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Some Reflection on the Position of Crimes against Humanity under the Ethiopia Law

Shewit Kahsay*

Abstract

The law of crimes against humanity initially was not considered as a separate form of international crime, nor was it termed as such. The distinction between crimes against humanity and genocide was blurred. Overtime, however, the definitions of the two crimes have evolved and posed differing requirements. Crimes against humanity comprise unique elements which are not adequately reflected in exercising criminal prohibitions specifically genocide and it is no longer useful to describe genocide as a subset of crime against humanity. However, in Ethiopia the place of crimes against humanity is far from clear. This paper after examining the relevant laws has concluded that, crime against humanity does not have any place in Ethiopia. It is recommended that Ethiopia should have a separate criminal provision to deal with crime against humanity. In this regard with a view to developing her legal framework Ethiopia can learn from a number of international experiences.

1. Introduction

The development of modern international criminal law is seen against the backdrop of the various atrocities of the late 19th and early 20th centuries.1 Some of these atrocities were relatively engaged in on a massive scale. As a result, various attempts were made, usually in the aftermath of such atrocities, to prosecute the perpetrators and to define a set of core crimes that reflect behavior that can never be tolerated, in any circumstances.2 Though the definition of this category varies, it has been developed in the practice of international courts or tribunals. The

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most significant of these courts or tribunals include the Nuremberg tribunal, the ad hoc tribunals for former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC).  

Generally, the evolutionary process of international criminalization lacks any form of systematization or method and is best characterized as a series of ad hoc response to specific events. Indeed, terms such as genocide and crime against humanity were the direct result of the atrocities committed in different times. Further, crime against humanity was not considered as independent from other international crimes. Nevertheless, the increase in the application of international criminal law has produced fruitful interplay between international instruments, jurisprudence and commentaries, leading to a more coherent picture of the scope and definition of crime against humanity today. Like that of international level, development of international crimes in the domestic jurisdictions is fragmented. In many states crime against humanity is not separately criminalized. Ethiopia has criminalized some of the international crimes. However, the place of crime against humanity is far from clear. This paper tries to assess the place of crime against humanity under the Ethiopian law. The paper begins with a general overview of crime against humanity. It then, discusses the place of the crime against humanity under Ethiopian law.

3 The above four show only the major developments. However, there were also other development in pre and post-cold war. For a comprehensive discussion of the history of crimes against humanity see Bassiouni, M.C., “Crimes Against Humanity” in International Criminal Law (1992); Lippman, M., “Crimes Against Humanity”, 17 B.C. Third World L.J. (1997), 171-173.
5 Ibid.
6 Ibid.
9 Some of the countries are China, Libya and Bahrain, ( The Law Library of Congress, Global Legal Research Center, 2016, • law@loc.gov • http://www.law.gov)
10 War Crimes and Genocide crimes are criminalized under the Criminal Statue.
2. General Overview of Crime against Humanity

2.1 Historical Development

The Nuremberg Charter was created to prosecute and punish major war criminals before the Nuremberg Tribunal for, *inter alia*, crimes against humanity as defined in the Charter itself.\(^{11}\) This was the first occasion of such prosecutions and it marked the most significant step forward in the development of both international criminal law and an international criminal tribunal.\(^{12}\) Prior to this, there had been discrete and unconnected references to conduct that offended principles of common humanity or which was in conflict with the laws of humanity.\(^{13}\) The First Hague Convention of 1899 on the laws and customs of war, as well as the Fourth Hague Convention of 1907\(^ {14}\) referred to “offences against the laws of humanity”.\(^ {15}\) It was also so referred by the Commission created by the Allies after the First World War in 1919. The Commission produced a Report on the Responsibilities of the Authors for War and on Enforcement of Penalties for Violations of Laws and Customs of War.\(^ {16}\) None of these instruments defined crime against humanity, nor did they generate prosecutions against possible offenders.\(^ {17}\) It was not until Nuremberg that any such prosecutions ensued. The Nuremberg Charter defined crimes against humanity to include:

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\(^{11}\)International Bar Association’s, Human Rights Institute International Criminal law manual, May 2010, p. 133.

\(^{12}\) See Agreement for the Prosecution and Punishment of the Major War Criminals, Art.6(c). Indeed, there were attempts to prosecute perpetrators of atrocities after the First World War when the governments of the allied nations France, Great Britain, and Russia condemned the actions of their defeated enemy Ottoman Turkey against the Armenians as “crimes against civilization and humanity.” The allied powers then went on to establish the Commission on the authors of war and the enforcement of penalties (See ElwaBadar, M., “From Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes against Humanity”, *San Diego International Law Journal* 5:73 (2004): 73-144, ap. 78.

\(^{13}\) Supra note 4, p. 799.

\(^{14}\) See Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899 and Laws and Customs of War on Land (Hague, IV), 1907.

\(^{15}\) Ibid.


murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Subsequently, subject to minor changes this definition was adopted by Executive Order setting up the International Military Tribunal for the Far East in Tokyo to prosecute major Japanese war criminals.\textsuperscript{18} There were also set up tribunals under Control Council Law No.10 to try war criminals who were not deemed to be major in those parts of Europe occupied by the Allies.\textsuperscript{19} In applying the law relating to crimes against humanity, the Nuremberg Tribunal was forced to turn to custom to determine the international law on the subject.\textsuperscript{20} Given that there was virtually no State practice that could be referred to, this inevitably devolved on the opinion of jurists and the few instances of objection by certain states to the conduct of others.\textsuperscript{21}

A major advancement or development of international law concerning crimes against humanity occurred almost after half a century from the time of Nuremberg when the Security Council created the ICTY and ICTR in response to mass crimes in the former Yugoslavia\textsuperscript{22} and in Rwanda.\textsuperscript{23} The statute of each the two tribunals contained acts based on the Allied Control Council Law No. 10 list.\textsuperscript{24} The Statute of Crimes against Humanity truly took hold as a separate basis of individual criminal responsibility. New definitions of key terms were incorporated in Article 5 of the ICTY Statute and article 3 of ICTR. Subsequently

\textsuperscript{18}For a comprehensive discussion of the history of crimes against humanity, see, Bassiouni, M. \textit{op.cit.}, p.34.
\textsuperscript{19}\textit{Supra note} 5. p. 189
\textsuperscript{21}\textit{Ibid}
\textsuperscript{24}See Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin (Jan. 31, 1946),
the new definitions got judicial elaborations. The definitions are similar except that the ICTY Statute requires armed conflict and the ICTR Statute requires discriminatory grounds. According to the ICTY statute ‘armed conflict’ whether international or internal in character is required. In contrast, the ICTR statute incorporated a requirement of a ‘discriminatory motive’.

The most recent, and arguably the most comprehensive, definition of crimes against humanity appears in Article 7 of the Rome Statute of the ICC (here in after ICC Statute). It has to be noted that, article 7 of the ICC Statute can generally be considered to be a crystallization of customary international law in relation to what constitutes a crime against humanity. However, the statute expanded the list of acts by adding certain underlying offences. In this regard, Cassese argues that article 7 of the ICC Statute is in some ways broader than customary international law in the sense that it expands the category of crimes against humanity by adding some sub-sections such as forced pregnancy, enforced disappearance of persons and the crime of apartheid. Unlike the previous Tribunals, the ICC Statute did not include both the armed conflict requirement and the requirement of discriminatory grounds.

2.2 Elements of Crime against Humanity

Generally, the definition of crime against humanity is categorized in two parts. The first part is general requirement referred to as the

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25 Supra note 23 and 24 respectively.
26 Ibid.
30 Over all reading of article 7 of the Rome statute indicates that the statute does not require a connection between crimes against humanity and any conflict.
contextual element. The second, comprises physical (*actus reus*) and mental element (*mens rea*) relating to specific or so-called underlying offences. They provide the context in which the conduct must take place in order to qualify as a crime against humanity. For that reason these requirements, which are common to all listed offences, are called contextual. The discussion in the next part is on crimes against humanity under Article 7 of the ICC Statute, with reference to prior jurisprudence where it serves to guide interpretation of this provision.

**2.2.1 General Requirements (Contextual Element)**

**2.2.1.1 Existence of attack**

According to the ICC statute the term attack refers to course of conduct involving the multiple commissions of acts against any civilian population, pursuant to or in furtherance of the state or organizational policy to commit such attack. By contrast, an attack has been defined by the ICTY as a “course of conduct involving the commission of acts of violence”. In the context of a crime against humanity, an “attack” is not limited to the use of armed force; it also encompasses any mistreatment of the civilian population. An attack may also be non-violent in nature such as instituting apartheid or exerting pressure on the population to act in a particular way. Such non-violent acts may constitute an attack for the purposes of a crime against humanity, if orchestrated on a massive scale or in a systematic manner. An attack within the meaning of the statute requires the state or organization to actively promote or encourage such an attack against civilian population. In other words, random acts of individuals do not constitute crime against humanity. However, if such random acts of

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32 ICC Statute, Article 7(2) (a).
33 ICTY Statute, Article 5.
35 Article 1 of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid (though such a system or elements thereof could also be violently imposed).
individuals have an underlying state or organizational policy directing, instigating or encouraging the crimes then they constitute crime against humanity.\textsuperscript{38} Existence of a policy or plan is, however, not a legal requirement.\textsuperscript{39} In the \textit{Kunarac et al. case}, the court held that existence of a policy or a plan may be relevant; yet it is not a legal element of the crime.\textsuperscript{40}

\textbf{2.2.1.2 Requirement that the attack be widespread or systematic}

In order to constitute a crime against humanity, the attack must be widespread or systematic and directed against a civilian population.\textsuperscript{41} The requirement that the attack be “widespread” or “systematic” is disjunctive rather than cumulative. Put differently, there is no apparent relation between these attributes. Hence, there is no rule that obliges those requirements to come together. For an attack to be widespread, it needs to be of a large-scale nature which is primarily reflected in the number of victims.\textsuperscript{42} The term “systematic” refers to the organized nature of the acts of violence and the non-accidental recurrence of similar criminal conduct on a regular basis.\textsuperscript{43} Consequently, except for extermination, a crime need not be carried out against a multiplicity of victims in order to constitute a crime against humanity.\textsuperscript{44} In other words, an act directed against a limited number of victims, or even against a single victim, can constitute a crime against humanity, provided it forms part of a widespread or systematic attack against a civilian population.

\textsuperscript{38}Ibid.
\textsuperscript{39}Ibid.
\textsuperscript{40}Ibid.
\textsuperscript{41} ICC Statute article, 7(1).
\textsuperscript{42} Article 7(2) of the ICC Statute defines a qualifying attack as “a course of conduct involving the multiple commission of [certain] acts against any civilian population pursuant to or in furtherance of a state or organized policy to commit such attack”.
\textsuperscript{43}Crimes Against Humanity, International Criminal Law & Practice Training Materials, Module 7, (Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions) p.12.
\textsuperscript{44}International Criminal Law Services and Open Society Justice Initiative, PART 4 (Section I) 2009, p139-140.
2.2.1.3 The Attack be directed against any Civilian Population

According to the Statute, the term ‘civilian population’ is given a broad definition.\textsuperscript{45} Members of the civilian population are people who are not taking any active part in the hostilities.\textsuperscript{46} It includes not only the general population but also members of armed forces who have surrendered or have been rendered \textit{hors de combat} due to wounds, illness, detention or other cause.\textsuperscript{47} Furthermore, there is no requirement that the entire population of the area in which the attack is taking place must be subjected to that attack.\textsuperscript{48} It is sufficient to show that a certain number of individuals were targeted in the course of the attack, or that individuals were targeted in such a way as to compel the conclusion that the attack was in fact directed against a civilian “population,” rather than against a small and randomly selected number of individuals.\textsuperscript{49} In this regard, the ICTY has held that reference to a ‘population’ is ‘intended to imply crimes of collective nature and thus exclude single or isolated acts which do not rise to the level of crimes against humanity’.\textsuperscript{50}

2.2.1.4 The link between the perpetrator’s conduct and the attack

The acts of the accused must by its nature or consequences be objectively part of the attack. Knowledge on the part of the accused that there is an attack on the civilian population and that his act is part thereof is important.\textsuperscript{51} In other words, the specific act of the accused or so-called underlying offence must be part of the widespread or systematic attack. The ICTY Appeals Chamber in the Tadić case held that:

\begin{itemize}
  \item \textsuperscript{45}Article 7 of the statute did not make abundantly clear definition, and needs to adopted the definition of a “civilian” under International Humanitarian Law. In an attempt to put to rest the definitional crises of who is to be referred to as a “civilian” under the Statute, the International Criminal Tribunal for Rwanda (ICTR) adopted in the case of Rutaganda, Musema, and Seromba’s the provisions of Article 3 of the Geneva Convention which defined a “civilian”.
  \item \textsuperscript{46}See Customary International Humanitarian Law Rule 5.
  \item \textsuperscript{47}Ibid.
  \item \textsuperscript{48}Prosecutor v. Milutinovic case the court indicates implicates magnitude must be high, for further discussion see, Case no. IT.05-87-T.judgment.
  \item \textsuperscript{49}Supra note, 44, p.139.
  \item \textsuperscript{50}Supra note, 11, p.143.
  \item \textsuperscript{51}Supra note, 11, p. 139.
\end{itemize}
to convict an accused of crimes against humanity, it must be proved that the
Crimes were related to the attack on a civilian population (occurring during an
armed conflict) and that the accused knew that his crimes were so related.\textsuperscript{52}

The accused need not necessarily be involved directly in the
commission of the act. As explained above, the ICC includes a policy
requirement; namely that the attack is committed pursuant to or in
furtherance of a State or organizational policy to commit such attack.
This requirement, however, applies to the acts forming an attack in
general.

\textbf{2.2.1.5 Mental element (\textit{Mens rea})}

The requisite subjective element or \textit{mens rea} in crimes against
humanity is not simply limited to the criminal intent (or recklessness)
required for the underlying offence.\textsuperscript{53} The accused must know that
there is an attack directed against a civilian population and that the
acts performed by him must be part of that attack or at least that he
took the risk that his acts were part of the attack.\textsuperscript{54} In other words, the
perpetrator of the crime against humanity must be aware of the ‘broader
context’ in which his actions occur.\textsuperscript{55} As stated above, when these
crimes take the form of persecution, another mental element is required:
a persecutory or discriminatory \textit{animus}.\textsuperscript{56} In this regard, the intent must
be to subject a person or group to discrimination, ill-treatment, or
harassment, so as to bring about great suffering or injury to that person
or group on religious, political, or other such grounds. Let it be noted
that the motives of the accused for taking part in the attack are
irrelevant.\textsuperscript{57} In other words, crime against humanity may be committed
for purely personal reasons.\textsuperscript{58} If the perpetrator committed the attack for

\textsuperscript{52}\textit{Ibid.}
\textsuperscript{53}\textit{Prosecutor v. Kanarac et al.,} case nos. IT-96-23/1-T, Judgment, June 12, 2002, paragraph
\textsuperscript{54}\textit{Ibid.}
\textsuperscript{55}\textit{Tadic}, Appeal judgment, paras 286 and 262.
\textsuperscript{57}\textit{Tadic Appeal judgment,} paras. 286 and 262.
\textsuperscript{58}\textit{Ibid.}
purely personal reasons that could give rise to a rebuttable presumption that he was not aware that his acts were part of that attack.\textsuperscript{59}

2.2.1.6 Specific (underlying) offences

Crimes against humanity consist of any of the specified acts, set out under the statute, committed in the circumstances outlined above. It is important to note that, the acts may be committed either by positive action or by omission. The accused must have committed at least one of the acts enumerated in Article 7(1) of the ICC Statute. In addition to the conduct in question which is in fact already penalized as a crime against humanity, it is possible that particular conduct may amount to crime against humanity through the catch all clause ‘other inhuman acts’ codified in article 7(1(k).

2.3 Relation with Genocide

In popular discourse, from media debates to everyday discussions, “crimes against humanity” and “genocide” are frequently used interchangeably. Sometimes they give the impression that they have the same meaning.\textsuperscript{60} Although these terms are often mentioned in the same context and, indeed, can be related, they are very distinct and carry specific meanings.

Genocide was first recognized as a sub-class of the category of crime against humanity.\textsuperscript{61} However, after the adoption of the Genocide Convention of 1948 and the gradual transformation of its main substantive provisions into customary international law, genocide is categorized as a crime \textit{per se}, having its own \textit{actus reus} and \textit{mens rea}.\textsuperscript{62} Crimes against humanity have many things in common with genocide. Both are heinous and most ideal crime to address the contemporary human rights violations. However, the objective and subjective elements of the two crimes differ in many respects. Crimes against humanity have a broader scope, for they may encompass acts that do not come within the purview of genocide. In the case of crimes against

\begin{footnotesize}
\begin{enumerate}
\item[Ibid.]
\item[\textsuperscript{60}]Supra note 1, p. 181
\item[\textsuperscript{61}]Why relate the Holocaust to other genocides and crimes against humanity, Education Working Group Paper on the Holocaust and Other Genocides, 2010, p., 9.
\end{enumerate}
\end{footnotesize}
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humanity, international law requires the intent to commit the underlying offence plus knowledge of the widespread or systematic practice constituting the general context of the offence.\textsuperscript{63} On the other hand, in genocide what is required is the special intent to destroy, in whole or in part, a particular group, in addition to the intent to commit the underlying offence.\textsuperscript{64} From this viewpoint, we can say the two categories are therefore mutually exclusive. Moreover, the protected right is broader in scope in crime against humanity than in genocide.\textsuperscript{65}

3. The Place of Crime against Humanity in Ethiopia
3.1 Introductory remarks

Having domestic legislation is essential in order ‘to ensure that individuals who are responsible for particularly serious crimes are brought to justice’.\textsuperscript{66} In other words, commitment to achieve a higher level of accountability for international crimes in the domestic arena is determined by how countries have adjusted their legislation to prosecute perpetrators.\textsuperscript{67} A number of international treaties require State parties to enact domestic laws that enable national prosecutions of the crimes contained in those treaties. For example, this obligation is set out in the 1948 Genocide Convention, each of the four 1949 Geneva Conventions,\textsuperscript{68} and the 1984 Torture Convention.\textsuperscript{69} As a result, the majority of State parties to those international treaties have criminalized


\textsuperscript{64}See Prosecutor v. Jelisic, Case No. IT-95-10-A, Judgment (July 5, 2001) and the elements of Crime, Article. 6.

\textsuperscript{65}In genocide protected groups are limited to what is provided in the statute. But in crime against humanity because of widespread or systematic attack, the attack affects not only the individual victim or a group of civilian population but also the international community as a whole.


\textsuperscript{67}Ibid.

\textsuperscript{68}See article 4 of the Genocide Convention and Article 49 of Geneva Convention I, Article 50 of Geneva Convention II, Article 129 of Geneva Convention III and Article 146 of Geneva Convention IV.

\textsuperscript{69}Art. 4 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85.
the relevant international crimes in their national legislation, thereby complying with their international obligations.70

The coming into force of the Rome Statute provided an important impetus for a large number of countries to not only examine their domestic legislation dealing with the regulation of war crimes, crimes against humanity and genocide, but also to introduce changes to their laws to ensure that they were in compliance with international obligations and the tenets of the Rome Statute.71 States have followed different models for the implementation of international criminal law into domestic law. Some countries, such as Denmark and Norway have used regular criminal law provisions for substantive offences, such as murder or torture, and a harsher sentencing regime to take into account the unique and international nature of the domestic offences.72 Other countries have followed what has been called static implementation where the national law dealing with international crimes repeats the definitions of genocide, crimes against humanity and war crimes as set out in the Rome Statute or in some other international agreements.73 Some states repeat the exact wording of these articles of the Rome Statute. This has for instance been done in the United Kingdom and Malta. There are countries which only make reference to them without reproducing the text of these articles of the Rome Statute. This can be seen for instance in the legislation of New Zealand, South Africa, Uganda and Kenya. 74 Yet other countries follow a dynamic model, whereby the conduct criminalized in the Rome Statute is redrafted in the domestic legislation either to provide a better connection to existing criminal offences in the domestic legislation or clarify some of the Rome Statute concepts especially where the crimes in the Statute are vague or imprecise as a result of incorporation of existing customary international law notions.75 The last model, the hybrid model, which has been used for instance in Canada, Costa Rica and Finland combines aspects of both the static and dynamic models in that

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70 Isaac and Babalola, Ibid., pp. 64-78.
72 Ibid.
73 Ibid.
74 Ibid.
75 Supra, note, 11.p. 351.
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some crimes are specifically defined while others are made subject to a reference to international law.\textsuperscript{76}

Coming to Ethiopia, the country has criminalized some international crimes under the previous Penal Code, the current Criminal Code and the Constitution.\textsuperscript{77} Regarding, the genocide crime it seems there is \textit{verbatim} coping of the Genocide Convention of 1948 that has also been the case with regard to war crimes under the Geneva Convention.\textsuperscript{78} Nevertheless, the place of crime against humanity under the Ethiopian law is far from clear which is the main theme of this discussion. In the next section of the article the place of crime against humanity in Ethiopia is assessed in the light of the Penal Code (1957), Criminal Code (2004) and the FDRE Constitution.

3.2 Crime against Humanity under the 1957 Penal Code

International crimes were first recognized under the 1957 Penal Code.\textsuperscript{79} This Code had addressed crimes against humanity and genocide in its article 281. According to this article, committing killings, bodily harm or serious injury to physical or mental health in any way whatsoever, or imposing measures to prevent the reproduction or the continued survival of the members of the group or their children, compulsively moving or dispersal of peoples or their children or placing them in conditions calculated to bring about their death or disappearance against national, ethnic, racial, religious or political group, whether in time of war or in time of peace, is considered as Genocide. This Penal Code was enacted after Ethiopia ratified the Genocide Convention in 1949. Indeed, the above article, borrowed heavily from the Convention albeit with some linguistic differences which gives clearer and elaborate acts of genocide.\textsuperscript{80} While the 1948 Genocide Convention limited the parameters of the victim or protected groups to only four, namely, those belonging to a national, ethnical,

\textsuperscript{76}Supra note, 63 p.21-26.
\textsuperscript{77}The 1957 penal code, 2004 criminal law and FDRE Constitution.
\textsuperscript{78}See Article 281 of the Penal Code of the Empire of Ethiopia of 1957, Proclamation No.158 of 1957((entered into force on 5 May 1958)).
\textsuperscript{79}Ibid.
\textsuperscript{80}See Haile, D., “Accountability for the Crimes of the Past and the Challenges of Criminal Prosecution; The case of Ethiopia” (2000) \textbf{Leuven Law Series} 42.
racial or religious group, the Penal Code of 1957 extended the list beyond what was stipulated in the Genocide Convention and included political groups.\footnote{According to section 281 of 1957 Ethiopian Penal Law, a national, ethnic, racial, religious and political group are covered.} The provision also incorporated distinct protected groups subjected to the ‘act of transferring people’ or ‘children’ to constitute genocide; which is not the case under international law.\footnote{Ibid.} The latter refers only to the transfer of children. In the case of \textit{Special Prosecutor v. Col Mengistu Hailamariam et al} which was brought before the Ethiopian Federal High Court, at the beginning of the trials, many defendants took issue with the discrepancies between the definitions of genocide in Article 281 and the Genocide Convention.\footnote{Special Prosecutor v. Major Hailemeles et al, Amhara regional supreme court, 1999, Criminal Case No 21/90, p.89 [unreported].} The Ethiopian courts held that Ethiopia could go beyond the minimum standards laid down in the Genocide Convention, so long as the aim is to give broad protection.\footnote{Ibid.} In this regard, the writer shares the ruling of the court. International agreements are not prescriptive rather provide minimal standards which States are duty bound to comply with. What is prohibited is that indefensible deviation below the minimal norms.\footnote{Ibid.}

Article 281 appears to treat genocide and crimes against humanity as one and the same offence. The caption of article 281, reads ‘Genocide; Crimes against Humanity’. From this caption it appears the article was intended to govern both genocide and crimes against humanity and treat them as a single offence. This article has narrowed down the definition of crimes against humanity to include only groups and acts listed in the provision. As pointed out above, the definitions of these offences, are more or less similar to the definitions of Genocide under Article II of the Genocide Convention (of course with the exception of the inclusion of political groups). However, the definition of crimes against humanity, as we have seen above in comparison with genocide crime, goes beyond the definition of genocide in terms of the scope of protection and the material acts constituting the crime. In this regard,
Debebe\textsuperscript{86} has correctly pointed out that article 281 of the Ethiopian Penal Code should not be interpreted to include crimes against humanity. If the intention of the legislature was also to penalize crimes against humanity, the wording of the title would appear as ‘Genocide and Crimes against Humanity’. The separation of the two terms without any conjunction but by semicolon is rather an indication that the offence is one, which is genocide and the phrase ‘Crimes against Humanity’ was used as explanatory to the crime of genocide. This writer also shares his views because the whole provision is about genocide, which is distinct from crimes against humanity.

In the cases of \textit{Special Prosecutor v. Major Hailemeles et al}, the defendant claimed that the charge against him was not clear: whether it was crime against humanity or genocide. He argued that the two crimes are separate. The Special Prosecutor on the other hand, argued that article, 281 consists both crime against humanity and genocide and the two crimes are similar except for slight differences. The charge was based on genocide, which is the worst form of crime against humanity. The court did not accept the objection of the defendants and shared the position of the prosecutor.\textsuperscript{87} To sum up, it is difficult under the Ethiopian penal law to differentiate crimes against humanity from genocide. It simply merges the elements of both crimes. The definition of crimes against humanity has been narrowed down to include only groups and acts listed in the provision. However, as stated above the definition of crimes against humanity transcend the definition of genocide in terms of the scope of protection and the material acts constituting the crime. It is the opinion of the writer that, because of such wrongful perception many defendants of the Red Terror were charged with various crimes instead of being charged with crimes against humanity.

\begin{footnotes}
\item[87]\textit{Special Prosecutor v. Major Hailemeles et al}, Amhara regional supreme court, 1999, Criminal Case No 21/90, p.89 [unreported].
\end{footnotes}
3.3 Crime against Humanity under the 2004 Criminal Code and the FDRE Constitution

The 1957 Penal Code was repealed by the new Criminal Code of Ethiopia in 2004. This Code came into force in May 2005. Although the Criminal Code carried amendments, such amendments did not substantially affect the previous provisions on international crimes. The only change under the 2004 Criminal Code was some additions to the list of underlying offences to the protected groups. According to article 269 of the Criminal Code ‘causing members of the group to disappear’ was one additional act that was prohibited and this is similar to what is mentioned in ICC statute as ‘Enforced disappearance of persons’. The new Code also shortened the punishment to rigorous imprisonment of five to twenty five years and added life imprisonment in the case of conviction for more serious offences. With the exception to the above, most of the contents remain largely the same. The new Code contained crime under international law including genocide, war crimes and other serious violations of international law. However, Crimes against Humanity were not included.

The FDRE Constitution, on the other hand has prohibited crimes against humanity as defined by the international agreements ratified by Ethiopia. The Constitution has stated that:

Criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture…

The title of the article which is “crime against humanity” indicates that, similar to the previous perception, crime against humanity is broad and encompasses the listed underlying offences. Moreover, the word “such as” indicates that the underlying offences are the sub class of crime

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89 Article 269 of the criminal law shortened the punishment to rigorous imprisonment of five to twenty five years, added life imprisonment to the punishment of more serious cases and act ‘causing members of the group to disappear’. Apart from those mentioned it largely retained the elements listed above.
90 Article 7(2)(i) of the ICC statute.
91 See article 269 of 2004 FDRE Criminal law.
against humanity. Although, there can be little doubt, whether crime against humanity is broad and includes different underlying offences, the classification preferred by the Constitution of Ethiopia is far from clear. It is confusing, especially considering the clear cut definitions of genocide and crime against humanity in relation to criminal law. It is clear that the Constitution does not impose a criminal liability like criminal statutes. Rather it simply asserts the commitment of the Government to respect its obligations under international instruments.

As stated above, Genocide was initially regarded as a particularly odious form of crime against humanity and there was no separate form of crime against humanity.\(^{92}\) Overtime, however, the definitions of the two crimes have evolved and each has got separate requirements. Crimes against humanity exist as a separate crime and it is no longer useful to describe genocide as a subset of crime against humanity. What is good in the FDRE Constitution is the desire to award a severe punishment for crimes against humanity. Those crimes do not have any procedural and jurisdictional objections such as ‘statute of limitation’ or ‘amnesty’ or ‘pardon’.\(^{93}\) In this regard, the FDRE Constitution envisages strict devotion to the international law obligations to prosecute and punish persons who have committed international crimes. Here, one would like to know, how the spirit of the constitution could be achieved, without recognizing crime against humanity as a separate crime. Thus, it is appropriate to conclude that crimes against humanity do not have any place be it in the Constitution or the Criminal Code of Ethiopia. At this juncture, it is important to advance reasons as to why crimes against humanity should be criminalized as separate crimes.

**3.4 The Rational for Specific Provision Penalizing Crimes against Humanity**

From a practical point of view, the most logical justification for criminalizing an act is to first verify whether the conduct in question is

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\(^{93}\) See Constitution of the Federal Democratic Republic of Ethiopia, Proclamation 1/95, Negarit Gazette, Article.28(1).
perhaps not already subsumed under existing law which criminalizes
the conduct.\textsuperscript{94} If the perpetrators of a particular conduct can be
adequately prosecuted using existing law, creating a new crime would
be redundant. While overlapping between crimes is allowed, a new
crime must be materially distinct; in the sense that it must have at least
one element that is not encompassed in existing crimes. In other words,
the act should require proof of facts that is not required by other crimes.
Such kind of requirement is mentioned both in the literature and
practice with regard to international crime law in a broad sense. Been
Sau argues, for example, that the fact that the existing international and
transnational crimes already prohibit the same conduct under a different
nomenclature calls for a pragmatic, but compelling objective not to
separately criminalize that conduct.\textsuperscript{95} On the other hand, if a crime has
distinct or unique elements, it warrants to be specifically criminalized
separately. As stated above, crime against humanity consists of unique
elements which are not adequately reflected in other crimes specifically
genocide. This justifies criminalization of crimes against humanity as a
separate offence.

