresponds to that of such proceeds, derived from offences related to corruption; and repatriation of proceeds of corruption.49 The requested state party shall, insofar as its law permits and at the request of the requesting state party, seize and remit any asset which may be required as evidence of

47 The AU Convention against Corruption, Art. 2.
49 The AU Convention against Corruption, Art.16(1).
the offence in question; or which has been acquired as a result of the offence which extradition is required.\textsuperscript{50}

On banking secrecy, which at times acts as a barrier or limitation for law enforcement agencies to retrieve some required financial information or to take action against customers who are implicated in criminal activities, the Convention intervenes. It requires each state party to adopt such measures necessary to empower its courts or other competent authorities to order the forfeiture or seizure of banking, financial or commercial documents with a view to implement this Convention.\textsuperscript{51} On this note, state parties are prohibited from refusing cooperation in respect of corruption and related offences basing on banking secrecy. The Convention states under article 17(2) that:

\begin{quote}
State Parties shall not invoke banking secrecy to justify their refusal to cooperate with regard to acts of corruption and related offences by virtue of this Convention.
\end{quote}

The Convention further obliges state parties to provide each other with the greatest possible technical cooperation and assistance in dealing with requests aimed at preventing, detecting, investigating or punishing corruption and related offences.\textsuperscript{52} This includes conduct and exchange studies, research and expertise on combating corruption and related offences.

The above outlined provisions of the Convention show that Africa as a region is determined to prevent and combat corruption and other serious and organised crimes. However, having a regional convention with such elegant provisions is one thing and implementing them is another thing altogether. In order for the Convention to be meaningful in terms of meeting the African expectations, strong commitment among state parties is highly required, as the following explanation tells it all that:

\begin{quote}
Africa’s decision to join the growing trend of combating corruption through international law by adopting the UN Corruption Convention is a remarkable
\end{quote}

\textsuperscript{50} Ibid., Art. 16(2).
\textsuperscript{51} Ibid., Art. 17(1).
\textsuperscript{52} Ibid., Art. 18.
step. Concrete results, however, require strong commitment, clarification of obligations, and proper, harmonized, and consistent implementation and enforcement of the norms set forth under the Convention.\(^{53}\) Therefore state parties should earnestly be ready to walk the talk of the convention.

(f) **Southern African Development Community Protocol against Corruption (SADC Protocol against Corruption)**

Given the uniqueness of socio-economic and political problems facing African continent as a region, initiatives are undertaken to come up with what may be solution-oriented efforts. Among the efforts is for African states to exploit all available advantages such as geographical positions to come closer and chart out ways forward to address those problems. Corruption and other related serious and organised crimes have continued to bring devastating and horrendous effects within the region. Measures have to be taken to address the situation. Therefore, apart from having a convention to that effect at regional level, there are some protocols at sub-regional levels to supplement or complement regional efforts. It has been noted with reference to West African sub-region but relevant to the whole African region that:

Many sub-regional inter-governmental groupings in Africa have taken initiatives to put the problem of corruption in the front burner of their programs…Member States have also begun to develop a Community Protocol on Corruption and have called for international assistance in the recovery of national assistance in the recovery of national wealth that had been stolen and deposited abroad.\(^{54}\)

It should be appreciated that regional and sub-regional efforts to fight corruption and related offences have a role to play in affording member states to self assess themselves in terms of the extent to which their domestic legal systems facilitate or frustrate international cooperation and assistance efforts among themselves. They then strive to develop their anti-corruption policies and review domestic laws while taking cognizance to what is provided for by the UNCAC. In the course of so

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\(^{54}\) Udombana, *op cit.*, p.455.
doing, they adopt the necessary legislative framework and other measures to establish as criminal offences under their domestic laws the acts of corruption.

In view of the above, the Southern African Development Community (SADC) member states, including Tanzania, have come up with the SADC Protocol against Corruption. The purposes of the Protocol are to promote the development of anti-corruption mechanisms at national level; promote cooperation in the fight against corruption by state parties; and harmonise policies and domestic laws relating to the prevention, punishment and eradication of corruption in the sub-region. As a matter of noting, West African sub-region has also come up with anti-corruption protocol under the auspices of the Economic Community of West African States (ECOWAS) namely, the ECOWAS Protocol on the Fight against Corruption.

Just like in the preceding instruments, SADC Protocol against Corruption requires state parties to adopt legislation to establish criminal offences under their domestic laws in respect of various acts of corruption. Regarding asset recovery, the Protocol obligates each state to adopt such measures necessary to enable forfeiture of proceeds derived from corruption. The measures should also enable competent authorities of state parties to identify, trace and freeze or seize proceeds and instrumentalities of corruption and other related offences for the

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55 SADC Member States are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Swaziland [Eswatin], Seychelles, South Africa, Tanzania, Zambia and Zimbabwe. The Protocol is the first sub-regional anti-corruption treaty in Africa.

56 The SADC Protocol against Corruption, Art.2.

57 The ECOWAS Protocol on the Fight against Corruption was adopted on December 2001 by Member States in Dakar, Senegal. According to article 3, the Protocol whose provisions cover extradition, financial disclosure, customs and immigration information management and judicial processes, has the following aims and objectives: (i) to promote and strengthen the development in each of the State Parties effective mechanisms, to prevent, suppress and eradicate corruption; (ii) to intensify and revitalise and strengthen the development in each of the State Parties, with a view to making anti-corruption measures more effective; and (iii) to promote the harmonisation and coordination of national anti-corruption laws and policies.

58 The SADC Protocol against Corruption, Art.7.
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purpose of eventual forfeiture. An effective implementation of such measures will eventually make it difficult for criminals to benefit from proceeds of corruption and other related offences. 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. 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 realised; engaging in criminal activities becomes useless. That is the message behind the idea of the economics of crime, as was propounded by Jeremy Bentham in 1788 when he stated that:

The profit of the crime is the force which urges man to delinquency: the pain of the punishment is the force employed to restrain him from it. If the first of these forces be the greater, the crime will be committed; if the second, the crime will not be committed.

The Protocol also provides for international cooperation and assistance among state parties, having in mind that the offences contained therein are extraditable. Gillian Dell states that:

The offences under the Protocol are deemed extraditable offences making it difficult for criminals to find a safe haven in one of the SADC countries. Moreover, the Protocol can provide the legal basis for extradition in the

59 Ibid., Art.8(1).
60 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.
62 See articles 9 and 10 of the SADC Protocol against Corruption.
absence of a bilateral extradition treaty. The Protocol also provides for judicial cooperation and the widest measure of mutual assistance among State Parties concerning requests from authorities investigating and prosecuting of acts of corruption.63

Noting from what has been stated above, the several international instruments, which deal with criminalisation of crime and international cooperation in the context of *inter alia* investigation and prosecution of profit generating crime is a sign of the growing concern over asset recovery within the international community. This is a reflection of the recent approaches to dealing with corruption by international community.64 The international community has vowed to develop the anti-corruption regimes largely taking the form of conventions and protocols at global, regional and sub-regional levels. In all these levels, it has been evident that an aspect of asset recovery process features significantly. Putting it in other words, all the instruments contain provisions on freezing, seizure and forfeiture of assets alleged to have been acquired through the commission of offences covered under the said instruments.

64 Costa, A.M., “Foreword,” in UNODC, *Compendium of International Legal Instruments on Corruption*, 2nd Ed., United Nations, New York, 2005, p.v, argues that: Fighting corruption has become more urgent than ever. As our knowledge of the phenomenon expands, we realize the extent of the harm it causes. Corruption impoverishes national economies, undermines democratic institutions and the rule of law, and facilitates the emergence of other threats to human security, such as organized crime, trafficking in humans and terrorism. For too long, the world has looked the other way while corrupt elites looted their countries of hundreds of millions and even billions of dollars, creating economic chaos and depriving citizens of education, health services, basic infrastructure and functioning public services. Even when good governance is restored or attained, officials can spend years or even decades attempting to retrieve funds that are often critically needed to repair the social and economic damage done by their corrupt predecessors.
5. Tanzania in the Context of International Legal Framework on Asset Recovery: A Brief Appraisal of Enacted Laws that are Reflective of Conventions Touching on Asset Recovery Process

Looking at how criminals are operating nowadays, little can be achieved without the effective cooperation and goodwill of countries where proceeds of crime are hidden. In fact countries in the world over cannot in any way have effective asset recovery without engaging international cooperation to the fullest. It has been argued at length that:

Globalization and, more specifically, the emergence and expansion of transnational crime confront all justice systems with some new difficulties. Criminal offenders are mobile and often seek to evade detection, arrest, and punishment by operating across international borders. They avoid being caught by taking advantage of those borders and playing on the frequent reluctance of law enforcement authorities to engage in complicated and expensive transnational investigations and prosecutions.

The weak capacity of any one country to address effectively some of these new threats translates itself into an overall weakness in the international regime of criminal justice cooperation. For countries with a relatively weak criminal justice capacity, these challenges can sometimes appear insurmountable.

The international community now recognizes international cooperation in criminal matters as an urgent necessity. This demands national efforts to comply with new international standards, to encourage convergence and compatibility of national legislation, to introduce complex procedural reforms, and generally to develop a much greater investigation and prosecution capacity at the national level as well as strengthen the capacity to cooperate at the international level. For some countries, building a capacity for international cooperation within their own criminal justice system is, to say the least, a struggle.

The main mechanisms supporting international cooperation are mutual legal assistance, extradition, transfer of prisoners, transfer of proceedings in criminal matters, international cooperation for the purposes of confiscation of criminal proceeds and asset recovery as provided for in the United Nations Convention against Corruption, as well as a number of less formal measures, including measures in the area of international law enforcement cooperation. These mechanisms are based on bilateral or multilateral agreements or arrangements or, in some instances, on national law. All of them are
evolving rapidly to keep pace with new technologies and their evolution over the last decade or so reflects the new determination of Member States to work more closely with each other to face the growing threats of organized crime, corruption and terrorism.65

Admittedly, it is in this understanding that Tanzania, being a state party to the above-outlined conventions and protocols, has ratified quite a number of them by enacting domestic laws that reflect to a great deal provisions of those conventions and protocols. Among those laws include the following:

(a) **The Proceeds of Crime Act, 1991 [Cap. 256 R.E.2002]**

The Act is aimed at ensuring that crime does not pay. It is designed to underscore that criminals cannot benefit from their ill-gotten wealth by depriving of the profits of their crimes. It has forfeiture provisions, which primarily suppress criminals’ profit making and prevent the re-investment of that profit in further criminal activity. The Act, as Mapunda correctly puts it, contains provisions intended to forge international cooperation designed to target both perpetrators and beneficiaries of criminal conduct.66 In order to facilitate the forfeiture, the Act provides a mechanism for tracing, freezing and confiscation of the proceeds and instrumentalities of serious and organised crimes committed against laws of Tanzania.

