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Securing legal reforms to the use of force in the context of police militarisation in Uganda: The role of public interest litigation and structural interdict

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Summary: *This article argues that the failure by the Ugandan government to put in place clear regulations governing the use of force and firearms by the police and armed security forces, particularly during joint police and military operations, as part of arrest and crowd control operations, threatens to violate the right to life, the right to freedom from inhumane treatment, the right to assemble and the right to a remedy under the Ugandan Constitution. It argues that the constitutional, statutory law and case law framework in Uganda can facilitate public interest litigation in order to secure the adoption by the Ugandan government of comprehensive and internationally-accepted standards on the use of force and firearms by police and armed security forces. The article draws on a recent progressive decision of the High Court in James Muhindo & 3 Others v Attorney-General, and the Human Rights Enforcement Act of 2019 to expound on the proactive potential of article 50 of Uganda's Constitution to deliver expedited institutional and human rights-oriented reforms and to afford the courts oversight functions in the implementation of these reforms through structural*

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interdict. These aspects of the public interest litigation framework in Uganda offer a pathway to civilian-led reform in a highly state-controlled, politicised and militarised police and security sector over which Ugandans otherwise have no civilian oversight. Thus, the article explores the potential of public interest litigation as an empowering tool in competing approaches to state formation in transitional contexts and positions public interest litigation as a transformative response to militarisation in a fragile state.

Key words: *use of force; militarisation; police powers; Uganda; James Muhindo & 3 Others v Attorney-General; Human Rights Enforcement Act of 2019*

1 Introduction

Militarisation is defined variably by different scholars but essentially involves ‘the enlargement of the role of the military establishment in society’.¹ Some indicators of militarisation include the proportion of a country’s gross domestic product (GDP) allocated to the military; the frequency with which the military is used to suppress civil disorder; the frequency of military *coups*; and the size of the domestic arms industry.² Some scholars define it to include the prevalent use of force as an instrument of political power, the growing influence of the military over civilian affairs and its growing influence in social and economic affairs.³ This article focuses on the manifestation of militarisation within the framework of use of force by the police and army as instruments of political power and control of civilian affairs. It posits that the permissible legal framework for the use of force by the police in Uganda entrenches a colonial legacy of violence as a means of regime survival and control as opposed to a policy of the protection of citizens. This legacy has facilitated a steady militarisation process within the institutional and normative framework governing the police forces. The effect has been a vicious cycle of human rights violations on a mass scale at the hands of the police and the armed forces, usually against political opposition rallies or protests or against political opposition figures, and with no accountability.⁴ This cycle of

1 PA Agbese ‘The political economy of militarisation in Nigeria’ (1990) 25 *Africa Spectrum* 293.

2 Agbese (n 1) 294.

3 As above.

4 Human Rights Watch ‘Uganda: Ensure independent investigation into Kasese killings’ 15 March 2017, <https://www.hrw.org/news/2017/03/15/uganda-ensure-independent-investigation-kasese-killings>; Human Rights Watch ‘Uganda: Investigate 2009 Kampala riot killings’ 10 September 2010, <https://www.hrw.org/news/2010/09/10/uganda-investigate-2009-kampala-riot-killings>.

political violence historically contributed to the country's instability under each successive regime, and is cited as a cause in fomenting ethnic animosities and instating a cycle of vengeance.⁵ To date there has been no systematic legal and policy intervention to disrupt it despite numerous calls for and attempts at reform.⁶

The article argues that the state's interest in monopolising the means and ends of violence for political dominance accounts for its recalcitrance in opposing fundamental reform of the use of force by the police. Thus, a citizen-led initiative provides the most viable avenue for a chance at introducing such reforms, which can best be achieved and facilitated through public interest litigation and court supervision under structural interdict. Uganda's constitutional and statutory landscape provide both these tools. The aim of the article is to demonstrate these arguments in four parts. Part 1 is the introduction; part 2 explores the nature and extent of militarisation under the use of force framework of the Ugandan police force as well as the human rights implications. Part 3 discusses the role of public interest litigation in securing fundamental reforms to the use of force framework to seal the human rights protection gaps. Part 4 highlights the limits of public interest litigation and amplifies the case for structural interdict and court supervision of use of force reforms under the Human Rights Enforcement Act. Part 5 concludes with some reflections on the implications of such reforms for peacebuilding in Uganda.

2 Militarisation of the police, human rights and use of force standards

The Ugandan police was instituted in 1899 as a colonial paramilitary force charged with protecting British colonial interests.⁷ Although purportedly a civilian force, it executed many military duties.⁸ As a police force during colonial rule it was answerable to the regime and the political executive's will and not to the people. It was highly

www.hrw.org/news/2010/09/10/uganda-investigate-2009-kampala-riot-killings (accessed 24 July 2018).

5 YK Museveni *Sowing the mustard seed* (1997); AB Kasozi *The social origins of violence in Uganda* (1994).

6 HURINET-Uganda *Towards a democratic and accountable police service: The public perception on the state of policing in Uganda* (2017); M Nankinga 'Uganda police launches human rights policy' 13 February 2019, <https://www.upf.go.ug/uganda-police-force-launches-human-rights-policy/> (accessed 24 July 2018).

7 Commonwealth Human Rights Initiative (CWHRI) *The police, the people, the politics: Police accountability in Uganda* (2006) 12, http://www.humanrightsinitiative.org/publications/police/uganda_country_report_2006.pdf (accessed 24 July 2018).

8 As above. These included patrolling of borders, suppressing cattle raids, putting down violent boundary disputes and actual service in army units.

militarised and authoritarian and emphasised law and order at the expense of human rights.⁹ The post-independence character of the police force did not change for the better. Instead, the same blueprint for its practice as used by the colonial government was adopted by successive regimes post-independence for political and military clout to secure power and to violently suppress political opposition.¹⁰ The independence regimes adopted a strategy of undermining and neglecting the police force in favour of the army as it had become apparent that whoever controlled military power also had the most assured control of political power.¹¹ When the current regime under President Museveni took power in 1986 following armed rebellion, its leadership promised a fundamental change in Uganda's political landscape.¹² Unfortunately, it too perpetuated the very ills it sought to eradicate regarding state violence.¹³ It inherited a poorly-trained, underpaid and ideologically non-aligned police force which it has neglected to professionalise as a civilian institution.¹⁴ Instead, the regime set about militarising the police to close the ideological gap by recruiting army officers to staff it at all levels, introducing military training for the police and equipping it with heavy weaponry which it deploys in joint operations with the Uganda Peoples' Defence Forces (UPDF).¹⁵ Notable events include the appointment in 2001 of Major General Katumba Wamala as the Inspector-General of Police (IGP) and the 2005 takeover by Major General Kale Kayihura, which events are viewed as significant indicators of the police militarisation process.¹⁶

While some changes in 2018 ushered in a civilian IGP, the deputy IGP is an army officer.¹⁷ Moreover, the country is witnessing a steady recruitment of army personnel into more high-ranking positions in the police under a context to which the current IGP has referred as 'an increasing convergence of policing and military doctrine'.¹⁸ In

9 As above.

10 Kasozi (n 5). See also B Kabumba et al *Militarism and the dilemma of post-colonial statehood: The case of Museveni's Uganda* (2017).

