DEMYSTIFYING

"THE ORDER FROM ABOVE"

The People versus the Attorney General, when the Forces exceed their Constitutional Mandate

ISAAC CHRISTOPHER LUBOGO

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ACRONYMS

ACHR	American Convention on Human Rights
ADF	Allied Defence Forces
CA	Court of Appeal
CCTV	Closed Circuit Television
CID	Criminial Investigation Department
CJ	Chief Justice
CMI	Chieftaincy of Military Intelligence
CPC	Criminal Procedure Code Act
CPS	Central Police Station
DISO	District Security Organizations
DPP	Directorate of Public Prosecution
ECHR	European Convention for the Protection of Human Rights
FDC	Forum for Democratic Change
HRNJU	Human Rights Network for Journalists Uganda
ICCPR	International Covenant on Civil and Political Rights
ICT	Information and Communication Technology
IGP	Inspector General of Police
IPOD	Inter-Party Organization for Dialogue
ISO	Internal Security Organization
JA	Justice of the Court of Appeal
JAT	Joint Anti Terrorism Task Force
JSC	Justice of the Supreme Court
LDU	Local Defence Units
LRA	Lord's Resistance Army
MCA	Magistrates Court Act

NGO	Non Governmental Organisation
NRM	National Resistance Movement
O/C	Officer-in-Charge
PRA	People's Redemption Army
PSU	Police Standards Unit
RRU	Rapid Response Unit
SC	Supreme Court
TIA	Trial on Indictments Act
UDHR	Universal Declaration of Human Rights
UHRC	Uganda Human Rights Commission
UN	United Nations
UPDF	Uganda Police Defence Forces
UPF	Uganda Police Force
VCCU	Violent Crime Crack Unit.

OPENING SCHOLARLY REMARKS

The theoretical framework for blatant abuse by force thrives from John Austin's definition of law as a command from the sovereign which can be rebutted by natural school of law especially St. Augustine who says people have a moral obligation to fight injustice even if its rebellion, revolution. In fact, Bishop Desmond Tutu calls it liberation theology…we in this book choose to call it a "constitutional self conscience and re awakening our self-righteousness in order to redeem our God given freedoms.

ABOUT THE BOOK

The law of criminal procedure lays down the machinery by which suspects are brought to court, tried and if found guilty, punished. Criminal procedure can also be defined as the means by which criminal law is enforced and involves the balancing of the liberty of the citizen against the interests of the community as a whole. The scope of criminal procedure extends over a wide perimeter from prevention and investigation of crime to prosecution and punishment of the offender.[1]

As far as human rights are concerned, every Ugandan citizen has a right to liberty. This presupposes that the freedom enjoyed by the citizens can only be limited according to the provisions of the law and anything done without heeding the same is said to be arbitrary. The Uganda Police Force is mandated under Section 4 of the Police Act to; protect the life, property and other rights of the individual, maintain security within Uganda, enforce the law, ensure public safety and order and detect and prevent crime in the society. In order to fulfill this mandate the Police is legally empowered to conduct arrests, searches and institute criminal proceedings. However, the in manner in which the Police has conducted numerous arrests over time, has left many Ugandans sceptical as to whether the Police is indeed a custodian of law and order. Many have witnessed brutal arrests of politicians, on television and in newspapers over time and even more recently when Police was dispersing people from political consultative sessions of presidential opposition candidates like Amama Mbabazi and Kiiza Besigye. The question that continues to linger is how should these arrests be conducted under the law? This book analyses the aspect of arrests by the government. It discusses the procedure of an arrest

[1] Odoki, Benjamin Justice: A Guide to Criminal Procedure in Uganda, 1990.

as enshrined in the laws of Uganda, the rights of an accused person, a suspect and even a convict.

The book in principle analyses the time before an arrest is carried out; the time and manner of the arrest; and the events that follow the arrest. The book discusses the Miranda rule that guarantees that persons detained by police will not be interrogated in a way that places them at a disadvantage. The book also explores the aspect of searches on people's property; how and when these searches should be conducted in accordance with the law.

The book demystifies the highly volatile discussion of use of reasonable force while carrying out arrests. It lays out the threshold of what amounts to reasonable force and envisages circumstances where force is necessary to effect and arrest. The book also sheds light on the fundamental presumption of innocence and how this presumption should ordinarily be treated. Consequently, the book highlights the abuses that have and can be occasioned following the disregard or misunderstanding of this notion. The book reviews the principle of preventive arrest in light of human rights and its use as a tool of oppression.

The book also labours to demystify the difference between the different armed groups in the country. It majorly indicates the difference between the police and the army and how their roles are different. It postulates the instances where this thin line of difference has been overstepped by either group and how catastrophic this action has proven to be overtime. It elaborates on the Posse Comitatus principle that argues against any military intrusion into civilian affairs. The book also tries to put into perspective the different groups being formed and revived in the country in the guise of maintaining law, peace

and order. These groups include the Local Defence Units, Crime preventers and the like. The book attempts to place them under the different laws promulgated for the governance of the people of Uganda.

The book also concerns itself with the aspect of obtaining confessions and admissions from arrested persons for purposes of presenting the same as evidence before courts of law. There have been instances where arrested persons have been coerced into confessions which have led to false imprisonments. The book also discusses aspects of finding no case against arrested people and the notion of nolle proseque; and the aspect of compensation for the people that have been falsely convicted or wrongfully arrested.

The book discusses the issue of liability for police brutality. It discusses the vicarious liability of the Government in civil proceedings as master and employer of police officers for acts of police officers done within the course of duty. The book also considers personal liability of Police officers for their reckless acts in law enforcement and the possibility of the Police opening up investigations and commencing criminal proceedings against its officers.

As a bonus, the book briefly discusses part of civil law that is relevant to the issues enunciated above.

CHAPTER ONE

HISTORICAL DEVELOPMENT OF CRIMINALITY

The Systematisation of criminal law through historical analysis reveals a contrast between common law crime and the enterprise of general principles underpinning contemporary criminal law.

COMMON LAW

Central practice is judgments in criminal trials. Judgments had authority by virtue of tradition, and the experience of the presiding judge. Coke CJ: regarded as the traditional origin of many common law principles. Judgments were submerged under the authority of common law tradition or, later, statute

General principles

Emerging from the end of the 18th century to the present, concern for systematic explanations by means of general principles. Systematization of the common law into a small number of conceptual structures capable of universal application.

A stark contrast exists between traditional common law crime and the general principles employed by contemporary courts. This contrast gave rise to a fundamental change in the way crime was perceived and punished. At common law, crimes were 'public wrongs' (today: 'crimes').

Common law tradition

Common law judgments derived their authority from two sources: long-standing legal tradition, and the experience of the judge. Common law judgments were submerged under the authority of the common law tradition or the governing statute.[2]

[2] Criminal Law and Procedure 01 - Introduction

Coke CJ is typically regarded as the origin of the original definition of crime at common law; later judgments would frequently refer to his definition.

Towards the end of the 18th century, a new set of general principles began to take form. With the transition from specific categories of common law crimes to a broad set of general principles, there were also changes in the fundamental construction of criminal activity itself: what were previously known as 'public wrongs' became known as 'crimes'. During the 19th century, judges (and, later, academics) were concerned to provide systematic explanations of the law such that they could give rise to general principles. This led to the systematization of the common law.[3]

Division of the Common law

The common law falls into two parts:

a) Formal rules (logical, formal reasoning; principles, definitions)

b) Bureaucratic institutions (trial, police, prison)

Prior to the development of general principles, the trial was seen as the pinnacle of the bureaucratic process, with the police and prison systems subordinate in their investigation and housing of the accused/convicted. With the rise of general principles, the trial became secondary to the police and prisons, which were now both more important than and less regulated by the judiciary. General principles were seen as being relevant only to the courtroom.

Previously, the trial was the pinnacle of the criminal process, and controlled both the other major parts of the criminal process. Police were under the direction of the judge or magistrate, and the prison authorities were called upon according to the details of the sentence. With the rise of general principles, the trial become secondary to the police and prison authorities, which became increasingly important and unregulated by the judiciary.

[3] Peter Rush, Criminal Law and Procedure: An Introductory Essay and Overview (2004) 7.

The trial is now subordinate to external processes and prosecutorial discretions, so that general principles are relevant only in the courtroom.

Changes in the criminal object

At common law, the object of crime was its modus operandi. The manner of acting was the major determinant of criminal liability. Thus the circumstances in which the accused acted and the qualitative characteristics of their behaviour determined liability (eg, poison or pitchfork?). Thus, the object of crime was an event: how did s/he act, and what did they do? The manner of acting played a large role in determining guilt or innocence. Circumstantial or qualitative characteristics determined liability. Today, criminal liability is determined by the consequences (results) of acting, and the mental state (purpose) of the accused. As a consequence of this transition, definitions of crimes became increasingly general; abstractions width wider scope for application to fact scenarios were adopted.

CONTEMPORARY CRIMINAL LAW

Today, it is the consequence of an action, in combination with a purpose or mental state, which determines guilt or innocence. Results, such as the killing of a human being are more important than, eg, the weapon with which it was brought about. Definitions of crimes become increasingly general, abstract, and capable of subsequent application to a wider range of fact scenarios. General principles operate as deterrents by targeting the mentality of individuals; in theory, the law should control the minds of individuals, which in turn controls their behaviour. Thus, by intimidating the mentalities of the general populace according to rational processes and common knowledge, criminal law sought to prevent the committal of crime. This contrasts with the common law approach of restitution, which targeted the bodies of perpetrators. An act is not guilty unless the mental state with which it is done is also guilty.

Definition of Criminal Law

In order to determine the scope of criminal law and the limits within which crime and law interact, it is necessary first to define crime. Williams' practical definition has been highly influential, and – though criticised as circular – emphasises the procedural nature of the law (a positivist?):[4]

A crime is an act capable of being followed by criminal proceedings having a criminal outcome.… Criminal law is that branch of law which deals with conduct… by prosecution in the criminal courts. Blackstone's 18th century definition, on the other hand, focuses upon the public harm suffered as a result of criminal conduct:

A crime or misdemeanour is an act committed, or omitted, in violation of a public law, either forbidding or commanding it … public wrongs, or crimes and misdemeanours, are a breach and violation of the public rights and duties, due to the whole community…

Heterodox approaches to contemporary criminal law are generally discouraged, as they tend towards fragmentation of previously unified bodies of law and dissolution of principle. Pragmatic approaches are favoured, particularly where they serve to improve the perception of criminal law as a single, self-coherent, and rational entity.

Application of Criminal Law

Substantive criminal law encompasses numerous semantic layers:

- Constructions of criminal responsibility
- Interpretation of definitional elements
- Classification of crimes
- Legal definition of specific types of crime
- Constructions of the 'facts' of the case

[4] williams, glanville (1955), 'the definition of crime', 8 current legal problems 107, 130.

As such, particular attention should be paid to the way in which judicial interpretation proceeds (eg, in defining the crime and treating evidence) and the values that underlie it and other legal reasoning and rhetoric.

GENERAL PRINCIPLES OF CRIMINAL LAW

DOCTRINES OF THE CRIME

A crime is composed of two parts:

1. **Actus reus**; An external, behavioural element; and
2. **Mens rea**; A mental, fault-based element.

Generally, in order to commit a crime an actor must possess both actus reus and mens rea. That is, an act is not guilty unless the mental state by which it was commissioned is also guilty. The crime is the combination of both, and is a single unity. Modern definitions of crimes construct the attribution of criminal responsibility around prohibited mentalities as to prohibited consequences. Note, however, that this can cause problems in crimes which are structured around a mentality as to a circumstance (eg, rape).

Definitions of specific legal crimes (eg, assault, murder) are generated by reference to these two components. Note that each legal type of crime has its own forms of mens rea (per Stephen J in Tolson). For criminal liability to be attached to a person, three elements are necessary:

1. ***Act (must be voluntary and a legal cause of the prohibited consequence)***

(a) Acts that are not willed are not legal acts (voluntariness)

(b) Omissions arguments are often claims that the act should have been done

2. Mental state (intent or purpose of the accused)

(a) Intention: oldest mental state

(i) attached to consequences

(ii) purpose of the actual accused (subjective); eg, killing vs scaring when carrying loaded shotgun

(b) Recklessness: foresee prohibited consequence as a 'possible or probable result' of conduct

(i) Irrespective of intention, but has subjective element

(c) Negligence: objective standard (that of the ordinary reasonable person)

3. Defence (there must be a lack of valid legal defences)

(a) Automatism: used as a defence to negative voluntariness

(b) Intoxication: used as a defence to negative voluntariness, intention, or both

(c) Temporal coincidence: to prevent unintended coincidences, both actus reus and mens rea must occur contemporaneously

Doctrines of defence

Doctrines of defence specify the legal requirements for employment of defences, and set limits on their use.

In order for a crime to exist according to law, it requires both external and internal elements to be present as well as the absence of available defences that would negative them.

There are two main types of defences:

(a) Can the actus reus or mens rea of the offence be proven?

(i) The defense operates by denying the elements of the crime

(ii) Arises as a consequence of the burden of proof, the onus of which lies with the prosecution

(b) Systematization of common arguments

(i) Legally recognized defenses with their own definitions, derived from general principles (eg, provocation)

(ii) These have legally distinct, precise definitions

Of the specific legal defences, there exist two types of defence based on the extent to which they negative or limit criminal liability:

• **Partial defences**: the accused is still guilty, but the defence changes the type of crime with which they are charged; and

• **Complete defences**: the prosecution must disprove the defence; if they fail, a verdict of not guilty is entered and the accused is acquitted.

Mens rea defences

Many defences are concerned with mens rea issues, such as provocation, where the argument of the accused is that a different mental state should apply, since they only brought about the prohibited consequence as a result of failing to exercise self-control.
Other mens rea defences:

- Duress: eg, a gun is put to the head of B, and A is told to kill C, or B will be killed
- Necessity: an objectively-determined circumstance
- Self-defence: reasonable belief

Note that the availability of these defences depends upon the nature of the crime. The exception is insanity, which is available for any crime.
When considering a defence, three questions need be raised:

1. Whether it is partial or complete?
2. For what crimes is it available and are its definitional elements fulfilled?
3. Identify the crime first. Note its elements. Identify relevant items of proof. Then (and only then) look at possible defences.

Quasi-defences

Pseudo/quasi-defences deny the existence of an actus reus or mens rea but the onus of raising such defences rests upon the accused. For example:

- Automatism Question of will; conduct was involuntary there can be no actus reus.
- Intoxication The accused was so drunk that there was no intention/purpose and/or voluntariness.
- Mistaken belief Intention predicated upon knowledge; if act committed innocently, this could undermine the basis of liability.

It might be asked of these quasi-defences whether they are excuses or justifications for the conduct of the accused. Previously, they were treated as excuses; now, however, procedural changes have transformed them into justifications.

Doctrines of strict and absolute liability

Doctrines of strict and absolute liability are methods of interpreting statutory definitions of crime. Crimes which attract strict or absolute liability do not require the prosecution to prove the existence of a mens rea.

These doctrines influence the reading of a criminal statute (typically, not concerned with the Crimes Act 1958 (Vic), but rather, eg, areas like environmental law).

Does the statute specify mens rea as a necessary element for the prosecution to prove?

- When statutes began to overtake the common law, they began to use non- legal expression of mens rea
- The judicial climate in which interpretation took place developed in response

Definition of honest and reasonable mistake of fact

• This defence is unavailable in crimes of absolute liability

Another difference between the two types of crime relates to the defence of honest and reasonable mistake of fact (belief in a set of circumstances which, if true, would afford an excuse to the conduct of the accused), which is available for crimes of strict liability, but not crimes of absolute liability.

Doctrines of complicity

The doctrines of complicity extend the limits of criminal liability to groups. In this way, individuals may be personally liable for the criminal actions of others. The doctrines of complicity define a method for finding people liable where elements of the crime are lacking.

Where a group of people act in cohort to produce a prohibited consequence, and each has knowledge of the circumstances in which they act, all members may be found guilty of the crime as though they themselves had produced the result as an individual. Generally, knowledge is an essential element.

Doctrines of inchoate crimes

Doctrines of inchoate crimes attach criminal liability to agreeing, planning, or promoting the commission of a crime (eg, attempted murder). Like doctrines of complicity, they extend criminal liability beyond the normal conception of a crime.

There are two main types of inchoate offences:

1. Attempts; An individual act, but doesn't achieve the desired results
2. Incitement A incites B to commit a crime; though no criminal act is performed by A, they are liable as an accessory

Inchoate is Latin for 'incomplete'.

CHAPTER TWO

ARRESTS AND WARRANTS

An arrest is the deprivation of liberty for the purpose of compelling a person to appear in court or other authority to answer a criminal charge or to testify against another person. It usually involves the taking of the person arrested in custody whereby he is detained or confined.

Every individual in Uganda has a constitutional protection as to personal liberty enshrined in the Bill of rights. Arresting a person therefore means interfering with his personal liberty. Therefore, a person will not be deprived of his liberty save as may be authorized by law.

Article 23 of the 1995 Constitution of Uganda provides for protection of personal liberty. Article 23(1) of the Constituition provides for instances under which this feedom maybe derogated.

Article 23(1)[5] stipulates that no person shall be deprived of personal liberty except in any of the following;

(a) in execution of the sentence or order of a court, whether established for Uganda or another

[5] Constitution of the Republic of Uganda, 1995 (As amended)

country or of an international court or tribunal in respect of a criminal offence of which that person has been convicted; or of an order of a court punishing the person for contempt of court;

(b) in execution of the order of a court made to secure the fulfillment of any obligation imposed on that person by law;

(c) for the purpose of bringing that person before a court in execution of the order of a count or upon reasonable suspicion that that person has committed or is about to commit a criminal offence under the laws of Uganda;

(d) for the purpose of preventing the spread of an infectious or contagious disease;

(e) in the case of a person who has not attained the age of eighteen years, for the purpose of the education or welfare of that person;

(f) in the case of a person who is, or is reasonably suspected to be, of unsound mind or addicted to drugs or alcohol, for the purpose of the care or treatment of that person or the protection of the community;

(g) for the purpose of preventing the unlawful entry of that person into Uganda, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Uganda or for the purpose of restricting that person while being conveyed through Uganda in the course of the extradition or removal of that person as a convicted prisoner from one country to another; or

(h) as may be authorised by law, in any other circumstances similar to any of the cases specified in paragraphs (a) to (g) of this clause.

The Criminal Procedure Code (CPC) does not define an arrest and there is no definition of this so we resort to case law as in Hussein v Chang Fook[6] where Lord Devlin stated that an arrest occurs:

1) when a police officer states u terms that he is arresting; or
2) when an officer uses force to restrain the individual concerned; or

[6] (1970) 2 WLR 441

3) when by words or conduct the officer makes it clear that he will use force if necessary to restrain the individual from going where he wants to go; but
4) it does not occur where he stops an individual to make inquiries.

The provisions relating to arrest found in sections 2 – 27 of the Criminal Procedure Code.

TYPES OF ARREST

There are ordinarily two types of arrests; arrest with warrant and arrest without warrant. It is normally expected that the police officer or any other person with authority carrying out an arrest will have a warrant either from a court of law or from the police. However, this is not usually the case as the police have the power to effect an arrest without a warrant.

ARREST WITH A WARRANT.

This is an arrest effected under the direction of a person with authority. This is usually by an official of court. This must be in writing and must be showed to the person who is to be arrested and explained in a language that he/she understands as we shall later discuss. The arrest warrant must therefore be issued by a magistrate and bear the seal of the court.[7] It is directed to police officers or any other person; commanding them to arrest the person named in it who is accused of having committed an offense named in it.

Every warrant must state shortly the offence with which the person against whom it is issued is charged, and must name or otherwise describe that person, and it must order the person or persons to whom it is directed to apprehend the person against whom it is issued and bring him or her before the court issuing the warrant or before some other court having jurisdiction in the case, to answer to the charge mentioned in it and to be further dealt with according to law.[8]

A warrant directed to a police officer may also be executed by any other police officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed, and similarly, a warrant directed to a chief may be executed by any other chief

7 Section 56 of the Magistrates' Courts Act Cap 16, laws of Uganda
8 Section 56(2), Ibid.

whose name is endorsed on the warrant by the chief to whom it was directed or endorsed.[9] Therefore, this means that the warrant cannot be executed by anyone without the necessary endorsement.

A warrant may be issued by the court for the arrest of someone who has been charged with a crime. The warrant can be issued at any time and will be valid until it is executed or revoked by the court that issued it. When a person is suspected of committing an offense, fails to appear at the time and place specified in a summons, or fails to appear at the time and place specified in a bail, a warrant of arrest may be issued against them.[10]

As a result, any error in the substance or form of a warrant will not impact the legitimacy of any proceedings in any case; unless the irregularity appears to deceive or mislead the accused, the court may adjourn the case hearing and remand or admit the accused to bail at the accused's request.

Second, the offence must be stated in accordance with the regulations for charging. If a charge is not constructed in line with the precise provisions established by law, it may be open to complaint in terms of its form or content. Finally, the person executing an arrest warrant must inform the person accused of the warrant's contents (and display the warrant if requested), and then bring that individual before the court as soon as possible.

ARREST WITHOUT A WARRANT

As opposed to arrests with warrants, this kind of arrest is done without any order from the magistrate and without an arrest warrant.[11] This kind of arrest can be undertaken by any police officer, an officer in charge of a police station, a person in charge of lawful custody, a magistrate, and a private person.

a) By a Police Officer

Section 10 of the Criminal Procedure Code Act provides that;

Any police officer may, without an order from a magistrate and without a warrant, arrest -

9 Section 60, Ibid
10 See Sections; 54,55,56,57 and 66 of the Magistrates Courts Act
11 See Section 23 of the Police Act

a) any person whom he or she suspects upon reasonable grounds of having committed a cognisable offence, an offence under any of the provisions of Chapter XVI of the Penal Code Act[12] or any offence for which under any law provision is made for arrest without warrant;
b) any person who commits a breach of the peace in his or her presence;
c) any person who obstructs a police officer while in the execution of his or her duty, or who has escaped or attempts to escape from lawful custody;
d) any person whom he or she suspects upon reasonable grounds of being a deserter from the Uganda Peoples' Defense Forces;
e) any person whom he or she finds in any highway, yard or other place during the night and whom he or she suspects upon reasonable grounds of having committed or being about to commit a felony;
f) any person whom he or she suspects upon reasonable grounds of having been concerned in any act committed at any place out of Uganda which, if committed in Uganda, would have been punishable as an offence, and for which he or she is, under the provisions of any written law, liable to be apprehended and detained in Uganda;
g) any person having in his or her possession without lawful excuse, the burden of proving which excuse shall lie on that person, any implement of housebreaking;
h) any person for whom he or she has reasonable cause to believe a warrant of arrest has been issued;
i) any person in whose possession anything is found which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to that thing.

[12] Cap 120

b) By an officer in charge of a Police station.

Further, the Criminal Procedure Code Act[13] provides that any officer in charge of a police station may, without an order from a magistrate and without a warrant, arrest or cause to be arrested: any person found taking precautions to conceal her/his presence within the limits of that station under circumstances which afford reason to believe that she/he is taking the precautions with a view to committing a cognisable offence; any person within the limits of that station who has no ostensible means of subsistence or who cannot give a satisfactory account of her/himself; any person who is by repute a habitual robber, housebreaker or thief, or a habitual receiver of stolen property knowing it to be stolen, or who by repute habitually commits extortion or in order to commit extortion habitually puts or attempts to put persons in fear of injury.

c) By a person in lawful custody

The person in charge of the lawful custody of a person apprehended has the authority to re-arrest the escaped or rescued individual. If a person in lawful custody flees or is rescued, the person from whose custody he or she flees or is rescued may follow and arrest him or her anywhere in Uganda.[14]

d) By a private person

Any private person with reasonable suspicion of committing a felony may arrest anyone who, in his or her opinion, commits a cognisable offense. The owner of the property, his or her servants, or individuals authorised by him or her may arrest persons found committing any offence involving property damage without a warrant.[15] Use of unreasonable force to effect an arrest my lead to criminal and civil liability (assault/false imprisonment and battery).

13 Section 11 of the Criminal Procedure Code Act (Cap 116)
14 Section 21, Ibid
15 Section 15(2), ibid

In Uganda v Muherwa,[16] a private person who used a weapon to incapacitate the deceased suspected to be thief in the process of which he died was prosecuted and convicted of manslaughter.

In Beard and Anor v R[17] the appellants, two private persons arrested the complainant, tied him and assaulted him although he made no attempt to escape. Delayed in handing him to the police. Prosecuted for assault and unlawful confinement. Convicted of these offences as they used unreasonable and unnecessary force.

When a private individual arrests someone without a warrant, he or she must immediately turn the person over to a police officer or, if no police officer is available, take the subject to the nearest police station. Under section 16(1) of the CPC, [18]a person arrested by a private person without a warrant should be handed over to the police without delay. The police, depending on the circumstances, should re arrest him or set him free.If a police officer has cause to suspect that the person arrested meets the criteria that would normally lead to an arrest without a warrant, the officer must re-arrest the subject.[19]

If there is reason to believe that the person arrested has committed a noncognisable offense and he or she refuses to give his or her name and residence when asked by a police officer, or gives a name or residence that the officer has reason to believe is false, he or she will be arrested by the officer in order for his or her name and residence to be determined. When that person's true name and residence have been established, he or she will be released on the condition that he or she executes a bond, with or without sureties, to appear before a magistrate if required; however, if that person is not a Ugandan resident, the bond will be secured by a surety or sureties who are Ugandan residents. If the person's genuine name and domicile are not determined within twenty-four hours of

[16] (1972) EA 466
[17] (1970) EA 448
[18] Cap 116
19 Section 16, ibid

his or her detention, or if he or she fails to execute the bond or provide adequate sureties, he or she is brought before the nearest magistrate with jurisdiction.[20]

If there is no reasonable suspicion that he or she has committed any crime, he or she is immediately released.

e) By a Magistrate

When a crime is committed in the presence of a magistrate within the local bounds of his or her jurisdiction, the magistrate may arrest or order the arrest of the offender, and may commit the offender to custody upon the arrest, subject to the rules of the Criminal Procedure Code regarding bail.[21]

Any magistrate may also arrest or direct the arrest of any individual for whose arrest he or she is competent at the moment and in the circumstances to issue a warrant in his or her presence, within the local limits of his or her jurisdiction.[22]

PREVENTIVE ARRESTS

Sections 24, 26 and 27 of the Criminal Procedure Code Act[23] empower any police officer to interpose and or arrest any person without a warrant to prevent commission of an offence.

Preventive detention means detention of a person without any trial or conviction by a court, but merely based on suspicion in the minds of the executive authority that one might be a threat to peace and security. Preventive detention, the practice of incarcerating accused individuals before trial on the assumption that their release would not be in the best interest of society-specifically, that they would be likely to commit additional crimes if they were released. Preventive detention is also used when the release of the accused is felt to be detrimental to the state's ability to carry out its investigation. In some countries

20 Section 13, ibid
21 Section 19, ibid
22 Section 20, ibid
[23] Cap 116

the practice has been attacked as a denial of certain fundamental rights of the accused. Preventive detention is used to a considerable extent in countries ruled by dictators.

Particularly in cases in which the accused individuals were perceived as political or security threats to the government. In such countries, where there was often little concern for the protection of individual rights, preventive detention was left almost exclusively in the hands of police and prosecuting authorities. Where there is greater concern for individual rights, the courts have been given control, but critics maintain that the practice in any form does not lend itself to vigorous and continuous protection of individual rights.

OBJECT: Is to prevent him from committing again and the detention takes place on the apprehension that he is going to do something again. It comes within any of the grounds specified like ..

- Security of the State
- Public Order
- Foreign affairs
- Services essential to the community.

Historical Background of preventive arrests in Uganda.

The background of preventive arrest can be traced from the Habitual Criminals (Preventive Detention)[24] whose primary goal was to make provision for the introduction in Uganda of preventive detention for habitual criminals. Reports of the Government's campaign to arbitrarily detain hundreds of workers and Political activists as the parties launched their protests in Kampala, illustrate, once again, the dangers of Uganda's preventive detention regime and its potential to be used as a tool to clamp down on fundamental freedoms. Not only is preventive detention incompatible with human rights law, the long history of abuse of preventive detention in the country suggests that Uganda must reconsider its laws and policy on arrest and detention as a matter of urgency. Preventive detention is a form of administrative detention, ordered by executive

[24] Act 1951

authorities, usually on the assumption that the detainee poses future threat to national security or public safety. Unlike regular detention under criminal law, its immediate aim is often not to bring criminal charges, much less to try the detainee in a court of law. In the sub-continent, preventive detention dates back to the colonial era. Under the British, executive authorities had sweeping powers to preventively detain individuals on a wide range of grounds including threat to public order and national security. After its creation in 1962, Uganda retained this security-oriented strategy in response to post-independence violence and instability, sacrificing fundamental rights and freedoms in the name preserving order and peace.

THE PROCEDURE OF EFFECTING AN ARREST

UNDERSTANDING THE CONCEPT OF AN ARREST

One of the ultimate purposes of a community is to be able to live in harmony and enjoy shared resources. From time to time, this harmony is disturbed by various elements. These elements can be natural; i.e., disasters or they can be otherwise. Part of the latter disturbance can be occasioned by fellow people in the community. These disturbances can be categorised in law into two; civil wrongs and crimes. There are some other wrongs that community might consider as moral wrongs which do not necessarily attract the law's ear.

A civil wrong occurs when one person violates a right of another that calls for compensation or repayment to the person wronged. For example, if a person fails to pay back money which was loaned to them, the other party can take a civil case to get the money back from the offender.

A crime on the other hand occurs when a person commits a wrong that calls for community condemnation or punishment. If a man has carnal knowledge with a girl below the age of 14, they are committing a criminal offence (aggravated rape) for which they may be punished if found guilty. They may be put in prison to serve a sentence as a form of punishment.

It should be understood that there are some wrongs that usually might cross over to both categories i.e., a civil wrong and a crime. For example, if a person takes the life of another, that person might be charged with the crime of murder or manslaughter and at the same time, the deceased's beneficiaries might sue using death as a cause of action for compensation from the offender.

Whether a civil wrong or a crime, it is undisputable that an occurrence of either is bound to disrupt the harmonious living in the community, either as a whole, or just against an individual. Therefore, in order to maintain this peace in the community, governments by law establish a body to keep watch and guard the harmony. This body is known as the police and in Uganda, it is the Uganda Police Force.[25]

The Constitution[26] and the Police Act[27] provide elaborately the functions of this force in maintaining law and order in the society. These include; to protect the life, property and other rights of the individual; to maintain security within Uganda; to enforce the laws of Uganda; to ensure public safety and order; to prevent and detect crime in the society; subject to section 9[28], to perform the services of a military force; to co-operate with civilian authorities and other security organs established under the Constitution and with the population generally; among others.

Most of the functions provided in these laws can best be fulfilled by apprehending offenders and temporarily removing these from the rest of the population. This process is known as arresting. The concept of arrest is part and parcel of the criminal procedure but this chapter is concerned with how the procedure of arrest should be carried out.

25 Article 211 of the Constitution of the Republic of Uganda, 1995 establishes the Uganda Police Force. Section 2 of the Police Act, Cap 303 provides that; "There is established a force to be known as the "Uganda Police Force"."

26 Article 212 of the Constitution

27 Section 4 of the Police Act (Cap 303)

28 It provides for the functions of the police authority

It should be remembered that every person is entitled to personal liberty. This freedom can only be limited in the event that a person violates any of the provisions of the law or fulfils the circumstances envisaged under Article 23 of the Constitution. It provides;

No person shall be deprived of personal liberty except in any of the following cases-

a) *in execution of the sentence or order of a court, whether established for Uganda or another country or of an international court or tribunal in respect of a criminal offence of which that person has been convicted; or of an order of a court punishing the person for contempt of court;*
b) *in execution of the order of a court made to secure the fulfillment of any obligation imposed on that person by law;*
c) *for the purpose of bringing that person before a court in execution of the order of a court or upon reasonable suspicion that that person has committed or is about to commit a criminal offence under the laws of Uganda;*
d) *for the purpose of preventing the spread of an infectious or contagious disease;*
e) *in the case of a person who has not attained the age of eighteen years, for the purpose of the education or welfare of that person;*
f) *in the case of a person who is, or is reasonably suspected to be, of unsound mind or addicted to drugs or alcohol, for the purpose of the care or treatment of that person or the protection of the community;*
g) *for the purpose of preventing the unlawful entry of that person into Uganda, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Uganda or for the purpose of restricting that person while being conveyed through Uganda in the course of the extradition or removal of that person as a convicted prisoner from one country to another; or*
h) *as may be authorised by law, in any other circumstances similar to any of the cases specified in paragraphs (a) to (g) of this clause.*

These circumstances are the only situations in which a person's personal liberty can be limited. It follows that the courts of law have further clarified the purpose of an arrest and

what does not amount to a valid reason to carry out an arrest. In the case of Ochwa v Attorney General,[29] court explained that;

[The right to liberty is the right of all persons to freedom of their person, freedom of movement and freedom from arbitrary arrest and detention by others. An unlawful arrest occurs when a person without legal authority or justification, intentionally restrains another person's ability to move freely—there is no power to arrest and detain a person merely to make enquiries about him or her. The Constitution does not permit an arrest for the purposes of interrogation in the hope of getting enough information to ground a charge. Any arrest must be on the basis of a reasonable suspicion—Having "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence]

Therefore, there are quite a number of considerations before an arrest can be effected. The person carrying out the arrest must fulfil the requirements prior to the arrest, during the arrest and must most importantly fulfil the requirements after an arrest.

PROBABLE CAUSE

Probable cause generally refers to the requirement in criminal law that police have adequate reason to arrest someone, conduct a search, or seize property relating to an alleged crime.

In February 2003, the Uganda Human Rights Commission (UHRC) reiterated the standard for reasonable and probable cause for detention as set forth in Ugandan law. “Reasonable” and “probable cause” are defined as:

An honest belief in the guilt of the accused based upon full conviction founded upon reasonable grounds for the existence of a state of circumstances which assuming them to be true would reasonably lead any ordinary prudent and cautious man placed in the

29 (Civil Suit-2012/41) [2020] UGHC 167 (27 February 2020)

position of the accuser to the conclusion that the person charged was probably guilty of the crime implied.[30]

Police must also have probable cause to arrest without a warrant, and in many cases to search or seize property without a warrant. Prosecutors must also have probable cause to charge a defendant with a crime. Typically, to obtain a warrant, an officer will sign an affidavit stating the facts as to why probable cause exists to arrest someone, conduct a search or seize property. Judges issue warrants if they agree that probable cause exists. There are many instances where warrants are not required to arrest or search, such as arrests for felonies witnessed in public by an officer. Here is more information on when warrants are not required. If a warrantless arrest occurs, probable cause must still be shown after the fact, and will be required in order to prosecute a defendant.

Probable Cause for Arrest, Probable cause for arrest exists when facts and circumstances within the police officer's knowledge would lead a reasonable person to believe that the suspect has committed, is committing, or is about to commit a crime. Probable cause must come from specific facts and circumstances, rather than simply from the officer's hunch or suspicion. "Detentions" short of arrest do not require probable cause. Such temporary detentions require only "reasonable suspicion." This includes car stops, pedestrian stops and detention of occupants while officers execute a search warrant. "Reasonable suspicion" means specific facts which would lead a reasonable person to believe criminal activity was at hand and further investigation was required. Detentions can ripen into arrests, and the point where that happens is not always clear. Often, police state that they are arresting a person, places him/her in physical restraints, or takes other action crossing the line into arrest. These police actions may trigger the constitutional requirement of probable cause. Someone arrested or charged without probable cause may seek redress through a civil lawsuit for false arrest or malicious prosecution.

[30] Steven Semugoma v. Magidu Mafuge & 5 Others [1994] II KALR 108, cited in Stephen Gidudu vs. Attorney General, UHRC, February 26, 2003.

Article 23(4) (b) of the 1995 Constitution allows a person to be arrested "upon reasonable suspicion of his or her having committed or being about to commit a criminal offence under the laws of Uganda." Ultimately, this allows for an arrest prior to the actual execution of the crime. The United Nations defines arrest as the "act of apprehending a person for the alleged commission of an offence or by the action of an authority.[31] Under this definition it is necessary for an alleged offense to have been committed. However, the Uganda Constitution allows for an arrest when a law enforcement agent thinks the individual might partake in a criminal activity, even in the absence of any probable cause. Typically, an arrest is made prior to any substantive investigation. As the former Chief Justice Benjamin Odoki observed in Kalanima v. Uganda, "the policemen arrest people before they have evidence to support the arrest and then, after arresting, they go out and find evidence to justify the arrest."[32]

DETECTION

The formal social institution charged with the control of deviance that is identified as crime, the police should not swing into action until a criminal offense is detected. Crime that goes undetected does not influence the justice process directly. It is only when the justice system (usually through the police) notices a possible criminal offense that the process begins. The first decision to influence the criminal justice process is determining whether a crime may have occurred. When a crime or suspected crime is reported to the police, the justice system is mobilized. If agents of police decide that crime has occurred, they have made the detection decision. The police respond to the report of a crime. It is then that case decision making rests with official agents of the justice process, the police officers.

[31] Body of Principles for the Protection ofAll Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. GAOR, 7 6 h plen. Mtg., at Annex (a), U.N. Doc. A/43/173 (1988).
[32] Benjamin J. Odoki, Reducing Delay in the Administration of Justice: The Case of Uganda, 5 CIuM. L. F. 57, 78-79 (1994) (citing Kulanima v. Uganda, 1971 High Ct. Bull. 210, 211 (Uganda High Ct.)).

Once the police come to believe that a crime may have been committed, it is their decision whether and how to proceed. We can say that the criminal justice system starts when justice system officials (usually the police) believe a crime has occurred. At that point, the agents of the justice system take control over the official societal response to the crime.

If there is no belief that a crime has been committed or that a criminal code has been broken, no individual should be arrested or detained. In other words, for any person to be arrested there must be probable cause for the arrest to occur. Probable cause occurs when there a criminal activity is detected. If there is no probable cause and an arrest is made, such arrest is wrongful arrest and results in violation of the arrested person's right to freedom.

CONDUCTING ARRESTS

Section 2 of the Criminal Procedure Code Act, stipulates that, in making an arrest the police officer or other persons making it shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action. This implies that if the person being arrested submits to the arrest, the police officer need not actually touch or confine his body. However, if a person forcibly resists or attempts to evade the arrest, the police officer or other person making the arrest may use all means necessary to effect it. This does not, however, justify the use of greater force than is reasonable or necessary in the circumstance for apprehension of the offender. In that case, the use of a fire arm on an unarmed suspect to secure their arrest may be disproportional for the purpose of apprehending him.

The Police is not allowed to use excessive force or fire arms during arrests unless a person through force, prevents or attempts to prevent the lawful arrest of himself or herself or of any other person and even then fire arms are not to be used unless a police officer has reasonable grounds to believe that he or she cannot otherwise effect the arrest; he has issued a warning to the offender that he or she is going to resort to the use of arms and the offender does not heed the warning; or the police officer has reasonable grounds to

believe that he or she or any other person is in danger of grievous bodily harm if he or she does not resort to the use of arms. In such a case, the force used still has to be reasonable in the circumstances. Once a person submits to custody of arrestor he should not be tied up. It is a requirement of a lawful arrest that the arrested be informed of his arrest.[33]

Method of Arrest.

Section 2(1) of the CPC[34] provides that in the making of an arrest the police officer making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

If such a person forcibly resists the endeavor to arrest him or attempts to evade the arrest, such police officer or other person making the arrest may use all means necessary to effect the arrest. However, there is an important proviso qualifying the use of force to the effect that nothing contained in this section 2 of the CPC shall be deemed to justify the use of greater force than is reasonable in the circumstances in which it is employed or is necessary for the apprehension of the offender.[35]

In other words, only reasonably necessary force is allowed to be used in order to effect an arrest. Excessive or unwarranted force is unlawful. In otherwords, there is no need to touch the person being arrested if he agrees to go with the person effecting arrest without resistance or argument.

It is even unnecessary to handcuff or tie him if he behaves himself and intends to cause no trouble. Under section 5 of the CPC,[36] it is provided that a person arrested should not be subjected to more restraint than is necessary to prevent his or her escape. The late Ayume in his book gave an example of a police officer who comes across a young lad trying to steal a tyre from a motor vehicle at Nakivubo mews and asks the lad to follow

[33] Article 23(3), Constitution of the Republic of Uganda, 1995 (As amended)
[34] Cap 116
[35] S.2(2) & (3) of the Criminal Procedure Code Act (Cap 116)
[36] Cap 116

him to the Central Police Station and he willingly agrees to go without any danger of his escaping, there is no need to handcuff him and push him around. It is unlawful and unnecessary to assault a person who is already in custody.

Note:

Where any person is charged with a criminal offence arising out of the arrest or attempted arrest, by him of a person who forcibly resists such arrest or attempts to evade being arrested the court should, in considering whether the means used were necessary or the degree of force used was reasonable for the apprehension of such person, have regard to the gravity of the offence which has been or was being committed by such person and the circumstances in which such offence had been or was being committed by such person.

Before use of force is employed, the arresting person should take into account the seriousness of the offence committed and the manner in which it was committed. If the offence is grave and violence is involved, the arresting officer may be justified to use deadly force like a firearm to arrest the offender, or prevent him from escaping.

Use of reasonable force

Reasonable force must be proportionate and always at the most minimal level necessary. For instance; the use of a fire arm to apprehend an armed person resisting arrest can be justified if such use is necessary in the circumstances. However, the use of a fire arm against unarmed or handcuffed men is unreasonable because the police are able to apprehend them without excessive force. Binding or tying up a man who has already submitted to custody is considered unreasonable and unnecessary force if the man has willingly given in to his captors.

Search of arrested persons

The Criminal Procedure Code Act provides that a police officer may search any person who has been arrested and may take possession of anything found on the person which might reasonably be used as evidence in any criminal proceedings.[37] The Act is silent as

[37] Section 6, Criminal Procedure Code Cap. 116

to the rank of a police officer that can conduct a search and seize any item without warrant. Many lowly ranked police officers do not know how to do searches and in many instances mishandle the evidence rendering it useless in court.

Whenever a person is arrested without a warrant, by a private person under a warrant, and the person arrested cannot be released on bail, the police officer making the arrest or the re arrest has power to search such a person and place in safe custody all articles other than necessary clothing, which are found on him.

A police officer or any person making the arrest has power to seize any offensive weapons found with an accused person.[38]

Whenever it is necessary to search a woman, the search must be carried out by another woman with strict regard to decency.[39]

Search of Premises of Arrested Persons.

When a police officer has reason to believe that material evidence can be obtained in connection with an offence for which an arrest has been made. Or of the person for whom the warrant of arrest has been issued, and he has power to seize anything which might reasonably be used as evidence in any criminal proceedings.[40] If the person to be arrested enters any building or place, the arresting officer or person has power to enter the premises and search them.[41]

Medical examination of arrested persons

The Criminal Procedure Code Act Cap. 116 does not require the medical examination of the arrested persons and the manner it should be conducted. This adversely affects prosecution of cases where such medical examination is crucial. Most criminal cases are lost in courts of law simply because crucial preliminary steps were not taken or were mishandled by the relevant authorities. Medical examination of suspects at the time of

[38] Section 9, Criminal Procedure Code Act (Cap 116)
[39] Section 8 Criminal Procedure Code Act and s. 23 (2) of the Police Act.
[40] Section 69, Magistrates Court Act (Cap 16)
[41] Section 3(1) Criminal Procedure Code Act (Cap 16)

arrests is important. The Court of Appeal in Kiiza Samuel V Uganda[42] faced with determining the age of the appellant at the time of commission of the offence stated that the age and mental status of every accused person at the time the alleged offence was committed is necessary because the age and or mental status of an accused at the time of the commission of the offence have a vital bearing on the whole trial, including the conviction and or sentencing process."

INVESTIGATION

Upon deciding that a crime may have been committed, the next decision is whether to investigate, and if so, how thoroughly to investigate. Investigation is the search for evidence that links a specific person to a specific crime. It is a process in which the results of initial inquiries often determine the intensity of the investigation. At the conclusion of the investigation, three outcomes are possible. First, no evidence of criminal activity may be found and, thus, the possible crime is classified as unfounded, or not real.

Second, evidence of possible criminal activity may support the finding that a crime was committed or attempted, but there is not sufficient evidence for an arrest. In this case, the crime will be left unsolved (i.e., no offender is known), and the investigation, at least theoretically, will continue. Finally, the investigation may yield evidence of both a crime and a probable guilty party.

In Uganda, according to PSU (2017), the Police unit can initiate investigations based on allegations contained in media reports, surprise visits to police posts, and complaints from the public. In cases of mistreatment of suspects, the unit relies heavily on family and friends of detained suspects to locate loved ones, gain access to the person, and then bring any complaints to the unit's attention. Complaints via family members are clearly much less likely to be made if suspects are held incommunicado or transported long distances, rather than detained close to home where family members can visit with relative ease.

[42] Cr. Appeal No. 0102 of 2008

INTERROGATION AND CONFESSIONS

Although the courts have long recognized the need for police interrogation of suspects, they have also recognized the potential for abuse inherent in the practice of incommunicado interrogation. At early common law, any confession was admissible even if extracted from the accused by torture. As the common law progressed, judges came to insist on proof that a confession was made voluntarily before it could be ad- mitted in evidence. In 1897 the Supreme Court held that to force a suspect to confess violates the Self-Incrimination Clause of the Fifth Amendment. [43] In 1936 the Court held that a coerced confession deprived a defendant in a state criminal case of due process of law as guaranteed by the Fourteenth Amendment.[44] In 1964 the self-incrimination clause was made applicable to state criminal prosecutions.[45] As a result, federal and state police are held to the same standards in evaluating the voluntariness of confessions of guilt. In Malloy, the Court said that the Fifth Amendment prohibits the extraction of a confession by "exertion of any improper influence."[46] A confession is voluntary when it is made with knowledge of its nature and consequences and without duress or inducement.[47] In Escobedo v. Illinois,[48] the Supreme Court recognized the right of suspects to have counsel present during in- terrogation. Anticipating the criticism that the Court's decision would hamper law enforcement, Justice Arthur Goldberg observed the following: "If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." However, the Court's work in this area was not finished. Two years later, in its landmark decision in Miranda v. Arizona,[49] the Supreme Court held that before interrogating suspects who are in custody, police must warn them of their right to remain silent and their right to have

[43] Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568.
[44] Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936).
[45] Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).
[46] 378 U.S. at 7, 84 S.Ct. at 1493, 12 L.Ed.2d at 659.
[47] United States v. Carignan, 342 U.S. 36, 72 S.Ct. 97, 96 L.Ed. 48 (1951).
[48] 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964),
[49] 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966),

counsel present during questioning. The typical form of the Miranda warnings used by law enforcement is as follows:

You are under arrest. You have the right to remain silent. Anything you say can and will be used against you in a court of law. You are entitled to have an attorney pres- ent during questioning. If you cannot afford an attorney, one will be appointed to represent you.

Unless these warnings have been given, no statement made by the suspect may be used in evidence, subject to certain narrow exceptions. The Miranda decision was severely criticized by law enforcement interests when it was handed down in 1966. But now it is accepted, even supported, by most law enforcement agencies and has been integrated into routine police procedure. It is also fi rmly established in the Supreme Court's jurisprudence, as evidenced by the Court's recent decision in United States v. Dickerson.[50]

Mirandarising the accused

The Miranda rule guarantees that persons detained by police will not be interrogated in a way that places them at a disadvantage (i.e. without a lawyer or legal defense counsel). Basically, the Miranda rule guarantees that the person:

- Has the right to remain silent
- Has a right to a criminal defense attorney
- Will be provided with an attorney if the cannot afford one

Also, the person is to be informed that if they decide to waive their right to remain silent, their statements can be used against them in court.

These rights are typically read immediately after the person is taken into custody by the police. A person is taken into "custody" when they are not free to leave. Many suspects decide to remain silent until their attorney arrives, after which, they may proceed with answering questions.

[50] 530 U.S. 428 (2000)

The right to remain silent refers to the idea that the criminal suspect can choose not to say anything if the police ask them questions. This goes hand-in-hand with the constitutional right against self-incrimination during trial. Basically, the person indicates that they wish to remain silent until they can meet with their lawyer.

Interrogation

Interrogation of suspects and witnesses has long been a mainstay of criminal investigation. We are all familiar with entertainment-media portrayals of police investigations in which detectives "grill" the suspect or continually return to the witness to extract details of the crime. Most often, it is the interrogation that leads the officers to the needed evidence and ultimately seals the case. Interrogation is a "search" for evidence through seeking testimony or responses to questions put to the suspect.

The aim of the questioning is usually to obtain an admission of guilt by the suspect, which would eliminate the need for a contested trial. Most countries place restrictions on the scope and methods of interrogation in order to ensure that suspects are not coerced into confessions by unacceptable means, though in practice the effectiveness of those restrictions varies greatly.

Suspects must be informed that they have certain rights, including the right to remain silent, to have a lawyer present during the interrogation, and to be provided with the services of a lawyer at the expense of the state if they cannot afford one. The statement of rights that is read to suspects, known as the Miranda warnings, was established in the case of Miranda v. Arizona.[51] Failure to advise a suspect of those and other rights can result in the rejection of a confession as evidence. In the Miranda case, as in many other cases preceding it, the police arrested the suspect and held him in custody for several hours while questioning him about the crime. At the conclusion of the interrogation, the suspect had confessed to the crime. Miranda's attorneys appealed the conviction on the grounds that Miranda was not aware that he did not have to speak during the interrogation

[51] 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966),

and that he had a right to an attorney during questioning. Thus, the attorneys contended that the confession was obtained improperly and should not have been allowed as evidence at the trial. The Supreme Court agreed, ruling that when police have a suspect in custody, they must advise the suspect that he or she may remain silent, that what is said may be used against the suspect in court, and that the suspect has the right to either a retained (hired) or appointed attorney during questioning

DETENTION CENTRES

Remand in custody pursuant to lawful arrest must not only be lawful but reasonable and necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime". Under the laws of Uganda everyone has the right to make an arrest, including civilians.[52] This leads to further problems because, in Uganda, arrests lead to detention, and when an arrest is made by an unqualified law enforcer, arbitrary arrests and unreasonable detentions become far too common, and in turn overwhelm the penal institutions. The right to make an arrest also gives paramilitary agencies without any legal mandates the power to act as enforcement agents and make arrests at will.[53] However, only the police force has the right to detain. Others, including civilians, the military, and paramilitary officers must release a suspect to the police immediately upon arrest.

Weakened protections and guarantees facilitate the commission of torture. These unacknowledged places of detention are not visited by outsiders nor by government officials charged with inspecting conditions inside detention cells. The government is provided "deniability" by holding the detainees in secret, and this creates a feeling of impunity among security and intelligence officers.

[52] Section 15, Criminal Code Act

[53] Since paramilitary forces are acting without any legal mandate, they are acting as a unauthorized civilian group, and therefore would have the right to make a civilian arrest. This would not allow them to detain suspects however; it would merely provide them the opportunity to bring the suspect to proper authorities.

The 1995 Ugandan constitution explicitly outlaws the holding of detainees in unacknowledged or "ungazetted" places of detention, that is, those not published in the official gazette.[54] Police stations are gazetted facilities. UPDF barracks and CMI offices are not gazetted facilities. The other "safe houses" where the non-police agencies hold, interrogate, and torture suspects are not gazetted and are illegal also.

Before 1995, safe houses had been commonly used for detention; some were then closed, but they are now being used again. The UHRC dates the reemergence of safe houses to 1998, during the 1997-99 wave of terrorist bomb attacks in Kampala believed by the security forces to be associated with the western-based rebel group ADF.[55]

The constitutional provision requiring gazetting of all places of detention is now not enforced at all. Suspects are routinely taken to ungazetted places of detention, many of them in the capital, Kampala, for prolonged periods, without any official condemnation or effort to close them down. The two most commonly-cited safe houses are the headquarters of the Chieftaincy of Military Intelligence (CMI) on Kitante Road in Kampala, and a house on Clement Hill Road in Kampala, formerly used as the headquarters for Operation Wembley.[56] Rooms, cells, and offices in military barracks are also frequently used as safe houses as well.

At both the Central Police Station (CPS) and Kiira Road police station in Kampala, the UHRC found, the CMI military personnel guarded "its" cells and did not allow relatives to visit the suspects—nor even the UHRC representatives, whose constitutional mandate it is to visit and inspect police stations and posts.[57]

In 2003, safe houses continued to be a permanent feature of the Ugandan system of detention and provided ample opportunity for torture and interrogation of suspects against

[54] Ugandan Constitution, article 23 (2) provides: "A person arrested, restricted or detained shall be kept in a place authorised by law." The minister of internal affairs must publish in the Ugandan gazette the location of detention places.
[55] UHRC, Annual Report, p. 51.
[56] FHRI, "Human Rights Reporter," p. 16
[57] https://www.hrw.org/reports/2004/uganda0404/7.htm#_ftn155

whom detaining authorities did not have, or did not care to find, sufficient information to bring formal accusations or indictments.

PUBLIC PARADING OF CRIMINAL SUSPECTS

Police officers often force detainees to be photographed by journalists prior to being brought to court, and suspects may be made to pose next to or holding firearms in front of photographers who have been invited by RRU.[58] An RRU officer testifying before the general court martial said that RRU headquarters has a policy in instances of theft or robbery to hold press conferences to parade suspects.166 Press coverage of these parades often refers to suspects as "hardcore criminals" and "thugs," even though they have never been convicted of a crime.[59] Such a practice clearly violates the right to be presumed innocent.

The press events serve several purposes: to create public support for RRU's supposed successes in cracking down hard on crime, to serve as a deterrent, and to be a potential platform for suspects' confessions. However, such policies aimed at forced public shaming of individuals can amount to violations of suspects' rights to a fair trial and flout principles of due process. One detainee said, "They published my story to the media. It was in the New Vision…. The government and public are scared of me, but I have never been tried."

[58] Human Rights Watch interview with Duncan, Mbale, December 7, 2009.

[59] See, e.g., Esther Mukyala, "Police Shoots 3 Robbers in Jinja," New Vision , May 24, 2010; Stephen Candia, "Police Arrests 35 Suspects Over Robberies," New Vision , January 28, 2010; Stephen Candia, "Kyengera Shooting Suspects Named," New Vision , January 4, 2010; Francis Kagolo, "Four Robbers Shot Dead in Kampala," New Vision , January 3, 2010; Vision Reporter, "Police Arrests Highway Thugs," New Vision , April 23, 2009; Moses Nampala, "RRU Team Kills Thugs, Recovers Gun in Tororo," New Vision , April 14, 2009; Chris Kiwawulo, "Police Shoot Two Armed Thugs," New Vision , October 29, 2008; Patrick Jaramogi and Richard Kanamugire, "38 Suspected Robbers Paraded," New Vision , October 28, 2008; Herbert Ssempogo, "Police Arrest 66 Suspects, Recover 19 Guns," New Vision , September 11, 2008; Moses Nampala, "Cop Held Over Hiring Out Gun," New Vision , August 20, 2008; Moses Mugalu, "Ex-Wembley Convicts Behind City Crime," New Vision , May 17, 2008; Abdulkarim Ssengendo, "Thugs Held," May 8, 2008.

Inviting press to photograph suspects also violates the UN Standard Minimum Rules for the Treatment of Prisoners, which provides that "[w]hen the prisoners are being removed to or from an institution, they shall be exposed to public view as little as possible, and proper safeguards shall be adopted to protect them from insult, curiosity and publicity in any form.

48-HOUR RULE

Article 23(4)[60] states that A person arrested or detained—

(b) Upon reasonable suspicion of his or her having committed or being about to commit a criminal offence under the laws of Uganda, shall, if not earlier released, be brought to court as soon as possible but in any case not later than forty-eight hours from the time of his or her arrest.

Article 28(1)[61] stipulates that in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

A majority of suspects, even suspects of petty crimes, are detained in the police stations for longer than forty-eight hours. Ad hoc security agencies often detain suspects in "safe houses" prior to releasing them to police custody. Testimonials from suspects support the conclusion that suspects spend a minimum of one week at these unofficial detention centers. Most spend months there, and some spen as long as two years. Detaining the suspects in these safe houses for longer than the forty-eight hours is clearly in violation of the Constitution. Not only do these suspects spend considerable time in these illicit locations, they also remain in the police stations far longer than the mandated forty-eight hour maximum. The police have no control over suspects brought into the police stations by the ad hoc security agencies; the station merely becomes a "legal" place for these suspects to reside until their release.

[60] Constitution of the Republic of Uganda, 1995 (As amended)
[61] Ibid

Corruption in the police system also leads to the persistent violation of the forty-eight hour provision. At this stage of the judicial process, corruption occurs in abundance.' The corruption that impedes proper investigations and causes arbitrary arrests also affects the timely release of suspects. Timely releases can be hampered by police demands for a fee in order to be released on bond. Ideally, bond is supposed to be granted to any suspect charged with a minor offense, such as petty theft or assault, or to any suspect, regardless of the rime, who has been detained for forty-eight hours. Regardless of the reason for releasing the suspect on bond, there is no charge associated. A suspect should not have to pay a fee in order to be released on bond." Unfortunately, almost all suspects are asked to pay a fee to be released on bond.

Most suspects are unable to pay these exorbitant fees and, therefore, are forced to remain in the police cells until the officers decide to move the case forward to court. However, suspects typically have some petty cash available that they can bribe officers with to push their cases forward. This, however, is a double-edged sword. Why would an officer want to push a case forward when the suspect is paying him small sums of money each day? Hence, the officer might deceive the suspect so that he believes that the officer is helping to push his case forward. Some of the reasons for violation of the forty-eight hour provision are not so purposeful. Many of the delays are due to logistical problems, such as lack of transportation, backlog at the Directorate of Public Prosecution's Office, and lengthy investigations. Most of the police stations are supplied with only one vehicle, which is to be used for investigations, to transport suspects and witnesses to court, and for stationing officers. Even though the vehicle is to be used for these purposes, many times a station's vehicles are used for personal errands of high ranking officers.

INITIAL APPEARANCE

Persons arrested for crimes are entitled to a hearing in court to determine whether they will be released pending further action. This initial appearance or hearing occurs relatively quickly after arrest, usually within a matter of hours. The hearing does not

involve a determination of guilt, but rather an assessment of the defendant's likelihood of appearing at later proceedings. Arrested suspects are usually entitled to release before trial. With the exception of some serious crimes (murder, terrorism, kidnapping, etc.) specified in some statutes, arrested persons may be released while awaiting trial.[62] Traditionally, this release has been accomplished by the posting of bail. The primary purpose of bail is to ensure that the suspect will return to court for later hearings. The theory of bail is that a person will return to court if it would cost too much not to return thus, traditional bail involves the defendant.

CHAPTER THREE

SEARCH AND SEIZURE

WHAT IS A SEARCH?

An officer who examines another person's premises, person, or property for the purpose of discovering contraband (such as stolen property) or other evidence for use in a criminal

[62] Onyango, 2013.

prosecution has conducted a “search”. A search involves prying into hidden places1 in order to discover something concealed.

WHAT IS A "SEIZURE"?

An officer who takes into custody a person (e.g., arrests that person) or property (e.g., removes a concealed deadly weapon from a suspect) seizes that person or property. The seizure may be temporary or permanent – the nature of the seizure will determine what circumstances must exist to authorize the seizure.

BASIC CONCEPTS

Search and Seizure law focuses on the concept of the reasonable expectation of privacy an individual has in a particular area. Without that expectation, there are no Fourth Amendment implications. In addition, without that expectation, an individual lacks standing – the right to bring a claim – even if someone else’s rights are allegedly violated, unless, for example, the person is a minor or legally incompetent to bring the claim on their own. Probable Cause is the standard that is required for the issuance of a search warrant, for an arrest warrant or warrantless arrest, or for a vehicle exception (Carroll) search. It is more than reasonable suspicion, but less than a clear and convincing or beyond a reasonable doubt.

THE EXCLUSIONARY RULE

If a search satisfies the basic requirements (as discussed above) and produces evidence relevant to criminal charges, that evidence is admissible (legally acceptable) in the trial on those charges. Conversely, if officers obtain evidence by an illegal search and seizure, the Court will exclude that evidence from the trial on the criminal charges, unless the Court finds an otherwise legal reason to admit it anyway. This rule of law, that evidence obtained by an illegal search and seizure is inadmissible in a criminal trial, is known as the "Exclusionary Rule." Some of the more common grounds on which courts exclude evidence as the result of illegal search and seizure are as follows:

- the search was not based on probable cause; or
- the search went beyond the scope of the warrant; or

- the search without a warrant was unreasonable because the officer had adequate opportunity to obtain a warrant.

THE DERIVATIVE EVIDENCE RULE (FRUIT OF THE POISONOUS TREE)

The Exclusionary Rule prohibits both direct and indirect use of unlawfully obtained evidence. Unlawfully obtained information cannot be the underlying basis for an investigation which develops other evidence. The new evidence is said to be tainted or the "fruit of the poisonous tree." The "fruit of the poisonous tree" doctrine may be applicable if illegally obtained evidence is the basis for discovery of:

- A willing witness who might not have been found.
- A confession or admission which might not have been made if the defendant had not been confronted with the illegally obtained evidence.
- Any other evidence which might not have been found even if an officer uncovers critical evidence which positively connects a suspect to a crime, if the evidence is obtained in violation of the defendant's Fourth Amendment rights, the evidence cannot be used unless an exception to the rule applies (such as the inevitable discovery exception,[63] the independent source exception, or the use of the evidence only in rebuttal)

SEARCHES WITH OR WITHOUT A WARRANT

Law applicable.

The Criminal Procedure Code Act (Cap 116)

The Police Act (Cap 303)

The Magistrate's court Act (Cap 16)

Definition of a search.

A search may be defined as an inspection made on a person or in a building for the purpose of ascertaining whether anything useful in criminal investigation may be discovered on the body of the person or in the building searched.

[63] Nix v. Williams, 104 S.Ct. 2501 (1984).

A search is carried out for the purpose of collecting evidence and exhibits which may be used in a criminal trial. A search may be carried out in anyplace whether it be within premises or outside, or in a vehicle.

Normally searches are carried out on the authority of search warrants issued by the court, but police officers are empowered to search without a warrant in certain cases.

SEARCH WITH A SEARCH WARRANT.

A search warrant is written authority given by a court ordering the search of the premises, place, or vessel named in the warrant for the purpose of seizing anything therein which is required or material in the investigation of an offence. In other words, a search warrant is an authority to search a place for evidence of a crime which is suspected or believed to have happened. The two main reasons why it may be necessary to search a place are, to make an arrest and second, to obtain evidence.

A search warrant must be signed by the magistrate issuing it, and must bear the seal of the court.[64] Every such warrant remains in force until it is executed or until it is cancelled by the court which issued it.[65]

The direction in the search warrant must be strictly observed. The person to whom it is directed is not supposed to seize articles which are not mentioned in the warrant unless such un named articles are likely to provide additional evidence as to the identity of such articles, or which at least, have some relevance in the charge against the accused person. Thus the seizure of irrelevant articles is not only legally unjustified but may damage the prosecution's case. In order to prove that the articles seized were from the accused, it is necessary to prove the contents of the warrant.

In Mohanlal Trivedi v R [1967] EA 355

The appellant was convicted of being in possession of property reasonably suspected of having been stolen and failing to give a satisfactory account of his possession. The police

[64] S.56(1) and s. 74 of the Magistrates Court Act (Cap 16)
[65] Section 55(3), Magistrates Court Act (Cap 16)

searched the house and shop of the appellant for a camera. Although they didn't find the camera, they found an exposure meter which was the subject matter of the charge. On appeal it was contend among others that the conviction ought not to stand as no search warrant was produced and there was no evidence to show that the appellant's house and shop were the buildings named in the warrant. The prosecution failed to prove the contents of the warrant because of their failure to produce it in evidence.

Power to issue a search warrant.

If it is proved on oath to a magistrate that anything which is necessary to the conduct of investigation into any offence is in a building, vessel, carriage, box, the court has power to issue a search warrant authorizing the person to whom it is directed to search such place for such a thing. The place to be searched for is found, the person carrying out the search is empowered to seize and carry it to the court which issued the search warrant or some other court to be use as an exhibit.[66]

Execution of search warrants.

A search warrant may be directed to one or more police officers or chiefs named therein or generally to all police officers and chiefs. However, where the immediate execution of search warrant is necessary and no police officer or chief is available, the issuing court may order any other person to carry out the search. Where a search warrant is directed to more than one officer or person, it may be executed by all or any one of them.[67]

A Search warrant directed to a police officer may also be executed by any other police officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed. The position is the same as regards chiefs. [68]

[66] Section 70, Magistrates Court Act (Cap 16)
[67] Section 58, Magistrates Court Act (Cap 16)
[68] Section 60, Ibid

Every search warrant may be issued and executed on a Sunday. It must be executed between the time of sunrise and sunset, although the court has power to authorize the police officer or other person to whom it is addressed to execute it at any hour.[69]

Search of closed places.

Whenever any building or other place liable to be searched is closed, any person residing in or being in charge of such building must, on demand of the officer or person executing the search warrant, and on production of the warrant, allow him free entrance and exit from the building. The person in charge of the building is also required to afford the person searching all reasonable facilities for the search.[70]

If entrance or exit is not allowed, the person executing the warrant is authorized to break in or break out of the building.[71]

If any person is found in or near the building to be searched, and is reasonably suspected of concealing on his body any article for which search should be made, such person may also be searched. If the person is a woman, she must be searched by a woman. S. 72(3) MCA and s. 23(2) of the CPC.

Detention of Property seized.

When anything is seized and is brought before a court, it may be detained until the conclusion of the case or the investigation. Reasonable care must be taken for its preservation. S. 73(1) MCA.

If any appeal is made, or if any person is committed for trial, the court must order it to be further detained for the purpose of appeal or the trial.[72] If no appeal is made, or if no person is committed for trial, the court must direct such thing to be restored to the person from whom it was taken, unless the court sees fit, or… authorized, to dispose of it otherwise. S. 72(3) MCA.

[69] Section 71, Ibid
[70] Section 72 (1), Magistrates Court Act (Cap 16)
[71] Section 71(2), Magistrates Court Act (Cap 16) and Section 4 Criminal Procedure Code Act(Cap 116)
[72] Section 3(2), Magistrates Court Act (Cap 16)

SEARCHES WITHOUT A SEARCH WARRANT.

Under s. 7 of the CPC, a police officer is authorized without a search warrant to stop, search or detain a vehicle, vessel, or aircraft, if he has reason to suspect that it contains stolen property or property un lawfully obtained. In any way he can stop and search any person and seize any property found on him

Section 7 (1) of CPC provides;

Any police officer may stop, search or detain any vessel, boat, air craft o r vehicle in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found and also any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained, and may seize such thing.

The application of this section is called into question when a police officer after stopping and searching, proceeds to charge the person searched with an offence under Section 300 of the Penal code act.[73] On a charge under this section, the prosecution must satisfy the court that there was reasonable suspicion before the vehicle or person was stopped and searched.

In other words, suspicion must precede the stopping. Suspicion which may be reasonable, arising or manifesting itself after the stopping will not render the action of the police officer legal under section 7 of the CPC.

Read Kityo Vs. Uganda [1967] EA 23.

It should be noted that the power of stopping and searching under s.7 of the CPC is vested only in police officers. For example, chiefs would not be acting lawfully if they assumed to exercise powers under this section

Read Tenywa V Uganda [1969] EA 102.

[73] Cap 120

Under Section 6[74] a police officer can search an arrested person, and obtain from him anything that can be used for trial. Under Section 9,[75] a police officer also can search, under s.8. Women to be searched by fellow women and section 74[76] and under Section 69,[77] a police officer is empowered to search a building.

Under Section 3,[78] where accused enters a house the arresting person is empowered to enter and search for him. Section 7[79] covers searches about vehicles, vessels airplanes .

Under Section 56(1)[80] and a search warrant must contain seal and signature of the magistrate MCA. Under Section 55[81], a search warrant stay valid until executed

Section 58[82] stipualates that a search warrant should be executed by the person on it if it is a group or any one of them under section 60.[83] if it is addressed to one of the police officer that can as well be carried on by one whose name is endorsed on it.

Circumstances where a search is conducted without a search warranted.

Where a person who is being sought by the police to be arrested enters a place where the process of getting a search warrant would give the fugitive a chance to escape, Section 10 of the CPC allows the police to enter such a place and search for the person to be arrested even thought they do not have search warrant.

NB: The police should only carry out a search fro the person when they are in hot pursuit of a person and they are afraid that he would disappear if they wait for a court to give them a search warrant.

[74] Criminal Procedure Code Act (Cap 116)
[75] Ibid
[76] Ibid
[77] Ibid
[78] Ibid
[79] Ibid
[80] Magistrates Court Act (Cap 16)
[81] Ibid
[82] Magistrates Court Act (Cap 16)
[83] Ibid

Section7 of the CPC[84] empowers the police to detain and search aircraft, vessels vehicles, and persons and if they have reason to suspect the same contains stolen property or property unlawfully obtained.

This person may be exercised by other persons with permission s from the commissioner of police e.g. officers of immigration department, income tax, customs and excise department. In all these circumstances the suspicion must precede the process of stopping a person for a search. Section 8 requires that a search to a woman must be done by another woman.

POWER TO STOP AND SEARCH PERSONS AND VEHICLES.

Any police officer has power to stop, search or detain any vessel, boat, aircraft or vehicle where he has reason to suspect that anything stolen or unlawfully obtained may be found. A police officer has similar powers in respect of any person who may be reasonably suspected of having in his possession or conveying in any manner any thing stolen or unlawfully obtained. The police officer is authorized to seize such thing.[85]

CITIZEN'S SEARCH

Both the Fourth Amendment to the U.S. Constitution and Section 10 of the Kentucky Constitution protect citizen from government action. Fruits of a citizen's search should not be excluded as being subject to any exclusionary rule, unless the citizen was acting as an agent of an officer. Generally, the courts will allow an officer to search to the same extent already done by a citizen who has searched and then told the officer of the results, but a warrant would still be required if the search was to go beyond that area, unless there was some emergency presented.

CONSENT SEARCHES

A consent search is legal only if:

1. Consent is given voluntarily; and

[84] Cap 116
[85] Section 7, Criminal Procedure Code Act (Cap 116)

2. Consent is given by a person with the authority to consent.

a) Consent must be Given.

Voluntarily Consent is voluntary when the person is aware of what he is doing and gives the consent under free will. The consent must be given without force, threat, trickery or coercion. If the officer claims to have a search warrant but does not have one, any consent given is not voluntary. If the officer first makes statements to show his authority to search, any consent which the person then gives is not valid. The court will look at all the surrounding circumstances in deciding whether the consent was voluntary. If a large number of officers were present, courts may find the consent was coerced. If possible, no more than two officers should be present. Generally, the simple fact that the officers are in uniform and/or armed does not make the consent coerced.

b) Person Consenting Must Have Authority to Consent.

Any person with control over the area to be searched may consent if he has a sound mind and is old enough to understand the ramifications of consent. A person must have possession or control over the property to give consent. If a home is to be searched, the owner may normally consent. However, if the home is rented out to a tenant, the tenant, not the owner, should provide the consent. If personal property such as a car or suitcase is to be searched, the owner may consent. If the person giving consent is not the suspect, the person giving consent must have authority over the place at least equal to the authority of the suspect. If two people such as husband and wife share the use and control of the property equally, either one may consent to the search. Further, the U.S. Supreme Court has held that any joint occupant of a residence may consent to search the residence if the other occupant is absent.

Exceptions

Even where two people share a home together, they may have an agreement that each person has complete control over certain areas, such as rooms, or items of personal

property such as a toolbox. If they have this arrangement, one person may not consent to search the areas under the other person's control.

a. Hotel-Motel Situation:

If the customer is still occupying his hotel or motel room, the manager or clerk may not give consent to search his room without his permission. Once the customer checks out, however, the manager may freely consent to a search of the room. A posted checkout time is not necessarily dispositive as not all establishments require a formal checkout at the desk. There must be adequate evidence that the lodger has left the room permanently and thus abandoned any reasonable expectation of privacy in its contents. On the other hand, although the usual checkout time has passed, the tenant may be remaining with a reasonable belief that it is still his room.18 However, if a maid enters the room and sees contraband, and reports it to the manager or the police, that information may of course be used to support a search warrant or even an exigent circumstance.

b. Parent-Children Situation:

The courts have held that a parent may consent to the search of a child's room or effects in the premises controlled by the parent and over which the parent may exercise control. However, if the child pays rent or room and board, a lessor-lessee relationship may exist and this relationship would determine the validity of the consent. An adult child, or even an older juvenile, may be held to be legally able to give consent of the parents' home, if they share authority over the area in question.

c. Babysitters

If the suspect, or his spouse, is the owner of the home, a babysitter may be held to be unable to give a legal consent to search. The babysitter's authority over the home would likely be considered less than the authority of the owner. However, a babysitter's consent may be valid as similar to that of a guest of the owner who happens to open the door and admit law enforcement.

d. Spouses

If one spouse consents, but the other spouse who is also present refuses, the refusal will control and a search will not be permitted. If only one spouse is present and consents, it is not necessary to seek out the other spouse to gain their permission as well. (However, if the other person is absent because of police action, such as an arrest, and that seizure was for the purpose of removing them from the house, the consent of the remaining spouse is invalid.)

Warnings

Under both U.S. Supreme Court and Kentucky case law, a consent by a person may still be valid even though the officers do not inform the person of his right to refuse. However, the failure to warn is still a factor considered by the court in deciding whether the consent was voluntary.

Limiting Consent

A person may limit consent to cover only certain parts of a house or building or withdraw his consent at any time. Once the subject withdraws consent, no further search can be justified as a consent search. It is pertinent to note that because of risks involved with a consent search, an officer should always get a search warrant instead, if possible. If a consent search is conducted, the officer should try to get a signed, written, recorded or otherwise documented consent. G. Body Evidence Evidence from a person's body, especially when evanescent (easily destroyed), may, under appropriate circumstances, be collected without a warrant. Evidence that is not possible to alter or destroy (such as a person's DNA) will generally require either consent or a warrant to obtain. In addition, evidence that requires surgery or an invasive medical procedure to recover will also, as a rule, require a warrant, unless there is a separate medical reason to remove the item immediately. (In such circumstances, of course, the patient will be presumed to have given consent, either explicit or implied, for the surgery.) Blood samples for DUI cases, if not given with consent, will require a warrant.

SEARCH ON DIFFERENT PROPERTIES

Abandoned property

A person may lose an expectation of privacy either:

1. By discarding the property in a place where others would have access to it or
2. By disclaiming ownership of the object.

Such situations would include when a person discards their trash, in the area where trash is commonly picked up, or when they abandon an item of property (such as a purse) where others would have ready access to the item. It also includes when ownership of an item is denied by a person under suspicion, although it is found in close proximity to their location. (However, they may still be found legally responsible for the item, under the doctrine of constructive possession.)

Plain view

The plain view doctrine is summarized as follows:

• If an officer is where he has a legal right to be, and

• Sees, in plain view, contraband or evidence of a crime (and immediately recognizes it as such),

• The officer may seize it if the officer has a right to access the item (legally be where the item is located). Officer is Where He Has Legal Right to be an officer's right to be in a location is established by:

• Being in a public place from where he sees evidence located in a public or private place

• Being Invited onto private property

• Obtaining actual consent from someone who has lawful control over private property

• Having implied consent

• Exigent (or Emergency) circumstances exist

• Executing legal process (arrest or search warrant).

Officer Sees in Plain View When the officer sees the item, he must have probable cause

at that time (Immediately) to believe the item is evidence of a crime. He may not move the item for further examination or to look for serial numbers or other identifying marks.

Plain touch, Plain smell.

The plain view doctrine implies use of the sense of sight, but the other senses may also be used. The U.S. Supreme court recognized the validity of plain "touch" (or feel) in Minnesota v. Dickerson[86] as well as "plain smell" in drug cases.

Evidence of a Crime (Contraband) Evidence (of a crime) may be divided into four categories:

- Instruments of a crime – items used to commit crimes (e.g., weapons, burglar tools and other items used to commit theft).
- Fruits of a crime – i.e., the gain or proceeds from a crime (e.g., money, stolen property, etc.).
- Contraband – i.e., items prohibited by law (e.g., defaced firearm, illegal drugs, etc.)
- Other Evidence of a crime – i.e., anything else that tends to prove that

a. A crime has been committed (i.e., the elements of a crime), and/or

b. A particular person committed it – usually circumstantial evidence found at a crime scene (e.g., fingerprints, lint, hairs, blood, etc.) that tend to show motive, intent, opportunity or means to commit the crime. It is critical, however, that the officer immediately recognize that the item is, in fact, evidence or contraband.

Right to Access the Contraband or Evidence

If the evidence is located in a place where the officer also has a right to be, the officer may immediately seize the evidence. If the item is readily destructible and the officer reasonably believes that if he does not immediately take it into possession the evidence will be destroyed, an officer may trespass and take physical control. Otherwise, the officer must use his knowledge of the illegality as probable cause for a search warrant. The warrant then authorizes the entry and seizure.

[86] 508 U.S. 366 (1993)

Flyovers

In general, items are considered to be in plain view if seen from an aircraft (fixed or rotary-win) flying within legal airspace.

Open Fields

An officer may search "open fields" without a warrant, without probable cause, despite notices or other efforts showing an expectation of privacy and despite the fact that the search may constitute a technical trespass. An "open field" is any land not included in the curtilage and does not describe the actual condition of the land. The land may in fact be considered an open field, but may also have buildings on it, be wooded or be otherwise used. A person's "curtilage" is his home, a reasonable area for yard space (whether fenced or not) and the nearby buildings used in connection with the home. Outside the curtilage is the "open fields" and that land may be searched by an officer. When in an open field area, the officer may not, however, on that account alone, search a building, person or non-abandoned car.

Public area

No one has a reasonable general expectation of privacy in a public area such as road, sidewalk, Public Park, etc., but they do have a reasonable expectation of privacy in their own person, luggage, or vehicle that is located in a public area. As used here, "Public," means "open to the public," and includes various commercial establishments such as bars and retail stores. Therefore, an officer can be in such an establishment in areas where prospective customers are allowed. at times when they are allowed to be there, and making no closer examination of things therein than an ordinary customer would and he will not have violated anyone's reasonable expectation of privacy. A regulatory officer, such as an alcohol beverage control or charitable gaming officer, may enter into an area where the item they regulate is stored but that is not open to the general public, under circumstances where the general jurisdiction officer may not. Of course, some areas,

such as bathrooms, may be so arranged as to support an expectation of some degree of privacy even though the general public is allowed to enter.

CONSTRUCTIVE POSSESSION

It is not necessary for an individual to be in actual possession of an item to be charged with its possession. So long as the item is where the individual may exercise control over it, for example, it is in their car, they may be found in constructive possession of the item. This may be the case even when the individual denies any authority over the item, if the item is close enough to the subject for the subject to exercise control over it. (For example, a handgun or drugs found under the seat the driver or passenger occupies in the vehicle, or in a closet or under the bed in the bedroom which the subject occupies.)

CHAPTER FOUR

THE HUMAN RIGHTS PERSPECTIVE: RIGHTS OF THE ACCUSED.

RIGHT TO REMAIN SILENT

The Miranda rule guarantees that persons detained by police will not be interrogated in a way that places them at a disadvantage (i.e. without a lawyer or legal defense counsel). Basically, the Miranda rule guarantees that the person:

- Has the right to remain silent.
- Has a right to a criminal defense attorney.
- Will be provided with an attorney if the cannot afford one.

Also, the person is to be informed that if they decide to waive their right to remain silent, their statements can be used against them in court.

These rights are typically read immediately after the person is taken into custody by the police. A person is taken into "custody" when they are not free to leave. Many suspects decide to remain silent until their attorney arrives, after which, they may proceed with answering questions.

The right to remain silent refers to the idea that the criminal suspect can choose not to say anything if the police ask them questions. This goes hand-in-hand with the constitutional right against self-incrimination during trial. Basically, the person indicates that they wish to remain silent until they can meet with their lawyer.

If the suspect begins speaking, however, they are usually deemed to have waived or forfeited their right to silence. This means that the statement that they said on their own volition can then be used during trial. There are certain exceptions in

which Miranda rights don't have to be read prior to interrogation, such as during a hostage negotiation situation.

The Miranda rule only applies to "Police questioning." This is any type of interrogation that is done during an official detention or in relation to an arrest. The interrogation must be geared towards obtaining information leading up to conviction, that is, that might be used in trial. Therefore, certain questions asked by the police might not be considered "police questioning" for Miranda purposes.

For instance, questions that are asked of all detainees during routine, standard booking procedures are not considered to be police interrogations. The detained person can answer such questions without fear that the information will be held against them in court.

Laws such as the Miranda Rule can sometimes be confusing to understand. This is especially true if there are points of the interrogation process that the defendant does not understand. This highlights the important of obtaining a criminal lawyer as soon as one learns that they may be facing a criminal case. A qualified lawyer can help when it comes to determining your rights in your particular case. Also, your lawyer can help represent you during the upcoming criminal hearings.

Miranda Rule

Article 23 (3) of the 1995 Constitution states that a person arrested, restricted or detained shall be informed immediately, in a language that the person understands, of the reasons for the arrest, restriction or detention and of his or her right to a lawyer of his or her choice. The charges should be read out to the person at the time of arrest, so that the person know exactly what laws they have violated in the constitution thus the cause for arrest.

The Miranda Rule originates from the landmark United States Supreme Court case of Miranda v. Arizona[87] and the Fifth Amendment to the United States Constitution which gave criminal suspects a number of rights when being questioned by officers. The law

[87] 384 U.S. 436 (1966)

states that whenever a person is taken into police custody and before being questioned, he or she must be told of the Fifth Amendment right not to make any self-incriminating statements and their Miranda rights.

Miranda v. Arizona 384 U.S. 436 (1966)

Miranda v. Arizona involved a young uneducated Hispanic man who was arrested for his involvement in a series of sexual assaults. Ernesto Miranda was charged on one account of robbery and three accounts of sexual assault. Although the first of the two trials was quick, convincing, and resulted in a conviction, the ultimate outcome of the second trial ended with a different conclusion – one that began at the Phoenix police station the day Miranda was arrested. The procedures law enforcement used to handle the Miranda case were problematic from the outset. Miranda was brought down to the Phoenix police station after agreeing to come in for questioning. After being questioned about his involvement in the sexual assault cases, Miranda denied all involvement and offered alibis for each one. Miranda was then asked to stand in a line-up for victims of two of the crimes. Although neither of the victims were positive that Miranda was the man who sexually assaulted them, the detective told Miranda both victims made a positive identification of him. Consequently, Miranda remarked to the detective that he better tell him about the crimes (Cooley & Farmer, 1980).

Miranda later signed a form that said he was going to make a statement voluntarily and that he had full knowledge of his legal rights (Stuart, 2004).

It was only after Miranda had given a written statement that the detectives finally arrested him. During the previous phases of questioning and line-up administrations, Miranda had been held without having been accused. Had Miranda ever asked to leave, the detectives would have had no choice but to grant that request. Furthermore, Miranda was never warned of his rights. In fact, the interrogators admitted that they did not explicitly inform Miranda of his rights because they were aware that he had a prior criminal record and that he should have already been cognizant of them. It was this lack

of knowledge and warning of his legal rights on which the appeals for Miranda would be based (Stuart, 2004).

The lawyers who presented Miranda's appeal to the Supreme Court made two critical points. First, they pointed out that the majority of citizens are at an enormous legal disadvantage as soon as they become a suspect of a crime (e.g., Kamisar, 1962). Second, they shifted the emphasis from whether suspects should be warned of their rights to when such warnings should be given (Stuart, 2004). This latter issue was the point from which they planned to extend the Escobedo v. Illinois (1964) ruling – a ruling that afforded suspects the right to counsel upon request, but which did not explicitly require that suspects be informed of this right.

The Miranda Decision

Miranda is often referred to as a marriage of the Fifth (i.e., right of privilege against self-incrimination) and Sixth Amendments (i.e., right to counsel and right to grand jury indictments). Although the Miranda decision is typically thought of as a single constitutional ruling, it was really predicated on three holdings:

1. The Fifth Amendment privilege applies not only at trial or before legislative committees, but also to the informal compulsions of law enforcement officials during custodial questioning,
2. Unless safeguards are put into place to ensure the safety of the suspect, all interrogations will result in compulsion, and
3. Statements given during an interrogation are not admissible unless the interrogator warned the suspect of her/his four rights and the suspect knowingly and intelligently waived these rights[88]

Although these three holdings, especially the second holding, seem bold and, as some initially criticized, impossible to be certain of, the Supreme Court made some effort to address these criticisms. They admitted that, although they were not certain

[88] Miranda v. Arizona 384 U.S. 436 (1966)

what occurs in police interrogation rooms, they were fairly confident about interrogation tactics that are used because of the interrogation methods typically recommended in the most often used interrogation manuals. The Court reasoned that interrogators try to undermine suspects' will to resist and, when necessary, resort to deceptive stratagems such as giving false legal advice and attempts to persuade or trick the suspect out of exercising her/his constitutional rights.

Thus, Miranda was an attempt by the Supreme Court to ensure a standardized means of fair treatment of criminal suspects. Accordingly, to protect suspects from similar situations as those that occurred in the Miranda case, the Supreme Court established safeguards for suspects against self-incrimination and police intimidation during custodial interrogations. The warnings inform suspects of the right to silence, the intent to use their statements against them in court, the right to an attorney, and the right to a court appointed attorney for indigent suspects. However, the Supreme Court's ruling did not indicate explicit verbiage to be used when Miranda was administered. It was assumed by the Court that the warnings would be comprehendible when administered to suspects. The Court held that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would otherwise do so freely." Therefore, a defendant "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."

Miranda Rules Today

The Miranda case surfaced in 1963 and still today, violations of this landmark Supreme Court ruling are still occurring in large urban settings where police departments are frequently found not to be following its provisions. After the United States Supreme

Court made their decision in 1966, Miranda v. Arizona[89] created a series of procedural requirements that law enforcement officials must follow before questioning suspects in custody. These rules specified that a suspect must be read the "Miranda warning" and then must be asked whether he or she agrees to "waive" those rights. If the suspect declines, the police are required to stop all questioning. Even if the suspect waives his or her rights, at any time during an interrogation he or she can halt the process by retracting the waiver or asking for a lawyer. From that point on, the police are not allowed even to suggest that the suspect reconsider. This is the proper process law enforcement officials are supposed to take.

Miranda Rules in Uganda

Our courts must follow the best practices in the administration of criminal justice in order to protect the liberties of the individual. It is trite law that any breach of these rules in the course of the arrest detention and interrogation by the police or any arresting officer or enquiry renders any confession statement given by a suspect or any evidence obtained in the process, inadmissible at a trial.

The fruit of the poisonous tree doctrine

The Miranda decision essentially established an exclusionary rule applicable to statements made by suspects during custodial interrogation. But the loss of a confession or statement may have consequences for other evidence gathered by the police. Under the fruit of the poisonous tree doctrine, evidence that is derived from inadmissible evi- dence is likewise inadmissible. [90] For example, if police learn of the location of a weapon used in the commission of a crime by interrogating a suspect who is in custody, that weapon is considered derivative evidence. If the police failed to provide the Miranda warnings, not only the suspect's responses to their questions but also the weapon discovered as the fruit of the interrogation are tainted. On the other hand, if the physical evidence was

[89] 384 U.S. 436 (1966)
[90] Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

located on the basis of independently and lawfully obtained information, it may be admissible under the independent source doctrine.[91] Thus, in our hypothetical case, if police learned of the location of the weapon from an informant, the weapon might well be admissible in court, even though the suspect's admissions are still inadmissible. A variation on the independent source doctrine is what is termed the inevitable discovery doctrine. A grisly case that illustrates this doctrine is Nix v. Williams,[92] In this case, a jury in a mur- der defendant's retrial was not permitted to learn of the defendant's incriminating statements because the police had violated Miranda. He was convicted nevertheless, largely on evidence derived from the girl's corpse. The body was discovered when Williams, before meeting with his attorney, led police to the place where he had dumped it. On appeal, Williams argued that evidence of the body was improperly admitted at trial because its discovery was based on inadmissible statements and thus constituted the fruit of the poisonous tree. In reviewing the case, the U.S. Supreme Court held that the evidence of the body was properly admissible at trial because a search party operating in the area where the body was discovered would eventually have located the body, even without assistance from the defendant.

The Public Safety Exception to Miranda Police generally provide the Miranda warnings immediately on arrest or as soon as is practicable to preserve as evidence any statements that the suspect might make, as well as any other evidence that might be derived from these statements. In some sit- uations, however, the Miranda warnings are delayed because police are preoccupied with apprehending other individuals or taking actions to protect themselves or others on the scene. In New York v. Quarles,[93] the Supreme Court recognized a public safety exception to the Miranda exclusionary rule. Under Quarles, police may ask suspects questions designed to lo- cate weapons that might be used to harm the police or other persons before provid- ing the Miranda warnings. If this

[91] Segurra v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984)
[92] 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).
[93] 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984),

interaction produces incriminating statements or physical evidence, the evidence need not be suppressed.

What Constitutes an Interrogation?

Although interrogation normally occurs at the station house after arrest, it may oc- cur anywhere. For the purpose of determining when the Miranda warnings must be given, the Supreme Court has defi ned interrogation as "express questioning or its functional equivalent," including "any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect."[94] Before police may engage in such interaction, they must provide the Miranda warnings or risk the likelihood that useful incriminating statements will be suppressed as illegally obtained evidence.

Waiver of Miranda rights

It is axiomatic that, in the context of criminal law, one's constitutional rights may be waived. A suspect may elect to waive the right to remain silent or the right to have counsel present during questioning as long as he or she does so knowingly and vol- untarily. Courts are apt to strictly scrutinize a waiver of Miranda rights to make sure it is not the product of some coercion or deception by police. In United States v. Carra,[95] the court observed that "[v]oluntary waiver of the right to remain silent is not mechanically to be determined but is to be deter- mined from the totality of circumstances as a matter of fact." For example, in United States v. Blocker,[96] a federal district court, citing de- cisions from the U.S. Court of Appeals for the Fifth Circuit, observed that a written waiver signed by the accused is not in itself conclusive evidence: "The court must still decide whether, in view of all the circumstances, defendant's subsequent decision to speak was a product

[94] Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 1693, 64 L.Ed.2d 297, 308 (1980).
[95] 604 F.2d 1271 (10th Cir. 1979),
[96] 54 F. Supp. 1195 (D. D.C. 1973) 3

of his free will." Although they must honor a suspect's refusal to cooperate, police are under no duty to inform a suspect who is considering whether to cooperate that arrangements have been made to provide counsel. In Moran v. Burbine,[97] police arrested a man on a burglary charge and sub- sequently linked him to an unsolved murder. The suspect's sister, not aware that a murder charge was about to be fi led against her brother, arranged for a lawyer to represent her brother on the burglary charge. The attorney contacted the police to arrange a meeting with her client. The police did not mention the possible murder charge and told the attorney that her client was not going to be questioned until the next day. The police then began to interrogate Burbine, failing to tell him that a lawyer had been arranged for him and had attempted to contact him. Burbine waived his rights and eventually confessed to the murder. The Supreme Court upheld the use of the confession in evidence.

PRESUMPTION OF INNOCENCE/RIGHTS OF THE ACCUSED

Article 28(3)(a)[98] states that every person who is charged with a criminal offence shall—

(a) Be presumed to be innocent until proved guilty or until that person has pleaded guilty

Benjamin Odoki, the former Chief justice of Uganda says 'presumption of innocence means that the burden of proof lies on the prosecution to prove their cases beyond reasonable doubt. That there is no such burden on the accused to prove their innocence. He further writes that it would have been too harsh if there was presumption of guilt for it would have been the duty of the accused to prove their Innocence and as it is generally accepted that it is more difficult to prove negative than a positive'.[99]

The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss

[97] 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986),
[98] The Constitution of the Republic of Uganda, 1995 (As amended)
[99] A guide to criminal procedure in Uganda at pg. 100

of physical liberty, subjection to social stigma and ostracism from community, as well as other social psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that the state proves an accused's guilt beyond reasonable doubt, he or she is innocent. This is essential in a society committed of fairness and social justice. This presumption of innocence confirms our faith in human kind; it reflects our belief that individuals are descent and law abiding members of community until proven otherwise.

Presumptions are part of the law. Under the law of evidence, a presumption of a particular fact can be made without the aid of proof in some situations. According to Black's Law Dictionary, 9th Edition, at Page 1304, a presumption is defined as a legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts. Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of proof or persuasion to the opposing party, who can then attempt to overcome the presumption. [100]

However, the law may require an accused person to prove certain facts within his peculiar knowledge. This would not be inconsistent with the presumption of innocence and the burden of the prosecution to prove a case beyond reasonable doubt. Article 28 (4) (a)[101] states thus:

"Nothing done under the authority of any law shall be held to be inconsistent with –

a. *clause (3) (a) of this article, to the extent that the law in question imposes upon any person charged with a criminal offence, the burden of proving particular facts."*

This provision has to be read together with Section 105 of the Evidence Act with regard to the burden of proving that the accused's case is within exceptions and facts especially within the accused's knowledge.

[100] Naziwa v Uganda (Criminal Appeal-2014/) [2018] UGSC 27 (18 January 2018);
[101] Constitution of the Republic of Uganda, 1995 (As amended)

THE PRINCIPLE OF LEGALITY

The principle of legality is a core value, a human right but also a fundamental defense in criminal law prosecution according to which no crime or punishment can exist without a legal ground. ***Nullum crimen, nulla poena sine lege*** is in fact a guarantee of human liberty; it protects individuals from state abuse and unjust interference, it ensures the fairness and transparency of the judicial authority. The principle is often associated with the attempts to constrain states, governments, judicial and legislative bodies from enacting on retroactive legislation, or ex post facto clauses and ensuring that all criminal behavior is criminalized and all punishments established before the commencement of any criminal prosecution. The origins of the principle date back to post-World War II when a set of compelling criminal statutes were established and the drafters of the Nuremberg Statute affirmed the notion of individual criminal responsibility from a tri-dimensional perspective: legal, moral and criminal.

Yet can this principle still find its place in the progressive positive international law, can it still serve its initial purpose? With a glance at some national legislations and taking a look at the European Union's example, it is fairly obvious that most European Union countries adapted and amended their legislations accordingly to the EU legislation and that the principle is still observed. Moreover, looking at the European Union from an institutional perspective, the existent jurisprudence proves that the principle is effective and applicable. In the **Kokkinakis v Greece,**[102] the European Court of Human Rights clearly confirmed that only a law can define a crime and prescribe a punishment. Moreover, in the case of Criminal proceedings against X, Joined Cases 74/95 and C-129/95, the Court stated that EU Members States have the obligation to observe the principle of legality with regards to crimes and sanctions when applying European directives into their national law.

[102] case, 25 May 1993, Case 3/1992/348/421

In terms of international law, the Article 11 of the Universal Declaration of Human Rights (UDHR) (1948) gives a very well structured definition of the principle: "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed". The same concept with nearly identical wording is found in several international and regional human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) (1966), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (1950) and the American Convention on Human Rights (ACHR) (1969).

However, the effectiveness of this principle has been discussed especially when it comes to international law, as international law treaties unlike national legislation do not always contain precise penalties, pointing out one key issue of customary law vs. legislative law. Despite the arguments supporting the limited effectiveness of the principle in the international customary law, the fairly recent precedent set by the International Criminal Tribunal for the Former Yugoslavia tends to prove that this principle is not only omnipresent but also effective in the positive international law. The tribunal stated that the application of penal sanctions to the various acts that can qualify as violations of the laws and customs of war under Article 3 of the ICTY Statute was legitimate and could be therefore used during prosecution.

Furthermore, if the principles were to be applied per the Statute of Rome (which explicitly states the principle in its article 22 and 23), for instance –due to the limited jurisdictional reach of the International Criminal Court the principle looses partly its effectiveness, making it less binding for non party-states.

In conclusion, given the fact that the principle reflects essentially the core considerations of justice, it should always be present in the states' legislations and practices but at the

same time it should also adapt to the needs of the international community it order to ensure that justice is served and to fight impunity.[103]

BAIL, POLICE BOND AND CONSTITUTIONAL PROVISIONS ON PRESUMPTION OF INNOCENCE

LAW APPLICABLE.

1. The Constitution of the Republic of Uganda, 1995.
2. The Trial on Indictments Act Cap 23
3. The Magistrates Court Act Cap 16
4. The Penal Code Act Cap 120

A person can be released either by grant of bond at a police station or bail by court.

POLICE BOND

This is the release of a person who was arrested with or without a warrant upon such a person availing sufficient sureties for his or her attendance before court at the specified time.

Bond arising from arrest without a warrant. This is provided for under Section 17(1) of CPC [104]which empowers the officer in-charge (O/C) of a police station to which a person is brought to consider the nature of the offence and if it is not an offence of a serious nature and it is not possible to produce the suspect before court within 24 hours after being brought into custody to release the person upon executing a bond with or without sureties for a reasonable amount to appear before a magistrate's court at the time and place named in the bond.

[103] Iulia Crisan Published as part of the Effectius Newsletter, Issue 5, (2010)

[104] Cap 116

This is also provided for under S.24(2)(b) of the Police Act[105] to the effect that a person who has been arrested as a preventive action can be released on execution of a bond with or without surety where provision is made for his or her appearance before a senior police officer at regular intervals if so required.

Bond from arrest with a warrant Under S.57 MCA[106] a magistrate can permit release on bond of a person whose name is stated in the warrant of arrest. In such a case, the officer to whom the warrant of arrest is directed can take security being the amount stated in the warrant and require the person whose arrest is going to be effected to execute a bond with sufficient sureties for his or her attendance before the court at a specified. The officer thereafter is expected to forward the bond to court including the security taken.

