Women as a naturally occurring, unequal gender is a credo that both Kenyan and Ugandan societies have struggled to emancipate itself from when chronicled narratives defend the need to transfigure exuding hegemonic attitudes. These posit an Aristolian-type view that the worst form of inequality is to try and make unequal things equal. Representative of this is that having the willingness and ability to enforce specifically enacted laws, which aspire to ensure that all persons are equal before and under the law, thus enjoying equal protection is hitherto considered a futile and discoidal task. Such endeavour for equality thus, fails to take into account the traditional patriarchal structures which dichotomize gender stereotypes and vectors therein, to define the parameters of behaviour that is expected of the masculine and feminine and, constrains the assessment of equality to the category of sex with which individuals ascribe. So then the dialogue goes that all men are equal in the sense that they are entitled to marry, work, be educated and to objectify and control women as property, so as to entitle them to occupy positions in the public domain. This then imputes notions of power, control, strength and dominance as gender-select binaries but, which are constrained by the ascendency of hyper-masculinity between each other. Antithetical, is a woman’s position where expectation is that she will marry, serve her husband and care for her children in the privacy of the home which connotes a subservient, weak, chaotic gender thus, perpetuating entrenched psychological differences lying in the natural inferiority of women in East African society. It is this naturally unequal paradigm that seeks to explain oppressive practices that fossilise women’s low ranking position in this patriarchal structure. This renders the

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1 Known as the ‘Aristotle Axiom’ as referred to by L Peter, Peter’s People, (1st edn, Morrow Publishing, 1979).
utopianism of cross-gender equality before the law unachievable unless misogynistic attitudes are educated, repelled and addressed through schooling, religious teachings and the local presence of Non Governmental Organisations.²

In order to seek to propose how Kenya and Uganda might achieve equal protection of women before the law, particularly in relation to the crimes of sexual and gender based violence (SGBV), it is necessary to consider the historical milieus of the Maasai with whom both Kenya and Uganda share heredity. This will evince a number of harmful practices that percolate modern day society which reinforce women’s subjugation and renders them more susceptible to being victims of SGBV; practices such as Female Genital Mutilation (FGM), Bride Price, Early Marriage and Polygamy. These practices further act so as to suppress a woman’s transendency from the private to the public sphere through the perpetuation of poverty and thus, impedes their ability to attend school, to achieve economic security, to obtain key decision making positions; fundamentally to influence change in state-centric institutions in order to seek to incapacitate patriarchal attitudes and structures and, to redress imbalances to the lack of proportionate representation of women therein.

Common law domestic legal systems in both Kenya and Uganda, through their respective constitutions recognise gender equality as a fundamental human right which accords with their international obligations in respect of ratified international treaties. These seek to ensure equality before the law as well as equal protection of the law between men and women.³ Furthermore, given the supremacy of the constitution

in the hierarchy of laws in both states\textsuperscript{4} and its expression to declare void any law which is inconsistent with it, including customary laws, then despite the enactment of legislation specifically prohibiting FGM and early marriage, the lack of enforcement of such laws impliedly endorse these oppressive traditions through impunity. As a corollary, the lack of investigation and prosecution of SGBV such as rape and defilement\textsuperscript{5} not only rigidifies impunity for perpetrators but, acts so as to successively maintain misogynistic social attitudes dissimulated by the lack of reporting through trepidation in being believed. There are further inconsistencies with the visionary statement of equality in the Constitution of Kenya given the enactment of the Marriage Act 2014 which retrogressively legalises the customary practice of polygamous marriage, which has further implications for women’s property rights and inheritance.

Neither is there vindication for the international community who neglect to acknowledge empirical human rights abuses when continuing to trade and give humanitarian aid to Kenya and Uganda despite the existence of United Nations safeguards which mandate ‘state parties to pay special attention to both gender based and sexual violence when assisting business enterprises in conflict-affected areas,\textsuperscript{6} thus condoning practices disadvantageous to women.

\textsuperscript{4}CEDAW Art 15 equality before the law, Art 26 ICCPR equal protection before the law and Art 7 Universal Declaration of Human Rights 1950.

\textsuperscript{5}Art 2(1) Kenyan Constitution 2010.

\textsuperscript{6}Which in Kenya and Uganda represents the offence of sexual activity with a child.

\textsuperscript{A/HRC/17/31 Annex Principle 7(b).}
Given the lack of heuristic ability to promulgate the practical enforcement of domestically enacted laws, then this renders claims made by both Kenya and Uganda that they are both genuinely willing and able to prosecute crimes of an international concern occurring in their territory during the civil war in Uganda and the Post-election violence in Kenya, somewhat thwarted.

However, whilst ending impunity for rape and other crimes of sexual violence in the International Criminal Court (ICC) might satisfy the conscience of international actors, who may assert that ‘top-down justice’ will percolate the necessary changes within these countries, the reality is that conviction of even the most heinous of perpetrators such as Joseph Kony, or Uhuru Kenyatta is an immolation to justice when direct perpetrators are those living within the same communities as their victims; evading prosecution.

Thus, the solution to realising verifiable justice in atoning for past impunity as well as to affect attitudes which encourage the enforcement of future crimes is through the creation of an internationalised domestic court, which has jurisdiction over serious international and domestic crimes. This then not only allows for Kenya and Uganda to

7 Kony is allegedly criminally responsible for thirty-three counts before the International Criminal Court on the basis of his individual criminal responsibility for his leadership of the LRA, who is an armed group carrying out an insurgency against the Government of Uganda and the Ugandan Army including: Twelve counts of crimes against humanity including Rape and Sexual Enslavement contrary to Art 7(1)(c) and (g) Rome Statute. Further, he is indicted for Twenty-one counts of war crimes including: inducing rape contrary to article 8(2)(e)(vi) and the forced enlistment of children contrary to 8(2)(e)(vii)).

8 Kenyatta was accused of crimes against humanity namely: Rape contrary to Art 7(1)(c) Rome Statute on the basis of his responsibility as co-perpetrator for the commission of Rape against civilian supporters of the Orange Democratic Movement Political party in 2007/8, as President of Kenya. However, all charges have subsequently been withdrawn against Kenyatta in March 2015, without prejudice to the possibility of bringing new charges at a later date on the same, or similar factual circumstances (thus the principle of ne bis in idem would not attach). This was on the basis of insufficient evidence, namely the inability to secure witnesses to attend and give evidence. ICC-01/09-02/11.
regain an element of control and reassert sovereignty over the proceedings but also, to submit this to international oversight seeks to reassure the international community as to the veracity of their ability and willingness to submit perpetrators through a proper and impartial judicial process.