11 As above. See also Commonwealth Initiative (n 7) 3 4.

12 J Oloka-Onyango 'Governance, democracy and development in Uganda today: A socio-legal examination' *African* (1992) 13 *Study Monographs* 91.

13 As above. See also JD Barkan *Uganda: Assessing risks to stability* (2011) 9-10.

14 Commonwealth Initiative (n 7).

15 J Kagoro & S Biecker 'For whom do the police work? The Ugandan police between militarisation and everyday duties' (2014) *Institute for Intercultural and International Studies Working paper*, http://paperroom.ipso.org/papers/paper_32619.pdf (accessed 24 July 2018); Commonwealth Initiative (n 7).

16 Commonwealth Initiative (n 7).

17 Business Focus 'Military police boss is new deputy IGP' 4 March 2018, <https://businessfocus.co.ug/military-police-boss-new-deputy-igp/> (accessed 24 July 2018).

18 K Kazibwe 'IGP Ochola welcomes army officers deployed to police as directors' *Nile Post (Kampala)* 3 July 2019, <https://nilepost.co.ug/2019/07/03/igp-ochola-welcomes-army-officers-deployed-to-police-as-directors/> (accessed 24 July 2019).

the run-up to and after the 2021 presidential elections, President Museveni appointed as Deputy IGP Major-General Paul Lokech, who went by the title of 'The Lion of Mogadishu' for his outstanding role in the fight against Al-Shabaab in Somalia.¹⁹ The President justified the deployment of Lokech as necessary to counter the leading political opposition candidate, Robert Kyagulanyi, whose protesters he perceived as 'an 'insurrection' of 'traitors' who were being backed by foreigners and 'homosexuals, who do not want to see peace and stability in Uganda'.²⁰ By referring to the election period protesters as 'an insurrection' and deploying Major-General Lokech due to, among other qualities, his proven experience in combating urban warfare while in Somalia,²¹ it was clear that President Museveni, also the commander-in-chief of the UPDF, perceived of the election protests as an armed conflict scenario requiring a militarised response and not a law enforcement approach. This attitude meant that policing standards retreated in favour of military force and military tactics.

Salter identifies the influence of paramilitary appearances and tactics in the police as examples of police militarisation. These manifest through the use by the police of military weaponry to respond to crime; the indiscriminate use of teargas, rubber bullets and pepper spray to disperse crowds; police mimicking of military uniform such as combat boots and utility belts to carry military technology; the dissemination of paramilitary tactics in normal police work; and the transfer of military and war technology to law enforcement.²² The Uganda Police Force (UPF) has manifested these attributes including through amassing military weaponry such as assault rifles, machine guns and military tanks, the mimicking of military uniform, training in military tactics among other manifestations, all allegedly to professionalise the police and equip it to respond to the modern challenges of terrorism and law enforcement.²³ However, this trend instead has escalated violence and facilitated police brutality.²⁴

Militarisation of the UPF also has manifested through the increased joint deployment of the UPF and UPDF in law enforcement missions

2018); see also DM Alier 'Will Maj Gen Paul Lokech be the lion or the lamb of Kampala?' 23 December 2020.

19 J Kamoga 'Military takes charge in Uganda as tensions rise ahead of polls' *The East African* 11 January 2021.

20 J Burke & S Okiror 'Bobi Wine likens Uganda's election to a war and battlefield' *The Guardian* 1 July 2021.

21 L Taylor 'They came in plain clothes with guns: Abducted by Uganda's army' *Aljazeera* 3 March 2021.

22 M Salter 'Toys for the boys? Drones, pleasure and popular culture in the militarisation of policing' (2014) 22 *Critical Criminology* 168.

23 HURINET-U 'Towards a democratic and accountable police service: The public perception on the state of policing in Uganda' 2017 68-69.

24 As above.

under which the regulatory framework and the leadership role of the UPF is ambiguous.²⁵ In such contexts the militant approach has proven dominant and has resulted in indiscriminate killings and loss of life. Such killings manifested during the November 2020 pre-election riots in which over 50 civilians, including children, were killed in a joint UPF and UPFD deployment within a span of two days.²⁶ The protests had erupted in response to the arrest and detention of Robert Kyagulanyi, the major political opponent of President Yoweri Museveni referenced above.²⁷ It later emerged in a leaked report into the said November riots that of all the 50 people killed only 11 were rioters. The rest of the victims were killed by indiscriminate 'stray bullets'.²⁸ Other such killings following joint operations are discussed further below.

It is argued here that the permissiveness of Uganda's statutory legal framework regulating police use of force standards deviates from its constitutional and international obligations, thereby facilitating the 'convergence of police and military doctrine' on the use of force particularly during joint operations to the detriment of human rights. Thus, Ugandan law on the use of force enables and facilitates a militarised approach to law enforcement, as discussed below.

2.1 Legal framework on the use of force in Uganda

It is important to distinguish the ordinary context of and standards for the use of force by the army and the use of force by the police. The army ordinarily uses force for defensive or offensive purposes during armed conflict. Under the rules of international humanitarian law that apply during armed conflict active enemy combatants are lawful military targets and soldiers may do all things necessary to achieve military advantage during hostilities, including shooting to kill.²⁹ The principles of distinction, proportionality and necessity of force all hinge on ensuring that there are minimal or no civilian casualties in the course of armed conflict as long as such civilians take no active part in hostilities.³⁰

25 S Namwase 'The roots of pre-election carnage by Uganda security forces' *The Conversation* 10 January 2021.

26 Human Rights Watch 'Uganda: Elections marred by violence' 21 January 2021.

27 As above.

28 T Butagira 'Government probe report on November riots leaks' *Daily Monitor* 17 May 2021.

29 M Sassoli & LM Olson 'The relationship between international humanitarian and human rights law where it matters: Admissible killing and internment of fighters in non-international armed conflicts' (2008) 90 *International Review of the Red Cross* 559.