According to S.63 (2) MCA[107] a magistrate can release a person from custody in cases where the warrant had an endorsement authorizing the release of the person arrested upon his or her giving security. The magistrate is expected to take the security and forward this together with the bond to the court which issued the warrant.

It is important to note that bond is free of charge and no duty is levied on the bail bond plus the bond does not have to be sealed as provided for under S. 38 Police Act.[108]

B A I L

D E F I N I T I O N O F B A I L :

Originally bail meant security given to court by another person that the accused will attend his trial on the day appointed. But these days, it includes a recognizance entered into by the accused himself conditioning him to appear and failure of which may result of the forfeiture of the recognizance. According to the case of Lawrence Luzinda V Uganda,[109] the definition of bail was given by justice Okello and he stated that bail is an

[105] Cap 303
[106] Cap 16
[107] Ibid
[108] Cap 303
[109] [1986] HCB 33

agreement between the court, the accused and sureties on the other hand that the accused will attend his trial when summoned to do so.

An amount of money or property must be deposited by an accused person with the court in order to be released from custody. This in law is called a recognizance.

According to the late Ayume in his book, criminal procedure in Uganda at pg 54, he said that there are two basic principles underlying bail. The first principle is that the accused is innocent until proved guilty or until he pleads guilty and therefore it would be unfair in certain circumstances to keep him in prison without trial. This is also enshrined in our constitution of 1995 under Article 28(3) (a).

The second principle underlying bail is that the only person capable of building up his defence at the trial may be the accused himself. If he is released on bail, it must be on the understanding that he will turn up for his trial. Therefore, there are good reasons why the accused would want to be released on bail. If employed, he would likely loose his job or have his business damaged while in prison.

The legal essence behind bail is in respect to upholding one's right to personal liberty. This is especially the product of the presumption of innocence as protected under Article 28 (3) of the Constitution of the Republic of Uganda.

A bail applicant must not be deprived of his/her freedom unnecessarily or as merely punishment where they have not been proved guilty by a competent court of law. This principle of protection of personal liberty was further cemented in the case of Col (Rtd) Dr. Kizza Besigye v Uganda[110] wherein Hon. Justice Masalu Musene was of the holding that "…court has to consider and balance the rights of the individual, particularly with regard personal liberty…" And further quoting the famous words of Hon. Justice Ogoola PJ (as he then was) in Criminal Misc. Application No. 228 of 2005 and Criminal Misc. Application No. 229 of 2005 wherein the learned Justice had this to say:

"Liberty is the very essence of freedom and democracy. In our constitutional matrix here in Uganda, liberty looms large. The liberty of one is the liberty of all. The liberty of one must never be curtailed lightly, wantonly or even worse arbitrarily. Article 23, clause 6

[110] Criminal Application No.83 of 2016

of the Constitution grants a person who is deprived of his or her liberty the right to apply to a competent court of law for grant of bail. The Court's from which such a person seeks refuge or solace should be extremely wary of sending such a person away empty handed- except of course for a good cause. Ours are courts of Justice. Ours is the duty and privilege to jealously and courageously guard and defend the rights of all in spite of all."

This was further confirmed by Hon. Justice Stephen Mubiru in the case of Abindi Ronald and Anor v Uganda[111] stating that;

"Under Article 28 (3) of the Constitution of the Republic of Uganda, every person is presumed innocent until proved guilty or pleads guilty. Consequently, an accused person should not be kept on remand unnecessarily before trial."

The Court's discretionary powers to grant bail are enshrined under Section 14 (1) of the Trial on Indictments Act and the conditions under which bail is to be granted under Section 15. These circumstances are broken down to proof of exceptional circumstances like grave illness, a Certificate of no objection from the Director of Public Prosecution, infancy or advanced age; and the fact that the accused will not abscond to be proved by the accused having a fixed place of aboard, sound sureties, among others. However, it is trite law that proof of exceptional circumstances is not mandatory as courts have the discretion to grant bail even where none is proved.

Hon. Justice Stephen Mubiru in the case of Abindi Ronald and Anor v Uganda[112] was of the view that "An applicant should not be incarcerated if he has a fixed place of abode, has sound sureties capable of guaranteeing that he will comply with the conditions of his or her bail."

RIGHT TO BAIL

The right to liberty enjoins the right to apply for bail. The grant of bail as stipulated under Article 23(6)[113] is to allow an individual facing trial to enjoy liberty while reporting to

[111] Miscellaneous Criminal Application No. 0020 of 2016
[112] Miscellaneous Criminal Application No. 0020 of 2016
[113] The Constitution of the Republic of Uganda, 1995 (As amended)

attend trial. The right is a delicate balance between personal liberty and administration of justice by which courts are given discretion to determine whether the conditions and circumstances of the accused warrant bail whilst not endangering the justice system.

The right to grant of bail has been construed to be premised on the principle of presumption of innocence.[114]

The right to 'automatic' grant of bail is provided for under Article 23(6)(b) and (c)[115] where individuals who have been on remand for 60 days (offences triable in a Magistrates court) and 108 days (offences triable by High Court).

A remedial guarantee is provided to personal liberty in the form of right to an order of Habeas corpus under Article 23(9)[116] and made non-derogable under Article 44 (a).[117]

The freedom(s) –seven of them-are tailored towards the protection of the dignity of the individual. The definition of the various facets of the freedoms in Article 24[118] was articulated by Justice Oder in the appeal in Attorney –General v. Salvatori Abuki.[119] The freedoms are infact non derogable under Article 44(a).[120]

What is cruel, inhuman or degradable as treatment or punishment depends on the virtues and perceptions in society. Thus it is the contention that the death penalty (means of execution and the death- row phenomenon) constitutes cruel, inhuman and degrading treatment or punishment**:** State v.Makwanyane & Anor[121];an exclusion order of 10 years under the provisions of the witchcraft act was treated in the same light: Abuki case[122]. The same position has been taken in respect of corporal punishment both under the penal system: Kyamanywa case[123]; Sewankambo v. Uganda,**[124]** and educational system:

[114] (Onyango Obbo & Anor Vs Uganda Crim. Misc Apl No. 145/1997
[115] The Constitution of the Republic of Uganda, 1995 (As amended)
[116] Ibid
[117] Ibid
[118] Ibid
[119] (Constitutional Appeal No.1/1998).
[120] The Constitution of the Republic of Uganda, 1995 (As amended)
[121] (1995) 2 LRC 269 (South Africa)
[122] (Constitutional Appeal No.1/1998).
[123] Kyamanywa Simon v Uganda (Criminal Appeal-1999/) [2000] UGSC 7 (07 April 2000)
[124] Crim Appeal No. 16/1999

Nganwa High School (1998). Significantly, in response to the argument against unconstitutionality of corporal punishment in the view that the law admits of 'reasonable chastisement', the constitutional court (by majority of 3-2) in Kyamanywa case observed that the freedoms under article 24 are non derogable under article 44, and therefore no qualification is to be made as regards the manner of application of the prescribed punishment. Other acts that constitute a violation of the freedom(s) is death penalty (Makwanyane (1995), spousal battery (wife beating/domestic violence), excessive sentences

CONSTITUTIONAL PROVISIONS ON BAIL:

The Constitution of the Republic of Uganda, 1995 contains provisions on the protection and promotion of fundamental human rights and freedoms. Article 20 (1)[125] provides that fundamental rights and freedoms are inherent and not granted by the state. Article 20 (2)[126] provides that all those rights and freedoms must be respected, upheld and promoted by all organs and agencies of Government and by all persons.

Article 28 (3)[127] thereof provides that every person who is charged with a criminal offence shall be presumed to be innocent until proven guilty or until that person has pleaded guilty is the basis on which the accused person enters into an agreement with the court on his recognisance that he appear and attend his trial whenever summoned to do so. Bail gives the accused person adequate time to prepare his or her defence.[128]

Hence Article 23 (6)[129] provides that where a person is arrested in respect of a criminal offence the person is entitled to apply to the court to be released on bail, and the Court may grant that person bail on such conditions as the Court considers reasonable.

[125] The Constitution of the Republic of Uganda, 1995 (As amended)
[126] Ibid
[127] Ibid
[128] Article 28 (3) (c), The Constitution of the Republic of Uganda, 1995 (As amended)
[129] The Constitution of the Republic of Uganda, 1995 (As amended)

Applying the interpretation of article 23(6)(a)[130] as amended by the judges in the case of Uganda V/s Col (Rtd) Dr. Kiiza Besigye.[131]

Under Article 23 (6)(a)[132] of the constitution, where the accused person has been in custody for 60 days before trial for a non capital offence here, the court has no discretion in the matter. It has to grant bail upon such terms as the court deems reasonable.

Article 23(6)(c)[133] of the constitution where the accused person is indicted with capital offences triable by the High Court only. In this case once the accused person has spent 180 days on remand, then the court has to release him/her on automatic bail upon reasonable conditions.

According to Justice Akiiki Kiiza in Florence Byabazaire's application for bail, it appears the accused can only benefit from this article, if he is not yet committed to the High Court for trial.

Their Lordships had the following to say in Kiiza Besigye's reference "as regards article 23(6)(c), where the accused has been in custody for 180 days on an offence triable by the High Court only and **HAS NOT BEEN COMMITTED** to the High Court for trial, that person shall be released on bail on reasonable conditions'. In the situation where the accused is charged with an offence only triable by the High Court, but has not spent the statutory period of 180 days in custody before committal, in this case, the court may refuse to grant bail where the accused fails to show to the satisfaction of the court exceptional circumstances under section 15(3) of the Trial on Indictments (Amendment) Act 9/98 (cap 23). These circumstances are regulatory.

The Lordships went on to state as follows;

"it is noteworthy that this is a 1998 Act, which came into force well after the constitution of 1995. its sole purpose was to operationalise article 23 (6) (c) for the accused desirous

[130] Ibid
[131] Constitutional Reference No.20 of 2005
[132] The Constitution of the Republic of Uganda, 1995 (As amended)
[133] Ibid

for applying for release on bail before the expiry of the constitutional time limit of 180 days. Justice Akiki Kiiza said in Byabazaire's application that before the High Court can release an accused on bail, one of the conditions or exceptional circumstances outlined in Section 15(3) of TIA[134] must be satisfied and dismissed the applicant's application on the ground that none of the exceptional circumstances had been satisfied.

CONSIDERATIONS FOR BAIL IN THE MAGISTRATE'S COURT.

Conditions for the grant of bail

In as much as the accused person has a constitutional right to apply for bail as enshrined in Article 23(6)(a) of the 1995 constitution, the grant of bail is subject to some conditions being fulfilled by the person seeking bail. As per Justice Akiiki Kiiza in the application for bail by Florence Byabazaire Vs. Uganda,[135] Bail is not an automatic right. Article 23(6)(a)[136] confers discretion upon the court whether to grant bail or not.

The conditions / considerations for granting bail are set out in both the Trial on Indictments Act Cap 23 for bail applications made in the High Court and the Magistrate Courts Act Cap 16 for applications made to the Magistrate's court.

Considerations in the Magistrate's court;

S. 77 of the Magistrates Court Act sets down some considerations that the Magistrate Court must have regard for in deciding whether bail should be granted or refused-

a) the nature of the accusation; [137]
b) the gravity of the offence charged and the severity of the punishment which conviction might entail; (it is more likely that bail will be refused where the offence is so grave as to warrant a severe penalty).
c) the antecedents of the applicant so far as they are known;(it would be a mockery of the judicial process and a miscarriage of justice if bail were to be granted to a

[134] Cap 23
[135] Miscellaneous Application 284 of 2006
[136] The Constitution of the Republic of Uganda, 1995 (As amended)
[137] see Uganda Vs. Mugerwa & Anor [1975] HCB 218.

person who has a staggering record of previous convictions to his name, which is an indication of his likelihood of committing further crimes if released on bail).

d) whether the applicant has a fixed abode within the area of the court's jurisdiction;[138] The fact that the accused has a kibanja, and that he has sixteen wives and or twenty four children, may be an indication that he is unlikely to abscond. But this by itself cannot be a ground for releasing a person on bail- Livingstone Mukasa & 5 others vs Uganda[139]

e) Whether the applicant is likely to interfere with any of the witnesses for the prosecution or any of the evidence to be tendered in support of the charge. (In the case of Uganda Vs. Wilberforce Nadiope and 5 others, bail was refused on the ground that because of the accused person's prominence and apparent influence in life, there was every likelihood of his using his influence to interfere with witnesses.

IS BAIL A CONSTITUTIONAL RIGHT AND THEREFORE AUTOMATIC?

Generally, the grant of bail is discretionary. Court must always exercise its discretion judiciously and always give the accused the benefit of doubt. Magistrates and Judges have interpreted the provisions regarding the conditions and considerations in different ways with some stating that they must be fulfilled before a person can be granted bail, while others holding that it is a constitutional right.

The right to bail is a constitutional protection of the right to personal liberty clearly based on the presumption of innocence which must thus not be denied lightly. An accused person charged with a criminal offence must be informed of his right to bail. It is not a constitutional right to automatic bail but a right to apply for bail. The later view is the one that has been propagated by judges in most of the recent judgments as seen hereunder;

[138] Sudhir Ruparelia Vs. Uganda [1992-1993] HCB 52,
[139] [1976] HCB 117.

POWERS OF MAGISTRATE'S COURTS TO GRANT BAIL.

The Magistrates Courts Act Cap 16, Section 75 (1) states that a Magistrate Court before which a person appears or is brought charged with any offence other than the offences specified in **ss. (2)** may, at any stage in the proceedings, release the person on bail, on taking from him or her a recognisance consisting of a bond with or without sureties, for such an amount as is reasonable in the circumstances of the case to appear before the Court, on such a date and at such time as is named in the bond.

Section 75(2) of the MCA provides that the offences excluded from the grant of bail under subsection (1) are as follows;

(a) an offence triable only by the High Court
(b) an offence under the penal code relating to acts of terrorism
(c) an offence under the penal code relating to acts of cattle rustling
(d) an offence under the firearms act punishable by a sentence of imprisonment of not less than 10 years;
(e) abuse of office c/s 87 of the Penal code
(f) rape c/s 123 of the Penal code and defilement c/s 129 & 130 of the penal code act;
(g) embezzlement;
(h) causing financial loss
(i) corruption
(j) bribery of a member of a public body
(k) any other offence in respect of which a magistrate's court has no jurisdiction to grant bail.

A chief magistrate has powers under Section 75(3)[140] to direct that any person to whom bail has been refused by the lower court within the area of his or her jurisdiction, be released on bail but the offence for which the accused faces must not be one that falls under subsection 2.

[140] Magistrates Courts Act (Cap 16)

POWERS OF THE HIGH COURT TO GRANT BAIL.

The Trial on Indictment Act (Cap 23)

Section 14 provides that the High Court may at any stage of the proceedings release an accused person on bail, that is to say, on taking from him or her a recognizance consisting of a bond, with or without sureties, for such an amount as is reasonable in the circumstances of the case, to appear before the court on such a date and at such a time as is named in the bond. Bail is a kind of insurance to guarantee that the accused will appear in Court for his or her trial. Where the accused fails to appear before the Court when ordered to do so, his or her bail money is forfeited.

The High court has powers after releasing an accused person on bail to increase the amount of the bail. This the court will do by issuing a warrant of arrest against the person released on bail directing that he be brought before the court to execute a new bond for an increased amount; and the High court will have powers to commit the person to prison if he or she fails to execute the new bond for an increased amount.[141]

Bail money may be paid up by the accused or someone on his or her behalf. A person released on bail may or may not be asked to put up people as his or her **sureties** to stand up for him or her before the Court.

A **Surety** gives security to the Court that the accused will attend his trial on the hearing date fixed by the court.

Recognisance is a security entered in to before a Court with a condition to perform some act required by Law; on failure to perform that act, the sum is forfeited.

Bail allows an accused person to be temporarily released from custody (usually on condition that the recognizance usually in the form of a sum of money guarantees their attendance at the trial).

Bail money should not be excessively high so that the accused is unable to pay it.

[141] (Section 14 (2) of the Trial on Indictmnents Act (Cap 23)

In Charles Onyango Obbo & Andrew Mwenda v Uganda[142] the High Court was empowered to interfere with the discretion of the lower court while granting bail under s. 75 (4)(a) MCA where it is shown that the discretion was not exercised judiciously. The imposition of a condition that each accused should pay 2,000,000/-, was a failure by the lower court to judiciously exercise its discretion according to **Bossa J.**

While court should take into account the accused's ability to pay, while exercising its discretion to grant bail on certain conditions, the court should not impose such tough conditions that bail looks like a punishment to the accused.

CONSIDERATIONS FOR BAIL IN THE HIGH COURT.

Section 15 (1) of the TIA provides that Court may refuse to grant bail where a person accused of an offence specified in ss (2) if he or she does not prove to the satisfaction of the Court –

a) that exceptional circumstances exist justifying his or her release on bail; and
b) that he or she will not abscond when released on bail.

In Section 15 (3) exceptional circumstances mean –

(a) grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody.[143]

Capt. Wilberforce Serunkuma Vs. Uganda [1995] I KALR 32

The applicant was charged with aggravated robbery and had been on remand for eight months. He brought an application for bail basing on he exceptional circumstances of grave illness. In his affidavit supporting the application the applicant deponed that he was an AIDS Victim and needed constant care which he could not get while in prision. He brought documents to prove that he had been attending AIDS clinics like TASO. It was

[142] (1997)5 KALR 25
[143] Capt. Wilberforce Serunkuma Vs. Uganda [1995] I KALR 3

held that where satisfactory evidence of AIDS is adduced, a court may consider the circumstances of the case and in the absence of a certificate from the medical board hold that AIDS is grave illness, and to justify grant of bail, the applicant has to prove to the satisfaction of the court that he was incapable of getting adequate treatment whilst in custody. In this case, all the applicant had were documents from TASO indicating that he was an AIDS victim and no report was made by any doctor who treated him at Luzira or mbuya military hospital to show that he could get adequate treatment whilst in custody.

(b) A certificate of no objection signed by the Director of Public Prosecutions, or

(c) The infancy or advanced age of the accused. In Mutyaba Semu V Uganda[144] the accused was a 60 year old and suffered from diabetes and he brought an application for bail on the ground that he was of advanced age. It was held that 60 years per se was not advanced age but this coupled with the fact that the accused suffered from diabetes, a disease that required a good diet which could not be provided by prison authorities he would be granted bail.

Section 15 (4)[145] provides that in considering whether or not the accused is likely to abscond, the court may take into account the following factors-

a. Whether the accused has a fixed place of abode within the jurisdiction of the Court or is ordinarily resident outside Uganda.[146]

Dennis Obua Otima v Uganda H C Crim. App. No 18 of 2005.

The applicant was charged with embezzlement and causing financial loss applied for bail on the assertion that he was of advanced age and that he is such a person entitled to be released on bail. Justice Remmy Kasule looked at the considerations in light of the other factors which court uses to deny bail. Firstly, is whether the accused is likely to interfere with the prosecution evidence. Where it is found to be the case, the court would exercise

[144] H.C Criminal Misc. Application No. 99/92
[145] Trial on Indictmnents Act (Cap 23)
[146] (Christopher John Boehlke v Uganda Misc. Application 332 of 2006)- no fixed place of abode and a non resident. Look at the conditions considered in this case.

its discretion by refusing bail. Secondly is to prevent a perception of the justice system as being a mockery of justice. This discretion to refuse bail is vested by the constitution.[147]

b. Whether the accused has sound securities within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail,
c. Whether the accused has on previous occasion when released on bail failed to comply with the conditions of his or her bail; and
d. Whether there are other charges pending against the accused.

Read the following decisions on bail in the Republic of Uganda.

1. Dennis Obua Otima v Uganda H C Crim. App. No 18 of 2005.
2. Emma Katto v Uganda H.C. Crim. Miscellaneous Application No. 10 of 2005
3. Mpuuma K. Leonard Vs. Uganda Misc Appl No 325 of 2006
4. Florence Byabazaire vs. Uganda Misc Appl. No 284 of 2006
5. Uganda Vs. Col(Rtd) Dr. Kiiza Besigye, Constitutional Reference No 20 of 2005
6. Christopher John Boehlke Vs. Uganda Misc. Appl No 332 of 2006
7. Dr. Aggrey Kiyingi Vs. Uganda Misc Appln No 41 of 2005
8. Charles Onyango Obbo & Andrew Mwenda Vs. Uganda [1997] v KALR 25
9. Mutyaba Semu Vs. Uganda [1997] v KALR 143.

48-HOUR RULE

The Constitution 1995 attempts to strengthen the right to liberty under article 23(4) with the 48 hrs limit compared to its 1967 predecessor with its vaguer notion of 'as soon as reasonably practicable'- even then a detention of over 7 days was held to constitute an infringement of personal liberty. [148]

Article 23(4) [149]states that A person arrested or detained—

[147] Article 23 (6) (a), Constitution of the Republic of Uganda, 1995 (As amended)
[148] Ochieng V Uganda [1969] EA 1.
[149] The Constitution of the Republic of Uganda, 1995 (AS Amended)

(b) Upon reasonable suspicion of his or her having committed or being about to commit a criminal offence under the laws of Uganda, shall, if not earlier released, be brought to court as soon as possible but in any case not later than forty-eight hours from the time of his or her arrest.

Article 28(1)[150] stipulates that in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

A majority of suspects, even suspects of petty crimes, aredetained in the police stations for longer than forty-eight hours as a result of a variety of factors, including (1) lack of control over the suspect, (2) lack of ample transportation, (3) backlog at the Directorate of Public Prosecution's office, and (4) corruption. [151]

Ad hoc security agencies often detain suspects in "safe houses" prior to releasing them to police custody. Testimonials from suspects support the conclusion that suspects spend a minimum of one week at these unofficial detention centers. Most spend months there, and some spend as long as two years. Detaining the suspects in these safe houses for longer than the forty-eight hours is clearly in violation of the Constitution. Not only do these suspects spend considerable time in these illicit locations, they also remain in the police stations far longer than the mandated forty-eight hour maximum. The police have no control over suspects brought into the police stations by the ad hoc security agencies; the station merely becomes a "legal" place for these suspects to reside until their release. Corruption in the police system also leads to the persistent violation of the forty-eight hour provision. At this stage of the judicial process, corruption occurs in abundance.' The corruption that impedes proper investigations and causes arbitrary arrests also affects the timely release of suspects. Timely releases can be hampered by police demands for a fee in order to be released on bond. Ideally, bond is supposed to be granted to any suspect charged with a minor offense, such as petty theft or assault, or to any suspect, regardless

[150] Ibid

[151] Brooke J. Oppenheimer From Arrest to Release: The Inside Story of Uganda's Penal System

of the rime, who has been detained for forty-eight hours. Regardless of the reason for releasing the suspect on bond, there is no charge associated. A suspectshould not have to pay a fee in order to be released on bond.'" Unfortunately, almost all suspects are asked to pay a fee to be released on bond.

Most suspects are unable to pay these exorbitant fees and, therefore, are forced to remain in the police cells until the officers decide to move the case forward to court. "However, suspects typically have some petty cash available that they can bribe officers with to push their cases forward. This, however, is a double-edged sword. Why would an officer want to push a case forward when the suspect is paying him small sums of money each day? Hence, the officer might deceive the suspect so that he believes that the officer is helping to push his case forward. Some of the reasons for violation of the forty-eight hour provision are not so purposeful. Many of the delays are due to logistical problems, such as lack of transportation, backlog at the Directorate of Public Prosecution's Office, and lengthy investigations. Most of the police stations are supplied with only one vehicle, which is to be used for investigations, to transport suspects and witnesses to court, and for stationing officers. Even though the vehicle is to be used for these purposes, many times a station's vehicles are used for personal errands of high ranking officers. In addition, investigations alone.

ITEMS FOUND ON SUSPECT AND MEDICAL ATTENTION WHILE INCARCERATED

Theft of Suspects' Property, Extortion, and Theft of Evidence

Many former accused persons describe how personal property, including money from wallets, phones, or household items, including medicine and food, was routinely stolen from suspects when they were arrested. Victims of robberies also told Human Rights Watch that money was rarely returned to them despite police confirming that they had recovered stolen cash.

Family members of suspects also complain that security personnel pressured them to give money to secure the suspects' release. In some cases, security personnel urges wives of

suspects to sell land in order to raise funds to buy their husband's freedom.[152] One suspect, arrested in 2008 for allegedly purchasing stolen goods in Mbale district, said RRU agents arrested him at his workplace. He recognized them as local RRU agents normally involved in arrests for violent crime. One of them asked for the phone number of his brother, whom he summoned to the station before demanding 2,000,000 Ugandan shillings ($900) to secure the suspect's release. The suspect told Human Rights Watch of the exchange between his brother and RRU agents. "They said, 'Your brother committed an offense. Give us 2 million.' My brother said, 'What for? If it's a capital offense, why should we pay? You should take him to court and sort it out.'"[153] When his brother did not pay, he was beaten and made to sign a confession that he was not permitted to read.

Another detainee was promised release if he paid over 6,000,000 Ugandan shillings (approximately$ 2,900), or that the beatings would stop if he paid 100,000 Ugandan shillings (approximately $45).[154] In one instance, the military court handed down the lenient punishment of a 22,000 Ugandan shillings (approximately $ 10) fine to an elderly detainee charged with unlawful gun and ammunition possession.[155] The defendant said in open court that he could not pay the fine since RRU officers had taken all his money during his arrest.

One knowledgeable source, familiar with the operations and methods of RRU, told Human Rights Watch that in some cases suspects have been forced to reveal bank account numbers or hand over bank account details.[156] Some suspects told Human Rights Watch that RRU personnel had used this method to withdraw money from their accounts.

Some people who reported theft of money by armed robbers to police never recovered their money. One victim who was robbed of several thousand dollars told Human Rights Watch that his money was still missing, even though RRU arrested the alleged thieves.

[152] Human Rights Watch interview with wives of suspects, Kampala, November 2010
[153] Human Rights Watch interview with Gabriel, Kampala, December 9, 2009
[154] Human Rights Watch interview with Jerome, Kampala, June 21, 2010.
[155] Human Rights Watch trial observation, Makindye General Court Martial, January 19, 2011.
[156] Human Rights Watch interview with Ugandan government official, November 2010

He said: I kept going back to Central Police Station and RRU to look for my money. They said they had recovered the money but couldn't release it yet. After a few weeks, the police said they had found the key to the safe where the money was held but when they opened the safe, the money wasn't there.[157]

MEDICAL ATTENTION WHILE INCARCERATED

There is a paucity of data about mental disorders among prisoners in low resource settings despite the existence of high numbers of prisoners.Data fromhigh income countries report a high prevalence of mental disorders among prisoners with developing countries carrying the biggest burden .The prevalenceof psychiatric disorders is greater among prisoners when compared to the general population.The mental health needs of prisoners should be paramount regardless of whether the inmate developed these psychiatric symptoms while in prison or prior to the incarceration. Most common factors associated with mental disorders among prisoners include: a prior history of traumatic brain injury, being male, young and of a low levelof education, being married and alleged to have committed a violent crime. Since the factors listed above vary across different settings, findings in one setting may not apply to other settings. There is therefore need to conduct studies in various settings.[158]

In Uganda, a low income country, the government owns and administers all prison facilities. The prisons have health facilities that provide services targeting gen- eral medical conditions and have no psychiatric services. Psychiatric cases and assessments are referred to nearby regional referral hospitals that offer mental health services.

[157] Human Rights Watch interview with robbery victim, Kampala, December 22, 2010

[158] Department of Psychiatry, Faculty of Medicine, Mbarara University of Science and Technology, P.O Box 1410, Mbarara, Southwestern Uganda, Uganda 2Department of Mental Health and Psychiatry, Faculty of Medicine, Kampala International University, P.O Box 71, Bushenyi, Southwestern Uganda, Uganda Full list of author information is available at the end of the article Forry et al. BMC Psychiatry (2019) 19:178 https://doi.org/10.1186/s12888-019-2167

Butabiika National Referral Hospital is the only mental health hospital in the country and has a forensic inpatient unit having a bed capacity of 116 beds with only about 10% of the beds in this unit occupied by the institutionalized mentally-ill prisoners, some for more than 5 years. The national incarceration ratefor 2014 was 121 per 100,000 persons and has been on the rise since 2010. This was greater than the average incarceration rates for Africa and Asia, and slightly below the average global incarceration rate of 144 per 100,000 of the national populations. When compared to other African countries in terms of top rankings for national incarceration rates, Uganda was in the 18th position sharing it with Cameroon. Healthscreening of prisoners is often conducted at the time of admission into the various prison facilities focusing on general medical conditions without regard for psychiatric disor- ders. This is probably due to poorly equipped health facilities with an absence of trained mental health care providers. Other factors that result in the incarceration of the mentally ill include deinstitutionalization, stringent judicial practices, inadequate community support, mentally ill offenders' limited access to community treatment, and the attitudes of police officers and society as a whole despite the enshrinement ofthe McNaughten rule and basic human rights in Uganda's constitution. Uganda has a high number of prisoners, with the southwestern region having one of the highest incarceration rates in the country However, there is a lack of published studies that have been conducted among Ugandan prisoners nationwide or in the region. Therefore, this book aimed to determine the burden of mental disorders and associated factors among prisoners in Uganda.

An example of a Setting is Southwestern Uganda which has several districts with Mbarara being one of the most densely populated. Mbarara municipality, which is the main third order administrative division, is 1445 m above sea level, found along the Kampala-Kabale highway and is 266 km from Kampala, Uganda's capital and largest city. The municipality consists of 6 divisions that include Biharwe, Kakiika, Kakoba, Kamukuzi, Nyakayojo and Nyamitanga. Mbarara Central and Mbarara Women Prisons are situated in Kiswahili cell, Nyamitanga division in Mbarara municipality, about 100 m from the

Mbarara- Kabale highway while Kyamugorani Prison is located in Kyamugorani, Kakiika division, Mbarara municipality.

Prison inmates in Mbarara municipality are incarcerated in two male and one female government funded and administered prisons called Kakiika, Mbarara Main and Mbarara Women Prisons respectively. Mbarara Main Prison is one of the largest prison facility in the region with a population of 1637, followed by Kakiika Prison with 742 and then Mbarara women Prison with 165 occupants. Of these, 70% were on remand, 23% were convicted but not sentenced and 7% were sentenced. The inmates considered for possible recruitment into the study were aged eighteen years and above regardless of their prison status, with no hearing or speech impedi- ments. The refusal rate for participation in the study was 0.7% (2 males and 1 female) and of the potential partici- pants excluded from the study; 19 males were absent, 3 males were below 18 years of age, 2 males had speech impairments and 1 male had a hearing impairment. There weren't participants who could not be included in the study due to acute mental illness as they were either too ill to be interviewed or could not give informed consent.

Measurement of mental disorders among prisoners

The study participants were interviewed once in a clinical setting with privacy and confidentiality in mind whilst adhering to the standard safety precau- tions, prison regulations and code of conduct. The socio-demographic, forensic and clinical factors of the study participants such as parenting style,2 past traumatic brain injury,3 category of crime,4 past psychological trauma5 and available follow-up services6 were obtained by a spe- cially designed interviewer administered questionnaire. A diagnosis of a mental disorder was attained by participants responding to queries in the MINI Version 6.0 and appro- priate conclusions and diagnoses arrived at by the princi- pal investigator based on their various responses without a need for an additional clinical interview.

Statistical analysis

The data collected was checked for completeness, coded and entered into Epidata manager version 2.0.8.56 and then transferred to STATA 12.0 for univariate, bivariate and multivariate analyses. Univariate analyses were done for the socio-demographic and clinical factors as well as to estimate the prevalence. Bivariate and multivariate lo- gistic regression analyses were conducted to determine associations between the category of mental illness, and the associated factors using the individual odds ratios with their 95% Confidence Intervals and p-values. The results were considered statistically significant if the p-value was less than 0.05 and clinically significant if the 95% Confidence Interval was a narrow range and did not cross the line of no difference.

Results Description of inmates

Majority of the 414 respondents in this prison were male (94%), aged 22–35 years (60%), married or cohabiting (53%), with a primary school education (67%) and belonging to the low income class (72%). Most of them were first-time offenders (89%) and had no access to legal representation (82%). Majority were incarcerated under regular imprisonment7 (55%), with more than half (53%) undergoing health screening for physical ailments at the time of admission into their various prison facil- ities, while 64% were alleged to have committed or were convicted of violent crimes. Many of them (88%) had sought health care services from the prison health facil- ities with 7% having ever sought professional psychiatric assistance, 3% currently seeking psychiatric treatment and another 3% having ever sought other forms of treat- ment for their psychiatric illnesses.

Prevalence of mental disorders among prisoners

Only 13% (n= 53) had a single mental disorder (current,8 past9 and lifetime10) while 73% (n= 301) having more than one diagnosis of a mental disorder (current, past and lifetime). The overall lifetime preva- lence of mental disorders was 86% (n= 354) with 95% (n= 338) of these having one or more current episodes. Of these, major depression

was the most common indi- vidual current diagnosis (44%), followed by post-trau- matic stress disorder (31%), suicidality11 (25%), psychotic disorder (22%) and antisocial personality disorder (21%)

Factors associated with mental disorders among prisoners

After multiple logistic regression (Table 2),a history of past traumatic brain injury (Adjusted Odds Ratio = 0.299; 95% CI = 0.106–0.843; P-value = 0.022) and being convicted but not sentenced (Adjusted Odds Ratio = 0.22; 95% CI = 0.05–0.93; P-value = 0.04) were the only factors that were statistically significant with regards to a single diagnosis of mental illness amongst prison- inmates incarcerated in Mbarara municipality. A similar multiple logistic regression model (Table 3) was utilized for all dependent variables to determine factors that influence the presence of more than one mental disorder among prisoners in Mbarara municipality and it was found that a total of five factors were statistically significant: having a low income status (OR = 0.32; 95% CI = 0.16–0.63; P-value = 0.001), past trau- matic brain injury (OR = 2.57; 95% CI = 1.22–5.42; P- value = 0.01), solitary confinement (OR = 0.35; 95% CI = 0.16–0.74; P-value = 0.006), and being raised by authoritarian parents/guardians (OR = 0.37; 95% CI = 0.18–0.75; P-value = 0.006).

This chapter assessed the prevalence of psychiatric morbidity and associated factors among prisoners in Mbarara municipality, southwestern Uganda. The prevalence of a single diagnosis was 13% whereas the prevalence of more than one diagnosis was 73%. We also found a prevalence of 95% for one or more current episodes and 86% for lifetime, past and current episodes of mental disorders. Overall major depressive disorders (44%), post-traumatic stress disorders (31%) and antisocial personality disorders (21%) were the most common individual mental disorders diagnosed. The prevalence of mental disorders in this study of 86% is quite high compared to that found in the general population of 30% but similar to what has been reported in previous prison studies with similar trends in individual current diagnoses, A high rate of suicidality is also consistent with the pub- lished prison mental health literature. Suicidality was also demonstrated to occur more

often in major depression than in psychotic disorders, a finding also in line with current literature. And among the least di- agnosed mental illnesses were psychiatric disorders due to a general medical condition (1.2%), bipolar affective disorders type I (9.7%) and substance use disorders (12.5%). Previous studies in prison populations have re- ported a high prevalence of alcohol and other substance use disorders in Uganda as well as other countries This difference might be attributed to the rigor- ous security checks that visitors are subjected to and the formidable security measures in place that limit access to such substances of abuse presently in Ugandan prisons. The other possible explanation for the differ- ence could be the need to avoid the repercussions of being reported to use substances of abuse, and the desire to reform and deal with the guilty conscience among prisoners who actually committed the crimes that they are accused of.

Majority of the individuals with mental illness were young and first time offenders. They had a low education level, were alleged or convicted of committing violent crimes and had a past history of traumatic brain injury. Previous studies report similar findings but with some exceptions such as substance use, a prior history of mental illness and a history of past psychological trauma such as child abuse.The possible explanation for the observed discrepancy could be due to the stigma and discrimination associated with substance use, mental illness and child abuse as well as the fact that Uganda is a low income country with markedly different sociodemographic and economic characteristics while the vast majority of the findings from studies reviewed have been conducted in middle and upper income countries. In addition, inadequacies in the judicial systems due to a variety of factors, as well as the inadequately equipped and overburdened health care systems may also play a role. The factors that were associated with mental illness in prisoners were low income status, incarceration under solitary confinement, past traumatic brain injury and being raised by authoritarian parents or guardians. Prisoners with more than one diagnosis were more likely to have suffered a traumatic brain injury in the past and to have been convicted but not sentenced, whereas inmates who were in solitary confinement, of a low income status and had been raised by authoritarian

parents/guardians less likely to be diagnosed with two or more mental disorders. The presence of a past traumatic brain injury was less likely among those diagnosed with a single mental disorder since fewer inmates had a single diagnosis. Traumatic brain injury is a known risk factor for mental illness and as such we expect it to be more likely in the majority i.e. those with more than one diagnosis. Most of the results from studies that were reviewed did not concur with the findings in this study and it can be postulated that the reason for this is the stark contrast attributed to differences in terms of study tools/instru- ments used, socioeconomic status, culture and judicial systems between Uganda and the other countries in which those studies were conducted. The limitations encountered during the course of conducting this study include the fact that study.

Participants comprised of only respondents incarcerated in the prison facilities. However, given the fact that the living conditions and judicial system is similar, these findings would provide a basic insight into the nature and extent of the burden of mental illnesses in Ugandan prisons. Some respondents may have deliberately declined to disclose and/or falsi- fied responses to some inquiries that they considered to be private, intimate, confidential and/or sensitive. This could have been due to fear of reprisals and consequences by the prison authorities, anticipated exploit- ation of the sick role and the societal status and the as- cribed privileges that accompanied it. This was mitigated by proper consenting of the study participants, sensitization of the non-professional psychiatric personnel, psychoeduca- tion of the study participants, soliciting of psychiatric drugs and funds to provide mental health services in the correc- tional institutions. Any difficulties in obtaining accurate information about details in the past and long term symp- toms were attributed to recall bias. Some inmates might have been malingering in order to assume the much coveted sick role and all its perceived benefits. The lack of resources to confirm diagnoses of general medical conditions and ruling out psychiatric symptoms due to physical illnesses. Absence of some prisoners at the time of data collection due to prison scheduling e.g. community service, prison duties, court schedules and pending releases from prison may have also impacted the results. Aspiring

to attain the mandated sample size while endeavoring to cater for potential data loss with the intension of getting a study population that is representative of the general prison population that I was planning to study went a long way to resolve these concerns.

There is a high prevalence of psychiatric illnesses among prisoners with most of them having more than one diagnosis. Most of the prisoners with mental illnesses go undiagnosed and untreated. A past history of traumatic brain injury is a risk factor for having more than one diagnosis of a psychiatric disorder. The findings of this study indicate that there is a need for capacity building for health workers and other staff in prisons in regard to screening, assessing and treat- ment of inmates with mental disorders. In addition, there is a necessity for a clear referral process for indi- viduals found to have mental disorders. Furthermore, improving the conditions and standards of living for

Table 3 Factors associated with more than one diagnosis among the study participants Variable (%) Unadjusted Odds Ratio (95% CI) P-value Adjusted Odds Ratio (95% CI) P-value

Past traumatic brain injury 119 (28.7) Yes 295 (71.3) 2.89 (1.64–5.11) 0.000* 2.57 (1.22–5.42) 0.01* No 1.00 - – 1.00 - –

Parenting style 143 (34.5) Authoritarian 119 (28.7) 0.57 (0.31–1.03) 0.06 0.37 (0.18–0.75) 0.006* Authoritative 58 (14.0) 1.14 (0.59–2.20) 0.70 0.66 (0.29–1.48) 0.31 Permissive 94 (22.7) 0.55 (0.26–1.13) 0.10 0.50 (0.21–1.18) 0.11 Neglectful/Uninvolved 119 (28.7) 1.00 - – 1.00 - –

Socioeconomic status (Annual income) Low-income (< 1 million UgShs) 298 (72.0) 0.47 (0.27–0.80) 0.006* 0.32 (0.16–0.63) 0.001* Middle-income (1–5 million UgShs) 114 (27.5) 1.00 - – 1.00 - – Upper-income (> 5 million UgShs) 2 (0.5) 1.00 - – 1.00 - –

Prison status On remand 292 (70.5) 1.77 (0.80–3.89) 0.16 2.07 (0.83–5.12) 0.12 Convicted not sentenced 94 (22.7) 4.28 (1.67–10.96) 0.002* 4.87 (1.66–14.26) 0.004** Sentenced 28 (6.8) 1.00 - – 1.00 - –

Current living situation in prison Regular incarceration 228 (55.1) 0.91 (0.54–1.54) 0.72 0.68 (0.34–1.34) 0.27 Solitary confinement 70 (16.9) 0.43 (0.22–0.81) 0.01* 0.35 (0.16–

0.74) 0.006* Incarceration with hard labour 116 (28.0) 1.00 - – 1.00 - – *Statistically significant at P-value < 0.05 **Confounding noted Socioeconomic status refers to the mean monthly income as reported by a study participant in the year prior to their current incarceration

Those incarcerated individuals would help in preventing mental disorders and their comorbidities.

Lastly, the field of forensic psychiatry in Uganda would significantly benefit from more comprehensive, longitudinal and na- tionwide studies to attain a clear picture of the actual magnitude of the burden of mental disorders in Ugandan prisons.

Individual current diagnosis refers to a major primary psychiatric disorder diagnosed in a study participant at the time of administering and as determined by the responses to the M.I.N.I Version 6.0 regardless of the timing, duration, frequency, comorbidity or presence of other multiple diagnoses.

Parenting style refers to the type of upbringing that the participant underwent and this was assessed by asking the study participant to briefly describe the na- ture of interaction with their parents or guardians.

Past traumatic brain injury refers to a study partici- pant reporting a history of head trauma associated with either loss of consciousness, nausea and/or vomiting, open wound, raccoon eyes, bleeding or discharge from the ears and/or nose.

Category of crime refers to the classification of the offense of which the study participant is alleged to have committed or is convicted of, as either violent, non- violent or drug-related, and this was assessed by asking the participant the nature of the offense of which he/she was accused.

Past psychological trauma refers to a study participant reporting a history of subjective or clinically significant distress that impaired their social or occupational functioning following witnessing or involvement in a physically or emotionally traumatic event but does not fulfill the DSM-IV-TR criteria for any mental disorder.

Available follow-up services refer to general and mental health services that are readily available and have been accessed by the study participants for follow-ups during incarceration as reported by the participant, and where they are found with options including prison- based outreach programs by non-prison health workers, the nearest regional referral hospital i.e. Mbarara, and the prison health facility.

Regular incarceration refers to the current living situ- ation in prison as reported by the study participants that does not include solitary confinement or incarceration with hard labor.

Current episode refers to a study participant having psychiatric symptoms as determined by the responses to the queries in the M.I.N.I Version 6.0 and present at the time of administering the M.I.N.I that meet the diagnos- tic criterion for a particular psychiatric disorder as per DSM-IV-TR.

Past episode refers to a study participant having a history of psychiatric symptoms as determined by the responses to the queries in the M.I.N.I Version 6.0 and at the time of administering the M.I.N.I that meet the diagnostic criterion for a particular psychiatric disorder as per DSM-IV-TR. 10Lifetime episode refers to a study participant having psychiatric symptoms at least once in their lifetime as determined by the responses to the queries in the M.I.N.I Version 6.0 and at the time of administering the M.I.N.I that meet the diagnostic criterion for a particular psychiatric disorder as per DSM-IV-TR. 11Suicidality refers to the presence and severity of suicidal ideations, suicidal intent with or without an associated suicidal plan as well as suicidal attempts in a study participant within the past 1 month as determined by the responses to the queries in the M.I.N.I Version.

RIGHT TO A FAIR HEARING

The right to a fair hearing guaranteed under Article 28[159] is underpinned by the concepts of natural justice and due process. The right (in this primary features and guarantees) is

[159] Constitution of the Republic of Uganda, 1995 (As amended)

non derogable in light of Article 44(b)[160] and pertains to both courts and tribunals and is respect of civil and criminal matters. The primary features of the right are provided under Article 28 (1),[161] viz:

(a) A speedy trial (or trial within a reasonable time)

(b) A public trial

(c) A trial before an independent and impartial court.

What constitutes a speedy trial (or trial within a reasonable time) is not defined and seems to be dependent on the socio-economic conditions, especially in the Third World Commonwealth Countries: DPP v. Tokai[162] (Trinidad and Tobago); Bell v. DPP [163] (Jamaica) (Contrast with a 14 month delay in New Zealand: Martin v. Tuaranga District Court.[164]

Recent trial before the Kotido Field Court Martial win two and half hours was represented by the Government as an instance of a 'speedy trial', but was it intended that a trial be carried in haste at the expense of fairness and in disregard of the guarantees that buttress it under article 28 (3)?[165] The trial in public is to endure the public appraisal of the fairness of the trial, save that trial can be conducted in camera (outside public purview) where matters of national security or protection of morals is in question-thus the right to information in the hands of state (testimony before parliamentary committee) and its use in judicial proceedings before a court was was subjected to it being heard in camera under article 28 (2): Tinyefunza case.[166]

An independent Court/Tribunal implies that the officers of the court should not be subject to the authority or direction of another organ or person-thus provisions of the referendum other provisions Act 1999 which mandated Judges to frame referendum question was

[160] Ibid
[161] Ibid
[162] (1996) 2 LRC 314 (Trinidad & Tobago)
[163] (1986) LRC (Const) 39
[164] (1995) 2 LRC 788).
[165] Constitution of the Republic of Uganda, 1995(As amended)
[166] (Constitutional Appeal-1997/1)

considered to be a contravention of Article 28 (1)[167] as far as it affected the independence of the Judges: Dr. Rwanyarare & Anor v. Attorney General,[168] On the other hand an impartial court imports the idea there should not be a likelihood of bias in the court or any one of its officers- thus where the trial Judge had close connections with the government in power of which the accused was charged with attempt to overthrow by arms (treason), the trial was held to have not been impartial: Professor Isaac Newton Ojok v. Uganda.[169] Similarly, a Lord of the House of Lords in UK was asked to step down on account that his wife worked for Amnesty International (an organization that was at the centre of the efforts to have Pinochet tried for crimes against humanity): Pinochet case[170]
The right to a fair trial is buttressed by several guarantees which are central to criminal proceedings. First is the right to presumption of innocence under Article 28 (3) (a)[171] which places the onus of proving guilt on the prosecution and beyond reasonable doubt, save the instance where the reverse onus is admitted as under Article 28 (4).[172] The right also prohibits situations in which there is a pre trial prejudging of the guilt of the individual (e.g. where authorities make pronouncements of guilt).
The reverse onus is **prima facie** regarded to contravene the right to presumption of innocence. Thus where a law, the Narcotics Control Act, provided that a person found in possession of prohibited narcotic was to be presumed, unless the accused showed the contrary, to be in possession for the purpose of trafficking, this instance of reverse onus was seen as contravening the right to presumption of innocence: The Queen v. Oakes[173]
Laws shifting the onus proof included the administration of Karamoja Act. Although it could also be said to extend to administrative authorities as stipulated under Article 42.[174]

[167] Constitution of the Republic of Uganda, 1995(As amended)
[168] Constitutional petition No. 5/1999.
[169] crim. Appeal No. 33/1991.
[170] R., ex parte Pinochet v Bartle and ors, Appeal, [1999] UKHL 17, [2000] 1 AC 147,
[171] Constitution of the Republic of Uganda, 1995(As amended)
[172] Ibid
[173] (1987) LRC (Const) 477 (Canada SC).
[174] Constitution of the Republic of Uganda, 1995(As amended)

Second, individual before a court is entitled to be informed in a language that he or she understands the criminal charges proffered against him as stipulated under Article 28 (3) (b).[175] The corollary is the right to be accorded the facilities of an interpreter where an individual does not understand language of the court under Article 28 (3) (f).[176]

Thus where a trial was conducted in English, in which the appellant had been charged with the possession of unauthorized literature and he only understood Portuguese and his native Mozambican language, the Kenyan High Court held that there was an infringement of the right to be afforded with the services of an interpreter: Andrea v. Republic[177]

Thirdly the individual is guaranteed a rubric of rights crucial in the defense of the criminal charges against him or her under article 28 (3) (c), (d) and (e), and these pertain to preparation and actual defense. An individual thus has a right to adequate time and facilities to prepare a defense as well as the right to legal representation during the actual defense of the case (and where criminal charges carry sentences of death or life imprisonment, legal representation is at the expense of the state).

The right to adequate time and facilities for preparation of legal defense has been considered to include the right to seek an adjournment to seek services of an advocate where counsel retained withdrew from handling appellants case: Zackary Kataryeba v. Uganda[178]; although this was further, in light of absence of legal counsel during the hearing before the court, an infringement of the right to legal representation: see also Muyimba &Ors v. Uganda,[179] where the advocate was unable to be present at the trial in Masaka as he was engaged in court in Kampala on date of hearing of case in Masaka.

In Esau Namanda case,[180] it was held that a summary conviction of the appellant of perjury on account of discrepancies in his testimony as to his age was contrary to his constitutional right to be 'informed of his offence' and to permit him to 'prepare his defense' (under article 15 (2) (b) and (the 1967constitution)[18]. The right to legal

[175] Ibid
[176] Constitution of the Republic of Uganda, 1995(As amended)
[177] (1970) EA 26. See also Esau Namanda v. Uganda (1993) Kampala Law Reports 38
[178] (1996) HCB 36
[179] (1969) EA 433
[180] Esau Namanda v. Uganda (1993) Kampala Law Reports 38

representation at expense of the State (for indigent persons) has been recognized by South African Courts.[181]

The question of whether the right to legal representation includes a right to 'legal aid' for the indigent (poor) has been raised[182]

Fourth the individual is entitled to equality of arms under Article 28 (3) (g)[183] (i.e. to cause attendance and examination of witness, submission of evidence, etc). Fifth, an individual has a right to be tried in presence under Article 28 (5)[184], and is thus guaranteed against trial in absentia (save situations of disruptive behavior in court).

Where a trial magistrate and a plea of guilt in respect of not only the accused who had been brought to court on day of hearing but also three other accused charged jointly (but were not in court that day), the high court held , on appeal, that there had been a failure on the part of the magistrate to address his mind to article 28(5) which entitles an accused person to be present at his trial. [185]

Sixth an individual has a right to specific guarantees obtaining as tenets of criminal law, including a right against **ex post facto** laws (in terms of offences and severe penalties) (article 28 (7) and (8),[186] a right against double jeopardy (in respect of conviction, acquittal and pardon) (Article 28 (9) and (10),[187] a right against self incrimination under article 28 (11)[188] (extending to spouse) and a right to trial for offences capable of a clear definition under article 28 (12).[189]

The right **against ex post facto** laws and to trial for offences capable of clear definition are premised on the notion that an individual cannot be able to determine that his present conduct will at a future date be an offence or carry a severer penalty, or even that his

[181] State v. Vermann; State v. DuPleiss (1995) 2 LRC 252.
[182] see e.g. Centre for Legal Research & Anor v. State of Kerala (1987) LRC (Const) 544 (India SC).see also recent advocates (Amendment) Act 2002 requiring advocates to avail free legal assistance as part of their practice, etc.
[183] Constitution of the Republic of Uganda, 1995 (As amended)
[184] Ibid
[185] Zackary Kataryeba v. Uganda (1996) HCB 36
[186] Constitution of the Republic of Uganda, 1995 (As amended)
[187] Ibid
[188] Ibid
[189] Ibid

conduct is in fact proscribed (prohibited) under the law. The Constitutional Court had considered the offence of witchcraft under the Witchcraft Act incapable of precise definition as to offend Article 28 (12),[190] but this was overruled by the Supreme Court: **Abuki case** (1996/1997). On the other hand, the law of false news has been held to vague as to meaning of the words constituting the offence,incl. 'publish', fear or alarm, 'public', 'statement' and 'false' :[191] see also dissenting judgment of Twinomujuni in Onyango-Obbo & Anor v. Attorney General.[192] The right against self incrimination makes the accused (and spouse) competent but not compellable witnesses. [193]

The freedoms from slavery and servitude guaranteed under Article 25(1)[194] are non derogable under article 44(b). On the other hand, the freedom from forced labor is not so, given that certain activities do not come under definition of forced labor under Article 25(3)[195], including service in the armed forces.

For conscientious objection to military service as 'forced labor': Attorney General v. Major General Tinyefunza, Constitutional Appeal No. 1/1998 (esp. Justice Oder). In the case ex parte Nasreen (1973), the High Court of Kenya held that and order directing a wife to return to her husband was tantamount to placing her in a state of servitude (in addition to violation of her rights to liberty and freedom of movement).

CHAPTER FIVE

[190] Constitution of the Republic of Uganda, 1995 (As amended)
[191] Mark Cahvunduka & Anor v. Minister for Home Affairs, case No. 36/2000 (Zimbabwe);
[192] Constitutional petition No. 15/1997.
[193] Rex v. Amkeyo (1917) 7 EALR 14
[194] Constitution of the Republic of Uganda, 1995 (As amended)
[195] Ibid

CHARGES AND INDICTMENTS

A charge is a formal written accusation of an offence drawn up either by a police officer or a magistrate and signed by a magistrate to be used in a magistrate's court as a basis for trial or preliminary proceedings. Where the charge is filed in the high court, it is called an indictment. A charge sheet is for the magistrate's court as an indictment is for the high court.

WHAT IS AN INDICTMENT?

An indictment is a formal written accusation of an offence drawn up and signed by the DPP and filed in the registry of the high court to be used as a basis for trial in that court. The purpose of the charge is to state concisely the offence the accused is alleged to have committed and also to bring to the accused 's knowledge the nature of the offence brought against him or her in order for him to prepare his defence. The difference between a charge and an indictment is one of form and not of substance. Both charges and indictments must contain a statement of the offence committed and the particulars of that offence.[196]

The legal provisions for framing charges and indictments are identical under Section 88 MCA[197] and Section 25 TIA [198]accordingly. Case law states that a trial without a charge is a nullity because the accused person would not know the case he is facing. Sir Udo Udoma stated in the case of Judagi & Ors v West Nile district Administration that the failure to frame a charge was a fundamental mistake and therefore the trial was declared a nullity.

CONTENTS OF A CHARGE AND AN INDICTMENT.

A Charge just like an indictment consists of four parts;

a) the commencement,

b) the statement of offence,

c) the particulars of offence and

[196] Section 85 of Magistrates Court Act (Cap 16) and Section 22 Trial on Indictments Act (Cap 23).
[197] Cap 16
[198] Cap 23

d) the conclusion.

Section 85 of MCA and S. 22 of the T.I.A provide that every charge /indictment must contain a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

The rules governing the form of a charge and or indictment are set out in Section 88 of the MCA and s. 25 of the T.I.A respectively.

C O M M E N C E M E N T

This states the place of the courts jurisdiction, indicate that the charge is preferred by the Uganda police, state the name of the police station, date when the charge is preferred, the police charge register no; CPS police charge no 01/06

The rules governing the form of a charge are set out under section 88 of the MCA and these rules are mandatory.

a) A count of a charge shall commence with a statement of the offence, called the statement of the offence.[199]

b) The statement of the offence shall describe the offence shortly in ordinary language, avoiding the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence is one created by enactment shall contain a reference to the section of the enactment creating the offence. i.e murder, contrary to section 188 & 189 of the penal code act cap 120.[200]

c) After the statement of offence, particulars of the offence shall be set out in ordinary language in which the use of technical terms shall not be necessary. (the particulars inform the accused as to the circumstances- e.g time, place, conduct, subject matter of the crime which has thus been alleged against him)

[199] S. 88 a) Magistrates Court Act (Cap 16), for an indictment, see s. 25 Trial on Indictments Act (Cap 23)
[200] (S.88 b) MCA and s.25 b) T.I.A)

only those particulars as are necessary to give the accused reasonable information as to the nature of the charge[201]

d) Where a charge contains more than one count, the counts shall be numbered consecutively i.e 1-20 there must be a reference of the law creating each offence.[202]

e) Where an enactment constituting an offence states the offence to be the doing or the omission to do any one of any different acts in the alternative… may be stated in the alternative in the count charging the offence[203]

f) when a person is charged with any offence under Sections 268-271 of the penal code i.e embezzlement, causing financial loss, it shall be necessary to specify the gross amount of property in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates. [204]

g) the full name and address of the accused must be contained on the charge sheet. It is desirable that his tribe or race, occupation, place of abode should also be inserted. The magistrate should always ensure that the name on the charge sheet is the name of the person standing before the court waiting to be charged.[205]

h) it is sufficient to describe any place, time, thing, matter, act in a charge in ordinary language. The time of the offence need not be stated unless the time is relevant for the commission of the offence e.g in a charge of burglary; the time must be stated because it can only be committed in the night. [206]

[201] S.88 C) of the Magistrates Court Act (Cap 16) and s.25 c) of the Trial on Indictments Act (Cap 23)
[202] S.88 e) of Magistrates Court Act (Cap 16) and s.25 e) of the Trial on Indictments Act (Cap 23)
[203] S. 88 f) of the Magistrates Court Act (Cap 16) and s. 25 f) of the Trial on Indictments Act (Cap 23)
[204] S.88 i) of the Magistrates Court Act (Cap 16) and s.25 i) of the Trial on Indictments Act (Cap 23)
[205] (s.88 of the Magistrates Court Act (Cap 16) and s.25 m) of the Trial on Indictments Act (Cap 23), Yonasani Egalu v R [1942] 9 EACA 65.
[206] Section 88 o) of the Magistrates Court Act (Cap 16) and s.25 o) of the Trial on Indictments Act (Cap 23)

i) the age of the accused is normally irrelevant and may not be stated unless known. It is however necessary to indicate the age in the particulars of offence where need arises e.g in a charge of defilement, the age of the victim is very important.[207]

j) the marital status is not normally necessary but should be indicated in the particulars of the offence where need arises e.g on a charge of adultery by a man contrary to s.154 PCA, the woman with whom a man has sexual intercourse must be a married woman, therefore this fact must be stated.

e) A Charge should be signed by the police officer preferring the charge before filing it in court as a means of authenticating it. After it has been filed, the magistrate should sign it before calling upon the accused to plead to it.

GENERAL RULES ON CHARGES AND INDICTMENTS

In Uganda vs Byaruhanga,[208] it was held that the charge sheet should be signed by the police officer who brings it and the magistrate should not accept to proceed with the charge until it is signed.

An indictment on the other hand must be signed by the director of public prosecutions under s. 26 and it must commence in the form stipulated under section 27 of the Trial on Indictments Act.[209]

JOINDER OF CHARGES/INDICTMENTS

There are two aspects of joinder of charges; - charging more than one offence in one charge or indictment (joinder of offences) and secondly joining more than one accused in the same charge (joinder of persons).

JOINDER OF OFFENCES

The rule for joinder of offences is that where an accused person is alleged to have committed more than one offence, he may be charged in the same proceedings with all

[207] Section 129, Penal Code Act (Cap 120)
[208] (Criminal Session-2010/10) [2013] UGHCCRD 63 (16 October 2013)
[209] Cap 23

the offences provided that the offences are founded on the same facts or form part of a series of offences of the same or similar character.[210]

Thus in order to join more offences than one in the same charge or indictment, it must be established that the offences were founded on the same facts, e.g if the accused successfully commits robbery on a passer-by and run away with the money, in the course of the escape, he is chased by a police man, whom the accused attacks in order to evade justice. Here there are two offences committed, robbery and assault on a policeman. Can these two offences be said to have been founded on the same facts?

Secondly, more offences than one can be joined in one charge or indictment if they form part of a series of offences of the same or similar character. For example, if in the course of an armed robbery on a bank, the security guard at the bank is killed, then obviously the robbery and the killing can be said to have been founded on the same facts and can be joined in one charge.

On the other hand, if one evening a man steals from a shop in kireka trading centre and the same evening he burgles the house of the Barclays bank manager which is 100 yards away and shortly thereafter he rapes a woman at mulago hospital. The question will be whether all these offences are founded on the same facts and therefore can be joined in one charge. These offences are definitely not founded on the same facts. The next question will then be whether these three offences form part of a series of offences of the same or similar character. Theft and burglary may be of the same character the common fact being the accuser's dishonest intention to acquire that which doesn't belong to him. However, notwithstanding the proximity in time and distance, the offence of rape is different in character from the offence of theft. Rape is a sexual offence against morality whereas theft and burglary are offences against property. Therefore, it would be inappropriate to join the charge of rape with that of theft and burglary. It should be noted

[210] S.86 (1) of the Magistrates Court Act (Cap 16) and s.23 (1) of the Trial on Indictments Act (Cap 23)

that where more than one offence is charged in a charge, a description of each offence so charged shall be set out in a separated paragraph of the charge called a count.

In the case of **R v DALIP SINGH (1943) EACA 121.**

The appellant and another were charged with theft of property belonging to the Kenyan and Ugandan railways. In the second count, the appellant was charged and convicted of giving a bribe to a police officer in order to secure his release from arrest and prosecution for the theft. There was evidence that the bribe had been offered shortly after the arrest of the two men.

On appeal to the CA it was argued that there had been an improper joinder of charges as the stealing and the bribery were not offences of a similar character nor were they founded on the same facts.

It was held that although the two offences were different in character, they were founded on the same facts. The evidence adduced indicated that the bribe was offered within a very short time after the appellant and his counterpart were arrested. The test used in determining whether these offences were founded on the same facts was the proximity in time between the commissions of the two offences. It was noted that proximity in time mattered a lot. Section 86(3) of the MCA provides that where before trial or at any stage of the trial, the court is of the opinion that the accused person may be embarrassed in his or her defence by reason of being charged with more than one offence in the same charge the court may direct that any of the offences be tried separately.

Joseph S/O Odoro v R (1954) 21 EACA 311

It was stated that a possible embarrassment might be caused by charging a string of different offences in the same charge. It would be unfair to put a man on trial on an indictment containing 40 counts involving distinct charges of false pretences.

AliKaeli v R (1932) 12 EACA 371

It is a rule of practice that has become a rule of law that no other count can be joined to a count of murder or manslaughter except where the additional count is based precisely on

the same facts as the more serious charge, i.e where murder resulted from arson, the court may exercise its discretion and allow the charges to be tried together.[211]

In AliKaeli v R (1932) 12 EACA 371

The accused was charged with five offences. Two were for manslaughter, one for assaulting a police officer, another for drink driving and the last was for driving a defective motor vehicle. All these were arising out of a motor accident. It was held that no other count can be joined to a charge of murder or manslaughter and that the basis for this rule is that a trial on a charge of that nature was so serious and complicated that the defence should not be embarrassed by the necessity of having to deal at the same time with other matters. The court said that although this ought to be regarded as a rule of practice amounting to a rule of law, the failure to comply with it would not necessarily result in quashing the conviction unless the accused was prejudiced at his trial. If, however the additional charge is based precisely on the same facts as the more serious offence, for example, where murder resulted from arson, the court may exercise its discretion and allow the charges to be tried together.

But under no circumstances can offences committed by two different individuals on different occasions at different places be joined in the same charge merely because the complainant is the same. Such misjoinder would no doubt, render the trial a nullity.

JOINDER OF PERSONS/OFFENDERS

S.87 of the Magistrates Court Act and S.24 of the Trial on Indictments Act provide that the following may be joined in one charge and may be tried together;

a) Persons accused of the same offence committed in the course of the same transaction, i.e if two or more persons jointly commit robbery at a bank, they may be joined in one charge and tried together.

b) Persons accused of an offence and persons accused of abetment, or of an attempt to commit that offence. i.e if A and his brother B get hold of a girl and

[211] See Yowana Sebuzukira v Uganda (1965) E.A 684

throw her down. While A has sexual intercourse with the girl, B holds the girl's legs to assist A. Both A and B can may be joined in one charge and may be tried together for rape.

c) Persons accused of more offences than one of the same kind (that us to say, offences punishable with the same amount of punishment under the same section of the penal code act or any other written law) committed by them jointly within a period of twelve months. For example, if cattle raiders attack a village at night and several people are killed, all the raiders can be jointly charged and tried for the several murders.

d) Persons accused of different offences committed in the course of the same transaction. In the case of Dalip Singh, it was stated that the test to be applied in order to determine whether different offences have been committed in the course of the same transaction is whether it was inherent in the acts constituting the offences, that from the very beginning of the earliest act the other acts were either in contemplation or necessarily arose there from, or whether from the very nature of the transaction in view, they formed component parts of one whole transaction. (Jackie, john and peter are muk students. They decide on one Sunday evening to go for drinks at Bermuda… Jackie drives back and on her way, she knocks a pedestrian, who is injured badly, john gets to the main gate and assaults the guard who refuses to open the gate for the trio after midnight, peter breaks complex window to let Jackie in since the custodian has refused to open. (Jackie- grievous bodily harm, john assault, peter malicious damage to property)

e) Persons accused of any offence under chapters 25 to 29 of the PCA

f) Persons accused of any offence relating to counterfeit coin under chapter 35 of the penal code act and persons accused of any other offence under the chapter relating to the same coin, or of abetment of or of attempting to commit any offence.

It should be noted that if two or more persons are charged or indicted separately, they cannot be tried together even though they are indicted of the murder of one and the same person. Such a trial would be a nullity.

In **Uganda vs Yokasafati Edopa & 8 others**[212] It was held that a misjoinder of persons is a mere irregularity and cannot be treated as having the effect of making the trial a nullity. A nullity can not be rectified and it will lead to the quashing of the conviction.

ALTERNATIVE CHARGES

An alternative charge is an additional count laid against the accused in the same charge where the prosecution is not certain of which offence the facts of the offence will support. The matter is then left in the hands of the court to decide which of the two counts the evidence supports. For example, where the prosecution is not sure whether the conduct of the accused amounts to theft of property or obtaining that property under false pretences, since the two offences are of the same character, one can be charged as an alternative to the other. The commonest example of alternative charges is found in cases of theft with alternative count of receiving stolen property. It should be noted that the alternative charge must be formally charged as an alternative charge. In the case of Harry Isiko v Uganda.[213]

It was held that the whole purpose of a criminal trial with its charges and particulars is to avoid surprise. Failure by the prosecution to formally charge as an alternative charge the offence of theft on the charge sheet, clearly prejudiced the accused as he had no way of knowing what he was to defend. The proper procedure should be to add the theft charge formally as an alternative to the charge of false pretence.

It should further be noted that a conviction on the alternative count can only be entered if

[212] [1977] HCB 3
[213] SCCA No 4 of 1993.

the prosecution fails to prove the main count. In the case of Wanda Alex and two others v Uganda,[214] it was held that a conviction on the alternative count of murder, when the judge had already entered a conviction on the main count of robbery was an error in law. Point of emphasis, an accused cannot be convicted on both the main count and its alternative; the court has to make a choice on one of them if a conviction is to be entered and then no finding is made on the other count. The accused can of course be acquitted of both if the prosecution fails to prove any of them.

DEFECTS IN CHARGES AND INDICTMENTS

A defect in a charge or indictment may come about either because of a failure to comply with the rules of framing charges or indictments under Section 88 M.CA and Section 25 T.I.A, or as a result of a mis joinder of offences or persons. However, whatever error or defect there may be, the validity of the proceedings cannot be questioned unless such error is material to the merits of the case and involves a miscarriage of justice.

In the case of Uganda v Borespeyo Mpaya,[215] it was stated that a miscarriage of justice occurs where by reason of a mistake, omission or irregularity in trial, the appellant has lost chance of acquittal which was otherwise open to him.

In the case of **Uganda Vs Dickens Elatu and another**,[216] the two parties were charged under the following charge sheet.

Statement of offence

Adultery contrary to section 150 A (1) and (2) of the penal code.

Particulars of offence

Count no 1. Dickens Elatu on the 22nd day of October 1971, at oyama village, k'do subcounty, kaberamaido county in the Teso district, you were found committing adultery with Bibiyan Akello, a married woman not being your wife.

[214] SCCA No 42 of 1995
[215] [1975] HCB 245
[216] HC Revision Case No.71 of 1972.

Count no II. Bibian Akello on the 22nd day of October 1971, at oyama village, k'do subcounty, kaberamaido county in the Teso district, you were found committing adultery with Dickens Elatu, not being your husband.

What are the defects in this charge?

While accepting this as an irregularity, the learned judge held that it did not occasion a miscarriage of justice. The accused was not in anyway misled as to the nature of the offences with which they were charged. There was therefore no miscarriage of justice.

DUPLICITY OF CHARGES

A charge whish is duplex is defective and may be bad in law if the defect cannot be cured by correction of otherwise. If two or more offences are included in one count, the charge is bad for duplicity because only one offence can be charged in a count. Two or more offences can be charged in one charge provided they are contained in separate counts. For instance, if the accused has assaulted two persons at the same time, the accused may be charged with the assault of the two persons in the same charge, but the assault on each person is to be charged in a separate count because assaulting any person is a complete and separate offence even if committed in the same transaction. Similarly, if two accused persons assault a person on two different occasions, they can not be charged in one count or same charge sheet, but in separate charge sheets so that each person will be tried separately. It is therefore clear that a charge is bad for duplicity if it contains a misjoinder of counts or offences, or a misjoinder of persons or offenders.

UNNECESSARY CHARGES.

A) ATTEMPTS:

Where a person is charged with having committed an offence, it is not necessary to add a count for attempt to commit the same offence since he can be convicted of attempt.[217]

[217] Section 146 Magistrates Court Act (Cap 16), Section 88 Trial on Indictments Act (Cap 23)

B) ACCESSORY AFTER THE FACT

When a person is charged of an offence, he may be convicted of being an accessory after the fact to the commission of the offence even without being so charged in accordance with Section 147 of the Magistrates Court Act[218] and Section 89 Trial Indictments Act.[219]

C) MINOR AND COGNATE OFFENCE

Where a person is charged of an offence and facts are proved which reduce it to a minor cognate offence, he may be convicted of the minor cognate offence although he wasn't charged with it.[220] The offence must be both minor that is of less gravity and cognate that is, of the same kind, nature, genus, or species. For instance, a person charged with murder, may be convicted of manslaughter, a person charged with robbery may be convicted of theft, a person charged with assault occasioning actual bodily harm may be charged with common assault.[221]

AMENDMENT OF CHARGES/INDICTMENTS

A magistrate is given power under Section 132[222] to amend a charge if he is satisfied that no injustice or prejudice will be caused to the accused. The power may be exercised under any of the following circumstances;

a) where the evidence discloses an offence other than the offence with which the accused is charged
b) where the charge is defective in a material particular. (A defective charge is one that is imperfect.)[223]
c) Where the accused desires to plead guilty to an offence other than the offence with which the accused is charged

[218] Cap 16
[219] Cap 23
[220] Section 145 Magistrates Court Act (Cap 16), Section 87 Trial on Indictments Act (Cap 23)
[221] See Ndecho v R 1951 18 EACA 171, R v Mayanja 6 ULR 11.
[222] Magistrates Court Act (Cap 16)
[223] Uganda vs Dickson Elatu. HC Revision Case No.71 of 1972.

Then the court, if it is satisfied that no injustice will be caused to the accused thereby, may make an order for the alteration of the charge by way of its amendment or by the substitution or addition of a new charge as it thinks necessary to meet the circumstances of the case.

Under S.132 (2) of the Magistrates Court Act,[224] where the charge is altered, the call shall thereupon call upon the accused person to plead to the altered charge. The accused will have a right to give or call such further evidence on his or her behalf as he or she may wish.

The amendment of the charge is made at the request of or application of the prosecutor and the court has discretion to permit the amendment before judgment is pronounced. The court can amend a charge at any stage of the trial, even after the close of the case for the defence provided no injustice is caused to the accused.[225]

Amendments should be limited to periods before judgment is pronounced otherwise grave injustice would be caused to the accused by having to re open the case after a verdict of an acquittal.

In Maulidi Abdulla Chengo v R, [226]a new charge which carried a more sever penalty than the original charge was substituted at the close of the case for the defence. It was held that such substitution at such a late stage of an entirely new charge for a more serious offence couldn't be said to have been made without injustice to the appellant.

Look at s.132(6) of the Magistrates Court Act (Cap 16), the prosecution may be ordered by the court to pay costs incurred to the accused owing to the alteration of the charge.

[224] Cap 16
[225] See S.50 and s.51 Trial on Indictments Act for alteration of indictments
[226] Maulidi Abdulla Chengo v R

CHAPTER SIX

CRIMINAL PROFILING

One of the more widely recognized and practiced sub specialities within criminology is that of criminal profiling. It has a long history, as detailed in Turvey (2008a). It also boasts a small library of distinct literature, with differ- ent methods and subspecialities all its own. Criminal profiling is a practice that has seen increasing popular and media attention over the past several decades. It has been depicted in popular fic- tion such as films like Silence of the Lambs (1991) and television programs like Criminal Minds (2005–present). It has also been applied in a number of high profile cases, including the "Washington Snipers" (see Turvey and McGrath, 2005, for an extended discussion of profiling and the media in the D.C. Sniper case). As a result, students of criminology commonly express an interest in studying criminal profiling with a view to becoming profilers themselves. At the same time, many professionals, including criminologists and psycholo- gists, have rather abruptly entered the field by hanging out shingles proclaiming related areas of expertise. The resulting student push and practitioner pull have made it a subject of keen interest, but confusion remains among many. So while advances have been made in the field and interest is high, there is still much debate about the efficacy of profiling and even fundamental educational standards. It is the purpose of this chapter to present an overview of criminal profiling and what it involves in relation to the forensic criminologist.

First, we will examine what criminal profiling is, what its goals are, what is necessary to complete a profile, as well as the ways in which a profile may assist with inves- tigations. Second, we will discuss the logic and reasoning utilized by profil- ers, including the basic theories behind practical approaches to profiling, the differences between inductive and deductive logic, and the methods that use them. Next, we will address the main types of

profiling, discuss their strengths and criticisms, and touch on the background knowledge required by the pro- filer to use each of these methods. Finally, we will address the educational requirements of the profiler and comment on the appropriate pathways necessary within university, the importance of the Socratic method as it relates to studying specific cases, and issues with undertaking short courses. We will also discuss those areas in which the criminologist may be able to provide profil- ing advice, as well as the perils and pitfalls doing so may present. First, we turn to a broad introduction of profiling, examining definitional issues, goals, and the like.

Trial Phase: A stage of criminal profiling that involves providing information about a crime or series of crimes for which there is a suspected offender. Victim Exposure: The amount of exposure to harmful elements experienced by a victim. Victimology: An examination of all aspects of a victim's life, including lifestyle, hobbies, habits, friends, enemies, and demographic features.

What is Criminal profiling?

Although the practice of criminal profiling has been documented for centuries in different forms (Turvey, 2008a), the term offender profiling was first put into regular use by a small group of FBI analysts. They used it to describe the process of making inferences about offenders' characteristics from their actions during a crime (Canter, 1995). In its most basic form, criminal profiling is an investi- gative tool that discerns offender characteristics from the crime scene and the behavior of the offenders. It is an inferential process that involves the analysis of offender behavior, their interactions with the crime scene and the victim, and their choices during the crime (Petherick, 2003). Despite its appearing in many of the early works on profiling, the FBI no lon- ger uses the term criminal profiling. This term and others like it, such as criminal personality profiling and psychological profiling, have been deliberately replaced by the general term criminal investigative analysis (CIA). This newer term covers profiling and a number of other services: indirect personality assessments; equivocal death analysis (otherwise known as psychological autopsy, meaning determining from information and evidence gathered

whether a death was accidental, natural, suicide, or homicide); and trial strategy. Regardless of the change in labeling, the FBI's methods in this regard remains unchanged. The process of criminal investigative analysis will be discussed in more detail in the inductive methods section later.

GOALS OF CRIMINAL PROFILING

Irrespective of the nomenclature used to describe it, or the actual processes uti- lized, all methods of profiling have a similar goal. Throughout its application across time, profiling has been designed to help law enforcement develop a viable suspect pool in unsolved crimes, either by narrowing an extensive list of suspects to a small and more manageable group, or by providing new areas of inquiry[227]. As noted by Napier and Baker[228], "the purpose of offender profiling is to supply offender characteristics to help investigators narrow the field of suspects based on the characteristics of the crime scene and initial investigative information." It is not the goal of profiling to identify a particular person or to give his or her identity. Douglas, Ressler, Burgess, and Hartman, 1986), and Muller (2000) notes that the profile will rarely be so accurate as to suggest a certain individual as being responsible.

It has been demonstrated that the newer term was developed to distinguish FBI "profilers" from psychologists with actual education in the behavioral sciences, as well as to facilitate courtroom admissibility of profiling conclusions[229]

Nor should it, as determining guilt or innocence of any individual is the task of the trier of fact, not the profiler. Petherick and Turvey[230] identify two main phases of profiling, divided by their goals and priorities. The first is the investigative phase, which involves dis- cerning features of the unknown offender for the known crime. It is this phase that

[227] Homant and Kennedy, 1998
[228] 2005, p. 615
[229] Turvey, 2008a.
[230] 2008a

will be most aligned to stereotypical notions of profiling. In the investiga- tive phase, there are seven primary goals (p. 138):

1. Evaluate the nature and value of forensic and behavioral evidence to a particular crime or series of related crimes
2. Reduce the viable suspect pool in a criminal investigation
3. Prioritize the investigation into remaining suspects
4. Link potentially related crimes by identifying crime scene indicators and behavior patterns (i.e., modus operandi [MO] and signature)
5. Assess the potential for escalation of nuisance criminal behavior to more serious or more violent crimes (i.e., harassment, stalking, voyeurism)
6. Provide investigators with investigatively relevant leads and strategies
7. Help keep the overall investigation on track and undistracted by offering fresh insights

The second phase identified is the trial phase, which involves providing information about a crime or series of crimes for which there is a suspected offender. A profile can be useful at this stage of an investigation because it can assist in developing proper interview and interrogation strategies among other things; further, a profile may be used in court as expert evidence to argue for aggravating circumstances and the like, sometimes meaning the dif- ference between life-imprisonment and death penalty cases. Therefore, during the trial phase of an investigation, a profiler's goals are to[231]:

1. Evaluate the nature and value of forensic and behavioral evidence to a particular crime or series of related crimes
2. Develop interview or interrogation strategies
3. Help develop insight into offender fantasy and motivations
4. Develop insight into offender motive and intent before, during, and after the commission of a crime (i.e., levels of planning, evidence of remorse, precautionary acts, etc.)

[231] Petherick and Turvey, 2008a, p. 138:

5. Link potentially related crimes by identifying crime scene indicators and behavior patterns (i.e., MO and signature)

The goals of profiling may also be dictated in part by the type of crime being profiled and by the needs of the investigative team requesting help.

Also, some crimes are more suited to profiling than others. Therefore, it is also necessary to consider the types of crimes that profiling might assist in and whether a case requires the use of what may be an expensive and time- consuming tool. Generally, it is noted that profiling is most suited to crimes involving psy- chopathology, or where there is some evidence of psychological dysfunction, [232] or in crimes of a sexual nature because they involve more interaction between the offender and the victim[233]. Such crimes typically involve murder, rape, arson, and bombing but may also include anonymous letter writing (Davis, 1999; Homant, 1999; Strano, 2004) and other crimes of an unusual, bizarre, violent, sexual or repetitive in nature (Cook and Hinman, 1999; Geberth, 1981; Palermo, 2002; Royal Canadian Mounted Police, 2005; Strano, 2004). It has also been used in hos- tage negotiations and threats (Davis, 1999; Douglas and Hazelwood, 1986) and assessing suicidality (see Canter, 1999; Homant and Kennedy, 1998; La Fon, 2002). Teten (1989, pp. 366–367) provides this poignant commen- tary, summing up the issue nicely:

Therefore, while it is theoretically possible to prepare an accurate profile of the perpetrator in any type of crime, it is not feasible. Psychological profiling should be utilised only in those types of crimes where the crime-scene investigation is as complete and thorough as possible.

As a practical matter, this procedure can be expected to provide usable data in only a few highly specific types of crimes. Even then, it is totally dependent upon the psychological value of the evidence collected. Most of the offences, to be appropriate for profiling, must feature some form of overt sexual activity or a loss of contact with reality. Generally speaking, the types of crimes in which profiling has been most successful include:

[232] McCann, 1992; Pinizzotto, 1984
[233] Nowikowski, 1995

Homicides that involve sexual activity, or appear to be sex related Forcible rapes Sexual molestations Indecent exposures Some forms of arson Homicides involving the parents, children or a majority of the members of a family Deaths by hanging These are not the limits of the application of profiling, however, and it has also been applied to more esoteric areas, such as intrusion management in computer security (see Schlarman, 1999), threat management in stalking (see Petherick, 2008), and premises liability in civil actions. Regardless of the fact that profiling can be and has been used to understand a broad range of criminal behaviors, it should be noted that the goals of profiling remain consistent—to narrow the suspect pool, provide new areas of inquiry, keep the investigation on track and undistracted, and understand the behaviors more completely.

INPUTS AND OUTPUTS OF CRIMINAL PROFILING

To successfully complete a profile in a given case, a variety of information may be required, depending on the method used. This ranges from statistical data regarding past crimes, to physical evidence and witness statements, to the reconstruction and interpretation of offender behavior. Ostensibly, the more complete this information, the more accurate profiling inferences can be. If the information is incomplete or incorrect, depending on the profiling method used, certain characteristics may be impossible to determine; at the very least it may seriously undermine the veracity of the conclusions. Therefore, it is gener- ally true that more information is better. For example, the first stage of the FBI method is profiling inputs, and describes those elements necessary to compile the assessment.[234] These elements include a complete synopsis of the crime, location, weather conditions, and complete victim information including domestic setting, employment, reputation, and criminal history. Forensic information relevant to the crime is also necessary; autopsy reports, photographs and toxicology, as well as crime scene photographs of the area and crime scene sketches to help provide an overall picture.

[234] see Douglas, Ressler, Burgess, and Hartman, 1986

However, it may not be said that a limited amount of evidence will produce a limited profile in every case. Some profilers show constraint with the informa- tion or outputs they provide in their profiles, whereas others are considerably more liberal in their estimates. This liberalism is typical of inductive methods which focus more on offense generalizations, and not necessarily on the avail- able evidence, resulting in a broader range of characteristics offered. Inductive methods will be discussed thoroughly later. Turvey[235] is an example of someone who is more conservative in his approach. He argues that in most cases, during the investigative phase only about four relevant offender characteristics can be deductively inferred from crime scene behavior. These are Criminal Skill, Knowledge of the Victim, Knowledge of the Crime Scene, and Knowledge of Methods and Materials.

Although other characteristics are potentially inferable, they are considered less relevant to investigative needs by virtue of failing to narrow the suspect pool or failing to discriminate from the general public, thus not allowing for new avenues of inquiry to be proposed. However, Turvey[236] notes that although only four characteristics are relevant to determining a suspect, after that person is located (during the trial phase), there will be additional ques- tions of forensic interest regarding the crime scene and offender that may be of further value to the court. At the other end of the spectrum is Geberth[237], who provides an exhaus- tive list of those things he believes can be determined from the crime, including:

1. Name
2. Age
3. Sex
4. Race
5. Height and weight

[235] (2008b)
[236] (2008b)
[237] (1996)

6. Marital status a. Children, ages and sex b. Wife, pregnant and recent birth

7. Education level

8. Socioeconomic status

9. History of, and type of, sexual problems

10. Physical abnormalities and/or defects such as a. Acne, speech impediment, obese, walks with a limp, etc.

11. Residence, condition of, etc.

12. Automobile, condition of, etc.

13. Behavior including any noticeable change recently and describe

14. Mannerisms and personality

15. Employment, recently laid off? Skills associated with job?

16. Day or night person?

17. Users of drugs or alcohol, recent increase?

18. Dress, sloppy or neat? Type of clothing?

19. Known to carry, collect, or display weapons? What type?

20. Rigid versus flexible personality

This list is consistent with Ault and Reese (1980) and O'Toole (2004), who provide exhaustive lists of inferable offender traits and emotional states, cov- ering almost every facet of their past, present, and future.

It should be noted, however, that the means for inferring these broader and less investigatively relevant traits is typically through comparison to past offenders who commit- ted similar crimes, and not through a process of case-based deduction. The problems inherent in this process will become clear in the following section discussing how profilers may render their findings.

LOGIC AND REASONING IN THE METHODS OF CRIMINAL PROFILING

The following sections will briefly introduce readers to the logic and reason- ing used within profiling before covering the major approaches to profiling that are available. Far

from being an in-depth exposition, these sections seek to provide readers the necessary and relevant points of each. For a more in-depth treatment of these matters, readers should consult Petherick (2003), Petherick (2005), and Petherick and Turvey (2008b).

Logic and Reasoning

Before considering the different methods of criminal profiling, we need to can- vass some fundamental issues related to logic and reasoning. The reason is that, regardless of profiling method used, they differ most according to the way in which the final conclusion is rendered. It could be said that there are predominantly two types of logic used: the first is inductive and the second is deductive. Inductive methods are those relying on statistical or correlational reasoning, and these methods will be discussed forthwith. The final method, Behavioral Evidence Analysis, is deductively oriented and will be discussed in "Deduction: The Suggested Approach" section later. The science of logic is variously defined, and in the broadest sense it is the process of argumentation. As Farber (1942, p. 41) argues, logic is "a unified discipline which investigates the structure and validity of ordered knowledge." According to Bhattacharyya (1958, p. 326):

Logic is usually defined as the science of valid thought. But as thought may mean either the act of thinking or the object of thought, we get two definitions of logic: logic as the science (1) of the act of valid thinking, or (2) of the objects of valid thinking. Stock (2004, p. 8) suggests:

Logic may be declared to be both the science and the art of thinking. It is the art of thinking in the same sense in which grammar is the art of speaking. Grammar is not in itself the right use of words, but a knowledge of it enables men to use words correctly. In the same way a knowledge of logic enables men to think correctly or at least to avoid incorrect thoughts. As an art, logic may be called the navigation of the sea of thought. It is the purpose of logic to analyze the methods by which valid judgements are obtained in any science or discourse, which is met by the formulation of general laws that dictate the validity of judgements (Farber, 1942). Without a solid foun- dation in logic and reasoning, the criminologist cannot proceed competently.

INDUCTIVE CRIMINAL PROFILING

An inductive argument provides a conclusion (or offender characteristic) that is made likely, or a matter of probability, by offering supporting argumentation. In profiling, this support often includes things like physical and behavioral evidence, research findings, or even profiler experience and expertise. A good inductive argument will provide strong support for the conclusion offered, but this still does not make the argument necessarily correct. In reality, even the best inductive argument is a generalization, hypothesis, or theory awaiting ver- ification through testing (Turvey, 2008a). Although inductive generalizations may be true in some—even many—cases, there is no way to guarantee that they will apply to the case being profiled. A key identifying feature of inductive profiles is the use of qualifiers, such as probably, may be, or typically, among others, highlighting the probabilistic nature of the assessment. For example, crime figures from the United States (Federal Bureau of Investigation, 2002) provide that approximately 90% of offenders who committed murder in that year were male. Even though this relationship is relatively strong, it still does not mean that a male will have committed every homicide in that year. As it stands, this statistic could be used to make the inductive argument that an offender in a given case is more likely, or even probably, a male, all else being equal. That is, a profiler using an inductive method may state "the offender in this case is most likely male." However, this argument based on nationwide statistics could very easily be wrong. This happens because in the examination of individual cases, all things are not equal. The likelihood of an offender being male changes based on a variety of factors, including the type of offense, the type of weapon used, and the sex of the victim, to name but a few, and even taking these things into account does not guarantee the accuracy of the predicted characteristic (in this case, the sex). Therefore, looking narrowly at just the issue of male versus female homicide offenders doesn't accurately reflect the complexity that will exist in the context of a real case. Apart from context, two of the issues which may seriously impact on the gener- alizability of any statistical data used to generate inductive theories are sample size and research methodology. This is

perhaps best illustrated by a specific FBI study (Burgess and Ressler, 1985) that originally set the stage for the sub- sequently developed method of profiling. The study, which was the basis for the FBI's entire profiling method, involved only 36 offenders (not all of whom were serial offenders). Furthermore, the methodology of the study was heavily criticized by the peer reviewers who noted, among other things, small sample size (Burgess, 2003) and a lack of inter-rater reliability (consistency between dif- ferent individuals rating the offender) (Fox, 2004). Others have been critical of this study as well, with Canter (2004, p. 6) noting that "the FBI agents conduct- ing the study did not select random or even a large sample of all offenders."

The FBI, being very much aware of the limitations of its inductive profiling methods, provides more than a qualifier with its criminal investigative analysis reports (profiles). It actually goes so far as to provide a broad disclaimer at the beginning of each investigative profile. While the wording may vary, the theme is consistent, with the following example being representative (Vorpagel and Harrington, 1998, p. 62):

It should be noted that the attached analysis is not a substitute for a thorough and well-planned investigation and should not be considered all inclusive. The information provided is based upon reviewing, analysing, and researching criminal cases similar to the case submitted by the requesting agency. The final analysis is based upon the probabilities, noting, however, that no two criminal personalities are exactly alike, and therefore the offender at times may not always fit the profile in every category. This standard FBI disclaimer signals the weakness of purely inductive profiling methodologies.

Inductive methods of Criminal profiling

The following is a basic primer on the major forms of inductive profiling methodology.

Criminal Investigative Analysis Without doubt, the best known method of criminal profiling is that of the FBI, known variously as criminal investigative analysis (CIA) and crime scene analysis. This approach arose primarily from the study mentioned previously, which was conducted between 1979 and 1983, with the research focus on the

development of typologies from an examination of various features of crimes perpetrated by incarcerated sexual murderers (see Burgess and Ressler, 1985). The goal was to determine whether there are any consistent features across offenses that may be useful in classifying future offenders (Petherick, 2005). A number of publications have arisen from this original research, includ- ing Burgess, Hartman, Ressler, Douglas, and McCormack (1986); Ressler and Burgess (1985); Ressler, Burgess, and Douglas (1988); Ressler, Burgess, Douglas, Hartman, and D'Agostino (1986); and Ressler, Burgess, Hartman, Douglas, and McCormack (1986).

The study resulted in an organized/disorganized dichotomy, which became the FBI profiling method. This dichotomy classifies offenders by virtue of the level of sophistication, planning, and competence evident in the crime scene. An organized crime scene is one with evidence of planning, where the victim is a targeted stranger, the crime scene reflects overall control, there are restraints used, and aggressive acts occur prior to death. This suggests that these offenders are organized in their daily life with the crime scene being a reflection of their personality, meaning they will be average to above average in intelligence, be socially competent, prefer skilled work, have a high birth order, have a controlled mood during the crime, and may also use alcohol during the crime. A disorganized crime scene shows spontaneity, where the victim or location is known to the offender, the crime scene is random and sloppy, there is sudden violence, minimal restraints are used, and there are sexual acts after death. These characteristics are again suggestive of the per- sonality of these offenders, with disorganized offenders being below average in intelligence, being socially inadequate, having a low birth order, having an anxious mood during the crime, and involving the minimal use of alcohol during the offense. Despite having these mutually exclusive classifications, it is generally held that no offender will fit neatly into either category, with most offenders being somewhere between the two; these offenders are called "mixed."

Despite suggestions that the organized and disorganized terminology was an outgrowth of the study conducted in the late 1970s and early 1980s and pub- lished in 1985, it had

actually been in use for some time. The terminology first appeared in its original form of organized nonsocial and disorganized asocial in "The Lust Murderer" in 1980 (see Hazelwood and Douglas, 1980). As such, the study is best thought of as further developing an existing concept rather than generating a new one.

Like virtually all the profiling methods, CIA is composed of a number of steps or stages in which information about the offense is gathered, and determi- nations are made about its relevance and meaning. Despite the fact that an articulated methodology is available, there is much anecdotal evidence to sug- gest that protagonists of the FBI method do not adhere strictly to all steps or stages. Furthermore, many FBI employed and trained "profilers" are gener- ally not qualified to perform certain analyses proposed as part of the method (for example, crime scene reconstruction; see Chisum, 2000; Superior Court of California, 1999). In theory, CIA is a six-step method, though in reality it is five steps with the sixth step involving the arrest of an offender if one is identified. These first five steps are profiling inputs, decision process models, crime assessment, criminal profile, and investigation. The final phase (ostensibly the sixth) is apprehension. Douglas and Burgess (1986, p. 9) suggest a seven-step process that is "quite similar to that used by clinicians to make a diagnosis and treatment plan." These seven steps are:

Evaluation of the criminal act itself

- Comprehensive evaluation of the specifics of the crime scene(s)
- Comprehensive analysis of the victim
- Evaluation of preliminary police reports
- Evaluation of the medical examiner's autopsy protocol
- Development of profile with critical offender characteristics; and
- Investigative suggestions predicated on the construction of the profile.

The FBI method is one of the most prevalent today; however, despite (or per- haps owing to) its widespread use, this method of profiling has suffered the most criticisms, including:

- The mythology of the FBI profiling unit has led some to suggest the hype is ill deserved (Jenkins, 1994) and enjoys little in the way of a scientific framework or scrutiny (Canter, Alison, Alison, and Wentink, 2004).
- Its popularity may be a function of simplicity in that it requires little or no training or knowledge to apply the prefabricated offender templates to current cases (Petherick, 2005; Turvey, 2008a).
- A number of case dynamics might influence the level of organization or disorganization evident in a case. This includes evidence dynamics, an offender under the influence of controlled substances, an interrupted offense, anger-motivated offenses, or staged crimes (Turvey, 2008a).
- The method simply reduces offender behavior to a few observable parameters (Turvey, 2008a).
- The original study on 36 offenders was considerably flawed and criticized heavily by the peer reviewers (Fox, 2004).
- The classifications were seemingly made on the basis of information about the offenders and the crime scene involved (Homant and Kennedy, 1998) according to the offenders themselves.
- Most offenders will be neither organized nor disorganized, but will fall somewhere between the two extremes (Ressler and Schachtman, 1992) although this "mixed" category is less helpful to investigators because this decreases discrimination between types of offenders (Baker, 2001) and presents a problem because the two categories are supposedly discrete.
- The casework of FBI profilers has been heavily criticized in individual cases (see Darkes, Otto, Poythress, and Starr, 1993; Fox and Levin, 1996; Investigations Subcommittee and Defense Policy Panel of the Committee on Armed Services, 1990; Kopel and Blackman, 1997; Thompson, 1999; Turvey, 2008a). As a conclusion to criminal investigative analysis, let us consider the skills required in

various domains to be able to apply this model. The following chart outlines possible background knowledge and experience which may be necessary to profiling, and whether it is required for this method specifically. A similar chart will be used to describe the background knowledge necessary to apply each method, to assist in conceptualizing and comparing the abilities and strengths of profilers using various types of profiling: Background requirement Research Unnecessary Law enforcement affiliation Helpful Psychology Helpful Investigative Helpful Forensic knowledge Helpful Analytical logic Unnecessary Diagnostic Evaluations Diagnostic evaluations (DEs) do not represent a single profiling method or approach, but instead are generic descriptions of the services offered by psy- chologists and psychiatrists relying on clinical judgment in profiling offenders (Bradley, 2003). These evaluations are done on an as-needed basis (Wilson, Lincoln, and Kocsis, 1997) usually as one part of a broad range of psychological services offered by that individual. Historically, some of the earliest examples of profiling available are diagnostic evaluations, and prior to the formation of the FBI's Behavioral Sciences Unit, police sought the advice of psychologists and psychiatrists on particular crimes with varying results (Towl and Crighton, 1996). In modern terms, the contribution of mental health experts to inves- tigations took shape when various police forces asked if clinical interpreta- tions of unknown offenders might help in identification and apprehension (Canter, 1989). Even though other profiling methods have come to the fore, Copson (1995) claims that over half of the profiling done in the United Kingdom is conducted by psychologists and psychiatrists using a clinical approach. In a study of the range of services offered by police psychologists, Bartol (1996) found that, on average, 2% of the total monthly workload of in-house psychologists was spent profiling, and that 3.4% of the monthly workload of part-time consultants was spent criminal profiling. It is not these results that are of particular inter- est, however, but that 70% of those surveyed did not feel

comfortable giving this advice and felt that the practice was extremely questionable. Furthermore (Bartol, 1996, p. 79),

One well-known police psychologist, with more than 20 years of experience in the field, considered criminal profiling "virtually useless and potentially dangerous." Many of the respondents wrote that much more research needs to be done before the process becomes a useful tool. Without a clear and identifiable process, these evaluations are a little more idio- syncratic and rely to a large degree on the background of the individual compil- ing them. One's education, training, and experience dictate the approach taken at a given point in time, with the profile being an outgrowth of the clinician's understanding of criminals and criminal behavior, personality, and mental ill- ness (Gudjonsson and Copson, 1997). Developmental and clinical issues play a considerable role in DE profiles, and Jackson and Bekerian (1997) dedicate a discussion in their work to these areas, focusing heavily on the application of personality theory to profiling. Boon (1997) describes how psychoanalytic/psychodynamic, learning, dispositional/trait, humanist/cognitive, and alternative/Eastern philosophies affect case assessment. To illustrate how personality theories apply to profile compilation, Boon supplies several cases of extortion to which specific per- sonality characteristics are applied. He concludes that the feedback given in the profile will always be reflective of the psychological framework employed by the clinician, with those employing a psychoanalytic background offering advice typical of the Freudian paradigm and so on. Badcock (1997, p. 10) similarly discusses some of the background issues to offender development (i.e., developmental issues) and clinical issues (such as the prevalence of mental illness in offending populations):

Where developmental issues are great enough and begin early enough they can change the entire concept of what is "normal" for an individual. Everyone tends to assume that what they are used to must be normal and some people grow up with what most others would consider abnormal ideas of the meaning of normality. People who have been seriously abused from an early age, for example, can grow up believing that abuse is the

basis of normal relationships. They may have great difficulties in relating to others in ways that do not include abuse and some of them will become abusers themselves. The implication is that, as these issues have the potential to impact on later behavior by the individual, it is necessary for profilers to have the capacity to understand how these manifest in behavior. Specific issues cited include jeal- ousy, envy, control, power, sadomasochism, fantasy, and paraphilias. Turco (1990), in a widely cited article, provides his own adaptation of the diag- nostic approach through psychodynamic theory. Turco is critical of anyone without clinical experience (p. 151):

The experienced clinician has an underlying inherent understanding of psychopathology, experience with predictability, a capacity to get into the mind of the perpetrator and a scientific approach without moral judgement or prejudice.…The most productive circumstance likely to arise is when the profiler has both clinical (as opposed to academic) training and law enforcement experience. One cannot expect to obtain a graduate degree and make accurate predictions in the absence of a sound theoretical basis or clinical experience. In examining the role of forensic psychiatrists, McGrath (2000, p. 321) pro- vides the following reasons why they may be particularly suited to providing profiles:

Their background in the behavioral sciences and their training in psychopathology place them in an enviable position to deduce personality characteristics from crime scene information. The forensic psychiatrist is in a good position to infer the meaning behind signature behaviors.

