WIDESPREAD VIOLATION OF HUMAN RIGHT TO LIFE: AN OVERVIEW OF STRATEGIC PROSECUTORIAL AND INVESTIGATIVE GUIDELINES

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Abstract

Widespread violation of human right to life over the years has plunge the various developing countries into a protracted security dilemma. To enhance socio-economic development in any community, the safety of the indigenes and foreign investors is a paramount factor. Hence, the international treaties and conventions on the rights and security of human beings across the world. Article 6(1) of International Covenant for Civil and Political Rights, 1966, declare that: "Every 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 legislature is obliged to adopt series of strategies to tackle the menace and facilitate efficient criminal justice dispensation. However, it is observed that the crime control system of many developing countries demand strategic restructuring towards efficient investigation and prosecution of offenders, as a large percentage of perpetrators are usually undetected and unpunished. The paper contended that the investigators must respect, protect and uphold the universal concept of human dignity and human rights, and exercise the highest standards of integrity and care in the course of their duties. In this regard, the paper recommended series of rules and strategies that must be considered in the investigatory and prosecution process. Using primary and secondary sources of law including case law and relevant internet materials, the paper reviewed relevant international, judicial and statutory authorities in recommending that investigators and prosecutors must be well-informed and adequately equipped for their tasks.

Keywords: violation of human right to life, security dilemma, prosecutors and investigators, well-informed and adequately equipped

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1. Introduction

The various developing countries remain subject to the African Charter on Human and Peoples Rights as reaffirmed by the ECOWAS Court when it held that the various international instruments on human rights are applicable in all member states as stated below:

The Preamble to the United Nations Charter, adopted in San Francisco in 1945[1]:

> "*…determination to reaffirm faith in fundamental human rights, in the dignity and worth of men and women… and establishment of conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained and to promote social progress and better standards of life in larger freedoms.*"[2]

In the light of the aforementioned, this paper considered the unabated persistent violation of peoples' right to life in the various developing countries, and discourses the skills required of investigators and prosecutors in that respect. The investigator and the prosecutor must place before the court, credible evidence and establish the allegation in accordance with the accused's constitutional right to be presumed innocent. Hence, they must seek justice, protect the innocent and charge the offender.

Collection and preservation of samples / evidence from crime scene, demand specialized training, therefore the investigators and the prosecutors must possess diversity of skills. The paper analyses contemporary issues likely to feature in the trial of murder cases, and the relevant strategy that must be exhibited where the accused raises a statutory defence in extenuation. Considering the rights of accused persons to available statutory defence, the paper noted that a crucial factor in criminal prosecution is a fair trial. Accordingly, the Human Rights Committee and the Inter-American Commission on Human Rights stated that the right to a fair trial before an independent, impartial, and competent court is an absolute right that cannot be the subject of exception or suspension.[3] The paper further examines various issues in terms of statutory and judicial application of similar provisions on murder in some selected jurisdictions, and concludes with recommendations on the need for adoption of global best practices.

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[1] Adopted in San Francisco in 1945. Available at http://treaties.un.org/doc/Publication/CTC/uncharter.pdf. (Accessed on 23 June 2011).

[2] The International Covenant on Civil and Political Rights was adopted by the United Nations General Assembly in December 1966. See International Covenant on Civil and Political Rights Status as at 09 -09 -2012. Available online at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

[3] Human Rights Committee, General Comment No. 32, para. 19; Inter-American Commission on Human Rights, "Report on Terrorism and Human Rights", 2002, para. 261.

2. Strategic Guidelines on Investigation / Prosecution Process

2.1. The investigator's duty include gathering evidence to show other options that were available to the accused indicating that the alleged violence was either avoidable or unavoidable.[4] For efficient collation of evidence required for establishing offence of murder, the investigator must be conversant with 'forensic accounting', which is a method of analysing digital and documentary evidence; concept of *actus reus,* ("the criminal act"), and *mens rea,* ("the guilty intent"). For any specific offence, the *actus reus* will be described by the wording of the statute that prohibits the conduct. There are some offences where intent (*mens rea*) is not required, and such offences are called "strict liability offences", and in that regard, only the guilty act (*actus reus)* must be established. In *S v. Van der Mescht*,[5] Rumpff C.J. reiterated this principle as follows:

> "*In Criminal Law, when death follows upon an unlawful* assault, it must be proved that the *"accused could and must reasonably have foreseen that death could intervene as a result of the assault, the expression "must have foreseen" is used in the sense of "ought to have foreseen".*

Fault may come in form of Intention (*dolus*), or Negligence (*culpa*). The test of negligence is not what the accused thought or foresaw, but rather what a reasonable person would have foreseen and would have done in the circumstances.[6] The enquiry in this regard is as follows:

(i) would a reasonable person in the same circumstances as the accused, have foreseen reasonable possibility of the occurrence of the consequence or the existence of the circumstance in question?

(ii) If so, would a reasonable person have taken steps to guard against that possibility?

(iii) did the accused fail to take the steps which he should reasonably have taken to guard against it ?.[7]

Accordingly, in *S v. Van der Mescht*,[8] the Appellate Court set aside the conviction of the accused for culpable homicide on the ground that the prosecution failed to prove beyond reasonable doubt that a reasonable person in the position of the accused would have foreseen that the heating of gold amalgam might lead to the death of a human being.