(b) **The Mutual Assistance in Criminal Matters Act, 1991 [Cap. 254 R.E.2002]**

The Act provides for mutual assistance between Tanzania and other 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.67

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Assistance is mainly sought in relation to evidence and the identification and forfeiture of property. In this endeavour, among aspects of mutual assistance include matters regarding taking of evidence and production of documents, assistance in relation to search and seizure and arrangement for persons to give evidence or assist in investigations; location of assets that may be forfeited or may be needed to satisfy pecuniary penalties imposed, in respect of predicate offences.\textsuperscript{68} However, whereas international legal instruments mandatorily obligate states parties to request for mutual assistance to requested states, the Act makes it optional for the same.\textsuperscript{69}

(c) The Extradition Act, 1965 [Cap. 368 R.E.2002]

The Extradition Act applies to Tanzania and any other country declared as such by the Minister responsible for legal affairs.\textsuperscript{70} The objective of extradition proceedings is to bring to justice persons alleged to have committed, or who have been convicted of, crimes under the law of the requesting state. The Act operates under the principle of international co-operation between countries, which ensures that any criminal who has committed an offence is punished, regardless of the fact that the accused committed, or was convicted of, an offence in another country. It regulates the procedure, which is involved in the extradition of criminals in Tanzania. This includes addressing issues that may arise in the course of the process of extradition. Its operation covers both Mainland Tanzania and Zanzibar.

\textsuperscript{68} The Mutual Assistance in Criminal Matters Act, 1991 [Cap. 254 R.E.2002], s.4.

\textsuperscript{69} See s. 12(2) of the Mutual Assistance in Criminal Matters Act, Act No.24 of 1991 [Cap.254 [R.E. 2002].

\textsuperscript{70} According to UNODC, Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime, \textit{op cit.}, p.2, the term “extradition” means the formal process by which a state requests the enforced return of a person accused or convicted of a crime to stand trial or serve his sentence in that state.
(d) **The Fugitive Offenders (Pursuit) Act, 1969 [Cap. 57 R.E.2002]**

The Act seeks to enable the police of certain contiguous countries to be authorised to pursue offenders fugitive from such countries within Tanzania. The Act should be read in conjunction with the Extradition Act, 1965.\(^{71}\) Application of the Act is subject to compliance with principles of reciprocity and dual criminality.\(^{72}\) According to the Act, a fugitive offender is any person accused or convicted of an extradition crime committed within the jurisdiction of any contiguous country to which this Act applies who is, or is suspected of being in Tanzania.\(^{73}\) Under section 3 of the Act, such a contiguous country has to be gazetted by the minister responsible for legal affairs. The minister authorises the police from such a country to operate in Tanzania in relation to a fugitive offender(s). Once an offender is arrested, he or she has to be forthwith delivered to a police officer in Tanzania who shall as soon as possible bring the offender before a magistrate with a view to his being surrendered to the contiguous country concerned. The proceedings for the surrender of the fugitive offender are those prescribed by the Extradition Act, 1965\(^{74}\) where a magistrate has to conduct the trial of an extradition crime.\(^{75}\) In the course of the proceedings, a magistrate has power to remand or admit to bail an offender, as he has in the case of a person arrested under a warrant issued by him.\(^{76}\)

(e) **The Witness Summonses (Reciprocal Enforcement) Act, 1969 [Cap.67 R.E.2002]**

Reading from its long title, this is an Act for the enforcement of witness summonses issued by courts of certain countries and for matters incidental thereto and connected therewith. A summons requires the attendance of a person to give evidence before a court or to produce any document before a court.\(^{77}\) This law aims to enforce

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\(^{71}\) Ibid., s.2.
\(^{72}\) Ibid., s.6(1).
\(^{73}\) Ibid., s.6(2).
\(^{74}\) Ibid., s.1, which is the interpretation section.
witness summonses issued by courts of certain countries on reciprocal basis. What is envisaged here is that enforcement of witness summonses is preceded by reciprocal arrangements with respect to service of summonses between Tanzania and certain countries being made. And on this note, application of the Act is dependent of the satisfaction of the Minister responsible for legal affairs that those arrangements have been or will be made under the law of any country for the enforcement of a summons issued by any court in the United Republic of Tanzania.\(^{78}\) The Act provides for the procedures to be followed in witness summonses, the service of summonses, and the powers of the court and the minister [responsible for legal affairs] to excuse the person to whom a summons was issued from complying with the summons.\(^ {79}\)

Moreover, when a summons is served on a person, such person is legally bound to obey the summons. Any disobedience risks him to an offence punishable, upon conviction, with a fine not exceeding five hundred shillings.\(^ {80}\)

(f) **The Anti-Money Laundering Act, 2006\(^ {81}\)**

This Act makes provisions for prevention and prohibition of money laundering and the disclosure of information on money laundering.\(^ {82}\) It also establishes a Financial Intelligence Unit [FIU] and the National Multi-Disciplinary Committee on Anti-Money Laundering. The Act also provides for sanctions, obligations for reporting persons to report suspicious transactions and physical cross border transportation of cash or bearing of negotiable instruments and the protection of reporting persons.\(^ {83}\) These are mechanisms for

\(^{78}\) *Ibid.*, s. 3.

\(^{79}\) *Ibid.*, ss. 4-8.

\(^{80}\) *Ibid.*, s. 9.

\(^{81}\) Act No. 12/2006.

\(^{82}\) According to section 3 of the Act, money laundering means engagement of a person or persons, direct or indirectly in conversion, transfer, concealment, disguising, use or acquisition of money or property known to be of illicit origin and in which such engagement intends to avoid the legal consequence of such action.

coordinating measures for combating money laundering. Arguably, this Act criminalises money laundering in a manner that largely conforms to the international instruments that call for prevention and combating of transnational organised crime namely, the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the UN Convention against Transnational Organised Crime.

However, the Act has a major drawback, which affects expected meaningful asset recovery. Under section 3, the Act provides a list of predicate offences. It means that it is only those offences listed thereof are said to generate illicit income under the law. Short of that, no matter how huge the profits are made as a result of commission of criminal activities other than those in the list, those profits are not proceeds of crime! Reason is simple: such criminal activities are not predicate offences as envisaged by the law. But it is a fact that there are a lot of crimes, which generate illegal income that would attract forfeiture. This, it is argued, is a drawback that needs to be addressed as a matter of urgency. With emerging crime dimensions, it is very dangerous to continue maintaining such a selective and restrictive list of what should be predicate offences. It is advisable that law reform bodies should do away with the list at issue and only remain with a wide definition that accommodates all unlawful activities provided that they generate illegal income.

(g) The Anti-Trafficking in Persons Act, 2008

The Act seeks to criminalise acts of trafficking in persons and related matters. Trafficking in person is a crime, which is centered on profit making. In fact it is becoming increasingly attractive income generating business. Traffickers make profits at several points along the way. It is a booming criminal activity not only in Tanzania but also in several other parts of the world. It is a global phenomenon. Just like in narcotic

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84 Act No.6 of 2008.
85 Its regulations, namely the Anti-Trafficking in Persons Regulations 2015 were launched on August 2015.
drug and psychotropic substances issues, Tanzania has so far been turned into a source, transit and destination for men, women and children who are subjected to forced labour and sexual exploitation. The Act has forfeiture provisions. It empowers the court to order forfeiture of proceeds and instrumentalities derived from trafficking in persons. The forfeiture is in addition to the penalties which would be awarded by the court upon conviction of an offence of trafficking in persons. Given the “slavery-like” feature depicted by this type of crime, it has become necessary to have such provisions of the law. Trafficking in persons and other related offences go contrary to dignity of a human person and respect of individual rights. It has been stated on what happens in Europe with regard to the sex trafficking business but with relevancy to the rest of the world that:

Trafficking in women for sexual exploitation is now ‘big business’ for the criminals who profit from these activities, for the ‘clients’ who use trafficked prostitutes and for the news organisations who benefit from the public’s appetite for titillating human interest stories. The only people not to benefit are the women who end up as victims of human trafficking in what has been described, in the worst case scenarios, as virtual ‘slavery-like’ conditions.

What now remains is for LEAs and other actors to make use of the provisions of the law effectively in order to prevent and combat this type of criminality, which denies victims thereof of their fundamental and basic human rights. Moreover, forfeiture provisions should be

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87 According to section 3 of the Anti-Trafficking in Persons Act, 2008, Act No.6 of 2008, the term “forced labour and slavery” refers to the extraction of work or services from a person by means of enticement, violence, intimidation or threat, use of force or coercion, including deprivation of freedom, abuse of authority or moral ascendancy, debt-bondage or deception. Regarding “sexual exploitation”, it means participation by a person in prostitution or the production of pornographic materials as a result of being subjected to a threat, deception, coercion, abduction, force, abuse of authority, debt bondage, fraud or through abuse of a victim’s vulnerability.

88 See the Anti-Trafficking in Persons Act, 2008, Act No.6 of 2008, Part III, which covers sections 9-16.

89 Ibid., s.14.

fully resorted to so that the impact thereof shall be felt by not only criminals but also the would-be-criminals.

(h) The Drug Control and Enforcement Act, 2015

In essence the Act prohibits the possession of drugs and their consumption, cultivation, processing, manufacturing, preparation, sale, purchasing, distribution, storage, importation into and exportation from Tanzania. This is in view of the fact that Tanzania has been rated as a destination and transit point in illicit drug trade. Much as drug trafficking is a highly lucrative business that produces huge profits, criminals have been going on inventing new ways of carrying on the business with less possibilities of apprehension. The Act takes all these factors into consideration. It, among other things, provides for the forfeiture of property owned by an accused person on the date of the conviction of an offence under the Act or acquired by him after that date. The forfeiture is carried out in accordance with the provisions of the Proceeds of Crime Act. However, the Act goes an extra mile beyond the ordinary understanding of the criminal forfeiture, which is made after an accused person is convicted of a predicate (profit generating) offence. It means that conviction for the underlying offence is required. The Act states under section 46 that the court, after due proceeding in respect of an offence under the Act, is required to decide whether an article or anything seized is liable for confiscation whether the accused is convicted, acquitted or discharged. Such powers are, however, to be exercised only if the conditions set out in section 46(3) of the Act are complied with. Those conditions are that such confiscation cannot be done until the expiry of one month from the date of seizure; until anyone claiming ownership of such article is heard; and that such claimant must have produced evidence proving the ownership.

In view of what has been provided above, one fundamental and paramount question still abound. To what extent those laws are effectively resorted to in order to meet contemporary demands in addressing criminality. Practice shows that dual criminality requirement

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91 Act No.5 of 2015.
92 Ibid., s.49.
93 Ibid.
in mutual legal assistance hampers quick response although, however, this is not a problem in Tanzania only, but everywhere. It has been further noted that the country has fairly a good law worth dealing with cross-border criminal matters. The problem is implementation of those laws by LEAs and other actors. Moreover, the mechanisms and processes to support mutual assistance on asset recovery as provided by the legal system in Tanzania are more complicated and depend more on treaties and agreements. It is more argued that some legal provisions contradict international best practices. For instance, as far as mutual assistance in criminal matters is concerned, UNCAC requires that it is mandatory for the requested state parties to furnish assistance. However, very interestingly, Tanzania in the Mutual Assistance in Criminal Matters Act, 1991⁹⁴ makes it optional.