The uniqueness or distinctiveness of international crimes and the
concern for proliferation of offences, and duplication of crimes also has
procedural importance. This aspect may be demonstrated by turning to
the practice of cumulative convictions, which is accepted before
international criminal bodies. According to the case of ICTY,
cumulative convictions of two or more offences for the same conduct
are allowed, in so far as each distinctive crime contains at least one
materially distinctive element not included in the other crimes.\textsuperscript{96} In
other words, what happened in the \textit{ad hoc} tribunals was that, the same
acts can so often be charged as either war crimes or crimes against
humanity or genocide or both.\textsuperscript{97} Within the crimes against humanity

\textsuperscript{94}See \textit{Haenen, Supra note}, 1, p.810.
\textsuperscript{95}\textit{Ibid}, p.811.
\textsuperscript{96}\textit{Ibid}, p. 813

\textsuperscript{97} Slobodan Milosevic, the former President of Yugoslavia and others serving under him
were accused for genocide and crimes against humanity and war crimes. For details on
those prosecutions, see ICTY website: \url{http://www.un.org/icty.as} those crimes are
intersecting or they are crimes which only call for some higher level of specialization in
order to determine the type of crime (Cassese, 2003). Many factors were taken to enter
into the prosecutors’ charging calculus along with the accessibility of evidence, the
category itself, the same acts may be charged both as stand-alone murders or exterminations or inhumane treatment and as persecution, using the underlying murders as the deprivation of rights required for persecution. Thus, a single act or set of actions such as inhumane treatment or rape can form the basis for charges of war crimes, and several separate crimes against humanity. As a result indictment may often have dozens of counts based on a single fact situation. So long as the crimes have an independent element not found in the other, they can support separate convictions.

On the other hand, the presence of particular provision of crime against humanity has theoretical and practical significance. As stated above, crime against humanity is broader in scope, it encompass acts that do not come within the purview of genocide. For example crimes such as discrimination based on racial, ethnic or religious grounds, enforced prostitution and other forms of sexual violence are included within the domain of crime against humanity not in genocide crime. Thus, it prevents heinous violations of human rights that do not fit into the definition of different categories of international crimes particularly crimes of genocide and war crimes. Such crimes could validly constitute crimes against humanity. Because of the peculiarities of definition, some of the worst crimes in history may not be brought as genocides but only as crimes against humanity. For example, in

differences in definitions and levels of proof between genocide, crimes against humanity and war crimes. As a result of the difficulties, the assessment reflects that crimes against humanity can be easily investigated in situations of political violence in both armed and unarmed conflict, as has been done by the ICC in its interventions in the situations in Sudan, Kenya, Ivory Coast, and Libya. Crimes against humanity charges are more preferred than genocide because of the complexity of proving the specific intention to destroy in whole or in part required for genocide charges to be sustained. Brian Dube, Understanding the content of crimes against humanity: Tracing its historical evolution from the Nuremberg Charter to the Rome Statute, Afr. J. Pol. Sci. Int. Relat, p.182, 2015.

In accordance with the case law of the ICTY, cumulative convictions of two or more offences for the same conduct are only allowed in so far as each distinct crime contains at least one materially distinct element not included in the other crimes. If this is not the case, cumulative convictions are impermissible and instead, the more specific provision will have primacy over the less specific offence in accordance with the lespecialis-rule.412-413.(Prosecutor v. Delalić, Mucić, Delić and Landžo (Appeal Judgment), ICTY IT--96--21--A, Feb. 20, 2001, para. 412 (hereinafter Čelebići Appeal Judgement).
Cambodia mass atrocities against millions of city dwellers and upper social class Cambodians committed during the Khmer Rouge regime were not genocide rather crimes against humanity. There is a widespread agreement among commentators that such crimes do not qualify for genocide treatment due to their “racial, religious, national or ethnical” character. Similarly, the alleged Darfur atrocities in the Sudan constituting purposeful killings, rapes and relegation of villagers to a way of life almost certain to destroy them have been labeled by an expert UN Commission of Inquiry as likely crimes against humanity rather than genocide. These experts were not convinced that the special genocidal intent of destruction of a group as such could be shown as opposed to a relentless and barbarous campaign to ferret out rebels hidden among the villagers. Therefore, the above discussion shows the need of having a separate list of crime against humanity.

3.5 What to take into consideration with regard to Crimes against Humanity in Ethiopia

Some might argue that crimes against humanity as an international crime has already acquired the status of customary law and existed as a distinct crime under international criminal law. Therefore, having a separate legislation may not be that important. There has been little or no debate with respect to the core crimes whether they reach customary international law status or not. However, a question has been raised as to how this customary international law could apply at the national level. Some people have suggested that regarding the possible use of crimes against humanity and other core crimes at national level article 15 of the 1966 International Covenant on Civil and Political Rights seems possible answer. Sub article 1 of this article prohibits retroactive application of any criminal offences. On the other hand sub-article 2 of the same article provides an exception. It states:

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99 Supra note, 63, p. 627.
100 See W. Hays Parks, The ICRC Customary Law Study: A Preliminary Assessment, 99 AM. SOC'Y INT'L L. PROC. 208 (2005). Not all treaties, however, qualify as expressions of customary law—especially if they have not been adopted or adhered to by a majority of civilized nations and not all customary law is incorporated in treaties.
'Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations' [Emphasis added].

The phrase “according to the general principles of law recognized by the community of nations” in article 15(2) has the same meaning as customary international law. Given the fact that crimes against humanity have been known to international criminal law since the judgment of the International Military Tribunal in Nuremberg in 1948 and considering the fact that this Covenant has been ratified by 160 countries the argument that crimes against humanity are part of domestic law from the time that a country has ratified the Covenant cannot be easily assailed. In this regard, one might argue that the above Convention is part of Ethiopian laws as per article 9 (4) of the Constitution. However, there are existing theoretical and practical challenges to apply this legal position in Ethiopia.

The challenge begins with the status of international human rights instruments in Ethiopian law which has always been controversial. The method of incorporation of international human right treaties in Ethiopia indicate that Ethiopia does not strictly adhere to one method of incorporation (dualist and monist). The Ethiopian constitution provides for both methods. An international agreement in Ethiopia is concluded by the State’s Executive branch which must subsequently submit it for ratification to the House of Peoples Representatives (HPR). Under Article 55(12) of the Ethiopian constitution, the HPR ‘shall ratify international agreements concluded by the Executive’. Once they are ratified, all international agreements, including human rights instruments, are integral parts of the law of the land (Art.9 (4) of the constitution). According to these provisions, Ethiopia could be classified as dualist as a national legislation needs to be promulgated in order for the provisions of international instruments to be implemented at the domestic level. Nevertheless, Parliament merely ratifies a proclamation. Hence, this does not enable us to conclude the country is dualist.

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101 Supra note, p.74-76.
102 The Constitution further provides, under Article 9(4), that international conventions ratified by Ethiopia are part of Ethiopian law.
totally dualist. Thus, this area poses challenges on the normative position of ratified treaties and role of courts as far as their enforcement is concerned. The Constitution declares its supremacy over any law including international instruments. As stated above, article 9(4) of the constitution makes ratified treaties integral part of the laws of the land. This presupposes that the ratified treaties are subordinate to the constitution. The same Constitution under art 13(2) has stated that:

The fundamental rights and freedoms specified in chapter three of the constitution shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.

The insertion of the phrase “… in a manner conforming to…” shows that the Constitution is not supreme to the above human rights instrument. Hence, there is controversy with supremacy of the constitution.

The other problem is related to the competency, attitude and related practice of the judiciary. The functioning of the judiciary is unsatisfactory owing to the weak judicial jurisprudence. In addition to the ambiguity on status of international instruments in the FDRE Constitution, there is lack of expertise and impartiality in the judicial process. The problem also lies on the judiciary itself for the attitude and related practice towards its appropriate role.

The other problem is, whether proceedings for international crimes should be undertaken only on the basis of international customary law. In this regard, it is better to look at the experience of other countries. Some States do not undertake proceedings for international crimes only on the basis of international customary law. In such States, no proceedings for international crimes on the basis of international customary law will take place unless there is an express national legislation to that effect. For example, in the case of Reporters sans

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103FDRE Constitution, Art 9(1) is called supremacy clause which makes any ratified laws including international instruments ratified by Ethiopia subordinate to it.


105Ibid.
frontiers v. Mille, the Paris Court of Appeal held that, it lacked jurisdiction over crime against humanity and other international crimes in the absence of provisions of domestic law and that international custom cannot have the effect of extending the extraterritorial jurisdiction of the French courts.¹⁰⁶

Coming to Ethiopia, there is no explicit provision that mentions that customary international law could be used as a source of law, except article 2(2) of Proclamation No.321/2003 which provides for the Amendment of the Federal Courts. This proclamation incidentally states that “without prejudice to international diplomatic law and ‘custom’ as well as other international agreement to which Ethiopia is a party, […]”. In this regard the insertion of the word “custom” shows that the proclamation implicitly recognizes custom as a source of law. Yet, there is no developed jurisprudence of referring to international customary law. Apart from reference to customary international law regarding international crimes, Courts in Ethiopia are not familiar with even referring to international agreements ratified by the country.

4. Concluding remarks

The crime of genocide and crimes against humanity were not known before the Second World War in their current form. Although there were acts, before the 1945 events which would have been considered genocide and crimes against humanity, they were not termed as such. They were recognized and identified as crimes of concern for the international community following the London Charter establishing the International Military Tribunal at Nuremberg which recognized crimes against humanity. However, what was under the Charter was considered as one single crime; today, however, they are two separate offences. A major advancement or development of international law concerning crimes against humanity occurred almost after half a century later when the ICTY and ICTR and its subsequent tribunals were established. The most comprehensive definition of crimes against humanity appears in Article 7 of the Statute of the ICC. The Statute provides more specific definition of crime against humanity compared with any previous international courts statute when it comes to defining

¹⁰⁶See further Cassese supranoste 30, p.303-304.
crimes. While many questions regarding crime against humanity are answered at the international level, the problem continues at the national level. There is no uniform legal regime regarding crime against humanity across different nations. This kind of variation would obviously undermine the conception of the crimes and the integrity of the criminal justice system. In Ethiopia as discussed above, crime against humanity is not recognized as a separate crime. There is no law in Ethiopia which defines crime against humanity as a separate crime. The perception of the legislator and the courts is simply that crime against humanity is a broad concept encompassing the international crimes. In this regard, it is my strong opinion that, rather than looking at customary international law to fill the gaps the legislator should go one step further to enact separate provisions to cover crimes against humanity. There are a number of international experiences from which Ethiopia can draw in order to meet her legal framework obligations. Moreover, Ethiopia should reconsider the provision related to crime against humanity under the FDRE constitution. Since a comprehensive definition of crime against humanity is found in the ICC statute the writer appeals to Ethiopia to pick a leaf from ICC.
Control and Change of Control in Regulation of Mergers and Acquisitions: A Reflection on The Fair Competition Commission’s Practice

A. S. Mlulla* & D. J. Nangela*

Abstract

“Change of control” in mergers and acquisitions seems to be a controversial issue. For some corporate law analysts, it is an issue that needs to be perceived through the corporate (company) law lenses while to competition law analysts it is as a matter falling strictly within the purview of competition law. The key question is: should this concept be understood from what may be considered a purely ‘corporate or company law’s perspective’ or should it be given a different attention from a ‘competition law’s perspective?’ This paper sets out to address this question and how the Fair Competition Commission interprets this concept.

Keywords: Competition, Control, Mergers, Acquisition, Minority shareholding, Change of control.

1. Introduction

“Change of control” in mergers and acquisitions in Tanzania seems to be a controversial issue. For some corporate law analysts, it is an issue that needs to be perceived through the corporate (company) law lenses. To others, especially the competition law analyst, it is seen as a matter falling strictly within the purview of competition law. In view of this, there has been an on-going (underground) debate between various corporate legal counsel who act for and represent interest of various corporate entities that are obliged to notify mergers and acquisitions in accordance with the requirements of the Fair Competition Act, 20031 (referred hereafter as the “FCA”). The gist of their debate concerns the appropriate perspective which needs to be adopted when defining the concept of “change of control”. In other words, should this concept

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1Cap. 285 of the Laws of Tanzania.
be understood from what may be considered a purely ‘corporate or company law’s perspective’ or should it be given a different attention from a ‘competition law’s perspective?’

This paper sets out to address this question. In particular, it seeks to provide clarity on the concept of “change of control” in mergers and acquisitions in Tanzania and how the Fair Competition Commission (referred herein after as the “FCC”) interprets this concept which, although it prominently features in section 2 of the FCA, the Act does not define it.

In terms of its taxonomy, the discussion in this paper is structured under seven parts. Part 1 introduces the discussion and its main underlying problem. Part 2 considers the conflicting perspectives upon which the concept of ‘change of control’ is perceived to be anchored. Part 3 considers the corporate (company) law perspective on ‘change of control.’ Part 4 carries a discussion regarding the statutory provisions under the FCA relevant to the discussion. Part 5 mirrors on how other jurisdictions define this concept from competition law viewpoint. Part 6 is the FCC position on what amounts to change of control and, finally, Part 7 concludes the discussion with recommendations.

2. Perspectives Regarding “Change of Control”

The definition or interpretation of what amounts to change of control in mergers and acquisitions, when viewed from a competition law perspective, is different from the way it may be perceived and interpreted under the company law perspective.

Merger is defined as an acquisition of shares, a business or other assets, whether inside or outside Tanzania, resulting in the change of control of a business, part of a business or an asset of a business in Tanzania. As such in the Tanzanian context a merger includes an acquisition and is synonymous to an amalgamation.

From a competition law perspective in many jurisdictions, the issue seems to have been treated differently based on the definition of mergers provided for in the respective statutes and applied in the review

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2 Section 2 of the FCA.
of mergers and acquisitions. Change of control, covers share acquisitions that may fall short of an outright majority of the target firm company’s shares where the purchaser may have the potential ability to exert significant influence over a company’s affairs.

In view of this, it is therefore clear that some transactions may require notifications due to the fact that such transactions would enable the buyer to exercise a competitively significant influence over affairs of the company even if the transaction involved may have been an acquisition of insignificant ownership of the assets (shares) of a company.

On the other hand, the interpretation and application of the concept of change control may as well go beyond the entitlement of majority voting in general meetings or in the board of directors or an acquisition of a majority shareholding in the issued share capital.

Of great concern, for instance, is the fact that there is a possibility of there being an acquisition of shares or a business or any other assets exceeding the stipulated threshold (where applicable). Such a scenario has the potential to constitute change of control as long as there is an exercise of changing hands of the said assets or business or a part of that business between the merging parties (original owners (s) (the target) and the acquirer). The changing of hands is considered the same even in scenarios whereby the merging parties are from within the same firm/group (internal restructuring) or otherwise based on the interpretation given in foregoing paragraph.

Consequently, and, as earlier noted, in Tanzania, as is the case in other jurisdictions, the issue regarding ‘change of control’ has brought about heated debate as to its definition and interpretation when applied in regulation of mergers and acquisitions. For a more focused discussion, the next section provides insights to the relevant provisions of the FCA regarding the change of control issue.
3. The Company Law Perspective Regarding Change of Control

As stated in our earlier discussion, there are slight variations regarding change of control as understood by corporate lawyers applying the Company Law and competition lawyers applying the competition law approach. To many corporate lawyers, ‘change of control’ occurs when there is an acquisition of all or substantially all assets of a party; any merger, consolidation or acquisition of a party with, by or into another corporation, entity or person; or any change in the ownership of more than fifty percent (50%) of the voting capital stock of a party in one or more related transactions.³

In principle, the precise definition varies by jurisdiction and entity. Typically, and from a corporate context (company law perspective), change of control refers to a transfer of ownership in which a new person or entity obtains a fifty percent or greater ownership interest. However there is a continuum in the legal definition of what is change of control that may stretch to even an assignment by operation of law. Thus, in company law, change of control may also mean the occurrence of anyone or more of the following:

(i) ‘Any Person becomes an Acquiring Person, except as the result of: (a) any acquisition of Voting Securities of the Company by the Company; or (b) any acquisition of Voting Securities of the Company directly from the Company (as authorized by the Board).’ ⁴

(ii) ‘Individuals who constitute the Incumbent Board cease for any reason to constitute at least a majority of the Board; and for this purpose, any individual who becomes a member of the Board … whose election, or nomination for election by holders of the Company's Voting Securities, was approved by the vote of at least a majority of the individuals then constituting the Incumbent Board [and] considered a member of the Incumbent Board (except that any such individual whose initial election as director occurs as the result of an actual or threatened election contest, …. or other actual or threatened solicitation of proxies or consents by or on behalf of a Person other than the Board shall not be so considered).’ ⁵

(iii) ‘The consummation of a reorganization, merger, share exchange, consolidation, or sale or disposition of all or substantially all of the

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³See, ‘Change of Control & Legal Definition’ (from http://definitions.uslegal.com/c/change-in-control/ (accessed on 13/05/2016)).
⁴Ibid.
⁵Ibid.
assets of the Company unless, in any case, the Persons who or which Beneficially Own the Voting Securities of the Company immediately before that transaction Beneficially Own, directly or indirectly, immediately after the transaction, at least 75% of the Voting Securities of the Company or any other corporation or other entity resulting from or surviving the transaction (including a corporation or other entity which, as the result of the transaction, owns all or substantially all of Voting Securities of the Company or all or substantially all of the Company's assets, either directly or indirectly through one or more subsidiaries) in substantially the same proportion as their respective ownership of the Voting Securities of the Company immediately before that transaction. 

(iv) ‘The Company's shareholders approve a complete liquidation or dissolution of the Company.’

In law, a company controlled by another is referred to as a subsidiary company. The Companies Act defines what a subsidiary or a holding company is. The section provides that for the purpose of the Act:

A company shall subject to the provisions of subsection (3), be deemed to be a subsidiary of another if, but only if:

(a) that other either-
   (i) is a member of it and controls the composition of its board of directors; or
   (ii) holds more than half in nominal value of its equity share capital; or

(b) the first-mentioned company is a subsidiary of any company which is that other's subsidiary.

The law further provides that:

[for the purposes of subsection (1), the composition of a company's board of directors shall be deemed to be controlled by another company if, but only if, that other company by the exercise of some power exercisable by it without the consent or concurrence of any other person can appoint or remove the holdings of all or a majority of the directorships; but for the purposes of this provision

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6 Ibid.
7 Ibid.
8 Section 487 (1) of Cap. 212.
9 Ibid.
10 Section 487 (2) of the Act of Cap. 212.
that other company shall be deemed to have power to appoint to a directorship with respect to which any of the following conditions is satisfied, that is to say-

(a) that a person cannot be appointed thereto without the exercise in his favour by that other company of such a power; or

(b) that a person's appointment thereto follows necessarily from his appointment as director of that other company; or

(c) that the directorship is held by that other company itself or by a subsidiary of it.

The other relevant part of the law\textsuperscript{11} provides:

(3). In determining whether one company is a subsidiary of another-

(a) any shares held or power exercisable by that other in a fiduciary capacity shall be treated as not held or exercisable by it;

(b) subject to the two following paragraphs, any shares held or power exercisable-

(i) by any person as a nominee for that other (except where that other is concerned only in a fiduciary capacity); or

(ii) by, or by a nominee for, a subsidiary of that other, not being a subsidiary which is concerned only in a fiduciary capacity; Shall be treated as held or exercisable by that other;

(c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned company or of a trust deed for securing any issue of such debentures shall be disregarded;

(d) any shares held or power exercisable by, or by a nominee for, that other or its subsidiary (not being held or exercisable as mentioned in paragraph (c)) shall be treated as not held or exercisable by that other if the ordinary business of that other or its subsidiary, as the case may be, includes the lending of money and the shares are held or power is exercisable as above by way of security only for the purposes of a transaction entered into in the ordinary course of that business.

(4) For the purposes of this Act, a company shall be deemed to be another's holding company or alternatively its parent company if, but only if, that other is its subsidiary.

(5) In this section the expression "company" includes anybody corporate, and the expression "equity share capital" means, in relation to a company, its issued share capital excluding any part thereof which, neither as respects dividends nor as respects capital, carries any right to participate beyond a specified amount in a distribution.\textsuperscript{1}

\textsuperscript{11} Section 487 (3) of the Act of Cap. 212.
As already stated, it is worth noting the above understanding regarding the concept of “control” (and, thus change of control) from the corporate law perspective. This perspective may also be observed from the manner in which the Capital Markets and Securities Regulations governing Mergers and Takeovers (acquisitions) define what amounts to “control”. According to these regulations, the term "control" includes the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreement or voting agreements or in any other manner and for the purpose of these Regulations, acquisition of control include acquisition of all or substantially all assets as opposed to shares.’ Furthermore “substantial acquisition" means acquisition of twenty per cent or more of the shares or voting rights of any company.’

The term ‘takeover’ is defined as follows:

A scheme involving a making of an offer for acquisition by or on behalf of a person or persons acting in concert with him-

(a) of all shares or voting rights in the offeree Company;
(b) of such shares in any company which results in an offeror acquiring control in an offeree, or
(c) of any shareholding in a subsidiary of a public or listed company that entitles the acquirer to the distribution of earnings of the subsidiary amount to more than 50% of consolidated total earnings of the public or listed company.

As earlier stated in this paper, the competition law perspective does not follow the corporate law context in defining change of control especially in relation to mergers and acquisitions. In the Tanzanian context, there is only one point of agreement between the company law and the competition law perspectives in relation to defining the concept of control. However, this provision does not apply to mergers. It only applies to transactions that relate to agreements and abuse of

\[\text{12 See Regulation 2(1) of the Capital Markets and Securities Regulations, 2006.}\]
\[\text{13 Ibid.}\]
\[\text{14 Section 4 (1) of the FCA.}\]
\[\text{15 Sections 8 and 9 of the FCA.}\]
dominant position;\textsuperscript{16} for the purposes of those provisions, if a body corporate controls another body corporate, the bodies corporate shall be regarded as a single person.

The FCA\textsuperscript{17} further elaborates when control in those circumstances will be said to exist. In particular, the subsection provides that:

A body corporate shall control another body corporate within the meaning of sub-section (1) if the first-mentioned body corporate:

(a) owns or controls a majority of the shares carrying the right to vote at a general meeting of the other body corporate;
(b) has the power to control the composition of a majority of the board of directors or other governing organ of the other body corporate; or
(c) has the power to make decisions in respect of the conduct of the affairs of the other body corporate.

Clearly, as it may be seen from the above, section 4(2) of the FCA, as cited herein above, has captured the spirit of control as may be understood from the corporate law perspective.\textsuperscript{18} But as argued earlier, section 4 of the FCA has purposely excluded section 11 of the FCA (which deals with mergers and acquisitions). In our view, this exclusion is very purposeful and quite informed by the fact that the corporate perspective, which applies also to transactions governed by section 8 of the FCA (concerning anti-competitive agreements); section 9 (cartels) and 10 (abuse of dominance), does not apply to transactions involving mergers. Instead, such transactions are to be analysed by way of invoking a competition law perspective; it being wider enough to ensure that the process of competition and the objectives of competition law are promoted, protected and that markets remain contestable\textsuperscript{19} even in a post-merger scenario.

\textsuperscript{16} Section 10 of the FCA.
\textsuperscript{17} Section 4(2) of the FCA.
\textsuperscript{18} See section 487(1) and (2) of Companies Act, 2002, Cap. 212. See also regulation 2(1) of the Capital Markets and Securities (Substantial Acquisitions, Takeovers and Mergers) Regulations, Government Notice No. 168 published on 1/12/2006.
\textsuperscript{19} Contestable markets are imperfectly competitive markets in which firms face real and potential competition. A perfectly contestable market is defined as a market 'in which entry is absolutely free and exit absolutely costless.' See, Davies, J.E., “Competition, Contestability and the Liner Shipping Industry” (1986) Journal of Transport Economic and Policy, pp.299-312, at 302.
Indeed, as it may be observed from the definition of what amounts to a merger, the FCA approach to defining this term differs from the corporate law approach, taking, for instance, the definition of a merger under regulation 2(1) of the Capital Markets and Securities Regulations (cited above). Thus, as noted, a merger under the Fair Competition Act is said to be ‘an acquisition of shares, a business or other assets, resulting in the change of control of a business, part of a business or an asset of a business.’\(^\text{20}\) (Emphasis added).

While any of the above occurrences or explanations, may be construed, under the corporate law context, as constituting a change of control, one may argue that their non-acceptance by Competition Authorities is due to the fact that they present a narrow view and would not allow the relevant competition authorities to examine a wide range of transactions which could result in an alteration of the market structure and in particular reduction in the level of competition in the relevant market as correctly stated in the case of Distillers Corporation (South Africa) Limited.\(^\text{21}\)

4. Statutory Provisions for Change of Control
4.1 Relevant Provisions in the Fair Competition Act

The following sections in the Fair Competition Act provide for change of control. First is section 2 of the FCA which defines a merger to mean an acquisition of shares, a business or other assets, whether inside or outside Tanzania, resulting in the change of control of a business, part of a business or an asset of a business in Tanzania.

Secondly is section 11(1) of the FCA which provides that a merger is prohibited if it creates or strengthens a position of dominance in a market.

\(^{20}\)Section 2 of the FCA, Cap. 285.

\(^{21}\)See In the matter between: Distillers Corporation (South Africa) Limited, (First Appellant); Stellenbosch Farmers’ Winery Group Limited, (Second Appellant) and Bulmer (S.A) (Proprietary) Limited, (First Respondent); Seagram Africa (Proprietary) Limited (Second Respondent), 27th November 2001, in the Competition Appeal Court of South Africa Case No. 08/CAC/MAY 01.
Thirdly is section 5(6) of the FCA. This section provides that a person has a dominant position in a market if both (a) and (b) apply:

(a) acting alone, the person can profitably and materially restrain or reduce competition in that market for a significant period of time; and

(b) the person's share of the relevant market exceeds 35 per cent.

Fourthly is section 2 of the FCA which provides that "competition" "market" and "dominant position in a market" are economic concepts and, subject to the provisions of this Act (FCA), shall be interpreted accordingly. (Emphasis supplied).

Fifthly is section 4 (1) of the FCA which provides that for the purposes of sections 8, 9 and 10 of the FCA, if a body corporate controls another body corporate, the bodies corporate shall be regarded as a single person. A body corporate shall control another body corporate within the meaning of sub-section (1) if the first-mentioned body corporate:

(a) owns or controls a majority of the shares carrying the right to vote at a general meeting of the other body corporate;

(b) has the power to control the composition of a majority of purposes the board of directors or other governing organ of the other of body corporate; or

(c) has the power to make decisions in respect of the conduct of the affairs of the other body corporate.

It is worth noting that the provisions of section 4 of the FCA (cited above) reflect the understanding of the concept of ‘control’ as may be understood from the company law’s perspective. And, it has decisively excluded section 11 of the FCA in its ambit of consideration as this section deals with mergers from a competition perspective.

4.2 Change of Control in Relation to Mergers

Neither the FCA nor the FCC Procedure Rules, 2013 have defined the term “Change of Control” as provided in section 2 of the FCA with regard to definition of a merger. Furthermore, section 4 of the FCA has provided for control of one company by another in so far as sections 8, 9 and 10 of the FCA are concerned. The FCA’s express mention of the provisions to which the defined control is applicable means that those

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22 Section 487 of Cap. 212.
excluded from the mentioned list are not affected by the definition. As mergers and acquisitions are operationally dealt with under section 11 of the FCA, it means that the definition under section 4 is not applicable to mergers. This exclusion of mergers at the time of drafting the law was not accidental; rather it was a lacuna occasioned by design.

Basically, it is the versatility and predictive nature of merger regulation that prompts and justifies the lacuna at the early stages of development of Competition Law. Practice has shown that the definition of “change of control” in the merger regulation realm has been coded in subsequent generation of Competition Laws so as to allow the jurisprudence to inform its full development. In Tanzania, this lacuna has in practice been filled by the FCC albeit with contention from the receiving end of the users of the FCA.

Reading and construing the FCA provisions as detailed in 2.1 above shows that there is a direct connection between mergers, markets and position of dominance in both the definition and application perspectives. It suffices, however, to state that, as one attempts to fill the said lacuna by defining and applying the change of control phenomenon with reference to regulation and control of mergers in Tanzania, the cautionary approach would be to consider such definition and application thereof jointly other than severally with the market and dominant position.

The above position is also reinforced by the fact that "competition" "market" and "dominant position in a market" are economic concepts and, subject to the provisions of the FCA (as related to regulation of mergers) should be interpreted accordingly. These provisions when considered under the auspices of the spirit of the FCA, (which is “to promote and protect effective competition in trade and commerce, to protect consumers from unfair and misleading market conduct”), show that, the FCA’s context is dynamic and versatile. It is thus vital to emphasize that the definition of change of control leans more towards the markets, prevention of potentially harmful dominance to markets and firms’ rivalry (competition) in the markets rather than as a legal provision aimed at regulating and controlling mere existence of the said companies as may be provided for in the spirit of the Companies Act.
5. Change of Control as Defined in Other Jurisdictions

5.1 The EU Position

Under the EU Merger Regulation (EUMR), the concept of ‘concentration’ is used to provide the basis for the EU Competition Commission’s powers under that regulation to determine mergers.\(^{23}\) Article 3(1)(a) and (b) of the EU Merger Regulations define two categories of concentrations, namely, those arising from a merger between previously independent undertakings (Article 3(1)(a)) and those arising from an acquisition of control (Article 3(1)(b)). Under this Article 3, thus, ‘any transaction or group of transactions which brings about ‘a change of control on a lasting basis’ by conferring ‘the possibility of exercising decisive influence on the undertaking concerned’ is a concentration which is deemed to have arisen for the purposes of the EUMR.’\(^{24}\)

In distinguishing how the concept of control under the competition law perspective may be understood differently from the company law’s perspective, the EU Merger Regulation focuses on decisive influence enjoyed on the basis of rights, assets or contracts or equivalent \textit{de facto} means.\(^{25}\) In this regard, the concept of change of control is also defined to include a “situation where one party acquires the possibility of exercising decisive influence over another company”.\(^{26}\) Decisive influence may arise by the ownership of all or part of the company’s assets or rights which confer decisive influence on the decision-making process of the company (for example, by means of voting rights attached to shares or contractual rights).\(^{27}\)


\(^{25}\)Ibid, Para 22.


\(^{27}\)Article3 (2) EU Merger Regulation.
Considering the above situation, it is clear that the EU Merger regime also covers the review of minority acquisitions. This fact, however, has been a subject of debate the gist of which is whether the scope of the definition of change of control should be widened to extend even to circumstances where the acquisition of shareholding does not confer control of an entity involved. However, it has been made clear that even if an acquirer of a minority shareholding in an entity may not assume the nature of ‘control’ of that entity but merely obtains an opportunity to influence management and commercial strategy of the target, that sort of influence will amount to a form of ‘indirect control’. From a competition law perspective the exercise of such influence can decisively be expected to reduce competition notwithstanding that it falls short of control.28 Indeed, in the case of Ryanair/Aer Lingus29 the European Competition Commission considered that, the Ryanair’s minority shareholding of 29% in Aer Lingus was likely to affect the commercial policy and strategy of Aer Lingus. In another case, a shareholding of 34% (which was to be increased to 42% by a capital reduction of the share capital) was held to confer decisive influence over the target’s affairs.30

From the above discussion one may state, in a nutshell, that under the EU Merger Regulation regime, control can be exercised on a de facto or legal basis, depending on whether an acquisition of stake in a particular entity confers upon the acquiring party a decisive influence over the target, regardless of the size of the shareholding concerned.