Given their training, education, and focus on critical and analytical thinking, the forensic psychiatrist is in a good position to "channel" their training into a new field. Although these may seem obvious areas in which forensic mental health spe- cialists can apply their skills, McGrath also notes that any involvement in the profiling process should not revolve around, or focus on, treatment issues. It is here that we shall turn to the criticisms of diagnostic evaluations:

- Mental health officials must not fall prey to "role confusion" (McGrath, 2000; Petherick, 2006, p. 45) and give treatment advice while attempting to derive the characteristics of the offender.
- While learning and personality theories may play a role, it is difficult, if not impossible, to determine the degree to which they apply in a given case until a structured clinical assessment with the perpetrator is undertaken by a mental health professional.
- Many clinicians have no investigative experience and so there may be a disconnect between the perceived and actual requirements of an investigation (see Ainsworth, 2001; Canter, 1989; Dietz, 1985; West, 2000; Wilson, Lincoln, and Kocsis, 1997).
- There is a reliance on indirect methods of assessment, including intuition, psychodynamic theories, and statistical reasoning (Gudjonsson and Copson, 1997).
- Without a unified approach, theory, or process, diagnostic evaluations may be hit-and-miss, and any attempts to study the underlying reasoning or logic behind these profiles may be hampered by the inability to reproduce the train of thought that led to profile characteristics. The following chart provides a list of the necessary background knowledge and experience required to perform a diagnostic evaluation.

Investigative Psychology The main advocate of investigative psychology (IP) is David Canter, a British psychologist who promotes a scientific-research-based approach to the study of offender behavior. Investigative psychology is an inductive approach and is dependent on the amount of data collected (McGrath, 2000). Although sample size is a problem for some inductive methods, Canter is constantly carrying out research to improve the samples on which conclusions are based, and rigor- ous social scientific

methods to expand knowledge are employed (Egger, 1998; Petherick, 2003). As a result, the conclusions are still inductive but based on more empirically robust evaluations.

As with the FBI approach, investigative psychology identifies profiling as only one part of an overall methodology. This is explained in Canter (2000, p. 1091):

The domain of investigative psychology covers all aspects of psychology that are relevant to the conduct of criminal and civil investigations. Its focus is on the ways in which criminal activities may be examined and understood in order for the detection of crime to be effective and legal proceedings to be appropriate. As such, investigative psychology is concerned with psychological input to the full range of issues that relate to the management, investigation and prosecution of crime. It is further explained in Canter (2004, p. 7):

The broadening and deepening of the contributions that psychology can make to police investigations, beyond serial killers and personality profiles, to include the effective utilisation of police information, through interviews and from police records, as well the study of police investigations and decision support systems has lead to the identification of a previously unnamed domain of applied psychology… called…Investigative Psychology. According to the program's Web site, investigative psychology provides the following:

[A] scientific and systematic basis to previously subjective approaches to all aspects of the detection, investigation and prosecution of crimes. This behavioral science contribution can be thought of as operating at different stages of any investigation, from that of the crime itself, through the gathering of information and on to the actions of police officers working to identify the criminal then on to the preparation of a case for court.

Canter (1998, p. 11) has also gone to great pains to differentiate IP from "every- day" profiling:

So should psychologists be kept out of the investigation of crimes? Clearly as the Director of the Institute of Investigative Psychology I do think that psychologists have much to

offer to criminal and other investigations. My central point is to make a distinction between "profiling" and Investigative Psychology.

Further, to distinguish between IP and those idiosyncratic profiling approaches, the following is noted (Canter, 1998, p. 11):

Investigative psychology is a much more prosaic activity. It consists of the painstaking examination of patterns of criminal behavior and the testing out of those patterns of trends that may be of value to police investigators.… Investigative psychologists also accept that there are areas of criminal behavior that may be fundamentally enigmatic.

This method, commonly referred to as the five-factor model, has five main components that reflect an offender's past and present. These are interpersonal coherence, significance of time and place, criminal characteristics, criminal career, and forensic awareness. These components will be addressed in turn.

Interpersonal coherence refers to the way people adopt a style of interaction when dealing with others, where crime is an interpersonal transaction involv- ing characteristic ways of dealing with other people (Canter, 1995). Canter believes that offenders treat their victims in a similar way to that in which they treat people in their daily lives; that is, criminals carry out actions that are a direct extension of the transactions they have with other people (Wilson and Soothill, 1996). For example, a rapist who exhibits selfishness with friends, family, and colleagues in daily life will also exhibit selfishness with victims. Similarly, an offender may select victims who possess characteristics of people important to him or her (Muller, 2000). This belief is not unique to IP, and most profiling approaches rely on the notion of interpersonal coherence in developing offender characteristics (Petherick, 2003).

As "interpersonal processes gain much of their psychological nuance from the time and place in which they occur" (Canter, 1989, p. 14), time and space considerations should also be reflective of some aspects of the offender. That is, the time and place may be specifically chosen by the offender and so provide further insight into his or her actions in the form of mental maps. The implication is that "an offender will feel more

comfortable and in control in areas which he knows well" (Ainsworth, 2001, p. 199). Two considerations are important: the first being the specific location, and the second being the general spatial behavior which is a function of specific crime sites (Canter, 1989). Canter (2003) dedicated a whole work to these aspects that are largely based on the foundational theory of environmental criminology.

Next, criminal characteristics provide investigators with some idea about the type of crime they are dealing with. The idea is to determine "whether the nature of the crime and the way it is committed can lead to some classifications of what is characteristic…based upon interviews with criminals and empirical studies" (Canter, 1989, p. 14). This is an inductive component of the approach and, as it stands, is similar to attempts made by the FBI in applying an organ- ized/disorganized typology. Studying a criminal career provides an understanding of the way offenders may modify behavior in light of experience (Nowikowski, 1995).

There is room for adaptation and change, with many criminals responding to victim, police, or location dynamics owing to learning and experience. This adaptation and change may be reflective of past experiences while offending. For example, a criminal may bind and gag a current victim, based on the screams and resis- tance of a past victim (Canter, 1989). This may reflect the evolution of MO displayed by many offenders who learn through subsequent offenses and con- tinue to refine their behavior. Additionally, the nature and types of precau- tionary behaviors may provide some insight into whether the offender has experience with or exposure to investigative practices. Finally, forensic awareness may show an increase in learning based on past experience with the criminal justice system. Perpetrators may be sophisticated in that they will use techniques that hinder police investigations, such as wear- ing a mask or gloves or through attempts to destroy other evidence (Ainsworth, 2000). A rapist may also turn to using condoms to prevent the transfer of bio- logical fluids for DNA analysis. Further, five characteristics utilized in the IP method may be instructive to investigators. They are self-explanatory and include residential loca- tion, criminal biography, domestic/social characteristics,

personal char- acteristics, and occupation/education history (Ainsworth, 2000). While there is not necessarily any greater weighting placed on any of these profile features, Boon and Davies (2003) suggest that research from the United Kingdom identifies residential location and criminal history as the most beneficial, whereas domestic, social, occupational, and educational char- acteristics are of least value (again highlighting the emphasis IP places on crime geography). The following criticisms could be made of investigative psychology:

- The rigorous reconstruction of offender behavior is not undertaken, so the meaning of behavior may be questionable.
- The generalization of past cases to the current case is dangerous and potentially misleading.
- Offender characteristics are only a possibility, and nothing concrete or specific about the current case is offered.
- IP assumes that the research on a particular crime type is valid to the crime type (general research on murder versus specific research on domestic homicide) and to the crime under consideration (that the probabilities within the research apply to the extant case). The following chart provides the background requirements necessary for those practicing investigative psychology.

The suggested approach In profiling terms, Behavioral Evidence Analysis (BEA) is the most recent of the individual profiling methods. The method was developed by Brent Turvey in the late 1990s. It is based on forensic science and the collection and interpreta- tion of physical evidence, and by extension what this means about an offender. BEA is primarily a deductive method and, as a result, will not make a conclu- sion about an offender unless specific physical evidence exists that suggests the characteristic. This means that, instead of relying on averaged offender types, BEA profilers conduct a detailed examination of the scene and related behav- iors and argue from this what offender characteristic are evidenced in the behavior and scene. The strength of BEA lies

in the fact that the profiler works only with what is known; nothing is assumed or surmised (Petherick, 2003), and a great deal of time is spent determining the veracity of the physical evidence and its relation- ship to the criminal event. In this way, evidence that is irrelevant or unrelated has little evidentiary value and is not given weight in the final analysis. This assists in maintaining objectivity and leads to a more accurate and useful end product. Like its inductive counterparts, BEA involves a number of steps, with each building on previous stages to provide an overall picture. The first stage of BEA is referred to as the forensic analysis and "must be performed on the physical evidence to establish the corresponding behavioral evidence in a case before a BEA profile can be attempted" (Petherick and Turvey, 2008b, p. 135). In this stage all the physical evidence surrounding a case is exam- ined to assess its relevance and determine its overall nature and quality. This step also ensures the probative quality of the evidence should the case end up in court. Ultimately, the forensic analysis informs the profilers what evi- dence they have to base a profile on, what evidence may be missing, what evi- dence may have been misinterpreted, and what value that evidence has in the subsequent analyses. Thornton (2006, p. 37) contextualizes the importance of physical evidence:

We are interested in physical evidence because it may tell a story. Physical evidence—properly collected, properly analysed, and properly interpreted—may establish the factual circumstances at the time the crime occurred. In short, the crime may be reconstructed. Our principal interest is ultimately in the reconstruction, not the evidence per se.… Also, along with the ethos is an ethic—a moral obligation to maintain the integrity of the processes by means of which the reconstruction is accomplished. In short, the ethics of crime reconstruction represents an imperative to "get it right." "Getting it right" involves more than guessing correctly. It necessitates a systematic process. It involves the proper recognition of the evidence, the winnowing of the relevant wheat from the irrelevant chaff, and the precise application of logic, both inductive and deductive. The process is not trivial. Because this stage relates to the examination of physical evidence, profilers who are not familiar with or qualified to interpret physical evidence should not undertake

this task. Instead, they should work with trained professionals whom they trust to examine the evidence on which they are basing their con- clusions. The importance of establishing a set of given facts from information given during an investigation should be apparent, but this information is all too often assumed as correct without question. Two cases that exemplify the pitfalls of working with information that has been gathered and interpreted by others are the investigation of the explosion aboard the USS Iowa and the homicide of Joel Andrew Shanbrom, for which brief explanations are provided next.

USS Iowa Early one morning in 1989, Turret Two on board the USS Iowa exploded, killing 47 of the ship's crew (Thompson, 1999). The explosion sent shockwaves throughout the U.S. Navy, with the subsequent investigation revealing danger- ous practices, incompetence, cover-ups, and investigative failures, only some of which were related to the explosion and deaths. Given the magnitude of the disaster, the Navy consulted agents from the FBI's Behavioral Sciences Unit to provide some insight into what they felt were the actions of a suicidal homo- sexual by the name of Clayton Hartwig stationed on the ship. In an attempt to provide this insight, the FBI agents used a technique known as Equivocal Death Analysis (EDA) to examine Hartwig. While the EDA was not responsible for first bringing attention to him as the person responsible, it was most certainly responsible for cementing this opinion in the minds of investigators and the naval executive. What followed was a series of events that perpetuated bad judgment and showed just how dangerous it can be to accept at face value information that has not been observed or collected first hand: investigators from the Naval Investigative Service (NIS) started by assuming Hartwig's guilt and then provided this information to the FBI profilers, whose assessment fed this line of thinking back to the NIS and the Navy. With regards to their analysis, a report of the Investigations Subcommittee of the Committee on Armed Services House of Representatives noted two important issues with the FBI's analysis (pp. 6–7):

The procedures the FBI used in preparing the EDA were inadequate and unprofessional. As a matter of policy, the analysts do not state the speculative nature of their analyses.

Moreover, the parameters that the FBI agents used, either provided to them or chosen by them, biased their results toward only one of three deleterious conclusions. Further biasing their conclusions, the agents relied on insufficient and sometimes suspect evidence. The FBI agents' EDA was invalidated by 10 of 14 professional psychologists and psychiatrists, heavily criticized even by those professionals who found the Hartwig possibility plausible.

The FBI analysis gave the Navy false confidence in the validity of the FBI's work. If the Navy had relied solely on the work of the NIS's own staff psychologist—which emphasized that such psychological autopsies are by definition "speculative"—the Navy would likely not have found itself so committed to the Hartwig thesis. Despite the questionable nature of the EDA process and its methodology, there were more fundamental concerns about the material on which the analy- sis was based. The following concerns were also raised by the Investigations Subcommittee about the process and results: Richard Ault (working for the FBI) admitted that the Navy had only provided him with fragments of the evidence assembled against Hartwig. Ault was asked who wrote the poem "Disposable Heroes," a key piece of information on which Hartwig's alleged homosexuality hinged, and he didn't know. Asked whether the agents were aware that another gunner's mate told Admiral Milligan that another sailor had written the poem, Hazelwood stated that this was immaterial because Hartwig had the potential to see it. The agents were asked if they were aware that David Smith had recanted the testimony used in their EDA, and they claimed they weren't sure what he had recanted. The agents had relied entirely on the information provided to them by the NIS and had not done any interviews themselves.

There were further concerns about the veracity of the information on which the profile was based (Investigations Subcommittee and Defense Policy Panel of the Committee on Armed Services, 1990, p. 42):

The preponderance of material came from interviews conducted and provided to the FBI by the NIS. As the subcommittee found earlier, serious questions were raised about the

leading nature or bias introduced in the interviews by the NIS interviewing agents. Some witnesses denied making statements to NIS that are significant to the profile…in at least one instance, the witness recanted several portions of his testimony, but was still considered a valuable witness.

Joel andrew shanbrom Another example stressing the importance of not only establishing a set of facts for oneself, but also in assessing evidence dynamics, is the homicide of Joel Andrew Shanbrom, a school district police officer in California. Shanbrom's wife, Jennifer, claimed that she was upstairs bathing their son when she heard an altercation downstairs between her husband and some [black] men. A profile of the alleged offender was compiled by Mark Safarik of the FBI's Behavioral Analysis Unit. Safariks's assessment gave considerable weight to the apparent ransacking of certain rooms in the house, including that of the son Jacob:

The dressers and night stands in the master bedroom, Gisondi's room, and Jacob's bedroom had been disturbed.… In Jacob's bedroom, a room clearly identified as a child's bedroom, the dresser drawers were pulled out to give the appearance they were searched. Such a room would not be expected to contain any valuables and this would have been passed over by offender(s) looking for valuables. While police had trouble with Jennifer Fletcher's story from the outset, particu- larly after discovering significant life insurance policies on her husband, the profile remained steadfast to its assessment of someone ransacking the bedroom in an attempt to stage a burglary. It wasn't until later that an expert pro- filer, in providing trial assistance to the defense, was able to establish through consideration of evidence dynamics that the scene had in fact been altered by a police officer in her search for clothing for Jacob Shanbrom, who was naked and cold from hiding in a bedroom closet with his mother since the alleged homicide. In a postscript to this case, Jennifer and her new husband, Matthew Fletcher, were both charged with the 1998 murder of Shanbrom after facing counts of fraud and conspiracy (Associated Press, 2002; Blankstein, 2002). It is also necessary to establish the accuracy and quality of the information which serves as the basis of the profile because of evidence dynamics. This

refers to influences that change, relocate, obscure, or obliterate physical evidence, regardless of the intent of the person or circumstance that bring about the change (Chisum and Turvey, 2008). So, evidence dynamics may be the result of the offender moving from one room to another during an offense, a bleed- ing but not yet deceased victim crawling down a hallway, paramedics attending the scene of a violent crime, or firefighters attending a fire scene. However, evi- dence dynamics is important in the case far beyond the extant circumstances of the crime scene, playing a role from the time the evidence is deposited until the final adjudication of the case (Chisum and Turvey, 2000). To provide some context to the way that evidence dynamics may alter the physical presenta- tion of crime scene actions, consider the following example from Chisum and Turvey (2000, p. 9):

A youth was stabbed several times by rival gang members. He ran for a home but collapsed in the walkway. A photo of the scene taken prior to the arrival of the EMT team shows a blood trail and that the victim was lying face down. Subsequent photos show the 5 EMT's working on the body on his back. He had been rolled over onto the blood pool. It became impossible for bloodstain patterns interpretation to be used to reconstruct the events leading to the death of the youth.

Given these examples, the importance of the forensic analysis and establish- ing a set of facts for oneself should be clear. Although only three cases have been used as examples, there are numerous others with a similar lack of criti- cal appraisal of the presenting evidence (see also Superior Court of California, 1999). The other aspect of the forensic analysis that is important and factors in evidence dynamics is crime reconstruction, which is "the determination of the actions surrounding the commission of a crime" (Chisum, 2002, p. 81). Popular conceptions of crime reconstruction abound, with some believing the process involves the physical rebuilding of the crime scene in another location. Saferstein (2004) suggests that "reconstruction supports a likely sequence of events by the observation and evaluation of physical evidence, as well as state- ments made by witnesses and those involved with the incident."Rynearson (2002) incorporates "common

sense reasoning" and its use with forensic sci- ence to interpret evidence as it resides at the crime scene. Cooley (1999, p. 1), in an excellent paper written while a graduate student at the University of New Haven, suggests that crime scene reconstruction is the foundation of the BEA method:

Deductive reasoning, via crime scene reconstruction, can and will provide the profiler with the appropriate information allowing him or her to construct the most logical profile of an unknown offender. This will enable the profiler to supply the requesting agency with investigatively relevant information.

The second stage of the BEA process, victimology, examines all aspects of the victim including lifestyle, hobbies, habits, friends, enemies, and demographic features. The information derived through the victimology can help to deter- mine the existence or extent of any relationship between the victim and the offender. Two other related components of the victimology are victim expo- sure and offender exposure. Victim exposure refers to the possibility of suffering harm or loss by virtue of an individual's personal, professional, and social life (Petherick and Turvey, 2008c). This risk is further partitioned into overall expo- sure (lifestyle exposure) and the exposure present at the moment of victimiza- tion (incident exposure). As a general rule, exposure can be low, medium, or high, indicating that a person is at a low exposure by virtue of personal, profes- sional, and social life and so forth. In BEA just as much time should be spent examining the victim's personality and behavioral characteristics as would be spent assessing the offender. In the third stage, crime scene analysis, the profiler determines such factors as the method of approach and attack, method of control, location type, nature and sequence of any sexual acts, materials used, type of verbal activity, and any precautionary acts the offender engaged in (Petherick and Turvey, 2008b), such as wearing gloves or a balaclava, altering one's voice, or wearing a condom. This stage also sets out to determine what types of crime scenes are involved in a criminal event. They include the point of contact; primary, secondary, and tertiary scenes; and the dump or disposal site. For example, a victim with exten- sive wounds that would have produced a

substantial amount of bleeding is found in an area devoid of bloodstains. This suggests the victim was killed else- where (a primary crime scene) and then moved to the scene where the body was found (the dump or disposal site). The final stage is the actual offender profile, known as offender characteristics. All the information from the previous stages is integrated and assessed through deductive reasoning to determine what the physical evidence, victimology, and crime scene characteristics collectively argue about the offender. Turvey (2008b) argues against offering the profile characteristics of age, sex, race, and intelli- gence because these are typically assessed inductively and not based on physi- cal evidence. As mentioned in the "Inputs and Outputs of Criminal Profiling" section earlier, it is argued that the following four conclusions can be offered deductively and posited with a high degree of confidence:

- Knowledge of the victim
- Knowledge of the crime scene
- Knowledge of methods and materials
- Criminal skill

While BEA is a method relying on deductive logic, it could not, however, be characterized as purely deductive. The reason is that the process of deduction relies in part on induction, which produces theories that may be tested against the evidence. This is confirmed by Stock (2004, p. 5), who writes, "in the natu- ral order of treatment inductive logic precedes deductive, since it is induction which supplies us with the general truths, from which we reason down in our deductive inferences." Because of the reliance on physical evidence and the reconstruction of the behavior involved in the criminal event, many inductive generalizations will be employed. Wound patterns and victimology are two such examples in which inductions may be used to form the basis of a later deduction. The type of knife used, its width, the length of the blade, and other characteristics of edged weapons have typically been determined through a study of known weapons and their features. However, the application of this knowledge to the

particu- lar features of a set of wounds present on a victim's body involves the deductive application of this knowledge. Petherick (2003, p. 186) presents another example of the application of the reasoning:

If a prostitute is murdered, a principally inductive approach suggests that because of her profession she was at high risk of victimisation. However, a more in depth deductive approach may determine that she had a small select clientele, was naturally cautious, had taken self defense training, and worked only in established premises. All of these factors work to reduce her risk. There are no direct criticisms of BEA in the literature, though there is some minor discussion of deductive approaches in general. Most seem to be quite confused by the application of the reasoning (Canter, 2004; Godwin, 1999), whereas others provide some cursory discussion of it but seem unsure of how the overall process operates. Holmes and Holmes (2002, p. 7) note that "much care is taken from the examination of forensic reports, victimology, and so forth and the report will take much longer to develop using only this approach." These authors seem largely unaware of the finer points of logic, such as induction being a component of and important to the overall process of deduction.

Readers are also left with the distinct impression that the thor- oughness of the approach (and the subsequent time involved) is pejorative. A final deductively rendered opinion will rely on inductively derived knowl- edge, though Holmes and his colleague tend to treat both processes as being dichotomous and largely exclusive. This suggests a fundamental lack of overall knowledge of the processes involved in reasoning. McGrath (2000) has however identified one critical observation of this method, and that is if the initial premises on which conclusions are based are wrong, then the subsequent conclusions will also be wrong. Given that one of the primary purposes of the EFA is to establish the veracity of the premises, this is not necessarily a problem as long as profilers are aware that it is incumbent on them to establish the basic information on which their decisions are based. If the basis of the premises cannot be established, then this may limit the num- ber of characteristics that can be offered (because deductive approaches will

derive conclusions only on what has been unequivocally established). Beyond these observations, there has been little criticism of this approach. The following chart breaks down the background knowledge necessary to use a deductive approach to profiling.

DEDUCTIVE CRIMINAL PROFILING

Deductive profiling relies on a more scientific and systematic process whereby offender characteristics are a direct extension of the available physical and behavioral evidence (Turvey, 2008a). If the premises are true, then the conclu- sions must also be true (Bevel and Gardiner, 1997) (recall in inductive argu- ments if the premises are true, the conclusion is possible but not necessarily true). Neblett (1985, p. 114) goes further, stating, "if the conclusion is false, then at least one of the premises must be false." For this reason, it is incumbent on the profiler to establish the veracity and validity of each and every premise before attempting to draw conclusions from them. Because a deductive argument is structured so that the conclusion is implicitly contained within the premise, and unless the reasoning is invalid, the conclu- sion follows as a matter of course. A deductive argument is designed so that it takes us from truth to truth. That is, a deductive argument is valid if (Alexandra, Matthews, and Miller, 2002, p. 65):

It is not logically possible for its conclusion to be false if its premises are true. Its conclusions must be true if its premises are true. It would be contradictory to assert its premises yet deny its conclusions. In profiling, deduction draws on the scientific method which is a "reasoned step by step procedure involving observations and experimentation in prob- lem solving" (Bevel, 2001, p. 154). Unlike induction, then, deduction takes the possible hypotheses garnered from statistics and research (the inductive conclusions) and tests them against the physical evidence present in each case. This is undertaken with a view not to prove the hypothesis, but rather to dis- prove it. That is, each possible characteristic of the offender is tested against the evidence with the goal of falsifying it or proving it to be untrue. If falsified, the inductive hypothesis is dropped or restructured, while those hypotheses that consistently and repeatedly fail to be disproved survive. It is

only after this rigorous testing that we can be certain an analysis is complete and truths are arrived at.

Once a hypothesis has consistently withstood falsification, it can be presented in a deductive fashion. It is under this strict procedure of testing and retesting that deductive profiling operates. From an analysis of case inputs, theories are formed inductively and tested against the evidence. After numer- ous and repeated attempts to disprove the theories, a deductive conclusion can be put forth. However, the profile that results from this process is by no means static and may be updated in light of new information. New physical evidence may be incorporated into the decision process to update the conclusion. Also, new advances in science and understanding may challenge long-held assumptions and question the current hypothesis. Although it may appear as such, this is not a problem with the process because a deduction can operate only within the realm of established laws and principles. This tenet of argumentation is made clear by Farber (1948, p. 48):

Every "logical system" is governed by principles of structure and meaning. A system that claims to be a "logic," i.e., which operates formally with one of the various definitions of implication, possibility, etc., is subject to the laws of construction of ordered thought, namely, to the fundamental principles of logic. This requirement imposed on all systems cannot amount to a law that there shall be law. The specific application is provided by the rules in each system. When these laws or principles change because of new knowledge, so too must the nature of the deduction made. Armed with an understanding of logic, let us now turn to the inductive methods.

CRIMINAL PROFILING EDUCATION

The issue of profiler education has not been touched upon in any significant way in the literature on profiling, with most discussions revolving around the theoretical paradigm offered by respective authors. That is, those psychologists engaged in the process argue for an educational experience including advanced study in psychology; law enforcement officers engaged in profiling (mostly the FBI and those they train) argue that law

enforcement experience is a neces- sity; those who approach profiling from the perspective of physical evidence argue that a broad-based understanding of physical evidence, its relevance, and meaning is important. The following sections of this chapter will discuss the issues relevant to profiler education, what is required, and where to get it.

Tertiary education

A tertiary education typically involves formal and structured classes in a vari- ety of areas as dictated by the degree program students enroll in. Those taking psychology will be educated in aspects of human behavior and cognition, from introductory courses on the history of psychology through to abnormal psy- chology, the neuropsychological basis of behavior, and treatment and assess- ment. Those taking criminology or criminal justice programs will be exposed to the role, structure, and function of the police, courts, and prisons. Depending on the program, they may also get extensive training in the behavioral sciences in areas that have traditionally been the province of psychology (human behav- ior and psychological disorders, among others). For those taking accounting or business, students will be taught business administration, entrepreneurship, account and book-keeping, and other business-related activities.

While it is noted that BEA is a largely deductive method and does not rely on research in developing the final conclusion, research is employed to generate hypotheses that are then tested against the physical evidence which subsequently informs the deductive decision-making process.

The point is this: not all educational experiences are equal, and the degree of instruction one receives in any area related to profiling differs based on a variety of factors. This may be owing to the educational institution or degree program at a broad level, there being critical differences not only among the institutions, but also between two programs even of the same name. Consider the following example: Two universities in the same general location both offer Criminology and Criminal Justice degrees. One is housed within a social sci- ence faculty, and the other is located within a law school. In the first program,

there is a degree of overlap between criminological offerings and psychologi- cal offerings, exposing students to a range of issues relating to human behavior and cognition. The students in this program will develop a healthy under- standing of behavioral science and how this applies to the profiling endeavor. In the latter program, students are taught primarily by legal professionals and theoretical sociologists in such a way that they develop a healthy understand- ing of policy and procedure as it relates to the legal system. It should be clear that students in the first program would be better placed to consider a career in profiling than students in the second. Staffing may also dictate the quality of a given program, with those staff under- taking research or casework in a given area perhaps being more equipped to provide a holistic education than those approaching any given topic from a purely theoretical point of view. The reason is that they will be better able to understand and subsequently explain the nuances of casework, evidence examination, and report writing. Interested students should seek out a program that not only has a sufficient level of education in the behavioral sciences, but also one that is taught by staff who understand the theory of what they are teaching, why it is important, and how it applies.

With regards to specific areas of study, the following discrete areas of study are suggested:

- Criminology
- Psychology
- Forensic Science
- Law

The areas of criminology and psychology should be self-explanatory and have been covered elsewhere within the chapter. Forensic science is suggested because it will provide a fundamental understanding of the nature of physical evidence, its identification, limitations, benefits, and interpretation. Because profiling is based on an assessment of behavior, and the behavior is often determined through the lens of the physical evidence,

students seeking work in the area would be left wanting in an education that did not encompass some aspect of forensic science.

Law, or at least some understanding of the criminal justice system, expert evidence, and procedure, will be required because profil- ers, whether private or government employed, are forensic examiners. As such, there is an expectation that they may have to provide evidence in a court of law before a trier of fact. It should also be noted that the subject area under which one decides to study is not the only thing to think about when preparing for work in profiling. Similar to the issues of institutions and programs, all things are not created equal when it comes to studying criminal profiling. Unlike many courses in the criminology field, such as theories of crime courses which have an fairly predictable and consistent curriculum across teachers and universities, not all courses related to profiling are created equal. That is, depending on what school the profiling course is run from, and who teaches it, which aspects of profiling are important, which methods should be utilized, and which issues are most salient will differ. Students should seek out those courses that compare and contrast different methods; that study actual profiles and real cases; and that endorse the scientific method, analytical logic, and critical thinking. As an adjunct to these forms of tertiary study, it is also suggested that profilers engage in short courses. However, there are a number of perils and pitfalls evi- dent in such a practice, as outlined next.

Bricks, mortar, and the Socratic Method

For those who are already working in the criminal justice system or outside it, there is often a desire to return to university to acquire a new or round out an existing education. It has been the authors' experience over the years that there are a variety of reasons why students may return to university, including change of a career, promotion or advancement, interest, or simply to increase their knowledge base. Aside from choosing the right university, program, and staff, students are fur- ther presented with a number of other options in terms of full-time or part- time degrees, on-campus, and external programs. Which option to take will be dictated largely by the requirements of the

prospective student, availability and commitments to work and family, motivation, and financial means. However, students should not choose a university simply because it meets their time commitments or is affordable; doing so may mean that, in the grand scheme of things, the quality of the program is sacrificed for expedience of completion or because it doesn't unduly stretch the purse strings. The net result is that they spend a given amount of time and energy on a program that means little if any- thing in terms of their vocational prospects or the quality of the information they receive and bring to bear at a later time.

For busy professionals, their choices may be limited to those programs that offer classes at night or via an external-only option where students are sent class materials, furnished with deadlines in which to submit their work, and contact their instructors through a variety of electronic means. Some distance programs also employ an on-campus option during the semester, often titled a "residential school," where students attend the university for lectures and tuto- rials and face time with teaching staff. While this is true in some instances, it does not apply to all distance programs. Unfortunately, in today's competitive educational market, some institutions have watered down their approach to education such that students are never seen, feedback on assessment is scarce, and they are not given the opportunity to engage in any meaningful way with their peers. The most significant aspect of this would be the lack of ability to engage in a question-and-answer envi- ronment so as to have the basis of their beliefs questioned, to highlight the flaws in thinking, and to shape their critical thinking skills. This is the province of the Socratic Method. According to Goldberg (2007, p. 18):

The Socratic Method, which takes its name from the process Socrates used to ascertain philosophical truths, exposes the weakness of arguments through a process of relentless inquiry.

While the Socratic Method forces students to think on their feet, it also replicates the tension of standing before a judge in court, knowing he or she can humble you at any moment. "The tension is a necessary part of the learning experience," says University of

Chicago law professor Richard Epstein, a proponent of the Socratic Method, who is thought to be one of its most skilled practitioners. The Socratic Method is "an approach to knowledge building and problem solv- ing based on discussion and debate" (Chisum and Turvey, 2007, p. 100). It is process oriented in that it seeks to identify weak assumptions in an argument and, through repeatedly interrogating these assumptions, arriving at a more valid conclusion or answer. It is what the first author refers to as "intellec- tual Darwinism"—a reference to Darwin's theory of evolution whereby weak theories are systematically culled. As a pedagogical tool, the Socratic Method involves interaction between two or more people where one (usually a lecturer or instructor) asks a question of another (a student or participant). The responses are then queried within a general or specific theoretical framework and any flaws identified. Further questions are then tailored to incorporate the new arguments, and the process goes on. This step-wise procedure for the Socratic Method is identi- fied by Pedersen (2006, p. 1) as it applies to legal reasoning:

Students study cases before class.

In class, the professor calls on a student, with no advance notice.

The student gives a recitation of the facts and the procedural history.

The professor questions the student, probing underlying legal issues, thus forcing the student to identify relevant facts, question assumptions, take a position and argue its defence.

Meanwhile the rest of the class remains attentive by answering the professor's questions in their own mind. The same process may be applied to the process of profiling and crime analy- sis in the following way regarding motive (the following is hypothetical, but follows general discussions that take place in both authors' classes regarding Criminal Profiling and Behavioral Evidence Analysis):

Q: With regards to the case study, let's discuss the motive or motives that are evident in the offender's behavior.

A: I think that the motive for the crime was murder.

Q: B ut murder is a term that describes a behavior or penal classification. A motive is a physical or psychological need. So what would you suggest the motive would be?

A: (Another student) The motive might be profit, as the offender didn't do anything sexual with the victim.

Q: S o what evidence do we have that the motive was profit? What would you expect to find in a profit offense?

A: You would expect to see something stolen: money, jewelry, computers, or something of value. There is no evidence that anything has been stolen.

Q: So if nothing has been stolen, is it likely the motive was profit?

A: It might be possible that the offense was interrupted, and that the offender didn't have the chance to actually take anything…. If an acceptable answer is reached, then a new question is developed and the process begins again. For a more detailed or complex problem, the process may take minutes or hours, or may even span multiple sessions.

It should be noted that the process follows along similar lines to the use of the scientific method as a form of inquiry, which is a "way to investigate how something works, or how something happened, through the development of hypotheses and subsequent attempts at falsification through testing.

During the Behavioral Evidence Analysis class taught by the first author, the students spend 12 weeks working on an actual case file including autopsy reports, crime scene photographs, police brief of evidence, and other material. Each week, the Socratic Method is employed, beginning with basic questions before moving onto more advanced issues, culminating in the students' writing a report on the case outlining their conclusions and reasoning.

Accepted means" (Petherick and Turvey, 2008b, p. 47). Furthermore, the pro- cess works in much the same way as dissecting a case for which a criminologist's opinion has been sought. In this way, by utilizing the scientific method, we are essentially teaching students how to pull a case apart, put it back together, and infer conclusions from it. With both authors working in the tertiary education environment, our recom- mendation to students

is that they seek out a relevant education that will better equip them to understand the range of issues they will face in the analysis of crime and criminal behavior. They should seek out instructors who are actively working, researching, or publishing in the areas they teach; and they should seek this out in an actual institution, with staff who can mentor and challenge them, students with whom they can engage, and educational requirements that will provide them with the theory and practice that will enable them to become tomorrow's practitioners.

Short Courses: perils and pitfalls There is an inherent attraction in that which requires the least effort; anything that demands less of our time and attention is seen as being of greater signifi- cance regardless of that fact that whatever it is may be of lesser value. Because of this tendency toward the path of least resistance, short courses offer a significant attraction for many. A short course is any truncated pathway to education or information that is offered in an intensive mode, often without the enforcement of educational standards or assessment. Before going any further, we need to point out that both authors are advocates of short courses, given the right context and framework. Perhaps one of the best discussions of short courses comes from Chisum (2007, pp. 314–317). While this discussion relates specifically to short courses in bloodstain pattern analysis, the juxtaposition to general criminology should be easy to see:

In addition to reading the recommended publications, it is advised that anyone interested in crime reconstruction take a course in bloodstain analysis from a qualified forensic scientist. These courses can be useful for providing certain basic overviews of fundamental concepts. However, depending on the scientific background of the instructor, they may be lacking in certain crucial areas. A true scientist will find that a majority of the short bloodstain classes are lacking with regard to a discussion of accuracy, precision, and significant numbers. Appreciating these deficiencies is the difference between the technician's pedantic understanding of bloodstains and the forensic scientist's interpretive role in the reconstruction of the crime.

The preceding passage is useful and captures both the benefit and dangers of short courses; they are useful in providing overviews of certain basic concepts, but many such courses are not taught by qualified instructors, and they are by no means a holistic approach to education in any given domain. But don't get us wrong. Many authors in this volume run short courses in many different countries around the world, and these courses do have value. It is the authors' opinion that short courses are useful for a variety of reasons, including the following:

- They provide an overview of certain fundamental concepts.
- They keep students and professionals abreast of new theories and techniques.
- They give potential students an insight into a discrete area so they can make informed choices about future streams of study.
- Short courses can be invaluable for teaching process-oriented tasks.
- Students and professionals can learn a variety of valuable skills through a case study approach that is not always practical in formal tertiary environments. The main point is that a short course, while offering a number of benefits, should be considered only one small part of an overall educational approach; they should not be taken as a standalone. That is, taking one short course on profiling does not qualify a person to represent himself or herself as a profiler, or to actively profile ongoing cases; this would be considered dangerous, irre- sponsible, and dishonest.

CRIMINAL PROFILING AND THE CRIMINOLOGIST

The argument for the involvement of criminologists in profiling is relatively straightforward on its face. Criminologists are those who, by definition, are involved in the study of crime, so it would seem a natural extension of their other responsibilities. However, the reality is far from this clear. Some criminologists are involved only in research activities, an endeavor that may leave them ill equipped to understand the foibles of human behavior in a practical sense. Some criminologists are involved in other discrete areas, such as crime prevention, victimology, policy and procedure, or purely theoretical

areas that will similarly leave them ill equipped in the evaluation of specific criminal acts. Recall from the first chapter, criminologists by their nature come from an array of similarly vast and diverse backgrounds including sociology, anthropology, psychology, psychiatry, law enforcement, or medicine, among others. Some will be able to lay legitimate claim to a stake in the profiling community; some would never even make the attempt; whereas others still will lack the acumen but jump on the bandwagon, so to speak, of an area that is popular among the media, other professionals, and students. Given this, it is necessary to explore a more concrete foundation for education and background requirements for criminologists who want to "try their hand" at profiling. The main suggestion we would offer for criminologists involved in profiling is to ensure that their knowledge is as well rounded and holistic as possible. Just because one is an "expert" in "crime" does not mean that one is an expert in all areas of crime, regardless of what he or she thinks.

As such, the crimi- nologist-profiler should make every effort to educate himself or herself in the areas of behavioral science, physical evidence, and the law. Criminologists should have as detailed knowledge as possible in the different areas in which they will analyze evidence as profilers. This means acknowledging that different kinds of analysis require different experience, education, and training. It also means knowing their own limits and where their work stops and that of another should start. It means not going beyond their own qualifi- cations and abilities, and knowing when to raise their hands for help. It means being cognitively aware enough to understand the limits of what they can—and can't—do. As suggested by the discussion on profiling inputs earlier, the range of mate- rial criminologists-profilers may be expected to deal with is considerable. From autopsy reports, to first response police reports, to crime reconstructions, to witness statements and crime scene photographs, criminologists-profilers needs to know what they are looking at, what they are looking for, how to interpret it, and what it means within the global context of the crime. Lacking in any of these areas will result in nothing less than an incomplete examination of the facts, which will lead to a dangerously incomplete

assessment and possible flawed conclusions. So what does all this mean? The answer is simple, but lost on a few overzeal- ous individuals who fail to appreciate what and where their limits are. This doesn't mean that one has to be a forensic pathologist to read an autopsy report, but it does mean that one should know the difference between cause, mechanism, and manner of death. It doesn't mean that one has to be a blood stain pattern analyst, but it does mean one knows what an angle of impact is, the difference between high and low velocity spatter, and how the surface of an object will effect the bloodstain pattern. It doesn't mean one has to be a forensic scientist, but it does mean one needs to understand the difference between a positive result, a negative result, and an inconclusive result. So, based on this, criminologists-profilers should work with other profession- als they know can be trusted and who produce valid work. They need to know enough of the language to ask educated questions and to understand what a response means in both a theoretical sense and an applied one (that is, how the answer to their questions impacts their analysis and conclusions). If nothing else, this highlights the multidisciplinary and often team-based approach that profilers should take. It also warns us that short course educa- tion is not enough and that every person has limits—even though we don't often like to admit them.

Criminologists may be well suited to the practice of criminal profiling, pro- vided their education is complete in the sense that it has equipped them to understand the intricacies of offender behavior, including an assessment of the physical evidence that creates the record of it. They may be further suited to profiling because their training and education often involved instruction not only in social sciences, but also in law, so that they understand the limits of expert witnesses and reports. Furthermore, they may be suited to the task of profiling by virtue of the analytical processes they employ in other aspects of their work. This chapter provided students and practicing criminologists with an over- view of criminal profiling, the "inputs" and "outputs" of the process, the nature of logic and reasoning, and the major paradigms involved in pro- filing. These have included the inductive methods of criminal investigative analysis, investigative psychology, and

diagnostic evaluations. The authors have also suggested a preferred theoretical/practical approach in Behavioral Evidence Analysis, a predominantly deductive method of profiling involving the detailed analysis and reconstruction of physical evidence, victimology, and crime analysis. As criminologists, we have also been warned not to be carried away with our own abilities, but to know the limits of our own analysis and when to seek help. In this way, criminologists-profilers will be able to provide more accurate and forensically oriented assessments of crime and criminal behavior and to assist the police in their investigative decision processes and the trier of fact in their determinations of culpability.

CHAPTER SEVEN

THE CONCEPT OF EVIDENCE

ADMISSIBLE EVIDENCE

In general, any Relevant Evidence is admissible. In criminal cases in particular, certain types of evidence are inadmissible, except where there are exceptions in common law or statute. Each of these has its own entry in this glossary. The general exceptions include:

- `Hearsay', that is, spoken or documentary evidence that is a report of someone else's observation (see: Hearsay), not that of the reporter himself;
- `Opinion' (see: Opinion Evidence), except where it is from a expert on matters that are expected to be outside the knowledge of the court;
- Evidence that tends to show the bad character of the accused (see evidence of bad character), but is not related to the case in point (except certain items of `Similar Facts' evidence -- but be aware that this area of law is due for a radical shake-up in the CJA2003);
- `Narrative' evidence, that is, evidence from prior statements made by a witness that would contradict his current position. Exceptions include Res Gestae utterances.

In English criminal law, the burden of Proof generally lies with the prosecution -- it has to prove all the facts that establish the guilt of the accused, except those which are assumed to be obvious (see Judicial Notice). The Standard of Proof is, nearly always, ``beyond reasonable doubt".

If the prosecution does not discharge the burden of proof, to the requisite standard, the accused will be acquitted. R V Woolmington[238] 1935, for a textbook example.

[238] [1935] UKHL 1

However, some statutory and common-law provisions have the effect of shifting the burden of proof to the defendant. For example, the prosecution does not have a duty to prove that the defendant is sane, or was incapable of moral reasoning. If these points are used as a defence then the defendant will generally have to prove them, at least to the `balance of probabilities' standard (see Reverse Burden Of Proof). In addition, there are many cases in which the defendant may carry an Evidential Burden; that is, the defendant will have to adduce evidence to support his case, although he may not be required to prove it.

In a civil hearing, the side that brings the action usually has the burden of proof overall, although a more accurate rule is ``he who asserts must prove".

In some trials or hearings, the determination of burden of proof is straightforward. More often, however, there are subsidiary matters to the main facts in issue, and the question then arises who has the burden of proving those. There are many technicalities concerning the burden of proof in such cases, some of which are created by statute and some of which have been developed by the courts over a period of time. What follows is a few examples; you should not assume that this is an inclusive list, by any means.

- In a criminal trial, the side that wishes to adduce evidence has the burden of proving that it is admissible (see Admissibility of Evidence). For example, if the defendant wishes to adduce evidence that might be regarded as hearsay, and this evidence is contested by the prosecution, the defence will have to prove that the evidence is not hearsay, or that it falls within one of the exceptions to the hearsay rule.
- In a criminal trial, if the defendant argues that his confession was extracted under duress, then s.76 of PACE imposes on the prosecution the duty of proving that this was not the case that the confession was made freely.
- In a civil action for breach of contract, a party who wishes to rely on an Exclusion Clause -whether that party is the claimant or the defendant -- must show that the clause was validly incorporated into the contract.

- In an action in tort, it is now generally accepted that a plea of Res Ipsa Loquitur does *not* have the effect of shifting the burden of proof to the defendant. It does, however, create for the defendant an obligation to raise some evidence to show that he was not at fault.

BURDEN OF PROOF

In the common law, burden of proof is the obligation to prove allegations which are presented in a legal action. For example, a person has to prove that someone is guilty or not guilty (in a criminal case) or liable or not liable (in a civil case) depending on the allegations. More colloquially, burden of proof refers to an obligation in a particular context to defend a position against a *prima facie* other position.

ADMISSIBILITY AND RELEVANCY OF EVIDENCE

TYPES OF BURDEN OF PROOF IN EVIDENCE

There are generally three broad types of burdens.

A legal burden or a burden of persuasion is an obligation that remains on a single party for the duration of the claim. Once the burden has been entirely discharged to the satisfaction of the trier of fact, the party carrying the burden will succeed in its claim. For example, the presumption of innocence places a legal burden upon the prosecution to prove all elements of the offence (generally beyond a reasonable doubt) and to disprove all the defences except for affirmative defenses in which the proof of nonexistence of all affirmative defence(s) is not constitutionally required of the prosecution. [239]

An evidentiary burden or burden of leading evidence is an obligation that shifts between parties over the course of the hearing or trial. A party may submit evidence that the court will consider prima facie proof of some state of affairs. This creates an evidentiary burden upon the opposing party to present evidence to refute the presumption.

A tactical burden is an obligation similar to an evidentiary burden. Presented with certain evidence, the Court has the discretion to infer a fact from it unless the opposing party can present evidence to the contrary.

[239] (432 U.S. 197).

STANDARD OF PROOF

The standard of proof is the level of proof required in a legal action to discharge the burden of proof, i.e. convince the court that a given proposition is true. The degree of proof required depends on the circumstances of the proposition. Typically, most countries have two levels of proof: the balance of probabilities (BOP), called the preponderance of evidence in the U.S., (which is the lowest level, generally thought to be greater than 50%, although numeric approximations are controversial) and beyond a reasonable doubt (which is the highest level, but defies numeric approximately. In addition to these, the U.S. introduced a third standard called clear and convincing evidence, (which is the medium level of proof).

The first attempt to quantify reasonable doubt was made by Simon in 1970. In the attempt, she presented a trial to groups of students. Half of the students decided the guilt or innocence of the defendant. The other half recorded their perceived likelihood, given as a percentage, that the defendant committed the crime. She then matched the highest likelihoods of guilt with the guilty verdicts and the lowest likelihoods of guilt with the innocent verdicts. From this, she gauged that the cutoff for reasonable doubt fell somewhere between the highest likelihood of guilt matched to an innocent verdict and the lowest likelihood of guilt matched to a guilty verdict.

Balance of probabilities

Also known as the "preponderance of evidence", this is the standard required in most **civil** cases. The standard is met if the proposition is more likely to be true than not true. Effectively, the standard is satisfied if there is greater than 50% chance that the proposition is true. Lord Denning in Miller v. Minister of Pension[240] described it simply as "more probable than not".

[240] [1947] 2 All ER 372

Beyond a reasonable doubt

This is the standard required by the prosecution in most criminal cases within an adversarial system. This means that the proposition being presented by the government must be proven to the extent that there is no "reasonable doubt" in the mind of a reasonable person that the defendant is guilty. There can still be a doubt, but only to the extent that it would *not* affect a "reasonable person's" belief that the defendant is guilty. If the doubt that is raised *does* affect a "reasonable person's" belief that the defendant is guilty, the jury is not satisfied beyond a "reasonable doubt". The precise meaning of words such as "reasonable" and "doubt" are usually defined within jurisprudence of the applicable country. Usually, reasonable doubt is defined as "any doubt which would make a reasonable person hesitate in the most important of his or her affairs."

Criminal law

In most western countries, criminal cases place the burden of proof on the prosecutor - sometimes referred to by the Latin legal expression "*ei incumbit probatio qui dicit, non que negat*" (the burden of proof rests on who asserts, not on who denies). The principle that it should be is known as the presumption of innocence, but is not upheld in all legal systems or jurisdictions. Where it is upheld, the accused will be found *not guilty* if this burden of proof is not sufficiently carried by the prosecution.

Civil law

In civil law cases, the "burden of proof" requires the plaintiff to convince the trier of fact (whether judge or jury) of the plaintiff's entitlement to the relief sought. This means that the plaintiff must prove each element of the claim, or cause of action, in order to recover. The burden of proof must be distinguished from the "burden of going forward," which simply refers to the sequence of proof, as between the plaintiff and defendant. The two concepts are often confused.

ADMISSIBILITY AND RELEVANCE OF EVIDENCE. (RES GESTAE)

The term res gestae is used to connote acts, declarations and circumstances constituting or explaining a fact or transaction in issue. It is therefore assumed that there is a transaction in issue or a principal fact. What constitute res gestae are those other facts that are in relationship with the fact in issue. Res gestae therefore refers to facts that are admissible in evidence as the surrounding circumstances of the event to be proved. The doctrine of res gestae is incorporated in the Evidence Act from section 4 to section 15.

R V KURJI (1940) 7 EACA 58

The accused had stabbed the brother of the deceased and had uttered threats against the deceased. Immediately afterwards, he was seen in the go down of an immediate shop standing over the deceased holding a dagger. It was held that the two circumstances were so interconnected that the wounding or stabbing of the deceased's brother must be regarded as part of the res gestae in the trial of the accused in the murder of the deceased. Further that this evidence was admissible even though it tended to lead to the commission of another offense.

ORIENTAL FIRE AND GENERAL ASSURANCE LTD V GOVENDA AND OTHERS. (1969) EA 116

In the case, the appellant sued the respondents seeking to avoid motor vehicle policy which they had given the respondent on the grounds that the respondent had made a representation of fact that they had been involved in a motor accident with a vehicle owned and driven by the first respondent. The issue was whether the statements made after the motor accidents were part of res gestae. Court found that the statement was not part of res gestae because they were not made at or immediately after the occurrence of the accident

PARTICULAR ASPECTS OF RES GESTAE.

- Facts which form part of the same transaction.
- Facts which are the occasion, cause or effect of the facts in issue

- Facts which show motive, preparation, previous or subsequent conduct
- Explanatory and introductory facts.
- Facts which show common intention.
- Contradictory or inconsistent facts
- Facts which show the state of mind or bodily feeling
- Facts which are evidence of similar facts or occurrences
- Facts which show the ordinary course of business

Now let us turn to each of the above aspects in some detail.

1. Facts which form part of the same transaction.

Section 5 of the Evidence Act[241] provides as follows, "Facts which though not in issue are so connected to the fact in issue as to form part of the same transaction are relevant whether they occur at the same time or place or at different times and places." [242]

Under this provision, facts constituting the same transaction can only be introduced for purposes of explaining the fact in issue. Section 5 provides that time may not be important.

Section 5 is applicable in civil and criminal proceedings and the issue of whether time is relevant or not will depend on the nature of the transaction.[243]

2. Facts which are the occasion, cause or effect of the facts in issue

Section 6 of the Evidence Act provides, "Facts which are the occasion, cause or effect, immediate or otherwise of relevant facts or facts in issue, or which constitute the state of things under which they happened or which afforded an opportunity for their occurrence or transaction are relevant."

Therefore, any fact which could be a cause to any fact in issue is relevant.

[241] Cap 6
[242] See R V Kurji (1940) 7 EACA 58
[243] See, Oriental Fire and General Assurance Ltd V Govenda and others.

MAKINDI V R (1961) EA 327

The appellant was convicted for manslaughter of a boy for whom he stood in **loco parentis** by beating him so severely that he died. At the trial, the appellant had raised a defense to the effect that the boy was epileptic and so had suffered these injuries in the course of an epileptic attack. The prosecution had then adduced evidence of previous severe beatings of the deceased by the appellant in order to rebut his defense the issue was whether that evidence was admissible and it was held that that evidence was admissible and section 6 of the Evidence Act as explaining substantiating the cause of death as well as under sections 7 and 13 (now section 8 and 14) showing the motive of the appellant to revenge on the deceased and the appellants' ill will towards the child.

HARRIS V DPP (1952) AC 57

A series of thefts having common characteristics occurred in an office in an enclosed market at times when the gates were shut and on occasions where the accused police officer was on duty in the market the precise time of only one of those breaking was known and the accused had been found in the immediate vicinity. The accused was charged with eight breaking thefts but acquitted on seven counts and convicted on the eighth. The issue on appeal was whether the seven counts could have been admitted/proved and it was held that as regards the eighth breaking evidence of the previous seven breakings would have to be excluded because they occurred at a time when it hadn't been proved that he was near the office. Court went on to say that the proper rule as laid down in the case of Makin V Attorney General of New South Wales.[244] The proper rule is that evidence tending to show that the accused has been guilty of criminal offences other than the one he is being tried is inadmissible unless certain evidence is relevant to the issue before court as for example it bears on the question whether the acts alleged to constitute the offense were designed, accidental or if it rebuts an offense which will otherwise be open to the accused

[244] (1894) AC 57

Under section 6, facts that afford an opportunity to bring out facts in issue are very relevant. For example, time, place, physical presence, ability etc. In civil proceedings, this section may be used to show what caused the fact in issue and will assist the court in apportioning liability as well as help in the assessment of damages.

3. Facts which show motive, preparation, previous or subsequent conduct

Section 7 (1) of the Evidence Act provides as follows, "Any fact is relevant which shows or constitutes a motive or preparedness for any fact in issue or relevant fact."

Section 7 (2) provides that the conduct of any party … in any suit or proceeding or in reference to that suit or proceeding or in reference to any fact in issue to a suit or proceeding or relevant to it, and the conduct of any person to an offense against whom is a subject of any proceeding is relevant if that conduct influences or is influenced by any fact in issue or relevant fact and whether it was previous or subsequent to the fact in issue or relevant fact.

Motive is what influences a person to act in a particular way. In criminal law, motive is irrelevant, but in the law of evidence; motive may be relevant in so far as it establishes causation. Motive may be a fear or a desire to bring about a particular activity. Motive is a mental state and it's normally derived from circumstances and relationships. It can also be established from a person's words and moods.

Under section 7, facts which constitute preparation are also relevant and admissible. Preparation refers to plan to bring about a particular event. Preparation refers to completing all the necessary preliqiusites to bring about the fact in issue. Section 7 also makes relevant previous and subsequent conduct. Previous conduct refers to conduct before the fact in issue is committed. It may include motive. It could refer to the means of bringing about the fact in issue. It could also mean previous attempts as well as declarations of intent.

Subsequent conduct may explain the occurrence of an offense and may be used to implicate a person of a crime. Some cases, silence by the accused person, giving of false statements or evasive explanations and the absconding form jurisdiction may amount to subsequent conduct.

4. Explanatory and introductory facts.

Section 8 of the Evidence act provides that facts necessary to explain or introduce a fact in issue or relevant fact, or which sup[port or rebut an inference suggested by a fact in issue or relevant fact or which establish the identity of anything or person whose identity is relevant or fix the time or place at which any fact is in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose. Section 8 introduces the following specific elements as relevant;

a) Facts that explain or introduce a fact in issue.
b) Facts which support or rebut an inference.
c) Facts which establish identity where identity is in issue.
d) Facts that fix time and place at which the relevant issue may have happened.
e) Facts that show a relationship of the parties.

Now, let us look at each in detail.

a) Facts that explain or introduce a fact in issue.

These are facts which have an element of showing how a particular fact is brought about. There are related to other parts of **res gestae**. Explaining could be by way of relation for example under the law of bankruptcy, absconding form jurisdiction or keeping house may explain the fact of bankruptcy. In cases of breach of contract, any letter expressing dissatisfaction may be preparatory or preparation for breach of contract.

b) Facts which support or rebut an inference.

A fact in issue may raise certain presumptions such which contradict or support an inference. Such presumptions are relevant. For example, if a crime is committed in a

room, the only person with the keys is inferred that he or she is guilty. If evidence is relayed to show that he or she was not around at the time of the crime, then that fact contradicts the presumption and is relevant.

Section 8 and 10 are related because the latter generally reviews the facts that are inconsistent with any fact in issue or with the relevant fact. These provisions apply to both the prosecution and the accused.

FRANCIS KAYEMBA V UGANDA (1983) HCB 30

The appellant was charged with and convicted of theft mainly based on circumstantial evidence. It was held that before a conviction is entered on a case mainly based on circumstantial evidence, court should first find in interlocutory facts are incompatible with the explanations on any other reason/hypothesis other than that of guilt. It is also necessary before drawing the inference of guilt drawing on circumstantial evidence to be sure that there are no co existing facts which would weaken or destroy the inference.

In UGANDA V BARINDA

The accused was indicted for kidnapping with intent to murder. Evidence showed that the deceased as was being served with a drink at a party was called away by the accused towards the trading Centre where he was attacked by the accused along with others and dragged near the bush and was never seen again. It was held that there was evidence both circumstantial and direct to the effect that the death of the deceased was caused by the assault on him by the accused and others. However, to establish the cause of death [partly by circumstantial evidence, court had to be sure that there were no other co-existing circumstances which would weaken or destroy the inference. Therefore, it was on the prosecution to show that the deceased being dragged into the bush was not enough since anything could have happened to him there. That there were therefore co existing circumstances which tend to weaken the evidence as to the cause of death

UGANDA V RICHARD BAGUMA (1988-90) HCB 74

The accused was indicted on account of robbery and kidnapping with intent to murder. It was alleged that on the day the deceased died, the accused had picked him from his house

and taken him away and his bullet ridden body was found the following day. It was held that where evidence is circumstantial in order to justify an inference of guilt. Facts must be incompatible with innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt.

UGANDA V KASYA [1988 – 90] HCB 48.

The accused was indicted for murder; evidence was relayed to show that on the evening of the deceased's death, the accused had been seen in company of eth deceased. Evidence was also led to show that the deceased's body had been found about a half a mile from the accused's residence. That she had first been raped before being strangled and graduated tax tickets belonging to eth accused were found some meters from the body and the accused upon arrest was found wearing blood stained trousers. The accused raised the defense of alibi and it was held that where the accused raises an alibi, he doesn't thereby assume the burden to prove it, the burden rests on the prosecution to disprove or destroy that the evidence against the accused was purely circumstantial and did not irresistibly point to the guilt of eth accused because there are other co-existing circumstances which would weaken or destroy the inference. Further that the prosecution had failed to destroy the accused's alibi by putting him at the scene of the murder.

Facts which establish identity where identity is in issue

Any fact which shows identity of anything is a relevant fact. Identification is an expression of opinion that a thing or person resembles another thing or person so much so that it is likely to be the same person or thing. Identification is the quality of sameness. When the process of identification is being conducted, a number of things are considered;

i) The person identifying must have seen or observed the accused.

ii) The identifying person must have had a settled impression in his or her mind.

iii) The mental picture that a person has at the time of identification must be the same as when he or she saw the accused and should not be tainted with opinions of third parties or by other factors.

iv) Time taken in identifying the accused is important for example if it is too short, it may not be adequate.

v) There must be an opportunity allowing for proper identification.

vi) The coincidence between the person identifying and the person being identified.

Identification involves pointing out characteristics of a thing or person sought to be identified. For example, the manner of dress, sex of the person, the height of the person, age of the person, size, complexion, accent, handwriting, blood group, etc because it is easier to identify a person who has been known to the person identifying him or her.

MUSOKE V R [1958] EA 715

It was held that it is not an established practice to question a witness as to his or her reasons for doing so. That voluntarily made comments by the witness is often received in evidence as part of eth act of identification but answers to questions will be of less value and of doubtful admissibility.

KARANJA V R (2004) 1KLR 578

The appellant was convicted of aggravated robbery; he was identified by the victim at an identification parade. He raised the defense of alibi and argued that evidence of identification was unsafe or unsustainable. Court held that subject to certain exceptions, it is very vital that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest of care. The evidence of a single witness regarding identification especially where it is known that the conditions favoring identification were difficult. In such a case, what is needed is other corroborating evidence whether direct or circumstantial.

KIBUTHU V R

The appellant was accused of having committed aggravated robbery and was convicted. Evidence showed that police had used a track dog to lead them to eth accused on the scene of the robbery. He appealed against the decision basing that the identification was unsafe. Court held that the accused had not been recognized by the complainant and none of eth stolen property had been traced back and it could therefore be unsafe to rely solely on the

fact that a police track dog led the police where the accused was that night especially in absence of expert evidence of what the track dog could or could not do.

SHAMA AND ANOTHER V R [2002] 2 EA 589.

The appellant was charged with murder and had been identified by a witness using the voice recognition. This witness had never had face to face conversation with the accused and the accused raised the defense of alibi. Court held that identification becomes a crucial issue of the identifying witness is unable to physically see the speaker whose voice the witness claims to identify thus its necessary for the court to consider the identification with the greatest or caution. There is a possibility of mistaken identity by voice where it is claimed that a person has been identified.

NJIRU V R [2002] 1 EA 218.

The appellant were tried with aggravated robbery. Evidence adduced was that the complainant who claimed to have seen them cut off power supply. There was also voice identification by one of them and the complainant also claimed that the robbers had spoken to them and he could register the appellant's voice. An identification parade had also been carried out and on appeal by the accused, court held,

i) Where an identification parade is to be carried out, the requirement in respect to the members of the parade is subject; they should be of the same age, height, appearance, class of life as the suspect and not that they should be identical. N respect of the first accused, there was no need to find people with similar swellings as the first accused had on his side of the face although if it was possible, it would have a commendable thing to do.

ii) Where a witness says that a part from visual identification of the suspect, he has also been identified by voice, the witness should be allowed to confirm that. There was nothing objectionable in a witness requesting for parade members to shout for him, so that he cold satisfy himself that he would not make any mistake identifying the particular suspect.

In **Uganda V Ntambazi [1996] HCB 29,** the following rules were laid out for the purposes of an identification parade;

1. The accused must be informed that he may have a lawyer present.
2. The officer in charge of the case even though may be present, does not carry out the identification.
3. The witness does not see the accused before they parade.
4. The accused is placed among at least eight persons of similar age, height and class of life and general appearance.
5. The accused should be allowed to take any position he chooses and is allowed to change his position after each identifying person has left if he so desires.
6. Care must be exercised so that the witnesses are not allowed to communicate to each other after they have been to the parade.
7. Persons who do not have any business at the parade should be excluded.
8. Careful notes should be made after each witness has been to the parade recording whether the witness identified the accused or not and other circumstances.
9. If the witness desires to have the accused person to walk around, speak, put on a cap pr put it off. That should be done as a pre caution measure; the whole parade is asked to do those things so that the witness identifies the person.
10. During the conduct of the parade the accused should be asked whether he is satisfied how the parade is being conducted where it is fairly conducted and a note of his reply should be made.
11. The witness should only be told that he will see a group of people who may or may not include the suspected person. This is to ensure that the witness is not influenced in any way.

In TWEBAZE DRAKE V UGANDA

It was held that the intention of eth parade was to make sure that the ability of eth witness to recognize a suspect is tested. Court went on to say that the identification parade is not the only search test because the correctness or otherwise of identification will depend on the circumstances such as length of time, distance, the light and the familiarity of the

witness of the accused. If the circumstances are good, then the danger of mistaken identity is reduced.

In STEPHEN MUGUME V UGANDA

It was held that identification parades are as a practice held in cases where the suspect is a stranger to the witness possibly where the witness does not know the name of the accused. The parade is held to enable the witness confirm that the person identified at the parade is the same as the one the witness saw commit the offense. Further, the evidence of the parade could only be accepted if the parade conformed to the established practice.

c) Facts that fix time and place at which the relevant issue may have happened.

Normally, the time at which a particular crime is committed may not be material although there are instances where time is important to establish an element of time. For example, burglary and house breaking. In the defense **of alibi, time** is important because a person cannot be in two places at the same time. Time will therefore be crucial if the accused person is to be placed at the scene of the crime.

d) Facts that show a relationship of the parties.

This may include blood relations or pedigree. It may include contractual relations between parties, may include personal relationships for example friendship or enmity. Hatred, even love fiduciary relationship like that between lawyer and client, doctor patient, clergy congregation etc…

5. Facts which show common intention.

Section 9 of the Evidence Act provides that where there is a reasonable ground to believe that two or more persons have conspired together commit an offence or an actionable wrong, anything said, done or written by anyone of those persons in reference to their common intention, after the time when that intention was first entertained by anyone of those persons is a relevant fact as against each of the persons believed to be conspiring as well as for the purpose of proving the existence of the conspiracy and for the purpose of

showing that any such person was party to it. This relates to conspiracy where two or more persons agree to commit a crime it becomes a crime at the time of agreement under this section. People who conspire are said to have common intention and thus provision would show that conspiracy existed and the person was party to the conspiracy.

6. Contradictory or inconsistent facts

Facts not otherwise relevant are relevant if they are;

a) Inconsistent with any fact in issue or relevant facts

b) If by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Section 10 introduces a negative element in that facts which negate or affect improbability of nay fact in issue are relevant. Evidence of inconsistent facts can be derived from a number of factors for example, the defense of alibi is inconsistent with allegation that the person who committed the offence where that offense requires physical preference.

In **UGANDA V DISMAN SABUNI (1981) HCB 1**

It was held that it's well established law in Uganda that when an accused sets up an alibi which is technically a defense, the accused does not have any responsibility of proving the alibi. The prosecution must negative the alibi by evidence adduced before the defense is put forward or by calling witnesses to give evidence in rebuttal. If on the full consideration of the whole of the evidence put before the court, it is found that the alibi is sound and it has not been negative, then the prosecution won't have proved its case beyond reasonable doubt and the accused is entitled to an acquittal. It was established that only a grave inconsistency is not satisfactorily explained will usually result in the evidence of the witness being rejected. Minor inconsistencies will not usually have that effect unless they point to deliberate untruthfulness.

Minor inconsistencies do not usually have the effect of leading to the rejection of the witness' evidence unless they point to deliberate untruthfulness. Another example of inconsistency is the fact of impotence especially where there is an allegation of rape or

allied offences. In matrimonial causes, wherein the issue of paternity is raised, the fact that a husband has had no access to the wife for a period falling outside the gestation period; it becomes relevant if it's alleged that you have fathered the child.

In UGANDA V NASUR (1982) HCB 1

It was held that in assessing evidence of the witness and the reliance to be placed upon it, his consistency or inconsistency is a relevant consideration. Where grave inconsistencies occur, the evidence may be rejected unless satisfactorily explained, while minor inconsistency have no adverse effect on the testimony unless it points to deliberate untruthfulness.

7. Facts which show the state of mind or bodily feeling

Section 13 of the Evidence Act provides that facts showing the existence of any state of mind such as intention, knowledge, good faith, negligence, rashness, ill will or good will towards any particular person or showing the existence of nay state of body or bodily feeling are relevant when the existence of any such state of mind with body or bodily feeling is in issue or relevant. The person may bring about particular acts or commit particular facts because of his or her state of mind. In some cases, the mental element whether in crime or tort is a relevant consideration.

Under this provision, evidence of which a state of mind can be inferred is often and therefore is admissible under section 13. Sanity is important in criminal cases to prove guilt or otherwise, it is also relevant to determine whether a person can be party to a trial. It is also important in succession cases where the sanity of a testator may be called in question and may be used to challenge his or her will. Knowledge is important in tort and contract because it helps in determining liabilities for example the knowledge that the contract is being made fro an illegal purpose is a relevant fact. In tort, where the owners of an animal knows that the animal has the propensity to bite even though its not naturally dangerous he is liable it bites any one.

Intention is relevant in criminal and civil cases, for example threats before the actual commission of an offense may reflect an intention.

8. Facts which are evidence of similar facts or occurrences

This is provided for under section 14 of the Evidence Act which states that when there is a question of whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such an act formed part of a series of similar occurrences in each of which the person doing the act was concerned, is relevant. All evidence which that the act was accidental or not is admissible. Evidence of similar facts generally refer to the rule that court can use past similar occurrences relating to a particular person to establish whether that person is guilty or not or liable in civil actions or not.

This rule assumes that generally people do not change their habits so that if they have done similar acts in the past, they are likely to repeat such acts. This general rule under similar facts is exclusionary, in other words, it excludes evidence of similar acts recognizes exceptions. Evidence of past similar acts is not admissible except to prove that an act was not accidental.

The general principle was laid down by the Privy Council in Makin V Attorney General**,** where court stated that it's undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried but court also recognized exceptions under which that evidence may be admitted for example where its sought to adduce that evidence to rebut the defense of accident or mistake or where its used to show that what happened was by design.

R V SMITH

The appellant was indicted for the murder of a mistress who was found drowned in a bath tab, it had been made to look like he died in an epileptic fit. It was also established that on previous occasion other mistresses had died in similar circumstances after making favorable financial statements to the appellant, it was held that those past similar acts could be admitted to show that the death was not an accident.

9. Facts which show the ordinary course of business

This is provided for under section 15 which provides that, when there is a question of whether a particular act was done, the existence of nay course of business according to which it naturally could have been done is a relevant fact. Here, there are two facts under investigation;

a) Act done which is being investigated

b) There is the ordinary or natural way through which it would have been done.

HEARSAY EVIDENCE

Hear say evidence has been defined sometimes as "third party's assertions" narrated to court by a witness for the purpose of establishing the truth of that which is the assertion. A more precise description of hearsay evidence was made in the case, **Subraminium V Public Prosecutor,**[245] where it was held that hearsay evidence is an assertion of a person other than the witness testifying offered as evidence of the truth of that assertion rather than as evidence of the fact that the assertion was made. Court added that it is not original evidence. The rule of hearsay evidence is therefore exclusionary in the sense that it exclude4s hearsay evidence in the course of proceedings.

According to section 59 of the Evidence Act, oral evidence must in all cases whatever be direct, that is;

a) If it refers too a fact that could be seen, must be the evidence of the witness who says he or she saw it.

[245] [1956] W.L.R. 965

b) If it refers to a fact that could be heard, must be the evidence of a witness who says he or she heard it.

c) If it refers to a fact that could be perceived, by any other sense or in any other manner, must be the evidence of a witness who says he or she perceived it in that sense or any other manner.

d) If it refers to an opinion, on the grounds of which that opinion is held, it must be the evidence of a person who holds that opinion on that ground.

Per section 59[246], only direct evidence is admitted in court thus other evidence is hearsay and therefore inadmissible.

In R V GIBSON

The accused was inducted for willful wounding. It was alleged that the accused had thrown a stone at the victims house and immediately after the stone had hit the victim, a passer by woman pointed at the accused's house and said that the person who had thrown the stone had gone inside and it was only the accused who was found inside the house and was prosecuted and convicted. He appealed on the grounds inter alia that on evidence of this lady who herself had not been called in as a witness in court should not have been admitted. Court held that the evidence was hearsay because the lady had not been called to testify and the evidence should not have been admitted. Court further stated that it has been court's mandate to exclude hearsay evidence from the proceedings right from the beginning but in practice parties have a duty to raise objections against certain evidence and where they fail to do so, they may be deemed to have waived their rights.

In SPARKS V R

The appellant was convicted of indecent physical assault of a girl under the age of four. Immediately after the assault, a child who was not called as a witness at the trial told her mother that it was a colored boy who had done it. The appellant was a white man. This evidence was objected to on grounds of hearsay but court held that the mother's evidence

[246] Evidence Act (Cap 6)

of what her daughter told her was hear say, the child not having been called as a witness there was no basis on which her statement could have been admitted. For the rationale for the rejection of hearsay evidence, see Marshall V R and State V Medley Court.

In MARSHALL V R

It was stated that the general rule is that hearsay evidence is not admissible for the reason that such statements are not subjected to the ordinary tests required by law to ascertaining their truth. That is, that the author of the statement is not exposed to cross examination in the presence of penal sanctions of an oath. There is no opportunity to investigate his character and nature and neither is his demeanor subject to observation.

In STATE V MEDLEY COURT

Court stated that the rules regarding hearsay have been adopted to guard against the manifest danger to human life that is so liable to arise from the admission as evidence of declarations made not under the sanction of an oath and not offering to the party affected by them an opportunity of cross examination. All attention to omitted facts that if stated, modify or completely overturn the inference made from the declarations made. These rules have been found so essential as safeguards in the investigations of truth that they have become fundamental in our system of jurisprudence. No matter how convincing the testimony may be to an intelligent mind, unless unrepresented under fixed rules, it can not be received

Exceptions to the Hearsay Rule.

Despite the existence of reasons which justify the exclusion of hearsay evidence, there are situations where practice has shown that wholly excluding such evidence could be unfair and would lead to injustice. Fro this reason therefore, common law developed a series of exceptions to the rule against hearsay and many of these have been codified in the Evidence Act. These are found in section 30 of the Evidence Act.

Section 30 is to the effect that statements written or verbal of relevant facts made by a person who is dead or who can't be found or who has become incapable of giving evidence or whose attendance can not be procured without an amount of delay or expense

which under the circumstances of the case appears to be unreasonable, they are relevant to cases falling under section 30. [247]

MUHAMMAD TAKI V R

Counsel applied that evidence be admitted by way of exception instead of bringing a witness form Switzerland to confirm that he sold the watches to the appellant, court said that it might have been better if the learned magistrate had had evidence before him of the conditions which made section 30 of the Evidence Act applicable. But he was entitled to take judicial notice of the fact that Switzerland is in Europe and Kampala is in Uganda and it seems to have been satisfied that the attendance in Kampala of the witness form Switzerland could not be procured without an amount of delay or expense which in the circumstances of the case appeared unreasonable.

In THORNHILL V THORNHILL

The trail judge of the lower court was of the view that air travel is very rapid and so the witness could fly in and the cost and inconvenience of bringing the witness form the United Kingdom would not be great in this era of quite inexpensive travel. On appeal, judges agreed that air travel is rapid but not inexpensive and could cause serious financial embarrassment and hardship to the parties. They thus held that the judge misdirected himself in dismissing the application that he should have been granted both on the ground of inconvenience and expense and on the ground that the court would not be likely to derive any advantage from the presence of the witness.

In COMMISSIONER FOR CUSTOMS AND EXCISE V PANACHAND

Court said that may be court might take judicial notice of the distance between Nairobi and The Hague and inferred that bringing of a witness to Nairobi from The Hague in relation to this particular case would be unreasonable. That in Taki V R, court only suggested but didn't decide that such an approach would be legitimate.

[247] See Muhammad Taki V R, Thornhill V Thornhill, Commissioner for customs and Excise V Panachand.

Dying Declarations

When a statement is made by a person as the cause of his or her death or as any of the circumstances of the transaction which resulted into his or her death, in cases in which the cause of death of that person comes into question and the statements are relevant whether the person who made them was or was not at the time when they were made of eth proceeding which the cause of his or her death comes into question. It is a statement uttered by a since deceased person; the purpose of which is to establish the cause of death of that person. Ordinarily, this would amount to hearsay evidence because the maker is not before court. However, such evidence is admitted as an exception to the hearsay rule under section 30 of the Evidence Act.

SABIITI VINCENT V UGANDA

Court said that a dying declaration is admissible evidence but caution must be taken when relying on it to convict because such evidence lacks cross examination. In addition, the circumstances under which the dying declaration was made must be examined so as to determine whether the declarant was able to see the accused.

In R V WOODCOCK

It was stated that the deceased must have lost all hope of living that if at least he had a chance however remote, then it cannot be admitted. The rationale being to make sure that ii is the moral and spiritual compulsion which has taken over and that therefore the person doesn't tell lies.

Elements of a Valid Dying Declaration

i) The maker must have died.
ii) Statement must be complete.
iii) It should be a free expression of the deceased.
iv) It should be corroborated.
v) The issue of time.

In R V PIKE

Court decided that a child of tender age could not make a dying declaration. His statement was incompetent as a dying declaration because the maker was not capable of giving evidence in court as a witness.

In WAUGH V R

The deceased was allegedly shot by the appellant. Before he died, he was found conscious and said that he was shot innocently but when he was about to give the reason why the appellant had a grudge against him, he fell into a coma from which he never recovered. The issue was whether his statement was admissible as a dying declaration and it was held that it could not be admitted because on its place, it was incomplete and no one could tell what he was about to add.

In CHARLES DAKI V R

This was a murder case where the deceased was admitted in hospital. The police officer went to examine him, during which examination, he was able to say the name of the person who shot him but in the course of the interview, the doctor came and interrupted the interview. The deceased died before completing his statement. On whether the statement was admissible as a dying declaration, it was held on the place and the footnote thereto that the deceased was interrupted by the doctor yet he might or might not have added something. Accordingly, on the authority of decided cases, the statement was inadmissible. Court went on further to say that it is true, that in the earlier case, the deceased fell unconscious having begun but not completed the sentence but the principle applies where although there was apparently no unfinished sentence, it is not established that a declarant said all he wished or intended to say before the doctor intervened.

In UGANDA V ALFRED OYAKA

The issue was whether there was sufficient corroboration of a statement made by a deceased pinning the accused for sexual assault. The woman (while pregnant) was allegedly pierced by a man. In her dying declaration, she alleged that she had been assaulted by the man. The prosecution sought to use it as corroborative evidence. Court

held that the law regarding dying declarations is that to base conviction from it, the declaration must be satisfactorily corroborated. Corroboration is an independent form of proof evidence which confirms the complicity of an issue of an offence. Medical evidence showed that the deceased suffered a ruptured uterus and on the evidence of the doctor showed that the rapture could have been caused by violence or trauma on the abdomen on being hurt. This was consistent with the violence meted out by the accused to the deceased. Therefore, this medical evidence accorded the necessary corroboration to the dying declaration.

In UGANDA V RUTARO

Court said that they could not base a conviction on a dying declaration unless it was satisfied that the declaration was truthful and satisfactorily corroborated.

In KALISTI SEBUGWAWO V UGANDA

On sufficiency of corroboration, court held that the repetition of a dying declaration by different witnesses is not enough corroboration.

In R V KABATEREINE

Two days before the deceased was burnt to death, she had made a statement to her head man that the accused had threatened to burn her in her house because she had caused the death of her father by witchcraft. The issue was whether the statement to the headman made two days before was a rightly admissible dying declaration as it was directly related to the occasion of the death of the deceased. The time at which the statement was made was immaterial.

In BARUGAHARE V R

A period of six months had elapsed thus court had rejected a statement made as a cause of fear to the deceased holding that there must be a proximate relationship between the statement made and the death itself. In this case, it was a mere fear of death thus inadmissible.

Statements made in Ordinary Business.

According to section 30(b), when the statement was made by such a person in the ordinary course of business and in particular when it consists of any entry or memorandum made by him or her in books kept in the ordinary course of business or in the discharge of professional duty or on acknowledgement written or signed by him or her of the receipt of money, where securities or property of any kind or of a document used in commerce written or signed by him or her or of the date of a letter or other document usually dated, written or signed by him or her.

The statement must have been made before the controversy arose. This derives from the Latin maxim, "ante litem motum" – declaration must have been made before the dispute arose. It should not have been in anticipation of its use in court.

Records must be made by someone who is under duty to make them and such statements are admissible because it is felt that they are most probably true since people did not anticipate that there will be a point in issue in litigation. Again, since they are made in the ordinary course of business, the person makes them truthfully.

Section 30(b), should be looked at together with section 32 on entries in books of account regularly kept in the course of business which are relevant when they refer to the matter which court is interested in.

Section 33 is about entries in public reports made in the performance of duty should also be looked at in light of section 30(b).

Statements against Pecuniary or Primary Interests of the Maker.

Section 30c) of the Evidence Act stipulates that when the statement is against the pecuniary or proprietary interest of a person making it, or when it could expose him or her or would have exposed him or her for a criminal prosecution or to a suit for pursued damages. See ***R V O'Brien. Dias V R***

In R V O'BRIEN.

There were two accused persons. O'Brien and Jensen who were jointly charged for possession of narcotics. O'Brien submitted himself for trial but Jensen fled the country. After O'Brien's conviction, Jensen returned and later made a statement while saying that he alone was the perpetrator of the crime and died soon. Thereafter O'Brien applied to court to review his conviction on the basis of the statement by Jensen. However, his application was denied contending that the maker was already aware of the proceedings and that the statement would be calculated to save his friend.

In DIAS V R

A letter was written by one Thomas, to the effect that the accused had instructed him to pay false pay sheets (ghost employees). It came out at the trial that when Thomas wrote that letter, he only intended to be promoted at work. Court held that much as it exposed him to criminality and was against his own interest, he made it without full knowledge of its consequence except for purposes of advancement at work.

Public Rights and Records.

Section 30(d) of the Evidence Act provides, "When a statement gives the opinion as to the existence of any public right or custom, or matter of public or general interest of the existence of which if it existed, he or she would have been likely to be aware and when that statement was made before any controversy o the right, custom or matter had arisen.

Pedigree Relations.

Section 30 (e) of the Evidence Act provides that when the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood marriage or adoption the person making the statement had special means of knowledge and when the statement was made before the question in dispute was raised, then that statement can be admitted in court in evidence.

Private Rights and Family Affairs.

When the statement relates to existence of any relationship by blood, marriage or adoption between persons deceased and is made in any will or dead relating to the affairs of the family to which any such deceased person belonged or in any family pedigree or upon any tombstone family portrait or other thing on which such statements are usually made and when the statement was made before the question in dispute was raised.[248]

In HAINES V GUTHRIE

This was a suit for the price of goods sold. The defendant who at the time of the sale was an infant could not b e held liable in law. The issue before court was the defendant's date of birth and for him to prove his infancy he brought an affidavit sworn by his father in another matter where he had put down the date of birth of the defendant. Court rejected this statement on grounds that it could not establish the relationship of family descent.

OPINION EVIDENCE

An opinion is a statement as to what one thinks about an alleged fact. It could be as to whether that fact exists of not, who caused it and why it could have happened. Generally, matters of opinion are conclusions or inferences drawn by a person in reference to particular instances. The general rule is that opinions of inferences as to the existence of facts in issue or relevant facts are inadmissible.

The Rule against Opinion Evidence.

The rule is much narrower in its scope than the term opinion in its ordinary sense. Thus while the general rule is that opinion evidence is inadmissible, there are some instances where it can be admitted as an exception between the general rule and this is provided for in section 43 – 49 of the Evidence Act.

[248] See Haines V GuthrieSee also sections 30(g) and (h) of the Evidence Act for other exceptions.

Expert opinion.

Section 43 of the Evidence Act provides for opinion of experts according to which court has to form an opinion upon a pint in foreign law or of science or art or as to identity of handwriting or finger impressions. The opinions upon that point of persons specially skilled in that foreign law, science or art or impressions as to identity of handwriting or finger impressions are relevant facts and such persons are called experts.

Who is an expert?

Educational background.

Ordinarily, for a person to be judged as an expert, he should have an educational background which enables him or her to become conversant with the subject matter that he is expected to testify on and usually before evidence of such person is admitted, his educational background is generally first pit on record.

In R v Oakley [1979] 70 Cr. App Reports 7

Facts: A police man was called as an expert in an accident. He had worked 15 years in road traffic service, taken as a qualifying exam in accident investigation and it was shown that he had investigated more than 400 cases of traffic accidents.

Held: He qualified as an expert.

In Uganda v Ogwang

Facts/ Held: A medical assistant was held to be an expert for purposes of classifying harms as dangerous or not dangerous and injuries as fatal or minor. In ordinary practice, such are the duties of a medical doctor. This case also considers judges as experts.

Experience. Court will consider the experience of experts even when they did not acquire formal training. Experts may therefore not be specialists in a particular field but may just be skilled or experienced in the branch of knowledge even though the exercise of such skill or acquisition of such knowledge is not part of their general occupation.

R v Silverlock [1894] 2 QB 766,

Facts: There was a dispute as to the identity of handwriting of the accused. A solicitor was called to testify to that identity. His relevance in the matter was that he'd been in the habit of perusing old parish bills and registers drafted by various individuals for over 30 years. He claimed to be an expert as to handwriting. An objection was raised claiming that since the solicitor had no formal training in the field of handwriting, he couldn't give expert evidence.

Held: Court allowed the solicitor to testify and held that his experience in perusing documents partly for professional use and partly for private purposes enabled him to acquire experience in handwriting although he hadn't acquired any formal education.

In R v Gatheru

Held:

"Court has on several occasions said that when a trial court has to form an opinion upon the question whether a home-made gun or part thereof, is a lethal barrelled weapon, it must have the assistance of expert opinion that we think that such special skill is not confined to knowledge acquired academically, but would also include skill acquired by practical experience that in the present circumstances, even though a police officer employed on operational or investigation work, acquires a sufficient practical knowledge to qualify him as an expert, his competence as an expert should in all cases, be shown before his testimony is properly admitted. "

Mohammed Ahmed v R

Court in regard to the issue in the **Gatheru case** held:

"The rule in *Gatheru* requiring competence of a witness to be established was one of practice, omission of whose observance would not in all cases, render the evidence inadmissible. That rule will be applied more strictly in criminal than in civil proceedings where it can be overlooked.

Value of expert evidence.

Expert evidence is not binding on court. It is only to assist court.

In Uganda v Ntura

Facts: There was an accident caused by a Uzi gun. In a bid to establish the characteristics of a Uzi gun so as to show if it could have caused the accident, a police officer was called to testify as an expert on guns. It was established that he was an expert since 1949 and that he'd had a habit of training on firearms.

Issue: Whether the accident could have been caused by such a gun?

Held: The policeman's professional experience coupled with some specialised study of firearms qualified him to be an expert witness in the matter of guns.

In Mugisha v Uganda

Facts: There were 4 counts of issuing threats with murder and demanding menaces. There was evidence of a handwriting expert which sought to link the accused with the offence, but this evidence was not scrutinised by the trial magistrate. The appellant was convicted.

Held: An expert's opinion is opinion evidence and it can rarely, if ever, take the place of substantive evidence that opinion is only a piece of evidence and it's for the court to decide the issue one way or another upon such assistance as the expert might offer. Although the general rule requires an expert to state in evidence the grounds for his opinion, there may be cases in which it is necessary for the expert to lay a proper foundation for his opinion.

Under section 49, before an opinion is admitted the grounds on which it formed are relevant. Court must also give reasons if it is to reject expert opinion. Under section 44, any facts not otherwise relevant are relevant if they support or are inconsistent with the opinions of expert where these opinions are relevant. "Do not take opinion evidence on its own but take it in relation to other facts." [249]

[249] See Walusimbi V Standard Bank, De Souza V Sharma, Charles Alfred Sutton V R,R V Smith.

In De Souza v Sharma

Issue: Whether the construction board had a right to reject or question expert evidence?

Held: Court considered the evidence of the expert witnesses and rejected their estimates as in the view of the board, they were very high. Referring to s.49 at the time, court said that had the board done this without giving reasons, their rejection might have been unjudicial, but gave it 2 reasons based on lower figures admitted by the appellant. The court is not bound to accept the evidence of experts if it finds good reason for not doing so.

In R v Smith

Facts: The appellant was charged with assaulting a person who *interalia*, put up a defence of automatism (sleep walking). 2 psychiatrists brought evidence that he suffered from automatism.

Issue: Whether the psychiatrists' expert evidence was relevant to determine automatism?

Held: Since the question whether the applicant had acted in a state of automatism was in issue and since automatism was a condition outside the experience of the ordinary lay person, the psychiatrists' expert evidence was relevant and necessary to help the jury determine whether the applicant's defence of automatism was valid. In reference to s.44, the judge had rightly exercised his discretion to permit the cross-examination of the appellant and the psychiatrists to be called as witnesses.

Opinions of ordinary witnesses

Evidence of ordinary witnesses is provided for under sections 45 to 48 of the Evidence Act. Under section 45, when the court has to form an opinion as to the person by whom any document was written or signed, the opinion of nay person acquainted with the handwriting of a person by whom it is supposed to be written or signed but it was or was not written by that person is a relevant fact.

A person is acquainted with the handwriting of another person where he or she has seen that person write or when they have received documents purporting to be written by that

person in answer to documents written by themselves or have in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to them.

Section 46 states that opinion as to the existence of right or custom may be given by someone who is likely to be knowing of its existence.

Section 47 states that opinions as to usages or tenets of anybody of men or family or opinion as to the constitution or government or of any religious or charitable foundation or opinions as to the meaning of words or terms used in particular districts or by particular classes of people, the opinions of persons having special means of knowledge thereon are relevant facts.

Section 48 states that opinions on relationship are relevant when court has to form an opinion as to the relationship of one person to another the opinion of nay person who is a member of the family or who has special means of knowledge of the subject is relevant. See ***Case V Ruguru***

In Case v Ruguru

Held: Special expertise was not needed to prove the existence of a marriage in the Embu custom, however, you must be likely to know, e.g. by being a member of that tribe or group of people. It must have been in existence for 6 or more months.

C H A R A C T E R E V I D E N C E

The term character is not defined in the Evidence Act. It is explained under section 54 to mean and include both reputation and dispositions. Under section 54, if character evidence is to be given, it should only be as to general disposition and general reputation but should not be evidence of the particular acts by which reputation or disposition was shown. Disposition in this case means the tendency of a person to act or behave in a particular way whereas reputation refers to the opinion of members of the public about a particular person.

General Principles Underlying Character Evidence.

As a general rule, character evidence is not admissible in court. However, indeed as any other rule, that rule has exceptions under which admissibility if character evidence depends on the following;

a) Nature of the case in other words, is it a civil case or a criminal case?

b) Nature of the parties in other words, is it the accused, plaintiff or character of defendant, complainant or character of witnesses.

Character Evidence in Criminal Cases.

Under section 51 of the Evidence Act, in criminal proceedings, the fact that the accused person is of good character is irrelevant. According to section 52, the fact that an accused is of bad character in criminal cases is irrelevant unless it falls under section 52d). As seen in section 54, if bad character evidence is to be adduced, it must be; evidence of reputation, it must also be shown that a substantial part of a community holds that view.[250]

Exceptions under section 52

Under Section 52 (a) such character evidence is relevant if evidence has been given or a question or questions asked by the accused person or his or her advocate for the purpose of showing that he has a good character. Once an accused gives evidence that he is of a good character or asks questions to show him as such, then he is said to have put his character in issue, in other words the issue of his good character can be determined by allowing the prosecution to say that he is a person of bad character.[251]

Yowana Setumba v R (1957) EA 35

Held: Character evidence is admissible against the accused if the prosecution shows him as a person of bad character. According to section 52 it is the general rule that in criminal proceedings the bad character of the accused person is irrelevant. However, you can show

[250] See R V Rowton.

[251] See Maxwell V DPP, Yowana Settumba V R On how to introduce evidence of bad character, see Stirland V DPP

it as part of resgestae as evidence of past similar occurrences under section 14 of the Evidence Act. Section 52 provides circumstances when bad character would be admissible. The bad character referred to here is normally evidence of reputation and before such evidence can be admitted it must be established that a substantial part of the community holds that view pre case of **R v Rowton (1965) 10 Cox 25**

In Stirland v DPP (1944) A. C 315

Facts: The rules determining bad character were discussed in this case. The accused person was charged with forgery and he gave evidence of his good character. He called a witness to say that he was a person who had never been convicted before and he was very moralistic.

Held: The court allowed the prosecution to adduce evidence of his bad character and on appeal the following guidelines were laid down by the court:-

1. An accused person may be cross-examined as to his claims of good character in any evidence he has given in chief and that a result of such cross-examination can prove his bad character and that they are a way of testing his velocity that such accused past record can be put in evidence, but this should be the whole of the accused's past life, mere suspicion that someone has ever committed a crime is not enough and it is not relevant to establish his bad character and this is not enough to deny him his claim of good character.
2. During the trial the evidence of witnesses who can establish bad character may be adduced.

Per section 52b) the proof that he or she has committed or been convicted of another offence is admissible evidence to show that he or she is guilty of the offence that he or she is charged. However, before such evidence is adduced, there must be a relationship. In other words there must be a similarity between the offense he is being charged of and the one being adduced as evidence of character.[252]

[252] See R V Rodley (1913) 3 K.B 468

R v Rodley (1913) 3 K.B 468

Facts: This case discusses section **52(b)** of the Evidence Act regarding previous convictions. The appellant was indicted for having broken into a dwelling house in the night with intent to lavish a woman. Prosecution's evidence was to the effect that the appellant broke into the house and went downstairs where he seized her, he pulled down her clothes and upon the woman's father coming downstairs the appellant went away. The defence at the trial was that evidence of the prosecution was not true since the appellant went to the house for purposes of courting the complainant with her consent and he did not intend or attempt to ravish her. Prosecution tendered evidence that the appellant at about 2.00am on the same morning went to the house of another woman about three houses from the complainant's house gained access to her bedroom and had a connection with her. It was contended that this evidence was admissible to show the state of the appellants mind and body at the time when he broke into the complainant's home and coupled with the evidence of what happened when he was in the house was admissible to show the intent of the appellant. This evidence was admitted and the appellant was convicted on it and he appealed.

Held: This evidence was not relevant to any of the issues in the case and therefore not admissible and citing the case of **R v Fisher**[253] court said the principle is that prosecutors are not allowed to prove that the accused has committed the offence with which he is charged by giving evidence that he is a person of bad character who is in the habit of committing crimes, for that is equivalent to asking the court to say that because an accused has committed other offences he must therefore be guilty of the particular offence for which he is being tried, but if the evidence of other offences, does go to prove that he did commit the offence charged, it is admissible because it is relevant in issue and it is admissible because it proves that the accused committed another offence. Court finally said that the governing rule must always be that any evidence to be admissible must be

[253] (1910) 1 K.B 149

relevant to the issue.

According to section 52c) the nature of conduct to his or her defense such as to involve imputations on the character of the complainant or the witnesses or the prosecution. Where in the course of his defense, an accused makes imputations on the character of eth complainant or prosecution witnesses then prosecution is allowed to adduce evidence of bad character of the accused. [254]

In Royston v R[255] it was stated that if the imputations of bad character are an integral part of the defence of the accused without which he cannot put his case fairly and squarely then he cannot be cross-examined on previous criminal history

Abdulla Katwe v R (1964) E.A 477

Facts: The appellants were charged with conspiracy to commit robbery, the evidence being that acting on information received, an Inspector of Police with five other officers all in plain clothes went to patrol a road and they saw a car some yards in front of them trying to broke them, five men with stones descended upon the Inspectors car. When the officers emerged the five men withdrew but they were arrested and stones were found in their car and the number plate was smeared with sand. At the trial Counsel for the appellants in cross-examination suggested to the Inspector that he had fabricated the evidence, and the prosecuting officer applied for leave to cross-examine one of the appellants on his previous convictions, the magistrate ruled that the appellants had put their character in issue and therefore the prosecutor was entitled to cross-examine the appellants on previous convictions. The 3rd and 5th appellants admitted previous convictions and all the five appellants were convicted. On appeal the issue was whether the evidence of bad character of the appellants was properly admitted at the trial?

Held: It was suggested to the Inspector that he had fabricated evidence, by planting stones into the appellants car and he had obscured the number plates of the car Counsel for the

[254] See Royston V R.
[255] (1953) 20 EACA 14

appellants went beyond what was necessary for the proper and fair presentation of his clients' case before the court. Accordingly, the magistrate had properly exercised his discretion in admitting evidence of bad character of the 2nd appellant. It would have been otherwise if the appellants had simply said the evidence was untrue such suggestion would not entitle the prosecution to cross-examine any of the accused as to their character. The principle is that a clear line should be drawn between words that are denial of evidence and words which attack the conduct or character of a witness. It is one thing for the appellant to deny that he performed the act, but it is another thing to say that the whole thing was a deliberate and elaborate concoction on part of the prosecution which seems to be an attack on the character of a witness. Court finally said in making imputations on the character of the prosecution witnesses the defence had gone so far as to bring the imputations outside the scope of protection under the rule in **Royston's case**.

Per section 52d) if the accused has given evidence against any other person charged with the same offense which he or she is charged, then evidence of his or her bad character is admissible.[256]

R v Bruce (1975) 1 W.L R 1252 (meaning of 'evidence against')

Facts: In this case 8 youths surrounded a passenger on a train and when they realized that he was frightened they took money from him. They were all charged with robbery, one accused called Mc Guinness said that there was a plan to rob but he said that he had played no part in it. His Counsel was allowed to cross-examine another accused Bruce about his previous convictions on the basis that Bruce had given evidence against Mc Guinness by denying that there was a plan to commit robbery.

Issue: Whether evidence of Bruce's previous conviction was admissible. Whether he had given evidence against Mc Guinness?

Held: 'Evidence against' means evidence which supports the prosecution's case in a material respect, or which undermines the defence of co accused. That evidence cannot

[256] See R V Bruce(1975) 1 W.L R 1252, Murdoch V Taylor (1965) 1 ALL ER 406

be said to be given against co accused if its effect if believed is to result not in his conviction but his acquittal of that offence. Court went ahead to say that Bruce's evidence undermined the defence of Mc Guinness. The previous convictions of Bruce were wrongly admitted. The appeal was dismissed on the ground that if such evidence leads to an acquittal then it is not evince against co accused.

Murdock v Taylor (1965) 1 ALL ER 406

Facts: The appellant Murdock was charged jointly with one Linch with the offence of receiving cameras knowing them to have been stolen. In cross examination the appellant said that he had nothing to do with stolen cameras and that they were entirely linch's responsibility. Further answers of the appellant pointed to the conclusion that Linch alone was in control and possession of the box containing the stolen cameras. Linch's counsel was allowed to cross-examine the appellant who admitted a number of convictions for theft. On appeal;

Issues: Whether the appellant gave evidence against Linch and whether therefore cross-examination as to his previous convictions was rightly allowed?