2.2. Intention to kill or to cause grievous bodily harm may be inferred from the circumstances of the case. Such circumstances as: the weapon used on the victim; the part of the body struck; the degree of force used by the accused person; evidence that the act of the accused which caused the death was in the prosecution of unlawful

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[4] Ibid. "*Introduction to Criminal Investigation: Processes, Practices and Thinking*",

[5] 1962 (1) S.A 521 (A).

[6] *S v. Ngubane,* 1985 (3) S.A. 677 (A).

[7] Ibid.

[8] Ibid. 1962 (1) S.A. 521 (A).

purpose; and that the act is such that could endanger human life.[9] The enquiry in this regard is as follows:[10] whether the accused had the capacity to appreciate the wrongfulness of his conduct (ii) whether he had the capacity to act in accordance with that appreciation.[11]The alleged conduct of the accused may take the form of a commission of an unlawful act, or an omission to act in a particular instance as required by the law.[12] According to Burchell,[13] it must be revealed whether the alleged act or event, is of such a nature and gravity that warrants that the accused be absolved from liability for the ensuing consequences of his conduct.[14] The prosecution must establish that the accused made the alleged act or omission voluntarily,[15] and this has to do with whether the alleged conduct was physically controlled by his conscious will.[16] An instance is a conduct that occur during a state of automatism. In *Bratty v A.G. for Northern Ireland*,[17] the court described automatism as any act which is performed by the muscles without any control of the mind. It may be in form of convulsion, epilepsy, spasm.[18]

2.3. Where the accused thus plead involuntariness of his conduct in extenuation, the accused must adduce evidence in support of that defence,[19] and the prosecution must disprove the defence by examining the circumstances under which the accused made the alleged conduct. Thus, where he fails to act diligently in order to prevent harm to others, the prosecution must prove that the accused had the appropriate means to prevent the alleged harm, but the harm is directly attributable to his unlawful act / omission.[20]

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[9] *Ibikunle v State* (2005) 1 NWLR, (pt.907) p.387, S.C.

[10] See Snyman, "*Criminal Law*" 5th ed. (2008) 159.

[11] See S 78 of the Criminal Procedure Act 51 of 1977, and S 27 & 28 of Nigeria Criminal Code.

[12] According to James Grant, "Critical Criminal Law (2018)
In south Africa, the test in this regard is the legal convictions of the community in terms of the provisions of the Constitution. See Carmichele v Minister of Safety and Security, 2001 (4) S.A 938 (C.C).

[13] Ibid. Burchell, "*A Provocative Response to Subjectivity in Criminal Law*" (2003) Acta Juridical, 36.

[14] James Grant, "*The Permissive Similarity of Legal Causation by Adequate Cause and Nova Causa Interveniens*" (2005) 122 SALJ).

[15] *S. v. Johnson,* 1969 (1) S.A. 201 (A), *S v. Chretien*, 1981 (1) S.A. 1097 (A).

[16] Burchell, "*A Provocative Response to Subjectivity in Criminal Law*" (2003) Acta Juridical, 36. See R v Kemp 91957) 1 QB 399 at 407.

[17] (1961) 3 All E.R. 523.

[18] De Wet Strafreg 4th Ed. (1985) 17.

[19] Rupert Cross & Philip Jones, "*An Introduction to Criminal Law*" 3rd Ed. (1953) 34-5.

[20] Deborah Denno "*Crime and Consciousness: Science and Involuntary Acts*" (2002) 87 Minnesola Law Revtew, 287.

In establishing that the accused, by his unlawful conduct, voluntarily caused the death of the deceased,[21] the prosecutor is required to establish beyond reasonable doubt, that there is a causal link between the alleged conduct of the accused and the death of the victim.[22] In *Friday Aiguoreghian & Ors. v. State*,[23] the Nigerian Supreme Court reiterated the instances when *novus actus interveniens* will be inferred in homicide cases as follows:

> *"Where as in the instant case, the deceased was treated in two hospitals following his encounter with the accused persons, and he died not instantly but after about three months, there is novus actus interveniens which must be accounted for by the prosecution. To be able to do this, there must be evidence of the type of attention and treatment given by each hospital. In the absence of this, there is likely to be a break in the chain of causation..."*

In this respect, James Grant,[24] viewed that the appropriate enquiry in such an instance is: "*Whether the accused caused the victim to die sooner than he or she otherwise would have*". In *S v. Daniels,*[25] two Judges of South African Court of Appeal totally declined to approve that only an act which is a direct or proximate cause of death may be regarded as its legal cause, thus, the Court adopted the theory of "Adequate Causation". In the same vein, Snyman, a South African Criminal Law analyst,

viewed that the proximate-cause criterion is "too vague" to serve as a yardstick for legal causation.[26] The essence of the theory of "Adequate Causation is that, the alleged conduct of the accused would be regarded as the legal cause of the alleged offence, if in the normal cause of events, such conduct has the tendency of producing the ensuing consequences, having regard to the entire circumstances of the case.[27]

The prosecutor is expected to guide the court appropriately as to the liability of the accused in such instances where the deceased subsequently died of complications based on the initial unlawful conduct of the accused. Accordingly, the appropriate enquiry in such an instance is: "Whether the accused caused the victim to die sooner than he or she otherwise would have".[28]

2.4. Relevance of Evidence: A direct evidence, or circumstantial evidence, or a free and voluntary confession of guilt by an accused person, duly made and satisfactorily

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[21] It must be proved that the alleged unlawful conduct coincides in time with a culpable mental state known as the requirement of contemporaneity. See R v Chiswibo 1961 (2) S.A. 714 (FC).