5.2 The UK Position

In the United Kingdom, merger provisions are contained in the Enterprise Act 2002.31 Under it, the issue of “control” exists when an enterprise is able, at least, to exercise material influence over the policy of another. Under the Act, ‘control’ with regard to acquisition of shares has been put under the following three categories, namely:

29Case T-411/07R Aer Lingus Group Plc v. Commission.
30Case IV/M.1046 Ameritech/Tele Danmark).
31See the UK Enterprises Act, 2002.
(i) \textit{de jure} (controlling interest by having more than half of the shares),

(ii) \textit{de facto} (right to control policy without having controlling interest); and

(iii) material influence (influential ability).

The first level or category, the \textit{de jure} control is not problematic. It is clear that, under a \textit{de jure} circumstance an acquisition of “control” will arises where, for instance, the acquirer purchases a majority of the target company’s shares, (a 50+), which means he will have obtained outright voting rights that permit him to control the target company’s board, management and/or business direction. What may bring a similar discussion as the one held in Part 4.1 above are the \textit{de facto} and material influence (influential ability) categories especially when the issue of acquisition of a minority shareholding is involved in assessing competition in the relevant market. All in all in the UK the Enterprises Act, 2002 permits the relevant Competition and Market Authority (previously the OFT) to treat material influence and \textit{de facto} control as equivalent to control.

As already pointed out, under the \textit{de facto} level, control occurs when an entity controls the target enterprise despite not holding the majority of voting rights. This could arise where the acquirer would have, in practice, more than 50 per cent of votes cast at shareholder meetings because of shareholder turnout. This is somewhat akin to the concept of ‘decisive influence’ under the EU Merger Regulation.

The third level, i.e., the ‘ability to exercise material influence’ is considered to be ‘the lowest level of control that may give rise to a relevant merger situation.’ Its applicability in the context of the UK Enterprises Act ‘focuses on the acquirer’s ability to influence policy relevant to the behavior of the target in the marketplace.’ In particular, in the UK, a shareholding structure conferring more than 25 per cent of

\footnote{32See section 26 of the UK Enterprises Act, 2002.}
\footnote{33See, section 26(3) of the Act. See also OECD, “Definition of Transaction for the Purpose of Merger Control Review”, \textit{DAF/COMP(2013)25}, 2013 at p. 191.}
\footnote{34See OECD, “Definition of Transaction for the Purpose of Merger Control Review”, \textit{Ibid.}, at p.190.}
\footnote{35\textit{Ibid}, at p.191.}
\footnote{36\textit{Ibid}.}
voting rights generally enables the holder to block special resolutions. Consequently, such a share of voting rights of over 25 per cent is considered to be ‘presumptively conferring the ability to materially influence policy of a target company. This is what the Office of Fair Trade (OFT) considered in Ryanair/Aer Lingus, whereby it was found that ‘Ryanair’s ability to block special resolutions to disapply pre-emption rights (which it had applied in the past) restricted Aer Lingus’ access to capital, which was a factor in finding that Ryanair had or may have material influence over Aer Lingus.’

Similarly, in the case of BskyB/ITV, where BskyB acquired 17.9% shares in ITV, a public listed company, it was found that the ability to block special resolutions, particularly in blocking resolutions to waive pre-emption rights, was a key component to Sky exerting material influence over ITV. The influence arose out of the BskyB’s ‘ability to block a waiver of pre-emption rights’ a fact which was seen to be ‘particularly important if the company is looking to raise funds quickly to finance a strategic acquisition’.

Moreover, there was also evidence that BSKyB was attending and voting at ITV shareholders’ meetings. This created a strong belief that BSKyB had material influence over ITV. This evidence was another clear indication that BSKyB was likely to represent more than 25 per cent of votes cast at ITV shareholders’ meetings (based on shareholder turnout figures) and as a result BSKyB may have the ability to block special resolutions at such meetings. In view of all such circumstances, a presumption was held to the effect that BSKyB had material influence in relation to ITV.

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37 See Completed acquisition by Ryanair Holdings plc of a minority interest in Aer Lingus Group plc, ME/4694/10, 15 June 2012, paragraphs 35-37. (Available from https://assets.digital.cabinet-office.gov.uk/media/555de2f4e5274a74ca000051/Ryanair.pdf (as accessed on 13/05/2016)).

38 See Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc: Report sent to the Secretary of State, 14 December 2007 (BskyB/ITV), paragraph 3.40.


40 See OECD, op. cit., at p. 191.

41 Ibid.
There are also other instances where, for instance, OFT found material influences to exist even if the shareholding was only 15 per cent. In *First Milk/Wiseman* OFT held that there was material influence on the basis that First Milk had a Director on the board with considerable industry experience where it was expected that particular weight would be attached to his views. Moreover, in a situation where there is possible interlocking directorship, the ability to materially influence commercial policy and strategy of the target through board representation is also brought to the attention of the authorities.

### 5.3 Influential Ability as Applied in Other Jurisdictions

In Japan, the threshold is between 20% and 10% shareholding depending on possibility that the minority shareholding will confer the ability to influence the business policy of the targeted firm.

In India, the Competition Commission decided, in the case of ZOCDs, that:

‘…..The ability to exercise decisive influence over the management and affairs of each of the Target companies and the same amounts to control for the purpose of the Act…..’

In Ukraine, the Ukrainian competition law takes the widest possible view of change of control. It provides that:

- The acquisition of direct or indirect control over a business entity, including by means of:
  
  (i) the acquisition of title to those assets comprising the integral property complex or its part (structural subdivision), as well as the rent, lease, concession or acquisition by other means of the right to use such assets, including the acquisition of such assets from the business entity being liquidated;

  (ii) the appointment/election to the top management position of an individual who already holds one of the top management positions in another legal entity; and

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42 See Completed acquisition by First Milk Limited of a 15 per cent stake in Robert Wiseman Dairies plc, 7 April 2005.

43 Definition of Transaction for the Purpose of Merger Control Review 2013, at p. 23.

44 Combination registration No. C-2012/03/47.
(iii) causing the cross-over of more than half of the members of the supervisory board, management, or another supervisory or executive body of two or more business entities.

- the establishment of a joint venture ("JV") by two or more business entities that are independently engaged in business activities for an extended period of time, provided that establishment of such JV is not aimed at, and shall not result in, the co-ordination of competitive behaviour (i) of its founders; or (ii) of the legal entity and its founders; and

- the direct or indirect acquisition, obtaining ownership of, or management over, the shares (participation interest) of the business entity, if such acquisition results in the obtaining of over 25% or 50% of the voting rights of the target business entity.

The law in Ukraine also defines "Control" as direct or indirect decisive influence, by one or more persons connected by a relationship of control over the commercial activity of a business entity, in particular through:

- the right to own or use all the assets or their considerable part;
- the right to have a decisive influence on the formation, voting results, and decisions of managing bodies of the targets;
- the conclusion of such agreements and contracts that make it possible to set conditions for economic activities, to give binding instructions or to perform functions of the managing body of the targets;
- the occupation of the position of a head, a deputy head of the supervisory board, the board of directors or of other supervisory or executive board in the target company, by a person who occupies one or several of these positions at other companies;
- the occupation of more than half of the positions of members of the supervisory board, the board of directors or other supervisory or executive boards, of the economic entity by such persons that occupy one or several of these positions at other companies.

Any acquisition of 25% or more of votes requires prior approval from the competition authority, regardless of control matters.

In South Africa, the Competition Appeals Court in Distillers Corporation (South Africa) Limited stated:

A similar example to be found in Richard Whish Competition Law (4th Edition) at 746 namely:

were one undertaking acquires more than 50% of the voting capital of another, this would normally give rise to sole control unless, for
example, the shareholders agreement gave the minority shareholder(s) joint control with the majority shareholders, for example, through rights of veto.

As Whish notes at 742

merger control is not, or not only, about preemptively preventing a merged entity from abusing its dominant provision in the future; it is also about maintaining a market structure that is capable of producing the kind of outcome that follow from competition.

For this reason the purpose of merger control envisages a wide definition of control, so as to allow the relevant competition authorities to examine a wide range of transactions which could result in an alteration of the market structure and in particular reduces the level of competition in the relevant market.45

6. FCC’s Position on Change of Control in Relation to Mergers

In the absence of an outright legal definition regarding what amounts to change of control in merger and acquisition transactions, the FCC and the Fair Competition Tribunal (FCT) have been strongly persuaded by existing foreign definitions of change of control in respect of merger transactions based on the school of thought that propounds the position that change of control is not dependent on acquiring a company’s right to excise more than half of the votes at a general meeting alone. It may be de facto, where the acquirer has a right to control the policy of a company without having a controlling interest in the target company, or it may result from there being possible material influence, where the acquirer has the ability to influence the target company’s policy through conventional business acumen or specialised skills without exercising voting rights at shareholders’ meeting.

The latter position is further shielded by what section 5(6) (a) of the FCA provides, that is, “acting alone, the person can profitably and materially restrain or reduce competition in that market for a significant period of time”. As part of definition of dominant position, FCC considers it necessary to have the latter position included in construing

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45In the matter between: Distillers Corporation (South Africa) Limited, (First Appellant); Stellenbosch Farmers’ Winery Group Limited, (Second Appellant) and Bulmer (SA) (Proprietary) Limited, (First Respondent); Seagram Africa (Proprietary) Limited (Second Respondent), 27th November 2001, in the Competition Appeal Court of South Africa Case No. 08/CAC/MAY 01.
a broader definition of “change of control” for purposes of merger control and regulation.

Based on what has been stated above, in the case of Toyota Tshusho Corporation (Alliance Autos Ltd) v. Fair Competition Commission,\textsuperscript{46} the Fair Competition Tribunal was of the view that ‘control’ may also be defined or interpreted in a manner that determines the kind of economic relationship between a party to a merger and a non-party (especially where the merger involves a distributorship agreement with a non-party to the merger). The tribunal also noted that a competition agency reviewing a merger should not be restrained with a narrow interpretation of what may amount to ‘control’ as between the merging companies since, as it was held in the Commercial Solvent Case (at p. 229):

\begin{quote}
under competition law it is possible to go even further into the complex of legal and factual in order to discover reality of control than is possible under company law.\textsuperscript{47}
\end{quote}

The FCT’s decision on this point is very important as it has added an important milestone in the development of the competition law in this important area relating to mergers and acquisitions.

All said and done, what is clear from the foregone discussion is that under the FCA, control, or, for that matter, “a change of control” in a merger, does not depend on whether the acquiring firm assumes a full or substantial ownership of the entire business of the target but rather, change of control is also counted in respect of ownership of part of a business or an asset of a business. A clear view of this definition, therefore, suggests a wider interpretation (i.e., it is not narrowly confined to a change of control that gives a firm a majority presence in the targeted firm or decisive influence over its affairs through directorship alone, as some people would want to argue).

\textsuperscript{46} FCT, Tribunal Appeal No 6 of 2013 (unreported).
\textsuperscript{47}See Commercial Solvent v. Commission, Joined Case 6 & 7/73.
7. Conclusion and Recommendations

7.1 Conclusion

Based on the foregoing discussions, FCC defines change of control for purposes of merger control and regulation as the potential ability of the acquiring firm to materially influence the business policy and operations of the target firm in the post-merger scenario irrespective of the size of ownership change.

7.2 Recommendation

In Tanzania, the Fair Competition Act does not provide a definition of what a change of control means when it applies to mergers and acquisitions. In view of this lacuna, change of control in mergers and acquisitions, and especially those transactions involving acquisition of a minority shareholding seem to be a thorny issue. The debate generated by this lack of a specific legal definition reflects a wider concern that has also been felt in other jurisdictions. While this paper was not intended to shut down the doors of discussion concerning the appropriate position which needs to be adopted, since the FCT has already provided a legal position and the same has never been overturned by any other higher court, it suffices to state that this position stands to be the applicable legal position by the FCC. It is thus recommended that applicants who seek to apply for clearance of mergers and acquisitions with the FCC should be guided by the current position of the law as succinctly captured in the above conclusion.
Competition, Trade Competitiveness and Regional Integration: Examining the ‘Intra-African-Trade Relations’

Deo Nangela*

Abstract
Competition, trade competitiveness and regional integration are important keywords in the African development agenda. From an African perspective, these three concepts are not only closely associated with the need to reduce poverty by improving intra-trade relations among African countries but also to the ever increasing economic globalization, and Africa’s demand for fairness in the global trade which, simply stated, translates into enhancing market access for primary products from Africa.

Keywords: Competition, Trade, Competitiveness, Regional Integration, Globalization, Development Agenda.

1. Introduction
Africa has made certain important milestones which have the potential to unlock the continent’s economic development dilemma. Such milestones include the economic transformations which the continent has embraced from 1980s to the present. Notably, the adoption of market oriented economic principles that cherish competition and competitiveness, the growing desire to embrace a definitive intra-African Trade, as well as the deepening African economic integration agenda are issues worth mentioning. Ambitious as some of these initiatives seem to be, the fact is that they are already taking and will continue to take root and shape. This article, delves on examining such important milestones and argues that the same need to be further reinforced or rather catapulted a bit further through, not only a strong impetus derived from political will among the African heads of state, but also sound and demonstrable uniform actions to improve intra-African competitive trade relations with a view to not only bolstering the 1continent’s economic progress and status in the global economic

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agenda but also widening and deepening the African economic integration initiative.

In terms of its taxonomy, the article is divided in four parts. Part one carries this introductory note. From a historical context, Part two discusses the African development dilemma, the existing causes and the milestones that have so far been achieved in entangling Africa from its economic predicament. Part three discusses the importance of interweaving intra-African trade and competition regulation as one of the means of creating a healthy environment for a thriving private sector in the continent. Part four concludes the discussions and suggests a way forward.

2. **The African Developmental Dilemma**

Perhaps, we should start by way of asking a question: Is African economic underdevelopment an issue of choice or a matter of design? Whether where Africa is today, in terms of its economic development as compared to the rest of the world, is a matter of choice or design, is not a novel issue. Even though it might have taken a long time to unravel, this issue is as old as the independent African states are. African and non-African scholars have grappled with it from varied angles. For instance, from 1970’s, one may cite, as a reference point, the ground-breaking work of Walter Rodney: *How Europe Underdeveloped Africa.* Deriving his concerns within the contemporary African situation from a historical perspective, Rodney sets in motion a debate that has been rolling on even to this end, taking into account today’s phenomenon of neo-colonialism which, as Rodney puts it, craves ‘for [an] extensive investigation in order to formulate the strategy and tactics of African emancipation and development.’

While this article is not meant to give a critique of Rodney’s work, it is worth acknowledging that his work has some illuminating blocks which can still be looked at given the myriads of issues which surround Africa

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in the light of today’s globalized world. One of such enlightening blocks, and which needs to be a lesson worth embracing in the light of today’s global environment, is that, entangling Africa from its socio-economic woes and liberating the majority of its people from poverty solely depends on an array of continental-based socio-economic and political solutions geared at transforming, re-placing and re-shaping what had been inherited from the past experiences. This, indeed, is the case since, as Rodney perceived it in the 1970s, Africa’s state of affairs and its dilemma resulted from a combination of political manipulations and previous economic exploitation by the ‘external forces’.

In view of the above, and while acknowledging that there are potent truths in Rodney’s arguments and extrapolations, if, in terms of its development, Africa is where it is today as a matter of design by some forces external to it and not as a matter of choice, then we need to re-model or re-design the inherited models or designs, this being a matter of our own choices. The challenge, however, has always been how to do this or make it happen.

We argue, in this article, that there are three important headways already afoot in Africa which has the potential ability to address the ‘how aspect’. One of such notable developments, for instance, is the African Integration Agenda which has already taken root and shape as a bed-rock for a future and vibrant African continent. The second notable development that seems to be working for Africa is the economic reform Agenda in the nature of embracing market driven economic policies, and the last, which is by no means the least, but closely linked with the rest, is the current agenda promoting Intra-African Trade and Investments. These triangulated approaches are the “anointed” tools in the hands of African leaders which, if well exploited, can work miraculously in favor of Africa both internally and externally.
2.1 The African Integration Agenda

From the 1960s to the late 1990s, African countries pursued different socio-political and economic developmental patterns. On the one hand, some countries pursued policy options inclined towards the west while, on the other hand, other African countries, for instance, Tanzania, had their own socio-economic policies inclined eastwards. By so doing, and, given that many African states that emerged from the shackles of colonialism were confronted with the shadowing era of cold-war, it was difficult for Africa to entangle itself from the yoke of economic underdevelopment. In fact, at that time, by virtue of its past legacy and the nature of things as they were, the continent found itself polarised from all angles. Significantly, however, despite such a polarised situation in which the continent found itself immediately after independence of most of its member states, the hope for a better African future was not lost.

In the midst of such a polarised situation, a few visionary voices were being raised, and, Africa as a continent, was mapping its own oneness-agenda, championed in the spirit of Pan-Africanism. From this spirit, the African economic integration agenda was born and evidenced by the formation of regional integration groupings commonly referred to as Regional Economic Communities (RECs). Such groupings were those of the East African Community (EAC), Southern Africa Development Community (SADC), Economic Community of Western Africa States (ECOWAS) and the Common Market for Eastern and Southern Africa (COMESA). The ambition is further growing among African countries as witnessed in 2004 when the Assembly of the African Union (AU) held “that the ultimate goal of the African Union is full political and economic integration leading to the United States of Africa.”

Although the existing regional trade blocs are seen as the agents that play a supportive role in expanding globalisation and its consequential loss of sovereignty and policy space as key concerns, we should not

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lose sight that if these vehicles are properly and effectively exploited, they have a tremendous potential to accelerate economic growth and reduce poverty.

From a welfare point of view, for instance, such regional groupings harbour net trade creation especially where member states have agreed to a ‘significant degree of trade liberalization …where emphasis is put on reducing cost-creating trade barriers which simply waste resources.’ In view of this, regional economic integration is viewed as ‘a precondition for, rather than an obstacle to, integrating developing countries into the world economy by minimizing the costs of market fragmentation.’ One fundamental problem, as pointed out by one trade law expert, is, however, that, most of these regional groupings and the institutions created under them, have remained less empowered, “weak, and performing mainly administrative functions.” A reversal of this order is therefore necessary through enhanced political commitments and serious reforms of the *modus operandi* of the regional institutions. In line with such a necessity, it is worth noting that, of all the sub-regional communities, the EAC seems to have made significant strides in promoting a functioning common market, customs union and is on its way to embrace a monetary union.

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effects of the Eurozone crisis on Greece, Portugal, Italy and Spain that the classical model of sovereignty has eroded and the nation-state “has lost the last shreds of its supreme authority to make decisions on domestic policy matters” due to the requirements and standards imposed by extra sovereign bodies such as the EU, the Central Bank, and the IMF.


6 See Matthews, *op. cit.*, at pg. viii.

7 See Toferenyika, M., “Intra-Africa trade: Going beyond political commitments” (citing Trudi Hartzenberg, executive director at the Trade Law Centre (TRALAC) for Southern Africa, an organization that trains people on trade issues), (available from http://www.un.org/africarenewal/magazine/august-2014/intra-africa-trade-going-beyond-political-commitments (as accessed on 13/11/2016)).

Besides, the recent vesting of jurisdiction upon the East African Court of Justice, (EACJ) to deal with trade and investments disputes in the region is another significant milestone that deserves commendation. It was during the 16th Ordinary Summit of the EAC’s Heads of State that a decision was made to extend the Court’s jurisdiction over trade and investment cases as well as cases arising under the EAC’s Monetary Union treaty.\(^9\) Initially, as it may be well observed from the EAC Treaty,\(^12\) the EACJ, which is one of the organs of the EAC established under Article 9 (1) (e) of the of the Treaty, which, in terms of Articles 23 (1) and 27 (1) of the Treaty, exercises judicial functions of ensuring that there is ‘adherence to law in the interpretation and application of and compliance’ with the EAC Treaty.\(^13\) In view of the current position, therefore, the EACJ has a role of not only deciding, in accordance with treaty and its rules of procedures, on all contentious matters arising out EAC Treaty within the meaning of Article 27 (1) of the Treaty, but also of giving advisory opinions in accordance with Article 36 of the Treaty, arbitrating matters in accordance with Article 32 of the Treaty and rules of arbitration,\(^14\) and, finally, exercising jurisdiction over trade and investments cases.

\(^10\) Monetary Union Protocol was adopted in accordance with the EAC Treaty and signed on 30th November 2013.
\(^13\) Article 23 of the EAC Treaty reads: “The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty.”
\(^14\) Article 32 of the EAC Treaty provides that the EACJ shall have jurisdiction to hear and determine any matters: “arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party; or arising from a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner
2.2 The African Economic Reform Agenda: Adoption of Market Driven Economic Policies

The African economic reform agenda, which is manifested through the adoption of market driven economic policies by African states, is a move which is largely driven by the process of globalisation. From an economic perspective, globalisation is a process that implies an integration of domestic economies into the global economic structures through relaxed cross-border interactions. It favours elimination of unnecessary economic barriers to trade and commerce and allows market forces to drive trade and commerce thus making governments to assume the role of being facilitators rather that of being players in the market arena.\(^{15}\) To most African states, however, globalisation came with a price-tag of sweeping policy reforms, especially to those countries with little or no experience in an economy driven by market forces. Countries that had a socialist positioning like Tanzania, for instance, had to undergo a radical change in terms of their macro and micro-economic policies under the patronage of the Bretton Woods Institutions, namely, the World Bank and the International Monetary Fund (IMF).\(^{16}\)

Although the radical policy reforms may be seen as both a ‘covert influence and overt pressure’ in favour of globalisation,\(^{17}\) the reality is that there has been positive trends out of them as most of these countries have been ushered into a new economic dispensation driven not by state-centric economic approaches but rather market oriented and private-sector led economy. Under the new drive, African countries

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\(^{17}\) See Haque, *op.cit.* at pg.103.
from early 1990s to the present time had to embark ‘on market-driven policies such as streamlining, privatisation, deregulation, and liberalisation’, a move that had to witness a major shift towards more reliance on the private sector as the engine for economic growth. Institutional reforms and promotion of rule of law and efficient governance systems have all been seen as a *sine qua non* for economic growth. Transformations have also permeated the public sector cultural set-up in most countries changing its roles, structure, orientation, and organisational culture, thereby moving it away from the state-centred governance mode to a more transparent mode of governance.\(^{19}\)

Generally, although such reforms have been criticised at some point in terms of their overall impact on state sovereignty and expanding international inequality, worsening poverty and external dependency\(^{20}\) to list but a few of such criticisms, the fact remains that through these reforms, most, if not all African countries, including countries like Tanzania that hitherto were experiencing economic down-turn due to policy failures, have seen and continue to experience significant growth.\(^{21}\) In other words, these reforms were and continue to be a necessity especially in Africa. The only challenge is how they should be gauged to work for Africa and not against Africa. To answer this key question, the third milestone which African states are keen to achieve, i.e., “Intra-African Trade and Investments”, is, in our humble view, the magical bullet.

### 2.3 The Intra-African Trade and Investments

There is no doubt that an increased intra-African trade and investments offer great potential and wider economic spaces for the Continent. It is indeed acknowledged by some trade experts that “[t]he future for a

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\(^{19}\) *Ibid.*, at 104.


sustainable growth and development of Africa depends on increasing the levels of intra-African trade and investment within the African continent.\textsuperscript{22} This statement carries an important message which is central in entangling the ‘Gordian knot’ of poverty and underdevelopment that has beset the African continent for more than five decades now.

As argued earlier, the intra-African trade woes and agonies are self-induced or self-inflicted, and, one of its corrective measures is through increased intra-African Trade and Investments. The African continent has been losing its cutting edge for a long time due to lack of vibrant intra-African trade development and cross-border investments. In terms of what Africans do outside the continent in the areas of trade and investments in comparison with what is done within the continent, the facts are alarming and saddening. It is said, for instance, that, intra-Africa trade volumes have been standing at 14% of Africa’s total trade. This means that, 86% of Africa’s trade consists of trade with the rest of the world.\textsuperscript{23}

A better understanding of the dilemma facing intra-African trade relations was aptly captured by Toferenyika who states as follows:

Trade flourishes when countries produce what their trading partners are eager to buy. With a few exceptions, this is not yet the case with Africa. It produces what it doesn’t consume and consumes what it doesn’t produce. It’s a weakness that often frustrates policy makers; it complicates regional integration and is a primary reason for the low intra-regional trade, which is between 10% and 12% of Africa’s total trade. Comparable figures are 40% in North America and roughly 60% in Western Europe. Over 80% of Africa’s exports are shipped overseas, mainly to the European Union (EU), China and the US. If you throw into the mix complex and often conflicting trade rules, cross-border restrictions and poor transport networks, it’s hardly surprising that the level of intra-Africa trade has barely moved the needle over the past few decades.\textsuperscript{24}

\textsuperscript{23}Ibid.
\textsuperscript{24} See Toferenyika, \textit{op. cit.}
This sad situation is further comparably and aptly summarised by the UNCTAD Report on Africa (2013) noting that:

Over the period from 2007 to 2011, the average share of intra-African exports in total merchandise exports in Africa was 11 per cent compared with 50 per cent in developing Asia, 21 per cent in Latin America and the Caribbean and 70 per cent in Europe. Furthermore, available evidence indicates that the continent’s actual level of trade is also below potential, given its level of development and factor endowments.25

As seen from the above comparative view, it is clear that had the intra-African trade and investments relations been given the due weight they deserve, such would have unleashed a ‘potential to create employment, catalyse investment and foster growth in Africa.’26 The above observations, therefore, call for serious policy considerations and effective surgical procedures, loaded with concrete political commitments on the part of African leaders if African intra-trade volumes are to see significant growth. Political commitment, for instance, must be evidenced by the willingness to implement regional trade agreements which African countries have signed up to now. Taking the example of SADC, it is said that although this 15-member regional economic group launched a Free Trade Area in 2008 with a decision to remove trade restrictions, there has been slow progress as ‘some countries have not eliminated tariffs as stipulated by the agreement. Worse still, in some cases countries that removed the tariffs have since reinstated them.’27 Similarly, a show of ‘political commitment to boosting intra-African trade will need to go hand in hand with measures to boost industrialization and intra-industry trade development.’28 True political commitment is therefore an essential factor that needs to be drummed up among African leaders.

For a better understanding of the potential hindrances to growth of intra-regional trade in Africa, some few, but key factors affecting intra-

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26See Toferenyika, op. cit.
27Ibid.
28See UNCTAD op. cit., at pg.54.
African trade development and what should be their appropriate solutions, are further discussed below.

(a) Factors Reducing Intra-African Trade Development

It has been acknowledged that intra-African trade development has never been an easy path. However, whether this happened to be so by design or by default, a choice has to be made to reverse the trends. But before making a solid choice as what should be done, it is important to identify and address the perpetual obstacles that have so far detained intra-African trade relations with a view to ensuring that the same are once and for all effaced. Such obstacles, as succinctly summarised by Babatunge and Odularu, include the following:

(a) First is the existence of a multiplicity or overlapping of membership in regional integration groupings. The effect of this is that it tends ‘to hinder harmonization and standardization, as well as the enforcement of rules of origin.’ In addition, the tendency of maintaining multiple memberships is considered to be wasteful as it drains the meagre resources that could be channelled into other profitable investments.

(b) Second is lack of economic diversification: It has been argued that ‘the vast majority of Africa’s economies lack globally competitive industries and services. With a few

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complementary goods to exchange with each other, these countries cannot exploit the gains of comparative advantage."31 A similar view was echoed by the UNCTAD to the effect that intra-African trade development is to some extent hindered by an integration approach that focuses more on the elimination of trade barriers and less on the development of the productive capacities.32

(c) Third is a tendency of incessant internal conflicts: This is yet another big hindrance to intra-trade and investments growth in Africa. It is a fact that an environment plagued with political tension, conflict and violence discourages both internal and external investors. Indeed, as Ndulo submits ‘economic co-operation and integration flourish better in an environment that is politically peaceful and stable.’33 Consequently, an endless culture of conflicts in Africa ‘weakens the capacities of African states to engage in intra-regional trade’ and has led to ‘low levels of economic growth, destruction of trade-facilitating infrastructure, and intra-regional disintegration.’34

(d) Fourth, is the issue of non-integrated infrastructure development. Africa’s infrastructure exhibits one of the poorly developed and interlinked patterns globally. Consequently, for a long time Africa’s infrastructure deficiencies have continued to hamper trade within and between African countries and raise transportation costs.35

(e) Fifth, are other border issues of interest to the continent as well. It is as well noted that ‘Africa’s notoriously bad customs environment poses yet another impediment to the

31Ibid.
32 See: UNCTAD, op. cit.
33 See Ndulo, M., ‘Harmonisation of Trade Laws in the African Economic Community’ (1993) 42 International and Comparative Law Quarterly 101-118, 105. It is a well noted fact that ‘a world anchored in peace, stability and shared prosperity is one which fosters sustainable development.’
34Babatunde, A & Odularu, op. cit.
35Ibid.
success of its intra-regional trade. The exorbitant fees that customs offices charge are part of the problem. The costs to businesses in time delays are another issue. Delays are up to three times longer in Africa compared with other regions of the world. Excessive bureaucracy is one cause of this.\footnote{Ibid.}

(f) Six are varying stages of economic integration among RECs: This is yet another factor depicted as a hindrance to effective intra-Africa trade development.

(g) Seven is financial constraint. This is also an obstacle since a large portion of African countries ‘are financially weak and fall within the category of Least Developed Country (LDCs).’ Due to this fact, it is envisaged that they may be unable to implement other massive investments in infrastructure development envisioned under new regional arrangements such as the envisaged Tripartite Free Trade Area.

(h) Eight is lack of political commitment: The reluctance to cede power to a supra-national body and the failure to implement commitments made at the REC level is also a frequent problem with some of the countries involved in inter-RECs negotiations.

(i) Nine is language and currency barriers: these are issues that have more to do with the colonial legacy. Essentially, ‘while English is the agreed-upon language across some RECs, French is used in others for the purposes of administration, public trade facilitation and private transactions. Furthermore, the fact that multiple currencies are currently being used in Africa is a problem for the progress of the FTAs.’ This barrier affects intra-regional trade although it could have been removed had there been
sufficient political will to promote the African *lingua franca* such as *Kiswahili* language.

One may yet add another factor which is linked to history through which Africa has gone through. This is lack of a harmonised legal regime among African countries, given the fact that most of them were colonised by different colonizers and inherited different legal cultures. Different legal frameworks have the potential to reduce certainty and predictability which are essential to any effective functioning of intra-African cross-border trade.