Held: The evidence given by the appellant in cross examination was evidence against Linch because it supported the prosecution's case against Linch in a material particular and therefore questions as to the previous convictions were properly allowed because they were relevant and directed to the appellants credibility. In this case court laid down the following principles

1. The evidence against co accused means evidence which support the prosecution's case against co accused in a material respect, or which undermines the defence of co accused, it also means positive evidence which would rationally have to be included in any summary of evidence in which the case which if accepted would warrant conviction of co accused.

2. Both must be charged with the same offence.

The material considerations in determining whether such evidence has been given is the effect of the evidence in the minds of the court and this is an objective test. Evidence

against co accused is not limited to evidence given with hostile intent, once an accused has given evidence against his co accused a trial judge has no discretion whether or not to allow the former to be cross-examined by the co accused as to his previous convictions although the trial judge must rule as to the relevancy of the proposed cross-examination. This means that it should go to the credibility of the accused, who has given evidence against co accused.

EYE WITNESS IDENTIFICATION

Meaning of Identification

Identity of a thing or person is an expression of opinion that that thing or person resembles another thing or person so much so that it is likely to be the same thing or person. It is a comparison that looks for resemblances.

In criminal law, the identity of an accused must be established and that person has to be shown to be the one who committed the particular offence. Therefore, there has to be a process through which the accused is connected to the crime and this process is referred to as identification.

Likewise, in civil cases, identity is important. Any person who wishes to institute a case against another must clearly describe the identity of that other person and where the person is found.

The process of identification in criminal law usually seeks to ensure the following:

- The person identifying must have seen or observed the person being identified.
- The identifying person must have had a settled impression in his/her mind at the relevant time i.e. he or she must not have been in panic.
- The mental picture a person has at the time of identification must be the same as that he or she had when he or she first saw the accused. It must not be tainted by other factors or opinions of third parties.
- The time taken in identifying the accused person is important. If for example it is a short period such as a few seconds, it may not be enough for a person to notice.

- Consideration must also be given to those opportunities allowing for proper identification. This is generally referred to as the conditions and circumstances ideal for identification such as time taken, amount of light, distance between the identifier and the accused person and whether the suspect was known to the identifier before or is a complete stranger.

An accused person may be identified in court, at an identification parade or through previous conduct.

IDENTIFICATION PARADE

Identification parades are normally conducted by the police during investigations in an attempt to identify the accused or suspect with the offence for which he or she is charged or suspected. The purpose of the parade is to find out from the witness who claims to have seen the accused or suspect at the scene of the crime whether he can identify the accused or suspect as the person he or she saw previously at the scene of the crime or actually committing the offence. The witness must have seen the suspect previously, lest the parade will be of no evidential value. In addition, the witness should not have seen the suspect subsequent to his or her arrest, as his or her identification at the parade may be said to be based on his or her having seen the suspect after arrest and not at the time the crime was committed.

In order to ensure that identification parades are conducted fairly, the High Court of Uganda has approved certain rules for conducting identification parades.[257]

The police officer conducting the parade is required to ensure the following:

1. That the accused person is always informed that he may have an advocate or friend present when the parade takes place;
2. That the officer in charge of the case, although he may be present, does not carry out the identification;

[257] See: Sentale v Uganda (1968) EA 365; R v Mwango (1936) 3 EACA 29; Simon Musoke v R (1958) EA 715

3. That the witness does not see the accused before the parade;
4. That the accused is placed among at least eight persons as far as possible, of similar age, height, general appearance and class of life as himself or herself;
5. That the accused is allowed to take any position he or she wishes after each identifying witness has left if he so desires;
6. Care should be exercised that the witnesses are not allowed to communicate with each other after they have been to the parade;
7. Exclude every person who has no business there;
8. Make a careful note after each witness leaves the parade, recording whether the witness identifies, or other circumstances;
9. If the witness desires to see the accused walk, hear him speak, see him with his hat on or off, see that this is done. As a precautionary measure, it is being suggested the whole parade be asked to do this.
10. See that the witness touches the person he or she identifies.
11. At the preparation of the parade or during the parade ask the accused if he or she is satisfied that the parade is being conducted in a fair manner and make a note of his or her reply.
12. In introducing the witness, tell him or her that he or she will see a group of people who may or may not contain the suspected person. Do not say "Pick out somebody" or influence him or her in any way whatsoever.
13. Act with scrupulous fairness, otherwise the value of the identification as evidence will depreciate considerably.

The following extract is from the case of **Kurong Stanley v Uganda (Court of Appeal Civil Appeal No. 314 of 2003) [2008] UGCA 11**

"We now turn to the merits of the appeal. We find it convenient to begin with the evidence of the identification parade. The learned trial judge considered the evidence at length and came to the conclusion that the parade was conducted in accordance with the rules laid down in ***Republic vs Mwanga s/o Manaa (1936) EACA 29.*** *It is this conclusion that*

was challenged by the appellants' counsel at the trial of the appeal. We begin with his submission that the appellant was never informed of his right to request that a lawyer be present at the parade and that this omission was fatal to the whole parade. Counsel relied on the case of ***Ssesanga Stephen vs Uganda Civil Appeal No.85 of 2000 (CA)*** *in which this Court held that the right of the accused to be informed that he could have his lawyer present was mandatory and failure to inform him would be fatal to the parade. In the instant case, the appellant was asked whether he had an advocate whom he wished to attend and he answered in the negative. In our view, the fact that the appellant was asked whether he had lawyer should have alerted him to the possibility that he could have a lawyer present if he wished to have one present. He could have asked there and then whether, if he had one, he would be allowed to attend. Instead, he simply answered that he had no lawyer and never complained thereafter about the absence of one at the identification parade. We think that this case is distinguishable from the* ***Ssesanga case*** *where the appellant was never alerted to the possibility that he could require that an advocate or a friend attends the parade.*

The second objection to the parade is that witnesses at the parade were shown the appellant before the exercise was conducted. We have read the evidence of PW7, the officer who carried out the parade, and the appellant's own evidence on the matter. We do not find any evidence to support that claim. The learned trial judge can be forgiven for rejecting the appellant's evidence on the matter because, on the whole, she found that he was an ***"inveterate liar".*** *As the trial judge who had the opportunity to see all the witnesses, including the appellant, in the witness box, she was entitled to make that finding.*

The third objection was that at the parade, the appellant was lined up with people of dissimilar appearance in size and height which made it easy to be identified. The rules in ***Mwanga case (supra)*** *require that the accused should be placed as far as possible with persons of similar age, general appearance and class of life of himself or*

*herself. According to PW7 Ojok Bona who conducted the parade, most of the volunteers who participated in the parade were **"almost of same size"** with the suspect. We also note that most of the volunteers were aged between 18 and 31 years except one who was aged 37 which was also the age of the appellant. It is not always an easy matter to assemble eight volunteers of similar age, height and size, but all effort should be made towards that direction so that the suspect does not stand out as manifestly distinct from all other participants. We accept the evidence of the police officer (PW7) that he lined up eight people of similar appearances of the appellant save that only one of them was of his age. However, since the witnesses did not know the age of the appellant, this could not have occasioned a miscarriage of justice or prejudice the judgment of the witnesses. Moreover, this was not one of the reasons that the appellant advanced against the fairness of the whole exercise when he was asked whether he was satisfied with the conduct of the parade. We hold that the irregularity on age differential is minor and did not prejudice the fairness of the whole exercise.*

Finally, counsel challenged the fairness of the conduct of the parade on the ground that it was suggested to the witnesses that the man whom they saw in Gulu at the scene of crime was definitely one of the nine men paraded. According to DW7, he was instructing the identifying witness to walk along the parade and to touch the person he/she saw in Gulu if he/she recognised one. Four witnesses were told the same thing and they picked out the appellant. The appellant himself agrees that this was the procedure used. Counsel for the appellant did not tell us the words PW7 used that suggested that the suspect would be in the parade. We do not agree that the instructions PW 7 gave the witnesses suggested what counsel for the appellant is complaining of. All he said was that if you recognise among these people the man you saw in Gulu, then touch him. The use of the word IF clearly left the possibility that the suspect may be there and you don't recognise him or he may not be there at all. This objection to the fairness of the parade is unfounded and we reject it.

On the whole, we find that there were a few minor irregularities in the exercise but on the whole they did not prejudice the fairness of the identification parade. Both PW7 (the police witness) and the appellant himself agree that four witnesses picked out the appellant from the line. We agree with the trial court that there was no credible evidence that three Gulu lodge witnesses who picked the appellant from the line were shown the appellant before the exercise began. It is unfortunate that two of them did not testify in court but the appellant himself testified that they picked him out of the parade of eight volunteers. We hold that the identification parade was conducted properly and fairly."

CONDITIONS NECESSARY FOR A PROPER IDENTIFICATION

The leading authority is the case of:

Abudala Nabulere & 2 Others v Uganda, Court of Appeal Cr. App. No. 12 of 1981; [1979] HCB 77

Held: The court observed the following:

> *"Where the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correct identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances the identification came to be made, particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced, but the poorer the quality the greater the danger*."

Abdallah bin Wendo & Another v R 20 EACA 166

Facts: The appellants were convicted of murder of a plantation watchman on a very dark night.

Held: The trial judge convicted the appellants feeling it safe to accept evidence of one man M as to their identity.

Identification by a single witness[258]

Under s. 133 of the Evidence Act, no particular number of witnesses is required to prove any fact. Accordingly, even a single witness can be called to prove a fact. However, because of the dangers associated with such testimony, the courts have set out certain rules in this regard.

Uganda v George Wilson Simbwa Sct. Cr. App No. 37 of 1995

Facts: The respondent was tried and acquitted of murder. The DPP appealed against the acquittal arguing that the appeal involves a point of law of public importance. It was alleged that one night while the deceased and his son guarded their banana plantation against thieves who used to steal their bananas, the respondent, armed with a spear and a panga went to the plantation to steal. The deceased's son saw him and the deceased went forward to confront him but was speared by the respondent. The son raised an alarm which many villagers answered. When they arrived at the scene the deceased was still alive and told them that he had been stabbed by the respondent. The respondent lived on the same village as the deceased and was well-known to the deceased's family. The trial judge found the conditions in the banana plantation unfavourable for easy identification. That it was in a valley, no evidence was given to show that the two cell torch held by the deceased's son gave out light of sufficient intensity, no evidence was led to show how the clusters in the plantation were spaced , *interalia*.

Held: (Supreme Court): The law regarding identification by a single witness is now well settled and quoted a number of cases,

> *"Briefly, the law is that although identification of an accused person can be proved by the testimony of a single witness this does not lessen the need for*

[258] See: Areet Sam v Uganda Supreme Court Criminal Appeal 20/2005; Amooti Immaculate v Uganda High Court Criminal Appeal 27 of 2007

testing it with the greatest care especially when the conditions favouring correct identification are difficult. Circumstances to take into account include the presence and nature of light, whether the accused person is known to the witness before the incident or not, the length of time and the opportunity the witness had to see the accused and the distance between them. Where conditions are unfavourable for correct identification, what is needed is other evidence pointing to guilt from which it can be reasonably concluded that the evidence of identification can safely be accepted as free from possibility of error. The true test is not whether the evidence of such a witness is reliable. A witness may be truthful and his evidence apparently reliable and yet there is still a risk of an honest mistake particularly in identification. The true test is...whether the evidence can be accepted as free from the possibility of error."

The Supreme Court further observed that the deceased's son was carrying a torch containing two dry battery cells (two weeks old), had flashed the torch at the respondent who was only six metres away from the witness, the witness had known him for seven years and lived in the same village and was even able to describe the clothes the accused was wearing which evidence was unchallenged. That although the trial judge had properly directed himself on the law applicable to evidence of identification by single witness but misapplied the law thereby reaching a wrong conclusion. The evidence of identification was also corroborated by the dying declaration which ruled out any mistaken identity.

CHAPTER EIGHT

ADMISSIONS AND CONFESSIONS

The substantive law on confessions in Uganda is covered by sections 23 to 29 of the Evidence Act. The term confession is not defined in the act itself but according to the case, **Swami V King Emperor**,[259] a confession generally means the statement by an accused person acknowledging guilt of an alleged crime. **Lord Atkin in** the case stated that a confession must admit in term an offense or at any rate substantially the facts that constitute the offense.

UGANDA V MUTAHANZO 1(988-1990) HCB 44

The accused was indicted for murder. Together with the deceased they had been drinking waragi and on their way home engaged in an argument when the accused asked the deceased to give him some waragi but the deceased refused. During the ensuing scuffle, the accused stabbed the deceased and when apprehended made a confession and court held that a confession connotes an unequivocal admission of having committed an act which in law amounts to an offense or at any rate admits the facts that substantially constitute a crime

In **ANYANGU V R [1968] EA 239**

It was held that a statement is not a confession unless it is sufficient of itself to justify the conviction of the person; making it of the offense he or she is being tried.

Majorly, there are three issues to answer in determining the admissibility of a confession; Who can take down a confession? What is the value of a confession? What are the consequences of making a confession?

[259] 1939 1 AER 696 i

PROCEDURE FOR RECORDING CONFESSIONS.

The question is to whom and how the confession is made. According to section 23 of the Evidence Act no confession made by any person while he or she is in the custody of the police shall be proved against any such person unless it is made in the immediate presence of a police officer of or above the rank of Assistant Inspector or a magistrate. The section goes ahead to provide that no person shall be convicted of an offence solely on the basis of a confession unless the confession is corroborated by other material evidence in support of the confession implicating that person.

The procedure for recording confessions is found in the Evidence (Statement to Police Officers) Rules and case law. The procedure for magistrates is illustrated in the case of Uganda v Doyi Wabwire Kyoyo.[260] Justice Sekandi laid down the following procedure.

1. When an accused person or suspect is brought to a magistrate the magistrate should ensure that the police or prisons officer escorting the accused leaves the chambers.
2. The magistrate should ask his court clerk to sit in the chambers with him so as to guard against unnecessary allegations and to act as an interpreter where necessary.
3. The Magistrate should use court paper in recording any statement from the accused.
4. The accused should be informed of the charge against him if in fact he has been charged. If he has not been charged before, the magistrate should inform him of the allegations brought by the police as clearly as possible so that the accused is in no doubt as to the nature of the charge which he is likely to face and upon which the statement is likely to be adduced as evidence at the trial.
5. Immediately upon being informed of the charge, the magistrate should caution the accused in the following terms:

[260] (1976) HCB 213.

"You need not say anything unless you wish but whatever you do say will be taken down in writing and may be given in evidence"

6. Then the accused should be informed that he has nothing to fear or hope for in making a statement before the magistrate.
7. If the accused volunteers a statement then this should be recorded in the language used by the accused and an English translation made of it. Both statements should be read back to the accused who should signify his agreement with the contents with his signature or thumb mark. Then the magistrate should countersign both statements and date them.

According to the case of Njuguna & others v R[261] it was held that it is inadvisable if not improper for the police officer who is conducting the investigation of the case, to charge and record the cautioned statement of the accused. According to the case of Uganda v Kalema & Another,[262] it is clearly indicated that such a section means that the accused should appear before an impartial person who knew nothing about the background of the case. This means that the courts have to be on their guard to see that the purpose of the exercise was not defeated by backdoor practices. The accused was interrogated by a police officer who briefed the magistrate and here the magistrate could not be regarded as an impartial person.

The Process of Taking down a Confession.

Favorable circumstances

The accused person must feel free at the time when he is asked to make the confession. There must be a caution administered. You must ascertain the language in which the confession is to be made reason being, one may require an interpreter. Language is also important because the confession is taken down verbatim.

After the statement has been recorded, it should be read back to the accused to confirm

[261] (1954) 21 EACA 316
[262] (1974) HCB) 142

that that is what he stated. After confirmation, the accused is asked to signor thumbprint as a sign of approval. The person taking down the confession should also sign the date of the confession and if it is a magistrate, it may be prudent that they use a court seal. It is important to note that in this session, the accused should not be cross examined.

On the issue of caution; See R V Kaggwa where the recording officer failed to administer a caution and it was held that there was insufficient compliance with the rules of taking down confessions therefore, the statement was inadmissible.

For an elaborate explanation of the process and the precautions to be taken in taking down a confession,[263]

Who can take down a confession?

Before 1971, a confession could be made before a police officer of the rank of corporal or above. In the 1991 amendment, it was made a requirement that a confession be made to a police officer in the presence of a magistrate. Later, the law was further amended to read as follows; "No person shall make a confession while he or she is the custody of a police officer shall be proved against such persons unless it's made in the immediate presence of;

a) Police officers at or above the rank of Assistant Police Inspector

b) Magistrate and

No person shall be convicted of an offense under paragraph 1unless of confession made under that paragraph is corroborated by material evidence supporting the confession implicating that person.

I n **W A S S W A V U G A N D A**

It was held that a confession made to a police officer under the rank of Assistant Inspector of police was inadmissible as it contravenes section 23 of the Evidence Act.

B E R O N D A V U G A N D A (For the rationale of the changes in the law)

Court gave the rationale of the changes in the law on who can take a confession as follows;

[263] see Uganda V Doi Wabwire

"the law was changed because there were frequent submissions some made without justification that some confessions had been obtained by police officers by intimidation or even force. The new law is intended to ensure that confessions relied on are truly voluntary.

Under section 24 of the Evidence Act, a confession made by the accused person is said to be irrelevant if the making of the confession appears to the court having regard to he state of mind of the accused and to all circumstances have been caused by any violence, force, inducement calculated in court's opinion to cause an untrue confession to be made, the law therefore requires that all confessions be made voluntarily.

In R V SYKES,

It was held that court must decide bearing in mind the state of mind of the accused, whether there was any threat or inducements of violence so that if any of those operated on the mind of the accused, such a statement would be considered involuntary.

In ABASI KANYIKE V UGANDA

It was held that the voluntariness or otherwise of a confession can only be determined at the trial within a trial.

In NJUGUNA AND OTHERS V R

Court held that it is the duty of every judge ad magistrate to examine with the closest care and attention all the circumstances in which the confession has been obtained by an accused person particularly when that person has been in police custody for a long time before his or her confession.

In R V OKELLO

The appellant intended to have sex with a woman and after negotiations agreed and identified a place with good grass. Instead of lying down, the woman who wore a grass necklace clung to a tree at which point the accused tried to pull her down and she fell down and died. When he was arrested, he was told by the authorities; "confess and your punishment will be light." At which point he confessed and the confession was used against him at the trial. On appeal, it was held that the confession was inadmissible

because it was made by way of inducement of a temporal nature offered by a person in authority.

In MWANGE S/O NJOROGE V R.

The appellant was convicted of unlawful possession of a homemade fire arm. The police officer who interrogated him did not caution him and kept questioning every fifteen minutes, "you had better think whether you are going to tell me or not." It was held that these words constituted a threat and would render inadmissible any confession got thereafter.

Section 25 of the evidence Act is an exception of section 24 and states that if the confession as referred to in section 24 is made after the impression caused by any such violence, force, threat, inducement or promise has in the opinion of the court been fully removed, then it is relevant and admissible.

In ARIKANJERO DAU V R,

A six year old girl was left by her mother with the aplenty and she disappeared. Her body was found the following day in a river. Medical evidence showed that she had been sexually assaulted prior to death. The appellant was arrested, taken to the river and asked by the police officer to point out where he had pushed the deceased into the river and he did so. The following day, the police officer said to the accused the following words; "You are going to tell me what you said yesterday but I am not going to force you to do so". It was held that the above words did not constitute an order or threat to the mind of the appellant as they were tempered by the words that followed and nay possible threat they might have had on the aplenty had been dissipated by the words of caution that followed.

In R V ZAVEKAS,

The defendant was charged with theft of a coin box from a telephone booth. Before the trial, he asked the police officer; "If I make a statement, will you give me bail now?" the police officer replied in the affirmative and the defendant made a written confession on the basis on which he was later convicted. On the issue of whether that amounted to

inducement by a person in authority, it was held that it made no difference that the defendant and not the police officer had raised the question of bail but the statement was made as a result of an inducement by a person in authority.

In IBRAHIM V KING

The appellant was charged with murder. At the trial, evidence of an officer in command was admitted that ten to fifteen minutes after the murder, he had said to the appellant who was then in custody; "why have you done such a senseless act?" a question to which he replied, "some three or four days he has been abusing me, without doubt, I killed him." The issue was whether this confession was voluntary. It was held that the confession was voluntary statement in the senses that it was not made in the fear or prejudice or hope of advantage.

The law is that the court has discretion and it bears the duty to determine whether an influence has been fully removed. Court look at the circumstances of the case and the nature of the case, person being threatened to determine whether section 25 will apply or not.

In BAGAGA V UGANDA., the appellant appealed against a conviction for murder on grounds that his confession was involuntary. It was contended on his behalf that he had been tortured by the police ad that he had been in custody for a long time. It was held that the appellant's confession was voluntary and although he had been beaten prior to his confession, the beating was not connected to the confession since the LDU who arrested him did not know at the time that the appellant was a suspect in a murder case, he was only arrested for having escaped from prison.

Where a confession, otherwise relevant it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practiced on eth accused person for the purpose of obtaining it or when he or she is drunk, or because it was made in answer to a question which he or she need not have answered. Whatever may have been the form of this question, or because he was not warned that he was not

bound to make a confession and that evidence of it might be given against him or her. See section 26 of the Evidence Act.

REPUDIATED OR RETRACTED CONFESSIONS.

Repudiation means that the accused denies having made the statement. Retraction on the other hand means that although the accused admits making the statement, he now wishes to challenge the truthfulness or the voluntariness for that statement. These two are common features of Ugandan criminal justice system because of the poor methods used to extract confession from the accused. For the distinction between retracted and repudiated confession,

In TUWAMOI V UGANDA

Court held that the basic distinction between a retracted and a repudiated confession is that a retracted confession occurs when the accused person admits that he made the statements recorded but now seeks to take back what he said generally on the grounds that he had been forced or induced to make the statement. In other words that the statement was not voluntary. A repudiated statement is one which the accused avers that he never made

It is a well established rule of prudence that court shall not act when a retracted or repudiated confession has not been corroborated in some material particulars or is not satisfied about its truth.

In KASULE V UGANDA

Where the accused retracted his confession, court held that a trial within a trial should have been held to establish the truth within the confession. It is established law that a retracted confession will not normally support a conviction unless it is corroborated by other evidence but the court may do so if it was fully satisfied with the circumstances that the confession is true.

In AMOS BIRUNGE V UGANDA

Court held that it is established law that when the admissibility of an extra judicial statement is challenged, then the accused must be given a chance to establish by evidence

his or her grounds of objection through a trial within a trial. The purpose of a trial within a trial is to decide upon the evidence of both sides whether the confession should be admitted.

In KATO V UGANDA

Court held that a retracted confession had to be treated with caution and before founding a conviction on it, the trial court has to be satisfied that the confession was true. Usually, such a confession will be acted on if corroborated in some material particulars by independent evidence. However, such corroboration is not necessary in law and the court could act on the confession alone if it is fully satisfied that the confession is true.

In THIONO V R

Court held that there is no rule that a court cannot act on a retracted or repudiated confession unless corroborated in a material particular. What exists is a rule of prudence that a court should be cautious to act on such a confession unless it is corroborated in material particulars.

CONFESSION AGAINST CO ACCUSED (SECTION 27 EVIDENCE ACT)

Under section 27 when more persons than one are being tried jointly for the same offence, and a confession made by one of those persons affecting himself or herself and some other of those persons is proved, the court may take into consideration such confession as against that other person as well as the person who makes the confession. Under this section the general rule is that an accused person's confession can be used against his co accused. However, there are exceptions to the rule in section 27. According to the case of Nsubuga v Uganda if the statement intends to exonerate its maker and implicates the co accused then the weight attached to it is very small. In the case of Abdu Kasujja v Uganda,[264] Justice Keating said that a confession by an accused person can be used as a basis of the prosecution's evidence against the co accused however such evidence needs

[264] Criminal Appeal 596 of 1964

corroboration and the accused must implicate himself to the same extent he is implicating the other and he should be exposing himself by making such a confession to the same risk or even greater risk than the others. The same principles are contained in the case of Uganda v Kamusuni &Another.[265]

Uganda v Sebuguzi & Others (1988-1990) HCB 18

Facts: The three accused were indicted with murder of the father of A1. In this case all the evidence of the 7 prosecution witnesses was admitted including an extra judicial statement recorded from A1 by a grade 11 magistrate who was also a witness for the prosecution. The extra judicial statement produced as an exhibit at the trial contained the gist of all the prosecutions' evidence of five witnesses called to testify in court. PW1 a son of the deceased and brother to A1 testified that his brother (A1) who had been staying with A2 moved to the deceased's house in December 1984 but soon thereafter started selling the deceased's property as a result of which a report of the theft was made to the police before whom A1 admitted the sales. Later, the disappearance of the deceased was reported to the Chiefs who convened a meeting at which A1 stated that his father had gone to Bukakata and he was asked by the gathering to bring proof of this statement on an appointed day. A1 never turned up on the appointed day but later turned up alleging that his father had given him authority to look after his house. He was taken to the Sub county Chief before whom he denied the whereabouts of his father. The search for the deceased started in June 1988, A1 who had in the meantime disappeared from the village reappeared and was taken to police before he admitted killing the deceased together with A2 and A3. Through A1's direction the body of the deceased was dug up from where it had been buried.

In the meantime co accused 2(A2) was arrested. Other evidence was of a land dispute between the deceased and A2&A3, evidence of the police officer in charge of the case who on top of arranging the exhumation of the deceased, arranged for medical

[265] (1976) HCB 159.

examination by a doctor and recording of A1'S extrajudicial statement before a grade 11 magistrate. Medical examination revealed a fracture of the scale ones and a large crack extending to occipital bones. The cause of death was bleeding to brain damage.

The extrajudicial statement was in the nature of a confession in which A1 narrated how he got involved in the plot to kill his father. It started he said, when he moved to live in the house of A2 as a paying guest as his father was mistreating him. When staying with A2, he was told by A2 about the land already mentioned and of the previous unsuccessful attempts to kill the deceased by A2 &A3 and that he agreed to facilitate the death of his father by A2&A3. That this happened on one evening when he was digging in his father's garden where A2 dug a pit and when the deceased came at about 7.pm to check on his work A2&A3 who were hiding nearby jumped out; A3 caught the deceased while A2 seized the hoe from A1 and hit the deceased with it twice on the head. The deceased was pushed into the pit and buried.

A1'S statement was a denial of involvement in the crime and an explanation of how some properties of the deceased came to be in his house.

During submissions Counsel for A2&A3 argued that the evidence of the extrajudicial statement needed corroboration or support by independent evidence.

Held: It was held *interalia*:-

1. Although a confession of a co accused could be taken into consideration against a fellow accused person, this being of the weakest kind, could only be used as lending assurance to other evidence but could not be used to form the basis of the case against another accused. The reason for considering such evidence as the evidence of the weakest kind was that it was not only hearsay, but it was evidence of such a nature that the co accused couldn't test in cross-examination of the maker against him.
2. Credible and independent evidence was required to support such a confession.
3. As regards the value of a confession against the maker, it is trite law that a confession should be taken as a whole it was also clear law that it needed not to

be believed as a whole or disbelieved as a whole. It was open to the trial judge to accept part of the statement and reject all of it. A1 was found guilty while A2&A3 not found guilty.

In the case of **Gopa & others v R,**[266] it was held that the weight of evidence of a confession by an accused against co accused is lessened where he obviously intends to implicate his co accused and not himself although actually he does fully implicate himself.

INFORMATION LEADING TO DISCOVERY.

Per section 29 of the Evidence Act, notwithstanding sections 23 and 24, when any fact is deposed to as discovered in consequence of information received from a person of any offence, so much of that information, whether it amounts to a confession or not as relates distinctly to the facts thereby discovered may be proved. Sometimes, a statement may not have value of convicting the maker with regard to the alleged offense but may have the value of assisting the police to discover other crimes. The issue then is whether this statement may be used for another purpose other than the particular purpose for which it was obtained. Under this provisions, that issue is answered in the affirmative.

In JOHN ROBERT EYIRU V UGANDA

The appellant was convicted for murder; it was held that under section 29, it had to be strictly interpreted because it could in certain circumstances lead to the introduction of a confession which would otherwise be inadmissible. All that could be introduced under this section was such part of the statement as led to the discovery of something and no more.

In BIREMBO V UGANDA.

The appellants were jointly tried and convicted for the offense of murder. The deceased's body and some money belonging to the deceased were discovered on the information obtained from the appellant. it was held that the information to the police by the appellant

[266] (1953) 20 EACA 318

was incriminatory but was also information leading to the discovery of the act and was therefore admissible under section 29 notwithstanding that it was made to a police constable.

CONFESSIONS AND COMPELLED SELF INCRIMINATION

The Uganda Evidence Act does not define confessions nor does the Interpretation Act. One can however, borrow the definition of the Kenyan Evidence Act which indicates that confessions comprise of words or conduct or a combination of words and conduct from which whether taken alone or in connection with other words lead to an inference that may reasonably be drawn that the party making the confession has committed an offence. It is important to note that confessions have several ingredients. These have been spelt out by court in different cases. In Uganda under s. 24, it is indicated that a confession is irrelevant if it appears to court that having regard to the state of mind of the accused in all circumstances surrounding it, the accused made it out of violence, force or threat, inducement or promise calculated in the opinion of the court to cause an untrue confession. In the case of Swami v The Emperor,[267] the principle was confirmed that a confession must either admit in terms the offence or all facts which constitute the offence. The same decision was upheld by the court in Uganda v Yosamu Mutahanzo[268] where it was held that a confession connotes an unequivocal admission of having committed an act in law that amounts to a crime and must either admit in terms the offence or at any rate substantially all the facts which constitute the offence. The accused's extra judicial statement was an exculpatory statement in the sense that the 4 accused threw blame on the accused and his statement could not amount to a proper confession. Instead of being convicted for murder the accused was convicted for manslaughter.

An admission of a gravely incriminating or even conclusively incriminating fact is not in itself a confession. In an accused person admits that he owned a fire arm at the murder of

[267] (1939) 1 ALL ER 396
[268] (1988-90) HCB 4

someone, this does not mean that he has confessed to the murder of the deceased. Therefore a confession must be an unequivocal admission of having committed an act which in law amounts to a crime and must either admit in terms the offence or at any rate substantially all the facts which constitute an offence. Thus in Gopa &others v R,[269] it was stated that the accused's extra judicial statement was exculpatory in the sense that it explained the act of stabbing and therefore the blame on the deceased person. Also in the case of Uganda v Lakot,[270] it was held that the confession was equivocal since the accused admitted to having assaulted the complainant but went ahead to explain why he did so.

In the case of **Gopa** the Judge said that a confession is a direct acknowledgement of guilt on the part of the accused which is sufficient to convict him. The judge held that although an extrajudicial statement contains self exculpatory matter it can still be a confession if the self exculpatory matter does not negative the offence alleged to be charged. It is important to note that this is different from admissions. An admission may be equivocal as long as it contains matters relating to the liability of the maker.

SELF EXCULPATORY MATTERS

The definition is in Swami V The Emperor. It is clearly indicated that it is a matter adopted or intended to free the maker from blame for the act admitted in the confession. The same was discussed in the case of Uganda v Kamalawo & Others (1983) HCB 25.

The other ingredient is that a confession must be admitted as a whole. If it contains some parts that are inadmissible then it cannot be taken as a confession. In the case of Uganda v Yosefu Nyabenda[271] the judge clearly stated that the court was to receive the confession of the accused as a whole and not in several parts and since it contained lies and half truth then the confession could not be admitted as a true one. A confession has to be taken as a whole although it does not have to be believed as a whole. The case of Uganda v

[269] (1953)20 EACA 318,
[270] (1986) HCB 27
[271] (1972) 11 ULR 19,

Sebuguzi & others[272] clearly stated that as regards the value of a confession against the maker it is trite law that a confession should be taken as a whole. It was also stated that a confession need not be believed as a whole or disbelieved as a whole. It was open to the trial judge to accept part or reject the whole of it.

THE EFFECT OF INDUCEMENTS AND THREATS

This is governed by Section 24 of the Evidence Act. The section is to the effect that the confession made by an accused person is irrelevant if taking into account the state of mind and the circumstances surrounding the confession - it was caused by violence, threats, force, inducement or promise calculated in the opinion of the court to cause an untrue confession. It is important to note the salient elements referred to in the section.

1. The court has to consider the state of mind of the accused during the time the alleged confession was made. It is therefore mandatory that when the accused person alleges that he made the confession in any of the circumstances mentioned by the section then the court should make a finding as to whether the accused person voluntarily made the confession therefore the state of mind of the accused has to be clearly stated. This is in line with the position in the case of Emmanuel Nsubuga v Uganda (1992-1993) HCB 24.
2. The circumstances in which a confession was made have to investigate to find out whether such circumstances amount to any of the aspects mentioned in the section. It is important to note that although the section appears to say that both the state of mind and the circumstances have to be looked at proof of the items indicated in the section by any of the two means would suffice.
3. The Violence, force, threat, inducement or promise must be of a nature calculated in the opinion of the court to cause the making of an untrue confession. It must have been made to a person in authority i.e. a police officer or magistrate. The nature must be relating to the commission of an offence according to case of R v Norahma 9KLR

[272] (1988-1990) HCB

12. The onus of proving threats, violence, inducement or force lies with the person alleging such.

Section 24 reflects the position which was taken in the case of**:**

Uganda v Wabwire (1976) 212

Facts: The accused was charged with murder and the prosecution sought to produce a confession statement allegedly made by him on 16th October 1975 to a magistrate Grade 11 at Iganga. At the commencement of the trial Counsel for the accused intimated that he intended to challenge the confession statement and so the trial Judge ordered a trial within a trial to be held. During the trial within a trial the Magistrate Grade 11 (PW4), the only witness called by the prosecution during this trial, testified that the accused was brought to his Chambers at Iganga Court by a police Constable for purposes of making a statement.

Held: The magistrate cautioned the accused in the following terms:

> "If you have been forced or threatened or induced in any way by the police to come here and make this statement you should say so. But whatever you will say shall be recorded down and may be brought as evidence at your trial at the High Court."

The accused told the Magistrate that he had not been forced and wished to make a statement voluntarily. A statement was then recorded in the language of the accused; it was read back to him and he said it was true and correct. A translation was made in English and the accused thumb marked both statements and the Magistrate countersigned them.

On Cross examination, when it was suggested to the magistrate that the caution administered was improper and that the accused had not volunteered the statement as he had been beaten prior to being taken to him, he (the magistrate) said he did not know what happened to the accused prior to being brought before him but as far as he could see the accused was normal and fit. He did not complain of any beating or threat.

The accused, who gave sworn evidence, said that he had been arrested on 8th October 1975 and kept in Police custody until 16th October 1975 when he was taken to the court to make a statement. During that time he was subjected to interrogations and merciless beatings (he showed court some scars to substantiate these allegations) and was told to admit having killed the deceased. Before he was taken to the magistrate he was told to admit or else he would face further beatings. The statement he made was untrue and it was because he feared the police beatings that he made a confession; he made it out of fear for his life.

Counsel for the state submitted that even if the allegations of the accused that he was beaten were true, that was not enough to exclude the statement; the accused must prove that the beatings and the threats were intended to cause an untrue confession to be made.

Court **held** as follows *interalia*:

1. Once a confession is properly recorded it is primafacie admissible. However, the accused is entitled to challenge such a statement if prior to being made he was induced to make or made it through fear or threats or through promises and under section 24 of the Evidence Act. It is for the prosecution to prove beyond reasonable doubt that a confession is voluntary and the accused need only raise objections to it for there is no requirement in law that he must prove his allegations of threats or promises.
2. Where the defence challenges a confession a trial within a trial is held and it is during this trial within a trial that the prosecution must adduce all the evidence relied upon to prove the voluntary nature of the statement. The prosecution must therefore call witnesses for purposes of proof and witnesses who have testified before or who might be called later must be called for the purpose of proving the statement if their evidence is relevant and in fact for purposes of the trial within a trial any witness whether on the summary of evidence or not is relevant. The accused is then entitled to give evidence on oath or not on oath and to call witnesses if any.
3. In a trial within a trial the evidence must be complete by itself but the evidence in the main trial is not before the court at that stage and although it may be looked at, it cannot be relied upon to the prejudice of an accused.

4. In the instant case, the prosecution did not comply with the standard procedure in proving the alleged confession for they did not lay before court all the evidence that as necessary for it to decide on the issue of admissibility of the confession. The prosecution called only the magistrate as a witness for purposes of proving the alleged confession yet the accused made damaging allegations of brutal beatings against the police in his sworn evidence and showed the court some scars to substantiate these allegations. Since the prosecution did not call anybody from police to deny these allegations it was extremely difficult to assume that the accused had lied against the police.
5. The accused in instant case, ought to have been charged and taken to court as soon as he was arrested and in the absence of police evidence denying the accused's allegations of long interrogations, beatings and threats by the police it could not be said with certainty that these allegations were without merit, which doubt in the circumstances of the case and the evidence before court would be resolved in favour of the accused.
6. The confession was inadmissible since it was made as a result of threats.
7. A confession is generally received by court with caution because the motive of the person making such confession is often not clear; it is doubtful whether the legislature intended to enact that the end justifies the means when in section 24 maximum safeguards were made against extracting confessions made by use of force.

The exception to section 24 is found in section is found in section 26 of the Evidence Act. Under section 26 confessions otherwise relevant do not become irrelevant because of promise of secrecy, deception, drunkenness or failure to be warned that such a person was not bound to make a confession. According to the case of Mwangi v R (1954)[273] the general principle is that the court must have regard to the state of mind of the accused and all circumstances of the case in admitting confessions.

[273] EA 377

CHAPTER NINE

COERCION, BEATING AND INVESTIGATIVE DURESS

Investigations in Uganda are performed haphazardly, leading to lengthydetentions, arbitrary arrests, and violations of fundamental human rights. Investigations are impeded by archaic ways of obtaining information, negligence, corruption and logistical barriers. Proper investigations are needed so that reliable evidence is accrued and suspects are provided with a fair and impartial trial. Ad hoc security agencies use renowned torture chambers, so-called "safe houses," to perform barbaric investigations to obtain confessions or other desired information. Notwithstanding the lack of reliability of evidence retrieved under these nefarious methods, officers of these ad hoc agencies put extreme pressure on suspects to confess or concede through the use of physical and emotional torture.

Some of their common torture methods include caning with batons and electric wires, shocking with electrical devices, hangingrocks from the prisoners' testicles or twisting their penises, physical mutilation, kandoya,[274] "Liverpool" water torture,[275] showing of corpses,[276]

exposure to poisonous snakes,[277] injecting hypodermic needles into the prisoners' genitals,[278] strangulation,[279] and kicking the prisoners' abdomens.[280] Aside from the

[274] Kantoya is the process of tying the suspect's hands and feet together behind the suspect's back. Rone & Kippenberg, supra note 10, Jemera Rone and Julianne Kippenberg, State of Pain: Torture in Uganda, HUMAN
RIGHTS WATCH, Vol. 16, No. 4(a), Mar. 2004, at 4

[275] Liverpool water torture is a method where a suspect is forced to lie face up with his mouth open under a water spigot, Ibid

[276] Ibid

[277] Ibid

[278] Ibid at 23

[279] Ibid at 4

[280] Ibid

physical torture, suspects undergo strenuous mental abuse as they are typically isolated from other suspects and held underground with no access to sunlight, and repeatedly humiliated and mocked by their commanding officers.[281]

In the eyes of the paramilitary, torture is a necessary mechanism to retrieve information from its suspects.[282] This notion was clearly endorsed to the public by Col. Noble Mayombo of the Chieftaincy of Military Intelligence (CMI). [283]

Though torture is a common mechanism to elicit confessions, the laws of Uganda prohibit the use and admissibility of such forced confessions. Section 24 of the Ugandan Evidence Act imparts that:

A confession made by an accused person is irrelevant if the making of the confession appears to the court, having regard to the state of mind of the accused person and to all the circumstances, to have been caused by any violence, force, threat, inducement or promise calculated in the opinion of the court to cause an untrue confession to be made.

Unfortunately, in contrast to forced confessions, admissions are admissible even if made as a result of torture.[284] An admission is an acknowledgment of the existence of facts which are usually favorable to an adversary but that do not amount to a confession.[285] Generally speaking, a confession admits guilt of a particular offense while an admission concedes only to a particular point which may or may not result in a conviction. Since admissions are admissible in court proceedings, torture is an effective way to guarantee a conviction; an officer can torture a suspect until the suspect concedes to certain facts, making the prosecutor's case plausible and compelling.

Upon receiving a suspect's confession, the aforementioned ad hoc security agencies

[281] Ibid

[282] See FHRI Talk Show: Manya Eddembe Lyo (Central Broadcasting Services radio broadcast May 2004) (Col. Noble Mayombo appearing on talk show).

[283] See FHRI Talk Show: Manya Eddembe Lyo (Central Broadcasting Services radio broadcast May 2004) (Col. Noble Mayombo appearing on talk show).

[284] Daniel D. Ntanda Nsereko, The Poisoned Tree: Responses to Involuntary Confession in Criminal Proceedings in Botswana, Uganda and Zambia, 5 AFR. J. INT'L & COMP. L. 609, 618 (1993) (citing Uganda Evidence Act, §25, Laws of Uganda, cap. 43) at p. 630

[285] See BLAcKs LAW DICTIONARY 48 (7th ed. 1999)

transfer the suspects to police stations. Though it is required that they transfer a suspect immediately upon arrest, it could be several weeks or months until security agencies deliver the suspect to a police station. Kampala Central Police Station (CPS) is a favorite police station of ad hoc security units. Although the security agencies use other urban police stations to house their suspects, the majority of detained suspects are found at CPS. Even where police officers provide the Miranda warnings and the suspect agrees to talk to police without having counsel present, a confession elicited from the suspect is inadmissible if it is obtained through coercion, whether physical intimidation or psychological pressure.[286]

A classic example of psychological coercion is the so-called Mutt-and-Jeff strategy. Under this tactic, one police officer, the "bad guy," is harsh, rude, and aggressive, while another police offi cer, the "good guy," is friendly and sympathetic to the suspect. Obviously the objective of the strategy is to get the accused to confess to the "good guy," and there is reason to believe that it is an effective technique. There is controversy about whether the Mutt-and-Jeff tactic is a constitutional means of eliciting a confession from a suspect who has waived his or her Miranda rights and agreed to talk to po- lice without the presence of counsel. In Miranda, the Supreme Court alluded to the Mutt-and-Jeff routine as a possible example of impermissible psychological coercion.[287] Yet, absent other indications of coercion, courts have generally acquiesced in the practice.

POLICE DECEPTION

The use of tricks or factual misstatements by police in an effort to induce a defendant to confess does not automatically invalidate a confession. A misstatement by police may affect the voluntariness of a confession, but the effect of any misstatements must be considered in light of the totality of surrounding circumstances. In Frazier v. Cupp, [288]

[286] United States v. Tingle, 658 F.2d 1332 (9th Cir. 1981)
[287] 384 U.S. at 452, 86 S.Ct. at 1614,16 L.Ed.2d at 711
[288] 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969),

the Supreme Court re- versed a conviction where the police had falsely informed a suspect that his codefen- dant had confessed. Although the Supreme Court found the misstatement relevant to the issue of whether the confession had been given voluntarily, it did not fi nd that the misstatement per se made the confession inadmissible.

The Nebraska Supreme Court has held that even deceptive statements referring to nonexistent autopsies of victims will not automatically render a confession involuntary. [289] How far may police go in their use of deception? In 1989 a Florida appellate court affirmed a trial judge's order holding a confession involuntary where police had presented fabricated laboratory reports to the defendant to secure a confession. The "reports," which were on the stationery of a law enforcement agency and a DNA testing firm, indicated that traces of the defendant's semen had been found on the victim's underwear. Among the factors cited by the appellate court in support of the exclusion of the confession were the indefi nite life span of manufactured documents, their self-authenticating character, and the ease of duplication. The court expressed concern that false documents could find their way into police files or the courtroom and be accepted as genuine. [290] In State v. Patton,[291] a police offi cer, posing as an eyewitness, was "interviewed" on an audiotape and fabricated an account of the vic- tim's murder. The tape was later played to the defendant. Despite his earlier denials of involvement, upon hearing the audiotape, the defendant confessed to the murder.

The fabricated audiotape, identifi ed as such, was later introduced into evidence at trial, and the defendant was found guilty. Relying heavily on the Florida court's opinion in State v. Cayward, supra, the New Jersey appellate court held this fabrication of evidence violated due process. The court found the defendant's resulting confes- sion to be inadmissible and reversed the defendant's conviction. Police deception must be distinguished from cases where the police use or threaten force or promise leniency to

[289] State v. Norfolk, 381 N.W.2d 120 (Neb. 1986).
[290] State v. Cayward, 552 So.2d 971 (Fla. App. 1989).
[291] 826 A.2d 783 (N.J. Super 2005)

elicit a confession. In instances where force is used or leniency is promised, courts will suppress confessions obtained.[292] Moreover, when the police furnish a suspect an incorrect or incomplete advisory statement of the penal- ties provided by law for a particular crime, courts will generally suppress the suspect's confession. [293]

FACTORS CONSIDERED BY JUDGES IN EVALUATING CONFESSIONS

Judges consider several variables in determining whether a challenged confession was voluntary. These include the duration and methods of the interrogation, the length of the delay between arrest and appearance before a magistrate, the condi- tions of detention, the attitudes of the police toward the defendant, the defendant's physical and psychological state, and anything else that might bear on the defendant's resistance.[294] Courts are particularly cautious in receiving confessions by juveniles[295] In a landmark ruling, Arizona v. Fulminante,[296] the Supreme Court said that the use of a confession that should have been suppressed does not automatically require reversal of a defendant's con- viction. Rather, the appellate court must determine whether the defendant would have been convicted in the absence of the confession. If so, the admission of the confession is deemed to be a harmless error that does not require reversal.[297]

IDENTIFICATION PROCEDURES POLICE

Identification procedures include those in which victims and witnesses are asked to identify perpetrators, such as lineups, showups, and photo packs. They also encompass scientifi c techniques comparing forensic evidence taken from a suspect with that found at a crime scene. All of these procedures are extremely im- portant in police work, but each poses unique legal problems.

[292] See Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959)
[293] See, for example, People v. Lytle, 704 P.2d 331 (Colo. App. 1985).
[294] Commonwealth v. Kichline, 361 A.2d 282, 290 (Pa. 1976).
[295] See, for example, Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224 (1948).
[296] 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)
[297] See, for example, State v. Tart, 672 So.2d 116 (La. 1996).

Forensic Methods Forensic methods involve the application of scientifi c principles to legal issues. In the context of police work, forensic methods commonly include fi ngerprint identifi - cation, comparison of blood samples, matching of clothing fibers, head and body hair comparisons, identification of semen, and, more recently, DNA tests. When these methods are conducted by qualifi ed persons, the results are usually admissible in evidence. Indeed, the courts have ruled that obtaining such physical evidence from suspects does not violate the constitutional prohibition of compulsory self-incrimination.[298]

In Gilbert v. California,[299] the U.S. Supreme Court held that a suspect could be compelled to provide a hand- writing exemplar, explaining that it is not testimony but an identifying physical characteristic. Similarly, in United States v. Dionisio,[300] the Court held that a suspect could be compelled to provide a voice exemplar on the ground that the recording is being used only to measure the physical properties of the suspect's voice, as distinct from the content of what the suspect has said. Of course, police may not use methods that "shock the conscience" in obtaining physical evidence from suspects.[301] Courts will scrutinize closely procedures that subject the suspect to major bodily intrusions. For example, in Winston v. Lee,[302] the prosecution sought a court order requiring a sus- pect to have surgery to remove a bullet lodged in his chest. The prosecution believed that ballistics tests on the bullet would show that the suspect had been wounded during the course of a robbery. The Supreme Court, weighing the risks to the sus- pect against the government's need for evidence and noting that the prosecution had other evidence against the suspect, disallowed the procedure. The Court declined to formulate a broad rule to govern such cases. Rather, courts must consider such mat- ters on a case-by-case basis, carefully weighing the interests on both sides. As the 1995 O. J. Simpson murder

[298] Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).
[299] 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967)
[300] 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973)
[301] Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).
[302] 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985)

trial demonstrated, defense lawyers can attack the methodology of forensic procedures as well as the qualifi cations of those admin- istering them. If the evidence is inherently unreliable, it is inadmissible regardless of whether there were violations of the suspect's constitutional rights. In 1996 the FBI crime laboratory was criticized for allegedly sloppy procedures in the conduct of DNA and other forensic tests. This encouraged defense lawyers to challenge the reliability of the evidence in several cases where prosecutors were using evidence analyzed by the FBI crime lab. With the rapid progress of science and technology, forensic procedures are con- stantly evolving and new procedures becoming available to the police. Evidence obtained through scientifi c and technological innovations can be both relevant and probative in a criminal case. Yet care must be taken to ensure that a new method is clearly supported by research. Until recently, federal and state courts followed the test articulated in Frye v. United States,[303] and admitted scientifi c evidence only if it was based on principles or theories generally accepted in the scientifi c community. In Daubert v. Merrell Dow Pharmaceuticals, Inc.,[304] the Supreme Court held that the Federal Rules of Evidence su- persede Frye and govern the admissibility of scientific evidence in the federal courts. This approach causes admissibility of scientific evidence to hinge on such factors as whether the evidence can be tested and whether it has been subjected to peer review. State courts are now divided on whether to accept the newer Daubert standard or remain with the classic standard announced in 1923 in Frye.

Lineups Eyewitness identification may be more persuasive to juries than forensic evidence, but it can also present problems. One of the most common nonscientific methods of identifi cation is the lineup. In a lineup, a group of individuals, one of whom is the suspect in custody, appears before a victim or witness, who is usually shielded from the suspect's view. Often, the individuals in the lineup are asked to walk, turn sideways, wear certain items of clothing, or speak to assist the victim or eyewitness in making a positive identifi cation. The Supreme Court has held that there is no Fifth Amendment

[303] 293 F. 1013 (D.C. Cir. 1923),
[304] 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993),

immunity against being placed in a lineup as an identifi cation procedure.[305] However, courts must guard against the possibility that identifi cation procedures, especially lineups, are unfair when a victim or witness is prompted to identify a particular suspect as the perpetrator.[306] Obviously, if the perpetrator is known to be black, it is impermissibly suggestive for police to place one African American suspect in a lineup with fi ve white individuals. In practice, however, the moresubtle suggestiveness of lineups causes problems for the courts. To avoid such problems, police should place several persons with similar physical characteristics in a lineup. To further protect the rights of the accused, the Supreme Court has said that after formal charges have been made against a defendant, the defendant has the right to have counsel present at a lineup.[307] To ensure that police and prosecutors honor that right, the Supreme Court has said that a pretrial identifi cation obtained in violation of the right to counsel is per se inadmissible at trial. Gilbert v. California, supra. A per se exclusion- ary rule was deemed necessary to ensure that the police and the prosecution would respect the defendant's right to have counsel present at a lineup. On the other hand, a pretrial identifi cation obtained through impermissibly suggestive identifi cation pro- cedures is not per se inadmissible. Instead, such an identifi cation may be introduced into evidence if the trial judge first finds that the witness's in-court identification is re- liable and based on independent recall. In making this determination, the trial judge must consider

(1) the opportunity of the witness to view the accused at the time of the crime

(2) the witness's degree of attention

(3) the accuracy of the witness's prior description of the accused

(4) the level of certainty demonstrated at the confronta- tion, and

(5) the time that elapsed between the crime and the confrontation.[308]

[305] United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).
[306] See, for example, Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969).
[307] Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972).
[308] Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); see also Wethington v. State, 560 N.E.2d 496 (Ind. 1990).

SHOW UPS

The showup is a frequently used method of identification of a suspect. In a showup, the police usually take the victim to the suspect to determine whether the victim can make an identifi cation, and at least one state Supreme Court has held that the police may transport a person stopped for an investigatory stop a short distance for purposes of a showup.[309] In 1967 the U.S. Court of Appeals for the District of Columbia Circuit approved the use of showups, commenting,

"[W]e do not consider a prompt identifi cation of a suspect close to the time and place of an offense to diverge from the rudiments of fair play that govern the due balance of pertinent interests that suspects be treated fairly while the state pursues its responsibility of apprehending criminals." [310]

In Stovall v. Denno,[311] the Supreme Court recognized a defendant's due process right to exclude identifi cation testimony that results from unnecessarily suggestive procedures that may lead to an irreparably mistaken identification. This form of "on-the-scene" confrontation be- tween an eyewitness and a suspect is inherently suggestive because it is apparent that when law enforcement takes a victim for a showup of a suspect, they usually believe they have caught the offender. Therefore, courts review identification testimony carefully to make sure a witness's identifi cation testimony is not based on impermissibly suggestive identifi cation procedures. In making such a determination, courts often look to the length of time between the crime and the confrontation and the level of certainty demonstrated by the witness at the confrontation. Although critics complain of the use of showups, such a confrontation may be justified by the necessity to preserve a witness's memory of a suspect before the sus- pect has had an opportunity to alter his or her clothing and appearance. Appellate courts consistently admonish caution in the use of showups; however, they generally approve of their use when the identifi

[309] People v. Lippert, 432 N.E.2d 605 (Ill. 1982).
[310] Wise v. United States, 383 F.2d 206, 210 (D.C. Cir. 1967).
[311] 308 U.S. 293, 87 S.Ct. 198, 18 L.Ed.2d 1199 (1967),

cation occurs shortly after the crime has been committed and the showup is conducted near the scene of the crime under circumstances that are not unduly suggestive. In approving showups, some courts have pointed out that a victim's or eyewitness's on-the-scene identifi cation is likely to be more reliable than a later identifi cation because the memory is fresher.[312] Courts base their judgments on the reliability of showups based on many factors and circumstances. For example, in United States v. Bautista,[313] in its review of a challenge to an on-the-scene identifi cation immediately following a nighttime narcotics raid, the court observed, "The fact that the suspects were handcuffed, in the custody of law enforcement offi cers, and illuminated by fl ashlights . . . did not render the pretrial identification procedure unnecessarily suggestive." The court went on to explain that because the on-the-scene identifi cation was necessary to allow the officers to release the innocent, the incidents of that identifi cation were also necessary.

PHOTO PACKS

A photo pack is simply a set of "mug shots" that are shown individually to the victim or eyewitness in the hope of being able to identify the perpetrator. To produce a reli- able, hence admissible, identifi cation, the presentation of the photo pack should not emphasize one photo over the others. For example, in Commonwealth v. Thornley,[314] the Supreme Judicial Court of Massachusetts found that the photographic array was impermissibly suggestive because the witnesses admitted they made their selection of the defendant's photograph because the man in the photo was wearing glasses. The defendant was the only one of thirteen men in the photo array who was wearing glasses. The words and actions of the offi cers making the presentation must manifest an attitude of disinterest.[315] In analyzing a de- fendant's claim of being the victim of an impermissibly suggestive photo pack identi- fi cation, courts generally apply a two-part test. First, did the photo

[312] See, for example, Jones v. State, 600 P.2d 247, 250 (Nev. 1979).
[313] 23 F.3d 726 (2d Cir. 1994),
[314] 546 N.E.2d 350 (Mass. 1989),
[315] State v. Thamer, 777 P.2d 432 (Utah 1989).

array present the defendant in an impermissibly suggestive posture? Second, if so, under the totality of circumstances, did the procedure give rise to a substantial likelihood of misidentifi ca- tion?[316]

Conclusion Police are permitted broad discretion in their interactions with the public. There are no legal prerequisites to the many consensual encounters through which police routinely perform their investigative and preventive duties. But the whole array of nonconsensual encounters with the public including arrest, investigatory detention, interrogation, roadblocks, and identifi cation procedures are subject to strict constitutional requirements.

[316] State v. Bedwell, 417 N.W.2d 66 (Iowa 1987).

CHAPTER NINE

PHONE-TAPPING & THE RIGHT TO PRIVACY

This book will examine the extent to which the right to privacy in communication is being realized within the context of the operations of the national security, surveillance and defence organs/agencies of the Republic of Uganda. It is especially concerned to provide the legal, historical and practical framework within which it is necessary to understand the right, and makes an effort to examine how the Canadian and Ugandan conceptions of privacy interests differ from one another and how these conceptions affect the practical articulation of rights.

Any State organ that purports to keep and maintain national security in Uganda must adhere to certain minimum international and constitutional standards of maintaining peace and security. In particular, such organs are obligated to protect and uphold the fundamental right to privacy. The right to privacy is multifaceted and very broad in nature. It includes the right not to be subjected to unlawful search of the person, home or other property of that person, unlawful entry by others of the premises of that person, and the prohibition on the interference with the privacy of a person's home, correspondence, communication or other property. In their totality, these rights constitute the minimum standards for administering the right to privacy in a free and democratic society of which Uganda is aspiring to be.

The fight against terrorism and armed rebellion in Uganda has sparked off a wave of public concern over the involvement of security organs/agencies in the interception and conducting of surveillance on people's correspondence and communication in the guise of maintaining peace and security in the country. It has also presented an opportunity for the re-examination of the role of security organs/intelligence agencies in the observance

and enjoyment of the right to privacy in Uganda. The paper shall examine the privacy interests in Uganda alongside the Canadian treatment of the same right.

Uganda's 1995 Constitution provides for the right to privacy in its Article 27[317], as a reasonable guide to what constitutes the right to privacy in correspondence and communication, and only stipulates it as a right without more. However, the United Nations (UN) and International Human Rights Instruments have interpreted the right to privacy in correspondence and communication based on the circumstances and complexities of the case (especially in the fight against terrorism and maintenance of national security) and the conduct of all parties, thereby providing a more elaborated framework within which consideration of the right should be undertaken. 11

The Constitution and Other laws in Uganda place limits to the enjoyment of rights including the right to privacy as clearly seen in the Access to Information Act[318] and the Anti-Terrorism Act[319] which actually provides for the interception of communication and surveillance of any person suspected of engaging in terrorism activities. The Constitution also obliges security organizations including all intelligence services to observe human rights under Article 221.

The predicament of infringement of the right to privacy by security organizations/intelligence services in Uganda has grown and is caused by several factors, including complaints received by the Uganda Human Rights Commission (UHRC) on alleged interference with the correspondence and communication of especially members of the Opposition in Uganda, the lack of a culture of human rights observance on the side of security organizations in Uganda, including the existence of loopholes in the enabling law.

Though the right to privacy in correspondence and communication did not pose a major challenge in Uganda two decades ago, new developments in science and technology

[317] Constitution of the Republic of Uganda, 1995 (As amended)
[318] Act No.6 of 2005
[319] Act No.14 of 2002

continue to pose new challenges to human rights, in particular the right to human dignity and privacy. In the fight against organized crime and terrorism, modern police and intelligence agencies are using information and surveillance technology, including phone tapping that potentially affects numerous innocent citizens and constitutes far-reaching interference with the right to privacy and data protection.

Unlike in Canada where there is a strict adherence to proper identification and registration before one can be connected to a service phone provider be it mobile or fixed line, Uganda telephony service providers do not enforce the identification requirement, which has in turn led to increased telephone crime due to the cheap telephony in which a Sim Card costs as low as CAD $1.

The legal challenges posed by technological change and by increased State involvement in the private lives of citizens necessitate the constant, dynamic development of new measures of protection within established State obligations and a wide application of the principle of privacy. Ample evidence of this is provided in the media reports and complaints at the UHRC relating to interception of communication and surveillance. One may, however, question whether the limits of Article 27, even within the Constitution and other laws relating to national security, can, in the long run, satisfy the actual needs. Further, elaboration of the principles of the right to privacy enshrined in Article 27 of the Constitution and Uganda's obligations in international human rights law must be given priority.

HISTORICAL AND LEGAL CONCEPTIONS OF THE RIGHT TO PRIVACY IN UGANDA.

This part of this chapter concerns itself with the historical evolution and legal conceptions of the right to privacy in Uganda. In discussing the history relating to the right to privacy in Uganda, this part of the paper shall be core to forming the basis upon which the right to privacy in communication can best be understood in the Ugandan context.

History of Phone tapping and Surveillance in Uganda

Though slightly new in Uganda, communication interception and surveillance of which phone tapping is just an example has been around for more than a century. It was born during the Presidency of President Abraham Lincoln of the United States of America. Communication interception can be traced back to the period of the American Civil War where eavesdropping of telegraph (telegraphy system invented in 1844) conversations was the first recorded. Though not clear as to when the telephone was first used, the telephone was first invented in 1876 and it is believed that telephone tapping is as old as the telephone itself at least in the developed world. According to Kaduuli, telephone wiretapping began in the 1890s, following the invention of the telephone recorder. Kaduuli further bases his timing on phone tapping to The Einstein File by Fred Jerome, arguing that from the time Einstein arrived in the United States in 1933 to the time of his death in 1955, the FBI files reveal that his phone was tapped, his mail was opened and even his garbage searched.

Though there may be disagreements between Kaduuli and Jerome as to the exact dates when phone tapping may have started, it is clear that phone tapping has been around for at least more than half a century. The right to privacy in communication is not new in Uganda. It was equally provided for in the Bill of Rights of the 1962 and 1967 Constitutions. Uganda's 1995 Constitution provides for the right to privacy in its Articles 27, as a reasonable guide to what constitutes the right to privacy in correspondence and communications, and only stipulates it as a right without more. What is new however is phone tapping which is an infringement of the right to privacy in communication. Though the right to privacy in communication did not pose a major challenge in Uganda two decades ago, new developments in science and technology continue to pose new challenges to human rights, in particular the right to human dignity and privacy. In the fight against organized crime and terrorism, modern police and intelligence agencies are using information and surveillance technology, including phone tapping that potentially affects numerous innocent citizens and constitutes far-reaching interference with the right

to privacy. Lt. Gen. David Tinyefuza was possibly the first high profile government official to complain about phone tapping after his failed bid to resign from the army in 1997.

In 2003, the Member of Parliament for Lira Municipality, Ms. Cecilia Ogwal, was up in arms with the government and President Yoweri Museveni in particular for allegedly tapping her mobile phone conversations. This was after the latter told Parliament on September 8, 2003, that he had listened in on a conversation between Ogwal and a rebel commander of the Lord's Resistance Army. The media was however awe with the opposition politicians accusing the state intelligence operatives and agencies of phone tapping at the height of the 2001 Presidential and Parliamentary Campaigns.

The Constitution and other laws in Uganda place limits on the enjoyment of rights including the right to privacy as clearly seen in the Access to Information Act, and the Anti-Terrorism Act, which actually provides for the interception of communication and surveillance of any person suspected of engaging in terrorism activities. The Constitution also obliges security organizations including the intelligence services to observe human rights under Article 221. Though the law in Uganda provides for phone tapping, the same does not provide for the procedure to be followed in this exercise. Thus, the government proposed the Regulation of Interception of Communication Bill 2007 which was presented by the Security Minister Hon. Amama Mbabazi to the ruling/NRM party meeting where government was canvassing MPs to ensue the bill sails through Parliament. President Yoweri Meseveni, who was in attendance, said that the bill was intended to monitor communication between suspected terrorists. The opposition and members of the public have already vehemently condemned the proposed bill.

The debate is basically about the right to privacy vis-à-vis security of person and the state. All commentators are aware that Government has for some time been tapping phones albeit illegally in Uganda. The main battle field between those opposed to the bill and those pushing for it is whether there should be no law at all to regulate phone tapping or there should be watertight safeguards in the law to ensure that the citizens' rights are not

trampled upon. Whatever reasons the two opposing sides may have for either supporting or opposing the bill, what remains clear is that the state has been tapping phones without any regulation/illegally and will continue to do so whether the bill is passed or not!

ELEMENTAL ASPECTS OF THE RIGHT TO PRIVACY IN COMMUNICATION IN UGANDA 1995 -2008

This chapter deals with the elemental aspects of the right to privacy in communication in Uganda for the period 1995-2008. The Chapter will essentially discuss the rationale for the right to privacy in communication, the enjoyment of the right to privacy in communication in Uganda for the periods 1995-2008. The chapter also addresses the major impediments to the enjoyment of the right to privacy in communication in Uganda and how national security and intelligence agencies engaged in the fight against terrorism and organised crime can be helped to develop a culture of human rights observance in the execution of their duties.

THE RATIONALE FOR THE RIGHT TO PRIVACY IN COMMUNICATION

The rationale for the right to privacy in communication is to secure the individual against arbitrary interference by the public authorities in his private and family life. This notwithstanding, one of the most contentious issues of our times relates to the protection of the right to privacy in communication in the era of terrorism and The Regulation of Interception of Communication Bill is currently being considered by the Uganda Parliamentary Committee on Information and Communication Technology (ICT), and has been approved by the majority Members of Parliament of the ruling National Resistance Movement Government of President Yoweri Kaguta Museveni which means that phone tapping has in effect been legalized in Uganda.

See Complaint lodged by Col (rtd) Dr. Kizza-Besigye at the Uganda Human Rights Commission (UHRC) on alleged phone tapping by the State during the 2001 Presidential and Parliamentary campaigns in which he contested as the Reform Agenda (RA)

Presidential Candidate. 24 Act No. 6 of 2005. 25 Act No. 14 of 2002.[320]

The raise in organised crime and terrorism is a big challenge to the right to privacy in communication. Owing to the core relevance of the right to privacy in communication, this right has been made subject of the 'principle of legality' in other jurisdictions requiring that actions by public authorities which infringe significantly on the rights and freedoms of private citizens (eg police surveillance), be authorised by Statute/law. The ambitious expansion of electronic surveillance and its implications on are enormous. What used to be the rationale for the protection of the right to privacy in communication is now being looked at in relation to national security and the fight against terrorism. New developments in the area of national security and terrorism have set the stage for discussion on what should be the appropriate limits of national security and anti-terrorism.

Though the concept of privacy in communication figures prominently in the discourse about the social and political threats posed by modern information and communication technology, the rational for privacy in communication can basically be found in terms of information control. Privacy is mainly regarded as being of value to individual persons and of societal benefits. Most discourse on privacy and privacy rights tends to focus only on the benefits these rights have for individuals. These benefits are typically cast in terms of securing (or helping to secure) individuality, autonomy, diginty, emotional release, self-evaluation, and inter- personal relationships of love, friendship and trust. They are, in the words of Westin, largely about "achieving individual goals of self-realisation''. The converse side of this focus is that privacy in communication rights are often seen as essentially in tension with the needs of the wider "society''. This is more so the case when it comes to the balancing of the rights to privacy in communication and national security

[320] See The New Vision, April 7, 2008, and The Daily Monitor, April 10, 2008 . See the websites at http: //www. new vision. co. ug and http:// ww. monitor. co. ug 27 See The New Vision, May 30, 2007, and The Daily Monitor, May 30, 2007. 28 See Mollynn G Mugisha, 'Do not support phone tapping' letter in the Daily Monitor, June 4, 2007, at p.11.

or the fight against terrorism. This view observers comment carries sometimes over into the claims that privacy rights can be detrimental to societal needs.

As Professor Lee Bygrave observes:

'Casting the value of privacy in strictly individualistic terms appears to be common trait in the equivalent discourse in many other countries. Indeed, it is an integral feature of what Bennett and Raab term the "privacy paradigm" – a set of liberal assumptions informing the development of data privacy policy in the bulk of advanced industrial states".

This notwithstanding, the grip of that paradigm varies from country to country and culture to culture. For example, whereas the Canadian courts emphasise the value on the individual right to privacy in communication, the Ugandan courts are yet to be faced with such challenges of having to deal with evidence illegally obtained through wire tapping. The law on privacy in communication seeks to protect human identity, the rights of man, privacy, individual and public liberties. These virtues are core to any free and democratic society. Concern for privacy tends to be high in societies espousing liberal ideals, particularly those within the Western liberal democratic "camp" Canada inclusive compared to the less liberal and undemocratic societies like Uganda and other African states. As Lukes notes, privacy is in the sense of a "sphere of thought and action that should be free from 'public' interference" constitutes "perhaps the central idea of liberalism". The liberal affection for privacy is amply demonstrated in the development of comprehensive legal regimes for privacy protection in Western liberal democracies. By contrast, such regimes are under-developed in most African nations Uganda inclusive. It is tempting to view this situation as symptomatic of a propensity in Ugandan and African cultures to place primary value on securing the interests and loyalties of the group at the expense of the individual. 40

ENJOYMENT OF THE RIGHT TO PRIVACY IN UGANDA FOR THE PERIOD 1995 – 2008

The notion of fundamental rights and freedoms has existed from the very outset of the birth of the modern constitutional state of Uganda in 1962. Thus, prior to the 1995 Constitution, the conceptualisation of fundamental freedoms and rights was manifested in the provisions of Chapters II and III of the 1962 and 1967 Constitutions respectively. Further, the predecessor constitutions provided for mechanisms for the enforcement of rights and freedoms, in particular through the courts. Evidently, a cursory glance at both constitutions does reveal emphasis on traditional civil and political rights, while the 1995 Constitution has since incorporated a range of new categories of rights and freedoms, particularly socio- economic and cultural rights and specific group-based rights (in respect of, for instance, women, children, persons with disabilities, and minorities).

Notwithstanding the provisions on human rights under both the 1962 and 1967 Constitutions, the human rights situation in Uganda was largely dismal, as the period from 1962 to 1995 was characterised by abuses in the form of arbitrary arrests, preventive detention, torture, disappearances. The political situation militated against the meaningful enjoyment of rights.

The protection and enforcement/enjoyment of the right to privacy in communication in Uganda (1995-2008) as provided for in article 27 of the Constitution has now been tested for thirteen years since the Constitution came into operation.

Lt. Gen. David Tinyefuza was possibly the first high profile government official to complain about phone tapping after his failed bid to resign from the army in 1997. In 2003, the Member of Parliament for Lira Municipality, Ms. Cecilia Ogwal, was up in arms with the government and President Yoweri Museveni in particular for allegedly tapping her mobile phone conversations. This was after the latter told Parliament on September 8, 2003, that he had listened in on a conversation between Ogwal and a rebel commander of the Lord's Resistance Army. The media was however awe with the opposition politicians accusing the state intelligence operatives and agencies of phone

tapping at the height of the 2001 Presidential and Parliamentary Campaigns. The Constitution and other laws in Uganda place limits on the enjoyment of rights including the right to privacy as clearly seen in the Access to Information Actand the Anti-Terrorism Act, which actually provides for the interception of communication and surveillance of any person suspected of engaging in terrorism activities. The Constitution also obliges security organizations including the intelligence services to observe human rights under Article 221.Though the law in Uganda provides for phone tapping, the same does not provide for the procedure to be followed in this exercise. Thus, the government recently proposed the Regulation of Interception of Communication Bill 2007 which was presented by the Security Minister Hon. Amama Mbabazi to the ruling/NRM party meeting where government was canvassing MPs to ensue the bill sails through Parliament. President Yoweri Meseveni, who was in attendance, said that the bill was intended to monitor communication between suspected terrorists. The opposition and members of the public have already vehemently condemned the proposed bill.

However, a close look at the enjoyment of this right as espoused in the article in the last twelve years has had some problems. The problems that have hindered the enjoyment of this right have been multifarious as discussed hereunder.

MAJOR IMPEDIMENTS TO THE ENJOYMENT OF THE RIGHT TO PRIVACY IN UGANDA 1995 TO DATE

Though the right to privacy in communication did not pose a major challenge in Uganda two decades ago, new developments in science and technology continue to pose new challenges to human rights, in particular the right to human dignity and privacy. In the fight against organized crime and terrorism, modern police and intelligence agencies are using information and surveilance technology, including phone tapping, that potentially affects numerous innocent citizens and constitutes far-reaching interference with the right to privacy and data protection.

In a bid to maintain national security and counter terrorism, the Uganda government has passed legislation which has had drastic effects on the enjoyment of the right to privacy

in communication. A case in issue is the Anti-Terrorism Act. S.18 of this Act is the most relevant. It provides thus:

18. (1) The Minister may, by writing, designate a security officer and an authorized officer under this part.

(2) An order issued by the Minister in respect of an authorized officer shall have the right to intercept the communications of a person an otherwise conduct surveillance of a person under this Act.

19. (1) Subject to this Act, an authorized officer shall have the right to intercept the communications of a person and otherwise conduct surveillance of a person under this Act.

(2) The powers of an authorized officer shall be exercised in respect of a person or a group or category of persons suspected of committing any offence under this Act.

(3) The functions of an authorized officer shall be exercised only in respect of the person or group or category of persons described in the order.

(4) The purposes for which interception or surveillance may be conducted under this part are---- (a) safeguarding the public interest;

(b) prevention of the violation of the fundamental and other human rights and freedoms of any person from terrorism;

(c) preventing or detecting the commission of any offence under this Act; or

(d) safeguarding the national economy from terrorism.

(5) The scope of the interception and surveillance allowed under this Part is limited to---- (b) interception of the telephone calls, faxes, emails and other communications made or issued by or received by or addressed to a person; (g) searching of the premises of any person.

(6) For the avoidance of doubt, power given to an authorized officer under subsection (5) includes---- (a) the right to detain and make copies of any matter intercepted by the authorized officer; (b) the right to take photographs of the person being surveilled and any other person in the company of that person, whether at a meeting or otherwise; and

(c) the power to do any other thing reasonably necessary for the purposes of this subsection.

(20) Any person who knowingly obstructs an authorized officer in the carrying out of his or her functions under this part commits an offence and is liable, on conviction, to imprisonment not exceeding two years or a fine not exceeding one hundred currency points, or both.

(21) Any authorized officer who— (a) demands or accepts any money or other benefits in consideration of his or her refraining from carrying out his or her functions under this Part; or

(b) demands any money or other benefit from any person under threat to carry out any of his or her functions under this Part; (c) fails without reasonable excuse or neglects to carry out the requirements of the order; (d) recklessly releases information which may prejudice the investigation; (e) engages in torture, inhuman and degrading treatment, illegal detention or intentionally causes harm or loss to property, commits an offence and is liable, on conviction, to imprisonment not exceeding five years or a fine not exceeding two hundred and fifty currency points, or both.

(22) Any recording, document, photograph or other matter obtained in the exercise of the functions of an authorized officer under this Part is admissible in evidence in any proceedings for an offence under this Act.

For a long time since the Anti-Terrorism Act came into force in 2002, the government has not passed any Regulations to regularize/operationalise phone-tapping or interception of communication of suspected terrorists. This comes at the backdrop of allegations that the absence of a law operationalising phone- tapping not withstanding, the government has nevertheless intercepted communication and done surveillance on suspected terrorists. It is upon this background that the government has proposed the Regulation of Interception of Communication Bill 2007 which seeks to make provision for lawful interception and monitoring of certain communications in the course of their transmission through telecommunication, postal or any other related services or system in Uganda.

As MP Reagan Okumu said:

"The Government is now moving towards legalizing what they have been doing. Security organs have been tapping people's phones especially for those of us who are in the opposition. Is there anything new? My only worry is that the system may turn out to be expensive," This assertion was affirmed by Col. (rtd) Dr. Kiiza-Besigye [Party President, FDC] in the interview done on 28th January, 2008.

Interview with Hon. Rose Namayanja [Chairperson, National Defence Parliamentary Committee] done on 1 st February, 2008, affirmed the fact that the Bill would make it possible for the government to now use in court evidence against wrong elements suspected of terrorism obtained through surveillance including phone-tapping in The New Vision, Wednesday, May 30, 2006, p.3. The Bill is intended to suppress terrorism in Uganda. The Bill would also reinforce the provisions of the Interception of Communications and Surveillance of the Anti- Terrorism Act 2002, whose main focus is suppression of terrorism.

The Bill states that people authorized to apply for warrant of Interception of Communication will be chief of defence forces, director of ESO and ISO, Inspector General of Police and the Commissioner General of Prisons.

According to Government the purpose of the Bill is to put a law in place authorizing who can tap phones, now that it is done haphazardly. Another reason for the Bill according to its major sponsors is to intercept terrorists' communication with bad motives and those bad elements who deal in trafficking arms. At this stage, the sword is now drawn between the sponsors of the Bill and those opposed to it with the predominant view being whether to tap illegally or to tap with judicial review? The general consensus is that the government should not interfere in the civil liberties of its citizens. However, since the government is bent on infringing the citizens' right to privacy and has also been tapping phones illegally, there is now a shifting paradigm: that tapping phones should be used for the common good of any society and not for selfish motives and that there should be watertight safeguards in the law to ensure that the citizens' right are not trampled upon.

As MP Guma Gumisirisa rightly observed:

"It is not bad but such a law should put into consideration people's right to privacy and secrecy. The idea of tapping people's phones can not be accepted,"

Article 27 of that the Constitution provides for the right to privacy. It states

"(1) No person shall be subjected to---- unlawful search of the person, home or other property of that person; or unlawful entry by others of the premises of that person.

(2) No person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property.

Article 43 of the Constitution places general limitations on fundamental and other human rights and freedoms. This article permits any limitation of the enjoyment of the rights and freedoms prescribed by the bill of rights in the Constitution as long as it is not beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in the Constitution. Another article in the Constitution which touches on this concept is on the right of access to information in the possession of the State (or its organs and agencies). The article provides thus:

"(1) Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to privacy of any other person.

(2) Parliament shall make laws prescribing the clauses of information referred to in clause (1) of this article and the procedure for claiming access to that information."

Unlike Sections 18 and 19 of the Anti-Terrorism Act and Article 27 (2) of the Constitution which have not been tested in court yet, Article 41 of the Constitution has been tested in court in several cases bringing out interesting revelations about the scope and breadth of the article by the courts of law. In the Cases of Major General David Tinyefuza v. Attorney General and Attorney General v. Major General David Tinyefuza both the Constitutional Court and the Supreme Court remarked that it is not enough for the State to merely assert that the release of information would cause prejudice to those interest –

to that end, the State had to avail evidence to that effect and, therefore, the burden of proof lay with the State to show that the information that is being sought was restricted. More significantly, the import of the exceptions in article 41 of the Constitution was considered, with Mulenga, JSC of the view that those exceptions pertain to the effect of the release of information rather than to categories of information:

"The exception under Article 41 is not directed to types or categories of information… It is rather concerned with the effect of release of the information. The citizen is entitled to access any type of information, whether related to national security or national economy, as long as its release is not likely to prejudice the security or sovereignty (or interfere with the right to privacy of any other person).

As a consequence, right of access should exist with regards to information of whatever kind unless the State (or its organs or agencies) can show that it falls within the scope of the limited regime of exceptions (in terms of the effect upon security or sovereignty of the State or individual privacy). Reflecting on the decision of the lower court on the issue of the release of the information in a 'limited context', the Supreme Court was agreed that the release of information in a 'limited context' has been proper in balancing the need to determine rights of the individual (the petitioner) as against any perceived prejudice to the security of the State that the release of the information to the public would occasion. Oder, JSC observed thus:

... [I]t appears the mischief feared is in the release of information to the citizen, probably with the consequence that such information might be made public, prejudicing the security of the State. If the release was of a limited context, namely if it was denied to the public and the press but made available to the court and the parties for the determination of issues between the State and such party, then the prejudice to the security of the State would be averted by exclusion of the public and press and hearing in camera, as authorized by article 28(2) of the Constitution. 62

To the contention by the government in the case of Dr. Paul Ssemwogerere & Another v.

Attorney General[321] that article 41 of the Constitution only guaranteed access but not use of information, Okello, JA observed that 'access to information without use of it would be empty', and was of the view that 'access and use go together'.

Just as the individual can seek for information from government in the same way government can seek for information from an individual in public interest and for the security of the country. This leaves one wondering whether the State may derogate from its role of ensuring that ever citizen enjoys the right to privacy. From the foregoing, it can be noted that the passing of the Anti-Terrorism Act, has greatly impacted on the enjoyment of the right to privacy in communication in Uganda. The Act provides for interception of communication of any one suspected of engaging in terrorist activities. Equally, the fight against terrorism and organized crime in Uganda coupled with the lack of government will to uphold the rights of its people, has negatively affected the enjoyment of the right to privacy in Uganda as discussed above.

THE RIGHT TO PRIVACY AND COMMUNICATION IN CANADA AND LESSONS FOR UGANDA

This part of the book addresses the experiences with and approaches to the right to privacy in communication in Canada and its attendant lessons for Uganda. In this part, an analysis of how the Canadian and Ugandan conceptions of privacy interests differ from one another; and how these conceptions affect the practical articulation of the right to privacy in communication shall be discussed.

The Experiences with and approaches to the Right to Privacy in Communication in Canada.

Not only is the problem of national security and the fight against terrorism and organised crime a threat to the right to privacy in communication in Least Developed Countries (LDCs) like Uganda but also other jurisdictions including Canada.

However, unlike in Uganda, Canada being a developed democratic country, wire tapping

[321] (Constitutional Petition-1999/3) [1999] UGCC 5 (23 September 1999)

is strictly controlled to safeguard individuals' privacy.

The Canadian Charter of Rights and Freedoms 65 guarantees the right to privacy in s.8 which states that:

"Everyone has the right to be secure against unreasonable search or seizure."

Similarly, s.24 (2) of the Charter conditions the admissibility of the evidence in any criminal matter on the very different consideration as to whether its admission "would bring the administration of justice into disrupt".

Thus, the Charter guarantees the right "to be secure against unreasonable search or seizure". American cases dealing with the similar right protected by the Fourth Amendment have held that intangible conversation can be the subject of search and seizure.

Though the Ugandan Bill of Rights as seen in Article 27 of the Constitution is very explicit on the right to privacy in communication, the Canadian Charter of Rights and Freedoms only talks of an infringement of the protected right against unreasonable seizure. However, based on s.8 of the Canadian Charter, it is possible that the criminal interception of a private communication would be regarded as an infringement of the protected right against unreasonable seizure. It seems thus that the right to privacy in communication is an implicit right as opposed to the explicit nature the right takes in Uganda.

Accordingly, s.184.4, which purports to admit such illegally, obtained evidence on the basis of consent would presumably have to yield to s.24(2) of the Charter which conditions admissibility of the evidence on the very different consideration as on whether its admission "would bring the administration of justice into disrepute". Interception of communication is only in exceptional circumstances otherwise it is prohibited.

S.184.4 A peace officer may intercept, by means of any electro-magnetic, acoustic, mechanical or other device, a private communication where

[a] the peace officer believes on reasonable grounds that the urgency of the situation is such that an authorization could not, with reasonable diligence, be obtained under any

other provision of this Part; [b] the peace of officer believes on reasonable grounds that such an interception is immediately necessary to prevent an unlawful act that would cause serious harm to any person or to property; and [c] either the originator of the private communication or the person intended by the originator to receive it is the person who would perform the act that is likely to cause the harm or is the victim, or intended victim, of the harm. [1993, c.40, s.4.]

S.184.5 permits a judicial review of the process of interception of private communication here in Canada. Such an application may be made ex parte to a judicial officer, a judge of a superior jurisdiction in criminal proceedings. However, this Canadian position is radically different from the position advocated for in the Regulation of Interception of Communication Bill in Uganda which empowers the Security Minister to intercept communication upon request from the Chief of Defence Forces, the Inspector General of Police and the Director of Internal Security if terrorism, serious crimes such as robber, or a threat to the State is suspected. It is thus possible to see that the abuse to the right to privacy in Uganda does not have a judicial review like is the case here in Canada but shall be at the whelm of the Security Minister. The Bill is welcome in so far as it seeks to provide for a law regulating the interception of private communication, and for the Government of Uganda to regulate interception of private communication, for the people of Uganda to know who can lawfully intercept their private communication, for what purpose, and who issues warrants to do so.67 In Uganda, once again, in the Bill, the bizarre thing is that the warrants are to be signed by the Minister for Security. The Bill seeks to make a provision for lawful interception and monitoring of certain communications in the course of their transmission through telecommunication, postal or any other related service or system in Uganda.

Owing to the fact the Bill on the Regulation of Interception of Communications in Uganda gives too much power to the Minister of Security, human rights activitists have criticized the Regulations saying that the Bill will be used to target people with dissenting views from those of the Government. It is also apparently clear that the proposed law to legalize

phone tapping in Uganda infringes on people's rights to privacy and freedom of expression.

S.186 of the Canadian Criminal Code (CCC), states that a judicial official must be satisfied before authorizing a wire tap and any wire tap done without authorization is null and void and such evidence shall not be admissible in Court. Any one who wants to wire tap including the government or security agencies in Canada must apply for authorization under s.185 of the CCC.

The jurisprudence right to privacy in communication is more developed in Canada than in Uganda. Canada is a leading example in this area of safeguarding citizens' rights on the wire tap with several safeguards including judicial review. The variation between the privacy regimes of Canada and Uganda can also be symptomatic of differences in perceptions of the degree to which interests that compete with privacy, such as public safety and national security, warrant protection at the expense of privacy interests. In other words, it can be symptomatic of differing perceptions of the need for surveillance and control measures. This is seen most clearly in the impact on U.S. regulatory policy of the terrorist attacks of 11 th September 2001. In the wake of those attacks, the U.S. has been more prepared than many other countries to curb domestic civil liberties, including privacy rights. This very attitude led to the hurried passing of the Anti- Terrorism Act in 2002 in Uganda as a result of the twin bombings of the cities of Nairobi and Tanzania by alleged terrorists targeting the American embassies there. There were also widespread reports of bomb blasts in Kampala. The proposed law on phone tapping is inimical to the enjoyment of the right to privacy in correspondence and communication in Uganda.

Despite the fact that both Uganda and Canada are members of the United Nations and several fundamental human rights multilateral instruments like the Universal Declaration of Human Rights (U.D.H.R.), the International Covenant on Civil and Political Rights (I.C.C.P.R.), from which the formal normative basis for privacy and protection laws derives, most Uganda has failed to adhere to a strict observance of the right to privacy in communication and also requiring the strict national implementation of the basic

principles of privacy in communication laws. 74 This is the case in Uganda despite the Constitutional provision in Art 221 which states: "It shall be the duty of the Uganda Peoples' Defence Forces and any other armed force established in Uganda, the Uganda Police Force and any other police force, the Uganda Prisons Service, all intelligence services and the National Security Council to observe and respect human rights and freedoms in the performance of their functions".

The intelligence agencies continue to tap people's phones articles 27 and 221 not withstanding.

Across the Atlantic, Canada offers very good jurisprudence for safeguarding the right to privacy in communication from which Uganda can emulate. Save for the constitutional provision in Article 27 on the right to privacy, Uganda generally lacks a major legislation protecting the right to privacy in communication. The only legislation available such as the Anti-Terrorism Act is only for further suppression of the right. Uganda should borrow a leaf from Canada and pass a comprehensive law on the protection of the right to privacy.

In Uganda, phone-tapping has not been tested in court. In Canada, the Supreme Court of Canada in the case of R. v. Wong, held inter alia that evidence of gambling obtained by unconstitutional video surveillance not to be excluded under s. 24(2) of Charter where officers acting in good faith, upon reasonable and probable cause and breach stemming from reasonable misunderstanding of law obtained such evidence.

In the earlier case of R. v. Duarte, the Supreme Court of Canada emphasised judicial review in wire tapping. The Supreme Court concluded:

"If privacy may be defined as the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself; a reasonable expectation of privacy would seem to demand that an individual may proceed on the assumption that the State may only violate this right by recording private communication on a clandestine basis when it has established to the satisfaction of a detached judicial officer that an offence has been or is being committed and that interception of the private communications stands to afford evidence of the offence"

Further, Justice Iacobucci, in R. v. Oickle, observed thus: "….the Charter is not an exclusive catalogue of rights. Instead, it represents a bare minimum below which the law must not fall. A necessary corollary of this statement is that the law, whether by statute or common law, can offer protections beyond those guaranteed by the Charter".

From the aforegoing, it can clearly be seen that the Canadian and Ugandan conceptions of privacy interests differ from one another and these conceptions affect the practical articulation of this right as discussed above.

S.189 (1) of the Canada Criminal Code (CCC) on automatic exclusion of private communication evidence unless the interception had been lawfully made or consent for admissibility was expressly given by neither the originator or the person intended by the originator to receive the communication. It also provided that "evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence". S.189 (1) to (4) was repealed in 1993. This eliminated the automatic exclusionary rule if an interception was unlawful. Now s.24 (2) of the Charter governs the admissibility or exclusion of al intercepted private communications and evidence gained directly or indirectly by an unlawful interception. However, even if the interception is lawful within the provisions of Part VI of the CCC, it is still subject to Charter standards including s.8.

CONCLUSION.

The response to the threat of terrorism and national insecurity should go beyond military and police action and address the root causes of the increasing use of terrorist methods. In addition to the unresolved conflicts in Northern Uganda and the denial of self-government/power sharing between the central and the regional governments, there seem to be many other causes of terrorism and threats to national security in Uganda. The blind pursuit of the structural adjustment policies of the IMF and the World Bank coupled with the poverty and denial of human rights as a result of globalization driven by neo-liberalist

policies (mostly pursued by the WTO and WIPO) certainly figures prominently among the root causes of present day terrorism in Uganda much of which is foreign sponsored. Uganda too should avoid a policy of aggression similar to that taken in the 1990s against neighboring countries such as DRC, Sudan, and Rwanda as this aggravates the likelihood of terrorist attacks by those countries and their allies against Uganda. Open alliance with terrorist prone/target countries such as the U.S.A. and the U.K. in turn makes Uganda a soft target by the many enemies of the two superpowers who may opt to vent their anger on the defenceless Uganda after missing their targets on the U.S.A. or the U.K. Mere legislation alone will not help but these factors too need be looked into in the fight against terrorism and other threats against national security in Uganda. Canada offers much to Uganda to learn in form of safeguarding to the right to privacy in communication in this era of terrorism and increased organized crime.

CHAPTER ELEVEN

GAZZETTED CELLS AND SAFE HOUSES

"At RRU [Rapid Response Unit] station … they don't want to listen. They want you to accept that you've stolen something. With the pain of beating, you accept."

–Former suspect detained by RRU and charged with aggravated robbery, Kampala, November 19, 2009

On August 20, 2010, robbers broke into the house of an affluent woman in Makindye, Kampla, held machetes to her guard's neck, and allegedly stole property and money. Police questioned several people, including Frank Ssekanjako, a 22-year-old who was renting a room near the crime scene. He was arrested, along with three others. Eyewitnesses who saw Ssekanjako in detention in Kabalagala police station two days after his arrest said that he was concerned about the allegations against him but seemed in good health and spirits.

On August 23 2009, three officers from Uganda Police's Rapid Response Unit collected Ssekanjako and another suspect allegedly in order to recover stolen property. What happened next is a matter of dispute. The RRU officers told Human Rights Watch that Ssekanjako complained of stomach pain in the car, so they took him to the hospital where he died a few minutes later. But the official post-mortem report suggests otherwise, as do multiple eyewitnesses who described how the officers beat Ssekanjako and other suspects for over an hour at the scene of the alleged robbery with plastic pipes and a large entolima, or wooden club, until he stopped moving or making any noise.

Reportedly, officers then dragged the men to the car, dropped off two suspects at Kabalagala police station to give statements and took Ssekanjako to the hospital, where he was later pronounced dead. According to the post-mortem report Ssekanjako's injuries

were "fresh" and included eight puncture abrasions on the right foot, bruising on the back, a swollen right shoulder, bruising on the right and left upper arms and left flank, and abrasions on the left thigh and elbow. No cause of death was determined. Three officers have been arrested and are awaiting trial. Ssekanjako's family has yet to receive information, documents, or medical evidence related to his death—including copies of photos that police took of his body—and say interacting with police about the investigation has been very difficult. "Either the police were negligent or they were purposefully trying to kill [Ssekanjako], but my mother has a right to know what happened," Ssekanjako's brother told Human Rights Watch. "You go to police and expect vigilance and instead get violence"

Over the last decade, a range of security units within the police and the military in Uganda have earned notorious reputations for using brutal and unlawful interrogation methods. Confronted with mounting evidence of abuse, government officials have often denied allegations or made piecemeal reforms, such as changing a unit's name or commander. In this climate of tacit tolerance of brutal methods, victims have been reluctant to speak out about their ill-treatment and abuse, fearing reprisals.

At the same time, Uganda has worked to enhance its reputation as country that respects human rights, for example, by becoming a member of the United Nations Human Rights Council (UNHRC). There are also increased efforts to professionalize Uganda's security forces via international trainings and participation in African Union (AU) and United Nations peacekeeping missions. But despite these measures of external engagement the government still fails to protect human rights domestically, or to take significant steps to address the problem of systemic and pervasive torture and prolonged illegal detention.

Human Rights Watch has documented hundreds of cases of torture by various security units in Uganda over many years. This report details extrajudicial killings, torture, illegal detention, forced confessions and other abuses by the Rapid Response Unit (RRU) of the Uganda Police Force. RRU is the legacy of Operation Wembley, a short-lived security unit that quickly earned a reputation for torture, including water-feeding, genital

mutilation, and stabbing, whipping or beating detainees. While the name and command structure of the unit has changed, abusive practices continue and are rarely exposed, acknowledged, challenged, or punished.

During more than 13 months of research, Human Rights Watch carried out over 100 interviews in regions where RRU is most active—Kampala, Mbale, Jinja, Masaka, and Mbarara. Drawing on interviews with victims of abuses, as well as current and former RRU employees, researchers documented serious human rights violations by RRU since its formal establishment in 2007. RRU officers routinely use unlawful force during arrest, including beating suspects and, in one instance that Human Rights Watch documented, shooting a handcuffed suspect. RRU personnel were allegedly responsible for at least six extrajudicial killings in 2010 alone, frequent use of torture during interrogations to extract confessions, and prolonged illegal and sometimes incommunicado detention of suspects at RRU headquarters in Kireka, Kampala, and other locations. This report builds on previous Human Rights Watch work published over almost a decade. State of Pain: Torture in Uganda, published by Human Rights Watch in March 2004, was broad in scope, examining illegal detention and torture by several security agencies, including Operation Wembley. In 2009, Human Rights Watch published Open Secret: Illegal Detention and Torture by the Joint Anti-terrorism Task Force in Uganda, a detailed and in- depth account of torture and illegal detention by the Joint Anti-terrorism Task Force (JATT), a security organization led by military intelligence, which was also featured in State of Pain . Unfortunately, despite government officials' commitments to investigate and make changes to eradicate brutality and detention without charge, evidence of abuses continues to mount.

RRU's predecessor, Operation Wembley, was formed in June 2002 on the executive order of President Yoweri Museveni to combat armed urban crime. Commanded by a then-military colonel Elly Kayanja and comprised of soldiers and other ad-hoc operatives untrained in law enforcement, Operation Wembley became synonymous with brutal forms of torture against alleged armed robbers. In late 2002, Operation Wembley's name

was changed to the Violent Crime Crack Unit (VCCU) and was led by a police commander, but the military involvement in the law enforcement operations continued. Nongovernmental organizations (NGOs) and the Uganda Human Rights Commission documented extensive abuses by the VCCU. In July 2007, the unit again changed its name to Rapid Response Unit and officially moved under the command control of the police. According to interviewees, over half of the original operatives affiliated with Wembley remain active in RRU, although it is unclear precisely how many.

Ugandan police claim RRU is mandated to investigate "violent crime," usually offenses affiliated with the use of firearms. However, since the unit was established, RRU officers and affiliated personnel have carried out arrests for a wide range of crimes, from petty theft to terrorism. Known for practices that flout basic legal safeguards in Ugandan and international law—such as ignoring laws regulating the right to arrest and detain persons, and extracting confessions by coercion—RRU appears to be the preferred unit of authorities seeking arrests and confessions by any means. RRU also continues Operation Wembley's practice of handing over civilian suspects to the military courts for prosecution, even though Uganda's Supreme Court and its international obligations prohibit the trial of civilians before military courts.

Although under police command, RRU has sometimes used soldiers and untrained informants to carry out law enforcement operations. RRU personnel typically operate in unmarked cars, wear civilian clothes with no identifying insignia, and carry a range of guns— from pistols to larger assault rifles. The unit's members have on occasion transported suspects in the trunks of unmarked cars.

Of the 77 interviewees arrested by RRU, 60 said that RRU personnel had beaten or tortured them at some point in their custody. The most common form of torture was repetitive beatings on the joints, such as knees, elbows, ankles, and wrists during several sessions over many days while handcuffed in stress positions. RRU personnel beat detainees with batons, sticks, bats, metal pipes, padlocks, table legs, and other objects. Detainees reported that torture had left them with swollen or fractured limbs, unable to

walk or lift objects, and with ongoing chronic pain. In some instances, RRU personnel inserted pins under suspects' finger nails or in rare instances administered electric shocks. Suspects often said they were forced to sign confessions under duress following torture. In May and August 2010, for example, media reported that RRU operatives had killed two suspects in their custody due to torture while trying to extract information about robberies.

From their detention at the Kireka facility, civilian suspects are handed to military courts to face trial. Although military courts have regularly heard testimony that the accused has been tortured, the military officers who act as judges in military courts have admitted into evidence confessions extracted through torture and have not instructed anyone to take steps to address the allegations. Neither the judiciary nor the regular police have tried to assess the quality of RRU's investigative methods. As a result, suspects often spend long periods in pre-trial detention, in some instances, because their trials cannot proceed due to lack of evidence, or judges rely upon coerced confessions as the main form of evidence. The absence of a lawyer when a suspect is interrogated, a standard safeguard against abuse, has allowed torture to persist in Uganda. All suspects have the legal right to counsel in Uganda; in practice, defendants do not receive a state-provided lawyer until their case is at trial and often spend years in detention before they ever meet a lawyer. During this time, evidence of the serious ill-treatment and torture used to elicit confessions often vanishes, and the defendant becomes demoralized by the long remand time, desperate for the case to be resolved, and skeptical there will be a fair trial. For the vast majority of suspects arrested by the RRU, they will be tried before military courts, where they are judged, prosecuted and defended by members of the military and where the lack of sufficient guarantees of independence and impartiality makes the outlook for suspects even bleaker.