[22] In establishing causation, the prosecution must have recourse to the factual and legal enquiry. The essence of the factual enquiry is to determine whether the deceased would not have died, had it not been for the alleged conduct of the accused. In this regard the court will apply the *'Conditio sine qua non* "test, known as the *"But for"* theory.

[23] (2004) 3 N.W.L.R. (pt.866) 367 S.C.

[24] James Grant*: "Critical Criminal Law"*, 2018, 1.

[25] 1983 (3) S.A., 275 (A)

[26] C. R. Snyman, Ed. (2002) "*Criminal Law*", 4th Ed. 74-5.

[27] See *R v. Loubser*, 1953, (2) PH, H 1, 90 (W)

[28] Ibid James Grant*: "Critical Criminal Law"* (2018) p. 1.

proved, is sufficient. However, where the accused subsequently retracts his confessional statement, it is important to corroborate the evidence against the accused. According to Van derWalt: [29]

> *"Evidence is direct if it establishes a fact in issue directly, usually through the testimony of an eye witness, while circumstantial evidence has to be inferred from circumstances of the case, it is a strong evidence provided an inference of guilt can be drawn from it, but it must be consistent with the facts that have been proved, and must flow naturally, reasonably and logically from them*"

Basically, there are four main types of evidence: biological, digital, documentary, and physical:[30] *Biological samples from bodies may be collected directly from human body at the crime scene, at the morgue or forensic anthropology laboratory, while additional evidence can be collected from items used by the deceased, such as toothbrushes, hair brushes, and unlaundered clothing. However, where it concerns a living person, it should be based on informed consent.[31] Such

biological samples which include the bone; teeth; blood; urine; saliva; semen/sperm; hair; fingernails and toenails, can be used to establish a person's identity, as it is a source of DNA.[32]

*Digital evidence is an information collected or transmitted electronically. It should be diligently preserved, and analysed in accordance with international standard.[33]

*Documentary evidence includes records, papers, and other written / printed documentation including fingerprints, tyre tracks, footwear impression, blood spatter analysis, tool marks. Fingerprints can be gathered from smooth surfaces by applying powder and lifting the fingerprint with a gel lift, and photograph it. The photographs must establish[34] a spatial relationship between evidence collected and their location in the crime scene.[35] Also, measurements and notes taken at the crime scene must incorporate the search criteria and location, name of the investigator, the case number, date and time.[36]

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[29] Menintjes-Van derWalt, Singh, M. du Preez, "*Introduction to South Africa Law, Fresh Perspectives*", 2nd ed. P.308.

[30] See Stuart Casey-Maslen, "Investigation and Prosecution of Potentially Unlawful Death 'A Practitioners' Guide No. 14": International Commission of Jurists (ICJ), June 2019; Minnesota Protocol 2016, para. 146.

[31] Minnesota Protocol 2016, para. 133.

[32] Ibid Minnesota Protocol 2016, para. 134.

[33] See Association of Chief Police Officers, "Good Practice Guide for Digital Evidence", United Kingdom, at: http://www.digital-detective. net/digital-forensics-documents/ ACPO Good_Practice_Guide_for_Digital_Evidence_v5.pdf.

[34] See pp. 100 – 110

[35] Ibid., para. 178.

[36] Ibid., para. 179.

*Physical evidence include weapons, fibers, keys, gunshot residue, and explosive materials.[37] Trained firearms examiners may link ammunition components to a particular firearm, and also identify the company that manufactured the gun.[38] All relevant material gathered must be documented and investigators should be appropriately equipped with personal protective equipment; relevant packaging bags,[39] which must be transported diligently to avoid cross-contamination.[40] Each piece of evidence recovered should always include the investigator's details.[41]

Once the evidence has been identified and secured, the prosecutor must ascertain that the chain of custody is intact. Chain of custody requires that the identity and categorization of all persons who handled the item from the time it was acquired by investigators till the time of tendering it

in the court, be clearly confirmed. Any gap in the chain of custody may be disastrous. According to Murphy:

> "*Samples taken from a crime scene may be of low quality, having been subjected to heat, light, and moisture as well as other elements (such as the dye in denim) that degrade the DNA or inhibit the testing process. Even crime-scene samples in good condition can nonetheless behave erratically when there is a low quantity of material available to test*."[42]

The aforementioned scientific evidence such as DNA, bodily samples, fingerprint, and impressions are considered as important evidence to link a suspect to the crime. In this respect, Code D of the PACE 1984, paragraphs 4 & 6,[43] is relevant**.** Paragraph 4 is based on identification by fingerprints and footwear impressions, and by this provision, the prosecution is required to show that the fingerprints taken from the crime scene tally with those on the fingerprint form; and paragraph 6 is based on Identification by Body Samples and Impression. If there is no enabling law for the taking of DNA bodily samples and impressions, the investigator must inform the suspect before taking the scientific evidence, and must have in attendance a legal personnel in order to protect the fundamental rights of the suspect. Also, where blood or urine sample is required, the investigator must afford the suspect the opportunity to retain a portion of the sample for purposes of independent testing; and the

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[37] Ibid., para. 137.

[38] Ibid., para. 138.