A History

Folklore proclaims that the modern Maasai emanated from two, equal, gender-specific male and female tribes which became unified when the female coterie lost their cattle to disease, thus becoming dependent upon the male group; acceding their freedom in exchange for aegis. Thus patriarchal social structures and male hegemony resulting from such notions of indebtedness do not only delineate this parable but, have perpetuated the attribution and acceptance of ‘cultural traditions which put women on a lower rung of the social ladder’. Furthermore, that the retelling of tales which depict women as ‘good, hardworking, non-adulterous wives’, and those which portray countenance for fathers and husbands meting out physical punishments to daughters and wives involving stories of betrayal, preserves the moral tone in encouraging social conformity shaped by a patriarchal mindset. This not only effectuates the confining of women to the private sphere of the home whilst reserving the public

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sphere for men but, represents the male gender as having the capacity to be judge, jury and executor in a fictional depiction of gender stereotyping which portrays a male role as being in ‘guaranteeing community welfare’. 13

Colonialism had the effect so as to crystallise those established social norms in the early days which subjugated and suppressed women’s equality and the motivation for this was two-fold. Firstly, in confining women to the home meant that early male settlers could orchestrate full advantage to accessing employment in the workplace, and secondly, that there was a need to ‘accommodate effective partnerships with indigenous patriarchs’ which renounced any early shift in the conceptualisation of women. 15 This also resulted in dichotomising legal structures which, whilst retaining customary laws, imposed a common law system within national borders, which were neither promoted nor explained and therefore, did not provide a foundation upon which to exude a belief in change or encourage compliance. To a certain extent however, the friction still impeding change in modern day resonates in ‘the power of myth which lies precisely in the ability to make an arbitrary system of values appear as systems of fact’. 17 This narrative is then axiomatic, as being a systemic contributor

14 ibid, p376
to the prevailing social attitudes, harmful practices, and reluctance in asserting the full provisions of the law against perpetrators. Yet ‘the status of women is defined by more than just their formal legal standing, in any society it is also a matter of culture’ and therefore, before considering legal provisions, it is necessary to consider such practices.

**Harmful Practices - Female Genital Mutilation**

FGM known traditionally as female excision finds its heritage in Maasai folklore which tells a story of *Naipai*, a daughter who betrayed her father and brother, when, during conflict, she was discovered having sex with an enemy soldier. In seeking to punish his daughter, the father administered the cutting and alteration of her genitalia, the morality of which sought to deter her and other young girls from engaging in sexual practice for pleasure.\(^\text{18}\) However, in modern day practice, it is represented more palatably as a rite of passage from childhood to womanhood, than as a tortuous punishment which inflicts pain and unnecessary suffering upon girls, typically between the ages of 12 and 14.\(^\text{19}\) This further aligns the practice as a biologistic one in accordance with the natural process of puberty, which customises the ritual as promoting virginity and chastity of girls and women. The sustainability of FGM as a practice is not only then perpetuated by discrimination and stigmatisation that a non-excised female experiences and the sullying of family honour but, more importantly,

\[^{18}\text{A Hollis, The Masai: Their Language and Folklore (1st edn, Oxford Clarendon Press, 1905)}\]

the precipitation to other harmful practices that are invoked by its occurrence, namely bride price and early marriage.20

Bride Price

Bride Price is a relatively neoteric practice in Maasai culture, of which its prominence is largely attributable to British colonialists instilling capitalist values in traders, who utilised livestock, especially cattle, as a form of male currency. However, rather than being portrayed as a purely commercial transaction ‘where cattle and cash dowries are paid to a girl’s parents in return for marriage, the societal reasons are cited as being ‘to indemnify the girl’s family for the loss of her services and as an earnest of good intentions on the part of the groom and his family’.21 However, whatever the semantics or motivation for the undertakings it is clear that such a practice still embodies the promulgation that ‘marriage is the transfer of a woman as a possession from her father who reared her to her husband who rules her’,22 and reinforces the expectation that women are dependent upon men for their existence as an antithetic binary to autonomy.

Early Marriage

Heritage of early marriage in traditional society is that the young age of the bride helped to maximise the number of pregnancies and ensure enough surviving children

20 However, early marriage for men appears to be having the opposite effect; where the practice of circumcision is being eroded according to E Coast, ‘Maasai Marriage: A Comparative Study of Kenya and Tanzania’ (2006) 37(3) Journal of Comparative Family Studies, 412.


to meet pastoral labour needs.\(^{23}\) However, the tradition of seeking to secure a daughter's future as a pastoralist by marrying into a good family at a young age is becoming outdated given ‘rare land fragmentation, dispossession, continued neglect by the state, increased climatic instability and population growth’.\(^{24}\) But seeking to legitimise the practice of early marriage upon a father’s aspiration to ensure the stability of his daughter’s economic future, as a personification of good African parenthood simply, statically fortifies this tradition. Because the reality is that early marriage has now become a product of poverty in that families struggle to feed their children and so, the younger a child gets married, the sooner the parents will receive a bride price, which relieves this pressure.\(^{25}\) Therefore, these practices appear not simply to be just a perpetuation of patriarchal practices, as a ‘consequence of history’,\(^{26}\) but are a reflection of the inability of a modern society to economically sustain and assist large pastoral families. This ethnographical evaluation however, attributes the precipitance of ‘woman as commodity’ to the collective; as a consequence of the environment and thus, a state problem. Whereas, this problematises a societal ethos that denies agency to individuals who choose to trade their daughters in return for dowries and typifies the lack of desire to render persons

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ibid, 637.

culpable in Kenya and Uganda by submitting them to account, either through public condemnation or effective juridical process.

Polygamy

The East African Marriage Ordinance 1902 notes that ‘a native marriage is not a legal marriage if polygamous’, and yet 13% of women in Kenya and 25% in Uganda still live within a polygamous unions. Explanations for this apparent conflict with tradition are cited as being that most polygamous marriages occur in non-educated, poor households. This means that patriarchal traditions are likely to be more prevalent in pastoral communities that place more importance upon agriculture than education and further, reinforces the justification that men need more than one wife in pastoral communities to keep up with the labour requirements of cattle farming, thereby needing to reproduce more children. However, the demise of pastoralism and increase in poverty should result in a reduction of polygamy in the future on the grounds of utilitarianism but, this is unlikely given that it is a male subserving practice which preys upon the vulnerabilities of women, who have no autonomy to rebut the


28 Kenyan Demographic and Health Survey 2008-09, pg 80. <www.dhsprogram.com>


30 supra n34 and n35, 33% of those in Kenya are non-educated cf with 14% in Uganda.
advances of polygamy, once already married.\textsuperscript{31} This form of marriage also seeks to encourage obsequiousness in creating competition between co-wives, not as some suggest, collaboration,\textsuperscript{32} which is merely reactionary to the position of subjugation in simply accepting ones position as an additional wife.

