



Examining the Efficacy of the Law Governing the Estates of Missing Persons in Uganda

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ABSTRACT

This article examines the efficacy of the law governing the estates of missing persons in Uganda. The article revealed that regardless of whether the missing person returns, those left behind are faced with immediate practical problems such as how to deal with mortgage payments, lack of access to bank accounts that might become overdrawn, or insurance renewal on a car or motorbike. The existing law does not facilitate immediate access to for example the missing person's bank accounts. Much of the emotional impact on those left behind can be directly attributed to the lack of information when a person goes missing. More so, the challenge of managing estates of missing persons is that a lot of time is spent mediating and counseling to end disputes that come up before management orders have been issued by court. So, to easily handle these issues properly, this article calls for Uganda to ratify the Rome Statute. Though Uganda is a signatory to the ICPAPED, it has not ratified the convention. Furthermore, civil society organizations should provide support to the families of the missing by ensuring their voices and needs are heard within and beyond Uganda.

Keywords: Administrators of estates, Conventions, Disputes, Legal frameworks, Missing persons

INTRODUCTION

Throughout the world, hundreds of thousands of people have lost track of a relative during an armed conflict or in a situation of violence. Their relatives may have been killed in mass executions and their bodies thrown into unmarked graves, they may have been captured or abducted or arrested at their homes and then died in custody; or they may be in secret locations, held incommunicado. They may be civilians fleeing the fighting or children separated from their families; or soldiers killed in combat whose remains have not been tended to properly [1]. The plight of persons who disappear is tragic. So, too, is that of their families, living in limbo, unable to mourn, and in the absence of definite knowledge, constantly tormented by hope a secret prison, a new life in a foreign land, anything but the finality of death [2]. Many spend years and their life savings, searching fruitlessly for their relatives. Besides the emotional suffering, can be financially crippling. It is often the case that it is the breadwinner who has gone missing, leaving wives and mothers impoverished and in need. In some countries, families have to wait for years before their missing relative is officially declared dead or absent. This interval can seem an eternity for family members, whose lives stand still, so to speak: they are unable to sell property, remarry or even go through funeral rites. Numerous provisions of international law have been developed to help avert cases of disappearance and to support; "when relatives of theirs go missing. Responsibility for enacting and implementing these rests mainly with the pertinent authorities [3]. A missing person in Uganda is provided for under a law called "The Estates of Missing Persons (Management) Act Chapter 159[4]" as "a person who disappears from Uganda without making provision for the administration of his or her estate and investigations have shown that his or her whereabouts are not known. Under this law, if a person simply vanishes or disappears without being heard from for 6 months, then such a person could be classified as a Missing Person. Upon such classification, any relative of the missing person may within the concurrence of the family of the missing person, apply to the court to be granted an order to manage his or her estate, but the court may, if it considers it necessary or desirable, grant an order to more than one relative to manage the estate jointly. However any person authorized in writing by the missing person to manage his or her estate during his or her absence may, in like manner, apply for the grant of an order before he or she assumes the office of the manager[5]. Section 2 [4], stipulates that where a person, In this Act referred to as a "missing person", disappears without making provision for the administration of his or her estate, or the maintenance of his or her dependent relatives, if any, and is not heard of within six months, any relative of the missing person may with the concurrence of the family of the missing person, apply to the court to

be granted an order to manage his or her estate but the court may, if it considers it necessary or desirable, grant an order to more than one relative to manage the estate jointly. Sadly, regardless of the circumstances of a disappearance or the period of absence of the missing person, the impact on those left behind, family members in particular, cannot be understated. As the disappearance of a person is often unanticipated and unexpected, the emotional trauma caused by the disappearance can be devastating for those left behind [6]. Regardless of whether the missing person returns, those left behind are faced with immediate practical problems such as how to deal with mortgage payments, lack of access to bank accounts that might become overdrawn, or insurance renewal on a car or motorbike. The existing law does not facilitate immediate access to for example the missing person's bank accounts. Much of the emotional impact on those left behind can be directly attributed to the lack of information when a person goes missing [7]. This article examines the efficacy of the law governing the estates of missing persons in Uganda.