[39] Ibid., para. 64.

[40] Ibid., para. 66.

[41] Ibid., para. 65.

[42] E. Murphy, "Forensic DNA Typing", Annual Review of Criminology, Vol. 1 (January 2018), pp. 497–515, citing J. M. Butler, *Advanced Topics in Forensic DNA Typing: Methodology*, Academic, San Diego, CA, 2012. See also Minnesota Protocol 2016, para. 131- 133.

[43] Ibid. The Code for Crown Prosecutors, "*Prosecution guidance*"

investigator must ensure that the analysis is conducted by medical practitioners and other designated health professionals.[44]

2.5. Establishing Liability of persons involved in gang killings**:** In such instances where a number of persons are involved in the unlawful killing of their victim, the liability of the parties will depend on the extent of their participation in the crime. However, where all the persons involved in the crime actually formed a common intention to prosecute the unlawful purpose in conjunction with one another, each one of them will be deemed to have committed the offence.[45] Burchell, a South African Criminal Law analyst,[46] viewed that in such an instance, it is the duty of the prosecution to establish that the members of the group have committed the alleged offence, the conduct which is imputed to the individual must satisfy the causation requirement,

2.6. Evaluation of Evidence: Evidence is a crucial factor in the investigative and prosecution processes, hence, it is imperative for investigators and prosecutors to understand the various types of evidence, and the manner in which evidence is evaluated by the court. This includes inculpatory evidence, exculpatory evidence, corroborative evidence, and hearsay evidence.

Inculpatory evidence is such an evidence that tends to link the accused person to the offence being investigated, such as physical evidence, witness accounts, or the circumstantial relationships that are being recorded during the investigative process.[47] Exculpatory evidence is such evidence that tends to show that the accused did not commit the offence,[48] while corroborative evidence basically implies any other evidence that tends to strengthen or confirm the validity of existing evidence.[49] Meanwhile, hearsay evidence is such evidence which is based on what has been stated or reported to a witness by others.[50] Hearsay evidence is inadmissible in criminal trials based on the following reasons**:**[51]

* the court generally applies the best-evidence rule to evidence being presented and the best evidence would come from the person who gives the firsthand account of events;

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[44] Ibid. The Code for Crown Prosecutors, "*Prosecution guidance*"

[45] S v Safatsa, 1988 (1) S.A. 868 (A).

[46] Burchell, "*South African Criminal Law & Procedure: General Principles of Criminal Law"*, 4th ed. Vol. 1 (2011) 489.

[47] https://en.m.wikipedia.org.

[48] Ibid. Wikipedia; see Brady v. Maryland, 1973 U.S. (1963), 83 (Brady rule).

[49] https://www.law.cornell.edu > wex.

[50] https://www.collinsdictionary.com. ; see John Sopinka, "*The Law of Evidence*," 1999, p. 173

[51] "*Introduction to Criminal Investigation: Processes, Practices and Thinking"* https://pressbooks.bccampus.ca/criminalinvestigation/chapter/chapter-3-what-you-need-to-know-about-evidence/

* the original person who makes the communication that becomes hearsay, is not available to be put under oath and cross-examined by the defence;

* the court does not have the opportunity to hear the correspondent directly and assess their integrity; and

* the court recognizes that communication that has been heard and is being repeated is subject to interpretation, and restatement of what was heard can deteriorate the content of the message.[52] However, in the following instances, the court will consider hearsay evidence:

(i) a dying declaration, particularly, of a homicide victim. In the English case of *R v Woodcock*,[53] Justice Eyre stated :

> "*The general principle on which this species of evidence is admitted, is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; the situation so solemn and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice*";

(ii) Where the witness is the recipient of a spontaneous utterance of a victim, the court may accept a restatement of that utterance by the witness if, according to *Ratten v R* :[54] "*… the statement providing it is made in such conditions of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused*";

(iii) Where the witness is testifying to hearsay from a child witness who is not competent or available to provide evidence, the parent or another adult, who has heard a statement from that child, may be permitted to provide that information by way of hearsay to the court. These instances was considered by the Supreme Court of Canada in *R v Khan*.[55] In this case, the mother of a 3 ½ year old girl was not present when the child was sexually assaulted by her doctor during an examination. However, immediately after the examination, the child vividly explained the scenario to her mother. Based on the facts of this case, the court considered hearsay evidence as an exception to the hearsay rule, and the case of *R v Khan* has become known as the "principled approach" whereby hearsay evidence may be admissible if the following conditions are established: necessity; and reliability.[56] Hence,

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[52] Ibid.

[53] (1789) , 1 Leach 500, 168 E.R. 352 (K.B.).

[54] 1971, 3 All.E.R. 801.

[55] (1990) 2 S.C.R. 531.

[56] Ibid. "*Introduction to Criminal Investigation: Processes, Practices and Thinking"*

hearsay evidence may be admissible if the evidence adduced is considered necessary to prove a fact in issue at the trial, and the hearsay evidence is found to be reliable.[57]

However, the court will first consider if the witness is competent and compellable to give evidence. A competent witness is *generally* a compellable witness. In *R v Schell,*[58] it was held that to be 'competent' means legally qualified to testify, and compellable means legally permitted to testify. If a witness is found to be both competent and compellable, the court will hear their testimony and will then consider the value of the evidence after assessing the credibility of the witness. If a witness is neither competent nor compellable, the evidence will be excluded at trial.