6. Challenges and Ways Forward

It has so far been noted that little can be achieved without the effective cooperation and goodwill of countries where proceeds of crime are hidden. It is true that the legal system in Tanzania provides for cooperation with other countries in such areas as mutual assistance in criminal matters as well as extradition of criminals who are alleged to have committed predicate offences. However, there are a number of challenges, which affect the international efforts in facilitating recovery of illegally acquired assets in Tanzania. They include the following:

(a) Inadequate skilled human resource

Asset recovery process is too much involving both at domestic and international levels. More so criminals mobilise extensive resources to camouflage themselves through various ways. Eventually they are able to transfer their illegally acquired assets to safe havens thereby making it difficult for many investigators to identify and trace them. Counting on the sophistication and complexities of predicate offences makes it worse for the investigators to end up with successful investigations due to inadequate capacity which is caused by lack of appropriate financial investigation training courses. Obviously there are aspects that are

⁹⁴ Cap. 254 [R.E. 2002].
technical to the extent that skilled and experienced human resource is highly and inevitably needed for effective end-results. It has been reminded that:

But effective implementation is not limited to legislation and administration. It runs far deeper than that. A country may have an excellent legislative and treaty scheme for mutual assistance and an established administrative process and it still may be virtually impossible to provide effective assistance; because the best designed system is only as good as the people who operate it on a practical level. In many instances, success in mutual assistance is dependent almost entirely on the knowledge and most critically— the flexibility—of the authorities request and, even more importantly, providing the assistance.\(^{95}\)

Majority of human resource in LEAs in Tanzania as is the case in many other developing countries have limited skills in dealing with asset recovery cases that are complex and whose financial investigation involves multi-jurisdictional approach. It has become apparent that law enforcement and prosecutorial authorities focus on criminal investigation, giving little attention to the financial investigation.\(^{96}\) Even when attention to the financial investigation is given, there are limited capacities to undertake any relevant investigative tasks.\(^{97}\)

Inadequate skills on the part of investigators have far reaching effects because possibilities of gathering relevant evidence become mean. In order to get rid of this ugly situation, there is a need to enhance capacity building to officials of all key institutions involved in the administration of criminal justice. There is no doubt that in order to make the legal-institutional framework on asset recovery operative, several institutions in the administration of criminal justice should be in place. They include the LEAs, Prosecution, the Courts and others. All these have a shared responsibility of ensuring that they effectively perform their respective duties. Officials of all grades in these


\(^{97}\) \textit{Ibid.}
Institutions should be capacitated in terms of training and equipment so that they undertake matters pertaining to asset recovery without any hesitation. They should undergo training courses that will enhance their skills and knowledge so that they are able to effectively deal with asset recovery cases at both national and international levels.

(b) Inadequate Resources in Relation to Costs Consideration

Asset recovery process is a very expensive exercise, involving gathering evidence both at domestic jurisdiction and in foreign countries where investigation and other aspects related thereto must comply with the domestic law regime of the requested state. It is also taking too long to accomplish. Likewise, assets that are seized or frozen assets under a request neither automatically move to the requesting state nor manage themselves. Targeted assets must be managed at the expense of the requesting state until they are finally forfeited under the domestic law in the requested state. Despite that international cooperation comes into play, yet asset recovery is too costly, complicated and time consuming. This ugly situation is well summarized by Greenberg et al in the following words:

Once the stolen funds have been transferred abroad, recovery is extraordinarily difficult. On the one hand, developing countries face serious obstacles as a result of limited legal, investigative, and judicial capacity; inadequate financial resources; and a lack of political will. This weakens countries’ abilities to successfully conduct their own investigations and prosecutions, and to trace, freeze, forfeit, and return the proceeds of corruption. Furthermore, those same obstacles reduce their capacity to submit adequate international requests to the foreign jurisdiction where the stolen assets are located, whereas a sufficient request could enable the foreign jurisdictions to initiate proceedings to restrain the assets or enforce a foreign freezing or forfeiture order. On the other hand, jurisdictions where stolen assets are hidden – often developed countries – may not be responsive to requests for legal assistance. Many countries can freeze assets, but not return them. In other cases, the evidentiary and procedural standards required by the laws of the foreign jurisdictions are high and therefore difficult or impossible for the requesting jurisdiction to meet. Where death, the fugitive status, or immunity of officials engaged in stealing assets

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impedes a criminal investigation and prosecution, the asset recovery process is made even more difficult or impossible.  

In view of the above, a number of steps should be taken in order to salvage the situation. Firstly, there is the need for adequate funding LEAs and other actors. It must be born in minds that budget constraints have been for a long time hampering LEAs and other actors in the whole asset recovery processes and mechanisms. In order for the state to expect successful results, it is inevitable that those law enforcement agencies and other actors who are involved in all stages of dealing with asset recovery cases should be allocated enough funds. Secondly, there must be time-sensitive mutual legal assistance between requested foreign jurisdictions where assets are located and the victim requesting jurisdictions where assets are looted.

(c) Insufficient Cooperation Among States

International cooperation is 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 jurisdictions 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. Brun et al sum up this ugly situation at international level by arguing that:


101 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.
In contrast, asset tracing and recovery by law enforcement officials and prosecutors may take months or years because the principle of sovereignty restricts domestic authorities’ ability to take investigative, legal, and enforcement actions in foreign jurisdictions. Successful tracing and recovery efforts often depend on assistance from foreign jurisdictions, a process that may be slowed and complicated by differences in legal traditions, laws and procedures, languages, time zones, and capacities.

In this context, international cooperation is essential for the successful recovery of assets that have been stashed abroad. The international community has concluded a number of multilateral treaties or instruments requiring states parties to cooperate with one another on investigations, production of evidence, provisional measures and confiscation, and asset return.

Despite such limitations, countries need to continually enhance the cooperation for the better asset recovery process. It should remain a responsibility of law enforcement officers and other actors in the whole asset recovery process to play an effective and proactive role to see into a well functioning and enhanced international cooperation. It has been noted by Brun et al regarding what should be expected to be done by law enforcement officers and other actors in the whole asset recovery process at international level that:

Practitioners should take into account that international cooperation is “mutual”: not only will the jurisdiction that has been plundered of its assets be requesting assistance from the foreign jurisdiction(s) where the assets are hidden, but it may need to provide information or evidence to these jurisdictions to obtain the most effective recovery of assets. In addition, practitioners must be proactive in seeking international cooperation, as well as in alerting their counterparts in foreign jurisdictions to potential corruption offenses. Examples of the primary forms of cooperation include informal assistance, spontaneous disclosures of information, joint investigation teams, mutual legal assistance (MLA) requests, transfer of proceedings to another jurisdiction, implementation of domestic laws that permit direct recovery, enforcement or registration of a provisional restraint or confiscation order from another jurisdiction, and extradition.

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103 Ibid., pp.121-122.
(d) Differences in Legal Systems: Procedural Hurdles Related to Mutual Legal Assistance

Mutual legal assistance is one of the reliefs expected from international cooperation. However, it is often hindered by the fact that procedural laws of cooperating countries may vary considerably due to differences in legal systems and historical backgrounds. For instance, the requesting state may require special procedures that are not recognised under the law of the requested state, or the latter may provide evidence in a form or manner which is unacceptable under the procedural law of the requesting state. Such hindrance renders all efforts aimed to make mutual legal assistance practically a reality are frustrated as summed up below:

Differences in legal traditions between jurisdictions introduce challenges and frustrations throughout the asset recovery process. Practitioners said these differences were a common reason that many requests are sent back for more information. These differences also can lead to frustration for practitioners unfamiliar with the procedures and capabilities of a particular jurisdiction, whether it is a civil law, common law, or hybrid jurisdiction. For example, the time needed to respond to particular types of requests varies from one jurisdiction to another. Practitioners may become frustrated if they do not appreciate that some investigative techniques can be applied quickly in some jurisdictions but not in others.

In order to mitigate the rigor of these legal differences both originating and requested jurisdictions should be diligent and willing to waive some unnecessary legal provisions which seem to bring hurdles. States should appreciate the fundamental importance of a timely response to their requests for assistance. They should underscore the fact that with technological advancement and complexities involved in organised crimes, any delays to honour the requests may turn into lee-ways to be exploited by criminals to conceal the assets and tamper with vital evidence which could incriminate them. States should through the bilateral agreements seethe the urgent need of waiving some unnecessary procedural aspects and conditions, which seem to be hurdles towards increased scope of the requested and rendered evidence. Moreover, they should exploit the flexibilities that are

permissible under several multilateral conventions in complying with procedural forms in the course of executing mutual legal assistance requests. On the same note, they should also opt for some form of informal assistance, where possible, especially near the beginning of investigations. Such assistance is very helpful to the process of asset recovery, especially in the initial identification stage where coercive powers are not much needed. Such informal assistance may suffice to provide information helpful to set in motion asset recovery process. Therefore there should be assistance through channels outside of the formal mutual legal assistance (MLA) channels, often through direct communications between counterparts such as financial intelligence units (FIUs), police and other law enforcement agencies sharing intelligence or data which is legally available to that agency through domestic databases\(^\text{106}\) and contacting potential witnesses to determine availability and taking voluntary statements. It has been appreciated that:

Informal assistance creates a dialogue which can produce invaluable information, but formal MLA will likely be needed to obtain documents and witness statement to be used in court as evidence. Following the informal assistance, if permitted, a draft of the formal MLA request can be sent to the other country to ensure that the prerequisites are met. This practice can hopefully avoid time-consuming delays resulting from rejections of the request for failure to comply with treaty requirements.\(^\text{107}\)

Similar views have been made by Willie Hofmeyr who argues that:

International assistance that does not require the use of coercive powers by requested State can be carried out on the basis of informal police-to-police contact, for example through Interpol. Few or no formalities are usually required. Examples include gathering publicly available information or intelligence, obtaining information from government departments and taking statements from co-operative witnesses.


\(^{107}\) Ibid.
In confiscation matters, much of the process of tracking assets can be done in this way, as it can be done without invoking coercive powers.\textsuperscript{108}

Tanzania has over time been a member of different regional organisations, which have some inputs towards dealing with transnational crime. Due to her strategic geo-location, Tanzania enjoys membership of two regions, namely the Eastern Africa and the Southern Africa Region. In the Eastern Africa, Tanzania is a member of the Eastern African Police Chiefs Cooperation Organisation [EAPCCO] while in the Southern Africa Region; Tanzania is a member of the Southern African Regional Police Chiefs Cooperation Organisation [SARPCCO].\textsuperscript{109} In their efforts to fight against transnational crime, member states conduct regular meetings to strategise on the same. They also carry out joint intelligence-led operations as well as conduct joint training. They also share intelligence and information through Interpol communication system namely, I-24/7. All these efforts, which most of the time are carried out informally have a bigger share in the initial stages of asset recovery process.

