
# KAMPALA INTERNATIONAL UNIVERSITY

# LAW JOURNAL (KIULJ)

*KIULJ. VOL 3, ISSUE 2, 2019*

**© KIULJ. 2019**

Journal of School of Law, Kampala International University, Kampala, Uganda

*All rights reserved. No part of this publication may be reproduced, distributed, or transmitted in any form or by any means including photocopying, recording, or other electronic or mechanical methods, without the prior written permission of the Editorial Board of the Journal except in the case of academic research and proper acknowledgement having been made.*

**ISSN: 2519-9501(Print)**

**ISSN: 2519-9528(Electronic)**

**Published by:**

School of Law

Kampala International University

P.O. Box 20000 Kampala

Kampala

Uganda

## ABOUT THE JOURNAL

*Kampala International University Law Journal* is the official journal of the School of Law, Kampala International University. It is a peer-reviewed Journal providing distinctive and insightful analysis of legal concepts, operation of legal institutions and relationships between law and other concepts. It is guided in the true academic spirit of objectivity and critical investigation of topical and contemporary issues resulting from the interface between lawandsociety. The result is a high-quality account of an in-depth assessment of the strengths and weaknesses of particular legal regimes with a view to introducing reforms. In furtherance of the requirements of advanced academic scholarship, the Journal pays high premium on originality and contribution to knowledge, plain and conventional language, and full acknowledgment of sources of information among other things. It is superintended by a Board of respected academics, lawyers, and other legal professionals.

The Journal offers useful reference material to legal practitioners, international organisations, non-governmental organisations and the academia. It also provides multipurpose policy guide for the government.

The Journal is a biannual publication. Calls for articles and submission datelines are determined by the Editorial Board.

All correspondences are addressed to:

**The Editor-in-Chief**
**Kampala International University Law Journal,**
**School of Law, Kampala, Uganda**.

## EDITORIAL NOTE

We are delighted to introduce the second edition of Kampala International University Law Journal (KIULJ) for the year 2019. The objective of the Journal, as usual, is to publish current legal issues, high quality, insightful and original research works. In the accomplishment of this objective the current edition contains in-depth analysis of contemporary legal issues on a wide spectrum of areas such as, the mechanisms for Alternative Dispute Resolution (ADR), criminal law and practice, constitutional law, international human rights law, commercial law and practice, among others.

We are hugely grateful to all those who assisted in the editorial process and made this publication possible. In particular, the Editorial Board will like to appreciate our team of anonymous reviewers who took time off their tight schedules to assess the works submitted by colleagues. Their observations, suggestions and general comments contributed immeasurably to the high quality of the articles published in this edition. We also appreciate the authors for thoroughly revising their works based on the reviewers' comments.

The KIULJ is a bi-annual publication of the School of Law, Kampala International University, Uganda. Contributions in the form of articles, case/book reviews, commentaries etc., are received by the Journal on a rolling basis. We therefore welcome research works on different areas of the law from academics and legal practitioners either individually or jointly. Contributors are to note importantly that the Journal adopts the Oxford Standard for the Citation of Legal Authorities (OSCOLA) and that any work that does not comply substantially with it (OSCOLA) may not be accepted for publication. Contributors are also requested to indicate their affiliations and qualifications (academic and professional) while turning in their works.

This edition of the Journal may be cited as: *KIULJ, Volume 3, Issue 2, 2019*.

***Ifeolu John Koni, PhD.***

**EDITORIAL BOARD**

**Valentine Tebi Mbeli** **Chairman**
School of Law,
Kampala International University

**Ifeolu John Koni** **Editor-in-Chief**
School of Law,
Kampala International University

**Apio Esther** **Secretary**
School of Law,
Kampala International University

**Mahmud Sewaya** **Member**
School of Law,
Kampala International University

**Tajudeen Sanni** **Member**
School of Law,
Kamapala International University

**Jimmy Walabyeki** **Member**
School of Law,
Kampala International University

**EDITORIAL CONSULTANTS**

**Prof Tony Ijofor, SAN**
Faculty of Law
Benue State University,
Nigeria.

**Prof Adewale E Taiwo,**
Dean, Faculty of Law,
Adekunle Ajasi University
Akungba-Akoko, Nigeria.

**Prof Olaide A Gbadamosi**,
Dean, Faculty of Law,
Osun State University,
Osogbo, Nigeria.

**Leah Ndimiwirno, PhD**
Department of Public Law,
Faculty of Law,
Nelson Mandela Metropolitan University,
South Africa.

**Scope**

Kampala International University Law Journal (KIULJ) is the official Journal of the School of Law, Kampala International University, Uganda. It is a peer-reviewed Journal providing an objective and industry focused analysis of national and international legal, policy and ethical issues. The Journal publishes well researched articles that are in sync with sound academic interrogation and professional experience on topical, legal, business, financial, investment, economic and policy issues and other sectors.

**Citation**

This Journal may be cited as *KIULJ Vol 3, Issue 2, December 2019.*

**Disclaimer**

Statements of fact and opinion contained in the Kampala International University Law Journal are those of the respective authors and contributors and are not necessarily those of the School of Law, Kampala International University, the editors or the institutions with which the authors are affiliated. Accordingly, the authors and contributors are responsible for the integrity and accuracy of the respective material contents and references. The School of Law, Kampala International University, does not make any representation, express or implied, with regard to the accuracy of the materials in the Kampala International University Law Journal and wishes to unequivocally disclaim any responsibility or liability for such materials.

# TABLE OF CONTENTS

# AN ANALYSIS OF THE LEGAL FRAMEWORK FOR SUSTAINABLE FISHERIES' FINANCING IN UGANDA

**VALENTINE T MBELI**∗

**Abstract**

*The fisheries sector is critical to Uganda's economy as it contributes about 3% to national GDP and 12% to agriculture sector GDP. Curiously, the sector does not benefit from the proceeds of revenue generated from fisheries activities. This raises an important question of how best to ensure that proceeds and revenue generated from the fisheries sector are ploughed-back for the sustainable development and improvement of the sector. Through a doctrinal research methodology, this study examined the legal framework for sustainable fisheries financing in Uganda. In that vein, the study attempted to tie the loose ends of the Constitution and the Public Finance Management Act, with an effectively crafted link to relevant provisions of a substantive fisheries legislation to address the issue of inadequate financing. The study resonates with previous research findings that attribute the financial gap in the fisheries sector to low public investment, and over-dependence on central government transfers. Drawing lessons from other jurisdictions, it contends that developing and implementing a robust legal framework is critical to filling the financial gap and realizing the full potentials of the sector. It advocates for the ring-fencing of funds such that the fisheries sector is allowed to retain a quota of proceeds deriving from fees, licenses, and taxes for its development. Similarly, the study presses for the adoption of principles of fiscal decentralization to give local governments right to retain a share of government revenue deriving from fisheries activities within their areas of jurisdiction.*

## 1.0 INTRODUCTION

The fisheries sector is an important source of livelihood and a major economic bastion in Uganda. According to the Uganda Investment Authority (UIA), the fisheries sector remains the second highest foreign exchange earner for Uganda and is therefore strategic to the country's economic growth.[1] While fisheries contributes 12 percent of agriculture sector GDP of Uganda and supplies 50 percent of animal proteins consumed in the country, a number of challenges, which

∗DIL, LLB (HONS) Uni. Dschang-Cameroon; LLM; PhD Nigeria.Senior Lecturer & Dean, School of Law, Kampala International University, Kampala, Uganda. (+256)0706970595; Email: mbelivalentinetebi@yahoo.com

[1]Uganda Investment Authority 'Fisheries Sector Profile' available at http://www.ugandainvest.go.ug/uia/images/Download_Center/SECTOR_PROFILE/Fisheries_Profile_Sector.pdf

seriously affect the economic and social contribution of fisheries and aquaculture, continue to threaten the vibrancy of the sub-sector.[2]

Results from previous studies on fish production indicate that lack of adequate funding is a major constraint to the development of the fisheries sector in Uganda resulting in fish supply deficits.[3] This is largely attributable to low public investment in the sector, especially in the domain of aquaculture which has the potential to increase fish production in the country remarkably.

The core responsibility of government in this regard is to formulate, review and implement laws and policies that can ensure sustainable funding strategies for the fisheries sector. In an effort to achieve this, parliament thought it wise to amend the Fish Act[4], by empowering the Department of Fisheries Resources in the Ministry of Agriculture, Animal Industry and Fisheries (MAAIF) to retain funds accruing from the issue of licenses and permits for purposes of defraying the expenses of that department and for the effective development and management of the fisheries sector.[5] Despite the clear statutory provision on the retention of funds accruing from the issue of licenses and permits this fund was not operationalised due to lack of specific guidelines and modalities on the utilization of the funds.

In the light of the foregoing, it remains a legitimate concern to explore appropriate legal avenues for the furtherance of adequate and sustainable funding of the fisheries sector in Uganda. The main thrust of this study is to identify and analyze workable financing options that can drive the fisheries sector of Uganda in the context of an enabling legal framework that guarantees a fully sustainable fisheries industry.

## 2.0 LAWS RELEVANT TO FISHERIES SECTOR FINANCING

### 2.1 The Constitution

The Constitution of the Republic of Uganda, 1995 is the grundnorm of the land. The basic principles on matters relating to public revenue and expenditure are enshrined in the Constitution. Chapter 9 of the Constitution deals with the finances of government in general. It provides for the establishment of a Consolidated Fund, into which all revenues or other monies raised or received for the purpose of, or on behalf of, or in trust for the Government shall be paid.[6]This provision uses principles of agency and trust to ensure that all public funds are funneled into the

[2]FAO 'FAO and Ministry of Agriculture, advance efforts towards regulation of fisheries and aquaculture in Uganda' 2019.
[3]Kwikiriz et al. 2018.
[4]Cap.197, 1970.
[5]Fisheries (Amendment) Act 2011, s 22(a).
[6] ibid, art 153 (1).

Consolidated Fund. There are however, two exceptions to the mandatory remittance of revenues of government into the Consolidated Fund. This exceptions are in relation to monies that are payable by or under an Act of Parliament, into some other fund established for a specific purpose and that may, under an Act of Parliament, be retained by the department of Government that received them for the purposes of defraying the expenses of that department.[7]

As a proper link between the Constitution and public finance, it is important to point out the implications of this constitutional provisions on financing the fisheries sector. Following the Constitution, there are basically three routes of channeling revenue received on behalf of government including revenue from the fisheries sector into use namely; (1) by lodging into the consolidated fund, (2) by creating a special fund under an Act of Parliament and, (3) by retention wherein monies may be retained by the Department of Fisheries Resources and Development for the purposes of defraying the expenses of that department.

Reasons have been advanced for the deviation from the constitutional norm of paying all public revenue into the consolidated fund thus: "Whereas the consolidated fund has the potential of ensuring government revenue is effectively mobilised and monitored, it may at the same time create the unintended consequence of failing to address sector's demands due to inadequate financial allocation as it is the case with the fisheries sector in Uganda".[8] It is in recognition of this problem that the Constitution allows for the establishment of other funds for specific purposes and the retention of funds by governmental departments for purposes of defraying the expenses of the departments.

### 2.2 Public Finance Management Act

The Public Finance Act[9]has over the years, undergone a series of sloughs by way of amendments. The present legislative framework on public finance in Uganda is enshrined in the Public Finance Management Act, 2015 (the Act). The Act, is substantially similar with the provisions of the Constitution on matters relating to handling of public funds. First, it prohibits a vote, state enterprise or public corporation, from collecting or receiving revenue except under the authority of Parliament.[10] It further imposes an obligation to remit all revenues collected by a

[7] ibid, art 153 (2) (a) and (b).
[8]Mugoya Musa "The absence of the Fish Fund is hurting the fishing sector" available at http://parliamentwatch.ug/the-absence-of-the-fish-fund-is-hurting-the-fishing-sector/#.XIti1khlDIU accessed 14 March 2019.
[9]Cap 193, 1962
[10]Public Finance Management Act, s 29 (1).

vote, state enterprise or public corporation into the Consolidated Fund.[11] Like the Constitution, the Act creates two exceptions to this obligation. To that end, section 29 (2) provides: The revenue collected or received by a vote, state enterprise or public corporation under subsection (1) shall be (a) paid into and shall form part of the Consolidated Fund; OR (b) receivable into a public fund established for a specific purpose where this is authorised by an Act of Parliament. Section 29 (3) on its part exempts revenue that is retained by the relevant agency of government. It states 'A vote, state enterprise or public corporation SHALL[12] retain revenue collected or received, where the revenue—(a) is in the form of levies, licences, fees or fines and the vote, state enterprise or public corporation is authorised through appropriation by Parliament to retain the revenue'.

A fundamental question that arises for determination is whether the legislative language "shall" as used in suction 29 (3) is mandatory or directory. The question is raised bearing in mind the difficulties involved in determining cases when the provisions of a statute are merely directory and when they are mandatory. The usual rule is that the use of the word "shall" generally evidences an intent that the statute be interpreted as mandatory.[13] Construed in that sense, section 29 (3) could be interpreted as expressing an intent of having funds accruing to the relevant agency in the form of levies, licences, fees or fines compulsorily retained by those agencies.

This, however, may not be a reliable nor completely accurate guide in concluding that the statutory provision is mandatory given the high number of instances where the word "shall" has been found to be directory.[14] This is mainly because statutes must be construed as a whole to ascertain legislative intention.[15] In the case of the Public Finance Management Act, the use of the word "shall," though significant, does not necessarily create a mandatory duty since it is coming by way of an exception to the general rule which says all revenues of government must be paid into the Consolidated Fund.

The idea behind retention of funds is built around the concept of hypothecation also known as the ring-fencing or earmarking of revenue where monies received by a government agency or sector from levies, licences, fees or fines may be retained and applied for purposes of defraying the expenses of the department. Hypothecation can ably protect the fisheries sector by ring-fencing its

[11] ibid, s 29 (2) (a). See also section 30 of the Act.
[12] Emphasis supplied
[13] See Stewart v Tunxis Service Center, 237 Conn. 71, 78 (1996).
[14] See Tramontanov.Dilieto 192 Conn. 426, 434-34 (1984).
[15] ibid.

resources from competing political interests and in that way, by-passing budgetary constraints mandated by the ministry of finance.

**2.3 Fish Act**

The Fish Act[16] was first enacted in 1970 to make provision for the control of fishing, the conservation of fish, the purchase, sale, marketing and processing of fish, and matters connected therewith. The Act was completely bereft of provisions on fisheries financing. This lacuna was addressed by the 2011 amendment[17] section 22 (b) of which states:

> (1) Any fees received by the Chief Fisheries Officer or anauthorised licensing officer from the issue of licences and permits and other fisheries activities under this Act shall be retained by the Department of Fisheries Resources in a Fund established for the purpose, in accordance with the Public finance and Accountability Act, 2003 for purposes of defraying the expenses of that department and for the effective development and management of the fisheries sector.

In principle, this provision has far-reaching impact in that it offers safeguards to the fisheries sector. In essence, it helps in the ring-fencing of fisheries resources from competing political interests and in that way, by-passing budgetary constraints.

A careful consideration of section 22 (b) of the Fish (Amendment) Act requires the establishment of a Fund as condition precedent to the retention of revenue by the fisheries sector. The Fish (Amendment) Act however failed to establish the said fund making the operationalisation of the provisions on retention of revenue impracticable and thereby pushing for further amendment of the Act.

A proposed amendment to the Fish Act now seeks to address this concern among other issues. The proposed amendment code-named the Fisheries and Aquaculture Bill, 2018 makes far reaching provisions on the finances for management and development of the fisheries and aquaculture subsectors which shall include: funds from public funding, grants, export fish levy and fees from

[16]Cap 197.
[17] Fish (Amendment) Act No. 5 of 2011.

fishing activities.[18]Section 10 (3) of the Bill provides for the establishment of a Fisheries Development Fundfor management, development, control and regulation of fisheries, and for supporting management and development plans of the subsectors. Nevertheless, a major problem that needs to be addressed is the risk of two co-existing Funds under the Bill. This stems from the fact that section 22 (a) of Fish Act inserted under section 11 of the Bill provides for the establishment of a fund to accommodate retained revenues while section 10 (3) provides for the establishment of a Fisheries Development Fund. A potential conflict that may arise from this scenario will be on management of the funds. While section 10 (5) provides that 'the Fisheries Development Fund shall be managed by the Chief Fisheries Officer', section 22 (2) of the Fish Act adopted under section 11 of the Bill refers to the Accounting Officer of the Fund to be the Accounting Officer of the Ministry responsible for fisheries.

In order to avoid administrative hiccups and to ensure proper revenue mobilisation and utilisation in the fisheries sector, there is need to harmonise the two positions with the view to establishing a single fund into which all revenues accruing to the sector may be channeled. This will further ensure proper management and accountability under a uniform structure as opposed to a situation where there are different accounting officers. It is, therefore submitted that all authorised revenue of the fisheries sector be received into Fisheries Development Fund and applied for all intended purposes.

On its façade, the idea of wholly retaining funds received from licensing and permits by the fisheries sector as canvassed under section 11 of the Bill may be subject to debate in that it would deprive government of the authority of prioritizing revenue allocation. Nevertheless, the provision should not be construed strictly as the funds retained will be to the extent required by the sector for purposes of defraying the expenses of that department and for the effective development and management of the fisheries sector. This gives government the latitude and powers of intervening to ensure that what is retained is a reflection of the financial needs of the sector.

The key consideration behind ring-fencing fisheries resources is to ensure that the sector benefits from the proceeds of revenue generated from fisheries activities. The practical import ofthis is to establish an effective cost recovery mechanism wherein the proceeds and revenue generated from the fisheries sector are ploughed-back for the sustainable development and improvement of the sector.

[18] See generally Fisheries and Aquaculture Bill 2018, s 10.

The cost recovery mechanism mainly focuses on administrative cost but offers little or no financial assistance to fishers. This, coupled with the unwillingness or inability of the formal financial institutions to provide financial services to fish operators creates major constraints for the sector. Low interest loans and credit guarantees to fishers could go a long way in resolving this problem. In the same light, accidents and natural hazards associated with the fisheries business require appropriate legal mechanisms to cushion the effects of risks and uncertainties in the sector.These therefore crave the need to extend further support to the sector in the form of low interest loans to fishers for the purchase of new and used vessels and extension of insurance subsidies to enable fishers obtain insurance policies. One key area where government intervention is highly solicited is through subsidies on insurance premiums, and for that, it is strongly recommended that a **fisheries insurance and credit guarantee scheme** be established under the Fisheries Fund to enable fishers and fish farmers obtain low interest loans and insurance premiums under conditions to be laid down by specific regulations.

## 3.0 BUDGET FRAMEWORK VIS-À-VIS THE FISHERIES SECTOR

Currently, fisheries management is still vested in the central government ministry responsible for fisheries (Ministry of Agriculture, Animal Industry and Fisheries). The competent authority under this agency is the Department of Fisheries, headed by the Commissioner for Fisheries.[19]The fisheries sector is largely dependent on allocations to the MAAIF. To begin with, budgetary allocation to the agriculture sector as a whole is low. According to the World Bank Group, while policy documents emphasize the importance of the agriculture sector, de facto budget allocations have remained limited.[20]For example, with development partner funds fully added, agriculture is estimated to have accounted for as low as 4.2% of total public expenditures in 2017/2018, far from the 10 per cent of total expenditures that the Comprehensive Africa Agriculture Development Programme (CAADP)compact recommends.[21]

The issue of lack of sufficient funds for the MAAIF has a trickling down effect on the various departments in the Ministry including the department of fisheries. According to the Agriculture Sector Budget Framework Paper for financial year 2018/19, UGX10.163 billion was allocated to the Fisheries Vote function out of UGX: 340.024 billion available to the MAAIF.[22]The funds are

[19] FOA 'Information on Fisheries Management in the Republic of Uganda' http://www.fao.org/fi/oldsite/fcp/en/uga/body.htm accessed 22 March 2019.
[20] World Bank Group 'Closing the Potential-Performance Divide in Ugandan Agriculture' (2018) 63.
[21]ibid.
[22] Ministry of Finance, Planning and Economic Development 'BUDGET FRAMEWORK PAPER FY 2018/19 –FY 2022/23 p. 7

mainly to support Fisheries regulation and enforcement activities[23]as against any meaningful improvements in the sector. The funding pressure in public sector agriculture financing makes a strong and compelling case for alternative and sustainable funding options for the fisheries sector.

## 4.0 GUIDELINES FOR FINANCING FISHERIES

Developing the best financing model for the fisheries sector is key to creating measurable change and to ensure the long-term sustainability of the sector.[24] Several models have been designed to facilitate and ensure adequate financing for the fisheries sector depending on the fisheries characteristics in terms of scale of the industry, political economy, government support, ecosystem impacts, and management structure among other things. The major financing models are:

a. Non-profit/foundation support. This is a financing method designed such that fisheries receive its primary funding through non-profit donations. Fisheries and their stakeholders work with the non-profit to obtain funding.[25]
b. Industry-Elected Premium. This takes the form of paying a self-imposed premium per unit of raw material passing through a particular level (e.g., buyer, processor, seller).[26]
c. Quota Ownership. In this model, a fund is established to hold fishing quota rights within an individual fishery.
d. Export duty. In this model, fisheries derive their funding through direct government contributions. This funding is generally a portion of the amount received from a tax on products or a duty levied on exported products.[27]
e. Crowdfunding. With crowd funding, money is donated to fisheries by many small funders. Crowd funding uses online platforms such as standalone websites, mainstream crowd funding websites, or social media to reach a large group of people (the "crowd") willing to donate small amounts of funding.[28]

The expected costs for developing the fisheries sector in Uganda far exceed the country's financial capacity. Attracting funding to the fisheries sector requires innovative and adaptation measures. To succeed, there needs to be a compelling and strategic rationale behind a financing model; typically

[23] ibid
[24]WWF FIP Handbook Guidelines for Financing Fisheries in Transition (2015) 1.
[25]ibid.
[26]ibid .
[27]ibid .
[28]ibid .

through an impact consideration. For example, the fisheries-climate modeling that combines both the effects of climate change and fisheries management may be of strategic importance in attracting external finance. A practical example could be the impact of fishing on forest resources in case where traditional boat building requires the use of timber thereby leading to deforestation. Financing options that seek to address the problem of deforestation resulting from harmful fishing practices is most likely to attract funding from donor agencies interested in the protection of forest resources.

The rationale for greater involvement of the international development community in funding the fishery sector follows directly from MDG and SDG documents, because there is the imperative to reduce poverty among small-scale fishers and their dependents, now faced with declining income, and the urgent need to address the looming ecological crisis associated with fishing.[29]

## 5.0 NATIONAL FISHERIES AND AQUACULTURE POLICY

This is a policy document by the Ministry of Agriculture, Animal Industry and Fisheries. The policy which came into effect in 2017 has as main thrust to 'optimise benefits from fisheries and aquaculture resources for socio-economic transformation' A major challenge to this policy goal is about limited funding allocated to the fisheries sector which makes achieving the fisheries and aquaculture management and development targets difficult.[30] This makes the need for sustained finance imperative for the proper management and development of the fisheries sector in Uganda as this is instrumental in ensuring social and economic benefits to resource users and the country as a whole.[31]

The Policy charges Government to mobilise resources to finance the sector through the national budget framework and in line with the Public Finance Management Act (2015). To ensure this, Government is expected to revitalise mechanisms to mobilise resources from within the sector including internally generated resources such as: fish levies, registration and licensing fees, inspection fees, testing fees and fines. According to the policy, the implementation of cost recovery systems as a means to finance fisheries management is crucial.[32] The Policy further recognises the need of establishing

[29]The World Bank Agriculture and Rural Development Department 'Saving Fish and Fishers toward Sustainable and Equitable Governance of the Global Fishing Sector' (2004) xiv.
[30]MAAIF National Fisheries and Aquaculture Policy (2017) 12.
[31]ibid.
[32]ibid.

a Fisheries Fund in line with Article 153 (2) of the Constitution and section 29 (2) (b) and (3) of the Public Finance Management Act, 2015.

From the foregoing analysis, it may safely be said that the current practice where monies deriving from levies imposed on fish exports are being collected by the Uganda Revenue Authority (URA) and remitted fully into the Consolidated Fund is a major setback to the development of the fisheries sector. It is therefore expected that the Fisheries and Aquaculture Bill when passed into law, shall address this problem by setting up a Fund into which such monies shall be paid either in part or in whole as may be stipulated by parliament for the sustainable development of the fisheries sector.

## 6.0 PUBLIC-PRIVATE PARTNERSHIPS FOR SUSTAINABLE FISHERIES AND AQUACULTURE DEVELOPMENT

Public/Private Partnerships (PPPs) are gradually gaining grounds as an effective method of financing projects globally. The generic principle of PPP lies in the implementation of policy frameworks as a joint responsibility of government, donor agencies, technical institutions and other sector stakeholders.[33] With regards to the fisheries sector, PPP emphasizes the need of enhancing private sector investment and financing mechanism as part of the cross-cutting issues under policy consideration.[34] The overall objective for the implementation of PPP projects is to enhance increased and sustainable returns from the sector.[35] PPP in the fisheries sector is fast gaining grounds at local and international levels, giving rise to several legislative and policy frameworks.

The African Union (AU) is at the forefront of the initiative toward promoting PPP in the fisheries sector at the continental level. In 2015, an AU meeting of experts in Yaoundé-Cameroon adopted a framework to assist member states in developing and implementing PPP models for sustainable fisheries and aquaculture development on the continent. Member states are by this framework required among other things to develop/amend overarching legislation in PPP law to reflect fisheries and aquaculture issues.[36]Such laws are required to have sections that:

i) Define clear and transparent mechanisms for financing PPPs;
ii) Deal with setting up efficient risk management strategies in all PPPs;

[33] A Wojewnik-Filipkowska and J Wegrzyn 'Understanding of Public–Private Partnership Stakeholders as a Condition of Sustainable Development' (2019) MDPI
[34] AU-IBAR (2019) "A Guide For Developing And Implementing Public-Private Partnership Models For Sustainable Fisheries And Aquaculture Development in Africa" VIII.
[35]ibid.
[36]ibid 10.

iii) Have adequate participatory processes to address stakeholder issues and concerns;
iv) Incorporate cross-cutting issues such as gender, youth, environment, climate change, HIV/AIDS, equal opportunities etc., and take care of environmental social governance;
v) Incorporate transparency and accountability and due diligence in the design of partnerships; and
vi) Cater for regional / trans-boundary resource management issues.

In Uganda, Public-Private Partnerships are a subject of intense statutory regulation under the Public-Private Partnerships Act.[37] The Act was enacted by Parliament of Uganda and assented into law by President YuweriMuseveni on August 5, 2015.

Section 4 of the Act defines public-private partnership to mean:

> a commercial transaction between a contracting authority and a private party where the private party performs a function of the contracting authority on behalf of the contracting authority, for a specified period, and acquires the use of the property, equipment or other resource of the contracting authority for the purposes of executing the agreement; assumes substantial financial, technical and operational risks in connection with the performance of the function or use of the property; or receives a benefit for performing the function through payment by the contracting authority or charges or fees collected by the private party from the users of the infrastructure or service, or both.

There are numerous benefits associated with the application of PPP concepts to fisheries and aquaculture. This includes; improved access to national and international markets; improved food safety and quality; developing niche markets; improving sector-specific infrastructure services; improving financial services; technology development and research; improving information and communication; improving physical and technical infrastructure; improving capacity building and extension services; providing bio-security and bio-safety supports; privatising government-owned facilities and services etc.[38]

Under this scheme, private investors can be able to mobilise resources to finance capital intensive projects in the fisheries sector such as theconstruction

[37] Public-Private Partnerships Act, 2015
[38]AU-IBAR (n 34).

of landing sites, storage, handling, processing and marketing facilities as well invest in modern technologies for improved economic efficiency in the industry and for the individual fishers. The task is on government to open up opportunities that can leverage private investment for the benefit of the fisheries sector in Uganda.

## 7.0 FISHERIES FINANCING AT LOCAL GOVERNMENT LEVEL

Local governments in Uganda play an important role in critical areas of fisheries sector management[39]. According to FAO, local governments perform important roles in the following areas:

> Planning for fishery community development and poverty reduction; seeking funding for fishery-community-led development projects, ensuring compliance with national laws and policies on water bodies, adapting national laws and policies to local needs, establishing forums for effective management of resources shared by more than one district, promoting co-management and responsibility sharing, supporting the regulation of major fishing water bodies in partnership with central authorities where appropriate, building capacity and providing support and guidance to fisheries communities in livelihood enhancement strategies, and representing the views of communities at national level through the central fisheries body and through the ministry responsible for co-ordination of local government enacting appropriate ordinances and by-laws for the management of fisheries resources.[40]

The question that arises is if local governments possess the requisite resources and capacity to engage in these activities. This question constitutes an integral part of the broader agenda in relation to the search for legal avenues that will promote sustainable financing of the fisheries sector. Unfortunately, local governments have insufficient funds for the required levels of service delivery.[41] More so, most of the financing is from central government but this isin

[39]These roles are espoused under section 19 (a), (b), and (c) Fisheries Bill, 2018 to include: inspecting, monitoring and coordinating government initiatives and policies in the fisheries sector as applied to local governments; coordinating and advising persons and organizations in relation to fisheries projects involving direct relations with local governments; and assisting in the provision of technical advice, support, supervision and training to local governments to enable them carry out the delivery of fisheries services in their respective areas, and to develop their capacity to manage fisheries resources.
[40]FAO (n. 19).
[41]BMAU BRIEFING PAPER (15/19) 2019, p.4.

form of conditionalgrants[42]. By conditional grants, it means central government allocated funds are earmarked for specific projects based on national priorities. This means that local governments have no discretionover such funds. Thissystem of financing by conditional grants from the centre, has been faulted in that it creates limited flexibility for specific local needs.[43] Under the fiscal decentralisation theory, local governments are given powers of revenue generation and expenditure for effective service delivery. To that end, local governments are given the powers to formulate, approve and execute their budgets and plans.[44]

Unfortunately, trends in revenue generation and performance shows a significantly low contribution of internally generated revenue to local governments' budgets in Uganda. According to the Budget Monitoring and Accountability Unit (BMAU)Ministry of Finance, Planning and Economic Development several efforts have been invested to improve local revenue collections, but their contribution to the LGbudgets has remained low,at less than 3% for district local governments,and 7% for Town Councils and Municipalities.[45]

In order to boost internally generated revenue of LGs and thereby strengthen capacities toward delivering on the tasks associated with fisheries sector management and development, the decentralized functions of LGs must be accompanied by adequate resources. This idea was incorporated intothe National Fisheries and Aquaculture Policy 2017. According to the Policy "Local governments will retain fees from local fish taxes accruing from the fisheries of their jurisdiction like fish movement permit, trading licenses, service levy, parking fees and landing fees". The consolidated fund on the other hand will retain funds collected in excess of anticipated estimates"[46]. In terms of scope and content, this policy document is an important tool for sustainable financing of the fisheries sector through fiscal decentralization.

> The question however remains whether this policy is constitutional in the absence of an

enabling law. This question is critical having regards to Article 153 (1) and (2) (a) & (b); and section 29 (2) & (3) of the Public Finance Management Act. The provisions have three thematic limbs. First, there is the requirement of remittance of all revenues raised or received for the purpose of, or on behalf of Governmentinto the consolidated fund as a general rule. Second, government revenue may be paid

[42]ibid.
[43] ibid
[44]See section 77 LG Act
[45]BMAU BRIEFING PAPER (n 41).
[46] See National Fisheries and Aquaculture Policy 2017.

into a specific fund establishment by an Act of Parliament. Lastly, revenue in the form of levies, licences, fees or fines may be retained by the relevant agency of government subject to authorisation of Parliament through appropriation. The foregoing provisions therefore raise serious issues about the constitutionality and legality of theNational Fisheries and Aquaculture Policy 2017 as far as it purports to vestin local governments, theauthority to retain certain amounts fees and fish taxes within their areas of jurisdiction.

In answer to the question of constitutionality, it is opined thatthe Policy does not satisfy the constitutional requirement for retention of funds by local government. At best, the policy document defines the aspiration of government and outlines what the government ministry hopes to achieve in moving the fisheries sector forward. As it is well known, policies are the forerunnersleading to the amendment of existing laws or enactment of new laws. In that spirit, it is hoped that the proposed amendment of the Fisheries Act will incorporate the principles enshrined in the Policy for greater sustainability of fisheries financing at local government level. To be considered alongside this proposal, is the need for robust mechanisms of governance and accountability to ensure proper utilization of retained funds.

## 8.0 LESSONS FROM OTHER JURISDICTIONS

This section examines the laws of other countries is in line with the broad objective of comparative legal research namely; to garner understanding of the experiences of other jurisdictions including possible resistance of their traditions with the overall purpose of improving on domestic law. The section is devoted to laws and experiences relating to fisheries financing in select jurisdictions in Africa. The countries considered here include; Tanzania, South Africa, Madagascar and Seychelles.

### 8.1 Fisheries Financing in Tanzania

In Tanzania, the principal legislation governing the fisheries sector is the Fisheries Act, 2003. The Act repealed the Fisheries Act, 1970 with a broad policy rationale to make provision for sustainable development, protection, conservation, aquaculture development, regulation and control of fish, fish product, aquatic flora and its products and related matters. ‘Development’ is an all-encompassing term that embraces all types of activities leading to growth, expansion, progress and success of the fisheries sector.

The primary responsibility of government under the Act is to promote, encourage and support all initiatives leading to the development and sustainable use

of the fish stock and aquatic resources.[47] The question of availability of funds is obviously central to the sustainable development of the fisheries sector without exception to Tanzania. This issue has been addressed under the Fisheries Act by establishing the Fisheries Development Fund.

The Fisheries Development Fund is a special fund established under the Fisheries Act[48] to accommodate funds drawn from diverse sources including; (a) sums appropriated by the Parliament; (b) monies or property which may in any manner become payable into the Fund;(c) any income generated by any project financed by the Fund, due allowance being made for any necessary expenses which must be met by any such project;(d) grants, donations, bequests or such sum contributed by any private individuals, corporate bodies, foundations and international organizations, within or outside the country; and (e) any such funds legally acquired from various sources.

The Fund is managed by a Committee appointed for that purpose by the Minister responsible for fisheries.[49] The activities of the Fisheries Development Fund are fully articulated in the Fisheries Regulations 2009. In view of this, Regulation 141 (1) states: "The Fisheries Development Fund shall support the following-(a)protection, rehabilitation and enhancement of the habitat;(b)monitoring, control and surveillance of fisheries;(c)training and awareness raising related to management of fishery resources and environment;(d)facilitation of fisheries research;(e)improvement of infrastructure and facilities in the fishery industry;(f)fish post-harvest loses reduction and quality of fish and fishery products;(g)development of aquaculture;(h)facilitation of fisheries statistical data collection, processing, analysis, publication and dissemination;(i)capacity building in fisheries;(j)enhancement offish inspection and safety assurance regimes;(k)the fishing communities in case of natural disasters; and(l)any other activity as it may deem necessary for the proper implementation of the objectives of the Fund". These Regulations were made pursuant to section 57 of the Fisheries Act, 2003.

The Fisheries Development Fund was established in Tanzania in 2003 as part of amendment to the 1970 Fisheries Act. This was done in the spirit of promoting sustainable development of the fisheries sector. As rightly observed by the FAO, whilst the fisheries sector is an important source of revenue to the Government of Tanzania, the money collected is used to develop the sector in terms

[47] Fisheries Act 2003, s 9..
[48] ibid s 29 (1).
[49] ibid s 29 (3).

of management, training and monitoring of the resource utilization.[50] Some of the revenue is also used for human resource development in the fisheries sector[51]. The Tanzanian Fisheries Act, therefore provides a persuasive benchmark for Uganda in terms of sustainable and impactful development of the fisheries sector.

**8.2 The Position in South Africa**

The idea of promoting the fishery industry in South Africa is an age-long concern. A key focus area in that regard has been and continues to be the issue of sustainable financing. The Sea Fisheries Research Fund was first established under section 19 of the Sea Fishery Act, 1973.[52] This was later renamed the Sea Fishery Fund under section 27 (1) of the Sea Fisheries Act, 1988[53]. The fund currently exist under the name Marine Living Resources Fund.[54]Despite the slough in nomenclature under the various amendments, there is a clear message of consistency in maintaining a special fund to promote development in the fisheries sector. For purposes of this study, references shall be made to the provisions of the Marine Living Resources Act,[55] it being the extant law on fisheries.

By virtue of section 10 (1) of the Marine Living Resources Act, the Sea Fishery Fund referred to in section 27 of the Sea Fishery Act, shall continue to exist under the name the 'Marine Living Resources Fund' (the Fund). The Fund is meant to facilitate the management and development of the fishing industry. Allocation of money from the Fund is on the advice of a Consultative Advisory Forum for Marine Living Resources consisting broadly of representatives of multidisciplinary, and qualified members.

In terms of sources of finance, section 10 of the Act states:

> (2) Into the Fund there shall be paid, notwithstanding the provisions of any other Act, but subject to section 22-
>
> (a) money paid in respect of fines, penalties and interest for any offence committed in terms of this Act, including any proceeds from the sale of any vessel, vehicle, aircraft, gear or fish forfeited or seized in terms of this Act;

[50]FAO "National Fishery Sector overview The United Republic of Tanzania" available at http://www.fao.org/fishery/docs/DOCUMENT/fcp/en/FI_CP_TZ.pdf accessed 19 April 2019.
[51] ibid.
[52]Act No. 58 of 1973.
[53]Act No. 12, 1988.
[54]Marine Living Resources Act,
[55]No. 18 of 1998.

(b) all interest and fees collected in terms of this Act;

(c) money appropriated by Parliament for the realization of the objects of the Fund;

(d) interest on investments;

(e) donations, with the approval of the Minister in consultation with the Minister of Finance;

(f) money which, with the approval of the Minister in consultation with the Minister of Finance, may accrue to the Fund from any other source; and

(g) any levy on fish, fish products, aquatic plants or other marine resources, imposed and collected in terms of this Act, the Sea Fishery Act, 1988, or any other law.

In South Africa the law is apt to provide diverse sources of financing for the fisheries sector with possible preference to sources outside parliamentary allocations such as money paid in respect of fines, penalties, interests and fees. These, added to levies on fish and fish product, are predictable sources geared toward considerable financial autonomy for the fisheries sector. These provisions are highly inspirational for Uganda.

**8.3 The Position in Seychelles**

The Republic of Seychelles, is a country in the western Indian Ocean, comprising about 115 islands. After tourism, the fisheries sector is the country's most important industry,[56] contributing significantly to annual GDP and employing 17% of the population. Fish products make up around 95% of the total value of domestic exports.[57]

Fisheries regulations is placed under the Seychelles Ministry of Environment, Natural Resources and Transport, while the Seychelles Fishing Authority is the executive body that is responsible for fisheries.[58] The Fishing

[56] This is similar to Uganda.
[57] The World Bank 'Seychelles launches World's First Sovereign Blue Bond' https://www.worldbank.org/en/news/press-release/2018/10/29/seychelles-launches-worlds-first-sovereign-blue-bond accessed 27 March 2019,
[58] http://www.seychelles.org/seychelles-info/fishing-industry

Authority was created in 1984 to develop the fishing industry in Seychelles to its fullest potential as well as preserve the resource base for sustainable development.[59]

The main legislation regulating the fisheries sector in Seychelles is the Fisheries Act, 2014.[60]This Act does not make financial provisions for the development of the fisheries sector though it bears clear legislative intent for efficient and effective management and sustainable development of the sector.

Financial provisions are rather enshrined in the Seychelles Fishing Authority (Establishment) Act.[61] Section 15 of the Act provides for the sources of finance for the Authority thus:

> The funds of the Authority shall consist of:
>
> (a) moneys appropriated by an Appropriation Act and paid to the Authority;
>
> (b) moneys derived by the Authority from carrying on any business or enterprise or by reason of its shareholding in any company;
>
> (c) moneys lawfully borrowed by the Authority;
>
> (d) moneys due on any investment made by the authority; or
>
> (e) other moneys lawfully received by the Authority for the purposes of the Authority.

In terms of application of funds, section 18 of the Act states: Subject to subsection

> (3), the funds of the Authority may be applied by the Authority:
>
> (a) in payment or discharge of the costs, expenses and other obligations of the Authority;
>
> (b) in payment of remuneration, fees and allowances payable to any person under this Act; or

[59]ibid.
[60]Act 20, 2014.
[61]Cap 214, 1984.

c) as provided in subsection (2), but not otherwise.

(2) Moneys of the Authority not immediately required for the purposes of the authority may be invested:

(a) on fixed deposit with one, or more than one, bank;

(b) in Government securities; or

(c) in any other manner which the Authority thinks fit.

A perusal of the foregoing provisions shows that Seychelles fisheries sector shares much in common with other jurisdictions considered in terms of sources of finance. Nevertheless, there are some unique angles of distinction. For example, section 16 of the Act states that 'the Authority may, for the purpose of the performance of its functions under this Act, with the approval of the President, given either conditionally or unconditionally, borrow money in or outside Seychelles'. This provision is crafted as a mechanism for financing the fishery industry from public and private sectors.

Recently, the Seychelles government announced the launch of the world's first sovereign blue bond, which will be used to help finance the island nation's transition to sustainable fisheries and the protection of marine areas.[62]The bond, which raised US$15 million from international investors, demonstrates the potential for countries to harness capital markets for financing the sustainable development of the fisheries sector. This is perhaps the most exciting lesson for Uganda.

### 8.4 The Position in Madagascar

Madagascar's fishing economy is critical for the livelihoods and food security of over250,000 people.[63]The Ministry of Agriculture and Fisheries (MAEP) in Madagascar has the responsibility for the management of the fisheries sector.[64] The legal framework governing fisheries in Madagascar can be located in three major pieces of legislation namely:

- Ordonnance n°93-022 du 4 mai 1993, portantréglementation de la pêcheet de l'aquaculture.

[62]The World Bank (n 76).
[63]Global Fisheries Sustainability Fundhttps://www.msc.org/for-business/fisheries/developing-world-and-small-scale-fisheries/gfsf
[64]FAO 'Fisheries and Aquaculture Department' at http://www.fao.org/fishery/facp/MDG/en accessed 12 April 2019.

- Décret n° 94-112 du 18 février 1994, portantorganisationgénérale des activités de pêche maritime.
- Décret n° 2007-957 du 31 octobre 2007, portantdéfinition des conditions d'exercice de la pêche des crevettescôtières.

The earlier legislation from the 1990s (namely; the order from 4 May 1993 detailing the regulation of fishing and aquaculture, Ordonnance 93-022 portantréglementation de la pêche et de l'aquaculture) has recently been repealed through the adoption of the Law on Fisheries and Aquaculture 2015 (Loi No. 2015-053 portant code de la pêche et de l'acquaculture).[65] There reforms introduced by the new Fisheries and Aquaculture Law are expected to promote sustainable development of fisheries and aquaculture in Madagascar. This brings to the fore the question of sustainable financing.