30 As above.

For their part, police officers ordinarily exercise their powers during peace time, which is the focus of this article. In these contexts the use of force must be deployed in a manner that respects human rights, particularly the right to life, with their official main prerogative being to arrest a suspect as opposed to shooting to kill. As law enforcement officials the police may use firearms only in self-defence or in defence of others against imminent threats of death or serious injury; to prevent the perpetration of a serious crime involving a threat to life; to arrest a person presenting such a danger or to prevent their escape; but only when less extreme means are insufficient to meet these objectives. Moreover, the intentional use of lethal force should be applied only when strictly unavoidable in order to protect life and in case of an *imminent threat* to life.³¹ When the army exercises police functions during peace time, it is bound by this strict standard on the use of force to protect the right to life.³² This limitation on the use of force is reflected under Uganda's constitutional framework as well as the international human rights conventions which Uganda has ratified.

Unfortunately, this standard is not readily evident under Uganda's statutory laws, which disregard the right to life and contribute to the blurring of police and military standards and doctrines on the use of force.

2.1.1 Use of force under the 1995 Constitution

Uganda's Constitution lays the foundation for the use of force by the police and armed forces. It recognises the Uganda Police Force (UPF) and the Uganda Peoples' Defence Forces (UPDF) as central institutions of defence and national security as well as for the maintenance of law and order.³³ The police force is charged specifically with the protection of life and property alongside its function of maintaining law and order,³⁴ whereas the UPDF is mandated, among other functions, to foster harmony and understanding between the defence forces and civilians.³⁵ In direct relation to the limits on the use of force and firearms, the Constitution provides a high threshold for the protection of the right to life under article 22 as follows:

31 Sassoli & Olson (n 29) 611. See also the UN Basic Guidelines on the Use of Force and Firearms by Law Enforcement Officials (emphasis added), <https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx> (accessed 24 July 2018).

32 As above. See also General Comment 3 on the African Charter on Human and Peoples' Rights (The right to life) art 4 para 29.

33 Arts 208 & 211 1995 Constitution.

34 Art 212(a) 1995 Constitution.

35 Art 209(c) 1995 Constitution.

- (1) No person shall be deprived of life intentionally *except in execution of a sentence passed in a fair trial by a court of competent jurisdiction* in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.

Uganda also ratified the International Covenant on Civil and Political Rights (ICCPR)³⁶ which protects the right to life under article 6 by providing that '[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

The same protection on the right to life is accorded under the African Charter on Human and Peoples' Rights (African Charter) in similar terms.³⁷

The right to life is not listed among the non-derogable rights under article 44 of the Ugandan Constitution, but it is submitted that the high threshold for its protection under article 22 and its non-derogability under article 4(2) of ICCPR binds Uganda to uphold it even in situations of emergency. Moreover, the right to life is recognised as a rule of international customary law and as part of *jus cogens*.³⁸

The United Nations Basic Principles on the Use of Force and Firearms by law enforcement officers (UN Basic Principles) also provide practical guidelines on the limits on law enforcement officers when deploying force and firearms by, among others, calling for the respecting and preserving of human life. On the use of firearms in particular, as highlighted above, the guidelines provide as follows:³⁹

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the *imminent* threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

36 16 December 1966, 999 UNTS 171, 6 ILM (entered into force 23 March 1976) (ICCPR).

37 Art 4 African Charter on Human and Peoples' Rights.

38 C Heyns 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (2014) UN Doc A/HRC/26/36 para 42.

39 Basic Principles on the use of force and fire arms for law enforcement officials, adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

Although the UN Basic Principles are considered soft law and are not legally binding, they are 'widely accepted as authoritative statements of the law'.⁴⁰

In contrast to the foregoing constitutional and international limits, the domestic statutes regulating the UPF and UPDF mandates contain highly-permissive standards and vague frameworks for the use of force which undermine a range of human rights identified below and facilitate the blurring of functions and doctrines on thresholds of force applicable in war and law enforcement contexts, as listed below.

2.1.2 Use of force to disperse assemblies or riots

Sections 65, 68 and 69 of Uganda's Penal Code Act⁴¹ grant powers to police officers or any commissioned officer in the armed forces or other officers empowered by law to make a proclamation as to an unlawful assembly or riot and to disperse it after the proclamation. In particular section 69 provides as follows:

If upon the expiration of a reasonable time after the proclamation is made, or after the making of the proclamation has been prevented by force, twelve or more persons continue riotously assembled together, any person authorised to make the proclamation, or any police officer or any other person acting in aid of that person or police officer, *may do all things necessary* for dispersing the persons so continuing assembled or for apprehending them or any of them, and if any person makes resistance, *may use all such force as is reasonably necessary for overcoming such resistance and shall not be liable in any criminal or civil proceeding for having, by the use of such force, caused harm or death to any person.*

A similar provision is contained in section 36 of the Police Act.⁴² Although this provision in the Police Act has since been declared unconstitutional,⁴³ the continued existence of its equivalent under the Penal Code Act as seen above renders its nullification redundant.

2.1.3 Use of force in arrest and custodial contexts

In situations of arrest, the Criminal Procedure Code Act under section 2 permits the use of *all means necessary* to effect an arrest,

⁴⁰ Heyns (n 38) para 44.

⁴¹ Penal Code Act, Cap 120.

⁴² Police Act Cap 303 (as amended).

⁴³ *Moses Mwandha v Attorney-General* Constitutional Petition 5 of 2007, <https://ulii.org/ug/judgment/constitutional-court-uganda/2019/5> (accessed 24 July 2018).

although it cautions that this does not justify the use of more force than was reasonable in the specific circumstances under which it was applied or than was necessary to apprehend the offender. However, it is submitted that this precaution is equivocal when juxtaposed with the overtly 'enabling provision' which permits the use of 'all means necessary' to effect an arrest. This equivocation stands in stark contrast to the unequivocal protection afforded the right to life under Uganda's Constitution, as seen above.

The Prisons Act contains a slightly more restrictive standard on the use of force in custodial contexts compared to the foregoing provisions. Sections 40(2), (3) and (4) of the Act restrain the use of firearms without first resorting to non-violent means and, where unavoidable, to use firearms with restraint and 'in proportion to the seriousness of the threat and the legitimate objective to be achieved while minimising injury and preserving the prisoner's life'. However, even with this seemingly restrictive standard, the justification for the use of firearms has a low threshold of 'ensuring compliance with lawful orders and to maintain discipline in the prison'.⁴⁴ Further in custodial contexts, the Police Act under section 28 imposes restrictions on the use of firearms by police officers although it also permits a low threshold for their use in order to 'prevent persons attempting to escape from custody'. This low level is in stark contrast to the high threshold under the UN Basic Principles of self-defence or defence of others against an imminent threat to life or grievous harm.⁴⁵ 'An imminent threat is one that is expected to materialise in actual harm in a split second or at most a matter of seconds.'⁴⁶ More succinctly, the Special Rapporteur on Extra-Judicial or Summary Executions notes the following with respect to the right to life and the use of firearms:⁴⁷

The 'protect life' principle demands that lethal force may not be used intentionally merely to protect law and order or to serve other similar interests (for example, it may not be used only to disperse protests, to arrest a suspected criminal, or to safeguard other interests such as property). The primary aim must be to save life. In practice, this means that only the protection of life can meet the proportionality requirement where lethal force is used intentionally, and the protection of life can be the only legitimate objective for the use of such force. A fleeing thief who poses no immediate danger may not be killed, even if it means that the thief will escape.