(e) Lack of Strong Institutional Mechanisms to Ensure Compliance

There are no strong institutional mechanisms to ensure country’s compliance and accountability not only with domestic legal provisions but also international instruments on asset recovery. Moreover, whereas international legal instruments mandatorily obligate States Parties to request for mutual assistance to requested states, domestic law in Tanzania makes it optional for the same. It would further be noted that much as there are laws on asset recovery such laws are under-utilised as if no predicate offences while on ground there are plenty of them.


7. **Conclusion: The Need for Enhanced International Cooperation and Assistance**

In view of what has been discussed above, albeit briefly, it is apparent that international instruments on asset recovery are necessary in facilitating asset recovery in the states parties. Equally importantly, it carries more weight if state parties to those international instruments ratify and put in action of what are contained in those instruments. All these are in full appreciation of the fact that asset recovery is tedious and complex undertaking but necessary for depriving criminals of their proceeds of crime and tools of trade. Such interventions are necessary in order to fight against transnational organised crime so that the world becomes a safer place to live in. It is in this line of argument that the role of international community in facilitating asset recovery process comes in. The community has inescapable role of enhancing cooperation in the asset recovery processes through advising, supervising and coordinating best international asset recovery legal framework, providing technical and operational capacity building, especially for developing countries and those, which are in the transition. There should be a fair treatment and even distribution. Criminals have a tendency of taking advantage of soft targets. All targets should be hardened so that no way can they sneak.

The discussion in this paper has revealed that international efforts have an instrumental role to play towards effective asset recovery. Putting it in other words, the paper has submitted that international cooperation is unavoidable because no single nation can be able to fully recover illegally acquired assets that transcend national borders. It has demonstrated that enhanced cooperation and rendering assistance among countries the world over is the cornerstone of ensuring that nobody can benefit from criminal activities. It has further cautioned that international cooperation is unavoidable because no single nation can be able to fight crime generally and retrieve illicit assets that crossed borders in particular without seeking assistance from such country where the assets were destined. Countries should be relying more and more on each other in this shrinking world in order to smooth run and effective asset recovery process. It has been noted by Prosper...
Mwangamila and Josephat Mkizungo, State Attorneys from the office of the Director of Public Prosecutions in Tanzania that:

The changing nature of the criminal landscape and law enforcement underlines the fact that we are increasingly dependent upon assistance from foreign jurisdiction in seeking to investigate and prosecute criminals. We must therefore increase cooperation with foreign law enforcement and jurisdictions in order to simplify extradition and mutual assistance in criminal matters procedures and remove the barriers that currently exist so that we can better assist one another in the fight against global crimes.¹¹⁰

In the course of discussion, it has been shown on efforts that Tanzania has done in honour of relevant international instruments on asset recovery by enacting a number of laws that are reflective of what such instruments require or provide. Although it is well settled that to have such laws is one thing and to enforce them is another thing altogether. What is needed is better coordination, optimal use of resources and constantly learning from each other. This will spearhead facilitation of the exchange of information and ideas of best practices in investigation and prosecution of predicate offences among states parties. This paper calls for specialised training courses for investigators and other officials within LEAs, emphasis being on financial investigation. Moreover, efforts should continually be done to enhance cooperation and assistance among nation states so that asset recovery process takes place effectively.

Private Enforcement of Competition Law in Tanzania: The Untapped Opportunity

Sabby Francis*

Abstract

The central theme of this paper is to analyze the issue of competition law enforcement in Tanzania. The specific objective is to propose introduction of private competition law enforcement where the role of ordinary courts will be pivotal. This however, will be arrived at systematically after analyzing the benefits private enforcement has in the competition law enforcement. The law and practice in Tanzania today reveal that private enforcement of competition law has an insignificant role to play, if at all. The involvement of ordinary courts is very minimal; the courts are only featured where consumers’ welfare is at stake. This paper is prompted by the fact that public enforcement of competition law in Tanzania does not yield the expected results by the individuals who happen to be victims of anticompetitive practices. At the end the paper proposes how private enforcement can be incorporated in the Tanzanian legal system.

1. Introduction

For purposes of the present paper, unless otherwise expressed, the terms “competition law” and “antitrust law” are used interchangeably. Competition law enforcement in Tanzania is mainly governed by the Fair Competition Act (FCA). Enforcement under the FCA is basically public, in that the same is done by public institutions. The responsible institutions are mainly two, the Fair Competition Commission (FCC) and the Fair Competition Tribunal. In some circumstances, however, sector specific authorities have been mandated to deal with competition matters.4

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1 Act No. 8 of 2003.
2 See section 62 of the Fair Competition Act (FCA).
3 See, section 83 of the FCA.
4 These include but not limited to Energy and Water Utility Regulatory Authority (EWURA), Tanzania Civil Aviation Authority (TCAA), Surface and Marine Transport Regulatory Authority (SUMATRA), and Tanzania Communication Regulatory Authority
Public enforcement mainly aims at punishing defiant businesses with the aim of deterring them from committing prohibited practices which are generally considered to be anticompetitive. These authorities receive complaints from competitors and consumers about conducts that breach the prohibitions under the FCA.

Sometimes such authorities act *suo motu* upon receiving information about competition law violations from sources, other than competitors or consumers. These authorities then carry out the proceedings to enforce the law, investigate the conducts reported and, when appropriate, punish the wrongdoers with fines and other public sanctions.\(^5\) Essentially all this is done with the aim of deterring competitors from engaging in anticompetitive practices. Individuals who have suffered as a result of anticompetitive practices have the right to be compensated. Right to compensation accrues because where there is a wrong there is a remedy (*ubi jus ibi remedium*). Such right to compensation cannot be thoroughly achieved through public enforcement whose main focus is deterrence.

Individuals may effectively be compensated through private enforcement which allows them to institute damages claims in the ordinary courts. Unfortunately, this remedy is not recognized by the Tanzanian competition law enforcement legal framework.

### 2. Competition Law Enforcement in Tanzania

Effectiveness of any law depends on its enforcement. That is to say, if there are good laws but the same are not effectively enforced; the expected fruits are hardly enjoyed. In its broadest sense, enforcement hinges on the relevant laws and the institutional setup (legal framework). Generally, in as far as competition law enforcement is concerned there are two main approaches or methods of enforcement, namely; public enforcement and private enforcement. There is public enforcement which is carried out by the Fair Competition Commission (FCC) and Private Enforcement which is carried out by individuals.

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enforcement where the task to enforce competition laws and to ensure compliance is vested in a public authority(s). Private enforcement entails filing by private individuals of private actions in ordinary courts seeking compensation as a result of damage or loss suffered due to some anticompetitive practices.\textsuperscript{6}

Private enforcement is not only aimed at compensating the victims. It also deters violations by undertakings. The European Commission’s (EU) philosophy has maintained that greater private enforcement of competition law may achieve the dual policy goals of deterring infringement and delivering redress and, in so doing, complements public enforcement.\textsuperscript{7}

3. **Public Enforcement of Competition Law: An Overview**

Public enforcement means that competition rules are enforced by state authorities. Public enforcement of competition law is dominant in most jurisdictions as compared to private enforcement. This is because its reliance on state power enables it to enjoy wide investigative and sanctioning powers. Competition authorities are generally better placed at discovering and proving antitrust infringements than private parties, because the authorities have wider investigative powers, allowing them to collect not only the information detained by the victims of the infringements, but also by the infringers and any other source.\textsuperscript{8}

Considering that public enforcement is backed up by state power, more sanctions are available through it and the level of such sanctions is better controlled.\textsuperscript{9} Public enforcement allows not only for the imposition of monetary sanctions in the form of fines, but also other


\textsuperscript{7} Aidan Synnott, *op cit.*, p. 1.


\textsuperscript{9} *Ibid.*,.
types of sanctions, such as director disqualifications and prison sanctions. This however is only available in some jurisdictions, not all.

The public enforcement process can broadly be categorized into two stages, which are detection and intervention. In the detection stage the basic task for an antitrust authority is to separate forms of suspicious conduct from pro-competitive business conducts. In general, this task is not simple. There are two approaches/rules which may be used by competition authorities to achieve such categorization; per se rules and the rule of reason. While the per se rule approach generally prohibits well defined forms of bad behaviour (e.g., horizontal price fixing etc), the so-called rule of reason approach accommodates the more frequent case that the pro-competitive effects of certain behaviour have to be weighed against the anticompetitive effects. Thus the decision by a competition authority as to whether or not a certain conduct or practice is anticompetitive basing on the rule of reason approach depends much on a case-by-case analysis rather than generalization. This in turn vests much discretion on the competition authority.

After the competition authority has detected an infringement, the next stage is intervention. This may be done in various ways; the most common form is by imposition of administrative fines. The fine that is imposed has to be able to deter subsequent infringements by undertakings. The common practice has been to impose a fine that is above the reaped benefit or profit by the undertaking in question.

4. A Historical Backdrop of Private Competition Law Enforcement

Private enforcement of competition law has a long history, and today many jurisdictions have it in place. The United States of America (USA) is among the first states to establish private enforcement of competition law and this was established many years ago. Since its inception, private enforcement has been developing, a bit slowly.

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11 Ibid.,
However, there are recent developments where in some jurisdictions\textsuperscript{12} private enforcement through ordinary courts is developing at a notable speed.\textsuperscript{13}

U.S.A (to be referred to also as the US) was the first state to develop competition law principles in their present form, in the late 19\textsuperscript{th} century.\textsuperscript{14} This was through the Sherman Antitrust Act which was enacted in 1890. This Act was named after Senator Sherman who presented the Bill which led to the enactment of the Sherman Antitrust Act. In his speech to Parliament Senator Sherman said that he had not introduced new principles but relied on the old and well recognized rules in common law.\textsuperscript{15} In 1887 an Act known as Interstate Commerce Act was passed to take care of cartels, specifically in transportation industry.\textsuperscript{16} After these predecessors, other Acts were later enacted.\textsuperscript{17}

Introduction of antitrust legislation in the US was due to existence of large, organized cartels which monopolized certain businesses. Some undertakings entered into agreements to fix prices so as to bar small and medium-sized enterprises from entering into the market.\textsuperscript{18} These large undertakings were operating in the form of trusts or cartels (which were common law institutions) which were linked to anticompetitive practices so as to achieve dominance in the market.\textsuperscript{19} To repress this tendency, a complex set of rules known as “antitrust” were introduced in the US.