Such practices, which oppress women, lead to incidences of SGBV due to a general lack of ability to advocate on behalf of oneself at a young age, as well as being subjected to early sexual experiences which are professed to be as of a right to the husband once married. This not only infringes upon a woman’s personal freedom and sexual identity but, has implications for contracting sexually transmitted diseases, the incidence of early pregnancy and the existence of birth defects in children being born to young mothers. But coupled with a ‘curbing of personal liberty; an incomplete education; and a lack of employment and career prospects [this underlines] the cylindrical nature of poverty and gender inequality’, \textsuperscript{33} and so consideration of the cumulative effects upon emancipation is further necessary.

**Emancipation - Education**

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\textsuperscript{31} Further, given that divorce is not a recognised practice in Maasai culture and the repayment of bride price, should a woman not agree, is an economic non-reality then acceptance is hitherto manipulated by circumstance. Further it is cajoled through praised fidelity and fuelled by fears of ignominy. See E Coast, ‘Maasai Marriage: A Comparative Study of Kenya and Tanzania’ (2006) 37(3) *Journal of Comparative Family Studies* 402.


As a fundamental right, everyone has a right to education however,\textsuperscript{34} such is the marginalisation of the female gender that they are often denied even a basic primary education on the basis that economic deprivation, particularly in pastoral communities means that parents have to choose which children to educate (if any). Traditional practices dictate that boys are naturally selected to be educated over girls but, promises made to educate all primary school age children with positive selection policies, which state that at least two girls are to be selected from each family,\textsuperscript{35} was seen as an optimistic step towards achieving equality in education. Nevertheless, in Kenya however, classes quickly became over-subscribed and a lack of real investment meant that schools had to resort to again charging fees,\textsuperscript{36} which meant that the 75\% net attendance ratio achieved for girls between 2008 and 2012,\textsuperscript{37} fell to 42\% which was just above the average primary school attendance in 2003.\textsuperscript{38} This was as a result of families having to again choose, who best to educate.\textsuperscript{39} Uganda’s policy to increase participation however has been more sustainable in the long term due to the construction of more classrooms, deployment of more teachers and increase in

\begin{itemize}
  \item \textsuperscript{34} Art 26 UN Charter.
  \item \textsuperscript{36} The Conversation, <www.theconversation.com/free-education-in-kenya-is-a-failed-promise-22453>
  \item \textsuperscript{37} Unicef, <www.unicef.org/infobycountry/kenya_statistics.html.>
  \item \textsuperscript{38} Child Info, <www.childinfo.org/files/ESAR_kenya.pdf>
\end{itemize}
investment which has yielded returns of 49% of girls being enrolled in primary education since 2003.\textsuperscript{40}

**Employment**

There is no doubt that a corollary exists between women that have been empowered through education to repudiate traditional practices and, their aggrandizement to positions of authority within state-centric institutions. However, at times intervention has been necessary so as to take affirmative action in equalising representation, particularly in the political process. Affirmative action policies in both the Kenyan and Ugandan Parliament has meant that women form a pre-set percentage of the total number of specially elected constituency representatives, so as to forcibly increase female participation in legislative functions,\textsuperscript{41} as well as to promote discourse on gender mainstreaming in the scrutiny of Government policy and administration.\textsuperscript{42} However, whilst women are actively appointed to the government, female ministers often occupy positions of mediocrity but, the gesticulation of gender equality through tokenism only actually works if women are elected to key decision-making positions. This then provides the basis for an early assertion which questions the dogmatisation of a genuine aspiration to achieve gender equality, when positions of power and authority appear ring-fenced from the marginalised.

\begin{footnotesize}
\textsuperscript{40} supra, n41.
\textsuperscript{41} Uganda is ranked 24\textsuperscript{th} out of 189 countries for proportionate representation of women in parliament cf with Kenya who are ranked 78\textsuperscript{th}. Inter-Parliamentary Union, 1\textsuperscript{st} Feb 2014. <http://ipu.org/pdf/publications/wmmmap14_en.pdf>
\textsuperscript{42} Kenya Vision 2030 para 8b states that it seeks to ‘prohibit retrogressive cultural practices and social ills’. <http://theredddesk.org/sites/default/files/vision_2030_brochure__july_2007.pdf>\end{footnotesize}
The same can be said for other roles of importance in society such as the judiciary where women occupy important positions in the administration of justice, as judges in the Supreme Court and Magistrates Court. However, the top three key roles of Chief Justice, Deputy Chief Justice and Principal Judge have never been occupied by women. Given that they are elected positions then the provisions of the affirmative action policy apply (meaning 1/3 must be women) however, there appears a general disregard for this constitutional provision.\footnote{Art 27(8) the Constitution of Kenya 2010; 33(5) Ugandan Constitution 2005.}

Similarly, women occupy positions within the Police forces however; again the top two positions of Inspector General and Deputy Inspector General are politically appointed positions having never been occupied by women.

This reinforces the notion that entrenched patriarchal attitudes within state institutions, perpetuated by traditional beliefs in women ascribing to the category of ‘private’ and thus, predisposed to having an innate inability to undertake positions of leadership where control and power are naturally occurring attributes to which women do not possess. This therefore places a limitation on the participation, career progression, and economic earning ability of those women in public office which impedes their elementary migration from traditional to modern, rural to urban and community to individual so as to represent gender equality as pretence.\footnote{T Kanogo, African Womanhood in Colonial Kenya 1900-1950 (1\textsuperscript{st} edn, James Curry Publisher, 2005) 25.}
Legal Domesticity

After achieving independence from the British as Protectorate in 1963, both Kenya and Uganda enacted constitutions vesting considerable power in the office of president as both Head of State and Commander in Chief of the armed forces. However, constitutional guarantees relating to the separation of powers are lacking given that the respective presidents (currently Uhuru Kenyatta in Kenya and Yoweri Museveni in Uganda) are part of the Executive (the Cabinet), part of the Legislature (National Assembly) and are also responsible for the appointment of the Judiciary. Therefore, the constitutional systems, in failing to promote such a principle of doctrinal importance heralds the possibility of arbitrary excesses in the concentration and exertion of political power by the President, despite aspirations of facilitating effective and efficient machinery capable of providing a legal framework for good governance. Thus it provides a paradigmatic culture within state-centric


organisations from the top-down, which are susceptible to incidences and allegations of bias and corruption (which shall be considered later).