The Fisheries and Aquaculture Law, 2015 caters for the financial needs of the fisheries sector under Article 167 thus: "The exercise of local (artisanal) and industrial fishing as defined in this law is subject to the payment of annual duties or taxes into the public treasury…The duties or taxes shall be assigned towards a sustainable management and development of the fishery and aquaculture sectors".

The practical significance of this provision lies in its plough-back philosophy which puts in place an industry self-funding mechanism for the fisheries sector. This is similar to the New Zealand's Cost-Recovery System which is founded on the logic that levies or charges in fisheries should be employed where appropriate, to promote and develop the sector.[66]Whereas this approach provides valuable insights into and lessons which may be of interest to Uganda, the position in Madagascar must be treated with cautiousness.

The key concern here lies with the requirement of payment of duties and taxes into the public treasury. This creates an unease of control exerted within the context of the Consolidated Fund leading to failure to address fisheries sector's demands due to inadequate financial allocation. A proper operationalization of the cost-recovery system therefore requires a comprehensive regime in terms of sources of finance as well as proper management and utilization of the funds by the fisheries sector.

[65]http://danlaffoley.com/resources/NPA_Madagascar_Final.pdf p.19.
[66] The Nature Conservancy "Learning from New Zealand's 30 Years of Experience Managing Fisheries under a Quota Management System" (2017) 54.

## 9.0 CONCLUSION

This study examined the legal framework for sustainable financing mechanisms of the fisheries sector in Uganda. In the context of an ongoing national debate on the amendment of the Fisheries Act 2011, the question of sustainable financing of the fisheries sector attracts special consideration due to lack of adequate financing of the sector under the current legal dispensation. This is attributable mainly to low public investment in the sector, and over-dependence on central government transfers which every so often are released in the form of conditional grants for specific projects that may not constitute local priorities.

Developing and implementing a robust legal framework is key to filling the financial gap and realizing the full potentials of the sector. The Constitution and the Public Finance Management Act provide the fundamental principles favourable to the implementation of sustainable financing options in the fisheries sector. These principles can be harnessed by adopting cost recovery mechanisms under the proposed fisheries and aquaculture bill to enable a retention of a quota of funds deriving from fees, licenses, and taxes by the sector. Similarly, there is need for the adoption of principles of fiscal decentralization to give local governments right to retain a share of government revenue deriving from levies, licences, fees or fines collectable in the fisheries sector. In that way, local governments will be assured of sufficient funds to enable them to perform their role in the critical areas of fisheries sector management.

# THREATENED MILITARY INVASION AS A MEANS OF DISPUTE RESOLUTION IN INTERNATIONAL RELATIONS: AN APPRAISAL

**GODARD BUSINGYE, LL. D***

**Abstract**

*Threatened military invasion is not new on the global scene. It was used even before the First and the Second World Wars. The current notion of threatened military invasion, however, has its historical roots in the Cold War after the Second World War. The Cold War period lasted until 1989. The phenomenon again emerged after September 11, 2001, when mighty States adopted it as a model of disputes resolution in international relations; pegging their arguments on their inherent right to fight global terrorism. Threatened military invasion offends the letter and spirit of laws governing conduct of international relations. Its modus operandi does not constitute a distinct class of armed conflict apart from international and non-international armed conflicts. This paper contends that threatened military invasion is reminiscent of the Western capitalist mode of production; it is largely used as a tool of economic aggression, but may culminate in armed confrontation. The main objective of the paper is to bring to the realm of knowledge the evils of threatened military invasion under the current international legal order and relations. The paper uses the lenses of feminism perspective to interrogate the rationale behind threatened military invasion under the current international legal order. The paper likens victims of threatened military invasion to a situation of a psychologically battered spouse. The paper concludes that threatened military invasion is increasingly being used today as a tool of economic coercion and recommends a rethink of the value of threatened military invasion in the current international legal order.*

## 1.0 INTRODUCTION

Threatened military invasion is not a new global phenomenon. It was used as a tool of power relations at the international level even before the First and the Second World Wars. For purposes of this paper, threatened military invasion refers to the use of words, sending signals through for example, testing nuclear war heads, development and stockpiling weapons that can wipe out another sovereign State which is at loggerheads with the one so developing and stocking such arsenals, moving the armed forces of a State close to the frontiers of a State to which the one

moving the armed forces is at loggerheads, or instituting blockades of the ports or coasts of a State by the armed forces of another State. It might, however, be difficult to trace the earliest time when threatened military invasion was used either as a military or political tool by one State against another. In modern times, however, threatened military invasion has its roots in the Cold War after the Second World War.

> Cold War is the open yet, restricted rivalry that developed after World War II between the United States and the Soviet Union and their respective allies. The Cold War was waged on political, economic and propaganda fronts and had only limited recourse to weapons. The term was first used by the English writer George Orwell in an article published in 1945 to refer to what he predicted would be a nuclear stalemate between two or three monstrous super-States, each possessed of a weapon by which millions of people can be wiped out in a few seconds.[1]

The possibility of wiping up millions of people in few seconds posed a military threat to would be victims of the Cold War. The Cold War period lasted until 1989.[2] During the Cold war period, a number of events with a global impact took place, namely:

> The Cold War reached its peak in 1948–53. In this period the Soviets unsuccessfully blockaded the Western-held sectors of West Berlin (1948–49); the United States and its European allies formed the North Atlantic Treaty Organization (NATO), a unified military command to resist the Soviet presence in Europe (1949); the Soviets exploded their first atomic warhead (1949), thus ending the American monopoly on the atomic bomb; the Chinese communists came to power in mainland China (1949); and the Soviet-supported communist government of North Korea invaded U.S.-supported South Korea in 1950, setting off an indecisive Korean War that lasted until 1953.[3]

The North Korea war appears to be the historic landmark of the wraths of the Cold War.

> To those who lived and grew up during the Cold War era, the current tensions between North Korea and the US are a reminder that the conflicts of around 70 and more years ago have left legacies and enmities that have not yet gone away – and which still pose a real threat to world peace. To begin to understand this complex

∗School of Law, Kampala International University, Uganda. Email: godardbusingye@yahoo.com

[1] The Editors of Encyclopaedia Britannica, Cold War: International Politics, available at: https://www.britannica.com/event/Cold-War, accessed 9 July 2019.

[2] ibid.

[3] ibid..

> relationship, you have to look back to the Korean War of 1950-1953 – a bloody conflict in which up to 3 million Koreans died, most of them in the north. About 58,000 US soldiers also lost their lives, as did 1 million Chinese and about 1,000 British troops.[4]

The world seemed to have forgotten about cold wars after 1989. The phenomenon, however, again emerged after September 11, 2001, when mighty States adopted it as a model of disputes resolution in international relations; pegging their arguments on their inherent right to fight global terrorism. This paper argues that threatened military invasion offends the letter and spirit of laws governing military conduct in international relations, whether *jus ad bellum* (the law of use of force) or *jus in bello* (the law in war). Viewed through the lenses of the United Nations Charter, 1945 framework, threatened military invasion is essentially an act of aggression.[5]Aggression is defined in the Annex to United Nations General Assembly Resolution 3314 under Article 1 as follows:

> The use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations set out in this Definition.

The UNGA RES 3314 attaches an Explanatory Note to the definition of aggression thus: In this Definition the term 'State': is used without prejudice to questions of recognition or to whether a State is a member of the United Nations; and includes the concept of a 'group of States' where appropriate. Accordingly, an act of aggression may be committed by a single State or a group of States such as those in an international organisation. It suffices to note that the United Nations Charter agreed upon by States in 1945 advocates for peaceful resolution of conflicts and abhors aggression.[6] Threatened military invasion is used today as a political tool, but largely as a tool to achieve economic rights over a territory of another sovereign State, in an aggressive manner. In some instances, it is disguisedly used as a tool of self-defence. In this regard, in the *Legality of the Threat or Use of Nuclear Weapons*, for example, the International Court of Justice stated:

> A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet al1 the requirements of Article 51, is unlawful; a threat or use of nuclear weapons should also be compatible with the requirements

[4]AJezard, The US and North Korea: a brief history, 19 December 2017; available at: https://www.weforum.org/agenda/2017/12/north-korea-united-states-a-history/, accessed 13 July 2019

[5] See United Nations General Assembly Resolution 3314 (XX1X) (Definition of Aggression), which calls upon all States to refrain from all acts of aggression and other use of force contrary to the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

[6] Charter of the United Nations,1945, Article 1 and ChapterVII entitled: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.

> of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake. There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in al1 its aspects under strict and effective international control.[7]

In its wisdom, the Court did not wish to tamper with the inherent sovereign rights of States to defend themselves under international law. The Court was, however, cautious and alive to the fact that most of the undertakings of States under international law are done through treaties, which must be entered into in good faith.[8]In that respect, the Court did, in fact find that nuclear weapons pose a military threat to the international community, and in particular, to those countries to which they might be specifically directed to in case of an outbreak of an armed conflict, and concluded that their use, should only be reserved for self defence. It is argued herein that while stocking of nuclear weapons may not amount to threatened military invasion*per se*, because the ground is rather hazy on whether or not their use in extreme cases of self defence is lawful, development, and testing of the same followed by threatening words directed against a particular State may amount to threatened military invasion. On his part, Trump, the President of the United States of America does not mince his words when it comes to sending messages of threatened military invasion to other leaders. For example, while reporting for Fox News on 12 July 2019, Shesgreen observed thus:

> The House approved a measure Friday that would bar President Donald Trump from launching a military strike against Iran, setting

[7]*Legality of the Threat or Use of Nuclear Weapons,(1996) Advisory Opinion,* 1CJ Reports 226.

[8] The Vienna Convention on Law of Treaties, 1969; Preamble, which *inter alia* states: The States Parties to the present Convention considering the fundamental role of treaties in the history of international relations, Recognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems, Noting that the principles of free consent and of good faith and the *pactasuntservanda* rule as universally recognized,Affirming that disputes concerning treaties, like other international disputes,should be settled by peaceful means and in conformity with the principles of justice and international law; and Article 26, "PACTA SUNT SERVANDA": Every treaty in force is binding upon the parties to it and must be performed bythem in good faith.

> up a confrontation with the White House over the administration's aggressive stance toward Tehran. Trump nearly bombed Iran last month after Tehran shot down a U.S. military surveillance drone. …the president called off the strike at the last minute; he has since threatened Iran with obliteration and warned that the U.S. would use overwhelming force if it attacked American assets or personnel.[9]

From this quote, there is no doubt that threatened military invasion, especially by a country which has the capacity to deploy the force it states it will use, is akin to an imminent act of armed violence. In any case, the impeding and subsequent resolute act will always be an armed attack on the hitherto threatened State. In the case of President Trump and Iran, the word 'obliterations' as used by President Trump, is not only the highest level of threatened military invasion, but one that insinuates that he can use any means of violence at his disposal including nuclear weapons. Within the purview of the *Legality of the Threat or Use of Nuclear Weapons Case*, the United States would be acting in self-defence, whose scope would be extended to obliteration of the whole sovereign State of Iran. It is, however, not clear whether or not, the United States threat to Iran would be actualized, because use of nuclear weapons and any other means of violence capable of obliterating a State is governed by independent treaties, within the spirit *of pactasuntservanda*. It is posited that if such obliteration was to happen, then, the war would not be one of self-defence, but of self-aggrandisement, and answering to the descriptions of the Western capitalist mode of production. In this regard, threatened military invasion appears to be yet another facet of globalisation. In support of this argument, Saul states:

> Globalisation emerged in the 1970s as if from nowhere, fully grown, enrobed in an aura of inclusivity. Advocates and believers argued with audacity that, through the prism of a particular school of economics, societies around the world would be taken in new, interwoven and positive directions. This mission was converted into policy and law over twenty years—the 1980s and 1990s—with the force of declared inevitability. Now after three decades, we can see the results. These include remarkable success, some disturbing failures and a collection of what might best be called running sores. In other words, the outcome has had nothing to do with the truth or inevitability and a great deal to do with an experimental economic theory presented as Darwinian fact. It was an experiment that

[9]DShesgreen, House approves measure to block Trump from launching military strike against Iran, Fox News, 12 July 2019 <https://www.yahoo.com/news/house-approves-measure-block-trump-163251451.html> accessed 13 July 2019.

> attempted simultaneously to reshape economic, political and social landscapes.[10]

Saul's analysis of the concept of globalisation demonstrates that it is increasingly becoming clear that threatened military invasion, in some cases based on economic grounds, or even if it is based on alleged terror activities in the threatened States, is a real threat to international peace and security. Threatened military invasion is, indeed, the major tool capable of reshaping the world economic, political and legal order, and even politics, especially if words such as 'obliteration of another State' being so threatened are used. In support of this argument, Karabell, using the example of the United States and China, states thus:

> The deepening saga of the US government's campaign against Chinese tech company Huawei intensified this week, with Huawei filing a lawsuit in Texas alleging that the government's ban of Huawei equipment is illegal and based on propaganda, not facts. The case may not have much of a chance legally, but it underscores how this contest has become a microcosm of the larger competition between the US and China over who will define—and control—the technology of the 21st century.One brief against Huawei is that the company would be bound by the Chinese National Intelligence Law compelling it to give the government access to networks, an argument that the company vehemently rejects. At the Mobile World Congress in Barcelona last month, US government officials aggressively pressed Europeans to reject Huawei as a supplier of 5G equipment largely on those lines. Some countries such as Poland were receptive, but major Western European Nations such as Great Britain, Spain, and Germany were unconvinced that Huawei represented a security risk fundamentally different than other suppliers.[11]

The outcome of the Huwei saga may not only end at the economic propaganda, but may extent to military threats by the United States against China, the emerging world economic global giant. Saul sums up his view of globalisation, which is agreeable to in this paper, by stating:

> When a grand idea or ideology is fresh and the sailing is easy, even the most serious proponents make all-inclusive claims on its behalf. This grand view makes it easier for them to impose the specific changes they want. When things become more complicated, as they do, most of the same advocates retreat to more modest claims, while

[10] JR Saul, *A Prophet Time, The Collapse of Globalism and the Reinvention of the World*(Atlantic Books 2005) 3.

[11]ZKarabell, The Huawei Case Signals the New Us–China Cold War over Tech, available at: https://www.wired.com/story/huawei-case-signals-new-us-china-cold-war-tech/, accessed 14 July 2019.

> still insisting on the central nature of their truth and inevitability. Many will deny they ever claimed more.[12]

Indeed, as was demonstrated in the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*, the Court did not wish to condemn the very States that possessed nuclear weapons, because of their influence in the Security Council that has a stake in the Court. In subsequent events, countries such as North Korea and Iran which develop similar weapons are, however, to be condemned. When this happens, the negative side of globalisation and its expansionist ideology reminiscent in the Western capitalist mode of production, which pretends to be calm and peaceful, starts to unfold. In order to remain potent, however, the failures of globalism reincarnate in yet another form, threatened military invasion that supports an aggressive economic order championed by the mighty States, which have the audacity to sniff and to cause others to tremble. In order to clarify further on the evils of the current international relations championed by the aggressive economics, which thrive on aggressive policies crafted in the mighty States with a view to influencing the internal dynamics of the perceived weak economies, the paper uses the lenses of feminism, which helps to interrogate the rationale behind any threatened military invasion under the current international legal order and civilization. Stanford Encyclopaedia of Philosophy states the purpose of feminism as:

> As a branch of political philosophy, feminist political philosophy serves as a field for developing new ideals, practices, and justifications for how political institutions and practices should be organized and reconstructed. While feminist philosophy has been instrumental in critiquing and reconstructing many branches of philosophy, from aesthetics to philosophy of science, feminist political philosophy may be the paradigmatic branch of feminist philosophy because it best exemplifies the point of feminist theory, which is, to borrow a phrase from Marx, not only to understand the world but to change it.[13]

Based on this understanding, therefore, this paper comes up with recommendations on how the current global impasse based on the aggressive economics, clothed in aggressive politics and legal order, the outcome of which is threatened military invasion, can be reshaped to provide an environment which

[12]Saul (n 10) 5.
[13]*Stanford Encyclopaedia of Philosophy, Feminist Political Philosophy*(First published Sunday1 Mar 2009; substantive revision Friday12 October 2018,available at:https://plato.stanford.edu/entries/feminism-political/, accessed 16 July 2019.

answers to the description of international law as envisaged under the Charter of the United Nations. To explain the irony of threatened military invasion better, the paper uses the metaphor of a psychologically battered spouse who at all material times remains apprehensive of what might happen to him or her again or who is apprehensive of the acts of the intending assailant. This metaphor is appropriate to the discussion in this paper because at the formation of the United nations in 1945, each member State was bonded to the other in a fashion of the bondage spouses undertake at marriage. It is argued that in such a situation the reaction of the psychologically battered spouse cannot be foretold or estimated. It can only be attested to, once actualized. Indeed, as has been demonstrated by cases such as North Korea and Iran, once threatened with imminent military attack, such States have become aggressive in the development of weapons that can be used in self-defence once the threats upon them are actualized. Such countries would buttress their legal arguments regarding self-defence in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, and rightly so. The paper supports these arguments with real time examples where the mighty States have used the weapon of threatened military invasion to disguise their aggressive capitalist economic ideology. The latter being the only motive behind threatened military invasion, but with serious ramifications to the legal order established in 1945 under the Charter of the United Nations. The next subsection discusses the legal order established under the United Nations Charter in regard to threatened military invasion.

## 2.0 THE LEGAL ORDER UNDER THE UNITED NATIONS CHARTER 1945

In order for one to determine the law applicable to the concept of threatened military invasion, one must seriously consider the mind of the framers of the United Nations Charter, which is decisively presented in the Preamble to the Charter. The Preamble to the United Nations Charter *inter alia* states thus:

> WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our life time has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish 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 freedom, AND FOR THESE ENDS to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be

> used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples.

From the Preamble to the this Charter, the following is discerned: that after 1945, the international legal order does not accommodate individualistic interests of particular sovereign States, the grand norm is collectiveness, that where, as happens, there is misunderstanding between members or even non-members of the United Nations, parties must, and without any other option, practice tolerance and live together in order to maintain international peace and security. These ingredients form the pillar of law applicable to the notion of threatened military invasion in the current international legal order, and deviating from any of them means deviating from the letter and spirit of the Charter. Within the ambit of the United Nations Charter, 1945, therefore, threatened military invasion by one State against the other is against the letter and spirit of the international law. The Charter of the United Nations sets the limit within which use of force, actual or threatened may be resorted to in international relations. Article 1 (1) of the Charter of the United Nations provides, *inter alia*, the purpose of the Organisation:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

The spirit of the Charter in Article 1 is to collectively remove any threats to the peace and suppression of aggression. This, therefore, means that an individual Member of the United Nations, whether capable or not, does not have mandate to remove threats to peace or suppress aggression, except with the express authorisation provided for under the Charter. In order to be effectively operationalized and respected, the Charter creates organs, such as the United Nations Security Council, to which it bestows power and primary responsibility to ensure total compliance with the Charter provisions. Article 24 (1) of the Charter provides:

> In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

Article 24 (2) of the Charter provides:

> In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

The legal order established under the United Nations Charter is unique, and it applies to all members and even non-members without exception. In this respect, in the *Reparation for Injuries Case,* the International Court of Justice opined:

> That, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a Member State, the United Nations as an Organization has the capacity to bring an international claim against the responsible *de jure* or *de facto*government with a view to obtaining the reparation due in respect of the damage caused to the United Nations; That, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State which is not a member, the United Nations as an Organization has the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused to the United Nations.[14]

Moreover, Article 25 of the Charter assumes a general consensus amongst the Members of the United Nations to execute decisions of the Security Council. Article 25 states: The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter. Articles 24 and 25 of the Charter, therefore, give unlimited powers to the Security Council to determine the existence or threat to international peace and take necessary actions to prevent or avert the threat. These Articles and even other Articles of the Charter are explicit and clear on who has the mandate to use or threaten to use military invasion against a sovereign State. In this regard, Article 39 of the Charter provides:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

[14]*Reparation of Injuries Suffered In the Service of the United Nations, Advisory Opinion*, The International Court of Justice, 11 April 1949.

The foregoing analysis clarifies that that under the current international legal dispensation established under the United Nations Charter, threatened military invasion, by one sovereign State against another falls in the category of aggression. Aggression is now an international crime clearly provided for in the Rome Statute, 2002, under Article 8 *bis* thus: Article 8 *bis*(1) provides:

> For the purpose of this Statute, crime of aggression means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

Indeed, the discussion in this paper shows that where it has been used by individual States against others, threatened military invasion has fallen squarely within the ambit of this definition. Article 8 *bis* (2) gives further details on what constitutes an act of aggression. It provides:

> For the purpose of paragraph 1, act of aggression means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression: (c) The blockade of the ports or coasts of a State by the armed forces of another State.

From the foregoing analysis, it can assertively be stated thattreaty law, and by analogy, customary international law, abhor aggression, which encapsulates threatened military invasion. It is, however, not possible that States can voluntarily abide by the legal order set forth in the United Nations Charter. There will definitely be defaulters, who, however, cannot escape the wraths of the law established under the Charter. Ironically, that is the state of affairs the world has come to be accustomed to both in the past and in our times. The next subsection discusses the irony of threatened military invasion under the current international legal order. The subsection illustrates the discussion with particular examples, probably not strange to anyone's mind.

## 3.0 THE IRONY OF MILITARY INVASION UNDER THE CURRENT INTERNATIONAL LEGAL ORDER

The irony surrounding threatened military invasion under the current international legal order lies in the manner in which it is disguisedly used by the

mighty States in the international political, legal and economic order. This is multifaceted. In the words of Saul, the ideology of threatened military invasion is fresh and the sailing.[15]It appeals to those who stand to benefit from the political, legal and economic chaos created under it. It is, however, criticised because it offends the letter and spirit of the international legal order particularly that enunciated under the Charter of the United Nations in 1945. It threatens the sovereign rights of other States contrary to the position agreed upon under the United Nations Charter. The wraths of an imminent military invasion as explained in this paper using the by the metaphor of the psychologically battered spouse are not farfetched. The psychologically battered spouse metaphor does, however, not imply that the battered spouse is weak, but rather that the aggressor prompts the whole outcome of threatened military invasion, without necessarily understanding the capacity of the threatened 'spouse' to retaliate in equal or greater forces. The outcome of the actualized threatened military invasion as demonstrated by the cases of Iraq, Afghanistan and Libya is disastrous to international peace and security, and may be long lasting. The irony of this saga manifests in the fact that the threat is sometimes initiated within the ambit of the law—the United Nations Security Council Resolutions, but actualised not by all members of the United Nations, but only a few members with the ability, capacity and sometimes, vested interest to implement the resolutions so adopted.[16]The right to self-defence has a legal basis in the Charter of the United Nations, 1945 under Article 51, which provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the

[15]Saul (n 10) 5.

[16] See for example, The United Nations Security Council Resolution 1441, which was a United Nations Security Council Resolution adopted unanimously by the United Nations Security Council on 8 November 2002, offering Iraq under Saddam Hussein 'a final opportunity to comply with its disarmament obligations' that had been set out in several previous Resolutions; see also Resolution 1973 (2011) Adopted by the Security Council at its 6498th meeting, on 17 March 2011, paragraph 4 authorizing Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, and requests the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council and United Nations Security Council resolution 1386, adopted unanimously on 20 December 2001, after reaffirming all resolutions on the situation in Afghanistan, particularly resolutions 1378 (2001) and 1383 (2001), the Council authorized the establishment of the International Security Assistance Force (ISAF) to assist the Afghan Interim Authority in the maintenance of security in Kabul and surrounding areas. It was the final Security Council resolution adopted in 2001.

> Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The irony of the concept of self-defence under the Charter is that all States are Members of the United Nations, and either those on the offensive or defence belong to one family. It is certain that not all family members will consciously agree on the similar goals, but within the spirit of the Charter, there are other options available other than resort to either verbal, or even psychological threats between or amongst members of the family when a disagreement arises. It is also ironical in a sense that the 'psychologically battered spouse'has always turned out to be better prepared for the invasion than the invader. In the cases of Iraq, Afghanistan and Libya, the aftermaths of the actualised threatened military invasion have been worse than the situations before the threat was actualized against those countries. There have, and continue to be more human rights violations in those countries today and their containment is far from being realised. It appears leaders of the psychologically battered States prepare traps to which the invading States unconsciously fall in, leading to prolonged measures and countermeasures from either side.

It appears, and with the support of the examples given in this paper, that the initiators of the military threat downplay their role in the whole cycle of the events that unfold later. It is possible that their minds are blindfolded by the anticipated political or economic gains that might or might not ensue once the military threat is actualized. Ironically, the world economic order, especially after the adoption of the United Nations Charter in 1945, does not explicitly admit threatened military invasion a tool of externalising political economic policies from the mighty States to the wrongly perceived weak economies, but it happens, nevertheless. Indeed, it should not be taken for granted that there is a weak State that can be so threatened militarily without posing veritable resistance. Much as it may, the world now leaves in a wave of uncertainties and threatened military invasion appears to be a tool that is not about to be dropped both by mighty States in their individual or collective capacities and also in their legal right to occupy the key seats in the United Nations Security Council, which is the sole international body authorised to use violence to resolve international security problems.[17]The increasing, and ever enlarging number of political, economic and in some cases purely military alliances such the North Atlantic Treaty Organisation (NATO), the Warsaw Pact (now in abeyance), The Cooperation Council for the Arab States of

[17] The Charter of the United Nations, 1945, Article 39, which provides: The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security

the Gulf (the Gulf Cooperation Council (GCC), The African Union, and the European Union whose mandates are rooted in the United Nations Charter, is yet another signal that use threatened military invasion as a tool of coercion is not about to be forgotten in the world political, legal and economic order. In some cases the language used in the instruments establishing such organisations expressly coins them as military bullies. For example, the NATO in Article 5 provides:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.[18]

NATO is a purely military alliance with capacity to put into action all its treaty undertakings using military force, including protecting economic interests of its members. NATO has twelve original founding member nation states. Its membership has been enlarging gradually. After the end of the Cold War, NATO added 13 more member nations (10 former Warsaw Pact members and three former Yugoslav Republics). Its current membership is twenty nine. Provision for enlargement is given by Article 10 of the North Atlantic Treaty. Article 10 states that membership is open to any European State in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area. NATO's enlargement signifies a potential military threat to non-members, especially non-European Countries, or even European countries opposed to its aspirations.[19]

On the African continent, threatened military invasion was recently used against the Republic of Burundi. The African Union Commission, acting on behalf of members of the African Union issued a number of *Communiques* to ensure Burundi complies with its demands to protect civilians in the country, lest it faces

[18] The North Atlantic Treaty (1949) was adopted at Washington D.C., 4 April 1949. The Parties to this Treaty reaffirm their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments. They are determined to safeguard the freedom, common heritage and civilization of their peoples, founded on the principles of democracy, individual liberty and the rule of law. They seek to promote stability and well-being in the North Atlantic area. They are resolved to unite their efforts for collective defence and for the preservation of peace and security.

[19]D Reiter, 'Why NATO Enlargement Does Not Spread Democracy International Security' (2001) 25(4) *Spring 41-67.*

military action from willing members of the Union. Article 8 of the *Communique* adopted on the 13 November, 2015 *inter alia* provides:

> In this regard, Council reaffirms its decision, in support of the peace efforts, to impose sanctions against the Burundian stakeholders whose actions and statements contribute to the persistence of violence and impede the search for a solution. Council welcomes the intention expressed by the UN Security Council to consider additional measures against all the Burundian stakeholders whose actions and statements contribute to the perpetuation of violence and impede the search for a solution.[20]

In another *Communique* issued on 17 December, 2015, the African Union Commission sent a clear message to Burundi when it established an African Prevention and Protection Mission in Burundi (MAPROBU) and mandated it to take all necessary military action to stabilise Burundi. The *Communiqueinter alia* stated:

> Further decides that MAPROBU shall have an initial strength of up to 5,000 military personnel and police, including formed police units, with an appropriate civilian component, shall integrate the human rights observers and military experts deployed to Burundi in pursuance of the relevant decisions of Council, and that it shall be placed under the authority of the Special Representative of the Chairperson of the Commission. Council requeststheChairperson of the Commission to immediately undertake consultations with Member States, including the countries of the region in the framework of the EASF, to generate the troops and police elements needed to quickly reach the authorized strength.[21]

Much as the threat to use military intervention in Burundi never materialised, largely because the United Nations Security Council never endorsed it, the Government of the Republic of Burundi has gradually been implementing the key demands of the African Union Commission expressed in the *Communiques* issued.[22]This is largely because of fear of the military invasion that might ensue if the Government of Burundi fails to respect the human rights of its citizens. The

[20] African Union, Peace and Security Council, 557th Meeting, Communique, Addis Ababa, Ethiopia, 13 November 2015.

[21] African Union, Peace and Security Council, 565th meeting, Communique, Addis Ababa, Ethiopia ,17 December, 2015.

[22] The Communique *inter alia* (paragraph 17): Requeststhe Chairperson of the Commission to transmit this communiqué to all Member States, as well as to the UN Secretary-General and, through him, to the UN Security Council. Council also requeststhe Chairperson of the Commission to transmit the communiqué to other AU bilateral and multilateral partners and to solicit their support for the effective implementation of the decisions contained therein.

foregoing examples show an upsurge of military alliances capable of using the ideology of threatened military invasion to have the world political, legal and economic order changed, particularly to dance to the tunes of those in such military alliances.

It is suggested in this paper that until now, there is no clear demarcation between the international legal, economic, and political order when it comes to what prompts use of the ideology of threatened military invasion. It appears there are a multitude of reasons and conceptualisations of the situations which warrant such. Saul attempts to explain the current world legal and economic order using his analogy of the negative and positive nationalism, thus:

> Between negative nationalism and positive nationalism lies the eternal possibility of war. Its presence tells us a great deal about how any ideology is doing and where it might be headed. Conflict is one of the ultimate measures for the state of any system. The questions we might ask ourselves today are surprisingly simple. Are we really at war? If so, have we correctly identified the nature of the conflict? What is the purpose of the war? The answers should tell us whether the war would have happened anyway, is a product of globalisation's failure or of the confusion during the prolonged vacuum or both. Finally, if we can answer these questions, we should begin to understand how best to deal with the conflict so that we don't simply generate more violence. After all, our histories are full of accidental wars fought in an inappropriate manner or brutal victories that confirm the prejudices and complaints of the losers. In both cases the outcome of peace is more bitterness and conflict.[23]

A reading into the analogy of the negative nationalism and positive nationalism as propounded by Saul reveals a number of contradictions with the so called mighty States. Nationalism in this case is used to refer to the egocentric wishes of a political, legal and economic order that might be at the blink of collapse, if it does not bark so loud so that its *pseudo* potency is felt by the whole world. Put in other words, threatened military invasion thrives on the theory of 'anything is one's saviour in times of need'. The theory of 'anything is one's saviour in times of need' is one of uncertainties, which cannot be relied upon in all circumstances. For example, the case of the United States and North Korea punches holes in the value of the ideology of threatened military invasion and equally exposes the weaknesses in the ideology of nationalism espoused by the world's mighty States. Whereas, for instance, the United States President, Trump

[23]Saul (n 10) 258.

thought that North Korea's Supreme Leader would bow down to whatever he tells him to do, the latter returned wrath to him in kind. Bandow tweeted:

> A couple of years ago the Trump administration seemingly brought the Korean Peninsula to the brink of war. The president matched North Korea's Supreme Leader insult for insult, sent what he called the "armada" off of the North's coast, and threatened "fire and fury." The consequences of a conflict most likely would have been catastrophic, especially for America's ally, the Republic of Korea.[24]

Amidst exchange of verbal threats between the United States President Ronald Trump and Norh Korea's leader Kim Jong Un, North Korea tested its long range missiles. The missiles tested flew between forty-two and one-hundred-and-twenty-four miles. The U.S. homeland obviously is not within their range, but South Korea's capital of Seoul is.[25] Moreover, Kim escalated pressure on President Trump by resuming his visits to military units and weapons sites, which he had previously refrained from during his diplomatic engagements with the American leader.[26]Reporting for World Economic Forum on 19 December, 2017, Jezard stated:

> A planned summit between the United States and North Korea has been cancelled after US President Donald Trump withdrew. In a letter to North Korean leader Kim Jong-un, Trump said: Sadly, based on the tremendous anger and open hostility displayed in your most recent statement, I feel it would be inappropriate, at this time, to have this long-planned meeting. The decision came after North Korea threatened to pull out of what would have been the first meeting between a serving US President and North Korean leader, following what were seen as confrontational remarks by US officials.[27]

Logically, any form of threatened military invasion of one State by another would lead to an armed conflict. It suffices to note, however, that not all cases of threatened military invasion culminate into armed conflicts. Other such threats, as exemplified by the case of the African Union Commission and the Republic of

[24] D Bandow, On North Korea, a Return to Fire and Fury Isn't Worth The Risks, 6 May 2019, available at: https://nationalinterest.org/blog/korea-watch/north-korea-return-fire-and-fury-isnt-worth-risks-56197, accessed 13 July 2019.
[25] D Bandow, On North Korea, a Return to Fire and Fury Isn't Worth The Risks, 6 May 2019, available at: https://nationalinterest.org/blog/korea-watch/north-korea-return-fire-and-fury-isnt-worth-risks-56197, accessed 13 July 2019.
[26]C Sang-Hun,North Korea's Latest Weapons Test: Short in Range but Long in Message, 18 April 2019https://www.nytimes.com/2019/04/18/world/asia/north-korea-weapons-test.html, accessed 13 July, 2019.
[27] Adam Jezard, The US and North Korea: a brief history, 19 Dec 2017; available at: https://www.weforum.org/agenda/2017/12/north-korea-united-states-a-history/, accessed 13 July 2019.

Burundi achieve the objective without moving any military arsenals to the frontiers of the threatened country. In this regard, Dinstein opines:

> When we get into international, we find that there is no binding definition of war stamped with *imprimatur* of a multilateral convention in force. What we have is just a few scholarly attempts to depict the practice of States and to articulate, in a few choice words, an immensely complex idea. Instead of seeking to compare multitudinous definitions, all abounding with variable pitfalls, it may be useful to take as appoint of departure one prominent effort to encapsulate the essence of war. This is the often quoted definition, which appear in L. Oppenheim's treatise on International Law:War is a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.[28]

That being the case, then war need not be actual physical contact between States nor need it be characterised by the kinetic movement of one State's armed forces onto the territory of another State. It can be psychological, hence the relevance of the metaphor of a psychologically battered spouse to this discussion. Involvement of the armed forces of the feuding States, however, only implies that the threat is real and imminent and may be actualised, if the terms set by the mighty State are not obliged to by the perceived weaker State. In the case of the United States—VietnamWar, Rotter asserts:

> U.S. policymakers, and most Americans, regarded communism as the antithesis of all they held dear. Communists scorned democracy, violated human rights, pursued military aggression, and created closed state economies that barely traded with capitalist countries. Americans compared communism to a contagious disease.[29]

Indeed, The United States policy against the Communist Eastern democracy was met with stiff resistance in the Vietnam War. Rotter acknowledges this fact thus:

> When Johnson began bombing North Vietnam and sent the Marines to South Vietnam in early 1965, he had every intention of fighting a limited war. He and his advisers worried that too lavish a use of U.S. firepower might prompt the Chinese to enter the conflict. It was not

[28]YDinstein, *War, Aggression and Self-Defence*,(3rd ed.., Cambridge University Press 2001) 4, in L. Oppenheim (edn), *International Law, II* (7thed.,Lauterpacht 1952).

[29] AJ Rotter, 'The Causes of the Vietnam War', in John Whiteclay Chambers II (edn) *The Oxford Companion to American Military History*(Oxford UP, 1999)< available at: https://www.english.illinois.edu/maps/vietnam/causes.htm> accessed 13 July 2019.

> expected that the North Vietnamese and the NLF would hold out long against the American military. U.S. policymakers never managed to fit military strategy to U.S. goals in Vietnam. Massive bombing had little effect against a decentralized economy like North Vietnam's.[30]

Moreover, there was no consensus about the United States military strategy to invade North Vietnam. Rotter asserts:

> As the United States went to war in 1965, a few voices were raised in dissent. Within the Johnson administration, Undersecretary of State George Ball warned that the South Vietnamese government was a functional nonentity and simply could not be sustained by the United States, even with a major effort. Antiwar protest groups formed on many of the nation's campuses; in June, the leftist organization Students for a Democratic Society decided to make the war its principal target. But major dissent would not begin until 1966 or later. By and large in 1965, Americans supported the administration's claim that it was fighting to stop communism in Southeast Asia, or people simply shrugged and went about their daily lives, unaware that this gradually escalating war would tear American society apart.[31]

The perceptions of the Americans, which from this captioned were informed by their view of the world economic order—trade ties with other States, led to its invasion of Vietnam. From the foregoing discussion it becomes clear that the notion of threatened military invasion is encapsulated with the international legal order established under the United Nations Charter. The Charter, however, reserves the right to use military threats to the specialised organs of the United Nations with specific mandate given to the United Nations Security Council. There are of course some divergent views which might be opposed to the absolute authority of the United Nations Security Council, but sadly there is no option. All are Members of the United Nations and bound by our undertaking in 1945 when the Charter of the United Nations was adopted.

## 4.0 CONCLUSION

The paper concludes that threatened military invasion is increasingly being used today as a tool of economic coercion, but disguised under the self-defence paradigm established under the United Nations Charter. The specific law applicable to threatened military invasion is the United Nations Charter legal order established

[30]ibid.
[31]ibid.

by members of the world's body in 1945. Threatened military invasion destabilises international economic, social and even the political order. The feminist perspective, which uses the metaphor of a psychologically battered spouse is able to demonstrate how the aggressed States, which are under imminent threat of military invasion, may react in the face of their helplessness nature. The world legal order, especially after the adoption of the United Nations Charter in 1945, does not explicitly admit threatened military invasion as a tool of externalising political economic policies from the mighty States to the wrongly perceived weak economies, but it happens, nevertheless. Be that as it may, the world now leaves in a wave of uncertainties and threatened military invasion appears to be a tool that is not about to be dropped both by mighty States in their individual or collective capacities and also in their legal right to occupy the key seats in the United Nations Security Council, which is the sole international body authorised to use violence to resolve international security problems. The discussion makes it clear that until now, there is no clear demarcation between the international legal, economic, and political order when it comes to what prompts the use of the ideology of threatened military invasion. Lastly, the paper, recommends a rethinking of the value of threatened military invasion in the current international legal order.

# THE ROLE OF COURTS IN THE INTERPRETATION OF TAXING STATUTES IN NIGERIA

**HAFSAT IYABO SA'ADU* & AHMED OLATUNJI ISAU****

***Abstract***

*The rules guiding the interpretation of statutes cannot be lightly regarded, most especially as they relate to the interpretation of tax legislations and the approach of the courts when exercising their judicial discretion to opt for one of the several rules. This is particularly imperative in the light of the fact that the interpretational rule applied by the courts often determines their interpretation of statutory provisions and ultimately the application of such provisions to the determination of tax disputes being adjudicated upon. This paper evaluates the rules of interpretation of statutes as applied by the courts in relation to tax legislations in Nigeria. The study employs doctrinal research method which entails library-based analysis of the content of both primary and secondary sources of law and information. Thus, the study found that the rule of interpretation opted for by the court determines the outcome of the judicial proceedings, and where the court has opted for the wrong rule of interpretation and consequently interpreted tax legislations wrongly, it is inevitable that its judgment and final verdict on the suit would have been reached in error (per incuriam), and would always readily be set aside on appeal. The study concluded that such wrongful interpretation and application of tax legislations by the apex appellate body (i.e. The Supreme Court), would set in an oppressive binding precedence on lower courts. The article recommended that Nigeria should device efficient and effective legal drafting of tax statutes and legislations.*

**Keywords**: Role, Courts, Interpretation, Taxing Statues, Nigeria.

## 1.0 INTRODUCTION

Judges do not make laws but do possess some discretion in the interpretation of statutes. Discretion involves the choice of an alternative out of a series of alternatives. This choice is sometimes dictated by policy. There are areas in which judicial discretion should be tolerated in the interests of legal development but how far should this be allowed in taxation?

Tax Law is in the main statutory, so that if the law says one thing or omits to provide for a variety of circumstances should the judges be allowed to use their

* Ph.D, Senior Lecturer, Faculty of Law, University of Ilorin, Nigeria. E-mail: adu39asa@gmail.com +2348060848422.

** Ph.D, Lecturer, College of Law, Kwara State University, Malete, Nigeria Email: ahmedisau.elcs@gmail.com, +2347030070078.

discretion to fill in the gap? We attempt to look at the judicial discretion in the interpretation of taxing statutes and to see how far it is acceptable, that even though a taxing statute provides for or omits to provide for certain situations judicial discretion can contrive a solution to any problem which the statute or the omission therein is supposed to provide for.

**1.1 General Rules on Interpretation of Statutes:**

There are three main general principles of interpretation, namely, the Literal or Plain meaning rule, the Golden rule and the Mischief rule. The **Literal rule** is best summed up in the words of Jervis C.J. in *Abley v Dale*[1]that:

> If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense, even though it does lead, in our view of the case, to an absurdity or manifest injustice.

According to this rule, statutes are to be given their 'plain meaning'. Words used in statutes are thus, to be construed in their grammatical sense. If the words are used in relation to a trade or business they are to be given their usual meaning in the trade or business. It is immaterial that hardship would result from literal interpretation, as stated by **Balogun J.** in *Akanro v Lagos Electoral Commission*[2]thus:

> It is necessary that courts of justice should act on general rules without regards to the hardship which in particular cases may result from their application.

Also in *Ifezue v Mbalugha*,[3]Aniagolu JSC held that**:**

> If there is nothing to modify, alter or qualify in the language of a statute, it must be construed in the ordinary and natural meaning of the words and sentences used.

[1](1851)11 QB 378, 391.
[2](1981) NCLR 51, 60.

[3](1984) SCNLR 427, 430.

Lord Reid once said,

> What we must look for is the intention of Parliament, and I also find it difficult to believe that Parliament ever really intended the consequences which flow from the appellants' contention. But we can only take the intention of Parliament from the words which they have used in the Act.[4]

However, Lord Blackburn on the other hand said,

> The cases, in which there is real difficulty, are those in which there is a controversy as to what the grammaticaland ordinary sense of the words, used with reference to the subject matter, is.[5]

Therefore, the literal rule should be applied only when the wording of the statute is clear and unambiguous as the court held in *Nabhan v Nabhan*[6]that:

> ... the cardinal rule is to look first at the wordings of the statute which is being construed and if that is found to be unambiguous, it is neither necessary nor permissible to look further.