44 Sec 40(1) Criminal Procedure Code Act Cap 116.

45 Art 9 UN Basic Principles (n 39).

46 <https://www.policinglaw.info/international-standards> (accessed 24 July 2018).

47 Heyns (n 38) para 72.

All the foregoing statutory provisions under Ugandan law deviate from the high constitutional and international human rights thresholds on the right to life. The laws also omit clear limitations on the use of force mandates of the UPF and the UPDF in peace time contexts. Applied to a vague legal framework regulating joint police and military deployments, these permissive statutory provisions facilitate a dominant militarised approach to the use of force in law enforcement and, through it, enable and entrench a cycle of human rights violations.

2.2 Joint deployment of the armed and police forces and human rights violations

Under article 209 of the Constitution and section 42 of the UPDF Act army officers are liable to be called on to assist the civilian authority in case of an emergency, a riot or a disturbance of the peace which it is beyond that authority's powers to suppress or prevent. Here it must be noted that under General Comment 3 on the right to life under the African Charter:⁴⁸

Members of the armed forces can only be used for law enforcement in exceptional circumstances and where strictly necessary. Where this takes place all such personnel must receive appropriate instructions, equipment and thorough training on the human rights legal framework that applies in such circumstances.

Similar restrictions on and regulation of the armed forces prior to joint deployments in law enforcement contexts exist in the laws of progressive African countries such as South Africa, but are absent under Ugandan law.⁴⁹ Moreover, under South African law it is unequivocally provided that joint deployments do not automatically confer command and control powers to the South African Defence Forces over the South African Police Service and *vice versa*. By comparison, under Uganda's law the military personnel called upon in joint deployments and without further appointment or oath have and may exercise powers and duties of a police officer while retaining their powers and duties as military officers.⁵⁰ The army officer thus deployed acts only as a military force and is obliged to obey the orders of his or her superior who exercises power in collaboration with the officer in charge of the civil power,⁵¹ but there is no similar

48 General Comment 3 on the African Charter on Human and Peoples' Rights (The right to life) art 4 para 29.

49 Sec 20(11) South Africa Defence Act 42 of 2002.

50 Sec 43(1) Uganda Peoples' Defence Forces Act (UPDF Act).

51 Sec 43(2) UPDF Act.

unequivocal protection of lines of authority for the police officers in terms of chain of command.

It has been observed that '[a]n army may kill in the execution of its normal functions but the function of the police is fulfilled by apprehending and bringing to account. An armed policeman is not a soldier, and a soldier is not an armed policeman.'⁵²

The foregoing provisions of the UPDF Act combined with Uganda's permissive use of force powers for police officers serve to blur this distinction during joint military and police operations. They also effectively subordinate the civilian police authority to the military authority by emphasising the military chain of command without declaring a similar pronouncement in respect of the command and control structures of the police forces during joint deployment. Given Uganda's historical and political context considered above, it is unlikely that a joint police and military deployment would result in the genuinely collaborative relationship envisaged under the UPDF Act. Indeed, some findings from inquiries into previous joint deployments indicate that the UPDF dominates and intimidates the UPF and disregards civilian laws and procedures.⁵³

The various human rights violations that have been perpetrated by the use of excessive force during joint UPF and UPDF operations in peace time must be understood in this context. Thus, riots in support of a traditional ruler in 2009 resulted in the police and army killing more than 40 people as they protested the state's blockade on their king's movements,⁵⁴ while a raid on another traditional leader's premises by the Ugandan army and the police force, purportedly to quell an uprising late in 2016, resulted in the death of more than 100 people in the Rwenzori region.⁵⁵

It should be observed in this context that joint police and military deployments are weaponised to suppress political opposition. In 2005 an unconstitutional raid on the High Court was orchestrated by unidentified men dressed in black to re-arrest a key political opposition figure, Dr Kizza Besigye, and other co-accused persons after they had been granted bail on charges of terrorism. The men were later identified as members of the Joint Anti-Terrorism Task Force

52 JR Thackrah 'Army-police collaboration against terrorism' (1983) 56 *Police Journal* 46.

53 Commonwealth Initiative (n 7) 12 13.

54 Human Rights Watch 2010 (n 4).

55 'Uganda admits security forces killed over 100 people in palace raid in November', <http://www.africanews.com/2017/03/16/uganda-admits-security-forces-killed-over-100-people-in-a-palace-raid-in/> (accessed 10 August 2017).

(JATT), a special joint force from the army, police and anti-terrorism teams.⁵⁶ The explanation offered later by the UPDF spokesperson at the time was that the team had been deployed to re-arrest the accused persons so that they could be tried under the General Court Martial as they were subject to military and not civilian law.⁵⁷ The analysis made by some scholars was that the re-arrest in fact was meant to prevent Dr Besigye from running against the incumbent Museveni in the 2006 presidential elections.⁵⁸

In yet another violation of the separation of powers principle, the Special Forces Command (SFC), which is part of the UPDF believed to be presidential guards, was deployed in force at the Ugandan Parliament on 27 September 2017, allegedly at the request of the inspector-general of police, violently evicted opposition legislators during the tabling of a Bill aimed at lifting the presidential age limit. The Bill as well as the SFC deployment have been condemned as unconstitutional and as serving the interests of a life presidency for President Museveni.⁵⁹

From the foregoing discussion it emerges that the laxity of the legal framework on the use of force during peace time in Uganda, coupled with gaps in the law regulating joint police and military operations, facilitates militarised responses to law enforcement and perpetuates a disregard for human rights. It lays the basis for the argument that real reform in such contexts cannot come from the state's initiative but from a vigilant civilian-led intervention using the tools of public interest litigation and structural interdict.

3 Use of force laws and the reform potential of public interest litigation

Public interest litigation (PIL) has been defined as 'a court action seeking remedies aimed at a broader public good, as opposed to the specific interests of the individual litigant(s)'.⁶⁰ The action impacts

56 International Bar Association 'Judicial independence undermined: A report on Uganda' (2007) 26, file:///C:/Users/user/Downloads/Uganda_Judicial_independence_undermined%20(2).pdf (accessed 24 July 2018).

57 As above.

58 GB Asiiimwe 'Of fundamental change and no change: Pitfalls of constitutionalism and political transformation in Uganda, 1995-2005' (2014) 39 *Africa Development* 37.