The Concept of a Missing Person in Uganda

A missing person in Uganda is provided for under The Estates of Missing Persons (Management) Act Cap 159 [4], as "a person who disappears from Uganda without making provision for the administration of his or her estate and investigations have shown that his or her whereabouts are known." Under this law, if a person simply vanishes, or disappears without being heard from for 6 months, then such a person could be classified as a missing person and upon such classification, a Manager is then appointed to manage and look after that person's property. Under this law, a missing person is presumed dead if such a person is not heard from for 3 years, this is different from other laws such as the Evidence Act [8], which assume a person is dead after 7 years. A missing person is a person who has disappeared and whose status as alive or dead cannot be confirmed as their location and fate is unknown. A person may be missing due to their own decision, accident, crime or death in a location where they cannot be found. When a missing person is presumed dead, then the property will be dealt with under the Succession Act for instance if there is a Will and letters of Administration or if the Missing person left no Will behind [4]. Section 1(f)[4], describes a missing person as a person who disappears from Uganda without making provision for the administration of his or her estate and investigations have shown that his or her whereabouts are not known. Increasingly, the missing victims of mass atrocities around the world are being formally recognized as a key impediment to genuine social repair and transitional justice. A recent conference organized by the International Commission on Missing Persons (ICMP) found that where a concerted effort was made to locate and identify the missing victims of mass atrocities some of these impediments were overcome. Going forward, the international community now recognizes that the missing victims of past and ongoing mass atrocities are an urgent global concern that warrants a structured and sustained response that works in tandem with local government and civil society organizations [9]. As such, the Government of Uganda and Ugandan civil society organizations, in collaboration with relevant sectors within the international community, have a legal and moral obligation to address the missing victims of Uganda's recent civil war in order to promote genuine social repair and transitional justice in northern Uganda. In line with these international developments and building upon its history of working with families affected by the recent civil war, the Justice and Reconciliation Project (JRP), in collaboration with the families of the missing, launched the "Right to Know" campaign in 2012 to promote awareness of the plight of the missing and the anguish of their families. JRP has since completed a pilot study in PalabekKal and Palabek Gem sub-counties in Lamwo District that establishes the circumstances under which people disappeared, examines past and present coping strategies used by the affected communities, evaluates surviving families' needs and provides recommendations for civil society organizations, the Ugandan government and international actors [10]. Even when it seems clear that a missing person is most likely dead, in the absence of a body it is difficult to register that person's death or to obtain legal proof of the death such as a death certificate and without this, people can struggle to administer their estate, dissolve a marriage, claim benefits and life insurance or re-mortgage a house. They often have to pursue separate legal processes in order to resolve different affairs (obtaining a grant of probate for example, does not automatically dissolve a marriage) which can be bureaucratic and lead to lengthy delays [11]. In regard to letters of administration, a grant of Letters of Administration is a legal document issued by the court which allows the administrators to manage and distribute the deceased's assets. There are two distinct types of applications for Letters of Administration; letters of Administration where the deceased died without leaving a will (died intestate), letters of Administration with the Will annexed and the deceased left a Will but there is no executor available to apply for a grant of probate for example, if the will did not name an executor or the sole executor has died or is otherwise unwilling or unable to act [12]. A separate fact sheet is available in relation to applications for Letters of Administration with the will annexed. An application for a grant is made in the same form with the necessary modifications as that for letters of administration.⁴⁶ On receiving an application for a grant, the court may make inquiries which it may deem fit and this include, examining the applicant on oath or solemn affirmation on any matter relating to missing persons and his or her estate requiring further evidence of facts relating to disappearance of the missing persons and issuing summons upon all persons appearing in the application to have any interest in the estate of the missing

persons to appear before court on the day and time appointed in the summons [13]. You must firstly conduct a thorough search to locate any Will that may have been made by the deceased or any document that might set out the deceased's intentions in relation to the distribution of their estate. It is advisable to seek legal advice before commencing an application to apply for a grant of Letters of Administration [14]. Section 15(1) [4], in regard to inventory, statement and annual accounts, every person appointed to be a manager of an estate of a missing person shall within six months of the date of his or her appointment or such other time as the court may order, deliver to the court an inventory of the property belonging to the missing person and of all such sums of money, goods and effects as he or she shall receive on account of the estate together with a statement of all debts due or owed by the person and shall furnish to the court annually or at such other periods as the court may order within three months of the close of the year or such other period, an account of the property in his or her charge, showing the sums received and disbursed on account of the estate during that year and the balance then remaining in his or her hands [4]. The families of missing persons have the right to know the fate of their missing family members and relatives, their place of (temporary) residence or if dead, the circumstances and cause of death and location of burial, if such location is known, and to receive the mortal remains. In reference to the case of Administrators of the estate of the late Administrators of the estate of the late Yozefu Mukiibi v Administrator General & 10 Ors [15], section 2 of the Administration of Estates, (Small Estates) Special Provisions Act [16], and submitted that, the import of the section is that "a Magistrate Court can grant letters of Administration. Where they supersede jurisdiction, the High Court may only revisit that if an injustice was done. The Magistrates Court exercised jurisdiction in this case. The case of Israel Kabwa vs. Martin Banoba Musiga [17], it was held that letters of Administration entitle the Administrator to all the rights belonging to the estates effectually as if the administration has been granted at the moment alter his death.