However, with regard to the legal systems operating within these states, they both retain the English common law system but, stipulate that under the hierarchy of laws, that the constitution is supreme law, followed by all written laws expressed in statutes.

Yet the lack of express recognition within both acts of international law as a source of law, reaffirmed the original dualistic nature of both systems as requiring the enactment of domestic legislation in order to give effect to the provisions of internationally ratified treaties, meaning that Parliamentary sovereignty is enshrined through the primacy of the constitution. However, in recognising that Parliament could veto a bill to enact domestic legislation, enabling the provisions of a ratified treaty and given that the courts had already began to apply the spirit of international law in the absence of enabling legislation, the 2010 Kenyan Constitution shifts from a two-staged dualist system of ratification and implementation to a monist system where ratified treaties and customs already become part of Kenyan domestic law. However, this places international law in a hierarchical position similar to

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50 Art 45 Bill of Rights in Uganda states that the constitution is not exhaustive which implies it can be added to and therefore, perhaps recognises the future ability to include international law as a source of law.
51 In the case of Rono v Rono (2005) AHRLR 107 para 22.
domestic legislation which Orago claims, limits the desired impact and effect of international human rights law unless given constitutional parity.\textsuperscript{53} Furthermore, given that the ‘legislative authority at the national level is vested in and exercised by parliament then challenges to sovereignty exist with the requirement to enact laws which take account of international commitments and are not incompatible with them’.\textsuperscript{54}

At an international level, both Kenya and Uganda have ratified The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW),\textsuperscript{55} which firstly requires that the state party accord to women, equality with men before the law.\textsuperscript{56} Both constitutions call for gender equality and affirmative action for women and provides that ‘Every person is equal before the law’,\textsuperscript{57} and this is so ‘in all spheres of political, economic, social and cultural life’.\textsuperscript{58} However, as is demonstrated, women are not appointed to key decision making positions. In Uganda they dominate leadership

\begin{itemize}
\item \textsuperscript{53} Art 2(6) Constitution of Kenya 2010.
\item \textsuperscript{54} N Orago, ‘The 2010 Kenyan Constitution and the hierarchical place of International Law in the Kenyan Domestic Legal System: A Comparative Perspective’ (2013) \textit{African Human Rights Law Journal} 431.
\item \textsuperscript{55} Kenya in 1984 and Uganda in 1985.
\item \textsuperscript{56} Art 15 CEDAW.
\item \textsuperscript{57} Art 21(1) Constitution of Kenya 2010.
\item \textsuperscript{58} Art 21(1) Constitution of Uganda 2005.
\end{itemize}
positions in education, sport and social affairs but, not in those positions which equate to having power or authority in foreign affairs, security or finance.\textsuperscript{59}

This suggests that whilst affirmative policy making must be prima facie equality compliant in all sectors of reform, there is a margin of appreciation where presidential discretion is exercised, particularly in the recruitment of women to such positions which is preponderant in reinforcing a level of distrust by society in a woman’s ability to undertake these roles. This then renders perlocutionary the aim of achieving gender equality if the lack of praxis is not promulgated by those wielding ultimate authority. Furthermore, this then perpetuates entrenched traditional attitudes that inhibit the enactment of gender-specific policies in the workplace, designed to establish a body of rights to improve working conditions for women.

In addition, the respective constitutions state that persons have the right to equal protection before the law and that ‘any law, culture, custom or tradition which is against the dignity, welfare or interests of women which undermine their status are prohibited’\textsuperscript{60} This is particularly relevant to the practice of FGM which in accordance with the constitution is prohibited as a form of torture or cruel, inhuman or degrading treatment, and this accords with international obligations with regards the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, ratified by both states in 1986 and 1997 respectively and the fundamental

\textsuperscript{60} Art 33(6) Constitution of Uganda 2005: Art 2(4) Constitution of Kenya 2010 states that ‘Any law including customary law that is inconsistent with this constitution is void’.
customary freedoms from torture guaranteed under Art 4(2) International Covenant on Civil and Political Rights (ICCPR).

The Prohibition of Female Genital Mutilation Act 2011 renders an offence, the commission,\textsuperscript{61} aiding and abetting,\textsuperscript{62} or procuring of all forms of harmful procedure to the female genitalia including clitoridectomy, excision and infibulations.\textsuperscript{63} Yet the practice is still widely performed, particularly in Kenya,\textsuperscript{64} and its prevalence can in part be attributed to the meagre penalty for conviction of a term of imprisonment not less than three years or a fine.\textsuperscript{65} This has limited deterrent effect and does not take account of its grave nature, as an obvious type of physical mutilation akin to torture under Art 4(2) Commission Against Torture. Furthermore, between 2011 and 2014, 71 cases of FGM were brought before the court in Kenya with only 16 resulting convictions;\textsuperscript{66} challenges to prosecution being attributed as evidential, with the reluctance of victims in reporting or giving parol evidence against perpetrators ‘based upon cultural beliefs, attitudes and fear of intimidation’.\textsuperscript{67} And so, ascribing the lack of legal proceedings against perpetrators, to victim disinclination, is a mendacious

\textsuperscript{61}Art 19 Prohibition of Female Genital Mutilation Act 2011.

\textsuperscript{62}ibid. Art 20.

\textsuperscript{63}ibid. Art 21.

\textsuperscript{64}27% of women in Kenya report that they are circumcised with a prevalence range of 73% in the Maasai communities. Unicef, Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change. <www.unicef.org/esaraFGCM_Lo_res.pdf>

\textsuperscript{65}Art 29 Female Genital Mutilation Act 2011.