(b) Are there Lasting Solutions?

With such a list of hindrances facing intra-African trade development, is there hope to see positive trends happening in Africa? Are there solutions? To address these questions, it is imperative to note that the hopes to see positive things happening in African trade are not lost. It is worth noting, however, that, solutions to the existing intra-trade problems in Africa do not come from the east or from the west but from Africa itself. Whether the current economic woes facing Africa are by design or by default, Africa has to make a choice, a deliberate choice that will redeem it out of the mires into which it has been waggling for so long. In other words, the so-called African intra-trade problems, as the ones noted herein above, require home-grown solutions.

The fact will always remain that Africa as a continent has all the requisite potentials to realise its economic strengths. For instance, according to the *World Population Review*, by 2016 African population stood at 1.2 billion.\(^{37}\) This means that its own internal market is a potential asset that may be utilised through intra-African trade to the benefit of its people and the African economy. However, the small size of most of the African economies constitutes one of the reasons for not only the lack of significant progress in African countries but also their inability to compete in the global market. It would seem, therefore, that the most practical way to circumvent such a problem is

\(^{37}\)Available online from *http://worldpopulationreview.com/continents/africa-population/* (as accessed on 20/9/2016).
by forging a closer economic integration which will no doubt be an answer for the ‘small market sizes’ of individual countries.

It is observed with interest that Africa is now set on the right pace and, that intra-African trade and investments dynamics are projected to blossom for the betterment of Africa and its peoples. In the recent past, for instance, two important integrating and all-embracing agenda took place in Africa: one is the signing of an Agreement for the formation of the EAC-SADC-COMESA -‘Tripartite Free Trade Area (TFTA), in Cairo on 10th June 2015, and the second is the African Union’s plan to establish a Pan-African Trade Pact or Continental Free Trade Area (CFTA) by 2017. As once noted, these two developments suggest, that ‘Africa’s rising integration – within Africa and between Africa and the rest of the world – is a fundamental part of understanding Africa’s full potential and realising its true economic prospects.’

The signing of the EAC-SADC-COMESA -‘Tripartite Free Trade Agreement and the envisaged CFTA, exemplify the home-grown African solutions to the existing intra-African trade and investments dilemma. According to the African Development Bank (AfDB), the Tripartite Arrangement, ‘backed up by political commitment at the highest government level, also holds the prospect for heightened infrastructure development and trade expansion efforts in the region.’

Besides, the AfDB is of the view that ‘enabling the flow of capital, management know-how and technologies within the sub-region, and between the sub-region and the rest of the continent’ should be encouraged as ‘a priority outcome of the regional integration process.’

Currently, for instance, there has been a growing ‘pattern of intra-regional investment, led by Kenyan private enterprises operating across the EAC market, of the emerging footprint of pan-African financial

40 Ibid.
institutions and increasing presence of multi-country private equity funds in the region.’ 41 These are positive developments which should be further encouraged. In fact, all these developments suggest that African countries and African businesses are now becoming more concerned, first and foremost with their next door trading neighbourhoods before rushing to reach out to long-distant partners in the form of signing the so-called Economic Partnership Agreements (EPAs) which, according to trade analysts, ignore the continent’s efforts to promote intra-African trade.

Indeed, there is a need to be wary about the EPAs. Without a shade of doubt, the straight-talk about the EPAs is that they are bent to thwart Africa’s integration efforts. Preferences and priority should be given to the more Afro-centric projects such as the New Partnership for Africa's Development (NEPAD), the EAC-SADC-COMESA -‘Tripartite Free Trade Agreement’ and the envisaged Continental Free Trade Area (CFTA). If well implemented, such projects have the potential to boost intra-African trade and growth, thereby doing away with poverty and untying the “Gordian knot” hindering Africa from its path to economic glory. As the AfDB notes, currently, ‘African countries are losing out billions of dollars in potential trade every year because of a fragmented regional market and because cross-border production networks that have spurred economic dynamism in other regions, especially East Asia, have yet to materialize in Africa.’ 42 To address this problem, however, sustainable development of the African productive capacities should be an area where concerted efforts are needed. This includes the effective carrying out of coordinated plans among African countries ranging from joint industrial development to transport and communication infrastructural developments.

As observed herein above, the existing low intra-trade volumes in Africa is a self-induced infliction. It arises out of the failures to see the importance of co-ordinating policies that foster peace and security,

41 Ibid.
governance challenges and cross-border investments, such as, infrastructure connectivity in terms of ICTs, transportation networks (e.g., standard gauged railways (SGR) and tarmacked roads) connecting different land-locked countries to the existing sea-ports. There is, therefore, a need ‘to create a well-connected, economically prosperous and peaceful region by supporting both public and private sector actors engaged in the regional integration process.’

Africa needs to walk in its shared development vision and focus on it unwaveringly. Indeed, as once noted, the only solution to Africa's development problems is economic unity. A persistent and full commitment to it is thus required to make economic integration work out its promises of sustainable growth. In the EAC, for instance, the on-going move to construct standard-gauged rail network (SGR) is a commendable policy decision that needs to be emulated by all. Equally, the cost-sharing of projects such as the construction of an oil refinery and pipeline from Hoima in Uganda to Tanga in Tanzania and like other projects, need to be fully encouraged as one of the means to unlock the African economic potentials. All these signify the importance of nurturing and implementing a shared vision which most African countries either neglected or were indifferent with for a long time. Without a shared vision which is unanimously implemented, there is always confusion. As a matter of fact, although the seed and spirit of an integrated African economy was sown since 1960s (through the famous advocates of Pan-Africanism such as Mwalimu Julius K. Nyerere and Dr. Kwame Nkrumah), the failure, neglect or indifference shown by most African countries to appreciate the importance of nurturing and implementing its shared vision has continued to cost the continent dearly, thus creating the intra-trade deficit which is currently witnessed. As a result, most African countries have failed to unlock their huge wealth of natural resources and other potentials for almost 50 years plus until the recent activation of the enzymes of development in favour of revamping intra-trade and investment agenda, and the desire to deepen economic integration in Africa.

43 See the AfDB, *op. cit.*, at pg. ii.
44 See: Mburu-Ndoria *op.cit.*
It is worth noting, however, that in view of the on-going reforms and the increasing desire to deepen economic integration, Africa is seen to be on positive trends compared to some few decades in the past. As the African Development Bank (AfDB) says:

Africa is emerging as an attractive investment destination and a key market for goods and services. With a working population of 600 million set to double by 2040, overtaking both China and India, and an improving business environment, Africa is poised to become the world’s next emerging economy.\(^{45}\)

However, according to the AfDB, if Africa is to turn its projected ‘economic gains into sustainable growth and shared prosperity, Africa's public and private sectors must work together to connect the continent's markets, deepen regional integration, and adopt reforms that enhance competitiveness.’\(^{46}\) This private-public partnership approach is yet another solution to African economic woes and hindrances to growth. AfDB sees new frontiers in African economic development future as being: ‘business friendly policies, increasing urbanization, a growing and better educated workforce, and growing consumer spending’ all of which continues to create ‘opportunities for manufacturing and services industries to grow.’\(^{47}\) Furthermore, it believes that ‘unlocking Africa’s full economic potential would require economic integration—globally, regionally and between rural and urban areas.’\(^{48}\)

Improving intra-trade connections within Africa should be the top priority. The AfDB notes, for instance, that ‘in 2008-2009, the average share of intra-regional trade in Eastern Africa was 9%. Among the three regional groups, the EAC countries dominated intra-regional trade with a share of 71.82%, followed by the Horn of Africa (27.74%). The island countries had a lower share (0.44%), illustrating their limited trade link with the mainland. Kenya is the regional trade hub accounting for 33% of intra-regional trade, attributed to its larger


\(^{46}\) See: Mburu-Ndoria op.cit.

\(^{47}\) Ibid.

\(^{48}\) Ibid.
private sector, followed by Uganda (21%) and Tanzania (11%). In our view, Africa is where it is today because it neglected this potential in favour of external links. Whether the neglect came as a result of colonial legacy of ‘divide and rule’ or purely out of Africa’s own miscalculations, the fact remains that the past 50 years of independence have sufficiently given Africa the much needed lecture from which corrective measures should now be taken to change the status quo and enable the continent to stand where it deserves to be economically.

2.4 The EAC-SADC-COMESA -Tripartite Free Trade Agreement’

As pointed out herein above, the envisaged EAC-SADC-COMESA -Tripartite Free Trade Area is an important home-grown idea that has the potential to unleash tremendous changes in the intra-African trade trajectory in the coming years. The third Tripartite Summit convened to officially launch the COMESA-EAC-SADC Tripartite Free Trade Area (TFTA), took place in Sharm El Sheikh, Egypt on 10 June, 2015. A total of 17 member states namely, Angola, Burundi, Comoros, Democratic Republic of Congo (DRC), Djibouti, Egypt, Kenya, Malawi, Namibia, Rwanda, Seychelles, Sudan, Tanzania, Uganda, Swaziland, Zimbabwe, and most recently, Zambia (signed on 17 June 2016), pegged their signatures to the Agreement. The signing was a culmination of a series of negotiations which were kick-started on 12 June, 2011, by the Heads of State and Government of the three RECs following their joint declaration launching negotiations for the tripartite Free Trade Area (FTA).

The importance of the TFTA is hinged on the need to promote intra-African trade which has for decades been lagging behind while it ought to have been considered as a matter of priority. The signing of the Tripartite Agreement in June 2015, therefore, was an important milestone for the continent’s intra-trade development. Its significance is

49 See AfDB, op. cit., at pg. 5.
also pegged on the fact that the envisaged free trade area ‘represents an integrated market of 26 countries with a combined population of 632 million people which is 57% of Africa’s population; [and] with a total Gross Domestic Product (GDP) of USD$ 1.3 Trillion (2014) contributes 58% of Africa’s GDP.’ This being the case, there is a windfall of benefits ranging from increased market access due to economies of scale, employment creation and attraction of foreign investment in the region.

Basically, TFTA is focused to address important barriers to intra-regional trade; itself being established on the principles of tariff-free, quota-free, exemption-free, and variable geometry. Experts note that, although ‘it may be difficult to determine actual impact of the current trade expansion efforts on regional trade flows,’ currently, ‘available data show that merchandise exports among the members of this new FTA have steadily increased from $2.3 billion to $36 billion between 1994 and 2014—more than a 12-fold increase over 20 years.’

According to the World Bank projections as shown below, the intra-TFTA trading trends indicate a steady increase. It follows, therefore, that, there are reasons to believe that a fully functioning TFTA will further accelerate the pace of regional intra-trade engagements and growth compared to where it currently stands.

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Although not much has been written about the TFTA, the high prospects of intra-trade flows expected through unifications of the three RECs into one FTA have made some analysts to consider this deal as big enough to potentially become ‘a game changer for the African trading system.’ This is particularly so if the TFTA‘s main pillars – market integration, infrastructure development and industrial development are fully and sustainably implemented. However, the TFTA’s successes or failures are a matter that should be judged with time.

2.5 The Envisaged Continental Free Trade Area (CFTA)

Whereas the establishment of the TFTA is seen as an impetus towards bolstering intra-regional trade by creating a wider market, increase investment flows, enhance competitiveness and encourage regional infrastructure development, it is as well seen as a pioneer to the holistic integration of the African continent as a common free trade area. The idea to arrive at this vision was endorsed during the 18th Ordinary

\[52\text{Ibid.}\]
African Union Summit held in January 2012 in Addis Ababa, Ethiopia. At this meeting, an Action Plan and a roadmap for the establishment of a CFTA, to be operationalized by an indicative date of 2017 was drawn.

The demand for a more canvassed Continental Free Trade Area is propelled by a number of factors. According to UNCTAD, ‘one of the characteristics of the African continent is the multiplicity of national borders that act as barriers to intra-African trade.’\textsuperscript{53} It is noted with concern that, although there are 54 countries in Africa, still ‘Africa has very small national markets’.\textsuperscript{54} Consequently, it has been argued that, ‘[t]he existence of too many small economies limits the potential for economies of scale, hampering production efficiency and competitiveness. Furthermore, crossing too many borders and complying with different trade regimes implies weak market integration, a factor that discourages intra-African trade.’\textsuperscript{55} In view of all these, and taking into account the African states and policy makers’ growing interest to promote intra-African trade as a vehicle for promoting economic growth and deeper integration, the CFTA is seen to be a vehicle to realise these ambitions.

As noted earlier, these efforts echo the previous Pan-Africanist sentiments which sought to see Africa moving in unison. In particular, they echo the African vision of establishing the African Economic Community envisioned in the Lagos Plan of Action (LPA) which was focused on developing a regional strategy for African development, with steps leading up to an African Common Market (OAU, 1981), the Final Act of Lagos of 1980, Abuja Treaty of 1991\textsuperscript{56} as well as the Resolution of the African Union Summit held in Banjul, the Gambia in 2006. All these had the effect of promoting harmonized and coordinated policies/programmes among the RECs; this being an important strategy for rationalization, increasing intra-Africa trade and

\textsuperscript{53}See UNCTAD, \textit{op.cit.}, at p.50.
\textsuperscript{54}\textit{Ibid.}
\textsuperscript{55}\textit{Ibid.}
investment, and integration of African economies in the global economy. The proposed CFTA by 2017, however, seems to be a dream not easily made real ‘so long as strategic structures and systems on the continent remain weak.’

### 2.6 Interweaving Intra-African Trade Competitiveness and Competition Regulation

Although “trade” and “competition policy” domains have developed separately overtime, they are mutually reinforcing policy-tools which can be relied upon to contribute to the advancement of an inclusive African economic integration agenda and ultimately growth in Africa. The two are mutually supportive in dealing with systemic challenges that have the potential to halt the benefits of free intra-trade relations not only in the envisaged TFTA but also in the entire Africa continent. Anti-competitive threats of that nature include private international cartels and anti-competitive agreements that affect the efficacy of many economies, especially in Africa. The regimes of trade and competition, therefore, belong to key determinants of market attractiveness to the private sector actors.

According to the **Global Competitiveness Report**, 2013-2014, trade competitiveness entails a set of institutions, policies, and factors that determine the level of productivity of a country. The level of productivity, in turn, sets the level of prosperity that can be reached by an economy. The productivity level also determines the rates of return obtained by investments in an economy, which in turn are the fundamental drivers of its growth rates. In other words, a more competitive economy is one that is likely to grow faster over time.

From these facts, it is undoubtedly clear that competition policy is one of the important aspects which form the basis of a country’s trade competitiveness. This is due to the fact that it enhances efficiencies in productivity and promotes innovations that assist in the optimal

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57 See: Babatunde, A., & Odularu, *op.cit.*

realisation of one’s investment returns. Trade competitiveness and competition are therefore intertwined concepts, the latter being a subset of the former.

As it may be observed from the Global Competitiveness Report 2013-2014, one of the twelve pillars of competitiveness is “goods market efficiency.” Competition, on the other hand, is about markets’ efficiency and fairness (free entry/fair exit) resulting from the interplay of market forces. With free access and exit from markets, firms in an integrated regional economic context enjoy their freedom to enter into or justifiably exit from the regional common market. According to the Global Competitiveness Report:

Countries with efficient goods markets are well positioned to produce the right mix of products and services given their particular supply-and-demand conditions, as well as to ensure that these goods can be most effectively traded in the economy. Healthy market competition, both domestic and foreign, is important in driving market efficiency, and thus business productivity, by ensuring that the most efficient firms, producing goods demanded by the market, are those that thrive. The best possible environment for the exchange of goods requires a minimum of government intervention that impedes business activity.

As it has been well noted, currently, the private sector in Africa is ‘at the centre of economic transformation in a number of African states’ national and regional development strategies.’ The on-going transformations include the creation of an enabling business environment which is seen to be ‘an important pre-requisite for unleashing a private sector response that leads to dynamic growth, and ultimately employment and income generation.’ However, for the

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60Ibid, at p.6.


62See UNIDO, Creating an enabling environment for private sector development in sub-Saharan Africa, the United Nations Industrial Development Organization
African private sector to thrive and take the necessary lead as an engine of Africa’s economic growth, a level-playing environment driven by market forces is necessary to ensure benefits to consumers.

From an intra-regional trade perspectives, however, this calls for not only well tailored ‘institutional conditions such as good governance within the private sector, public sector, and civil society’\(^{63}\) but also well harmonised trade regimes that take into account the importance of subduing all forms of anti-competitive conduct. This means that there is a need to build and strengthen competition regulatory regimes within the continent as a means of not only building the requisite culture of competition within the African growing private sector portfolio but also within the fabrics of public policy makers and government departments. Similarly, it also entails a relaxed ‘Doing Business Framework’ which, even though ‘embedded in a neo-classical framework assuming that markets work reasonably well if property rights and competition are guaranteed’, it also advocates for an inclusionary agenda seeking to abolish unfair regulations that hinder a significant growth potential for informal sector players.\(^{64}\)

The interweaving of trade and competition agenda in a regional setting, however, is better understood within the context of harmonisation of trade laws, including competition laws. From a bigger picture, harmonization implies an attempt to create a coherent framework within which domestic laws can be modified or updated in a standardized manner in order to enhance predictability in cross-border commercial transactions. Such harmonization is a matter of necessity. From an Afro-centric perspective, and taking into account the need to deepen economic integration in Africa, the process can be evidenced through not only the integration projects such as the formation of the RECs but also the additional steps so far taken to deepen the integration


\(^{64}\) See UNIDO, \textit{op.cit.}, at ix.
process through implementation of Common Market principles as the case is for the EAC or COMESA.

As a means of facilitating trade, most RECs the world over, have in one way or the other, taken on-board competition policy considerations in order to address anti-competitive behaviours and give the much needed space for a well-functioning private sector growth.\(^{65}\) In the EAC, for instance, ‘harmonisation trade-related of laws’, is one of the key concepts espoused by the EAC Treaty and its subsequent Protocols. For instance, on the one hand, Articles 83 and 126 of the EAC Treaty, and Article 47 of the EAC Common Market Protocol espouse such a concept of harmonisation at the national levels. In order to spur competition and intra-trade flows in the region Article 83 of the Treaty calls for the harmonisation of monetary and fiscal policies within the region.\(^{66}\)

On the other hand, Articles 33 and 36 of the EAC Common Market Protocol are also relevant in this respect. Article 33 (1) requires the Partner States to “prohibit any practices that adversely affect free trade.” In order to strengthen this prohibition with a view to promote a freer and fairer competition culture that guarantees that small and medium size enterprises (SMEs) within the region are protected from the vagaries and greed of larger companies operating within the region, pursuant to Article 36 (2) of the Common Market Protocol, the EAC Council of Ministers adopted the East African Competitions Policy. Subsequently, in 2006, the East African Legislative Assembly (EALA) enacted the East African Competitions Act.\(^{67}\) The Act, which was


\(^{66}\)In particular, Article 83 (2) (d) requires the Partner States to ‘enhance competition and efficiency in their financial systems.’

\(^{67}\)Act No. 2 of 2006. The Act was published under Legal Notice No. 2 of 2007 as a supplement by the Government Printer. In terms of the application of this legal Notice, according to Article 8 (2) (b) of the EAC Treaty, each Partner State is required, to confer
further amended in 2010 and followed with the adoption of the EAC Competition Regulations,\textsuperscript{68} stands as a supranational legislation which provides a framework for the promotion and protection of competition and consumer welfare within the Community.\textsuperscript{69} It also provides for establishment of the EAC Competition Authority.\textsuperscript{70} The Act, however, applies only to economic activities and sectors having cross-border effects. Similar developments may as well be noted in COMESA in relation to promotion of fair competition as part and parcel of encouraging and facilitating intra-trade and cross-border investments within the COMESA regional bloc.

To further signify the importance of competition in facilitating intra-African trade agenda, the COMESA-EAC-SADC-Tripartite Agenda has as well taken into account the importance of competition policy within its FTA framework. In particular, Article 45 of the Tripartite Agreement signed in 2015 calls upon the Tripartite Member/Partner States to negotiate and endeavour to conclude the a number of protocols within 24 months upon entry into force of this Agreement. The protocols include a protocol on trade in services and protocols on trade-related matters, such as Competition policy, Cross- Border Investment, Trade and Development, and Intellectual Property Rights. Although issues falling under Article 45 of the Agreement are yet to produce tangible results as they were destined for a phase II negotiations, suffice it to conclude that the inclusion of competition policy in this framework is vital since intra-trade relations in the TFTA cannot bring home the successes desired if negative forces of international cartels and other ant-competitive elements are not properly checked and effectively dealt with.

\textsuperscript{68} See the EAC Gazette, Vol. AT 1 – No. 11 ARUSHA, 12\textsuperscript{th} August, 201.
\textsuperscript{69} See Section 4(1) of the EA Competition Act, 2006.
\textsuperscript{70} See Section 37(1) of the EA Competition Act, 2006.
3. Conclusion and the Way Forward

3.1 Conclusion

In order to boost cross-border trade flows in and outside Africa, efforts have been on-going which include signing of not only bilateral trade agreements but also multi-lateral ones. However, despite there being such efforts, one striking feature in African trade development which remains unsolved is that intra-trade relations within Africa have not been successful as they ought to have been. Currently, intra-African trade flows have been less than 20% while 80% accounts for trade relations between Africa and the outside world. Some obstacles that affect the integration agenda and ultimately the intra-regional trade developments were identified in Part 2.3 above. Apart from such obstacles, which need to be removed, the fact remains that most African countries have had a tendency of looking outside Africa in search of trading partners forgetting that they are themselves a ready market for goods and services that can and should be produced in Africa. The existing syndrome of looking “out-there” for trade partners is a colonial legacy that has been lingering with Africa for a long time now. Because of it, African countries have been made to produce what they do not consume and consume what they do not produce. The reversal of this trend is therefore necessary and, indeed, it is a long delayed issue.

3.2 Way Forward

Boosting intra-trade within Africa is an essential agenda because it will enhance the continent’s economic status by way of exploiting its own business proximities before looking at the far-fetched markets in the rest of the world. To be successful, however, there are key challenges that ought to be tackled head-on and in a concerted manner. These include concerted efforts to not only eliminate trade barriers but also address all other external factors shaping international trade, such as globalization and trade liberalization. As correctly noted by UNCTAD, lifting tariff and non-tariff barriers to intra-African trade is important but not the ultimate solution that will unlock the African intra-trade dilemma. On the contrary, ‘policymakers must also foster entrepreneurship and address supply-side constraints inhibiting the

71 See UNCTAD, op. cit., at pg.64.
ability of the private sector to produce and export. Elimination of tariffs across countries will not have any significant impact on intra-African trade if market imperfections on the input side (for example in credit, labour and capital markets) are not adequately dealt with.\textsuperscript{72} African states should, therefore, stop from focusing only on regional trade initiatives that are more on the elimination of trade barriers and less on the development of productive capacities. However, such a move should go hand-in-hand with the adoption and effective implementation of regionally harmonised policies that promote local industrialization, particularly in the area of manufacturing and agro-related industries in Africa in order to countermand dependence on imported cheap goods from outside the continent. This is an indispensable factor. Policy makers should seek to promote an entrepreneurial mentality, strive to formalise Afro-business enterprises and improve the quality of locally made goods (nationally and regionally) all these being essential factors to an increased intra-regional trade in Africa. Improved quality of locally manufactured goods, for instance, will give them a competitive advantage when compared with the cheap goods imported from outside the continent.

The involvement of the private sector in the form of private-public partnership is also an essential aspect that will unlock the existing economic quagmires in the continent. For a long time Governments have been the sole drivers of economic integration agenda in Africa without realising that the private sector is a key ally. The importance of this sector cannot therefore be over-emphasised. Admittedly, and of recent, African regional economic communities are increasingly making efforts to incorporate the private sector into their structures and action plans, for example through the establishment of business councils, such as the EAC Business Council. Through partnership with the private sector, there is a potential to revitalise not only the much needed industrial and technological developments in Africa but also the requisite and inter-linked infrastructure networks of paved roads, standard gauge railway systems, shared oil and gas pipelines and the like. All these are essential in harnessing of the continent’s rich

\textsuperscript{72}Ibid.
resources that hitherto have been left under-exploited. They also form the bases for opening up and facilitating competitive intra-trade relations within Africa

Overall, efforts to enhance intra-African trade competitiveness need to be taken concomitantly with enhanced and balanced policy measures aimed at creating an environment that promotes competition and competitiveness, boosting supply capacities, promoting wide involvement of the private sector in regional integration initiatives and efforts in order to reverse the current weak trade performance of the continent.
The Use of Social Media in Conducting Legal Research in Tanzania: Opportunities and Challenges

Goodluck Temu*

Abstract
It may not be overemphasized that currently the world has entered into a new age of science and technology. Science and technology have tremendously grown in the last few decades to the extent that it is possible to replace almost anything done by human beings with technological systems. These developments have promoted the use of information and communication technology where now almost all transactions can be done online with the assistance of internet connection. It is with this growth that we have seen the rapid introduction and use of social media, a new web-based platform where the contents are generated by users. With this new type of media, communication and sharing of information have been simplified beyond imagination. However, lack of editorial policies and weak and inefficient controlling mechanisms have raised the question of whether pieces of information contained in such media are authentic, valid and true to be relied upon by researchers and the public. It is with these concerns in mind that this article has attempted to examine to what extent social media can be used in conducting legal research in Tanzania. Thus, key concepts such as research and social media have been defined. A case has been made on how positively social media can be of assistance to a legal researcher. Lastly, some precautionary measures have been suggested to guide a legal researcher against presentation of false, invalid and unverified information obtained from social media.

1. Introduction
There is a saying which goes “no research, no right to speak”.¹ This common and valid assertion underlines the overall significance of research in human life. It is through research that truths are unveiled and solutions to various problems are obtained. Research is at the very centre of social progression. It is a catalyst to innovation; a medium of human development; and sparkplug of social, economic, political and cultural changes in the society. It is through research that progress from one stage to another stage in all spheres of life may be well appreciated.

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Research is a scientific process of finding truths about certain issues that directly affect the society. It is guided by the established principles which aim at proving the veracity and authenticity of collected and presented information. According to Bradford University Workbook on research and research methodologies, research is defined as:

a process of enquiry and investigation; it is systematic, methodical and ethical; research can help solve practical problems and increase knowledge.\(^2\)

Hancock B., K. Windridge and E. Ockleford define research as a process which:

involves an explicit, systematic approach to finding things out, often through a process of testing out preconceptions. This process begins with deciding on a research question.\(^3\)

Thus, from the above definitions, research involves searching what is not already known. It is a process of finding out hidden things, thoughts, ideas, knowledge, and information to mention a few of them. This can be done by observing well established principles which guarantee the authenticity of final findings.

The key purpose of conducting research is searching for truth and generation of knowledge. Research also involves attempts of examining and reviewing the existing structures, systems and paradigms in order to come up with the best and acceptable alternatives. Research is conducted in order to find out some hidden information, which ultimately lead into finding solutions to complex problems in the society. Ultimately, it is through research that new knowledge is generated and solutions to problems in the society obtained. Research is among those factors that can rapidly accelerate development in all spheres of life. Kothari notes that the purpose of research is:


\(^3\) Beverley Hancock, Elizabeth Ockleford and Kate Windridge, *An Introduction to Qualitative Research*, The NIHR RDS EM / YH, 2007.
The Use of Social Media in Conducting Legal Research in Tanzania

...to discover answers to questions through the application of scientific procedures. The main aim of research is to find out the truth which is hidden and which has not been discovered as yet...⁴

Research is a wide subject applicable to all disciplines. No meaningful development can be witnessed into any discipline in the absence of researching activities.

Thus, research is also conducted in the legal field in order to deal with issues and problems that are peculiar to law. It is through legal research that solutions to legal problems may be obtained. There are serious and complex legal issues which may not be solved unless critical legal studies are undertaken. For instance, legal research can be used to examine the efficiency of laws or legal systems in a particular jurisdiction. It may be conducted to assess the extent to which socio-economic activities have direct impact on development of law and the pertaining legal systems. Legal research can also be done in order to examine issues that affect administration of justice such as a democracy, rule of law, independence of the judiciary, etc.

In that regard, Majamba has noted that the purpose of legal research is:

....to acquire and impart knowledge for purposes of proving or disproving a legal issue/s and extend ideas or develop new ones in the legal scholarly literature or a dispute. One may also undertake legal research to justify the existing status quo…⁵

We have noted that the underlying role of research is to find truths on certain issues that directly affect the society in question. It is through these truths that solutions to these problems are found. In order to find out these truths, several methods are embarked upon. Traditionally, researchers have been using primary methods of data collection (field work) and secondary methods of data collection (literature/documentary review). However, the development of

information and communication technology has changed the way things used to operate.

Currently, we have not only witnessed the increase of use of computers in our daily activities, but also the increase of use of social media as a form of socialization, spreading and exchanging of information. This article, therefore, intends to examine to what extent legal researchers can use these social media in their researching activities.

2. **Social media defined**

A mention of social media is likely to drive minds of a large section of the public into Facebook, WhatsApp, twitter and the like sites. While these may be considered as major social media sites, it is important to note that social media is a wide and growing concept. Introduction of advanced mobile operation systems such as android and iOS has boosted the designing of several applications which are social in nature. The very essence of social media comes from the word ‘social’ meaning that the society is at the centre of such media. Social media have become a medium which has facilitated easy communication and interaction between members of the society. In an attempt to define social media, Ray Pointers observes:

> The term ‘social media’ is useful because it groups together much of the new phenomena of the internet in a relatively value-free way. The term does not imply that social media is better than other media, or that it will necessarily replace old media, it is simply a description of media based on the paradigm of many-to-many.

According to the United Kingdom Manual on the use of social media for social research, social media are divided into six categories. These

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6 This is a mobile operating system owned by Google and used by several mobile devices from different companies such as Samsung, Sony, HTC, Huawei, Tecno etc.
7 This is an operating system used by devices created by an American company, Apple.
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are blogs and microblog sites (e.g., Twitter, Tumblr), Social networking sites (e.g., Facebook, Myspace), Content communities (e.g., YouTube, Daily Motion, Pinterest, Instagram, Flickr, Vine), Collaborative projects (e.g., Wikipedia), Virtual game worlds (e.g., World of Warcraft) and Virtual social worlds (e.g., Second Life, Farmville).\(^\text{10}\)

All of the above social media have one thing in common. Their contents are not generated by a team of persons who have been trained to collect, analyse and present information in a correct and accurate manner to the community (as in cases of newspapers or television stations). In most cases, no editing is done before a person can post on these sites. Most social media have, however, developed polices which restrict posting of materials which are likely to be offensive or in contravention of legal requirements of a particular country.