An extraordinary illustration of the point is *Inland Revenue Commissioners v Henchy*[7]The Income Tax Act, 1952 (U.K.) provided that a person who fails to deliver a correct tax return shall 'forfeit the sum of £20 and treble the tax which he ought to be charged under this Act. The defendant made a return under a particular

[4]*Inland Revenue CommissionersvHinchy* AC [1960] 748,767.

[5]*Caledonian Rail Co. v.North British Rail Co*. [1881] 6 A.C. s 114, 131, 132.

[6](1967) 1 All NLR 47, 54. See also *MajekodunmivMajekodunm*iCCHJ/6/74 809 and s.15 (2) (c),Matrimonial Causes Decree *1970.*

[7]*Inland Revenue Commissioner* (n 4).

heading which was GBP 32.19s 9d less than it should have been. The tax assessable on the amount which he should have declared was GBP14.55 the rest of his tax assessment came to GBP 125.6s 6d, which would have made up a total liability of f139.11s.6d. The Court of Appeal held that the Act meant that he should pay GBP 62.15s, being £20 plus treble the sum of GBP14.5s. The House of Lords, however, held that it meant that he should pay f438 14s 6d, being GBP20 plus trebles the sum of GBP139 11s 6d. Both tribunals were applying the *'plain meaning'*.[8]

The difficulty with this rule of interpretation is that it is not always easy to say whether a word is plain or not.
The golden rule was formulated in *Beck v Smith*.[9] It states that:

> It is a very useful rule in the construction of statute to adhere to the ordinary meaning of the words used, and to the grammatical variance with the intention of the legislation to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience but no further.

The golden rule of interpretation is however not without criticisms. The criticism in this regard centers on the fact that resorting to this mode of interpretation has been found to open the door of bias and opinion for judges who under the guise of trying to find the intention of the legislature may pursue their own objectives, opinions, desires and intentions.[10] In such situations, judges are said to be usurping the role of the legislature to pursue their own personal desires on the excuse that the literal meaning of the words would breed absurdity.[11] The golden rule of interpretation is also criticized for being a mere extension of the literal rule which only allows a judge to go for the interpretation that will avoid absurdity.[12]

---

[8]Reginald Walter Michael, *Dias Jurisprudence*, (4[th]edn, Butterworth and Co. Publishers Limited 1976). 227-228.

[9] (1836) 150 ER 724-726.

[10] Muhammed TaofeeqAbdulrazaq, *Principles and Practice of Nigerian Tax Planning & Management*, (2[nd]edn.., Stirling-Horden Publishers. Limited 2013) 137.

[11]AM Ekanem'Illuminations on the Attitude of the Court in Interpretation of Tax Legislations in Nigeria-F.B.I.R v I.D.S. Ltd in View,'<https://ssrn.com/abstract=2873618> accessed 10 February 2019.

[12] ibid.

The mischief rule was formulated to provide compass to guide judges on the path of search for the intention of the legislature. The rule requires that the judge should look at the statute to see the intendment of parliament and interpret it to remedy the wrongs in the society that it was meant to correct.[13]The mischiefrule was propounded long ago in 1584 by Lord Edward Coke in the *Heydons's*case.[14] In this case it was stated that:

> For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discussed and considered: 1st, what was the common law before the making of the Act; 2nd, what was the mischief and defect for which the common laws did not provide; 3rd, what remedy hath parliament resolved and appointed to cure the disease of the Commonwealth; and 4th, the true reason of the remedy; that then the office of all the judges is always to make *such* construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privatocommodo*, and to add force and life to the cure and remedy according to the true intend of the makers of the Act *pro bono* public.

This rule contemplates an inquiry into the policy and purpose behind the statute and is applicable only where the meaning of the statutory provision is ambiguous. This rule was applied in *Jammal Steel Structures Ltd. v African Continental Bank*[15]where the court having considered the history of the Federal High Court Decree held that the true object and purposes of the Decree as can be

[13] ibid.
[14]76 ER 638 (1584).
[15](1973) All NLR 208.

gathered from the four corners of it is the more expeditious dispatch of the revenue cases particularly those relating to personal income tax, company tax, custom, excise duties, illegal currency deal, exchange control measures and the like which the State High Courts were supposed to have been too tardy to dispose of especially in recent years.

Therefore, the rule thus sets the pedestal for historical survey of what was before the law to ascertain what the law came to provide that wasn't available before the law came and the courts have held that this can be gleaned from the preamble to the Act itself.[16]In *Emologu v. State*[17], the Supreme Court held as follows:

> Unless I put the legislation…in the proper historical setting…I cannot reach a correct decision in the matter…I feel entitled to call in aid the historical background of the enactment in order to correctly comprehend the true import thereof.

The mischief rule unlike the golden rule does not afford the judge the liberty to bring in alien considerations in his effort to seek out the true intention of the legislator. It only allows the judge to avoid the absurdity that the literal rule may occasion by looking at the state of the law before the statute to find out what was wrong (the mischief) that the present statute came to correct.[18]

There are other general principles which aid the court in its interpretation of statutes. A statute is to be construed in such a manner as not to command doing what is impossible – *Lex non cogitadimpossiblia.*[19] In principle, where a provision is reasonably susceptible of two interpretations and it is found that by one interpretation the provision would be valid and by the other it would be invalid the provision ought to be construed in such a manner as to make it valid. In other words, the statute is to be construed *ut res magisvaleat quam* pereat,[20] that it may rather have effect than be destroyed.

[16]AM Ekanem (n 11).
[17](1988) 2 NWLR (pt. 78) SC.
[18]A.M Ekanem (n 11).
[19]*Commissioner of Police v.Okoli* (1966) NLR1.

[20]*Osho v Phillips* (1972) All N.L.R. 2786; See also *Roe vTranmarr Willies* [1957] 682.

Provisions being interpreted should not be read in isolation.[21] Words are to be construed in their context and any section, part of which is being interpreted must be read as a whole. There are also presumptions of interpretation. One of the presumptive principles is the *ejusdem generis* rule. According to the principle, where particular words of the same class are followed by general words, the general words must be construed to be similar in meaning to the particular words. Can these general principles be applied in the interpretation of taxing statutes?

## 2.0 RULES ON INTERPRETATION OF TAXING STATUTES

The law of taxation is wholly the creature of statute; that is to say, there is no common law of taxation, no principles of law which are applicable other than those principles which are found in the Taxing Acts themselves according to their true meaning and effect. In any tax case, it is consequently necessary for the court to determine the rule, meaning and effect of the particular statutory provision which is in question. The approach of the courts to the interpretation of Taxing Acts has been fairly evasive throughout the years, but it is generally recognized that Taxing Acts are a rather special type of statute, demanding a predictable and hence strict form of interpretation. Certain general principles, characteristic to this approach, have been formulated by the English courts. These general principles provide relevant guidelines for the Nigerian courts, not for the purposes of slavish limitation, but because it is common place and sensible to learn from another's experience. The principles thus formulated are:[22]

a) A tax must be expressly imposed upon the subject by the clear words of the statute[23]
b) The words of the Act must be given their natural meaning.[24]
c) Where the meaning of a statutory provision is ambiguous the taxpayer must be given the benefit of the doubt.[25]
d) There is no equity in taxation.[26]

[21]*Council of the University of Ibadan v Adamolekun* (1967) 1 NLR.213.

[22]AJEasson.Cases and Materials in Revenue Law, 3.

[23]*Coltness Iron Company v Black App* [1881]Cas. 315.

[24]*Pryce v Monmouthshire Canal v Railway Company* (1974) *4 App. Cass.197.*

[25]*Adamson v Attorney-General [1938].C. 257*

[26]*Cape Brandy Syndicate v Inland Revenue Commissioners*[1921] 1K.B.64. See also *Federal Board of InlandRevenue v. Omotosho* (1973) N. Comm. L.R. 369.

e) Where the meaning of the statute is clearly expressed, the court will not have regard to any contrary intention or belief of Parliament.[27]

f) Where the meaning of the statute is not clear, it should, if possible, be construed so as to carry out the expressed or presumed intention of Parliament.[28]

g) Ambiguity may be resolved by subsequent legislation.[29]

h) In applying the appropriate statutory provision to a given set of facts, the court will not go behind the form of the transaction or document concerned and have regard to the substance unless the form is a "mere sham".[30]

There are apparent contradictions in these rules of statutory interpretations which indicate that there is a lack of consistency on the part of the courts with regard to interpreting taxing statutes particularly in the area of tax planning or avoidance. This lack of consistency is more noticeable in the court's attempt to stifle any transaction which it 'feels' has a tax avoidance motive. That is, the court has continuously in its efforts to stop tax avoidance unable to lay down any predictable approach to such cases. Thus, the courts have failed to realize that tax statutes are special and that they have no discretion other than to decide whether a particular transaction falls within or without a taxing provision. They possess no discretion to look into the motive of tax planning.

**2.1 Tax Planning[31]**

The various cases in the area of tax planning illustrate this inconsistent interpretation approach of the courts in Nigeria; judicial decisions squarely on the issue of tax avoidance or the construction of statutory provisions against tax avoidance are the exception rather than the rule. This is rather unfortunate, in view of the fact that it is a notorious fact that the incidence of tax avoidance, just like its twin factor, tax evasion, is rampant in Nigeria. Based on a critical review of some of the tax cases, the general trend which can be easily discerned is a conscious judicial

[27]*Inland Revenue Commissioners vAyshire Employers Mutual Insurance Association Ltd* (1946) 1 All E.R.637.

[28]*Astor vPerry*[1935]A.C 398. See also *Luke v. IRC*[1956]A.C 557; *Brown v. National Provident Institution* [1921] 2 A.C.222.

[29]*Ormond Investment v Betts* A.C [1928] 143.

[30]*Inland Revenue Commissioners v Duke of Westminster* [1936] A.C. 1. See also *Marina Nominees Ltd. vFederal Board of Inland Revenue*, FCA/L/20/83.

[31]This is used interchangeably with tax avoidance as they both substantially mean the same thing.

side tracking on technical grounds, of the issue of tax avoidance or an in-depth judicial construction and analysis of the statutory provision against tax avoidance.[32]

Therefore, in order to assess how the Nigerian courts interpret a taxing statute it is to the English courts we have to turn as a guide. The ideal no doubt, is for a country to have its own 'homegrown' legal system, but the organic development of any such system is a slow and gradual process, and until when a society chooses or is forced by circumstances to undergo a radical change, it is most unlikely that its domestic law will be able to adapt itself rapidly enough to fit the altered situation. One solution to this problem is for the society to take over and apply for its purposes the legal system of another country which has already developed to the stage which it is itself hurrying.[33]

No better starting point can be afforded than the principle enunciated in *Inland Revenue Commissioners v Duke of Westminster*[34] by Lord Tomlin to the effect that:

> Everyman is entitled if he can to order his affairs so that the tax attaching under the appropriate acts is less than it otherwise would be. If he succeeds in ordering them as to secure this result, then, however unappreciative the Commissioner of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of "the substance" seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable.

Also, in the US's case of ***Cape Brandy v IRC***[35], the court held as follows:

[32] Margaret TOkorodudu, 'Measures Against Tax Evasion and Avoidance: Some Equity Question & Suggested Reforms' (1985) Being text of a paper presented at the 15th Annual Senior Staff Conference of the Federal Inland Revenue Department 34.

[33] Andrew Edward Wilson Park, *Sources of Nigerian Law* (Sweet & Maxwell 1963)15-16.

[34][1936] AC 1.

> In a taxing Act, clear words are necessary to tax the subject. But it is often endeavoured to give to this maxim a wide and fanciful construction. It does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in such acts. It means this, I think; it means that in taxation you have to look simply at what is clearly said. There is no room for any intendment, there is no equity about tax, you read nothing in; you imply nothing, but you look fairly at what I said and at what is said clearly and that is tax.

What the principle is really saying is that a taxpayer is to be taxed by reference to what he has actually done, and not by reference to what he might more naturally have done but did not do, to achieve the same result. This, it is respectfully submitted, should be the approach of the courts in deciding cases of tax planning, however, recent decisions of the courts have tended to depart from this principle to adopt the role of an unsolicited tax intelligence agency for the Revenue. To perform this role the courts have coined various terminologies like "no commercial purpose", "fiscal nullity" and "no appreciable effect" to nullify certain taxing transactions which they feel have a tax avoidance motive.

The modern developments started from the case of *Floor v Davis*[36]through *Inland Revenue Commissioners v Plummer*,[37]*Inland Revenue Commissioners v Ramsay,*[38]*Eilbeck v Rawling,*[39] *Inland Revenue Commissioners v Brumah Oil Co. Ltd.*[40] *and Marina Nominees Ltd.v Federal Board of Inland Revenue*[41] where the

[35]12 Tax Cases 358 [1921].
[36](1972) All ER 677, H.L.

[37](1979)3 All ER 865, H.L

[38](1981) 1 All ER 865, H.L.

[39]ibid.

[40](1982) STC 39.

English courts, and the Nigerian court in *Marina Nominees*, seem to take the position that they were not precluded by the principle in the *Duke of Westminster* case from interpreting otherwise especially as an essential feature of all the transactions in these cases:

> .... was that, when they were completely carried out, they did not result in any actual loss to the tax payer. The apparently magic result of creating a tax loss that would not be a real loss was to be brought about by arranging that the scheme included loss which was allowable for tax purposes and matching again which was not chargeable.[42]

What the courts failed to realize in these cases is that a lot of the transactions involved were:

> .....capable of explanation by reference to ordinary business or family dealing, without necessarily being labeled as a means to avoid tax ...[43]

And that:

> ….a transaction for the purposes of income tax must be looked at from a commercial point of view. In dealing with commercial men in income tax matters, we must try and understand what is the real commercial result of a particular action taken by a commercial man ....[44]

---

[41]FCA/L/20/83.

[42]*Aberdeen Construction Group Ltd. v IRC* [1978] A.C. 855.

[43]*Newtown v Commissioner of Taxation of the Commonwealth Australia, Privy Council* [1958] AC.

450 Per Lord Denning.

[44]*C.I.T.E.P.T. Bompay v Sir HomiMehataI.L.R.*[1956]Hom.154 at 156.

This thinking seemed to govern the decisions of the Nigerian courts in *Nasr v. Federal Board of Inland Revenue*[45] *and Reiss & Company (Nigeria) Ltd. v. Federal Board of Inland Revenue*[46]where the suggestion that certain transactions were carried out with a tax avoidance motive were rejected on the grounds that no evidence was called which could have justified such finding.

The guiding rule which the courts considered in *Furniss v. Dawson and Coates v. Arndale Properties Ltd.* in rejecting the *Ramday and Burmah Oil Co. Ltd*. cases was that, although the principles enunciated in them represented a radical change in the approach of the courts to artificial schemes designed to avoid tax. The House of Lords had not gone so far as to over-rule its earlier decision in the *Duke of Westminster* case – namely that in ascertaining the fiscal effect of a transaction the court had to have regard to the substance of the transaction and the position which resulted from the legal rights and obligations of the parties ascertained from ordinary legal principles. The court could not disregard the transaction which a taxpayer had actually entered into and the rights and obligations which flowed from it and substitute for it, some more straight forward transaction on the ground that the more straightforward transaction would have achieved a similar economic or business and was the transaction which the taxpayer would have entered into if he had not set out to reduce the incidence of tax.

Despite these reasons the courts, again, seem to take a contradictory interpretative stance in the Nigerian case of Marina Nominees and the House of Lords decision in *Furniss v. Dawson.*[47] *In Marina Nominees Ltd.*, the company which was the company secretariat arm of **Peat, Marwich**, **Ani Ogunde**Chartered Accountants sought to disclaim liability for tax on the grounds that all its workers belonged to its parent company, **Peat, Marwick, Ani Ogunde**said since its parent company had paid tax, then that payment should be imputed to them. The argument advanced and the scheme in this case looked rather curious, simplistic and seemed to suggest a total lack of the basic knowledge of company Law and Income Tax Law on the part of the planners. The Planners seemed to be encouraged by the decision in *Reiss & Co (Nigeria) Ltd v Federal Board of Inland Revenu e*where the Nigerian company was engaged in the business of agency services and introducing customers in Nigeria to the Dutch Company, Reiss & Co. (Amsterdam). The Federal Board of Inland Revenue had assessed the Nigeria Subsidiary, Reiss & Co. (Nigeria) Ltd., for tax in respect of all the profits made by its Dutch principals, Reiss & Co. (Amsterdam) on all businesses introduced by the Nigerian subsidiary.

[45](1964) N. Comm. L.R.93 SCN.

[46]Suit No. FRC/L/1A/76 of 15July 1977.
[47][1984] AC 526.

The Federal High Court disallowed the impugning of the separate legal entity of **Reiss & Co. Nigeria Ltd**. and **Reiss & Co**. (Amsterdam) respectively, on the forcible authority of *Salomon v Salomon*[48] in spite of the suggestive element of tax sheltering motive emerging from the facts.[49]

The proper approach the planners in Marina Nominees should have taken was either to pay all the income of **Marina Nominees** to **Peat Marwick** as remuneration for work done so that **Peat Marwick** would then pay the tax due with all allowances they may be entitled to claim as Marina Nominees would not have any income on which tax may be levied or claim all possible losses incurred by **Pea**t **Marwick** under Group relief equivalent to the tax that may be levied on them. In view of the simplistic tax planning scheme canvassed, the court wasted no time in dismissing Marina Nominees' contention. The decision of the House of Lords in *Furniss v Dawon* in which a roll-over given by statute to a disposal by way of an exchange of shares for shares was, denied on the ground that the share exchange had been arranged purely for the tax-avoiding purposes. The principle is relatively easy to apply, for what is required is a pre-ordained series of transaction one or more of which have been inserted for no commercial purpose other than the avoidance of liability to tax, one then disregards the transaction or transactions which have been inserted for that purpose. Having excised those transactions, one looks at the end result and applies tax law accordingly.[50]

Hence, one may ask the question; what is the principle behind the decisions reached in these cases? Could it have been the need to carry out the *"*intention of the Parliament*"* to settle tax planning cases? A glimpse into the principle is proved by the approach of Lord Diplock (dissenting) in *Inland Revenue Commissioners v Plummer*,[51] that;

> *(*The question is) can Parliament really have intended to tax this particular transaction by the wide words the draftsman has used? If the only sensible answer to that question is 'No' the words of the Act should be understood as inapplicable to the

[48][18897] AC 22.

[49]Margaret.T. Okorodudu*( n* 33) 40.
[50] *C.N. Beattie, Furnissv.Dawson. British Tax Review* [1984] 109.

[51][1980] AC 896, 924.

> transaction. That question, when asked about a transaction which only falls within the literal meaning of the words used in the section but has no further object than to enable the settlor to avoid a liability to tax on his income which he would otherwise be obliged to pay, so far from inviting the answer 'No' invites the answer: 'whatever kind of transaction Parliament may have intended to exclude it cannot have been this one.

This intention of the Parliament or Legislature that the judges have always sought to carry out, what exactly is it? Is it really the intention of the Parliament? Does this not contradict the rule that tax must be expressly imposed upon the subject by the clear words of the statute? Are the judges not acting according to private opinion? Should one not agree with the Supreme Court in *Animashaun v Osuma*[52]that,

> .... The function of the courts is to ascertain what the parties meant by the words which they have used…

The real problem in these matters is enunciated in the statement of Learned Hand J. in *C libertv Commissioner of Internal Revenue*[53] that:

> It is a corollary of the universally accepted canon of interpretation that the literal meaning of the words of a statute is seldom if ever, the conclusive measure of its scope. Except in rare instances statutes are written in general terms and do not undertake to specify, all occasions they are meant to cover; and their 'interpretation' demands the projection of their expressed purpose,

[52](1972) All NLR (pt 1) 363.

[53]248f 2nd, 399, 411 (1957).

> upon occasions, not present in the minds of those who enacted them...

That is, since statutes are written in general terms and do not undertake to specify all occasion they are meant to cover, if an occasion which they do not cover arises what is the court supposed to do?

> The one point at which the judges get struck is when there is a gap. The words are clear enough. The meaning of them is clear enough. But they do not cover the matter in hand. Something has taken which the draftsman has not foreseen. Nor have the members of Parliament. So they have not provided for it. Or else, by some mistake, they have overlooked something, or not provided for it. There is a gap. Can it be filled by the judges?[54]

**2.2 Filling in the Gaps**

As early as 1946 the House of Lords held emphatically that the judges could not fill the gap. Lord Simonds said in *Inland Commissioners v Ayrshire Employers Mutual Insurance Association*[55] that:

> The section (under discussion) is clearly a remedial section. It is at least clear what the gap which is intended to be filled is and hardly less clear how it is intended to fill that gap. Yet I can come to no other conclusion than that the language of the section fails to achieve its apparent purpose and I must decline to insert words or phrases which might succeed where the draftsman failed.

[54]Rt H. Lord Denning.The Closing Chapter,.98-99.

[55](1946) 1 All ER 637, 641.

Lord Denning does not agree with the above view and he says:

> Beyond doubt the task of the lawyer – and of the judge – is to find out the intention of Parliament. In doing this, you must, of course, start with the words used in the statute: but not end with them – as some people seem to think. You must discover the meaning of the words …

Further on he says:

> At one time the judges used to limit themselves to the bare reading of the statute itself – to go simply by the words, giving them their grammatical meaning, and that was all. That view was prevalent in the 19th century and still has some supporters today. But is wrong in principle…[56]

This view cannot be right to the interpretation of a taxing statute since legislative intention can only be discovered from the statute itself and the rules are clear – a tax must be expressly imposed upon the subject by the clear words of the Act which must be given their natural meaning.

The modern trend is to introduce a new approach to the traditional rule of statutory interpretation; and the chief protagonist of this new approach which is hereinafter referred to as the *"purposive* construction" is no other than the erudite Lord Denning.[57] The first case in which there was an opportunity to advocate this new approach to the statutory interpretation was *Seaford Court Estate Ltd. v Asher***.**[58]In his own judgment when the matter was considered by the Court of Appeal, Denning L.J. (as he then was) held, *inter alia,* thus:

[56] Lord Denning, *The Discipline of Law*(Butterworths 1979) 9- 10.

[57]*Awolowo v Shagari.* Suit No. SET/1/1979 per Kazeem.JCA.

[58][1949] KB 481.

> …It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply hold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and to the intention of the legislature….

The purposive approach also known as 'the doctrine of disregard' 'the principle of fiscal nullity' and 'a judge-made anti-avoidance weapon',[59]overlaps with the mischief rule, which itself dates to the 16th century when judges viewed legislation as a means of meeting the deficiencies of the common law as formulated in the *Heydon's case*.[60]The purposive mode of interpretation proceeds from the premise that in enacting tax legislation 'the legislature must have had some rational purpose in mind'.[61]It therefore directs the judge to ascertain the true purpose or purposes of the legislature and to interpret the words of the statute in accordance with that purpose[62] which may or may not require the words of the provision in question to be read strictly.[63]

The purposive approach enables judges to modify or even 'reframe' the language of legislation to accord with the intention or purpose of the legislation

[59]AHalkyard, 'Not a Weapon of Mass Destruction: Can the Ramsay Approach Apply to the Inland RevenueOrdinance in Hong Kong*?'*(2005) 9 (3) Asia-Pacific Journal of Taxation 68.

[60] (1584) 76 ER 638 (1). The Mischief rules are as follows: (1) what was the common law before the Act was passed (2) what mischief was the Act designed to remedy (3) what remedy was provided for in the Act; (4) the reason for the remedy.

[61] Per Lord Oliver in *Commissioners v Sir John Aird's Settlement [1984] Ch. 382, 382.*

[62] *Hart v Pepper* (1993] AC. 93,*Agbaje v Fashola* (2008) 2 NWLR 908.

[63] M Zander, *The Law-Making Process*, (Sweet & Maxwell London 1980) 62.

even to the extent of 'doing some violence to the words' of the statute.[64] It is permissible for a judge to have regard to extrinsic material as an aid in the construction of statutory provision where such material throws light on the real intention of Parliament.

What the legislature has not written, the court must write. This proposition which re-states in a new form the view expressed by the lord justice in the earlier case of *Seaford Court Estates. Ltd v Asher*(to which the lord justice himself refers), cannot be supported. It appears to me to be a naked usurpation of the legislature's function under the disguise of interpretation, and it is less justifiable when it is guess work with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is discoverd, the remedy lies in an amending Act.

It is thus clear from the exposition of the rules of statutory interpretation, that in the construction of words of a taxing statute, the liberal interpretation should be adhered to instead of the new approach.

Even in Nigeria, the Supreme Court has held in *Okumagba v Egbe*[65]that:

> ...amendment is the function of the legislature, and the courts cannot fill a gap which comes to light by altering the words of a regulation to make it read in the way they think it should have been enacted. As Lord Bacon said in his essay on judicature, the office of a judge is *jurisdicere*, not *juris dare*, to state the law, and not to give law….

This of course will result in a situation in which the judges will:

> ....pull the language of Parliament to pieces and make nuisance of it….[66]

in order to avoid opening up a tax legislation to: "destructive analysis"[67]

[64]DA Obadina,'Fighting Aggressive Tax Avoidance in Nigeria: An Agenda for Reform' <https://www.academia.edu/10805766/Tackling_Aggressive_Tax_Avoidance_in_Nigeria_an_agenda_for_reform> accessed 17 February 2019.

[65](1965)1 All NLR 62.

[66]*Magor and St Mellons Rural District Council v Newport Corporation* (1951) 1.All E.R.1018.

[67]Ibid. See further the following Nigerian cases.*Alh. Ibrahim Ahmadu& 1 Or. vThe Governor of Kogi State*. (1960-2010) 1 NTLR 244, *7UP Bottling Co. PLC v L.S.I.R.B.* Suit No.CA/L/83/98; (2000) 3

## 3.0 CONCLUSION AND RECOMMENDATIONS

It is strongly recommended that Nigeria should devise means of efficient and effective drafting of tax statutes and legislations to avoid many of the pitfalls associated with court's interpretation of taxing statutes generally. The country must take a cue from the arrangement of the judicial system in England and ensure that those who eventually get appointed to judicial offices are made to sit on cases in which they have specialization and experience, so that, in the case of taxation, those who get appointed to the Federal High Court and Tax Appeal Tribunal to sit on tax cases are people with proven experience and specialization in tax matters. The country must also devise its own home grown sustainable and sufficient judicial precedents on issue of taxation generally and the interpretation of taxing legislation in particular. Lastly, efforts must be made from time to time to amend all legislations dealing with tax and taxation whenever gaps are detected in these instruments.

NWLR (Pt. 650) 565, at 590-592 and *Ansaldo Nigeria Limited v National Provident Fund Management Board*, (1960-2010) 1 NTLR 476.

# COMPLICITY OF BOKO HARAM RESILIENCE AND THREAT TO SECURITY AND GOOD GOVERNANCE IN NIGERIA

**HANAFI A HAMMED, Ph.D***

***Abstract***

*Boko Haram insurgence has become a contemporary fashionable topic of research as well as an international issue. This study traced the emergence of the sect, its principles and causes of its destructive style of operation. The paper further examined the complicity behind the resilience of Boko Haram operations, challenges of Boko Haram to good governance and efforts of the Nigerian security agencies in tackling the menace of the sect. The study relied on information from textbooks, journals, newspapers and internet. The study revealed that the sect frowns on western civilization but not western education and that its targets are generally those perceived as enemies of Shari'ah legal system. The study therefore recommended collaborative efforts among all stakeholders, that is, the government, the security agents, the civil society, local vigilante and individuals to checkmate Boko Haram insurgence.*

## 1.0 INTRODUCTION

Boko Haram conflict is the latest in the long list of such conflicts to afflict Nigeria in recent time. Until the period when this conflict arose, the country has witnessed the Niger Delta conflict which pitted militants of the Niger Delta area against the government of the country over poor and inequitable utilisation of the revenue accruing to the country from the oil produced in the region.[1] However, Boko Haram insurance has proved to be more ferocious than the Niger Delta militancy, deploying the lethal strategy of suicide bombing which is alien to Nigeria. Thousands of people have been killed and properties worth millions of dollars have been destroyed since 2009 when Boko Haram appeared.[2]

Boko Haram insurgency has been incubated in north –eastern part of Nigeria since 1995. Its transformation into armed violent sect can be traced to events

*Diplomat, Senior Lecturer, School of Law, Kampala International University, Uganda, Email: hahannafi@alhikmah.edu.ng Tel: +256754169440/ +2348033843685

[1]Richard L Sklar&CRWhitaker, 'Nigeria: Rivers of Oil, Trials of Blood, Prospect for Unity and Democracy' (1995) 31 SIS African Notes 179.

[2]Femi AjayiandNgoziNwogwugwu,'Boko Haram and the Crisis of Governance in Nigeria'<paperroom,ipsa.org/papers/Paper-3185.pdf> accessed 6 April 2014.

leading up to the 2003 general elections in Nigeria. Immediately the founder of the sect, AbubakarLawan, proceeded for further education in Saudi Arabia, a committee of clerics appointed Mohammed Yusuf as their leader in 2002 who later disposed the clerics who appointed him on allegations of their corrupt practices and failure to properly interpret the teachings of *Shar'iah*. Yusuf message preaching attracted unemployed youths from Borno and Yobe States and from neighbouring countries like Cameroon, Chad and Niger Republic.[3] As the members increased, the sect became very attractive to politicians in the build-up to the 2003 general elections.[4] Before the elections, youths among Yusufiyya movement and other groups operating under different names were armed with sophisticated weapons by politicians contesting for governorship elections in these States.[5] However, due to the fact that the 2003 governorship election in Borno State never took the shape that those that invited them thought it would be, the then State Government subsequently gave the movement the ultimatum to immediately quit.[6]

These disillusioned youths and frustrated militias became susceptible to the radical brand of Islam Preaches by Mohammed Yusuf because they do not have means of legitimate livelihood.[7]The movement first took up arms against the state establishment on 24 December 2003 by attacking police stations and public buildings of Geiam and Kanama in Yobe State. Members occupied the two buildings for several days, hoisting the flag of Afghanistan's Taliban movement over the camps before they were eventually dislodged by security operations.[8]

The security operatives later received a tip –off that the sect was planning to strike from their base in DutsenTanshi in Bauchi State. When security operatives stormed the place, nine members of the group were arrested while items used in local production of bombs were recovered.[9] In retaliation, the members attacked and destroyed the DutsenTanshi police station. This attack was the curtain raiser for a wave of unrest that manifested in Bauchi, Borno, Kano, Katsina and Yobe States. The revolt ended on 30 July 2009, when their leader, Mohammed Yusuf was finally captured in Maiduguri and was extra judicially killed by the police. Although police

[3]H Monguno,'An Indigene, Resident and Security Analyst in Borno' Interviewed by the Author on Board Ethiopia Airways,Abuja-Addis Ababa. 27 April 2013.
[4] ibid.
[5]Idris Hamzaand Maiduguri Ismail Adebayo,'Boko Haram: Now Senator Sheriff, Zana Clashed on the Truth' (Sunday Trust, Nigeria, 28 October 2012) <http://sundaytrust.com.ng/index.php/top-stories/111845-boko-haram-now-sheriff-zana-clash-on-the-truth> accessed 12 April 2018..
[6] I Ohia,'Boko Haram Killing: What was Governor Sheriff's Role?' (*Desert Herald*,Nigeria, 18 August 2009) 3.
[7] See JP Pham, 'Boko Haram Training Evolving Threat' (2013) *African Security Brief* 20.
[8]T Suleiman, 'Terrorism Unsettles the North' (*Tell Magazine*, Lagos, 26 February 2007) 25.
[9]Ohia (n 6) 6.

officials claimed that he was killed while trying to escape, over 800 persons, mainly sect members were killed during the revolt, and hundreds of the sect members were arrested and detained for formal trial.[10]The thrust of this paper is therefore to examine the factors responsible for the emergence of Boko Haram insurgence, complicity behind the operations of the insurgence, impacts of the insurgence on good governance and how the insurgence has really overstressed Nigerian security agencies.

### 1.2 Conceptual Clarification of Terms

#### i. Terrorism

Terrorism is not a modern phenomenon. It has been in existence for at least 2000 years. The scholars traced the history of terrorism to the act which is now call terrorism perpetrated by a radical offshoot of the Zealots, Jewish sect in Judea during the first century AD. The term terrorism was used to describe the wanton destruction and intimidation inflicted by Nazi, fascists and totalitarian regimes that respectively came to powers in Germany, Italy and Soviet Union. The repressive means employed by these governments against their citizens include beating, unlawful detention, torture, so-called death squads (often consisting off-duty or plain clothes security or police officers) and other forms of intimidation.[11]

Terrorism like most concepts in law and social science defies any single universally acceptable definition. The United States Department defines the term as a 'premeditated politically motivated violence perpetuated against non-combatant target by national groups or clandestine agents, usually intended to influence an audience'.[12] The definition raises the question of what amount to non- combatant targets. Could the September 11 attack on the Pentagon be defined as non-combatant or the 1983 terrorist attack that killed 241 US marines in Beirut be classified as such. Birch defines terrorism as the infliction of grievous harm on one or more members of an identifiable group or category of people with aim of frightening other members of that group or category into changing their intended behaviour, whether pursued for political or religious reasons. Most civilized people regard it as being morally repugnant because it involves the infliction of grievous harm on innocent and defenseless people irrespective of whether the observer happens to approve or disapprove of the policy objective of the terrorists.[13]Terrorism is a particular species of political violence involving a threat

[10] IT Sampson, 'The Dilemmas of Counter-Boko Haramism: Debating State Responses to Boko Haram Terrorism in Northern Nigeria' (2013) *Security Journal Advance* online Publication.
[11] JO Abimbola and SA Adesote, 'Domestic Terrorism and Boko Haram Insurgence in Nigeria, Issues and Trends: A Historical Discourse' (2012) 4 *Journal of Arts and Contemporary Society* 11-29.
[12]J Kaarbi and JL Ray, *Global Politics*(10th edn, UK and US, Wadsworth Cengage Learning 2011).
[13]AH Birch, *The Concept and Theory of Modern Democracy* (3rd edn,London and New York, Routledge 2007).

of violence against non-combatants or property in order to gain a political, ideological or religious goal through fear and intimidation. Usually, symbolic in nature, the act is crafted to have an effect on an audience that differs from the immediate targets of the violence. Therefore, terrorism is a strategy employed by actors (state and non-state) with widely differing goals they intend to achieve and constituencies they intend to reach.[14]Going by the various dimensions of the concept of terrorism, it is justified to conclude that by their nature and method of operations, Boko Haram is indeed a terrorist group. The right of legitimate killing is considered a right of the State because in international law, state violence considered through the prism of legality whereas, violence from non-state actors is perceived illegal in entirety. The term is something that can be inflicted upon people either by government (state terrorism) or by groups like A-Qaeda, Al-Shabaab and Boko Haram.[15] A former United Nations Secretary General, Kofi Anan, defines terrorism as 'action intended to cause death or serious bodily harm to combatants or non-combatants with the purpose of intimidating a population or compelling a government or international organisation to do something or not to do something.'[16] The United Kingdom Terrorism Act has further been defined as the use of threat of action where:

a. The action falls within subsection 2;
b. the use of threat is designed to influence the government or to intimidate the public or a section of the public; and
c. the use of or threat is made for the purpose of advancing a political, religious or ideological cause.[17]

In Nigeria, the first attempt to define and legislate on terrorism was in 2004. This legislation is not independent legislation on terrorism. Some critics regard this legislation as 'economic terrorism', as the title is 'Economic and Financial Crimes Commission (EFCC) Established Act, 2004. The Act defines terrorism as:

a. An act which is a violation of the Criminal Code or Penal Code and which can endanger the life, physical integrity or freedom of; or cause injury or death to any person, any number or group of person or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to-

[14]MP Jerrold, *The Mind of the Terrorist: The Psychology of Terrorism from the IRA to Al-Qaeda* (NewYork, Palgrave Macmillan 2007) 3.
[15] P Hough, Understanding Global Security (2ndEdn, London and New York, Routledge , Taylor and Francis Group, 2008) 66.
[16]Kofi Anan, 'A Global Strategy for Fighting Terrorism,' (The Guardian, Lagos, Nigeria, 14 March, 2005) 4.
[17]The United Kingdom Terrorism Act, 2007 http://www.opsi.gov.uk/Acts2002/2011.htm accessed 31 June 2018.

i. intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing and act, or to adopt or abandon a particular standpoint or to act according to certain principles; or
ii. disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
iii. create general insurrection in a State.

b. Any promotion, sponsorship of, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to (iii).[18]

In 2011, Nigeria enacted the Prevention of Terrorism Act (amended in 2013) which punishes the crime of terrorism as well as offences of supporting, financing, encouraging and supplying materials to terrorists. The Act is strong in criminalizing support to Boko Haram but it is weak as a tool to attack terrorism because it has very broad definitions of elements of the offence it created. Thus, apart from the conviction and sentence to life imprisonment of KabiruSokoto and his co-accused, who masterminded the 2013 Christmas Day bombing near Abuja, no other notable terrorist has been successfully prosecuted and convicted under Prevention of Terrorism Act.[19]

**ii. Insurgence**

The term insurgency has been defined as a struggle to control a contested political space between a state and one or more popularly based non-state challengers.[20] It is the actions of minority group within a state, which are intended on forcing political change by means of a mixture of subversion, propaganda, and military pressure aiming to accept such a change. It is an organised armed political struggle, the goals of which might be diverse.[21] It is also an internal uprising often outside the confines of state's laws and it is characterised by socio-economic and political goals as well as military or guerilla tactics. In other words, it is a protracted struggle carefully and methodologically carried out to achieve certain goals with an

[18]Economic and Financial Crimes Commission (EFCC) Establishment Act, 2004, s 15..
[19]I Ohino, 'Judicial and Institutional Development in Nigeria against Atrocity Crimes and the Protection of Victims' Nigerian Coalition on the ICC<http://ledapnigeria.org/judicial-and-institutional-developments-in-nigeria-against-atrocity-crimes-and-the-protection-of-victims> accessed 10 April 2018.
[20]O Hagler, 'Combating Boko HaramInsurgency in Nigeria: The Imperative of Adopting the Mechanism of Rule of Law' (2014) 1 (2) Ife Journal of International and Comparative Law 367-378, 368.
[21] Army Field Manual, Combined Arms Operations, Counter Insurgency Operation, Strategic Operational Guidelines, part 10, (Army Code 71749, July 2010) A-1-1.

eventual aim of replacing the existing power structure. To launch their anger on the state, insurgents often target civilians and critical infrastructure.[22]

## 2.0 CAUSES OF BOKO HARAMISM IN NORTHERN NIGERIA

The conflicts and insecurity in Nigeria since independence in 1960 can be traced to the enthronement of an antagonistic ruling class along ethnic and religious lines by departing colonialists at the nation's independence.[23]Ogbonnaya and Ehigiamusoe believe that the unfortunate colonial contraption is the primary cause of communal and ethno-religious crises in the Northern part of Nigeria.[24]Boko Haram group alleges that Northern political leaders do not live in compliance with the tenets of *Shar'iah*. They resorted to barbaric accumulation of wealth and indecent personal life styles which are offensive to Islamic culture, without regard to the needs and sensibilities of the masses. The Boko Haram employed terrorist activities as their method of getting back to the system which has refused to take care of the needs of the less privileged, rather choosing to administer over unlimited corruption without fear of God.[25]Boko Haram sect does not aim to overthrow the government violently but its leaders often criticise the Northern Nigerian Muslims for participating in what it believed to be illegitimate, non-Islamic state and preached a doctrine of withdrawal.[26] As the group leader, Mohammed Yusuf continued to criticise bad governance exemplified by police brutality and political corruption with harsh government treatment, the group gained more followers.[27]

This coincided with the loss of the presidency of the country by the North following the demise in office of President Mus Yar'adua in 2009. By the existing arrangement as at the time within Peoples' Democratic Party in Nigeria, another candidate of Northern origin was to be selected as replacement. Citing the precarious situation of the country at that time, a 'doctrine of necessity' was formulated by the country's leaders to enable the then Vice-President, Dr. Goodluck Jonathan, to take over as President.[28] It was believed that the dominant Northern interests were uncomfortable with this arrangement, fueling suspicions that the Boko Haram (BH) phenomenon is an invention of the Northern establishment for

[22]O Hagler (n 16) 369.
[23]RO Okonkwo, 'Beyond the Nigerian Terrorist Bomber'Sahara Reporter (Nigeria 8 December 2009) <www.saharareporter.com>accessed 4 April 2018.
[24] UM Ogbonnaya& UK Ehigiamusoe, 'Niger Delta Militancy and Boko Haram Insurgency: National Security in Nigeria' (2014) 4 (3) Global Security Studies, Summer 1-4.
[25]JO Abimbola and SA Adesote (n 11).
[26] RA Adetoro, 'Boko Haram Insurgency as a Symbol of Poverty and Political Alienation in Nigeria' (2012) 3 (5) *IORS Journal of Humanity and Social Science* 21-26.
[27] T Johnson, 'Boko Haram-Council on Foreign Relations' (2011)<www.ctr.org/africa/boko-haram/p25739>accessed 13 April 2018.
[28]Adeniyi Olusegun, *Power, Politics and Death: A Front row Account of Nigeria under the Late President Umar Yar'adua (*Lagos, Kachifo 2011).

the pursuit of their political and sentimental interests.[29] This however has not been substantiated but BH violence has continued to increase intensity in the country, especially the north has continued to groan under the impact.[30] Some equally argued that BH is a tool in the hands of the north for the purpose of the 2015 presidential contest in Nigeria. The argument then was that, either the north was using BH to distract the then President Jonathan so that by the end of his tenure in office in 2015, he would leave office, or that BH was a bargaining strategy in the hands of the North to force Jonathan not to seek re-election in 2015. However, this thought has since become otiose since the election had been conducted and won by a Northern while the BH crisis persists till date.[31]

However, the claim of Boko Haram which has gained acceptance in the Northern part of Nigeria was that in 2002, Mohammed Yusuf was co-opted by the then Borno State gubernatorial candidate for the support of his large youth movement. The group was to ensure that Sheriff win the election in exchange of full implementation of *Shar'iah,* appointment of Yusuf's followers into government positions,[32]50 million naira reward, 50 motorcycles and the office of the Commissioner for Religious Affairs.[33]After becoming governor, Sheriff created a Ministry of Religious Affairs and appointed AlhajiBujiFoi, *yusufiyya'*snational secretary, as the Commissioner for the Ministry.[34] There was a breakdown in the relationship between Governor Sheriff and the Mohammed Yusuf-led group after the election. Though, Sheriff has continued to deny entering into strategic alliance with the group, the fact that the state resources were made available to Yusuf by his government and that members of the group received government protection during his tenure, points in opposite direction. The government never implemented *Shar'ah* and that has become one of the agitations of the group.[35] Based on this, Mohammed Yusuf ordered AlhajiBujiFoi to resign from Sheriff's cabinet along with other staff brought by Foi to the Ministry.[36]

[29]TajudeenSanni, 'A Conspiracy of Silence' (*Tell Magazine*, Lagos, Nigeria, 25 June- 2 July 2012) 20-26.
[30]EI Onah, 'The Nigerian State' 63-80, 64 <https://www.ajol.nfo/index.php/ajor/article/views/13363/103080> accessed 8 April 2018.
[31] O Ogbonnaya, 'Boko Haram is a Battle for 2015, Says Chukwumereije' (*The Nation* Lagos, Nigeria, 29 September 2011).
[32]Femi Ajayi, 'Jonathan Dialoguing with the Devil' (*Nigerian World,* Nigeria 2 February 2012) <www.nigeriaworld.com> accessed 6 April 2018.
[33]H Monguno (n 3).
[34] Hamza, Maiduguri &Adebayo(n 5).
[35]Ajayi, (n 28).
[36]Monguno (n 3).