\textsuperscript{67}
representation when the state has a conversion rate from prosecution to conviction of 22.5% in three years, but simply seeks to disguise the inability of the state to adopt strategies in countenance of this phenomenon. In addition, the fact that Kenya’s north eastern province has a population of up to 1 million displaced Somali refugees, then FGM prevalence rises to 97.5% of all Somali women who are reported as being circumcised and so the rampancy of discrimination that is encountered by these women,\textsuperscript{68} who intersect with other vulnerabilities of ‘refugee’ and ‘ethnicity’ renders the exacerbation of inequality unmeasureable.\textsuperscript{69} These figures however, do not take account of those who cross borders to undergo the procedure, particularly to Tanzania.\textsuperscript{70}

Yet, the ability of Kenya to improve efforts to investigate and enforce international treaties and domestic laws can be attributed to the fact that since the enactment of the FGM Act and, the establishment of the Anti-Female Genital Mutilation Board, there has been a distinct lack of governmental supervision and coordination relating to public awareness of FGM in the last three years.\textsuperscript{71} And whilst the recent presidential appointment of Linah Kilimo to the position of chairperson of the board is seen as a promising one on the basis of her noted dedication to ‘her work in the field and at a

\begin{quote}
\textsuperscript{68}Director of Public Prosecutions, Keriako Tobiko. ‘Tobiko Deploys Special Units to Nip FGM’ <www.capitalfm.co.ke/news/2014/04/tobiko-deploys-special-units-to-nip-fgm.>
\end{quote}

\begin{quote}
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\textsuperscript{70}Uganda also attracts some 600,000 refugees from the Democratic Republic of Congo and so, this is not an isolated incidence.
\end{quote}

\begin{quote}
\textsuperscript{71}Travel is usually from Uganda to Kenya, and Kenya to Tanzania who have not outlawed the practice. <www.standardmedia.co.ke/articleD=200129154&story_title=Kenyans%20cross%20border%20to%20get%20the%20cut'/the%20countries/>
\end{quote}

Art 5(1) FGM Act 2011 state this as one of its functions.
political and legislative level’ to eliminate FGM, the fact that the position is a presidential appointment, renders its integrity for the future, problematic due to a perceived lack of impartiality and its susceptibility for political manipulation, given a lack of distinct *trias politica*.

The provisions of CEDAW further places a duty upon a state to take appropriate measures to eliminate discrimination against women in matters relating to marriage, particularly the right to enter into marriage with free and full consent. Again, in both the Kenyan and Ugandan Constitution, they embody this principle of equality when it states that ‘every adult has the right to marry a person of the opposite sex based on free consent’. However, Unicef state that 40% of girls in Uganda and 26% girls in Kenya are married by the age of 18, and further cites that 10% of girls in Uganda and 6% in Kenya are married pre-15. The significance of this is that early marriage is carried out below the age of 18 ‘before the girl is physically, physiologically and psychologically ready to shoulder the responsibility of marriage and childbirth’.

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73 Art 4(1)(a) FGM Act 2011.

74 Art 16(b) CEDAW.

75 Art 31 Constitution of Uganda 2005, which also sets the minimum age of 18; Art 45(2) Kenyan Constitution 2010.


77 The significance of assessing the age pre-15 is that traditionally, under Principle 1 of the 1965 Recommendation on Consent to Marriage, the minimum age for registration of marriage was set as being no lower than 15.
this means that infringements of this fundamental protection is not only a constitutional domestic breach but, also breaches international obligations; namely those relating to the Convention on the Rights of the Child.\textsuperscript{79} This cites that a state’s responsibility spans to protecting a child (those under 18 by Art 1) against all forms of discrimination.\textsuperscript{80} Thus, early marriage can be described as a forced marriage because identifying with ‘child’ status, vitiates the giving of fully formed consent. Therefore, under Art 1(c) of the Supplementary Convention on the Abolition of Slavery, The Slave Trade, and Institutions and Practices Similar to Slavery 1956, a marriage which is forced upon a girl amounts to slavery, which constitutes another fundamental human rights abuse in permitting the continued traditional practice, with impunity.

Another reverberation is the expectation of consummation between those married. In early marriage this equates to engaging in sexual activity with a child, thus constituting the offence of Defilement.\textsuperscript{81} This imposes liability on conviction to a mandatory life sentence however, in Uganda, where the offence is committed against a child under 14 then the perpetrator ‘is liable to suffer death’.\textsuperscript{82} Nevertheless, despite the severity of sentence, the desensitisation of society to an act which constitutes a fundamental breach of a child’s right to protection from sexual abuse by both, their parents and the state,\textsuperscript{83} renders the provision extraneous to traditional marriages,

\textsuperscript{79} United Nations Population Fund 2006.

\textsuperscript{80} GA Res 44/25. 20\textsuperscript{th} November 1989. Ratified by both states in 1990.

\textsuperscript{81} Art 2(2) Convention on the Rights of the Child.

\textsuperscript{82} s129(1) The Penal Code (Amendment) Act 2007, Uganda; s8 Sexual Offences Act 2006, Kenya.

\textsuperscript{83} s129(2) Penal Code (Amendment) Act 2007.
through a lack of cognisance. One of the challenges to the conviction of perpetrators in defilement cases is reported as being that most parents ignore legal proceedings in preference to negotiating with the perpetrators, for material gain or, tampering with evidence after accepting bribes.\textsuperscript{84}

But given that law enforcers and prosecutors are drawn from the same citizenry, where traditional attitudes can be ubiquitous then there is a likelihood that this creates a proclivity for a lack of thoroughness in investigation and charge. Thus, narratives such that ‘women and girls are inclined to tell false stories which are easy to fabricate but, extremely difficult to prove’,\textsuperscript{85} are irrepressible when the process for invoking the investigation procedure for reporting rape and other sexual violence is intentionally obfuscatory so as to be an impediment to justice. Such is the process that typically, victims must obtain a Request for Medical Investigation Form from a police station,\textsuperscript{86} where fees of up to 10,000 Ugandan shillings are levied by the police in order to obtain.\textsuperscript{87} Of further concern is that in Kenya, doctors can then charge up to 1500 Kenyan Shillings to complete the examination, confirming the existence of DNA evidence in order to prove the offence of Rape.\textsuperscript{88}

\begin{itemize}
\item Article 19(1) Convention on the Rights of the Child.
\item Ugandan Police Annual Crime and Traffic Road Safety Report 2013.
\item Maina v R (1970) EA 370.
\item Form P3 in Kenya and Police Form 3 in Uganda.
\item Human Rights Watch, Uganda, Just Die Quietly: Domestic Violence and Women’s Vulnerability to HIV in Uganda which was confirmed by Amnesty International in ‘I Can’t Afford Justice’ – Violence Against Women Unchecked and Unpunished 2010.
\end{itemize}
This therefore poses economic barriers to justice, particularly to those in rural communities and those considered to be refugees who do not possess the funds to access such services. Furthermore, given that there are only limited hospital within Kenya and Uganda that undertake DNA testing, then this also places geographical barriers to achieving justice, particularly given the lack of information available about the preservation of seminal DNA; evidence which is susceptible to expiration after delayed retrieval. These barriers can be illustrated by the statistics collated in Uganda, where out of 1042 cases of rape reported in 2013, 365 cases were prosecuted, with only 11 convictions secured. So again, despite rape being expressly recognised as a sexual offence, and the type of acts which will constitute rape being, in some cases, progressive, there is still the persistent patriarchal patterns of behaviour and attitudes which are manifest in discriminatory practices. There is also the retention of legal provisions endorsing patriarchal privilege in the presumed rights of sexual access to their wives, no matter their age, where marital rape is not considered unlawful in respect of those persons who are lawfully married. The Committee on the

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91 Instead of an offence against morality as was previously (under Chapter 63 Penal Code in Kenya)

92 In comparison to western legal systems for eg. In Kenya, the Sexual Offences Act 2003 states that rape is envisaged, not just by men upon women but, by men upon men, women against women and women against men.