According to Kaplan and Haenlein, there are two basic concepts that enable us to understand what a social media is.\(^\text{11}\) These are Web 2.0 and User Generated Content (UGC). Web 2.0 refers to an [electronic] platform where not only a few individuals are having an access to determine the web contents, but “instead are continuously modified by all users in a participatory and collaborative fashion”.\(^\text{12}\) Thus, instead of one person owning and determining the contents of a website, Web 2.0 allows individuals to have access and participate in generating its contents.

For instance, take a website owned by institutions such as the Legal and Human Rights Centre or the University of Dar es Salaam. Such websites have restricted access and therefore no one may post contents on them unless he is authorized by the administrator. Such a website is built on an old platform known as Web 1.0. On the contrary, social

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\(^{10}\)Ibid, pg 3-4.


\(^{12}\) Kaplan, A.M. & M. Haenlein “Users of the world, unite! The challenges and opportunities of Social Media”, op. cit., 59—68.
networks, such as Jamii Forums, Twitter and Facebook, allow users to post and contribute to their contents. These are built in the later generation platform known as Web 2.0.

On the other hand, User Generated Content (UGC) refers to how people use or make use of social media. On this aspect Kaplan and Haenlein have said:

...User Generated Content (UGC) can be seen as the sum of all ways in which people make use of Social Media. The term, which achieved broad popularity in 2005, is usually applied to describe the various forms of media content that are publicly available and created by end-users. According to the Organisation for Economic Cooperation and Development (OECD, 2007), UGC needs to fulfil three basic requirements in order to be considered as such: first, it needs to be published either on a publicly accessible website or on a social networking site accessible to a selected group of people; second, it needs to show a certain amount of creative effort; and finally, it needs to have been created outside of professional routines and practices. The first condition excludes content exchanged in e-mails or instant messages; the second, mere replications of already existing content (e.g., posting a copy of an existing newspaper article on a personal blog without any modifications or commenting); and the third, all content that has been created with a commercial market context in mind...

The two authors conclude that social media is:

...a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of User Generated Content...

Therefore, a general definition of social media would involve any web-based platform where the general public (users) have an access to generate its contents. An example common to many persons would be Facebook. Facebook is a social media because users are free to post contents such as pictures, words, videos, etc. This is true also for other sites such as twitter, YouTube, Instagram, snap chat, etc.

From what we have seen above, the general features of social media include connectivity, involvement of the community, openness and encouragement of participation.

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13Ibid.
14Ibid at pg. 61.
3. Policy and Legal Framework on the General Use of Social Media in Tanzania

There is no specific policy or law that regulates the general use of social media in Tanzania. However, there are several policy and legal provisions that encourage the use of information and communication technology, including social media. This part focuses on such provisions.

3.1 Policy Provisions

Tanzania has adopted several policies which have an impact on the use and development of information and communications technology. Such policies include the National Research and Development Policy (2010), the National Information and Communication Technology Policy (2016), National Science and Technology Policy (1996) and Tanzania e-Government Strategy, (2012). These policies intend to create enabling environment which will improve the use of science and technology in Tanzanians’ daily lives. It is through these policies that we have seen a tremendous increase in the use of information and communication technology in the country. This improvement is seen almost across all sectors of the economy in Tanzania.

3.1.1 The National Science and Technology Policy of 1996

This policy came in as a result of a review of the then National Science and Technology Policy of 1985. This review was necessary as Tanzania had already embarked on a move from state-controlled to a more liberalized economy. It was therefore important to have in place a new policy direction which would match with and supported the new economic approach. This policy puts science and technology at the centre of national development. It seeks to build a science and technology-literate society which is innovative and thus able to use

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16 The United Republic of Tanzania, Ministry of Science, Technology and Higher Education, The National Science and Technology Policy for Tanzania, April 1996
science and technology in their daily activities. For instance, one of the general objectives of the Policy is:

...to promote science and technology as a tools for economic development, the improvement of human, physical and social well-being, and for the protection of national sovereignty.\(^{17}\)

The policy also seeks to encourage training of people on the use of science and technology and establish training centres for the same purpose. It is through this policy direction that we have seen an increase in the use of science and technology. The use of mobile and internet communication, for example, has tremendously increased.\(^{18}\) It is this increase that has also boosted the development of social media which are now used as a fast and simple way of communication and expression of ideas in the society.

### 3.1.2 The National Research and Development Policy

This policy sets a framework on coordinating research and development activities in the country.\(^ {19}\) According to this policy, research is the key to every development activity. Thus, its general objective is:

...to provide guidance to researchers in the public and private sector, policy and decision makers, as well as development partners in addressing present and future national research challenges for socioeconomic development.\(^ {20}\)

The policy notes that there is insufficient use of Information and Communication Technology in researching activities. In this aspect, the policy sets out two objectives:

i. Increasing the contribution of research in socio-economic disciplines and ICT for national development, and

ii. Increasing the use of ICT in research.

Through this policy document, the government is expressing its commitment in encouraging the use of ICT in researching activities. It

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\(^ {17}\) Paragraph 16, bullet one, ibid.


\(^ {19}\) The United Republic of Tanzania, Ministry of Science and Technology, the National Research and Development Policy, 2010.

\(^ {20}\) Paragraph 2.5, ibid.
calls for researchers to move from traditional methods and embrace the use of ICT in conducting research. The use of ICT is likely to be more efficient and less demanding on the researcher’s side while guaranteeing more accurate and reliable information. Social media falls within the modern use of ICT and as we shall note later on, they are likely to be beneficial in the whole process of conducting research.

3.1.3 The National Information and Communication Technology Policy 2016

This is the newest policy to have come into force on issues of science and technology.\textsuperscript{21} This comes in as a review of 2003 policy which has taken our country through a tremendous growth in the ICT sector within a very short period of time. The policy recognizes that there is an increase in the use of ICT and thus there is a need to establish a policy that would cater for a friendlier environment for ICT expansion. It also recognizes the increased use of social media the daily lives of Tanzanians. For instance, the policy notes:

\ldots There has been an improvement in adopting and using ICT in day-to-day activities. This is a result of the realization of the productive sectors focus area of the NICTP 2003, which envisioned enabling ICT to contribute towards the reduction of poverty and improvement of the quality of life. A good example is the uptake of mobile money services. The introduction of mobile money services such as M-Pesa, TigoPesa, Airtel Money and EzyPesa, has enabled people to save, send and spend money including payment of bills for utilities through mobile platforms…Moreover, the use of social media applications such as Facebook, Twitter, Instagram, WhatsApp, LinkedIn, YouTube and Blogs is increasing in Tanzania just as the trend in the world is. Social media now constitute dominant forms through which society communicates using different languages including Kiswahili.\textsuperscript{22}[Emphasis mine]

This policy therefore comes in with a view to transforming Tanzania into an ICT-enabled, knowledge-based economy through development, deployment and sustainable exploitation of ICT to benefit every citizen and business.\textsuperscript{23} It seeks to accelerate development where Tanzania can

\textsuperscript{21} The United Republic of Tanzania, Ministry of Works, Transport and Communication, The National Information and Communication Technology Policy, May 2016.
\textsuperscript{22} Paragraph 1.1.6, \textit{Ibid.}
\textsuperscript{23} See Paragraph 2.1.2 of the Policy, \textit{Ibid.}
cross into a middle economy country.\textsuperscript{24} It, therefore, puts citizens at the centre of ICT. In order to benefit from ICT the society must be ICT literate. The policy recognizes the problem of ICT literacy in our society. With a view to mitigating this problem, through Policy Statement 3.1.3.2, the government commits itself to:

i) Ensure that ICT awareness is created among the public;

ii) Embrace ICT as an integral part of national development and empower citizens to use it to fight poverty, ignorance and disease so as to improve the quality of their lives.

The above policy statement encourages the public to use ICT in their daily activities. One of ICT medium which is commonly used by majority of Tanzanians is internet service upon which social media operate.

\textbf{3.1.4 Tanzania e-Government Strategy}

Tanzania e-government strategy\textsuperscript{25} is not a policy document \textit{per se}. It is a strategy adopted by the government that seeks to use ICT in delivery of services and thus increase efficiency in the public sector. The strategy defines the term e-government to mean:

\ldots the use of ICT to enhance work efficiency and improve service delivery in order to meet the needs of the public in a responsive and transparent manner. E-Government is expected to facilitate the interaction between the Government and its clients including the citizens (G2C) and business communities (G2B), as well as within the public administration itself (G2G).\textsuperscript{26}

The strategy intends to see that the government is providing services electronically without citizens actually visiting its offices. Through e-government, the government envisages a possibility where there will be a full interaction to the extent that it will be possible for a citizen to carry a transaction, an application or complete a request without physically visiting the responsible office. At page four of the strategy, the government recognizes the potential that lies with internet and

\textsuperscript{24} See Paragraph 2.1.3.1. of the Policy, \textit{Ibid}

\textsuperscript{25} The United Republic of Tanzania, President’s Office – Public Service Management, Tanzania e-Government Strategy

\textsuperscript{26} Paragraph 1.1 of the Strategy, \textit{Ibid}
electronic devices and thus intends to use them in achieving its goal. Specifically, the strategy observes:

…The government recognises the potentials of technologies such as computers, mobile devises, the Internet, Television, radio, and many others in enhancing services delivery. It is therefore resolved to exploit such technologies to enhance its relationship with citizens, business communities, government employees, as well as other Governments…

The government has already established an e-agency to promote the use of ICT in its offices and departments. The agency deals with a number of things including developing of websites and mobile phone applications for individuals and the government itself. It intends to bring services closer to the people as much as possible.

This e-government strategy also lays a strong foundation for operation of social media in Tanzania. This is because social media is one of the best ways of reaching majority of citizens easily. Several government offices and departments maintain social media accounts through which they inform the public of various developments. Such accounts are found within twitter, Facebook, blogs, You Tube\(^{27}\) and even Instagram. Several government officials are also having social media accounts through which they communicate and interact with the Tanzanian public.

3.2 Legal Provisions

3.2.1 The constitution of the United Republic of Tanzania

A constitution is the basic law of the land. It defines the state in question, provides for its boundaries, powers and its limits and its direction on its policies. Most of modern constitutions also contain a bill of rights in which rights and responsibilities of citizens are embodied. Our constitution has a provision which may be regarded to

\(^{27}\) For instance, Tanzania State House runs a You Tube account accessible at https://www.youtube.com/channel/UCBjbx3Y59dnH7UMnSCdSd-g as accessed on 8th November 2016
have set a basis for the use of media in Tanzania. That provision is Article 18 which is on freedom of expression. It provides:

Every person -
(a) has a freedom of opinion and expression of his ideas;
(b) has a right to seek, receive and, or disseminate information regardless of national boundaries;
(c) has the freedom to communicate and a freedom with protection from interference from his communication; (sic) and
(d) has a right to be informed at all times of various important events of life and activities of the people and also of issues of importance to the society.

The above provision is very vital in as far as the use of social media is concerned. First, it guarantees every person’s right to have an opinion and freedom of expression. The manner in which such a freedom of expression can be enjoyed may be very wide. This may also include the use of social media. It is common to see both members of leadership cadres and commoners using Facebook and Twitter in airing their views. This is a perfect exploitation of Article 18(a) of our Constitution.

Second, the same Article in paragraph (b) declares that everyone has the right to seek, receive and disseminate information regardless of national frontier. Social media, like other forms of electronic media are a perfect medium of enjoying this right. It is through this medium that information can spread into the entire world on a click of a mouse.

Third, Article 189(c) declares the right to communication. This freedom is not only limited to our long time conventional methods. It certainly covers, as well, those who have resorted to modern and instantaneous means of communication, social media inclusive.

The constitution is therefore relevant as it allows people to communicate freely, to develop and express their opinions and to disseminate information within and outside the country. Use of social media can therefore be considered to fit squarely within this freedom.

28 The Constitution of the United Republic of Tanzania, Cap. 2 of the Laws, 2005
3.2.2 The Cybercrimes Act of 2015

The Cybercrimes Act\textsuperscript{29} is one of the newly enacted Acts that intends to control and regulate the use of computers in relation to the committing of crimes. Its long title introduces it as:

\begin{quote}
An Act to make provisions for criminalizing offences related to computer systems and Information Communication Technologies; to provide for investigation, collection, and use of electronic evidence and for matters related therewith.
\end{quote}

This Act criminalizes several acts which were not criminal before its passing by the Parliament. Some of the acts criminalized include publication of false or sedition information, pornographic and lavish pornographic materials, cyber bulling, etc. Most of these crimes are best committed by use of social media. Therefore, even though the Cybercrimes Act does not specifically mention the use of social media, it establishes a clear framework that governs its proper use in the society.

4. The Use of Social Media in Legal Research

4.1 Situational analysis

It has already been noted that it is common for most of law students and legal researchers to use traditional primary and secondary methods of data collection. These include the use of questionnaires, interviews, observation, participation, focused group discussion and literature review. Of recent there has been an increase in the use of internet as a source of literature where several journal articles, papers, research reports and conference papers may easily be retrieved either freely or upon subscription.

The use of computer, mobile devices and internet services in Tanzania has increased tremendously over the recent years. For instance while in 2011 there were about 5,311,218 internet users, the number grew up to

\textsuperscript{29} Act No 14 of 2015
17,263,523 as of December 2015.\textsuperscript{30} The number of telecom subscriptions (Vodacom, Tigo, TTCL, Halotel, Zantel, Smart and Airtel) has reached 39,236,444\textsuperscript{31} in 2010 from 19,592,795 in 2005.\textsuperscript{32}

Worldwide, the third quarter of 2016 saw Facebook active users reaching at 1.79 billion people.\textsuperscript{33} You Tube claims to have more than 1 billion users,\textsuperscript{34} a third of people that visit the internet daily. This means, one in every three persons who visit the internet also visits YouTube. Twitter had active users rounding to 320 million, while Instagram had active users rounding 400 million as of December 2015.\textsuperscript{35}

There are no official statistics from Tanzanian authorities on the number of people using social media. However, a number of people who are using mobile phones and internet services as indicated above gives a rough picture reflecting on an increase in the use of ICT in Tanzanians’ daily lives. Unofficial data suggest that majority of Tanzanians are already using Facebook. About 4million people are active users of Facebook.\textsuperscript{36} Tanzania is also among top ten leading internet users in Africa.\textsuperscript{37} These statistics may not be overlooked when it comes to the role of social media in conducting legal research.

\textsuperscript{30} Tanzania Communication and Regulatory Authority, \textit{Quarterly Communications Statistics Report}, April- June 2016 Quarter.
\textsuperscript{31}Ibid.
\textsuperscript{34}You Tube, \textit{Statistics}, as accessed at \url{https://www.youtube.com/yt/press/statistics.html} on 8\textsuperscript{th} November 2016.
\textsuperscript{35}\url{http://www.adweek.com/socialtimes/heres-how-many-people-are-on-facebook-instagram-twitter-other-big-social-networks/637205} as accessed on 8\textsuperscript{th} November 2016.
\textsuperscript{37}\url{http://www.internetworldstats.com/stats1.htm} as accessed on 8\textsuperscript{th} of November 2016.
4.2 Use of Social Media in Legal Research: A Positive Approach

The nature and challenges brought up by the use of social media has limited its applicability in conducting research. While it is almost impossible to use social media as a method of data collection in some fields, it has now become possible to use such media in social sciences research. Obviously there are several challenges associated with the use of social media as we shall have a look on them later on. However, ignoring its role in conducting legal research may be an obvious oversight. Several studies have shown an increase in the use of social media even with academic institutions in the world. For instance in the USA:

Nearly two-thirds of all faculty have used social media during a class session, and 30% have posted content for students to view or read outside class. Over 40% of faculty have required students to read or view social media as part of a course assignment, and 20% have assigned students to comment on or post to social media sites. Online video is by far the most common type of social media used in class, posted outside class, or assigned to students to view, with 80% of faculty reporting some form of class use of online video…\(^{38}\)

Social media has also been praised as a revolutionary approach on how people communicate in our daily lives. It is a people-centred approach which puts the people at its very centre. It thus comes with potential that may change the conventional way of doing things.\(^{39}\) Social media may therefore be used in the following ways.

4.2.1 As an indicator of existence of a legal problem

Sources of legal research problem can be wide. They may vary from findings on existing literature, passed bills in Parliament, decided cases and even practice of administrative officials in carrying out their day to day activities. However, one of the common source of research problem


is actually what comes from the people. A good research problem must be people-centred. It is through the people that we learn of their dissatisfactions on the existing legal systems. Through the people we get the public opinion on matters of public interest.

For instance, if the Court of Appeal of Tanzania has issued a decision that has sparked a debate in the society, it is the people’s reaction in the public that is likely to indicate their acceptance or otherwise of the said decision. Similarly, if Parliament has passed a bill which majority of Tanzanians, or a section of targeted community is unhappy with, it is their reaction that indicates the existence of a problem. The public may also express its dissatisfaction with the performance of public institutions such as law enforcement agencies, corruption investigation machinery or even revenue collection bodies. All these can very well be explained through social media. While it may not be possible for a researcher to read all newspapers in order to get peoples’ opinions, he can capture that through social media. It is common for people to discuss trending issues in social media such as Facebook and Twitter. From these discussions, a researcher gets a pointer towards the existing legal problem in the society.

4.2.2 As a complementing method of data collection

The traditional methods of data collection such as questionnaires and interviews are known to be time consuming and cost insensitive. If a law student or a researcher intends to interview twenty persons, he will have to physically visit them. This may bring practical challenges especially where interviewees are located in different geographical locations. Additionally, interviews are normally faced with challenges of time management. With limited time available to most researchers, and especially students, meaningful and effective interviews normally remain to be an optimistic ambition. Most of the interviewees are normally occupied with a lot of engagements. Getting time for appointments and honouring them remains a serious challenge. Experience shows that not many law students are able to conduct effective interviews due to the above challenges.

Social media may be used as an alternative in addressing the above challenges. A legal researcher may set an appointment with his
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interviewees where later on she can use interactive social media such as WhatsApp and Telegram in conducting interview. This is a fast and convenient method of communicating with respondents especially where a researcher has already made a first contact. Use of blogging has also been a common method of data collection in social sciences and humanities.\(^4^0\) It is important to note that this will be practical to interviewees who are willing to use this medium. It is also very practical to respondents who are well conversant with the use of modern technological gadgets.

Social media can also be used for strategic focused discussions as a way of data collection. It is common to have people with common interests having groups in social media such as WhatsApp and Telegram. While these groups are primarily for social interactions and communication, they can as well be used for discussing research questions. For instance, if a lawyer is doing research on efficacy of certain legislation, he may hold an online discussion with a group of fellow lawyers for a detailed discussion on such legislation.

Today’s younger generation is much more interested with posting of pictures and videos in social media. No wonder social media like Facebook, Instagram and Snapchat which give priority to posting of pictures and video are becoming more popular. While this may not directly bring an answer to an obvious legal research question, they may be useful in understanding the public perception towards law and other social issues. Issues of morality, for instance, can be very well observed through these kind of social media which will reflect on the level of legal compliance in the country.

4.2.3 As sources of literature and information

The expansion of social media has seen an increase in posting of useful and resourceful information in relevant sites. While collaborative sites such as Wikipedia and related wikis may not be reliable at a hundred percent, they provide very useful information to researchers. They

\(^{4^0}\) See Poynter, R., The Handbook of Online and Social Media Research Tools and Techniques for Market Researchers, John Wiley & Sons Ltd, United Kingdom, 2010 (Part III).
 normally indicate their sources—such as books, journal articles, websites from which more authentic details may be available.

It is also important to note that most of educational institutions such as universities especially in developed countries have accounts with educational social media. One example would include Apple through its podcast services where it posts a lot of series of teachings in word and audio versions which are a good literature for researching activities.\textsuperscript{41} Another practical example can be found in the use of You Tube. You Tube is now being used by higher education institutions as a medium of posting teachings, lectures and seminars.\textsuperscript{42} The London School of Economics, for example, has a You Tube account on which several materials, lectures and information are posted.\textsuperscript{43} Another good example is the Oxford University Press You Tube channel with lots of useful materials and lectures across all disciplines.\textsuperscript{44} Apart from higher learning institutions, there are several other reliable organisations, offices and departments that maintain accounts with social media. In Tanzania, several government departments and media houses are already having such accounts.\textsuperscript{45} Through these accounts, the public get a lot of information that may be useful in conducting of research.

4.2.4 \textbf{As a medium of knowing and recruiting possible respondents}

Social media is becoming an increasingly common platform upon which a good section of public does air its opinion. Some of these opinions are given through public accounts which may be accessed by any interested member of the society. It is common to see people discussing, commenting and airing their views on current social,

\textsuperscript{41} See details of podcast at \url{http://www.apple.com/uk/itunes/podcasts/} (accessed on 11\textsuperscript{th} November 2016)

\textsuperscript{42} See Harvard Law School You Tube site at \url{https://www.youtube.com/results?search_query=harvard+law+school} (accessed on 11\textsuperscript{th} November 2016),

\textsuperscript{43} \url{https://www.youtube.com/results?search_query=london+school+of+economics+research+methods+} (accessed on 11\textsuperscript{th} November 2016)

\textsuperscript{44} See \url{https://www.youtube.com/oupacademic} as accessed on 16\textsuperscript{th} January 2016

\textsuperscript{45} See for instance a You Tube accounts owned by ITV Tanzania at \url{https://www.youtube.com/user/ITVTZ}, an account owned by directorate of state house communication \url{https://www.youtube.com/channel/UCBjbx3Y59dnH7UMnSCdSd-g} (both accessed on 30\textsuperscript{th} March 2017). Similar accounts are maintained with twitter, Facebook and even Instagram.
economic, political and even cultural issues in the society. These include people of high profile such as prominent politicians, business persons and even heads of state. Through these media, a researcher may take a keen interest in observing tweets, comments, publications of these persons in order to spot out his possible respondents. This will save him a lot of time and resources which would have been consumed in a physical attempt of recruiting the respondents.

4.2.5 As a method of connecting with researchers, researching organisations and funding opportunities

Social media such as Twitter and Facebook may be used by researchers to connect with their fellow researchers, researching organisations or even funding opportunities. Most researchers do maintain accounts with social media where they communicate their research procedures, methods, findings, recommendations, research openings or even funding opportunities. Social media provides an excellent opportunity for such a connection which is vital in researching activities. A good example of such media is research gate. Social networking sites where researchers are free to upload their works and publications in order to share with the public. Through research gate, one researcher is able to trace publishers of the same interest who may develop interests in reviewing their works, in joint researching activities and in joint publications.

4.2.6 As a medium of collecting data with global views and perspectives

Traditional methods of data collection are very limited geographically. A researcher who wishes to use questionnaires or interviews is likely to be limited within his geographical reach. Electronic methods such as emails may be used to reach those who may not be easily accessible physically. However, the use of emails depends much on the preference of the respondent. It is not as instant as social media. And it is not practical to collect global views on issues of wider public concern through emails.

46See details on research gate at https://www.researchgate.net/home
Social media, on the contrary, proves to be an excellent medium of communication where people on different places of the world may interact and have instantaneous correspondence at the same time. This will enable the researcher to get additional information which would not have been accessible by use of conventional methods of data collection.

Social media can also prove to be useful in collecting opinions of international communities on issues of global effect. It is now common for people of influence to share their views using twitter and Facebook and the like sites. This is true even for people of higher calibre in the society such as heads of state and government, politicians, businessmen, renowned academicians, etc. Thus, a survey on these media may assist a researcher to know the global views on his research topic, and the appropriate steps to take in order to incorporate views in his study.

5. **Dangers of using social media in legal research**

The overall purpose of any research is a scientific and consistent finding of truth. This means research must present nothing else but a true reflection of the society. While social media may be an easy and much more comfortable tool in researching, relying on it solely may compromise the very same objectives of research. There are various dangers of using social media in legal research as shown below.

5.1 **Biased sampling**

Sampling is an important key in collecting accurate information from the field. A poor sampling is likely to compromise the role of research in question. Use of social media has its limitations and that is so more in developing countries like Tanzania. For instance, we have seen it is only 34% of people who have internet access in Tanzania. Of this percentage, not all of them are interested in social media. Social media attracts more the young generation than senior citizens; even though it is common to see those who are above fifty years of age joining them as well. It is more likely than not that views and information collected from social media will reflect opinion of the young generation. This may not be the true reflection of the whole society. For instance, the younger generation is likely to have a different opinion on the existing cyber laws compared with senior citizens.
5.2 Biased information

People are, normally, biased towards certain patterns. Their views and opinions are affected by several factors such as political affiliations, religious beliefs, social standing etc. Similarly, some social media may be comprised of users who form certain common view and therefore their opinion may be biased. Some forums have taken clear political standings that may easily be identified with certain political parties. Having respondents from such a site alone may lead to collection of biased information. It has also been noted that researchers are likely to give biased online information if the research in question is likely to benefit them.\(^{47}\)

5.3 Ethical challenges

Ethical consideration is always at the centre of all researches. It is through research ethics that a research is conducted in a fairly and acceptable manner. A research project which has discarded ethical principles is not likely to provide a true picture of the society. Thus, Northumbria University Handbook on Research Ethics notes:

> The application of a robust ethics structure is an integral part of good research practice. It ensures that research is, firstly, conducted safely and meets agreed principles, standards and codes of practice; and secondly that it produces knowledge that benefits participants and society, and deepens academic understanding of the subject area… \(^{48}\)

Use of social media, therefore, poses several ethical challenges. First, rules of ethics require that a researcher introduces himself, the topic and the purpose of the research before he proceeds with data collection from the respondents. This is essential in obtaining a pre-informed consent. A respondent is expected to be fully aware of the type, nature


and purpose of research before he takes trouble to participate in providing his views. In discussing this principle of pre informed consent, Paul says:

\[\text{…we might say that it should include any information which a participant might conceivably need in order to make decision about whether or not to participate…The principle of informed consent applies not only to all situations with human participants, but also to research on social groups and organizations, businesses and corporate entities…}\]

It is still doubtful whether pre informed consent can be effectively procured via social media. For instance, it is hard to prove that the respondent has attained the age of majority and therefore has given his full consent. Social media may not provide a convenient mechanism upon which the respondent is fully informed before he decides to participate in the research in question.

On the same ethical footing, it is always advisable to allow the respondent to read or verify the information you have recorded [only his responses]. This is very simple when using conventional methods of data collection such as questionnaires and interviews. The respondent may easily crosscheck to see whether what has been recorded is what he actually meant and conveyed. Social media on the other hand may not provide such an opportunity. For example, if a researcher chooses to conduct an interview with an assistance of interactive media such as WhatsApp, he would be expected to have a transcript of such interview to be used in his research. He would record the information as understood by himself and not as how the respondent had intended. At this point, the respondent is not in the position of either knowing the transcript version of their WhatsApp conversion or to correct anything that might have been incorrectly captured.

The second area of concern is on the use and acquiring of intellectual property rights. Intellectual property is a very common concern for persons who are using social media as a tool for legal research. Normally, information collected by a researcher directly in the field gives him copyright over the compiled document. This is because such

work is a product of the researcher’s personal efforts. Using social media may pose a serious challenge on this aspect. A researcher may never know whether information he is getting from his respondent is in its original version or a mere presentation of another person’s work. It is possible to get a response from a person who is simply copying ideas from another person’s work. At the end, no researcher may be confident to claim copyright over the information collected via social media.

The third ethical challenge is in the area of confidentiality. Confidentiality is another major ethical concern in the whole process of conducting research. Most respondents, especially those providing sensitive information, may not want to have their identities revealed. It is hard for a researcher to ensure this especially with the improved technology where hacking and cyber tracing has become so common. It is therefore very possible that online activities of the respondent are being tracked by a third party which waters down the whole concept of privacy. It has also been argued that some of the information presented online may very well identify who are the sources of such information. For example, it has been proved that combination of data collected from Facebook may very well identify the profiles of those who gave such data and thus breach the whole concept of confidentiality.\(^50\)

5.4 Correctness and authenticity of information collected

Research, as already noted, is supposed to be a collection of nothing but a true account of what happens in the society. A research which collects wrong information is not worth such a name. A researcher has to make sure he does not only collect as much information as he can from the field, but also make sure that such information is correct. Use of social media is likely to compromise this fact. Since there is no face to face meeting with the respondent, it is hard to prove the respondent’s identity. It is also not possible to know whether the respondent is what he claims to be and whether the account he is presenting is actually

\(^{50}\) Moreno, M.A., and others, “Ethics of Social Media Research: Common Concerns and Practical Considerations”, Cyber psychology, Behaviour, And social Networking, Volume 16, Number 9, 2013, pp. 708-713 at pg. 711
true. There could be a lot of exaggeration which may not be counterchecked by body language, demeanour, etc.

As one author notes:

...But there is also nonsense out there. Along with quality content on social media websites, there is a lot of unworthy content that is of little educational value. All this unworthy content - whether it amuses, shocks, stimulates, repulses, or just bores the viewing audience - is online all the time. This kind of content is referred to as digital noise. Unlike white noise, which exists as a constant background annoyance of little consequence, digital noise is in the foreground, in your face, and if it is not filtered it can have consequences in education. Students may believe erroneous information or choose to learn a skill by watching an unqualified person's online tutorial, which could teach them the wrong way to do something…⁵¹

5.5 Data sharing and lack of comprehensive legal framework on data protection in Tanzania

Conducting research by use of social media involves data sharing. Participants are expected to give some information to researchers, some of which may be very sensitive. While some jurisdictions have passed laws that govern data protection, Tanzania has no specific law which protects data collected by the researcher apart from the general constitutional provision on protection of the right to privacy.⁵² The effects of lack of clear legal framework is to put respondents’ privacy at risk. Further, respondents remain without an assurance on whether information they have shared remain protected (data protection). Tanzania has no law which provides for the means of storing data and the manner of sharing where it is necessary.

5.6 Hacking and its underlying dangers

Hacking and its effect that might befall users of social media can never be underestimated. It has been common to see this happening at personal levels where emails and social media accounts such as twitter and Facebook are being hacked. Hacking can also be done on a large

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⁵² See Article 16 of the Constitution of the United Republic of Tanzania
scale where the entire system or network may be intruded. Recent claims by the United States that Russia hacked its electoral systems prove the magnitude of this danger. Collecting information from social media is not exempt from this danger. It is most likely that a researcher may be collecting information from hacked sources which water downs the authenticity of research in question. It is even more serious as a lay person [in information technology] may not be able to point out the difference between authentic and hacked information.

5.7 Addressing the dangers of relying on social media in legal research
There are two realities that need to be balanced concerning the use of social media in legal research. On the one side, it is true that there is an increase in the use of social media in Tanzania as it is across the world. The trend shows that the number of people who are exposed to social media is increasing. It is therefore not realistic to discard altogether any possibility of using the same in legal research. On the other hand, the nature of social media raises a serious question on the authenticity and reliability of the information to be collected. It is through a balanced approach of these two realities that the quality of the final research may not be vindicated.