International Human Rights Law on Estates of Missing Persons **International Human Rights Law**

International Human Rights Law gives rights to all individuals, which states should respect and protect. Key treaties include the International Covenant on Civil and Political Rights and the UN Convention on the Rights of the Child which are international in their scope and application, and the regional European Convention on Human Rights [18]. In reviewing IHRL and its application in situations of migrant border deaths, some preliminary comments should be made unlike IHL, IHRL does not directly address the identification of the dead, or the 'management' of bodies. With one exception on enforced disappearances, human rights treaties do not set out explicit duties of states in relation to death thus there is no explicit duty to register a death, in contrast to for example the Convention on the Rights of a child's CRC's recognition that every child has the right to have his or her birth registered [19]. Although limited in their legal application to situations of conflict, the relevance and moral authority of these rules is much wider. They should be taken into account in formulating responses to death and loss in situations of international migration. The duties of states engaged in-parties to a conflict include the obligation to search for missing persons and to collect the dead; to identify and record information on the dead and missing, to issue death certificates or certified lists with the relevant particulars, to hold this information nationally and to share it with other interested parties. The provisions on identifying, recording and passing on information relating to the deceased reflect a right for families to know the fate of their relatives. Parties to a conflict have explicit duties to ensure decent and dignified burial and prevent the dead from being 'despoiled [20]. The legal rules have been given practical expression In the International Committee of the Red Cross excellent Guiding principles/Model Laws on the Missing (JCRC Guiding Principles) which set out the steps which should be taken to trace the missing, recover and identify bodies, their burial, and notification to families. They reflect not only the practices of international humanitarian law but also the content of international human rights law. They apply principally in situations of conflict, where all available means must be employed to identify human remains. If the remains of a person are found, yet not identified or identifiable, the body and all personal effects must still benefit from all measures that ensure dignified handling and burial. A record should necessarily be kept active in order to allow for future identification and subsequent notification to relatives and interested parties [21]. The International Committee of the Red Cross Guiding Principles state that everyone has the right to know about the fate of missing relatives, including their whereabouts or, if dead, the circumstances of their death and place of burial, and to receive mortal remains, the authorities must keep relatives informed about the progress and results of investigations. All available means must be undertaken to recover and identify bodies and recover personal effects; the dead should be treated with respect and dignity; identified and buried in individually marked graves in sites that are identified and registered; the rights and interests of missing persons shall be protected until their fate has been ascertained or heir death recognized; the Guiding Principles recommend the creation of national data bases (national information bureau)to centralize information on the dead and missing, and transmit it to the ICRC's Central Tracing Agency in Geneva [22]. European Court on Foreign Relations[23] in Article 1 states that human dignity is 'inviolable', and must be respected and protected. It does not indicate that dignity continues after death, although this is a common constitutional tradition in some EU member states. The point will be

clarified when the European Court of Justice decides a case on this issue. Nonetheless human rights law imposes certain unclear duties on states in relation to deaths. These are not expressly set out in the language of the treaties and must be defined through a process of interpretation, by applying broadly-drafted rights to a specific situation, through the decisions of international courts, and in the case of UN treaties through the interpretative General Comments of treaty bodies. Thus, although international human rights law does not contain a specific provision requiring states to investigate deaths, international judicial bodies, including the European Court on Human Rights and the Human Rights Committee, have ruled that in order to protect the right to life, alleged breaches of the right must be investigated [23]. A further difficulty arises from a lack of case law dealing specifically with death and loss during migration. Families who wish to take cases to the European Court of Human Rights in Strasbourg have first to surmount practical and legal obstacles which include distance, cost and often their own irregular status[24]. The result is that the Court has seldom been asked to apply Convention rights in relation to migrant deaths, and there is not yet a developed body of case law directly on this issue. Principles must therefore be developed by analogy, from decisions in cases dealing with broadly comparable situations. A causal link between closed maritime borders, dangerous journeys, smuggling operations, and migrant deaths has been generally accepted by academics and civil society[25]. But establishing the legal responsibility of states for deaths at sea is more difficult, outside clear situations such as deaths resulting from defilement, push backs or criminal actions by, for example, coast guards. This is a major obstacle for families since an application to the ECHR must identify the responsible state. Jurisdiction States have obligations to ensure and respect the rights of everyone within their territory and subject to their jurisdiction, power and effective control. They are required to respect and protect the lives of all individuals located on ships or aircraft flying the state's flag or registered by it and of those individuals who due to a situation of distress in sea find themselves in an area of the high seas over which a state has assumed de facto responsibility, including under international maritime law governing rescue at sea [23]. Human rights responsibilities thus arise where for example a person dies in a State's territorial seas and their body is washed ashore, a person is missing within a State's territorial seas, a State retrieves bodies from the sea, including in international waters, a family member/relative of the missing and dead is within the jurisdiction of the State. Rights should be protected at national borders. The UN has usefully set out the measures which states should take to protect human rights at borders in its Recommended Principles and Guidelines on Human Rights at International Borders (OHCHR Principles) [26].