93 Art 43(5) Sexual Offences Act 2006 and inferred by Art 123 Penal Code 1950, Uganda where a ‘person personating a woman’s husband commits rape’ implying that her husband does not.
Elimination of Discrimination Against Women expresses concerns that its continued existence ‘discriminates against women...in spite of having constitutional provisions that promote equality between women and men and prohibit discrimination on the grounds of sex’.\(^{94}\)

However, it is not just the slow pace of law reform which fossilises discriminatory attitudes but, at times, the positive enactment of laws; in this case the Marriage Act 2014. This legalises the occurrence of polygamous marriage,\(^{95}\) which has repercussions for the progress made in seeking to achieve equality with men in the marriage union when enabling women to administer, hold and control matrimonial property.\(^{96}\) This has further implications upon previously improved asset-sharing provisions, when a husband dies or divorces because, now it would appear that this is reduced with the existence of multiple wives.\(^{97}\)

And neither does the existence of international frameworks relating to Good Business Practice,\(^{98}\) which places a duty upon elected member states whose business enterprises transact with conflict-effected states, prohibit gender discrimination nor promote a verifiable intention to eradicate impunity for SGBV. This is hitherto due to the

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\(^{94}\) CEDAW/C/UGA/7 – 25\(^{th}\) May 2009, para 14, pg 20.

\(^{95}\) s3(1) Marriage Act 2014, Kenya.

\(^{96}\) ibid. Art 4(a).

\(^{97}\) Despite s8 Matrimonial Property Act 2013 expressly stating that polygamous marriage will not affect each wife’s individual share but, the male will be entitled to a share of all of the assets.

assertion that the UK, for example, prioritises aims in increasing trade with both Kenya and Uganda,\textsuperscript{99} with business risk guidance citing that ‘significant improvements for women and girls through high levels of political and commercial representation’ have mitigated such abstention.\textsuperscript{100} Yet given the diplomatic efforts deployed to exert pressure on a Ugandan state, whose systemic patriarchal attitudes and hegemonic masculine structures, not only affect women but, impose anti-homosexual laws which criminalise aggravated homosexuality with life imprisonment,\textsuperscript{101} demonstrates the global ability to exhort discourse on societal discriminations against marginalised groups. But, the only explanation proffered for as lack of dialogue between those governments on gender discrimination appears to be symptomatic of a vestigial patriarchy in the west, which overlooks the consequences of economic, political and legal inequalities for women in these states, in favour of continually defining hegemony in trade relations with African states, over trade with the East.\textsuperscript{102}

\textsuperscript{99} The UK currently imports $450 million worth of goods from Kenya and $57 million from Uganda whilst countries from the Eurozone collectively import $1.3 million from Kenya and $507 million respectively. The UK is responsible for exporting $600 million alone to Kenya whilst exporting $128 million to Uganda and, collectively Eurozone countries are responsible for exporting $1.875 billion to Kenya and $533 million to Uganda. Thus, the UK contributes 14.1\% to Kenya’s GDP whilst contributing 4\% to the Ugandan economy and therefore, despite the existence of the ‘Good Business Practice’ still makes significant economic and trade contributions. Ratification of international statutes seeking to promote equality for women by Kenya and Uganda as well as the enactment of respective Bill of Rights thus appears to create an illusory effect in maintaining and attracting trade. https://atlas.media.mit.edu/en/profile/country/uga/

\textsuperscript{100} UK Foreign and Commonwealth Office <www.gov.uk>.

\textsuperscript{101} Anti-Homosexuality Act 2014.

However, it has been highlighted that whilst women’s political representation in Uganda is a slight improvement on Kenya, that this does not improve participation given the lack of appointment to influential decision-making positions. And this lack of real access to political power structures is cited as the reason that women are singled out as victims of sexual violence, particularly when preserved by the lack of presence in the post-conflict transition in such fragile states; so as to lack the opportunity to negotiate their position in a reconstructed social and political framework, devoid of gender mainstreaming in all activities pertaining to ‘peace, development and human rights.’

However, before considering the post-conflict situation it is perhaps necessary to firstly assert that given the stated fundamental breaches of international human rights obligations then theoretically, those persons most responsible for being complicit in their lack of practical enforcement, namely the president, could be susceptible to indictment before the International Criminal Court; for the perpetuation of FGM and early marriage: tantamount to crimes against humanity, namely torture and sexual slavery. This necessarily requires a course of conduct against the female population in furtherance of a systematic patriarchal policy to perpetuate the subjugation of women, which arguably is satisfied here. However, the fact that matters investigated before the

103 supra n47.
105 For eg, there was no female presence in the Juba Peace talks in 2007 between the Ugandan government and the Lord’s Resistance Army.
ICC are typically accompanied by armed conflict, with depictions of death and physical suffering almost being a profound prerequisite, then what could be perceived as isolated incidents of gender inequality are not congruous with the likelihood that an investigation will be initiated. Furthermore, given that patriarchal governance is still prevalent throughout the international community, with hegemonic masculinities not only being played out between states but, is also deducible within the composition of the international organisations including the ICC, then the occurrence of women’s domestic, daily human rights abuses remains part of conjugal privacy.

But whether international values should or could be transposed through law and, governed through the legal institution of the ICC by assigning breaches of international values to a state via its state actors is an aggregative disquisition.