The best approach for a researcher is to use social media as a complementing method of data collection instead of solely relying on it. It is important not to discard the traditional methods of data collection which are likely to give more guarantee on the authenticity of collected data as it would have been with social media. Thus, information collected through social media should be used to add what is already

collected through conventional methods rather than replacing them entirely.

It is also advisable to have a mechanism to verify information collected through social media. This may be done through carrying out of comparative studies with existing literature and other findings from the field. Telephone interviews and teleconferences may be used to counter this danger.

Verification of account holder may also prove to be a good alternative. Some social media have developed systems of verifying their users. This is an inbuilt system with the social media owners/operators with an ability to verify an account holder. This system enables the social media in question to verify that an account registered in a certain name (say of a prominent politician) is actually registered by him. Twitter and Facebook, for instance, have developed mechanisms which verify accounts registered by prominent persons in the society-like heads of states, heads of international organisations, members of parliament, business persons, etc. With these systems, it is possible to know that a person is actually the one he is claiming to be. Information gathered from such person may be relied upon as his true account on certain issues in question.

6. Conclusion

The world is changing from analogy to digital era. In fact, save for poverty-stricken countries in the third world, most of the developed nations have replaced traditional ways of doing things with introduction of science and technology systems, including the use of ICT. And as noted in this article, Tanzania is following the course. It is high time ICT was more integrated in the process of data collection by researchers. Properly and cautiously used ICT and specifically internet and social media may improve researching activities especially in humanities and social sciences.

We have noted that the use of social media in researching activities may come up with some limitations. These are caused by the very nature of these media. It may be assumed that social media has nothing useful to offer apart from a platform that offers a chatting avenue for its
members. While this is partly true, as it reflects the very purpose of their establishment, current tendencies prove otherwise. Social media are now in use not only by friends who have 'time to waste' but also by prominent and influential persons in the society, as a medium of sharing information and expressing of their opinions. Several governments around the world are already using social media in disseminating information to their subjects. The US, for example, maintain an official president twitter account known as @PUTUS (President of the United States)\textsuperscript{54} and official White House account named @The White House.\textsuperscript{55} Their president, Mr Donald Trump, has expressed his confidence over twitter than main stream media, claiming that he will continue to use it to easily convey his message to his people without going through mainstream media.\textsuperscript{56} Even in Tanzania, the chief government spokesperson maintains an account with twitter and other social media.\textsuperscript{57}

It is therefore my general conclusion that developments in the ICT sector has left us with nothing but one option. Legal researchers, like any other persons in the world, have to keep up with these changes. There is a need to positively consider the role of social media in contributing to research process. Just as researchers have embraced the use of electronic searches (e.g. Google) in researching activities, social media may and in fact will provide equally a valuable contribution. With good data analysis techniques, a good researcher will be able to extract useful information from social media for a better research results.

\textsuperscript{54} https://twitter.com/POTUS?lang=en (accessed on 31st March 2017)
\textsuperscript{55} https://twitter.com/WhiteHouse?lang=en (accessed on 31st March 2017)
\textsuperscript{56} Mary Papenfuss, Donald Trump Says He’ll Stick With Personal Twitter Account As President, The Huffington Post, 16th January 2017 also available at http://www.huffingtonpost.com/entry/donald-trump-personal-twitter-account_us_587c504fe4b0e58057ff74e1 as accessed on 31st March 2017
\textsuperscript{57} https://twitter.com/TZ_MsemajiMkuu?lang=en (accessed on 31st March 2017)
Turbulent Relationship between Africa and the International Criminal Court: The Future of Human Rights and Court System in Africa

Bilal Mohamed* & Ally Possi**

Abstract

This contribution revolves around the endless debate surrounding the current ‘turbulent’ relationship between Africa and the International Criminal Court (ICC). Despite Africa’s role in engineering the establishment of the world criminal court, lately, the legitimacy of the Court is questioned; after being accused of bias against Africa. With this ongoing perception, there are calls among African states that they should snub the ICC. While all that is happening, the prevalence of impunity in Africa sheds some doubt of the Continent’s ability to deal with atrocities. In trying to showcase its innocence of preventing impunity, Africa has turned to the African Court on Human and Peoples’ Rights, and is rethinking about re-structuring the Court to have human rights authority. This controversial move is the genesis of the argument of our article that the ‘turbulent’ relationship between the ICC and Africa threatens the effective promotion and protection of human rights in the Continent. The latest attempt to boycott the ICC and move the international criminal jurisdiction to the African Court is likely to preserve impunity, something that all concerned African citizens would not subscribe too.

1. Introduction

Prosecution of international crimes is not a new development, as it is perceived by many today. It first started in the 19th Century, after atrocities from World War I and II. History on the other hand suggests otherwise. Prosecution of international crimes was evident since ancient times of the Greeks, but such prosecutions were handled by domestic courts.1 In the 19th Century, the idea for prosecuting humanitarian abuses started to emerge. International lawyers, diplomats, and advocates considered the creation of an international criminal adjudicatory body for holding individuals accountable for mass

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atrocities.\textsuperscript{2} Henri Dunant\textsuperscript{3} proposed to establish the International Criminal Court (ICC) and further proposed for drafting of statute to establish the court. The proposal, however, was perceived premature and unnecessary for that particular time.\textsuperscript{4} Before the establishment of the court, the international community in several instances tried to codify international crimes through different international instruments. Such codification definitely indicated the need of creating an international judicial organ. The first notable conventions which were created to codify laws of war were the Hague Conventions of 1899 and 1907.\textsuperscript{5} The Versailles Treaty\textsuperscript{6} was another instrument in the process of creation of a court for prosecuting international crimes. After World War I, there was outrageous spread of public opinion demanding sanctions against persons liable for atrocities in the War. At the Paris Peace Conference, the matter was concluded by allowing prosecution of Kaiser Wilhelm II\textsuperscript{7} for supreme offence against international morality and the sanctity of treaties.\textsuperscript{8} Another treaty was the Treaty of Sévres of 1920, which governed peace with Turkey. It was one of the series of treaties that the central powers signed after their defeat in World War I, which later was replaced by the treaty of Lausanne of 1923.\textsuperscript{9} Lastly, was the Nuremberg Charter which regulated the Nuremberg trials that were held to prosecute Nazi war criminals in Nuremberg.\textsuperscript{10} Worth a mention, Tokyo Trials that were facilitated by


\textsuperscript{3} Henri Dunant is one of the Founders of Red Cross Movement which grew up in Geneva in 1860’s.


\textsuperscript{5} \textit{Ibid.}

\textsuperscript{6} An International meeting convened in Versailles – France in January 1919.

\textsuperscript{7} Kaiser Wilhelm II was the German Kaiser (emperor) and King of Prussia from 1888 to 1918. Retrieved from \url{www.history.com/topics/world-war-i/kaiser-wilhelm-ii} (accessed on 22 June 2017).


\textsuperscript{9} The Treaty of Sevres, available at \url{https://en.wikipedia.org/wiki/treaty-of-sevres} (accessed on 22/06/2017), the Treaty marked the beginning of the partitioning of Ottoman Empire and its ultimate annihilation.

the Tokyo Charter\textsuperscript{11} had notable aspects toward creation of the ICC. The specific features within the Nuremberg Charter include: firstly, the establishment of international military tribunal for trial of war criminals.\textsuperscript{12} Secondly, was the jurisdiction of the tribunal to punish the war criminals on crimes against peace, war crimes and crimes against humanity.\textsuperscript{13} After the trials were concluded, the United Nations (UN) made further advancement by adopting a resolution in December, 1946 declaring genocide a crime against international law. In 1948, the Convention for the Prevention and Punishment of the Crime of Genocide was adopted. Its early draft also included a proposal of statute for a criminal court, but again, it seemed that it was too ambitious for that time to have such a court.\textsuperscript{14} On 9 December 1948, the United Nations General Assembly (UNGA) adopted a resolution calling the International Law Commission (ILC)\textsuperscript{15} to prepare a statute of the ICC. Together with the ILC the UNGA established a Committee for drafting the statute of the court.\textsuperscript{16} The draft statutes by the ILC were shelved during the cold war, because quite a number of years had passed without any advancement.\textsuperscript{17} In December 1995, a preparatory committee was established for preparation of a text of the Rome Statute. In the course of preparation of the text there were contributions from states which mostly related to definitions of crimes and criminal law principles and procedures.\textsuperscript{18} Before creation of statute of the court circumstances forced creation of courts on an ad hoc basis. These courts included the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda

\begin{itemize}
\item \textsuperscript{11} Tokyo Charter was established through executive decree of General McArthur.
\item \textsuperscript{12} Article 1 of the Charter of International Military Tribunal (Nuremberg or London Charter) of 1945.
\item \textsuperscript{13} Art 6 of the Charter of International Military Tribunal (Nuremberg or London Charter) of 1945.
\item \textsuperscript{14} Schabas, W.A., \textit{Op.cit.}, at P. 8.
\item \textsuperscript{15} The International Law Commission is the body of experts named by General Assembly charged with the codification and progressive development of International law. The commission was the one which also prepared Nuremberg principles which were completed in 1950.
\item \textsuperscript{17} The International Criminal Court (ICC), retrieved from https://en.wikipedia.org/wiki/international_criminal_court (accessed on 22 June 2017).
\end{itemize}
(ICTR). Further, there was creation of special or hybrid courts, such as Special Court for Sierra Leone (SCSL) and The Extraordinary Chambers in the Courts of Cambodia (ECCC). In December 1997, the UNGA decided to convene the ‘United Nations Diplomatic Conference on the establishment of ICC’ which was to be held in Rome – Italy from June 15th to July 17th 1998. Successfully, the conference was held as planned consisting members from 160 states, more than 20 intergovernmental organizations, 14 specialized agencies of the UN, and 200 Non-governmental organizations. The result of that conference was the adoption of the Rome Statute.19

Africa had a great contribution toward the establishment of ICC.20 African states participated in discussions when the draft statute was presented at UNGA for consideration.21 At the Rome conference in 1998, almost 47 African states were present for drafting of the Rome statute. Seventeen African states were the first among the 60 states that ratified the Rome statute.22 Currently, Africa has 34 signatories to the Rome statute.23 In 2005, the African Commission on Human and Peoples’ Rights (ACHPR) issued a resolution24 calling for the civil society organizations in Africa to offer cooperation to the court.25 Most of the first cases to ICC were referred by African states. In spite of such contribution, currently the ICC’s relationship with Africa is in turmoil. The ICC has widely been accused of targeting only African leaders or

countries.\textsuperscript{26} The African Union through different decisions has criticized the ICC on its prosecutions; indeed, many prosecutions involve African countries.\textsuperscript{27} Several African countries have notified the UNSG of their intentions to withdraw from the Court. The relationship between ICC and Africa has undergone several phases up to this moment when AU has reached a decision for its member states to withdraw from the Court, a call which has started to be obeyed by some member states.

2. The Rome Statute and the Functioning of the ICC

The Rome Statute is an instrument establishing the ICC. As stated above, the Statute was adopted on 17\textsuperscript{th} July 1998, in a UN sponsored conference in Rome and entered into force in July 2002.\textsuperscript{28} Currently, there are 124 member states to the Rome Statute; out of that number 34 members are African states, 19 are Asian - Pacific states, 18 are from Eastern Europe, 28 are from Latin America and Caribbean states, and 25 are from Western Europe and other states.\textsuperscript{29}

2.1 Jurisdiction of the Court and Applicable law

The jurisdiction of the Court is well provided under Article 5 of the Rome Statute.\textsuperscript{30} The ICC as influenced by its purpose of establishment has jurisdiction over international crimes, specifically the crime of genocide, crimes against humanity, war crimes, and crime of aggression.\textsuperscript{31} The Court’s \textit{ratione temporis} jurisdiction is limited only to the crimes committed after the entry into force of the Rome Statute.\textsuperscript{32}

\textsuperscript{29}State parties to the ICC, retrieved from \url{https://asp.icc-cpi.int/en_menus/asp/states%20states%20parties%20to%20the%20rome%20statute.aspx} (accessed on 15/08/2017).
\textsuperscript{31}Art 6, 7 and 8 provides for exhaustive definitions of Genocide, Crimes against humanity and War crimes.
\textsuperscript{32}Art 11 of Rome Statute of the ICC, 1998.
The Court may exercise its jurisdiction only if the crime is committed to a state party (the state party to the Rome Statute) or where the accused is a national of a state party. A state which is not party to the Rome Statute may lodge a declaration to the Registrar of the Court so as to accept the exercise of Court’s jurisdiction where it has been requested to do so.\(^{33}\) On part of applicable law, the Court at first place should apply the Rome Statute as fundamental law which provides for the jurisdiction of the Court, the elements of crimes and the Rules of Procedure and Evidence. In second place, the Court may apply different treaties, principles and rules of international law. And finally, the Court may apply general principles of law derived by the Court from national laws provided that they are not inconsistent with the Rome Statute.\(^{34}\)

### 2.2 Exercise of Jurisdiction/ Referral of a Situation to the ICC

There are mainly three ways in which a situation can be referred to the ICC. The first way is by the state party, where there is one or more crimes committed which falls within the jurisdiction of the Court.\(^{35}\) A good example is when Uganda referred a situation against the alleged Commander-in-chief of Lord Resistance Army (LRA), Joseph Kony.\(^{36}\) The second way is by the Prosecutor of the Court. The Prosecutor has the power to initiate investigation pertaining to any situation after having information on the same. The Prosecutor must seek authorization from the Pre-Trial Chamber of the Court to investigate.\(^{37}\) One of the notable situations when the Prosecutor initiated investigation was on the situation in Kenya against Uhuru Kenyatta at the time he was the Deputy Prime Minister of Kenya.\(^{38}\) The third and last way is by the United Nations Security Council (UNSC), where it has mandate to refer any situation to the Court under the auspice of Chapter VII of the UN Charter.\(^{39}\) The logic behind this kind of referral is simply to ensure that the Court available to the UNSC to investigate situations which can

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35 Art 14 of Rome Statute of the ICC.
37 Art 15 of Rome Statute of the ICC.
38 The Prosecutor v. Uhuru Muigai Kenyatta, ICC – 01/09 – 02/11.
39 Art 13(b) of the Rome Statute of the ICC.
cause threat to international peace and security.\textsuperscript{40} A good example of referral by the UNSC is the situation in Darfur – Sudan against President Omar Al Bashir.\textsuperscript{41}

\textbf{2.3 Admissibility Issues/ the Complementarity Principle}

For the Court to have jurisdiction, it must determine the admissibility of a particular case. Certain conditions must be satisfied for the case to trigger the admissible clause. The admissibility of cases in the ICC depends on the complementarity principle. This principle implies that, national courts will have an initial jurisdiction to prosecute responsible persons on crimes committed; the jurisdiction of ICC complements that of national courts.\textsuperscript{42} The adoption of this principle is fundamental to ensure the preservation of national sovereignty, where the state concerned maintains their primacy over their criminal jurisdiction.\textsuperscript{43} It has to be satisfied that a case has not been investigated or prosecuted by a state concerned which has jurisdiction, and also the state is unwilling or unable genuinely to carry out the investigation or the prosecution of responsible person(s) that ICC will come in.\textsuperscript{44} Another condition, where the state has investigated over a situation and has decided not to prosecute the responsible person(s); also, where the person(s) has not being already prosecuted on the same situation complained about.\textsuperscript{45}

\textbf{2.4 Composition and Administration of the Court}

The Court has mainly four organs, which include: the Presidency, Chambers (Appeals Division, Trial Division, and Pre-Trial Division), the office of the Prosecutor, and the Registry.\textsuperscript{46} Judges are elected as

\textsuperscript{41} The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC – 02/05- 01/09.
\textsuperscript{42} Murungi, B.K., “Implementing the International Criminal Court Statute in Africa” (2001), 26 \textit{International Legal Practitioner} 87, at P. 88.
\textsuperscript{44} Art 17 17 of the Rome Statute of the ICC
\textsuperscript{45} \textit{Ibid}.
\textsuperscript{46} Art 34 of the Rome Statute of the ICC.
full time members of the Court and are available to serve on such basis including the President. The number of Judges required is 18 in total although the Presidency can propose the increase of Judges to the member states giving the reasons for such proposal. The Judges are nominated by the state parties and are chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective states for appointment to the highest judicial offices. The chambers consist of three categories, namely, the Appeals Chamber which constitutes the President and other four Judges, the Trial Chamber which constitutes not less than six Judges and the pre-trial chamber which consists of not less than six Judges. Also, as part of management there is an office of the prosecutor which acts independently as a separate organ of the Court. In addition there is a Registry which is headed by a Registrar who is a principal administrative officer of the Court. The Registry is responsible for non-judicial aspects of the administration and service of the court. Also, the Rome Statute under Part XI establishes the assembly of state parties which acts as the legislative organ and is responsible on several functions including electing and removing Judges.

3. International Criminal Court and Human Rights

It is undisputed that there is an inherent relationship between the ICC and Human Rights; where the Court in a certain way acts as an agent of human rights protection. In analyzing the relationship between the ICC and human rights different aspects must be considered.

The first aspect is the origin of ICC and human rights. After World War II is when the focus was upon development of international human rights and international justice. The atrocities occasioned by the Nazi during the II World War inevitably led to the prosecution of

47 Art 35 of the Rome Statute of the ICC.
48 Art 36 of the Rome Statute of the ICC.
49 Art 39 of the Rome Statute of the ICC.
50 Art 42 of the Rome Statute of the ICC.
51 Art 43 of the Rome Statute of the ICC.
perpetrators of such atrocities marking the realization of international human rights law.\textsuperscript{53} The same situation also gave rise to the adoption of Universal Declaration of Human Rights. It is when the international community made of sovereign states declared a set of fundamental rights and freedoms that all human beings are entitled despite of any difference they have. From this point it is when the demand of international justice also led to the establishment of the ICC.\textsuperscript{54} The ICC and human rights share almost the same igniting factors for their development.

The second aspect related to the jurisdiction of the ICC and fundamental human values. ICC has jurisdiction over the international crimes as defined under article 5 of the Rome Statute. Such crimes include the crime of genocide, crimes against humanity which includes murder, rape, imprisonment, enforced disappearances, enslavement, sexual slavery, torture, and apartheid. In addition, there are war crimes which can be carried within international armed conflict or non international armed conflict. All these mentioned crimes constitute prohibited acts in because they violate fundamental human rights.\textsuperscript{55}

Lastly, in order to appreciate the functions of the ICC one has to understand the history behind the establishment of the Court. As already observed amongst the functions of the ICC is to end atrocities against human rights.\textsuperscript{56} Therefore, the ICC was created by the international community of sovereign states to purposely act upon terminating the grave crimes which threaten world peace, security and well being.\textsuperscript{57} The office of the prosecutor of ICC has investigated on several situations of human rights violations. One of the several

\textsuperscript{53} Hans-Peter Kaul, “Human Rights and the International Criminal Court”, Address at the International Conference on The Protection of Human Rights through the International Criminal Court as a Contribution to Constitutionalizing and Nation-Building, held at Thammasat University, Bangkok – Thailand, 21st January 2011, Pg 3.

\textsuperscript{54} Ibid.

\textsuperscript{55} Ibid at P. 8 – 9.

\textsuperscript{56} See Paragraph 2 and 5 of The Rome Statute of the International Criminal Court, of 1998

situation was that of Uganda where the Court issued an arrest warrant on 8\textsuperscript{th} July 2005 against members of Lord Resistance Army.\textsuperscript{58}

4. The ICC and Africa

Africa has had great contribution towards the architect of the ICC; from the contribution in the Rome Conference until the signing of the Rome Statute. Currently, Africa has 34 signatories to the Statute.\textsuperscript{59} Many situations have been referred to the ICC from Africa, and while many African individuals have been prosecuted, others are being wanted by the Court but are yet to be apprehended. There are several examples including Ommar Al Bashir (the Sudanese President) for crimes allegedly committed in Darfur Sudan,\textsuperscript{60} Ahmad Al Faqi Al Mahdi, a Tuareg Islamist militia in North Africa (Mali) who was prosecuted and found guilty as co-perpetrator of war crimes committed in Mali,\textsuperscript{61} Abdallah Banda, the Commander in Chief of the Justice and Equality Movement (JEM) who is alleged to have committed war crimes in Darfur Sudan,\textsuperscript{62} Callixte Mbarushimana of Rwanda who is alleged to have committed crimes against humanity and war crimes.\textsuperscript{63} These are some of the examples; generally, however, there are many situations from Africa which have been referred to the ICC. As pointed out above African states have played a very important role in not only making of the Rome Statute but also in the use of the ICC. \textsuperscript{64}


\textsuperscript{60} \textit{The Prosecutor v Omar Hassan Ahmad Al Bashir}, ICC–02/05–01/09.

\textsuperscript{61} \textit{The Prosecutor v. Ahmad Al Faqi Al Mahdi}, ICC-01/12-01/15.

\textsuperscript{62} \textit{The Prosecutor v. Abdallah Banda Abakaer Nourain}, ICC-02/05-03/09.

\textsuperscript{63} \textit{The Prosecutor v. Callixte Mbarushimana}, ICC-01/04-01/10.

4.1 Adherence to Human Rights and Good Governance in Africa

Africa, like many other countries, has experienced bloody conflicts, gross violations of human rights and genocide. There are several examples from different parts of the African continent where there have been alleged mass violations of human rights and abuse to the concept of good governance (disrespect of democracy and lack of rule of law). In this regard the starting example is that of the Genocide in Rwanda in 1994. In that event Hutu militiamen committed murder, violent sexual abuses and grave violations of humanitarian law against Tutsis. The other example is that of the crisis in Sierra Leone in 1991. In this Country, the Revolutionary United Front (RUF) conducted an operation against the government in power and later refused to give up control of the country to the newly elected government. The campaign by RUF resulted in massive killings, incidents of rape and sexual abuse, destruction of properties and displacement of a large part of the population. The conflict in Democratic Republic of Congo which started since 1992 up to date is yet another example. This conflict left more than three million victims and half million refugees. Another example is that of the Darfur in Sudan. The events in the Darfur left hundreds of thousands of people dead, and two million people displaced. In Uganda, we have the example of the Lord Resistance Army (LRA) since 2002. LRA, an armed group, believed to be under the command of Joseph Kony, carried insurgency and attacks against Uganda People’s Defence Force and against civilian population. The attacks by LRA resulted in murder, abduction, sexual enslavement,

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67 Ibid at Pg 302
mutilation, as well as destruction of properties.\textsuperscript{70} All the cited examples took place in the African continent.\textsuperscript{71}

It was due to prevalence of such atrocities that African leaders decided to make a firm decision and support practically the creation of ICC, believing the same would be a solution against impunity.\textsuperscript{72} Some of African states still believe that ICC has an important role in Africa for protection of humanitarian international law.\textsuperscript{73} At this point it is important to refer to the views of Monageng\textsuperscript{74} which clearly describe the concept of having ICC to manage situations including the ones from Africa. She opines that:\textsuperscript{75}

…by supporting the ICC, Africa aligns itself with its own values of justice and commitment against oppression and impunity. The concept of justice and accountability are part of African traditions and cultures.

\section*{4.2 The Current Relationship between ICC and Africa}

In 2008, at the regular session of the AU Assembly, the AU adopted a decision on the ‘abuse of the principle of universal jurisdiction.’ Again in 2009, at the meeting of 30 African states that have ratified the Rome statute, they called for the UNSC to postpone proceedings against President Al Bashir.\textsuperscript{76} In 2013, the AU unexpectedly decided that, no charges should be commenced or continued before any international

\begin{flushright}
\textsuperscript{70} The Prosecutor v. Joseph Kony \& Vincent Otti, ICC – 02/04- 01/05.
\textsuperscript{71} These are some of examples on violations of humanitarian law taking place from different parts of Africa, there are several examples of Human Rights violations, commission of International Crimes, disrespect of Principles of Good Governance where Democracy is highly infringed including leaders staying in power for decades.
\textsuperscript{74} Judge of the International Criminal Court, Judge Monageng was elected in 2009 and the term of office ends in 2018, She is a citizen of Botswana.
\end{flushright}
court or tribunal against any serving AU head of state or government. Further, AU decided that any member state wishing to refer any situation to the ICC must first seek advice from the AU. In general, there have been several events indicating poor relationship between ICC and Africa. In January 2017, the AU decided in favor of the withdraw from the ICC. From the narration above, it can be clearly seen that the Court’s relationship with Africa is currently in tatters. The Court has been accused of targeting only African leaders or countries. In several events from 2008 up to 2016 the AU through different decisions has criticized the ICC on its prosecutions, many of which have involved African countries. Not only have AU members raised concern against ICC, but also several African countries have notified the UNSG of their intentions to withdraw from the court. The countries include Burundi and South Africa. Other countries which have shown intention to withdraw from ICC are the Gambia, Uganda and Namibia; however, they are yet to notify the UN. At its 28th ordinary session held from 30th – 31st January 2017 at Addis Ababa – Ethiopia AU decided to call member states to withdraw from the court and instead speed up the already made decision to extend the jurisdiction of African Court on Human and Peoples’ Rights (AfCHPR) to try international crimes.

4.2.1 States Obligation toward the Court

It is a mandatory requirement of the Rome Statute that all state parties to the ICC shall cooperate fully with the Court. Such cooperation is in all matters pertaining to investigation and prosecution of crimes within the jurisdiction of the court. It is a general and binding obligation in accordance with the Rome Statute that each state party has to fulfill.

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80 Ibid.
In addition to the fundamental principle to fulfill any treaty in good faith, commonly referred to as *pacta sunt servanda*, the statute requires full cooperation with the ICC by the state parties.\(^8^4\) The Court at any time when it deems necessary may request for cooperation to any state party to the Rome Statute, and it shall be a mandatory obligation for such State to cooperate with the Court.\(^8^5\) It should be noted that ICC does not have its own enforcement mechanism so it depends only on the will of state parties.\(^8^6\) And this has been a great challenge to the Court that it is dependent on the will of state parties in accomplishment of its mission. National courts and governments also have a role to play as part of state obligation toward the ICC by enforcing judgments and decisions of the Court and facilitate reparations under national laws for victims of crimes under international law.\(^8^7\) This legal requirement has caused great disappointment recently to the court from African states. A good example is the non cooperation of African states in relation to the execution of arrest warrant issued by the court against the Sudan President Omar Al Bashir.\(^8^8\)

### 4.2.2 The Non-cooperation stance

The relationship between Africa and ICC started to get sour in around 2009 when it issued an arrest warrant against the Sudan President Omar Al Bashir.\(^8^9\) The arrest warrant against President Al Bashir was on the basis of his individual criminal responsibility on the crimes allegedly committed in Darfur – Sudan.\(^9^0\) The Darfur conflict has its origin from ethnicity between the Arab groups and non Arab groups. The Arab government in the city of Khartoum was often said to have taken the side of the Arabs in case of any dispute concerning resources.\(^9^1\) The increasing favouritism and racial discrimination led to the foundation of


\(^{8^5}\) Article 87 of the Rome Statute of the International Criminal Court, of 1998.


\(^{8^9}\) *Ibid* at P. 114.

\(^{9^0}\) *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09.

opposition groups against the government such as the Sudan Liberation Army (SLA) and the Justice Equality Movement (JEM). After Al Bashir came to power as the President of Sudan he initiated a fight against the groups (SLA & JEM). The government used the ‘Janjaweed’ militia to fight against the opposing groups. The Janjaweed militia carried out attacks against the non Arab tribes mainly the Zaghawa, Masalit and Fur and perpetrated atrocities on civilian populations which caused forced displacement. In 2005, the UNSC through resolution 1593 decided to refer the matter to the ICC prosecutor under Article 13(b) of the Rome Statute. In July 2008, the ICC prosecutor prayed before the ICC for arrest warrant against Al Bashir on the grounds that Al Bashir committed not only war crimes and crimes against humanity but also genocide. In 2009, the pre-trial chamber issued arrest warrant against Al Bashir and expressed that his official capacity as sitting head of state does not excuse him from criminal liability. The news about issuance of arrest warrant against President Al Bashir was negatively received by many African countries. The news triggered hostility and a great opposition against the ICC. It was not only individual African states against ICC rather it was now AU against the ICC. Therefore, in 2009, the AU passed a decision calling for member states not to cooperate with the court by virtue of article 98 of the Rome Statute. The basis of such decision by AU was the fact that waiver of immunity according to article 27 of the Rome Statute does not apply to non-member states such as Sudan. In 2010, when the AU met in Kampala, Uganda, it dropped the harsh words used in the decision but again maintained its position and requested its member states to balance their obligations between the AU and the ICC. Since the decision by AU for not cooperating with the ICC on the arrest warrant of President Al Bashir, many African countries, though state parties to the Rome Statute, failed to honour

92 Ibid at P. 737.
95 The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC–02/05–01/09.
99 Ibid at P. 114.
their obligation to the ICC. In July 2010, President Al Bashir visited Chad, in August 2010, again, Al Bashir visited Kenya, and the member states did not arrest him. Also in 2011, Al Bashir visited Malawi which failed to arrest him. Following Malawi’s failure to arrest al Bashir and ICC referred Malawi to the UNSC and Assembly of State Parties (ASP) for such failure. At another instance the ICC criticized South Africa for failure to arrest President Al Bashir when he visited Johannesburg for AU meeting in 2015.

4.2.3 Demand for Review of the Rome Statute

In 2009, African States, members to the Rome Statute, demanded for a review conference with a view to amending the Rome Statute. The target of the review was toward the powers of UNSC to refer situation to the ICC, the issue of immunity of sitting heads of state and even powers of ICC Prosecutor. Also the African states requested the UNSC to defer prosecutions against President Al Bashir. The Assembly requested the preparatory meeting to prepare the guidelines and code of conduct for the ICC Prosecutor in respect of exercise of his/her discretionary powers when initiating proceedings. In the AU’s extraordinary session held on 12th October 2013, the AU made a decision on several aspects including to fast-track the process of expanding the mandate of the AfCHPR to try international crimes, African states parties to propose relevant amendments to the Rome Statute in accordance with article 121 of the statute, any AU member state that wishes to refer a case to the ICC may inform and seek the advice of the AU, and President Uhuru Kenyata would not appear before ICC until such time as the concerns raised by AU and its member states had been adequately addressed by the UNSC and the

101 Sande Shomari, Idhaa ya Kiswahili ya Sauti ya Amerika, Redio One stereo, 06/07/2017, 19:50 Hrs.
103 Ibid at Pg 216.
104 Ibid.
ICC.\(^{105}\) During the 12\(^{th}\) Annual Assembly of state parties to the Rome Statute, the African member states were able to put the agenda item of “indictment of sitting heads of state and government and its consequences on peace and stability and reconciliation.”\(^{106}\) Despite several efforts by African countries to push for amendment, to-date the same efforts have proved futile.