Boko Haram considered western influence on Islamic society as a basis of the religion's weakness.[37] It opposes secular government, conventional banking, taxation, jurisprudence and particularly, western education which is believed not founded on moral teachings.[38]This explains why the group is popularly called Boko Haram which means 'Western education is forbidden.' Meanwhile, a statement released in August, 2009 by self-identified interim leader of the group, MallamSanniUmaru, rejected the media description of it as Boko Haram. The group preferred to be addressed as *Jama'atuAllissunnahLida'awatiWal Jihad*, which means people committed to the propagation of the Prophet's Teachings and Jihad.[39]

The entire faith of a true Muslim also argued that western education was un-Islamic as it embodies all that Islam rejected, while it propagates the negative of what Allah and His Prophet had ordained. For instance, mixing boys and girls under the same shade, the propagation of the theory that men evolved from the family of monkey as well as the sun in the sky is static. According to them, there is conflict with the direct words of Allah Who said Muslim must not mix sexes under the same umbrella and that He created men from clay as well as the sun, earth and the moon, each move on its own axis. They further argued that today's banking system is shylock and Islam forbids interest in financial transactions just as the laws of the land are man-made in replacement of the ones ordained by Allah. It was in their bid to run away from all of these vices that members of the sect decided to cluster themselves in strategic locations in the outskirt of most major towns of Bauchi and Yobe States.[40]

This is the remote cause of his opposition to secularism, democracy and partisan politics as practiced in Nigeria and it led him to collision course with Nigerian authorities on several occasions, culminated to the 2009 crisis. As far as he was concerned, fidelity to the Constitution of the Federal Republic of Nigeria and subjecting oneself to the institutions created by it, amount to unbelief. Those who formulated evil laws in their parliament have made themselves partners to Allah.

---

[37]See S Sani, 'Boko Haram: History, Ideas and Revolt. The Constitution' (2011) 11 (4), *17-41,26* in EA Lucky and JD Ojochenemi, B*oko Haram The Socio-Economic Drivers*Springer Briefs in Political Science (Cham Heidelberg New York London 2015) <http://books.google.com.ng/books?id=b141CgAAQBAJ&1pg=PA80&dq=sani,+s.+(2011)+Boko+Haram+History,+Ideas+and+Revolt. The Constitution> accessed 6 April 2018.

[38]Onuah Freedom, 'The Audacity of the Boko Haram: Background, Analysis and Emerging Trend' (2012) 52 (2) *Security Journal* 134-151.

[39]European Commission's Expert Group on Violent Radicalisation, Radicalism Processes Leading to Act of Terrorism, A Concise Report Submitted to The European Commission, 15 May 2008.

[40] MO Okeke, Boko Haram Crisis and the Socio-Political Development of Nigeria: A Case Study of Niger State, 24 (2012) 24. https://project.com.nig/public-administration/boko-haram-crisis-and-socio-political-development-of-nigeria... accessed 26 June 2018.

Those who followed the legislative system and agreed to take their cases to those courts are in agreement with *taghut* and are idolaters.[41]Many analyses about Boko Haram and its splinter factions limit its root causes to issues of religious fundamentalism and fanaticism. However, it is imperative to note that the reasons underlying the crises go far beyond issues of ideological radicalism. The rebellion is born out of poverty, illiteracy and unemployment. It is a response to corruption and social neglect. Given the shocking disparities in wealth, analysts in the West have argued that the government in order to stop the violence has to address the root causes of the crisis.[42]

It is colossal to state here that the transformation of Boko Haram from *dawah* to an arms-bearing sect was in the making of security agencies, which approached the situation as one of law and order and responded as such with disastrous consequences. There was no attempt to perceive the issues raised by the sect in its broader versatile prism as political, social and economic. The crisis in Borno began over a contest for ownership of a place of worship with the Izala at Monguno in December, 2008. Boko Haram members had been thrown out of Izala mosques as a result of a complete break with the Izala over the Izala's inability to dissuade Mohammed Yusuf from his firmly held convictions. While on their way to Monguno to reclaim the mosque from the Izala, 67 Boko Haram members, including AbubakarShekau were arrested and detained at the Maiduguri prison by state authorities, apparently, at the instigation of their rivals. Mohammd Yusuf vowed to recover the disputed mosque through due process.[43] The security agencies mismanaged the crisis from the inception and in the process forced the group to the extreme end of spectrum.

Uzoigwe observed that the most viable explanation for the insurgency including religious and sectarian violence is the failure of good governance in Nigeria.[44] To be more precise, Boko Haram is a symptom of multiple rationales characterised by corruption, mismanagement and unresponsive government,

---

[41]Yusuf Mohammed, HaziliAqeedatunWaminhajuDa'awatuna, 'This is our belief and method of call' 66 (2009)

[42] Johnnie Carson, Ass. Secretary of State of African Affairs, by (Anon), *US Official: Violence in Nigeria is not about Religion,(Daily Trust* , Lagos, Nigeria 6 April 2012) 29.

[43] Interview with Masta'aMonguno, Mohammed Yusuf vowed to revenge this unlawful act and urged his supporters to use the prison to proselytise, in Marc-Antoine Perouse Montclos Introduction and Review,' *in Boko Haram: Islamism, Politics, Security and the StateiIn Nigeria 2* African Studies Centre (Asc) Institute Francias De RechercheEnAfrique (Ifra) West African Politics and Society Series, 23-24 (October 10, 2010)

[44] See Uzoigwe John Chukwuyere, 'The Constraints of Government Security Agencies in Tackling Terrorism in Nigeria: A Case Study of Boko Haram' (undated) 1<https://www.academia.edu/4210854/the_constraints_of_Government_security_agencies_in_tackling_terrorism_in_nigeria_a_case_study_of_boko_haram> accessed 10 May 2015.

grievances over persistent government corruption and mismanagement, economic injustice and poverty especially in the Northern part of Nigeria.

## 3.0 COMPLICITY BEHIND PROPAGANDA OF BOKO HARAM OPERATIONS

Boko Haram considered Christians and Muslims who do not share their opinion as enemies and genuine targets of assault. There is no doubt that Boko Haram has been assaulting Christians and their places of worship and creating social tension and disharmony between Christians and Muslims in the Northern States of Nigeria. Some Southerners perceived Boko Haram as mechanism for Islamising Nigeria. The leadership of the Christian Association of Nigeria (CAN) has equally considered the insurgency as a ploy to impose Shari'ah and Islam on the country.[45]

El-Rufai, in his reply to whether Boko Haram is real or the metaphor of an agenda against a section of the country, said that without doubt, there is Boko Haram which aims to establish, according to them, a just social system of governance.[46]Any objective observer could not have missed how certain northern politicians, through massive propaganda, have been made to look like the sponsors of the terror group because of their insistence on former President Jonathan to honour the zoning accord of his party, Peoples' Democratic Party (PDP) cleverly avoiding the fact that the terror group's existence preceding the zoning debate. In fact, this deliberate misinformation will benefit those who want to perpetrate the ethno religious division in the north more as these select northern leaders are cast in the mould of the Hausa/Fulani enemies of Christianity bent on enslaving or exterminating the northern minority tribes to engender a Hausa/Fulani hegemony or oligarchy.[47] He further postulated that Boko Haram could possibly be a mix of some Christians and Muslims psychopaths who can do any work for money in the same fashion as there are gangs of armed robbers with membership cutting across religious and ethnic lines.

### 3.1 Specific Acts of Boko Haram Complicity

#### a. Nigerian Borders

The borders of the Nigerian State are not spared from the dire consequences of its porosity. This manifests in the poor management of the nation's borders. The disclosure by a former Minister of Interior, Abba Moro that there are

[45]Human Right Watch, 'Spiraling Violence: Boko Haram Attacks and Security Force Abuses in Nigeria' *(2012)44* Human Right Watch, Chicago.
[46]AminuSarki, 'Nasir El-Rufai Claims Christians are Behind Boko Haram in a Plot to Destabilize the North<http://www.information.com/2012/06/el-rufai-claims-christians-are-behind-boko-haram-plot-to-destablize-the-north.html> accessed 4 August 2015.
[47] ibid.

over 1, 497 illegal and 84 officially identified entry routes into Nigeria, confirmed the very porous state of these borders which permits illicit transnational arms trafficking into the country.[48] It is not surprising that terrorist groups take the advantage of the poorly managed borders for smuggling sophisticated weapons into the country. This is evident by Boko Haram's sophistication in heavy fire power such as anti-aircraft weapons mounted on four-wheel-drive vehicles and by their access to arms smuggled out of Libya which are now used by the insurgents to resist government forces.[49]Imobighe equally opined that Nigerian borders are not effectively manned. The Immigration Service like other security agencies is under staffed, underfunded and ill-equipped to effectively man the borders. Nigeria has about 4,084 illegal entry routes across the borders with its neighbouring West and Central African countries and only about 90 entry routes are officially recognised. He identifies 1,500 illegal entry points along Nigeria's borders with Benin and Niger Republic alone. This makes it possible for terrorists to move through the borders and launch attacks and slip out of the country before the security agencies can react. This has happened severally especially, in Borno state where Boko Haram has concentrated its activities attacking from Cameroon unchecked.[50]

Residents of border communities have been reported to be hostile to immigration officials and other security agencies. They see the agencies as component of government that has no regard for their existence. Basic social amenities like good road network, electricity, portable drinking water, health centres/hospitals, primary and secondary schools among others are lacking in most border communities in Nigeria. As a result, the residents prefer to harbour and aid those who claim to be business men, using the illegal routes to enter the country. Such a situation frustrates efforts of immigration officials and other security agencies to effectively man the borders.[51]

Therefore, the prod of external element squabble is hinged on the thought that foreign terrorist organisations are responsible for the recent terror attacks in Nigeria. This is due to the significant increase in the involvement of illegal aliens in the Boko Haram attacks. Chadians, Malians, among others, have been identified in the nation's recent security challenges in which the new tactics of suicide bombing has been used. It is argued that a true Nigerian will not commit suicide for the sake of achieving a particular goal. The Nigerian government has deported a significant

[48]AT Igidi, 'We'll Build Physical Fences at Illegal Routes into Nigeria'Abba Moro' (*Sunday Trust*, Lagos, Nigeria, 17 April 2013) <http://www.sundaytrust.com.ng/index.php/interview/12387-we-ll-build-physical-fences-at-illegal-routes-into-nigeria-abba moro>accessed ) 10 April 2018.
[49] A Yusuf and G Ogunwale,'Boko Haram Fighters resist Troops with Libyan Arms' (*The Nation, Lagos*, Nigeria, 22 May, 2013)<http://issuu.com/thenation/docs/may-22-2013> accessed 10 April 2018.
[50]T Imobighe, *Nigerian's Defenceand National Security Linkage*, Ibadan (Heineman Educational Book Nigeria Plc 2003).
[51]Ajayi and Nwogwugwu (n 2).

number of illegal aliens in its hope to avert terrorist attacks. For instance, in Lagos, over 50 illegal aliens were handed over to the immigration for screening and onward deportation to their countries.[52]

**b. Source of Finance**

Like other terrorist groups, Boko Haram sustains its operations through diverse sources of funding. Members of the group pay daily levies to their leader, thus providing financial base for Boko Haram. Before the extrajudicial killing of Mohammed Yusuf, members had to pay one hundred naira daily to their leader. The sect claims to have over forty thousand members altogether in Nigeria and some neighbouring countries like Chad, Benin, Cameroon and Niger Republic. The popular members then were predominantly peasant farmers, disaffected northern youth, Professionals, unemployed undergraduates, Islamic clerics, ex-*al-majirai* (children who constantly migrate for purpose of acquiring Quranic education in Hausa language), drop out from universities, traders, road side car washers, some members of the state security agencies who thus assist the group with training and useful intelligence reports and commercial motor cycle/okada riders. Most of these okadas were believed to be owned by Mohammed Yusuf who collected daily returns from them. The activities of the sect become secretive and it becomes difficult for the researcher to survey the nature of commercial activities that the sect engaged in to realise funds and whether the members continue paying dues after the death of their leader.[53]

Another source of revenue to the sect is the donations from some disgruntled government officials, politicians, businessmen and other individuals and organisations within Nigeria. For instance, on 5 January 2011, the Nigerian police celebrated what it described as a landmark achievement when security operatives arrested AlhajiBunu Wakil and 91 other persons. Alhaji Wakil is a contractor and indigene of Borno state. He was alleged to be a major financier of the Islamic sect.[54] Also, on 24 November, 2011, state security operative arrested a former Senator, representing Borno South senatorial district, Mohammed Ali Ndume, who was subsequently arraigned before an Abuja High Court for ties with and sponsorship of

[52]I Kareem, 'Fear of Boko Haram: Mass Deportation of Illegal Aliens' *P. M .News* Nigeria, 2013) <http://pmnewsnigeria.com/2013/03/26/fear-of-boko-haram-mass-deportation-of-illegal-aliens> accessed 6 April 2018

[53]C Ajaero, 'A Thorn in the Flesh of Nation' *Newswatch* Nigeria, 21 November 2011).

[54]Hamza, Maiduguri and Adebayo, (n 31).

Boko Haram.[55] He was tried under the provision of the Terrorism Prevention Act, 2011 but has been discharged and acquitted.

The sect has been alleged of receiving financial assistance from foreign terrorist networks. A good example, in 2007, Mohammed Damagun, the proprietor of *DAILY Trust* Newspapers group, was arraigned before a high court in Abuja on a-three count charge, to wit: belonging to Nigerian Taliban, receiving a total sum of 300, 000 USD from Al-Qaeda to recruit and train Nigerians in Mauritania for terrorism and aiding terrorist in Nigeria. However, charges against him were later dropped by the court. Mohammed Yusuf was arraigned on five count charges which included receiving money from Al-Qeada operatives in Pakistan to recruit terrorists to attack foreigners, especially Americans, living in Nigeria.[56] In an interview in January, 2012, a self-identified spoke man for Boko Haram, AbulQeada, informed the *Guardian Newspaper* that they are the spiritual followers of Al-Qeada and late Osama bin Laden, and that their leader, Mohammed AbubakarShekau had met Al-Qeada leaders in Saudi Arabia in August, 2011 and was able to obtain financial and technical support needed from Al-Qeada. It is very difficult to ascertain the authenticity of the claims by AbulQeaqa that they received this support. However, it could be one of the propaganda employed by the sect to attract more attentions or to even scare the West.[57] In spite of the fact that the issue of external financial assistance to Boko Haram remains nebulous, US Homeland Security Department officials contends that the groups like Boko Haram are being influenced and financed by extremist foreign religious leaders and groups. Evidence emerged during the trial of Kabiru AbubakarDikko Umar, Known as 'KabiruSokoto" before the Federal High Court, Abuja in 2011. A prosecution witness informed the court that "KabiruSokoto," in his statement, included details of funding received by the sect from an Islamic group, MuslimiYaa'maa, based in Algeria and how the funds led to the fragmentation of Boko Haram, following disagreements over the sharing of the money.[58]

Furthermore, Boko Haram equally relied on criminality like banks raiding or supporting robbery gangs to raid banks to finance its operations. Sheriff Shettima, a member of robbery gang who was arrested by the police in 2011 confessed that his gang was responsible for some robbery operations in Borno State

[55]Ike Abonyi, 'Boko Haram: Senator Ali Ndume Charged to Court' (*This Day*, Lagos, Nigeria 22 November 2011).
[56]Onuoha C. Freddom, 'Combating the Financing of Boko Haram Extremism in Nigeria' (2011) 2 (1) African Journal for the Preventing and Combating of Terrorism, 89-121.
[57]Onuoha (n 29) 164.
[58]Tobi Soniyi, 'Muhammed Bello &YemiAkinsuyi, KabiruSokoto Trial: Sharing of Funds Spilt Boko Haram' (*This Day*, Lagos Nigeria, 10 May 2013)7.

to raise funds to finance Boko Haram operations. He claimed that, his gang raided the Damboa branch of First Bank Nigeria Plc on 12 October, 2011. He stated further that during the raid, a policeman was killed and12 million naira was chatted away.[59]It is important to state here that out of about 100 bank branches attacked by armed robbers in Nigeria in 2011, over 30 of the attacks were attributed to Boko Haram.[60] Boko Haram subscribed to the principle of Fa'I, the religious argument used by extremists to justify the robbing of banks and jewelry shops to finance their jihadist operations. 'KabiruSokoto" has equally confirmed that the sect raises funds for its operations through banks robbery. The booties from banks robbery are usually shared among five groups: the less privileged, widows of those that have died in the jihad, zakat, those that brought in the money and the leadership for use to prosecute the jihad.[61]

The security agencies have tightened the noose on the known funding streams of the sect. As a result of this, the sect may eventually resort to other criminal activities such as car theft, kidnapping, pipeline vandalism, illicit trafficking in arms and narcotics and offering protection rackets for criminal networks to raise funds for the survival of its members and for the sustenance of its operations.[62]

**c. Compromise among Security Agencies**

The efforts of the federal government to tackle the Boko Haram insurgence will to some extent be insufficient and intransigent without tackling the root causes of the conflicts. Since the beginning of the Boko Haram insurgence, the federal government has engaged in a severe battle with Boko Haram and maintained heavy police and military presence in Borno, Yobe, Adamawa and other neighbouring States in an attempt to eradicate Boko Haram. One of the efforts of the governments to curb the insurgency is the formation of anti-terrorist squad otherwise called Joint Task Force (JTF) in 2011, a special security unit trained purposely to counter terrorism. The security agencies despite the marshalling of Joint Task Force in the affected States have not achieved the target of halting the terrorist group. There are reports of military and other security agencies being compromised (a position equally shared by the Special Forces from United States that came to Nigeria to

[59]J Bwala, 'Bok Haram Wraps Bombs as Sallah Gifts' (*Nigerian Tribune*, Ibadan, Nigeria, 3 November 2011) <http://www.tribune.com.ng/index.php/front-page-news/30668-boko-haram-wraps-bombs-as-sallah-gifts-police-arrest-bomb-makers-recover-bombs-guns> accessed 13 June 2016.
[60]Boko Haram, 'Armed Robbers Attacked 100 Bank Branches' (*This Day*, Lagos, Nigeria, 10 December 2011) 6.
[61]Yusuf A,'KabiruSokoto Names Boko Haram's Leaders' (*The Nation* Lagos, Nigeria, 14 February 2012) <http://www.thenationonlineng.net/2011/index.php/news/36766-kabiru-sokoto-names-boko-haram%E280%99S-leaders.html> accessed 13 June 2016.
[62]Freedom, (n 29) 265.

assist in rescuing the abducted Chibok school girls), which resulted in several efforts being sabotaged, making the security agencies seem incapable of curbing the insurgency.

**d. Failure of the Nigerian State**

The Nigerian State is unable to discharge many of its statutory functions, including those to ensuring development, guaranteeing welfare, minimising corruption and regulating people's monopoly of violence. The implication of these contradictions and social pathologies arising from the complicity of the Nigerian State is that, if good governance concurrent with development is not employed as curative to past government ills, the Nigerian State will further create a much more enabling environment for the growth of more terrorist groups than Boko Haram sect. It is not only that these stark realities have not been taken into consideration by the leaders of Nigeria's counter-terrorism Committee, but also they have not hesitated to do so at the expense of peace and have thus left the strategy of counter terrorism grappling with symptoms rather than tackling the menace.[63]

## 4.0 BOKO HARAM INSURGENCE AND CHALLENGES TO GOOD GOVERNANCE

Nigeria has witnessed immeasurable damage in every facet of life since the emergence of Boko Haram. There is no doubt that it has slowed down the national economic growth, good governance and sustainable development because no investors would prefer to invest in a nation ridden in crisis. More so, huge amount of money which ought to have gone into provision of social amenities goes for security. It has further heightened the problems associated with the relocation of Multinational Companies to other Africa countries like Ghana due to infrastructural decay. One of the noticeable challenges has been the tendency to worsen unemployment leading to youth restiveness, thereby making crime a profitable venture and attractive.[64]

Good governance relies on principles of accountability, anti-corruption and thoroughness on the part of the government. For the government to be accountable, it must come out with initiative such as establishment of anti-corruption commission to check the excesses of corrupt practices, create mechanisms of information sharing, monitoring government use of public funds and policies implementation. The anti-corruption institutions in Nigeria like Economic and

[63]Efehi R Okoro, 'Terrorism and Government Crisis: The Boko Haram Experience in Nigeria' (2014) 103-127, 121 <https://www.ajol.info/index.php/ajc/article/download/11365/103082> accessed 7 April 2018.
[64]Uzoigwe&Chukwuyere (n 41) 26.

Finance Crimes Commission, serve as oppression to opposition parties instead of playing their role in checking the excesses of all corrupt practices. The agency has been making selective arrest and prosecution leaving numerous members of ruling party unaffected.[65]

It also has negative effect on tourism industry as the nation loses huge foreign currency that could have accrued from this sector. Boko Haram has led to food scarcity in Nigeria and this has been experienced since July 2012 when the prices of food items and vegetables skyrocketed in Nigeria.[66] This was as a result of inability of traders from the North to transport commodities due to general insecurity in the place to other parts of the country.

The government has not paid attention to the dangerous nature of exodus that is currently experienced in Nigeria for the first time. In this instance, it is not the Southerners alone that are migrating from the North but also the Northerners are migrating from the North on account of insecurity. Most of the migrants from the North are in their productive age who are mainly farmers and trades men and women by profession. Uzoigwe opined that most of the Okada riders in the Western States are of Northern extraction. The danger is that, they have abandoned their profession (farming) as this reduces food production and compound the problem of food importation.[67] For the past few years, Nigeria spends over 20 billion dollars yearly on importation of food items like sugar, wheat and rice. Though, former President Jonathan said that the situation was unacceptable the long run effects of the insurgence had not been given justifiable attention as governments in Nigeria pay lip services to agricultural revolution. This explained why President Muhammadu Buhari banned importation of rice to Nigeria in 2017.

Furthermore, there is no doubt that the immigrants will put additional pressure on the host communities in terms of infrastructure and security challenges. With the banning of Okada riders on major roads in places like Lagos, the Eastern parts of the nation may be a viable alternative and there is the tendency that the immigrants may constitute security threat and take to crime as a means of livelihood. Ilorin, the Kwara state capital is feeling the purse of decision of Lagos State Government, banning Okada riders and extraditing beggars from its land. Kwara State now remains the alternative settlement for them thereby posing unprecedented security challenge. More than that, such frustrated elements might easily be influenced to serve as agents for the Boko Haram in the South. Any successful attack by the sect in the south might lead to reprisal, the effect of which might not be predictable with

[65]DanjumaAbdullahi, 'Good Governance as Panacea to the Socio-Economic Crisis in Nigeria' (2012) 2 (3) *IOSR Journal of Business and Management* 36-40, 41.
[66] See Nigeria Food Security Outlook, 2013.
[67]JUzoigwe&Chukwuyere (n 41) 24.

respect to good governance and corporate existence of Nigeria. The insurgency has the tendency to lead more Nigerians into poverty. Presently, many able bodied Nigerians have been rendered jobless, particularly in North East of Nigeria. If the scourge is not tackled, many more able hands will be rendered jobless because of the high rate of migration and this will eventually pose serious security challenges. In an attempt to address insecurity, there is the tendency for government to increase its spending on security, while resources would be diverted from socio-economic development programmes that could transform the nation.

More so, Boko Haram insurgence may affect the corporate image of Nigeria within committee of nations. Internationally, the image of the nation is dented while prostitution, crime, drug trafficking, fraud and high level of corruption are the issues that are negatively affecting the reputation of Nigeria and Nigerians anywhere in the world. For a decade, efforts were made without success to rebrand the shattered image of Nigeria. There is no amount of image laundering that can change the impression of the international community if negative news on daily basis emanate from the nation. The activities of the Boko Haram in Nigeria have also led to palpable fear among the citizenry and high sense of insecurity due to regular loss of lives and damage to properties and infrastructures on account of bombings and reported cases of assassination. This shows that there is no good governance and that government is helpless and incapable of handling the situation as this has left the populace at the mercy of bloodthirsty sect and everybody to himself. The attacks by the sect showed that it has no respect for any establishment including Mosques and Churches, Security agencies, International agencies, Press, Private individuals and Emirs. It has left the impression that nobody is safe while it questioned their avowed commitment to Islamic revival.

Furthermore, the experience of Miss Agnes Agwuocha, a seventeen-year old student in Kano captured the state of palpable fear when she narrated her experience as follows:

> We are afraid of Boko Haram. Daddy and Mummy keep awake all night in case the attackers decide to invade our home. They would lock all the doors tightly, pray all night and ask us to sleep. However, we never can, for we do not know what will happen next…. They said we would soon go home, so we are waiting.[68]

Lastly, the insecurity also has the tendency to breed religious unrest because of multitude of attacks on churches and on Muslim praying grounds.

[68]ibid 26.

## 5.0 CONCLUSION AND RECOMMENDATIONS

Recently, the Federal Government set up a committee to constructively engage key members of Boko Haram and define a comprehensive and workable framework for resolving the crisis of insecurity in the country. The President also approved constitution of the Federal Government Committee on the Proliferation of Small Arms in keeping with his pledge that Nigeria will work with the United Nations and other countries to stem the worrisome proliferation of small arms and light weapons and their use in creating insecurity in Nigeria and other countries. However, the President has been criticized for using forced-based approach which has compounded the problem without any meaningful results. The crisis continues to aggravate with many sporadic attacks causing more deaths and destruction of property. More significantly, the failure to end the insurgency has exposed the operational constraints of the Nigerian security services, further raising questions regarding the ability of the government to respond to the threat. Accordingly, there appears to be no end in sight for the deadly attacks masterminded by Boko Haram as the group continues to cause more casualties and increase in lethality in its assault. Unquestionably, the use of heavy-handed tactics and the over-reliance on forces has hindered any chances of a negotiated settlement and peace because it is not addressing the underlying grievances fueling the crises.

Although, there have been some attempts in the past to engage in dialogue with the Islamic sect, it has not yielded any success due to lack of political will on the part of the federal government. Past mediating efforts by President Olusegun Obasanjo with the Islamic sect, for instance, stalled when one of Boko Haram‘s interlocutors was killed by the military shortly after a meeting with government representatives. Besides, former President Goodluck Jonathan has also challenged Boko Haram to come forward and state their demands as a basis for dialogue. Then, members of the Islamic sect remain highly suspicious of the government‘s offer to discuss their grievances because of the betrayal they allegedly experienced in the past.. Some have also called on the federal government for unconditional release of all of their members detained in the various prisons across the country before they can accept any dialogue. But will this be feasible?[69]

It has been argued that the sect may be impossible to overcome, based on realities on ground which suggest that government did not hold much advantage in terms of morale or strategy or even fire power.[70] Beyond this, there are also doubts

[69]ibid, 29.
[70]David Zounmenou and Kane Mouhamadu, ‘Nigeria’s Fight against Boko Haram: How can France Help? (11 March 2014) Research on Islam and Muslim in Africa,ISS Today, 2014 <https://www.issafrica.org/iss-today/htm/20/3/2014> accessed 13 April 2018.

about government's capacity to win the war on the field if the root causes of the conflict are not effectively addressed. It has been pointed out that the real causes of Boko Haram phenomenon are not to be located in religion or electoral politics but in the socio-economic conditions of the North occasioned by the failure of the governance in the country. It is the people's disenchantment with the lack of inclusive governance in the country, coupled with the extreme poverty, particularly, in the North that is at the root of Boko Haram menace.[71] This was reinforced by pervasive police brutality against members of the sect that actually drove the sect into taking up arms. Lack of inclusiveness and violence have reflected the nature and character of the state in Nigeria even from the very beginning.

In order to curb the activities of Boko Haram, the Nigerian government needs to take drastic effort to eradicate poverty and social injustice through good governance that is accountable to the citizens. There is need to pay attention to the causes of the crisis and improve living condition of citizens in Nigeria, particularly in the North instead of focusing on military repression. There is need for sustainable development, mass economic empowerment, skills acquisition and effective administration.

To subdue the insurgency, the security agencies need to purge themselves of some disgruntle elements. Security should be taken as every person's business. Therefore, there is need for well-trained community policing officers for effective means of promoting public safety and to enhance the quality of life in their neighborhoods.

The ruling elites have to completely change their ways and assume responsibility for the masses, improving the living condition and bringing social justice. If this cannot be done urgently, Nigeria may eventually fall apart and political class would lose its sources of income.

The federal government must take urgent step to block all sources of funds to the sect, otherwise, all efforts to subdue it will be a mirage. Coupled with this, government should take responsibility to tightening Nigerian borders to avoid further intrusion of illegal immigrants to Nigeria. The immigration sector needs to be more strengthened in terms of funding, staffing and equipment. The residents at Nigerian borders must be taken care of in terms of provisions for their social needs

[71]United States, 'Federal Government not Supporting Northern Governors' Development Efforts' (*The Punch* Lagos, Nigeria, 2 May 2014) 3.

in order to consider themselves as part of efforts to overcome unwanted ingression of members of Boko Haram from neighbouring countries.

There is need for initiation of robust economic, political and religious reforms. Political reforms would target strengthening governance processes and institutions to ensure transparency, accountability and responsive ways that would increase the legitimacy of government at all levels in Nigeria. Economic reforms involve rolling out robust interventions that will drastically reduce poverty, unemployment and social destitution in northern Nigeria which extremists have exploited in their recruitment and radicalization derives. Religious aspect requires a national project by the government to counter ideological support for extremism and terrorism, focusing on monitoring religious sermons, supporting moderate Islamic scholars to deliver enlightenment programmes, scrutinizing foreign aids for religious underpinning and encouraging the teaching of comparative religion in Nigerian schools at all levels.[72]

Lastly, our political elites must be ready to provide quality and good governance as magic potion for the insecurity challenge in Nigeria. War against insecurity could be won by raising governance standard through cultivating the culture of good governance where the government is responsible and accountable to the people. Security arrangement cannot be separated from good governance. Many others have linked security to good governance system. The general opinion is that peace and security is determined by good governance. Security is every person's business. Therefore, there is need for well-trained community policing officers as an effective means of promoting public safety and enhancing the quality of life of the citizenry.

[72]Wahab O Egbewole and Hanafi A Hammed, 'Curbing Religious Extremism of Boko Haram Insurgence in Nigeria: Judicial Interventionism and Human Rights Absolutism' (2018) *Religion, Law and Security in Africa* 1-19, 18.

# IMPLEMENTATION OF SDGS IN NIGERIA: ISSUES AND CHALLENGES

**OLADIRAN AKINSOLA AYODELE & MARUF ADENIYI NASIR**[1]

**Abstract**

*It is a notorious fact that development is not even among countries of the world. The gap is more noticeable in the developing countries, especially in Africa. The United Nations, dissatisfied with this situation, has set up various developmental agenda aimed at fast tracking development in less developed countries of the world. This move for development is notably seen in Stockholm, Sweden, and Rio where declarations have been made on development agenda to ensure sustainable development. Nigeria is not left out in the global effort to ensure sustainable development. Therefore, the Nigerian government has enacted different laws to ensure full implementation of development goals. However, despite the recognition of Sustainable Development Goals (SDGs) in various legal instruments, their implementation has posed a big challenge. Hence, this paper examines the provisions for sustainable development under the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and the federal environmental laws. The paper discusses implementation challenges resulting from lack of commitment towards a genuine implementation of the SDGs in Nigeria. It recommends that government and other institutions should ensure that the laws are implemented to ensure a full realization of SDGs in the country.*

**Keywords:** Development, Sustainable Development, Socio-Economic Sustainability, Corruption.

## 1.0 INTRODUCTION

Sustainable development is a relatively new concept which developed as a result of increased concern shown for the protection of the environment because of growth in population which resulted in increase in production and consumption.[2] Globally, it became apparent that the cumulative negative environmental effects of

[1] O. A Ayodele, (LL.D), Department of Business and Private Law, College of Law, Osun State University(Ifetedo Campus),Osogbo, Nigeria oladiran.ayodele@uniosun.edu.ng 08035399396 and Maruf Adeniyi Nasir, (Ph.D), Ag Head, Department of Public and International Law, College of Law, Osun State University (Ifetedo Campus), Osogbo, Nigeria adeniyinasir@uniosun.edu.ng +2348062511875.

[2] W Alan Strong and Lesley A Hemphill, Sustainable Development Policy Directory (Wiley 2006) 422.

human activities were going to be unsustainable in the long term. The increased awareness resulted in environmental movement of the 1960s which resulted in a massive legal response.[3]For instance, in 1972 the United Nations (UN) organized a conference on Human Environment in Stockholm, Sweden. The conference emphasized that the protection of human environment was a crucial element in the development agenda.[4] At Stockholm, it became obligatory for the UN Members to conduct environmental impact assessment before starting any activity that could affect the environment.[5]

In 1987, the UN released the Brundt land Commission Report tagged "our Common Future". It was all about how to maintain the delicate balance between development of mineral resources and the environment. Protection and improvement of the human environment are some of the major issues affecting the well-being and economic development of people throughout the world.[6]For example, the exploration and development of petroleum resources in Nigeria starting from 1956 has left the Niger Delta environment devastated.[7]

The Sustainable Development Goals (SDGs) therefore aim at tackling key systematic barriers to sustainable development, such as inequality, poverty, unsustainable consumption and production patterns, inadequate infrastructure and lack of decent jobs. The world leaders have launched various plans to drive development globally. The UN has set out a new, universal set of goals, targets and indicators that Members of the Organisation will be expected to use to frame their agenda and political policies. Furthermore, the UN, in its bid to drive development globally, has made sustainable development the guiding principle which aims at achieving development globally by 2030.

## 2.0 SUSTAINABLE DEVELOPMENT GOALS

In the year 2000, the UN Members developed an agenda for global development known as the Millennium Development Goals (MDGs). A total of eight MDGs were developed and they were meant to reduce poverty and hunger;

[3]J William Futrell, 'Environmental Ethics, Legal Ethics and Codes of Professional Responsibility' (1994) 27 Loy. L. A. L. Rev. 825.
[4]P Rogers, Jalal and Boydan, Introduction to Sustainable Development (Earthscan, 2012).
[5]M Getu,'Defiance of Environmental Governance: Environmental Impact Assessment in Ethiopian Floriculture Industry' (2013) 4(4) EJERM 220-221.
[6] TB Ayana and WD Sima 'Sustainable Development Laws in Ethiopia: Opportunities and Challengesof their Implementation" 9 *AfeBabalola University Journal of Sustainable Development Law& Policy* 2, 26.
[7] OA Ayodele,*A Comparative Study of the Legal Framework Governing Oil and Gas Exploration in Nigeria* (LLD Dissertation NWU, South Africa 2018) 169.

achieve universal education; promote gender equality; reduce child and maternal deaths; combat HIV, malaria and other diseases; ensure environmental sustainability; and develop global partnerships, but failed to consider the root causes of poverty. They also overlooked gender inequality as well as the holistic nature of development. The goals made no mention of human rights and did not specifically address economic development. While the MDGs, in theory, applied to all countries, in reality they were considered targets for poor countries to achieve, with finance from wealthy States. However, by 2015 (15 years after) MDGs have not achieved the expected results hence the world leaders gathered to formulate SDGs as new development agenda globally. Under the new agenda, every country will be expected to work towards achieving the SDGs. The SDGs' 17 initiatives are aimed at transforming the world by 2030.

As of 2015 when MDGs deadline was approaching, about 1 billion people still lived on less than $1.25 a day[8] and more than 800 million people did not have enough food to eat. Women were still fighting hard for their rights, and millions of women were still dying in childbirth. The States agreed under the banner of UN in 2012 in Rio+20 that a new integrated agenda beyond 2015 that would ensure the promotion of an economically, socially and environmentally viable future for our planet and for present and future generations should be embarked upon. Furthermore, during the first United Nations Environment Assembly (UNEA-1), in June 2014, Ministers from UN Members concluded that the post-2015 sustainable development agenda should fully integrate economic, social and environmental dimensions in a "coherent, holistic, comprehensive and balanced manner".[9]The SDGs' 17 initiatives are aimed at transforming the world by 2030.

What was agreed upon was a plan of action for people, planet and its well being. It is to strengthen universal peace. It was to eradicate poverty in all its ramifications, which is the greatest global challenge and an indispensable requirement for sustainable development. It is expected that all countries and stakeholders are to collaborate in implementing these plans of action. The 17 Sustainable Development Goals, have attached to them 169 targets. However, goals 2, 3, 9 and 11 to 15 are related to environmental and natural resources protection. They are: End hunger, achieve food security and improved nutrition, and promote sustainable agriculture; Ensure healthy lives and promote well–being for all at all ages; Build resilient infrastructure, promote inclusive and sustainable industrialisation, and foster innovation; Make cities and human settlements

[8]The World Bank measure on poverty.
[9] Our Planet "The three Dimensions of Sustainable Development" www.unep.org/post2015, accessed 04 September 2018.

inclusive, safe, resilient and sustainable; Ensure sustainable consumption and production patterns; Take urgent action to combat climate change and its impacts (taking note of agreements made by the UNFCCC forum); Conserve and use the oceans, seas and marine resources for sustainable development; and Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification and halt and reverse land degradation, and halt biodiversity loss respectively. These goals are therefore given prominence in this paper.

## 3.0 WHAT IS SUSTAINABLE DEVELOPMENT?

For a better understanding of sustainable development, this paper will first attempt the definition of development.

### 3.1 Development

It can be said to be the advancement of life of persons living in a particular place which enables him\her to access the good things of life or the needs of his\her life with minimum labour, cost and time.[10] This view is reinforced by Rodney who also defined development as follows:

> *…At the level of the individual, it implies increased skill and capacity, greater freedom, creativity, self-discipline, responsibility and material well-being.*[11]

The World Bank Development Report[12]views development in relation with the people or a society, which includes the attainment of basic qualities in the areas of good health, good education, environmental security, liberty, economic empowerment and high level expectancy. A community is assessed to be developed when it evolves its own easier ways of meeting the above mentioned targets by their individual efforts. In his further analysis of the concept of development Claude Ake stated thus:

> Development is the attainment of an easier and higher standard of life set by the developer in accordance with his aspiration value and need ... the developer's effort must be involved both in formulating the higher goal and in implementing it, for it to be development. In other words, Government dashed projects do not engender development, unless the people are involved in the

[10] SE Abila and DK Derri, 'Sustainable Development Issues in the Niger Delta' in Festus Emiri and Gowon Deinduomo (edns.),*Law and Petroleum Industry in Nigeria: Current Challenges*(Malthouse Law Books 2009) 230.

[11]R Walter, *How Europe Underdeveloped Africa* (Panaf Publishing Inc, Abuja) 1.

[12] World Bank, *World Development Report*(1991) 4.

formulation, execution, utilization and maintenance of such projects.[13]

### 3.2 Sustainable Development

The Sustainable Development Goals (SDGs), otherwise known as the Global Goals, are a universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity. In 1987 the World Commission on Environment and Development published its report, *Our Common Future,* and in an effort to link the issues of economic development and environmental stability defined Sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'[14]

The concept of sustainable development aims to maintain economic advancement and progress while protecting the long-term value of the environment. It provides a framework for the integration of environment policies and development strategies[15] It is important to point out that sustainable development emphasizes the importance of intergenerational equity, that is, the concept of conserving resources for future generations is one of the major features that distinguish sustainable development policy from traditional environmental policy, which also seeks to internalise the externalities of environmental degradation. Therefore, the overall goal of sustainable development (SD) is the long-term stability of the economy and environment; this is only achievable through the integration and acknowledgement of economic, environmental, and social concerns through the decision making process.[16]

Apart from intergenerational equity, governments are also encouraged to require polluting entities to bear the costs of their pollution rather than impose those costs on others or on the environment. The principle requires that the company/polluter that pollutes the environment should be made to pay compensation to victims and be responsible for the cost of remediating the environment.[17] It imposes liability on the polluter whether or not the polluter is at fault especially in matters of oil pollution and gas flaring. The polluter is strictly liable for its harmful act even if all reasonable care is taken. Sometimes the damage

[13] C Ake, *Democracy and Development in Africa* (First Printed by Bookings Institution 1996 ,Reprinted by Spectrum Books Ltd 2001) 125-129.
[14] ibid.
[15] United Nations General Assembly, 1987.
[16] REmas, Brief for GSDR (2015) 'the Concept of Sustainable Development: Definition and Defining Principles' 2.
[17] Ayodele (n 7).

caused by the polluter is beyond its capacity and that is why trust funds are usually set up to mitigate large-scale environmental degradation. Although this principle has been incorporated into the statute books, Nigeria is yet to join other advanced economies where such trust funds are established to compensate and remediate the environment.[18]

There is also the precautionary approach which is vital to sustainable development in that it enjoins states, international organisations and the civil society, particularly the scientific and business communities, to avoid human activities which may cause substantial harm to human health, natural resources or ecosystems.[19] The precautionary principle establishes that 'where there are threats of serious or irreversible damage; lack of full scientific certainty shall not be used as a reason for postponing cost effective measure to prevent environmental degradation.'[20] Thus, the promoter of an activity bears the burden of proving that this action will not cause major damage. Clearly stated in the Rio Declaration, the notion of common but differentiated responsibilities recognises that each country must play its role on the issue of sustainable development. This principle also acknowledges the different contributions to environmental degradation by developed and developing nations, while appreciating the future development needs of the less developed countries.[21] Developed nations, therefore, bear greater responsibility in the light of the resources they require and the pressures they exert on the environment.

## 4.0 SUSTAINABLE DEVELOPMENT IN NIGERIA

The Constitution of Federal Republic of Nigeria (CFRN), 1999 [as amended] has adequately provided for sustainable development. For instance, the Constitution states that the Federal Republic of Nigeria is 'a State based on the principles of democracy and social justice'. It promises justice to all Nigerians encompassing the social, economic, political development and equal opportunity for all and sundry. It emphasises healthy environment as the corner stone for sustainable development. Section 20 (2) of the Constitution states that; 'the State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria.' But, how well has Nigeria fared in achieving sustainable development?

[18]For instance, United States of America sets up Trust Fund to remediate the environment when it is polluted as result of exploitation of mineral resources.
[19]Ayodele (n 7) 201.
[20]United Nations Conference on the Human Environment, 1992.
[21]ibid.