In the US, section 7 of the Sherman Antitrust Act (this was later on replaced by Section 4 of the Clayton Act) provided for private

\begin{itemize}
\item \textsuperscript{12} This has now been common in the European Community level.
\item \textsuperscript{15} Sandra Marco Colino, Competition Law of the UE and UK, (7\textsuperscript{th} Edn), New York, Oxford University Press, (2011), p.2.
\item \textsuperscript{16} Barbara Pasa, \textit{op. cit.}
\item \textsuperscript{17} These included the Clayton Act and the Federal Trade Commission Act, both of 1914.
\item \textsuperscript{18} Barbara Pasa, \textit{op. cit.}
\item \textsuperscript{19} \textit{Ibid.}
\end{itemize}
enforcement of the antitrust laws. Section 4 of the Clayton Act currently provides that:

any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in [a] district court of the United States [...], and shall recover threefold damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.\(^{20}\)

This provision does not only provide for the possibility of instituting private damages actions in ordinary courts, but it also encourages such actions. It motivates potential litigants to pursue antitrust private actions because successful litigants are assured of recovering their costs, including expert fees and attorney’s fees. The provision of treble damages and the asymmetric cost rule reflect a conception of private actions for damages as an instrument of deterrence and punishment apart from being a compensating tool.\(^{21}\)

The notion of private damages claims as a deterrence and punishment instrument can be understood in the light of US antitrust enforcement. While the 1890 Sherman Act made antitrust violations misdemeanours, and thus punishable by fines and imprisonment, there was no budgetary appropriation which was made for public enforcement. Thus Private treble damages actions were used as a substitute for public enforcement. Also later on, when criminal enforcement by the Department of Justice had started, potential fines were until 1974 limited to $ 50 000, thus leaving a deterrence gap to be filled by follow-on treble damages actions. Today, while the Department of Justice has statutory authority to prosecute all violations of sections 1 and 2 of the Sherman Act criminally, the scope of criminal enforcement has in fact been narrowed over time to "hard-core" price-fixing, bid-rigging or market allocation cartels. For other antitrust violations, US public enforcement is, in practice, limited to prospective injunctive relief,


leaving a deterrence gap to be filled by follow-on treble damages actions.\textsuperscript{22}

5. Private Competition Law Enforcement and its General Global Trends

Private enforcement refers to individually initiated litigation, either as stand-alone or follow-on action, before an ordinary court to remedy an infringement of antitrust law (also referred to as damages actions). If successful, the legal action leads to some sort of civil sanction imposed by a court such as damages, restitution, injunction, nullity or interim relief, as the case may be.\textsuperscript{23} While a stand-alone action is the one initiated where there is no decision or order pertaining to the infringement in question, a follow on action takes place where there is an already made decision or order by a competition authority which vests right to compensation on a victim. Thus, in a follow on action the burden of proof on the victim is light for the right has already been established.\textsuperscript{24} Considering their private nature, private competition litigations are litigated within the civil procedure code.\textsuperscript{25}

Depending on the nature of the impugned violation, damages actions may be used as a shield or a sword. As a sword damages claims are brought in national courts by private parties who were injured or suffered harm caused by infringements of competition rules in order to


\textsuperscript{23} Barbara Pasa, Loc cit,. See also Ana Pendes, Private Enforcement of Competition Law in the EU: Actors behind its Development, July, 2016 at p. 4. Accessed via https://www.google.com/search?source=hp&ei=CRR4W9TTLCfikgW_y4rgCg&q=Private+enforcement+of+competition+law+in+the+EU%3A+Actors+behind+its+development&oq=Private+enforcement+of+competition+law+in+the+EU%3A+Actors+behind+its+development&gs_l=psy-ab.3...3882.3882.0.5146.4.3.0.0.0.0.0.0..0.0....0...1c.2.64.psy-ab..4.0.0.0...0.qQCJS4YI-GU.

\textsuperscript{24} Luis Silva Morais, Integrating Public and Private Enforcement of Competition Law-Implications for Courts and Agencies, 16\textsuperscript{th} Annual Competition Law and Policy Workshop, Florence, 17-18 June 2011, European University Institute, at p. 10.

\textsuperscript{25} Anna Pendes, Loc cit..
seek indemnity or compensation for that harm. As a shield, damages claims are initiated seeking voidance of anticompetitive contractual obligations, mainly through injunction.\textsuperscript{26}

However, not every person may bring a damages claim in court; rather, only those who have \textit{locus standi} (standing). This is the legal requirement for purposes of avoiding frivolous and vexatious litigations. This essentially means that a person who brings a claim in court must have suffered harm as a result of competition law infringement caused by an undertaking (the infringer). Thus the courts tend to evaluate the complainant’s harm, the alleged wrongdoing by the defendant(s), and the relationship between them.\textsuperscript{27} To do so, the courts weigh the following factors, namely, the nature of the complainant’s alleged injury, including whether the complainant was a participant in the relevant market; the directness of the alleged injury; the speculative nature of the alleged harm; the risk of duplicative recovery; and the complexity involved in apportioning damages.\textsuperscript{28} In the US these are called Associated General Contractors factors (‘AGC’ factors).

A competition law private enforcer has an obligation to state in his pleadings, among others, his status in the relevant market, i.e., whether he is a consumer, supplier or a competitor. This however is not determinative \textit{per se} of his standing. In some situations other market participants, such as potential entrants, licensors, landlords, and dealers, could suffer from anticompetitive conducts as well. It should be noted that, the status of a market participant does not confer standing on it, but the relationship between the defendant’s alleged unlawful conduct and the resulting harm to the complainant.\textsuperscript{29}

Thus, for a private complainant to have standing for pursuing a competition law infringement he has to prove first that he suffered injury-in-fact to his “business or property”; secondly that the injury was “by reason of” competition law violation; thirdly that a proximate or

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\textsuperscript{26} Ana Pendes, \textit{Op cit.}, at p. 5. See also Luis Silva Morais, \textit{Op cit}, at p. 11.
\textsuperscript{28} Ibid.
\textsuperscript{29} Ibid, p. 34
\end{flushright}
direct causal connection between the defendant’s competition law violation and complainant’s harm existed; fourthly that it was an antitrust injury and fifthly that this was a case of reasonably quantifiable damages.\textsuperscript{30}

An injury to “business” is understood in the ordinary sense and generally refers to injury to one’s commercial interests or enterprises, including one’s employment or occupation.\textsuperscript{31} In most cases, courts have found injury to ones’ business where such injury can be characterized as economic. Deprivation of future business prospects, including the loss by an individual of the opportunity to engage in employment, can also qualify as an injury to business.\textsuperscript{32}

Courts generally have the view that, preventing a person from engaging in business and driving him out of business through anticompetitive means is equally unlawful. But in order to demonstrate that it has suffered a loss of business opportunity, a private complainant must be in a position to show a watertight intention to enter into the business and there has to be some tangible preparations (a showing that generally involves evidence that the complainant has taken substantial demonstrable steps to enter an industry).\textsuperscript{33} In as far as injury to property is concerned competition law has been interpreting the word ‘property’ broadly. A valid contract has been termed a property within the purview of competition law. Also customers who pay higher prices for commodities purchased for personal use are injured in their property as well.\textsuperscript{34}

The other element which the complainant has to prove is that, the injury or loss was ‘by reason of competition law violation’. Proof by the complainant that his loss or injury was caused by the defendant’s actions is insufficient to show that the loss or injury was by reason of competition law violation. In addition to that, the complainant has to

\textsuperscript{30} Ibid,.
\textsuperscript{31} Ibid,..
\textsuperscript{32} Ibid,.
\textsuperscript{33} Ibid
\textsuperscript{34} Ibid.
show that the claimed injury or loss is of a type that the competition laws were intended to prevent, as opposed to injury caused by increased competition in the market. A good example is where a retail company lost business simply because one of its competitors opened new stores near that company’s stores, those losses would not be the type of injuries contemplated and thus covered by competition laws.\footnote{Ibid., p. 37.}

The other element the complainant has to prove is the proximate or direct causal connection between the defendant’s competition law violation and complainant’s harm. This requires courts to evaluate the complainant’s harm, the alleged wrongdoing by the defendant, and the relationship between them. In arriving at a conclusion as to whether the complainant’s injury is too remote or not, the courts usually resort to the AGC factors referred to above. All the five factors have to be considered for there is no one factor which is dispositive.

The other factor which the complainant has to prove is the antitrust injury. This is also referred to as antitrust injury doctrine. It was introduced specifically to filter out complaints by competitors and other players who may be hurt by production efficiencies, higher output and/or lower prices, or any other result that the competition laws were designed to encourage.\footnote{Jones Day, \textit{Antitrust Law Answer Book}, (2015 edn), United States, Practicing Law Institute, p. 38. Accessed via https://www.bookdepository.com/Antitrust-Law-Answer-Book-2015-Edition-Jones-Day/9781402422621.} Therefore, for the complainant to be within the rule, he has to prove that the antitrust injury he suffered resulted from a competition-reducing aspect or effect of the defendant’s conduct. Essentially, this means that, where injury results only from a defendant’s pro-competitive conduct, courts will not find antitrust injury.\footnote{Ibid.,}

Once these elements are proved, the complainant may recover damages for the loss or injury suffered. In some jurisdictions like the US, the complainant may be entitled to treble damages (that is, three times the
actual damages caused by the defendant’s unlawful conduct) and the cost of suit, including reasonable attorney’s fees.\textsuperscript{38}

According to the U.S. Supreme Court:

by offering potential litigants the prospect of recovering three times the amount of their damage, Congress encouraged these persons to serve as ‘private attorneys general.’\textsuperscript{39} The U.S Supreme Court also has called the “treble-damages provision wielded by the private litigant . . . a chief tool in the antitrust enforcement scheme”, because the treble damages threat creates “a crucial deterrent to potential violators.”\textsuperscript{40}

The U.S. Supreme Court has also observed that this remedy was “also designed to compensate victims of antitrust violations for their injuries.\textsuperscript{41}

6. Challenges Inherent in Private Competition Law Enforcement

Private competition law enforcement has proved to be useful in a number of jurisdictions, the USA being one of them. It has been said, that 90% of the antitrust cases in the USA are private law cases and most of them civil liability cases.\textsuperscript{42} In other jurisdictions private enforcement has been developing at a slow rate. This is a result of some challenges or predicaments inherent in private enforcement. Some of these challenges are discussed below.

Competition law is a very complicated matter of law. This can be seen in its application to a specific case where notions such as, relevant market, market power and the definition of what an undertaking is come into play. And, all these notions are linked to the economic

\textsuperscript{38} Ibid. See also Directorate for Financial and Enterprise Affairs, Competition Committee Working Party No. 3 on Co-operation and Enforcement, Relationship between Public and Private Antitrust Enforcement, Unites States, 15 June 2015, p. 2.


\textsuperscript{40} Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985).


theory. These notions are difficult to understand and some if not all, are unknown to most of the judges and magistrates. This is a problem that arises only in the stand-alone proceedings;\(^43\) that is to say, in proceedings where there is no decision that has been made by a competition authority which may be the basis of a claim in a court of law. This challenge retards the development of private enforcement.