4.3 The ICC: An Independent Judicial Body or A Political Gang?

ICC has been highly influenced, in terms of its structure, with the previous ad hoc tribunals which were created by UN.\(^{107}\) Currently, ICC has been highly criticized by African countries with great support of AU. The basis of such criticism is that ICC is politically influenced rather than being an independent judicial body. The translation for such critics is substantiated by many factors (as according to African states) including the modality of referring situations to the ICC, the jurisdiction of the court and Complementarity principle.\(^{108}\) It is essential to assess these areas which, indeed, seem to cause collision between ICC and African states.

4.3.1 Claim against Abuse of Universal Jurisdiction

‘Universal Jurisdiction’ refers to the idea that national courts may opt to prosecute individuals who are alleged of any serious crime against international law such as genocide, war crimes, crimes against humanity and many others. This principle is based on the notion that such crimes harm the international community or international order itself which individual states may act to protect.\(^{109}\) The basis of former international tribunals was quite different from ICC. ICTY or ICTR, for example, enjoyed primacy as basis of their jurisdiction.\(^{110}\) The tribunals possessed sort of concurrent jurisdiction, so to say, with the national

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\(^{106}\) Ibid.


\(^{110}\) Tiba, F., Op. cit. at P. 137.
courts to prosecute persons involved in serious violations of humanitarian law. The advantage was that the states concerned were not given chance to claim jurisdiction first so as to circumvent prosecutions against the responsible persons involved in the alleged atrocities. Since 2008, African states have been complaining on disregard of universal jurisdiction by ICC and most European courts. African states claimed that the abuse of the principle of universal jurisdiction could endanger international law and infringe state sovereignty. Thus they decided that none of the arrest warrants from the ICC would be executed. The principle has been considered by the UN and also discussed by UNGA from the 64th to 66th sessions. UNGA, after calling again states views, noted a diversity of views from states and therefore there was a need to have further consideration on better understanding of the principle. Therefore, the UN was called upon to establish a working group in its 66th session. In the 70th session, UNGA invited member states and other observers to submit information and observations on the scope and application of the universal jurisdiction principle including international treaties and/or respective national legal rules and judicial practice. UNGA also requested the Secretary General to prepare and submit to UNGA in the 71st session, which commenced on 13th September 2016, a report of such information and observations. Up to date the issue of clear meaning of universal jurisdiction is not settled.

4.3.2 Powers of the UNSC

Among the ways to refer situations to the ICC is by referral of UNSC. Generally, two actors are required so as to initiate investigations before the court, namely, a state party and the ICC prosecutor, or UNSC and ICC prosecutor, or ICC prosecutor and the Pre Trial Chamber. The UNSC has the power, acting under Chapter

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112 Ibid.
113 Ibid.
114 Ibid.
115 Ibid.
117 Ibid.
VII of the Charter of UN, to refer any situation to the prosecutor of ICC. The main purpose behind Chapter VII provisions in the Rome Statute is to make the Court available to UNSC for purposes of investigating situations that pose a threat to international peace and security. In a certain way, the provisions widen the jurisdiction of the court because the UNSC while acting under Chapter VII of the UN Charter can refer situations from the states which are not even parties to the Rome Statute, so long as they are parties to UN. There are conditions though for the UNSC to refer situations to the court. UNSC is supposed to refer a situation and not a specific case or crime. It is upon the Court to decide whether the situation should be investigated and which crimes should be prosecuted.

Generally, one of the igniting factors for the African countries to stand against ICC is the role of UNSC. For the purpose of our discussion, the role of the Security Council can be categorized into two major parts: namely, power of UNSC to refer situations to the court and the power of the UNSC to differ investigations or prosecutions before the Court. With regard to the first major part UNSC has power to refer a situation to the court. This referral process is enshrined under Article 13 (b) of the Rome Statute under which UNSC can even refer a situation from a state that is not a party to the Rome Statute. The process has been argued by African states as reflection to neo-colonial rule under the umbrella of international justice and thereby it is a threat to Africa’s sovereignty, peace and stability.

With respect to the second major part, the UNSC has mandate given under the Rome Statute to differ any investigation or prosecution before the court by the resolution of the council passed under Chapter VII of the UN Charter. In 2008, Moreno-Ocampo (the then ICC Prosecutor) presented evidence before ICC and prayed for arrest warrant against the Sudanese President Omar Al Bashir. Consequently on 4th March 2009

120 Ibid.
the Court issued an arrest warrant.\textsuperscript{123} After the Court had issued the arrest warrant several regional organizations including AU called for UNSC members to differ the prosecution of Al Bashir.\textsuperscript{124} In 2008 AU specifically requested deferral of Al Bashir’s prosecution through Peace and Security Council.\textsuperscript{125} The UNSC ignored the request by AU to differ prosecutions against Al Bashir. This made AU to call for its member states not to cooperate with the ICC.\textsuperscript{126} The issue of referral and deferral of situations by UNSC has been discussed by African states and AU. Several decisions have been made by AU to demand the amendment of article 16 of the Rome Statute.\textsuperscript{127} To date the efforts of African states to amend article 16 or 13 (b) of the Rome statute have not succeeded and it has been a very difficult area which threatens the relationship between the Court and AU. It should be understood that the UNSC is the organ that has been vested with duty and responsibility to ensure peace and security of the world. That is why where necessary it can even engage using military actions to rescue violations of peace and security.\textsuperscript{128} The powers vested in UNSC is very important, particularly to those states which are not members to the Court. It is through these powers that the perpetrators from such states can be indicted. The process is by invoking the powers of UNSC to refer a situation before the Court. UNSC must refer a situation through the ICC prosecutor under certain conditions with a view to maintaining the independence of the Court.\textsuperscript{129}

4.3.3 Immunity of sitting heads of state

History has revealed that heads of state for a long time have been investigated, prosecuted and even punished for commission of international crimes.\textsuperscript{130} There are several examples including the

\begin{footnotes}
\item[124] \textit{Ibid} at P. 744.
\item[125] \textit{Ibid} at P. 745.
\item[128] Article 39 and 41 of the Charter of United Nations of 1945.
\end{footnotes}
conviction and sentencing of former Rwandan Prime Minister Jean Kambanda,\textsuperscript{131} and Charles Taylor of Liberia.\textsuperscript{132} But it should be noted that all of the prosecuted and sentenced leaders were former heads of state and government and not sitting power holders.\textsuperscript{133} In recent years the ICC has received situations and opened investigations toward sitting heads of state. One such situation concerns President Al Bashir of Sudan and the second was against Kenyan Prime Minister who is now the President of Kenya, Uhuru Kenyatta. Coincidentally, all these situations are from Africa.\textsuperscript{134}

The provision of article 27 of the Rome Statute is very clear on the immunity of sitting heads of state. Although the Rome Statute has removed immunity from sitting heads of state, it has retained immunity from arrest and surrender, an aspect which is quite debatable.\textsuperscript{135} In 2009, when passing the decision for noncooperation with the ICC, the AU put forward the argument that article 27 may apply to member states to the Statute; but what happened concerning Sudan which is not member state to the Rome Statute is not acceptable.\textsuperscript{136} It is very clear that UNSC can refer a situation to the court even from states not party to the Rome Statute under Chapter VII of UN Charter. Immunity serves as a bar toward administration of justice by the court. African states have been debating with the court on the issue of immunity probably to save African leaders engaged in perpetration of international crimes from being subjected to justice. On this issue, Tiba’s views are that:

Both Kenya and Sudanese leaders made a Political issue out of ICC cases against them and exploited to their advantage the often alleged bias by ICC against their countries in particular and Africa in general.\textsuperscript{137}

5. The African Court with Criminal Jurisdiction

The African Court on Human and Peoples’ Rights (AfCHPR)\textsuperscript{138} is the continental court established by AU member states to ensure the

\textsuperscript{131} The Prosecutor v. Jean Kambanda, Case No. ICTR 97 – 23.
\textsuperscript{132} The Prosecutor v. Charles Ghankay Taylor, SCSL 03 – 01 – T.
\textsuperscript{133} Tiba, F., Op. cit. at P 136.
\textsuperscript{134} Ibid at P. 137.
\textsuperscript{137} Tiba, F., Op. cit. at P. 152.
protection of human and peoples’ rights in Africa.\textsuperscript{139} The Protocol establishing the Court was adopted on 9\textsuperscript{th} June 1998 in Burkina Faso and came into force on 25\textsuperscript{th} January 2004 after it was ratified by more than 15 countries.\textsuperscript{140} The Court has a permanent seat at Arusha in the United Republic of Tanzania.\textsuperscript{141} The jurisdiction of the AfCHPR is over all cases and disputes concerning the interpretation and application of the African Charter on Human and Peoples’ Rights, its Protocol and any other relevant human rights instrument ratified by the states concerned.\textsuperscript{142} As of July 2017, a total of 30 African states are members of AfCHPR, and out of the 30 states it is only 8 states that have made declaration in accordance with the Protocol establishing the Court recognizing the competence of AfCHPR to receive cases from NGO’s and individuals.\textsuperscript{143}

\textbf{5.1 African Court and International Criminal Justice}

Following the concerns by African states that ICC targets only African states, and also following the refusal of UNSC to defer prosecutions against President Al Bashir, the AU made a decision to vest AfCHPR with international criminal jurisdiction.\textsuperscript{144} In February 2010, the Commission of AU appointed consultants to prepare a draft protocol to amend the ‘Protocol on the statute of African Court of Justice and Human Rights’. The draft protocol was intended to amend the structure and key features of the African Court.\textsuperscript{145} The consultants had a task to

\begin{footnotesize}
\textsuperscript{138} The African Court on Human and Peoples’ Rights is established by virtue of Article 1 of the Protocol to the African Charter on Human and Peoples’ Rights on the establishment of an African Court on Human and Peoples’ Rights of 1998.
\textsuperscript{140} \textit{Ibid}
\textsuperscript{141} The seat of the Court was concluded by ‘The Host Agreement between the United Republic of Tanzania and the African Union on the seat of the African Court on Human and Peoples’ rights in Arusha, Tanzania’, entered into force on 31\textsuperscript{st} August 2007, concluded in Addis Ababa, Ethiopia.
\textsuperscript{142} Article 3 of the Protocol, of 1998.
\textsuperscript{145} \textit{Ibid.}, at P. 287.
\end{footnotesize}
expand the jurisdiction of AfCHPR to prosecute international crimes within the region. In June 2014, African heads of state and government meeting in Malabo - Equatorial Guinea adopted the so called Malabo Protocol. The aim of the Protocol was to grant international criminal jurisdiction to the newly proposed African Court. The Protocol changed the name of the African Court to be ‘The African Court of Justice and Human and Peoples’ Rights.’ In AU’s 28th ordinary session held in January 2017, the AU expressed its concern for slow pace on ratification of the Protocol (The Malabo Protocol) and called its member states to sign and ratify the Protocol as soon as possible. This decision to speed-up ratification of Malabo protocol signifies nothing else rather than seriousness of AU to extend the jurisdiction of African Court to prosecute international crimes; and thus providing one step ahead towards snubbing the ICC. The question is whether the African Court with criminal jurisdiction will be able to end impunity. Before answering this question there is an issue of legality of the African Court in the light of the ICC Statute. Articles 1 and 17 of the Rome Statute deal with complementarity principle under which ICC complements national courts. It is submitted that this principle does not extend to regional courts, for the simple reason that regional courts are not national courts. Application of the complementarity rule is likely to cause complications on the sphere of jurisdiction between the ICC and the expected African Court. Suppose African states withdraw from the Rome Statute; still they will be members of UN. What if the UNSC refers a situation under Chapter VII of UN Chapter to ICC and at the same time the situation is intended to be referred to the African Court? In such a situation it may not be advisable to invoke the principle of complementarity since a clear interpretation of the Rome Statute does not envisage regional courts.

146 Ibid.
147 A protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.
Prosecution of international crimes is not an easy task. This is because normally it involves senior state officials including sitting heads of state and military officials.\textsuperscript{151} In Africa, peace and security are in the hands of heads of state. A good example is the case against Al Bashir where the African leaders stood firmly to protect Al Bashir. Are the African leaders likely to hand a fellow African leader to the African Court? The answer to this question is obviously in the negative. An African Court with criminal jurisdiction is impracticable.\textsuperscript{152} The AfCHPR has received declarations from only 8 countries out of 30 member states to recognize the jurisdiction of the Court concerning individuals to file complaints since the establishment of the Court.\textsuperscript{153} Are these same African Countries going to cooperate and acknowledge criminal jurisdiction of the African Court of Justice and Human and Peoples’ Rights? This is a moot question.

Another aspect to be considered is resources, i.e. the funds of the Court to ensure its smooth operation. African states once failed to honour their financial obligations in respect of Habre’ trial in Senegal. In the same vein are they likely to provide funds for the running of a criminal chamber at the African Court?\textsuperscript{154} Currently AU is suffering from lack of sufficient budget. This hard fact may be a great hindrance for smooth running of its organs including the Africa Court. In July 2017, during a bi-annual meeting of AU the Chairman of the AU Commission Moussa Faki Mahamat criticized member states for lack of solidarity for failure to fight famine and drought.\textsuperscript{155} At the time when AU was struggling to pay dues, the ousted Zimbabwean President, Robert Mugabe sold his own cattle and handed one million US Dollars to AU.\textsuperscript{156} The establishment of criminal chamber within the African Court can be seen as a great effort towards fighting impunity; but in reality the task is not an easy one. Tracing from immediate and long term causes for its

\textsuperscript{151} Ibid., at P. 1083.
\textsuperscript{152} Ibid.
\textsuperscript{155} AFP, “AU Chairman Frustrated by African inaction on famine”, The Citizen newspaper, Wednesday, 5\textsuperscript{th} July 2017, P. 23.
\textsuperscript{156} Ibid.
establishment, the possibility of management and the cooperation expected to be received from member states, the Court will not be able to protect human rights violations within the continent.

6. Conclusion

The current relationship between ICC and Africa is in a turbulent situation, with the AU persuading member states not to cooperate with the Court. However, it seems this is not the stand of the whole African continent at large. There are several countries within Africa which still support the role of the CC. Indeed, in many of AU’s decisions some states have been reserving their positions or directly opposing such decisions. It is important to understand the factors which generally triggered the perception that ICC targets only African countries. There are several areas of debate such as universal jurisdiction, complementarity principle and immunity towards sitting heads of state. All these areas, if well analyzed, are crucial threats to state officials, who disrespect human rights and rule of law. Regardless where are they from, whether Africa or not, it is meaningless for a leader who respects democracy and rule of law to argue that there must be immunity to a sitting head of state who breaches humanitarian law, or the one who perpetrates international crimes. The AfCHPR has been established since 1998, but in general, it is yet to say that it has been able to effectively protect human rights. The major challenge facing the ICC with African states has been poor cooperation from members of AU. It is likely that vesting criminal jurisdiction in the African Court will face the same challenge. While establishment of the African Court with criminal jurisdiction might be possible theoretically it would be very difficult in practical sense. African countries will not achieve victory in fighting impunity by expanding the jurisdiction of the African Court. There are different ways to enhance cooperation between Africa and ICC rather than withdraw from the Court and expanding jurisdiction of African Court. African states have a wide opportunity to propose amendment of Rome Statute against such provisions which seem to be against their sovereignty. Indeed, African states can resolve their differences with the ICC through discussions with ICC and UNSC and find ways to mend its turbulent relationship with the Court.
The Naming of Culprits by the Dead: A Forensic Approach to the Crime of Murder in Mainland Tanzania

Petro Protas*

Abstract

It is almost mythical to imagine that the dead can talk. It is even regarded as a taboo to some African societies for people to talk about dead men. Nevertheless, in criminal jurisprudence where crime of murder is the subject matter before the court, there comes a time when we wish the dead could talk and name the culprits involved. This wish is even more pronounced where the crime scene is so complicated that it is almost impossible to know who the murderer is. In these circumstances prosecutors tend to rely heavily on the statements given by suspects who are unlikely to incriminate themselves. As a result, most murder cases of this nature have ended up with exoneration of culprits for the failure to meet the standard of proving the case ‘beyond reasonable doubt’.

Thus, the consequence of this phenomenon is becoming more apparent in Tanzanian Community. Members of the community lose faith in the justice system as it releases individuals whom the society believed are guilty. Such loss of faith has led to an increase in extra-judicial killings in an attempt to secure justice out of the court system.

This Article examines the applicability of forensic science to the crime of murder in Tanzania. In doing so, it explains how scientific evidence can assist in increasing the ability of the law enforcement organs and the judiciary in the identification of the actual culprits. The article goes further to identify the setbacks in the application of forensic science in Tanzania and suggest the way forward.

1. Introduction

Development of science and technology has been a blessing and a curse at the same time. There are several reports on how morally and culturally the society has been spoiled by science and technology. However, there are many other successful stories of science and

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technology. One of such success stories is the relationship between science and the law. It is now possible to apply scientific techniques to uncover correct information on what has transpired in the crime scene.\(^1\) Application of scientific methods such as fingerprints, ballistic analysis, DNA and digital forensics\(^2\) is what is referred to as forensic science.

Various studies show that the use of forensic science has not only impacted on the way relevant pieces of information are obtained from the crime scene\(^3\) but also act as a crucial tool for identifying the culprits involved in a crime.\(^4\) Forensic Science serves to unearth two very important matters in criminal justice. First is the exoneration of persons who were wrongly convicted. This is made possible through reviewing complex cases which were already concluded in the court of law. The reviewing of cases has been made possible due to a new discovery of crucial evidence through the use of forensic tools. In most cases, had the court become aware of those pieces of evidence, it would not have reached the verdict of convicting the accused person.\(^5\) Second, is ensuring that innocent people are not wrongly convicted.\(^6\) This is in line

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\(^2\) See John P. Abraham, “An Introduction to Digital Forensics”, Research Gate, p. 1. Found at www.researchgate.net/publication/228864187_An_Introduction_to_Digital_Forensics retrieved on 4th July, 2017. The Article explains the meaning of ‘digital forensics’ to generally mean the investigation techniques to obtain information relating to crime from digital devices or computerized devices such as laptops, desktop computers, servers and many other devices.


\(^5\) ConnectEd, “Integrated Curriculum Unit on Forensic: Crime Scene Investigation”, The California Centre for College and Career, 2010, p. 5 in which the authors refers to a Report of the Innocent Project, a Non-Profit Legal Clinic which reported that by 2010, forensic science techniques assisted in solving cold cases which were still going on in the court and reopened other cases which were decided on merits. On those reopened cases, 205 people at the state of California were exonerated after DNA evidence depicting that they were not connected to the crimes charged and convicted.

with the Blackstone principle which insists that “It is better that ten guilty persons escape, than that one innocent suffer”.\textsuperscript{7} Blackstone’s principle creates a general obligation to criminal justice systems to work diligently to avoid wrongful conviction of innocent persons as well as avoid wrongful acquittals of guilty persons. Putting the principle in very simple words Kohen said:

Injustices happen not only when the innocent are convicted but equally so – sometimes more so - when the guilty are acquitted.\textsuperscript{8}

Application of forensic techniques in investigations assist in balancing these two contesting interests of making sure that guilty persons are identified, prosecuted and convicted in accordance with the law while ensuring that innocent persons do not suffer.

In that light, Tanzanians like many other members of the global population became more optimistic with the application of forensic science techniques in identification, prosecution and conviction of suspects of the crime of murder.\textsuperscript{9} This is especially so in complex murder cases where apart from the accused persons, no other witnesses can confidently and correctly connect the suspects to the crime scene. In these circumstances one would wish a ‘dead person’ to rise and name the culprits involved. Nonetheless, this is not possible. The only avenue is the use of forensic techniques to obtain trace evidence from the crime scene for the purpose of connecting the accused person with the crime scene and thereby corroborate the existing circumstantial evidence.

\textsuperscript{8} Joel Kohen, “When the Guilty are (Wrongly) Acquitted”, 2014, p. 2. It can be found at m.huffpost.com/us/entry/5613695 retrieved on 4\textsuperscript{th} July, 2017.
\textsuperscript{9} Black’s Law Dictionary, 2\textsuperscript{nd} Ed., defines the term ‘Murder’ to mean a crime committed where a person of sound mind and discretion (that is of sufficient age to form and execute a criminal design and not legally “insane”) kills any human creature in being (excluding quick unborn children) without any warrant, justification, or excuse in law. See also Section 196 of the Penal Code, Cap. 16 [R.E. 2002] which has malice aforethought as one of elements of murder. Malice aforethought means killing with intent which can either be through unlawful act or omission.
On realization of this fact, the government of Tanzania has adopted various policy statements\(^{10}\) and laws on forensic science.\(^{11}\) Instead of these initiatives being a cause for rejoicing, it has indeed been a leeway for discontent and mistrust to the criminal justice system of the country. This is partly due to the tendency of the courts of law to release individuals who are believed to be guilty by members of the public. The discontent is not on the overruling of their ‘belief’ by the court but is on the basis for such overruling. In most cases, the court would rule that, evidence tendered before it was inadequate to warrant a conviction or the prosecutors had failed to prove their case beyond reasonable doubt.\(^{12}\) In retaliation, members of the public engage themselves in mob-justice by killing suspects of crimes. This is an indicator of mistrust to the criminal justice system by members of the public.\(^{13}\) However, one would ask why inadequate or insufficient evidence in complex murder cases despite the adoption of policy and laws on forensic science? What role has forensic science played in remedying the situation?

Therefore, this Article examines the effectiveness of forensic science techniques in obtaining trace evidence related to a crime of murder in Tanzania. It explains the effective contribution of forensic science to both law enforcers and the judiciary in identification of culprits. It also discusses various complex scenarios where forensic science has been both a success and a failure. The Article further identifies the setbacks in the effective applicability of forensic science techniques in Tanzania and offers solutions to those setbacks.

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\(^{10}\) See Statement 3.8 of the National Health Policy, 2003.

\(^{11}\) These laws include among others, the Constitution of the United Republic of Tanzania, 1977, the Criminal Procedure Act, Cap. 20 [R.E. 2002], the Evidence Act, Cap. 6 [R.E. 2002], the Human DNA Regulations Act, 2009, the Government Chemist Laboratory Act, 2014 and the Cybercrimes Act, 2015.

\(^{12}\) See Republic v. ACP. Abdallah Zombe and 12 others, in the High Court of Tanzania at Dar es Salaam, Criminal Sessions Case No. 26 of 2006 (Unreported) in which the matter involved the killing of four gemstones businessmen by Police Officers acting on the order of the superior. This case ended with acquittals of all 13 accused persons due to failure to meet the threshold of proving the case beyond reasonable doubts by the prosecution side.

\(^{13}\) See Legal and Human Right Centre (LHRC), Tanzania Human Rights Report, 2015, p. 24.
2. Historical Development of Law on Forensic Science in Tanzania

Globally the history of forensic science is as old as the history of crime itself. The manners for which forensic techniques are applied and used are affected by changes of time and advancement of science and technology. Different societies in the world at different times have invoked forensic techniques and enacted laws governing applicability of forensic science for the aim of identifying suspects of crimes. The Chinese society, for example, at around 1785 had already developed and utilized autopsies for the purpose of knowing the causes of unnatural death.\textsuperscript{14} The Chinese experience varies with that of African Societies and Tanzania in particular. To appreciate the variation, this Article traces the evolution of rules on forensic science and their evolvement in Tanzania in pre-colonial, colonial and post-colonial period.

2.1 Pre-Colonial Period

In pre-colonial Tanzania, there were no specific rules on forensic science. Majority of communities were in a communal mode of production in which the major means of production were communally owned. The customs and traditions of people insisted on togetherness which yielded peace and harmony among members of the community. These customs and traditions had also an impact on the identification of offenders and conclusion of disputes among the people. The pre-colonial societies had no formal distinction of criminal and civil offences; nor did they have formal court systems. For example, if there was a crime of murder, they would apply the so called ‘restorative justice system’. The family of the accused person was required to pay compensation to the family of the deceased. In some cases, they would give one of their daughters to be married to the victim’s family. This was one of the most effective ways of resolving disputes amicably.

\textsuperscript{14} Xie Xin-Zhe, “Forensics and Politics in Qing China: A Beijing Case”, Ming Qing Studies, 2015, pp. 309 – 333. In this Article the use of forensic science is aimed at finding the truth surrounding unnatural death of a noble Manchu woman in the empire of Qianlong in China in which Beijing was the capital city. It is explained that, four autopsies were performed on the deceased body and finally the culprits were brought to justice.
during that time. In case of complicated murder cases where the identity of the murderer could not be known, the family of the victim or the community would seek the assistance of traditional medicine man. In these circumstances, the medicine man was believed to have powers of not only identifying offenders but also of telling the community whether the cause of death was natural or not. This person could as well spot the harmful witchcraft materials to living individuals and could conduct autopsy to dead bodies in an attempt to identify the cause of death.\textsuperscript{15}

In some occasions, the traditional medicine man could administer a medicine which would identify culprits. Under this arrangement, the medicine was to be consumed by the suspects. In effect, it would immediately harm the guilty and spare the innocents. The case of \textit{Rex v. Palamba s/o Fundikira}\textsuperscript{16} is a testimony to this practice. Although the case occurred during colonial period, it reflects the practice of the pre-colonial society which could not easily be extinguished by the introduction of colonialism and colonial rules. In this case Palamba and another person were charged jointly with the murder of an old woman and sentenced to suffer death penalty by the High Court of Tanganyika. They were dissatisfied with the decision of the High Court and appealed to the then Court of Appeal of Eastern Africa.

The root of the matter was that the appellant was suspecting that someone was behind the deaths of his eleven children who he believed encountered unnatural death. The appellant and another person went to a medicine man who gave them ‘\textit{Mwavi}’ a local medicine with instructions that if it is consumed by suspects it will help identifying the real culprit. He further explained that ‘\textit{Mwavi}’ would make the innocent vomit and the guilty die. At last he caused the medicine to be consumed by his two wives, his mother and daughter. The only rule which was observed was that, the suspects were supposed to swallow the medicine and drink a lot of water. Out of the four women only two survived after vomiting several times but the other two old women died on the spot. So, the appellant believed that, those who died were guilty of murder of

\textsuperscript{15} Aime Muyoboke Karimunda, \textit{The Death Penalty in Africa: The Path Towards Abolition}, Routledge, Oxon, p. 19.

\textsuperscript{16} [1947] 14 EACA 96.
the eleven children who died mysteriously. On the basis of what has been explained above, it can be concluded that, there were no recognizable rules to govern applicability of forensic science in pre-colonial Tanzania. Societies did not distinguish between criminal matters and civil matters as a result in both cases they would apply restorative form of justice. Complex death scenarios were linked with witchcraft or evils and therefore, they would make use of traditional medicine men to identify the culprits.

2.2 Colonial Period

Mainland Tanzania, formerly known as Tanganyika, passed through the hands of two colonial masters at different periods. The first country to colonize Tanganyika was Germany which ruled the country from 1885 to 1918 and the second country was Britain which colonized Tanganyika from 1919 to 1961. The introduction of foreign domination to Mainland Tanzania had several impacts on the culture, customs, traditions and laws which governed the pre-colonial society. The colonizers introduced written laws in Mainland Tanzania, which not only varied the practice of forensic science by pre-colonial society but also brought with it codified rules on the admissibility of forensic evidence.

2.2.1 During the German Era

Germany took control over German East Africa (Tanganyika) immediately after the completion of the Berlin Conference in 1885. In the beginning the then Chancellor of Germany, Otto von Bismarck was hesitant in establishing a direct control over her overseas provinces as he thought it would be a burden on Germany tax payers. He was therefore, in favor of administration via company rules. He issued charters to companies to rule overseas provinces in the name of Germany. In early 1880’s Germany East Africa (GEA) was under the company rule. In 1890 company rule collapsed and Germany introduced direct rule over GEA.

Germany, the colonizer, did not do much with regard to rules on forensic science. Germany did not build strong law enforcement organs
which would assist *inter alia* on criminal investigation and dispensation of justice. For instance, they used district and village administrators who were known as *Akidas* and *Jumbes* as Police Officers.\(^{17}\) They also established para-military groups for the purpose of defeating any internal resistance and defending the boundaries of their province.\(^{18}\) Thus, the great aim was not the protection of the indigenous life and their properties but rather, it was the protection of colonial administration and its machinery.

With regard to rules on forensic science and their application it can be said that such rules did not get a fertile ground from which they could germinate and grow during the Germany era. The stagnation was both in terms of absence of the law to govern forensic science and strong institutions such as police force and judiciary which would oversee the implementation of those rules.

### 2.2.2 During the British Era

Germany lost all her colonies including Germany East Africa immediately after the First World War, 1914 to 1918.\(^{19}\) The Germany East Africa was placed under the mandate of Great Britain as a mandate Territory of the League of Nations.\(^{20}\) By the order of His Majesty the King of Great Britain on 22\(^{nd}\) July, 1920 at Buckingham Palace, Germany East Africa was renamed Tanganyika.\(^{21}\) It is worth noting that, it is this Order which allowed the applicability of laws which were in force in India at that time.\(^{22}\) They included the Criminal Procedure Code, the Civil Procedure Code, the Penal Code, other Indian Acts and other laws of India.\(^{23}\) The Order stipulated further that, if those laws


\(^{19}\) Article 119 of the Treaty of Versailles of 28\(^{th}\) June, 1919.

\(^{20}\) *Ibid*, Section 22.

\(^{21}\) See the Pre-amble to the Tanganyika Order in Council, 1920.

\(^{22}\) See Section 17 (2) of the Tanganyika Order in Council, 1920.

\(^{23}\) *Ibid*. 
would have some gaps, then the substance of the common law, the doctrine of equity and statutes of general applications which were in force in England before 22\textsuperscript{nd} July, 1920 would be applied to fill those gaps.

It is through these laws that rules on forensic science were introduced and applied in colonial Tanganyika. For example, the Indian Evidence Act, 1872 introduced \textit{inter alia} the concept of expert opinion.\textsuperscript{24} It is through this law that the opinions of experts in forensic science were made relevant fact\textsuperscript{25} before the court of law. This means that, the court could act on these opinions as part of relevant facts to convict or acquit the accused person. The specific provision states as follows;

\begin{quote}
When the Court has to form an opinion upon a point of foreign law, or of \textit{science} or art, or as to identity of handwriting, the opinions upon that point of persons especially skilled in such foreign law, \textit{science} or art, are relevant facts. Such persons are called experts.\textsuperscript{26}
\end{quote}

Therefore, it is through this provision, that evidence obtained by the use of forensic techniques was recognized and given a force of law. However, for the court to treat those pieces of evidence as relevant facts to the case, they ought to have been presented by an expert in the area, be it ballistic, fingerprint or handwriting.