59 The Observer 'Makerere law dons slam age limit Bill' (2017), <http://observer.ug/news/headlines/55249-makerere-law-dons-slam-age-limit-bill.html> (accessed 24 July 2018).

60 J Oloka-Onyango 'Human rights and public interest litigation in East Africa: A bird's eye view' 5 January 2015 3, <https://ssrn.com/abstract=2606120> or <http://dx.doi.org/10.2139/ssrn.2606120> (accessed 24 July 2018).

the public at large even if instituted by an individual.⁶¹ PIL cases may result in the alteration of laws and the declaration of some laws as unconstitutional with the effect of enhancing human rights protections for the wider public.⁶²

According to Oloka Uganda's 1995 Constitution opens up various avenues for accessing justice by the public against a history of instability and political turmoil where justice has been limited.⁶³ He identifies a wealth of court decisions arising out of PIL that have expanded the human rights and political freedoms in the country spanning free speech, gender equality, multiparty democracy and dignity, among others.⁶⁴ He also points to four key articles of the Constitution as responsible for the rise in PIL cases, namely, article 50 which opens up *locus standi*; article 126 which enables the circumventing of technicalities; article 137 which grants interpretative jurisdiction to the Court of Appeal; and article 43 which excludes from 'public interest' political persecution, detention without trial, limitation of the enjoyment of the rights and freedoms beyond what is acceptable and demonstrably justifiable in a free and democratic society or what is provided for in this Constitution. This latter article was especially included as a move away from the historical misuse of 'public interest' in perpetuation of an oppressive agenda in the state's interests.⁶⁵ Oloka predicts that Uganda and the rest of East Africa are bound to witness more PIL cases in the future, given the continuing existence of colonial era laws on their statute books which require reform, the increase in state impunity and the need for accountability for state actions in order to protect vulnerable groups.⁶⁶

In Uganda this prediction is already proving accurate and it can further be predicted that the colonial era 'use of force' laws discussed above will be the subject of PIL in the not too distant future. A range of cases brought under a liberal article 50 and article 137 above have laid the ground for future prospects relying on this action, as discussed further below.

3.1 Article 50: Rights infringed or 'threatened'

The 1995 Constitution provides a liberal basis for PIL as it permits a court action based on a right that has been infringed or that is

61 As above.

62 As above.

63 Oloka-Onyango (n 60) 14 17.

64 Oloka-Onyango (n 60) 25.

65 Oloka-Onyango 14.

66 Oloka-Onyango 42.

threatened. Article 50(1) specifically provides that '[a]ny person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or *threatened*, is entitled to apply to a competent court for redress which may include compensation'.

In the true spirit of PIL this provision allows any individual Ugandan to initiate a court action which will not directly benefit him or her but enhance the human rights protections of the Ugandan public at large. Thus, in *James Muhindo & 3 Others versus Attorney-General*⁶⁷ the applicants filed an application under article 50 seeking declaratory orders that the absence of an adequate procedure governing evictions from land was a violation of the rights to life, dignity and property under articles 22, 24 and 26 of the Constitution. They also petitioned the Court for an order compelling the government of Uganda to develop comprehensive guidelines governing land evictions before, during and after the process of evictions. They argued that the mere absence of the guidelines amounted to a breach by the state of its article 20(2) constitutional obligations to respect, protect and promote the human rights of Ugandans enumerated above.⁶⁸

In keeping with the liberal nature of article 50, Ssekaana J ruled that although the petitioners had produced no evidence to prove the claims of alleged human rights violations during land eviction processes, the Court took judicial notice of the fact that evictions have always resulted in various human rights violations in Uganda. Moreover, the Court noted that the state had itself acknowledged this fact through its Ministry of Lands. The justice noted the broad wording of article 50(1) of the Constitution which 'allows for a human rights case to be brought where one alleges that a right has been infringed or *threatened*' in order to partly allow the order. On this basis, the Court declared that the absence of adequate procedures governing evictions was a threat to and could lead to the violation of the rights to life, to dignity and to property under articles 22, 24 and 26 of the 1995 Constitution of Uganda.⁶⁹ The Court granted the order compelling the government to develop comprehensive guidelines governing evictions before, during and after the fact.⁷⁰ However, as will be further discussed below, such orders that require extensive reform and which target government institutions are likely

67 *James Muhindo & 3 Others v AG* Miscellaneous Cause 127 of 2018 (before Justice Ssekaana Musa), <https://ulii.org/ug/judgment/hc-civil-division-uganda/2019/2> (accessed 24 July 2018).

68 *Muhindo* (n 67) 9.

69 *Muhindo* 17.

70 As above.

to be disregarded by the state unless the court retains jurisdiction to supervise their implementation.

The *Muhindo* decision serves as a good indicator that public interest litigation regarding use of force laws need not suffer the evidential burden of actual human rights violations accruing from excessive use of force by the state in order to succeed. The petition need only indicate the rights that are *threatened* by the continuing existence on Uganda's statute books of laws with highly-permissive standards on the use of force coupled with no accountability for abuse by the police and armed forces. Further, a lack of regulations on the standards governing the use of force, particularly during joint UPF and UPDF missions, perpetuates the violation of these rights. On demonstrating the rights violated or threatened under present conditions that relate to the use of force, there already is a court precedent that can lend support to the success of this cause.

3.2 Use of force: Threats to the rights to life, dignity, association and remedy

The decision of *Moses Mwandha v Attorney-General*⁷¹ was instituted under article 137 of the Constitution challenging the constitutionality of, among other provisions, section 36 of the Police Act. Although this petition was lodged by an individual, the final outcome had ramifications for the enjoyment of rights by the general public and as such could be categorised as part of the body of public interest litigation.⁷² Briefly, the facts of the case are that the petitioner, a coordinator of the Busoga Pressure Group for Development, applied to the inspector-general of police (IGP) for a permit to allow his group to stage a peaceful demonstration against the failure of the Uganda Investment Authority to distribute investment opportunities equally between the capital city and his city of Jinja. The IGP declined to grant the permit and directed the group instead to voice their grievances before Parliament. The IGP referred to various sections of the Police Act, including section 36, in denying the permit.

Section 36 of the Police Act, which is similar in terms to section 69 of the Penal Code Act, has already been discussed in part 2 of this article, but is reproduced here for purposes of the discussion in this part of the article. It provides:⁷³

71 *Mwandha* (n 43).