There are some problems which have to be tackled by the courts in private competition law enforcement. The first problem/issue is to determine whether a breach of competition prohibitions has taken place in the case submitted to the court. This means that the court has to be well acquainted with the said prohibitions, short of that, an innocent person may be convicted while a culprit may be set free.\(^44\)

The other problem the court has to deal with in these cases is to decide who has suffered the damage. The question of standing (\textit{locus standi}) and the problem of the direct and indirect victims in tort cases come in. Often the victims of the unlawful conducts are not the direct customers of the tortfeasors. On the contrary, they are the customers of the tortfeasor’s customers. This reality gives rise to two important problems related to the person of the complainant; that is to say, if it happens that the complainant is the direct customer of the tortfeasor, the defendant could raise the ‘passing-on defence’. The implication of this defence is that, the defendant could allege that the complainant has not suffered any damage at all because, in case of overcharging, he (complainant) has passed on the price excess (derived from the unlawful conduct) to his own customers and thus he, the victim, is not entitled to compensation.\(^45\)

\(^{43}\) \textit{Ibid.}, p. 233.

\(^{44}\) \textit{Ibid.}, p. 234. See also Ana Pendes, \textit{Private Enforcement of Competition Law in the EU: Actors behind its Development}, July, 2016 at p. 10. Accessed via https://www.google.com/search?source=hp&ei=CRR4W9TTLcfikgW_y4rgCg&q=Private+enforcement+of+competition+law+in+the+EU%3A+Actors+behind+its+development&oq=Private+enforcement+of+competition+law+in+the+EU%3A+Actors+behind+its+development&gs_l=psy-ab.3...3882.3882.0.5146.4.3.0.0.0.0.0.0.0.0.0...0..1c.2.64.psy-ab.4.0.0.0...0.qQcJS4Y1-GU.

The other problem is that, if the complainant is the last in the distribution chain (the consumer), it could as well be very difficult for him to prove that he has suffered a damage caused by the breach of competition law prohibitions. In such cases, the court may face difficulties in determining which part of the final price (if any) paid by the consumer comes from the unlawful conduct complained of. But also, the complainant could allege that the damage complained of is too remote and that there is no link of causality between his conduct and the damage suffered. This complicates the situation even more by shifting the burden of proof to the complainant.46

The other complicated task the court has to face is to calculate the correct compensation for the damages in these cases. Making calculations about this issue requires a high level of economic and mathematical knowledge that most of judges and magistrates do not posses. Among others, this involves determining the price level of the market in competitive conditions, in order to compare that price with the real price derived from the unlawful conduct. This essentially means that only those judges and magistrates who are conversant with competition issues can fairly handle such cases.47

In as far as private competition law enforcement is concerned the complainant is equally bound to face some challenges, some of which make private enforcement to be unattractive. One of such challenges is the amount of damages suffered. In most cases and especially when the unlawful conduct complained of is quite dangerous and harmful, the damage caused to each victim is little. A good example is where the dominant Petrol Companies agree on the prices of the gasoline or gas oil, it could be only a few cents damage for consumers each time they go to the petrol station. In such a situation it is ridiculous to commence court proceedings for such a token amount of money.48 This forces a victim of anticompetitive practices to forego his legal rights despite the

47 Ibid., See also Till Schreiber, Ibid.,
fact that he has suffered. Thus a legal mechanism has to be put in place to address this challenge for private competition law enforcement to be a success.

The other challenge is that evidence of the conduct’s unlawfulness may not be available to complainants. The duty on the complainant to prove the unlawfulness of the conduct complained of is not simple. The difficulty is based on the fact that all the evidence about the unlawfulness of the impugned conduct is in the hands of the wrongdoers. This necessitates that there should be a minimum level of disclosure between the parties during the process; otherwise it would be impossible for the complainant to prove the existence of the tort complained of.\(^{49}\)

In the same line of argument, the other major challenge regarding the complainants in these cases is related to the limitation periods. For a better understanding of this difficulty we have to take into consideration the fact that the unlawful agreements (for example to inflate prices) or decisions usually remain hidden. The wrongdoers benefit nothing in disclosing what they have done or agreed upon. Therefore, if according to the law of limitations the time starts to run when the unlawful conduct is committed, or when the damage was caused for the first time, we are obstructing any hypothetical possibility of filing civil proceedings for damages.\(^{50}\) This is because, by the time the complainant becomes aware of the anticompetitive conducts, he might be well out of time.

Furthermore, enforcement of antitrust damage claims may involve significant economic and financial risks. In some cases the preparation of claims for damages resulting from the violation of competition law may be expensive and time consuming. This is especially so where such violation involves more than one state; a good example is the breach of the European Union (EU) competition law. In addition to that, the collection and analysis of relevant evidence and purchase data together with the preparation of antitrust damage actions generally


\(^{50}\) Fernando P. Lopez, Loc cit.,
require support from external legal and economic experts. In the EU for example, depending on the jurisdiction in which an action for damages is brought, the filing of private enforcement actions may require the payment of considerable up-front court fees. This discourages private litigants; and some decide not to engage in such proceedings at all.  

7. Mitigation to Challenges Inherent in Private Competition Law Enforcement

Private enforcement is a very useful compensatory tool, indeed, in some circumstances it may be used as a deterrence tool. Its utility needs no emphasis. For private competition law enforcement to be more attractive to victims of anticompetitive conducts, there are a number of measures to be taken.

For purposes of alleviating the burden of proof on the complainant to prove that he actually paid the inflated price and that he did not pass the same to its customers, if any, there must be a rebuttable presumption that the illegal overcharge was passed on to them totally. This will simplify the burden on the complainants.

But also, in order to put the domestic courts in a good position to determine the amount of damages to be paid to victims, it is suggested that there should be put in place a non binding guide for quantification of damages in antitrust cases; this can be achieved by means of approximation methods of calculation or simplified rules on estimating the loss.  

Regarding the expensive nature of managing damage claims by individuals considering the insignificant nature of loss one may have suffered new rules should be made. Such new rules should take into consideration the prevailing circumstances and establish or recognize representative actions brought by qualified entities (such as consumer associations, business associations, administrative bodies, etc.) or opt-in

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actions, in which victims could decide to combine their claims for harm they suffered into a single action.\textsuperscript{53}

This procedure is recognized by the Civil Procedure Code, Cap 33 [R.E 2002] of Tanzania. However, some amendments need to be done so as to accommodate the peculiarity of the subject matter in question. By so doing Tanzania will have created an attractive environment for private enforcement.

In respect of inability by the complainant to produce relevant damage evidence, basing on the fact that such evidence may, in most cases, be under the wrongdoers’ possession courts must have the power to order parties to proceedings or third parties to disclose relevant pieces of evidence when the other party is unable to produce the requested evidence by himself.\textsuperscript{54} This aspect of the law is already in existence in the Civil Procedure Code.\textsuperscript{55} Under this, a party to a proceeding may request some documents which are in possession of another party to the proceeding. This essentially means that, to a great extent the Tanzanian Civil Procedure Code is well suited to dealing with private competition law enforcement save for minor amendments which have to be effected to accommodate such proceedings.

With regard to the issue of time limitation computation as a challenge, it is suggested that the prescription period in this kind of actions should begin when the complainant becomes aware of the existence of an unlawful conduct, or when it would be negligent not to know it. This would avail the complainant ample time to file damage claim within time.\textsuperscript{56} This position would, as well, bar wrongdoers from hiding behind the complainants’ unawareness. Considering the wording of the Law of Limitation Act, Cap. 79 of laws of Tanzania, the amendments to be effected are minor for what is needed is a slight twisting of the rule

\textsuperscript{53} Ibid.,
\textsuperscript{54} Ibid.,
\textsuperscript{55} See Orders XI and XIII on Discovery and Inspection and Production and Impounding of Documents.
in as far as reckoning of time is concerned. That is to say, for competition related proceedings time should start to run from the time the potential complainant becomes aware of the impugned anticompetitive conduct.

The Basic Foundations of the Interplay between Private and Public Competition Law Enforcement (Complementarity)

It is now evident that both private and public competition law enforcement form a part of a common enforcement system and serve the same aims: to deter anti-competitive practices forbidden by competition law and to protect firms and consumers from these practices and any damages caused by them. However, the two methods of enforcement produce different proceedings and thus function differently. Indeed, the roles of the national competition authorities and that of the ordinary courts do differ and thus they should not be confused.

The vertical nature of an administrative-public enforcement, where great investigation powers are employed to deal with an alleged complex and serious competition law infringement, the product of which is the imposition of sanctions of administrative nature and serves the deterrent function, should not be confused with the horizontal civil enforcement whereby national courts are a suitable forum for solving contractual conflicts between parties to agreements and imposing remedial sanctions.

However, the interplay between these two methods of enforcement needs no emphasis. Such relationship has proved to be so useful in other jurisdictions such as the EU for it increases the level of

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57 Ana Pendes, “Private Enforcement of Competition Law in the EU: Actors behind its Development,” July, 2016 at p. 14. Accessed via https://www.google.com/search?source=hp&ei=CRR4W9TTLcfikgW_y4rgCg&q=Private+enforcement+of+competition+law+in+the+EU%3A+Actors+behind+its+development&oq=Private+enforcement+of+competition+law+in+the+EU%3A+Actors+behind+its+development&gs_l=psy-ab.3...3882.3882.0.5146.4.3.0.0.0.0.0.0..0.0..0...0...1c.2.64.psy-ab.4.0.0.0...0.qQCjS4YI-GU.

58 Ibid.
enforcement of EU competition law. Their complementarity is seen from the fact that the effects of one support the other. A good example is gathered from the scenario where an individual basing on a decision by a competition authority files a follow-on action in an ordinary court for compensation. In this situation, public enforcement has promoted and acted as a catalyst to private enforcement.\(^{59}\)

Among other things, public enforcement interacts with private enforcement in as far as access to privileged information is concerned. This may arise from two angles, that is to say, access to the Commission’s (FCC) public enforcement file and access to the contents of the Commission’s decisions pertaining to competition law infringements. However, in so doing, the Commission should consider confidentiality issues in the disclosure of such information and decisions.\(^{60}\)

This situation although useful and necessary, creates a tension between these two forms of enforcement. Allowing potential claimants to have access to the Commission’s file while the investigation process is ongoing may seriously affect investigation powers of the Commission. But on top of that, the willingness of the undertakings to cooperate with the Commission, in as far as public enforcement investigation is concerned may seriously be affected. This is because the undertakings may fear that the Commission’s discovery powers may be used as a tool for follow-on actions against them.\(^{61}\)

This type of tensions may be solved in the interests of the effectiveness of public enforcement of competition rules. Accordingly, there is ground to refuse potential claimants access to the Commission's file while the investigation is taking place.

The other challenging situation pertaining to access to privileged information by potential claimants arises where a court of law requests access to the Commission’s file. This is bound to happen because of the

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\(^{60}\) Ibid.,

\(^{61}\) Ibid
cooperation that has to exist between competition authorities and courts of law. In such a situation, it may be a matter of debate how the confidentiality of certain business secrets and aspects of the file is to be preserved. This may be done through the assessment to be done by the Commission itself when delivering the file or through confidentiality verification by the requesting court. Again, given the controversial and sensitive nature of these kinds of issues, a jurisprudential clarification to be produced in this area by the higher judicial bodies would be a very positive development.\textsuperscript{62}

The relationship between public and private enforcement is a two way traffic in that, stand-alone proceedings may as well influence public enforcement, for it alerts the competition authorities that an alleged competition violation has been committed. This means that, at this point the major objectives of the two methods may have been achieved, i.e., to deter transgressions (through public enforcement) and to compensate victims (through private enforcement).