\subsection*{2.3 Post-Colonial Period}

Since independence of Tanganyika in 1961 till today, a lot has been done regarding the development of laws on forensic science in the country. The development of the laws in this area has been influenced by the changes in the way crimes and crime enterprises operate. In more than two decades now, Tanzanians have witnessed the drastic increase in crime such as murder, armed robbery and terrorism. This upsurge in evils manifested itself in several ways such as killings of people with albinism,\textsuperscript{27} invasion and killings of both police officers and

\begin{footnotesize}
\begin{enumerate}
\item Section 45 of the Indian Evidence Act, 1872.
\item Ibid.
\item Ibid.
\item Legal and Human Rights Centre (LHRC), \textit{Tanzania Human Rights Report} (Tanzania Mainland), 2015, p. 44. See also BBC, Tanzania Albino Murders: ‘More than 200
\end{enumerate}
\end{footnotesize}
citizens by unknown criminal groups, terrorizing and killings of village leaders in some districts in the country and extra-judicial killings by police officers. These evils constituted a problem which had to be addressed.

Efforts that were made included, looking for methods that would lead to the proper identification of culprits through advanced investigation techniques to meet the standard of proving cases beyond reasonable doubt. Thus, the government of Tanzania has caused amendment of existing laws and has enacted new laws on forensic science in addition to amending the existing laws.

2.4 Initiatives of the Government on Forensic Science

The initiatives of the government of Tanzania and its commitment towards application of forensic science techniques in identification and deterring commission of crimes is reflected in both policy statements and legislation. The policy statement has adopted a broad objective on reduction of poverty and rise of economic development of individuals in the country. The policy realizes that in order to attain this goal, crime prevention is not an option but a necessity. Thus, the policy insists on the use of forensic science techniques in the whole process of detecting and preventing crimes. In doing so, the policy requires the Ministry responsible for health to provide timely feedback on the


29 Republic v. ACP Abdallah Zombe and 12 Others, The High Court of Tanzania at Dar es Salaam, Criminal Sessions Case No. 26 of 2006 (Unreported). Extra Judicial killings by police officers is also reported in the Legal and Human Right Centre (LHRC), Tanzania Human Rights Report, 2015, p. 24.

30 See the Human DNA Regulations Act, the Government Chemist Laboratory Act, Tanzania Evidence Act, the Tanzania Criminal Procedure Act and the Cybercrimes Act.

31 Statement 2.5.1 of the National Health Policy, 2003.

32 See statement 3.8 of the National Health Policy, 2003.
forensic evidence examined in their laboratories. This specific policy statement says:

The Ministry of Health through the Government Chemist Laboratory Agency will provide timely forensic science information and scientific expertise to legal instruments and other customers to support investigation, detection, prevention and reduction of crimes in the community. The forensic science services will contribute to existence of safer, fair and justice society by providing laboratory analytical/test results and reports backed up with evidence data.33

Apart from the policy statement on forensic science, the government of Tanzania enacted various laws which allow the application of forensic science in detection and prevention of crimes. These laws include the Constitution of the United Republic of Tanzania,34 the Government Chemist Laboratory Act,35 the Human DNA Regulations Act,36 the Criminal Procedure Act,37 the Evidence Act,38 the Police Force and Auxiliary Services Act39 and the Cybercrimes Act.40 However, due to limited time and space no attempt is made to discuss each and every piece of legislation. The discussion is restricted to application of forensic science techniques towards efforts to identify culprits before courts of law in Tanzania.

Despite several initiatives taken by the government, there are still complaints from members of the public on the criminal justice system. This is due to the fact that, the system releases persons who are believed to be guilty of murder due to failure to meet the standard of proof beyond reasonable doubt. As a result some people think, these initiatives were just put in place for the purpose of consuming taxpayers’ money. Hence, the question which must be answered is whether the application of forensic science techniques both at the scene of crime

33Ibid.
34Cap. 2 [R.E. 2002].
35Act No. 8 of 2016.
36Act No. 8 of 2009.
37Cap. 20 [R.E. 2002].
38Cap. 6 [R.E. 2002].
39Cap. 322 [R.E. 2002].
40Act No. 14 of 2015.
and the admissibility of forensic evidence in court is really a solution in the fight against the crime of murder.

2.5 Forensic Science as a Solution

There has been a global debate on whether forensic science is actually a science due to involvement of human judgment in the so called scientific findings.\(^{41}\) However, this is another wide area which is not subject of this Article. Our discussion is confined to the contribution of forensic science in identifying and bringing to justice culprits of murder in mainland Tanzania. As it was noted earlier, prosecutors in several occasions have failed to link the suspects with the crime and end up failing to prove the guiltiness of the accused beyond reasonable doubt. Probably it is high time dead men named their murderers by way of applying forensic science both at the crime scene and before the court of law.

It is crucial to note that, the proper application of forensic science techniques especially in complex murder scenarios, increases the ability to identify and justly prosecute the real culprits of murder. Further, it reduces the chances of wrongful convictions and wrongful acquittals of accused persons.\(^{42}\) Indeed, the highest risk for forensic science in the identification and prosecution of culprits of murder is the human inability to find, study, understand and properly apply forensic evidence before the court of law.\(^{43}\) This is in line with the Locard’s Exchange Principle which maintains that there is always exchange of physical materials whenever a human being makes contact with environment.\(^{44}\)

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the contact is for criminal purposes, the criminals tend to leave behind certain trace evidence and take with them other pieces of evidence from the crime scene. It may be blood, DNA materials embodied in knives or other sharp instruments, footmarks, bite marks, fingerprints, hair or even cloth fibers. It is human inabilities to properly apply forensic science techniques that diminish the value of the evidence obtained. Wilding makes it clear when he says:

Trace evidence is factual. Unlike humans, it cannot be confused by the excitement of the moment, and it does not forget. It’s a silent witness that speaks when humans cannot. A physical evidence cannot be wrong, it cannot lie, it cannot be wholly absent. Only human failure to find it, study and understand it, can diminish its value.45

On this understanding, no matter how complicated the crime scene is, it is still possible to let the dead talk through proper application of forensic science techniques.

2.6 Applicability of Forensic Science in Tanzania

Generally, the application of forensic science in Tanzania has been divided into two areas. First, during investigation with the aim of collecting trace evidence and identifying possible culprits of crime. Second, during prosecution process the prosecutors devote their skills, energy and time to prove the guilt of the accused person beyond reasonable doubt. In both areas, the proper application of forensic science is crucial46 for the criminal justice to serve its purpose of not convicting the innocent as well as not acquitting the guilty. In order to meet these two demands, the law has set a higher standard to be met before one can be convicted or acquitted basing on forensic evidence.47 It is required that the forensic findings be presented by an expert by way of giving opinion. It is a trite law that, an expert in forensic science must possess special knowledge, skills, experience or

45 Steve Wilding, op.cit.
46 Brandon L. Garrett, “The Substance of False Confessions”, Stanford Law Review, Vol. 62, No. 4, 2010, pp. 1051-1119. In this article, the author portrays inter alia the positive role played by DNA Evidence in exonerating persons who were wrongly convicted based on their previous false confession.
47 Section 47 of the Evidence Act, Cap. 6 [R.E. 2002].
training in the said area.\textsuperscript{48} Thus, the opinion of an expert is treated as relevant fact for the purpose of admissibility before the court of law.\textsuperscript{49}

Reading the law and policy, one can easily appreciate the efforts taken to allow the applicability of forensic science in Tanzania. In spite of the efforts, it has been shown to be difficult or almost impossible to pin down culprits of murder especially in most complex murder scenarios. Most of suspects in those scenarios have been released by courts of law due to several reasons.\textsuperscript{50} Studies show that, as a result of courts convicting the innocent and setting free the guilty members of the public continue to lose faith on the criminal justice system in the country and embarking on mob justice as an alternative.\textsuperscript{51} The leading reasons for those acquittals of suspects in complex murder scenarios in Tanzania include poor investigation, contamination of evidence, insufficient evidence, confusion over the question of blood group, non-applicability of forensic techniques to circumstances which demand their applicability and inadequate forensic laboratories.

2.6.1 Contamination of Forensic Evidence

Contamination of forensic evidence can occur in many ways. One of the ways is the introduction of new physical evidence to the crime scene or circumstances of the case so that it may be counted as one of the evidence in the case. Contamination can be intentional or unintentional. Intentional contamination occurs when there is intent to render useless the available evidence so that the real culprits cannot be identified. Sometimes it is for the purpose of protecting certain suspects from being successfully prosecuted. Unintentional contamination normally occurs due to ignorance or lack of skills of persons responsible for identifying, storing and transferring trace evidence. Contamination of forensic evidence has been one of the reasons for acquittals of suspects in Mainland Tanzania.

\textsuperscript{48}Ibid.
\textsuperscript{49}Ibid.
\textsuperscript{50} The leading reasons in this category, include; poor investigation, contamination of evidence, inadequate evidence, inadequate forensic laboratories and non-applicability of forensic science techniques to complex murder scene.
\textsuperscript{51} See Legal and Human Right Centre (LHRC), Tanzania Human Rights Report, 2015, p. 24.
The case of Republic v. ACP Abdallah Zombe and 12 others\textsuperscript{52} illustrates contamination of forensic evidence. This case involved the killing of four gemstones’ businessmen by ‘the order of the superior’. In this case four businessmen were arrested and falsely linked with an armed robbery. After their arrest instead of being escorted to police station, they were taken to the ‘Pande Forest’ and executed mercilessly by police officers. The suspected police officers were arrested and taken to the court to answer charges of murder. Interestingly, the court in this case was only certain on one thing:

That the victims were dead and the cause of the death was a gun shot, and that from the nature of the wounds, whoever did it, did so with malice aforethought.\textsuperscript{53}

Drawing from the above statement of the court, it is clear that until the conclusion of the case, the court was unable to know the actual culprits. This resulted into the acquittal of all police officers charged with the offence of murder. Among the reasons for acquittal of the accused persons in this case was contamination of evidence. The suspects were not suspended from work immediately after the initiation of the case. This gave them room to contaminate evidence. From the case it is revealed that the suspects participated in acts like sending cartridges to ballistic experts.\textsuperscript{54} Furthermore, there was also allegation on the alteration of armory register by the suspects to reflect the digits they wanted.\textsuperscript{55} Similarly, the suspects made an effort to create another scene of crime different from Pande forest. This was the postal fence in Sinza in which the suspects claimed that there was a fire exchange between police and the victims.\textsuperscript{56} They went further showing some bullet holes on the wall suggesting that, the victims were shot dead while climbing the wall in an attempt to escape. Additionally, the suspects made effort of trying to submit to the forensic bureau four samples of blood mixed

\textsuperscript{52} In the High Court of Tanzania at Dar es Salaam, Criminal Sessions Case No. 26 of 2006 (Unreported).
\textsuperscript{53}Ibid, pp. 127-128.
\textsuperscript{54}Ibid, refer to p. 116 of the Judgment, where the second accused in this case is reported to have sent nine cartridges for ballistic examination on 25/1/2006.
\textsuperscript{55}Ibid, pp. 42, 43 and 138.
\textsuperscript{56}Ibid, p. 137.
with sand claiming that it was collected from the scene of crime at Sinza.\textsuperscript{57} On this matter, the High Court of Tanzania, stated that, it was an extension of a conspiracy to detract the truth about the killings of the victims.\textsuperscript{58}

Due to this prevailing contamination, some prosecutor’s witnesses doubted the ballistic evidence from the two cartridges claimed to have been collected from Pande forest. To them, the cartridges could have been fired on a date later than the date of the crime for the purpose of hiding the truth.\textsuperscript{59} Thus, the opinion by a ballistic expert that, the cartridges were from a gun issued to a suspect who was dead at the time of tendering evidence before the court, did little than multiplying doubts on the case.

### 2.6.2 Poor Investigation

Apart from contamination of evidence, there has been poor investigation of murder cases in Tanzania.\textsuperscript{60} This is manifested in most complex murder scenarios in which the investigation team failed to collect crucial evidence which would have impacted on the outcome of the case. This is also revealed in the case of Republic v. ACP Abdallah Zombe and 12 others.\textsuperscript{61} In this case the first suspect (ACP Abdallah Zombe) communicated with the second suspect (SP Christopher Bageni) and ordered him to execute the victims. To prove this, the prosecution was required to tender evidence of the content of the communication between the first and the second suspects. However, they failed to produce the said conversation because the investigators did not trace them timely from Vodacom and Celtel cell phone service providers. Indeed, the records for the said conversation had been

\textsuperscript{58}\textit{Ibid}, p. 117.
\textsuperscript{59}\textit{Ibid}, p. 129.
\textsuperscript{60}\textit{Ibid}, p. 181, the High Court agreed with the Counsel for defense that, generally the case was poorly investigated and produced unreliable evidence. This resulted into acquittal of all suspects by the High Court.
\textsuperscript{61} In the High Court of Tanzania at Dar es Salaam, Criminal Sessions Case No. 26 of 2006 (Unreported)
deleted upon expiry of six months.\(^6^2\) This made the court to rule that, the first suspect was not successfully linked with the crime.

The reasoning behind the court’s ruling was that, the orders of executing the victims alleged to have originated from him were neither proved nor corroborated.\(^6^3\) One would ask why did investigators wait until the expiry of six months without tracing conversation between first and second suspect. The answer is poor investigation which did not respond timely into acquiring such an important piece of evidence. Likewise, some key suspects were not brought before the court.\(^6^4\) For example, there was evidence that, a police officer known as D/CPL Saad was the one who opened fire and killed the victims\(^6^5\) but he was not among those who were accused and sent before the court.\(^6^6\) Therefore, it can be said that, poor investigation has contributed to the release of suspects even where there were strong indications of guilt.

It is worth noting that this case reached the Court of Appeal of Tanzania in which only one person was convicted and the other suspects were acquitted. This was in *Director of Public Prosecutions v. ACP Abdallah Zombe and 8 others*.\(^6^7\) Like the High Court, the Court of Appeal failed to know the real culprits in this case. It agreed with the High Court that, whoever might have killed the victims did so with malice aforethought.\(^6^8\) However, the Court of Appeal convicted the second suspect, SP Christopher Bagenito and sentenced him to suffer death by hanging. The basis for the conviction was the fact that, he was the high officer in rank and present at Pande forest at the time the victims met their death but did not prevent the killings.\(^6^9\) Consequently,

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\(^6^2\)Ibid, p. 105.
\(^6^3\)Ibid, p. 220.
\(^6^4\)Ibid, p. 181. In this part it is revealed that among 15 police officers who were involved in the crime not all of them were charged.
\(^6^5\)Ibid, p. 86.
\(^6^6\)Ibid, p. 128.
\(^6^7\)In the Court of Appeal of Tanzania at Dar es Salaam, Criminal Appeal No. 358 of 2013 (Unreported). The Judgment of the Court was delivered on 13\(^{th}\) September, 2016.
\(^6^8\)Ibid, p. 7.
\(^6^9\)Ibid, p. 49.
he was found guilty of facilitating the killings and therefore, unlawfully causing death of the victims.\textsuperscript{70}

\subsection*{2.6.3 Insufficient Forensic Evidence}

Evidence is at the core of any criminal justice system. It is crucial for prosecutors to be armed with sufficient evidence before the court of law for the purpose of proving guilt of accused persons. In most complex murder scenarios which demand the collection of forensic evidence, insufficient forensic evidence has been a leading reason for acquittals. In the case of \textit{Shaban Mpunzu @ Elisha Mpunzu v. Republic}\textsuperscript{71} the Court of Appeal of Tanzania ruled that, the evidence of blood which was opined by the Government Chemist to be a human blood but could not establish if it belonged to the suspect did not successfully link the appellant with the murder of the deceased person. This led to the acquittal of the appellant.

In Shaban Mpunzu case a son was convicted of the death of his father. It was shown that the deceased went for an outing and did not return at home for the whole night. The following day in the morning the deceased’s body was found lying along the path a short distance away from the village houses. On setting up an investigation on the crime scene a trail of blood was spotted to some point about 20 paces from the house of the appellant (the son). When the house of the appellant was searched, a pair of rubber shoes stained with blood was found hidden under his bed. The case of the appellant was entirely based on circumstantial evidence as there was no person who saw him killing his father. The strongest evidence to link him with the murder of his father was, thus, the blood stained rubber shoes which were found in his house. The blood was examined by the Government Chemist and reported that it was human blood. The Government Chemist stated further that it was difficult to extract a blood group from stain of blood found on those shoes. This piece of evidence made it impossible to link the said blood with that of the deceased in order to confirm if it was the deceased’s blood or not. Therefore, the Court of Appeal decided to acquit the appellant on the ground that, forensic evidence (blood)

\textsuperscript{70}\textit{Ibid}, p. 52.

\textsuperscript{71} In the Court of Appeal of Tanzania at Mwanza, Criminal Appeal No. 12 of 2002.
unsuccessfully linked the appellant with the death of his father. The Court of Appeal reasoned that since the blood found in the accused’s shoes was just a human blood linked to no particular human being the case against the appellant was not proved.

The above case is a typical case where forensic science techniques could have been used to collect more evidence. On the contrary, the investigation team collected less forensic evidence from the crime scene. One would think that, because there was a trail of blood from where the dead body was found to about 20 paces away from the appellant’s house, then it was possible as well to extract foot-prints or shoe prints from the crime scene and compare them with those of the accused person. Unfortunately, this was not done. It is not even shown that, there was an effort to extract fingerprints or hairy evidences from the crime scene. Therefore, it can be said that, insufficient collection of forensic science contributed highly to the acquittal of the suspect in this case.

Similarly, in the case of Wilfred Lukago v. Republic the Court of Appeal of Tanzania was of the view that, in the absence of evidence linking the appellant with the blood found on the axe alleged to be the weapon used for murder of the deceased, a conviction could not be sustained. The facts of this case are that, the appellant had a conflict with his wife which resulted into separation. While in separation, his wife got a boyfriend. On a sudden visit to the place where appellant’s wife was living, he found his wife with her new boyfriend. Due to this he decided to go away from that house. The next day, the appellant’s wife and the boyfriend while on the road, were given a lift by the appellant in a motor vehicle which consisted of other passengers. It is further explained that, the wife and the boyfriend were blind folded by some of the passengers and taken to some place where they were beaten. As a result the boyfriend died and the appellant’s wife was unconscious for over two months in the hospital. Therefore, in convicting the appellant the High Court relied on the statements given by the appellant’s wife which explained how the incident occurred. The

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court’s conviction also relied on the axe which had human blood on its blade and the wooden handle found in the appellant’s house.

On appeal, the Court of Appeal of Tanzania quashed the conviction on the ground that, although marks of human blood were found on the axe which belonged to the appellant, they were insufficient to warrant a conviction because it was not shown whose blood it was. The Court went further to rule that, because the woman was unconscious for over two months, it had suspicion on her memory over the incident.

In this case, one would expect the investigation team to do more regarding the collection of forensic evidence. Just relying on blood found on the axe was not enough. They could have looked for other evidence to connect the accused person with the death of the deceased.

2.6.4 The Dilemma on Blood Group Matches

Another reason for acquittal of suspects despite the use of forensic science in gathering evidence is where the deceased’s blood group matches that of the suspect. It is obvious that the Government Chemist needs to establish a blood group from samples found at the crime scene in order to identify a person to whom the blood belongs. The dilemma rises whenever, the findings of the Government Chemist depict that the blood group of the suspect matches with that of the deceased. In such circumstances, the prosecutor as well as the court in Tanzania has found it difficult to condemn the accused person. Thus, most cases of this nature are ruled in favour of the accused person.

*Nuhu Selemani v. Republic*73 illustrates the blood group dilemma. Nuhu Selemani was convicted in the High Court of the offence of murder. The conviction was based on the blood stained shirt of Nuhu which was examined by the Government Chemist and discovered that, the blood on the shirt was a human blood and had the same group with that of the deceased. On appeal, Nuhu was set free by the Court of Appeal of Tanzania on the ground that, he had the same blood group with that of the deceased and that the blood on the shirt could as well belong to Nuhu Selemani. As a result the court concluded that the blood stained

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73 [1984] TLR 93 (CA).
shirt could not be sufficiently linked with the crime allegedly committed by the Appellant.

Although courts in Tanzania have tried to find a solution to this dilemma, in most circumstances it has been difficult for the prosecution side to secure a conviction from the court. In *Hamidu Mussa Timetheo and Majid Mussa Timetheo v. Republic*, the Court of Appeal of Tanzania in an attempt to solve the dilemma of suspects’ blood group matching that of the deceased said:

...blood grouping in the laboratory is not the only way of linking a sample of blood to the subject in issue. Other deductive methods can be used as well.

In the Court of Appeal, the appellants were challenging the decision of the High Court which convicted them of murdering their father and sentenced them to death. The appellants had a misunderstanding with their father because he sold the family cattle. Due to this they had previously threatened to kill him. But before they were reconciled the deceased went missing at his home and work place for three days. It is explained that, although his two children (the appellants) had contact with him (the deceased) at least once every day, they did not take any trouble to report the disappearance of their father to either a police station or at his work place.

It was further shown that, on the fourth day of the search the deceased was found dead and his body was floating in a nearby river. The postmortem examination revealed multiple cut wounds on different parts of the body including head. A search conducted in the appellants’ house by Police Officers and witnessed by three neighbours, found a blood stained *panga* and bicycle parts hidden under the bed. It was the deceased and not the appellants who owned the bicycle. On the day the deceased went missing, he was going to do some shopping to the market by using a bicycle. It was further, shown that the *panga*...
belonged to the appellants but they failed to explain how it sustained blood. While one of the appellants said it is animal blood (Dik Dik) which they killed during their recent hunt, the other said, he knows nothing on how the panga came to be blood stained.  

Forensic evidence (expert opinion) from the Government Chemist confirmed that the blood stains on the panga were human blood although its group could not be determined due to deterioration. In other words, the forensic expert opined that, although he could identify with certainty that, it was human blood, he could not link the blood with the deceased due to the inability to extract blood group from deteriorated blood.

Both the High Court and the Court of Appeal of Tanzania used the forensic findings to corroborate the prevailing circumstances and convict the appellants. Specifically, the Court of Appeal stated that, ‘blood grouping in the laboratory is not the only way of linking a sample of blood to the subject in issue’. Thus, in cases where the linkage is lacking for one reason or other, deductive methods can be used. Such methods may include looking at all the circumstances of the case and the evidence available.

It should be noted that the Court of Appeal of Tanzania is of the view that, where there is sufficient circumstantial evidence to link the blood found on the suspects’ articles to that of the deceased, even when the blood group has not been established, the court may proceed to convict. However, in most circumstances it has proved to be difficult for the prosecutor and the court to condemn the suspect.

2.6.5 Non-Application of Forensic Science

Some acquittals in Tanzania have been instigated by non-application of forensic science in investigation process. This is so even in the circumstances which demand the application of forensic science to uncover the truth on what has transpired in the crime scene. The case of

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78Ibid, p. 127.
79Ibid, p. 128.
Republic v. Vincent Flavian Mbaga and 6 others\textsuperscript{80} shed more light on this regard. Seven accused persons were charged of murdering a person suspected to be a thief. It was alleged that, one woman who owned a kiosk in the village saw the deceased sneaking into her kiosk and informed fellow villagers. This made them to suspect him to be a thief, as a result they summoned sungusungu (militia people) to make a search for the deceased. When arrested, the chairperson of the village and six other sungusungu tied the deceased’s hand with a piece of sisal rope and started to escort him to police station. Two sungusungu in the group were armed with ‘pangas’ and the rest had sticks on their hands and they did not submit the suspect to police station. The suspect was found dead along the road leading to the police station somewhere within the edges of the forest. His hands were still tied and he had two big gaping wounds on his head. The postmortem report revealed that the wounds were caused by objects with sharp edges. The accused persons claimed that they did not kill the deceased person. They explained that on their way to the police station the deceased suspect broke through and run away into the forest and that they tried to run after him but he surpassed them.

This case raised a lot of doubts on the accused’s innocence. These included a doubt as to how a tied up person could run and surpass eight ‘sungusungu’ escorting him. Why was the deceased body found very close to the place where the accused persons claimed the deceased escaped and it was along the road and not in the forest as they claimed it to be. The fact that, the deceased’s body had two deep cut wounds and that two of the accused persons had pangas with them increased the doubts. Lastly, why the accused persons chose to return to the village and remained quiet on the incidence as if nothing had happened.

Despite these doubts, the court acquitted all the accused persons for failure of the prosecution side to prove their case beyond reasonable doubt. In other words, the prosecution side was unsuccessful in associating the accused persons with the crime scene. They merely relied on circumstantial evidence without enough corroboration for the

\textsuperscript{80} In the High Court of Tanzania at Morogoro, Criminal Session Case No. 117 of 2002, (Unreported).
The mere fact that the accused persons were the last persons to be seen with the deceased was not enough. It is submitted that forensic science was crucial in gathering trace evidence which could have corroborated the circumstantial evidence. However, the investigators chose not to use other forensic techniques apart from postmortem. Instead, they relied heavily on the suspects’ testimonies as a way of convincing the court on the guiltiness of the suspects. In any case, it was very unlikely for the suspects to incriminate themselves.

2.6.6 Insufficient Forensic Laboratories

Insufficiency of forensic laboratories hinders effective application of forensic science techniques in Mainland Tanzania. Statistics depict that Mainland Tanzania has a population of about 51 Million people in its 26 regions. However, where need arises for the application of forensic science, trace evidence collected from these regions have to be sent to Dar es Salaam. This can either be sent to the Government Chemist laboratory or to the forensic laboratory under the Police Force. The Police General Order insists that, trace evidence such as blood, fingerprints, footprints, explosives and toxics are to be sent to the forensic department in Dar es Salaam. Hence, due to insufficient forensic laboratories, there is over-dependence on the forensic laboratory under the forensic department of police in Dar es Salaam. Insufficiency of laboratories leads to other problems such as delay in investigation, contamination of forensic evidence and indeed delays in delivery of justice.

It is important to note that for trace evidence concerning Human DNA materials, the law has tried to solve the problem of insufficient laboratories. This is addressed by allowing other private persons apart from the Human DNA laboratory under the Government Chemist

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82 Police General Order No. 229 (28).
83 Ibid.
84 Ibid, PGO No. 229 (28), (i), (ii) and (iii).
Laboratory Agency (GCLA) to run human DNA laboratories.\textsuperscript{85} However, almost a decade has passed, private persons have not utilized this avenue accorded by the law. Practically, the question of insufficient human DNA laboratories has not yet been addressed as well. This problem can be reduced or put to an end if forensic laboratories are to be established in each region in Mainland Tanzania by the Government itself.

### 2.7 Success Stories

Apart from shortcomings in the application of forensic science in Mainland Tanzania, experience has taught us that the correct application of the same can yield good results. A few cases in which forensic techniques were applied properly can illustrate this success. \textit{Makungire Mtani v. Republic}\textsuperscript{86} shows how the proper application of forensic science can assist in identifying the culprits involved in a murder case. The deceased had invited the appellant and his friend to his house. After a short time of living together, misunderstandings broke out and the deceased wanted to evict them from his house. This made the appellant and his other friend vow to teach a lesson to the deceased person. One evening three of them went out but only two of them came back to the house. After three days of not knowing the whereabouts of the deceased person, his body was found in the potato field with injuries on the head and legs. Following this incidence, the appellant and his friend were arrested. While in remand the appellant’s friend died; as a result the case proceeded against the appellant alone.

It is important to point out that this case was based entirely on circumstantial evidence because no one saw the persons who killed the deceased. A quick responsive investigation was set and a shirt with stained blood was recovered from the appellant. The Government Chemist was able to obtain the blood groups from the stained blood on the shirt. He opined that, the blood group matched that of the deceased person and not of the appellant. The appellant failed to reasonably explain how the blood of the deceased was found on his shirt. Due to

\textsuperscript{85} Section 17 (1) of the Human DNA Regulations Act, 2009.
\textsuperscript{86} [1983] TLR 179 (CA).
this, he was convicted to suffer death by hanging in the High Court and his appeal to the Court of Appeal of Tanzania was dismissed.

This case shows the importance of properly applying and quickly responding to the crime by doing investigation and submitting forensic evidence to the laboratory timely. What seemed to be a complex situation of identifying the culprits was easily settled by science.

2.8 Conclusion and Recommendations

This Article focused on the applicability of forensic science techniques in identifying culprits of murder in Mainland Tanzania. The Article has revealed that, there have been complaints and discontent among members of the public on how murder cases are handled. There have been cases of acquittal of persons who the society strongly believes to be guilty. The discontent is shown to be higher in most complex murder scenarios where the identification of culprits seems impossible. The Article depicts further that most of murder cases of this nature have ended up with acquittal of culprits for the failure of prosecutors to prove their cases beyond reasonable doubt. As a result members of the public lose faith in the criminal justice system. Such loss of faith is manifested through the increase of extra judicial killings in an attempt to secure justice out of court. Additionally, the Article explains that the difficulties of identifying culprits in these cases may make people wish that the dead arose and named the actual murders. Indeed, this is not possible and therefore, the better solution is through application of forensic science to obtain trace evidence.

In order to back up this argument, the Article explored how is it crucial to make use of forensic science techniques in identifying culprits of murder in Mainland Tanzania. In doing so, the historical development of law on forensic science has been discussed. Several initiatives taken by the Government of United Republic of Tanzania in support of forensic science have been highlighted. The Article has revealed several setbacks which hinder the applicability of forensic science in deterring crime of murder in the country. It is contended that if these setbacks are left unattended, Mainland Tanzania is running a risk of increasing the number of wrongful acquittals which is contrary to the objectives of any effective criminal justice system in the world.
Based on the arguments raised in this Article, the following recommendations are made:

First, the law should be amended to specifically give mandate to a qualified police officer to do the work of collecting evidence from the crime scene. The current position of the law which empowers every police officer to collect forensic evidence from the crime scene should be amended.\(^{87}\) To allow every officer to collect trace evidence increases the risk of contamination of evidence.

Second, there should be deliberate efforts to increase the number of forensic laboratories in Mainland Tanzania. As it stands now, it is unrealistic for a population of almost 51 million people in 26 regions to depend on the forensic laboratory under the forensic department in Dar es Salaam. It is important for these laboratories to be established at least in every region in the country.

Third, there should be strict adherence to the requirement of suspending suspects from employment pending their investigation. The Article has revealed that, one of the leading cause of wrongful acquittals is contamination of evidence by suspects. This is only possible when suspects who are employed in the public sector are not suspended from office during investigation, thus giving them an opportunity to temper with the whole process.

Fourth, there should be frequent training of law enforcers on forensic science techniques. This will assist in equipping them with necessary skills of responding, collecting, preserving and transferring of samples from the crime scene to the forensic laboratories. As a result the risks of rendering trace evidence valueless will be reduced.

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\(^{87}\) See section 14 (2) of the Human DNA Regulation Act, No. 8 of 2009.
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