2.7. Efficient Collaboration of Prosecutors with Investigators: It is observed that the prosecutor will have a better understanding of the relevant facts and materials gathered by the investigator if the prosecutor participates in the investigation process by visiting the crime scene, guiding investigators on criminal procedures and admissibility of evidence. It is proposed that a minimum of two prosecutors should be assigned to a murder matter, and their roles may be: Lead Prosecutor and Assistant Prosecutor in order to augment continuity in such instances where one of the prosecutors is ill, on vacation or retires.

2.8. Protection of Witnesses: If a witness is unwilling to give evidence publicly, prosecutors may apply for the hearing to be held in camera or by using special protective measures, which include the use of screens or evidence by live link, or evidence given in private, where appropriate.[59] Prosecutors may apply for such measures in terms of the Court's inherent powers to ensure that the best evidence is given, and fulfil the interest of justice.[60]

The court in terms of its inherent jurisdiction to control proceedings, may permit the name and other identifying details of the witness to be concealed from the public and the press, and permit the witness to be referred to by a pseudonym (witness anonymity),[61] also, the witness may be granted access to courtroom through separate entrances to ensure that the supporters of the accused do not see the witness, or the

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[57] Abebe, Dostal: "*Hearsay Evidence*" Mizan Law Review – African Journals Online 2012: https://www.ajol.info > article > view. See *R v Smith*, where the court assert that if a statement sought to be adduced y way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be reliable (that means a circumstantial guarantee of trustworthiness is established) - [1992] 2 S.C.R. 915 (SCC). https://SCC.CSC.Lexum.com >.

[58] (2004) 348 A.R. 306 (C.A): https://ca.vlex.com

[59] **Scott v Scott** [1913] A.C. 417, HL

[60] "*Guide to Investigation and Prosecution of Serious Organised Crime*", fifth edition 2014: https://ijust.info>2017/02);

[61] Ibid. "*Guide to Investigation and Prosecution of Serious Organised Crime*": https://ijust.info>2017/02 ; *R v Socialist Worker, ex parte Attorney* ***General*** [1975] QB 637.

witness may be allowed to stay in a separate waiting area.[62] Accordingly, the court may take into account the following factors:

* the credibility of the witness or a tendency to be dishonest (considering the affinity or any relationship between the witness and the accused);

* reasonableness of the fear of the witness;

* availability of other source of concrete evidence or corroborative evidence against the accused; and whether the accused will receive a fair and just trial in the circumstance.[63]

Therefore, while applying to the court for the adoption of special protective measures or witness anonymity, the prosecutor must ensure that the investigator has obtained sufficient corroborative evidence. [64]

Investigators may appoint a Family Liaison Officer (FLO) to keep the family of deceased informed of the progress of the case, and the prosecutors must establish how the FLO would work with their office in accordance to the relevant legislative provisions on the FLO.[65]

It is viewed that this veritable approach to protect witnesses at the early stage of murder matter will undoubtedly yield positive result as the trial approaches

2.9. Addressing Plea of Criminal Defences by Accused Persons: The investigator needs to understand specific statutory authorities, case law and the concepts of criminal justice, natural justice, and fundamental rights in order to enhance effective performance of the investigative and prosecutorial processes. Accordingly, where the accused pleads justification in order to exclude liability based on intention and unlawfulness of his act or omission, it is the duty of the prosecution to examine the basics and legal requirements of the justification pleaded by the accused, and relate it to the circumstances of the case. [66]

Unlawfulness is excluded when the alleged conduct of the accused is the appropriate step in the circumstances.[67] Unlawfulness of an act or omission depends on the objective standard and legal requirements of the particular community,[68] hence, in

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[62] Ibid.

[63] Ibid. Ellis, Simms and Martin v. UK *ECHR 2012* , http://www.echr.coe.int/echr/homepage_EN.; *R v Mayers* [2008] EWCA Crim1418.

[64] Ibid.

[65] Ibid.

[66] See *R v. Patel,* 1959 (3) S.A. 121 (A).

[67] See Fletcher "*Rethinking Criminal Law*" (1978); *S V. Trainor* 2003 (1) S.A.C.R. 35 (S.C.A.).

[68] See the Constitution of the Federal Republic of South Africa 108 of 1996, and the Constitution of the Federal Republic of Nigeria LFN 1999. An example is Self-defence (also known as Private defence), *S v. Engelbrecht*, 2005 (2) S.A.C.R. 41 (W.L.D.), *S v. Fourie*,

line with the intention of the accused, unlawfulness of his conduct is also a requirement for criminal liability. Usually in criminal prosecution, the onus of proof rests on the prosecution to prove the charge against the accused beyond a reasonable doubt, however where the accused pleads a defence of pathological incapacity (known as a defence of Insanity in Nigeria), the accused bears the evidential burden, hence, he must show, on a balance of probabilities, that he lacked criminal capacity due to mental illness.[69]

Non-pathological criminal incapacity may arise out of non-pathological claims which may be based on provocation, intoxication, or severe emotional stress, and if successfully raised, it will result in an acquittal and an unconditional discharge.[70] Accordingly, section 2 of the 1957 Homicide Act provides that :

> *"Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired mental responsibility for his acts or omissions in being a party to the killing*"[71]

In line with this provision, in South Africa, if the court finds that the accused at the time of the commission of the alleged offence was criminally liable for the offence but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused (a pathological incapacity defence usually result in a committal to a mental health institution or unconditional release).[72]

Where the defence of self-defence succeeds in a murder case, the accused will be discharged and acquitted, however the accused person must have proved that his life

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2001 (2) S.A.C.R. 674 (C) 681 A-B, *Minister of Safety and Security v. Van Duiverboden,* 2002 (6) S.A. 431 (S.C.A).