72 Oloka-Onyango (n 60) 14.

73 Sec 36 Police Act (n 42) (my emphasis).

If upon the expiration of a reasonable time after a senior police officer has ordered an assembly to disperse ... the assembly has continued in being, any police officer, or any other person acting in aid of the police officer, may do *all things necessary* for dispersing the persons so continuing assembled, or for apprehending them or any of them, and, if any person makes resistance, may use *all such force as is reasonably necessary for overcoming that resistance, and shall not be liable in any criminal or civil proceedings for having by the use of that force caused harm or death to any person.*

The Court in *Mwandha* found that the power of the police officer to do 'all things necessary' for dispersing the persons assembled or to disperse them was '*nothing but a licence to shoot and kill citizens who are peacefully assembled to express their views as guaranteed under the Constitution*' and went beyond the powers of Parliament to enact.⁷⁴ The Court further noted that by granting immunity to the police from harm caused the law not only condoned but authorised and legitimised police brutality.⁷⁵

In a similar fashion to the *Muhindo* decision above, the Court took judicial notice of the report by the Human Rights Commission of 15 July 2016 on police brutality which detailed human rights violations by the police. It also noted an August 2018 statement by the Uganda Law Society on excessive use of force by the police and army as well as a report by the Human Rights and Peace Centre at Makerere University detailing the human rights violations perpetrated through excessive use of force by the police and army. The Court also recognised that the head of state had himself noted the use of excessive force by police and had even issued use of force guidelines on 28 October 2018 regarding the arrest and detention of arrested persons.⁷⁶

Kakuru J observed that if section 36 of the Police Act was meant to protect citizens, on the basis of the evidence it was instead *doing the reverse of protecting their right to freedom of assembly*.⁷⁷ It would indeed follow that if the state has a permissible mandate on the use of force to disperse assemblies, groups with political agendas opposed to those of the government would be deterred from associating or assembling for fear of losing their lives or facing grievous harm by the state forces and in response to which they would receive no justice. Kakuru J further castigated the state for complaining about

⁷⁴ *Mwandha* (n 43) 20.

⁷⁵ As above.

⁷⁶ *Mwandha* (n 43) 21-25.

⁷⁷ *Mwandha* 25.

the police brutalising its people, yet it retained section 36 on the statute books.⁷⁸

In the final analysis the Court declared that section 36, among other sections of the Police Act, was in violation of article 20 on obligations of the state to respect and protect human rights, article 22 on the right to life, article 24 on the right to dignity and article 29 on freedom of assembly under the 1995 Constitution.⁷⁹

Based on the discussion of use of force laws under part 2 above, the *Mwandha* decision provides a strong precedent on which to base the claim that all subsisting and similarly-worded statutory provisions granting permissive use of force standards violate the same range of human rights noted in *Mwandha*. In particular, the decision is a blueprint for the nullification of section 69 of the Penal Code which mirrors the impugned section 36 of the Police Act.

3.2.1 *Police immunity and the right to a remedy*

It should be observed that the *Mwahdha* decision neglects the fact that police immunity under section 36 of the Police Act (and, by necessary implication, section 69 of the Penal Code Act) violates the right to a remedy, which is another aspect that would strengthen the case for PIL. By providing that a police or army official who uses excessive force 'shall not be liable in any criminal or civil proceedings for having by the use of that force caused harm or death to any person', both the Police Act (section 36) and the Penal Code Act (section 69) not only legitimise brutality, as Kakuru J points out in *Mwandha*, but also infringe on the right to a remedy which is provided for under articles 50 and 20 of the Constitution and violates Uganda's obligations under international law.

As explored above, article 50(1) of the Constitution entitles any aggrieved person to apply to court for redress where any right has been infringed or threatened, while article 20 obliges all agencies of government to uphold, protect and promote the human rights enshrined in the Constitution.

These obligations are fundamental under the International Covenant on Civil and Political Rights (ICCPR) to which Uganda has

⁷⁸ As above.

⁷⁹ As above.

acceded.⁸⁰ Article 2(3) of ICCPR provides that each state party to the Covenant undertakes:

- (a) to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) to ensure that the competent authorities shall enforce such remedies when granted.

In addition, the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law⁸¹ detail in article 3 that the scope of the obligation on state parties to respect, ensure respect for and implement international human rights law under the respective bodies of law, includes the duty to:

- (a) take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- (c) provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- (d) provide effective remedies to victims, including reparation, as described below.

The Guidelines further provide in article 4:

In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, states have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.

80 Uganda acceded to ICCPR on 21 June 1995. See https://treaties.un.org/Pages/CTCTreaties.aspx?id=4&subid=A&clang=_en (accessed 24 July 2018).

81 Adopted and proclaimed by General Assembly Resolution 60/147 of 16 December 2005, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> (accessed 24 July 2018).

The foregoing provisions are also in line with Uganda's Human Rights Enforcement Act which suspends the defence of immunity for proceedings instituted under it.⁸²

The impugned provisions of the Penal Code Act and Police Act granting police civil and criminal immunity are in stark contrast to the foregoing obligations on Uganda to grant a remedy to victims of human rights violations even where these are perpetrated by its state officials acting in an official capacity under its permissive use of force laws. These provisions in themselves provide a strong basis for PIL to inject human rights standards on the right to a remedy into Uganda's use of force laws.

It should be noted, however, that despite the foregoing precedents and progressive PIL jurisprudence in Uganda they are yet to have a significant impact on the state of the country's politics and human rights as far as law enforcement, political freedoms to assemble and express political dissent are concerned. As Oloka rightly observes:⁸³

The results of PIL litigation in Uganda can be considered mixed at best – and problematic at worst. Although the voice of the judiciary over this period grew in confidence, some of its decisions did not have a marked impact on the body politik, either because the state defied them and reintroduced legislation to thwart the decision, or because the courts themselves were not very clear in terms of the remedies they stipulated.

As argued earlier and elsewhere,⁸⁴ court orders that imply extensive legal and institutional reforms on control of the use of force are likely to be evaded or deliberately subverted to preserve the regime's political interests. They require additional vigilance from civil society and the courts if real transformation is to be achieved.⁸⁵ This observation foregrounds the basis for the ensuing analysis of the limits of declaratory PIL court orders and the potential of structural interdicts as far as reforms on use of force laws in Uganda are concerned.

82 Secs 10 & 14 Human Rights Enforcement Act 2019.

83 Oloka-Onyango (n 60) 26.

84 S Namwase 'Why Uganda needs new laws to hold police in check, accountable' *The Conversation* 25 July 2019, <https://theconversation.com/why-uganda-needs-new-laws-to-hold-police-in-check-and-accountable-120900> (accessed 24 July 2018).