Nigeria can be said to have achieved steady growth in agriculture. It has witnessed economic development especially between 2002 and 2011; the economy grew at an average of 6.2 percent[22], but Nigeria's population has also increased tremendously thereby posing some challenges to the provision of basic services for all, despite government efforts, particularly in terms of safe water and sanitation. As a result there has been an increasing pressure on the environment as a result of indiscriminate exploitation of the natural resources by the growing population. Nigeria's environment is presently under increasing threat from natural and human-induced disasters such as drought, floods and erosion as result of air and water pollution. In order to meet these development challenges and follow the path of sustainable development Nigeria has put in place policies and programmes to hasten economic development and enhanced good environmental management. It has also strengthened institutional and legal frameworks necessary for sustainable development

Furthermore, in order to revamp the economy the Nigerian government has articulated the Vision 2020, targets to catapult Nigeria into the league of the first global 20 economies by the year 2020. The vision 2020 was launched at the national level as- the **National Economic Empowerment and Development Strategy (NEEDS)**, at the state level as- **State Economic Empowerment and Development Strategy (SEEDS)** and **Local Economic Empowerment and Development Strategy (LEEDS)** at the local government level to ensure the implementation of the SDGs. In view of the importance of SDGs to development, Nigeria also introduced environmental-related laws to achieve sustainable development. With the introduction of these laws, has Nigeria fared well in the implementation of the laws? This paper, in the next segment, examines the National Policy on Environment, the provision for sustainable development under the CFRN,1999 and other environmental related laws with a view to determining the extent to which the laws conform to sustainable development initiatives.

**5.0 NATIONAL POLICY ON ENVIRONMENT**

Nigeria has embraced SDGs and has put in place a national policy towards the implementation of the programme. Nigeria is blessed with abundant natural resources. The government over the years has embarked on exploration and exploitation of these resources for economic development of the country. However, these resources are exploited indiscriminately leading to environmental degradation, depletion of ozone layer and global warming. Oil spillages pollute land and water rendering agricultural infertile and destroying aquatic animals. Indiscriminate bush burning and felling of timber have exposed the earth to leaching, erosion and

[22]Federal Government of Nigeria, 'Nigeria's Path to Sustainable Development through Green Economy' (2012) *Country Report to the Rio+20 Summit* 16.

flooding which are inimical to human health.[23] In order to prevent indiscriminate exploitation of the resources and safeguard the environment, the government has formulated the National Policy on Environment. The goal of the revised 1999 Policy is to achieve sustainable development in Nigeria and, in particular to:

i. Secure for all Nigerians a quality environment adequate for their health and well-being.
ii. Conserve and use the environment and natural resources for the benefit of present and future generations.
iii. Restore, maintain and enhance ecosystems and ecological processes essential for the functioning of the biosphere and for the preservation of biological diversity and to adopt the principle of optimum sustainable yield in the use of living natural resources and ecosystems.
iv. Raise public awareness and promote understanding of essential linkages between environment and development and to encourage individual and community participation in environmental improvement efforts.
v. Co-operate in good faith with other countries, international organisations and agencies to achieve optimal use of trans-boundary natural resources and effective prevention or abatement of trans-boundary environmental pollution.

The basis of national environmental policy can be found in the CFRN, 1999. According to section 20 of the Constitution, 'the State is empowered to protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria'. Also, section 2 of the Environmental Impact Assessment Act of 1992 (EIA Act) provides that 'the public or private sector of the economy shall not embark on or authorise projects or activities without prior consideration of the effect on the environment, that is without subjecting it to environmental Impact Assessment'.

## 6.0 SDGs PROVISIONS UNDER NIGERIAN LAW

Nigeria enacted some laws to ensure that SDGs are implemented. Some of these laws are: *CFRN 1999*, *Environmental Impact Assessment Act* (EIA Act) 2004, National Oil Spill Detection and Response Agency (NOSDRA), *National Environmental Standards and Regulations Enforcement Agency (NESREA) Act 2007, and* Nigeria Extractive Industries Transparency Initiative (NEITI) 2007. The Constitution has also made copious provisions for the implementation of SDGs. This paper will in turn discuss these laws.

[23]EI Wonah, 'The State, Environmental Policy And Sustainable Development in Nigeria' (2017) 5(3) *Global Journal of Arts, Humanities and Social Sciences* 28.

**6.1 Constitution of Federal Republic of Nigeria 1999**

Although, in Nigeria, the 1999 Constitution does not expressly provide for a
right to a clean environment, the protection of the right to life under section 33 includes the right to an environment not detrimental to the right itself. Furthermore, section 20 of the Constitution provides that the State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria. Section 36 of the Constitution protects the right to a fair hearing within a reasonable time by a court of competent jurisdiction or other tribunal established by law. The right to seek redress for violation or threatened violation of an individual's fundamental rights is provided for in section 46 and gives the High Court original jurisdiction to entertain such applications. There is a right of appeal to the Court of Appeal and finally to the Supreme Court on points of law and constitutionality under sections 241 (1) and 233 respectively. These constitutional provisions guarantee citizen's right to a healthy environment.

To ensure healthy lives and promote well–being for all at all ages, section 33 of the Constitution provides for right to life. Provisions are also made to end hunger, achieve food security, improve nutrition and promote sustainable agriculture.[24] The Constitution aims to build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation.[25]

Economic objectives are provided for in section 16 of the Nigerian Constitution. The Constitution states, among other things, that the State shall, within the context of the ideals and objectives for which provisions are made in this Constitution-

(a) harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy;

(b) control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity;

(c) without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy, manage and operate the major sectors of the economy;

[24] See generally CFRN 1999, ss 16(2), 17(3) & 34.
[25]ibid ss 16(1) (a)-(d) & 16(2) (a)-(c).

(d) without prejudice to the right of any person to participate in areas of the economy within the major sector of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.

The Constitution also makes copious provisions to ensure social development. Section 17(1) of the Constitution states that 'the State social order is founded on ideals of Freedom, Equality and Justice.' Pursuant to this objective, the Constitution provides, *inter alia*, that:

(a) every citizen shall have equality of rights, obligations and opportunities before the law;

(b) the sanctity of the human person shall be recognised and human dignity shall be maintained and enhanced.

To achieve these lofty objectives the Constitution directs the State to ensure through its policy that 'all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment.'

### 6.2 **Sustainable Development under Environmental Impact Assessment Act 1992**

Environmental Impact Assessment came up in response to pollution and degradation of the environment caused by rapid and unsustainable exploration and exploitation of minerals resources, industrialisation, agricultural development, and technological process.[26]The Federal Government in response to environmental degradation majorly caused by oil spillage and gas flaring enacted the Environmental Impact Assessment Act (EIA Act)[27] to curb the menace of oil spillage and gas flaring in the country. It is important to mention here that the essence of an environmental impact assessment is to assess what the impacts oil and gas and other mineral resources exploration and exploitation could have on the environment.[28] Thus, the assessment ought to be done before the commencement of the project. The EIA Act makes conducting an EIA study mandatory before an oil and gas project can be commenced.[29] Environmental Impact Assessment is to be

[26]Jennifer C. Li, "Environmental Impact Assessments in Developing Countries: An Opportunity for Greater Environmental Security?" (Working paper 4, 2008) 5.
[27]Environmental Impact Assessment Act, E12 Laws of the Federation of Nigeria 2004.
[28]AK Usman, *Environmental Protection Law and Practice* (1[st]edn.Ababa Press Ltd. 2012) 5.
[29]EIA Act, s 22.

carried out with a view to determining the nature of the project and to what extent the project will affect the environment.[30] EIA studies apply not only to private projects, but also to projects being carried out by public institutions.[31]Further, section 59 of the Act[32]recognises the principle of access to justice as it makes provisions for judicial review, apparently without the usual impediment of the *locus standi* rule.

Oil and gas constitute a major source of environmental degradation in Nigeria and as such special guidelines and standards were made which are referred to as Environmental Guidelines and Standards for the Petroleum Industry (hereinafter referred to as 'EGASPIN'). However, there is a closed category of projects that do not require EIA studies:

(i) Projects that the President or the Federal Environmental Protection Council feels are likely to have minimal environmental effect.
(ii) Projects carried out during national emergencies.
(iii) Projects carried out in circumstances that, in the opinion of the National Environmental Standards & Regulations Enforcement Agency are in the interest of public health or safety.

EGASPIN prescribes that the EIA study must be prepared by the project proponent or initiator, together with consultants certified by the Department of Petroleum Resources (DPR) (where necessary) and in conjunction with the DPR.[33]

Nigerian government has also created specific agencies to provide more focused attention to some specific environmental problems. These include the National Oil Spill Detection and Response Agency (NOSDRA) and National Environmental Standards and Regulations Enforcement Agency (NESREA), which were created respectively in 2006 and 2007.

**6.3 National Oil Spill Detection and Response Agency (NOSDRA)**

It was established by Act No. 15 of 2006 as a deliberate and articulate response by the Federal Government to the persistent environmental degradation and devastation of the coastal ecosystem especially, in the oil

[30]ibid s 2.
[31]ibid s 2 (1).
[32]Environmental Impact Assessment (EIA) Act of 1992.
[33]Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN), 1991. It was revised in 2002, The Guidelines were issued by the Department of Petroleum Resources (DPR).

producing areas of the Niger-Delta region. NOSDRA is statutorily empowered to co-ordinate oil spill management and ensure the implementation of the National Oil Spill Contingency Plan (NOSCP) for Nigeria in accordance with the International Convention on Oil Pollution Preparedness, Response and Co-Operation (OPRC) 1990, which Nigeria has ratified. The NOSCP is a blueprint for checking oil spill through, containment, recovery and remediation/restoration. It was drafted in 1981 and first reviewed in 1997, and further reviewed in 2000 and 2006. NOSDRA is essentially mandated to play the lead role in ensuring timely, effective and appropriate response to all oil spills, as well as protect threatened environment and ensure cleanup of all impacted sites to the best practical extent.

### 6.4 National Environmental Standards and Regulations Enforcement Agency (NESREA) Act 2007

The fore runner to NESREA Act was the Federal Environmental Protection Agency Act. It was the statutory threshold of a national policy on environmental protection in Nigeria.[34] The NESREA Act repealed and replaced both the Nigerian Environmental Protection Agency established by the Federal Environmental Protection Act.[35]It is an Act that provides for the establishment of the National Environmental Standards and Regulations Enforcement Agency charged with responsibility for the protection and development of the environment in the country and for related matters.[36] It is also responsible for biodiversity conservation and sustainable development of natural resources in general and environmental technology, including coordination and liaison with relevant stakeholders within and outside the country on matters of enforcement of environmental standards, regulations, rules, laws, policies and guidelines.[37] The Act also prescribes the establishment of an Agency[38] with a Governing Council to be headed by a Chairperson appointed by the President on the recommendation of the Minister of

[34]MT Okorodudu-Fubara, *Law of Environmental Protection: Materials and Texts* (1st edn. Caltop Publication (Nigeria) Limited, 1998) 168.
[35]NESREA Act, s 63(1) (Decree No. 48 of 1992). See also SG Ogbodo 'National Environmental Standards and Regulations Enforcement Agency (NESREA) Act – A Review'<http://nigerianlawguru.com> accessed 12 May 2017.
[36] See the preamble to the Act.
[37]NESREA Act, s 2.
[38]ibid s 1(2) (b).

Petroleum Resources. Other members are to be representatives of relevant ministries and other relevant stakeholders.[39]

The NESREA Act allows each State and Local Government in the country to set up its own agency for the protection and improvement of the environment within the State. Each State is also empowered to make laws to protect the environment within its jurisdiction. All the States have environmental agencies and State laws; e.g. Ondo, Akwa Ibom, Delta, Bayelsa, Rivers, Lagos and the Federal Capital Territory (FCT), Abuja. Section 7 (c) and (d) of NESREA Act, 2007[40]is targeted at reducing child and maternal mortality rates among others. The Act was enacted to combat climate change and its impact[41]and to conserve and sustainably use the oceans, seas and marine resources for sustainable development[42]. Other regulations were made to ensure sustainable development. For instance, in order to build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation the National Environmental (Mining and Processing of Coal, Ores and Industrial Minerals) Regulations 2009; National Environmental (Chemical, Pharmaceutical, Soap and Detergent Manufacturing Industries) Regulations 2009 etc. were set up. To make cities, and human settlements inclusive, safe, resilient and sustainable National Environmental (Vehicular Emission etc) Regulations 2011, National Environmental (Air Quality Control) Regulation 2014, National Environmental (Energy Sector) Regulation 2014 are put in place to ensure these targets are met.

Section 8 of the Act empowers the Agency to use law enforcers to enable it to discharge its responsibilities/functions. The law enforcer of the Agency is referred to as an "Authorised authority or officer" and this can as well be interpreted to mean that any Police officer not below the rank of Inspector of Police or any Customs officer can enforce the Act.[43] The law states that anyone that obstructs an officer of the agency has contravened the law and upon conviction can be sentenced to a minimum fine of two hundred thousand naira only (N200,000:00) or to a maximum imprisonment of one year or to both fine and imprisonment. In addition, the Act prescribes a further fine of twenty thousand naira only (N20,000:00) for each day the offence continues.[44] In case of obstruction by a body corporate, the

[39]ibid s 3.
[40]National Policy on Environment items 3.2 and 7 the National Environmental (Sanitation and Wastes Control) Regulations, 2009 are also targeted at reducing child and maternal mortality rates among others.
[41] NESREA Act, ss 2(7)(c) & 8.
[42] ibid ss 7(c)(e)(h) & 8(k).
[43]ibid s 37 (interpretation section of the Act).
[44]ibid s 3.

corporation is liable, upon conviction, to two million naira only (N2,000,000:00) and an additional fine of two hundred thousand naira only (N200,000:00) for each day the offence continues.[45]

The critical role of NESREA is primarily located in section 4 of the 1999 Constitution which deals with the expansive legislative powers while sections 80 to 89 thereof are on the powers and control over public funds; and the power to make laws for the progressive realization of chapter 2 of the Constitution on fundamental social, economic, educational, political, environmental and foreign policy objectives and directive principles of state policy, which aim at addressing the negative impacts of inequalities and climate change on the quality of life and standard of living of Nigerians. Particularly, section 14(2)(b) of the Constitution provides that the main purpose of government is to promote the security and welfare of all people. While section 13 places fundamental obligations and responsibility on all organs of government, all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this chapter, especially sections 15-20 on political, economic, social, educational, foreign policy and environmental objectives, as well as item 60 (a) of the Second Schedule to the Constitution.

Item 60 (a) of the Second Schedule to the Constitution provides that the National Assembly has the exclusive legislative power to make laws for the establishment and regulation of authorities for the Federation or any part thereof:- "(a) to promote and enforce the observance of the Fundamental Objectives and Directive Principles of State Policy contained in this Constitution." This is confirmed by the Supreme Court of Nigeria in the case of the *Attorney General of Ondo State v AGF*[46] and in the *Attorney General of Lagos State v AGF*[47], that the provisions of chapter two on fundamental objectives can be made justiciable by the National Assembly enacting implementing legislation on them as it did with the Independent Corrupt Practices and Other Related Offences (ICPC) Act in 2000.[48] The importance of effective institutions is perhaps more appreciated in countries that are experiencing strong growth, and are looking for ways to translate the benefits into sustainable human development that can be shared by all.

[45]ibid s 31.
[46](2002) FWLR Part III, 1972.
[47](2003) 12 NWLR (pt. 833), 1.
[48] MT Ladan, 'Achieving Sustainable Development Goals (SDGs) in Africa through Effective DomesticLaws and Policies on Environment and Climate Change' Being a Paper Presented at the International Seminar onEnvironmental Law, Human Rights and Climate Change ina Post 2015 World: Global Call, Local Action; Organized by the University of Nigeria, NsukkainCollaboration with Stockholm University, Sweden 50.

The Environment Protection Agency ensures that all environmental laws and regulations of Nigeria are complied with and also recommends cost-effective ways to comply with such regulations. It checks whether environmental laws/regulations are being obeyed by conducting on-site visits, and reviewing information. The Environment Protection Agency encourages government, industry and business facilities to assess their overall compliance with environmental requirements and voluntarily correct and report compliance problems. The Environment Protection Agency's incentive programs include the audit policy, environmental management systems, pollution prevention, the small business policy, and the small community policy.

**6.5 Nigeria Extractive Industries Transparency Initiative (NEITI) 2007**

The Nigerian government has also enacted into law the Nigeria Extractive Industries Transparency Initiative (NEITI) in 2007.[49] The NEITI is a national subset of the global movement, known as the Extractive Industries Transparency Initiative (EITI). The EITI was established in June 2003 to achieve sustainable development and poverty reduction in resource rich countries plagued by the phenomenon of 'resource curse', with the following objectives:[50]

i. To ensure due process and transparency in the payments made byall
ii. extractive industry companies to the Federal Government and statutory recipients;
iii. To monitor and ensure accountability in the revenue receipts of the Federal Government from extractive industry companies;
iv. To eliminate all forms of corrupt practices in the determination, payments,receipts and posting of revenue accruing to the Federal Government fromextractive industry companies;
v. To ensure transparency and accountability in the application of resources from payments received from extractive industry companies and
vi. To ensure conformity with the principles of the Extractive Industries Transparency Initiative.

This initiative is a useful tool for government and citizens in the quest for better transparency and responsibility in the management of revenues from mining,

[49]The NEITI Act 2007 in Nigeria.
[50]DT Mailula,*Protection of Petroleum Resources in Africa: A Comparative Analysis of Oil and Gas Laws of Selected African States (2013)*PhD-Dissertation,University of South Africa 1 -536 at 56-60.

oil and gas.[51]According to the Act, the NEITI is charged with the following objectives: to ensure due process, transparency and accountability and eliminate all forms of corrupt practices in the extractive industry:[52]

Apart from the agencies and institutions set up, Nigeria has also set up a parliamentary committee on SDGs implementation; office of the Senior Special Assistant to the President on SDGs; a country transition strategy framework (from the MDGs to SDGs); and a high level inter-ministerial committee that was to bring together all groups/sectors working across ministries.[53]The main responsibilities of such an inter- ministerial group was to carry out following: - to develop or coordinate SDG implementation strategies; develop a national monitoring framework and accompanying set of national indicators; compile or update an annual sustainable development report; consult with key stakeholders; and prepare for regional and global dialogues on the implementation of the SDGs.[54]Also, Nigeria reflected in its 2016 national budget, special intervention funds specifically targeting SDGs.[55]

## 7.0 CHALLENGES TO IMPLEMENTATION OF SDGs IN NIGERIA

Economic development is the aspiration of every country of the world, therefore the economic dimension of sustainable development is very important. Nigeria is not left out in the desire for economic development. However, despite the huge resources in Nigeria, the country ranks low in economic performance. Nigeria has not been able to maintain the growth rate necessary to reduce poverty.[56]

Despite the robust legal framework for sustainable development, Nigeria has not succeeded in reducing poverty or promoting sustainable development. This is partly due to non-justiciable nature of the Fundamental Objectives and Directive Principles of State Policy enshrined in Chapter II of the 1999 Constitution and lack of political will on the part of the government to implement the socio-economic objectives as stated in the Constitution. The fact that citizens could not hold government responsible for non-implementation of these objectives in court has

[51] ibid.
[52]NEITI Act 2007, s 2..
[53]Federal Republic of Nigeria, Office of the Senior Special Assistant to the President on MDGs/SDGs, the Presidency, Abuja (2015): - Nigeria'sRoad to SDGs – Country Transition Strategy, (October 2015) 1 -36.
[54]See the 2030 Agenda, at paras 39 -47.
[55]Federal Republic of Nigeria, Abuja (2015) Full Text of President Buhari's 2016 Budget Address to the Parliament. (Daily Trust Newspaper, Abuja, 23 December 2015) 1-9http://www.dailytrust.com.ng/news/general/full-text-of-president-buhari-s-2016-budget-address/125699.html
[56] MO Erhun,'A Sustainable Approach to Economic Development in Nigeria: A Legal Perspective' (2015) 6(14)*Journal of Economics and Sustainable Development* 3.

encouraged impunity by successive governments in Nigeria. Although, implementation of sustainable development depends on the availability of government resources, and granting the judiciary the power to determine the allocation of those resources will amount to giving the courts power to determine government priorities, thus usurping the powers of the executive. This cannot remove the fact that fulfillment of the people's aspiration for sustainable development is the basic priority of a responsible government, and the courts should be given the power to enforce this relationship.. For instance, in the South African case of *Government of the Republic of South Africa and Others v Irene Grootboom and Others*[57], the court per Yacoob J stated as follows:

> I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognized by the Constitution, which expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately. I stress, however, that despite all these qualifications, these are rights, and the Constitution obliges the state *Consilience Jerome: Sustainable Development and Law* to give effect to them. This is an obligation that courts can, and in appropriate circumstances, enforce.

### 7.1 Political challenges

Although, Nigeria is presently enjoying a relatively stable political system it has suffered greatly from political instability some decades back. The polity has been militarised. There has been emergence of various militia groups ranging from the Boko Haram, Herdsmen attacks in the north to oil pipeline vandals and kidnapping in the southern part of Nigeria. Nigeria has been polarised into ethnic and religious divides thereby overheating the system. This is a big challenge to ensuring sustainable development because development can only be achieved in an atmosphere devoid of intertribal and interreligious conflicts.

### 7.2 Weak institution

The institutions meant to control environmental degradation lack capacity and resources.[58] There is also lack of coordination among various agencies of

[57] 2000 (11) BCLR 1169 (CC).

[58] World Bank, Defining an Environmental Development Strategy for the Niger Delta, 25 May 25 1995, Vol II, Industry and Energy Operations Division West Central Africa Department 45-53; The World Bank, Nigeria Rapid Country Environmental Assessment, Final Report 11/30/2006, 39,

government. The bodies saddled with monitoring the activities of pollutants and ensuring that the legal framework for the control of air and water pollution is achieved are set up at national and state levels, each having different roles and responsibilities. For instance, apart from NESREA at the federal level, there are State Environmental Protection Agencies. Because of this, there is overlapping of functions between bodies set up to implement EIA and by attempting to satisfy these bodies, companies met with the attendant problems, especially costs and time of executing reports for two or more of the controlling authorities.[59] At times companies simply ignore one of the agencies.[60]Many ministries, departments and agencies play a significant role in the designing of strategies and their effective implementation to achieve desired goals. A typical example is the Ministry of Environment.

**7.3 Corruption**

All efforts at implementing SDGs have been thwarted by corrupt government officials who took an undue advantage of the system. Corruption has been the bane of Nigeria's economic development. Once the regulators "are settled" they looked the other way when laws are breached.[61] Unfortunately the judiciary is not immune against corruption either. A Supreme Court Justice was accused of money laundering and illegal possession of passports and two High Court Judges were alleged to have received bribes during and after the General Election of 2015.[62]

In Nigeria, there are reported cases of corporations or chief executives of corporations openly or secretly donating funds for campaigns of the ruling parties. These practices have negative effects on the enforcement of legislation to ensure a healthy environment, particularly in the Niger Delta Region and Nigeria in general.

---

which states: "Environmental inspectors belonging to the FMEV often have to rely on private companies for providing cars to undertake monitoring activities, in addition to hotel bills, per diems and other expenses, compromising legitimacy and effectiveness in the environmental monitoring process."

[59]OA Ogunba,'EIA systems in Nigeria: evolution, current practice and shortcomings' (2004) *24(6) Environmental Impact Assessment Review*643-660 <www.sciencedirect.com/science/article> accessed 02 June 2017.

[60]ibid 643-660.

[61]JPeterson, 'The Resource Curse in Nigeria: A Story of Oil and Corruption' (2012)*The Geopolitics and Economics of Oil*8-9 www.researchgate.net/publication accessed 11 October 2017; KO Vanessa, 'Nigeria's 'ResourcesCurse:Oilas Impediment to True Federalism' (2014) *E-International Relations Students* unknown pagewww.e-ir.info/2014/07/20/nigerias-resource-curse-oil-as-impediment-to-true-federalism/ accessed 11 October 2017.

[62]AAdemuwagun and K Agyeman-Togobo 'Nigeria: Top Nigeria Judges on Trial for Corruption' mondaq Ltd http://www.mondaq.com/Nigeria accessed 3 October 2017; Sahara Reporters "Names of Nigerian Judges Under Investigation Revealed" http://saharareporters.com/2016/10/16/namesnigerian-judges-under-investigation-revealed accessed 3 October 2017.

For example, in the Malabu oil deal, Oil Prospecting Licence (OPL) 245, an oil block was sold to Shell and Eni oil companies, but more than half of the N171.32 billion ($1.1 billion) of the price was paid to Malabu Oil and Gas company. It was alleged that the payment was used to bribe Nigerian politicians and intermediaries who helped to secure the controversial deal.[63] Instead of performing its corporate responsibility, International Oil Companies prefer to settle the militants.

Corruption and economic sabotage have been the bane of Nigerian polity, and this menace has frustrated economic development of the country, despite abundant petroleum resources and the revenue that accrues to the nation through it. Corruption pervades the Nigerian socio-political milieu and Omorogbe has rightly observed that corruption, more than any other related vices, is the root cause of Nigeria's socio-political and economic problems.[64] Achebe has also opined in his book titled 'The troubles with Nigeria' that one of the problems Nigeria has is corruption.[65] Lip service is being paid to the fight against corruption. In fact, all military coups in Nigeria cited corruption as the major reason for toppling democratically-elected civilian regimes.[66] Yet, Nigeria has the worst military regimes in terms of corrupt practices.[67]

In order to curb corruption, the Constitution establishes the Code of Conduct for public officers, which provides for certain rules and regulations which a public officer during his official duties must adhere to.[68] It also establishes a Code of Conduct Tribunal to enforce the provisions of the Code of Conduct.[69] Despite the existence of these laws, it is worrisome that the prevalence of corruption is still very high; Nigeria ranked 136 out of 176 countries having scored 28% on the list of Corruption Perception Index (CPI) in 2016.[70]

[63]INicholas, 'Malabu Oil Deal: Corrupt Nigerian officials bought private jets, armoured cars with N83 billion bribe' Premium Times https://www.premiumtimesng.com/news/headlines/168992-malabuoil-deal-corrupt-nigerian-officials-bought-private-jets-armoured-cars-with-n83-billion-bribe.html accessed 3 October 2017.

[64] JI Omorogbe, *Ethics for Every Nigerian* (Joja Educational Research and Publishers Ltd. 1991) vii; G Fawehimi,*State of the Nation and the Damages Ahead* (Book Industries Ltd. 1999) 4.

[65]CAchebe,*The Trouble with Nigeria* (1st ed. Heinemann Educational Books 1984) 37.

[66]EE Alemika, 'Recession and Regression in Nigeria' (Afrigov 1998) 19.

[67]ibid. See also E Okechukwu, "A Critique of the Activities of EFCC vis -a –vis the 1999 Constitution' (2006) 3(1) *Ife Juris Review a Journal of Contemporary Legal and Allied Issues* 104.

[68]See CFRN 1999, s 15(5) which states that 'the State shall abolish all corrupt practices and abuse of power'; see also sections 172 and 209 respectively which enjoin the federal and state public office holders to observe and conform with the Code of Conduct.

[69]See 5th Schedule, Part II of the Constitution of Federal Republic of Nigeria 1999.

[70]ibid.

Table 1: Nigeria's ranking in the Corruption Perception Index from 2006- 2016.

| Year | Ranking | No. of countries surveyed |
|---|---|---|
| 2006 | 142nd | 163 |
| 2007 | 147th | 180 |
| 2008 | 121st | 180 |
| 2009 | 130th | 180 |
| 2010 | 134th | 178 |
| 2011 | 143rd | 183 |
| 2012 | 139th | 176 |
| 2013 | 144th | 177 |
| 2014 | 136th | 175 |
| 2015 | 136th | 168 |
| 2016 | 136th | 176 |

Source: Compiled from the Transparency International Corruption Perception Index Report 2006-2016.

**7.4 'Dutch Disease' or non-diversification of the economy**

The Nigerian government places emphasis on the production of petroleum. This does not support sustainable development of the resources more so that it is non-renewable. The unsustainable exploitation of petroleum resources through oil spillages and gas flaring has led to environmental degradation. As of 2004, oil and gas exports accounted for more than 95% of export earnings and about 80% of Federal Government revenue, as well as generating more than 40% of its GDP.[71] It is important to put on record that up to the 1960s, agriculture was the mainstay of the Nigerian's economy before crude oil production took the leading position beginning from the 1970s, following the first series of oil bonanza or oil boom in 1973-1974. This wave of the oil boom drove into the background the exploitation of solid minerals; and agricultural and manufacturing activities nearly come to a halt subsequently. Thus, Nigeria became a monolithic economy, depending on a single commodity for export. Jensen, while commenting on the Nigerian's over dependence on crude oil, posits:

> [t]he oil boom of the 1970s led Nigeria to neglect its strong agricultural and light manufacturing bases in favour of a dependence on crude oil. New oil wealth, the concurrent decline of other economic sectors, and a lurch towarda non-dynamic economic model, generated massive migration to the cities and

[71]Omiyi MD SPDC, Nigeria, "Location Reports: Nigeria" in *The Shell Report 2004*; CNC Ugochukwu and J Ertel,'Negative impacts of oil exploration on biodiversity management in the Niger Delta area of Nigeria' (2008) *26(2) Impact Assessment and Project Appraisal* 139 <www.tandfonline.com/doi/pdf> accessed 01 June 2017.

> led to increasingly\widespread poverty, especially in rural areas. Along with the ubiquitous malaise of Nigeria's non-oil sectors, the economy continues to witness massive growth of"informal sector" economic activities, estimated by some to be as high as 75 percent of the total economy while oil dominates the Nigerian economy, and generates the vast majority of government revenues…[72]

Aturu was making a forecast when he pointed out that the way Nigerian economy is structured leaves much to be desired and that if oil production ceases for any reason then the nation will grind to a halt. Recently, Nigeria fell into economic recession due to fall in price of crude on the international market. Most States of the Federation were unable to meet their financial obligations, especially the payment of workers' salaries.[73]

## 8.0 CONCLUSION

From the foregoing, it could be deduced that there could not be a meaningful development unless the internal issues and challenges inhibiting development are addressed. The Nigerian government has demonstrated her willingness to implement SDGs. It has reflected in its laws the provisions of SDGs but she lacks the will power to implement these laws and regulations. Her system is bedeviled by corruption; money meant for development is diverted into private purse. It was also observed that the provisions reflecting SDGs contained in Chapter II of the Nigerian Constitution are not justiciable as such government cannot be held responsible for non implementation of the constitutional provisions. The Constitution only enjoins the State to implement the said provisions. Past experiences have shown that a mere appeal will not work in Nigeria, especially in the field of natural resources exploitation. Despite several peace and violent protests in the Niger Delta because of the deplorable state of infrastructural facilities and environmental degradation over the years the living standard of the inhabitants gets worse without foreseeable changes in the near future. The revenue realised is not being ploughed back into the system to ensure sustainable development more so petroleum resources are a non renewable source of energy which once utilised could not be replenished. The huge revenue does not translate to economic development;

[72] L Jessen, *Corruption as a Political Risk Factor for Investors in the Oil and Gas Industry, with Specific Emphasis on Nigeria: Identification Analysis and Measurement* (2012) A thesis presented in partial fulfilment of the requirements for the degree of Master of Arts (International Studies) at Stellenbosch University 57.

[73] DT Mailula, *Protection of petroleum resources in Africa: a comparative analysis of oil and gas laws of selected African states* (2013) PhD Dissertation,University of South Africa 1 -536 at 56-60.

majority of Nigerians leave in abject poverty. The SDGs three dimensional strategies of socio-economic development and sustainable exploitation of natural resources though provided for under the Nigerian laws still remain a paper work. Unless something urgent is quickly done the new vision 2030 that is aimed, among other things, at ending poverty in all its forms everywhere, may not come to fruition in Nigeria.

**8.1 Recommendations**

1. Socio-economic and environmental provisions contained in Chapter II of the Nigerian Constitution should be amended to make them enforceable in the courts.

2. Nigeria should give the development of infrastructural facilities a priority to enable the development of private business in place of the present dependence on government paid employment.

3. Development should be inclusive, that is, every segment of the society need be involved in governance for instance the people of Niger Delta who bear the brunt of oil and gas exploration and exploitation should be involved in the chain of production of oil and gas to effectively monitor the multi-national companies' activities in order to reduce environmental degradation in the area. The people know where the shoe pinches.

4. Climate change and how human activities lead to environmental degradation should be controlled, government agencies in charge of regulating the activities of the companies involved in exploitation of natural resources should be up and doing. They should sanction erring companies that violate environmental laws and there should be no sacred cows. Apart from that, the people should be educated on the importance of sustainable use of natural resources in a way that these resources are not used up faster than they can be replenished.

5. Governments at every level should be included in the development efforts. For instance, it is important to note that the SDGs only stand a chance at being achieved if everyone takes a part in the implementation. National, State and Local Governments, the private sector, the academia, civil society as well as the citizens all have a stake at achieving Agenda 2030.

6. Government should prioritize her policies to improve the lives of the people. There is the need to reduce poverty to the barest minimum. Government should therefore put economic policies in place to raise the standard of living.

# AN APPRAISAL OF COMMUNITY SERVICE AS A NON-CUSTODIAL SANCTION UNDER THE ADMNISTRATION OF CRIMINAL JUSTICE LAW OF LAGOS STATE AND THE ADMNISTRATION OF CRIMINAL JUSTICE ACT OF NIGERIA

**GLORIA SHAJOBI-IBIKUNLE (PhD)* & GABRIEL ADENYUMA (Phd)****

**Abstract**

*Imprisonment is one of the frequently used penal sanctions in Nigeria. It partly accounts for why the Nigerian Correctional system is over- crowded and facilities grossly inadequate to ensure effective rehabilitation of convicts. Therefore, Community service is one of alternate measures taken to divert offenders from prison, whereby certain class of offenders are required to serve their punishment doing work regarded as beneficial to the community. This paper examined the provisions of the Administration of Criminal Justice Act (ACJA) 2015; a federal legislation which introduced community service to federal jurisdiction in comparison to the Administration of Criminal Justice Law (ACJL) of Lagos State which blazed the trail. The article utilized doctrinal research method by a critical analysis of community service provisions of both statutes, identified provisions militating against effectiveness of community service and made recommendations on how to improve its operations. The research found that community service as a penal sanction is more in tune with the philosophy of traditional African punishment. Further, that whilst it should not be viewed as a panacea to prison congestion, it does have a clear benefit of keeping first time offenders and offenders of minor crimes from prisonization and its attendant side effects. Recommendations made include the fact that community service work should not only benefit the community but also exact service in the area of professional/specialized competence of the convict as well as confer work skill & values. The provision requiring guarantor of financial means is counter -productive as it is tantamount to a bail provision, instead a salutary member of the community will suffice. The paper further recommends that community service is too vital to be left solely to the Judiciary so non-governmental organizations should be encouraged to assist in placement places.*

**Keywords:** Community Service, Crime, Nigerian Correctional System; Offender, Punishment.

## 1.1 INTRODUCTION

Prisons are institutions in which convicted offenders spend time for punishment for crimes. It is a relatively modern idea which came about as a result of growing intellectualism in Europe and America and as a reaction to the barbarities of corporal punishment.[1] The Nigerian Prison System has a total of two hundred and twenty seven (227) prisons made up of eighty three (83) satellite prisons; one (1) open prison camp; three (3) borstal institutions, one hundred and forty (140) prisons of both medium and maximum security hue and thirteen (13) mechanized farm centers.[2]The challenges of the prisons in Nigerian are multi-faceted.[3] Fundamentally, Nigerian prisons are over-crowded and compounded by inadequate facilities which renders rehabilitation of offenders difficult.[4] Successive governments made efforts at addressing this problem. with limited success.[5]Hence the need to consider community service or community corrections as an option to treat offenders.

## 2.0 DEFINITION OF COMMUNITY SERVICE

The term Community Service can be used in different ways. The first is in the sense of a voluntary service intended to help people in a particular area or

∗Senior Lecturer & TAC Volunteer, School of Law, Kampala International University, Kampala, Uganda. Email: shajobi@yahoo.com.

∗∗Senior Lecturer & TAC Volunteer, Kampala International University, Kampala, Uganda. Email: ijijecta@yahoo.com

[1]F Schmallenger .& J Ortiz, *Corrections in the Twenty First Century (*Glencoe McGraw Hill 2001) CA. 78.

[2] OA Ogundipe, 'Strategies for the Attainment of Total Prison Decongestion within the Context of the Proposed Criminal Justice Reforms' (2011)A paper presented at the Nigerian Bar Association Criminal Justice Reform Conference.

[3]G Shajobi-Ibikunle, **'**Challenges of Imprisonment in the Nigerian Penal System: The Way Forward' (2014) 2(2)*American Journal of Humanities and Social Sciences* 94-104.

[4]ibid, 98-104.

[5]General Abdulsalam Administration released about 14,000 prisoners in 1998. See MT Ladan, 'Penal Reform and the Introduction of Non-Custodial Sentence to Achieve a Fairer Criminal Justice System in Nigeria' (2010) A paper presented at the National Summit On Penal Reform And Prison Decongestion In Nigeria 14. This was followed by the establishment of the National Working Group on Prison Reforms and Decongestion by the Obasanjo Administration on the 10 February 2004 to audit the prisons. A pertinent the key finding was that 10.5% of the convicted prison inmates were in prison for minor offences which carry sentences of six months or less or option of fine. Sentencing judicial officers hardly considered nor awarded non-custodial sentences for these minor offences. See Ladan , ibid 15. This was followed by the Decongestion project of the Federal Ministry of Justice which paid legal practitioners to provide legal services for Awaiting Trial persons for minor offences. See M Diri, 'Decongestion of Prisons: The Journey so far' (2010). A Paper Presented at the National Summit on Penal Reform and Prison Decongestion in Nigeria.

community.[6]Some educational jurisdictions in the United States require students to perform community service hours to graduate from high schools. Some schools in Washington require students to furnish 200 hours of community service to get a diploma.[7]There is also Corporate Social Responsibility (CSR) in which some employers involve staff in an identified community service program. Forty percent of Fortune 500 companies offer volunteer grants where companies provide monetary donations to non-profit organisations in recognition of their employees volunteerism.[8] Certain religious groups also engage in this form of volunteerism to benefit their neighborhoods and families. This range from running soup kitchens, homeless shelter, day care etc. Examples are the Salvation Army[9]and Habitat for Humanity.[10.] *Stricuosenso*, in the context of judicial use of the term as a penal sanction, this is not the sense in which the phrase 'community service' is used in this paper.

In the sense of it being a penal sanction, community service has been defined as a criminal sentence requiring that the offender perform some specific service to the community for some specified period of time.[11] It is work administered by a community agency.[12]Technically, diversion of offenders from incarceration is intended to turn an offender away from the criminal justice system and into community programs that might be more beneficial than incarceration.[13]It is regarded as one approach to re-integrating offenders and compensating victims such that offenders shall perform community service, pay a fine to the state, or pay restitution to the victim.[14.]Also, Community service" is defined as non-custodial punishment by which after conviction the court, with the consent of the offender, makes an order for the offender to serve the community rather than undergo imprisonment.[15] Restitution and fines are used frequently in conjunction with community service assignments. It can benefit either the victim or the community and often involves work with the community or government agencies. Community service is sometimes regarded more as an adjunct rather than a type of correctional

[6]*What Is Community Service? Definition, Programs, Benefits and Examples*. Available at: https://study.comaccessed 7 September 2018.
[7]*Community service- available at* https://en.wikipedia.org/wiki/community_service.accessed 10 September, 2018.
[8]ibid
[9]The Salvation Army was founded by William Booth in 1865 and is committed to giving shelter, food and clothing to those in need. It operates in 131 countries, using a quasi –military structure. Available at https://www.salvationarmy.org accessed 12 September 2018.
[10]Habitat for Humanity provides housing for people in need. It was founded by M Fuller. It has built/repaired over 800,000 homes, served more than four million since 1976.available at https://www. Habitat.org/emea accessed 10 September 2018.
[11]ST Reid, *Crime and Criminology*, (13thed.,Oxford University Press, 2010) 553.
[12]*Deluxe Blacks Law Dictionary*Centennial Edition 6thed (1891-1991),West Publishing Co, St Paul, Minnesota,1990.
[13]Schmallenger (n 1) 376.
[14]Reid (n 11) 553- 556.
[15]Uganda Community Service Act. 2011, s 2 cap 115.

service. It has been described as a credible and prudent alternative to custodial sentencing aims and focuses on rehabilitation as a cardinal element of punishment.[16]

A problem with community service sentences is that authorities rarely agree on what they are supposed to accomplish. Most people admit that offenders who work in the community are able to reduce the costs of their own supervision, but there is little agreement on whether such sentences actually reduce recidivism, act as a deterrent, or serve to rehabilitate offenders.[17]The goal of the program should be to address the multi-faceted problems of criminal behavior. Community sentence is never a soft option, as it combines punishment with changing behavior and making amends, sometimes directly to the victim of the crime, if not the community.

Community sentence can also encourage the offender to deal with any problems that might be making them commit the crime, i.e drugs, alcohol, joblessness, peer pressure, lack of self- control etc. The program element of the sentence should incorporate offender management supervision, individual participation in support groups, and individual one-to-one counseling sessions and/or cognitive behavior modification therapy and vocational/skill training. Furthermore, community sentence also provides the resources and the opportunity to empower the courts with the option providing eligible offenders (minor offences) with supervision and the opportunity to develop positive attitudes and behavior that will impact their criminal behavior, built on the premise that offenders who commit minor offences for which custody is less than 12 months (1 year) can be rehabilitated and re-integrated into the community via strong supervision and exposure to counseling and community service. The degree to which a correctional system can be said to be community corrections can be measured by the frequency, quality and duration of community relationship, the extent to which other community services are used, and the degree of involvement by local groups and individuals.

It is argued that the actual rehabilitative value of community service is doubtful, citing a leading American study.[18]They submit that day fines[19] are more valuable as a punishment: a sanction that deprives the person of leisure and exacts

[16]Marcus, '*Managing Offenders In the Community in Ghana: Offender Management and Rehabilitation (Omrs) Perspective (October 2012)*. Available at https:/www.modernghana.com/news accessed 12 June 2017.

[17] Reid (n 11)555.

D McDonald, "Punishment Without Walls" Chapter 6, (1996), See also K Pease, "Community Service" In Home Office Research study,( No 39, HMSO, 1976).

[18]McDonald, ibid. See also K Pease, ibid.

[19]A day fine is where fine units are computed as a percentage of disposal of in income

unpaid labor, in a community setting than community service.[20] According to Schmallenger,[21] Community Sentences can be performed in the home or at a job site during the hours they are permitted to be away from homes..