The interaction between public and private enforcement however, is likely to have its challenges. Considering the investigative powers public enforcement has, among others, there is a likelihood of one harming the other. However, it should be remembered that neither of the enforcement venues can bear all the responsibility of competition rules implementation alone and thus successfully cover all the enforcement gaps. To maintain a useful interaction between the two a careful balance between them must be maintained.\textsuperscript{63}

\textsuperscript{62}Ibid., at p. 23.

\textsuperscript{63}Ana Pendes, “Private Enforcement of Competition Law in the EU: Actors behind its Development”, July, 2016 at p. 15. Accessed via https://www.google.com/search?source=hp&ei=CRR4W9TLcfikgW_y4rgCg&q=Private+enforcement+of+competition+law+in+the+EU%3A+Actors+behind+its+development&oq=Private+enforcement+of+competition+law+in+the+E+U%3A+Actors+behind+its+development&gs_l=psy-ab.3...3882.3882.0.5146.4.3.0.0.0.0.0.0.0...0.1c.2.64.psy-ab.4.0.0.0...0.qQCJS4Y1-GU
8. **Why does Tanzania Need Private Competition Law Enforcement?**

As stated earlier in this paper, competition enforcement in Tanzania is mainly public. Thus the enforcement duty is mainly vested on the Fair Competition Commission (FCC) and the Fair Competition Tribunal (FCT). It goes without saying that the ordinary courts of law do not have a playing ground in competition law enforcement save for suits involving consumers’ welfare under the FCA.\(^\text{64}\) This literally means that, individuals who fall victims of anticompetitive conducts have no opportunity to pursue such damages claims in our courts. The only way they can get proceedings in motion is through the FCC\(^\text{65}\) which will prosecute the same, the end result of which is imposition of administrative penalties. These may include imposition of compliance orders, fines, interim orders and compensatory orders.\(^\text{66}\)

This means that, there is no any avenue available to claim for any other remedies apart from using the FCC. In the EU for example, competition can be enforced through private actions claiming among other things a declaration of nullity, compensation, restitution and interim relief. It is argued that this kind of enforcement (private) can be efficient and more relevant.\(^\text{67}\) Apart from achieving its compensatory function, private enforcement also serves as deterrence against anticompetitive practices, complementing public enforcement. Private enforcement also acts as a means to create public awareness and a source of information.\(^\text{68}\) It is therefore important for the relevant authority to consider establishing a

\(^\text{64}\) See parts VI and VII, and specifically, among others, section 59 (6).
\(^\text{65}\) See section 69 of the FCA.
\(^\text{66}\) These compensatory orders are in as far as product recall is concerned. Mainly these orders are issued when the breach in question concerns consumer welfare, and not otherwise.
framework where individuals can enforce their claims without necessarily being forced to involve the Commission.

The EU Commission has recognized in 2008 that the lack of private enforcement has many consequences. It stated that without an appropriate level of private enforcement the costs of the unlawful conducts are borne by the customers and law abiding businesses, and not by the wrongdoers, less competition restrictions are detected by the legal system. As a result the economy works less competitive and produces poor results; the deterrent effect of the enforcement of EU competition law is lower. This could lead to a higher level of unlawful conducts in the future and at the end, our internal market does not work as well as it could, so greater prices and less innovation have to be expected.\textsuperscript{69} To avoid these impacts, private enforcement should be put in place in Tanzania.

The legal state in Tanzania is supportive to private enforcement, this makes introduction of the same to be welcomed. The judiciary is well staffed with experienced personnel, thus even if the judges and magistrates did not study competition law as one of their compulsory or optional courses, they will still be able to adapt to such new environments. With such kind of personnel, trainings can be helpful to them. In the same line of argument, most of our laws pertaining to civil litigations are also user-friendly, in the sense that they are ready to accommodate private enforcement proceedings. A good number of such laws require very few amendments, if at all, to adapt to private enforcement proceedings, good examples are the Civil Procedure Code, Cap 33 [R.E 2002], the Tanzania Evidence Act, Cap 6 [R.E 2002] and the Law of Limitation Act, Cap 79 [R.E 2002] to mention just a few.

The most important of all, is the political will of the government to adopt private enforcement. Human beings are always suspicious to adopt new changes because of the fear or indifference as to what such changes will bring about. Thus readiness of our government in adopting

private competition law enforcement is paramount towards the successfulness of such proceedings in Tanzania. As stated earlier in this paper, many jurisdictions have in place operational private competition law enforcement regimes, which have proved to be very useful. Basing on that background, Tanzania should not lag behind, it should think of adopting such proceedings so as to, among others, recompense private competition law infringement victims.

It is admitted elsewhere that a fully functioning competition regime may be established where there is a perfect interaction between public and private enforcement. Private enforcement once established will act as a stimulus to damages claims. This in one way or the other will deter potential wrongdoers from flouting our competition legislation. The outcome of which will be the existence of a leveled playing field for all market players.

9. Conclusion

It can fairly be concluded that Tanzanian competition enforcement regime is basically public, where the competition authorities (as stated above) play a dominant role. However, for there to be an optimal enforcement the interaction between public and private enforcement needs no emphasis. This dictates that it is high time private enforcement be introduced in Tanzania, considering that the way our competition regime is tailored, private enforcement is not featured anywhere. This however, requires a high level of political will and commitment from the incumbent government. We should not be worried in venturing to new horizons, the success private enforcement has brought in other jurisdictions such as the EU, USA and others should be a motivating factor to us. On top of that, our legal framework in its generality supports to a great extent the adoption of private enforcement, this should give us confidence that not much costs will be incurred in adopting private competition law enforcement.
The Felix Bwogi Scenario Resurrected: A Case Note

G. Mgongo Fimbo*

1. Introduction

The Civil Procedure Code (CPC) Cap. 33, the Evidence Act Cap. 6 and case law carry detailed rules on documentary evidence generally. The rules address annexures to pleadings as well as production of documents during the trial.

The utility, if any, of annexures to pleadings may be traced in the context of stages in which a case develops, that is to say, before the trial, during the trial and on appeal.

1.1. Before the trial

Order VII rule 14 addresses the plaintiff. It requires that if the plaintiff sues on a document in his possession he must deliver the document or a copy thereof to be filed with the plaint. He must, in addition, enter other documents in a list to be annexed to the plaint. The usual sanction for failure is stated in rule 18 of the same order, namely, the document is not receivable in evidence without leave of the court and leave is not granted as a matter of course.

In the event of a plea that the plaint does not disclose a cause of action against the defendant the court examines the plaint and its annexures.¹ Thus, annexures may, in an appropriate case, save the day for the plaintiff and in another case annexures may undermine or defeat him entirely.

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This case note was prepared in August 2006.

A prudent defendant, on the one hand, annexes to his written statement of defence (wsd) copies of documents he intends to rely upon at the trial for purposes of buttressing his case. A careful plaintiff, on the other, may find that in the wsd and its annexures the defendant admits the claim or part of it. He may, thereby, apply for judgment on admissions under Order XII rule 4.

It must be pointed out that annexures to pleadings are useful to the court in framing issues under Order XIV rule 3.

1.2. During the trial

At the trial an annexure to the plaint whose original is not tendered in evidence can be used by the plaintiff to refresh his memory under section 168 of the Evidence Act. It can be used by the defendant for purposes of cross-examining the plaintiff for any of the purposes stated in PART III of the Evidence Act. Likewise an annexure to the wsd whose original is not tendered in evidence can be used by the defendant to refresh his memory and can be used by the plaintiff for purposes of cross-examining the defendant under Order VII sub-rule (2) of rule 18. In either case, the annexure itself is not evidence. The court must rely upon oral testimony in respect of the annexure.

This case note deals with annexures to pleadings. In this note I am not concerned with annexures generally, I am concerned with annexures whose originals are not tendered in evidence at the trial or having been tendered by a party they are not admitted because they are not admissible. Yet the annexures form part of the court record and, in most cases the court does not expunge them from the record. What is the utility of these annexures to the civil court or appellate court in the course of construction of a judgment?

This case note argues that the utility of these annexures for this purpose is nil.

2. Felix Bwogi Case

This case involving a tenancy of Mr. Felix Bwogi’s firm is a perfect starting point. On 25th July 1990 the Court of Appeal of Tanzania
delivered a remarkable decision in a case whose significance has not always been appreciated. The case is *Felix Bwogi t/a Eximpo Promotion & Services v. Registrar of Buildings*\(^2\) (ROB). There was an appeal in the Court of Appeal followed by an application in the same Court.

### 2.1. Appeal

In civil appeal No. 19 of 1988 the issue was whether the appellant, the Registrar of Buildings (ROB), which was the landlord had wrongly terminated a tenancy in respect of commercial premises situated at Plot No. 582/9 along Samora Avenue/Independence Avenue in the City of Dar es Salaam. The Court of Appeal held that the appellant was entitled to terminate the tenancy and it did so in reliance upon annexure “D” to the written statement of defence of one of the defendants. The Court stated:

Undoubtedly there was uncontroverted evidence adduced at the trial as Exhibit (sic) D attached to the written statement of defence of the first defendant, that is, a letter Ref. No. RFO/CR/BJ/135 dated 26\(^{th}\) February 1980 addressed “TO WHOM IT MAY CONCERN” by the Regional Finance Officer, Dar es Salaam and the Coast Region. The letter reads:

‘M/S EXIMPO

The above mentioned business is ordered to stop operation with effect from 26\(^{th}\) November 1979 because they were found in operation while their business licence had already expired on 31\(^{st}\) March 1979 and it had not been reviewed. They will go into business again after they had obtained a valid licence to cover the period from May 1979 to 30\(^{th}\) April 1980 and after their offence for carrying on business illegally had been compounded under the Finance Act 1972’.

We are of the view that since the tenancy agreement between the parties was for the purpose of carrying on business in the premises in question, that agreement contained an implied term to the effect that the respondent was to carry on that business lawfully. By failing to renew his trade licence and illegally carrying on business as stated in the contents of Exhibit D, the respondent was in breach of the tenancy agreement. We are satisfied that the

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\(^2\) Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 26 of 1989 (unreported).
G. Mgongo Fimbo

appellant was entitled to terminate the tenancy to stop the respondent using the premises illegally.