**Conflict in Context**

Post-election violence which has deluged both Kenya and Uganda in the last two decades is not only representation of current geo-political vulnerabilities played out in the assertion of masculinity through political aspirations of power and control in governance but, is an ingrained Machiavellian tactic used to evoke support by terroristic means designed to both punish dissenters and inhibit opposition supporters from voting. Such hyper-violence provides a thriving environment for militia who seek to act upon the vulnerabilities of the state by exacerbating tensions between ethnic groups in ‘recovering what they think they lost when the Europeans forcibly
acquired their ancestral land’. Yet expiation for such barbarity, particularly for sexual offences was never achieved domestically despite the apparent pro-activity in establishing a Multi-Agency Task force on Post-election violence in Kenya which reviewed over 6,000 files, finalising 445 cases and achieving 26 convictions but, none for sexual offences. However, the nemesis to the process was judicially cited as ‘shoddy police investigations’ and led to the recommendation that a special tribunal be established to prosecute crimes involving SGBV in order to ‘break the cycle of impunity’. This was no different for Uganda who cited the lack of law enforcement provision to succeed in arresting those members of the LRA leadership having committed crimes of international concern

However, given the continued failure to enact an amendment to the Kenyan constitution to affect the creation of a Special Tribunal with the constitution of Kenya (Amendment) (No 3) Bill 2009 failing to receive the necessary parliamentary consensus, there was torpidity of inaction in admitting those most responsible to a

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proper judicial process domestically. Further, given that one of those most responsibly as indirect co-perpetration is the President Uhuru Kenyatta, and the documented difficulties with impartiality that such a position brings, as well as a lack of public belief that judicial process is free from bribery and corruption\textsuperscript{112} then the fact that the ICC prosecutor made a decision in both cases to request authorisation from the pre-trial chamber to begin full investigation into the situation\textsuperscript{113} at least ostensibly bolstered optimism in fundamental due process guarantees. But, this still means that low profile perpetrators of SGBV are evading prosecution through a combination of an unwillingness to atone for the crimes committed against women (perpetuated by discriminatory attitudes), which is manifested in reports that victim statements given, concerning SGBV, were recorded a year after offences were committed\textsuperscript{114} as well as the lack of collection and preservation of DNA evidence to corroborate offences which, given the amount of time having passed, means that notions of domestic procedural and retributive justice, chimeric.

After admission to the ICC and the issuing of arrest warrants for Kony et al and confirmation of charges against Kenyatta respectively by pre-trial Chamber II, issues of admissibility have been investigated. Firstly with regard to the case against

\textsuperscript{112} Transparency International. Corruption Perceptions Index 2013, measuring public sector corruption cite that Kenya and Uganda are 26\textsuperscript{th} and 27\textsuperscript{th} out of 177 countries for corruption. <http://www.transparency.org/cpi2013/results>


Kony, the pre-trail Chamber II initiated proceedings on its own motion in discerning whether the envision by the Ugandan Government of a special division of the High Court to ‘try individuals who are alleged to have committed serious crimes during the conflict’ in Uganda, paying ‘particular attention to crimes and violations against women’, represented a renewed ability to obtain the necessary evidence consistent with an intention to bring them to justice. However, as the prosecution had not identified ‘any national proceedings related to the case’; because admissibility was not, and is still yet to be affected by any continued negotiations between parties, then the matter shall, for the time being, remain before the ICC.

With regard to Kenya, admissibility was questioned by the Kenyan Government who asserted that ‘the enactment of a new Kenyan constitution, which incorporates a bill of rights guaranteeing fair trial and procedural rights, meant that they were able to submit the matters to domestic prosecution and that ‘only by trying people in Kenya itself and ensuring an even-handed investigation and prosecution of all those on whom suspicion rightly falls, may the national process of dealing with those be properly balanced...and will certainly build public confidence in the police and


117 ibid. Clause 13 (c).

118 Article 17(2)(c) Rome Statute.

119 ICC–02/04-01/05-377, Decision on the Admissibility of the case under Article 19(1) of the Statute, para 5, 10 March 2009.
judicial process’. However, the pre-trial chamber rendered admissible the case for the same reason; that investigative steps (as required by Art 17 (1)(b)) were not being taken in relation to Kenyatta in relation to the same case, domestically which therefore did not demonstrate willingness or ability to prosecute or investigate the matter. In a subsequent change of tactic, Kenya directed a request for deferral of the ICC process to the UNSC under Art 16 Rome Statute, citing that the threat to Kenya from terrorism was such that the prosecution of Kenyatta as the incumbent head of state, would threaten peace and security in the region and so, its suspension was necessary in order to allow a concentration of efforts in this regard. However as this only permits for a 12 months renewable deferral, then the suggestion that Art 53(4) would provide a better solution to the complimentary issue, where the ICC prosecutor is empowered to reconsider a decision whether to initiate a prosecution based upon new facts or information (such as evidence of an ability and willingness to submit matters through a thorough, impartial judicial process). But, given the Trial Chamber’s ability to exercise by its own motion, under Art 19(1), a review of admissibility at any stage in the proceedings, then the fact that those against Kenyatta are advanced because the trial has already began, does not appear to preclude the

121 ICC-01/09-01/11-101, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, , para 41.
124 Article 53(4) Rome Statute.
possibility. Yet, this is likely to be limited to the extent that the court needs to ‘bear in mind the interests of the suspect’. In the Kenyan case therefore, the fact that the trial had commenced, then in accordance with the fundamental right to an entitlement to trial within a reasonable time, the interchange of jurisdiction would have frustrated such a right. However, this might still be a possibility for Uganda, where the trial process is yet to be commenced but, the Prosecutor or Trial Chamber would have to be satisfied with their ability to prosecute Kony because, *Ne bis in idem* would possibly prevent the ICC in reasserting jurisdiction. But whether the ICC, either through the principle of complementarity, which acts as a catalyst to retaining state sovereignty through effective domestic prosecution, or as an institution which successfully prosecutes those responsible, is the right place to impact upon the social change necessary in Kenya and Uganda; to reshaping stereotypical attitudes towards women, requires serious consideration. As an eminent consequence, international criminal justice has very little, if any deterrent value, particularly given the distance between the location of trials in the ICC at the Hague and the jurisdiction of commission.

125 Art 9(3) ICCPR where ‘Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time

126 Article 20(3) Rome Statute where ‘no person who has been tried by another court for conduct also proscribed shall be tried by the court in respect to the same conduct unless the proceedings were a) for the purpose of shielding the person concerned from criminal responsibility or b) proceedings were not otherwise conducted independently or impartially.


However, there is some merit in that the prosecution of Kenyatta and Kony has the effect so as to de-legitimise them as political and influential elites but, this also means that the ICC judicial process is susceptible to being used as a tool in pursuit of partisan politics. Nevertheless, public awareness and the international condemnation of atrocities can only be a good thing in driving change in both states, but given that there are continuing publicised suggestions made that the case against Kenyatta should be (and in fact have been) dismissed given that a lack of support from the Kenyan Government in assisting the ICC with evidence gathering, resulted in the withdrawal of matters against Francis Muthara (Kenyatta’s co-perpetrator), which left the ICC ‘with a big problem of credibility in relation to his prosecution’.  