It includes washing police cars, cleaning school buses, refurbishing public facilities and assisting in local government offices He submits that one of the problems with Community Service sentences is that authorities rarely agree on what they are supposed to accomplish. Again, that there is little agreement whether such sentences reduce recidivism, provide deterrent or act to rehabilitate offenders. This criticism is right on target. Furthermore, in view of cultural diversity of the Nigerian nation, it is not clear if a national consensus on what should constitute community service is workable bearing in mind the heterogeneous and cultural diversity of the nation.

## 3.0 PENAL SANCTIONS IN TRADITIONAL AFRICAN SOCIETY

The judicial process upon which justice is administered is crucial to African legal heritage. Punishment of offenders in pre-colonial traditional justice system had as its' main focus the deterrence of other offenders and maintenance of the social fabric by sanctions. These sanctions included compensation, restitution, restoration, slavery, banishment and social ostracism. Compensation was a sanction built into other forms of punishment. Punishment is a justified concept in Yoruba[22]legal culture because the person being punished has been found guilty of committing some offence(s) and such punishment inflicted upon him is a just desert.[23]As a special arm of the Yoruba legal culture, the institution of punishment is a projection of societal concerns, for a violation of the collective conscience, which is a crime. This central agency comprises of several legal officials with prescribed authority and prerogatives of power to impose sanctions on offending members of the Yoruba society. These legal officials, who are members of the "Ogboni" secret societies jealously guard over the legal norms of Yoruba society to

[20]MWasik& A Hirsch, " Non-Custodial Penalties and the Principles of Desert", *Criminal Law Review* (Sweet & Maxwell 1988) 567. They cite the Vera Institute of Justice in New York which operates what they state to be the most sophisticated community service program, which treats Community Service as punitive sanction, but still a penalty less severe than imprisonment.

[21].Schmalleger(n 1) 376.

[22]Yoruba people-available at https://en.wikipedia.org/wiki/Yoruba_people.The Yoruba are about 40 million and constitute one of the major ethnic groups of modern Nigeria. They effectively occupy the whole of Ogun, Ondo, Oyo, Ekiti, Lagos States, and a substantial part of Kwara State in Nigeria, and are spread across Benin Republic and Togo and also Brazil. Available at https://www.worldatlas.com/articles/who-are-the-yoruba-people.htmlaccessed 21 September 2018.

[23]ABalogun, 'A Philosophical Defence of Punishment in Traditional African Legal Culture: The Yoruba Example' (2009) 3(3)*The Journal of Pan African Studies* 43.

.

the effect that there was minimal breach of promulgated laws.[24.] Among the tribes in Uganda, homicide was normally settled by payment of blood money comprising seven head of cattle to the next-of-kin of the deceased but in intra family homicide the death penalty is exacted.[25]The Teso tribe exacted blood money for homicide where the murderer was apprehended but if he escaped, he was outlawed and the members of the deceased clan were entitled to obtain their satisfaction by killing a member of the offender's clan.[26]There are various categories of punishment in Yoruba society. However in order to enhance our cognitive understanding on these typologies of punishment, perhaps there is need to first examine the types of crime in Yoruba society. Basically, there are two types of crime: social and spiritual crimes. Social crimes are directed against individuals who ultimately upset the societal harmony. Notable among such crimes are adultery, fighting, lying, stealing, etc. Spiritual crimes are said to have spiritual undertones which made them affect the gods and goddesses with consequences visited upon the entire community. Spiritual crimes are not directly against individual as such, but essentially an invitation to the wrath of both the gods and goddess.[27]Spiritual crimes are viewed with more seriousness than social crimes among the Yoruba. In this category are incest, murder, suicide, killing sacred animals, unmasking the masquerade, speaking evil of elders and so on. These crimes are believed to have something to do with specific gods. Its commission is believed to have serious consequences on the entire community.[28] Punishment in Yoruba legal culture can be categorized into capital, corporal, imprisonment and miscellaneous punishments. Principally, social crimes attract corporal punishment. This kind of offence does not require death. Such punishment may consist of flogging, whipping, tying, putting in the stocks or yoke, lacerating wounds, banishment, castration or emasculation.[29] Capital punishment is the type of punishment which involves the execution of the convicted criminal under the sentence of a court constituted by legal officials. Spiritual crimes are most liable to capital punishment. For the Yoruba, death is the common mode of punishment for the most serious crimes, such as murder, sacrilege and other magico-religious offences.[30] Imprisonment is another mode of punishing offenders in traditional Yoruba society. It is a type of punishment where the offender is put in prison or kept in a place or state where he cannot get out as he wishes. The prison house is known as "Ibi-ihamo", which are located in Yoruba "Oba" palaces. Imprisonment is a punishment that involves loss of liberty on the part of the convict. It inflicts pain on the psyche of the criminal by restricting his movement,

[24]ibid 46.
[25]TO Elias, *The Nature of African Customary law*(University of Manchester Press 1956) 135.
[26]ibid.
[27]AF Udigwomen, *Footmark On African Philosophy* (Obaron&Ogbinaka Publishers Lagos, 1995) 64-65.
[28]ibid 69.
[29]AK Ajisafe, *The Laws and Custom of The Yoruba People*(Kash and Klare Bookshop, Lagos, 1946) 35.
[30].D Oppenheimer (2009) 3(3)*The Journal of Pan African Studies* 47.

his social liberty and actions in order to have a change of heart and character. Imprisonment in traditional Yoruba society can either be of short term or life imprisonment. The short term has time-lag while the life imprisonment involves life duration.

Miscellaneous punishments are less severe punishments against the violations of rules of the land and which may take different forms. They are usually in the form of fines and levies, suspension and expulsion of membership, excommunication, razing down the house of the offender, selling into slavery and among others. Among the Igbo tribe,[31] if a man steals from a kinsman and it is proved, the thief will be sternly warned and rebuked if the stolen property is trifle. If the property involved is of high value, the thief is tied up for days without food and if he was caught red- handed, he is carried about the village especially round the market square with the stolen property conspicuously tied around his neck while passers-by jeer, curse and spit on him. Later, the thief would be expected to make restitution. The punishment will be more severe if the stolen property is symbolic such as yams, hen and so on or if certain persons are the culprits such as titled men, and elders. Thus, African culture had non- custodial ways to treat offenders of not so grievous crimes.

Stealing from an outsider is even much more serious for the thief is detained until a substantial ransom is paid by his relatives.[32]In cases of murder of a kinsman by a fellow kinsman, the villagers may nonetheless exert serious psychological and social pressure on the murderer but cannot go beyond that. If the murderer has fled, his family must also flee, and their property is confiscated. Whenever the murderer is caught, he will be made to hang himself to enable the *umuokpu*(daughters of the land) perform their cleansing rites, *izachapuntuochu*(sweeping away the ashes of murder.[33] Failure to perform these rites has consequences which are dreaded by the villagers. Again, the involvement of the community in ensuring justice can be seen. For such societies, if an offence is committed the whole community jointly redresses the wrong. Oyewo&Olaoba state that in criminal matters, fines could be imposed as compensation to the family of the one killed or flogging of a culprit may be ordered according to the justice and circumstances of the case.[34] Also communal justice exists in any offence which cannot be atoned for by any form of compensation. Communal courts were often

[31]The Igbo constitute one of the major tribal groups in Nigeria today and occupy mainly the eastern part of the country. They are today found in high concentration in Anambra, Abia, Enugu, Ebonyi and Imo States of Nigeria. There are also large Igbo populations in Delta and River States. See IKOraegbunam**,** *Crime And Punishment In Igbo Customary Law: The Challenge Of Nigerian Criminal Jurisprudence*,available at *https:www.semanticcholar.org.paper.*accessed 3 October 2018.

[32]Oraegbunam**, ibid.**

[33] U Okafor, *Igbo Philosophy of Law, (*Fourth Dimension Publ. Co. Ltd, 1992) 35.

[34]TAOyewo& OB Olaoba, *A Survey of African law and Custom with Particular Reference To the Yoruba Speaking Peoples of South Western Nigeria*, (Jator Publishing Company, Ibadan, 1999) 12.

used to adjudicate between injured parties among the Igbos and also the Kukuyi and Kamba of Kenya.[35] Generally in East African societies, capital offences were viewed seriously such that the taking of the life of a stranger must be fully compensated for (even if he stayed with the host for only a day)and payment must be made to the host.[35]Restitution or Restoration goes to the essence of African traditional justice.[36]

## 4.0 INTRODUCTION OF COMMUNITY SERVICE TO THE NIGERIAN CRIMINAL JUSTICE SYSTEM

### 4.1 Administration of Criminal Justice Law (ACJL) 2011 of Lagos State

Community service is now a penal sanction in the criminal justice sector in Nigeria. Lagos State blazed the trail with the Administration of Criminal Justice Law (ACJL) 2011. It defines Community Service as environmental sanitation, assisting in the care of children and the elderly in Government approved homes or any other service which in the opinion of the court would have a beneficial and salutary effect on the character of the offender.[37] In my considered opinion, this is restrictive and effectively restrains the court in otherwise devising alternative appropriate sanctions for an offender and even community relevant sanctions. Furthermore, there are some other provisos in the ACJL that gives cause for concern, such as the fact that an offender must have been tried summarily i.e. a verdict arrived at after a full trial does not attract this option.[38]Secondly, section 347(1) states that Community Service is applicable as a sanction in lieu of a sentence or fine. Thus, where the law provides for imprisonment without an option of a fine for an offence, an order of community service is not available to the offender. It is submitted that since community service is meant to guide non-violent offender and those convicted of minor offences from the debilitating effects of incarceration. Therefore, it should not be seen as a form of an "escape route" from incarceration for such class of persons. Therefore, to now restrict its applicability to sentences involving fines or summary trials alone is counter- productive. Thirdly, sub-section 4(1) states that the offender and the community officer shall enter into a written agreement specifying the number of hours to be rendered for the offence. What if both parties cannot arrive at such an agreement? It is my view that this is too generous a proviso and provisos such as this furnish antagonist of community service with ammunition to allege it is a 'soft option'. It should be reviewed.Tarhule opined that:

[35]Elias(n 25) 40.
[36]ibid.
[37]ACJL 2011, s 350(1).
38 ibid, s 347(1).

> "Community service as benevolent as it may be, is still a corrective measure and should not be done at the discretion of the offender. The entire purport of the measure is to thwart minor or less serious offenders frombeing contaminated by the prison culture, and not that the offender can nowdictate terms as to how he will serve the punishment".[39]

It would appear the position is the same under the Uganda Act. The Ugandan Community Service Act states that before passing a community service order, the court shall consider the circumstances, character and antecedents of the offender and ask him or her whether he or she consents to the order.(underlining mine).[40] This appears to be in tandem with sub-section 4(1) of section 347 of the ACL Law of Lagos State. Thus, in Uganda, the service is voluntary and it can be safely concluded that an offender may thus have an option of opting out.

**4.2 The Administration of Criminal Justice (ACJ) Act 2015**

The Administration of Criminal Justice(ACJ) Act is a federal statute and is applicable to the Federal Capital Territory and all federal courts in the country. The stated purpose of the Act is to ensure that the system of administration of criminal justice in Nigeria promotes efficient management of criminal justice institutions, speedy dispensation of justice, protection of the society from crime and protection of the rights and interests of the suspect, the defendant, and the victim.[41] Section 460(2) introduces community service. It states that the court may, with or without conditions, sentence the convict to perform specified service in his community or such community or place as the court may direct. However, Community service is not an open cheque available to all classes of offenders.

**4.3 Offences that Qualify for Community Service**

There is a restriction to offences that attract the sanction of community service. Thus, section 460 sub section (3) provides that a convict shall not be sentenced to suspended sentence or to community service for an offence involving the use of arms, offensive weapon, sexual offences or for an offence which the punishment exceeds imprisonment for a term of three years. A study aimed at investigating the perception among residents of a metropolis about community service as an alternative to imprisonment was undertaken in Kumasi, Ghana.[42] In responding to a question on which offences should be made punishable by

[39]V ATarhule, *Corrections under Nigerian law* (2004) Innovative Communications 347-348.
[40]The Community Service Act, Chapter 115 of Uganda. Part 11, section 3, second Paragraph
[41]ACJ Act, s 1(1).
[42]K Ofori-Dua et al., 'Prison without Walls: Perception about Community Service as an Alternative to Imprisonment in Kumasi Metropolis, Ashanti Region, Ghana' (2015) 3(6).*International Journal of Social Science Studies* 135.

community service, the respondents generally preferred public disturbance, minor traffic offences and domestic violence cases. They were of the view that these type of offences were accidental and could be committed by anybody, no matter how law abiding one may be. Other offences selected were minor fraud, assault and deceit of a public official, minor domestic violence, minor traffic offence and causing minor damage to public property, contempt of court, defilement, incest and public disturbance as offences punishable by community service. A review of the foregoing offences would fit into the ACJ Act requirements in section 460(3) except for the offences of incest and defilement. It is our submission that defilement and incest be excised from the list because such offences merit the full weight of the law. In Uganda, the Community Services Act states that community service be rendered for minor offences.[43] A "minor offence" is defined as an offence for which the court may pass a sentence of not more than two years imprisonment.[44]Definitely, in the light of the foregoing, community service cannot be an appropriate sentence for the offences of incest and defilement. In Kenya, the Community Services Act states that the service orders are to be applicable to offenders. It goes further to define the class of offenders to which the Act is applicable.[45] These are any persons convicted of an offence punishable with: (a) imprisonment for a term not exceeding three years, with or without the option of a fine; or (b) imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate. From the foregoing, the type of offences that merit a sentence for community service are similar in in the statutes of Kenya and the Nigerian federal statute whilst that of Uganda are for lesser offences.

### 4.4 Considerations Guiding a Sentence for Community Sentence under the ACJ Act

Section 460 of the ACJ Act provides that the court exercises its powers under subsection (1) or (2) by regard to the need to: (a) reduce congestion in prisons; (b) rehabilitate prisoners by making them to undertake productive work; and (c) prevent convicts who commit simple offences from mixing with hardened criminals. These principles serve as a guide to a presiding judicial officer.[46] However it is our views that sub section (a) is difficult to achieve. This is due to the fact that there often is no relationship between prison authorities and individual judges on number of inmates in the nation's prisons talk less of controlling /reducing inmate population. The Judiciary needs to go beyond the ceremonial visit of the Chief Judges to prisons to taking active steps to work with the Nigeria

[43]Ugandan Community Service Act (n 40) section 3, Part 11.
[44]ibid, s 2.
[45]Community Services Orders Act 1998, s 3(1).
[46]ibid s 461(1).

Correctional Service[47]((hitherto known as the Nigerian Prison Service) to institute a systemic procedure of receiving regular update of prison inmates population in their jurisdiction. Such information would be passed on to the judges in their jurisdictions to guide them in reducing penal sanctions that lead to incarceration. This will assist in actualizing the noble objective in sub-section (a). It simply is not salutary to keep sending first offenders/minor offenders to prison when they can be better handled through community service options.

**4.5 Establishment of Community Service Centres (CSC)**

Under the ACJ Act, the Chief Judge is to establish in every judicial division a Community Service Centre (CSC) to be headed by a Registrar to oversee execution of community service orders.[48]The Act assigns certain functions to the CSC. These include:[49]

(a) documenting and keeping detailed information about convicts sentenced to Community Service including the:

(i) name of the convict

(ii) sentence and the date of the sentence;

(iii) nature, duration and location of the community service;

(iv) residential address of the convict;

(v) height, photograph, full fingerprint impressions; and

(vi) other means of identification as may be appropriate.

(b) providing assistance to the court in arriving at appropriate community service order in each case;

(c) monitoring the operation of community service in all its aspects;

(d) counselling offenders with a view to bringing about their reformation;

(e) recommending to the court a review of the sentence of offenders on community service who have shown remorse;

(f) proposing to the Chief Judge measures for effective operation of community service orders;

(g) ensuring that supervising officers perform their duties in accordance with the law; and

(h) performing such other functions be necessary for the smooth administration of CSO.

Section 350(3) of the ACJL of Lagos State provides for establishment of community service officers to be appointed in each magisterial district. The Kenyan Act[50] establishes their own National Community Service Orders Committee. It further established District, divisional and locational community service orders committees.[50]Section 461(3) (b) of the ACJA stipulates that part of

[47]The Nigerian Correctiona1 Service Act (hitherto known as the Nigerian Prison Service) Act
[48]ACJ Act, s 461(3).
[49]ACJ Act, pt 111, s 7.
[50]ibid, pt 111, ss 7-11.

the functions of the CSC shall be to provide assistance to the court in arriving at appropriate community service order in each case. This is cogent and important to the success of the service. The proviso in the Lagos Law is that the judicial officer has the responsibility. Better still; the practice in Uganda is instructive. In practice, a district community service committee is responsible for generating a list of placements for areas of work such as construction & environmental work, work in schools and health facilities, planting of trees, desilting of drain etc. The work undertaken by the offender is provided by placement institutions which are public or community based institutions.[51]

**4.6 .Database of Convicts**

Section 461, subsection (3) paragraph (b) of the ACJ Act also provides for establishment of a database of convicts involved in a community service program per judicial division in sub-section (a) in the fore-going. This is commendable but it is hoped such database would be safely stored for use and be easily accessible when required. Furthermore, it is recommended that such information from each judicial division should be warehoused at the Office of the Chief Judge. This would be useful for overview of the scheme and for decision making purposes.

**4.7 .. Duty to Assist the Court under the ACJ Act**

The ACJ Act also confers on the Registrar the duty to assist the court in arriving at an appropriate community service order in each case is an improvement on the earlier but similar provisions in the Lagos State law. This is cogent and important to the success of the Community service. This proviso is absent in section 350 of the Lagos Law which places this duty solely on the judicial Officer. It is submitted that the ACJ Law of Lagos should not have conferred on the court the discretion to determine what would constitute beneficial community service. This is because generally, the nation's judiciary has not proven its readiness to keep pace with alternatives in offender treatment regimes. Thus, the correction officers would be better placed to advise the court as to what works best in a particular community. Furthermore, judicial officers by training and social stratification may not be in tune with a community area of demand for service in tune with demand for social justice, for in a sense that is what community service should be.

[51]P Kintu'Community Involvement in the Administration of Justice, Community Services in Uganda' (2013) Ministry of Internal Affairs, Uganda (Paper presented at the World Congress on Probation, London) 4.

### 4.8 Nature of Community Service under the ACJ Act

Under the ACJ Act, where the court has made an order committing the convict to render community service, the community service shall be in the nature of: (a) environmental sanitation, including cutting grasses, washing drainages, cleaning the environment and washing public places; (b) assisting in the production of agricultural produce, construction, or mining; and (c) any other type of service which in the opinion of the court would have a beneficial and reformative effect on the character of the convict.[52] However, under the ACJ Law of Lagos State, community service covers such work as environmental sanitation, assisting in the care of children and the elderly in Government approved homes.[53]What is clear from the foregoing is that the provisions of section 461 (4) of the Administration of Criminal Justice Act with particular emphasis on paragraph (b) is more extensive than section 350(1) of the Lagos State Law. This is critical as community work should not be viewed as being used to denigrate or humiliate a person which would be counter-productive. It should be beneficial and confer work skills. Subsection(c) of section 461 of the ACJ Act does state that any other type of service that in the court's opinion of the court should have a beneficial and reformative effect on the character of the convict may be imposed. An examination of the parallel proviso in the ACJ Law of Lagos State states that it should be any other service which in the opinion of the court would have a beneficial and salutary effect on the character of the offender. The intendment is clearly the same. The Kenyan Act[54] states that community service shall comprise unpaid public work within a community, for the benefit of that community, for a period not exceeding the term of imprisonment for which the court would have sentenced the offender. It further provides that for the purposes of the Act, public work shall include but not be limited to:

(i) construction or maintenance of public roads or roads of access;
(ii) afforestation works;
(iii) environmental conservation and enhancement works;
(iv) projects for management supply; water conservation, or distribution and
(v) maintenance work in public schools, hospitals and other public social service amenities;
(vi) work of any nature in a foster home or orphanage;
(vii) rendering specialist or professional services in the community and for the benefit of the community, and the nature or type of public work shall, in any particu1ar case, be determined by the court after consultation with the community service orders committee.

[52]ACJ Act, s 461(4).
[53]ACJ Law, s 350.
[54]Kenyan Act, pt11, s (2)(a).

For the Ugandan Act, section 2 of Part 1 of the enabling Act states that community service" means noncustodial punishment by which after conviction the court, with the consent of the offender, makes an order for the offender to serve the community rather than undergo imprisonment. Thus, the Act does not prescribe particular acts or list out works as obtainable under the Nigerian statutes and the Kenyan Act.

Examples of community service in the United States include: washing police cars, cleaning school buses, refurbishing public facilities, and assisting in local government offices.[55] It is also important that a convict should not be subjected to undue financial stress and burden in carrying out the penalty for his crime. It must be remembered that it may very well have been financial lack that drove an offender to crime especially in the case of petty criminals. To this end, the proviso in the Federal Act i.e. the ACJA requiring that the community service be performed as close as possible to the place where the convict ordinarily resides is very much in order.[56] Another benefit as stated in the section is to enable the community monitor him closely. An added advantage in our view is that the Registrar should be able to quickly detect if the convict keeps unsavory friendship ties with criminals in the locality.

**4.9 Provision of Guarantor**

Under the ACJ Act, a convict shall be required to produce a guarantor who shall be a relation or any other responsible person of adequate means who shall be responsible to produce the convict whenever required by the court.[57] The purpose of this provision is not clear. This is not a bail issue and the offender has already been convicted by a court of competent jurisdiction. If the convict was sentenced to incarceration, would a guarantor be required? In any event, is this requirement not a further proof that the penalty of community service is not regarded as a full criminal sanction by itself? It is interesting that the distinguishing feature for a guarantor as stated by the Act is that he should be a relation of the offender or a responsible person of adequate means or substance.[58] Thus, not just character is an issue but financial means. It is our submission that this is counter- productive. The emphasis should have been a respectable member of the community, one who is resident in the community or with close ties or investment in the community. Furthermore, a lacuna is evident in the Act as it is silent on the consequences of a convict failing to produce a guarantor.

[55] Schmalleger (n 1) 376.
[56] ACJ Act, s 461(5).
[57] ibid, s 461(8). Subsection (9) of the Act states that in the event of a default, the guarantor is liable to a fine of one hundred thousand naira or more as the circumstances may require.
[58] ibid, subsection 9.

**4.10 Period of Community Service**

The performance of the community service shall be for a period of not more than six months and the convict shall not work for more than five hours a day.[59]It is noteworthy that the Act takes a step to insulate the convict from abuse by an unscrupulous supervisor.[60]A supervising officer shall not employ the convict for his or her personal benefit. This also serves to protect the integrity of the supervisory officer and to also protect the integrity of the correctional process. Nevertheless, the phrase 'for his personal benefit' does appear to water down this protection as the supervisor may not directly benefit but connive or influence the process for the benefit of someone else. It is our submission that whoever the benefit is aimed at, other than the institution indicated in the court order, it would amount to an abuse of the convict. The Kenyan Act imposes a community service order for a period of days or months. The time period is translated into a number of hours of unpaid work to be undertaken by the offender.The minimum daily period of work is 2 hours and the maximum is 7 hours.[61]This is unlike the ACJ Act which puts a maximum of five hours daily.

**4.11 Abscondment**

The issue of abscondment by convicts sentenced to community service is a clear and pressing problem in community service. Offenders often flee from location of offence and conviction to another place in the country or city. The ACJ Act provided for this very likely event such that in the event of a default by the convict in fulfilling the terms of the community order, the court shall issue a summons compelling his appearance. Where he fails/neglects/refuses to appear in obedience to the summons, the court may issue a warrant of arrest.[62]

**4.12 Inability to Comply with Community Service Order**.

Where the court is informed that the convict has failed to comply with any of the requirements of the community service order, it may vary the order to suit the circumstances of the case or impose on him a fine not exceeding one hundred thousand naira; cancel the Order and sentence the convict to any punishment which could have been imposed in respect of the offence, but the period of community sentence already performed may count in the reduction of the sentence.[63]In Kenya, offenders on community service do abscond. Between 2005-2010, out of the community orders ordered by the courts, 304,421 (97%) of the orders were satisfactorily executed and 2% of the offenders absconded i.e. 6,668 which led to

[59]ibid, s 462.
[60]ibid, s 463 (4) & (5).
[61]Community Services Orders Act No 10 of 1996.

[62]ACJ Act, s 463(1) & (2).
[63]Ibid, s 463(3).

instigation of court proceedings.[64]In Uganda, between 2008-9, 6,350 offenders were on community service and only 254(4%) absconded.[65] This is commendable.

It is said that the greatest use and best developed alternative non-custodial sentences in Africa is in Kenya.[66]

It is said that the greatest use and best developed alternative non-custodial sentences in Africa is in Kenya.[67] It supervises non-custodial court orders, probation and community service. For the period 2005-2010, there were 117 community service officers in Kenya. During that period, 314,013 community orders were ordered by the courts, out of which 304,421 (97%) of the orders were satisfactorily executed. In 2,924(1%) cases the order was partially completed.[68] In Tanzania, the community service is run similar to that of Kenya.[69]As at October 2011, there were 748 offenders on community service orders (653 men and 95 women) and the compliance rate with court orders was 90%.[70]

### 4.13 Supervisory Department

The Community service under the ACJ Act is supervised by the Judiciary[71]whilst that of Uganda is run by the Ministry of Internal Affairs.[72] In Malaysia, the community service order division is located in the Ministry of Women, Family & Community Development.[73]The Act provides for a probation officer to coordinate community service in their respective districts. The problem is that the probation officers are deemed to be court officials and as such tend to be more involved in social welfare work than community service. Their brief is more related to children/juvenile work.[74] From the foregoing, it is clear that community

[64]'Alternatives to Imprisonment in East Africa: Trends &Challenges' Penal Reform International 9 (available at www.penalreform.org/publications/alternatives to imprisonment-east-africa-trends and -challenges) accessed 19 August 2018.
[65]ibid
[66] Marcus,(n 16).
[67]Alternatives to Imprisonment in East Africa: (n 64).
[68]ibid .
[69]Penal Reform International (n 64). The National community service committee is chaired by a High Court Judge with representation from all criminal justice administration agencies including the police, office of the Director of Public Prosecutions, Non-Governmental Agencies, the Law Reform Commission & the Ministry of Gender, Ministry of Local Government & the Prisons.

[70]ibid
71 ACJ Act, s 461.

[72]Penal Reform (n 64).
[73]This is by virtue of section 293 of the Code of Criminal Procedure (Amendment) Act 2006 (Act 1274). This is by virtue of section 293 of the Code of Criminal Procedure (Amendment) Act 2006 (Act 1274).
[74]ibid.

service in East Africa is relatively recent but on its way to getting better established. It should be reiterated that if the corrections is not sufficiently deemed a sanction or culturally appropriate, it will not serve as a deterrent or engender confidence of the local community that justice is served. Also the ACJL should not have defined what constitutes community services. The instances itemized are too restrictive. It should have been left to administrative guidelines.

**5.0 RECOMMENDATIONS**

It is clear that community service is a viable option in dealing with adult offenders especially of petty and non-violent crimes as has been shown in other jurisdictions. Therefore, judicial officers should be tasked through practice directions by the heads of Judiciary and continuous training and re-training to apply it more to those identified class of offenders.

Community service recognizes the importance of partnership with the community in responding to crime. Our communities not only have a right to safe streets and homes, but also bear responsibility for making them safe. Therefore, a closer linkage through active partnership with non-governmental organizations, religious bodies, private firms and community organs to ensure proper placement and maximum impact of the communal work is imperative. Furthermore, the present list of envisaged community tasks in the ACJA Act and ACJ Law are inadequate.

Community service activity should not only benefit the community. Work skill, professional or specialized competence of the convict can be utilized also in relevant schemes to benefit the community.

The ACJ Act also provides for establishment of a database of convicts involved in a community service program per judicial division. This is commendable. However, it is hoped such database would be stored per district and warehoused preferably in the Office of the Chief Judge and be easily accessible when required. This would be useful for overview of the scheme and for decision making purposes.

It is recommended that appointment and supervision of community service officers be handled by the Social Welfare Departments of the relevant ministry. They already possess the requisite experience and background in social work than the Judiciary in this regard.

Some persons regard the prison as the only just and equitable way to punish offenders and options seeking to divert offenders from the criminal justice 'pit' or prison are viewed with disgust or at best with extreme suspicion. It is hoped that as the public see its benefits, suspicion will give way to public acceptance and support. Consequently, there is need for massive public enlightenment on its benefits and for communities to 'buy in' into the schemes.

## 6.0 CONCLUSION

The introduction of community corrections has come late to the Nigerian Correctional system. Both the ACJ Act & the ACJ Law have been rigorously examined in this paper. The exhaustive analysis undertaken is to identify strengths of each legislation and likely obstacles in its implementation. To this end, comparison had to be made with laws and operation of community corrections in East African jurisdictions. It is acknowledged that introduction of penal provisions per se is not enough for a shift of attitude by the Judiciary towards its implementation, hence the foregoing recommendation, but it is a significant step forward towards revamping the treatment of certain classes of offenders and thereby reducing the overload on the Nigerian correctional system.

# AN EXAMINATION OF THE LEGAL REGIME FOR THE PROTECTION OF LIVING RESOURCES OF THE GULF OF GUINEA

**GIDEON N. GASU, PhD**[1]

**Abstract**

*The discovery of off shore hydrocarbon deposits in the Gulf of Guinea has gone a long way to increase the geostrategic importance of this marine area. As a result of the quality of oil extracted from the region which has low sulphur content and coupled with the restiveness of the Persian Gulf, many hydrocarbon consumers are shifting interest to the Gulf of Guinea. This paper examined the legal regime for the protection of the living resources of the Gulf of Guinea. The paper revealed the existence of a wide range of laws to protect the dwindling fortune of the Gulf of Guinea but these laws and policies are grossly flawed. The paper concluded that until adequate strategies are devised towards enhancing the effectiveness of the laws as a means of protecting the living resources of the Gulf of Guinea, the region will continue to experience adverse environmental conditions and security challenges.*

## 1.0 INTRODUCTION

International experience in environmental governance seems to confirm the point that custom-built asymmetrical regimes are more easily achieved within existing groups of countries where enough tradeoffs (to compensate for the asymmetries) are available as a result of close regional integration and solidarity. Environmental problems generally have a trans-boundary nature and wide spectrum of environmental challenges confronting other continents in general and Africa our dear continent in particular; it requires strong political will and enormous financial cooperation among member States to tackle the threats to biodiversity. In this regard, the Gulf of Guinea and other regions have taken initiatives to protect the marine living resources through legal regimes at both regional and national levels. There has consistently been higher

[1] Gideon N. Gasu (Ph.D) is a Senior Lecturer with the Department of Private and Business Law, Faculty of Law, Ajayi Crowther University Oyo, Oyo State, Nigeria (phone: +2348038771987 email: g.gasu@acu.edu.ng or dr.gasuesq@gmail.com

degree of understanding than under comparable global regimes except possibly CBD and other UNEP Agreements.

Whether these resources are properly managed is open to several other questions. Indeed the Food and Agricultural Organization (FAO) highlighted that fish stocks are over fished in many parts of the world. Thus in Resolution 58/240 the United Nations General Assembly reiterated 'a deep concern at the situation of many of the world's fisheries caused principally by over capacity, overfishing and illegal unregulated, unreported fishing as well as in many areas pollution'.[2]

Until the late 19th Century, the marine living resources of the vast world oceans were thought to be essentially inexhaustible even by the most dominant biologists.[3] As the fishing industry expanded and technology made larger catches possible and more areas of the ocean exploitable, the received wisdom that fisheries were inexhaustible soon became discredited.

Natural resources as a whole whether renewable or non-renewable have suffered catastrophic exploitation and wanton destruction by mankind, particularly in the 20th century. The present generation will need to regulate and manipulate the use of these resources through the evolution of sound management strategies.

The countries of the Gulf of Guinea are part of the International System and have satisfied most of the International Conventions for the Protection of the Environment from pollution by the comity of nations. But the issue has been the implementation of these conventions. Most of these international instruments are flawed. This has not been different in the sector offshore exploration and production of oil and gas. The above notwithstanding, a regional approach is still the best method in protecting the Gulf of Guinea from environmental harm related to petroleum activities.[4]

[2] See the UN General Assembly Resolution. Oceans and the Law of the Sea A/RES/58/240, 23.12.2003.12 of Preamble. According to a report of the Secretary General, many scientists considered that if current levels of exploitation were maintained, not only would the commercial extinction of fish stocks soon become a reality, but the long term biological sustainability of many fish stocks would also be threatened. United Nations Report of the Secretary-General, Oceans and the Law of the Sea, A/59/62, 4.3.2004, 53, para. 206

[3] T Smith, *Scaling Fisheries* (Cambridge University Press 1994).

[4] Phillip H Sands, 'The Rise of Regional Agreements for Maine Environment Protection in FAO CESSAUS' in MEWRY OF JOHN CARROZ (edn), *The Law of the Sea* (1987), available at http:www.fao.org/docept/S5280t0y.htm.

## 2.0 **LEGAL FRAMEWORK FOR THE PROTECTION OF THE LIVING RESOURCES OF THE GULF OF GUINEA**

### 2.1 The Lusaka Agreement on Cooperation Enforcement Operation Directed at Illegal Trade in Wild Fauna and flora 1994

The Lusaka Agreement on Cooperation Enforcement Operation Directed at Illegal Trade in Wild Fauna and Flora[5] is a regional initiative under the auspices of UNEP aimed at complementing earlier African and International efforts by establishing a well-designed implementation machinery towards the encouragement of individual and joint action for the conservation, utilization and development of the soil, water, flora and fauna for the present and future welfare of mankind, from economic and nutritional, scientific, educational, cultural and aesthetic points of view.[6] The Convention in its Article 1 being the definitional section adopts the definition of Biological diversity as stated in *parimateria* by the CBD and goes ahead to define "conservation as the management of human use of organisms or ecosystems to ensure such use is sustainable; it also includes protection, maintenance, rehabilitation, restoration and enhancement[7]. The objective of the Convention is stated in Article 2 to reduce and ultimately eliminate illegal trade in wild fauna and flora and to establish a permanent Task Force for this purpose.[8].

The Agreement adopts stricter enforcement measures at the regional level to curb illegal trade in wild life species and aims at easing the administrative difficulties hampering effective cross-border efforts to restrict trade and increase compliance with CITES at regional level.

The Convention came into being out of the concerns of the African States for the preservation of African wild fauna and flora, which are being lost due to illegal trade in precious fauna and flora arising from large-scale poaching thereby resulting in the depletion of the continent's biological diversity to a level that is gravely prejudicial to sustainable development. The Convention goes ahead in Article 4 to enumerate the obligations of parties.[9]

[5] Lusaka and JIWLP (1998) entered into force on 10 December 1996.
[6]GO Amokaye, *Environmental Law and Practice in Nigeria* (University of Lagos Press 2004) 164-165.
[7]Lusaka Agreement on Cooperation Enforcement Operation Directed at Illegal Trade in Wild Fausa and Flora (LACEODITWIFF) 1994, art 1.
[8]ibid art 2.
[9]The parties shall, individually and/or jointly take appropriate measures in accordance with this Agreement to investigate and prosecute cases of illegal trade; Each party shall cooperate with one another and with the Task force to ensure effective implementation of this agreement; Shall provide the Task Force on a regular basis with relevant information and scientific data relating to illegal trade; Shall provide the Task Force with technical assistance relating to its operations, as needed by the task force; Shall accord to the Director; Field Officers and the Intelligence Officer of the Task Force while engaged in carrying out the function of the Task Force in accordance with Paragraph 9 of Article 5, the relevant privileges and immunities, including those specified under paragraph 11 of Article 5; Each party shall protect information designated as confidential that becomes available to parties in connection with the implementation of this agreement. Such information shall be used exclusively for the purpose of

The Lusaka Agreement of 1994 equally establishes a Multinational Task Force in its Article 5 whose mandate among other things includes to conduct cross-border investigations into the illegal trade in wild fauna and flora. State Parties are also obliged to designate a National Bureau to collaborate with the Task Force on such investigations.[10] The National Bureau will be 'a governmental entity with the competence encompassing law enforcement.[11]Article 10 of the Agreement deals with the settlement of disputes among member countries. Any dispute concerning the interpretation or application of this Agreement which cannot be settled by negotiation, conciliation or other peaceful means may be referred to any member of the Governing Council. Where the parties fail to settle the matter it shall be submitted to an arbitral body[12] Moreover, an amendment to the Agreement may be proposed by any party and communicated in writing to the Director of the Task Force who shall transmit the proposals to all parties. No proposal for amendment shall be considered by the Governing Council unless it is received by the Director at least 120 days before the opening day of the meeting at which it is to be considered by a 2/3 majority.[13]

### 2.2 The Convention on the Protection, Management and Development of the Marine and Coastal Environment of the West and Central African Region

The Abidjan Convention of 1981,[14]as it is popularly known, seeks to protect the marine environment, coastal zones and related internal waters falling within the jurisdiction of the States of the West and Central African Regions from Mauritania to Namibia.[15] Member States of the Convention may enter bilateral or multilateral

implementing this agreement; Each Party shall encourage public awareness campaign aimed at enlisting public blueprint for the objective of this agreement and the said campaigns shall be so designed as to encourage public reporting of illegal trade; Each party shall adopt and enforce such legislative and administrative measures as may be necessary for the purpose of giving effect to this Agreement; Each party shall return to the country of original export or country of re-export any specimen of species of wild fauna and flora contracted in the course of illegal trade provided that: - The country of original export of the specimen(s) can be determined, or The country of re-export is able to show evidence that the specimen(s) re-exported were imported by the country in accordance with the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora governing import and re-export and; The costs of returning such specimens of wild fauna and flora are borne by the country receiving the specimen(s), unless there is an alternative offer to bear costs to which both the Party returning the specimen(s) and the party receiving the specimen(s) agree; Each party should pay its contribution to the budget of the Task Force as determined by the Governing Council; and Each Party shall report to the Governing Council on the implementation of its Obligations under the Agreement of intervals as determined by the Governing Council.

[10]LACEODITWIFF 1994, art 4.

[11]The Task Force is empowered to 'investigate violation of national laws pertaining to illegal trade (in wild fauna and flora) at the request of the National Bureaus or with the consent of the of the parties concerned, and to present them evidence gathered during such investigations'. Finally to enable the Task Force to perform its functions effectively, parties need to have in place effective and up-to-date national laws relating to illegal trade in wild fauna and flora.

[12]Abidjan Convention, art 10(1) and (2).

[13]ibid art 11(1) to (3).

[14]Adopted at Abidjan, Cote d'Ivoire on 23 March 1981; came into force 5 August 1984. See 20 ILM (1981) 746

[15]Abidjan Convention 1981, art 1.

agreements including regional and sub-regional agreements for the protection of the marine region of the Convention area. More so, the Convention clarifies that nothing in its ambit shall prejudice the codification and development of the Law of the Sea by UNCLOS III convened pursuant to UNGA Resolution 2750 (XXV)[16].

The general obligations of the contracting parties are started in Article 4 to include, *inter alia,* the taking of appropriate steps either jointly or individually to prevent, reduce, combat and control pollution of the Convention area to ensure sound environmental management of natural resources, using for this purpose the best practicable means at their disposal and in accordance with their capabilities[17]. Equally, contracting parties according to Article 4(3) are supposed to establish national laws and regulations for the effective discharge of their obligations prescribed in this Convention, and shall endeavour to harmonise their national policies in this regard.

In regards to pollution of the region, Articles 5-9 deal with pollution from ships, Aircrafts, land based sources and activities relating to exploration and the exploitation of the natural resources of the sea bed as well as pollution from atmospheric sources and embody measures to prevent, reduce and combat these environmental vices[18] . With regard to coastal erosions, Article 10 of the Convention states that contracting parties shall take all appropriate measures to prevent, reduce, combat and control coastal erosion in the Convention Area resulting from man's activities such as land reclamation and coastal engineering. Article 11 enjoins Contracting Parties to protect and preserve rare or fragile ecosystems, as well as the habitat of depleted, threatened or endangered species and other marine life in specially protected areas. Articles 12 and 14 demand for cooperation in dealing with pollution emergencies in the Convention Area and in exchanging scientific and technological[19] information while Article 13 of the Convention is on Environmental Impact Assessment admonish Contracting Parties to develop technical and other guidelines regarding environmental impact assessment of their development projects; and to develop and establish rules, regulations and guidelines for the determination of liabilities and the payment of adequate and prompt compensation for the pollution damage of areas falling within the jurisdiction of the Convention.[20]

The Convention equally designates UNEP as the Secretariat of the Convention to carry out a wide variety of functions[21]. The parties to the Convention shall hold

[16]ibid art 2.
[17]ibid art 4 (1).
[18]ibid arts 5-9.
[19]ibid arts 12 and 14.
[20]ibid arts 13 and 15.
[21] UNEP as the Secretariat of the Convention shall carry out the following duties (i) to prepare and convene the meetings of contracting parties and conferences provided for in Articles 17 and 18. (ii) To perform the function assigned to it by the protocols of the convention
(iii) to consider enquiries by and information contracting parties and to consult with them on question relating to this convention and its related protocols and Annexes there to:

ordinary meetings once every two years and extraordinary meetings at any other time deemed necessary, upon the request of the Organisation or at the request of contracting parties supported by 3 other contracting parties.

### 2.3 Regional Convention on Fisheries Cooperation among African States Bordering the Atlantic Ocean

The African States bordering the Atlantic Ocean (Parties to this Convention) took cognizance of the United Nations Convention on the Law of the Sea (UNCLOS III)[22] whose provisions encouraged the conclusion of regional and sub-regional agreements on fisheries cooperation as well as other relevant international treaties to adopt the Rabat Declaration at the end of the Ministerial Conference on Fisheries Cooperation among African States bordering the Atlantic Ocean[23], which took place in the Kingdom of Morocco.

Furthermore, convinced of the need for regional consultation for the purpose of achieving harmonized policies regarding sustainable exploitation, conservation and processing of fishery resources, it became imperative for the affected States to promote collaboration with competent sub regional, regional, and international organizations and active cooperation in line with the aspirations of States of the Region, within the context of a fisheries management strategy designed to serve the economic, social and nutritional development of their populations.

The Morocco Convention in its Article 1 enumerates the 22 State Parties to the instrument who are mostly the Gulf of Guinea States.[24]Article 2 of the Convention spells out the objectives of this Convention which include:

(a) to promote an active and organized cooperation in the area of fisheries management and development in the Region;

(b) to take up the challenge of food self-sufficiency through the rational utilization of fishery resources, within the context of an integrated approach that would embrace all the components of the fishing sector;

(c) to stimulate the national economic sectors through the direct and secondary effects resulting from fishery resources exploitation, bearing in mind the importance

(v) To coordinate the implementation of cooperation activities agreed upon by the meetings of contracting parties and conferences provided an Article 17

(vi) to enter into such administrative arrangement as way be required for the effective exchange of the secretariat function.