2.2. Application

In civil application No. 26 of 1989 the applicant sought rectification of the judgment of the Court of Appeal in civil appeal No. 19 of 1988 by erasing the use (sic) of Exhibit “D” that did not form part of the proceedings. On perusal of the record the Court found that the co-defendant of ROB had filed two written statements of defence (wsd) in the High Court. The first wsd was abandoned and replaced with the second one. Exhibit “D” that was relied upon by the Court in resolving the issue of wrongful termination of the tenancy was annexed to the first wsd. It was the applicant’s contention that the Court erred in relying on a non-existent Exhibit D. At page 3 of the typescript the Court stated:

The central issue of this application therefore is whether this court has jurisdiction to erase or strike out the relevant portion of its judgment against the applicant, and consequently enter judgment for the applicant.

Drawing inspiration and support from the decision of the House of Lords in Lazard Brothers and Company v. Midland Bank Limited\(^3\) the Court held that it had inherent jurisdiction to declare that its earlier judgment was vitiated to the extent that it relied upon exhibit (sic) D. Consequently, it allowed both the application and the appeal. The Court agonized and ruled at page 8 of the typescript:

If as a consequence of the decision of the High Court, the plaintiff/applicant entered into occupation of the suit premises and is still in occupation, his tenancy is to be treated as valid until otherwise terminated according to law. In case the plaintiff/applicant entered into occupation but has subsequently vacated as a consequence of the earlier judgment of this court, or in case he did not enter, he may now re-enter into occupation as a tenant of the suit premises, unless the landlord – that is the Second Defendant, has allocated the premises to a new tenant consequent upon our earlier judgment. In such a case where \textit{bona fide} new tenant is in occupation, we are of the considered opinion that it would be just and proper for the plaintiff/applicant to be paid compensation by the landlord in lieu of tenancy at the rate of shs. 1,500/= per day from 1980 to the date of this decision, excluding any period that the plaintiff/applicant may have been in occupation of the suit premises in

\(^3\)[1933] A C 289.
consequence of the judgment of the High Court. To that extent and with the modification of the quantum of compensation, the appeal is allowed with costs to be taxed.

This case is significant in two respects. Firstly, an error of law in the Court of Appeal affects the status of parties to the appeal and may affect other persons and may be quite costly to the parties. Secondly, in an appropriate case, the Court has an opportunity to rectify the error if Advocates are vigilant.

3. The Coral Cove Case

Thus the Felix Bwogi case is the first one whereby the Court of Appeal of Tanzania reviewed its earlier decision and overruled itself. This case was certainly novel, but it was not complicated on the facts or law. The Court has since the Felix Bwogi case laid firm and strict conditions for review of its decisions. In Raymond Martin v. Coral Cove Limited the plaintiff (appellant in the Court of Appeal) had claimed in the High Court, Zanzibar that between 5.11.1996 and 15.12.1997 he had lent to the defendant a sum of shillings 6.5 million. It was also claimed that the defendant agreed to pay compound interest at the rate of 35% p.a. Despite promises and undertaking to pay the defendant had failed to pay the loan amount and interest. The plaintiff relied upon documentary evidence marked Exh P1 to Exh P8.

Exh P1 dated 11.6.1998 was a letter from the director of the defendant company to the plaintiff in which the loan of shillings 6,500,000/= was

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4 Transport Equipment Ltd v. Devram P. Valambhia, Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 18 of 1993 (unreported); Tanzania Transcontinental Co. Ltd v. Design Partnership Ltd, Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 62 of 1996 (unreported); Blankets Manufacturers Ltd v. Ottu on Behalf of Milanzi & Others, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 64 of 2000 (unreported); Chandrakant Joshubhai Patel v. The Republic, Court of Appeal of Tanzania at Dar es Salaam, Criminal Application No. 8 of 2000 (unreported).

5 Court of Appeal of Tanzania at Zanzibar, Civil Appeal No. 54 of 2004.
expressly acknowledged and an undertaking was made to repay the loan in installments with effect from 15.8.1998. It was indicated in the letter that interest on the loan would be paid and **worked out in due course**. Regarding this letter the Court of Appeal stated at page 9 of the typescript:

> From this letter it seems to us that right from the beginning, the parties were agreed that interest on the loan amount would be paid. The modalities (sic) of payment was still to be worked out and agreed upon.

Exh P3 dated 25.8.1998 was a statement of account in which the interest was shown at the rate of 35%. Exh P4 dated 4.9.1999 was an acknowledgment of the loan signed by the director of the defendant company and his wife. The total amount payable was shown to be 17,351,000/=.

Exh P5 dated 14.2.2000 was acknowledgment of outstanding loan balance by the director of the defendant company with an undertaking to repay the loan.

Exh P7 dated 31.5.2000 was a letter from the director of the defendant company to the shareholders of the company.

In addition there was plaintiff’s letter dated 6.3.2000 and marked “B” in the attachment to the plaint. The letter was addressed to the defendant in which the loan amount together with the interest calculated for 2½ years was shillings 17,351,000/= It was also indicated that with the repayment made until 14.2.2000 the outstanding balance was shillings 10,851,000/=.

At the trial issue 1 was framed as follows:

> Whether or not there was a valid and binding agreement between the parties herein for the charge and payment of compound interest on the sum of money lent to the defendant at the rate of 35% per annum.

The trial judge in the High Court held that the plaintiff was entitled to payment of USD 1,875 as the outstanding balance at the court interest rate of 10%. The trial judge was satisfied that the plaintiff had failed to prove that there was an agreement on interest at the rate of 35% per annum. He is quoted at page 14 as having stated:

> I am thus unable to accept Exhibit P3 as evidence or proof of admission of liability and acknowledgment of indebtedness for the amount of T. Shs.
17,351,000/= computed thereon … In my opinion, discussing and agreeing to the charge of interest on a loan is distinct from actual fixation of the discussed and agreed rates and type of interest … Since there is no satisfactory, admissible and acceptable (sic) placed before me by the plaintiff herein; it is thus my finding that the plaintiff’s claim thereon is unenforceable (sic) for lack of consensus and uncertainty.

The Court Appeal conceived that determination of the appeal turned on one issue, namely, whether the parties had agreed to pay interest at the rate of 35%. The Court felt that it was imperative to examine the surrounding circumstances. Among the documents closely examined was attachment “B” to the plaint, a letter dated 6.3.2000. The Court of Appeal referred to it extensively and based its decision upon it. The Court stated at pages 9 - 10 of the typescript,

Next is the letter marked “B” in the attachment to the plaint dated 6.3.2000.

…………

To our minds, what emerges from this correspondence is that in between the time when the letter Exh P1 of 11.6.1998 was written and the time of writing this letter “B” it is more likely that the appellant and the respondent had come to some agreement on the rate of interest to be paid on the loan. Otherwise, it is clearly referring to calculations of the outstanding loan balance including interest. In our view, if as yet, no consensus or discussion and agreement had been reacted (sic) on the rate of interest payable, ordinarily, upon receipt of the letter dated 6.3.2000 from the appellant, Mr. Richard N. Nunes of Coral Cove Ltd, the Respondent, would have promptly reacted against the interest element being included in the outstanding balance.

At page 12 it is stated:

In the circumstances the Respondent having not objected or questioned the outstanding loan balance shown in letter “B” of 6.3.2000 after the previous correspondence discussed above, the inference is the amount indicated including interest was accepted …

The letter that was dated 6.3.2000 was an attachment to the plaint. Invariably, it was a photocopy. It was not referred to by the trial judge in his judgment. The original, if any, was not given an exhibit number (Exh P) at the trial. The Court of Appeal did not explain why this document, unlike the others, did not have an Exh P number. In these circumstances, it can be concluded that its original was not tendered in evidence at the trial. In my submission the annexure was not evidence;
it had no status at the trial or on appeal; it was a nothing. Consequently, it should not have been included in the record of appeal under rules 83 and 89 of the Tanzania Court of Appeal Rules 1979. The latter rule requires that the record of appeal should contain, *inter alia*, copies of “all documents put in evidence at the hearing.”6

4. Quest for orderly and judicious relationship of courts

There is an additional curious and unusual feature in the decision of the Court of Appeal. This feature relates to what the Court conceived to be the treatment of Exh P3, P4 and P5 by the trial court. At page 13 of the typescript it states that the trial judge considered these documents and found them inconclusive:

> From the totality of the context of these documents, the question is whether it can be inferred that there was consensus on the rate of interest between the appellant and the Defendant Company. As said before, the learned trial judge was firmly of the view that the documentary evidence in Exh P3, the statement of account, Exh P4, the acknowledgement of the loan and Exh P5, payment confirmation, did not constitute a binding agreement, acknowledgment, admission or acceptance on the part of the Respondent company that 35% compound interest would be charged on the loan.

In my submission this finding is consistent with the excerpt from the judgment of the High Court quoted above. However, at page 18 of the typescript the Court paints a wholly different and contradictory picture. It gives an impression that the trial judge rejected admission of those documents. The Court states:

> We are therefore satisfied that the learned judge erroneously rejected the admission of those documents. With the documents, Exh P3, P4 and P5 admitted, properly analysed and evaluated, it is our view that the learned judge would have found that there was *consensus ad idem* that the interest rate agreed was 35% compound interest on the outstanding loan amount.

(Emphasis in the original).

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6Tanzania Court of Appeal Rules, 1979, rule 89(1)(f). The proviso to sub-rule (1) of rule 89 is important in respect of exclusion of exhibits that are not relevant to the appeal and where the advocate is in doubt on relevance of certain exhibits he can make an application under sub-rule (3) of rule 89.
If the trial court rejected admission of these documents, the Court of Appeal should have articulated the trial judge’s error and why it found the documents admissible and usable. There is nothing in the judgment to that effect and that omission may impact negatively upon the relationship between it and the High Court. In *Scolastica Benedict v. Martin Benedict* the Court rationalized that higher courts are not capricious. It stated:

> The second part of this answer relates to the courts above the primary court. Under the hierarchical scheme of the Courts’ system in this country, a decision of a primary court can be overturned by a court above in the course of appellate or revisional proceedings or in the rare case of judicial review (where no other remedy is available). The present case originated in the court of the Resident Magistrate as a suit for vacant possession, *inter alia*. It was not instituted as an appeal against or revision of the decision of the primary court. These proceedings therefore cannot give rise to a decision overturning that of the primary court. This conclusion should not be treated as a technicality. **It is based on the principle that the higher courts are not capricious and that the relationship between the lower and higher courts is orderly and judicious.**

In my submission the decision of the Court of Appeal in the *Coral Cove case* fails in two respects. Firstly, it fails in its treatment of an annexure to the plaint. Further, it fails the Court’s own quest of maintaining an orderly and judicious relationship between itself and lower courts.

My advice to Advocates with regard to annexures is fourfold. Firstly, they must take great care in identifying documents for purposes of annexing to pleadings. Secondly, they must be vigilant in permissible uses of annexures before the trial and during the trial. Thirdly, they must always assist the court, during final submissions, in identifying annexures whose originals have not been tendered in evidence so that they are not considered by the court. Fourthly, while preparing the record of appeal for instituting an appeal in the Court of Appeal they should exclude annexures whose originals have not been tendered in evidence.

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7[1993] TLR 1 at page 5 D E.
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