85 As above.

4 Limits of public interest litigation, the Human Rights Enforcement Act and the case for structural interdict

Structural interdict has been defined as ‘a remedy to deter violations of a similar nature in the future’.⁸⁶ The remedy is ‘a response to the inadequacy of traditional remedies in responding to systemic violations of a complex organisational nature’.⁸⁷ It is preferred in ‘structural or institutional suits that challenge large-scale government organisational or administrative deficiencies and failures arising from the misuse of discretion, negligence, misunderstanding the law, red tape and deliberate disregard for human rights, among other factors’.⁸⁸ According to Mbazira, courts usually issue a mandatory structural interdict where ‘there is evidence of likely non-compliance with the court’s declaratory orders’.⁸⁹ The nature of the interdict differs from a mere declaratory order in so far as it enables judges to go beyond being mere umpires to becoming active participants in the disputes before them, granting them continued participation in the implementation of their orders.⁹⁰ The structural interdict’s most prominent feature is that it ‘provides for a complex ongoing requirement of performance and is not a one-shot way approach to providing relief’.⁹¹

Mbazira critically observes:⁹²

The interdict has also been inspired by recognition that some constitutional values cannot be fully secured without effecting changes in the structures of complex organisations especially in government bureaucracy settings. In a setting of systemic violations, what would be most appropriate are those remedies that aim at achieving structural reforms and tackling the systemic problems at their root rather than redressing their impact. This may require the development of ongoing measures designed to eliminate the identified mischief.

Thus, for instance, in the landmark school desegregation case in the United States of *Brown v Board of Education* which was aimed at transforming an entrenched one hundred year-old racial segregation system, ‘structural interdict had to be applied for reforms to

86 C Mbazira *Litigating social economic rights in South Africa: A choice between corrective and distributive justice* (2009) 166.

87 C Mbazira ‘From ambivalence to certainty: Norms and principles for the structural interdict in social economic rights litigation in South Africa’ (2008) 24 *South African Journal on Human Rights* 5.

88 As above.

89 Mbazira (n 86) 171.

90 Mbazira 176.

91 As above.

92 Mbazira 177.

be implemented which included new procedures for student assignments; a revision of school transport routes; re-assignment of faculty; reallocation of resources; curricular modifications which would not have been achieved through a 'conventional one stance traditional litigation and remedial procedure'.⁹³

In relation to reforming use of force laws in Uganda, courts are faced with similar entrenched legacies of state violence and repression, hence the recalcitrance of the state towards legal and institutional reforms that might upset the *status quo*. Courts may issue structural interdicts where they anticipate that their declaratory orders will not be complied with, or where it is unsafe to assume that they will be complied with.⁹⁴ Past failures to comply or any other reason to assume that court orders will not be complied with are justifiable triggers for structural interdict.⁹⁵ Where political interests are at stake, structural interdicts certainly are a worthwhile risk for courts to take.⁹⁶

Thus, in *Amama Mbabazi v Yoweri Kaguta Museveni & 2 Others*⁹⁷ the Supreme Court of Uganda noted the failure by the executive and legislative branches to implement reforms relating to electoral laws and presidential elections as it had recommended in two previous electoral petitions. On this basis the Court issued structural interdicts relating to electoral law reforms on increasing the number of days required to file and decide election disputes; ensuring equal airtime on state-owned media for presidential candidates during campaign seasons; among others. The Court gave the Attorney-General two years from the date of the judgment to report back to it on the steps it had taken towards implementing the recommendations. The structural interdict three years later gave scope to two concerned citizens and a civil society organisation, Kituo Cha Katiba, to sue the Attorney-General for contempt of court, on the grounds that two years had lapsed since the court order without significant progress on the electoral reforms or a report back to the court as had been ordered.⁹⁸ The Court found that the Attorney-General was not in contempt, but used the suit to issue further and more specific supervisory orders for the electoral reforms. The reforms were eventually secured in 2020,

93 Mbazira 179.

94 K Roach & G Budlender 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable' (2005) 122 *South African Law Journal* 333.

95 As above.

96 D Hausman 'When and why the South African government disobeys Constitutional Court orders' (2012) 48 *Stanford Journal of International Law* 453.

97 *Amama Mbabazi v Yoweri Kaguta Museveni & 2 Others* Presidential Election Petition 1 of 2016.

98 *Prof Frederick Ssempebwa & 2 Others v Attorney-General* Civil Application 5 of 2019 arising out of Presidential Election Petition 1 of 2016.

four years after the 2016 court order,⁹⁹ thanks in part to PIL, but in particular, to the application of structural interdict.

In relation to reforms on use of force laws and regulating joint police and army deployments for law enforcement, a survey of past court decisions suggests that the Ugandan government is likely to ignore or subvert court orders that would require it to give up its control of political spaces and respect the freedoms to assembly and speech, the right to life and dignity, the right to a remedy and freedom from inhumane treatment, through the restrictions on its use of force mandate. Thus, even though in 2008 the Constitutional Court in the case of *Muwanga Kivumbi v Attorney-General*¹⁰⁰ nullified a provision of the Police Act which granted powers to the inspector-general of police (IGP) to disperse public assemblies if he or she believed they might cause a breach of the peace, in 2013 the Ugandan Parliament passed the Public Order Management Act reinstalling the same powers.¹⁰¹ The Act gives the IGP powers to regulate the conduct of all public gatherings and to require all conveners to notify him or her of planned public meetings in advance.¹⁰² It also grants the IGP powers to bar the convening of a meeting at any venue if it is in the interests of 'crowd and traffic control'.¹⁰³ The Act thus effectively revives the IGP's powers to limit freedom of assembly which the Court in *Muwanga Kivumbi* had earlier declared unconstitutional.¹⁰⁴

To further reflect the entrenched nature of repressive laws on the use of force in the context of political rights on assembly and association, it is little wonder that more than ten years after *Muwanga Kivumbi* the courts found themselves deciding in the *Moses Mwandha* decision above similar questions relating to the constitutionality of the IGP's powers under the Police Act and whether the subsisting sections 33 and 34 of the Police Act were still law in relation to the *Muwanga Kivumbi* decision.¹⁰⁵

The foregoing recalcitrance by the state forms the basis for a strong case for adopting structural interdict in relation to PIL geared towards reforms on use of force laws.

99 See Electoral Commission (Amendment) Act 2020; the Political Parties and Organizations (Amendment) Act 2020; the Parliamentary Elections (Amendment) Act 2020; and the Presidential Elections (Amendment) Act 2020.

100 *Muwanga Kivumbi v Attorney-General* Constitutional Petition 9 of 2005, <https://ulii.org/ug/judgment/supreme-court-uganda/2008/4-0> (accessed 24 July 2018).

101 Public Order Management Act 2013 (POMA), <https://ulii.org/ug/legislation/act/2015/1-6> (accessed 24 July 2018).

102 Secs 5, 7 & 8 POMA (n 101).

103 Secs 7, 8 & 9 POMA (n 101).

104 Namwase (n 84).

105 *Mwandah* (n 43) 2.