[22]Signed at Montego Bay, Jamaica on 10 December 1982.

[23] 30 March to 1 April,1989.

[24] The Parties include: the People's Republic of Angola, Republic of Benin, Republic of Cameroon, Republic of Cape Verde, Republic of Congo, Republic of Côte d'Ivoire, Democratic Republic of Congo, Republic of Gabon, Republic of The Gambia, Republic of Ghana, Republic of Guinea, Republic of Guinea-Bissau, Republic of Equatorial Guinea, Republic of Liberia, Kingdom of Morocco, Islamic Republic of Mauritania, Republic of Namibia, Federal Republic of Nigeria, Democratic Republic of Sao Tome and Principe, Republic of Senegal, Republic of Sierra Leone and the Republic of Togo

of the fisheries sector in the economic, social and nutritional development process of the people of the Region;

(d) to enhance, coordinate and harmonize their efforts and capabilities for the purpose of conserving, exploiting, upgrading and marketing fishery resources, considering in particular fish stocks occurring within the waters under the sovereignty or jurisdiction of more than one Party; and

(e) to reinforce solidarity with African landlocked States and geographically disadvantaged States of the Region.

The Convention goes ahead in Article 3 on the subject of Conservation and Management of Fishery Resources in the region to state as follows:

1. Parties shall combine their efforts to ensure the conservation and rational management of their fishery resources and take concerted action for the assessment of fish stocks occurring within the waters under the sovereignty or jurisdiction of more than one Party.

2. Parties shall establish and maintain an up to-date inventory of human and material resources of the Region and shall conclude arrangements utilizing their complementary strengths in the area of fishery resources assessment.

3. Parties shall exchange scientific information regarding fishery resources, statistics relating to catch and fishing effort and other data relevant to the conservation and management of fish stocks with the objective of achieving their optimum utilization.

4. Parties shall endeavour to adopt harmonized policies concerning the conservation, management and exploitation of fishery resources, in particular with regard to the determination of catch quotas and, as appropriate, the adoption of joint regulation of fishing seasons.[25]

Furthermore, under Article 4 on Assessment and Conservation of Highly Migratory Species, States Parties undertake to exchange information on their activities regarding the assessment and conservation of highly migratory species and coordinate their actions in this area within the competent international organizations. On Monitoring, Surveillance and Control of Fishing Vessels Article 5 call on Parties to work and collaborate with all the means at their disposal, or which they may jointly acquire to ensure the monitoring, surveillance and control, including technical control, of fishing vessels operating in the Region. According to Article 6 on Development of Fishery Production and Means of Production, Parties shall give particular attention to development and upgrading of fishery production in all its forms so that the beneficial effects of fishing activity may contribute to the social and economic development of their people. Also for the purpose of developing fishery production in the Region, Parties shall promote cooperation and encourage joint actions in the following priority areas:

[25]Convention on Fisheries Cooperation, art 3.

(a) the enhancement of the Region's capabilities with respect to freezing plants and fish processing facilities;

(b) the modernization of means of production, particularly for artisanal fishing;

(c) the promotion of under-valued or under-exploited species;

(d) the development of aquaculture and the utilization of technical improvements achieved in this area for the purpose of adapting it to the particular circumstances of the Region.

To ensure effective Market of Fishery Products, Article 7 calls on Parties to encourage the establishment of bilateral and multilateral cooperation in the marketing of fishery products so as to promote intra African fish trade and to enhance the exporting capacities of Parties in the world market.[26]

Equally according to Article 7 (2), Parties shall encourage meetings between operators from the fisheries sector in order to encourage the exchange of information on technological advances in fisheries and aquaculture and to promote the products of their respective fishing industries.

The Regional Convention on Fisheries Cooperation among African States bordering the Atlantic Ocean in its Article 8 on Fisheries Planning and Financing with a view to promoting the fisheries sector and its connected industries at the macroeconomic level, Parties shall endeavour:-(a) to reinforce specialized bodies and capabilities, in particular those relating to economic and social analysis, in order to determine the required policies and strategies for the rational management and planned development of the fisheries of the Region;(b) to promote specific financing mechanisms in line with the needs of the Region's fisheries sector, in the form of a system of maritime credit or other appropriate system.

On the social conditions of fishermen, taking into account the vital role of the Region's fishermen in the development of artisanal and industrial fisheries, Parties agreed to promote the improvement of their welfare in particular with respect to professional standing and working conditions.[27]

The Convention on Development of Marine Scientific Research in line with UNCLOS III states that:

1. Parties shall encourage the exchange of experience in the field of marine scientific research with a view to promoting joint activities aiming at achieving better knowledge of the marine environment and its resources and, in due course,

[26]To this end they undertake: to inquire into their needs and capacities regarding fishery products; to promote and harmonize laws and regulations concerning trade in fishery products; to determine common positions regarding international trade in fishery products; to promote the conclusion of bilateral or multilateral arrangements favouring, in particular, trade preferences and facilities for payment; to identify and carry out measures capable of enhancing the quality image of fishery products of the Region.

[27]Convention on Fisheries Cooperation, art 9.

formulating fisheries management plans as well as improving fishing techniques or gears adapted to the specific needs of the Region;

2. Parties shall encourage the twinning of the Region's institutions so as to allow the exchange of scientists and the formulation of research programmes as well as the optimum use of vessels and other means of research.[28]

On the Protection and Preservation of the Marine Environment in line with UNCLOS III, this regional Convention declares thus:

1. Parties shall intensify their efforts at the national, regional and international levels, directly or with the assistance of competent regional or international organisations, to ensure the protection and preservation of the marine environment as well as the management of coastal areas of the Region.

2. To this end, they shall promote the strengthening of bilateral, sub regional and international cooperation mechanisms dealing with the protection and preservation of the marine environment and coastal areas as well as the intensification of their activities, while taking into account the relevant international standards and regulations on the subject.[29] Parties shall endeavour to harmonize their fisheries policies. To this end:

(a) they shall adopt at the national level, laws and regulations to ensure proper implementation of the provisions of this Convention and its protocols;

(b) they shall encourage the exchange of information on fisheries laws and regulations and methods of their implementation;

(c) they agreed to consult one another in international conferences on fisheries in order to harmonize their positions.[30] Also under Article 14 on Fisheries Cooperation Agreements, Parties shall encourage the conclusion of fisheries agreements between them on a preferential basis. Furthermore, they shall exchange their experience in the negotiation and conclusion of fisheries cooperation agreements with third parties.

To keep and maintain a Maritime Data and Information Bank Article 15 requires State Parties with a view to promoting the dissemination of scientific, economic, technical and legal data and information regarding the Region's fisheries, to collaborate in the establishment and operation of a data and information bank, in cooperation with relevant sub regional, regional and international organizations.

Article 16 calls for solidarity with landlocked African States and with geographically disadvantaged States of the Region. Parties affirm their solidarity with landlocked African States and with geographically disadvantaged States of the Region and shall establish active cooperation with them.

[28]ibid art 11.
[29]ibid art 12.
[30]ibid art 13.

For the purpose of implementing this Convention and its protocols, Article 17(1) demands Parties to establish an institutional framework comprising the Conference of Ministers[31], the Bureau[32] and the Secretariat[33].

According Article 17(2), the Conference of Ministers shall define the status of the above-mentioned organs. Finally, States and competent governmental and non-governmental international organizations may be invited as observers to the sessions and meetings of the said organs.[34]

The Convention demands the establishment of a Regional Fisheries Development Fund (RFDF) which shall be managed by the Secretariat and the modalities concerning its establishment and operation shall be determined by the Conference of Ministers. The fund shall be used:

(a) to cover the operating expenses of the Secretariat; and

(b) to finance project and programme activities to be carried out under this Convention.[35]

The Regional Agreement calls for Cooperation with Other Organizations with a view to achieving the objectives of this Convention, Parties shall cooperate through all appropriate means with relevant sub-regional, regional and international organizations, as well as with any other concerned institution. On Settlement of Disputes**,** Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with the Charter of the United Nations.[36]

The Convention shall be subject to ratification, acceptance or approval by States which have signed it and shall remain open for accession by other States of the Region in accordance with their respective procedures.[37] For amendment of the Convention, any Party may propose amendments to this Convention and its protocols[38]. Amendments shall be circulated to all Parties six (6) months prior to their consideration. Amendments shall be adopted by a two-thirds majority of the Parties and shall enter into force ninety (90) days after their adoption. Five (5) years after the coming into force of the Convention any party may denounce it, provided that it notifies to the depositary its intention to do so.[39] Convention shall be transmitted to the Secretary General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations.

[31]The Conference of Ministers is the governing and decision making body with respect to fisheries cooperation among the Parties. It shall determine the objectives and principles governing programmes and activities to be carried out under this Convention. It shall hold a regular session once every two years and a special session at the request of a majority of the Parties;

[32] The Bureau is the coordinating organ of the Conference of Ministers;

[33] The Secretariat is the executive organ.

[34]Convention on Fisheries Cooperation, art 17(3).

[35]ibid art 18.

[36]ibid art 21.

[37]ibid art 23.

[38]ibid art 25.

[39]ibid art 26.

### 2.4 Gulf of Guinea Treaty

The recent discovery of offshore hydrocarbon deposits in the Gulf of Guinea has gone a long way to increase the geostrategic importance of the marine region. After many years of neglect of this maritime zone, there has renewed Western interest in the region accompanied by similar interest of America. This has necessitated the development of regional cooperation in the Gulf of Guinea leading to the recent establishment of the Gulf of Guinea Commission.[40] The main aim of the Commission is to create a collective framework for the regulation of the oil multinationals that already operate in the area and those that may be attracted to do so in the future. The recently concluded Treaty establishing the Gulf of Guinea Commission[41] outlines the framework of the Gulf of Guinea Commission and prescribes its objectives, powers and responsibilities.[42]

The Gulf of Guinea Commission Treaty in comparison with other treaties, is a relatively short and concise legal instrument. It has a preamble, 31 Articles and lists the signatories of the current Head of States appended to it. The initial Head of States and Government include: The Republic of Angola, the Republic of Cameroon, the Republic of Congo, The Democratic Republic of Congo, The Republic of Gabon, The Republic of Equatorial Guinea, the Federal Republic of Nigeria and the Democratic

[40]GbengaOduntan , 'The Emergent Legal Regime for Exploitation of Hydrocarbons of the Gulf of Guinea: Imperative Considerations for participating States and Multinationals' (2008) 57 *International & Comparative Law Quarterly* 203, available at<http://heinonline,org >accessed 6 October 2015.

[41]Hereinafter referred to as the Treaty.

[42]According to GbengaOduntan, given the huge interest generated among the major oil producing Multinational Corporations (MNCs), the newer independent producers and the participating States, a critical assessment ought to be made of the main provisions of this treaty to see whether and to what extent they can facilitate a sustainable and responsive regime for anticipated explosion of explorative activities in this resources rich and strategic littoral zone. There is need to regulate the activities of multinational companies and tankers that crisscross the Gulf of Guinea such as those from the Caspian Sea which is landlocked, transporting must atleast begin with pipelines, followed in many cases by tanker travel through the shadow and already congested Borphorus straits. Access to the Gulf of Guinea is easier than the above mentioned regions. The strategic importance and economic implications of the littoral oil discoveries for States and multinationals can hardly be over emphasized. Oil companies and Western governments are engaging in a new strategic thinking about the countries in the Gulf of Guinea and other locations around the continent as a potential replacement for the Middle East as a source of oil. African governments are crucially aware of their increasing and unique bargaining powers in the scheme of world oil production. Sources in Nigerian Government before the fall in oil prices noted that: The attempt to gain a strong foothold in West Africa by Europe and North America has been linked to economic and geopolitical considerations. Currently, West Africa supplies about 15% of US oil imports, compared to the Middle East which supplies 25%. However, with ever increasing tension and rash of conflicts in the Persian Gulf, American Officials are searching for more secured and predictable sources of oil … The high quality of the crude (usually very low sulphur content) as well as the absence of religious based violence in west Africa is said to make the Gulf of Guinea particularly attractive. The production figures has slowed down aggressively due to the fall in oil prices and the gross insecurity in the Gulf of Guinea recently and the insurgency in the region especially in Nigeria and Angola. Furthermore, attraction of the treaty area for investors and perhaps a source of quiet joy for many of the governments in the capitals of the participating States is the fact that the resources of the Gulf of Guinea are not on land territory but are conveniently based off shored in the seas. This off Shore Theater for oil production represents for governments and the MNCs a welcome distance from many of the problems that are, for instance affecting the Niger Delta Area in Nigeria; and therefore, guarantee the safety of investments.

Republic of Sao Tome and Principe. The States were desirous to reinforce and consolidate the Fraternal Relations existing among them prompted by the desire to establish and develop close and multifaceted cooperation among States and to establish relations on the basis of mutual understanding, good neighborliness and strong bounds of friendship. As further stated in the preamble, it resolved to remove obstacles likely to impede cooperation, to create and maintain conditions of peace and security among member countries.[43]

The preambular provisions of the Gulf of Guinea emphasise the motivation of the seven pioneer States Parties to make natural resources of their countries available for economic development and social progress of their people through multifaceted cooperation mutual understanding, good neighborliness and strong bonds of friendship.[44] The Parties express their willingness to be guided by the noble aim of ensuring that the natural resources of their various countries are made available for the economic development and social progress of the people of Member States. To ensure lasting peace in the region, the States Parties have undertaken to pool their efforts towards the harmonisation of their respective policies in the areas of common interest. To this end, they pledge to map out common policies, particularly in the areas of: (a) Peace and security; (b) Exploitation of hydrocarbon; (c) Fishery and mineral resources; (d)The environment; (e) The movement of people and goods; (f) Development of communication; and (g) Promotion of the economic development and integration of the Gulf of Guinea.[45]

Membership of the Commission is open to Sovereign States bordering the Gulf of Guinea that sign up to and ratify the treaty.[46] Membership is also open by accession to any State bordering the Gulf of Guinea which has not signed the Treaty at the time of its entry into force by notification to the Executive Secretary of the State's intention to accede to the Treaty.[47] It is crucial at this point to take note of the method of becoming a member of the Commission which inter alia include: (1) To be a Member State of the Commission, a State shall be bordering the Gulf of Guinea. (2) It must have accepted to be bound by the provisions (rights and obligations) under the treaty, although there is the possibility that a state may under certain circumstances exempt itself from specific provisions and obligations by virtue of the safety clause incorporated in Article 30 of the Treaty. This provision allows for the Assembly to decide on the modalities and conditions under which a Member State may be authorized to stay the implementation of specific provisions of the treaty. (3)

[43]Preamble to the Gulf of Guinea Treaty.
[44]Oduntan (n 40) 258.
[45]Gulf of Guinea Treaty, art 5.
[46]ibid art 2.
[47]ibid art 27. The Executive Secretary shall upon receipt of such notification transmit copies thereof to all Member States. The vote of each Member State shall be received by the Secretary. Upon receipt of the required number of votes, the Executive Secretary would transmit the decision of admission to the concerned Member State.

Membership of the Commission is not open to corporations but only to Sovereign States bordering the Gulf of Guinea that become parties to the treaty.[48]

The above provisions mark a significant development on the African continent in directing its affairs towards the management of sovereign resources through international organizations. The Commission is established in line with the Agreement establishing the African Petroleum Producers Association (APPA)[49] whereas members of APPA is open to African States, from various regions, membership of the Commission is geographically discriminatory to the extent that it insists on appurtenance to the Gulf of Guinea. The Commission shares a lot of familiarities with Organization of Arab Petroleum Exporting Countries (OAPEC). Petroleum products are incontestably the domain in which the Arab countries have really shown a will to cooperate with African Countries exemplified by the cooperation ties under OPEC. Both the Gulf of Guinea Commission and the OAPEC are regional intergovernmental organizations concerned with the development of the hydrocarbon industry for States that rely on these exports. The broad aim of both organizations is to foster cooperation among their members.

To enable the Commission carry out its functions and implement its aims and objectives, Article 6 of the Treaty establishes certain organs namely:

a) The Assembly of Heads of States and Government;[50]
b) The Council of Ministers;[51]
c) The Secretariat, and
d) The Ad Hoc Arbitration Mechanism.[52]

The Assembly shall meet once a year in a regular session and at any time in extraordinary session subject to approval by two-thirds majority of Member States of the Commission. The function of the Assembly shall include:

a) Define the general policy and major guidelines of the Commission.
b) Oversee the functioning of the Commission.
c) Examine the reports of the Council and take relevant decisions.
d) Decide as a last resort about all matters on which the Council has not been able to take a decision.
e) Establish any organ of the Commission or specialized Committees.
f) Adopt the budget of the Commission.

[48]ibid art 2.
[49] This Agreement was made in Lagos, Nigeria on 27 January 1987. This Association embraces 12 Countries: Nigeria, Angola, Benin, Cameroon, Congo, The Democratic Republic of Congo, Egypt, Equatorial Guinea, Gabon, Ivory Coast, Libya & Nigeria [1987] ILM 1493
[50] Article 7 states that the Assembly shall be the supreme organ of the Commission. It shall be compared of Heads of States & Governments or their duly accredited representatives.
[51] The Council shall be compared of Ministers responsible for Foreign Affairs on other Ministers or Authorities as designated by Member States. The Ministers for Economy and Finance, Hydrocarbons Fisheries Resources, Mines, Environment of all such Ministers as are designated by Member can also meet as need be.
[52]Gulf of Guinea Treaty, art 6.

g) Appoint and remove the Executive Secretary.

h) Decide on the location of the Headquarters of the Commission.[53]

The Assembly shall take decisions by consensus or, failing which, by two-thirds majority of the members present. The quorum for meetings of the Assembly shall be two-thirds of Members States.[54]

The Council shall meet twice a year in regular session. At the request of any Member State and subject to approval by two-thirds majority of the Member States of the Commission, it shall meet in extraordinary session.[55]

The Council is answerable to the Assembly and it shall be entrusted with the following responsibilities:

a) Preprinting the Sessions of the Assembly.

b) Promoting all activities geared towards the attainment of the objectives set forth in Article 2 of this Treaty, within the framework of the general policy defined by the Assembly.

c) To this end, it shall formulate and propose general policy measures.

d) Take cognizance of any matter referred to it by the Assembly.

e) Implement the cooperation policy in accordance with the general policy defined by the Assembly.

f) Create Committees and determine their areas of competence.

The Council shall be assisted in the accomplishment of its tasks by specialized Committees of this Treaty[56]. The Council shall take its decision by consensus or, failing which, by a two-thirds majority of the members present. The quorum shall be two-thirds of the Members States[57].

The third very important arm is the Secretariat whose functions include the following:

a) To ensure the day to day functioning of the Commission;

b) to implement the decisions of the Assembly and the Council;

c) to prepare the reports, draft decisions and agreements for attention of the Assembly and the Council;

d) to formulate the recommendations that might enhance the efficient and harmonious functioning and development of the Commission;

e) to provide technical services for the Sessions of the Assembly and the Council as well as the Specialized Committees;

f) to play the role of custodian of the documents and assets of the Commission;

g) to prepare the budget of the Commission; and

[53]ibid art 8.
[54]ibid art 9.
[55]ibid art 11.
[56]ibid art 12.
[57]ibid art 14

h) to carry out any other duties that may be assigned to it by the Assembly or the Council.[58]

The Secretariat sponsors, studies, organize Seminar and Conferences, and collaborate with other relevant governmental and intergovernmental organizations within and outside of the region and internationally. The Secretariat of the organization is expected to maintain consultation and activities with the APPA, and the various national energy companies such as the Nigerian National Petroleum Corporation (NNPC) and its Cameroonian counterpart SONARA.

The brain behind this Treaty under consideration is the creation of progressive institutional regime to govern the Gulf of Guinea. The Treaty does consider many of the major areas that ought to be considered in a legal instrument of this nature. Thus, the Treaty is a charter for the onset of major exploration of a substantial portion of African deep seas.[59] It lays a foundation for rational discussion of issues relating to the common interest of the participating States and will in many ways guarantee peaceful conduct of exploratory activities in what appears to be the resources Eldorado (consisting primarily hydrocarbons but including other valuable resources such as fisheries) for the next few decades.[60] The Treaty broadly identifies the scope of the Commission's tasks, areas of operation, hopes and aspirations. Equally it addresses the means and manner by which the Member States hope that the organization function and deals with the usual details that would ensure operation of an interactional organization such as the official languages of the Commission[61] and its privileges and immunities.[62]

In the area of dispute settlement, Article 20 of the Treaty states that Member States shall act collectively to guarantee peace security and stability as prerequisites to the realization of the objectives set forth in this Treaty. To this end, they undertake to settle their disputes amicably failing which either party shall refer the matter to the Ad hoc Arbitration mechanism of the Treaty or any mechanism for peaceful resolution of conflicts stated by the Charter of the UN, the Organization of African Unity and the African Union.[63]

Member States are therefore enjoined to act collectively to guarantee peace, security and stability as prerequisites to the realization of the objectives set forth by the Treaty.

The formulation of Article 20 of this Treaty under consideration suggests a hierarchy of dispute management techniques for the Member States.

[58]ibid art 17.
[59]Oduntan (n 40) 264.
[60]ibid.
[61]ibid art 21.
[62]ibid art 22.
[63]ibid art 20.

Article 22 of the Treaty enshrines upon the Commission a juristic person capable of entering into contracts, purchasing and owning property and can be a party to judicial and other legal proceedings. In this regard the Commission shall be represented by the Executive Secretary (its alter ago). The immunities and privileges granted to the Secretariat shall be the same as those enjoyed by diplomats in the country hosting the headquarters of the Commission and in Member States.[64]

As regards its relation with other organizations, Article 24 confers international legal personality on the Commission. Accordingly, the Commission is empowered 'to enter into cooperation agreements with other regional organizations, intergovernmental institutions and third parties.'

### 2.5 Memorandum of Understanding on Maritime Safety and Security in Central and West Africa (The Yaoundé Summit 2013)

In response to the United Nations Security Council Declaration of 30 August 2011 and Resolution 2018 of 31 October 2011 and acts of piracy and armed robbery or the Gulf of Guinea and recalling the United Nations Security Council Resolution 2039 of 29 February 2012 which urged ECCAS, ECOWAS and GGC to work together to develop a legal strategy to fight against piracy, armed robbery and other illicit activities, a Multilateral agreement was entered into between the Economic Community of Central African States[65] (ECCAS), the Economic Community of West African States[66] (ECOWAS) and the Gulf of Guinea Commission[67] (GGC) acting through their General Secretariat Commission and Executive Secretariat respectively on 25 June 2013. It was entered into in recognition of the treaty establishing ECCAS[68], Revised Treaty of 24 July, 1993 signed at Cotonou, and the treaty establishing the Gulf of Guinea of 2 July, 2001 signed in Libreville and also the Regulation[69] mandating the ECOWAS Commission to develop the regional maritime integrated strategy signed in Abuja and taking into consideration the objective of the ECCAS to promote and reinforce a harmonious cooperation and balanced and self-sufficient development in every area of economic and social activity, to increase and to maintain economic stability, to reinforce the close and peaceful relationship between Member States and to contribute to the progress and development of Africa. The ECOWAS on its part has as an objective to promote cooperation, integration and maintain regional stability in order to establish an economic and monetary union in West Africa.

[64]ibid art 22.
[65] General Secretariat Headquarters located at Hausts de Guegue District P.M.B. 2112 Libreville, Republic of Gabon.
[66] Commission with Headquarters located at 101, Yakubu Gowon Crescent Asokoro District P.M.B. 401 Abuja, Federal Republic of Nigeria
[67] Executive Secretariat with Headquarters at 43, 2 ANDAR, Rua Pereira Guileme Ingles, Luanda, Angola
[68]Dated 18 October 1983.
[69] CMS/REG. 1/02/12 of 17 February 2012.

Thus the present MoU under consideration has as an objective to strengthen cooperation and coordination of their activities with a view of ensuring safety and security in the West and Central African maritime area. The MoU came at a time when the security situation was heavily shaken by the piracy, armed robbery and other illegal activities perpetuated at sea in the Maritime area of the Central and West Africa, constituting an obstacle to regional integration and the sustainable development of the Gulf of Guinea region.

This Memorandum of Understanding is established in order to achieve better cooperation among the regional ECCAS, ECOWAS and GGC maritime centers. According to Article 2 of the MoU, the cooperation shall seek to promote synergy through the pooling and interoperability of community resources. To this end, it shall have the following specific objectives:

(a) Coordination and implementation of joint activities;

(b) promotion of close partnership among the parties;

(c) regular exchange of information and experience sharing;

(d) harmonisation of control procedure of ships, ports installations sea farers, ship owners and insurers in the area of maritime safety security;

(e) harmonization of levy on piracy and other illegal activities at sea;

(f) adoption and implementation of a methodology for Automatic Identification of Ships (AIS);

(g) strengthening cooperation with the International Criminal Police Organization (ICPO)–INTERPOL); and

(h) promotion to fight crimes at Sea[70].

The implementation of this Memorandum shall be guided by the principles of international law such as subsidiary, complementary, equality, independence, consensus, cooperation and right based approach to contractual relations among the parties[71].

In line with this MoU the areas of cooperation, according to Article 4, include-

(a) technical cooperation, training and capacity building;

(b) information management and data collection;

(c) mobilization of resources necessary to achieve the objectives;

(d) coordination of joint activities;

(e) management of sea borders; and

(f) any other area of common interest recognized as relevant by the parties.

The implementation and monitoring mechanism put in place by the parties of the current MoU include:

(a) Hold annual meetings of the Chief Executives of ECCAS, ECOWAS and GGC which shall provide guidance monitoring and evaluation of regional cooperation.

[70]Yaounde MoU 2013, art 2.

[71]ibid art 3.

(b) Create an Inter-regional Coordination Centre (ICC) for the implementation of the regional strategy for maritime safety and security[72].

For dispute resolution, all disputes arising from the interpretation and/or implementation of this memorandum shall be settled through diplomatic means[73].

Finally the Memorandum of Understanding shall be published in the four official languages English, French, Portuguese and Spanish languages while it shall be deemed to have entered into force as adopted in Yaoundé, Republic of Cameroon on 25 June, 2013. The MoU equally seeks to support strategic partnership at international, bilateral and multilateral levels as a mechanism of implementation of this Memorandum[74]. The Yaoundé Summit permitted the area to be put in perspective always at the lnternational level. Thus for the countries of the Gulf of Guinea, attention should be on the importance of addressing a preventable security risk while it has not yet erupted.

## 3.0 AN APPRAISAL OF THE REGIONAL REGIME PROTECTING THE LIVING RESOURCES OF THE GULF OF GUINEA

In other oil rich gulfs, such as the Gulf of Mexico or the North Sea, extensive regulatory frameworks have been put together on regional basis to mitigate potential damage caused by the activities. Offshore development in developing countries may result in unmitigated environmental rights. The countries of the Gulf of Guinea on the other hand have major challenges in regard to government, peace, wealth distribution, economy, health and security. The Gulf of Guinea has been characterized by incessant problems such as piracy, oil bunkering, internal conflicts and terrorisms which throw up the question as to whether the oil in the Gulf of Guinea is a blessing or a curse.[75] These issues are associated with grave environmental challenges such as pollution and other adverse environmental harm. There exist a gap with respect to environmental protection related to offshore oil and gas exploitation and production in the Gulf of Guinea. The regional regime has not dealt with the issues bedeviling the region. There are harmful effects, from operational discharge throughout the different stages[76] of oil exploitation associated with risks of accidental spills or accidents and from support vessels, tankers, platform equipment and pipelines. Terrorist attacks on oil infrastructure present another potential risk of accidental discharge.

[72]ibid art 5.
[73]ibid art 8.
[74]ibid art 6.
[75]DO Mane, 'Emergence of Gulf of Guinea in Global Economy, Prospects and Challenges' (2005) IMF Working Paper 13.
[76] The four stages of exploitation include: the geological and geophysical survey mainly seismic surveys consisting of the generation of Seismic waves, exploration stage, development stage and finally the decommissioning stage involving decommissioning of platforms and pipelines. The issues concerned here are whether to abandon a platform in place, remove it or sink it to the bottom of the sea.

Strictly speaking, an exclusive national approach to prevent offshore pollution in the Gulf of Guinea suffers serious flaws. The regional approach in many regions has always been the best approach to issues of oil pollution.

The Abidjan Convention and other Regional Seas Programme Action Plans are silent on pollution from offshore from the activities of exploration and production. This is in fact short sighted because 95% of pollution is offshore.[77] The only related item is in the Action Plan which calls for 'regular surveys of oil shock in offshore waters' as part of regional environmental assessments. However, these surveys are likely at shipping activities in the area.[78]

Protocols are the backbone of conventions which are lacking in the Abidjan Convention. Currently there is only one protocol to the Convention that relates to cooperation in combating pollution in cases of emergency.[79] There is need for the Convention to create a specific protocol to deal with offshore Exploration and Production of Oil and related environmental issues. The most efficient way to create this new protocol would be to choose an existing regional protocol or set of industry guidelines as blueprint. Though the Gulf of Guinea countries have world class oil reserves the government resources necessary to completely write a detailed protocol are probably limited.

Though OSPAR Commission is currently playing a supporting role for the Abidjan Convention,[80] the OSPAR mode itself is unlikely to work for the Gulf of Guinea. Its basic level of OSPAR was arguably able to work because the country involved has a robust environmental regulatory system. In the Gulf of Guinea countries are not nearly as matured. Even the countries that do have some regulatory systems that are more than general statements have problems enforcing them. In addition, both the OSPAR and Helsinki conventions rely heavily on issues recommended by their respective commissions. The Abidjan Convention on the contrast does not have a strong central body that could perform a similar role.

There are two model UNEP Regional Seas Programmes that specifically address offshore oil E & P namely: the 1989 Kuwait Protocol and the 1994 Mediterranean offshore protocol. Of the two, the Kuwait Protocol seems to be the better choice for an Abidjan Protocol for two reasons viz:

[77] See Conference of Plenipotentiaries on cooperation in the Protection and Development of the Marine and Coastal Environment of West and Central African Region, resolutions adopted by the Conference 23 March 1981, 20 I.L.M. 734. See also Action Plan for the Protection and Development of the Marine and Coastal Areas of the West and Central African Region Adopted 23 March 1981, 20 I.L.M. 738.
[78] ibid741-42.
[79] Protocol concerning cooperation in combating pollution in cases of Emergency March 16.
[80] United Nations Environmental Programme, Western African, http://www.unep.org/regionalseas/

(1) both regions are made up solely of developing countries; and

(2) the Mediterranean offshore protocol has only been ratified by three countries and is thus not yet in force whereas the Kuwait protocol has been in existence for a considerable period of time.

## 4.0 CONCLUSION AND RECOMMENDATIONS

In the foregoing analysis, we have been able to highlight the various legal regimes for the protection of the living resources of the Gulf of Guinea. The Conventions/MoUs, Committee activities and policies considered in this work could have appropriately bridged this gap but have been flawed because they condone a state control that provides for the exploitation of natural resources without adequate or appropriate consideration of the conservation of some finite resources. In the absence of a better regulatory framework, there are genuine fears that the condition of biological diversity will not improve.

Having discussed the legal framework for the protection of marine living resources of the Gulf of Guinea, we hereby call for the restoration, maintenance and enhancement of the ecosystems and ecological processes necessary for the functioning of the biosphere, to protect marine living resources and the utilization of the principle of optimum sustainable yield in the use and exploitation of biodiversity. Natural resources as a whole whether renewable or non-renewable have suffered catastrophic exploitation and wanton destruction particularly in the $20^{th}$ century. The present generation of mankind will need to regulate the use of these resources through the adoption of robust legal instruments and sound management strategies so that they can leave the world oceans better than they met it. Interestingly many of the legal regimes examined in this paper have played major roles in the fight against species extinction and unsustainable exploitation of marine living resources in particular and environmental degradation in general. We must not assume that the best response to the protection of marine living resources is often a global one. Nevertheless, global institutions are inevitable machineries than national governments and regional frameworks in responding to environmental issues such as the environmental challenge of species extinction and depletion of marine living resources.

# LEGAL AND SOCIO ECONOMIC CONSEQUENCES OF IMMIGRATION AND INTERNALLY DISPLACED PERSONS IN AFRICA*:* A NIGERIAN PERSPECTIVE

**OMOLABAKE OGUNWANDE, LLM**[1]

***Abstract***

*From the inter-tribal and communal clashes to terrorism, the number of internally displaced persons (IDPs) has continued to be on the rise often with little consideration to its implications on the IDPs and the nation at large. It is in the light of this that this study examines internal displacement in Nigeria, causative factors and policies of Nigerian government towards internally displaced persons (IDPs). It asserts that Nigeria must promote, respect and fulfill its obligations under treaties in as much as they do not conflict with section 12 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which requires their re-enactment into domestic law by the National Assembly. While the efforts of the government in passing the rights of the IDPs Act, 2016 is a right step towards eliminating the institutional overlapping and specifically address the plight of IDPs, it is essential that the government accords attention to the implementation of the rights of the individual, which is often overlooked, as the best practice towards preventing internal displacement. The study concludes that internal displacement will continue to occur except effective protective measures are put in place.*

**Key words*:*** internally displaced persons (IDPs), internal displacement.

## 1.0 INTRODUCTION

There has been an alarming rise in the number of internally displaced persons (IDPs) in Nigeria owning to several reasons including ethnic, religious and political conflicts, violations of human rights, and mostly human-made and occasional natural disasters such as floods.[2]Currently, Nigeria has no legislation that deals explicitly with the plight of IDPs, neither is there any governmental organization equipped to handle IDP registration and other related matters[3]. In recognition of this gap, the Federal Government of Nigeria in 2003 set up a

[1]Faculty of Law, Osun State University, Osogbo, Nigeria.

[2]BagoniAlhajiBukar, 'Nigeria Needs to Take Responsibility for its IDPs' *Forced Migration Review* (2012) 44 <www.fmreview.org/young-and-out-of-place/bukar.htm> *accessed 25 July 2018.*

[3]This affects proper planning of the government towards meeting the needs of the IDPs

committee to draft a National Policy on IDPs but the policy has not been adopted.[4]Eni Alobo and SyndaObaji[5] identified the absence of a legal and institutional framework for the protection of IDPs in Nigeria as the main reason for the lack of a systematic and coordinated support for IDPs.

At the global level, there appears to be more concerted efforts in galvanizing support for IDPs. For example, the UN General Assembly now accords recognition to those displaced by natural disasters within their own countries as IDPs.[6]It will be recalled that as early as 1990, the Intergovernmental Panel on Climate Change (IPCC) noted that the greatest single impact of climate change must be on human migration with millions of people displaced by shoreline erosion, coastal flooding and agricultural disruption.[7]Natural disasters, particularly those related to climate change, are fast becoming a leading cause of forced displacement though conceptual, normative and institutional frameworks to provide human rights protection to the environmentally displaced are not yet in place.[8] The UN Human Rights Council also in 2007 requested the Representative of Secretary-General of the United Nations **(***RSG)* to promote protection for those displaced by natural disasters.[9]The UN General Assembly reinforced this approach by recognizing that those displaced by natural disasters within their own countries are IDPs.[10]At the moment, the United Nations has a mission at the Nigeria's North East to cater for the needs of IDPs.

In Nigeria, Africa's most populous nation, there is still no universal instrument specifically addressing the plight of IDPs because the guiding principles providing specific protection for IDPs do not constitute a binding instrument, though they have received large support from the international community.[11]As a result of the absence of appropriate laws and policies governing IDPs protection and assistance in Nigeria, there has been unnecessary burden on the National

[4]This is regrettable considering the rise of displacement in Nigeria in the last one decade.
[5]Eni Alobo and SyndaObaji, 'Internal Displacement in Nigeria and the Case for Human Rights Protection of Displaced Persons' (2016) 51*Journal of Law, Policy and Globalization* 33 <www.iiste.org/Journals/index.php/JLPG/article/download/32031/32901> accessed *4 July 2018.*
[6] Cohen & Bradley cited GA Res. A/C.3/64/L.34/Rev.1 of 10 November 2009.<www.preventionweb.net/file202271116disaster-displacement-cohen.pdf> accessed*25 July 2018.*
[7] Steve Lonergan, 'The Role of Environmental Degradation in Population Displacement' (1998) 4*Environmental Change & Security project Repor*t 5 www.ifrc.org< accessed 25 April 2018
[8]Roberta Cohen and Megan Bradley, 'Disaster and Displacement: Gaps in Protection' (2010) 1J*ournal of International Humanitarian Legal Studies* 1<www.preventionweb.net/file202271116disaste r-displacement-cohen.pdf> accessed*25 July 2018.*
[9] Cohen and Bradley cited Human Rights Council Res. 6/32, 14 December 2007, para. 6(g) <www.preventionweb.net/file202271116disaster-displacement-cohen.pdf> accessed*25 July 2018.*
[10] Cohen & Bradley cited GA Res. A/C.3/64/L.34/Rev.1 of 10 November 2009 <www.preventionweb.net/file202271116disaster-displacement-cohen.pdf> accessed*25 July 2018.*
[11]ibid

Emergency Management Agency (NEMA) which is the only body with capacity to respond swiftly to emergency situations given its mandate.[12]

Meanwhile, there are few legal instruments which though not principally meant for the welfare of the IDPs are often resorted to. These laws include: The Constitution of the Federal Republic of Nigeria 1999, (as amended); NEMA (Establishment etc.) Act Cap N34 Laws of the Federation of Nigeria 2004; African Charter on Human and Peoples' Rights Cap A9 LFN 2004; The African union Convention for the Protection and Assistance of IDPs in Africa 2009; The Guiding Principles 1998; and The Geneva Conventions 1949 and their Additional Protocols 1-2 of 1977.[13]

The implications of having to rely on subsidiary legislations are two-fold. One, there tends to be lopsidedness in the management of the welfare of the IDPs. Suffice is to state however that the existing laws are not sufficient to address the emergency situation and challenges facing IDPs in the north-east of the country alone not to talk of the whole of the country.[14]Secondly, a cursory appraisal of the existing legal instruments would reveal that essential elements of a truly effective national response are absent, notably a legislative and policy framework on internal displacement, consistent with international standards including the 1998 Guiding Principles on Internal Displacement, that are urgently required to help guide and inform responses in the short, medium and long-terms.[15]

The lack of legal and definitional clarity for the environmentally displaced is often reflected in the weak institutional arrangements for protecting their human rights.[16] Indeed, laws, policies and implementation machinery that integrate human rights concerns into disaster response are largely non-existent at the national level.[17]

### 1.1. Institutional Developments for the Protection of Internally Displaced Persons in Nigeria

[12]ShedrackEkpa&NuarrualHilal Md. Dahlan, 'Legal Issues and Prospects in the Protection and Assistance of Internally Displaced Persons in Nigeria' (2016) 49*Journal of Law, Policy and Globalization* 110<www.iiste.org> accessed 11 January 2018.

[13]MuhammedTawfiqLadan, 'National Framework for the Protection of IDPs in Nigeria' (2013) 10-11 <www.abu.edu.ng/.../2013-05-180015_3901.docx> accessed 25 April 2018.

[14]ChalokaBeyani, 'End of Mission Statement by the United Nations Special Rapporteur on the Human Rights of Internally Displaced Persons on his visit to Nigeria' (23 to 26 August 2016) <http://reliefweb.int/report/nigeria/end-mission-statement-united-nations-special-rapporteur-human-rights-internally> accessed 24 July 2018.

[15] ibid.

[16]ibid 6.

[17] Cohen & Bradley cited Brookings-Bern Project on Internal Displacement *etal*, '*Regional Workshop on Protection and Response in Situations of Natural Disaster*' (Guatemala City, 28-29 May 2009) <www.preventionweb.net/file202271116disaster-displacement-cohen.pdf> accessed 25 April 2018.

IDPs do not benefit from a specific international regime exclusively devoted to ensuring their protection and assistance.[18] Instead, they are subjected to the many actors involved in providing assistance, protection, and development aid in conflict situations, including *UN* agencies, human rights organizations, and international and local NGOs.[19]Owing to the absence of clearly delineated area of responsibilities for each of the relevant institutions such as NEMA and National Commission for Refugees, Migrants and Internally Displaced Persons sharing concerns on IDP issues, the requisite synergy is also lacking regarding humanitarian intervention in Nigeria as well as the provisions of material needs for victims.[20]

NEMA is responsible for overall disaster management in Nigeria – including the coordination of emergency relief operations as well as assisting in the rehabilitation of the victims where necessary. It supports IDPs in the emergency phase of a crisis, but it does not have the necessary resources to assist people displaced for a longer period of time, or to assist returnees in their reintegration. State Emergency Management Agencies (SEMA) also exist in some States, but with varying performance levels. As seen in numerous displacement crises across Nigeria in recent years, assistance for return and reintegration is one of the major needs of IDPs, but government assistance rarely extends beyond emergency response.

National efforts to respond to displacement and mitigate its long-term effects on IDPs and host communities tend to be fragmented, uncoordinated and inadequate. Most assistance IDPs receive, regardless of the cause of their displacement, is provided by host communities. SEMAs have only limited resources and capacity, and there is no law or policy framework setting out responsibilities in terms of IDPs' protection and assistance beyond the initial phase of displacement. In the absence of clear roles for the ministries, departments and agencies involved in any response, they often compete with each other for the limited funds available.[21]

### 1.2. Protection Framework for Internally Displaced Persons

According to Bertrand Ramcharan, protection encompasses all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law such as human rights law and

[18]Catherine Brun, 'Research Guide on Internal Displacement' (2005) 8 <www.forcedmigration.org/researchguide> accessed 07July 2018.
[19]ibid 8.
[20]ShedrackEkpa&NuarrualHilal Md. Dahlan,(n 11) 111.
[21]Internal Displacement Monitoring Centre (IDMC), 'Nigeria: Multiple Displacement Crises Overshadowed by BokoHaram' ( 9 December 2014) <www.idmc.org/nigeria-multiple-displacement-crises-overshadowed-by-boko-haram.htm> accessed 18 July 2018.

international humanitarian.[22]He stated that human rights and humanitarian organizations must conduct these activities in an impartial manner (not on the basis of race, national or ethnic origin, language or gender).[23]According to him, a protection activity is any action which prevents or puts a stop to a specific pattern of abuse or alleviates its immediate effects. It restores people's dignity and ensures adequate living conditions through reparation, restitution and rehabilitation. Protection covers the full range of rights enumerated under the international human rights law, including civil, political, social, economic and cultural rights as well as international humanitarian law.[24]The major development in the efforts to secure the protection of IDPs has taken place in the humanitarian community.[25]

### 1.3. UN Policies on the Protection of Internally Displaced Persons

Policy on the implementation of the humanitarian process and the cluster approach has continued to develop in addition to the United Nations High Commissioner for Refugees's**(**UNHCR) important dialogue with the Executive Committee on the Office's evolving role in relation to internal displacement has resulted in various policy documents on internal displacement.[26]

### 1.4. Protection of IDPs under International Criminal Law

Nigeria ratified the Rome Statute of the International Criminal Court on 27 September 2001.[27] The International Criminal Court has jurisdiction over crimes (as prescribed by the Rome Statute) committed on Nigerian territory or by Nigerian nationals from 1 July 2002 onwards.[28]In July 2012, a bill to domesticate the Rome Statute was sent to the National Assembly. The bill is still pending.