But this is suggestive that the lack of Kenyan support seeks to exert pressure on the ICC, to engineer the resurrection of a hybrid court model, which effectively internationalises domestic tribunals by applying international standards to achieving national justice whilst reclaiming sovereignty. The advantages to such a model are cited as being to prevent future atrocities, punish offenders, foster national reconciliation, creates historical records of abuses, reveals the truth about the past and serves as catharsis for future prosecutions. However, perceptions of justice are relative to the victims against whom the offences are committed, meaning that jurisdiction over all serious violations of international humanitarian law and domestic

129 Mr Kay, Defence Counsel speech, ICC – 01/09-02/H – T-30-Eng WT.


law, not just high profile ones, adds to public perceptions of retributive justice. However, there have been criticisms of the various methods of administrative control over the process, where in Cambodia; domestic control by existing judicial personnel was a fatal deficit in a country that was plagued by corruption.

Further, that a lack of infrastructure in states such as East Timor, where homogenous grafting of new East Timorese legislation and, the adoption of international treaties has meant that The United Nations Transitional Administration, through the Serious Crimes Project has had difficulty pursuing perpetrators of international, as well as serious domestic crimes committed by Indonesian military personnel. In addition, for some African states, such as Sierra Leone, there has been the suggestion that legislation on crimes of sexual violence were considered regressive, which inhibits reconciliation with international human rights obligations relating to non-discrimination, rendering negotiations on draft statutes difficult.

Thus it appears that the criticisms can be mitigated in achieving an international domestic court in Kenya and Uganda, because both have enabling legislation to prosecute international crimes and this further mitigates the need for the simple

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Art 1(1) Statute of the Special Court for Sierra Leone, states that the competence of the court is ‘having the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean Law’.

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Because of difficulties in establishing state responsibility and thus, high level perpetrator responsibility of armed groups; for the planning and organisation of acts which resulted in the atrocities. S Linton, ‘Cambodia, East Timor and Sierra Leone: Experiments in International Justice’ (2001) 12 Criminal Law Forum 212. <https://www.essex.ac.uk/armedcon/story_id/000385.pdf>

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This would be particulary so with Kenya and Uganda because of the retention of laws which render lawful, marital rape for eg.
importation of international legislation which fails to take account of the particular
sensitivities of the conflict such as ethnicity. Further, submitting the process to the
oversight of the ICC prosecutor, whist synthesising domestic judges with international
judges, nullifies suggestion that nationals are not ‘players in their own processes.’

**Conclusion**

‘Confined to the home and subject to men’s rule, the obedient women has been an
angel in the house’. Thus, women in Kenya and Uganda remain shackled by the
imaginary restraints of tradition, perpetrated by the weight of such folklore narratives
that tautologise male despotism.

Notwithstanding the existence of constitutionally enshrined principles relating to
gender equality and specific laws, which pertain to prohibiting FGM and early
marriage that seek to redress such discriminatory practices; their indubitable lack of
enforcement contributing to the persistence of patriarchal patterns of behaviour and
stereotyping that reinforces expectations of women’s subordination to men.

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136 S Linton, ‘Cambodia, East Timor and Sierra Leone: Experiments in International Justice’

137 L Nkansah, ‘Justice within the arrangement of the special court of Sierra Leone Versus Local
and Comparative Law*, 119.


139 Article 5.1, paragraph 62 CEDAW/C/UGA/7 2009 Ministry of Gender, Labour and Social
Development, Combined 4th, 5th, 6th & 7th Periodic Report on the Implementation of CEDAW in
Such attitudes then sustain a belief in the male right to objectify women which result in the expectation of the entitlement to sex as of right and not as of choice. Furthermore, that the accepted occurrence of SGBV in the private sphere as a method by which to control and punish women for defiance, as well as the desensitisation to early nubility of girls, renders society phlegmatic to impunity for SGBV and defilement.

It is advanced herein however, that the existence of such laws are not enacted for utilitarian purposes but, are so enacted as a semblance of both states assertion of human rights compliancy in seeking trade agreements with the west, as well as to continue to meet the criterion of pursuing positive human rights development in attracting humanitarian aid. It is conversely advanced that the global community continues to trade with both Kenya and Uganda despite the existence of gender discrimination in which practices such as FGM and early marriage are tantamount to torture and slavery; crimes that constitute fundamental human rights abuses. This then highlights that the global community appear to be complicit in impeding palpable change, when reassured by the existence of such legislative provisions without attestation and thus, neglects the actualities of gender inequality being perpetuated against women which is inimical to emancipation from impoverishness, through the transposition from the home to the workplace; from subjugation to empowerment through education and opportunity. Yet, achieving justice for those women who have been victim to SGBV domestically through the effective identification, investigation and prosecution of perpetrators requires a society that believes in the laws that they are enforcing, which it is claimed that they did not do when colonially imposed and the development of a culture which informs conscience to end impunity. This may
then impact upon the militaristic propensity for conflict within both states, where SGBV is seen as a contributing factor.\textsuperscript{140}

So then, the appropriate location to inform change and achieve recognisable justice is through juridical proceeding of SGBV, committed upon the territory, in domestic courts. However, given the levels of public sector corruption and demonstrable disinclination to successfully investigate and prosecute SGBV, having occurred during the Ugandan civil war and, the post-election violence in Kenya, then the creation of an internationalised domestic courts offers the reassurances for international oversight, in an impartial judicial process and builds faith in a nations ability to atone for past abuses. This then reserves the ICC to prosecute the most serious crimes of international concern, for which Uhuru Kenyatta is one such perpetrator who, as a powerful figure in authority, was a perpetrator at worst and otherwise an individual who directed operations which included the acquiescence of rape ‘in pursuance of an organisational policy to keep his political party in power through every means’.\textsuperscript{141} And no more dehabilitating upon the victim is the commission of human rights abuses, than by those persons with whom the conviction of the nation lies.

So whilst valorous is the attempt to ‘shatter the culture of impunity for sexual violence in conflict’,\textsuperscript{142} this author asserts that the gamut of which should extend to the


\textsuperscript{141} Open Session, ICC-01/09-02/11-T-17-ENG ETWT 23-01-2012 1-9 SZ PT, 23 January 2012, para 288.

\textsuperscript{142} Global Summit to End Sexual Violence in Conflict. <https://www.gov.uk/government/topical-events/sexual-violence-in-conflict/about>
consideration of domestic patriarchal cultures, which suffuse and magnify wartime attitudes, that subjugate women and emasculates some men who do not ascribe to the hyper-masculinity which dominate hegemonic state structures. The alternative being of course that in ‘letting them loose in the world and rebellious toward such male domination, they become the devil’s gateway’.  

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