In 2010, police took a significant step in the fight against RRU impunity. Three RRU officers were arrested for the murder of Frank Ssekanjako, the 22-year-old suspect who they allegedly brutally beaten to death in August 2010. These arrests could mark a turning

point in addressing abuses by RRU. However, Human Rights Watch has investigated this case in detail and remains concerned that police have failed to collect statements from key witnesses to determine the circumstances of his death, or to document the full range of violence used against Ssekanjako and his co-accused that day. These shortcomings raise doubts about the quality of evidence that will be presented at trial, if and when it occurs. The three RRU officers have also been charged only with murder and not for the severe beatings meted out to the co- accused the same day. Ssekanjako's family members, who have demanded justice, have also faced intimidation that has led them to doubt the police's commitment to ensuring criminal accountability for his murder. And while taking action in response to a detainee's death is laudable, real reform will only come if RRU personnel face repercussions for other instances of brutality and beatings that can result in deaths in custody.

Uganda's government must comply with the provisions of its own constitution and fulfill its core obligations under international human rights law—in particular the absolute prohibition on torture and cruel, inhuman, and degrading treatment—by systemically addressing persistent allegations of torture and illegal detention by security services. Human Rights Watch welcomes commitments made by the inspector general of police to remedy abuses by RRU personnel. In November 2010, a new commander was appointed to head RRU who has established a toll-free phone line for complaints and a human rights desk within RRU headquarters. These measures are encouraging. But they need to be accompanied by a demonstrable no-tolerance policy of ill-treatment— including prosecutions and punishment for any violators—if meaningful change is to occur and abuses are to end. Officers implicated in abuse cannot only face administrative sanction or short-term suspension. While trainings in human rights are important, they will be ineffective if senior officials ignore or order beatings of suspects.

In carrying out its responsibilities to investigate and prosecute crime, Uganda's government must ensure that suspects enjoy the protections of due process and the right to counsel and fair trial that are currently lacking in practice. Commanders should not

wait until a suspect dies during an interrogation to take action. High ranking police and military commanders should publicly and unambiguously articulate a no-tolerance policy regarding torture and illegal detention, and prosecute and punish members of their forces who abuse suspects.

To achieve this, Human Rights Watch recommends that Uganda's Parliament pass the newly tabled Prevention and Prohibition of Torture Bill, which the president should sign into law without delay. The prosecutor's office should then use this law to proactively prosecute cases of torture by members of police and military. The government should also urgently create a functional legal aid system and identify appropriate funding so that all suspects access an independent lawyer from the start of their detention. Without such concerted action, the government is indicating its tolerance for the abuses documented in this report and implying its tacit acquiescence, which belies its stated commitment to the rule of law.

RECOMMENDATIONS

To the President and Government of Uganda

• Issue direct orders to police to cease illegal detention and torture of suspects, and respect criminal procedure at each stage of any criminal investigation.

• All individuals arrested should be brought to recognized, lawful locations where their detention can be monitored.

• End impunity for human rights violations by anyone employed or affiliated with Rapid Response Unit (RRU), including violations of the right to life, bodily integrity, liberty and security and fair trial, such as the right to be charged before a judge within 48 hours of arrest and the right of access to a lawyer.

• Improve safeguards in police custody, including guaranteeing the right of access to a lawyer from the outset of detention, presence of counsel during all interrogations, and access to family members throughout detention.

• Ensure that coerced confessions, particularly those extracted under torture, are not admitted as evidence against persons at trial, and that prosecutors and judges are able to

investigate torture and illegal detention by any branch of the military and domestic intelligence services free from obstruction or interference.

• Release prisoners who have been convicted in unfair trials, or appropriately retry them in accordance with international fair trial standards.

• Provide timely and adequate remedies, including compensation, for persons arbitrarily arrested, tortured, and otherwise mistreated in detention.

• Ensure that police, military and intelligence officers committing torture or other human rights violations against persons in their custody are appropriately and fairly prosecuted.

• Ensure that the Prohibition and Prevention of Torture Bill 2010, recently tabled in parliament, is passed and signed into law without delay.

• Ensure that commissioners for the Uganda Human Rights Commission are appointed in a timely manner so that torture complaints can be heard without delay.

• Devise a functional legal aid system to ensure that defendants have access to a lawyer, provided by the state if they cannot afford one, from the time of arrest and not only at trial.

• Ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), which would allow the Subcommittee on Prevention of Torture of the UN Committee Against Torture to visit Uganda.

• Abolish the death penalty and ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).

To the Uganda Police Force, Particularly the Police Standards Unit and the Criminal Investigations Department of Police

• Immediately release or charge with a cognizable criminal offense before a civilian court all those currently held without charge in Kireka's RRU headquarters, any military barracks, or any other locations—gazetted or ungazetted. Release those who have been

on remand where no steps have been taken to investigate the charges or bring the case to trial.

• Focus on the conduct of officers, special police constables, and informants working for the Rapid Response Unit anywhere in Uganda. Carry out more regular spot checks on any detention facility run by RRU officers, interview suspects out of earshot of RRU officers, investigate allegations of ill-treatment and torture, and ensure that the Criminal Investigations Department takes forward cases of torture and murder by RRU officers. Raise instances of incommunicado and illegal detention by RRU with commanders and press them to end the practice.

• Ensure the Uganda Human Rights Commission has full and unhindered access to the Kireka facility and other locations where there are allegations of unlawful detention, and ensure they can conduct such investigations and visits without prior notice.

• Immediately stop parading suspects before media.

• Immediately stop handing over civilian defendants for trial before military courts.

To the Ugandan Judiciary

• Use judicial powers to appoint a judicial agent to visit, without prior notice, the RRU facility in Kireka, prisons, police stations, military barracks, and any other facility where state security forces are allegedly holding or treating persons in violation of their rights.

• Ensure that civilian defendants are tried by civilian courts, in accordance with Uganda's constitutional court ruling.

• Ensure that confessions made under duress are not used as evidence in trials, as required by the Evidence Act. Limit the use of confessions as a basis for pretrial detention or conviction to confessions freely made in the presence of counsel and ratified within 24 hours before a judge and the defendant's counsel.

To the Parliament of Uganda

• Criminalize torture as an offense, in compliance with the Convention against Torture, by passing into law the Prohibition and Prevention of Torture Bill 2010.

To the Uganda Human Rights Commission

• Actively pursue investigations and visits to any location, including the RRU facility at Kireka and other RRU-run facilities throughout Uganda, especially where there are credible allegations of unlawful detention or torture. If denied access to specific areas or to specific detainees, continue to raise the issue publicly.

• Actively locate and interview former RRU suspects in prisons to determine their treatment in RRU custody and raise findings with senior police commanders.

• Report publicly and in a timely manner on findings related to individual acts of torture and illegal detention, and pass evidence to the director of public prosecutions for criminal prosecution.

To the United States, the United Kingdom, and Other Concerned Governments, Especially Development Partners in the Justice, Law and Order Sector (JLOS)

• Urge the government of Uganda to investigate human rights abuses by RRU and hold fair and credible trials for anyone suspected of criminal acts such as torture.

• Promote legislative and judicial oversight of the police.

• Closely monitor any assistance to police to ensure that human rights standards are strictly observed in all settings.

• Ensure that human rights training is an integral component of capacity building or of training projects for police and/or security forces. Such training should include a strong component designed to stop the use of torture and other cruel, inhuman, and degrading treatment as an interrogation technique or punishment. Base any continuation of training and/or provisions of equipment on police taking concrete action to investigate abuses and hold perpetrators accountable.

• Condemn torture and illegal detention when it occurs, and consistently raise concerns with Ugandan government officials, especially the inspector general of police and the

director of public prosecutions, until action is taken to hold perpetrators of torture, extrajudicial killings, and illegal detention responsible.

• Use every available opportunity to press for an end to impunity for perpetrators of human rights abuses, including by members of the police and military. Urge respect for international due process and fair trial standards and press for impartial inquiries into, and accountability for, cases of illegal detention, torture, extrajudicial killings and ill-treatment in detention.

• If cooperating with Uganda on counterterrorism and law enforcement activities, take all necessary measures to ensure that torture and ill-treatment of suspects is not used, raise concerns for the ill-treatment and illegal detention of suspects with authorities and press for accountability. Stop cooperating with abusive units.

• Support Uganda government efforts to devise a functional legal aid system to ensure that defendants have access to a lawyer from the time of arrest, not only at trial.

To the United Nations Human Rights Council (UNHRC) and the African Commission on Human and Peoples' Rights (ACHPR)

• The UN special rapporteur on torture and the AU special rapporteur on prisons and conditions of detention in Africa should request permission to visit Uganda. The Kireka facility and military barracks should be among the detention centers visited.

This report is based on research carried out in Uganda from November 2009 todate, involving interviews with 108 individuals with knowledge of the operations of Rapid Response Unit (RRU) and its predecessors, the Violent Crime Crack Unit (VCCU), Special forces command, Chieftancy of Military Intelligence (CMI), Internal Security Organisation (ISO) and Operation Wembley.

Human Rights Watch interviewed 77 current and former detainees who had been held in various places throughout the country, but predominantly in Kampala, Mbale, Soroti, Masaka, and Mbarara regions. Human Rights Watch researchers focused on recent cases since 2007, when RRU was officially established and placed under the authority of the

police. Particular efforts were made to quote testimony related to incidents that took place in 2009 and 2010.

Some interviewees had been arrested and detained by CMI, ISO, RRU, VCCU, or Operation Wembley and then released without charge. In other cases, individuals were on remand awaiting trial, or were convicted and serving sentences at the time of the interview. In prisons, Human Rights Watch identified prisoners likely to have been arrested by Operation Wembley, VCCU, or RRU agents based on the court in which they were being charged (most commonly the military courts) or the criminal charges against them (often aggravated robbery and illegal possession of firearms). In some instances, interviewees were selected based on the recommendation of prison officials familiar with their cases. Human Rights Watch spoke to prisoners out of earshot of officials, but also interviewed prison wardens and officers in charge of prisons, many of whom voiced concern about the years of remand time facing civilians before military courts.

Interviews with former RRU detainees were conducted with each person individually, except in two cases when Human Rights Watch interviewed two together. Pseudonyms have been used for interviewees to protect their identities. Sixty-nine were civilians, five were current or former soldiers, one was a member of a Local Defense Unit, one was a special police constable, and another a former prison warden. Interviews with current and former suspects were generally conducted in English, though in some instances with an interpreter from Luganda, Runyoro Rutoro, Runyankole Rukiga, Lusoga, Kiswahili, Iteso, and Karimojong.

Human Rights Watch took every precaution to verify the credibility of interviewees' statements and to corroborate their accounts with other knowledgeable sources. Uganda's government frequently challenges the credibility of evidence and allegations forwarded by human rights organizations that detail prolonged incommunicado detention and torture by police and security, despite a range of actors producing similar findings over more than a decade.

Human Rights Watch focused its efforts on determining the veracity of accounts. Wherever possible, Human Rights Watch corroborated details with others who had been released from RRU custody and interviewed them individually and separately. In some instances of allegations of ill-treatment, Human Rights Watch documented physical scars consistent with the alleged implements used. In instances where the method of torture left minimal physical evidence, scores of current and former detainees interviewed on different days and in different locations described identical or nearly identical treatment by RRU personnel, in some instances using the same names of those allegedly responsible.

Human Rights Watch made multiple and varied attempts to identify current and former officers of RRU and its predecessor units, and sought out interviews with them about the history, daily operations, and abuses that occurred during their employment. Some former officers approached by Human Rights Watch declined to be interviewed because they said they feared reprisals from colleagues in the unit. Five ultimately agreed to speak about their work.

Human Rights Watch observed trials at the General Court Martial in Kampala on 25 days in 2010 and 2011 and took particular note of civilians who were on trial and alleged that they had been arrested by Operation Wembley, VCCU, or RRU. In 11 instances, Human Rights Watch was able to observe the partial trials of individuals who had been previously interviewed about their arrest and pre-charge detention period.

Human Rights Watch conducted additional interviews with four private lawyers who had represented RRU suspects, and five family members of current or former suspects who witnessed the arrests or tried to visit suspects in RRU detention. Human Rights Watch also interviewed journalists and civil society members working on public law and order.

In 2010, Human Rights Watch made more than ten attempts to gain access to suspects held in Kireka through phone calls and text messages to RRU commanders and others in the police. Permission was never granted or denied, but was promised and then never fulfilled. On November 30, 2010 Human Rights Watch wrote a letter to the inspector

general of police inquiring about a range of issues related to the contents of this report (see first annex). He did not reply to that letter. In a meeting on January 24, 2011, the inspector general of police assigned two officers to provide responses to the questions. One officer, the new commander of RRU, furnished some answers (see second annex); the other officer never provided any responses to any of the questions despite phone calls, text messages and emails reminding him and his colleagues to do so.

Locally in Uganda, RRU is most often referred to as "Rapid Response Unit" or RRU, not the Rapid Response Unit. Throughout the report, we have been consistent with local usage.

Human Rights Watch took every precaution to verify the credibility of interviewees' statements and to corroborate their accounts with other knowledgeable sources. Uganda's government frequently challenges the credibility of evidence and allegations forwarded by human rights organizations that detail prolonged incommunicado detention and torture by police and security, despite a range of actors producing similar findings over more than a decade.

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The Rapid Response Unit was previously known as Operation Wembley and, later, the Violent Crime Crack Unit (VCCU). However, changes in name and leadership over time have not altered the fact the unit is responsible for carrying out arbitrary arrests, as well as detentions, torture and extrajudicial killings in violation of national and international law.

Operation Wembley In June 2002, President Yoweri Museveni created Operation Wembley (or "Wembley") as an autonomous ad hoc unit to combat armed crime.[322]1 Led by then- Colonel Elly Kayanja—an active member of the military and deputy director of the Internal Security Organization— Wembley was initially staffed by people from various units of the security services. These included the military's intelligence branch known as the Chieftaincy of Military Intelligence (CMI), the Criminal Investigation Department (CID) of police, the External Security Organisation (ESO), the Internal Security Organisation (ISO), as well as people who had worked informally as informants for military intelligence and the president's office.[323] Several credible sources told Human Rights Watch that most Wembley personnel were "repentant criminals" and former child soldiers who had fought in the National Resistance Army, a rebel group that President Museveni led before he took power in 1986, who needed work.[324]

In 2002, President Museveni said that Wembley was established to counteract the inefficacy of the civilian judicial system in prosecuting and punishing crimes. In 2002, the government- owned New Vision newspaper quoted him as saying:

The robbers, the police, and the judiciary were related just like the palate and the tongue. The police would make the statements poorly and the thirsty magistrates would release the robbers to continue terrorizing people.[325]

The legal basis for Wembley was not clear since the Ugandan Constitution states that intelligence organizations must be established by an act of parliament, which Operation Wembley was not.[326]5 Wembley also had no clear legal authority to carry out arrests and

[322] Operation Wembley was formed at a meeting of security chiefs on June 25, 2002, chaired by President Yoweri Museveni. Grace Matsiko, "Bageya 'is Voluntary ISO Cadre,'" New Vision , July 23, 2002.

[323] Human Rights Watch, State of Pain: Torture in Uganda , vol. 16, no. 4(A), March 2004, http://www.hrw.org/node/12160. Moses Mugalu, "Ex-Wembley Convicts Behind City Crime," New Vision , May 17, 2008. Human Rights Watch interview with current RRU employee, November 12, 2010.

[324] Human Rights Watch interviews with Ugandan journalists, Kampala, August 25 and December 13, 2010. Human Rights Watch interviews with former Wembley officers, Kampala, August 26, 2010. Human Rights Watch interviews with former Wembley officers, December 21, 2010.

[325] Allan Turyaguma, "Museveni Defends Ops Wembley," New Vision , August 26, 2002.

[326] In 2004, opposition parliamentarian Erias Lukwago alleged a constitutional violation in the formation of numerous security agencies without any act of parliament. Erias Lukwago, "Uganda Public vs. Yoweri

detentions. When it detained people, it took most suspects to a house on Clement Hill road in Kampala, which the minister of internal affairs had never designated a legal place of detention, as required by law.

Within its first month of operation, the government-owned newspaper New Vision reported that Wembley had killed 20 suspects.[327] Others recorded 83 suspects killed.[328] After its first two months, Wembley had arrested and detained over 430 individuals.[329] Suspects arrested and detained by Wembley routinely reported that they had been severely tortured during interrogations. One detainee who has been in detention awaiting trial since his arrest in 2002 told Human Rights Watch:

"At Clement [the offices of Operation Wembley at the time], there was beating every day. At night, they'd come and beat us…. They would tie us, lay us on the ground, and pour water on us. On Sunday, they would come in the morning and beat us…. They used sticks and whips. They beat all of us … morning and evening, we were beaten twice a day…. I lost a front tooth from being hit with a gun butt. The marks on my chest are from whips to the chest. I was admitted to Mbuya [military hospital] to suck out pus. They beat us terribly. I couldn't walk. My body was rotting…" [330]

Another former Operation Wembley detainee who has been on remand for over eight years, described Wembley members forcing him to drink large amounts of water, a practice known as "Liverpool."[331]

Members of the judiciary and NGOs condemned Operation Wembley for its unofficial shoot- to-kill policy and the use of torture and other ill-treatment.[332] Operation Wembley

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Museveni," Monitor , January 3, 2004 ("President Museveni and his NRM government have established a plethora of intelligence and other militia groups without any supportive Parliamentary legislation to wit; CMI, PPU, PGB, KAP, PIN, VCCU, Wembley etc. This contravenes Art. 218 of the Constitution which provides that: 'Parliament may by law establish intelligence services and may prescribe their composition, functions and procedures.'").

[327] Felix Osike, "Judiciary Protests on Kayanja," New Visio n, July 31, 2002.

[328] Human Rights Watch, State of Pain , p. 51.

[329] Ibid

[330] Human Rights Watch interview with Geoffrey, Kampala, June 24, 2010.

[331] Human Rights Watch interview with Anthony, Kampala, November 19, 2009.

[332] 11 Felix Osike, "Judiciary Protests on Kayanja," New Vision , July 31, 2002. The chair of the Judicial Service Commission, Justice Christine Kitumba, condemned the extrajudicial killing of suspected robbers.

also engaged in other illegal practices, such as detention in unauthorized locations euphemistically known as "safehouses"; detention without charge; denial of access to family, lawyers, or doctors; denial of bail; and trial of civilians by military courts martial.[333]

Despite the amassed evidence of Wembley's brutal tactics, the current inspector general of police, Major General Kale Kayihura, subsequently credited Wembley with reducing crime rates, telling media, "It is because of police incapacity that when Kampala was taken over by armed thugs in the late 1990s, Brigadier Kayanja's Operation Wembley was the salvation."[334]

Violent Crime Crack Unit (VCCU) The government appears to have ended Operation Wembley in late 2002 and shifted its duties to the newly created Violent Crime Crack Unit (VCCU).[335] This unit was mandated to be led and staffed only by the police. However, Colonel Kayanja remained at the helm until February 2003, when David Magara, his deputy and newly appointed assistant commissioner of police, took over.[336]15

While some have credited Magara with improving the conduct of operations, the VCCU was in many respects a de facto continuation of Operation Wembley, with the same personnel and tactics.[337] Several sources, including the Uganda Human Rights Commission, indicated VCCU staff continued to include soldiers and intelligence agents who had worked for Wembley.[338]

"We don't support that at all. We hope the security organisations will respect the law and bring the suspects to court so that they don't kill evidence. We should respect the rule of law," she said.

[333] Human Rights Watch, State of Pain.

[334] Maj. Gen. Kale Kayihura, "The State Has Not Become Militarized," New Vision , 28 July 2009.

[335] Human Rights Watch, State of Pain . The official end date of Wembley is not known. News reports indicate that it ended sometime in August 2002, but the Certificates of Appreciation handed out by the President's office to Wembley operatives indicate that the operations ended in January 2003.

[336] Ibid.; Magara was also Kampala's deputy regional police commander. Geoffrey Kamali and Kyomuhendo Muhanga, "Colonel Kayanja Quits Wembley," New Vision , February 26, 2003.

[337] Human Rights Watch interviews with former VCCU employee Kampala, August 26, 2010; and with Ugandan journalists, Kampala, August 25 and December 13, 2010.

[338] Uganda Human Rights Commission, Freedom from Torture: The End of Operation Wembley and the Rise of the Violent Crime Crack Unit , 2003, chap. 9. Human Rights Watch interview with police sources, December 13, 2010.

In 2003 and 2004, VCCU arrested at least one thousand people, still without a specific mandate in law to conduct arrests.[339] Reports of torture by VCCU endured,[340] and the Uganda Human Rights Commission asserted that allegations of torture against VCCU continued at the same rates as those against Operation Wembley.[341] Torture and interrogation methods also appear to have stayed the same.[342] A former VCCU detainee, echoing Operation Wembley detainees, described how VCCU operatives put a hose in his mouth and forced him to drink during an interrogation.[343] One detainee on remand for four years said that in 2005, VCCU operatives subjected him to a mock execution, making him and his co-accused lie down in a field at night before firing three shots at them.[344] A VCCU detainee who was on remand for two-and-a-half years said that agents suspended him from a pole and then beat him.[345]

In 2004, in a first step towards ending impunity, police arrested one VCCU operative for the death of a suspect in detention. A co-accused filed a complaint with the Human Rights Commission alleging that she had been tortured and her money stolen.[346] According to

[339] According to the United States Department of State country reports on human rights practices, VCCU arrested and detained over 500 suspects in 2003, and over 1,100 suspects in 2004. US State Department, Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices – 2003: Uganda," February 25, 2004, http://www.state.gov/g/drl/rls/hrrpt/2003/27758.htm (accessed September 6, 2010). US State Department, Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices – 2004: Uganda," February 28, 2005, http://www.state.gov/g/drl/rls/hrrpt/2004/41632.htm (accessed September 6, 2010). 19

[340] In 2003, Amnesty International called for an inquiry into the death of Nsangi Murisidi, a small business owner, who was picked up by VCCU and killed due to "extensive loss of fluid and blood, severe bleeding in the brain and extensive burns on the buttocks." Amnesty International, "Urgent need to end torture following death in custody," AFR 59/009/2003, June 27, 2003, http://www.amnesty.org/en/library/info/AFR59/009/2003/en (accessed September 6, 2010).

[341] Uganda Human Rights Commission, Freedom from Torture: The End of Operation Wembley and the Rise of the Violent Crime Crack Unit , 2003, chap. 9 ("In 2003 the Commission registered 48 complaints against the VCCU, compared to 44 complaints registered against Operation Wembley in 2002.").

[342] Human Rights Watch interviews with Arnold, Kampala, November 20, 2009; with Arthur, Kampala, November 20, 2009; with Roger, Kampala, November 20, 2009; with Ali, Mbarara Main, February 23, 2010; with Daniel, Mbarara Main, February 23, 2010; with Edward, Mbale, December 7, 2009; with Samuel, Mbale, December 7, 2009; with George, Kampala, June 24, 2010; with Gerard, Kampala, June 24, 2010; with Stephen, Kampala, June 24, 2010; and with Julius, Murchison Bay, November 10, 2010.

[343] Human Rights Watch interview with Gerald, Kampala, June 24, 2010.

[344] Human Rights Watch interview with Stephen, Kampala, June 24, 2010.

[345] Human Rights Watch interview with Donald, Mbarara Main, February 23, 2010.

[346] Emmanuel Mulondo, " VCCU Man Arrested On Torture Charges" New Vision , May 3, 2004.

police sources, the operative was eventually convicted of manslaughter although the duration of his criminal sentence remains unclear.[347] Despite this case, reports of torture continued. [348]

A representative of the Uganda Human Rights Commission said at the time, "This is the group that taints the name of the regular police force because most of the torture takes place in VCCU." VCCU head David Magara urged the commission to conduct its own investigations.[349]

Rapid Response Unit (RRU) In July 2007, police announced that despite its reputation, VCCU would be converted into Rapid Response Unit (RRU).[350] It would be one of three new units in the Criminal Investigations Directorate (CID), along with Crime Intelligence and Crime Investigations.[351] According to news reports, RRU was to respond urgently to crime scenes. It would also have a broader role in crime control, targeting armed robbers, and responding to general crime.[352]

However, in 2009 the Ministry of Public Service indicated in an official report on police structures that RRU "is an emergency unit set up to curb violent crime, track and arrest violent crime offenders."[353] The precise mandate of RRU remains unclear in practice.

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[347] Names of RRU operatives charged in courts of law since 2005, provided by RRU Commander Joel Aguma, On file with Human Rights Watch.

[348] Amnesty International, "Detainees Tortured During Incommunicado Detention," AI Index: AFR 59/006/2007, September 14, 2007, http://www.amnesty.org.au/news/comments/3117/ (accessed September 6, 2010).

[349] David Magara was quoted as saying, "Is that information on evidence? Have the people who have supplied that information to you visited us and do they have evidence? You investigate for yourself and make your independent findings." Solomon Muyita, "Army Leads in Torturing," Monitor , July 21, 2007. The UHRC continues to include abuses by RRU in its annual reporting.

[350] Simon Kasyate, "Kayihura Undergoes Massive Overhaul," Monitor , July 1, 2007.

[351] The Crime Intelligence Unit would be charged with studying crime trends and making projections. The Crime Investigations Unit would continue with the CID's traditional investigative role. Simon Kasyate, "Kayihura Undergoes Massive Overhaul," Monitor , July 1, 2007.

[352] Andrew Bagala, "VCCU Renamed, Gets Wider Role," Monitor , September 25, 2007.

[353] Ministry of Public Service, "A report on the approved structure of the Uganda Police Force," March 2009, on file with Human Rights Watch. The document further explains that RRU's "key functions" are to: "Develop plans, strategies, policies and guidelines for effective management of hard core criminals in the whole country; Plans and implements operations against hardcore criminals in the whole country; Trace and apprehend well-known criminals who are still at large; Liaise with other security agencies and other stakeholders within and outside Uganda for purposes of tracing and apprehending hard core criminals;

Since 2007, media reports have documented RRU agents carrying out numerous and varied tasks including patrolling during by-elections;[354] arresting journalists for covering specific stories;[355] investigating financial fraud;[356] counterfeiting;[357] impersonation;[358] stealing vehicles, money, livestock, and fuel—all without allegations that suspects were carrying weapons[359]; as well as instances of issuing fake checks,[360] stealing from empty hotel rooms prior to the 2007 Commonwealth Heads of Government Meeting in Kampala,[361] and cases of alleged terrorism.[362]

Once again, the unit's name change did not significantly alter its pattern of abuses, and at least some Wembley and VCCU personnel transitioned to RRU. Human Rights Watch interviewed five people who said they worked for Wembley, VCCU, and RRU, all of whom confirmed that changes in name did not constitute a substantial shift in

Compile case files and complete investigations of the violent suspects; Promote and ensure reduction of violent crime in the country by keeping vigilance surveillance on RRU suspects released from prisons; Assist police in curbing crimes which include but are not limited to burglaries, street mugging, mobile phone grabbing and theft of motorcycles and vehicles; Develop and build the human and non human capacity of the unit to handle hard core criminals."

[354] In Mbale in February 2010, RRU reportedly harassed opposition supporters from the Forum for Democratic Change (FDC) party during by-elections. Wafula Oguttu and Ofwono Opondo, "Is the Mbale Election Result a Reflection of FDC Strength or NRM Internal Weaknesses?" New Vision , February 20, 2010

[355] Andrew Bagala, "Police Search Bank over Missing 900 million UGS," Monitor , October 15, 2009.

[356] Herbert Ssempogo, "Two Held Over Fraud," Monitor , July 23, 2009; Eddie Ssejjoba, "Suspected Impersonator Faints at Press Conference," New Vision , June 7, 2009; and Luke Kagiri, "Mityana Police Arrest Suspected Conmen," New Vision , April 20, 2009.

[357] Pascal Kwesiga, "Three Arrested Over Fake Notes in Masindi," New Vision , June 30, 2010; and David Kazungu, "Police Impound a Million Fake Dollars," Monitor , September 30, 2009.

[358] Eddie Ssejjoba, "Kayihura Impostor Still in Police Custody," The New Vision , April 14, 2009; and Francis Kagolo, "Saleh Impostor Arrested," New Vision , November 8, 2008.

[359] Obed K. Katureebe, "National Forestry Authority Chokes Under Gross Corruption," Observer , November 25, 2009; Dradenya Amazia, "15 Stolen Vehicles Recovered," New Vision , November 12, 2009; Robert Mwanje and Faridah Kulabako, "Security Officials Beat Worshipers," Monitor , August 12, 2009; and Uwera Runyambo and Robert Muhereza, "Injured Suspect Now at Mulago," Monitor , July 30, 2009.

[360] Patrick Jaramogi, "Tycoon Ezra Escapes in Police Car Chase," New Vision , October 19, 2010.

[361] Zurah Nakabugo, "41 Arrested in Police Raid On City Lodges," Monitor , August 17, 2007.

[362] "Uganda: Kenyan Activists at Risk of Torture," Human Rights Watch news release, September 17, 2010, http://www.hrw.org/node/93131.

personnel.[363] One former Wembley operative said that his experience was typical; after serving in Wembley and VCCU with no training at all, in 2007 he was given two months of training in law enforcement and was made a special police constable and then continued on with RRU.[364] Knowledgeable sources indicate that currently roughly 25 original Wembley operatives are still employed at RRU.[365] Human Rights Watch found no evidence that police authorities vetted current RRU personnel to assess whether they had been implicated in past abuses before recruiting them into the unit.[366] In September 2007, a Uganda Human Rights Commission report stated that the VCCU/RRU topped its list of human rights violators, stating that, "Torture is common among suspects detained by VCCU/Rapid response unit (RRU), who bore marks consistent with torture."[367] In 2009, the commission again noted that it continued to receive reports of torture by RRU.[368]

In October 2009, the inspector general of police, Major General Kale Kayihura, reportedly dismissed around 50 officers from RRU, including its top three commanders. There was no explanation as to why these specific officers warranted termination, and it is not clear that their conduct in operations was a factor. Kayihura also removed the new RRU chief, who had only been in office for seven months, and his two deputies. According to media, they were removed after President Museveni rebuked them for detaining a suspect for 10 days without charge in a highly publicized case involving a

[363] In 2009, the Inspector General of Police terminated the services of 16 former Wembley operatives who had been employed in VCCU and RRU without explanation. Two active members of the military were ordered back to their military units. Orders from the inspector general of police, dated October 16, 2009 (On file with Human Rights Watch).

[364] Human Rights Watch interviews with current and former Wembley/VCCU/RRU employees, Kampala, August 25, 2010.

[365] Human Rights Watch interview, Kampala, February 22, 2011.

[366] Human Rights Watch interviews with current and former Wembley/VCCU/RRU employees, Kampala, August 25, November 13, November 14, and December 20, 2010.

[367] Solomon Muyita, "Army Leads in Torturing," Monitor , July 21, 2007; Mercy Nalugo and Solomon Mutiya, "Rights Bodies Want MPs to Criminalise Torture," Monitor , September 20, 2007.

[368] Solomon Muyita and Pauline Kairu, "UHRC Orders Closure of Prisons in Eastern Uganda," Monitor , June 27, 2009. The article notes that the Uganda Human Rights Commission "accused the Police force particularly the Rapid Response Unit (RRU) of administering 41.6 per cent of the claimed torture…."

government official. Magara was reappointed and then replaced by a new commander who again remained for less than one year. On November 18, 2010, the police chief appointed yet another police commander, Joel Aguma, to lead the unit. Aguma has committed to making reforms to address and curtail abuses.

According to several well-placed individuals interviewed for this report, the continuation of abuses despite these leadership changes is likely due to the fact that RRU is, at its core, run by some who operate outside the law and are either active military or former Wembley operatives specifically tasked to ensure they get confessions by any means necessary. Other personnel maintain close personal ties and direct access to senior officials within the government and security forces. These individuals can circumvent command hierarchy, take orders on an ad hoc basis, and enjoy protection from scrutiny or investigations when it is politically expedient.

Criminal suspects arrested by regular police are sometimes told they will be taken to RRU's headquarters in Kireka if they do not confess—a sign that RRU's notorious reputation for abuse is hardly a source of shame among police. In popular vernacular in Uganda and amongst current and former suspects interviewed by Human Rights Watch, the term "Wembley" still refers to RRU, indicating a popular understanding that the tough-on-crime, shoot-to-kill reputation of Operation Wembley lives on in the unit. This popular understanding appears, to some extent, to be well-founded. According to one intelligence agent who has worked in conjunction with RRU:

Since Wembley [in 2002], little has really changed there. It is the same people doing the same things. They just keep changing the name and bringing in new commanders, but those new police commanders never have the power to change the problems there. Those Wembley guys still run the place.

APPLICABLE INTERNATIONAL AND NATIONAL LAW

Uganda is a party to a number of international and regional treaties that impose legal obligations on Uganda regarding the conduct of law enforcement personnel and treatment of detainees. These include the International Covenant on Civil and Political Rights

(ICCPR), the United Nations Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment (Convention against Torture), and the African Charter on Human and People's Rights (ACHPR). The rights that these treaties protect include the absolute prohibition on use of torture or other forms of inhuman or degrading treatment on any detainee, the right of detainees to be held in humane conditions and treated with dignity, the right to liberty and security, which includes a prohibition on arbitrary detention, and the right to due process and a fair trial.

Various instruments further elaborate the standards with which Uganda is expected to comply as a party to these treaties. These include the Standard Minimum Rules for the Treatment of Prisoners,

Court decisions reinforce these core rights, which are also incorporated into, and reflected in, Uganda's Constitution. For example, under the constitution, a criminal suspect must be kept in a place that is authorized by law. The accused person is not to be subject to torture or cruel, inhuman or degrading treatment, although torture is not currently criminalized in law. There are references to the prohibition of torture in various laws, such as the Anti- Terrorism Act. However, despite evidence that torture has occurred during interrogations of terrorism suspects, there has never been a prosecution for torture under this provision.[369] According to the director of public prosecutions, Richard Buteera, perpetrators of torture can be charged with grievous bodily harm or assault as defined in the Penal Code, although this has rarely occurred.[370]66

In 2005 the UN Committee Against Torture (CAT) called on the government to amend the domestic criminal law in accordance with the Convention against Torture and Other

[369] Ibid. The Anti-Terrorism Act specifically states that an officer "who engages in torture, inhuman and degrading treatment, illegal detention or intentionally causes harm or loss to property, commits an offence and is liable, on conviction, to imprisonment not exceeding five years or a fine … or both." Anti-Terrorism Act, art. 17 (4). Human Rights Watch is not aware of any prosecutions of individuals under this article of the Act. For more, see Human Rights Watch, Open Secret: Torture and illegal detention by the Joint Anti Terrorism Task Force in Uganda. April 2009.

[370] Human Rights Watch interview with director of public prosecutions, Richard Buteera, January 20, 2009.

Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture),[371] to which Uganda is a party. In July 2010 the government finally tabled a bill in parliament that would introduce these changes. The bill is still pending.[372]

An accused person also has a constitutional right to be informed of the reason for his or her arrest and detention, and of the right to a lawyer.[373] Within 48 hours of arrest or detention, a suspect must be brought before a court to be charged with a crime. For serious offenses tried before the High Court, the state must provide legal representation in courts, though it is not specifically stipulated when in the process that right must adhere.[374]

Paid attorneys are not provided until the case is actually at trial, despite the fact that an accused person will normally have spent well over two—and sometimes several—years in detention by that time.[375] Detainees are also entitled to have access to family members, a lawyer, and a doctor and medical treatment.[376] A detainee's family must be informed of the detention at the request of the person in custody.[377]

The Ugandan Constitution also provides for a right to bail. The Supreme Court affirmed a constitutional right to bail in 2009 for all civilians, whether before military or civilian

[371]Conclusions and recommendations of the Committee against Torture: Uganda. "Consideration of Reports submitted by State parties under Article 19 of the Convention", Art. 10 (a), June 21, 2005. CAT/C/CR/34/UGA, http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.34.UGA.En?Opendocument.

[372] Website of the Parliament of Uganda, "Parliament of Uganda eNewsletter," Vol. 4 Issue No. 5, July 5, 2010 - July 9, 2010, available at http://www.parliament.go.ug/enewsletter/index.php/home/view/78/.

[373] Constitution of the Republic of Uganda, art. 23(3). 70 Ibid., art. 23(4).

[374] Ibid., art. 28(3)(e). Human Rights Watch interviews with criminal lawyers, Kampala, January 15 and 16, 2009.

[375] A 2007 census of Ugandan Prisons indicated that the average length of stay on remand for the entire trial (from date of admission to date of case disposal) was 30.3 months for capital offences. The Republic of Uganda Justice Law and Order Sector, "Census of Prisoners in 48 Central Government Prisons," 2007, http://www.prisons.go.ug/publications/Prisoners%20census-2007.pdf (accessed December 17, 2010).The U.S. State Department reports that judicial case backlogs contribute to pre-trial detentions between two and three years, and sometimes as long as seven years in Uganda. U.S. Department of State, "2009 Human Rights Report: Uganda," 2010, http://www.state.gov/g/drl/rls/hrrpt/2009/af/135982.htm (accessed December 17, 2010). Human Rights Watch is aware of at least four individuals who were arrested by Operation Wembley in 2002 and whose trial is still not concluded, meaning that they have been on remand for eight years.

[376] Constitution of the Republic of Uganda, art. 23(5)(b) and (c).

[377] Ibid., art. 23(5)(a).

courts.[378]75 In practice, accused persons are rarely released on bail. Instead, in the civilian court system, defendants are detained for an indeterminate period of time until the case is sent—referred to locally as being "committed"—to the High Court for trial.[379] This delay is partly due to the huge backlog of cases in the courts, but also gives the prosecution time to fully investigate the case against the accused. In practice defendants accused of serious crimes are prevented from exercising their right to bail during the investigative stage—which usually lasts for at least six months—because they are brought periodically before a magistrate's court, which does not have jurisdiction over the case, and so cannot hear a bail application.[380]

If a detainee can afford a private lawyer, he or she can apply for bail before the High Court— an option that is prohibitively expensive for most defendants. The court is obliged to grant bail on reasonable conditions for persons held beyond the six months.

Access to bail is also very difficult when suspects come before the military court. Military defense lawyers have never met their clients until just before a hearing, rarely consult their clients, and therefore are unlikely to raise matters at their client's request.79

Article 23(6) as amended by the Constitution of the Republic of Uganda (Amendment) Act 11/2005 provides:

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[378] Attorney General v. Tumushabe , Constitutional Appeal Number 3 of 2005. The court ruled that the General Court Martial is not exempt from the constitutional requirement to comply with the provisions on entitlements to bail. The case was brought by 27 individuals suspected to be members of the Peoples Redemption Army (PRA), a Congo-based rebel group charged with treason by the general court martial. For more than two years, the military refused to obey High Court orders for the suspects to be granted bail and access to their lawyers or families. By the time the Supreme Court issued its ruling, many of the suspects had already applied for amnesty.

[379] The Magistrates Court Act sets out the actions which must occur after a person is charged with certain capital crimes which must be tried in High Court. In particular, the Director of Public Prosecutions (DPP) must provide the magistrate's court with an indictment and a summary of the case in order to commit a case to the High Court. Magistrates Court Act of 1971, sec. 168. The Trial on Indictments Act does not allow a person accused of a criminal offence triable by the High Court to be produced in the High Court unless and until such person has been committed for trial by the DPP. Trial on Indictments Act of 1971, sec. 1. Due to the criminal process's dependency upon the speed of the DPP's actions, prisoners can continue on remand without any statutorily defined time limitations.

[380] A person also cannot plea before the magistrates court if the High Court has jurisdiction over the case. not always the case in practice.

(6) where a person is arrested in respect of a criminal offence –

(a) the person is entitled to apply to the court to be released on bail and the court may grant that person bail on such conditions as the court considers reasonable;

(b) in the case of an offence which is triable by the High Court as well as by a subordinate court, if that person has been remanded in custody in respect of the offence for sixty days before trial, that person shall be released on bail on such conditions as the court considers reasonable

(c) in the case of an offence triable only by the High Court, if that person has been remanded in custody for one hundred and eighty days before the case is committed to the High Court, that person shall be released on bail on such conditions as the court considers reasonable.

Before the constitutional amendment, (b) and (c) stated 120 and 360 respectively as the number of days that must pass before a person is entitled to bail.[381]

RRU ABUSES

The beatings started at 9 a.m. and went until 3 p.m. That RRU man got out a baton and beat me in the knee joints. He asked me to tell him where my boss is, saying that we rob together. He beat my joints for hours. I was seated and handcuffed. When he was not satisfied with my answers, he took a hammer and hit me on my back with it. He hit me on my backbone, from the bottom up to my shoulders. I said that the other man was a thief because I was in so much pain. He said, "If you don't tell the truth, I'll kill you….If you don't admit you know this man, we'll kill you."

Later, they tied us again, and told us to hold our hands under our thighs, and handcuffed us, bent over. There was a pole behind the house. That's where we were tied. It was between our legs; the pole was between our legs, and our arms were underneath. We couldn't move, but we sat on the ground. They used batons to beat us on the wrists, shoulders, elbows, and knees. They were beating us one person at a time. One man they

[381] See also Uganda v. Besigye, Constitutional Court of Uganda at Kampala, Constitutional Reference No. 20 of 2005, September 25, 2006.

called "Commander" pointed his pistol at me and ordered another one to beat me on the joints. I still have marks from the beating. Two guys were beating me….When one got tired, the other continued. Seven days after being beaten, when I was recovering, I was taken to the office for a statement. A man brought out a baton…. He said, "Tell me how you stole, what you stole." He beat me, so I said, "We got it from where the person was shot dead." He told me to make a statement and to admit at court. Because I was tired and scared, I said OK. He beat me four times in the process of writing my statement. They forced me to accept everything. At court, I denied the charges.

—Former RRU detainee, charged with murder, aggravated robbery, and unlawful possession of a firearm, on remand for two months at time of interview, Kampala, June 25, 2010.

Extrajudicial Killings Human Rights Watch has obtained information on some cases in which RRU personnel have been implicated in extrajudicial killings. An extrajudicial killing is a deliberate unlawful killing by security forces. The practice of extrajudicial killings violates basic human rights, including the right to life, the right to liberty and security of the person, the right to a fair and public trial, as well as the prohibition on torture and cruel, inhuman, and degrading treatment or punishment.80

Abusive behavior by security forces persists when perpetrators are not held accountable for their actions. Eliminating abusive actions requires more than new policies and senior officials committed to reform; it requires that would-be perpetrators know that they will go to prison and their careers will end if they order or participate in abuses such as torture and extrajudicial killings. Given the long history of abuse of detainees by Operation Wembley, VCCU and now RRU, the police must pay specific attention to this unit, hold perpetrators accountable, and end the long standing practices that have led to deaths in custody.

It is not known how many suspects may have died in RRU custody since it officially came under police control in 2007. Reports of killings have occasionally surfaced in the press. Family members of suspects, fearful of reprisals by security operatives, rarely seek

information regarding the whereabouts of those arrested by RRU and may believe the person is in prison or detained elsewhere, such as military barracks.

The Killing of Frank Ssekanjako In August 2010, RRU officers allegedly brutally beat to death Frank Ssekanjako, a 22-year-old robbery suspect from Wakiso district in Central Uganda.

On the evening of Friday, August 20, 2010, eyewitnesses saw police officers affiliated with Kabalagala police post arrest Ssekanjako and others for alleged robbery. Earlier that day, robbers had broken into the house of an affluent woman in Makindye, Kampala, held machetes to her guard's neck, and allegedly stole some property and money. Local police and the local community chairman questioned several people, including Ssekanjako, who was renting a room near the crime scene. On Sunday, some suspects were released on police bond. Eyewitnesses who saw Ssekanjako and his co-accused in detention that day described them as being in good health and spirits, and though concerned about the allegations against them, hopeful the matter would be resolved quickly.

On August 23, two RRU officers and an RRU driver were sent to Kabalagala police station to collect two of the suspects.[382] The RRU officers maintain that someone affiliated with the Presidential Guard Brigade had called the RRU deputy commander, requesting intervention and support.[383] The RRU deputy commander then ordered the three to recover the stolen property by collecting Ssekanjako and his co-accused from police custody. The officers drove Ssekanjako and his co-accused to the location of the robbery. RRU officers who collected Ssekanjako told Human Rights Watch that he complained of stomach pain while in the car, so they took him to the hospital where he died a few minutes later.[384]

This explanation is inconsistent with multiple eyewitness accounts and the official post-mortem report. Eyewitnesses described in stark detail how Ssekanjako and co-accused

[382] Police register at Kabalagala police station.
[383] Human Rights Watch interview with detained RRU officers, November 12, 2010.
[384] Ibid

were brought back to the scene of the alleged robbery by the two RRU officers and their driver and beaten severely for over an hour with plastic pipes and a large wooden club, known locally as an entolima. At one point, when Ssekanjako was hit repeatedly on the head and blood flowed from wounds on his ankles, knees and flanks, he said, "Why don't you shoot me, so I die?" This angered the officers, who responded by separating Ssekanjako from the others by some distance, saying, "You want to die with a bullet? No, you will die of beatings." The beatings continued.[385]

Eventually, Ssekanjako stopped making any noise, his eyes were wide open and he could not move or walk.[386] Eyewitnesses said that they suspected that he was dead.[387] This prompted one of the co-accused to admit to the robbery in order to stop the beatings. Officers dragged the suspects to the car, but allegedly protested to the family of the woman who owned the house, and who witnessed the physical state of the three suspects, that they did not have money for petrol. Two eyewitnesses told Human Rights Watch those family members handed RRU officers money, with the bleeding suspects still slumped in the dirt by the car.[388] Eventually RRU officers dropped other suspects at Kabalagala police station to give statements, and took Ssekanjako to Mulago hospital, where he was later pronounced dead.

The post-mortem report indicates that Ssekanjako had "eight puncture abrasions on the right foot, six linear tramline bruising on the back associated with linear abrasions, swollen right shoulder, diffuse bruising of the right and left upper arms, three linear abrasions over the left thigh, an abrasion 4 x 1 cm over the left elbow, multiple bruising of the left flank, injuries are fresh." No cause of death was determined.

[385] Human Rights Watch interview with eyewitness 1, November 29, 2010.
[386] Human Rights Watch interview with eyewitness 1, November 29, 2010 and eyewitness 2, December 3, 2010.
[387] Ibid
[388] Human Rights Watch interview with eyewitness 1, November 29, 2010 and and eyewitness 2, December 3, 2010. One reported that the amount was 20,000 UGS (US$10) the other said that each officer was given 50,000 UGS (US$25).

Police eventually arrested two RRU personnel, Muhammad Kavuma and Ramhadhan Dhikusoka. According to media reports, a third RRU officer, Hussein Dhikusoka (no relation) briefly evaded arrest after allegedly telling health workers that an angry mob had killed Ssekanjako.

The three are under arrest and currently awaiting trial, although police have yet to collect significant evidence related to the case. Three suspects were severely beaten that day and yet police have not helped them all to complete paperwork to certify their physical state after the torture. One has never made a statement to police regarding what occurred and he told Human Rights Watch he feared to interact further with police because of his sever beating that day. Multiple people in the community witnessed the events that day, heard the suspects screaming, and have valuable evidence that place the officers at the scene. The woman who owns the house that was robbed and was at the scene of the beatings was briefly detained and is now free on police bond. Community members indicate that she has now left the country, making it unlikely that she will be prosecuted for events that day, or that she will even testify as a witness to what occurred. Furthermore, no one has been charged for the household robbery that precipitated the original arrests.

Ssekanjako's family has also faced numerous challenges and intimidation in pushing the police to investigate and take action. On the day of Ssekanjako's burial, police gave the family "compensation" in the form of fuel for transport of the body, 500,000 Uganda shillings (US$230) cash, and some food. Later, after family members reported the death to a newspaper, they received phone calls from police saying that Ssekanjako was a thief and that family members should not return to the police. His brother told Human Rights Watch:

Police told me, 'Despite what we did for you, you keep complaining. We don't want to see you again. Every police officer here is waiting for you if you return here. Don't come back.' I took that as a threat. It made me feel that the police thought that my brother deserved to die.

Police have also failed to give the family information, documents, or medical evidence related to Ssekanjako's death. The family submitted multiple requests before receiving a copy of the post-mortem and death certificate, and has never received copies of photos that police took of his body. Police doctors have yet to officially determine the cause of Ssekanjako's death, and toxicology and histological tests have still not been completed because doctors at the mortuary claim they could not afford the chemicals needed to run the tests—even though Ssekanjako's family gave them 80,000 Uganda shillings ($40) to buy materials.

Ssekanjako's brother told Human Rights Watch:

I feel assured that the officers were arrested, but police have been so hard to work with. I get suspicious because police are so uncooperative at each step. Either the police were negligent or they were purposefully trying to kill [Ssekanjako], but my mother has a right to know what happened. You go to police and expect vigilance and instead get violence.

Ssekanjako's death also illustrates that RRU becomes involved in alleged criminal investigations for reasons that are not evident. In this instance, police had shown willingness to investigate the alleged robbery and take action by making arrests and detaining suspects in Kabalagala police station. No one, including the regular police or the RRU personnel, has claimed that a gun was involved in the robbery, the usual basis for RRU involvement.

Ssekanjako's death is unique in that his family actively pursued investigations, could afford the cost of the logistics to follow the matter up and complained to journalists and officials, despite multiple obstacles. The case, if well-handled, could be the first in which RRU officers are ultimately held accountable for murder of a suspect and act as a potential deterrent to others in the unit. If poorly handled, this case might well discourage victims of crime from coming forward and further embolden RRU.

The Killing of Henry Bakasamba In May 2010, media reported that RRU beat Henry Bakasamba during questioning about the theft of 80 million Ugandan Shillings [$34,000] from a foreign exchange bureau and that he subsequently died at Kireka from his

injuries.[389] According to eyewitnesses at the crime scene, Bakasamba was initially arrested by "informants," people who work with police but are not members of the police force themselves.[390]98 Two employees of the exchange bureau were also arrested after allegedly being implicated by Bakasamba. All three were taken to Central Police Station in Kampala, and from there to Kireka. One eyewitness told Human Rights Watch he saw Bakasamba in RRU custody, his hands and feet shackled to a pole, being repeatedly beaten on the joints. Other detainees later saw Bakasamba taken into a room for interrogation. One told Human Rights Watch that, an hour later, "I heard people outside saying that the man had died. I was very scared that I would be killed too but we didn't know what to do."[391]

The Uganda Human Rights Commission said it was investigating the death.[392] According to media reports, police arrested two police officers who were detained in Nsambya police barracks: three other RRU agents allegedly evaded arrest. It is not clear if anyone was ever charged in this case. Human Rights Watch could not find any names in prison records that media had mentioned, and a summary of RRU officers charged in courts of law that police provided Human Rights Watch did not include mention of this case. Police did not reply to Human Rights Watch's question posed in a letter to the inspector general of police regarding police action taken in regards to Bakasamba's death.

After Bakasamba's death, other suspects in the case were released on police bond. No one was ever charged in the robbery of the money from the exchange bureau and no money was ever returned to the owners. One source within government with knowledge of this case told Human Rights Watch that it had been mishandled by police who sought to cover up RRU's involvement in the death. A police officer who had also looked into

[389] Herbert Ssempogo, "RRU Officers Held Over Killing Suspect," New Vision, May 17, 2010. "Rights Body to Investigate Death in Police Custody," New Vision, May 18, 2010. Herbert Ssempogo, "Suspect Dies in Police Custody," New Vision, May 16, 2010.
[390] Human Rights Watch interview with multiple eyewitness, December 22, 2010.
[391] Ibid
[392] "Rights Body to Investigate Death in Police Custody," New Vision, May 18, 2010.

the incident told Human Rights Watch he believed that Bakasamba had become a liability for police, including some RRU officers, who had stolen money they had recovered from his robberies. Since police considered Bakasamba to be a "hardcore criminal" and a "thief for hire," the police officer said it was possible that he had been beating severely to keep him silent.[393]

The Killings in Kyengera

In January 2010, at least four people were shot dead in public on the Masaka Road in Kyengera, outside Kampala.[394] Police sources told media that the men— later identified by police as James Angulu, Jude Oceli, retired Lieutenant Kiiza, and retired Warrant Officer Musanje—were attempting to rob a supermarket and were being tailed by plain clothes RRU operatives. Cornered, the men shot at the officers who returned fire.[395] Multiple eyewitnesses who spoke to Human Rights Watch and media contradict that version of events, but no investigations into these killings have taken place.

Since the incident occurred in the evening on a busy roadway, there were many eyewitnesses. One man, who runs a shop nearby, told Human Rights Watch:

I saw a vehicle coming from the direction of Kampala, and I saw a man near me, shooting his gun at the vehicle, deflating the tires. When the four men jumped out of the car, the man shot them all. I read in the papers later about an attempt to rob the market, but that's not true. There was no exchange of bullets. As soon as the guys came out, they were shot dead. Those policemen with guns quickly took away the dead bodies, and the towing vehicle came and took away the car. The whole circus didn't take much time.[396]

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[393] Human Rights Watch interview with police officer, December 13, 2010.

[394] Some sources claim more than four were killed in this incident. See Ire Roilson, "Seven Unarmed Civilians Executed At Kyengera –Natete," The Independent , January 5, 2010.

[395] Andrew Bagala and Martin Ssebuyiira, "Four Shot Dead in City Robbery," The Daily Monitor , January 4, 2010. Steven Candia, "Kyengera Shooting Suspects Named," The New Vision , January 4, 2010.

[396] The numbers of those killed vary in the eyewitness accounts, but the lack of an exchange of gunfire is consistent. Andrew Bagala and Martin Ssebuyiira, "Four Shot Dead in City Robbery," The Daily Monitor , January 4, 2010. "[I]n a different account of events by residents, the suspects had accepted to surrender but the Police officers ordered them out of the car and shot them, a claim denied by the Police." Ire Roilson, "Seven Unarmed Civilians Executed At Kyengera –Natete," The Independent , January 5, 2010. The author

Other eyewitnesses corroborated the claim there was no exchange of gunfire. One Kyengera resident told Human Rights Watch:

They were shot dead. Were these people attempting to rob the supermarket? No, no one should tell lies. They were being trailed and the chance to kill them was in front of the supermarket. This is a story that is well known among the people of Kyengera.[397]

One person quoted by the government-owned New Vision newspaper, stated, "One is presumed innocent until proven guilty. How could the police, who are in charge of keeping law and order, shoot at people without establishing whether they were guilty?"[398]

Police did not reply to Human Rights Watch's question posed in a letter to the inspector general of police regarding specific police action taken after this shooting.

Other Killings

Many other people who had at some time been held in RRU detention told Human Rights Watch they had witnessed fellow detainees die, but did not know the full names of those killed.

Three witnesses formerly detained by RRU who were interviewed individually, in different locations, all told Human Rights Watch that RRU officers in Kireka beat to death a detainee known only as "Okello" in May 2010.[399] According to one former detainee, Okello had been arrested for allegedly stealing money and was beaten severely over two days.

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was an eyewitness, who wrote, "[T]here was absolutely no exchange of fire. Those seven people were unarmed; they did not return fire; but they were surely executed on the streets, with their hands up in the air and some were kneeling on the tarmac with their hands up pleading for their lives. Why they were not arrested, but shot mercilessly allegedly by law enforcement agencies in civilian clothes, terrifies people here who are bracing for violence in the run up to elections in 2011. The security personnel surely could have arrested those people and taken them into custody. For reasons best known to them, perhaps according to their operational command, they chose to summarily kill, rather than let justice run its course if indeed the victims were in any way connected to some crime."

[397] Human Rights Watch interview with eyewitness 2, December 6, 2010.

[398] Jude Kafuuma, "UPC Raps Cops On City Shootings," The New Vision, January 7, 2010.

[399] Human Rights Watch interview with James, Kampala, June 25, 2010. Human Rights Watch interview with Mohamed, Kampala, June 25, 2010. Human Rights Watch interview with Grace, Butuntumura, November 11, 2010.

Other former detainees interviewed by Human Rights Watch alleged that at least six other detainees were also killed, but Human Rights Watch could not further corroborate the killings. One man said that he witnessed the extrajudicial killing of a co-detainee in Mabira forest in July 2009 while RRU officers were transferring him from Soroti military barracks.[400] He alleged that another RRU detainee died in 2009 after he sustained injuries while being sodomized with a gun.[401] Another former RRU detainee said he knew of a man who died as a result of severe beating in 2010.[402] Another also said he knew of a fellow detainee who had been beaten to death in 2010.[403] Yet another said she witnessed beatings that resulted in the death of two other detainees in May 2010.[404] Former detainees also told Human Rights Watch of deaths at the hands of VCCU and Wembley agents.[405]

Torture

Nearly all the detainees experienced acts of violence when they were being arrested. They claimed that they were punched, kicked, hit with gun butts, and had guns pointed at them at close range or inserted in their mouths.[406]

Abuse continued once suspects were in custody. The aim of the interrogations was to extract information or confessions about robberies with particular emphasis on the whereabouts of firearms or money.[407]116 Interrogations accompanied by severe beatings

[400] Human Rights Watch interview with Francis, Soroti, December 8, 2009.
[401] Ibid
[402] Human Rights Watch interview with Simon, Kampala, June 21, 2010.
[403] Human Rights Watch interview with James, Kampala, June 25, 2010.
[404] Human Rights Watch interview with Agnes, Butuntumura, November 11, 2010
[405] For example, one former Wembley detainee said that he saw four people die while he was held at Wembley offices in Clement Hill. Human Rights Watch interview with Geoffrey, Kampala, June 24, 2010.
[406] Human Rights Watch interview with detainees, Kampala, Mbarara, November 2009, February 2010, June 2010. Human Rights Watch trial observations, Makindye General Court Martial, September 21, 2010.
[407] Civilians who wish to own a gun must apply to the Ministry of Internal Affairs for a firearms certificate. The police complete a background check to assess criminal, mental, and addiction records. Applicants must demonstrate a genuine reason for owning a firearm, be at least 25 years of age, and have competency in handling the firearm. If the applicant qualifies, the Ministry may then issue a certificate which must be re-applied for and renewed every year. See Firearms Act of 1970, sec 3 and 4. The estimated number of civilians with guns in Uganda is about 400,000, but only 2,770 of them are registered. GunPolicy.org,

took place in multiple locations, including during transportation between locations, at RRU headquarters in Kireka, and in uniports—temporary aluminum shelters—run by RRU but located within police compounds outside Kampala.

Of the 77 interviewees arrested by RRU, 60 said that RRU officers, constables, or informants beat or tortured them at some point during their custody. The most common form of torture was repetitive beating on the joints—knees, elbows, shoulders, ankles, and wrists—during several sessions over many days while handcuffed in stress positions. RRU personnel beat detainees with various objects, including batons, sticks, bats, wooden clubs, metal pipes, padlocks, glass soda bottles, and table legs. In three instances, detainees said they received electric shocks.[408]

Detainees interviewed in eastern, western, and central Uganda during more than a year of research described the same method of restraint and beatings during interrogations: suspects are frequently made to sit with their legs in front of them, bent at the knees, with their hands handcuffed under their legs. Sometimes suspects are placed in this position around a pole. They are then beaten repeatedly on the joints. One former detained said:

I saw many people being beaten in that position, where they tie your hands under your knees around the veranda pole. You can spend all day in that position. When you are inside, you can hear the crying of people throughout the building.[409]

Torture was frequently carried out on several detainees simultaneously, or within sight or earshot of others. In some instances, RRU operatives coordinated to take turns to beat suspects over the course of several days. There were usually two shifts for beatings, one in the morning and again at night.[410]119 A former RRU detainee who had been on remand

"Uganda, Gun, Facts, Figures, and the Law," http://www.gunpolicy.org/firearms/region/Uganda (accessed Jan. 20, 2011).

[408] Human Rights Watch interview with John, Kampala, June 21, 2010. Human Rights Watch interview with William, Kampala, June 25, 2010. Human Rights Watch interview with Isaac, Kampala, June 25, 2010.

[409] Human Rights Watch interview with Simon, Kampala, June 21, 2010.

[410] Human Rights Watch interview with Gideon, Kampala, June 24, 2010. Human Rights Watch interview with Geoffrey, Kampala, June 24, 2010.

for two- and-a-half years described torture he experienced in 2007:

They tortured me several times. They would take me from my cell and take me behind the offices. Many would take part in torturing. There were five consecutive days of them beating me. At night, around 11 p.m., and in the morning, around 10 a.m. They tied cloth on my mouth and handcuffed me so that I wouldn't obstruct the beating or bring my hands down. My hands were tied up. They used broken timber that had four corners, like a table leg, to beat me.[411]

Victims of beatings said they had difficulty walking or lifting heavy objects, sometimes for many months, after the event.[412] One detainee who had been beaten three months earlier said, "They hit me in the chest, and I still have pain there and in my joints. Everything still hurts because the beatings were heavy and long."[413]

Three persons arrested in 2010 in western Uganda each said that an RRU operative who used electric shock on them during questioning went by the name "Amoni".[414]123 It is not clear if the name "Amoni" is a pseudonym. One victim also said that "Amoni" used a hammer to strike his spine and a knife to cut his back. Another individual in eastern Uganda who had been on remand for a year said that an RRU agent named Kizza cut his stomach and thighs with a knife. Human Rights Watch researchers saw scars on his body consistent with this account.

Female detainees were not spared brutality. One woman, who was detained in Kireka for five months without charge, told Human Rights Watch that she witnessed eight women being tortured by RRU agents, who also forced needles under her fingernails during interrogations. She showed Human Rights Watch multiple black pin-like scars on her fingertips.

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411 Human Rights Watch interview with Gideon, Kampala, June 24, 2010.

412 Human Rights Watch interview with Roger, Kampala, November 20, 2009. Human Rights Watch interview with Simon, Kampala, June 21, 2010.

413 Human Rights Watch interview with Jonathan, Kampala, June 21, 2010.

414 Human Rights Watch interview with John, Kampala, June 21, 2010. Human Rights Watch interview with William, Kampala, June 25, 2010. Human Rights Watch interview with Isaac, Kampala, June 25, 2010.

I cannot recall the number of times they pierced my nails …. My nails were destroyed. They were black, swollen, and painful. The needles were inserted under the nail, on both my hands and feet. They pierced every nail.

Forced Confessions Detainees often alleged that RRU personnel forced them to admit to crimes or sign statements under duress while they were beaten or threatened with further violence. RRU personnel did not inform detainees of the contents of the statements or allow them to read them. If detainees questioned what they were signing, RRU personnel threatened or beat them further. In one instance, RRU personnel promised a detainee that he would be released if he signed the statement. Three detainees said they each signed several statements without knowing their contents.

One suspect, having endured two days of serious beatings while being questioned, said that his interrogator forcibly applied his thumbprint to a statement. Others said that the interrogator would have his baton with him when he was writing up a statement so that he could coerce detainees into signing. One man described his experience:

I made a statement and was put in a car by [my interrogator] and taken to Kireka. He wrote the statement, and he said, "Sign here." He had a baton. I delayed in picking up the pen, and he hit me with the baton. I didn't write the statement, but I signed it. I don't know what's in the statement because I never read it, and he never read it to me.

Two detainees suspected of robbery who had been tortured by RRU were brought to a local police station to make statements, but were so profoundly injured they could not sit up or hold a pen. A RRU operative told a female police officer to write the statements. One of the suspects told Human Rights Watch:

[RRU operative] ordered [the policewoman] to make us sign the statement, but I couldn't hold the pen because of the beatings on my arms. The RRU man held my hand with the pen in it and scribbled something on the paper. I have no idea what was in the statement. I had lost sense by then. Finally, the RRU man went away. I fell down on the ground and so did [the other suspect]. There was confusion then. I heard the policewoman yell, 'Suspects are dying!'

Police eventually took the two to Mulago hospital. One of the suspects left the hospital a day later, fearful that he would receive more beatings when he recovered. The other could not leave for several more days because of his injuries. In his medical records, seen by Human Rights Watch, the police surgeon lists 13 wounds varying in size from 2 x 2 centimeters, to a large wound on his upper arm more than 15 centimeters in length. There was never any follow up on the robbery case and neither man was ever charged with a crime. It may be that the physical state of the suspects caused police to drop the investigation into the robbery.

During trials before military courts, Human Rights Watch witnessed that even when a defendant argued that his statement was made under RRU coercion, it was admitted into evidence. During one trial, a defendant showed the court how he had been held in the stress position in a manner consistent with descriptions relayed to Human Rights Watch by other RRU suspects, and lifted his shirt and trouser legs to reveal scars. However, the court ruled that there was "no evidence [that] the statement was not given voluntarily." Under the Ugandan Evidence Act, admissions of guilt extracted by torture are to be considered irrelevant during trial. However, the Evidence Act applies only to civilian courts and not to military courts, where the vast majority of RRU suspects are prosecuted.

Illegal and Incommunicado Detention

All the detainees whom Human Rights Watch interviewed were not brought before a magistrate within the 48 hours mandated by the constitution. In most cases, they lacked access to family or lawyers, as prescribed by law.

Under the constitution, all places of detention must be designated by an administrative act of the minister of internal affairs, and the locations of legal places of detention must be published in a government gazette. Police argue that Kireka has been "gazetted," but have never furnished the gazette or any other evidence to support this assertion, despite multiple requests from Human Rights Watch for such information. Some have argued that because Kireka is officially under the jurisdiction of the Criminal Investigations Department, it is now a regular police post and therefore can be a lawful place of detention

for the 48 hours permitted by the constitution. Its status as a location of legal detention remains unclear.

Suspects repeatedly report being denied access to family members and attorneys during their detention in RRU's Kireka headquarters. As a party to the International Covenant on Civil and Political Rights (ICCPR) Uganda should ensure that everyone charged with a criminal offense can exercise their right to defend themselves in person or through legal assistance, including in pre-trial detention. This is also set out in the UN Basic Principles on the Role of Lawyers which provides that "all arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality." The African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa similarly provides that an arrested person shall have prompt access to a lawyer, and shall not be obliged to answer any questions or participate in any interrogation without his or her lawyer being present.

One detainee who had been in custody for five months in Kireka said, "I am sad that I don't know how my people and place are doing. I have ten children and two wives. I don't know the life of my people now and I have no way to communicate to them." A soldier testified during his trial that while he was detained Kireka, he asked RRU officers, "Let me call a lawyer and let my people know where I am." He added: "I refused to write a statement until I had a lawyer. They said, 'Here at RRU, we don't do that.''

Democratic Party mobilizer, Annet Namwanga was also detained incommunicado in the Kireka facility. Namwanga was arrested on January 18, 2011 from her work, held in the headquarters of the Joint Anti Terrorism Taskforce (JATT) in Kololo, Kampala until January 25 and then transferred to Kireka. She was not able to see family or her lawyer until she was brought to court on February 4, 2011.

The issue of incommunicado detention of suspects in Kireka also emerged after the July 11, 2010 bombings in Kampala, in which 76 people died. Suspects in the bombings were held in a range of facilities, including Kireka. Most notably, human rights activist Al-

Amin Kimathi of the Kenyan Muslim Human Rights Forum, and Kenyan lawyer Mbugua Mureithi were arrested on September 15, 2010, shortly after arriving from Kenya at Entebbe airport, and were taken to RRU headquarters in Kireka. Mureithi was deported back to Kenya on September 18, but Kimathi remained in detention in Kireka without access to a lawyer. He was eventually charged with terrorism on September 20, 2010, and transferred to Kampala's Luzira prison. He spent six days in Kireka without access to a lawyer.

On December 9, 2010, two relatives of one of the bombings suspects were arrested, allegedly for attempting to bring a knife to the suspect in the prison. The relatives, both elderly women, were detained in Kireka for 12 days. Lawyers made multiple attempts to visit the two women, be present during their interrogations, and observe their well-being, but were only granted access after 11 days of detention.

Several suspects arrested in relation to the July 2009 bombings in Kampala also faced interrogation and detention in Kireka, some after they had been charged with terrorism in court and should have been in the exclusive custody of the Uganda Prison Services. Some stated that DNA samples were taken from them while they were detained in Kireka, despite no court order and no consent for such a sample to be taken. Two former suspects detailed how they were questioned on and off for several days by Americans, who introduced themselves as members of the Federal Bureau of Investigations (FBI). In one instance, an RRU officer came in after a suspect had refused to work as an FBI informant. The suspect said:

He looked at me and said, 'You think your life is important? See what we will do to you.' I felt like they were going to disappear me. I was happy to finally see the prison after Kireka.

Opportunities to Address Abuses by Rapid Response Unit

Several branches of government can and should play a more active role in curtailing abuses by RRU, and in ensuring that perpetrators of human rights violations are held to account rather than shielded from scrutiny. The serious intimidation of suspects and their

families means that the police, among others, will need to work hard to encourage victims of abuse to report mistreatment. However, the manner in which suspects are tortured and often held for long periods incommunicado and then tried by military courts years after their alleged crimes means that the Uganda government cannot solely rely on victims coming forward. More must be done to identify abuses as they occur. This will require police commanders, the Police Standards Unit, and the Uganda Human Rights Commission to increase their monitoring of operations.

Commitments to Address Abusive RRU Practices

Efforts to address RRU abuses must come, first and foremost, from the unit's commanding officers. This is necessary to ensure that evidence during law enforcement operations is gathered within the limits of the law, and to ensure that personnel who commit abuses face criminal sanction.

Joel Aguma, the new commander of RRU, told Human Rights Watch that he had instituted numerous changes since taking office in late November 2010. He also confidently stated that abuses had reduced since he had taken office. He said he faced challenges in both eliminating "armed thuggery" from Uganda, as well as professionalizing his staff. He stated he is open to criticism and hoped to work closely with civil society to address complaints. He now gives written instructions to regional RRU offices that personnel must operate within the law, and work "hand in hand" with police from other units. He has also instituted a human rights desk in December 2010 and a toll free phone line for the public to communicate more directly with RRU. The desk has since registered six complaints, all regarding allegations that RRU officers failed to follow up investigations. It is not clear how detained suspects who had been recently tortured would be able to report abuse to either the desk or the phone line.

Upon request, Aguma provided Human Rights Watch with a list of RRU and VCCU personnel who have been brought before courts of law since 2005. The list includes some obvious errors in dates and names and it has not been possible to verify each assertion. But according to the document, in many instances cases were withdrawn or

"reconciliation was promoted." There is the one conviction for manslaughter stemming from an incident in 2005. Thirteen individuals involved in seven incidents are listed as free on court bail, including cases of alleged crimes (including murders) that appear—based on the court file number—to have occurred in 2007. Three individuals are on remand (involved in the death of Ssekanjjako noted earlier). Despite the numerous reports of abuse published by NGOs and the Uganda Human Rights Commission over the years, only one case involves a criminal charge of assault and that case has been pending since 2008.

The Role of the Police Standards Unit (PSU) In July 2007, the Uganda police force established the Police Standards Unit (PSU). According to one police member involved in setting up the unit, "At the time, there was a real question: As police polices the community, who polices the police?"

The unit was an effort to operationalize section 70 of the Police Act, which lays out the procedures for complaints regarding the police and monitoring conduct that violates the police code of conduct. The unit is to advise the inspector general of police (IGP) and police management on professional standards, investigate specific allegations of professional misconduct within the force as assigned by the IGP or the public, and promote the respect for rule of law and human rights within police, among other tasks. The unit is not currently represented throughout the country, but there are plans to expand offices to more easily receive complaints from more areas around the country.

Police sources indicate that the unit receives many complaints. In 2009 alone, there were over 2,000 complaints, of which 1,200 were "completed," although it is not clear how many of these involved RRU. Once a complaint is received, the unit must investigate and then can either recommend that the administrative courts of police handle the case, or hand it over to the Criminal Investigations Department (CID), both in consultation with the police's legal department.184 Violations of the police disciplinary code of conduct can result in dismissal from the police in the most serious cases, to fines and reprimands

for lesser offenses. In some serious instances, CID and PSU can jointly investigate a matter.

Police indicate that the unit can initiate investigations based on allegations contained in media reports, surprise visits to police posts, and complaints from the public. In cases of mistreatment of suspects, the unit relies heavily on family and friends of detained suspects to locate loved ones, gain access to the person, and then bring any complaints to the unit's attention. Complaints via family members are clearly much less likely to be made if suspects are held incommunicado or transported long distances, rather than detained close to home where family members can visit with relative ease. Human Rights Watch interviewed several suspects who indicated that their families had no idea where they were held or how to find them. Many asked Human Rights Watch to make calls to family members on their behalf so that relatives could know their whereabouts. Human Rights Watch researchers did not do so.

A PSU officer indicated that they make monthly visits to Kireka. He remembered that an RRU officer was arrested on one occasion for having detained someone over a dispute with a landlord, rather than a criminal matter. The RRU officer's arrest, according to PSU, sent a signal that the police do not condone this behavior. It is not clear what later occurred in that case.

Police indicate that inefficiencies in the justice system are an obstacle to accountability within the police force. In some cases, the PSU has funded travel costs for officers who have investigated cases of police misconduct or abuse so that they can appear as witnesses in court, only to be frustrated by the fact the courts do not sit on the days scheduled. Another challenge is public reluctance to report police abuse. This would appear to be particularly true of cases involving RRU, due to its notorious reputation and the influence of Operation Wembley. Complaints about RRU are very unlikely to be made unless police make a concerted effort to push for respect of rule of law.

The Role of the Uganda Human Rights Commission (UHRC) Established by the 1995 constitution, the Uganda Human Rights Commission (UHRC) is tasked with

investigating human rights violations and monitoring detention conditions. The UHRC, which is a standing body with judicial powers, is empowered to subpoena any witness or document, order the release of any detained person, and recommend payment or compensation, or any other legal remedy after it finds the existence of a human rights abuse. However, in cases before the UHRC, complainants do not sue their torturers directly: instead, the defendant is the attorney general as a representative of the state. This means that perpetrators are not identified and go unpunished. The UHRC can award damages for torture, and many such cases are currently pending. As the chairperson of the UHRC told media, "[E]rrant armed officers torture people and it is the tax-payer who bears the cost."

There is currently a significant delay in cases pending before the UHRC: complainants wait approximately two-and-a-half years for commissioners to hear a case. This is partly due to a significant delay in appointing commissioners in 2009. In addition, two commissioners recently stepped down from office, so the UHRC is again operating without its required manpower.

UHRC staff is granted access to Kireka but the content of those interviews has never been published or publicized, though commissioners have on occasion alluded to abuses occurring. For example, in April 2010, the UHRC held a training for RRU officers. According to media reports, officers were encouraged to reach out to the public more because "if RRU builds a better relationship with the public, the organ will not need to apply excessive force when arresting and extracting information from suspects."

In the past, the UHRC worked specifically on abuses by Operation Wembley and VCCU and engaged in high-level advocacy with government officials about their findings, which were then reported in publications.192 But in more recent reporting, particularly since a new chairman of the commission took office in 2009, there is less reporting on the substance of dialogue with high-ranking security officials and less analysis of the causes of ongoing abuse by this unit. This is despite the fact that the UHRC noted in its 2009 report that complaints involving allegations against RRU more than doubled between

2008 and 2009. This kind of finding should immediately trigger public condemnation and further in-depth research by the UHRC to ensure abuses are addressed.

UHRC commissioners should continue to raise concerns about RRU's use of excessive force and torture of suspects. Specifically, commissioners should insist that Rapid Response Unit warrants particular attention because of its history of abuse. While commissioners have engaged in "quiet diplomacy" with the security services, the results of this engagement—particularly commitments by the police and military to take action regarding specific allegations—are never made public. The commissioners, endowed by the constitution to protect human rights in Uganda, can play an important role in curtailing abuses if they speak out publicly about abuses and hold security services responsible for their actions in a timely manner.

Uganda's Duty to Provide Lawyers to Defendants Another key element in addressing the abuses documented in this report is for the government to ensure that all criminal suspects can access lawyers from the start of their detention. There is no reason to believe that a properly conducted police investigation would be compromised by ensuring that suspects have the right to a proper defense. Any system of justice must be measured by its fairness, as well as by its efficiency.

International fair trial standards require that all persons suspected or accused of a crime have the right to defend themselves and are entitled to consult with legal counsel.194 Suspects in police custody, no matter the alleged crime, should have the right to see a lawyer immediately, access a lawyer during interrogations, and to be informed of their right to remain silent. Prompt access to a lawyer is a fundamental safeguard against torture and ill-treatment. Many authoritative sources have indicated that the provision of lawyers should be from the moment of detention, to prevent abuse in custody. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment states:

[I]n its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Consequently, the possibility

for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs.

For the right to a lawyer to be fully operational in practice, appropriate provisions must be made for people who cannot afford legal fees. In practice in Uganda, defendants in criminal trials for the most serious crimes receive a lawyer at the commencement of trial if they cannot afford one, though this is always months, if not years, after their initial arrest. According to the Poor Persons Defence Act, defendants in criminal trials can also be certified to receive a state-provided lawyer if "it is desirable in the interests of justice." According to the Ugandan Legal Aid Providers Network, there is no legal aid policy to require government to provide legal services to indigent persons in custody whose rights have been abused. Though there are some provisions in national law regarding how legal aid must be provided, the systems are limited and do not function efficiently or transparently. As evaluators to the main donor-funded program concluded, the "meagre provision of state- funded legal aid almost certainly puts Uganda in breach of its international treaty obligations in relation to legal aid."

Trials of Civilians before Military Courts

In most cases, RRU detainees are subsequently transferred to Makindye military barracks, in Kampala, where they again spend long periods in pre-charge detention—from one month to well over a year, according to cases that Human Rights Watch has documented. One detainee interviewed by Human Rights Watch stayed in Makindye for two years, another for two-and a-half years. Eventually, suspects arrested by RRU are detained in civilian prisons once they have been charged before the military courts.

These cases end up before military courts because the government argues they have jurisdiction over cases involving the military, former military personnel, or persons found in unlawful possession of firearms or ammunition, which are considered to be the monopoly of the army.170 Statistics aren't available, but one military court official told

Human Rights Watch that he believed that most defendants at the general court martial are civilians accused of having firearms.

The trial of civilians in military courts has been a particularly contentious legal issue in Uganda in recent years. In 2009, the country's constitutional court held that military courts do not have jurisdiction over civilians. Despite this ruling, military courts continue to try civilians. The chairman of the general court martial affirmed this failure to implement the ruling in open court, saying, "We try people with army property …. Some people, the Uganda Law Society, wrote to say we should stay [stop] trying cases of civilians. I put it to the officials. We'll continue until otherwise. I'm waiting to be driven to court or I'll continue trying [civilians]."

Asked why RRU continues to hand suspects over to the military courts, despite the constitutional court ruling to the contrary, the inspector general of police told Human Rights Watch that police are obeying the law until parliament changes it.

One Ugandan defense lawyer described the difference between military and civilian courts:

The military courts have less oversight than ordinary courts, both in structure and practice. If you have a real case, then you take it to a civilian court. In civilian courts there is a reporting hierarchy.

As previously stated, the original aim in establishing Operation Wembley in 2002 was to circumvent the perceived obstacles in the civilian court system. That pattern continues despite significant increased support to the justice sector since then.

Under regional law, trying civilians in military courts is absolutely prohibited. The African Commission, interpreting the African Charter on Human and Peoples' Rights, has prohibited the trial of civilians in military courts. The African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa also prohibit the trial of civilians in Uganda Law Society v. Attorney General, Constitutional Petition no. 18 of 2005. The constitutional court held "That section 119(1)(g) and (h) of the Uganda Peoples Defence Forces Act No.7/05 which

subjects civilians not employed by or voluntarily or in any other way officially connected with the Uganda Peoples Defence Forces to military law and discipline, is inconsistent with Articles 126(1) ['Judicial power is derived from the people"] and 210 ["Parliament shall enact laws regulating the Uganda Peoples' Defence Forces"] of the Constitution." The court further held, "Therefore, civilians who do not fall under the categories stated in the [UPDF] Act are not liable to be tried by military courts because Parliament did not intend them to [be] so tried."

The African Charter also guarantees the associated right to judicial independence, guaranteed by article 26. The fundamental right to procedural fairness is undermined in Uganda by the infrequency of court sessions and the composition and lack of legal competency of the judges. The African Charter does not admit any exceptions to the rule against the use of military courts to try civilians, such as emergency situations.

Uganda should immediately stop prosecuting civilians before military courts, in accordance with regional laws and domestic court rulings.

CHAPTER TWELVE

POSSE COMITATUS

The origins of "posse comitatus" are to be found in domestic law. Black's Law Dictionary defines the term "posse comitatus" as:

the power or force of the county. The entire population of a county above the age of fifteen, which a sheriff may summon to his assis- tance in certain cases as to aid him in keeping the peace, in pursuing and arresting felons, etc.

The Posse Comitatus Act, 18 U.S. Code, Section 1385, an original intent of which was to end the use of federal troops to police state elections in former Confederate states, proscribes the role of the Army and Air Force in executing civil laws and states:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise Lujan (1997) notes that the commander of JTF-LA mistakenly believed his activities were subject to Posse Comitatus restrictions when they were not.

244 Preparing the U.S. Army for Homeland Security to execute the laws shall be fined not more than $10,000 or impris- oned not more than two years, or both.

According to Lujan (1997), the Air Force was added to the original language in 1956. Although the Navy and Marine Corps are not included in the act, they were made subject to it by DoD Regulation (32 C.F.R. Section 213.2, 1992).

POSSE COMITATUS DOCTRINE

The Posse Comitatus principle is derived from a long tradition of antimilitarism in English common law, represents the tradition and strong resistance of Americans to any military intrusion into civilian affairs.

The term posse comitatus translates to power of the country derived from the Roman

practice of allowing an entourage of citizens to escort proconsult as they travelled to their places of duty. (Major H.W.C furnman, Restrictions upon use of the Army imposed by the Posse Comitatus Act,7 MiL.L REV 85,87 (1960). In the Anglo American Legal tradition this principle stretches back to the thirteenth century English antimilitary sentiment. At the time, sherriffs and Magistrates uphold the civil peace with the assistance of the Jurata ad arma, a pool of free men on whom they relied upon for help.

Founded in the twelfth century under the Assize of Arms the jurata ad arma composed of every able bodied male over the age of fifteen and served primarily as a civilian military reserve until the fourteenth century. The transition of its role from military to law enforcement came as a response to the increasing reliance of English monarchs to enforce the law by force under a declaration of martial law under such a declaration, the King would assert his authority on the grounds of necessary and suspend civil authority while employing the military to maintain order.

Under Kings James 1 and Charles I, troops were quartered in private homes courts staged summary trials and brutal military force suppressed civil unrest. In 1628, Parliament's Petition of right protested the use of military tribunals to my civilians by the Tudar and Sturat monarchs, arguing it was improper under the Magna Carto's provision that no man would be taken, imprisoned or killed except by the law of the land. The Crown's continued use of martial law, however sparked the English civil war in 1642.The military tyranny of the cromwell regime further ingrained upon the English public the dangers of a standing army.

By the Restoration, the public feared the military so much that no standing army became the watchword of all parties. In Response, the parliament drafted the bill of rights in 1689 declaring that the raising or keeping a standing army within the Kingdom in times of peace, unless it be with the consent of parliament, is against law. The Bill echoed the terms of the Magna Carta and petition of Right, stating that the use of the Military to enforce order is not due process of law. It also struck new ground by placing the army under the strict control of the legislative.

The Riot Act's passage in 1714 further blastered these safeguards against military intervention. The Riot Act required the sheriff to order a crowd to disperse before employing force against it. Only after this requirement was satisfied could the sheriff call the posse comitatus consisting of all is Majesty's subjects of age and ability to restore the peace. (john D. Gares, Dont call out the Marines: An Assessment of the Posse Comitatus Act,13 Tex: TECH L.REV 1467,1470(1982). In contrast, the Riot Act strictly forbade employing the army in this same role as the military force was solely reserved for suppressing open rebellion.

The military is currently prohibited by federal statute from participating in domestic law enforcement. The Posse Comitatus Act of 1878 establishes criminal penalties for people who willingly use members of the Army or the Air force to execute the laws. Although a product of the Reconstruction Era, this law reflects a strong American tradition against the domestic use of the military that stretches back before the founding of the nation.

Over the last several decades, however there has been a growing trend to increase the role of the military in traditional law enforcement. Civilian law enforcement officials however have continued to adopt military tactics to carry out their mission with potentially significant consequences. Although the carts consider the impact that domestic military involvement has on individual liberty what often goes unnoticed are the subtle changes in the methods and priorities of civilian law enforcement authorities that flow from military or law enforcement cooperation. The training and equipment shared through joint task forces, critics argue have caused police departments to become increasingly authoritarian, centralized and autonomous bureaucracies that are isolated from the public. The result is the spawning of a culture of paramilitarism in Uganda police departments.

The increased cooperation between the police and the military has blurred the line between the two traditionally distinct organizations whereas soldiers must attack and defeat an enemy, police officers are charged with not only protecting the community from law breakers but also protecting the constitutional rights of these alleged law breakers that they arrest. Whereas soldiers are trained to inflict maximum damage to use minimum

force and only when reasonably justified in accomplishing their mission.

Ultimately by allowing so much training and equipment interchange between the police and military, the military cooperation has created a dangerous exception to the PCA forcing the military involvement into a law enforcement role makes me less like soldiers but not quite police officers and conversely using police officers in a paramilitary role make them resemble soldiers in appearance and actions. As the line between the police and military becomes blurred there are bound to be negative long term effects on the military civilian police organisations and the population as a whole.

Although presidents have used troops domestically, Congress passed the Posse Comitatus Act to bar federal troops from participating in domestic law enforcement activities absent an express authorization by the congress.

The Constitution permits Parliament to authorize the use of the militia to execute the laws of the country, suppress insurrections and repel invasions. And it guarantees the states protection against invasion on unsurpation that their republican form of Government and upon the request of the state legislature against domestic violence.

The posse comitatus theory has its origins in Chapter 263.It outlaws the willful use of any part of Army or Air force to execute the law unless expressly authorized by the constitution or an Act of parliament .History supplies the grist for an agreement that the constitution prohibits military involvement in civilian affairs subject to only limited alterations by congress or the President but the courts do not appear to have ever accepted the argument unless violation of more explicit constitutional command could also be shown. The express statutory exceptions include the legislation that allows the president to use military force to suppress insurrection or to enforce federal authority.

Case law indicates that execution of the law in violation of the Posse Comitatus Act occur when the Armed forces perform tasks assigned to an organ of civil government or when the Armed forces perform tasks assigned to them solely for purposes of civilian government .Questions concerning the acts application arise most often in the context, the courts have held that ,absent a recognized exception ,the Posse Comitatus Act is

violated when civilian law enforcement officials make directive active use of military investigators or the use of the military pervades the activities of the civilian officials or the military is used so as to subject citizens to the exercise of military power which was regularly prescriptive or compulsory in nature. The act is not violated when the Armed forces conduct activities for a military purpose.

With the groundswell of public support for the war against terrorism the decay of posse comitatus has accelerated dramatically. Some politicians and media sources now suggest that Parliament amend or even repeal the PCA to allow a degree of domestic military involvement that would have been unthinkable. Although there is undoubtedly a certain pragmatism in levying the immense resources of the Uganda Military against the threat of domestic terrorism. This strategy ignores the consequences of using soldiers as a substitute for civilian law enforcement. The military is not a police force. It is trained to engage and destroy the enemy not to protect constitutional rights. The founding fathers feared the involvement of the Army in the nations affairs for good reason. History has demonstrated that employing soldiers to enforce the law is inherently dangerous to the rights of the people.

OVERVIEW OF THE POSSE COMITATUS ACT

Enforcement Purposes.

Thus, the Army can provide equipment, training, and expert military advice to civilian law enforcement agencies as part of the total effort in the "war on drugs."

• Use of a member of the Judge Advocate Corps as a special assis- tant prosecutor, while retaining his dual role in participating in the investigation, presentation to the grand jury, and prosecu- tion, did not violate Posse Comitatus Act.

• The Coast Guard is exempt from Posse Comitatus Act during peacetime.

• Although brought under the Act through DoD regulation, described above, the Navy may assist the Coast Guard in pursuit, search, and seizure of vessels suspected of involvement in drug trafficking.

KEY EXCEPTIONS TO THE POSSE COMITATUS ACT

A summary of key exceptions to the Posse Comitatus Act follows:3

• National Guard forces operating under the state authority of Title 32 (i.e., under state rather than federal service) are exempt from Posse Comitatus Act restrictions.

• Pursuant to the presidential power to quell domestic violence, federal troops are expressly exempt from the prohibitions of Posse Comitatus Act, and this exemption applies equally to active-duty military and federalized National Guard troops.

• Aerial photographic and visual search and surveillance by mili- tary personnel were found not to violate the Posse Comitatus Act.

• Congress created a "drug exception" to the Posse Comitatus Act. Under recent legislation, the Congress authorized the Secretary of Defense to make available any military equipment and per- sonnel necessary for operation of said equipment for law

The language of the Posse Comitatus Act was further amended by congressional action reflected in P.L. 103-322 (1994). For further details, the reader is directed to: Lujan (1997); Department of the Army (undated); and to the notes of various court decisions refining the interpretation of the Posse Comitatus Act. For the latter, see United States Code, Title 18, Crimes and Criminal Procedures, Sections 1361 to 1950 2000 Cumulative Annual Pocket Part, St. Paul, Minn.: West Group, 2000, pp. 13–17. 410 U.S. Code Sections 331 through 334 provide guidance. Section 332 states: "When- ever the President considers the unlawful obstructions, combinations, or assemblages, or rebellion against the United States, makes it impracticable to enforce the laws of the United States in any state or territory by the ordinary course of judicial proceedings, he may call into federal service such of the militia of any state, and use such of the armed forces to suppress the rebellion" (Lujan, 1997).

POSSE COMITATUS ADVOCACY FOR UGANDA'S JURISPRUDENCE

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CHAPTER THIRTEEN

TORTURE BY THE STATE

Uganda ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment in 1986. As the U.N. Committee against Torture scrutinizes Uganda's compliance with the Convention, Human Rights Watch and Foundation for Human Rights Initiative (FHRI) would like to take the opportunity to put forward a report on this important matter for its consideration.

This briefing paper is based on interviews that Human Rights Watch and FHRI have conducted between May 2004 and March 2005. In order to protect identity of the victims, their names have been changed, unless victims expressly agreed to be named.

PATTERNS AND CASES OF TORTURE

In Uganda, government authorities frequently employ torture against government opponents, ordinary civilians accused of supporting rebel groups, as well as suspected common criminals. Members of the opposition Forum for Democratic Change (FDC) and civilians in northern Uganda in particular have often become victims of torture and ill-treatment.

Victims have been severely beaten with rifle butts, sticks, electric cables and other objects. Other methods of torture include tying the hands and feet behind the victim ("kandoya"), keeping detainees in pits in the ground; exposing the victim with mouth open to a water spigot, and inflicting injury to the penis and testicles. Withholding or denying necessary medical attention has resulted in more severe, even permanent, injury. Human Rights Watch and FHRI have described a pattern of torture and ill-treatment in Uganda in previous publications. As of March 2005, torture and ill-treatment continued in Uganda, as documented in this submission.

See for example Foundation for Human Rights Initiative, The Bi-Annual Human Rights Reporter 2004, Kampala, Uganda; Human Rights Watch: State of Pain. Torture in Uganda (New York, March 2004).

There is a confusing array of security organs in Uganda that have detained and tortured suspects. In many cases agents carrying out the arrest wear civilian clothes with no identifying insignia. Under Ugandan law, only the police are authorized to routinely arrest and investigate crimes, and the only authorized places of detention for civilians are police and sometimes prison facilities. Among the agencies against which credible allegations of torture have been made are the following:

- the Uganda Peoples' Defence Force (UPDF) and its military intelligence branch, Chieftaincy of Military Intelligence (CMI) - Internal Security Organization (ISO) and its District Security Organizations (DISO) - Joint Anti Terrorism Task Force (JAT), a joint body of CMI, ISO and other security agencies - Violent Crime Crack Unit (VCCU), a special unit comprised of CMI, ISO, and other security agencies, replacing Operation Wembley, tasked with stopping common crime - the police and its Criminal Investigation Department (CID).

The most serious abuses seem to occur when suspects are arrested and held by the army and its intelligence service, the CMI, as well as JAT and the VCCU. The regular police – i.e. police with no special military or security brief – have a slightly better record and do not seem to torture suspects as a matter of course. However, the regular police and other security agencies have also committed acts of torture and ill-treatment.

When suspects – such as political opponents or alleged 'rebels' – are held by the army, CMI, JAT or VCCU, they are often held in "ungazetted" or unauthorized places of detention or "safe houses", where torture can and does take place without any observers. The government has repeatedly denied the existence of safe houses. In a meeting with Human Rights Watch on April 14, 2005, Defence Minister Amama Mbabazi stated that there are safe houses which are used by security services to do their intelligence work. He conceded that suspects may be interrogated in safe houses but denied that people are

detained there.[415] However, field research by Human Rights Watch and FHRI has found that detainees were frequently detained in safe houses for days, weeks, and months at a time. For example, civilians have been and continue to be held at an unauthorized JAT detention centre in the Kololo neighborhood of Kampala and at other safe houses. Civilians are also often held for prolonged periods in army barracks in different parts of the country, especially the north and west, although by law the army is allowed to carry out arrests only in emergency situations and should promptly transfer the suspect to police custody. On some occasions in recent years, the security agencies and CMI have transferred detainees for the night in a police station and kept them all day at a safe house where the interrogation and torture takes place. This may be an effort to create a veneer of legality.

Human Rights Watch and FHRI have also found that the army, CMI, JAT and VCCU torture or ill-treat suspects frequently. As illustrated below, suspects are often detained by one of these agencies incommunicado in a safe house or barracks, and tortured or ill-treated to make a confession or to punish them for refusing to confess. Later, they are taken to a police station where they often suffer less abuse, and where the confession is taken again, sometimes in front of those who conducted the torture. Suspects are then charged by the police and produced in the Magistrate's Court and judicially charged with treason or terrorism.

Under the Ugandan constitution, treason and terrorism suspects can be detained for 360 days without trial and without bail. In many cases charges are dropped when the suspects are released on bail after the 360 days. In other cases, defendants seek amnesty for treason or terrorism, which requires a confession of guilt. The defendants sometimes seek amnesty because of the extreme slowness of the judicial system and the protracted time they must await trial.

Human rights observers have been denied access to unofficial places of detention. While the government readily allows independent observers to visit regular prisons and police

[415] Human Rights Watch meeting with Amama Mbabazi, Minister of Defence, Sam Kutesa, Minister of Foreign Affairs, and Moses Byaruhanga, Secretary of the President. London, April 14, 2005.

stations, it is very difficult to get access to military barracks, CMI facilities, and other "ungazetted" and thus illegal places of detention such as the JAT detention facility in Kololo, Kampala, where many victims claim to have been tortured. During a recent visit to Uganda, Human Rights Watch was denied access by army officials to the military barracks in Gulu and Makindye to interview detainees in private.3 Human Rights Watch was offered the opportunity to interview detainees in front of their guards, but decided not to do so as this is not conducive to an open discussion with the detainee.

Human Rights Watch was told that it could interview the detainees only in the presence of army officials. Human Rights Watch conducted interviews of officers in Gulu barracks and in April 2004 visited the waiting area of Makindye barracks, only to be refused permission to see any detainees or prisoners at all. Torture of alleged common criminals by the VCCU Suspected common criminals are frequently tortured, in particular when they are detained by the VCCU. The VCCU is the successor of Operation Wembley, which was tasked with cracking down on crime in Kampala starting in 2002. Many victims interviewed reported that they had been severely beaten and were still suffering the results.

In December 2003, Michael K., a forty-year-old man traveling by car from Masaka to Kampala was stopped by VCCU officers and told, "Black should come out." (Black was a notorious robber; this man denied that he was Black.) He was held at VCCU headquarters in Kireka, to the eastern edge of Kampala, for three weeks and then transferred to the Central Police Station in Kampala. He related that during his detention at VCCU, he was beaten with batons, wires, and sticks on the back, chest, knees and ankles. The torture resulted in swollen and deformed knees and many scars on his ankles.[416]

Brian L., a thirty-two-year-old man from Luwero, was arrested in January 2004 and accused of stealing a motorcycle. He was arrested by four plainclothed men in a white car, who immediately beat him to extract information about the stolen motorcycle.

[416] FHRI interview with Michael K. at Kampala Central Police Station, May 27, 2004. 5 FHRI interview with Brian L. at Kampala Central Police Station, May 27, 2004. 6 FHRI interview with Ben T. at Kampala Central Police Station, May 27, 2004, and after release in Kampala, June 2004.

According to the man, his captors hit the back of his knees, his ankles and genitals. This caused the victim to become incontinent. Brian L.'s itinerary shows how many agencies can be involved in a case, even when it concerns a minor crime: He was held briefly at CMI offices in Kitante, Kampala, then at Luwero police station, then at the VCCU headquarters and then at the Central Police Station in Kampala.

In April 2004, Ben T., a car washer in Kampala was arrested on allegations of car theft. According to Ben T., he was first brought to Central Police Station in Kampala where he spent five days. As he was about to be released on police bond, the police Criminal Investigations Department objected. He was then taken to VCCU headquarters, Kireka, Kampala, where he spent eight days. He was beaten with a baton and electric wires after his hands were tied around his legs. Ben T. had swollen legs and could not move his legs as a result of the beatings. When he was brought back to the police station he sought medical attention but was only given a pain killer. As a result of the torture, Ben T. had difficulty walking. He was released in June 2004.

In some cases, suspects were not only beaten, but subjected to other types of torture. In November 2003, John W., a twenty-two-year-old man from Mengo, Kampala, was eating lunch when VCCU officers came to arrest the person sitting next to him. He told a FHRI researcher that he asked where they were taking the man, which angered the officers so that they arrested him as well. During his one week detention at VCCU headquarters, he had his right small finger chopped off by a VCCU officer. VCCU agents also beat him with wire on the chest, and he still has scars from the beatings. Later John W. was transferred to the Central Police Station in Kampala, where he had been held for four months at the time of the interview.[417]

In early May 2004, Martin O., a twenty-seven-year-old man was arrested in Kampala by security agents, most likely CMI agents. He said the agents beat him with metallic bars around the knees and toes while asking about a motorcycle that had allegedly been stolen.