4.1 Structural interdict under the Human Rights Enforcement Act

Fortunately for Ugandans, the Human Rights Enforcement Act provides a statutory framework for structural interdict which has already been tested in the *James Muhindo* decision discussed above. The Act, which is made under article 50 of the Constitution, grants courts powers to issue orders they consider appropriate where they determine that fundamental human rights have been violated or ought to be enforced.¹⁰⁶ It further provides that all orders made by the courts must be enforced within six months from the date of the judgment unless appealed against.¹⁰⁷ It is here argued that the power of the court to issue 'orders it deems appropriate' grants courts powers to issue a wide range of remedies including those they would consider most effective to address the specific issues in cases before them. Such power extends to the realm of structural interdicts, which impose complex legal and institutional reforms.

Thus, in the *James Muhindo* case, after finding that the absence of regulations to guide the eviction process in Uganda violated human rights under the 1995 Constitution, the Court ordered the state to expedite work on the process of formulating eviction guidelines and noted that due to the gravity of the consequences of their absence a further order ensued for the government to embark on the process and report back to the Court within seven months from the date of handing down the judgment. The Court also specified that the process of developing the guidelines should be consultative, participatory and should draw on the UN Basic Principles and Guidelines on Development Based Evictions and Displacement for guidance on best practices.¹⁰⁸

In the foregoing order the Court adopted what Mbazira refers to as the 'report back to court model' of structural interdict.¹⁰⁹ This model requires the respondent, usually the government, to report back to the Court on how it intends to remedy the violations that have been the subject of a court petition.¹¹⁰ An example of a successful application of the order was highlighted in the *Mbabazi v Museveni* case above. One of the advantages of this 'report back to court' model is that it addresses concerns about separation of powers and competence which are common push-backs against courts when they

106 Sec 9 Human Rights Enforcement Act (n 82).

107 Sec 9(4) Human Rights Enforcement Act.

108 *Muhindo* (n 67) 13.

109 Mbazira (n 86) 189.

110 As above.

deploy structural interdict as a remedy.¹¹¹ This order allows the court to appear to defer to the executive or legislative arm of government, and is also the most effective way to remedy the violation as it creates an avenue for a self-imposed remedy from the government.¹¹² This way the court is able to harness the expertise of the government on specific technical solutions.¹¹³ Through this deference to the executive the court also ensures that the government itself comes up with a plan that caters to its budgetary capacities and needs.¹¹⁴ The court thereby minimises specific separation of power concerns that courts should not be making policy and financial decisions as these are the preserve of the executive and legislative branches.¹¹⁵

It should be noted, however, that with 'report back to court orders', even if the court defers to the executive it retains jurisdiction over the case and may reject the plan if it considers it inadequate for purposes of meeting the constitutional and human rights standards the state is obligated to fulfil.¹¹⁶

Systemic human rights violations, such as those that frequently occur in Uganda due to excessive use of force by state security forces, can most effectively be remedied through structural reforms that tackle their causes at the root rather than simply address their impact.¹¹⁷ This approach requires ongoing legal and possibly institutional reforms designed to address the mischief of excessive force, including the likelihood of restricting the role of the army in the police and law enforcement contexts. Such a process may require the participation of not only the parties to a court petition but all other relevant third parties in the search for the most appropriate solution.¹¹⁸ This will provide an opening for greater public and civil society consultations and input in a context where there is no civilian police oversight.

Reforming use of force laws might require technical expertise regarding appropriate weapons, crowd control and means of deploying force, and the courts can defer these questions to experts in the police and the government while retaining jurisdiction over the constitutionality of their proposed amendments. Moreover, there

111 See generally Mbazira (n 86) and (n 87).

112 Mbazira (n 86) 190.

113 Mbazira (n 86) 189.

114 Mbazira (n 86) 190.

115 Mbazira (n 86) 192-195. See also *CEHURD & 3 Others v AG Constitutional Petition 16 of 2011 [2012] UGCC 4*, <http://www.ulii.org/ug/judgment/constitutional-court/2012/4> (accessed 24 July 2018).

116 Mbazira (n 86) 190.

117 Mbazira (n 86) 177-178.

118 As above.

are in existence a wealth of international and regional standards against which the court can make a human rights assessment of the government's reform proposals. These include the 1979 Code of Conduct for law enforcement officials;¹¹⁹ the 1990 United Nations Basic Principles on the Use of force and Firearms for Law Enforcement Officials;¹²⁰ the 2020 UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement; and the African Union Guidelines for Policing of Assemblies by Law Enforcement Officials in Africa.¹²¹

Based on the arguments made earlier about police and military control, Ugandan courts can expect resistance and subversion from the state in pursuing meaningful reform of use of force laws and the law regulating joint police and military deployments in law enforcement contexts. In order effectively to manoeuvre against likely state recalcitrance, the courts cannot depend on ordinary traditional PIL declaratory remedies. They can fully exploit the liberal avenues of structural interdict to be availed under the Constitution as well as the Human Rights Enforcement Act, as demonstrated above. For civil society and other concerned Ugandan citizens there already is in the country's 1995 Constitution, the regional and international instruments Uganda has ratified and in the various court precedents discussed above a legal basis for a successful public interest challenge to the permissive statutory laws on the use of force that enable a militarised approach to law enforcement and the attendant human rights violations they facilitate.

5 Conclusion

Uganda's history indicates that successive regimes have deployed the police and army to secure and maintain political control and domination. This has fed a cycle of violence characterised by civil wars and military *coups*. The continuing existence of permissive colonial era laws on the use of force coupled with the militarisation of the police force in Uganda has reinforced the continuation of such violence. This article has demonstrated that the failure by the Ugandan government to implement comprehensive legal and institutional reforms governing the use of force and firearms in Uganda threatens the rights to life, freedom from torture, freedom of assembly and the right to a remedy protected under the Ugandan Constitution. Further, the lack of a robust regulatory framework

119 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx> (accessed 24 July 2018).

120 Basic Principles (n 39).

121 <https://www.saferpaces.org.za/resources/entry/guidelines-for-the-policing-of-assemblies-by-law-enforcement-officials-in-a> (accessed 24 July 2018).

for joint police and military deployment in the context of such permissive laws facilitates a militarised approach to law enforcement which in turn perpetuates said human rights violations. Also, it has demonstrated that Ugandan citizens and courts have a wide range of tools under the Constitution, including court precedents, public interest litigation and structural interdict remedies by which they can overcome the state's recalcitrance and secure effective reforms regarding the use of force in a context of police militarisation. These tools also provide a process of reform which can be initiated and sustained through civilian initiative and oversight. They promote dialogue between the state, security forces and citizens, thereby providing a pathway to sustainable solutions for peace and prospects for breaking the cycle of state violence in the country.