[69] Burchell, *"Principles of Criminal Law*" 3rd Revised ed. (2006) 358. In South Africa the insanity defence derived from the M'Naghten Rules of England (R v Boot 1878 Kotze 50' Rumpff Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters (1967) para 3.19), however, it was supplemented with an 'irresistible impulse' test (Reg v Hay 1899 (16) S.C. 290, Rumpff Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters (1967) para 3.24).See S. 78(1) of the Criminal Procedure Act 51 of 1977.

[70] Burchell, "Principles of Criminal Law 5th Ed (2016) 328.

[71] See *R. v. Bryne* (1960) Q.B. 396, In *Gabriel Adeyefa v. Queen* (1962) W.N.L.R, .235, the accused killed a ten-month-old boy for no apparent motive. The Court held that, there was sufficient evidence on which the defence of insanity could be set up. His plea of insanity was upheld. .

[72] See the Criminal Matters Amendment Act 68 of 1998; S. 78(7) of the Criminal Procedure Act 51 of 1977; S v Romer 2011 (2) SACR 153 (SCA).

was so much endangered by the act of the deceased and that the only option open to him was to use the force which resulted in the death of the deceased in order to preserve himself from death or grievous bodily harm.

Where the accused pleads the defence of Necessity or Compulsion in extenuation, it is the duty of the prosecution to show that a reasonable man would have resisted it.[73] In considering the defence of necessity, the court will apply a very strict standard in order to meet the conditions prescribed in the common law doctrine of necessity, thus, it is important for an investigator to know the criterion that the court will apply, as it will enable the investigator to discover evidence that either supports or negates the necessity defence.[74] The leading case in Canada for such a defence is *R v Perka* [75] where Justice Dickson described the rationale for the defence as a recognition that:

> "*a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience ...*"

The following elements are required for a successful defence: the accused must be in imminent peril or danger, the accused must have had no reasonable legal alternative to the course of action he or she undertook, and, the harm inflicted by the accused must be proportional to the harm avoided by the accused. In *S v. Pretorius*,[76] the court held that where the accused pleads the defence of necessity, the onus rests on the Prosecution to show that the actions of the accused was unreasonable in the circumstances. Thus, the defence of Necessity will not avail an accused person who willingly perpetrated an unlawful conduct, particularly, murder, as was established In *R v. Dudley & Stephens* [77], wherein the defendants with some other persons were involved in a shipwreck and had to remain at sea several days without food. After seventeen days, the defendants felt they were unlikely to survive if they continue without food, hence, they both decided that Dudley should kill Parker, a seventeen years old Cabin boy, so as to eat him. Eventually, Dudley killed Parker, and they ate his remains for four days, and they were rescued on the fifth day. Dudley and Stephens were charged for murder and they raised the defence of Necessity. The court rejected the defence of necessity raised by the accused persons, and convicted them.

Where the accused deliberately and voluntarily participated in the commission of an unlawful act, the defence of compulsion will not avail the accused. Hence, in *S v*

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[73] See *S v Pretorious*, 1975 (2) S.A. 85 (S.W.A.)

[74] "*Introduction to Criminal Investigation: Processes, Practices and Thinking*", https://pressbooks.bccampus.ca/criminalinvestigation/chapter/chapter-2-some-important-basic-concepts/ .

[75] [1984] 2 S.C.R.2S34.

[76] Ibid. *S v Pretorious*.

[77] (1884) 14 Q.B.D. 273.

Bradbury,[78] Holmes J.A. held: "*A man who voluntarily and deliberately becomes a member of a criminal gang with knowledge of its disciplinary code of vengeance, cannot rely on compulsion as a defence or fear, as an extenuation"*. However, there are instances where the defence of compulsion will avail an accused. In *S .v. Banda*,[79] the court considered that it is unfair to render a soldier criminally liable for merely acting in obedience to superior orders, also, in *Queen v. Albert*,[80] the court held that an infant who assists his father in committing a crime, is presumed to have acted in obedience to his father's orders, and would not be held liable for the offence.

2.10. Where the accused pleads the defence of alibi in order to show that he was elsewhere and not at the crime scene when the alleged offence was being committed and therefore he could not have been a party or the perpetrator of the offence,[81] the accused must have raised it as soon as he was arrested, and he must give the police details of his whereabouts to enable the police investigate it appropriately. An accused person who seeks to rely on alibi as a defence must give the investigating officers sufficient particulars to support the alibi. In *Chidiebere Igwe v, The People of Lagos State*,[82] the appellant was arrested in possession of a stolen vehicle. In his evidence in chief, he said he was attending a friend's wake-keep at St. Boy's Catholic Church Bus Stop Ajegunle Lagos and that he was called upon to assist in pushing the car off the road. He did not describe the men who called upon him, and he did not mention the name of the deceased whose wake-keep he attended or whosoever was present at the said program, though, DW2 testified to be present at the wake-keep. The evidence of PW1, PW2 and PW3 fixed the appellant to the alleged offences, hence, alibi as a factual defence did not avail the appellant just as identification parade was unnecessary. PW1 was not discredited in his evidence that he met the appellant and one other with the car snatched at gun point after it had been electronically demobilized. PW3 actually recognized the appellant because the appellant physically searched him personally while the car's cabin light was switched on to enable the appellant and his gang ascertain if the car had an electronic device. Thus, where there is direct, positive and unequivocal evidence pinning an accused person to the *locus criminis,* the obligation of the police to investigate the alibi is discharged and the defence of alibi would crumble.[83]