[417] FHRI interview with John W. at Kampala Central Police Station, May 27, 2004.

Martin O. was taken to the JAT safe house in Kololo and later taken to CMI offices on Kitante Road, Kampala. During interrogations, those detaining him threatened to squeeze his genitals so hard that he would never have children. They further threatened to beat him if he did not confess to having stolen that motorcycle.[418]

TORTURE OF POLITICAL OPPONENTS

Political opponents have frequently been threatened, arrested, detained, ill-treated and tortured. Particularly targeted are those who supported Kiiza Besigye in the 2001 presidential election, and who subsequently formed a political group called Reform Agenda. Besigye was President Museveni's strongest opponent in that election and fled the country in 2001 after harassment. In 2004 Reform Agenda merged with other groups to form what is now a registered political party, the FDC.[419]

Security agencies claim that members of Reform Agenda – now in the FDC – are actively involved with the People's Redemption Army (PRA). The PRA is a rebel group based in the Ituri district of the eastern Democratic Republic of Congo.[420] While dozens of political opponents and others have been arrested in connection with the PRA, no criminal trial has shown the link between the PRA and Reform Agenda or the FDC. Many observers believe that it poses little threat to security, law and order. Others have questioned the existence of the PRA because it has not conducted military operations inside Uganda. Some detainees have "confessed" PRA links to the press while in military custody and later said these confessions were made under duress. These detainees have been charged with treason or terrorism and detained for prolonged periods. A few have been amnestied and released.

Patrick Biryomumeisho, a Besigye campaigner and an elected official (LC-3) in Kabale district, southwestern Uganda, was arrested on May 2, 2003 and taken to an illegal detention centre run by CMI in Kampala where he was held for several months. He was

[418] FHRI interview with Martin O. at Kampala Central Police Station, May 27, 2004.
[419] FDC brought together Reform Agenda and several other political groups. Reform Agenda is now part of the FDC and does not exist any more as a separate group.
[420] The PRA has at times fought with other armed groups in eastern DRC, such as the Union of Congolese Patriots (UPC).

accused of supporting Besigye and the PRA. According to Biryomumeisho, he was tortured during his detention at the CMI detention centre. CMI agents beat him with an iron bar and other instruments, and kicked him, injuring the testicles, left clavicle, and right back shoulder. They also hit his big toe with a hammer, causing the nail to fall off after several weeks. He had a red chemical substance poured into his eyes that made him blind for several weeks and impaired his vision for months afterwards. In July 2003 he was charged and sent to Kigo Prison. When Biryomumeisho's detention exceeded the legal limit of 360 days, and after his lawyer brought a habeas corpus, he was released on August 2, 2004. The Director of Public Prosecutions (DPP) then withdrew the case against him. He has filed a civil suit before the Uganda Human Rights Commission, seeking damages for torture.[421]

On January 12, 2003, security officials arrested Pascal Gakyaro, a retired civil aviation engineer and supporter of Reform Agenda. He was held in unofficial places of detention for eight days and beaten during that period. On January 20, 2003, after the intervention of an MP and a High Court order, Gakyaro was charged with treason before the High Court. He was released on bail in July 2003, but re-arrested and only released in January 2005. The charges against him were dropped.[422] Pascal Gakyaro sought legal action, and on June 2004, the High Court ordered the government to pay thirty million Ugandan Shillings (about U.S. $ 17,000) compensation for unlawful arrest, detention and torture. However the damages have not been paid yet.[423]

In January 2003, Francisco Ogwang Olebe, a Reform Agenda activist, was detained and tortured in a CMI safe house. His neck was dislocated as a result of the torture. He was charged with treason along with four others. After he was released on bail, he brought legal action in 2004 against the Attorney General for his torture and illegal detention. The

[421] Human Rights Watch interview with Patrick Biryomumeisho, Kampala, March 18, 2005. Patrick Biryomumeisho is his real name.
[422] FHRI interview with Pascal Gakyaro, Kigo prison, March 2003. See also press reports: "Three PRA suspects cleared," New Vision, January 18, 2005; "I was arrested over a woman, says Gakyaro," New Vision, January 20, 2005. Pascal Gakyaro is his real name.
[423] "Shame that We Pay Millions for Torture," Monitor, June 18, 2004.

High Court ruled in his favor, as the Attorney General did not appear, and awarded him eighty million Ugandan Shillings (about U.S. $ 45,000) as compensation. His bail was revoked on January 17, 2005, on the grounds that the case was ready for trial, and he was detained again. By March 2005, Francisco Ogwang Olebe was still in Luzira prison awaiting trial. The award of damages has not been paid by the Ugandan government.[424]

There have been a number of arrests of government opponents in late 2004 and early 2005. Among them were FDC officials as well as many other less prominent political figures. Those arrested in early 2005 and held on terrorism or treason charges are likely to be unable to campaign during or participate in the March 2006 presidential elections, unless they are tried unusually fast. As the testimonies below indicate, there is a risk that political opponents are held on treason charges merely with the aim of punishing them and instilling fear.

On November 24, 2004, soldiers arrested Steven K., a businessman and known government critic in Koboko town, Arua district in northwestern Uganda. They accused him of being a rebel and illegally possessing guns. According to the victim, he was carrying out a government-managed demobilization process with members of a former rebel group and had been authorized to buy back arms in that context. The soldiers tied his hands and legs together behind his back ("kandoya") and cut him with a bayonet. He was held for one day in a pit at Koboko army barracks. After eight days of detention in Arua barracks where he had to suffer further abuse, he was transferred to the JAT safe house in Kololo, Kampala. Steven K. was again accused of being a rebel. They tied a stone to his penis with a short rope while he was in a squatting position, then forced him to jump in the air. He was forced to stand under a tap which jetted out water onto his head at such high pressure that he fainted several times and was eventually taken for treatment. At the time of this writing he was being held on treason charges in Luzira Prison. Steven K. told researchers that he saw other detainees in Kololo who were tortured "worse than

[424] Human Rights Watch interviews with Francisco Ogwang Olebe, Luzira Prison, June 13, 2003, and March 19, 2005. 15 The Uganda Constitution forbids bail or bond for 360 days after charges are brought in court in capital cases, which include treason and terrorism. 16 Human Rights Watch interview with Steven K., Luzira Prison, March 19, 2005.

me" and "who could not move".

In December 2004, Robert M., a leading member of the FDC, was arrested by CMI agents at Makerere University in Kampala. He told a Human Rights Watch researcher that he was accused of having links with the PRA rebel group and told, "We are going to throw you into Luzira for a year. We shall see whether you shall not reduce that noise. You are on treason." Robert M. was detained for three days at the JAT safe house in Kololo where his torturers stripped him naked, severely beat him, mutilated his penis with a razor blade, and threatened to kill him. Following his ordeal, he was taken to the Criminal Investigations Department where he signed a statement under duress; he did not know the contents. He was being held on treason charges at Luzira Prison at the time of this writing.[425]

In late January 2005, Godfrey G., an opposition politician was arrested by ISO officials and held by CMI at the army barracks in Arua for almost two weeks. He was accused of planning "military activities" with Kiiza Besigye. According to his testimony, he was kicked and beaten badly, and he had a weight tied with a short rope to his testicles and penis while he was squatting; he was then forced to lift up, which was so painful that he declared he would rather be killed. Godfrey G. also had several liters of dirty water poured down his nose and mouth, the "Liverpool" treatment. The man was then taken to the JAT safe house in Kololo where he was beaten very severely on the chest, causing him to collapse. After almost two weeks, he was sent to court to be charged. As of the writing of this report, he was held at Luzira Prison and is charged with involvement in the PRA.[426]

High-profile politicians are not exempt from ill-treatment. On November 22, 2004, soldiers of the Ugandan People's Defence Force beat three members of parliament in Acholi Bur, Pader district, northern Uganda, as they arrived to have a meeting with residents to discuss the government's White Paper on the constitution. The victims, some of whom had wounds from the beatings, were Ministers of Parliament (MPs) Odonga

[425] Human Rights Watch interview with Robert M., Luzira Prison, March 19, 2005.
[426] Human Rights Watch interview with Godfrey G., Luzira Prison, March 19, 2005.

Otto, Prof. Morris Ogenga Latigo, Michael Nyeko Ocula and their drivers. Odonga Otto had swollen arms and legs, Prof. Latigon suffered from head injuries and Michael Nyeko Ocula had swelling on the head and back[427].19

In November 2004, Reform Agenda's Secretary for Information and Publicity, Dennis Savimbi Muhumuza, was reportedly caned sixty-five times by an intelligence officer because he was distributing Reform Agenda magazines and campaigning for the group without police permission. According to an FDC spokesperson he was also held at gunpoint, kicked and beaten.[428]

Torture of alleged rebels in northern Uganda Northern Uganda has been wracked by armed conflict between the rebel Lord's Resistance Army (LRA) and the government UPDF army over the last eighteen years. The LRA has committed gross human rights violations against civilians, such as massacres, sexual slavery, abduction of children, mutilation and torture. Some of the crimes committed by the LRA amount to crimes against humanity.[429] In 2005, LRA rebels continued to commit abuses against civilians in northern Uganda. For example, Human Rights Watch interviewed several women whose lips were cut off by the LRA because the women were allegedly talking to government soldiers.[430]

While not on the same scale as the LRA, government forces in northern Uganda have also committed abuses against civilians, including torture. In some areas, the majority of the civilians live in camps for internally displaced persons. The camps are controlled by the army. Civilians in the camps are often accused of being "rebel collaborators" and then ill- treated or tortured. This happens frequently in certain areas when civilians breach the curfew, even if by only a few minutes. The local military battalion imposes a curfew on

[427] Human Rights Watch interview with witness, Kampala, March 3 and March 9, 2005. The names of the MPs are their real names.
[428] FDC appeals to Amama over torture of supporter," New Vision, November 12, 2004. Dennis Savimbi Muhumuza is his real name.
[429] See Human Rights Watch, Abducted and Abused. Renewed War in Northern Uganda (New York, July 2003); Foundation for Human Rights Initiative, The Bi-Annual Human Rights Reporter 2004, Kampala, Uganda.
[430] Human Rights Watch interview with victims, Kitgum Hospital, Kitgum, Uganda, March 2, 2005.

the civilian population; it sets a time by which they have to return to the internally displaced persons' camp, and another time by which they have to be inside their huts. Beating of civilians by soldiers outside of the camps is prevalent in northern Uganda. In some cases, civilians have been beaten even when they returned before the curfew has begun. Civilians also are beaten up regularly by soldiers for being out of their huts at night, although they are inside the camp. These abuses are occurring most frequently in two camps, Cwero and Awac in Gulu District, where the 11th Battalion is stationed. Although many have complained about this situation, as of late March 2005 no corrective action had been taken.

On February 17, 2005, Patrick W., a farmer near Cwero camp was arrested by soldiers. He had gone back to his old home outside the camp and built a fire break line around his house to protect his fruit trees, so that he could provide his family food to supplement the skimpy rations in the camp. The soldiers accused him of working for the rebels, caned him, and tied a rope around his testicles and pulled on it. Patrick W. fainted and was taken to nearby Cwero army barracks. He was released the next day and told never to go back to his home.[431]

Odang Binoni, in his seventies, was beaten to death by soldiers on February 19, 2005 in Cwero camp, Gulu district. He was out late at a funeral – funeral wakes usually continue the whole night – and was hence breaching the curfew rules. He had gone to the latrine, and when he returned, a soldier hit him with the butt of his rifle several times in the chest until the old man fell to the ground. Then several soldiers told the mourners to leave. Odang Binoni died shortly after of his injuries.[432]

In other cases, the army arrests and detains people accused of links with the LRA.

Soldiers, similar to other security and intelligence officials, seem to use ill-treatment and torture as methods of interrogation; questions would be asked during the beatings about the suspects' links with the rebel LRA. In several cases victims have been detained in a pit within the barracks.

[431] Human Rights Watch interview with Patrick W., Cwero camp, Gulu District, Uganda, February 26, 2005.

[432] Human Rights Watch interview with relative of Odang Binoni, Cwero camp, February 26, 2005. Odang Binoni was his real name.

For example, in August 2003, Bob O., Charles B., James K. and Lucius O. were arrested by the army at Paicor camp as alleged rebel collaborators and taken to Paicor military barracks, Gulu district, where they were held in a deep, mud-filled pit. They were tied back to back to each other until the next morning. Afterwards, they were detained in a storage building close to the Acholi Inn in Gulu, where they were interrogated about LRA links, and severely beaten with sticks in front of the Military Intelligence Coordinator for northern Uganda, Col. Charles Otema, a senior commander. The following day the four men were transferred to the police, and shortly after they were charged with treason and transferred to Gulu Central Prison. After one year, they were released on bail; the charges are still pending.[433]

On April 2004, Theodor O. was arrested at Paicor camp on accusations of being a rebel and owing a gun. During the five days of his detention at Paicor military barracks, he was held for one day in a pit. During this time he witnessed severe abuses against other detainees:

There were other people in the pit who were … taken out of the pit and beaten individually. The way the pit was constructed it had roofing you could peep through. I saw people beaten on the buttocks, beaten strictly on the buttocks until the stick was broken, until the buttocks were so swollen the person couldn't sit. I wasn't beaten but was tied up with rubber – it has ruined the circulation in my veins in my arms.[434]

In February 2005, Julius L. was arrested at Pabbo camp, Gulu district, on accusations of collaborating with the LRA and boasting about being a relative of Vincent Otti, a senior LRA leader. He was taken to Olwal military barracks and then forced to go out with soldiers to "show where the rebels were". At one point the soldiers stopped and hit Julius L. severely on the head, put a rope around his neck, sat on him and started strangling him. He fainted but survived, and eventually made it back to his camp. He continues to have body pain and feel very weak, and has a fracture in the waist.[435]

[433] Human Rights Watch interviews with Bob O. and Charles B., Paicor camp, Gulu District, February 27, 2005.
[434] Human Rights Watch interview with Theodor O., Paicor camp, February 27, 2005.
[435] Human Rights Watch interview with Julius L., Pabbo camp, February 25, 2005.

STATE ACTION AGAINST TORTURE

Ugandan Human Rights Commission (UHRC) The UHRC was established under articles 51 to 59 of the Constitution. It is entrusted with a wide variety of important functions, such as investigating abuses, carrying out prevention work and trying civil suits regarding human rights. Its commissioners sit as judges in a human rights tribunal, where they have the power to make awards of damages for violations of human rights.

According to its most recent report, the UHRC received 446 torture complaints during 2003.[436] 28 Most complaints were against the police, the army and the VCCU. The UHRC recognized that most torture complaints were closely linked to three illegal practices:

The use of torture was closely linked to the use of illegal detention places, detention beyond 48 hours as stipulated by law and the involvement of other security organs in police functions.

Out of the twenty-one complaints resolved by the UHRC Tribunal in 2003, eleven involved torture. Torture was established in nine of the complaints and in seven cases, compensation was ordered in favor of the complainants.[437] However, compensation payments have never been made because of general budgetary constraints in Uganda; no priority for payments is given to human rights victims.

Another key area of work of the UHRC is civic training and education for the promotion of respect for human rights. For example, UHRC has carried out important human rights training with the police and prison officials.[438]

Criminal prosecution and civil suits regarding torture

In a handful of cases, victims of torture have been able to file civil suits and have been awarded compensation. Apart from the UHRC tribunal, regular courts have occasionally dealt with such cases. For example, in two of the cases mentioned above – Francisco

[436] UHRC, 6th Annual Report, 2003, p.88. 29 UHRC, 6th Annual Report, 2003, p.88.

[437] The seven individuals who were awarded compensation payments for torture were the following: Stephen Gidudu, Akera Eric Bosco, Nsereko Sajjabi, Mahmood Hassouna, Embati Ophen, Acen Rose and Salim Chepkrwui. UHRC, 6th Annual Report, 2003.

[438] UHRC, 6th Annual Report, 2003; FHRI, The Defender, Vol. 8 Issue No. 2, "Human Rights Education of Law Enforcement Personnel in Relation to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment", 2004.

Ogwang Olebe and Pascal Gakyaro – the victims were awarded compensation although no payment has been made by the Ugandan government. Some other cases are pending. A girl and a woman who had been raped by UPDF soldiers and infected with the HIV virus had their case submitted to the High Court in Gulu on March 25, 2005 and are awaiting the court's decision. An old man tortured with melted plastic on his back in Gulu brought a suit against the Attorney General, who did not appear until the end of the trial, and did not present any witnesses.[439]

Criminal prosecution is even rarer. Complaints seem to be stifled at the local level by the local military commander. In almost all cases, the perpetrators are not punished.

Parliamentary commissions

A Parliamentary Select Committee to Inquire into Election Violence looked at the misconduct, mismanagement, violence and rigging that characterized the presidential, parliamentary and local elections held in 2001 and 2002. The investigations unearthed cases of detention of suspected opposition politicians in illegal locations, torture and state- sponsored violence against opposition supporters. Unfortunately, the report was never debated in parliament, as it was said its contents were too sensitive and touched on matters treated in court.[440] In 2005, according to donors, this report was finally to be debated in Parliament; the projected time of late March was not met, however.[441]

In 2002, a Select Committee under the Parliamentary Committee on Defence and Internal Affairs undertook a study of torture, safe houses, and other places of "ungazetted" (unofficial) detention. Among other things, its members visited prisons and interviewed many torture survivors. Unfortunately, the results of this study were also not made public.

[439] See Abused and Abducted, pp. 45-46 ; Human Rights Watch interview, Kampala, March 25, 2005.
[440] "Election Violence Report Shelved, Speaker Bashed," Monitor, December 4, 2002; "NGOs appeal on violence," New Vision, April 4, 2005.
[441] Human Rights Watch interviews with donors, Kampala, March 2005.

CHAPTER FOURTEEN

QUARING RIOTS (POMA)

In 2013, the Parliament of Uganda passed the Public Order Management Act (2013) (POMA) to give full effect to the realisation of the exercise of the fundamental right to assembly granted by the constitution. The law was passed with three objectives: to provide for the regulation of public meetings; to provide for the duties and responsibilities of the police, organisers and participants in public meetings; and to prescribe measures for safeguarding public order and for any other related matters. Debating and passing the law was a contentious matter. First, there was fear and concern, especially among human rights groups and the opposition political parties, that the law was passed in an effort to curtail civil and political liberties under a multiparty political dispensation.

Second, the law was seen as an attempt by the executive to reverse a court ruling in the Muwanga Kivumbi vs Attorney General[442] in which Muwanga Kivumbi challenged the constitutionality of section 32 (2) of the Police Act which conferred powers on the police to regulate assemblies and processions. Section 32, sub-section 2 of the Police Act provided that if the Inspector General of Police (IGP) has reasonable grounds to believe that any intended assembly or procession is likely to cause a breach of the peace, the IGP may, by notice in writing to the person responsible for convening the assembly or forming the procession,1 prohibit the convening of the assembly or forming of the procession. Court nullified this sub-section on grounds that it gave the IGP wide powers which could be abused to arbitrarily deny the right of assembly.

Since its enactment, POMA has remained a contentious piece of legislation in Uganda's

[442] (Constitutional Petition 9 of 2005) [2008] UGCC 34 (27 May 2008)

transition to a functioning multiparty political system. While some activities have been held and facilitated under POMA, many other activities of the opposition political parties have been blocked or dispersed by the police. In the face of the increasing demand by the political parties to exercise their right to assemble, many public assemblies have been stopped or dispersed by the police. Confrontations between the police and political leaders over the right to assemble are building a culture of violence and defiance within the population. This trend undermines the growth of democracy and the building of strong institutions that empower the citizens and demand accountability.

Public debate over dispersed assemblies has been characterised by accusations and counter-accusations. On the one hand, the police have consistently accused the political parties of non-compliance with the provisions of POMA. On the other hand, the political parties have accused the police of acting unconstitutionally in blocking their activities. The police is accused of acting outside the provisions of POMA, of misinterpretation of the law and of partisan conduct.

It is, therefore, important to understand why, in some cases, the police has stopped or dispersed some political party assemblies and why they have facilitated other assemblies of the same political parties. Does the police have clear and objective criteria in deciding which assemblies to facilitate and which assemblies to block? Has the implementation of POMA shifted in objective from facilitating the realisation of the right to assembly to abrogating the same rights when it comes to political parties? Notwithstanding the increasingly vociferous political debate on the right to assemble, particularly as exercised and enjoyed by political parties, no systematic study has been conducted to examine the implementation of POMA as the enabling law.

THE POLICE ACT, SECTION 32 (2)

The debate on POMA has stopped at raising the normative aspects. Focus has been placed on whether the law complies with international standards and practices with regard to freedom of assembly. The arguments have been, and remain, that despite the right to

assembly being recognised by the constitution, the police is fond of blocking opposition political parties from exercising their rights. On the other hand, arguments have been made that the law only requires organisers of public meetings to notify the police of their intention to hold public meetings. In what has been described as disregard of the law, the political parties have accused the police of assuming powers to grant permission to any person who wishes to exercise their right to assemble.

The police have also raised the concern that the opposition political parties do not comply with all the requirements of the law with regard to the exercise of public meetings. Therefore, the interpretation and application of the law have seen an upsurge in confrontations between the police and the political parties. What has not been discussed are the dynamics that take place between the police and the political parties in the course of exercising the right to assembly. It is these dynamics that tend to define the interface between the police and the organisers of public meetings. These dynamics are not always captured in the debate on the right to assembly and the never-ending confrontations between the police and political parties. Owing to the centrality of the right to assemble in building democracy, there is need to go beyond the normative considerations of whether the law conforms to international human rights standards. There is need to examine the practical exercise of the right to assemble.

Under international and national law, states have the obligations to protect, respect and fulfil the right to assembly and these obligations are performed through the various decisions and actions on the part of the state authorities. How are these obligations being performed in the implementation of POMA?

The right to assemble is a fundamental human right recognised by the Ugandan constitution. Article 29 (1) (d)[443] provides that every person has the right to freedom to assemble and demonstrate together with others peacefully and unarmed and to petition. 2 The right to assemble is described as a cornerstone of democracy because of its linkage

[443] Constitutuion of the Republic of Uganda, 1995 (As amended)

to other rights such as the right to association. It gives meaning and operationalisation to other socio-economic and political rights. For example, the right to food will be demanded if people are able to assemble. The right to assembly gives citizens the opportunity to publicly express their grievances, to petition authorities, to hold governments accountable and to place demands on leadership. Therefore, restrictions on the right to assembly have far-reaching implications for strengthening democracy, and for building democratic institutions and a functioning multiparty political system. With the escalation of confrontations between the police and political parties over the exercise of the right to assembly, there is concern as to whether the Public Order Management Act (2013) is actually facilitating the exercise of the right to assembly or whether it is being used to muzzle critics and block political parties from organising and exercising their right to assemble. Through these confrontations, the right to assembly, as a constitutionally enshrined right, has been violated and denied in many instances.

THE IMPLEMENTATION OF THE PUBLIC ORDER MANAGEMENT ACT, 2013 (POMA):

This year, 2019, marks six years since the enactment of POMA. It is important that a study is undertaken on the implementation of POMA to establish whether the law is indeed facilitating the realisation and exercise of the right to assemble or whether it has turned out to be a law that is being used to arbitrarily deny a constitutionally enshrined right. Based on experience with the implementation of POMA, this chapter will inform debate on the necessary legal and political reforms to enhance the protection and exercise of the right to freedom of assembly. Furthermore, once successfully concluded, the study is expected to contribute to improving the working relations between the police and organisers of public meetings.

The frequent and never-ending confrontations between the police and political parties in the course of organising public meetings negatively affect the growth of democracy and multiparty politics, and have the potential to build a culture of violence and resistance among the population. While the police have the obligation to facilitate the right to

assembly, these confrontations present a negative image of the role of the police as a violator of constitutionally enshrined rights. This undermines public confidence in the police.

Through examining the dynamics, mechanisms and processes involved in the implementation of POMA, the objective of this study was to examine how POMA is being implemented and to assess the extent to which it has facilitated the enjoyment of the right to freedom of assembly by political parties in Uganda.

Specifically, the chapter seeks to:

1. Analyse the legal-cum-constitutional content of POMA;
2. Assess the realisation of the objectives of the Public Order Management Act, 2013;
3. Examine the dynamics, modalities, processes and mechanisms involved in the implementation of POMA;
4. Assess the extent to which the police and the political parties comply with the provisions of POMA;
5. Analyse the reasons why the police have stopped or prevented the holding of particular public meetings by political parties; and
6. Establish the challenges faced by stakeholders in the implementation of POMA and to offer policy recommendations for reforms.

This exploratory and descriptive study attempted to take stock of some of the challenges in the exercise of the freedom of assembly in Uganda with reference to the implementation of the Public Order Management Act, 2013 (POMA). Specifically, the study focused on activities organised by political parties. The study took an interest in the public perception of confrontations and their consequences with regard to the prospects for the exercise of the right to assembly and the growth of multiparty politics in Uganda. Like any other study, this study faced serious limitations.

First and foremost, the enforcement of POMA is a highly sensitive issue politically. Authority to regulate public meetings is a responsibility of top leadership of the police. Accessing data from the police or getting police officers to be cleared for interview was

very difficult. On the part of political parties, poor documentation within the political parties further complicated access to documents relating to notices to the police for public meetings as provided for by law. Many of the political parties do not have correspondence with the police. It is expected that this study will lay the ground for more a comprehensive review of the implementation of POMA to guide the country as to how best to exercise the right to assembly in Uganda as provided for in the constitution.

Literature on policing and regulating public assemblies underscores two main theoretical understandings of the legislation of public order management laws. Waddington (1993) observes that the laws of public order management have had two versions in terms of interpretation and comprehension. The first interpretation, which he also calls the orthodoxy version, looks at public order management laws as attempts by various regimes to suppress any dissenting views.

In this case, the laws are designed to provide for high-handed methods of dealing with public gatherings. Under this theoretical understanding, the laws on public order management include provisions that give excessive powers to the authorities to clamp down on dissenting views. This view is widespread in most discussions on POMA.

According to the proponents of this view, the NRM government passed the POMA in an effort to circumvent a decision of the Constitutional Court that nullified section 32, sub-section 2 of the Police Act. They argue that many sections in POMA gave powers to the police, which powers have been used to violate and abuse people's right to assembly.

The second version of public order management laws looks at the laws as geared towards minimising confrontations, ensuring public order and ensuring the facilitation of the exercise of the right to assembly. This view considers any policing of public order to be aimed at avoiding confrontation and violence. All measures and conditions imposed, as well as all engagements, are geared towards facilitating, protecting and upholding the right to assembly. Even where the police have been given powers that could potentially limit the exercise of people's right to assemble, such powers have been used reservedly and as a matter of last resort. With this version, there is legal justification to arrest or to

limit the exercise of the right to assembly but, in most cases, the police or authority limits themselves to engagement.

This study was informed by both these interpretations of the purpose and intention of public order management laws. On the one hand, the law is seen as an attempt to curtail freedom through the various prohibitive sections in the law. On the other hand, the law is seen as primarily providing for the regulation of the right to assembly as provided for under the constitution. Evidence suggests that the application of a particular version has been on a case-by-case basis and depended on the issues and nature of engagement between the police and organisers of these public meetings. The strategy, approach and tactics employed by the police depend on the issues at stake, the perceptions of the police and organisers of these public meetings as well as the nature of engagement between the police and the organisers.

The right to freedom of assembly According to the first thematic report of the UN Special Rapporteur on the right to freedom of assembly and association, an assembly is an intentional and temporary gathering in a private or public space for a specific purpose. The right to freedom of peaceful assembly is among the most important human rights. It allows people to 'gather publicly or privately and collectively express, promote, pursue and defend common interests.' The freedom of assembly includes the right to participate in peaceful assemblies, meetings, protests, strikes, sit-ins, demonstrations and other temporary gatherings for a specific purpose.

Theoretical and conceptual understanding of policing public assemblies

The right to assembly is a cornerstone of democracy. It has inherent linkages to other human rights but mainly with the freedom of expression and association. These rights share a very close relationship in a democracy. Through freedom of assembly, citizens are able to come together and demand other rights, such as the right to food. With the right to assembly, citizens are able to express themselves and demand accountability from their leaders. This right to assembly is also critical in operationalizing the right to

association. With the adaption of multiparty politics, the right to assemble extends to political parties and organisations. Through the exercise of the right to assemble, political parties are able to mobilize support for their policies as well as build political parties as viable and sustainable institutions.

Under Ugandan law, the Constitution of Uganda, Article 29(1)(d)[444] guarantees the right to freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition together with others. Article 43[445] of the Ugandan constitution provides the general limitation on fundamental and other human rights and freedoms. This article provides that in the enjoyment of the rights and freedoms prescribed in the constitution, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.[446] Therefore, in the enactment of POMA, both Article 29 (1) (d) and Article 43 were incorporated as the principles of the law. International law states that the right to peaceful assembly can only be restricted in accordance with the law and when it is necessary in a democratic society in the interests of, among other things, public order.[447] The African Charter of Human and Peoples' Rights also states that individuals have the right to assemble freely with others, and that this right can only be subject to 'necessary restrictions provided for by law.'[448]7 While limitations are provided for under the law, the gist of regulating fundamental rights is basically safeguarding the rights of individuals against arbitrary powers of the state. Much as the authorities have powers to enact limitations, any such limitations should favour citizens' enjoyment of their fundamental rights.

Given that detailed regulation of such rights cannot be assigned to the constitutions, states formulate interventions by enacting legislation to provide for and regulate fundamental

[444] Constitution of the Republic of Uganda, 1995 (As amended)
[445] Ibid
[446] Article 43 (1) 1995 Constitution of Uganda
[447] Art 21, International Covenant on Civil and Political Rights; Article 20, Universal Declaration on Human Rights
[448] Article 11, African Charter of Human and Peoples' Rights

freedoms. This provides for the relativity of constitutional protection of fundamental rights. Analysis of such regulation normally takes into account the content of the regulation, the manner in which these rights are to be exercised and guarantees that such regulation is possible. On the question of content, analysis is done to establish if such laws are in conformity with international standards and norms. The conditions and methods of exercising these rights are also a critical factor for analysis. Debate on the regulation also seeks to establish whether the regulation of fundamental rights can be guaranteed under the legal frameworks. The guarantee that regulation is possible can be determined by the possibility of checks on the powers of the state to arbitrarily deny the right to assemble. The possibility of seeking redress in the event that rights are violated and denied must be practically feasible within the legal system.

When detailed regulation of the right to assemble is taking place, two critical factors must be taken into account. First, the regulation must ensure that state power is not undermined. State power is pursued through public order and security. Often legislation must strike a balance between guaranteeing fundamental rights and freedoms and preserving public order and security of the state. In the event that the balance cannot be established, normally the security of the state and public order prevail over fundamental freedoms. This is normally the case in the current war against terror. Various states have violated the rights of citizens in the name of fighting terror. The second factor that must be accommodated in the enactment of regulation concerning fundamental rights and freedoms is the fact that in the exercise of one's rights, the rights of others must be protected and not interfered with. This, therefore, provides for the coexistence and conflict of rights among citizens.

In the event of conflicts, the authorities must rely on objective criteria in guaranteeing that citizens enjoy their rights while respecting the rights of others. The authority should not rely on arbitrary, ideological or political interference in making decisions over rights. This is a key concern that has dominated events and policing public assemblies in many

transition countries. In evaluating the implementation of POMA, the clash between these rights has been considered on several occasions.

Several activities over the right to assemble have been blocked by the police on the grounds that exercising these rights could interfere with the rights of others. It is, therefore, important to establish whether the police rely on clear, objective and transparent criteria in determining and making decisions on the right to assembly when it comes to political party activities and how the balance between the right of political parties to assemble is balanced against the rights of others who may not be part of their public meetings. Is there a defined criterion? Is the criterion abstract or arbitrary? Is the current criterion prone to abuse? Is it complicated by the political context in Uganda? What principles and guidelines inform the criterion being employed by the police in such cases?

Protection of freedom of assembly under international law

The right to peaceful assembly is a fundamental human right, and is enshrined in international law, African regional law and Ugandan national law. Much of the available literature about this right to assembly in Uganda has tended to aim at explaining the laws regarding freedom of assembly. Such publications aim at assisting lawyers, civil society organisations (CSOs), political leaders and the police in understanding the laws regarding the policing of public assemblies in Uganda and the principles the police should abide by, to ensure that the constitutionally enshrined right to freedom of assembly is not arbitrarily denied. Available publications have mainly focused on explaining the legal frameworks, duties and responsibilities of the police, as well as the crimes and penalties that could be committed in the exercise of the rights to assembly. Not much has been written about the practical policing of public assemblies in Uganda.

Article 20[449] of the Constitution of Uganda enshrines the rights of every person in Ugandan to 'freely and peaceably assemble, associate and cooperate with other persons,

[449] Constitution of the Republic of Uganda, 1995 (As amended)

express views publicly and more specially to form or join associations or organisations formed for the purposes of preserving or furthering his beliefs or interests or any other interests.' However, under Article 43 of the Constitution, this right can be limited. International law states that the right to peaceful assembly can only be restricted in accordance with the law and when it is necessary in a democratic society in the interests of, among other things, public order. The African Charter of Human and Peoples' Rights also states that individuals have the right to assemble freely with others, and that this right can only be subject to 'necessary restrictions provided for by law.' Hence, in Uganda, all people have a right to peacefully assemble, but this right can be limited by other laws for the purpose of maintaining public order under the constitution.

Under international law, states have a duty to respect, protect and fulfill the right to freedom of assembly. In this case, citizens must be free to plan, organise, promote, advertise and hold assemblies as well as participate in one such assembly. States should not impose restrictions on the exercise of such rights other than those allowed and provided for in a democracy.

The United Nations Human Rights Committee has upheld the fact that any such limitations or restrictions imposed should aim at facilitating the exercise of the right rather than disproportionately or unnecessarily limiting the right to assemble. Restrictions are always imposed on aspects such as the time and place of exercising the right to assemble, the manner in which the right may be exercised and the requirements to notify the authorities should any person wish to exercise their rights to assembly. In determining these guidelines, the objective is to ensure that persons who wish to exercise their rights are able to exercise the rights without interfering with the rights of others.

On the one hand, but also without undermining the authority of the state, the power and authority of the state is always pursued through public order and security. Under international law, states are also under the obligation to facilitate the enjoyment of the right to assembly. The state is expected to perform and fulfil some positive steps aimed at assisting the citizens to enjoy their right to assembly.

The facilitation entails proper planning of events, establishing effective communication and collaboration with the organisers of public assemblies, the provision of basic services, the protection of the safety and the right of bystanders and adequate training of police personnel to facilitate assemblies. The question of facilitation is at the core of a human rights-based approach. The state must take, as its first basic responsibility, the duty to facilitate the enjoyment of the right to freedom of peaceful assembly. Within this context, public assemblies are not to be seen as threats to be controlled but as social and political processes to be facilitated.

The constitutionality of the various laws regarding freedom of assembly in Uganda has been a contentious issue. In discussing the constitutionality of POMA, questions have been raised as to whether the specific provisions of the law go against the constitutionally provided rights. There are questions as to whether the sections of the law limiting the right to freedom of assembly are so broad as to allow the arbitrary denial of the rights to assembly by the police. Concerns have also been raised that the powers given to the police under the law are more prohibitive than regulatory in nature. Furthermore, there have been questions as to whether the specific section is reasonably necessary to achieve a legitimate outcome of ensuring that the constitutionally protected rights are safeguarded and exercised by the public.

Right to assembly at the continental level

At the continental level, the question of the right to assembly presents serious and widespread dilemmas. While the majority of the African states have ratified the right to assembly and have signed various treaties and instruments that provide for this right, Africa has witnessed widespread violations of the right to assembly. Many African countries have violated and disrespected the right to assembly in total disregard of their international, regional and national commitments. The African Police and Civil Society Oversight Forum (APCOF) notes that despite the formal recognition of these rights, their practical exercise has been rendered difficult by the legal obstructions or practices that lead to poor management of public assemblies. 8

In its 2016 report, APCOF notes that there is lack of mechanisms and modalities of communication, negotiation, poor planning, and lack of coordination between the police and the organisers of public assemblies. Therefore, the recurring confrontations undermine public confidence in the police, transparency in police operations and the working relations between the police and the public.

Guidelines on freedom of assembly in Africa

The African Charter on Human and Peoples' Rights guidelines on the freedom of assembly in Africa spells out 10 key principles that would guarantee a human rights-based approach in safeguarding the right to assembly. First is the presumption in favour of rights. In the event that conflicts arise in the exercise of one's right to assembly, the state has to act in a manner that ensures that the right to assembly is respected, protected and exercised. Cases may appear when certain conditions are not met by the organisers of such assemblies. This principle calls upon the state to ensure that people are able to exercise their right to assembly. For example, persons who wish to exercise their right to assembly may not have fulfilled all the requirements under the law for holding of assemblies. The principle of presumption in favour of rights compels the state to do all in its means and capacity to ensure that the people are able to exercise their right to assemble.

Other important principles are ensuring an enabling environment, inclusive and participatory processes of developing such legislation, impartiality of state agencies, human rights compliance and simple and transparent procedures for one to exercise their right to assembly. Much as the laws provide for procedures and processes for one to exercise one's rights, the principle of simple transparent procedures demands that the state should not institute procedures that literally make it difficult for the citizens to fulfill them as a condition for the exercise of their right to assemble.

There have been cases where the state has used these conditions as a requirement for the exercise of the right to assembly. However, on critical examination, such conditions are disguised as facilitating the right to assembly yet, in actual sense, they are enacted to

curtail people's right to assembly. In addition, the guidelines spell out two other critical principles which must be followed in the drafting of the necessary legal framework and the subsequent interpretation during enforcement. These are reasoned decisions and judicial review.

This principle demands that in cases where the state objects to or blocks the exercise of the right to assembly, the responsible authority must provide in writing reasons as to why the right cannot be exercised at a given time. These reasons must be objective and transparent and should not be influenced by ideological or other political considerations. The aggrieved person's right to seek remedy must be protected. In other words, the legal framework and practice in the exercise of the right to assembly must provide for a process of seeking redress in the courts of law.

The incorporation of these principles into the enforcement of legislation aimed at regulating and protecting the right to assembly is critical to ensure that the constitutional rights are not only provided for in the law but are also protected and exercised without confrontation between the citizens and the police. The policing of assemblies must be guided by the human rights principles of legality, necessity, proportionality and non-discrimination and must adhere to applicable human rights standards. So long as an assembly remains peaceful, the police should not disperse it. Instead of dispersing an assembly, the police has the duty to remove violent individuals from the crowd in order to allow protesters to exercise their basic rights to assemble and express themselves peacefully. The dispersal of assemblies should only be a measure of last resort and be governed by rules informed by international standards.

The Public Order Management Act, 2013 (POMA)

The Public Order Management Act (2013) is organised into four main parts as follows: Part One presents the preliminary issues; and Part Two provides for the regulation of public meetings. This is followed by the rights and duties of police and organisers of public meetings in Part Three. The last part deals with miscellaneous issues. POMA was enacted to serve three main objectives as far as public assemblies are concerned. These

are: to regulate public meetings; to provide for the duties and responsibilities of the police and organisers of public meetings; and to prescribe measures for the protection of public order and related matters. It is important to ascertain how the law provides for each of these in the details.

The gist in these objectives is the regulation of public meetings. According to section 2 of POMA, regulation of public meetings is concerned with ensuring the exercise of freedom of assembly and demonstration in accordance with Article 29 (1) (d)[450] and Article 43 of the Constitution. The spirit of the law was to operationalise the spirit of Article 43.[451] Under this section the idea of regulation is to ensure that the conduct and behaviour of participants at public meetings conforms to the requirement of the constitution. In this case, Article 43 introduces and provides for grounds upon which limitations by be imposed. Basically, Article 43 takes cognizance of the rights of others and the need to provide for the protection of public order and security. That is to say, public assembly is not absolute but tit can be regulated.

Section 3 of POMA provides for the power of the IGP or any authorized officer to regulate public meetings. It is the duty of the IGP to ensure that the conduct of public meetings conforms to the requirements of the constitution. For purposes of POMA, the word 'regulate' means to ensure that the conduct and behavior at public meetings should conform to the requirements of the constitution. In this case, the conduct of public assemblies should conform to Article 29 (1) (d) and Article 43[452] of the Constitution. Should the public meetings go against, or threaten, these two articles, the IGP has powers to intervene in the conduct of these assemblies. Within the context of human rights, the powers of the IGP are primarily concerned with instituting measures under which the right to assembly can be exercised without violating the law. Blocking the exercise of the right to assembly is a matter of last resort and this must be determined through an

[450] Constitution of the Republic of Uganda, 1995 (As amended)
[451] Ibid
[452] Ibid

objective and transparent process.

For avoidance of doubt, section 4 defines public meetings as any organised procession, gathering or demonstration in a public place or premises held for the purpose of discussion, petition, acting upon or expressing views on a matter of public interest. This definition of a public meeting embraces three main elements: first, a gathering; second, the venue must be a public place; and third, the purpose of the meeting – discussion, expressing, petitioning and acting upon a matter of public interest. Any gathering that conforms to any of these elements can be categorised as a public meeting to which POMA applies.

Under section 4 (2), POMA provides for meetings that are excluded from regulation by the police. Specifically, section 4 (2) (d) exempts meetings of organs of political parties called in accordance with the constitutions of the respective political parties and organisations. This section explicitly exempts meetings of political party organs that are called to exclusively deliberate on the internal affairs of the political party. This section has been widely misrepresented by political party leaders and has been grounds for confrontations between the police and political parties in many meetings of the political parties. Many political party leaders take the exclusion to cover all meetings of political parties. However, the section is very specific in excluding meetings of the organs of political parties. The organs of the political party exempted are clearly defined under the respective political parties' constitutions. In other words, any meetings of party members, that cannot be defined as meetings of a party organ do not have this exemption. It is also important to note that under this clause, party organ meetings are restricted to deliberating on internal affairs of the party and not any public interest issue. 4.6 Notification for public meetings The issue of notification regimes when it comes to the exercise of the right to assembly dominates debate in the literature on the right to assembly. Advance notification of public gatherings is a fairly common regulatory procedure around the world. It has been upheld by the UN Human Rights Committee and regional human rights bodies. It imposes an additional restriction and responsibility on organisers of public meetings to

notify the authorities of any upcoming assembly. While the right to assembly is a fundamental right and not granted by the state, states always institute procedures and conditions under which this right can be exercised by their citizens.

Such notification procedures serve two main purposes: first, they give the state time to make adequate preparations to facilitate and protect the people's right to assemble. Preforming these roles is an obligation on the state and giving such notice is aimed at cooperation with the state to ensure it is well placed to perform this role.

Second, the state is given notice to ensure that it plans better to ensure that while groups may be exercising their right to assemble, public order and the rights of others are protected in equal measure. The UN Special Rapporteur, Mr. Maina Kiai, also states that the notification procedure can be considered necessary to 'allow the state authorities to facilitate the exercise of the right to freedom of peaceful assembly and take measures to protect public safety and order and the rights and freedoms of others.' [453]

The requirement for notification of the state authorities should not be construed to mean seeking permission for people to exercise their right to assemble. The key difference between the notification procedure and the permission requirement, therefore, is that the former is based on the legal presumption that no permit is necessary to exercise the freedom of assembly.

The goal of a notification procedure is to inform a competent authority about plans to hold a peaceful assembly in advance, in order to trigger the positive obligations of the state to facilitate the exercise of freedom of peaceful assembly. The requirement to give notice is consistent with the 'principle of presumption' in favour of holding assemblies outlined in the OSCE/ODIHR Guidelines on Assembly, which states:[454]

[453] Many of the best practices related to notification have been clearly explained in the second report of the UN Special Rapporteur from April 2013 on 'the rights to freedom of peaceful assembly and of association', which was submitted to the UN Human Rights Council pursuant to Council resolutions 15/21 and 21/16

[454] See OSCE/ODIHR and the Venice Commission, Guidelines on Freedom of Peaceful Assembly, Second edition (Warsaw/Strasbourg, 2010). 165

As a basic and fundamental right, freedom of assembly should be enjoyed without regulation in so far as is possible. Anything not expressly forbidden in law should, therefore, be presumed to be permissible, and those wishing to assemble should not be required to obtain permission to do so. In contrast, the underlying rationale for a permission requirement is much more tenuous because it places full power with the state. Where there is a 'permission requirement,' the authorities give approval for using public space for an assembly, which contravenes the essence of the nature of freedom for peaceful assembly.

POMA requires organisers of public meetings to give notice to the IGP or an authorised officer of their intention to hold a public meeting at least three days and not more than 15 days before the proposed date of the public meeting. [455]

In section 6, the law provides that upon receipt of notice under section 5, where it is not possible to hold the said meeting, due to an earlier notice on the date and venue, and where the venue is considered unsuitable for crowd and traffic control, the authorized officer shall, in writing, within 48 hours on receipt of the notice under section 5, inform the organiser that it will not be possible to hold the said public meeting. It is important to note that in this case, a public meeting can be stopped basing on the above two factors. The law is silent on any other ground upon which the police can stop a public meeting. Much as this is the case, there have been many cases where the police has stopped public meetings.

Under section 6, sub-section 3, when an authorized officer gives notification that the public meeting shall not be held, the meeting shall not take place. This provision is very explicit on stopping a public meeting should the authorized officer give notification. However, the law provides that in such cases, the authorized officer shall invite the organizers to select another date or venue as the case may be. The authorized officer has a duty to give reasons should he/she consider that the meeting cannot take place. It is this

[455] The Public Order Management Act, 2013

written response that provides grounds upon which any aggrieved person can petition the magistrate should they consider that their right to assembly is unconstitutionally being denied. It is important to note that the law does not give explicit mandate to the police to clear, grant permission or allow public meetings to take place. This notwithstanding, POMA gives powers to an authorized officer or any other police officer above the rank of inspector to stop or prevent the holding of a public meeting where the public meeting is held contrary to the Act.

Debate on the right to assemble in Uganda

The debate on the right to assemble in Uganda has greatly intensified during the last six years of POMA. This debate has tended to focus on the normative aspect of the right to assemble. Literature on POMA and the confrontations between the police and the political parties have laid emphasis on the international standards on the right to assemble. In one of the publications of Chapter Four Uganda on POMA, more attention is given to explaining the law and its limitations as well as the provisions that conflict with international standards.

Specifically, Chapter Four points out the key issues around freedom of assembly in Uganda and the gaps in the enforcement of the right to assemble. These gaps, according to Chapter Four, arise from the limitations imposed in the law. These limitations are in the form of requirements that must be fulfilled for the enjoyment of the right to assemble and crimes that can be committed in the process of exercising one's right to assemble.

Under section 5, sub-sections 8 of POMA, an organiser or his or her agent who fails to comply with the conditions under the act commits an offence of disobedience of statutory duty and is liable on conviction to the penalty of the offence under section 116 of the Penal Code Act.14 In its annual reports to Parliament, the Uganda Human Rights Commission has noted the continued violation of the right to assembly and made recommendations to ensure compliance with international standards.

As noted in the above survey of the literature on freedom of assembly, much of the debate has revolved around compliance with international standards and violations of

constitutionally protected rights. The back-and-forth accusations of the political parties and the police are not helping the entrenchment of the rule of law and the observation and protection of the right to assemble. Much as the different activities that have been dispersed or blocked by the police have been widely reported in the media, much of the coverage has reported on these activities as mere events without raising the human rights issues involved. It is also evident that despite the accusations and counter- accusations between the police and the political parties, no study has been conducted to establish the dynamics and mechanisms of engagement between the police and the political parties with regard to the right to assembly and the implementation of POMA.

The legal-cum-constitutional content of the Public Oder Management Act (POMA) The gist in the analysis of the law is the constitutionality of key sections, the wide powers conferred on the police as well as the wide scope of the meaning of public meetings. The law has a very wide meaning of public meetings.

In defining public meetings, the law does not simply consider gatherings but extends to the purpose of the gathering. Any gatherings at which people are to discuss, act upon, petition or express views on a matter of public interest are subject to regulation by the police.[456]

Discussing matters of public interest is the core of political party work and under this law, any such discussion in a public place is subject to regulation by the police. Political parties are, therefore, under obligation to notify the IGP should they wish to hold such meetings. Referring to section 4, sub-section (2) close (e), political parties have always claimed that party meetings are exempted from regulation by the police. However, the above section specifically exempts meetings of the organs of political parties called for discussing matters that are exclusive to the affairs of a political party. In other words, according to the law, even meetings of organs of political parties called to discuss, act upon, petition or express views on a matter of public interest must be subjected to regulation by the IGP.

[456] Section 4, sub-section (1) Public Order Management Act, 2013

The exempted meetings are strictly meetings of the party organs that are called and constituted in accordance with the constitution of the party. For a meeting to qualify for exemption under this clause, those in attendance must be only those members elected to that organ of the party and the discussions in that meeting must be confined to strictly internal affairs of the party. The 4 November 2019 Forum for Democratic Change (FDC) meeting that was scheduled to take place at Mandela National Stadium, Namboole provides a good example.

On that date, FDC called a meeting of the party leadership at Namboole National Stadium. The meeting was to be attended by the district leaders in Kampala and Wakiso districts. According to Mr. John Kikonyogo, the deputy party spokesman, this was an internal meeting that should have been exempted from police regulation under POMA. Despite this, the party had notified the police about the event and they (FDC) claim the police did not formally object to or clear the meeting to take place. According to FDC, the party made efforts to reach the police, including calling senior commanders, about the said meeting but no response was given on the position of the police leadership about the event.

On the day of the event, the police, acting on orders of the Division Police Commander, blocked the meeting and denied the party members access to the venue on grounds that the party had not complied with POMA. In blocking the meeting, the DPC demanded that FDC present evidence that the meeting had been cleared by the IGP. This clearance FDC did not have. Subsequently, angry party members began a march to the party headquarters in Najjanankumbi in protest against police action. This marching to the party headquarters constituted a procession, which, too, must be regulated by the police. The police tried to stop the procession on the Kampala-Jinja highway. The police deployed tear gas and water cannons to disperse the FDC supporters and arrested Dr. Kiiza Besigye.

On the one hand, FDC insisted on going ahead with their meeting, arguing they had complied with POMA and given the police the required notice. They were also convinced that the Namboole conference for Wakiso and Kampala district leaders was exempted

from regulation under POMA. However, the only exempted meetings are those of specific organs of the party and these are also restricted to discussion of internal affairs of the party. The Nambole meeting did not qualify for exemption under POMA. This was not a meeting of a respective organ of the party as provided for in the party constitution. Much as the police may have objected to the meeting, they did not communicate with reasons to FDC about their concerns and why the meeting could not take place. There was no evidence of any correspondence between the police and FDC on the said meeting. On the other hand, the FDC leaders were convinced that this was an internal party meeting that was exempted from POMA. While FDC was convinced that this meeting was exempted, they notified the police about the meeting in an effort to avoid any interruptions by the police. That notwithstanding, the party vowed to defy what they saw as unlawful orders of the police.

The wide scope of the definition of public meetings has made it possible for the police to disperse many political party meetings. Many political leaders have not addressed themselves to the very narrow exemption that the law gives to political party meetings. According to the law, the exempted party meetings are specifically those of party organs and they are further restricted to discussion of the internal affairs of a party. Enforcement of POMA to the letter implies that virtually all political party meetings aimed at the parties' participation and engagement in politics is subject to control and regulation by the police. However, the practice seems that in the event that the police objects to such meetings, no response is given to the political parties.

While the law only provides for objection on grounds that the venue is not available or that the venue is not suitable for crowd and traffic control, the wide definition of what constitutes a public meeting introduces other factors that may be under consideration on raising objection or no objection to public meetings organised by political parties. It is also not clear what criteria the police has used in some of these cases where public meetings by political parties have been blocked. The general statement from the police has been that the activities are being conducted without compliance with POMA.

Much as the political parties give notice to the police, the police in many cases does not write back to notify the political parties that the said meetings cannot take place and give reasons why the meetings cannot be held in accordance with section 6 of POMA. A person aggrieved by the decision of the authorized officer to block them for holding a public meeting has the option of petitioning the magistrate's court to appeal the decision. Under section (6), sub-section (4), a person aggrieved may within 14 days after receipt of a notice under sub-section 6 (1) appeal to the magistrate's court in whose jurisdiction the meeting was scheduled to take place. Unfortunately, no political party has appealed any decision of the authorized officer.

One of the key reasons has been that no political party has received an objection that spells out the grounds upon which an appeal can be filed. In many cases, the police gives the political leaders the impression that their notice is being considered and the police would revert when a decision has been made. Many times the notice periods elapse before the police has reverted. This then gives the local commanding officers grounds upon which the public meetings should be stopped. While the law does not require formal clearance of the public meetings by the police, the demand for proof of clearance by the IGP has become common practice on the part of the Divisional Police Commanders in whose jurisdictions the meetings are scheduled to take place.

Under the said section 8 of POMA, subject to the directions of the IGP, an authorised officer or any other police officer of or above the rank of inspector may stop or prevent the holding of a public meeting where the public meeting is held contrary to this Act. It is under this section that the police have blocked many public meetings organised by political parties. However, there are many other activities that have been blocked on grounds that they have not been cleared by the police.

In a number of cases, the political parties have given the police notice for public meetings but the police has not responded to the notice. Even when the police do not respond to a notice for a public meeting, the meetings have been stopped or blocked on grounds that they have not been cleared by the police. Blocking public meetings on grounds that the

police have not yet cleared them is not provided for under POMA and violates the right to assemble.

Under section (6) of POMA, upon receipt of a notice for a public meeting under section (5), where the authorized officer finds that it is not possible for the proposed public meeting to be held, he/she shall in writing notify the organisers that it would not be possible to hold the planned meeting on the date and at the time indicated. Subsequent powers and orders to block a public meeting are issued on the basis of this notification by the authorized officer. The significance of this notification can also be found in section (6), sub-section (4), which provides that any person aggrieved by the decision of the authorized officer may petition the magistrate's court to seek redress. While the police has powers under section 8 to stop or prevent the holding of a public meeting, the said public meeting must be held contrary to POMA. The actions of the police in blocking such public meetings are also constrained by the law and the police must act in accordance with the law as prescribed.

While the law explicitly provides for only two grounds upon which public meetings may not be held, the practice implies that the police has resorted to other considerations in stopping or blocking public meetings. However, the practice of not specifying the grounds upon which a meeting is being blocked undermines the transparency in the conduct of the police. In practice, the police have evoked powers under section 8 even in cases where they (police) have not complied with the requirements under the law.

Under POMA, the police have duties and responsibilities to perform when a notice for a public meeting has been issued. In many cases, these duties and responsibilities have not been performed. Instead, the police have shifted the burden to local police commanders who then demand that the political parties present proof of clearance. In many cases, these commanders have not had explicit instructions to stop the meetings.

They have also not used their internal police communication systems on this matter.

While the police can stop a public meeting if the venue where the public meeting is to be held is unsuitable for purposes of traffic or crowd control or where the meeting will

interfere with other lawful businesses, the law does not provide the specifics for a suitable venue, traffic or crowd against which the exercise of the police authority can be measured. The powers granted to the police under this section are vague, open-ended and liable to abuse and political machinations.

Compliance with the Public Order Management Act (POMA)

The study sought to examine the compliance of the political parties and the police with POMA. These two agencies were considered because the law gives them specific duties and responsibilities. In addition, the law sets procedures and processes that both these agencies must abide by in the policing of public assemblies. A key requirement is that the organizers of public assemblies must give notice of public meetings to the police at least three days before the public meeting and not more than 15 days. The law also provides, under Schedule 2, the detailed information that has to be given to the IGP or his/her authorized officer.

There is evidence that the political parties have given police notice for various public meetings. There is also evidence that the police has stopped or forbidden the holding of many public meetings organized by opposition political parties. In many of these cases, the media has reported that the organizers failed to comply with the requirements of POMA.

Owing to poor documentation on the part of political parties and the decision by the police to decline inspection of the register of notices to the police for public meetings as provided for by law, most of these claims cannot be substantiated with evidence. However, in cases where the political parties have filed notices, all the notices have fallen short of the detailed information required under the law.

While the law requires that organizers furnish the police with details, which include particulars of the organizers, the proposed venue and date of the meeting, the commencement time and duration of the meeting, the number of persons expected, and the purpose of the meeting, the political parties have not complied with this requirement

in detail. Most of the parties have mainly communicated the date, venue and purpose of the public meetings.

In other cases, the communication of political parties has been vague in nature, which does not serve the purpose of the notification requirement. For example, in a notice dated 12 September 2017, the Deputy Secretary General of the Democratic Party communicated to the IGP that the DP was going to conduct countrywide activities intended to mobilise the public and sensitise them regarding the Electoral Commission guidelines for the Local Council elections. This letter did not specify the venues of these meetings, the time as well as the expected number of persons. In the said letter, the Deputy Secretary General referred the IGP to the Electoral Commission's road map for further information.[457]

In a related letter from the FDC Secretary General concerning activities of the party concerning the lifting of the age limit, the FDC informed the IGP that their leadership in the districts would liaise with the District Police Commanders on the details of the routes for purposes of ensuring smooth traffic.[458] In this letter, copied to the Director of Operations, all Regional Police Commanders and all District Police Commanders, the FDC Secretary General seems not to take into account the responsibility of the IGP under the law and the delegated responsibilities to be performed by the District Police Commanders. The responsibility of delegating the responsible police officer is a preserve of the IGP. POMA defines such officers as authorized officers. Under section 3 of POMA, the IGP or an authorized officer shall have the power to regulate the conduct of all public meetings in accordance with the law.[459] Therefore, assuming or disregarding this power amounts to undermining the power of the state, which the police have rejected. The said meetings ended up in confrontations with the police.

[457] SG/03/17 Preparations for Local Council Elections by the Democratic Party, letter addressed to The Inspector General of Police , General Kale Kayihura

[458] Letter to the Inspector General of Police from FDC Secretary General, Nathan Nandala Mafabi, dated 18 September 2017

[459] Section 3, Public Order Management Act, 2013

Examining the letters/notices does not make it clear that some of the organizers are aware of the details and requirements of the public order management Act, 2013. None of the letters examined specifically pointed out that it was giving notice to the IGP in accordance with section 5 of POMA and calling upon him to perform his duties in accordance with the same Act.

Under POMA, the IGP has duties under section 9 to preserve law and order before, during and after public meetings. Analysis of the letters or notices reveals that, in some cases, the political leaders seem not to accept the requirements of the notice or are not aware of the necessity of the notice in policing public meetings and exercising the right to assembly.

While this is the case, there is very limited evidence that the police has responded, asking for clarification and providing detailed information in accordance with the law. No such correspondence was available with the Democratic Party.

On the other hand, with FDC there is evidence that, in some cases, where the party has given notice of public meetings outside the prescribed information, the police have written back to the political party seeking clarification or more information regarding the public meeting in accordance with POMA.

On 17 June 2017, the police responded to a notice by the FDC for post-election party retreats. In its response, the police informed FDC that an earlier notice to the police did not comply with the provisions of POMA that required evidence or consent from the venue owner and the proximate number of participants to enable proper planning and deployment of personnel to provide security.[460] In the correspondence, the police attached a form that FDC had to fill in. There is no evidence that FDC responded to the letter. Further support evidence that the police have in some cases responded to the FDC notices is seen in a 28 April 2016 letter from the police to FDC where the police advised the party to fully comply with the requirements and furnish the police with relevant information

[460] Reference No. OPS/175/219/01 letter to the Secretary General, FDC signed by Assuman Mugenyi for Inspector General of Police. 12 June 2017

under the law.[461]

The police has in some cases invited the FDC leadership for a meeting upon receiving a notice from FDC that fell short of the requirements as provided for under section 5 of POMA. On 1 May 2017, the police invited the FDC leadership for a preparatory meeting to discuss, among others, security plans for the party's mobilization and recruitment schedules and advised the party to postpone the said activities until the security preparatory meetings were held.[462] On 20 September 2017, the police wrote to the FDC leaders, inviting them for a meeting about the planned mobilization activities against the lifting of the age limit (amendment of Article 102 (b) in the constitution.

In the said letter, the police wanted to discuss how the activities would be carried out, policed and regulated in accordance with the relevant provision of the law.[463] There is no evidence that FDC responded or attended the said meetings. All these activities were subsequently not allowed to take place and ended up in confrontations.

In other notices, the police have blocked FDC public meetings on the grounds that they are illegal on top of not complying with the requirements of POMA. On 29 November 2016, the FDC Secretary General wrote to the IGP notifying him about the party's intended fundraising function for Makerere University. In the planned acidity, FDC had mobilised parents, guardians, alumni, charity organizations and well-wishers to raise funds for lecturers who had gone on strike leading to the closure of the university.[464] In response, the police notified the FDC that the intended mobilisation for Makerere University was illegal and would not be allowed. In this communication, the IGP also directed the Commander of Kampala Metropolitan Police to take appropriate action. The

[461] Reference No. OPS/175/219/01 letter to the Secretary General, FDC signed by Dinah Kyasiimire for Inspector General of Police. 28 April 2017

[462] Reference No. OPS/175/219/01 letter to the Secretary General, FDC signed by Assuman Mugenyi for Inspector General of Police, 1May 2017

[463] Reference No. OPS/175/219/01 letter to the Secretary General, FDC signed by Nuwagira John for Inspector General of Police, 20 September 2017

[464] Reference No. FDC 1.84/IGP/5/11/16 24 Reference No. OPS/175/219/01 VOL 15/40 letter to the Secretary General, FDC signed by Balimwoyo MM for Inspector General of Police, 1 December, 2016

activity was not allowed to take place.

Similar activities not allowed to take place have been activities organized on public holidays. These have been described as parallel activities to the national celebrations, such as the 54th Independence Anniversary.[465] The police also blocked a number of FDC activities that were intended to involve processions and demonstrations to demand an independent audit of the 2016 general election results.[466] The ground for not allowing these to take place was that these activities had no legal basis under the laws of Uganda.

While a number of activities of the FDC have not been allowed, the police have written back in some cases informing the FDC that the police has no objection to the intended activities. In such cases, the police have also cautioned FDC about the security measures that need to be addressed. Analysis of such no-objection letters reveals that the meetings that the police did not object to were mainly internal party meetings such as launching the policy agenda of the party in March 2015, internal party elections,[467]27 building party structures and during the national elections.

While FDC did not provide the police with all the required information in accordance with the law, no objection was raised on such grounds. On top of giving a no-objection notice, the police cautioned and supported the political party to hold and exercise their rights without any limitations.

It has also been established that in a number of letters to FDC indicating no objection to the intended public meetings, the police has cautioned FDC against holding processions to and from the venue of the event.

The police has also warmed that in case of failure to observe the security concerns, the police would discharge its mandate to protect the lives and property of all citizens by stopping the meetings and apprehending the perpetrators for any crimes committed. In

[465] Reference No. OPS/175/219/letter to the Secretary General, FDC signed by Warujukwa Erasmus for Inspector General of Police, 5 October 2016

[466] Reference No. OPS/175/219/letter to the l, FDC signed by Dinah Kyasiimire for Inspector General of Police, 28 April 2019

[467] The New Vision, 5 May 2019

other cases, the police has demanded that FDC ensures that the venue chosen does not interfere with normal activities of the people who are not part of their meetings. In this kind of caution, police give precedence to the rights of others who are not part of the meetings. The right of FDC to hold its assemblies is seemingly regarded as secondary. The police is not seen to be making an effort to ensure that they regulate the assemblies and ensure that all citizens can enjoy their rights. The burden to ensure non-interference is a responsibility of the state with the support and cooperation of the organisers of public meetings. In the case of FDC public meetings, there are many cases where this burden has been placed on FDC.

There have been incidents where FDC has combined a number of activities in the exercise of their right to assemble. For example, the party would organize a district or local branch meeting but add a procession to or from the venue of the meeting. In cases where the assembly has been an internal party meeting, the police has tended not to raise any objection to the meeting but advised against the procession. For example, on 4 May 2018, the police wrote to the FDC Secretary General regarding a notice for a public meeting at which the party was to open the district party branch office in Nawaikoki sub-county, Kaliro district.

In this correspondence, the police raised no objection to the activity of opening the district office but advised the party to follow POMA with regard to a public rally that had been planned to take place after the opening of the party office.[468]28 However, a number of the FDC leaders argued that such processions that normally follow their activities are not planned events but seem to happen spontaneously.

Powers of the police to disperse and stop public meetings

Under section 8, and subject to the directions of the IGP, an authorized officer or any officer above the rank of inspector may stop or prevent the holding of a public meeting

[468] Reference No. OPS/175/219/01 letter to the Secretary General, FDC signed by Assuman Mugenyi for Inspector General of Police, 4 May 2018

where the public meeting is held contrary to the Act. This has been a source of contention between the police and the political parties. To unpack the contention, we examine the circumstances under which the public meeting can be considered to be held contrary to the Act to justify police action to stop or prevent it from being held.

The first section that could be evoked for stopping a public meeting is section (2), sub-section (2), which defines the meaning of 'regulate' under POMA. Under section (2), sub- section (2), 'regulate' means that the conduct and behaviour at a public meeting conforms to the requirements of the constitution. In this case, the conduct and behaviour at a public meeting must conform to Articles 29 (1) (d) and Article 43 of the Constitution. Under 29 (1)(d), people must assemble peacefully and unarmed together with others.

Should the behaviour of participants at a public meeting cease being peaceful and unarmed, the police may stop the public meeting on grounds that it is being held contrary to the Act. Under Article 43, the conduct at the public meeting should not prejudice the fundamental rights of others or the public interest. This clause makes POMA a prohibitive law. It does not envisage the role of the state to facilitate the enjoyment of the right to assembly even when conflicts arise among the citizens. According to this law, the right to assemble takes a secondary position and the law gives priority to the rights of others who are not part of the said public meetings.

Section 4 (1), which provides for the meaning of a public meeting, is a second section that can be used to declare that a public meeting is being held contrary to the Act. In this section, a public meeting is defined as a gathering, assembly, procession or demonstration in a public place or premises held for the purpose of discussing, acting upon, petitioning or expressing views on a matter of public interest. In the light of this definition, virtually all political party meetings in this case fall under the definition of public meetings regulated under the law. The fact that the law is specific regarding the purpose of a public meeting extends the scope of the public meetings which the police may stop or prevent from being held. Much as this sub-section shows the categories of exempted meetings,

the law is very categorical on the purpose for which public meetings are called. All the exempted meetings are restricted to discussing matters internal to those organisations. Where political parties are concerned, under section 4 (2) (e), the exempted meetings are those of respective party organs and these must strictly discuss the internal affairs of the party. Therefore, any meetings of a political party that borders on discussing a matter of national interest can, therefore, be regulated by the police.

Dynamics, modalities, processes and mechanisms involved in the implementation of POMA

The perception of the police and the political parties

Despite the fact that section 14 of POMA provides that the Minister may, by statutory instrument, make regulations generally for better carrying into effect the provisions or purposes of the Act, no such regulations have been put in place since 2013 when the law was passed. As such, there has been wide divergence in interpretations and practices by both the police and organisers of public activities. In March 2019 the issue of not having such regulations became a subject of debate at the Inter-Party Organization for Dialogue (IPOD). The political parties agreed to institute a committee to develop the regulations but these have still not been presented by the Minister as provided for in law.

The perception of POMA among the political parties has remained largely negative. The law is considered as an attempt by the regime to stifle the opposition and reverse the gains in civil and political liberties. Many opposition political leaders have rejected the idea that the police can issue objections to public meetings since this right is a fundamental right. As such, correspondence from the police about requiring detailed information from the organisers has largely been ignored. However, there have been cases where the state has made demands or assumed powers to grant permission to hold public meetings. In a number of letters to the Democratic Party, the police have informed the party that their activity has been 'cleared'. Such language that involves 'clearing' a meeting by the police

has tended to confer authority on the police to grant permission for holding public assemblies.

Many political leaders read the law selectively and only concern themselves only with the requirement that they only have to notify the police. They disregard the purpose of the notice to the police and look at any possible conditions and requirements by the police as being outside the law. This has led to a breakdown of communication between the police and organisers of public meetings, particularly the political parties.

Still related to perception are the police stereotypes about the opposition. Immediately after the 2011 general elections, FDC launched the walk-to-work campaign. This campaign was seen by various commentators as an attempt to demonstrate the public frustration with the election results and to mobilise civic pressure for change. Following the 2016 elections, FDC launched a defiance campaign that demanded, among others, an independent election audit. This defiance campaign saw the establishment of what FDC called a People's Government aimed at mobilising Ugandans to demand and push for change. These campaigns coincided with uprisings elsewhere, which made the state more interested in containing such uprisings in Uganda.

Against this background, the police have categorized some opposition leaders as militant. The opposition has to an extent been unresponsive to police requests to play by the rules. This has made the opposition unpredictable and potentially uncontrollable through the use of consensual methods. In many of the opposition activities, the police have failed to accept that such activities, despite being near public premises, are not intended to arouse passion and public sentiments that can lead to an uprising in Uganda. The police have largely viewed political parties within a context of building civic pressure and as entities that are not ready to organise within the agreed frameworks. There have been incidents where the police has claimed not to have sufficient personnel to police a public meeting of a political party owing to national events and celebrations. However, in such cases, the police has been able to deploy a very high number of personnel to block the meeting. There has also been very close surveillance of the opposition activities.

Political context

Related to the above defiance campaign, many activities organised by the opposition parties have been interpreted by the police as building a defiance movement whose aim and purpose are not very clear to the police. Talking about defiance is not seen as a democratic campaign and the police and government have vowed to prevent it in the name of preserving or not allowing the undermining of the power of the state. In a 5 May 2019 statement, President Museveni vowed that the opposition will not be allowed to spread lies in the name of holding and exercising their right to assemble. He asserted: If you want to assemble publicly or to hold a procession, it must be for a legitimate reason. If it is to preach hate, to de-campaign investments in Uganda etc., then we shall not allow you, If you want to hold a public meeting or a procession for a legitimate reason, you should liaise with the police, so that your public meeting or your procession does not endanger the lives of other Ugandans or the safety of their property. You agree with the police on the route, if it involves a procession or the venue if it is an event or a rally.

The president accused some members of the opposition for ignoring and planning to hold meetings or processions near markets or through crowded streets.[469]

On the part of the opposition FDC, there is broad agreement that reforms and change within the political system will not be secured under the current frameworks where, it alleges, the powers of the people have been seized. In this context, many activities have been designed to galvanize the public to action. Evidence shows that purely internal activities of the political parties have taken place. However, activities related to mobilizing the population have been blocked. There are many cases where the political parties have chosen to conduct processions even when they were not part of the activities communicated to the police. It is from such activities that confrontations with the police have arisen. In the case of the FDC, the party leaders have organised or engaged in processions to and from venues of public meetings.

[469] The New Vision, 5 May 2019

The law gives the power to regulate public assemblies to the IGP, to whom all requests have to be submitted. The handling of the notice within the police force is an entirely internal matter of the police.

The first challenge is that, much as the law specifies and demands the details of the police officer who receives the notice, such information is not available. All the political parties complained that the police have deliberately refused to acknowledge receipt of such notices even when they are delivered to the police headquarters. Refusal to acknowledge receipt of such notices undermines accountability and follow-up. There are cases where political parties claimed to have delivered the notices, but such notices have gone missing within the police system.

Political parties have often formed teams comprised of senior leaders, who then have to pursue clearance from the IGP. In some cases, some of these leaders have been successful but, in other cases, they have failed to access the IGP before the planned activity day. In such cases, the political leaders have resorted to insisting that the IGP was served and that the meeting has to take place. Such meetings have ended up in confrontations.

According to the law, the IGP is mandated to write back to the organisers of the public meeting within 48 hours should he consider that the meeting cannot take place owing to an earlier meeting or should he consider that the venue selected is unsuitable for crowd and traffic control. The law assumed only two factors upon which police can reject a meeting. The evidence has shown that the police has based itself on so many other factors to stop and block public meetings.

There have been many cases where the police has not responded to organisers of such public meetings until the very day of the event. When the political parties give notice, they embark on mobilization for the event, preparation of which involves resources. It becomes very difficult for a political party to postpone an activity whose budget has already been spent and this, many times, becomes the contention and ground why political parties insist that their meetings must take place. Much as the law does not require the IGP to respond if the activity has been cleared, there are cases where the police have

responded to the political parties raising no objection to their activities or seeking more information. In other cases, the police has not responded to the notices. When this happens, the local District Police Commanders block the activities on the ground that the organisers have not been able to provide evidence that the activity has been cleared by the IGP. This kind of practice has been very frustrating to political parties and undermines cooperation and collaboration between the police and organisers of public meetings. It also undermines the transparency of the criteria on the basis of which activities are cleared and blocked.

There have been many incidents where the opposition party leaders opted to hold processions to and from public meetings of the party. In such cases, the police has tended to disregard the right of the party to hold activities and concentrated on what they consider as open defiance and disrespect of POMA. In such cases, even when the said activities do not threaten public order and peace, the police have simply relied on its powers under the law to stop or block the meetings.

Ideological differences and concerns The fundamental challenge with the confrontations between the police and opposition political parties arises out of ideological convictions on the part of the state and the opposition political parties. While some in the opposition believe that political change and reforms should be secured through the people rising up, those in the state view this approach as undemocratic and intended to a mentality that fosters violence and an uprising among the population. On these grounds, the state has tended to describe such activities as security threats. The debate shifts from the civil and political right to addressing security concerns. In some of the correspondence where the police has written to the opposition political parties, the concerns to be addressed have always been of a security nature.

The state has also taken a position on holding meetings in business and market areas. Much as the law does not prevent the holding of meetings in markets and at public facilities such as Parliament, the police has ruled out such places. In other jurisdictions, such as South Africa, the Regulations of Gatherings Act (RGA) 205 of 1993 provides for

the regulation of public gatherings and demonstrations at certain places. Under section 7, the RGA prohibits public gatherings in key places such as court buildings. The law, however, creates special exceptions where one can apply to the magistrate should they need to hold their demonstration in a particular restricted space.

Notification of the public meetings

Much as the political parties have filed notices for public meetings, it is evident that some fundamentally do not agree with the requirement. They also seem not to appreciate its purpose and the intentions of the law in the first place. All notices analysed revealed that they have not filed all the required information as required by law. Many consider the law as an attempt to curtail their constitutional rights. A number of politicians have also disregarded the correspondence and invitations from the police on grounds that such correspondence is outside the law. They consider that their duty is simply to notify the police. On the part of the police, much as they have used the requirement to give notice of public meetings as the primary reason for blocking public meetings, the manner in which the police handle notices for public meetings reveals that giving notice is not the primary consideration.

When political parties give notice, they embark on mobilisation for their meetings. In the run-up to the meetings, the police have issued statements that the planned meetings are not cleared and advised the public to avoid any unlawful assembly. While the police may be issuing caution, it politically demobilizes the meetings. In some cases, the political parties have issued counter-statements and vowed to go ahead with the meetings, insisting that a notice was served to the police. In other cases, some political leaders have sought to engage the police. Much of the engagement has been with the Director of Operations Engagement with the police has been at very high levels, indicating that decisions are taken at those levels.

Failure to access the IGP Despite the fact that under Schedule 2 of POMA the law provides details of the actions to be taken in a notice filled in for an intended public meeting, the police has not followed this to the letter. The law demands that details of the

receiving officer, such as their name and rank, the office held as well as the date and time of receipt of the notice for

Analysis and assessment of the realisation of the objective of POMA

The public meeting, be recorded. However, no such records are available. The police officers who have received these notices have not indicated these details and, in many cases, they have declined to acknowledge receipt of the notices. Clause 11 of Schedule 2 under POMA further demands that the IGP provide and record whether the grounds are free or not free for a public meeting. In the event that the meeting cannot take place, the IGP must state the reasons. This, however, does not take place.

The view has been expressed that POMA is actually not a bad law. The problem is that the police does not implement what is provided for in the law. Following the IPOD discussion on the law, the Prime Minister directed the police not to impose its own guidelines in implementing the law but to follow the law as stipulated. This resolution did not take account of the fact that many political leaders had not followed the laws in a number of incidents. Beside this observation, the law as it is currently provides very wide scope for the police, right from defining what meetings are public meetings under the law and which meetings are exempted.

According to POMA, section 4, a public meeting means a gathering, assembly, procession or demonstration in a public place or premises held for the purpose of discussing, acting upon, petitioning or expressing views on a matter of public interest. Under this definition, the police has the latitude to define most of the meetings as public meetings under the law and would seek to regulate them.

Assessment of the realisation of the objectives

POMA had three main objectives: to provide for the regulation of public meetings: to provide for the duties and responsibilities of the police, organisers and participants in public meetings; and to prescribe measures for safeguarding public order and for related matters. Overall, these objectives have not been realised in a practical sense largely due

to lack of clear mechanisms through which the police and the political parties interact and work with regard to public assemblies. Six years down the road, the Minister responsible has not been able to issue the required regulations.

The lack of regulations leaves interpretation of the law very open. Much as the law provides for the principles, there is need for regulations to operationalise and guide the police on how they can facilitate the right to assembly.

In terms of the law, the duty to regulate public meetings means that the police have to ensure that the conduct and behaviour of participants at public meetings conform to the requirements of the law. Article 29 (1) (d) provides for the right to peacefully assemble and Articles 43 provides for the general limitations on fundamental rights. From the available evidence, the police has mainly focused on granting permission to political parties and not regulating the behaviour and conduct of participants at public meetings. There is no evidence that the police has ever stopped or prevented public meetings on grounds that the conduct of participants was not in conformity with the law. In regulating the conduct of public meetings, the police would be facilitating the realisation of the right to assemble. The police have not played a facilitative role but rather a more prohibitive role. POMA has been used mainly to create an obstacle to political parties' efforts to realise their rights to assemble.

The realisation of the objectives of POMA has also been curtailed by the lack of transparency and the use of objective criteria regarding public assemblies that the police objects to. Evidence shows that the police have not hesitated to clear public meetings that are exclusively on internal party affairs. These have included internal elections and celebrations of the political parties. On the other hand, the police have not allowed any public meetings that have tended to touch on a specific government policy. FDC has suffered most in this case because of the party's defiance and public policy campaigns that the party sought to use to mobilise the masses for action. None of these activities were cleared by the police and, in cases where FDC insisted, such activities ended in confrontations. The opposition political parties made efforts to organise public meetings

during the constitutional amendment process, but all these activities were blocked by the police.

The lack of objective criteria can also have been seen in the selective application and performance of the duties of the police under POMA. While the police has an obligation to write to political parties stating reasons why particular public meetings are objected to, this has not always been the case. In most cases, political parties have been informed that their notices are under consideration until the stated day of the public meetings has arrived.

Not providing written objections has also made it difficult for the opposition political parties to appeal to the magistrates in cases where they are dissatisfied with the reasons given by the police for blocking their activities. While the law demands that the particulars of police officers who receive the notices for public meetings from political parties under section 5 of POMA are recorded, this has not been the case.

The police have in many cases refused to acknowledge receipt of some political party notices, which undermines accountability and follow-up. This practice undermines the realization of the objectives of POMA.

The directives of the President on public assemblies have been seen to influence the role of the police in managing public assemblies. Much as the directives of the President have been outside the scope of the law, they are being enforced through the police in non-transparent methods of work with regard to making decisions on public assemblies. The police decisions on public assemblies have largely been made on the basis of the purposes of the assemblies. There have been numerous cases where opposition leaders have made private arrangements with the local police commanders not to block their assemblies. According to Aruu County MP, the Hon. Odonga Otto, many opposition politicians bribe District Police Commanders not to block their local consultations.30 Other MPs who preferred anonymity confirmed that they have bribed and 'looked after the DPCs very well'. In other cases, they have also bribed the police to block activities or their local political rivals using POMA.

On the part of the political parties, their conduct and behaviour have largely been informed by the thinking that POMA was enacted to curtail freedom of assembly. The controversies that surrounded the passing of the law have continued in its application. Much as the political parties have issued notices as required by law, such notices have been lacked the details required under the law. Despite this, the police has in many 30 Hon Odonga Otto, Parliament Hansard, 27th November, 2019 cases had no objection to the holding of public meetings even when the detailed information has not been provided. However, there are cases where the police invoked these requirements as a way of objecting to a particular public meeting taking place.

On the part of FDC, the party's defiance campaign has also seen the party undertaking activities in total non-compliance with POMA. In many cases, the FDC activities have involved processions to and from the public meetings. While these processions are described as spontaneous activities on the part of the political parties, the active support that the party leaders give them does not absolve them of the responsibility of organising these processions. These processions have also ended up having confrontations with the police.

Many political party leaders do not understand the details of POMA. While many have accused the police of misinterpreting the law, a big number have also misinterpreted the law or lack awareness of the details of the law. Section (4), sub-section (2) that exempts meetings of organs of political parties has been the most misunderstand section. Under this section, the only meetings exempted are those of the specific organs of the party, that are held in accordance with the provisions of the party constitution and to discuss exclusively internal matters of the political party.

Many political leaders, even at the national level, are not aware of the exclusive exemptions and have been part of confrontations with the police whenever they have organised public meetings outside the scope of this provision.

While the notice processes and procedure are supposed to be simple and clear, POMA provides that all notices for public meetings are filed with the IGP. This requirement is

quite cumbersome for citizens who have to deliver their notices for public meetings at the police headquarters in Kampala.

Much as this is the case, we have yet to obtain empirical evidence to show how local-level citizens have had the police block their meetings owing to failure to deliver a notification to the police headquarters. The majority of the confrontations during activities organised by the national leaders have had a chilling effect on many local-level leaders who lack access to police headquarters or connections within the police.

There is urgent need for the Minister to present regulations which would specifically guide and provide for mechanisms through which the police and political party leaders can engage for purposes of facilitating the right to assembly. While the police has all avenues to engage the organisers of public meetings, the lack of clearly defined mechanisms and of goodwill undermines this engagement.

The law has very broad definitions of public meetings. Basing on the definition of public meetings, all activities of political parties are in essence subject to the regulation of the police under the law. Much as the police has not enforced the requirements with regard to all meetings, evidence shows that this broad definition has been selectively applied where other factors are at play – mainly political considerations. There is need to amend the law to allow space and freedom to political parties to conduct their activities. Discussing matters of public interest is the essence of political party work and subjecting this to the consent of the police undermines the very essence of multiparty politics. The broad definitions are also subject to abuse.

There is need to amend the law, to compel the police to respond to notices, and to provide for explicit interpretations in the event that the police does not respond to the notices for public meetings within the stipulated time frame. Under the current law, POMA demands that the political parties provide consent of the proprietor of the public premises when giving notice of public meeting. In many cases, the proprietors charge for these venues and always demand full payment before the consent can be given.

Blocking a public meeting on the very last day not only violates the rights of the organisers to hold the meeting, but also makes the political parties incur financial losses. Blocking a public meeting on the last day means that the political parties, which are financially constrained, may not have the required resources to reconvene the meeting.

These financial losses have partly been the reason why some political parties have opted to insist on holding their meetings when the police fail to respond to their notices under the law and to provide the necessary support to facilitate the meeting. There is a need to amend the law to explicitly provide a time frame to the police to respond and provide for interpretation in case the police have not responded with any objection.

There is need for further amendment to the law to specifically define the grounds upon which a public meeting can be prevented or stopped by the police. Under the current law, the police may prevent or stop a public meeting if the premises are already booked for another public meeting or if the venue is considered not suitable for crowd and

Policy recommendations and the way forward

traffic control. The law does not define what is suitable for crowd and traffic control. This leaves a lot of discretion to the police and much of this discretion has been abused to arbitrarily restrict the rights of political parties to exercise their freedom of assembly. The implementation of POMA has faced both ideological problems and lack of facilitating frameworks and mechanisms to guide the engagement of the police and the political parties. On the part of the police, the directives of the president on public assemblies clearly show the implied responsibility to guide how the right to assembly is to be exercised in Uganda. This implied responsibility is not consistent with the international norms and standards. As a result, the police has no clear objective criterion that demonstrates goodwill and transparency when making decisions on public meetings organised by political parties.

The police has also ignored its duties and obligations as provided for under POMA. The police has also abused its powers under section 8, by blocking and preventing public meetings that do not qualify to be stooped under section 8. This further demonstrates that

considerations for public meetings to be stopped are made on the basis of factors other than those provided for under POMA.

On the part of the political parties, the objection to the spirit and intentions of POMA remains a very huge stumbling block in compliance with the requirements under the law. Despite occasionally making public statements with regard to POMA not necessarily being a bad law and accusing the police of acting outside POMA, the majority of the confrontations the political parties have had with the police would not have taken place if the parties had complied with the requirements under POMA.

Detailed awareness about the details of the law and the principles of policing public meetings is needed both among the political leaders and the police. While the law instructs the police, in stopping or preventing public meeting, to take account of the right of individuals to assemble, this has not always been the case. The police have taken their decisions to stop public meetings to be final and all their subsequent actions have been taken on the basis of these decisions. Public meetings have been blocked in total disregard of the guiding principles under POMA and the right to assemble under the constitution.

There is lack of consensus on the need for and manner of policing public meetings to ensure that the constitutionally protected rights are safeguarded and public order is maintained. The current law and context have prioritised public order and have tended to be more prohibitive than facilitative. Under these circumstances, public debate has not advanced the critical challenges but has tended to address the outcomes and confrontations. Uganda is also going through a transition process that is seeing greater demands for rights and political space.

These demands are being pursued under a regime that seeks to guide both the pace and scope of the transition. Much of the debate and decisions on public meetings are taking place within a context of security which obscures and further complicates oversight on the role of the police in facilitating the right to assemble.

POMA issues are reserved for the top leadership of the police and regarded as security matters public discussion of which is carefully guarded. There is need for further consultative processes on policing public meetings in Uganda.

CHAPTER FIFTEEN

GENERAL HUMAN RIGHTS VIOLATIONS AND THE LEGALITY OF "SHOOT TO KILL" (RUBBER BULLETS, TEAR GAS, WATER CANONS AND PEPPER SPRAY).

Uganda is a constitutional republic led since 1986 by President Yoweri Museveni of the National Resistance Movement party. In 2016 voters re-elected Museveni to a fifth five-year term and returned a National Resistance Movement majority to the unicameral parliament. Allegations of disenfranchisement and voter intimidation, harassment of the opposition, closure of social media websites, and lack of transparency and independence in the Electoral Commission marred the elections, which fell short of international standards. The periods before, during, and after the elections were marked by a closing of political space, intimidation of journalists, and widespread use of torture by the security agencies.

The national police maintain internal security, and the Ministry of Internal Affairs oversees the police. While the army is responsible for external security, the president detailed army officials to leadership roles within the police force. The Ministry of Defense oversees the army. Civilian authorities maintained effective control over the security forces. Members of the security forces committed numerous abuses.

Significant human rights issues included: unlawful or arbitrary killings by government forces, including extrajudicial killings; forced disappearance; torture and cases of cruel, inhuman, or degrading treatment or punishment by government agencies; harsh and life-threatening prison conditions; arbitrary arrest or detention; political prisoners or detainees; serious problems with the independence of the judiciary; arbitrary or unlawful interference with privacy; serious restrictions on free expression, the press, and the internet, including violence, threats of violence, and unjustified arrests or prosecution of

journalists, censorship, site blocking, and criminal libel laws; substantial interference with the freedom of peaceful assembly and freedom of association; restrictions on political participation; serious acts of corruption; lack of investigation of and accountability for violence against women; crimes involving violence or threats of violence targeting lesbian, gay, bisexual, transgender, or intersex persons; the existence of laws criminalizing consensual same-sex sexual conduct between adults; and the existence of the worst forms of child labor.

The government was reluctant to investigate, prosecute, or punish officials who committed human rights abuses, whether in the security services or elsewhere in government, and impunity was a problem.

ARBITRARY DEPRIVATION OF LIFE AND OTHER UNLAWFUL OR POLITICALLY MOTIVATED KILLINGS

There were numerous reports the government or its agents committed arbitrary or unlawful killings, including due to torture. The law provides for several agencies to investigate, inquire into, and or prosecute unlawful killings by the security forces. Human rights campaigners, however, claimed these agencies were largely ineffective. The constitution established the Uganda Human Rights Commission (UHRC) to investigate any person or group of persons for violations of any human right (see section 5). The Police Disciplinary Court has the power to hear cases of officers who breach the police disciplinary code of conduct. Military courts have the power to hear cases against officers that break military law, which bars soldiers from targeting or killing nonmilitants.

Opposition activists, local media, and human rights activists reported that security forces killed individuals the government identified as dissidents and those who participated in protests against the government (see section 1.e). Opposition politician Robert Kyagulanyi, also known as Bobi Wine, reported on February 24 that a Uganda Police Force (UPF) truck assigned to the Rapid Response Unit (RRU) killed his supporter Ritah Nabukenya. The UPF had deployed heavily in Kampala to block a Kyagulanyi political meeting with his supporters, and local media, citing eyewitness accounts, reported the

police truck driver, upon seeing Nabukenya on a motorcycle taxi wearing red insignia associated with Kyagulanyi's People Power political group, drove toward her, knocked down the motorcycle, and then ran over her. Later that day the UPF released a statement saying Nabukenya fatally injured herself when her motorcycle taxi collided with another motorcycle as it attempted to overtake the police truck. The UPF stated it would investigate what happened and promised to review the roadside CCTV as part of its investigations. Kyagulanyi demanded police release the CCTV footage of the incident, but on February 26, the UPF declared the cameras at the location were faulty and had failed to record the incident. At year's end police had not revealed findings from its investigations.

On February 25, Kyagulanyi reported that as his motorcade drove through Nansana Town on his way back from Nabukenya's funeral, an officer attached to the military's Local Defense Unit (LDU) shot into a crowd of his supporters, killing 28-year-old Daniel Kyeyune. According to local media, a military spokesperson denied that an LDU officer was involved in the shooting and stated investigations had shown the assailant used a pistol, a firearm that he said LDU officers do not carry. On March 18, Kyagulanyi released amateur cellphone video footage, which showed an LDU officer firing straight into the crowd of Kyagulanyi's supporters, after which Kyeyune can be seen on the ground. A military spokesperson, upon seeing the footage, cast doubt on the video's authenticity, adding that the military would study it further. At year's end the military had not released any findings from its investigations.

Disappearance

Local media reported several disappearances. Officials of the opposition National Unity Platform party (NUP) said they could not account for dozens of their supporters whom they said the security agencies had arrested while participating in party activities. The government neither acknowledged the persons were missing nor complied with measures to ensure accountability for disappearances. In addition, the UPF did not share any

findings into the 2019 disappearance of Kyagulanyi supporter John Bosco Kibalama, who remained missing.

Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

The constitution and law prohibit such practices. The law stipulates that any person convicted of an act of torture may receive a sentence of 15 years' imprisonment, a monetary fine, or both. The penalty for conviction of aggravated torture is life imprisonment. Nevertheless, there were credible reports security forces tortured and physically abused suspects.

Human rights organizations, opposition politicians, and local media reported that security forces tortured dissidents as punishment for their opposition to the government. On April 24, local television stations showed images of opposition Member of Parliament (MP) Francis Zaake receiving medical treatment at the Iran- Uganda hospital in Naguru. The UPF and Uganda Peoples' Defence Forces (UPDF) had arrested Zaake at his home in Mityana District on April 19, accusing him of violating COVID-19 restrictions on public gatherings when he distributed food to his constituents. On May 6, Zaake told journalists that upon his arrest, UPF officers under the watch of Mityana District police commander Alex Mwine and regional police commander Bob Kagarura beat him with sticks and batons, kicked him on his head, and then tied his legs and hands to suspend him under the bench in the flatbed on a police pickup truck, which drove him to the headquarters of the Chieftaincy of Military Intelligence (CMI) in Mbuya. He said CMI officials sprayed his eyes with an unknown liquid that created a sharp burning sensation, then later beat him with a stick bearing sharp objects that tore at his skin. He said UPF officers then drove him to the Special Investigations Unit (SIU) offices in Kireka, where UPF officers kicked, slapped, and punched him while telling him to quit politics, quit opposing the government, and retire to business. Zaake said his health deteriorated further while in detention, and on April 22, the UPF drove him to the Iran-Uganda hospital in Naguru for treatment. According to a Ministry of Internal Affairs document, the Iran-Uganda

hospital found that Zaake had "blunt injuries on the forehead, earlobes, right and left of the chest, right side flank, right upper arm, right wrist, lower lip, left leg, and left leg shin." On April 27, a court in Kampala ordered the UPF to release Zaake or arraign him in court. That same day the UPF drove Zaake, dressed only in shorts and unable to walk, to a court in Mityana. UPF officers carried him on a stretcher into the courtroom where a magistrate declined to hear the charges against Zaake and ordered the UPF to take him to hospital for medical treatment. The UPF, however, drove Zaake back to the SIU, where they detained him for another night and then released him on April 28. On May 6, the minister for internal affairs concluded that Zaake must have inflicted his injuries on himself "by knocking himself on the metal of the UPF police pickup truck." On May 7, Zaake sued CMI commander Abel Kandiho, Mityana police commander Alex Mwine, SIU commander Elly Womanya, and three others for abusing him. On September 3, the Office of the Director of Public Prosecutions (ODPP) exercised its constitutional right and took over Zaake's private suit against the security officers. Zaake told local media on September 3 that the ODPP had taken over the case in order to exonerate his abusers by putting up a dispirited prosecution, which would lead the court to issue an acquittal. The trial continued at year's end. The ODPP also dropped its charges against Zaake on August 6.

Civil society organizations and opposition activists reported that security forces arrested, beat, and killed civilians as punishment for allegedly violating regulations to combat the COVID-19 pandemic. On March 18, the president announced restrictions to combat the COVID-19 pandemic, which included an indefinite closure of all schools and a ban on religious gatherings, which he would later expand to include a nighttime curfew, restrictions on public and private transport, and a closure of nonessential business (see section 2.d.). The president instructed police and military to enforce the regulations. Local media reported LDU and UPF officers indiscriminately beat persons they found outside after the nighttime curfew with sticks, batons, and gunstocks, maiming some and killing others. On May 13, LDU officers shot primary school teacher Eric Mutasiga in

the leg and chest, as he pleaded with the officers not to arrest his neighbor, whom the officers had found selling food three minutes into a nighttime curfew. On June 8, Mutasiga died of the gunshot wounds at Mulago hospital. The UPF stated it had arrested the LDU officers involved but declared Mutasiga was injured when he got into a scuffle with the security officers. At year's end the UPF had not released details of its investigations into the killing. LDU and UPF personnel also attacked pregnant women who sought health care during periods when the government restricted use of public transport due to COVID-19.

On April 4, local media reported that on the night of April 3, UPF, LDU, and UPDF officers had raided a community in Elegu Town, driven dozens of persons out of their houses, beaten them with sticks and iron bars, and forced them to remove their clothes, roll in the dirt, and for some specifically to rub the dirt on their genitals, accusing them of violating the curfew. The UPDF and UPF released statements condemning the actions and promised to prosecute the officers involved. By year's end the UPF and UPDF had not released findings from their investigations.

Impunity was a problem, and it was widespread in the UPF, UPDF, the Uganda Prisons Service (UPS), and the executive branch. The security forces did not take adequate measures to investigate and bring to account officers implicated in human rights abuses, especially in incidents involving members of the political opposition. The UPDF did not arrest or prosecute the LDU officer whom amateur cellphone video showed shooting into a crowd of opposition supporters and killing Daniel Kyeyune (see section 1.a.). Impunity was widespread because authorities gave political and judicial cover to officials who committed human rights violations. While speaking on November 29 about the November 18-19 protests, President Museveni directed police to investigate and audit the killings of 20 unarmed protesters struck by stray bullets, but not of the other 34 unarmed protesters, who he said were rioters (see section 1.e.). On August 22, President Museveni commended the UPDF's Special Forces Command (SFC) officers who beat Kyagulanyi in August 2018. Speaking at a police recruits graduation ceremony, Museveni stated: "I

found the man (Kyagulanyi) had been beaten properly, in the right way. He boxed them, and they also tried to box back until they subdued him. I was surprised that the SFC people acted properly; it was self-defense and beyond self-defense they didn't beat. It was in order." The government also provided legal services to police and prison officers facing charges of abuse in court. On September 23, the Attorney General's Office sent one of its lawyers to defend UPS officer Philemon Woniala in a civil court case that lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons filed against him in his individual capacity, accusing him of torture and inhuman treatment. The law bars government lawyers from defending officials sued in their individual capacity (see section 6). On July 20, the UPDF instituted human rights refresher training courses for its LDU officers to increase respect for human rights.

Prison and Detention Center Conditions

Conditions in detention centers remained harsh and in some cases life-threatening. Serious problems included overcrowding, physical abuse of detainees by security staff and fellow inmates, inadequate food, and understaffing. Reports of forced labor continued. Most prisons did not have accommodations for persons with disabilities. The government operated unofficial detention facilities where it detained suspects for years without charge.

Physical Conditions: Gross overcrowding remained a problem. On August 7, the UPS reported its prison population had risen from 59,000 to 65,000 in four months after security forces arrested numerous individuals for defying COVID-19 restrictions. The UPS said this population was more than three times its capacity, although other data from the nongovernmental organization (NGO) World Prison Brief showed the prison detainees held were actually at 375 percent of prisons' capacity.

Local NGOs and the UHRC declared overcrowding made the prisons a potential hotspot for the spread of COVID-19. On May 18, local media reported that some UPF posts kept male and female detainees in the same cell, and others kept adult detainees together with child detainees. On November 13, UPF officers in Oyam District arrested six NUP party

officials for violating COVID-19 restrictions at an election campaign rally and detained both female and male officials in the same cell.