International Convention for the Protection of All Persons from Enforced Disappearance

The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) [27], is an international human rights instrument of the United Nations and intended to prevent forced disappearance defined in international law, crimes against humanity. The text was adopted by the United Nations General Assembly on 20 December 2006 and opened for signature on 6 February 2007. It entered into force on 23 December 2010 and in January 2018, 97 states have signed the convention and 58 have ratified it [27]. "Enforced disappearance" is defined in Article 2 of the Convention as the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law[27]. Article I of the Convention further states that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance. The widespread or systematic use of enforced disappearance is further defined as a crime against humanity in Article 6 [27]. Parties to the convention undertake to investigate acts of enforced disappearance and bring those responsible to justice, ensure that enforced disappearance constitutes an offence under its criminal law; establish jurisdiction over the offence of enforced disappearance when the alleged offender is within its territory, even if they are not a citizen or resident; cooperate with other states in ensuring that offenders are prosecuted or extradited, and to assist the victims of enforced disappearance or locate and return their remains, respect minimum legal standards around the deprivation of liberty including the right for imprisonment to be challenged before the courts; establish a register of those currently imprisoned and allow it to be inspected by relatives and counsel [27]. The Convention is governed by a Committee on Enforced Disappearances elected by its parties. Parties are obliged to report to this committee on the steps they have taken to implement it within two years of becoming subject to it. The Convention includes an optional complaints system whereby citizens of parties may appeal to the Committee for assistance in locating a disappeared person. Parties may join this system at any time, but may only opt out of it upon signature[28]. Following a General Assembly resolution in 1992 containing a 21 article declaration about enforced disappearance and its resolution of 1978 requesting that recommendations be made, the Commission on Human Rights established an intercessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance in 2001[29]. The Group concluded its work in 2006 and its draft international convention was adopted by the Human Rights Council on 29 June 2006 and welcomed the offer

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by France to host the signing ceremony. On 20 December 2006, the General Assembly adopted without a vote the text of the Convention and opened it for signature at the signing ceremony in Paris [29].

National laws on Estates of Missing Persons The Prevention of Trafficking in Persons Act

This law was commenced in October 2009 with the specific purpose of preventing and prohibiting trafficking in persons and it successfully incorporates international minimum standards in relation to prohibition and prevention of trafficking [30]. The Act creates specific offences which allow for investigation, prosecution and punishment of offenders. Section 4 of the Act provides for the offence of aggravated trafficking in persons including where the victim of trafficking is a child and this is punishable by life imprisonment. The same section provides that any person who organizes, facilitates or makes preparations for the kidnapping, abduction, buying, selling, vending bringing from or sending to, receiving, detaining or confining of a person for purposes of harmful rituals or practices, human sacrifice, removal of any body part or organ or any other act related to witchcraft commits aggravated trafficking. The provisions of section 5 provide for the offence of child trafficking where a person removes any part, organ or tissue from the body of a child for the purposes of human sacrifice. The act also places an obligation on every member of the community to report another person who is suspected of trafficking.

The Penal Code Act (As Amended) Cap 120

The Penal Code Act contains provisions on crimes that are punishable. Section 243 of the Penal Code is clearest law under which an individual may be charged for child sacrifice. The section provides for the offence of kidnapping or detaining with intent to murder. Kidnapping or detaining with intent to murder; any person who by force or fraud kidnaps, abducts, takes away or detains, any person against his or her will. The rationale of this provision of the law is to deter people from kidnapping or abduct any person so that cases of missing persons are minimized in the society [31]. A considerable number of cases have been instituted in courts of law against individuals accused of child sacrifice including the famous case of Uganda vs. Kato Kajubi [32]. However, there is no specific provision in the Penal Code Act dealing with someone found in possession of human body parts. Hence this makes it hard to prosecute such a person and to secure a suitable conviction. Other charges that can be preferred against those practicing child sacrifices include kidnapping, abduction

CONCLUSION

The challenge of managing estates of missing persons is that a lot of time is spent mediating and counseling to end disputes that come up before management orders have been issued by court.

RECOMMENDATIONS

So, to easily handle these issues properly, this article calls for Uganda to ratify the Rome Statute. Though Uganda is a signatory to the ICPAPED, it has not ratified the convention. Furthermore, civil society organizations should provide support to the families of the missing by ensuring their voices and needs are heard within and beyond Uganda.

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