2.11. Murder can be proved by the doctrine of "*Last Seen*". The law presumes that the person "*last seen*" in the company of the deceased bears full responsibility for his death. Accordingly, an eye-witness account may be necessary, though it is not compulsory if the charge can otherwise be proved by a cogent and overwhelming circumstantial evidence. In this respect, Code D of the Police and Criminal Evidence

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[78] 1967 (1) S.A. 387 (A).

[79] 1990 (3) S.A. 466 (B).

[80] (1895) 12 S.C. 272.

[81] See Oxford Advanced Learner's Dictionary, International Student's Edition, p. 35, 8th Ed.

[82] (2021) 7 N.W.L.R. (Pt. 1776) 425 SC.

[83] *Kolade v. State* (2017) 8N.W.LR. (Pt. 1566) 60 SC., *Mohammed v. State* (2015) 10 N.W.L.R. (Pt. 1468) 496 SC.

Act 1984 (PACE), and the 'Turnbull Guidelines',[84] is quite instructive. In *R v Turnbull*,[85] the Court prescribed the applicable guidelines in circumstances where a case depends substantially on the correctness of identifications of the accused by each witness as follows: *Was there any material discrepancy between the description given by the witness and the actual appearance of the accused?*

Where there is a material discrepancy, the particulars should be provided to the defence and in all cases they should be supplied if requested".[86]

2.12. Requirement of Medical Evidence: Medical evidence is relevant in homicide cases, it is however not *a sine qua non*, death can be established by other sufficient evidence which establishes beyond reasonable doubt that death resulted from the particular act of the accused person.[87] However, in certain instances, a statement from the medical practitioner who treated the deceased during the relevant period may be useful to show the cause of death. In *Friday Aighuoreghian v. State,*[88] the Nigerian Supreme Court reiterated the instances where medical evidence will be compulsory in homicide cases as follows:

> *"where the cause of death is obvious, medical evidence ceases to be of practical necessity where the deceased died almost immediately from the voluntary act of the accused, medical evidence will not be necessary. However, where death occurred later (in this case after three months), and the medical evidence as to the cause of death and responsibility of the accused persons is uncertain and doubtful, then medical evidence as to the actual cause of death becomes a necessity, and failure to produce same (in the court below) would be fatal to the prosecution"*

3. Findings

The prosecution must further establish beyond reasonable doubt that the accused carried out his unlawful act or omission intentionally, while committing the crime, the accused knew that he was unlawfully killing a human being.[89] In *S v. Van Aardt*,[90] the South Africa Supreme Court of Appeal, having regard to the "sustained" and "vicious" assault upon the deceased by the appellant, found that *"the appellant subjectively foresaw the possibility of his conduct causing the death of the deceased and was plainly reckless as to such result ensuing*". He was appropriately held guilty of murder. However, certain offences do not require any form of fault, these are

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[84] The Code for Crown Prosecutors, "*Prosecution guidance*" https://www.GOV.UK .

[85] [1977] Q.B. 224

[86] Ibid. The 'Turnbull Guidelines'

[87] See *Azu v. The State* (1993) 6N.W.L.R. (pt. 229) p. 303; in terms of S. 313 C.C. when a person inflicts grievous harm on another, and death results either from the injury or from medical treatment thereof, he is deemed to have killed that other person; *Isong Akpan v. The State*, (2001) 12 N.W.L.R. (pt. 728) p.617 S.C

[88] *Supra*

[89] *S. v. De Oliveira*, 1993 (2) S.A.C.R. 59 (A).

[90] 2008 (1) SACR 336 (E) .

regarded as "strict liability offences" [91] Hence, the issue of intention is irrelevant to the liability of the offender [92] For such offences, the investigator is required to find evidence showing that the accused failed to meet the standard of care that is expected, and that reckless disregard caused the alleged harm. Though, intent is not a required element for this kind of charge, careful investigation of the evidence could elevate the offence from criminal negligence causing death or bodily harm, to offence of murder if the prosecutor can establish evidence of intent.

It is not within the province of law to compel anyone to do what is practically impossible, hence, the latin maxim: *"Lex non cogit ad impossibilia*"[93] Furthermore, by virtue of the Diplomatic Immunities and Privileges Act , Section 3 & 4, the Heads of States, special envoys or representatives from foreign countries (including their families and their staff) are immune from the criminal and civil jurisdiction of foreign courts.

In South Africa, the age of Criminal Capacity of children is 12 years old (minimum) and 14 years old (full). A child younger than 12 years is irrebutably presumed to lack criminal capacity, and a child between 12 and 14years is rebuttably presumed to lack criminal capacity in terms of Section 7 &11 of the Child Justice Act 75 of 2008. Similarly, the various countries have legislative provisions regarding criminal capacity of children.