There were reports of deaths in prisons due to prison conditions. On February 20, local media reported that three pretrial detainees died in Atopi prison after they went to work on a prison farm despite reporting in the morning that they were ill. Prison authorities said they were carrying out postmortems to establish the causes of death but did not report the findings. Political prisoners faced different conditions from those of the general population. Zaake's lawyers reported in April that UPF officers denied Zaake medical care.

Administration: Authorities did not always carry out investigations into credible allegations of mistreatment. The local civil society organization Human Rights

Awareness and Promotion Forum reported in June that UPS officials beat lesbian, gay, bisexual, transgender, and intersex (LGBTI) detainees on account of their sexual orientation. UPS officials denied this and declined to investigate (see section 6). Local media and human rights activists reported that the UPF, UPDF, CMI, ISO, and UPS denied access to visitors for some detainees held at official and unofficial detention facilities (safe houses) (see section 6).

Independent Monitoring: The UPS reported in August that due to COVID-19 restrictions, it stopped visitors from accessing prison facilities. The UPS, however, reported that prior to the COVID-19 pandemic, it allowed the local civil society organization African Center for Treatment and Rehabilitation of Torture Victims to conduct prison visits with advance notification; however, no independent monitors received access to any unregistered detention facilities or pretrial detention cells. The International Committee of the Red Cross declined to comment on whether it conducted prison visits during the year.

Improvements: The UPS reported in August that the president had pardoned 2,833 prisoners to decongest prisons and help prevent the spread of COVID-19, although this was only half the number of detainees that entered prison between March and August. The pardoned detainees largely comprised convicts of petty offenses serving less than

two-year sentences, mothers of infants, and convicts older than age 60. The Ministry of Health donated four modern tuberculosis-testing machines to the UPS, which improved the prisons' capacity to quickly diagnose and treat the disease.

Arbitrary Arrest or Detention

Although the law prohibits arbitrary arrest and detention, security forces often arbitrarily arrested and detained persons, especially opposition leaders, politicians, activists, demonstrators, journalists, LGBTI persons, and members of the general population accused of violating COVID-19 restrictions. The law provides for the right of persons to challenge the lawfulness of their arrest or detention in court, but this mechanism was seldom employed and rarely successful.

Arrest Procedures and Treatment of Detainees

The law requires that judges or prosecutors issue a warrant before authorities make an arrest unless the arrest occurs during commission of a crime or while in pursuit of a perpetrator. Nevertheless, authorities often arrested suspects without warrants. The law requires authorities to arraign suspects within 48 hours of arrest, but they frequently held suspects longer without charge. Authorities must try suspects arrested for capital offenses within 360 days (120 days if charged with an offense triable by subordinate courts) or release them on bail; however, if prosecutors present the case to the court before the expiration of this period, there is no limit on further pretrial detention. While the law requires authorities to inform detainees immediately of the reasons for detention, at times they did not do so. The law provides for bail at the judge's discretion, but many suspects were unaware of the law or lacked the financial means to cover the bond. Judges generally granted requests for bail. The law provides detainees the right to legal representation and access to a lawyer, but authorities did not always respect this right. The law requires the government to provide an attorney for indigent defendants charged with capital offenses. Most defendants endured significant delays in this process. Security forces often held opposition political members and other suspects incommunicado and under house arrest.

Arbitrary Arrest: Arbitrary arrests and unlawful detention, particularly of dissidents, remained problems. The UPF and UPDF on numerous occasions arrested and harassed opposition politicians, their supporters, and private citizens who engaged in peaceful protests and held public rallies. LDU officers raided communities at night, dragged persons out of their houses, and arrested them for violating the COVID-19 nighttime curfew (see section 1.c.). UPF officers arrested journalists for hosting opposition politicians on radio stations (see section 2). UPF officers also raided an LGBTI shelter and arrested occupants, accusing them of violating COVID-19 regulations on social distancing (see section 6). On February 26, the UPF arrested journalist Moses Bwayo as he was on a set, shooting a documentary and music video for opposition politician Kyagulanyi. Police accused Bwayo of holding an illegal assembly "in the middle of a busy public road, causing heavy traffic jam, which inconvenienced residents." The UPF detained Bwayo, impounded his cameras and recording equipment, and released him on February 27 without charge.

Pretrial Detention: Case backlogs due to an inefficient judiciary, inadequate police investigations, the absence of plea bargaining prior to 2015, insufficient use of bail, the absence of a time limit for the detention of detainees awaiting trial, and restrictions to combat the spread of COVID-19 contributed to frequent prolonged pretrial detentions. The UPS reported that although the rate of the country's pretrial detainees had fallen to 47 percent of the then 59,000 total inmates in the prison system, mainly as a result of plea bargaining, it rose to 53 percent when COVID-19 restrictions came into force. In August the UPS reported COVID-19 regulations on social distancing had stopped court sessions from taking place regularly, and only a few prison facilities had videoconferencing facilities that could facilitate an online trial, which further slowed the rate at which prisons processed detainees through the system.

Detainee's Ability to Challenge Lawfulness of Detention before a Court: Citizens detained without charge have the right to sue the Attorney General's Office for compensation for unlawful detention; however, citizens rarely exercised this right.

Denial of Fair Public Trial

The constitution and law provide for an independent judiciary, but the government did not always respect this provision. Corruption, understaffing, inefficiency, and executive-branch interference with judicial rulings often undermined the courts' independence. Chief Justice Alphonse Owiny-Dollo repeatedly decried the shortage of judges and criticized parliament and executive decisions to spend limited resources to create new legislative positions without expanding the number of judges, which contributed to a case backlog in the courts and prevented access to justice. The executive, especially security agencies, did not always respect court orders. UPF officers in April defied court orders for the immediate release of Zaake to seek medical attention and kept him in detention an extra day (see section 1.a.).

The president appoints Supreme Court justices, Court of Appeal and High Court judges, and members of the Judicial Service Commission (which makes recommendations on appointments to the judiciary) with the approval of parliament.

Due to vacancies on the Supreme Court, Court of Appeal, High Court, and the lower courts, the judiciary did not deliver justice in a timely manner. At times the lack of judicial quorum precluded cases from proceeding.

Judicial corruption was a problem, and local media reported numerous cases where judicial officers in lower courts solicited and accepted bribes from the parties involved. In January outgoing Chief Justice Bart Katureebe announced the judiciary would subject seven judicial staff to disciplinary hearings after receiving credible allegations of corruption against them. The judiciary had not released its findings by year's end.

Trial Procedures

Although the law provides for a presumption of innocence, authorities did not always respect this right. Defendants have the right to prompt, detailed notification of the charges against them and are entitled to free assistance of an interpreter. An inadequate system of judicial administration resulted in a serious backlog of cases, undermining suspects' right to a timely trial. Defendants have the right to be present at their trial and to consult

with an attorney of their choice. The law requires the government to provide an attorney for indigent defendants charged with capital offenses. Defendants have the right to adequate time and facilities to prepare a defense and appeal. The law allows defendants to confront or question witnesses testifying against them and present witnesses and evidence on their own behalf, but authorities did not always respect this right. Defendants may not be compelled to testify or confess guilt, and they have the right to appeal. The UPF and UPS denied some political and some LGBTI detainees access to their lawyers as they prepared their legal defense (see section 6).

All nonmilitary trials are public. A single judge decides cases in the High Court, while a panel of at least five judges decides cases in the Constitutional and Supreme Courts. The law allows military courts to try civilians who assist members of the military in committing offenses or are found possessing arms, ammunition, or other equipment reserved for the armed forces.

In September 2018, 10 years after he was arrested, the International Crimes Division of the High Court began the trial of Thomas Kwoyelo, a former commander in the Lord's Resistance Army. Kwoyelo faced 93 charges of war crimes and crimes against humanity; his was the first war crimes trial in the country's history. Civil society and cultural leaders criticized the slow pace of the trial, which was suspended due to COVID-19 in March with no definite date of planned resumption.

Political Prisoners and Detainees

Authorities detained numerous opposition politicians and activists on politically motivated grounds. Authorities released many without charge but charged others with crimes including treason, annoying the president, cyberharassment, inciting violence, holding illegal meetings, and abuse of office. No reliable statistics on the total number of political detainees or prisoners were available.

On December 22, plainclothes UPF officers arrested and detained human rights lawyer Nicholas Opiyo and four other lawyers while they were dining in a restaurant. The state released the other lawyers without charges but accused Opiyo of money laundering. The

first court he appeared in denied him bail, citing jurisdiction issues. On December 30, Opiyo was released on bail, and his trial continued at year's end.

On November 18, UPF officers arrested and detained presidential candidate Kyagulanyi in Luuka District as he attempted to address a campaign rally, accusing him of defying COVID-19 restrictions. Police detained Kyagulanyi at Nalufenya police station in Jinja and held him until November 20, when the Iganga chief magistrate's court granted him bail upon his arraignment. Kyagulanyi said that UPF officers detained him alongside 19 other male suspects in the same cell with three women. Kyagulanyi's arrest sparked widespread protests during which, according to local media, security forces attacked journalists, killed at least 54 unarmed persons and left hundreds injured. Local media showed images and footage of UPDF, military police, and UPF officers, as well as plainclothes individuals shooting with assault rifles at unarmed persons on the roadside, in office buildings, and in food markets. Several recordings of amateur cellphone footage showed military police officers shooting at unarmed individuals who were recording the security forces' actions. Officials at Mulago hospital told local media on November 20 that most of those killed died of gunshot wounds, while others died of asphyxiation caused by tear gas. On November 20, Minister for Security Elly Tumwine told local media that the killings were justified because "the police [have] a right to shoot you and kill you if you reach a certain level of violence." Kyagulanyi's trial continued at year's end.

On March 12, UPF and CMI officers surrounded the home of former minister for security, retired soldier, and presidential hopeful Henry Tumukunde in Kololo, Kampala, and told him he was under arrest for making treasonous statements. On March 3, Tumukunde had written to the Electoral Commission expressing his intention to consult the electorate regarding supporting him for a presidential election bid. Then on March 5, he appeared on a television program and said he welcomed Rwanda to support political change in Uganda. Local media and human rights activists reported that the UPF and CMI also arrested at least 13 Tumukunde associates, including his two sons and a cousin, and later

charged them with obstruction of justice. The UPF detained Tumukunde at the Criminal Investigations Directorate in Kibuli and later at the Special Investigations Unit in Kireka. The UPF detained his associates and sons at Jinja Road Police Station but released the sons on March 14. On March 18, the UPF arraigned Tumukunde in court and formally charged him with treason and unlawful possession of firearms. On March 23, Tumukunde applied for bail and while initially denied, on May 11, the court granted him bail. At year's end hearings for Tumukunde's treason trial had not begun.

On February 20, an appellate court overturned a 2019 cyberharassment conviction against dissident Stella Nyanzi on grounds that the lower court lacked jurisdiction to hear the case and that it had not carried out a fair hearing.

Civil Judicial Procedures and Remedies

Individuals or organizations may seek civil remedies for human rights violations through the regular court system or the UHRC, which has judicial powers under the constitution. The law also empowers the courts to grant restitution, rehabilitation, or compensation to victims of human rights abuses as well as to hold public officials involved in human rights violations personally liable, including contributing to compensation or restitution costs. The UHRC's powers include the authority to order the release of detainees, pay compensation to victims, and pursue other legal and administrative remedies, such as mediation. Civil courts and the UHRC have no ability to hold perpetrators of human rights abuses criminally liable. Bureaucratic delays hampered enforcement of judgments that granted financial compensation to victims. The government rarely complied with judicial decisions related to human rights. On May 13, opposition politician and Kampala city mayor Erias Lukwago said that courts had since 2009 awarded him in excess of 900 million Ugandan shillings ($243,000) in compensation for inhuman treatment by security forces, but the executive had not paid him.

Arbitrary or Unlawful Interference with Privacy, Family, Home, or Correspondence.

The constitution and law prohibit such actions, but there were reports the government failed to respect these prohibitions. Police did not always obtain search warrants to enter private homes and offices. In August 2019 media reported the government hired Huawei technicians to hack into Kyagulanyi's private WhatsApp communications to gather political intelligence against him. The Ugandan and Chinese governments both denied spying on Kyagulanyi. The UPF, however, noted in an August 2019 statement that Huawei had supplied it with closed-circuit television cameras with facial recognition technology, which it installed across the country. According to media reports, the government used Huawei surveillance technology to monitor the whereabouts of Kyagulanyi and other political opponents.

Human rights activists said that government agencies broke into activists' homes without judicial or other appropriate authorization and arbitrarily sought to access activists' private communication. On September 9, human rights lawyer Nicholas Opiyo reported unidentified individuals broke into his private apartment and stole his communication equipment, including his computers and cell phones. Opiyo reported on September 11 that he digitally tracked his missing phones to the CMI headquarters in Mbuya. The law authorizes government security agencies to tap private conversations to combat terrorism-related offenses. The government invoked the law to monitor telephone and internet communications.

RESPECT FOR CIVIL LIBERTIES, INCLUDING:

a. Freedom of Expression, Including for the Press

The constitution and law provide for freedom of speech, including for the press, but the government often restricted this right.

Freedom of Speech

The government restricted citizens' ability to criticize its actions or to discuss matters of general public concern. It also restricted some political symbols. The UPF randomly

attacked and arrested persons it found wearing camouflage clothing, red berets, and red insignia associated with Kyagulanyi's People Power political movement and the NUP party, which the security agencies stated were reserved for use by security forces (see section 3). Military police officers wear red berets, which feature a distinct logo from those on the berets that NUP supporters wear. Human Rights Watch reported that on July 24, the UPF raided the premises of Radio Simba FM station in Kampala and arrested four comedians (Julius Serwanja, Simon Peter Ssabakaki, Merceli Mbabali, and Gold Kimatono), accusing them of promoting sectarianism and "causing hatred and unnecessary apprehension." On July 15, the comedians had posted on the internet a satirical video of a mock prayer session, in which they asked a mock congregation to pray for specific political, public service, and military leaders including the president, all hailing from the western region. On July 28, a court ordered the UPF to release the comedians, which the police did.

Freedom of Press and Media, Including Online Media:

The country had an active media environment with numerous privately owned newspapers and television and radio stations. These media outlets regularly covered stories and often provided commentary critical of the government and officials. The UPF's Media and Political Crimes Unit and the communications regulator Uganda Communications Commission, however, closely monitored all radio, television, and print media. The government restricted media.

Violence and Harassment

Security forces subjected journalists and media houses to violence, harassment, deportations, and intimidation. On December 10, the Uganda Media Council (UMC) cancelled all existing accreditations for foreign journalists and required them to reregister within a week to be able to continue working in the country. On November 30, journalist Margaret Evans, working with the Canadian CBC News, reported that immigration authorities had deported her and her team after the UMC cancelled their accreditation. In

response to Evans's comments that the government was avoiding outside scrutiny ahead of the elections, government spokesperson Ofwono Opondo stated the government reserved the right to admit or refuse admission to foreign persons, including journalists, and it did not need outside scrutiny to qualify its electoral process as credible. Opondo later added that Evans' team had violated provisions of their tourist visas and that they were welcome to reapply for a visa that allowed them to work as journalists in the country. The Human Rights Network for Journalists Uganda (HRNJU) reported in January that the UPF blocked journalists from covering opposition rallies, confiscated their recording equipment, and forcibly deleted the content. On July 22, the UPF arrested five journalists working at Baba FM radio station, accusing them of inciting violence and disobeying lawful orders. On July 18, the journalists had hosted opposition politician Kyagulanyi on Baba FM for a political talk show. Police released the journalists on July 23 without charge. The HRNJU reported numerous incidents between April and August when UPF, UPDF, and LDU officers beat, detained, and confiscated equipment of journalists covering implementation of the COVID-19 restrictions. On April 13, CMI officers arrested blogger and Forum for Democratic Change (FDC) activist Kakwenza Rukirabashaija, who had published a book ridiculing the president and his family. Rukirabashaija stated that CMI officers chained him by the legs and hands to stair railings through the night. On April 21, the UPF arraigned Rukirabashaija in court and formerly charged him with "doing an act likely to spread disease," in relation to Facebook posts he made critical of the COVID-19 restrictions. The court granted him bail on May 6. The trial continued at year's end (see also section 1.d., Arbitrary Arrest).

On September 18, CMI officials again arrested Rukirabashaija in relation to an unpublished manuscript detailing his torture during the earlier arrest. CMI officers transferred him to SIU, whose officers stated they were investigating Rukirabashaija for inciting violence and promoting sectarianism. SIU officers released Rukirabashaija on September 21 without charge. On November 18, local media broadcast images of a UPF officer spraying pepper spray into the eyes of journalist Ashraf Kasirye as he recorded

other UPF officers arrest Kyagulanyi while holding a presidential election campaign (see section 1.e.).

Censorship or Content Restrictions: The government penalized those who published items counter to its guidelines and directly and indirectly censored media, including by controlling licensing and advertising, instructing editors to suspend critical journalists, arresting and beating journalists, and disrupting and ransacking photojournalistic exhibitions. Government officials and ruling party members owned many of the private rural radio stations and imposed reporting restrictions. Media practitioners said government and security agents occasionally called editors and instructed them not to publish stories that negatively portrayed the government. Journalists, under government pressure, practiced self-censorship. On August 1, the UPF wrote to Victoria Broad Link radio in Jinja City and instructed it not to host the opposition Democratic Party President Norbert Mao for a talk show. The UPF letter stated that hosting Mao "conflicted with COVID-19 guidelines of implementing curfew." The UPF also noted in the letter, however, that the radio station could host Mao via a Zoom internet connection and only if the discussion topics stayed clear of politics.

Libel/Slander Laws

Authorities used libel, defamation, and slander laws to suppress criticism of government officials. On May 7, the UPF arrested human rights lawyer Isaac Ssemakadde, accusing him of breaching the law on offensive communication and criminal libel after he posted a tweet criticizing the newly installed director of public prosecutions, Jane Francis Abodo. The UPF released Ssemakadde later that day without formal charges.

National Security

Authorities cited laws protecting national security to restrict criticism of government policies. On December 9, the Ugandan Communications Commission wrote a letter to Google asking the company to block certain YouTube accounts for disseminating content "contrary" to the country's laws after they posted videos showing security force abuses.

Security agencies arrested numerous dissidents on charges of incitement of violence. On the evening of April 20, UPF officers stopped journalist Samson Kasumba outside the NBS TV offices and arrested him after he completed his evening newscast. UPF officials declared they detained Kasumba over his alleged involvement in subversive activities. The UPF kept Kasumba at the Kira Road Police Station, and on April 21, UPF officers from the Electoral and Political Crimes desk carried out a search of Kasumba's home. The UPF released Kasumba soon thereafter.

Internet Freedom

The government restricted and disrupted access to the internet, censored online content, monitored internet communications without appropriate legal authority, and punished internet users who expressed divergent political views. On September 8 2020, the Uganda Communications Commission announced that it had given online publishers, bloggers, and influencers until October 5 to register with them for a $20 annual license before they continued content production for public consumption, which some criticized as an attempt to restrict online media. According to the Freedom on the Net Report, government officials openly monitored social media posts. Human rights activists, journalists, and opposition politicians reported the ruling party's communications arm sponsored a multitude of bots and fake online accounts to attack opposition politicians and activists on social media. Authorities used laws against cyberharassment and offensive communication to intimidate critics and to stop women from publicly identifying their abusers online (see section 6). On March 5, the HRNJU reported the UPF in Kumi District arrested journalist James Odongo Akia on cyberharassment, defamation, and computer misuse charges, accusing him of using a pseudo account to defame the UPDF commander for land forces, Peter Elwelu, and a local medic, John Okure. A court remanded Akia to prison on March 10 and granted him bail on March 13. The trial continued at year's end.

Academic Freedom and Cultural Events

The government restricted artistic presentations, including music lyrics and theatrical performances. On June 6, the government announced that on July 31 it would start to enforce a raft of regulations it had passed in 2019, which placed significant restrictions on the arts, telecommunications, and media such as the requirement to secure government permits before making film, documentary, or commercial photography content. On August 6, Minister for Information, Communications Technology, and National Guidance Judith Nabakooba indefinitely suspended implementation of the regulations to enable her ministry to carry out wider consultations with the arts industry. Authorities harassed musicians who recorded songs critical of ruling party politicians. On July 23, the UPF arrested musician Gerald Kiweewa, accusing him of defaming ruling party MP and former minister Idah Nantaba. Kiweewa had earlier recorded a song entitled "Nantaba" that alluded to the former minister's romantic relationships. On July 29, a court ordered the UPF to release Kiweewa, which they did.

Freedoms of Peaceful Assembly and Association

The government restricted freedoms of peaceful assembly and association. Government failure to investigate or prosecute attacks on human rights defenders and peaceful protesters led to de facto restrictions on freedom of assembly and association.

While the constitution provides for freedom of assembly, the government did not respect this right. The government used the Public Order Management Act (POMA) to limit the right to assemble and to disrupt opposition and civil society- led public meetings and rallies until March 26 when the Constitutional Court nullified sections of the law, which had granted the UPF vague powers to block gatherings. The law had placed a significant bureaucratic burden on those wishing to organize or host gatherings and afforded the UPF wide discretion to prevent an event. While the law only required individuals to "notify" police of their intention to hold a public meeting, it also gave police the power to block meetings they deemed "unsuitable." Typically, the UPF simply failed to respond to

"notifications" from opposition groups, thereby creating a legal justification for disrupting almost any gathering.

On numerous occasions between January and March, the UPF blocked presidential hopeful Kyagulanyi from holding consultative meetings with his supporters in preparation for his presidential bid. On January 6, the UPF fired tear gas and bullets to disperse one of Kyagulanyi's consultative meetings, arguing that Kyagulanyi had not fulfilled POMA requirements, which call for holding the event in an enclosed space, providing ambulances for emergency evacuation, providing firefighting trucks, and providing toilets. After the POMA nullification, the UPF used COVID-19 restrictions to block and disperse political opposition gatherings and rallies. On March 18, the president banned political and cultural gatherings as part of the measures to prevent the spread of COVID-19. On March 24, the government published the Public Health (Control of COVID-19) Rules that made it an offense to "hold public meetings, including political rallies, conferences, and cultural related meetings," punishable by two months' imprisonment. Opposition politicians, however, reported the UPF blocked opposition politicians from holding meetings but allowed ruling party politicians to hold rallies and processions. On July 10 and July 16, the UPF arrested FDC MP Ibrahim Ssemujju Nganda, accusing him of violating COVID-19 restrictions when he organized a meeting of party members. The UPF fired teargas and bullets to disperse the meetings.

UPF released Ssemujju Nganda without charge. In contrast, ruling party politicians such as State Minister for Investment Evelyn Anite, Minister for Justice and Constitutional Affairs Ephraim Kamuntu, and Minister for Health Jane Ruth Aceng held large campaign rallies and processions without interruption from security forces. On August 29, however, the UPF arrested ruling party MP Sam Bitangaro for holding a rally in violation of COVID-19 rules. He was released that day without formal charges.

Freedom of Association

While the constitution and law provide for freedom of association, the government did not respect this right. The government restricted the operations of local NGOs, especially

those that work on civil and political rights (see section 5). Government regulations require NGOs to disclose sources of funding and personal information about their employees and impose onerous registration and reporting requirements. They enable the NGO Bureau and its local level structures to deny registration to any organization focused on topics deemed "undesirable" or "prejudicial" to the "dignity of the people of Uganda." The regulations also provide the NGO Bureau broad powers to inspect NGO offices and records and to suspend their activities without due process. The NGO Bureau imposed registration, permit renewal, and administrative fees that local NGOs declared were exorbitant. On December 2, local media reported that the Financial Intelligence Authority had directed commercial banks to freeze the bank accounts of four human rights civil society organizations over suspicions that they were supporting political opposition. The organizations' bank accounts remained frozen at year's end. Authorities harassed and blocked activities run by organizations that advocated for the human rights of LGBTI persons (see section 6, Acts of Violence, Criminalization, and Other Abuses Based on Sexual Orientation and Gender Identity).

The government also restricted the operations of opposition political parties (see section 3).

Protection of Refugees

The government cooperated with the Office of the UN High Commissioner for Refugees (UNHCR) and other humanitarian organizations in providing protection and assistance to refugees, returning refugees, asylum seekers, stateless persons, or other persons of concern. The government continued to uphold its enabling asylum policies and practices toward refugees and asylum seekers from various countries, mainly from South Sudan, the Democratic Republic of the Congo (DRC), Burundi, and Somalia. Most refugees enjoyed unhindered access to asylum, freedom of movement, freedom of residence, right to registration and documentation, and access to justice, education, health care, and employment.

Abuse of Migrants, Refugees, and Stateless Persons: UNHCR and NGOs continue to receive reports that some government officials demanded bribes from refugees to process or issue paperwork. There were reports UNHCR staff demanded sex in exchange for food.

Refoulement: Although there were no credible reports of refoulement during the year, Rwandan and Burundian refugee groups continued to express fear that authorities were either complicit in or unable to stop extrajudicial actions by neighboring governments.

Access to Asylum: The law provides for the granting of asylum or refugee status, and the government has established a system for providing protection to refugees. Individuals fleeing South Sudan and the Democratic Republic of the Congo (as long as Congolese are from eastern DRC) who enter the country through a designated border point have automatic prima facie refugee status (status without determination of individual refugee status). The local Refugee Eligibility Committee, however, determines whether individuals fleeing from Rwanda, Somalia, Burundi, and other countries are eligible for refugee status. The committee was functional, but administrative matters and the continued influx of asylum seekers continued to cause backlogs, although UNHCR and the government were working to address them.

Durable Solutions: The government did not accept third-country refugees for resettlement, but it assisted in the safe and voluntary return of refugees to their homes and supported the resettlement of third-country refugees to other countries by providing birth certificates and travel documents. A 2015 constitutional court ruling confirmed that certain long-term refugees have the right to naturalize, and in 2016 the government committed to begin processing naturalization cases for an estimated 15,000 refugees who had resided in the country for approximately 20 years. During the year there were no known cases of a refugee having completed naturalization.

Freedom to Participate in the Political Process

The law provides citizens the ability to choose their government through free and fair periodic elections held by secret ballot and based on universal and equal suffrage. The

law also allows authorities to carry out elections for the lowest-level local government officials by having voters line up behind their preferred candidate or the candidate's representative, portrait, or symbol. Serious irregularities marred the 2016 presidential and parliamentary elections and several special parliament elections that followed.

Elections and Political Participation

Recent Elections: In 2016 the country held its fifth presidential and legislative elections since President Museveni came to power in 1986. The Electoral Commission (EC) announced the president was re-elected with 61 percent of the vote, and FDC candidate Kizza Besigye finished second with 36 percent. The ruling National Resistance Movement (NRM) party captured approximately 70 percent of the seats in the 431-member unicameral parliament. Domestic and international election observers stated the elections fell short of international standards for credible democratic elections. The Commonwealth Observer Mission's report noted flawed processes, and the EU's report noted an atmosphere of intimidation and police use of excessive force against opposition supporters, media workers, and the public. Domestic and international election observers noted biased media coverage and the EC's lack of transparency and independence. Media reported voter bribery, multiple voting, ballot box stuffing, and the alteration of precinct and district results. Due to election disputes stemming from the elections, in 2016 the Supreme Court recommended changes to electoral laws to increase fairness, including campaign finance reform and equal access for all candidates to state-owned media. The government had not yet enacted laws to comply with these recommendations.

During the year the EC held several local elections, which local media reported featured incidents of intimidation by security forces and irregularities such as voters in opposition strongholds complaining their names were missing on the voter register. Political parties also held party primaries in preparation for the 2021 general election. On September 4, the ruling NRM party held its primaries, in which party members alleged widespread voter intimidation, bribery, harassment, and killings of rival supporters. On September 4-5, local media broadcast images of party members receiving 5,000 Ugandan shillings

($1.35) each before lining up to vote. On September 5, amateur cellphone video footage emerged on social media showing State Minister for Labor Mwesigwa Rukutana in a scuffle with a rival's supporters, before drawing a rifle from one of his bodyguards and aiming it at his rival's vehicle. Local media reported that Rukutana fired the gun at the vehicle, injuring an occupant and damaging the car. On September 6, the UPF arrested Rukutana with his three bodyguards for inciting violence, attempted murder, and malicious damage to property. His trial continued at year's end.

Political Parties and Political Participation:

Security forces arbitrarily arrested and detained opposition leaders and intimidated and beat their supporters (see sections 1.a., 1.c., and 1.d.). On October 14, UPF and UPDF officers raided the NUP secretariat in Kamwokya and confiscated documents, property, and party insignia while accusing the NUP of being in possession of military uniforms (see section 2.a.). NUP officials reported UPF and UPDF personnel stole 25 million Ugandan shillings ($6,800) from the party's offices that the party had earmarked to pay nomination fees for its electoral candidates, and confiscated signatures backing Kyagulanyi's nomination to contest for the presidency. The UPF used COVID-19 restrictions to disperse opposition meetings and rallies but allowed similar meetings by the ruling party to proceed unhindered (see section 2.b.). The law prohibits candidates from holding official campaign events more than four months prior to an election, although the ruling NRM party operated without restriction, regularly holding rallies and conducting political activities. In December 2019 the EC announced it had closed its update of the voter register in preparation for the 2021 election, effectively blocking more than one million citizens who would have turned 18 years old--the required minimum age to vote--by February 2021 from participating in the electoral process. Local civil society organizations criticized the action and stated the EC closed the voter register early to lock out potential Kyagulanyi supporters. The UPF used COVID-19 restrictions regularly to block opposition politicians from appearing on radio and television talk shows (see

section 2.a.). Opposition politicians also accused the ruling party of gerrymandering when the parliament approved 46 new legislative districts.

Participation of Women and Members of Minority Groups: No laws limit the participation of women or members of minority groups in the political process, and they did participate. Women comprised 35 percent of the members of parliament and occupied 34 percent of ministerial positions. Cultural factors, high costs, and sexual harassment, however, limited women's ability to run for political office. Female activists reported the official fees required to secure a nomination to run for elected office were prohibitively high and prevented most women from running for election. Gender rights activists reported violence from the security agencies discouraged women from participating in electoral activities. Gender rights activists also reported an affirmative action policy, which reserved a legislative position for women in each district, instead discouraged women from running against men in the other positions not reserved for women. Election observers reported that holding party primaries and some local government elections by having voters line up behind their selected candidate effectively disenfranchised women, because they could be discouraged from participating in a process that could bring them into conflict with their domestic partners if they voted for the opposing candidate.

Corruption and Lack of Transparency in Government

The law provides criminal penalties of up to 12 years' imprisonment and confiscation of the convicted persons' property for official corruption. Nevertheless, transparency civil society organizations stated the government did not implement the law effectively. Officials frequently engaged in corrupt practices with impunity, and many corruption cases remained pending for years.

Corruption: Media reported numerous cases of government corruption, most notably the April 7 2020 arrest of four senior Office of the Prime Minister officials managing relief aid for the COVID-19 response, following an investigation by the Anti-Corruption Unit. The state charged the four, including the Permanent Secretary, Christine Guwatudde and Commissioner for Disaster Preparedness and Management Martin Owor, in the Anti-

Corruption Court with inflating prices of COVID-19 food relief items. As part of the investigation, on April 11, police searched Owor's private residence and found food and nonfood relief items, including items the government had designated for 2019 mudslide victims.

President Museveni dismissed or moved a number of high-level officials following corruption allegations. For example, on July 21, Museveni ordered the dismissal of eight senior EC officials. Media reported the firings were a result of corruption by the individuals during the procurement of election materials for the 2021 election. Opposition politicians, however, told media that Museveni actually fired the individuals because they did not procure the services of the company he preferred, alleging electoral malpractice. The EC chairperson denied all allegations, stating the eight had chosen to retire. Anticorruption activists said while high-profile individuals were fired, the government had not initiated legal proceedings, so the officials faced few material consequences.

Financial Disclosure: The law requires public officials to disclose their income, assets, and liabilities, and those of their spouses, children, and dependents, within three months of assuming office, and every two years thereafter. The requirement applies to 42 position classifications, totaling approximately 25,000 officials, including ministers, members of parliament, political party leaders, judicial officers, permanent secretaries, and government department heads, among others. Public officials who leave office six or more months after their most recent financial declaration are required to refile. The Inspector General of Government is responsible for monitoring compliance with the declaration requirements, and penalties include a warning, demotion, and dismissal.

GOVERNMENTAL ATTITUDE REGARDING INTERNATIONAL AND NONGOVERNMENTAL INVESTIGATION OF ALLEGED ABUSES OF HUMAN RIGHTS

A variety of domestic and international human rights groups operated with government restrictions. The president continued repeatedly to accuse civil society of accepting funding from foreign donors interested in destabilizing the country.

NGOs reported the government's measures to address the COVID-19 pandemic, particularly restrictions on the use of private and public vehicles from March to May, made community-level work especially difficult. NGOs continued to report subtle intimidation by government officials at the district level. In particular, NGOs reported having to pay fees to local government officials that are not required by law. Local government officials insisted on these payments before allowing NGOs to conduct activities in their respective areas. The law continued to hinder NGOs' operations. In particular, the requirement for local authorization through district-level memoranda of understanding proved difficult for many NGOs to execute and threatened their compliance with the law.

Following advocacy from the NGO Forum, an organization that represents NGOs in the country, the Ministry of Internal Affairs continued to allow NGOs that had missed a 2019 deadline to register (despite its premature November 2019 announcement that it had shut down 12,000 NGOs that had not done so), and by the end of the year, the ministry had not shut down any NGOs.

Government Human Rights Bodies: The UHRC is the constitutionally mandated institution with quasi-judicial powers authorized to investigate allegations of human rights abuses, direct the release of detainees, and award compensation to abuse victims. The president appoints its board, consisting of a chairperson and five commissioners.

The UHRC pursues suspected human rights abusers, including in the military and police forces. It visits and inspects places of detention and holds private conferences with detainees on their conditions in custody. It investigates reports of human rights abuses, reports to parliament its annual findings, and recommends measures to improve the executive's respect of human rights. The UHRC reported the executive did not always implement its recommendations.

In November 2019 the UHRC chairperson died suddenly of natural causes, and by year's end, the UHRC had not yet appointed a permanent replacement. Members of parliament and NGOs expressed concern that although there was an acting chairperson, the lack of

an official chairperson hindered the work of the UHRC. The UHRC's annual report cannot be publicly released without the chairperson first presenting it to parliament--without a chairperson, this report remained pending. On July 30, parliament's Public Accounts Committee questioned the UHRC regarding 1.3 billion Ugandan shillings ($351,000) of unspent funds in the 2018/19 fiscal year. The UHRC responded that with only two commissioners, the lack of a fully constituted committee meant they had been unable to conduct tribunal sessions and hear cases.

The UHRC provided human rights guidance to the government during the COVID- 19 pandemic, reporting on March 27 that the measures the government imposed did not infringe on the human rights of citizens. On June 23, the acting UHRC chairperson told reporters that through UHRC helplines they had received 283 complaints of torture perpetrated by security forces since the March implementation of COVID-19 countermeasures began. Of these, 150 complaints listed the UPF as perpetrators, 83 cited the UPDF, and five the Uganda Prison Service. The UHRC investigated these claims, referring them to the COVID-19 task force and district authorities as needed. Throughout the implementation of COVID-19 measures, the UHRC cautioned security forces to reduce their use of force, and citizens to follow the government regulations.

CHAPTER SIXTEEN

ENCROACHMENT ON GENERAL FREEDOMS BY THE STATE AND COMPENSATION (SUING THE ATTORNEY GENERAL) LIABILITY FOR POLICE EXCESSES AND BRUTALITY

Article 250(2)[470] of the 1995 Constitution stipulates that in civil proceedings by or against the government shall be instituted by or against the Attorney General.[471] In civil proceedings, the Government as master and employer of police officers is vicariously liable or responsible for acts of police officers done within the course of duty. In the case of Muwonge Vs Attorney General,[472] the Government was sued in negligence through the Attorney General for acts of a Policeman who during a riot fired shots that killed the Appellant's father in his house. The court had to decide whether the Government was responsible for the police officer's acts. It was held that the firing of the shot was an act done within the exercise of the policeman's duty for which the Government of Uganda was liable as master even if it was wanton, unlawful and unjustified. The question to ask is whether the acts of the Policeman were committed in the course of the policeman's duty regardless of whether they were committed contrary to the master's general instructions. The Government is therefore liable for acts of a policeman done within the exercise of his duty even when the acts are done contraryto its orders, wantonly recklessly or even negligently.

Therefore, for any person aggrieved by the conduct of the Police and they believe that it has infringed upon or threatened their fundamental rights and freedoms, Article 50 entitles them to petition the High Court for enforcement of their rights. They can also

[470] Constitution of the Republic of Uganda, 1995 (As amended)
[471] See also Section 10 of the Government Proceedings Act (Cap 77)
[472] [1967] EA 17

institute a suit in negligence against the government for any harm occasioned by any negligent acts of the police.

An aggrieved person who does not pursue civil court action may lodge a complaint with the **Uganda Human Rights Commission** which is mandated under Article 52 of the Constitution to investigate, at its own initiative or on a complaint made by any person or group of persons against the violation of any human right. The Commission may hear the complaint and order redress in terms of compensation or any other legal remedy. Police officers can also be held personally liable through criminal proceedings for their reckless acts in law enforcement.

The Police itself **can open up investigations and commence criminal proceedings against its officers**. In the case of Byarugaba v Uganda,[473] a Police Inspector, was convicted of unlawfully wounding two men who had been arrested but not charged with any offence. He shot them on the allegation that they were attempting to escape from lawful custody and yet they were unarmed and hand-cuffed. The court held that he could have easily re-arrested them without the use of excessive force and he was thus convicted. The 2014 Uganda Human Rights Commission report also states that, on 20th January, 2014, Police in Jinja killed a one Rashid Ntale, a seventh-grade pupil, when they fired live bullets to stop a student riot in the Bugembe sports stadium. Consequently, on 24th February, authorities arrested two police officers, Patrick Nuwagaba and Constable Julian Mucunguzi, and were charged by a court in Jinja with murder. The case is still pending in court but it is evidence that police officers can be held personally liable for their action.

P L E A D I N G S

It is in all cases desirable and necessary that the matter to be submitted in court for decision should in all cases be ascertained. The defendant is entitled to know all that the plaintiff alleges against him or her. The plaintiff is also entitled to know what the

[473] [1973] 1 EA 234 (CAK)

defendant's defence is.

The defendant may dispute every statement made by the plaintiff or may be prepared to prove other facts that will give the case a different turn. He or she may rely on a point of law or on the claim. In all cases, before the trial, parties should know exactly what they are fighting about. Otherwise, they unnecessarily labour and incur unnecessary expenses to procure evidence to prove at the trial facts which the opposite party concedes.

Section 2 of the Civil Procedure Act defines pleadings to include "any petition or summons, and also includes the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant to them, and the reply of the plaintiff to any defence or counterclaim of a defendant".

In Odger's Principles of Pleadings and Practice, 20th Edition, page 11, pleadings are defined as statements in writing, served by each party alternately on his opponent, stating what his contention will be at the trial, and giving all such details as his opponent needs to know in order to prepare his case in answer".

The usual pleadings in an action are: • Statement of claim/Plaint, in which the plaintiff sets out his or her cause of action with all necessary particulars as to his or her injuries and losses. • A defence, in which the defendant deals with every material fact alleged by the plaintiff in his statement of claim and also states new facts on which he or she intends to rely. A defendant may also set up a cross claim known as a counter claim. • A reply in which the plaintiff deals with fresh facts raised by the defendant in his or her defence. A reply is unusual except where a defendant sets up a counter claim.

The plaintiff naturally begins with a plaint presented to court. On the plaint, the plaintiff lays his or her claim.

The defendant may put in his or her defence which besides answering the plaintiff's claim may set up a counter claim or a set off.

The plaintiff may make a reply and the defendant may rejoin. Each of the alternate pleadings must in its own terms either admit or deny the facts alleged in the last preceding pleadings. It may also allege additional facts where necessary.

The points admitted by either side are extracted and distinguished from those in controversy. Other facts not disputed may prove to be immaterial. Thus, litigation is limited to the real matters in dispute.

Pleadings should be conducted so as to evolve clearly defined issues, definite propositions of law and fact asserted by one party and denied by the other but which both agree to be the points on which they wish to have the court decide in the suit. Refer to:

(a) Angella Katatumba v Anti-Corruption Coalition of Uganda, HCCS 307 of 2011 (Commercial Court),

(b) Michael Richardson v Randblair & Another (HCMA 51 of 2012 – Commercial Court)

There are advantages achieved after the exchange of pleadings namely:

- The parties themselves get to know what exactly is in dispute and actually may find that they are fighting over nothing.
- The parties get to know what exactly will be brought at the trial and this may save expenses in procuring evidence.
- The mode of the trial may be determined from the pleadings which may raise a simple point of law.
- Pleadings help in final determination of the issues. The successors to the parties do not have to fight over the same issue. (see s.7 CPA).

The function of pleadings is to ascertain with precision the matters on which the parties differ and those on which they agree and thus, to arrive at clearly defined issues which both parties desire a judicial decision. To arrive at this, pleadings must be exchanged between the parties in accordance with the law and practice.

The law requires each party to state clearly and intelligibly the material facts on which he or she relies omitting everything immaterial and to insist on his or her opponent admitting or expressly denying every material matter alleged against him or her. Each party must give his or her opponent a sufficient outline of the case.

After the first pleading, namely the plaint, each party must do more than state his or her case. He or she must deal with what is presented by the opponent. A party who wants to contest the opponent's case must deal with the other party's case in three ways:

a) He or she can deny the whole or some essential part of averments of facts contained in the pleadings. This is what is called traversing an opponent's allegations and the party will in essence be compelling the other to prove his or her allegation. [474]

b) He or she may confess and avoid (confession and avoidance). In his or her defence, the defendant may admit the truth of the facts set out by the plaintiff but then allege other facts which go to destroy the effect of the facts alleged in the plaint. This is so for instance in cases of contributory negligence. A plea of confession and avoidance neither simply admits nor merely denies; it admits that the facts alleged by the opposite party make out a good prima facie case or defence, but it proceeds to destroy the effect of these allegations either by showing some justification or excuse of the matter charged, or some discharge or release from it. [475]

c) A demurrer – This basically means pleading a point of law. The defendant may plead res judicata, limitation, e.t.c. particularly, the allegation may be traversed or objected to as bad in law, or some collateral matter may be raised to destroy the effect of the plaintiff's pleading. A demurrer in effect disputes the sufficiency in law of a pleading on the opposite side. In Uganda, it comes in form of what are called preliminary objections. In Mukisa Biscuit Manufacturing Co. Ltd –Vs- West End Distributors Ltd [1969] EA 696, at p. 701 Sir Charles Newbold, p. added: "A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any

[474] Refer to: Nile Bank Ltd v Thomas Kato & Others, HCMA 1190 of 1999 (Commercial Court)
[475] Refer to: Andes (EAS) Limited v Akoong Wat Mulik Systems Ltd & 2 Others , HCCS No. 184 of 2008; Agri Industrial Management Agency Ltd v Kayonza Growers Tea Factory Ltd & Another, HCCS No. 819 of 2004(Commercial Court).

fact has to be ascertained or if what is sought is the exercise of a judicial discretion." [476]

The cardinal rule of pleadings is contained in order 6 rule 1(1) which states that "Every pleading shall contain a brief statement of the material facts on which the party pleading relies for a claim or defence, as the case may be."

Under Order 6 rule 1(2) it is provided that: "the pleadings shall, when necessary, be divided into paragraphs, numbered consecutively; and dates, sums and numbers shall be expressed in figures."

From this rule, it follows that:

(a) Pleadings should contain facts not law and a party has to prove those facts that will help him or her to hold his or her case and he or she must do so precisely.[477]

In Shaw v Shaw [1954] 2 QB 429, 441, Lord Denning said that:

"It is said that an implied warranty is not alleged in the pleadings, but all the material facts are alleged, and in these days, so long as those facts are alleged, that is sufficient for the court to proceed to judgment without putting any particular legal label upon the cause of action".[478]

Whenever a party is pleading, he must only set out the material facts. It is not sufficient to plead generally.

(b) A party must plead only the material facts. In Bruce v Oldham's Press Ltd, [479] Scott, LJ, said that: "The word 'material' means necessary for the purpose of formulating a complete cause of action, and if any one 'material' fact is omitted, the statement of claim is bad".

In Darbyshire v Leigh[480], it was stated that: "But in an action for libel or slander, the precise words complained of are material, and they must be set out verbatim in the

[476] Refer to: 1. Dr. Arinaitwe Raphael & 37 others v Inspectorate of Government, HCCS No. 349 of 2007 (Civil Division) 2. ZTE Corporation v Uganda Telecom Ltd, HCCS No. 169 of 2013[2015]-ULII

[477] Refer to: Wekesa John Patrick v Attorney General, HCCS No. 130 of 2008 (Civil Division); Orishaba & 25 Others v Gold Trust Bank (U) Ltd, HCSS No. 194 of 2009 (Civil Division)

[478] See also: Singlehurst v Tapscott Steamship Co. (1899) WN 133

[479] [1936] 1 KB 712,

[480] [1896] 1 QB 554, 65 LJ QB 360

statement of claim. If the words taken by themselves are not clearly actionable, the plaintiff must also insert in his statement of claim an averment (with particulars in support) of an actionable meaning which he will contend the words conveyed to those to whom they were established. Such an averment is called an innuendo".

Whether or not a fact is material will depend on the circumstances of a case and where there is doubt, a fact should be included in the pleadings as the more facts included the better.

Where notice is an element of a cause of action, one must plead that notice. Rule 14 of Order 6 provides that: "Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege the notice as a fact, unless the form or the precise terms of the notice, or the circumstances from which the notice is to be inferred, are material." For instance, under Section 47 of the Bills of Exchange Act, it is a requirement to give notice of dishonor to the person who issued the bill of exchange.

A party must state his or her case. The plaintiff is not entitled to any relief not pleaded in the pleadings and not proved at the trial. In David Acar v Acar Aliro,[481] the court found that a party who has not pleaded an issue or led evidence on it in a lower court cannot raise it on appeal.

Under Order 6 rule 2, every pleading must be accompanied by a summary of evidence, list of witnesses, list of documents and list of authorities. This is hinged on the fundamental premise that there should be no element of surprise at the trial. Additional lists can be presented to the court with leave.

PARTICULARS IN PLEADINGS

The necessity for particulars springs from the need to have precise and concise pleadings. They serve to supplement otherwise vague and generalized pleadings and are necessary for a fair trial.

Particulars also help to prevent surprise at the trial by informing the other party of the

[481] (1987) HCB 60

nature of the case he or she is likely to meet and defend thus securing ground for an amicable settlement of issues as opposed to warfare.

Order 6 rule 3 of the CPR provides that: "In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary, the particulars with dates shall be stated in the pleadings."

In Bisuti v Busoga District Administration (1971) 1 ULR 179 (, the court held that the function of particulars was to carry into operation the overriding principle that litigation between the parties and particularly the trial should be conducted fairly, openly and without surprise. They serve to inform the other side of the nature of the case they have to meet as distinguished from the mode in which the case is to be proved, to enable the other side to know the what evidence they ought to be prepared with and to prepare for trial and to prevent the other side from being taken by surprise.

In Lubega v Barclays Bank, SCCA No. 2 of 1992, the Supreme Court held that particulars of fraud must be pleaded as a legal requirement but that failure to do so is a mere irregularity curable by adducing evidence.

In Kampala Bottlers v Damanico, SCCA No. 22 of 1992 court found that particulars are mandatory and failure to state them was fatal. Refer also to: Nagawa Agnes & Another v Segawa Samuel and 8 Others, HCCS No. 27 of 2012(Civil Division)

Further and Better Particulars Pleadings may be filed and exchanged between the parties, a plaint may be served on the defendant who may serve a written statement of defence in turn but the other party may feel that the opposite party's pleadings lack the particulars required. In situations where a party finds that the adversary's pleadings are not clear, procedural law provides for methods of seeking clarity.

This can be through seeking further and better particulars, discovery of documents or the administration of interrogatories. The opposite party's pleadings may be attacked in order to enable the party to acquire the necessary particulars required in the case.

Since a party cannot amend the other party's pleadings, he or she can ask for an alteration or clarification in the other party's pleadings.

Order 6 rule 4 states that: "A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, may in all cases be ordered upon such terms as to costs and otherwise as may be just."

Initially, the unsatisfied party writes to the other requesting him to furnish him with material facts. If after correspondence the particulars are not forthcoming, the party requiring particulars may apply to court for an order requesting the opposite party to furnish further and better particulars and the court may make such order.

The object of further and better particulars is to enable the other party to know what to expect at the trial. The opponent should not be surprised.

INJUNCTIONS AGAINST GOVERNMENT

Section 14 of the Government Proceedings Act Cap 77 gives the court powers to grant all such remedies against government as may be granted against private individuals in civil proceedings. However, the section bars the court from giving any such relief against the government if the effect is to grant an injunction or to order specific performance.

Similarly, according to section 14(2) an injunction can't be granted against a government official if the effect is that the relief is granted against government.

In the case of Attorney General vs. Silvers Springs Hotel Ltd (1992) II KALR 42, Court observed that the purpose (of now section 14) of is that government machinery shouldn't be brought to halt and the government shouldn't be subject to embarrassment. That it will be against public policy if the government business was brought to halt.

In the case of Christopher Sebuliba vs. Attorney General the plaintiff sued the government to recover land and for an eviction order in the trial court. The eviction order was denied as being contrary to section 14 of the Government Proceedings Act. On appeal, Justice Platt held that whereas the government is entitled to protection, such protection should be scrutinized carefully. There situations where the government may not insist on such

protection or may by implication wave its immunity. In this case the government conduct was such that it had waved its immunity. The government had indicated to the plaintiff that it wouldn't vacate the premises without a court order. However, court noted that it would be unfair to the plaintiff if the same government claimed immunity when faced with the court order.

The current position of the law as regards injunctions against government is in the Court of Appeal decision in the case of Attorney General vs. Osotraco Ltd.[482] An appeal arising from the judgment and orders of the High Court (Egonda Ntende) ruled that s.15 (1)(b) of the Government Proceedings Act not to be inconformity with the 1995 constitution and made ancillary order of eviction against the appellant and its agents with costs. Court of Appeal held that Art.273 requires existing laws to be construed with such modification, adoption, qualification and exceptions as may be necessary to bring into conformity with the constitution. That Art. 273 only empowers all courts to modify the existing unjust laws without necessarily having to refer all such cases to the constitutional court. This provision enables the court to expedite justice by construing unjust and archaic laws and bringing them in conformity with the constitution, so that they do not exist and are void. That the learned judge in his judgment reviewed a number of foreign decisions whose primary object was '*to do away with the archaic state protection and to place the sate or the government at par with any other juristic legal entity in line with modern social thinking of progressive societies*.' That this is the object of Art. 273 and cannot be said that he acted outside the ambit of Art. 273. That the Silver Springs case predates the 1995 constitution by about 6 years, times have changed, the decision cannot therefore be said to be in line with the spirit of the new constitution especially Art. 126(1) which provides that judicial powers is derived from the people and shall be exercised by the courts established under the constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the people. That since the 1995

[482] C.A No.32/2002.

constitution, the rights, powers and immunities of the state are not immutable anymore. That the judge's orders of eviction were confirmed.

O 41 r 3 requires service of application to the opposite party. i.e You can't get an exparte injunction. 041 r 9 Application is by chamber summons supported by affidavit. O.6 r 1 Summary of evidence, witnesses

EXECUTION AGAINST THE GOVERNMENT

Neither arrest nor attachment can be enforced against the government as of right. Rule 15 of the Government proceedings (civil procedure) rules S.171-1 excludes the applicability of O.22 (execution of decrees and orders), 23 (Attachment of debts) and 42 (appointment of receivers) to matters relating to government. Under these rules therefore, it is the law that no attachment of government property can issue.

Before an execution or satisfaction of an order against government is issued, the judgement debtor shall apply for a certificate of satisfaction order before a registrar after expiration of twenty one days S.19 GPA and Rule 14 (1) Government proceedings (civil procedure) rules. Such a copy of certificate is served to the Attorney General by the decree holder S.19 (2) GPA. This procedure was summarised in the case of Brother Peter vs A.G[483] to the effect that the proper procedure is for the judgement creditor to apply for and obtain a certificate from the registrar and present it to the proper officer or accounts and after endorsement from the Attorney General for payment.

Where the official refuses to pay, the judgement debtor can apply for mandamus. The high court has the power to make an order for mandamus which is directed towards the public officer in question requiring him to do that for which he is under a public duty to do[484]

In the case of Goodman Agencies Ltd & Ors vs A.G[485], an application for judicial review on which an order of mandamus directing the Government of Uganda through the commissioner treasury comply with the judgement and decree of court. Justice Tabaro

[483] [1980] 107
[484] S. 37 (1), Judicature Act (Cap 13)
[485] HCCS No.719/1997

held that by judgement dated 14-11-2005 it was decreed that Government to pay the sum of 1,332,172,842shs representing the value of the truck in question, Shs 12,865,370,000 representing loss of income/ earning and. Shs300,000,000 being cost of the suit. That subsequently in a ruling of court it was ordered that the decretal amount be paid in court, to date the defendant A.G has not met the detrital amount. That ordinarily the judgement creditors would be entitled to proceed with the execution, it is well known that execution against the Government is not permitted by law. Since there is no other mode or channel for recovery of the detrital amount, an application is granted under O.46A and an application for mandamus shall be fixed.

In the case of Nabuwati & 2 Ors vs. The Secretary to the Treasury & Anor [486] the applicant sought orders of mandamus to issue against the respondents to pay money indicated in the Certificate of order against the government. The issue was whether this was a proper case for issue of the order of mandamus. Court held that the high court has discretion to grant an order of manadamus in all cases in which it appears to be just and convenient. The order may be granted unconditionally or on such terms and conditions as the court thinks fit. That in order to obtain a writ of mandamus, the Applicant has to establish the following circumstances;

- A clear legal right and a corresponding duty in the respondent
- That some specific act or thing that the law requires that particular officer to so, has been omitted to be done
- Lack of any alternative
- Whether the alternative remedy exists but it is inconvenient, less beneficial or less effective or totally ineffective.

That courts have clearly stated that 'the duty to perform an act must be indisputable and plainly defined as mandamus will not issue to enforce doubtful rights'[487]

That in the present case, the applicant obtained judgement against the Attorney general,

[486] HCMA No. 2613 of 2016
[487] see Nampogo Robert and Another vs. A.G HCCMA 0048/2009.

a decree was extracted. A certificate of order was issued. Minister of justice by letter directed the respondents to pay the amounts due in the said certificate but the respondents have failed to settle the amount due, to the detriment of the applicants. That it has been established by courts '*a decree or order of payment made against Government becomes a statutory duty for the Government concerned to perform the duty. And that payments decreed against Government have to be made by the Attorney General through the Treasury Officer of Accounts.*'

That the respondent's refusal and or failure to pay amounts decreed by court continues to grossly inconvenience the applicants. The writ of mandamus to issue to compel the respondents to perform their statutory duty to pay the applicants the sums due and owing as per the decree and certificate of order against the government.

In case an order of mandamus is granted and the official is still obstinate, court can invoke contempt of court proceedings or by an application to show cause why the respondent should not be committed to a civil prison for non-compliance with order of mandamus. In practice, some decree holders are pushing for execution against Government departments by way of attachment of Government property (motor vehicles) relying on the principles and reasoning for the grant of injunctive relief against the Government .[488]

CONCLUSION

In conclusion, Police brutality infringes on Ugandans' fundamental right to be free from cruel, inhuman, degrading treatment as well as the right to peacefully assemble. Police needs to exercise its mandate with regard to principles of reasonableness and necessity. The overt displays of brutality and violence by the police are a misuse of its power in the Police Act. However, clear laws that define and limit the powers of the Police to what is absolutely necessary for it to perform its functions coupled with police training on the law, can result in less cases of Police brutality, more transparency and professionalism in effecting arrests.

[488] See Ostraca Ltd v A.G. (HC-00-CV-CS-1986/1380) [2002] UGHC 5

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APPENDIX

CASE EXTRACTS

JOSHI V UGANDA SUGAR FACTORY LTD [1968] EA 570

CORAM: (DE LESTANG. V-P, SPRY AND LAW, JJ.A.)

CIVIL APPEAL NO 16 OF 1968

BETWEEN

NARMADASHANKER MANISHANKER JOSHI}…….APPELANT

AND

UGANDA SUGAR FACTORY LIMITED}……...RESPONDENT

[Appeal from a ruling and order of the High Court of Uganda at Kampala (Saldanha, J.) dated 7th February, 1968 in Civil Case No. 305 of 1967] 11 July, 1968.

The following Judgments were read.

L A W , J . A .

This is an appeal against the dismissal by the High Court of Uganda (Saldanha, J.) of an application for further and better particulars of a pleading. The appellant is the plaintiff in a pending civil suit in which he claims damages for personal injuries resulting from a collision between the motor-cycle ridden by him and a tractor and trailer driven by the servant or agent of the defendant company.

By paragraph 5of the plaint, it is alleged that the accident happened “on or about the 2nd day of February, 1965, at about 7.45 p.m., on a road in Bukolongo Division of the defendant's estate near Lugazi" amongst the particulars of negligence alleged against the defendant's driver are that

“(c) he drove the said tractor or permitted them (sic) to be driven without any effective lighting;

(g) he failed to slow down or to stop when his view ahead was obstructed due to darkness."

By paragraph 4 of the defence, the defendant admitted that the accident occurred on the day and at the place alleged in the plaintiff but went on to plead "further, the defendant does not admit that the collision occurred at 7.45 p.m. as alleged." By paragraphs 5 and 6 of the defence it is pleaded that the collision was caused solely, alternatively was contributed to, by the plaintiff's own negligence, which is particularized but without any reference to lights.

The plaintiff's advocate wrote to the defendant's advocate in the following terms

"I refer to the defence filed herein and I shall be obliged if you will let me have the following further and better particulars thereof:

Para 4. The defendant denies that the accident took place at 7.45 p.m. I wish to know what time the defendant alleges that the accident took place."

To this letter the defendant's advocate replied as follows

"It is the plaintiff's allegation that the collision occurred at 7.45 p.m. (paragraph 5 of the plaint). Paragraph 4 of the written statement of Defence states, inter alia that the defendant does not admit that the collision occurred at 7.45 p.m. as alleged. The statement in your letter that 'the defendant denies that the accident took place at 7.45 p.m.' is not correct. The plaintiff has made a certain allegation of fact, and it is open to the defendant to say no more than that the allegation is not admitted. In our opinion, it is for the plaintiff to prove his allegation and he cannot call upon the defendant to amplify the non- admission."

The .plaintiff then applied to the High Court by notice of motion for an order that the defendant supply the further and better particulars asked for. n dismissing this application, Saldanha J. said "The plaintiff's task has been facilitated by the defendant's admission of the Collision and the date on which it occurred. That it occurred at 7.45 p.m. is not admitted and the plaintiff must therefore prove it and the defendant is under no obligation to state the time at which he alleges the collision occurred."

From this decision the plaintiff now appeals. Mr. Hunt for the plaintiff /appellant has made a number of submissions. The first is that there is no difference between a refusal

to admit an allegation, and a denial thereof and he relies on a dictum to this effect by Grove J. in Hall v.London and North-Western Railway Co. . (1877) XXXV L.T. 848.

Secondly, Mr. Hunt submits that, reading the pleadings as a whole, time is a material factor in this case. The plaintiff has claimed that the accident occurred in the hours of darkness, and that it has caused inter alia by reason of defective lighting on the defendant's vehicle. By admitting the date and place of' the accident, but denying that it occurred at 7.45 p.m. when it was dark, the defendant in Mr. Hunt's submission must be taken to be asserting that the accident took place at a time when it was not dark, and in those circumstances the plaintiff is entitled to particulars as to the time when the defendant alleges that the accident took place.

Thirdly, Mr. Hunt submits that the object of pleadings is to prevent either party being taken by surprise at the trial, and to enable the parties to know what case they have to meet. He relies on Order 6 rule 9 which reads as follows: "When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if the allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances."

Mr. Hunt submits that the defendant's pleading in this case is evasive. In admitting the date and place of the accident, but not admitting the time, the defendant is in effect alleging that the accident took place at a different time, and he should be made to give particulars of this allegation.

Mr. Dholakia for the defendant/respondent submits that all that the defendant has done is to traverse the plaintiff's statement that the accident took place at 7.45 p.m. and put him to proof of that allegation. A traverse of a positive allegation does not constitute an assertion of fact, and a defendant cannot be ordered to particularize the mere non-

admission of a pleaded fact. This is not a case of a traverse of a negative averment, which might involve an affirmative allegation (Pinson v. Lloyds Bank (1941) 2 All E.R. 636).
Mr. Dholakia also submits that a defendant should not be required. To disclose particulars of the circumstances of an accident which he 113,s admitted did take place, and he relies in this respect on Fox v. H. Wood (1962) 3 All E.H. 1100, and submits that the time at which an admitted accident occurred is one of its circumstances.
I may say at once that I disagree with this submission. It is clear from the judgment of Diplock L.J. in Fox's case, with which the ether members of the court agreed that by the circumstances of the accident he meant how and not when it happened.
Mr. Dholakia also relied on the judgment of Pennyquick,J. in Chapple v. Electrical Trades Union (1961) 3 All E.H. 612, in which the learned judge cited with approval the notes to Order 19 rule 6 R.S.C. In the Annual Practice, 1961, and in particular this extract there from
"Traverse by defendant. A traverse by a defendant even of a negative allegation which the plaintiff must establish in order to succeed is not matter stated of which particulars will be ordered, But particulars may be ordered where the traverse involves a positive allegation."
I am content to accept the above as a correct statement of the law on the subject with which this appeal is concerned. The answer in this appeal depends in my view on whether the defendant's refusal to admit the plaintiff's assertion that the accident occurred at 7.45 p.m., and therefore in the hours of darkness, implies a positive assertion on the art of the defendant that the accident occurred at a time other than in the hours of darkness.
I agree with Mr. Hunt that there is no effective (difference between a refusal to admit a fact and a denial of that fact. The exact time at which an accident occurred is not normally of material importance, but it is material in this case in view of the allegations of negligence in relation to light. The fact that the defendant has gone out of his way, whilst admitting the date and place of the accident, to deny the time of its happening, raises to

my mind a strong interference that the defendant considers the time of the accident to be a material factor in this case.

It would be material if the time contended for by the defence is a time during the hours of daylight, in which case those allegations of negligence relating to lights and to failure to stop because of darkness would fail. If in fact the defendant will contend at the trial that the accident occurred in the hours of daylight, then I consider that the plaintiff is entitled to be so informed, in order not to be taken by surprise.

In Thorp v. Holdsworth (1876) 3 Ch.D. 637, the defendant pleaded as follows:-

"The defendant denies that the terms of the arrangement between himself and the plaintiff were definitely agreed upon as alleged"

Such a denial was held by Jessel M.R. to be evasive, under Order XIX rule 12 R.S.C. as it was then expressed, which was in identical terminology with that of Order 6 rule 9 of the Uganda Civil Procedure Rules. As the Master of the Rolls commented "it is the very object we have always had in pleading to know what the defendant's version of the matter is in order that the parties may come to an issue". In my view the position in this appeal is comparable.

To say in a defence that it is not admitted or that it is denied, that an event took place at the time alleged in the plaint is in my opinion an evasive plea within the meaning of Order 6 rule 9, especially when time as in this case may well be a material factor. If the defendant is contending that the accident took place at a time other than "at about 7.45 p.m." as pleaded in the plaint, then to comply with Order 6 rule 9 he should specify the time for which he contends. If he is not so contending, he should not have traversed the allegation as to time. I consider that the plaintiff is entitled to know what the defendant's version is in relation to time of the accident, which has been put in issue by the defendant. I would allow this appeal.

S P R Y , J . A . :

I have had the advantage of reading in draft the judgment of Law, J.A., in which are set out the facts giving rise to this appeal and I do not think it necessary to repeat them in

full. Briefly, the position is that the appellant has averred that an accident took place at a particular time and place. The respondent company has admitted that the accident occurred and the place where it occurred but has refused to admit the time. The appellant claims to be entitled to further and better particulars, that is, he claims to be entitled to know at what time the respondent company alleges the accident took place.

The High Court refused an order for particulars and the appellant now appeals to this Court. The appeal turns on four rules of the Civil Procedure (Revised) Rules, 1948.These are rules 3, 3A, 7 and 9 of Order VI. Rule 3 provides for the ordering of further and better particulars; rule 3A provides that an allegation of fact in any pleading if not specifically denied, is to be taken to be admitted; rule 7 provides that every allegation of fact must be dealt with specifically by a defendant; and rule 9 provides that a denial must not be evasive.

The general principle is, I think; set out in the judgment of Astbury, J., in Weinberger v. Inglis (1916-17) All E.R. Rep. 843, when he said "As a general rule, the court never orders a defendant to give particulars of facts and matters which the plaintiff has to prove in order to Succeed, and this is especially the case where a defendant has confined himself to putting the plaintiff to the proof of allegations in the statement of claim, the onus of establishing which lies upon him."

Looking at the matter on the simplest footing, the appellant has made certain allegations which he must prove to succeed. The respondent company has made his task somewhat easier by admitting certain of those allegations but the onus remains on the appellant to prove those that are not admitted.

The court will, however, order a defendant to furnish particulars where he is making positive averments and will also exercise its discretion to order particulars where it believes that by so doing it will narrow the issues and avoid surprise, and so reduce expense.

It has been suggested that in refusing to admit (which, I agree, is for all practical purposes the same as denying) that the accident occurred at 7.45 p.m., the respondent company is,

in effect, asserting that it occurred at some other time, and that, since the plaint contains reference to a vehicle not having "any effective lighting" and to the view being obstructed by "darkness", it may be assumed that what he is asserting is that the accident occurred in day light. I am not persuaded by that argument. Of course, in a sense, just as a coin has an obverse and a reverse, so every negative can be expressed as a positive, but the question, as I see it, is not whether a denial could have been expressed in a positive way, but whether the defendant's intention is merely to deny or to set up a positive case in contradiction. A defendant is perfectly entitled, if he wishes, to adopt an entirely negative attitude, putting the plaintiff to proof of his allegations, and if he does so, the plaintiff cannot, by asking for particulars, compel him to make positive assertions.

On the other hand, of course, when a defendant adopts a purely defensive attitude in his pleadings, he will not be allowed

to conduct his case on a different footing, or at least only on terms (Weinberger v. Inglis, supra; Pinson v. Lloyds & National Provincial Foreign Bank, Ltd. (1941) 2 All E.R. 636). Again, I cannot say that there is likely to be any question of surprise. The appellant has averred, and presumably believes he can prove, that the accident occurred at about 7.45 p.m. He has been given notice that that allegation will be challenged. If the allegation is material, and it would appear that both sides think it is, the appellant will call all the evidence he can to prove it.

I cannot see that he is in any way handicapped in the preparation of his case. It is possible that there may be some extraordinary development at the trial, but the court has a discretion to allow rebutting evidence to meet any such situation, and for this purpose may, if necessary, grant an adjournment, making any appropriate order as to costs. There remains the question whether the denial can be said to be evasive. At first sight, there might seem an analogy with the example given in rule 9. If it is averred that a defendant received a certain sum, it is evasive merely to deny the receipt of that sum. The defendant must either say what sum he received, or that he received nothing.

On consideration, however, I do not think the analogy a good one. A denial by a defendant that he has received, say, £50, is, on the face of it, a denial of liability and it is obviously misleading to the plaintiff and to the court if he had in fact received £49. Here, however, the issue is one of negligence and that is clearly denied. The time when the accident occurred is not a primary issue. It may, or may not, be of importance in assessing the evidence of negligence. It is true that the appellant has referred to "darkness" in his plaint but only in the particulars, and a defendant is not required to plead to particulars (Chapple v. E.T.U. (1961) 3 All E.R. 612).

In my opinion, the denial was not evasive. For the reasons I have given, I think the learned Judge was right in refusing to order particulars and I would dismiss the appeal.

DE LESTANG V-P.:

The facts giving rise to this appeal are fully stated in the judgment of Law, J.A. and I will not repeat them. Suffice it to say that the appellant, who was the plaintiff in the court below, averred in his plaint that the accident on which his claim was found occurred at 7.45.p.m. on the day and at the place stated. The respondent admitted that the accident had taken place on the date and at the place stated but did not admit that "it occurred at 7.45.p.m. as alleged". As the appellant's case is partly founded on the accident having occurred in darkness, the time is clearly a material factor in the case. I do not think also that there is any material difference between a non-admission and a denial. It is contended for the appellant that in these circumstances the respondent's defence is evasive and that unless he gives particulars of the time when the accident occurred the appellant would be taken by surprise at the trial if it were sought to prove that it occurred in daylight. I cannot see any merit in the latter contention. Surely it is for the appellant to prove his case and he knows that time is in issue. I fail to see how in these circumstances he can say that he would be taken by surprise on the matter of time. As regards the allegation of evasiveness, a denial in the form in which it was made in this case is an extremely common form of pleading and does not seem to me to be embarrassing as it makes it quite clear that time is in issue. The Civil Procedure Rules of Uganda on the subject of particulars are not

materially different from the rules of the Supreme Court in England and consequently guidance may be obtained from the decided English cases.

In Fox v. H. Wood (Harrow) Limited, (1962) 3 All E.R. 1100, a workman put his foot in a hole in the floor at his place of work; he fell and was injured. In an action by the workman against his employers for damages for negligence, the defendants, by their defence, alleged contributory negligence and pleaded "it is admitted that the plaintiff suffered an accident on the date referred to in the statement of claim during the course of his employment, but no admissions are made as to the circumstances of the alleged accident."

The plaintiff applied for particulars of the accident admitted and for a description of it, saying when and where it occurred. It was held by the Court of Appeal that the defendants should not be ordered to give particulars of the accident admitted.

I cannot distinguish the present case from that case, and I would, with respect, endorse what Diplock, L.J. said in it.

"I might add that the only effect of permitting particulars to be given where the pleading is in this form would be to dissuade defendants from making such admissions as they can to limit the issues at the trial."

I would accordingly dismiss this appeal and as Spry, J.A. is of the same view, the appeal is dismissed with costs.

See also: Weiberger v Inglis (1916-17) All ER 844 (House of Lords)

BANK OF BARODA (U) LTD V WILSON BUYONJO KAMUGUNDA, SCCA NO. 10 OF 2004

[Appeal from a decision of the Court of Appeal at Kampala before (Okello, Engwau and Byamugisha.JJ.A.) dated 3rd March, 2004 in Civil Appeal No.66 of 2002]

JUDGMENT OF TSEKOOKO, JSC

This is a second appeal. It arises from the decision of the Court of Appeal which overturned the judgment of the trial judge, Katutsi, J., who had dismissed a suit instituted by the respondent to recover shs 80m/= from the appellant.

For easy reference I shall refer to the appellant as the defendant and to the respondent as the plaintiff. The facts of this case are as follows: Two brothers named Ham Kamugunda and Godfrey Katanywa, owned land upon which they lived in Lake Mburo National Park in Mbarara District. Ham Kamugunda had a son called Wilson Buyonjo Kamugunda, the plaintiff. At some point in time, probably in 1980s, the Uganda Government acquired the land of the two brothers, evicted them from the land and undertook to compensate them. The two brothers died in 1988 before receiving the compensation for their land. The plaintiff got letters of Administration to administer the estate of his father. In the course of his search for the compensation, he learnt from officials of the Ministry of Lands and from the Bank of Uganda that compensation had in fact been effected and that a cheque for shs 80m/= had been issued in the names of the two dead brothers and that the proceeds were in Baroda Bank (U) Ltd, the present defendant. It transpired then that indeed a Uganda Government cheque No.E003100764 for shs 80m/= had been issued on 23 rd December, 1996 in the names of the dead brothers.

Apparently, some strange persons impersonated the two dead brothers, got the cheque and with the help of one David Mukasa were allowed by the defendant to open an account in the names of the two deceased in the defendant's Kampala Branch. Thereafter the impersonators withdrew the money and disappeared in thin air with that money.

The plaintiff failed to get the money. He instituted a suit in the High Court against the defendant and David Mukasa claiming for shs 80m/= as special damages, interest at 26% and general damages. The claim was based on negligence, conversion and fraud. Later, the plaintiff withdrew the suit against David Mukasa.

The basis of the plaintiff's claim was that the defendant acted negligently when it allowed David Mukasa and the other strangers to open an account in the names of the dead beneficiaries of the cheque and negligently allowed those strangers and Mukasa to bank the cheque and also to withdraw the proceeds without verifying whether the persons drawing the money were the true owners. In its defence, the defendant admitted that it collected the cheque in the course of its ordinary business and placed the proceeds to the

credit of Ham Kamugunda and Godfrey Katanywa account and that it had received payment there of in good faith and without negligence. It averred that Ham Kamugunda and Godfrey Katwanywa appeared at its premises and identified themselves. It relied on S.82 of the Bills of Exchange Act in defence. It denied negligence. During what appears to have been a scheduling conference, the trial judge recorded the following as facts agreed upon between the parties: "Defendant on or about 23/12/96 in its Kampala Branch opened an account-current is (sic) the names of Kamugunda and G. Katanywa and admitted a cheque No.E003100764 to the said account. Bank of Uganda cheque drawn in the names of it. Kamugunda and G. Katanywa for shs 80,000,000m/=(sic). The money was collected and credited to that account and subsequently disbursed."

Two issues were framed for determination by the trial judge. The first issue which was the substantial one was - "Whether the bank was negligent in opening a bank account in the names of it (sic) Kamugunda and G. Katanywa."

The second issue was about reliefs. After trying the suit in which three witnesses testified for the plaintiff, and the defendant offered no evidence, the learned trial judge answered the issue in the negative and so he dismissed the suit. Upon appeal by the plaintiff, the Court of Appeal, by a majority of two to one, held that the plaintiff established his claim. It set aside the judgment of the trial judge and instead awarded the plaintiff special damages as claimed in the sum of shs 80m/= with interest at 26% from 23rd December, 1996 till payment in full. The defendant has appealed against that decision to this Court based on nine grounds.

Mr. Kanyemibwa and Mr. Ahimbisibwe represented the defendant at the hearing of this appeal but it was Mr. Kanyemibwa who actually argued the appeal. He proposed to argue grounds 1, 2, 8 and 9 separately but ground 3, 4, 6 and 7 together. It is convenient to discuss ground 1, 2 and 3 together. The complaints in these grounds are framed in these words - "1. The learned majority Justices of Appeal erred in law in awarding a sum of shs 80,000,000/= to the respondent as money had and received by the appellant.

2. The learned majority Justices of Appeal erred in law and fact in holding that in its pleading, the appellant did not dispute the respondent's title or claim to cheque No.E003100764 in the sum of shs 80,000,000/=.

3. The learned majority of the Justices of Appeal erred in law and failed to properly evaluate the evidence on record in holding that the respondent adduced sufficient evidence proving title to the said cheque." Arguing the first ground, Mr. Kanyemibwa contended that the plaintiff did not aver in the plaint for "money had and received."

Counsel relied on Paget's Law of Banking, 12th Edition. Learned counsel further contended that the Court of Appeal erred in awarding the whole of shs 80m/= to the plaintiff who had not proved a portion of the money to which he was entitled. For that contention Counsel relied on Joshi Vs Uganda Sugar Factory (1968) EA 570. Mr. Keneth Kakuru, counsel for the plaintiff, opposed the appeal. On the first ground, learned counsel submitted that the defendant admitted receipt of the money. As regards the second ground, Mr Kakuru contended that there was no need to adduce evidence to prove plaintiff's title to the cheque because title to the cheque was admitted and that is why at the trial no issue in that regard was framed for determination. It is instructive to refer to relevant pleadings. In his plaint, the plaintiff averred that - (a) His father H. Kamugunda and G. Katanywa owned the land which was taken over by the Uganda Government. (b) On 23/12/1996 cheque No.E.003100764 for shs 80m/= in compensation for the said land was issued payable to his father H. Kamugunda and G. Katanywa. (c) By 23/12/1996, H. Kamugunda and G. Katanywa had died. The cheque was therefore fraudulently obtained by one David Mukasa who obtained the proceeds of the cheque through the defendant. (d) That the defendant was negligent in that it allowed David Mukasa to use the cheque to open an account in the names of the two dead men without verification of those men and in allowing the withdrawal of the money without satisfactory identification of those entitled to it. (e) That one Joseph Lukanga, a servant of the defendant provided unsatisfactory identification of the two men before Mukasa withdrew the money on account of H. Kamugunda and G. Katanywa.

In the 1st paragraph of its written statement of defence, the defendant contented itself by just stating that it did not admit the relationship between the plaintiff and H, Kamugunda or that the plaintiff was the administrator of Kamugunda's estate.

In paragraphs 4 and 5 of the same written defence, the defendant expressly admitted receipt of the cheque in the sum of shs 80m/= and the collection of the amount which was put on the account of Ham Kamugunda and G. Katanywa. Indeed, as noted earlier in this judgment before the trial began it was agreed between the parties that that was the position. However the defendant relied on S.82 of the Bills of Exchange Act for the proposition that it received the cheque, its proceeds and operated Kamugunda and Katanywa account according to law. It therefore denied negligence.

Mr. Kanyemibwa relied on Joshi's case (supra) for the view that in pleadings, an averment of not admitting facts alleged by the opposite party amounts to a denial and so the other side must prove its case. In my considered view the plaintiff adduced sufficient evidence at the trial to establish his relationship with the deceased and his entitlement to the cheque and its proceeds. Furthermore, I think that pre 1998 judicial decisions such as Joshi's case on the effect of pleadings must be evaluated in the light of the provisions introduced by the Civil Procedure (Amendment) Rules, 1998. For instance, Order 6 Rule 1 of CP Rules as amended requires parties to summarise the evidence and to list the witnesses and documents they propose to rely on at the trial. Accordingly, the defendant indicated in its summary of evidence that it would produce evidence to prove that persons entitled to the cheque were properly verified. It also named three witnesses. No such evidence was adduced. So Joshi's case is not helpful.

During the trial, the plaintiff and two other witnesses testified that his father Ham Kamugunda and his brother Katanywa died in 1988 that is 8 years before the cheque for compensation was issued in 1996. This evidence had been substantially set out in the summary of evidence which was annexed to the plaint. The plaintiff testified further that he is the administrator of the estate of his father. He was supported by Dawson Rugigi (PW1). The plaintiff was hardly cross-examined on his evidence. Nor was he challenged

on the relationship with the deceased nor on the fact of his status as the lawful administrator of the estate of his dead father. Indeed, the defendant elected not to give evidence, not even to call David Mukasa who was described in the statement of defence as a long standing customer of the appellant who had introduced "Ham Kamugunda and Godfrey Katanywa." Neither did the defendant call any of its employees to whom the two persons were allegedly identified when the account was opened in the names of the two dead brothers. In its written defence, the defendant averred, in para 5 that "the said Ham Kamugunda and Godfrey Katanywa were duly introduced to the defendant by David Mukasa a long standing customer of the defendant and their account was opened in a regular manner." Yet despite that express admission of the involvement of David Mukasa in the opening of the account, the learned trial judge surprisingly accepted the submission at the trial by defendant's counsel that - "..... the plaintiff undertook to prove that the account in question was opened at the instance of David Mukasa but there is no any iota of evidence that the said person was so involved." In this, the learned trial judge erroneously acceded to misleading contentions of defence counsel, because the involvement of David Mukasa at least in the opening of the account was admitted by the defendant in its statement of defence and in the summary of evidence annexed to that defence.

Mr. Kanyemibwa's contention that the plaintiff never pleaded money "had and received" in order to be entitled to it is, with respect, no basis for saying that the plaintiff was not entitled to the money. Clearly, on the facts of this case, the father of the plaintiff together with his brother (Katanywa) were entitled to the cheque and the money. Undoubtedly there is no evidence showing how much of shs 80m/= was due to each of the two dead brothers. This may be so probably because the two brothers might have been joint owners of the land. This is explicable on the basis that a single cheque was issued in their joint names, instead of two separate cheques. Further the plaintiff was not challenged in cross-examination about what portion of land did not belong to his father. Since the plaintiff is the lawful administrator of his father's estate he is entitled to claim the money. Nobody

else has come forward to lay claim on any part of the money. Needless to say, the defendant is not entitled to any portion of that money. So the defendant cannot be the one to require the plaintiff to establish title to only a portion of the money.

In her lead judgment with which another member of the court concurred, Byamugisha, JA., said this- The plaintiff averred in paragraph 4(a) and (b) of the plaint facts which show his claim or title to the cheque. The paragraph was couched in the following words: "4(a) The plaintiff's father H. Kamugunda owned land in Mburo National Park together with the late G. Katanywa. The said land was taken over by Government.

(b) on 23rd December, 1996 a cheque No. E003100764 for shs 80,000,000/= …… drawn on the Bank of Uganda was issued payable to H. Kamugunda and G. Katanywa being compensation for the above land."

The learned Justice of Appeal then noted that in its reply the defendant simply averred that it had no knowledge of the matters alleged in the above paragraph. Consequently, she concluded that the averments by the defendant did not dispute the plaintiff's title or his claim to the cheque.

As title to the cheque was not made an issue for determination the learned justice held that it was not necessary to call evidence to prove matters that were not disputed by the respondent although she found that the plaintiff had in fact adduced evidence at the trial to prove title to the cheque.

I respectfully agree with the view of the learned Justice of Appeal. Mr. Kanyemibwa referred us to passages in Paget's Book (Supra). First the passage at page 483 under the heading "Entitlement to Immediate Possession" are not helpful to the defendant's case. According to the author, it is generally agreed, in stating the requisite for a plaintiff in conversion, that the plaintiff must have been entitled to immediate possession of the chattel at the date of conversion. The author cites cases explaining circumstances when a plaintiff in an action in conversion may or may not succeed. In the present case, there is no dispute that the father of the plaintiff was entitled to the cheque and to the proceeds of it. The plaintiff stood in the shoes of his father upon becoming the legal administrator

of the estate of his father. As I stated earlier, title to the cheque and its proceeds is indisputable.

Earlier Mr. Kanyemibwa raised the question of lack of pleading "money had and received" in the plaint. At pages 490 and 491, Paget's Book (supra) relied on by counsel states, inter alia, that wherever conversion lies, and money has been received or negotiable instrument converted, the claimant many waive the wrong of conversion and sue for "money had and received" to his use. The author further opines that the claims are usually joined in the alternative and that this is the form in which the action is couched against a banker who has collected cheque for someone without title. This is not the case here. All this does not require discussion because the plaintiff's action against the defendant was based on negligence whose basis was, inter alia, that the defendant did not identify David Mukasa properly and that it was negligent in allowing strangers to open an account and draw the money in the name of the deceased persons. As noted already, the learned trial judge dismissed the suit on the basis that the plaintiff failed to prove negligence.

In the Court of Appeal, the plaintiff, argued grounds 2 and 3 which were complaints against the findings of the trial judge that no negligence was proved against the bank. These grounds were framed as follows: - "2. The learned trial judge erred in law and in fact when he did not find that the plaintiff had on a balance of probabilities proved his case. 3. The learned trial judge erred in law and in fact by applying the wrong principles of law to the facts before him and thus reaching the wrong conclusion."

The learned Justice of Appeal discussed arguments on these two grounds in these words: "These two grounds concern proof of negligence and who had the burden to prove it. Negligence when used in connection with a banking transaction like the one we are dealing with, refers to breach of duty to the possible true owner. The test to be applied was laid down in the case of TAXATION COMMISSIONER ENGLISH, SCOTTISH AND AUSTRALIAN BANK LTD (1920) AC 683 where it was held that the bank has a duty not to disregard the interest of the true owner. Therefore it has a duty to make

inquiries if there is anything to arouse suspicion that the cheque is being wrongfully dealt with. Establishing the customer's identity and the circumstances under which the cheque was obtained can assist in doing so."

The learned Justice of Appeal referred to three other English Courts decisions in which provisions (similar to S.81 and 89 of our Bills of Exchange Act) were considered. She relied on the opinions of the English Courts in those three cases, re-evaluated the evidence in the instant case and concluded that - 1) The plaintiff had averred in the plaint that the bank failed to verify the identity of David Mukasa who allegedly introduced the two impersonators to the bank. 2) Although the Bank denied allowing Mukasa to open the account on which the cheque was deposited, the bank admitted in its defence that Mukasa introduced the two customers who brought the cheque and opened the account. 3) The plaintiff proved that Ham Kamugunda and G. Katanywa were dead. 4) That the bank admitted that it collected the cheque. 5) That the plaintiff proved that the two pictures in possession of the bank were not of Kamugunda and Katanywa (two dead brothers). 6) The bank had a duty to prove that in opening the account and collecting the cheque, it exercised due care. She observed that it is a well known recognised practice of bankers in this country not to open an account for a new customer without first ascertaining the respectability of the customer. This is done by obtaining references and letters of introduction from respectable customers of the Bank. In her view the defendant adduced no evidence of the steps and precautions it took to verify the identity of the two impersonators before opening the account and collecting the cheque. 7) She concluded that this was negligence. Engwau, JA, concurred with these findings.

I respectfully agree with the opinion of the majority Justices of the Court of Appeal that the bank was negligent in not verifying the identifies of the two strangers before allowing those strangers to open an account upon which they deposited the cheque for shs 80m/=. This amount by ordinary standard was a huge amount of money. It should have aroused the curiosity of the defendant. I think that Byamugisha J.A., properly re-evaluated the evidence on the record before she concluded that the defendant was negligent.

Only one issue was framed at the commencement of the trial. The issue was whether the bank was negligent in opening a bank account in the names of Kamugunda and Godfrey Katanywa without verifying their identity. The contention of the plaintiff was that the bank was negligent in that it did not take obvious steps to verify the identity of the two persons who opened an account in the names of the two dead brothers. The plaintiff proved that the land of the two had been acquired by Government, which undertook to give compensation to the owners. The plaintiff's investigations showed that the Government had issued out a cheque in the names of his father and his uncle in the sum of shs 80m/= and that that cheque had been banked with the defendant bank. By the time the cheque was issued out on 23/12/1996 and banked the father and his brother had long died, having died eight year earlier in 1988. There was no evidence from the defendant bank to rebut this evidence. The bank stated in its written defence that the two people who opened the account were introduced by David Mukasa, a long standing customer of the Bank. The bank did not adduce any evidence showing who this David Mukasa, was and for how long he had been a customer to the bank for purposes of showing that he was a reliable and respectable customer upon which the bank could rely to allow the opening of a new account for purposes of depositing a big government cheque.

Byamugisha.J.A, relied correctly on S.106 of the Evidence Act for the view that the particulars of negligence pleaded in the plaint that related to the manner of opening the account and collecting the cheque, though pleaded by the plaintiff, were facts especially within the knowledge of the defendant bank and, therefore, the plaintiff had no burden to prove them. That section reads as follows: -

"In Civil Proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

On the basis of these provisions, Byamugisha, JA found, and I respectfully agree with her, that the burden was on the bank to call David Mukasa or evidence to show who opened the account. Since the bank averred in its statement of Defence and its summary of evidence that it was Mukasa who introduced the two persons in whose names the

account was opened whereon the cheque was banked the bank bore the burden to establish this. On this basis it is more probable than not that the alleged David Mukasa was involved in opening the account and in the disbursement of its proceeds.

By ordinary values, the amount of money involved was reasonably big. As opined by the learned Justice of Appeal, it is a notorious practice in Banks in this country for a new customer to be introduced by customers already known in the bank. The tendency is to require at least two referees. The referees should be reliable and respectable customers. From the bank's averment in its written defence, the two men were introduced by David Mukasa before the account was opened. That implies that the men were strangers in the bank. They did not operate or have an existing account with the bank. A Government Bank of Uganda cheque was involved. Surely the defendant should have inquired how the depositors were entitled to the money, who they were and from where they came. The defendant bore the responsibility of establishing whether the bearers of the cheque were the genuine payees or not before allowing them to deposit the cheque and to draw its proceeds.

I am satisfied that the respondent proved negligence against the bank. In these circumstance I agree that defendant is not protected by S.81 of the Bill of Exchange Act. Accordingly, grounds1 and 2 must fail. Although Mr. Kanyimibwa initially intimated that he would argue grounds 3,4 6 and together, he actually argued ground 3 separately.

Mr. Kanyimibwa referred to various passages in the judgment of Byamugisha, JA in which the learned Justice of Appeal held that - (a) The plaintiff adduced sufficient evidence to prove title to the cheque. (b) The plaintiff's evidence was not hearsay. (c) The bank collected the proceeds of the cheque. Counsel then contended that plaintiff's evidence was hearsay and so counsel urged us to accept the dissenting opinion of Okello, JA, that the plaintiff failed to establish title to the cheque. Mr. Kakuru argued grounds 3,4 and 5 together and supported the majority decision of the Court of Appeal.

Okello, JA, dissented on the basis that the Plaintiff had failed to prove title to the cheque. According to the learned Justice of Appeal, this was because the evidence of the plaintiff

and his first witness (PW1) did not establish that the cheque which was collected by the bank had been for compensation and intended for the dead brothers, (Ham Kamugunda and Godfrey Katanywa), rather than those other persons who appeared at the defendant's Bank and opened the account in those names. Therefore according to the learned Justice of Appeal, the plaintiff failed to establish a prima facie case that he was entitled to the cheque. So the Bank was not negligent in paying out the proceeds of the cheque. With greatest respect, I think that the learned Justice of Appeal put a higher burden of proof on the plaintiff than was necessary. On the facts of this case it would be an extreme coincidence and highly unlikely that two totally strange persons would by coincidence bear names identical to those of the two dead brother, get also a government cheque bearing the same names and the same amount of money and deposit it in the same bank where the Bank of Uganda said the cheque for the dead brothers had been deposited.

Ground three has no substance. I have already covered it in my discussion of grounds 1 and 2. In my opinion, Byamugisha, JA., properly and adequately re-evaluated the evidence before she concluded that the plaintiff established title to the cheque.

Ground 3 must fail. The complaint in Ground 8 is that the majority Justices of Appeal erred in law and fact in holding that although the particulars of negligence were not proved the defect was cured by admissions of the defendant as contained in the written statement of defence. I disposed of this ground when I considered grounds 1,2 and 3. Anyway Mr. Kanyemibwa referred to pleadings of both parties and contended that the defendant in paragraph 6 of its WSD specifically denied that Mukasa opened and operated the account on which shs 80m/= were deposited. He contended that the Court of Appeal erred in holding that the burden of proof shifted to the defendant. Mr. Kakuru submitted that upon proof by the plaintiff that Ham Kamugunda and Katanywa were dead, the burden shifted to the defendant to prove that the men were the ones who opened and operated the account. Of course in para 5(ii) of its WSD, the defendant averred that Ham Kamugunda and Godfrey Katanywa were duly introduced to the defendant by David Mukasa, a long standing customer of the defendant and the account was opened in a

regular manner. In 5 (iii) the defendant also averred that Ham Kamugunda and God Katanywa duly identified themselves to the defendant. However the defendant neither explained in the same written statement of defence or the summary of evidence annexed thereto nor gave evidence to show how the two identified themselves. In compliance with the provisions of the Civil Procedures Rules as amended in 1998, the defendant, as stated earlier listed 3 witnesses as its witnesses. None was called. No explanation was offered why they were not called or why they could not testify. Para 6 of WSD upon which Mr. Kanyimibwa relied was worded thus: "The defendant specifically denies tat the said account was opened by David Mukasa and operated by him in the names of Ham Kamugunda and Godfrey Katanywa as alleged in the plaint."

May I point out at the risk of being lengthy that in its summary of evidence which was annexed to the defence, the defendant stated the following:

"The first defendant shall lead evidence to the effect that on 31st December, 1996 it opened a savings account in the names of Ham Kamugunda and Godfrey Katanywa who appeared at the first defendant's premise at Plot 18, Kampala Road and introduced by David Mukasa, a customer of the first defendant. The said Ham Kamugunda Godfrey Katanywa and David Mukasa duly identified themselves to the first defendant's staff upon which the said account was opened. The first defendant accepted the deposit of the cheque of shs 80,000,000/= on the said account which on the face of it was drawn in favour of the said account holders. The said account was operated in accordance with the mandate given to the bank."

Needless to say, this summary of evidence is part of defence pleadings. Two features in this summary are worthy of note. First the two drawees of the cheque were introduced to the bank by David Mukasa who was alleged to be a customer of the bank. Second, the two drawees and David Mukasa then identified themselves to the staff of the bank before the account was opened and the cheque deposited on that account. The defendant never gave evidence. Only two pictures of two strange men in whose names the account was apparently opened were shown to the plaintiff. The plaintiff denied knowledge of them

and asserted that those were strangers. The pictures were even not produced nor formerly tendered in evidence. No document in possession of the bank relating to the opening of the account was ever produced in Court to show what steps were taken in verifying the identities of the two strange men and even of Mukasa. The bank claimed that the account was operated in accordance with the mandate given. This mandate was not produced in Court either. Summary of evidence listed that mandate among documents to be produced by the bank. There is no evidence of what the mandate looks like. Did the account operators provide names and specimen signatures? If so, how did they look like? If no signatures, what was the substitute? Again according to the list of documents, which is part of defence pleadings, Ham Kamugunda presented 7 cheques and three savings withdrawal slips. These were apparently in the possession of the defendant when this case was instituted in the High Court. These documents were listed as part of pleadings required by Order 6 Rule 1 as amended by SI 1998 No.26. These documents were not tendered in evidence. They were not shown to the plaintiff or to his witnesses so that he could establish whether, assuming his father Ham Kamugunda could write, he had signed those documents (the cheques, the withdrawal slips and the mandate). In such circumstances, it is legitimate to draw an adverse inference that if such evidence was adduced it would have been adverse to the bank to the effect that the bank was negligent in the manner it allowed the account to be opened and to be operated. The bank bore the burden to show that it was not negligent. In all probability the account was opened and operated by David Mukasa. Therefore, ground 8 must fail. No submissions were made on grounds 4,6 and 7. I take it that the appellant abandoned these grounds. They must accordingly fail. The last ground is ground nine which was framed thus:

"The learned Justices of Appeal erred in law in awarding excessive interest of 26% p.a from 23rd December, 1996."

This ground was argued in the alternative for reasons I cannot appreciate. I think that this is an independent ground. Be that as it may, Mr. Kanyimibwa cited S.26 of CP Act and our decision in Milton Obote Foundation Vs Kennon Training Ltd (S.Ct. Civil Appeal

No.25 of 1995) (unreported) for the views that - 1. Award of interest is discretionary. 2. The action in this case arose from a tortuous act and not based on a commercial transaction. 3. Court did not give reasons why it awarded interest at 26% from, 23/12/1996. Learned Counsel urged us to grant the rate of 6%. Mr. Kakuru was of contrary views. That 26% rate was proper because the court had to put the plaintiff in the same position as before. That this was a commercial transaction. That the Court rates applied only after judgment.

The plaintiff did not indicate in his plaint and when he gave evidence why he claimed interest at the rate of 26%. In written submissions at the trial, counsel for the plaintiff submitted that the defendant was a banking institution having a commercial relationship with the plaintiff who should get interest on his money for the use of which he was deprived unlawfully. The learned trial judge said nothing about these submissions other than dismissing the suit.

In the Court of Appeal all the three justices recorded Mr. Kakuru who appeared for the plaintiff (as appellant then) as having asked for interest at the rate of 21% p.a from 23/12/1996. Starting with the submission on interest in the Court of Appeal the Court did not explain why it awarded 26% instead of 21% asked for by the plaintiff in that Court. The law on the subject of interest is well known. By virtue of S.26 (2)- "Where and in so far as a decree is for payment of money, the court may in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

It is clear from these provisions that - • Where there is no agreement between the parties as to the interest of rate payable, award of interest by Court is discretionary. The discretion must be exercised judiciously.

• Interest can be award as follows: (i) Interest on principal sum prior to the institution of a suit. (ii) On the principal sum at a given rate from the date of filing a suit. (iii) Interest on aggregate sum reflected in the decree till payment or earlier.

It is evident that in awarding interest and at what rate the court is guided by the circumstances of the case.

An award of 26% as interest in this case is on the high side. The circumstances given do show that the plaintiff lost use of money due to him but they do not show why he should get the high interest rate of 26%. I would set aside the award of interest at the rate of 26% p.m. I would substitute the rate of interest as follows: - (a) Interest at 10% p.a from 1/1/1997 to 31/12/1998 prior to the institution of the suit. (b) Interest at the rate of 8% p.a from 31/12/1998 when the suit was instituted to 3/3/2004 when the Court of Appeal gave judgment in favour of the plaintiff. (c) Interest at the rate of 6% p.a from date of judgment till payment in full. So ground 9 succeeds partially. I would dismiss the appeal with costs to the plaintiff in this court and in the courts below. I would vary the decree of the Court of Appeal as regards the rate of the in the manner discussed above.

J U D G M E N T O F O D O K I , C J

I have had the advantage of reading in draft the judgment prepared by my learned brother, Tsekooko, JSC. I agree with him that this appeal should be dismissed with the orders he has proposed.

As the other members of the Court also agree, this appeal is dismissed with orders as proposed by Tsekooko JSC JUDGMENT OF ODER, JSC.

I have had the benefit of reading in draft the judgment of Tsekooko, JSC. I agree with him that the appeal should be dismissed. I also agree with the orders proposed by him. JUDGMENT OF KAROKORA, JSC:

I have had the advantage of reading in draft the judgment prepared by my learned brother, Justice Tsekooko, JSC, and I agree with him that this appeal has no merit and must therefore be dismissed with costs to respondent as he has proposed.

JUDGMENT OF KANYEIHAMBA, JSC.

I have had the benefit of reading in draft the judgment of my learned brother, Tsekooko, J.S.C and I agree with him that this appeal be dismissed. I also agree that the respondent be awarded costs as varied by the proposed order of Tsekooko, J.S.C.

Condition Precedent (Order 6 Rule 5) Order 6 rule 5 states that: "Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his or her pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his or her pleading." Refer to: Charles Nsubuga v Eng. Badru Kiggundu & Others, HCMC No. 148 of 2015 (Civil Division) Godfrey Evans Kityo v Alice Kagyezi, HCCA No. 75 of 2012 (Land Division).

Denial must be specific Order 6 rule 8 states that: "It shall not be sufficient for a defendant in his or her written statement to deny generally the grounds alleged by the statement of claim, or for the plaintiff in his or her written statement in reply to deny generally the grounds alleged in a defence by way of counterclaim, but each party must deal specifically with each allegation of fact of which he or she does not admit the truth, except damages." See: Nile Bank v Kato (Supra)

Evasive denial Order 6 rule 10 states that: "When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he or she must not do so evasively, but answer the point of substance. Thus, if it is alleged that he or she received a certain sum of money, it shall not be sufficient to deny that he or she received that particular amount, but he or she must deny that he or she received that sum or any part of it, or else set out how much he or she received. If the allegation is made with diver's circumstances, it shall not be sufficient to deny it along with those circumstances."

NILE BANK LTD AND ANOTHER v THOMAS KATO AND OTHERS

HIGH COURT OF UGANDA AT KAMPALA (COMMERCIAL COURT)

HIGH COURT MISC. APPL. NO. 1190 OF 1999

(Arising from Civil Suit No. 685 of 1999)

(Before: Hon Lady Justice M.S. Arach -Amoko)

August 30, 2000

Contract – Sale Agreement – Sale of private company and assets by shareholders – Indemnity clause incorporated to protect buyer against claims by third parties – Breach of indemnity clause .

Civil Procedure – Pleadings – Written statement of defence – Application to strike out – Whether sufficient grounds sufficient for dismissal – Defence of illegality – Whether applicable.

Brief facts The Plaintiffs, Applicants in this matter, filed a suit against the Defendants/Respondents seeking damages for alleged breach of a contract of sale. In their plaint, the Plaintiffs stated that in 1990, the Defendants as shareholders and on behalf of the other shareholders sold a company, Sanyu Properties Ltd and it's assets to the Plaintiffs. It was stipulated in the contract of sale that the Defendants would indemnify the Plaintiffs against any claims of the Departed Asians Property Custodian Board or other claimants. In 1997, the plaintiff discovered that two of the properties had been repossessed and asked the Defendants to compensate them according to the terms of the agreement. The Defendants neglected to do causing the Plaintiffs to file a suit against them. The Defendants filed a statement of defence denying all the Plaintiffs allegations in the plaint, and a defence that that the agreement was illegal.

By notice of motion, the Plaintiffs applied under Order 6 Rule 29 Civil Procedure Rules to Court to have the Defendants written statement of defence struck off on grounds that it did not disclose a reasonable answer to the Plaintiffs claim. The issue for court to decide was whether the defence filed by the Defendants was reasonable, and the legality of the agreement.

Held: (i) The defence filed by the defendants contained general denials to the plaintiffs' allegations, and did not give clear and specific responses to the plaintiffs' allegations. It

thereby offended the provisions of Order 6 rule 7 Civil Procedure Rules, which requires each party to specifically deal with each allegation of fact that is denied;

(ii) Basing on the provisions of Order 6 rule 5 of the Civil Procedure Rules, the defence of illegality of the sale agreement on grounds that provisions of the Companies Act were flouted could not hold against the Plaintiff, since the issue of illegality was not specifically pleaded, and did not indicate which provision of the Act was breached;

(iii) The written statement of defence would be struck out for failure to disclose a reasonable defence, and judgment entered in favour of the plaintiff.

Cases referred to: Dever Finance Co. Ltd v Harold G. Cold [1969] 1 WKL at 1877 Kahima & Anor v UTC [1978] HCB 318. Libyan Arab Uganda Bank v Messrs Intrepco Limited [1985] HCB 73 North Western Salt Co. Ltd v Electrolytic Alkali Co. Ltd [I914] AC Obidegwu F.v D.B Ssamakadde Civil Suit No. 59 of 1992 (Unreported) Phillips v Copping [1935] 1 KB 15

Warner v Sampson [1959] 2 WLR 109 at P.114

Legislation referred to: Civil Procedure Rules Order 6 rules 5, 7, 29 Expropriated Act Sections 4, 5

Counsel for Applicant: Mr. Byenkya.

RULING

ARACH AMOKO, J: T

His application is by Notice of Motion under Order 6 Rule 29 of the Civil Procedure rules for orders that:

(a) The Respondent's defence be struck out for failing to disclose a reasonable answer to the Plaintiff s claim.

(b) Judgement be entered for the Plaintiffs in the terms of the plaint.

The main grounds for the Application are that the defence filed by the Respondents in HCCS No. 685 of 1999, discloses no reasonable answer to the Plaintiffs claim in so far as it inter alia, constitutes of general denials and does not allege any facts constituting illegality. That it is a frivolous and vexatious defence and an abuse of the process of court.

It is supported by the affidavit of Godfrey Zziwa a legal officer of the 1st Plaintiff/Applicant bank dated September 23, 1999. Patrick

Iyamulemye Kato the 1st Respondent swore an affidavit in reply on May 24, 2000 on behalf of both Respondents.

The brief background to this application is that the Plaintiffs sued the Defendants under HCCS No. 685 of 1999, for damages for breach of contract. In their 20 paragraph plaint filed on the July 14, 1999 the Plaintiffs set out the facts constituting the cause of action as follows:

"1. On August 17, 1990 the Defendants on their own behalf and on behalf and on behalf of the other shareholders in a limited liability Company known as Sanyu Properties Ltd, Hereinafter referred to as "the company"), entered into a sale if their entire interest in the Company and transferred the Company's assets to the Plaintiffs at the sum of Shs. 60,000,000/= (Uganda shillings Sixty Million). A copy of the sale agreement is attached hereto and marked Annexture 'A'.

2. In terms of the above-mentioned sale agreement, the Defendants sold all properties known as freehold Register Volume 52 Folio 23 situated at Plot 44 Kampala Road and Freehold Register volume 32 folio 7, Plot 46, Kampala Road to the Plaintiffs and in that regard signed documents transferring title in the said properties to the Plaintiff and delivered the certificates of title relating thereto to the Plaintiff.

3. At the time of the above sale, the Defendants assured the Plaintiff that the above properties were free from any claims and encumbrances. The Defendants undertook to indemnify the Plaintiff against any claims of the Departed Asians Property Custodian Board or any other claimants. Mention thereof was made in clause 9 of Annexture "A".

4. It was explicitly agreed between the parties and mention thereof made in clause 9 of the sale agreement that in the event of a third party having a superior claim to the property than that held by the Defendants, the latter were obliged to refund to the Plaintiff the purchase price together with interest thereon at the Bank rate and they would furthermore pay any damages that the Plaintiff may have suffered or incurred.

5. In April 1997, the Plaintiff was reliably informed that one of the said properties had been reposed by M/S Central Properties & Development Ltd and Certificates of Repossession No. 2890 issued in respect of plot 46 and Repossession Certificate No. 2994 dated 14th January 1997 issued in respect of Plot 44, Kampala Road.

6. Searches in Ministry of Lands confirmed that M/S Central Properties & Development Ltd had been registered on January 16, 1997 as proprietors of both Plot 46 Kampala Road and Plot 44 Kampala Road; vide Instrument Nos. 285089 and 285091 respectively. Copies of the Certificates of title relating thereto are attached hereto and marked Annexture "COO and "C".

7. On 7th May 1997 the Plaintiffs' lawyers wrote to the Defendants to admit liability to indemnify the Plaintiffs. A copy of the letter is attached hereto as Annexture "D".

8. On 14th May 1997, the Plaintiffs' lawyers wrote another demand to the Defendants to give the Plaintiffs a clear and unequivocal commitment to compensate the Plaintiffs in terms of the sale agreement. A copy of the said letter is attached as Annexture "E".

9. The 1st Defendant, by way of reply in a letter dated May 15, 1997, sought to sideline their contractual obligation to compensate the Plaintiffs by attempting to involve the Ugandan government in the matter. A copy of the said letter is attached hereto as Annexture "F".

10. The Plaintiffs' lawyers by a letter dated May 19, 1997 clarified to the Defendants their contractual obligations to compensate the Plaintiffs and requested the Defendants to indicate clearly whether the Defendants challenged their liability to compensate the Plaintiffs. A copy of the said letter is attached hereto as Annexture "G 1".

11. In a letter dated May 21, 1997 written by the 1st Defendant and addressed to the Plaintiffs' lawyers, the Defendants omitted to address the issue of liability to compensate the Plaintiffs for the subsequent defect in title to the sold properties.A copy of the letter is attached hereto as Annexture "G2".

12. Efforts to settle the said matter between the parties were rendered fruitless.

13. The Plaintiffs' entitlement to charge interest at the Bank rate on the contractual sum in terms of the sale agreement obliges the Defendants to pay to the Plaitiffs' a sum of shs. 250,241.095/= (Uganda Shillings Two Hundred fifty Million Two Hundred forty One thousand Ninety five). A copy of an account prepared by the 1st Plaintiff reflecting this amount as at 2nd February 1999 will be adduced at the hearing hereof and the accompanying letter as Annexture "H2"

14. By a letter dated March 1, 1999, the Plaintiffs' invited the Defendants to have the matter placed before an Arbitrator. A copy of the said letter is attached hereto as Annexture "I".

15. In a letter dated 4th March 1999, the Defendants explicitly declined to have the matter placed for arbitration hence entitling the Plaintiffs to file this suit against the Defendants. A copy of the said letter is attached hereto as Annexture "J".

16. Notice of intention to sue was communicated to the Defendants and this cause of action arose in Kampala within the jurisdiction of this Honourable Court.

17. WHEREFORE the Plaintiff prays for judgment against the Defendants jointly and severally in the following terms:

(a) Payment ofUg.shs. 250,241,095/=

(b) Interest on (a) at the Bank rate from 2nd February 1999 till payment in full.

(c) General damages for breach of contract.

(d) Interest on (c) from date of judgment till payment in full.

(e) Costs of the suit.

(f) Any other and such further relief as the Honourable court deems fit. Dated at Kampala the 4th day of June 1999.

Signed Counsel For The Plaintiffs"

By way of a defence, the Respondents filed the written statement of defence:

"Save what is hereinafter expressly admitted, the Defendants deny each and every allegation of fact in the plaint as if the same were set forth verbatim and traversed seriatim.

1. Paragraphs 1 and 2 of the plaint are admitted and the Defendants' address of service for purposes of this suit shall be c/o Tumusiime, Kabega & Co. Advocates, P.O. Box 21382, Kampala.

2. Paragraphs 3,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18,19, and 20 are denied and the Plaintiffs shall be put to strict proof thereof.

3. Without prejudice to the foregoing, the Defendants shall in answer to paragraphs 3 to 20 of the plaint state that the sale was illegal in so far as the provisions of the Companies act were flouted and hence the Defendants are not in any way liable to the Plaintiffs and the "loss lies where it falls".

4. In the alternative but without prejudice to the foregoing, the Defendants shall aver that they only sold their shareholding in the company to the Plaintiffs and the rest of the provisions of the agreement were legally meaningless.

5. Further in the alternative and without prejudice to the foregoing, the Defendants shall aver that there has never been any claim on the property by DAPCB or by any other claimant which the Plaintiffs unsuccessfully defended.

WHEREFORE the Defendants pray that the suit be dismissed with costs. Dated at Kampala this July 9, 1999.

Signed Counsel For The Defendants."

In paragraphs 4 and 5 his affidavit in support of the application, Mr. Zziwa deponed that he has read and understood the defence filed by the Respondents and that he verily believes, on the basis of his training as a lawyer and on the advice of his advocates that it does not disclose any reasonable answer to the Plaintiff s claim in so far as it constitutes of general denials and does not allege any facts constituting illegality that it is a frivolous and vexatious defence and an abuse of court process.

Mr. Byenkya, learned counsel for the Applicant argued the application on the basis of the said affidavit; and submitted firstly, the pleadings in paragraph 1 of the Written Statement of Defence where the Defendants deny the allegations in paragraphs 3 to 20 of the plaint is a general denial. It therefore offends the provisions of Order 6 rule 7 of the Civil

Procedure Rules which provides that a party must deal specifically with each allegation of fact which it does not admit. That this rule is mandatory, and a defence that offends the rule is bad and should be struck off and judgement entered in favour of the Plaintiff. He cited the case of Obidegwu F.v D.B Ssamakadde Civil Suit No. 59 of 1992 (Unreported) by TINYINONDI, Ag. J. as he then was, in support of this point.

Secondly, Mr. Byenkya submitted that paragraph 3 of the written statement of defence offends Order 6 rule 5 of the Civil Procedure Rules which requires the Defendant to set out the facts constituting illegality. It says that the sale was illegal in so far as the provisions of the Companies Act were flouted. This plea does not tell the Plaintiff anything about the facts or acts which are alleged to be illegal. It is just a general statement which does not disclose what the defence is. It is also a general denial which covers 17 paragraphs of the plaint.

Thirdly, the alternative defence in paragraph 4 of the Written Statement of Defence does not disclose any defence known in law. It says that the Defendants shall aver that they only sold their shareholding in the company to the Plaintiffs and the rest of the agreement were meaningless.

Fourthly, Mr. Byenkya submitted that paragraph 5 of the written statement of defence is not a reasonable defence in light of the copies of the certificates of title in respect of the two plots clearly indicating that the Repossession Certificates were duly registered thereon. The paragraph says that the Defendant shall aver that there has never been any claim on the property by the DAPCB, or any other claimant which the Plaintiffs unsuccessfully defended.

Finally, and in view of the above arguments, Mr. Byenkya submitted that there is no reasonable answer on record and to continue with the trial will just waste the court's time and delay justice, and he prayed that the written statement of defence be struck out, judgment be entered in favour of the Plaintiff for the purchase price and the suit be set down for formal proof to determine the question of interest and general damages. That he would not object to the Defence participating in the formal proof.

Ms. Khalayi Lilian, learned counsel for the Defendants opposed the application. She maintained that the written statement of defence filed on behalf of her clients disclose a reasonable answer to plaint. That paragraphs 2 and 3 of the written statement of defence read together are not a general denial because they disclose the defence of illegality based on the Companies Act. That details can only be given in evidence, so you do not have to plead specifically, she cited the case of Dever Finance Co. Ltd v Harold G. Cold [1969] 1 WKL at 1877.

In the alternative, learned counsel proposed that since the case has not yet been set down for hearing, the Defendant may apply for leave to amend the written statement of defence to include the details of illegality.

As regards paragraph 4 of the written statement of defence, the alternative defence is that the Defendants/Respondents only sold their shareholding in the company. They were therefore not responsible for any indemnity.

In her view paragraph 5 of the written statement of defence is a reply to the Plaintiff's claim denying a set of facts that arose out of the contract.

Finally, counsel submitted that the pleadings were closed in 1999, and the Plaintiff has not made any efforts to set down the suit for hearing. Counsel urged court not to condemn the defendants unheard but to set down the suit for hearing.

Order 6 Rule 29 of he civil procedure Rules under which the application was brought, gives court discretion, upon application, to order any pleading to be struck out of the ground that it discloses no reasonable answer, or where it is shown to be frivolous and vexatious. In the case of Libyan Arab Uganda Bank v Messrs Intrepco Limited [1985] HCB 73. ODOKI, J,. as he then was held in a similar application that:

"The discretion given to the court under Order 6 Rule 29 to strike out pleadings should only be exercised in plain and obvious cases since such applications were not intended to apply any proceedings which raised a serious question of law."

In the case it was further held that;

"It is well established that in considering applications under Order 6 rule 29 the court should look at the pleadings above and any Annextures thereto, and not any subsequent affidavits"

Mindful of the above authority, I now proceed to examine the pleadings in HCCS No. 685/99 together with the Annextures thereto in order to determine whether the written statement of defence raises any reasonable answer to the plaint. I have reproduced the relevant paragraphs of the plaint and the written statement of defence earlier on, I will not repeat them here.

As can be clearly discerned from the plaint. The Plaintiffs' claim is for breach of contract based on a contract signed between the parties on August 17, 1990; a copy of which is attached to the plaint as Annexture "A" in particular, Clause 9 thereof which provides:

"9. The vendors hereby warrant that the titles to the said plots are free of any claims and in cumbrances and they undertake to indemnity (sic) the purchasers against any claims by the Departed Asians Property Custodian Board or any other claimants. Should any claim arise and cannot be successfully defended by the purchasers, the vendors hereby undertake to refund to the purchasers the purchase price together with interest at bank rate and pay any damages the purchaser may have suffered"

The Plaintiffs' case is that in August 1990, the Defendants sold Sanyu Properties Ltd together with its assets including plots 44 and 46 Kampala Road under the said agreement. The Plaintiffs relied on Clause 9 above which entitled them to a refund of the purchase price together with interest thereon at in case the property is successfully claimed by DAPCB or any other claimants. In 1997, April, M/S Central properties & Development Ltd repossessed both properties. The Plaintiffs invoked the provisions of clause 9 and demanded for the refund of their money but the Defendants refused. The sum demanded now is in excess of shs. 250,241,095 inclusive of interest and consequential expenses. The Plaintiffs attached copies of the Certificate of Title in respect of the two properties which indicate that the certificates of Repossession by M/S Central properties Ltd were duly registered thereon.

The issue therefore is, whether the defence filed in court is a reasonable defence under Order 6 rule 29 of the Civil Procedure Rules, under which this application is made. Mr. Byenkya, learned counsel for the applicant says it does not amount to a reasonable defence. Ms Khalayi contends that it does.

In the opening statement of written statement of defence the Defendants deny each and every allegation of fact in the plaint as if the same were set forth verbatim and traversed seriatim.

This is known as a general traverse and it is usually allowed at the beginning or at the end of the written statement of defence. The purpose of a general traverse is to deny material facts in the statement of claim which the Defendant inadvertently omitted to deal with specifically; See: Warner v Sampson [1959] 2 WLR 109 at P.114 CA.

The Defendants however make a general denial of paragraphs 3-20 of the plaint in paragraph 2; they plead illegality in paragraph 3; in paragraph 4, they admit having sold only their shares, and aver that the rest of the agreement is legally meaningless; and in paragraph 5, they aver that there was never a claim on the properties in question by the DAPCB or any other claimant.

In my view, the written statement of defence in general and paragraph 2, in particular, does indeed offend the provisions of Order 6 rule 7 of the Civil Procedure Rules in it is a general denial. The rule provides:

"7. It shall not be sufficient for a Defendant in his written statement to deny generally the grounds alleged by the statement of claim, or for the Plaintiff in his written statement in reply to deny generally the grounds alleged in the defence by a Counterclaim, but each party must deal specifically with each allegation of fact of which he does not admit the truth except damages."

According to ODGERS PRINCIPLES OF PLEADING AND PRACTICE, 22nd Edition at page 136,

"It is not sufficient for a Defendant in his defence to deny generally the allegations in the statement of claim, or for a Plaintiff in his reply to deny generally the allegations in a

Counterclaim, but each party must traverse specifically each allegation of fact which he does not intend to admit. The party pleading must make it quite clear how much of his opponent's case he disputes. Sometimes in order to deny the rule and to deal with every allegation of fact of which he does not admit the truth, it is necessary for him to place on record two or more distinct traverses to one and the same allegation. Merely to deny the allegation in terms will often be ambiguous."

The object of pleadings is to bring the parties to a clear issue and delimit the same so that both parties know before hand the real issues for determination at the trial. See: Kahima & Anor v UTC [1978] HCB 318.

In the case of Obidegwu v D.B Ssamakade (supra) the Plaintiff brought an action against the Defendant for breach of contract by not delivering possession of a house he had leased from the Defendant, for a term of 3 years. The Defendant contended that the non delivery of the said house was because the Plaintiff/lessee had not paid the second installment of rent. TINYINONDI J. held inter alia, that the Defendant's pleadings did not deny the existence of the lease agreement, because they just denied generally the grounds of the claim of the Plaintiff, without specifics as to whether the alleged lease existed or not. The learned Judge held that Order 6 rule 7 is mandatory. He said;

"I hold that this rule is mandatory as it clearly states so. In the case before me the existence of a lease agreement between the parties was alleged to exist. A photocopy of it was annexed to the plaint. This was an allegation of fact. If the Defendant did not admit it, he ought to have specifically dealt with it. He did not"

Likewise in the case the subject of the instant application, the Plaintiffs alleged the existence of an agreement of sale between the two parties, and a copy thereof was attached. Furthermore, they alleged an indemnity clause under the said agreement, which entitled them to a refund of the purchase price plus interest and other consequential expenses in case of any claim by 3rd parties and DAPCB. These were allegations of fact. If the Defendants did not admit them, they ought to have specifically dealt with them. They did not. The second issue is the question of illegality. Under order 6 rule 5, matters

to be specifically pleaded include facts showing illegality either by statute or common law. The rule provides:

"5. The Defendant or Plaintiff, as the case may be, shall raise by his pleading all matters which show the action or Counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the proceedings pleadings, as, for instance, fraud, limitation act, release, payment, performance, or facts showing: illegality either by statute or common law". (The underline is mine).

On the subject of illegality, ODGER'S PRINCIPLES OF PLEADING AND PRACTICE, 22nd Edition, states at page 185;

"The defence that a contract is a wager within the Gaming Acts should be specially pleaded; and the facts which are relied on to bring the transactions within those Acts should be stated. However, the court itself will take notice of any illegality of the contract on which the Plaintiff is suing if it appears on the face of the contract or from the evidence brought before it by either party, and even though the Defendant has not pleaded illegality. Illegality once brought to the attention of the court, overrides all questions of pleadings, including any admissions made therein. Otherwise where the contract is not ex facie illegal as a general rule the court will not entertain the Question of illegality unless it is specifically pleaded and the court is satisfied that it has before it all the necessary facts concerning: the contract setting".

In paragraph 3 of their defence, the Defendants plead that: "the sale was illegal in so far as the provisions of the Companies Act were flouted".

The facts which are relied on to indicate that the sale in question contravenes the provisions Companies Act are not pleaded. The specific section of the Companies Act flouted is not stated; and yet the Companies Act has over 300 sections. This omission in my opinion is likely to take the Plaintiffs by surprise and therefore offends the provisions of Order 6 rule 5 of the Civil Procedure Rules. See: also, North Western Salt Co. Ltd v

Electrolytic Alkali Co. Ltd [I914] AC; Phillips v Copping [1935] 1 KB 15 at page 21 Per SCRANTON LJ.

The alternative defence which says that the rest of "rest of the provisions of the agreement were legally meaningless" also do not disclose any defence known in law, as Mr. Byenkya rightly said. Finally, the defence in paragraph 5 is in my view a 'sham' defence in view of the photocopies of the Certificates of titles in respect of plots 44 and 46, Kampala Road attached to the plaint. They show that Central Properties and Development Limited of P.O. Box 98, Kampala, were issued Certificates Authorising Repossession No. 2890 dated June 26, 1996 Certificate No. 2994 dated January 14, 1997 under the provisions of section 4 and 5 of the Expropriated Act; and the said certificates duly registered on the certificates of title. The defence that there has never been any claim on the property by DAPCB or any other claimant which the Plaintiffs unsuccessfully defended is therefore not only a sham but outrageous; and should be treated as such. All in all, I find that the defence filed does not disclose any reasonable defence to the plaint, it is a general denial and it is frivolous and vexatious and is accordingly struck out. In the result, judgment is hereby entered for the Plaintiffs against the Defendants for the shs. 60 million, being the purchase price paid by the Plaintiffs under the agreement. The rest of the claim and in particular the, issue of interest and general damages shall be set down for formal proof on the October 18, 2000. The defence counsel is free to participate in the formal proof as suggested by Mr. Byenkya.

GUNTER PIBER & ANOTHER V E KRALL INVESTMENTS (U) LTD & 4 OTHERS HCMA 103 OF 2008 (HC JINJA)

ARISING FROM CIVIL SUIT NO. 31 OF 2008

1. GUNTER PIBER}

2. BUWEMBE BREWERS} ::::::::::::::::::APPLICANTS/PLAINTIFFS & DISTILLERS (U) LTD. }

VERSUS

1. E. KRALL INVESTMENTS (U) LTD}

2. DRB DEUTSHCE ROHSTOFF & BERGBAU}

3. DRB MINING (U) LTD} :::::::: RESPONDENTS/ DEFENDANTS

4. THOMAS EGGENBURG}

5. JOSEPH BYAMUGISHA}

RULING The applicants who are the plaintiffs in the main suit brought this application under Order 6 rules 8 and 30, Order 52 rules 1 and 3 of the Civil Procedure Rules (CPR) and s. 98 of the Civil Procedure Act (CPA) for orders that the respondents' defence in the main suit be struck out for failure to disclose a reasonable and specific response to the applicants' claim. They also sought an order that judgement be entered in favour of the applicants. In the event that the above orders were granted, the applicants sought to have the main suit set down for formal proof, and for costs of the application to be provided for.

The applicant's application was supported by the affidavit of Ronald Tusingwire, an advocate practicing with the firm of Kaggwa & Co, Advocates who are counsel for the applicants, which was dated 16/06/08. The background to the application was that on 22/05/08, the applicants filed Civil Suit No. 31 of 2008 against the respondents. The respondents filed a WSD on 10/06/08. It is that WSD that is being challenged in this application. In order to bring clarity to the issues which are specifically about the pleadings, I shall reproduce the important parts of the applicants' claim starting with paragraph 2 of the plaint. 2. The 2nd plaintiff is a limited liability company incorporated under the laws of Uganda and whose address of service for purposes of this suit shall be c/o Kaggwa & Co. Advocates, Plot 3 Pilkington Road, NIC Building, Annex, P. O. Box 6624, Kampala Uganda.

3. The 1st, 2nd and 3rd defendants are bodies corporate and are engaged in the business of mining in Uganda and elsewhere, the Plaintiffs' advocates undertake to effect service of court process upon them.

4. The 4th and 5th Defendants are adult male Austrian and Uganda respectively, believed to be of sound mind and are Directors in the 1st Respondent and the plaintiffs' advocates

undertake to effect service of court process upon them.

5. The plaintiff's cause of action against the defendants jointly and severally is for a permanent injunction restraining the defendants from interfering, dealing with, disposing off (sic) and transacting in any way with the plaintiffs' interest as licencees on Plot M25, LRV 341, Folio 13, Land at Masese Jinja District and from breaching the agreement between the plaintiffs and the defendant, General damages and the costs of this suit.

6. The facts constituting the plaintiff's cause of action against the defendants jointly and severally arose as hereunder;

a) By an agreement dated 20th May 2005, the plaintiffs obtained a licence from the 1st defendant comprising of a building wherein they own and operate an industry engaged in brewing and distilling of alcohol for sale in exchange for provision of security for the 1st defendant's assets on the suit land. (See Annexure "A").

b) During the subsistence of the said licence the plaintiffs and the defendants orally agreed that the said licence was to run for the whole period of the lease from Kilembe Mines Limited on condition that the plaintiffs pay ground rent, premium and the 1st defendant's legal fees.

c) The said oral agreement arose out of a suit filed by Kilembe Mines Limited against the 1st defendant for breach of the lease agreement for the suit property of which the plaintiffs fulfilled their obligation under the oral contract by paying the legal fees for the out of court settlement, premium and ground rent for the lease to Kilembe Mines Lawyers, M/s C. Mukiibi- Sentamu & Co Advocates. (Receipts and the consent judgment are attached as "B" and "C" respectively).

d) The defendants have over time approached the plaintiffs to advance them money for their expenses which the plaintiff have so far lent them money totalling to US$ 150,000 (United Stated Dollars one hundred fifty thousand only) of which part of the money was to be further consideration for the licence.

e) On 25th May 2005, the plaintiffs also purchased a Metallurgical plant including a steel building together with a mobile crane ATT 480 (HAZET) from the 1st respondent (sic)

and paid valuable consideration of Ug. Shs 8,000,000/= (Uganda shillings eight million only). (See Annexure "D").

f) The plaintiffs have been in possession of the suit land since 1996 and carry out their business thereon.

g) The 1st, 2nd, 4th and 5th Defendants have in total breach of the various agreements enjoyed by the plaintiffs against them incorporated a sham company known as DRB Mining (Uganda) Ltd., the 3rd Defendant, to evict the Plaintiffs and take over their plant and mobile crane. (See resolution and notice of eviction marked "E" and "F").

7. The plaintiffs shall aver and contend that the above actions of the defendant breach the licence and other oral agreements, entitles them to an injunctive relief.

8. That the defendant's threats of eviction have caused grave mental torture to the 1st plaintiff and loss of income to the 2nd plaintiff as its business has been greatly affected of which (sic) they are entitled to damages.

9. By reason of all the foregoing, the plaintiffs will contend that there is just cause for the issuance of a permanent injunction against the respondents.

10. The plaintiffs have suffered damage, loss of income and inconvenience as a result of the defendants' acts and omissions.

The applicants thereafter stated that they issued a notice of intention to sue and that this court has jurisdiction in their cause, and listed their prayers, viz: a permanent injunction against the respondents, general damages, other reliefs that the court may deem fit, and the costs of the suit.

In the respondent's WSD filed on 10/06/08 they generally denied all the paragraphs of the plaint in the head paragraph, stating that they were all not admitted and had been traversed seriatim, as is the usual practice in suits of this nature. They then answered the plaint in the following manner:

1. Paragraph 1 is rooted (sic) but the defendants make no admissions as to the soundness of mind of the 1st plaintiff.

2. Paragraphs 2, 3 and 4 of the plaint are noted but no specific admissions are made.

3. Paragraph5 is denied in as far as if (sic) alleges a cause of action.

4. Paragraph 6 is denied in its entirety and the plaintiffs shall be put to strict proof of their frivolous allegations.

5. Paragraph 7, 8, 9 and 10 are completely false allegations and claims that are not sustainable in law.

6. The defendants' reply to all the allegations in the plaint shall show that the plaintiffs have no registerable interest in the law (sic) in issue.

7. Further the defendant shall show this suit to be a frivolous and vexatious one, intended to evict one of the defendants from its land and will pray for its dismissal with costs to be met personally by the plaintiff's counsel.

8. Further the defendant will show that the suit is filed in bad faith because there is already a pending suit previously filed by the plaintiff and with the same issued arising and plaintiff's counsel shall be faulted for unprofessional conduct.

9. The defendants shall show that a mere licensee has no right at law to evict the land owner or obtain the remedies such as the ones sought by the plaintiffs in this suit.

Wherefore the defendants pray that the plaintiff's suit be dismissed with costs.

On 18/06/08 the applicants filed this application to have the aforesaid WSD struck out under Order 6 rule 30 of the CPR. The respondents responded by filing an amended WSD on 23/06/08, without leave of court. The respondents now claim that the amended WSD is the operative defence that should be considered by this court, and not the WSD that was filed on 10/06/08, which was challenged in this application.

The applicant's application was based on the grounds that the written statement of defence (WSD) filed by the respondents on 10/06/08 disclosed no reasonable and specific response to the applicant's claim as is required by Order 6 rule 8, in as far as it constituted of general denials to the claims made in the plaint. Further that paragraphs 3 to 6 of the said WSD contained general denials to paragraphs 5 to 10 of the plaint and did not respond specifically to each of the allegations of fact that the respondents did not admit in their defence. It was also contended that the respondents' defence was prolix, frivolous

and vexatious and an abuse of court process and that it was thus just and equitable that the defence be struck out since to continue with the trial would be a waste of courts time and a delay of justice.

Further grounds that were contained in the affidavit in support were more specific complaints about the respondents WSD. The applicants took issue with paragraphs 3 to 5 of the WSD for not responding specifically to the existence of a licence evidenced by Annexure A to the plaint. Annexure A was a letter from the 1st respondent to the 1st applicant confirming an agreement entered into between the 2 parties allowing the 2nd applicant to use all the equipment on site in Jinja as well as all equipment and other assets of E. Krall Investments Ltd (at the site).

The applicants further stated that paragraph 6 of the WSD did not respond specifically to paragraph 6 (a) through (g) of the plaint, i.e. the role of each of the respondents in evicting the applicant from the suit premises, incorporation of a sham company (the 3rd respondent) and taking over of the applicant's plant and mobile crane. The applicants also complained that paragraph 7 of the WSD was a general denial without any mention of the agreements annexed to the plaint and the consent judgment referred to therein between Kilembe Mines Ltd. and the 1st respondent. It was further stated that the WSD did not respond to the allegation that there was a contractual licence enjoyed by the applicants on the respondent's land. Further that paragraphs 8 and 9 of the WSD were evasive denials in so far as they did not respond to paragraphs 6 and 6 (d) of the plaint wherein the applicants raised the debt of UDS 150,000 owed by the 1st respondent to the applicants.

At the hearing of the application, Mr. Kaggwa for the applicants repeated the contents of the affidavit in support and submitted that the stated paragraphs offended the provisions of Order 6 rules 8 and 10 of the CPR and that as a result the WSD ought to be struck out and judgement entered in favour of the plaintiffs/applicants after which the suit should be set down for formal proof. He relied on the decision in the case of Nile Bank Ltd. v. Thomas Kato & Others [1997-2001] EA, 325 where it was held that a defence such as the

one filed by the respondents in the main suit offended the provisions of Order 6 rule 8 and it was struck out. He also relied on Odgers' Principles and Practice in Civil Actions in the High Court of Justice, Ed. 22 where it was stated that each party must traverse specifically each fact that he does not intend to admit. The party pleading must make it quite clear how much of his opponent's case he disputes and that merely denying will often be ambiguous.

The respondents filed an affidavit in reply opposing the application. Richard Tamale, an advocate with the firm of Andrew & Frank Advocates, counsel for the respondents, swore the affidavit on 19/08/08. The facts on which the respondents sought to oppose the application as deduced from the affidavit in reply were briefly that the current application was filed prematurely because the respondents were still well within time to file an amended WSD without leave of court. The respondents further contended that they had subsequently filed an amended written statement of defence with the result that the current application ought to be dismissed. It was also stated by the respondents that the current application before court was "an exercise in futility and a vain attempt" by the applicants to evict the 1st respondent from its land on the strength of a licence; that a permanent injunction could not be granted to a licensee in a manner that would disqualify the title of the registered proprietor (the 1st respondent). The respondents asserted that the defence complained of sufficiently responded to the "wild allegations" and prayers set out in the plaint, which would be largely determined on matters of law.

At the hearing of the application, Mr. Andrew Bagayi for the respondents repeated the contents of the affidavit in reply and submitted that the decision in the suit was to be made solely on points of law. He contended that the main issue in the suit would be whether the applicants were entitled to a permanent injunction against the respondents and that the WSD clearly addressed that point. He further contended that though the applicants complained that the WSD did not address bad faith because it had not been particularised, paragraphs 6 and 9 of the WSD addressed it. Mr. Bagayi also submitted that though the applicants complained that the respondents were threatening to take away the mobile

crane and plant from them, that fact had not been substantiated; besides the crane had always been and is still in the possession of the applicants.

It was also the contention of Mr. Bagayi that the amended WSD filed by the respondents on the 23/06/08 dates back to the filing of the first WSD and that it should be considered as the operative pleading for the respondents. Further that in the presentation of their application the applicants had not demonstrated how the WSD complained against was going to prejudice their case. Mr. Bagayi was also of the view that the WSD complained of falls squarely within the category of cases that are addressed by Article 126 (2) (e) of the Constitution of the Republic of Uganda. That the matters that had been raised by the application were mere technicalities and if the application was allowed by court and the WSD struck out, substantive justice would not have been done. He prayed that the amended WSD be allowed in the spirit of Article 126 (2) (e) of the Constitution.

In order to save time court allowed the respondents to raise an objection against the plaint though it had neither been specifically pleaded in reply to the instant application nor in the WSD. Court considered that this would not prejudice either of the parties and would enable court to deal with all issues to do with pleadings at one go. The respondents' counsel then raised 2 objections, firstly, that the 4th and 5th defendants/respondents were directors of the 1st defendant and they were wrongly sued because at all material times, the 4th and 5th respondents had acted in their capacity as directors of the company; they could not be held liable for any wrongs of the 1st respondent.

The second objection was that the applicant(s) were only licensees in respect of the property in dispute, which was held by the 1st respondent as a registered proprietor of a lease from Kilembe Mines Ltd. It was submitted that the applicants being equitable licensees with no registerable interest in the land could not bring an action for a permanent injunction against the 1st respondent. Mr. Bagayi contended that a licence is a mere personal or revocable privilege to perform an act on the land of another. It does not operate to confer or vest in the holder any title, interest or estate in the property; it is not even assignable. Mr. Bagayi was of the view that the applicants' rights over the land

were only equitable and could be brought to an end by the respondent's issuing a notice to terminate the arrangement. Relying on the case of Chandler v. Kelly [1972] 2 All E.R. at 942, Mr. Bagayi submitted that a licensee has no right at law to remain on the land. He added that if the remedy of a permanent injunction, which was the main remedy that the respondents sought, was granted it would in effect be ejecting the 1st respondent, a registered lessee from the land. Mr. Bagayi finally submitted that since such an order could not be attained, the plaint should be struck out.

The parties' pleadings and counsels' submissions raise several issues that that can be summarised as follows:

i) Whether the respondents properly filed an amended WSD as alleged in paragraph 5 of the affidavit in reply; if not,

ii) Whether the respondent's WSD filed on 10/06/08 contravened the requirements for pleading contained in Order 6 rules 8 and 10 of the Civil Procedure Rules; if not,

iii) Whether the respondent's defence ought to be struck out; and if so,

iv) Whether the applicants would then be entitled to an interlocutory judgment against the respondents for the orders prayed for, and subsequent formal proof of damages for breach of contract.

I shall now answer the issues raised above in the order in which I have stated them.

Regarding the propriety of filing an amended WSD, the CPR provide for amendments of pleadings both generally and specifically. Order 6 rule 19 provides for amendments, generally, while rules 20 and 21 provide for specific amendments of the plaint and the WSD. Order 6 rule 21 provides, and I quote:

"A defendant who has set up any counterclaim or setoff may without leave amend the counterclaim or setoff at any time within twenty-eight days of the filing of the counterclaim or setoff, or, where the plaintiff files a written statement in reply to the counterclaim or setoff, then within fourteen days from the filing of the written statement in reply." (Emphasis supplied)

The terms of Order 6 rule 21 are very clear. It is only a defendant who sets up a counterclaim or setoff that is entitled to amend his/her WSD without leave of court. This is to be done within 28 days of filing the counter claim or set off, or within 14 days after the plaintiff's reply to the counter claim or set off. It would appear the CPR limits amendments without leave to plaintiffs only since a litigant who sets up a counterclaim thereby becomes a plaintiff to the counterclaim. The litigant who sets up a setoff is also placed in the same position as a claimant who has to prosecute his claim. It is also important to note that such amendment is limited to amendment of the setoff or counterclaim only.

The terms of respondent's WSD have been set out above. There is no counterclaim or setoff set up by the respondents against the applicants. I have found no other rule other than rule 21 of Order 6, which allows defendants to file an amended WSD apart from rule 19 of Order 6. The latter allows amendments by any party to the suit after leave of court has been obtained. It is thus apparent that the respondents had no right to file an amended WSD without leave of court. The respondent's amended WSD that was filed on 23/06/08 without leave of this court was therefore improperly filed. It cannot be considered as a pleading in the main suit or for purposes of this application.

Having established that the WSD filed on the 10/06/08 is the operative defence for purposes of the main suit and therefore this application, I now turn to the issue whether the said WSD offended the provisions of Order 6 rules 8 and 10 of the CPR. In paragraphs 2, 3 and 4 of the plaint, the applicants described the 2nd plaintiff and the 1st, 2nd and 3rd defendants as limited liability companies doing business in Uganda. In response thereto, the defendants merely stated in paragraph 2 that they had noted the contents of the said paragraphs but no admission was made as to the contents thereof. In other words, the defendant in a general manner denied that the said parties were limited liability companies. However, they did not specify in what capacity they were operating, if they were not limited labiality companies as stated in the plaint.

It is wrong to deny plain and acknowledged facts, or any fact which it is not in one's

client's interest to deny. As a rule, each party should admit whatever facts can be proved against him/her without trouble. Moreover, it looks weak to deny everything in the opponents pleading. It suggests that one has no substantial defence to it. In addition, by rashly traversing statements which are obviously true, much unnecessary expense may be caused [See Lever Brothers v. Associated Newspapers [1907] K.B. 628.]

In paragraph 6 (a) through (g) the plaintiffs stated the facts from which the cause of action against the defendants arose. The plaintiff's claim was that there is a licence that was granted to the 2nd applicant by the 1st respondent, which was evident from Annexure A to the plaint. They also claimed to have subsequently reached oral agreements with the 1st respondent for the licence to run till expiry of the contract with Kilembe Mines Ltd. In consideration of the oral agreements the applicants claimed in paragraphs 6 (b), (c) and (d) that they paid certain monies to C. Mukiibi- Sentamu & Co., Advocates on behalf of the 1st respondent as legal fees, to Kilembe Mines Ltd as rent in respect of the lease to the disputed property, and lent the 1st respondent up to US$ 150,000. The first two payments were evidenced by receipts annexed to the plaint that had been given to the applicants in acknowledgment by Mukiibi-Sentamu & Co. Advocates and Kilembe Mines Ltd. The respondents' made no specific response to these allegations in the WSD. Their response in paragraph 4 was a general denial of the whole of paragraph 6, and a threat that the applicants would be put to strict proof of their allegations.

Paragraph 6 (e) was that the 1st respondent purchased a mobile crane and plant from the 1st respondent for shs 8,000,000/=. The respondent attached an invoice to the plaint to show that there was such a transaction. Applicants also stated in paragraph 6 (f) that they had been in occupation of the disputed land for 6 years, and in paragraph 6 (g) that the respondents were in breach of the agreements between the parties that had been referred to in paragraphs 6 (a), (b) and (c). The general response to this was again paragraph 4 wherein the respondents denied all the contents of paragraph 6 and stated that the applicants would be put to strict proof thereof.

The respondents went on to plead in paragraph 5 that paragraphs 7, 8, 9 and 10 of the plaint were completely false allegations and claims that could not be sustainable in law. They did not state the law that the applicant's claim offended so as not to be sustainable. Respondents also pleaded generally in paragraph 6 of the WSD that in reply to all the applicants' allegations in the plaint they would show that the plaintiffs had no registerable interest in the land in issue. Clearly this was not an intelligible answer to all the claims in the plaint, for example it could never be an answer to the claims made in paragraphs 6 (c) and (d) which related to monies paid by the applicants on behalf of the 1st respondent. The respondents further pleaded in paragraph 7 that the suit was a frivolous and vexatious one that was intended to evict one of the respondents from its land. The respondents did not specify which one of the respondents this answer referred to. This particular paragraph remained ambiguous because the applicants' complaint in this regard was against the 1st and 3rd respondents.

In paragraphs 8 of the WSD, the respondents pleaded that they would show that the suit was filed in bad faith because there was a pending suit previously filed by the applicants with the same issues. They contended that counsel for the applicants would be faulted for unprofessional conduct. Even in this case, the respondents did not state which suit they referred to and the court in which it had been filed. Neither did they specify which conduct of counsel for the applicants was unprofessional. As it turned out, the suit that was pending in the Magistrates Court has completely different issues; it was an action under the Access to Roads Act, not in issue in this suit.

In paragraph 9, the respondents pleaded that they would show that a mere licensee had no right at law to evict the land owner or obtain the remedies sought by the applicants in the suit. They again did not state which law they referred to. Neither did they indicate the specific remedies that they intended to challenge. It is clear from the plaint that the applicants sought a permanent injunction and damages. The respondents ought to have specified which remedies they challenged in paragraph 9.

The function of pleadings is to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision. In order to attain this object, it is necessary that pleadings interchanged between parties should be conducted according to certain fixed rules. The main purpose of those rules is to compel each party to state clearly and intelligibly the material facts on which he/she relies, omitting everything immaterial and then to insist that his/her opponent frankly admit or explicitly deny every material matter alleged against him. By this method they must speedily arrive at an issue (Odgers, supra at page 88). Orders 6, 7 and 8 of our Civil Procedure Rules specifically aim at this.

Order 6 rule 8 provides:

"It shall not be sufficient for a defendant in his or her written statement to deny generally the grounds alleged by the statement of claim, or for the plaintiff in his or her written statement in reply to deny generally the grounds alleged in a defence by way of counterclaim, but each party must deal specifically with each allegation of fact of which he or she does not admit the truth, except damages."

As indicated above, it is clear that the respondents' WSD in general, but more particularly paragraphs 4 and 6 thereof offended the rule in Order 6 rule 8. It also offended the provisions of Order 6 rule 10 in paragraph 5 where it was stated that all the claims in paragraphs 8 and 10 where completely false allegations that could not be sustained in law. That statement was an evasive denial.

According to Odgers Principles of Pleading and Practice, 22 Edition at page 136,

"It is not sufficient for a defendant in his defence to deny generally the allegations in the statement of claim, or for the plaintiff in his reply to deny generally the allegations in a counterclaim. Each party must traverse specifically each allegation of fact, which he does not intend to admit. The party pleading must make it clear how much of his opponent's case he disputes."

Clearly the respondents departed from this rule of practice. Order 6 rule 30 provides that the court may, upon application, order any pleading to be struck out on the ground that it

discloses no reasonable cause of action or answer. This court considered this rule in the case of Nile Bank Ltd. v. Thomas Kato [1997-2001] EA, at page 325, which was cited by counsel for the applicants. It was there held, following the decision in Obidegwu F. v. D. B. Semakadde, High Court Civil Suit No 59 of 1992 (unreported) that the rule in Order 6 rule 8 is mandatory. Where the party pleading fails to follow it, the pleading is struck out under Order 6 rule 30.

In the instant case, the applicants pleaded a contract for a licence between them and the 1st respondent. A copy of the letter confirming the contract was annexed to the plaint as Annex "A." The defendant chose not to address it but to deny it in general terms in paragraph 4 of their WSD. The applicants also pleaded that there were monies had and received by the 1st respondent or by others on their behalf as a result of the licence, in paragraphs 6 (c) and (d) of the plaint. The respondents again chose to deny them generally without much ado. If the respondents did not admit these claims they ought to have addressed them specifically, not as they did in their paragraphs 4 and 6 of the WSD. I find that paragraphs 7, 8 and 9 of the WSD do not cure this defect in the WSD. In particular paragraphs 6 and 9 of the WSD could never be an intelligible response to a claim for moneys that the applicants claimed to have been paid on behalf of the 1st respondent, or lent to them. Consequently, I find that the defence did not raise a reasonable answer to the applicant's claim. It is accordingly struck out.

As to whether the applicants are entitled to an interlocutory judgment against the respondents and subsequently to formal proof of damages claimed, I now turn to the respondent's objection to the plaint, and specifically to the applicant's claim for a permanent injunction against the 1st respondent. I have not dealt with the first objection raised by the respondents regarding the parties to the suit because I find that the second objection substantially deals with the defect in the applicants' pleadings. It was submitted for the respondents that the applicants had not right to bring a suit against the 1st respondent for a permanent injunction because it would amount to an action to evict the 1st respondent.

The 1st respondent has a registered interest in the land under dispute holding a sub-lease from Kilembe Mines Ltd. The respondents did not specifically plead the fact in the WSD. The respondents glossed over this fact by referring to the 1st respondent as "a land owner" in paragraph 9 of the WSD, and repeatedly stating that the applicants merely had a licence, a right that was inferior to that of the 1st respondent. It was only later specifically pleaded in the affidavit in reply to this application in paragraph 7.

However, Annexure "C" to the plaint, a consent judgment between Kilembe Mines Ltd and the 1st respondent in High Court Civil Suit 248 of 2004 shows that there was outstanding rent on a sublease registered in LRV 341 F.13 at Masese Jinja. The amount paid in final settlement thereof was UD$ 30,000. The applicant claimed to have paid this amount to Kilembe Mines according to a tax receipt from Kilembe Mines Ltd dated 4/11/05, included in group Annexure "A" to the plaint. It is these facts which lead court to the conclusion that the 1st respondent was a registered owner under the Registration of Titles Act, not the respondent's pleadings.

The law relating to actions in such cases is s. 176 of the Registration of Titles Act where it is provided:

"No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under this Act, except in any of the following cases—

a) the case of a mortgagee as against a mortgagor in default; b) the case of a lessor as against a lessee in default; c) the case of a person deprived of any land by fraud as against the person registered as proprietor of that land through fraud or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud; d) the case of a person deprived of or claiming any land included in any certificate of title of other land by misdescription of the other land or of its boundaries as against the registered proprietor of that other land not being a transferee of the land bona fide for value; e) the case of a registered proprietor claiming under a

certificate of title prior in date of registration under this Act in any case in which two or more certificates of title may be registered under this Act in respect of the same land, and in any case other than as aforesaid the production of the registered certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in that document as the grantee, owner, proprietor or lessee of the land described in it, any rule of law or equity to the contrary notwithstanding."

The import of s. 176 was discussed by the Supreme Court of Uganda in The Executrix of the Estate of the Late Christine Mary Tebajukira & Deborah Namukasa v. Noel Grace Dhalita Stananzi, Supreme Court Civil Appeal No. 2 of 1988 (Unreported). In that case, the Supreme Court held that in any action against a registered proprietor other than in the instances named in s. 184 (now s. 176) of the RTA, the certificate of title is an absolute bar, any rule of law or equity to the contrary notwithstanding. (See also Francis Butagira v. Deborah Namukasa, Supreme Court Civil Appeal No, 6 of 1989 (Unreported)).

In that case, the respondent sought to challenge the physical re-entry against a lease that had been effected by the appellant for non-payment of rent. It was found that the certificate of title held by the appellant was an absolute bar to an action for trespass. The court found that the respondent had by his action for trespass against his landlord challenged her title. Court declined to grant the remedy of relief against forfeiture for (among other reasons) that the very action in which the respondent purported to sue for trespass was barred by s. 184 (now 176) of the RTA. In like vain, I find that the applicant's action against the 1st respondent for a permanent injunction was in effect an action for ejectment and thus agree with Mr. Bagayi's submission in that regard. Entertaining such an action would no doubt offend the provisions of s. 176 of the RTA. It would have benefited the respondent's WSD if s.176 of the RTA had been pleaded.

Order 6 rule 11 (d) of the CPR provides that where the suit appears from the statement in the plaint to be barred by any law, the plaint may be rejected. The applicants' plaint is barred by s. 176 of the RTA. It is accordingly rejected.

As to whether the applicants would have been entitled to set down the suit for formal proof of the general damages claimed in the suit after striking out the respondents' WSD, it is my considered opinion that that could not happen. Proof of damages normally refers to proof of special damages, general damages being a measure that is often determined judicially, i.e. according to the discretion of the court depending on the injury that is complained of. In the instant case, although the applicants referred to certain monies, viz: US$ 150,000 being a debt alleged to be due from the 1st respondent and US$ 30,000 paid to M/s Kilembe Mines Ltd as rent for the sub-lease, the applicants did not claim for refund of the same. Claiming the refund would have been in the way of special damages. It is trite law that special damages must be specifically pleaded and then proved. In the absence of this, I am unable to agree with counsel for the applicants that the suit should have been set down for formal proof.

In conclusion, I must comment about the unfortunate result of these proceedings. The applicant's plaint has been rejected and the respondent's defence struck out. None of the parties has gained anything from this action. This unfortunate result arose from the mistakes made in the pleadings by counsel for both the applicants and the respondents. I shall therefore make no orders as to costs.

Irene Mulyagonja Kakooza JUDGE 30/10/08

MWESIGYE ALPHONE KATITI & 30 OTHERS V NATIONAL FORESTRY AUTHORITY HCCS NO. 270 OF 2010 (COMM. COURT)

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION CIVIL SUIT NO. 270 OF 2010

1. MWESIGYE ALFONSE KATITI 2. ARINAITWE ASAPH ……PLAINTIFFS 3. KATAREIHA JOHN for and on behalf of 28 others

VERSUS

NATIONAL FORESTRY AUTHORITY……...……DEFENDANT

JUDGMENT:

The plaintiffs brought this suit in 2010 seeking for a declaration that they are entitled to payments for breach of contract by nonpayment of accrued sums, special damages, general damages, interest and costs of the suit. The amount claimed and their particulars were not specified in the plaint. However, in July 2011 the plaint was amended to give particulars of the claim by indicating the amount each of the plaintiffs are entitled to all totaling Shs. 168,470,000/=. It was averred in the amended plaint that the respondent subsequently paid Shs. 145,972,000/= leaving an outstanding balance of Shs. 22,498,000/= due and owing to nine out of the original 28 claimants.

It is the plaintiffs' case that between 2008 and 2009 the plaintiffs and 28 others on behalf of whom this suit was filed entered into contracts with the defendant to provide services such as clear slashing, initial clearing, spot hoeing, weeding and climber cutting in Rwoho Central Reserve and Bugumba Central Forest Reserve which are managed by the defendant. By June 2009, the plaintiffs had executed the work contracted to them but had not been paid.

The defendant filed a written statement of defence (WSD) in which each and every allegation in the plaint apart from the description of the parties were denied. When the plaintiff amended the plaint, the defendant filed an amended written statement of defence where it still denied every allegation in the amended plaint except the several demands made by the plaintiffs. The defendant also alleged that it paid the plaintiffs all the monies owing under the contract (which had earlier been denied) and denied the existence of a balance of Ushs. 22,498,000.

At the scheduling conference only one issue namely; whether the Plaintiffs are entitled to the remedies prayed for was framed for determination by this court.

The plaintiffs prayed for the following remedies: 1) A declaration that the Plaintiffs are entitled to payments in accordance with their contracts. 2) An order for payment of Shs. 22,498,000 in full. 3) Interest on the sum of Shs. 168,470,000 at 25% per annum from June 2009 till payment in full. 4) General damages for breach of contract. 5) Interest on

general damages at court rate from date of judgment till payment in full. 6) Punitive damages. 7) Costs of the suit.

It is noteworthy at this juncture, that although the amended plaint indicated that there were nine plaintiffs whose claims were due and owing, only three of them were called for cross-examination. The claims for two others as will be elaborated on later were wholly admitted by the defendant while those of four appeared to have been abandoned and so they were not called for cross-examination although they had filed witness statements. In view of those developments, "the plaintiffs" henceforth would refer to the two claimants whose claims were wholly admitted and the three who needed to prove their claims. The defendant called only one witness to prove its case. After closure of hearing evidence, both counsel agreed to file written submissions which they did. I have considered the prayers of the plaintiffs in the order in which they were made and submitted upon.

1) A declaration that the Plaintiffs are entitled to payments in accordance with their contracts.

On this prayer, Mr. Mwesigye Alphonse Katiti, PW1 on cross-examination testified that he had executed works under two contracts with the defendant which were supervised by Mr. Yuwa Mike but he was never paid. He stated that the contract required inspection and a certificate before they were paid but this was issued by the defendant. His claim was in respect of two contracts but one was paid leaving the unpaid amount in respect of the 2nd contract of Shs.2,310,000/= after tax.

Mr. Bimanyomwe Robert, PW2 testified that he carried out work under his contract with the defendant which was supervised by Kasimbazi and another supervisor called Micheal but he was never paid. His claim is for Shs. 3,290,000/=.

It was the evidence of Serutwe Bernard, PW3 that he did work under his contract with the defendant which Kasimbazi and Gaigana supervised and certified but he was neither given the certificate nor paid the contract sum of Shs. 3,580,00/= that is still due and owing.

Muluya Tony, the Acting Management Accountant of the defendant (DW) testified that the defendant entered into contracts with the plaintiffs for the purpose of maintaining Rwoho and Bugamba Forest Reserves. It was his testimony that upon execution of works, in accordance with the contract, it would be certified by the defendant's Plantation Manager after the Forest Supervisor had reviewed works done and a certificate issued on the basis of which the claimants would be paid. It was also his evidence that the certificate of completion was an internal document of the defendant which had no provision for the claimants' signature and they were not given copies of the same.

Contrary to the defendant's pleadings that it paid the plaintiffs all the monies owing under the contract, Mr. Muluya in his testimony acknowledged that some monies were still due and owing to four out of the nine claimants. Mr. Byabashaija Edward's claim of Shs. 2,210,000/= was wholly admitted by the defendant. Shs. 1,410,000/= out of the total claim of Shs. 3,290,000/= by Mr. Bimanyowe Robert was also admitted leaving a disputed balance of Shs. 1,880,000/=. Shs. 2,256,000/= out of Mr. Serutwe Bernard's total claim of Shs. 5,875,000/= was also admitted leaving a disputed claim of Shs. 3,619,000/=. The claim of Mr. Kiwanuka Geoffrey of Shs. 1,645,000/= was wholly admitted.

The total claim admitted at the trial was Shs. 7,521,000/= out of the Shs. 22,498,000/= that was pleaded. Mr. Muluya in his evidence specifically denied the claims of three of the nine plaintiffs including Mwesigye Alfonse Katiti. He testified that those claims were false since they were not supported by any certificate of completion.

Counsel for the plaintiffs in his submission conceded that the requirement for certificate of completion is provided for under Clause 1.3 of each of the contracts of the plaintiffs. He however, argued that according to the evidence of DW this was an internal document of the defendant which it had the duty to issue and failure to do so should not be visited on the plaintiffs who were not even signatories to it. He submitted that his clients had proved their case once they testified that they did the work and were supervised by the officials of the defendant.

He further submitted that lack of certificate of completion or non performance of the contract was never pleaded by the defendant. He referred to exhibit P3 being a letter from the defendant to the 1st plaintiff in his capacity as Chairman of Kikunda Rwoho Contractors Association. He argued that that letter shows that the plaintiffs had performed their contract but non-payment was due to the freezing of the defendant's account.

Counsel for the plaintiffs submitted that if at all the plaintiffs had not performed the contracts as alleged, the same would have been terminated in accordance with clauses 5 and 6 of the contracts. He pointed out that this was not pleaded and no evidence was adduced to prove the termination. He therefore argued that it followed that if work was contracted and the contracts were not terminated, then on a balance of probability the work must have been done which entitles the plaintiffs to payment as per the contract. He prayed that this court finds so.

Counsel for the defendant submitted that the amount owing to the plaintiffs arises from uncertified works yet it was a condition of the contract under Clause 1.3 that the works completed required certification. He contended that this was the reason for non-payment of the plaintiffs' claim.

I do agree with the submission of counsel for the plaintiffs that the defendant did not plead lack of certificate of completion as the reason for non-payment of the plaintiffs' claims. I must observe that the defendant's WSD was a general denial of the allegations in the plaint including the contracts that the evidence of DW later confirmed existed. That pleading seriously offended the provisions of Order 6 rule 8 of the CPR which requires denials to be specific on each and every allegation made by the opposite party and Order 6 rule 10 that prohibits evasive denial of allegations by the opposite party. If at all the plaintiffs had moved court to strike out that defence, I believe it would not have survived. Be that as it may, no such application was made and the defence is on record. Can the defendant now be allowed to improve on it at this stage by relying on what was never pleaded? I do not think so. This court is bound by the Court of Appeal decision to the effect that a party will not be allowed to succeed on a case not so set up by him and be

allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleading except by way of amendment of pleadings. Thus a party is precluded from departing from its pleadings. See Interfreight Forwarders (U) Ltd vs East African Development Bank Civil Appeal No. 33 of 1992. The defendant did not amend its pleadings to include non certification of works as the basis for denying the plaintiffs' claim. It cannot therefore rely on it to justify its actions to the plaintiffs' detriment.

This court is very much alive to the provisions of the contracts as regards the requirement for a certificate of completion to be issued before payment is made. In fact samples of the same were even adduced in evidence. But since this was not pleaded the defendant is precluded from relying on it as it would be a departure from its pleadings. To my mind this defence appears to be an afterthought that came up as a scheme to defeat the plaintiffs' claim and I will not allow it.

This is more so in view of exhibit P3 where the defendant appreciated "the patience and effort the plaintiffs took to complete the work assigned" and explained that what incapacitated it from paying the plaintiffs in time was the freezing of its accounts in September 2009. There was no mention of lack of certificate of completion in that letter whose authenticity was not challenged by the defendant. The defendant wrote that letter in response to the complaint made by the 1st plaintiff as Chairman to the RDC Mbarara on non-payment for work done. The letter was copied to the defendant hence the response.

I also wish to add that as rightly pointed out by counsel for the plaintiffs, certificate of completion was an internal document of the defendant which the plaintiffs being semi-illiterate people had no way of ensuring their issuance. The plaintiffs who testified stated that copies of the certificate of completion were never given to them. Furthermore, that they were not even aware of their issuance since they were not required to sign the same.

I must observe that if the requirement for certificate of completion is to serve its intended purpose of verifying work done, it would only be fair and just that both parties to the contract are made signatory to it. That requirement would compel the contractors to demand for the same as soon as work is completed. The defendant who I believe will still

continue to require the services of contractors to maintain its fleets of forest reserves may wish to look into this matter so as to avoid a scenario like this one.

As to whether the plaintiffs should be entitled to payment in the absence of certificates of completion, for the reasons stated above, I find that the plaintiffs whose claims are proved as discussed below are entitled.

In arriving at the above conclusion, I have also taken note of the defendant's insincerity in dealing with this matter from the time this suit was filed. There was total denial of all the claims including the existence of the contracts with the plaintiffs. Interestingly, as the claims and the contracts were being denied in court, payments were being quietly made to some of the plaintiffs under those very contracts leaving only a very small amount in dispute as shall be seen later. This, in my view, shows lack of trust on the part of the defendant and creates doubt on its ability to honestly handle certification of work. For that reason, even if lack of certificate of completion was pleaded, I would have still given the plaintiffs the benefit of the doubt and found that work was completed but the certificates were not issued.

2) An order for payment of Shs. 22,498,000/= in full.

The plaintiffs' total claim for special damages in the amended plaint was a sum of Shs. 22,498,000/=. However, counsel for the plaintiffs in his submission conceded that only Shs. 12, 985,000/= had been proved in accordance with the principle that special damages must be specifically pleaded and strictly proved. See Mustapha Ramathan & Osman Kassim Ramathan v Century Bottling Co. Ltd, HCCS (Commercial Division) No. 431 of 2006; Eladam Enterprises Ltd v S.G.S (U) Ltd & others Civil Appeal No. 20 of 2002 [2004] UGCA 1.

I must point out that if you deduct a total of Shs. 7,521,000/= which was admitted from what is alleged to have been proved, the contested amount would ordinarily be Shs.5, 464,000/=. But this is not the case because it was submitted for the plaintiffs particularly Mr. Serutwe Bernard that the amount of Shs.2, 256,000/= admitted by the defendant is in respect of contracts that were entered into after this suit was filed.

It does not relate to this claim. Following that submission which was made in reference to the documentary evidence on record, the contested amount would be Shs. 7,720,000/= whose breakdown I will consider per plaintiff as follows:

(a) Claim by Mwesigye Alfonse Katiti – PW1

In the amended plaint PW1 claims for a sum of Shs. 2,310,000/=. It was his evidence that as at the time of filing this suit he had not been paid a sum of Shs. 6,100,000/= arising from two contracts he entered into with the defendant in March 2009 and February 2009. Exhibit P1 (i) is the first contract dated 30th March 2009 for the amount of Shs. 2,600,000/= while Exhibit P1 (ii) dated 15th February 2009 is for the sum of Shs. 3,500,000/=.

However, PW1 further testified that upon filing the suit, the defendant paid him a sum of Shs. 3,290,000/= leaving a balance of Shs. 2,600,000/=. It was his evidence that he executed all the works contracted to him and that the same was verified by the defendant's officers. He also testified that previous payments for the other contracts he had with the defendant had been made without certificates of completion. Counsel for the plaintiff argued that if PW1 had not worked, his contract would have been terminated. He submitted that since the contract was not terminated Mr. Mwesigye had on a balance of probability proved that he was entitled to the net balance of Shs. 2,310,000/=.

Counsel for the defendant submitted that PW1 told court lies during cross examination when he testified that he last executed works for the defendant in 2008 and yet there were contracts executed between PW1 and the defendant during March and February 2009. Counsel prayed that PW1's evidence be considered false.

I find that the inconsistence in PW1's evidence is minor because during re-examination he clarified that he did the work for which he was contracted to do in 2009 as per exhibits P1 (i) and P1 (ii). I have carefully looked at exhibit P1 (i) under which this claim is made and I find that there was a provision under clause 6.6 for termination of the contract for total non-performance on the part of the contractor. Non- performance was one of the conditions for fundamental breach which would terminate the contract immediately.

If at all PW1 had not performed the contract the defendant would have notified him that the contract had terminated pursuant to clause 6.6 of the contract. There was no such notification. The only reason given for delay of payment as per exhibit P3 was freezing of the defendant's account. In the circumstances, this court is convinced that PW1 has proved on a balance of probability that he performed work as per the contract and he was never paid the contractual sum of Shs. 2,600,000/= which comes to Shs. 2,310,000/= after tax. I find that this sum is due and owing to PW1 and the defendant is accordingly ordered to pay.

(b) Claim by Bimanyomwe Robert – PW2

According to the amended plaint PW2's claim is Shs. 3,290,000/=. He testified that he performed works for the defendant for the above contract sum. DW testified at the hearing that only Shs. 1,410,000/= out of the entire claim was due and owing to PW2. He referred to exhibit D5 to show that this amount had been sent to PW2's account but bounced on 24th January 2011 due to irregularity in the account details.

I wish to point out that the contract sum under exhibit P1 (xxvii) was Shs. 800,000/= while the contract sum under exhibit P1 (xxviii) was Shs. 1,500,000/=. The total sum under the two contracts would therefore be Shs. 2,300,000/= and not Shs. 3,290,000/= as claimed.

However, in seeking to prove the claim counsel for the plaintiff relied on exhibit D5 and submitted that on the second page of that exhibit in line 8, on 24th January 2011 under reference 5482098 a sum of Shs. 1,410,000/= appears against PW2's name. In addition to that sum, counsel submitted that in line 35 of exhibit D5 on 30th June 2011 under reference 713296 BWO3 a sum of Shs. 1,880,000/= appears against PW2's name. In arriving at the sum of Shs. 3,290,000/= the two sums were added up.

The defendant already acknowledged the sum of Shs. 1,410,000/= as due to PW2 and I find that he is entitled to the same. I am not at all convinced that the entry on 30th June 2011 was in respect of PW2's claim. That entry was not indicated in the usual way as other entries. PW2's name is even outside that column implying that it could have

appeared there by mistake. This court cannot use it as a basis for his claim especially given that the figure there does not tally with the contract sum in exhibit P1 (xxvii). I therefore deny part of that claim and instead find that in addition to the sum of Shs. 1,410,000/= that is admitted, the sum Shs. 800,000/= is due and owing to PW2 under exhibit P1 (xxvii) and I order that a total sum of Shs. 2,210,000/= inclusive of what was admitted be paid to him.

c) Claim by Serutwe Bernard – PW3

In the amended plaint PW3 claimed Shs. 5,875,000/=. It was his evidence that he performed the works but the defendant did not pay him the sum of Shs. 4,940,000/= arising out of the contracts entered into between the two parties. The contract sum under contract number MB/04/09/40, exhibit P1 (xxiii) is Shs. 990,000/=. Under contract number MB/04/09/22, (exhibit P1 (xxiv)) the contract sum is Shs. 700,000/=. Under contract number MB/04/09/12, (exhibit P1 (xxv)) the contract sum is Shs. 1,750,000/= while the contract sum under contract number MB/04/09/12, (exhibit P1 (xxvi)) is Shs. 1,500,000/=. This comes to a total sum of Shs. 4,940,000/=. It seems that PW3 abandoned the rest of his claim as stated in the amended plaint. He testified that after filing the suit he was subsequently paid Shs. 1,410,000/= leaving a balance of Shs. 3,530,000/=. He also testified that he executed the work for which he was contracted and the same was certified by Mr. Kasimbazi and Mr. Gaigana although he got no copy of the certificate of completion of the work.

It was the evidence of DW that the defendant acknowledged the sum of Ushs. 2,256,000/= as due to PW3. The sum of Ushs 2,256,000 subtracted from Ushs 3,530,000/= leaves a balance of Ushs. 1,274,000. DW1 also testified that exhibits D6 and D8 were duly approved payment vouchers. I have looked at exhibits D6 and D8 and as submitted by counsel for the plaintiffs, I find that they relate to different contracts, namely MB/10/010/18 and MB/10/010/06. Those are not the contracts in issue and for that matter what is admitted does not extinguish the defendant's liability in this case.

In the premises, I find that PW3 has proved on a balance of probability that he did work

for which he was partly paid leaving an amount of Shs. 3,530,000/= due and owing to him. I accordingly order the defendant to pay that amount to him.

(d) Claim by Byabashaija Edward-P4

In the amended plaint, it was stated that the special damages due to Byabashaija Edward was a sum of Shs. 2,400,000/=. Since this amount is admitted by the defendant, I order that the defendant pays it to the claimant less tax.

(e) Kiwanuka Geoffrey-P5

According to the amended plaint Kiwanuka Geoffrey's claim is Shs. 1,645,000/=. Since this amount is admitted by the defendant, I order that the defendant pays it to the claimant.

The above evaluation of evidence shows that while Shs. 22,498,000/= was pleaded only Shs. 11,905,000/= was proved to the satisfaction of this court including the amount that was admitted.

3) Interest on the sum of Ushs 168,470,000 at 25% per annum from June 2009 till payment in full.

The amended plaint filed in this case was for a claim of Shs. 22,498,000/=. The claim for interest is based on a figure of Shs. 168,470,000/= which is alleged to have been due and owing as at the time this suit was filed. I however, do not see any mention of that figure in the original plaint that was amended. In the premises, it is my considered opinion that that amount which was never pleaded cannot be the basis for an award of interest. While it is true that that amount is mentioned in the amended plaint and the bulk of it said to have been paid by the defendant, no documents showing dates of payments were tendered in evidence. It therefore remains a mere allegation that that was the amount due and owing as at the time this suit was filed. For that reason I decline to consider the issue of interest based on that figure. I will instead award interest on the amount that was pleaded and proved.

Section 26(2) of the Civil Procedure Act Cap. 71 empowers this court to award interest for any period prior to the institution of the suit. Award of interest is discretionary. The basis of an award of interest is that the defendant has kept the plaintiff out of his money

and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly as per Lord Denning in Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co. Ltd (1970) 1 QB 447. The Supreme Court has upheld this principle in the case of Sietco v Noble Builders (U) Ltd Civil Appeal No. 31 of 1995.

In the instant case, there are a number of contracts involved. They had different commencement and finishing dates. Although exhibit P2 indicates that works were completed by June 2009, some contracts that form the basis of these claims like that of Mr. Serutwe were signed as late as September 2009. I will therefore look at the individual claims that have been proved and award interests.

a) Mr. Mwesigye Alfonse Katiti

According to clause 9 of the contract for Mr. Mwesigye that was not paid for work was to be completed by 31st June 2009. I find that payment was due upon completion of the work. The defendant denied PW1 use of his money from that date. However, giving the defendant a grace period of two months which could have been used for processing payment, I would award interest on the Shs. 2,310,000/= due to him at the rate of 18% per annum from September 2009 until payment in full and it is accordingly awarded.

b) Bimanyomwe Robert – PW2

According to the contract of Mr. Bimanyowe signed on 1st July 2009, the duration was up to 31st October 2009. The contract sum was Shs. 800,000/=. However, giving the defendant a grace period of two months which could have been used for processing payment, I would award interest of 18% per annum on that amount from January 2010 until payment in full and it is accordingly awarded.

The second contract of 3rd January 2012 was ending on 31st March 2010. The amount was Shs. 1,500,000/=. Giving the defendant the grace period of two months which could have been used for processing payment, I would award interest at the rate of 18% from June 2010 until payment in full and it is accordingly awarded.

c) Serutwe Bernard – PW3

It was not stated under which contracts Mr. Serutwe's claims remained unpaid. But going

by the date of the last contract and taking into account the grace period for processing payments, I would ward interest on the sum of Shs. 3,530,000/= due to him from December 2009 until payment in full and it is accordingly awarded.

(d) Byabashaija Edward

The particular contract under which this claim is made was not stated as there are several of them but I note that the last one was to be completed in June 2009. In the circumstances, I award interest on the sum of Shs. 2,400,000/= less tax at 18% per annum from September 2009 until payment in full.

(e) Kiwanuka Geoffrey

I was not able to locate Mr. Kiwanuka's contract that formed the basis of his claim. However, from his witness statement he did the work between 2008 and 2009. His claim was admitted. In the circumstances, I will use the common period of June 2009 as the completion date and award interest on the Shs. 1,645,000/= due to him at 18% per annum from August 2009 until payment in full.

(4) General damages for breach of contract

General damages are as such as the law would presume to be the natural or probable consequence of the act complained of on account of the fact that they are its immediate, direct and proximate result. Per Lord Macnaghten in Stroms v Hutchinson [1905] A.C 515.

The plaintiffs adduced evidence to show that they suffered inconvenience arising from the defendant's failure to pay them. PW1 testified that upon the defendant's failure to pay, he mobilized the rest of the plaintiffs to petition the Resident District Commissioner to assist them recover the money. It was also his evidence that a letter was written to the defendants demanding for payment, various meetings were convened with a view to obtaining their payment without success. Evidence was also adduced that most of the plaintiffs had borrowed money in order to perform the contracts with the defendant but the failure to obtain their payment resulted into some of them selling off their properties to meet their loan obligations. Others had to flee their homes for fear of being arrested

while some were arrested and imprisoned on account of the debts.

During cross examination DW1 acknowledged meeting some of the plaintiffs who were following up the issue of bounced payments with regard to their claims. This corroborates the plaintiff's version of the story. I do not agree with the submission of counsel for the defendant that the plaintiffs were paid. This is because some payments were advanced after the filing of this suit while other payments due were later on admitted by the defendant during the hearing of the matter.

I find that the plaintiffs suffered inconvenience due to the direct actions of the defendant. It is common for government institutions to enter into contracts and fail to honour their obligations thereby causing untold suffering to the innocent party. This practice must be discouraged. I therefore find the sum of Shs. 15,000,000/= adequate to atone for the hardships and inconveniences the plaintiffs were subjected to and I accordingly award it as general damages.

(5) Interest on General damages at court rate from date of judgment till payment in full

The award of Interest on general damages is a matter of discretion of the court as was observed by Okello J (as he then was) . in the case of Superior Construction and Engineering Ltd vs. Notay Engineering Industries (Ltd) High Court Civil Suit No 702 of 1989. In exercise of that discretion, I award the plaintiffs interest on the general damages at a rate of 8% per annum from the date of judgment till payment in full.

(6) Punitive damages

Counsel for the plaintiff conceded that punitive damages were not particularized in the plaint and consequently abandoned the remedy. Therefore the prayer for punitive damages is denied.

(7) Costs of the suit.

I find the prayer for costs justifiable because costs must follow the event. Since the plaintiffs are the successful party, I will award costs of this suit to them.

In the result, judgment is entered for the above five successful plaintiffs against the defendant in the following terms:-

(a) It is declared that the plaintiffs whose claims were outstanding as indicated above are entitled to payments as proved.

(b) It is ordered that the plaintiffs whose respective claims have been proved as above be paid by the defendant.

(c) Interest of 18% p.a is awarded to the respective plaintiffs as particularized above.

(d) Shs. 15,000,000 is awarded as general damages.

(e) Interest on the general damages is awarded at a rate of 8% per annum from the date of judgment till payment in full

(f) Costs are awarded to the said plaintiffs. I so order. Dated this 31st day of August 2012 Hellen Obura JUDGE

Delivered in chambers at 4.00 pm in the presence of Mr. John Kabandize for the plaintiffs. Parties and counsel for the defendant were absent. JUDGE 31/08/2012

Departure from Pleadings Under order 6 rule 7, it is provided that: "No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading."

This is intended to prevent surprise at the trial. See: Darcy v Jones (1959) EA 121 Joseph Yiga Magandazi v Andrew Maviri, HCMA 990 of 2014 (Commercial Division)

It also follows that evidence at the trial must be given in relation to a party's pleadings. Various authorities are available where the issue of departure from pleadings has been dealt with. In Mohan Musisi Kiwanuka V Asha Chand – SCCA 14/2002, it was observed that a party's departure from his/her pleadings is a good ground for rejecting the evidence and such a litigant may be taken to be a liar. Also see A. N. Biteremo Vrs. Damascus MunyandaSituma – CA 15/91. The above decision was also relied on in Sebughingiriza Vrs. Attorney General in HCCS 251/2012 where Justice Monica Mugenyi held that a party who departs from his pleadings and gives evidence contrary thereto would be deemed to be lying.

See: Mukasa v Bakireke [2009] 2 EA 255; Uganda Breweries v Uganda Railways Corporation [2002] 2 EA 634

Amendment of Pleadings A party may find that his or her pleadings are not clear and may in such a case move court by way of amendment. Sometimes, a need for amendment may arise from the other party adducing a new issue.

The law provides for amendment with leave and amendment without leave of court. In Matagala Vicent v URA HCCMA 25of 2013 (Comm Court) , Justice Hellen Obura observed that: "Both counsel relied on the affidavits and based their submissions substantially on the principles governing the amendment of pleadings as has been stated by courts. The summary of those principles which I agree with are that;

1. Amendment sought before the commencement of the hearing of the case which pleadings the intended amendment relates, should be freely allowed if the amendment can be made without prejudice to the other party. Application for amendment should be made at the earliest stage of the proceedings;

2. Where an amendment is not any different in quality from the cause of action it should be allowed. A court will therefore not exercise its discretion to allow an amendment which substitutes a distinctive cause of action for another or to change by means of the amendment the subject matter of the suit. The court will refuse to exercise its discretion where the amendment would change the action into one of a substantially different character;

3. No amendment would be allowed which would prejudice the rights of the opposite party existing at the date of the proposed amendment.The amendment should not work injustice to the other side. An injury which can be compensated by the award of costs is not treated as an injustice;

4. An amendment would be necessary within the meaning of Order 6 Rule 19 of the CPR if it is for the purpose of determining the real questions in controversy between the parties;

5. Multiplicity of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed;

6. An application made malafide should not be granted;

7. No amendment should be allowed where it is expressly or impliedly prohibited by law (e.g Limitation).

See: Gaso Transport Services (Bus) Ltd v Martin Adala Obene SCCA NO. 4/1994; Lubowa Gyaviira & others v Makerere University HCMA NO. 0471/2009."

Amendment with Leave Order 6 rule 19 CPR provides that: "The court may, at any stage of the proceedings, allow either party to alter or amend his or her pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

Amendment without leave The law allows both the plaintiff and the defendant to amend his or her pleadings without leave of court.

Order 6 rule 20 provides that:

"A plaintiff may, without leave, amend his or her plaint once at any time within twenty-one days from the date of issue of the summons to the defendant or, where a written statement of defence is filed, then within fourteen days from the filing of the written statement of defence or the last of such written statements".

Order 6 rule 21 provides that: "A defendant who has set up any counterclaim or setoff may without leave amend the counterclaim or setoff at any time within twenty-eight days of the filing of the counterclaim or setoff, or, where the plaintiff files a written statement in reply to the counterclaim or setoff, then within fourteen days from the filing of the written statement in reply."

See: Gunter v Krall Investments (U) Ltd (Supra) where it was said that: "The terms of Order 6 rule 21 are very clear. It is only a defendant who sets up a counterclaim or setoff that is entitled to amend his/her WSD without leave of court. This is to be done within 28 days of filing the counter claim or set off, or within 14 days after the plaintiff's reply to the counter claim or set off. It would appear the CPR limits amendments without leave to plaintiffs only since a litigant who sets up a counterclaim thereby becomes a plaintiff

to the counterclaim. The litigant who sets up a setoff is also placed in the same position as a claimant who has to prosecute his claim. It is also important to note that such amendment is limited to amendment of the setoff or counterclaim only. The terms of respondent's WSD have been set out above. There is no counterclaim or setoff set up by the respondents against the applicants. I have found no other rule other than rule 21 of Order 6, which allows defendants to file an amended WSD apart from rule 19 of Order 6. The latter allows amendments by any party to the suit after leave of court has been obtained. It is thus apparent that the respondents had no right to file an amended WSD without leave of court. The respondent's amended WSD that was filed on 23/06/08 without leave of this court was therefore improperly filed. It cannot be considered as a pleading in the main suit or for purposes of this application."

Apart from the cases specified as instances in which the parties can amend without leave, in all other cases, the parties must seek the permission of the court. After the lapse of the time within which pleadings can be amended, a party's pleadings will be deemed to be closed and documents filed thereafter will be of no legal effect or consequence.

Order 6 Rule 22 provides for disallowance of amendment in the following terms: "Where a party has amended his or her pleading under rule 20 or 21 of this Order, the opposite party may within fifteen days from the date of service upon or delivery to him or her of the duplicate of the amended document apply to the court to disallow the amendment or any part of it; and the court may, if satisfied that the justice of the case requires it, disallow the amendment or any part of it or allow it subject to such terms as to costs or otherwise as may be just."

Order 6 rule 23 provides for an amendment to be filed and served. It states: "Whenever any pleading is amended, the amended document shall be filed within the time allowed for amending the pleading; and where the filing occurs before the date specified in the summons for the appearance of or the entering of appearance by the defendant, then a duplicate of the amended document shall be served upon the opposite party in the manner provided for the service of a summons, but where the amended document is filed after

that date, a duplicate of the amended document shall be delivered to the opposite party by the party filing."

Rule 24 of Order 6 provides for reply to amendment. It states that: "Where any party has amended his or her pleading under rule 20 or 21 of this Order, the opposite party shall plead to the amended pleading or amend his or her pleading within the time he or she then has to plead, or within fifteen days of the service or delivery of the amendment, whichever shall last expire; and in case the opposite party has pleaded before the service or delivery of the amendment, and does not plead again or amend within the time above mentioned, he or she shall be deemed to rely on his or her original pleading in answer to that amendment."

Order 6 rule 25deals with failure to amend after order. It provides that: "If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is limited by the order then within fourteen days from the date of the order, he or she shall not be permitted to amend after the expiration of such limited time as aforesaid or the fourteen days, as the case may be, unless the time is extended by the court."

Under Order 6 rule 26, every pleading shall be signed by an advocate or by the party if he or she sues or defends in person.

Effect of an Amendment The case of Dhanji Ramji v. Malde Timber Company (1970) EA 422 is significant for the holding that: "While the amended pleading is conclusive as to the issues for determination, the original pleading may be looked at if it contains matter relevant to the issues (dictum of Newbold, JA in Eastern Radio Service v. R.J Patel (trading as tots) (1962) EA 818 applied). Newbold, JA said this: "Logic and common sense requires that an amendment should not automatically be treated as if it, and nothing else had ever existed".

Order 6 rule 30 (1) provides for striking out pleading. It states that: "The court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or defence

being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgment to be entered accordingly, as may be just."

In Blue Shield Insurance Company Ltd v Oguttu [2009] 2 EA 75, it was held that the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.

The Plaint A plaint may be an ordinary plaint (under Order 7 CPR) or a specially endorsed plaint (under Order 36 CPR). The formalities to be complied with by a plaint are generally provided for under Order 7. A plaint may be rejected under order 7 rule 11 of the CPR on the following grounds: (a) where it does not disclose a cause of action; (b) where the relief claimed is undervalued and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so; (c) where the relief claimed is properly valued but an insufficient fee has been paid, and the plaintiff, on being required by the court to pay the requisite fee within a time to be fixed by the court, fails to do so; (d) where the suit appears from the statement in the plaint to be barred by any law; (e) where the suit is shown by the plaint to be frivolous or vexatious.

Order 7 rule 12 provides that where a plaint is rejected the judge shall record an order to the effect with the reasons for the order.

Under rule 13, the rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

The Written Statement of Defence This is governed by Order 8 of the Civil Procedure Rules. A defendant sets up an answer to the claim through a written statement of Defence. According to rule 2 of Order 8, the defendant may set up a counterclaim or setoff. It provides that:

"(1) A defendant in an action may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether the setoff or counterclaim sounds in damages or not, and the setoff or counterclaim shall have the same effect as a cross-action,

so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the court may on the application of the plaintiff before trial, if in the opinion of the court the setoff or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself or herself of it. (2) Where a defendant includes a counterclaim in the defence, the defendant shall accompany it with a brief summary of evidence to be adduced, a list of witnesses, a list of documents and a list of authorities to be relied on."

Under Order 8 Rule 7, where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he or she shall, in his or her statement of defence, state specifically that he or she does so by way of counterclaim.

In Omumbejja Namusisi Naluwembe v Makerere University MISCELLANEOUS APPLICATION NO. 1199 OF 2013, Justice Byabashaija noted that: "It is a mandatory requirement under Order 8 r.7 CPR that where a defendant seeks to rely upon any ground as supporting a right of counterclaim, he or she must include the counterclaim in his written statement of defence. In the instant case there was no indication in the pleadings that the defendant intended to rely upon any ground as supporting a right of counterclaim in her written statement of defence. Therefore, the Applicant cannot apply to amend the defence to include a counterclaim because a defence is not a separate suit but simply a defence to an action. Given the above position of the law, it is erroneous for the Applicant to submit that the counterclaim is not a separate suit. It is further erroneous to maintain that a defence can be amended to incorporate a counterclaim, and that an application in that case would be for leave to amend the defence to introduce a counterclaim. On the contrary, it is settled law that a counterclaim is a separate action pursuant to provisions of O.8 rr.12 and 13 CPR which stipulate that a counterclaim can be excluded as being more appropriate to be filed as a separate suit, on application of the plaintiff or defendant to the counterclaim without even affecting the defence. See also: British General Insurance Co. Ltd. v. Moshanlul Sulank, CACA No. 30 of 1997; Charles Lwanga v. Centenary Rural Bank, SCCA No.33 of 1999. Additionally, since a counterclaim is a

separate action, an application seeking leave to amend the defence to introduce a counterclaim would in essence be seeking leave to amend pleadings to introduce a new cause of action; which would be legally untenable. See: Nambi v. Bunyoro General Merchants [1974] HCB 12. Such an application would not be granted because apart from amounting to exonerating a party from complying with provisions of the law, it would also involve a complete change in the nature of the action and set up an entirely different claim from that the a parties came to meet, and would require an entirely new counterdefence. See: Biiso v. Tibamwenda [1991] HCB 92; Hill & Grant Ltd v. Hodson [1934] Ch. D 53. The net effect is that the Applicant should have sought leave of court to file a counterclaim out of time, but not to amend the defence. She did not seek the leave and the application is incompetent, and it is dismissed with costs."

Order 8 rule 8 provides that: "Where a defendant by his or her defence sets up any counterclaim which raises questions between himself or herself and the plaintiff together with any other persons, he or she shall add to the title of his or her defence a further title similar to the title in a plaint, setting forth the names of all the persons who, if the counterclaim were to be enforced by cross-action, would be defendants to the cross-action and shall deliver to the court his or her defence for service on such of them as are parties to the action together with his or her defence for service on the plaintiff within the period within which he or she is required to file his or her defence".

In Nile Breweries Ltd v Bruno Ozunga t/a Nebbi Boss Stores HCCS No. 580 of 2006, Justice Lameck Mukasa noted as follows: "In this case the Written Statement of Defence and counter-claim was drafted in such a way that paragraph 16 was followed with a prayer for judgment in favour of the defendant and dismissal of the suit. This was followed by a section headed "COUNTER-CLAIM". Parties to the counter-claim were not indicated in a title.

Mr. Okalany, Counsel for the Plaintiff submitted that the requirement under order 8 rule 8 CPR to add a title to a counter-claim is mandatory. Since the title was absent Counsel prayed that the counter-claim be struck off. He cited Sekiranda Musoke Yakobo Vs China

Jie Fang (U) Ltd H.C.C. S. No 33 of 1996. In that case Counsel for the plaintiff applied for the counter-claim to be struck off for a similar reason that it offended Order 8 rule 8 CPR as it bore no title. Justice P. K. K. Onega upheld the objection. Also in Nampera Trading Co Vs Yusufu Ssemanye & Another (1973) ULR 171 it was held that a title to the counter claim is mandatory. Mr. Okalang submitted that a counter- claim is an independent suit and must have a title where the parties are described.

Mr. Okecha for the plaintiff argued that the requirement for a title arises where other persons who are not parties to the suit are being introduced by the counter-claim. He relied on the phrase "—the plaintiff together with any other persons –"used in the rule.

Rule 8 must be read in light of the other rules in Order 8 which concern a counter-claim. Rule 2 provides for a defendant in an action to set up by way of counter-claim against the claims of the plaintiff any right or claim and the counter-claim shall have the same effect as a cross-action so as to enable court pronounce judgement on both the original suit and on the counter-claim. Then rule 7 requires the defendant when he or she seeks to rely upon any grounds as supporting a right of counter-claim to state in his/her statement of defence, specifically that he/she does so by way of counter-claim. Then rule 8 covers a situation where the defendant by counter- claim claims against the plaintiff together with another person. There is need for such other person to be clearly named. Thus the specific provisions in rule 8 which requires the defendant where by his defence sets up any counter-claim which raises questions between himself and the plaintiff together with any other persons to add to the title of his defence a further title similar to the title in the plaint. That title should set forth the names of all the persons, who if the counter-claim were to be enforced by cross-action, would be defendant to the cross action. Then rule 9 provides for the summoning of such added party, if he is not yet a party to the suit and rule 10 for such party to appear as if has been served with summons to appear in the suit. Rules 11 and 12 provide for what course any person added as a party to the counter-claim should take. The above provisions show that the requirement to make a title to the counter claim

is mandatory where the claim is against the plaintiff together with another person as co respondents to the counter-claim.

The defendant in paragraph 8 of his Written Statement of Defence clearly indicates in compliance with rule 7, that he will raise a counter-claim to the plaintiff's suit for compensation and punitive damages. From the portion headed "Counter-claim" the defendant sets out his claim against the plaintiff. There is no other party to the defendant's claim named. So the defendant's claim is against the plaintiff solely and not against the plaintiff together with any other person. My opinion is that the requirement for a title in the counter-claim arises where the defendant claims against the plaintiff together with another person. This is necessary so that it is clear who, in addition to the plaintiff, the defendant claims against in the counter-claim and to make such a person a party to the suit. Otherwise, if such person is only named in the body of the counter-claim he would not be a party to the suit. In the premises I differ from the decisions in two cases referred to above.

In the event I am wrong, it is my view that the defect is one of such which can be cured by amendment. To strike out the plaintiff's counter-claim would in the circumstances mean the defendant filing another suit against the plaintiff, periods of limitation observed. To safeguard against multiplicity of suits and to save Court's time and since the defendant, had in the event Court finds the counter-claim defective, sought for an amend I find it safe to order an amendment of the defendant's pleadings to include a title to the counter-claim.

Accordingly, the application to struck out the defendants Written Statement of Defence and counter-claim is rejected. Before I take leave of this matter, I must point out that I have studied the defendants Written Statement of Defence and counter –claim and I agree with counsel for the plaintiff that it shows poor draftsmanship. For example, when referring to the defendant/counter-claimant words like "I" "me" "my" are used which makes it appear as if it was the defendant personally drafting. However negligence of counsel should not be visited on an innocent party."

It is possible under rule 9 to claim against person not party to the suit. It states that: "Where any such person as mentioned in rule 8 of this Order is not a party to the suit, he or she shall be summoned to appear by being served with a copy of the defence, which shall be served in accordance with the rules for regulating service of a summons."

Under rule 3, a defendant is required to make specific denials. It is thus provided that: "Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against a person under disability; but the court may in its discretion require any facts so admitted to be proved otherwise than by that admission."

A defendant is however not bound to plead to damages since they are in all cases deemed to be put in issue (Order 8 rule 4).

A counterclaim can survive if a suit is dismissed. Rule 13 of Order 8 provides that:

"If, in any case in which the defendant sets up a counterclaim, the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with."

What is Set-off?

The doctrine of set-off is provided by the Order-8, Rule-6, of Civil Procedure Code. Set –off may be defined as the extinction of two person's reciprocal debts against each other. Set off happens when both the plaintiff and defendant are debtors as well as creditors against each other. It is a reciprocal recovery of debts of two persons.

Let us suppose, A files a suit for recovery of money amounting to Rs. 25,000 against B. B says that A took a loan from him, amounting to Rs. 20,000 which is legally recoverable from A by a separate suit. And claims set off of Rs. 20,000 from the claim of A amounting to Rs.25, 000. If the claim of set off is proved and if the claim is not barred by the law of limitation or resjudicata, B need not to pay the whole amount of claim of A. Making minus of Rs.20, 000 as set off, from the claim of A amounting to Rs. 25,000, B needs to pay only the rest amount of Rs.5, 000 to A . This is called set off.

The following three conditions are necessary to entitle a defendant to claim set off:

1) The suit must be for recovery of money.

2) The amount claimed for set off must be ascertained sum of money. If the amount is not ascertained then the set off does not lie. The sum of money, claimed for set off must be legally recoverable. Where the plaintiff is not legally bound to pay the money by virtue of the law of limitation or resjudicata, set off does not lie. And the amount of money to be set off must not exceed the pecuniary jurisdiction of court.

3) Both the plaintiff and defendant must fill in the defendant's claim to set off the same character as they fill in the plaintiff's suit.

4) The money must be recoverable by the defendant or by all the defendants where there are more than one, from the plaintiff or the plaintiffs where there are more than one.

Set off may be legal set off or equitable set off.

What is Counter Claim.

Order 8, Rules 6A to 6G, of the Civil Procedure Code deal with the principle of Counter claims by the defendants.

When a suit is filed by the plaintiff it may happen that the defendant also has any right or claim in respect of a cause of action as against the plaintiff for which he is legally entitled to bring a separate suit. In that event he need not to bring a separate suit against the plaintiff for his cause of action. He may file a plaint for his claim with the written statement in the same suit filed by the plaintiff against him, without bringing a separate suit. This plaint filed by the defendant with the written statement is called counter claim.

Where any defendant seeks to rely upon any ground as supporting a right of counter claim, he shall, in his written statement, state specifically that he does so by way of a counterclaim. The counter claim can not in any case exceed the pecuniary limit of the Court's jurisdiction. The plaintiff shall be at liberty to file a written statement in answer to the counter claim .Such counter claim shall have the same effect as a cross suit .The counter claim shall be treated as a plaint and shall be governed by the rules applicable to the plaints.

If the plaintiff contends that the defendant's claim ought not to be disposed of by way of a counter claim but by an independent suit, the court may, if so satisfied, pass an order to that effect.

Where in any suit counter claim is established and any balance is found due to the plaintiff or the defendant, as the case may be, the court may give judgment to the party entitled to the balance.

The rules relating to the written statement by a defendant shall apply to a written statement filed by the plaintiff in answer to the counter claim.

The court can pronounce a final judgment in that suit, both on the original claim and On the counter claim. If the plaintiff's original suit is dismissed for default, the counter claim shall alone proceed to the final judgment as an independent suit.

Distinction between Set- off and Counter claim.

Order 8, Rule 6, of Civil Procedure Code deals with set off whereas Order 8 Rules 6A to 6G of Civil Procedure Code deal with counter claim.

The distinctions of set off and counter claim may be shown in the following tabular form:-

Set off Counter Claim

1. A set off is a statutory defence against the plaintiff's action.

Whereas counter claim is substantially a cross action.

2. A set off is a ground of defence, it is a shield as well as sword.

While counter claim is a weapon of defence.

3. A set off, if established, affords an answer to the plaintiff's claim wholly.

Counter claim enables a defendant to enforce a claim against the plaintiff effectually as in an independent action.

1. In case of set off, if plaintiff's suit is stayed, discontinued or extinguishes the claim of set off in that suit.
2. Whereas in such event counter claim may be proceeded with.

5. Set off must be for an ascertained sum or it must arise out of the same transaction as the plaintiff's claim.

A counter claim however need not arise out of the same transaction.

6. The amount of set off must be less than or equal to the amount claimed by the plaintiff.

In counter claim the amount may be greater than the claim of plaintiff.

7. In case of set off plaintiff can show that it was barred by law when he commenced his

In case of counter claim it is enough to show by the plaintiff that it was barred when it was pleaded.

Action. It is not enough to prove that it was barred when it was pleaded.

Isaac Christopher Lub

AUTHOR

About the book

The book in principle analyses the time before an arrest is carried out; the time and manner of t and the events that follow the arrest. The book discusses the Miranda rule that guarantees tha detained by police will not be interrogated in a way that places them at a disadvantage. The explores the aspect of searches on people's property; how and when these searches should be c in accordance with the law.

The book demystifies the highly volatile discussion of use of reasonable force while carrying o It lays out the threshold of what amounts to reasonable force and envisages circumstances when necessary to effect and arrest. The book also sheds light on the fundamental presumption of i and how this presumption should ordinarily be treated. Consequently, the book highlights the ab have and can be occasioned following the disregard or misunderstanding of this notion. The boo the principle of preventive arrest in light of human rights and its use as a tool of oppression.

The book also labours to demystify the difference between the different armed groups in the c majorly indicates the difference between the police and the army and how their roles are di postulates the instances where this thin line of difference has been overstepped by either group catastrophic this action has proven to be overtime. It elaborates on the Posse Comitatus prin argues against any military intrusion into civilian affairs. The book also tries to put into persp different groups being formed and revived in the country in the guise of maintaining law, p order. These groups include the Local Defence Units, Crime preventers and the like. The book to place them under the different laws promulgated for the governance of the people of Uga instances when these " forces" alledge to do when they over step their mandates in the the n order from above"

The book also concerns itself with the aspect of obtaining confessions and admissions from persons for purposes of presenting the same as evidence before courts of law. There have been where arrested persons have been coerced into confessions which have led to false imprisonm book also discusses aspects of finding no case against arrested people and the notion of nolle and the aspect of compensation for the people that have been falsely convicted or wrongfully arr The book discusses the issue of liability for police brutality. It discusses the vicarious liabil Government in civil proceedings as master and employer of police officers for acts of polic done within the course of duty. The book also considers personal liability of Police officers reckless acts in law enforcement and the possibility of the Police opening up investiga commencing criminal proceedings against its officers.