4. Conclusion

This paper outlined and discussed series of strategies that must be exhibited by the investigator and prosecutor in combatting unlawful killing of human beings. The paper further highlighted the strategies that must be adopted by the prosecutor where the accused raises a statutory defence in extenuation. Considering the rights of accused persons to available statutory defences, the paper noted that a crucial factor in criminal prosecution is a fair trial of the accused before an independent, impartial, and competent court. Invariably, the law requires that all those who exercise public power must act in accordance with the law and the Constitution,[94] hence, the prosecutor have a duty towards the accused to ensure that an innocent person is not convicted.[95]

5. Recommendations

In the light of the aforementioned, the paper proposes as follows:

(1) This paper recommends that strategic prosecutorial and efficient investigative techniques be adopted by the various countries in the light of incessant violation of human right to live worldwide.

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[91] Burchell, "*Principles of Criminal Law"* 3rd Revised ed. (2006) 45.

[92] Jonathan Burchell: "*Criminal Law & Procedure: General Principles of Criminal Law*" 4th ed. Vol.1 (2011) 953.

[93] See *R .v. Korsten* (1927) 48 N.L.R. 12

[94] *Lee v Minister for Correctional Services* 2013 1 SACR 213 (CC) para 70.

[95] See the *Van der Westhuizen* case para 13; *S v Masoka* 2015 2 SACR 268 (ECP) para 12

(2) Suspects should be treated appropriately in conformity with the Constitution and international human rights provisions.
(3) Investigations into reports of extrajudicial killings by law enforcement officers should be conducted by an independent body distinct from the Police.
(4) The paper furthermore posits that there should be a standard guideline for the exercise of power of prerogative of mercy, and recommends that murder matters should be excluded from the schedule of prerogative of mercy provisions in the various countries.

(5) Anyone arrested should be brought promptly before the court within a reasonable time and be availed the opportunity and the right to defend himself.

(6) There should be standard guidelines regarding participation and protection of witnesses in the legal process.

(7) The prosecutor must monitor the sentence and conviction passed by the court on the accused and ensure that it is dully implemented.

(8) The investigating police officers must live in staff quarters in order to avoid undue influence from civilians and this will facilitate speedy response to distress calls from citizens. Furthermore, the investigating officers must be supplied with modern infrastructures, patrol vehicles and helicopters for effective surveillance and patrol activities; regular supply of modern firearms and weaponry, provision of adequate bullet proof vests, and helmets.

(9) Another crucial strategy is that, the investigating officers must work in collaboration with other law enforcement officers, and the communities. Ireland and Thailand are examples of countries where such procedure is applicable. In line with this, Rt. Hon. Theresa May, noted as follows:

> "*Neither the Home Office nor the police can prevent crime acting alone. However, when Government, law enforcement, businesses, academics, voluntary sector organisations and the public all play their part, we can make a real impact*" [96]

(10) The unethical practices of the police investigators can only be regulated by efficient independent investigative agencies. The "Open Society Justice Initiative": *Who Polices the Police?*[97] identified certain regions that established Independent

[96] The Rt. Hon Theresa May MP, Home Secretary, Home Office: "*Crime Prevention Strategy*"
March 2016.

[97] Open Society Justice Initiative, "Who Polices the Police? *The Role of Independent Agencies in Criminal Investigations of State Agents*": Executive Summary and Main Recommendations Open Society Foundations, Justice Initiative: New York, NY 10019, USA : www.opensocietyfoundations.org ; https://www.justiceinitiative.org/publications/who-polices-the-police-the-role-of-independent-agencies-in-criminal-investigations May 07, 2021

Investigative Agencies (IIA) [98] and enjoins the regions to ensure that justice is done by empowering the IIA.

(11) This paper proposed that the various investigating sectors be supervised by experienced and legally trained officers. The German[99] / French/Swedish systems are good examples.[100]

(12) For effective performance of the investigating role, officers must undertake continuing education throughout their careers because scientists keep inventing new techniques and modern equipment.

[98] Ibid. *Who Polices the Police?* identifies 11 examples in different regions and legal systems. These are: Canada, Ontario, Special Investigations Unit (SIU), Republic of Georgia, State Inspector's Service (SIS), Republic of Ireland, Garda Síochána Ombudsman Commission (GSOC), Israel, Police Internal Investigations Department (Machash or PIID), Jamaica, Independent Commission of Investigations (INDECOM),Kenya, Independent Policing Oversight Authority (IPOA),Norway, Bureau for Investigation of Police Affairs, South Africa, Independent Police Investigative Directorate (IPID), Trinidad and Tobago, Police Complaints Authority (PCA),United Kingdom, England and Wales, Independent Office for Police Conduct (IOPC), United Kingdom, Northern Ireland, Police Ombudsman for Northern Ireland (PONI).

[99] Julia Broder, "*How Public Prosecutors Work in Germany*": www.deutshland.de/en/topic/politics/how-public-prosecutors-work-in-germany-text-But%20they%20mainly%20work% 20-05-2019.

[100] " *The Public Prosecutor, its Role, Duties and Powers in the Pre-trial Stage of the Criminal Justice Process –A Comparative Study of the French and the Swedish Legal Systems"* CAIRN –INFO, Revue Internationale De Droit Penal 2011/3 (Vol. 82),Editor: ERES: https://www.Cairn.Info/revue-Internationale-de-droit-penal-2011-3-page-532.htm. Page 532-540 (Accessed on May 20, 2017).