Article 8 of the Rome Statute of the International Criminal Court, states that war crimes during armed conflicts even with no international character are violations of Article 3, a provision common to the four Geneva Conventions. The Statute criminalizes attacks targeted at the civilian population or against individual civilians not taking part in the hostilities and attacks. The elements of the crime are

[22]Bertrand Ramcharan, 'The UNHCR and International Humanitarian Law' *Occasional Paper Series Number 3*, Harvard University (2005) 6 <www.hpcr.org> accessed 27**June**2018.
[23]Ramcharan cited ICRC, 'Strengthening Protection in War' (2001) 20, 21.
[24] OCHA, 'No Refugee: 'The Challenge of Internal Displacement' (2003)*UN, New York and Geneva*<www.migrationpolicy.org/news/no-refuge-release> accessed 10 February 2018.
[25]Borton et al, 'Support to Internally Displaced Persons' (2005) <www.sida.se/publications01.05.2005> accessed 25 April 2017.
[26]<www.unhcr.org/en-us/idps-policy-guiding-documents.html> accessed 28 **July** 2017.
[27] Amnesty International (AI), 'Stars on their Shoulders, Blood on their Hands: War crimes committed by the Nigerian military' (2015) 30.
*<www.amnesty.org/download/Documents/AFR4416572015ENGLISH.PDF> accessed 24 January 2018.*

[28]ibid 30.

that, the perpetrator inflicted severe physical or mental pain or suffering upon one or more people; obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind; the victims were *hors de combat* or were civilians, medical personnel or religious personnel taking no active part in the hostilities, the perpetrator was aware of the factual circumstances that established this status, the conduct took place in the context of and was associated with an armed conflict not of an international character; and the perpetrator was aware of factual circumstances that established the existence of an armed conflict.[29]

Article 7 of the Statute prohibits crimes against humanity which constitute any acts knowingly committed as part of a widespread or systematic attack directed against any civilian population such as: gender, or other grounds that are universally recognized as impermissible under international law; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The International Criminal Tribunal for the Former Yugoslavia has recognized that displacements are crimes punishable under customary International law.[30] It has defined the term 'forced' stating that it is not limited to physical force but rather may include the "threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person(s), another person, or by taking advantage of a coercive environment"[31]. The essential element is that it is "involuntary in nature, where the relevant persons had no real choice"[32].

## 2.0 THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT[33]

The Guiding Principles address a range of particular needs and protection risks that typically arise in situations of internal displacement, such as: family separation, loss of documentation, freedom of movement in and out of camps, and loss of property. The Principles reflect international human rights law and international humanitarian law and provided guidance in situations of displacement.

[29]ibid 35.
[30]*Prosecutor* v *Kmojelac* ,IT-97-25, Trial Chamber Judgment of 15 March 2002, para 475 'Developments in the Legal Protection of IDPs' ( Forced Migration Review December 2008. <www.un.org/icty> accessed 25 April 2017.
[31] ibid.
[32]ibid.
[33]United Nations General Assembly Resolution 58/177 of 22 December 2003 <www.brookings.edu/reports/2008/spring_guiding_principles.aspx.accessed 25 April 2017.

Under Principles 1-4, National authorities have the primary responsibility to protect and assist IDPs within their jurisdiction. IDPs are entitled to enjoy in full equality the same rights and freedoms as other persons in their country and shall not be discriminated against. Displaced unaccompanied minors, expectant mothers, mothers with young children, female heads-of-households, persons with disabilities and older persons require specific attention.

Principles 5-9 articulate a right not to be arbitrarily displaced and spell out the situations in which displacement is absolutely prohibited. States have a duty to avoid the displacement of populations unless absolutely necessary and to protect against the displacement of groups with a special dependency on their lands and When displacement is unavoidable, certain guarantees must be established for displacement to be lawful.

During displacement, Principles 10-23 provide that all persons, including IDPs, should enjoy a broad range of civil, political, economic, social and cultural rights. They should also enjoy freedom of movement in and out of IDP camps and be able to seek asylum in another country. The rights to personal documentation respect for family life and unity and to education and training are guaranteed equally for women and girls. IDPs have the rights to employment and participation in economic activities and to vote and participate in government and public affairs.

Principles 24-27 provide that when State authorities are unable or unwilling to provide assistance to the displaced, international organisations have the right to offer their services and to enjoy rapid and unimpeded access to the displaced. Humanitarian assistance shall be provided consistent with the principles of humanity and impartiality and without discrimination. Humanitarian actors should take into account and work to address both the assistance and the protection concerns of IDPs.

Principles 28-30 define the rights of IDPs to durable solutions which include the rights to return to their place of origin, integrate locally at the displacement site, or resettle elsewhere in the country voluntarily, safely and in dignity. They enjoy the rights to participate in the planning associated with their return or settlement and reintegration and return of lost property or, where not possible, compensation and equal access to public service.

These principles are laudable but they are not binding on States because they were not established by treaty.

## 3.0 CONCLUSION AND RECOMMENDATIONS

This paper has identified the lack of adequate legal framework for the protection of the rights and welfare of IDPs in Nigeria. It further highlighted the

global efforts towards protection of the rights of the IDPs which without a concurrent local extant law may be ineffective.

The following recommendations are made among others:

1. Economic empowerment of young people which would help to reduce youth involvement in armed groups as well as include the financial needs of IDPs in the national budget;
2. The revised draft national policy on IDPs must be adopted as part of the obligation of national authorities to protect and assist displaced persons; passing the Rights of Internally Displaced Persons, Bill 2016; the domestication of African Union Convention for the Protection of IDPs in Africa, Convention on the Elimination of All Forms of Discrimination against Women; and establishment of a specific international instrument and a single institutional mandate for the protection and assistance for IDPs.
3. The Federal Government should establish a legal framework to provide insurance cover for victims of internal displacement.
4. There should be a framework to evaluate the impact of the multi-sectoral support given to the IDPs in Nigeria. Efforts must be made to ascertain that the support given gets to the intended beneficiaries.
5. Policies on IDPs should be translated into the three main indigenous languages in Nigeria.[34]It is only when the IDPs understand the position of the law that they can actually engage the government to fulfill her obligations under the law.

[34] Translating the policies on IDPs into Hausa, Yoruba and Igbo languages will help ensure that many IDPs who are not proficient in English language will be able to access the documents.

# THE REGULATORY REGIME OF GENETICALLY MODIFIED ORGANISMS (GMOs) IN NIGERIA AND ITS IMPLICATIONS ON RELEVANT WTO AGREEMENTS

**AFOLASADE A ADEWUMI***

***Abstract***

*In Nigeria, there are mixed reactions towards GMOs. While there are pro-GMO activists arguing for the creation of a market for GMOs, there are also anti-GMO activists who maintain that GMOs and products from GMOs pose a threat to human health and the sustenance of naturally bred domestic products in the market. The prospects and fears associated with GMOs have found a place of balance under the National Biosafety Management Agency (NBMA) Act, 2015. This paper examines the implication of the NBMA Act, 2015 on Nigeria's obligations under relevant agreements of the World Trade Organisation (WTO) such as the General Agreement on Trade Tariffs (GATT), Agreement on the Application of Sanitary PhytosanitaryMeasures (SPS), and Agreement on Technical Barriers on Trade(TBT). While the jurisprudence of the WTO is to foster trade liberalisation and discourage discriminatory practices towards imported and exported products among member states, the Nigerian legislation on biosafety provides certain conditions precedent that must be fulfilled before GMOs can be commercially marketed in the country. Some of the questions that will be considered include: Does the NBMA Act treat GMOs less favourably than naturally produced like products? Are GMOs or products from GMOs produced in one country given more preference than those produced in other countries? Therefore, the fundamental issue this paper considers is whether the NBMA Act conforms to the non-discrimination and non-protectionist principles provided under the aforementioned WTO agreements.*

## 1.0 INTRODUCTION

Biotechnology has bestowed to mankind gifts that surpass the expectations of nature. However, with great gifts come great responsibilities. Thus, there has been a necessity over the years in various countries to regulate the influx and efflux of the products of biotechnology within their territories. While some countries are entirely receptive to GMOs without stringent technical regulations monitoring their assimilation into the biological environment, some have formulated rigid rules regulating the import and exports of GMOs and others have adopted a 'no-GMO'

stance.[1] However, in Nigeria, the National Biosafety Management Agency (NBMA) Act, 2015 has stipulated criteria that must be fulfilled before any organisation or country can partake in the import and export of GMOs in Nigeria. The purpose of the NBMA, Act 2015 is to provide a regulatory framework for safety measures in the application of modern biotechnology so as to prevent adverse implications on human, plant and animal health, and the environment at large.[2]

The goal of the WTO multilateral trading system is to eliminate all discriminatory barriers to trade. Under the framework of the WTO, there are relevant agreements governing trade relationships among member states.[3]Some of these agreements that will be considered include General Agreement on Trade and Tariffs (GATT), Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), and Agreement on Technical Barriers to Trade (TBT). In the WTO multilateral trading system, certain principles govern the trade relationship between parties and they include: non-discrimination,[4]reciprocity[5], and transparency[6]. Also, when contracting parties make commitments under WTO agreements, such commitments are regarded as binding and enforceable. All these principles are incorporated into the jurisprudence of the WTO towards the actualisation of the goal of trade liberalisation.

This paper is divided into four (4) parts. Part I examines the nature, scope and application of the relevant WTO Agreements; Part II addresses the relationship between the NBMA Act and WTO agreements, assessing whether the Act is within the purview of WTO agreements by highlighting pertinent provisions of the Act; Part III examines whether the NBMA Act conforms to the non-discrimination

∗LL.B, LL.M, Ph.D, BL. Lecturer, Department of Jurisprudence and International Law, Faculty of Law, University of Ibadan, Ibadan, Nigeria. Tel: 08034288083.E-mail: sade_abidemi@yahoo.com

[1] USA and South Africa are countries that are entirely receptive towards GMOs. The European Union has implemented a strict regulatory regime governing the introduction of GMOs. Whereas, Zambia has not opened its borders to GMOs, because on February 24, 2018, the Government of Zambia announced that Zambia had no intentions of importing GMO foods as the country is food secure. See www.lusakatimes.com/2018/02/24/zambia-will-not-import-any-genetically-modified-foods/

[2]AA Adewumi and CO Ilori,'An Appraisal of the National Biosafety Management Agency (NBMA) Act, 2015'(2019) *Journal of International Law and Jurisprudence (NAUJILJ)(in print)* ; Explanatory Memorandum of National Biosafety Management Agency Act, 2015.

[3]WTO Agreements are usually multilateral and binding on contracting parties

[4] See Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*; Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*

[5] See Appellate Body Report, Brazil — Desiccated Coconut; See also, Deremer D.R. 2016. *The Principle of Reciprocity in the 21st Century*. Discussion papers MT-DP –2016/13.Institute of Economics, Centre for Economic and Regional Studies, Hungarian Academy of Sciences.

[6] See C Steve,'Transparency and Participation in the World Trade Organization' (2004)*56 Rutgers L. Rev. 927*.

principle enshrined under the relevant WTO agreements and Part IV is the concluding part of the paper.

### 1.1 (Part I): WTO Agreements

The WTO is an organisation that is replete with several international trade agreements which are binding on contracting parties within the multilateral trading system. These agreements impose obligations on respective state parties to uphold non-discriminatory trade practices, and foster international trade among developed, developing and least developed countries of the world. Most of these trade agreements are automatically binding on member states upon joining the WTO. Whenever disputes arise from these trade agreements among state parties, they are usually submitted to the WTO adjudicatory body, the DSB;[7] and in the event of an appeal, the Appellate Body will hear the matter. The relevant WTO agreements to GMOs will be examined in subsequent paragraphs.

### 1.2 The General Agreement on Tariffs and Trade

The GATT imposes non –discrimination obligations on contracting parties.In terms of custom duties and charges, and internal taxation and regulation, the GATT requires that the principle of non-discrimination is adhered to in order to prevent preferential treatment among contracting parties either to domestic products or the products of another country. The non-discrimination principle enunciated under the GATT has two (2) limbs: most-favoured nation principle[8] and national treatment principle.[9]

The most-favoured nation (MFN)principle was considered by the Appellate Body in*EC – Seal Products*,[10]where it explained that 'article I sets out a fundamental non-discrimination obligation under the GATT 1994, and that the obligation set out in Article I: 1 has been described as being 'pervasive', a 'cornerstone of the GATT', and 'one of the pillars of the WTO trading system'.The MFN principle serves as the pillar of the multilateral trading system ensuring equal treatment of trade partners. The principle simply denotes that a trade advantage granted to a non-member of the WTO must be granted to a WTO member. Thus, MFN principle precludes discrimination among imports of WTO Members or in favour of imports of non-WTO Members.

From the above, it is evident that the MFN principle will require that Nigeria, being a member state of the WTO, does not adopt discriminatory practices through its national laws to grant preferential treatments to non-WTO members, while

[7] Dispute Settlement Body
[8] GATT, art I.
[9]ibid, art III.
[10]Appellate Body Report, *EC – Seal Products*, para.5.86 (quoting Appellate Body Report, *EC – Tariff Preferences*, para. 101).Se also, Appellate Body Report, *Canada – Autos*, para. 84.

withholding same from WTO members. In a situation where Nigeria has reduced import tariffs in favour of tomatoes imported from Country X, a non-member of the WTO, it must also grant the same advantage to tomatoes imported from Country Y, a member of the WTO.[11]However, advantages granted to a member of the WTO, do not necessarily need to be extended to non-members of the WTO.

The second principle of non-discrimination under the GATT is the National Treatment (NT) Principle. This principle complements the *MFN* rule. The Appellate Body in *Japan – Alcoholic Beverages II* explained the purpose of the national treatment principle in Article III in the following terms:

> *'The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III 'is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production'. Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. 'The intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given.'*[12]

Under the national treatment principle, each WTO Member must treat imported products, after they have crossed the border,[13] no less favourably than like domestic products.Specifically, internal taxes and charges, and laws and regulations affecting internal sale and distribution, 'should not be applied to imported or domestic products so as to afford protection to domestic production'.[14]Thus, national treatment precludes discrimination against imported products. The requirement that the domestic products and the imported products are like products within the interpretation of the GATT is also applicable under the NT principle.

[11]A requirement that must be fulfilled for the MFN principle to apply is that the products in question must be 'like-products'. They must be like products in terms of physical characteristics, product's end uses, consumer's tastes and habits , and the classification of the product.

[12] See, Appellate Body Report, Japan – Alcoholic Beverages II, para. 16; Appellate Body Report, Korea – Alcoholic Beverages, para.119; Appellate Body Report, Chile – Alcoholic Beverages, para.67; Appellate Body Report, EC – Asbestos, para. 97. See also Panel Report, Indonesia – Autos, para. 14.108.

[13] Panel Report, EC – Poultry, pp. 273–275.

[14]SLV Tania, *Cultural Products and the World Trade Organization* (Cambridge University Press 2007) 7.

The principle of nondiscrimination is not limited to the provisions of Articles I and III of the GATT. Under Article XI, the principle of nondiscrimination is extended to cover to discrimination through quantitative restrictions. Thus, the provisions ofArticle XI of the GATT, address quantitative regulations and the discriminatory administration of quantitative restrictions respectively. Article XI: 1 bans prohibitions through quotas or import and export restrictions on goods, subject to certain exceptions.[15] In *India – Quantitative Restrictions*, the Panel set out the scope of the concept of 'quantitative restriction' as follows:

> The text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges'. As was noted by the panel in Japan – Trade in Semi-conductors, the wording of Article XI:1 is comprehensive: it applies 'to all measures instituted or maintained by a Member prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges.' The scope of the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation.*[16]*

The provisions of Article XI: 1 supports the non-discrimination principle enshrined in Articles I and III of the GATT. While Articles I and III focus on internal measures such as taxes, charges, regulations, etc. that will usually apply where the goods have been imported or exported, Article XI focuses on measures other than those covered by Articles I and III. These measures will include import and export quotas with the goal of quantitative restrictions, and will usually apply prior to the importation or exportation of the goods.

### 1.3 The Technical Barrier to Trade (TBT) Agreement of 1994[17]

The TBT agreement protects against non-tariff barriers to trade, and at the same time acknowledges the right of contracting parties to undertake certain measures for the legitimate objectives[18] of protecting the life or health of animals, plants or humans and the environment.It requires that technical regulations are not

[15]GATT, art XI:2.
[16] Panel Report, *India – Quantitative Restrictions*, para. 5.129.
[17] The WTO Agreement on Technical Barriers to Trade came into force with the establishment of the World Trade Organization (WTO) on 1 January 1995.
[18] Legitimate objectives must be based on certain standards set by international bodies; otherwise, they would be regarded as ineffective. See Article 2.2 of TBT Agreement.

inconsistent with the non-discrimination principle, and not trade restrictive.[19]Non-discrimination obligations under the TBT are expressed in the prohibition of the use of technical regulations in international trade to affect import of goods,[20] entrenchment of the NT Principle,[21] the prohibition of technical measures that are unnecessary restrictions on trade[22] and the use of international standards when a member nation adopts a national measure.[23] These obligations are mutually inclusive with those under the GATT. Therefore, the Appellate Body in the case of *US –Clove Cigarettes* observed that:

> The balance set out in the preamble of the TBT Agreement between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate, is not, in principle, different from the balance set out in the GATT1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX[24]

It follows that obligations under the GATT are also fully entrenched under the TBT, although the TBT has a more restrictive application to technical regulations and standards for trade in goods. The extent to which the NBMA Act, 2015 is consistent with the provisions of the TBT Agreement will be considered. If there are technical regulations under the NBMA Act, 2015 are they discriminatory or protectionist in nature?

### 1.4 The Agreement on Sanitary and Phytosanitary (SPS) Measures

The purpose of the SPS agreement is to ensure that consumers in a country are supplied safe products for consumption, and also prevent health and safety

[19] Annex 1.1 of the TBT Agreement defines 'technical regulation' as a 'document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.'

[20] See Appellate Body Report, *EC – Sardines*, para. 189-195.

[21] See TBTAgreement, art 2.1.; See also, the Panel Reports in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Product*; *United States — Certain Country of OriginLabeling (COOL) Requirement and; United States – Measures Affecting the Production and Sale of Clove Cigarettes, available at*https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds406sum_e.pdf accessed 30 August 2018. .

[22] See TBT Agreement, art 2.2.

[23] ibid, art 2.4. See further the Appellate Body Report, *EC – Sardines*, paras. 275 – 282.

[24] Appellate Body Report, *US –Clove Cigarettes*, paras. 91 & 96; see also, Appellate Body Report, *EC – Asbestos*, para. 80; Panel Report, *EC –Trademarks and Geographical Indications (Australia)*, para.7.464.

regulations from being used as an excuse for protecting domestic products. The agreement allows countries to set their own health and safety standards, but requires that such standards are based on scientific findings.[25] To check the unjustified protectionist measures that may be adopted by member- states, the SPS entrenched the principles of transparency[26] in the adoption of Sanitary and Phytosanitary measures, the appropriate assessment of risks,[27] and strongly prohibits the unjustified discrimination in the use of sanitary and Phytosanitary measures whether in favour of domestic producers or foreign suppliers.[28]Therefore, whenever sanitary or Phytosanitary measures are adopted by a contracting party, such measures must fulfilthe transparency, risk assessment and non-discrimination principles of the SPS.

## 2.0 (PART II): RELATIONSHIP BETWEEN THE NBMA ACT AND WTO AGREEMENTS

The non-discrimination principle provided in the considered WTO agreements, are directed towards preventing protectionist attitude among contracting parties. Protectionist attitude means an attitude that encourages the implementation of laws and policies that discriminate against foreign products, so as to create a favourable market for domestic products. Thus,non-discrimination principleforbids members from favoring domestic products over imported 'like products' through the use of fiscal[29]or regulatory[30]trade measures or technical barriers to trade.[31]. It becomes imperative to examine the intersection between WTO agreements and the NBMA Act. Whether Nigeria will be held to have violated its obligations of non-discrimination under the WTO agreements is hinged on the determination of whether the NBMA Act is within the scope of these agreements. Therefore, the evaluation process is a two-pronged step:

i. Whether the NBMA Act, 2015 is within the scope of the WTO agreement concerned

ii. Whether there has been a violation of a non-discrimination principle under the WTO agreement

[25]SPS, art 2.2.SeeBRigod, 'The Purpose of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)' (2013) 24(2) ***European Journal of International Law***,*Volume 503–532*.
[26] SPS Agreement, art 7.
[27]ibid, art 5.
[28] See, Preamble to the SPS Agreement and Annex C (1) (a) of the SPS Agreement; See further, Panel Report, EC – Approval and Marketing of Biotech Products, para. 7.2411.
[29] GATT, art III:2.
[30] ibid, art III:4.
[31]TBT, art 2.2.

A consideration of the implication of the WTO agreements on the NBMA Act must commence with an analysis of whether the Act is within the scope of the relevant international instruments.

### 2.1. The NBMA Act and the GATT

The determination of the applicability of the non-discrimination principles entrenched in Articles I, III, and XI of the GATT must be preceded bya consideration of whether the measure at issue falls within the ambit of these relevant articles.[32]Therefore, it is pertinent to consider whether the NMBA Act falls within the scope of the Non-Discrimination provisions of Articles I, III, and XI of the GATT.

A consideration of the scope of Articles I, III, and XI reveals that they are mutually inclusive. A finding of the operation of one of them in relation to a measure may lead to a conclusion that the provisions of other Articles are applicable to that measure. For instance, any measure which is applicable under Article III of the GATT may also be applicable under Article I of the GATT because of the operative words, 'matters referred to in paragraphs 2 and 4 of Art. III', used in Article I of the GATT.[33] In relation to the NBMAAct, it may be argued that the NBMAAct and the regulations made pursuant to the powers conferred on the NBMA are laws and regulations or requirements that affect the internal sale or use of imported GMOs or GM-products. This is because, it has been found that the word 'affecting' in Art. III: 4 of the GATT are not restricted to laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products.[34] It can therefore be concluded that the NBMA Act is within the scope of the GATT Articles on non-discrimination. This presents the next question: whether the provisions of the NBMA Act are inconsistent with the non-discrimination provisions under the GATT Articles.

A finding of discriminatory practices under any of the relevant articles[35] may automatically result to a finding of discrimination under other articles. The first step requires that a discovery is made as to whether the products in question are 'like products' i.e. whether the foreign GMO product, the domestic GMO product and the naturally bred domestic product are like products.[36] To avoid a digression from the central discussion of this essay, and prevent broaching the debate surrounding the

[32]Appellate Body Report, EC – *Seal Products*, para. 5.86.
[33] GATT, art I.1. See further, Panel Report, *EC – Trademarks and Geographical Indications (US)* para.7.713; Panel Report, *EC – Commercial Vessels* paras. 7.79-7.81.
[34] Panel Report, *Italy – Agricultural Machinery* para. 12.
[35]The relevant articles being Article I, Article III, Article XI and Article XIII of the GATT.
[36]D Morgan,'International Trade Rules and the Implications for Biotechnology Regulation' (2004) 8*Asia Pac. J. Envtl. L* 177.

likeness of GMO products and their natural counterparts, it shall be assumed for the purpose of this essay that they are like products. This leads to the next step, which is a consideration of whether the provisions of the NBMA Act are discriminatory in nature.

The relevant provisions of the NBMA Act that will aid in the determination of whether the Act is discriminatory and protectionist in nature are Parts VII and VIII of the Act. Part VII of the Act addresses the need for acquiring a permit or authorisation for the purposes of export and import of GMOs and products from GMOs.[37] In deciding whether such permit will be granted to an applicant, upon completion of a safety risk assessment to determine if there are any risks associated with the consumption of the GMOs by humans or animals.[38] Section 31 of the Act makes the risk assessment procedure mandatory. The mandatory risk assessment may be carried out by the applicant or the National Biosafety Committee (NBC). A literal and purposive interpretation of the provisions of Part VII and VIII of the Act suggest that without conformity with the risk assessment procedure, GMOs cannot be introduced to Nigeria. Does this amount to discrimination, thus violating the non-discrimination principle under the GATT?

The writer submits in the negative that the considered provisions of the Act do not amount to a violation the GATT. The intent of the drafters of the Act was not to create a discriminatory environment against GMO imported from other countries. Instead, the intent of the drafter was to create a harmonised regulatory system that will take into account GMOs, their producers, and associated risks or harms. Nevertheless, there will only be a violation of Articles I and III[39]where there are regulations or laws treating GMOs and their products less favourably. This is not the case with the NBMA Act. The Act only requires that prospective importers and exporters of GMOs obtain the requisite permit or approval upon the completion of a risk assessment procedure which is similar to that imposed by the international standards. Also, a violation of Article XI[40] cannot be found within the provisions of the Act, because there are no provisions on the quantitative restrictions of the import or export of GMOs.

### 2.2. The NBMA Act, TBT and SPS Agreement

The coverage of the TBT Agreement extends to all technical regulations,[41] standards[42] and conformity assessment procedures that apply to trade in goods, i.e.

[37]NBMA Act, 2015, s 22.
[38]ibid, s 24(2).
[39] The provisions of Articles I and III apply to internal measures adopted when goods have been imported.
[40] Article XI applies to border measures which are applicable prior to the importation of the products.
[41]TBT Agreement, annex 1, para 1.

to all agricultural and industrial products.[43]To find a state party in breach of the TBT agreement, it must be established that:

i. The measure at issue is a technical regulation
ii. That the measure has breached the principles of non-discrimination (MFN and NT principles)[44]

Measures include laws, regulations, etc. Therefore, it may be argued that the conformity assessment procedure provision under section 31 of the NBMA Act constitutes a 'technical regulation' within the meaning of Article 1 of the TBT. Article 1 provides that for a regulation to constitute a technical regulation, it must:

(a)Applyto an 'identifiable group of products';

(b) Lay down characteristics;

(c)Impose 'mandatory compliance.'[45]

In respect of the first requirement, the NBMAAct clearly applies to GMOs or GMO products. Also, the NBMAAct gives an apt description of what a GMO or GMO product is and the modern bio-technology that is to be involved in the production or processing of such a GMO or GMO product.[46] Lastly, compliance with the NBMAA is mandatory as there are penalties ascribed to non-compliance with the requirements of an official permit.[47] Therefore, it can be inferred that the NMBA Act may be properly characterized as technical regulation and a conformity assessment procedure, but not a standard, within the meaning of TBT agreement.[48]

Whether the provisions of the NBMA Act have violated the principles of non-discrimination under the TBT will be determined by a cursory evaluation of the Act. It is submitted that the provisions of the Act are not discriminatory against GMOs and their products. The fact that the NBMA Act is a technical regulation, does not lead to an automatic conclusion that its provisions are discriminatory. GMO products are not the only products subjected to technical regulations. Their counterparts must also fulfil certain requirements stipulated by regulatory bodies in Nigeria such as the Standard Organisation of Nigeria (SON), the National Food and Drug Commission (NAFDAC), etc. A different conclusion might have been reached

[42]ibid, annex 1, para 2.
[43]ibid, art 1.3.
[44]ibid, art 1.2.
[45]Appellate Body Report, *EC – Sardines* paras.189-195; Appellate Body Report, *EC – Asbestos* paras.66-70; Appellate Body Report, *EC – Seal* paras. 5.22.
[46]NBMA Act, s 43.
[47]ibid, s 35.
[48] Unlike 'technical regulations' that are usually mandatory, 'standards' are voluntary. See Morgan, (n 36) 187.

if the case were that only GMO products were subjected to such measures excluding their non-GMO counterparts since discrimination in the literal interpretation of the word is giving a differential treatment to a class which is not given to another.

However, the provisions of the SPS and TBT Agreements are mutually exclusively. Thus, reaching a conclusion that a particular measure falls within the scope of the TBT excludes it from the ambit of the SPS.[49]The SPS imposes similar obligations as the GATT and TBT on contracting parties requiring that they do not adopt measures that are trade restrictive, [50]discriminatory,[51] etc. The NBMA Act is clearly within the scope of the SPS Agreement. The objective of the SPS agreement is to provide measures that are aimed at protecting the health of animals, humans and plants by guarding against diseases and pests.[52] The SPS agreement however, seeks to ensure that measures adopted by contracting parties to protect animals, humans and plants are not disguised protectionist policies that create a favourable market for domestic products while discriminating against imported foreign products from other countries.[53] This informed the decision of the WTO to set up certain organisations[54] that set standards[55] to determine appropriate measures to be adopted by contracting parties for the purposes of protecting the human, animal and plant health against potential risks associated with the import/export of certain products.

Furthermore, Article 2.2 requires that measures taken by a state party against the import/export of products must be based on scientific grounds. The provision of section 31 of the NBMA Act on mandatory risk assessment conforms to Article 5 of the SPS agreement because the purpose of that provision is to determine if there are any risks associated with the GMOs. The mandatory risk assessment under the Act must identify on scientific grounds harmful effects of GMOs to plant, animals and humans.[56]

## 3.0 NBMA ACT AND THE NON-DISCRIMINATION PRINCIPLE UNDER WTO AGREEMENTS (PART III)

[49]TBT, art 1.5.Seealso Morgan (n 36) 149.
[50]SPS Agreement, art 5.6.
[51]Ibid, art 2.3.
[52] From the provisions of the NBMA Act, especially the explanatory memorandum of the Act, it is evident that the objective of the Act is to protect the health of animals, plants, humans and the environment from the potential risks associated with continued exposure to GMOs.
[53]SPS Agreement, art 2.3.
[54] These organisations include Codex Alimentarius Commission (Codex), World Organization for Animal Health (OIE) and the Secretariat of the International Plant Protection Convention (IPPC).
[55]SPS Agreement, art 3.
[56] Third Schedule of the NBMA Act

The basis of the controversy between the EU and the US over the years regarding GMOs is that, the US has consistently asserted that the regulations, directives, and laws made by the EU are trade restrictive and discriminatory against GMOs exportedby it to Europe. The EU on the other hand, has maintained that the protection of the health of animals, plants, humans, and the environment has been the reason for its policies on GMOs.[57]The reason for this is not farfetched. The WTO agreements provide contracting parties with exceptional circumstances under which they can deviate from their trade obligations under the WTO multilateral trading system in order to secure the protection of the health of the populace and the environment. Under the GATT, these exceptions are provided under Article XX (general exceptions), and Article 2.2 of the TBT.[58]The DSB of the WTO has always been saddled with the onerous responsibility of evaluating these measures in the light of the obligations of respective state obligations under WTO agreements to determine whether on the balance of probability they are genuinely in the interest of public safety or are rather trade-restrictive and discriminatory.

However, it is fortunate to point out that that a thorough examination of the NBMA Act does not indicate any attitude of hostility towards the reception of GMOs in Nigeria. The NBMA Act conforms to the principles of law, requirements and criteria stipulated under the relevant international instrument on biosafety, the Cartagena Protocol. Provided that the requirement of mandatory risk assessment is complied with by any country desirous of exporting GMOs into Nigeria, and the results are satisfactory that there are no potential risks associated with the import of such GM-products, the NBMA Act deems it fit and appropriate that the requisite permit or approval is given to such entity.[59] Nonetheless, the National Biosafety Management Agency (NBMA) retains the discretionary power to 'develop measures and requirements for risk assessment'.[60] In the event that the NBMA seeks to adopt measures or requirements of risk assessment that are discriminatory in nature and could pose a threat to bilateral or multilateral trade system, concerned parties are allowed to challenge such measures or requirements on the ground of non-conformity with the standard set by the SPS agreement.

[57] Two famous cases settled by the DSB of the WTO on GMO issues between the EU and USA *are EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998European Communities – Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R/WT/DS292/R/WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006,*

[58] This includes measures that are necessary to protect human, animal or plant life or health, measures relating to the conservation of exhaustible natural resources if such restrictions are made effective in conjunction with restrictions on domestic production or consumption.

[59]NBMA Act, pt VII.

[60]ibid, s 3(d)-(e).

## CONCLUSION

This article has carried out a comprehensive study of germane provisions of WTO agreements that are applicable to GMOs in the light of the Nigerian National Biosafety Law to test the conformity of the Act with the agreements. The central subject matter WTO agreements revolve around is the prohibition of discriminatory trade practices through administrative regulations, directives, laws, tariffs, etc. Unlike other legal systems, the Nigerian jurisprudence on GMOs is still in its formative stage. Therefore, the *corpus juris* on GMOs in Nigeria do not address complex trade matters as opposed to the situation in the EU. In Nigeria, the NBMA Act only makes provision for certain procedures that must be complied with before GMOs can be imported or exported. It has been established that these procedures are legitimate in the context of the provisions of the Cartagena Protocol and the SPS agreement. While the Act remains silent on the condition of GMOs or GM-products when they have been introduced into the market,[61] it however regulates GMOs prior to their importation or exportation (border measures).

The Act does not discriminate against GMOs in the market. The treatment of GMOs is quite similar to that which other imported or exported goods/products from or to other countries receive. Upon importation of GM-products into Nigeria, the acceptability or otherwise of such products in the market is left to the dictates of the powers of demand and supply.The Act has not given any preference to GMOs produced from one country while discriminating against others. In fact, in Nigeria some GMOs have been approved for circulation in the country for agricultural purposes.[62] In terms of fulfilling its obligations under WTO agreements and providing a safe environment for plants, animals and humans, the NBMA Act has found a position of balance. The Act is not discriminatory in purposes and intent, and it aims at providing Nigerians with a safe habitat without impinging on Nigeria's WTO obligations.

[61] The Act is silent on internal measures that should regulate GMOs. It however, provides that the approval or permit granted to importing or exporting parties can be revoked where there is evidence showing that there is a new risk associated with the continued exposure to such GMOs. See NBMA Act, s 2 9.

[62] GM-cotton has been approved in Nigeria, and is in fact the first GMO to be approved in the country.

# RESOLVING DISPUTES ARISING FROM EXPROPRIATION IN NIGERIA THROUGH THE MECHANISM OF ALTERNATIVE DISPUTE RESOLUTION

**JOSEPH I AREMO, PhD***

**Abstract**

*Dissatisfaction about the government take-over of private land for public use has been a common phenomenon in Nigeria, partly, because of the people's perception about the viability or the genuineness of the proposed projects. The Land Use and Allocation Committee (LUAC) one of whose core mandates is to determine disputes arising from incident of expropriation has been criticised to be preponderantly skewed in favour of the government and leaves much to be desired. This study therefore undertook a critical examination of the provisions of the land Use Act, 1978 in relation to settlement of disputes arising from compulsory land acquisition in Nigeria. It was found that the LUAC has the tendency to be susceptible to abuses owing to its composition. The non-justiciability of expropriation-compensation matters repels against sentinels of justice and fair play. Therefore, this study recommended a paradigm shift to Alternative Dispute Resolution (ADR) mechanisms. This is in tandem with global trend win-win justice system and if this is inculcated into the enabling statute of expropriation, inter party differences and frictions will be reduced to the barest minimum..*

**Keywords:** Expropriation, Dissatisfaction, Compensation, ADR, Fairness

## 1.0 INTRODUCTION

Sustainable development requires governments to provide public facilities and infrastructure that ensure safety and security, health and welfare, social and economic enhancement, protection and restoration of the natural environment.[1] The delivery of these services will directly benefit any community and significantly improve public welfare. Infrastructure provision is necessary for economic growth and the development of any nation, as well as for competitiveness in international markets and sustainable development. As such, it is by this that operating costs are

*M.Phil, PhD (Ife), BL; Former Commissioner, Ondo State Law Commission and currently Lecturer, College of Law, Joseph Ayo Babalola University, Ikeji-Arakeji, Nigeria. Email: aremsonjoe@gmail.com

1 A Otubu, 'Private Property Rights and Compulsory Acquisition Process in Nigeria: the Past, Present and Future' (2012) 8 ( 2) *European and International Law AUDJ* 5.

reduced and, more importantly, market opportunities are expanded.[2] The ensuing gain in competitiveness and production is what stimulates the gains in economic growth and ultimately welfare.[3] A fundamental prerequisite to this is the availability and provision of land. Land as a factor of production is characteristically fixed and limited in supply and this sometimes poses a constraint in the development process.[4] Unfortunately, the appropriate size of land and location may not be readily available or where available it may not be for sale at the time it is needed for public use or such land may be in private domain. A proper step in the process of providing these facilities and infrastructure is the acquisition of appropriate land.[5] Therefore, in order to keep faith with the electorates in providing the needed infrastructure, governments are vested with the power of expropriation which is otherwise known as compulsory land acquisition's power or eminent domain. Expropriation is the power to take private property for public use by a State or national government. The property may be taken either for government use or by delegation to third parties who will also devote it to public or civic use or, in some cases, economic development. The most common uses of property taken by eminent domain are government buildings and other facilities, public utilities, highways, and railroads; however, it may also be taken for reasons of public safety. Some jurisdictions require that the condemner offer to purchase the property before resorting to the use of eminent domain. Eminent domain is the incidental exercise of sovereign power of the State to acquire private property for 'public purpose' by providing just compensation.[6]

Perception of the landowners is critical to the success or otherwise of the exercise of expropriation. Over the years governments at all tiers have been brought under pressure to provide land for public facilities and infrastructure. Unfortunately, more often, there are incidents of resentment and affront by the landowners against the acquiring authorities and officials. While in some cases, there is no established institutional framework for handling cases of disaffection and conflicts arising from the exercise. Though, the Land Use Act (LUA)[7] provides for the establishment of the Land Use and Allocation Committee (LUAC)[8] to adjudicate on issue of disputes arising from compensation payable to the dispossessed landowners, the composition does not seem to guarantee fair hearing and as such many landowners appear to lose trust in the committee. The non-justiciability of the same issue calls for concern and it tends to be an affront against the judicial powers of the regular courts in the

2 F Famuyiwa and MM. Omirin, 'Infrastructure Provision and Private Lands Acquisition Grievances: Social Benefits and Private Costs' (2011) 4 (6) *Journal of Sustainable Development* 1.
3*ibid.*
4*ibid.*
5Otubu (n 1).
6 GS Pande, *Constitutional Law of India* (10th edn, University Book House (P) Ltd. 2007) 600.
7The Land Use Act 1978, Cap L5 LFN 2004.
8LUA 1978, s 2 (2) (c), & (3).

country.[9] In the light of the above therefore, it has become imperative to examine the legal and institutional frameworks provided by the LUA to determine disputes arising from expropriation and the likely challenges it throws up with a view to having a paradigm shift to exploring the options of ADR.

## 2.0 PURPOSE, BENEFITS AND PROCESS OF COMPULSORY LAND ACQUISITION

The government is empowered by the provisions of the LUA to revoke the right of occupancy of any holder for overriding public interest.[10] What is overriding public interest[11] or public purpose[12] is defined by the Act. The definitions are elaborate and would seem to cover virtually any foreseeable

9LUA, s 47 (2).

10 'Overriding public interest' in respect of both statutory right of occupancy and customary right of occupancy is defined by section 28 (2) and (3) of the Act: "(2) Overriding public interest in the case of a statutory right of occupancy means--.(a) the alienation by the occupier by assignment, mortgage, transfer of possession, sublease, or otherwise of any right of occupancy or part thereof contrary to the provisions of this Act or of any regulations made there under; (b) the requirement of the land by the Government of the State or by a Local Government in the State, in either case for public purposes within the State, or the requirement of the land by the Government of the Federation for public purposes of the Federation; (c) the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith. (3) Overriding public interest in the case of a customary right of occupancy means - (a) the requirement of the land by the Government of the State or by a Local Government in the State in either case for public purpose within the State, or the requirement of the land by the government of the Federation for public purposes of the Federation. (b) the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith; (c) the requirement of the land for the extraction of building materials; (d) the alienation by the occupier by sale, assignment, mortgage, transfer of possession, sublease, bequest or otherwise of the right of occupancy without the requisite consent or approval".

11 'Overriding public interest' in respect of both statutory right of occupancy and customary right of occupancy is defined by section 28 (2) and (3) of the Act: "(2) Overriding public interest in the case of a statutory right of occupancy means--.(a) the alienation by the occupier by assignment, mortgage, transfer of possession, sublease, or otherwise of any right of occupancy or part thereof contrary to the provisions of this Act or of any regulations made there under; (b) the requirement of the land by the Government of the State or by a Local Government in the State, in either case for public purposes within the State, or the requirement of the land by the Government of the Federation for public purposes of the Federation; (c) the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith. (3) Overriding public interest in the case of a customary right of occupancy means - (a) the requirement of the land by the Government of the State or by a Local Government in the State in either case for public purpose within the State, or the requirement of the land by the government of the Federation for public purposes of the Federation. (b) the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith; (c) the requirement of the land for the extraction of building materials; (d) the alienation by the occupier by sale, assignment, mortgage, transfer of possession, sublease, bequest or otherwise of the right of occupancy without the requisite consent or approval".

12 'Public Purpose' is defined by section 51 (1) of the Act to include: "(a) for exclusive Government use or for general public use; (b) for use by anybody corporate directly established by law or by anybody corporate registered under the Companies Act 1968 as respects which the Government owns shares, stocks or debentures; (c) for or in connection with sanitary improvements of any kind; (d) for obtaining control over land contiguous to any part or over land the value of which will be enhanced by the construction of any railway, road or other public work or convenience about to be undertaken or provided by the Government; (f) for obtaining control over land required for or in connection with mining purposes; (g) for obtaining control over land required for or in connection with planned urban or rural development or settlement; (h) for obtaining control over land required for or in connection with economic, industrial or agricultural development"

government venture, social or public activity. However, some of the reasons for which a right of occupancy may be revoked centre on the breach of the terms and conditions actual or implied of a certificate of occupancy by an owner[13] or the alienation of a right of occupancy without the requisite consent first had and received[14] or the refusal or neglect to accept and pay for a certificate which has been cancelled by the Governor.[15]

The Land Use Act provides that revocation of a right of occupancy by a Governor shall be 'signified under the hand of a public officer authorised in that behalf by the Governor and notice thereof shall be given to the holder.'[16]This presupposes that there is essentially an instrument of revocation which must be communicated to the holder of the right of occupancy being revoked. A notice of acquisition of property by the government has to be specific and precise as to the property acquired; a notice thereof which is ambiguous and capable of more than an interpretation will not be valid and where a community acquisition is involved, there must be a schedule annexed to the notice specifically ascertaining the boundaries and area of the land to which the acquisition relates.[17] The instrument of revocation must give details of the right of occupancy being revoked. In other words, the notice of revocation must contain a clear and full description of the right of occupancy affected by the revocation and preferably the date of the revocation.[18]Even where the Right of Occupancy is stated to be revoked for public purpose, the Supreme Court had in *C.S.S. Bookshops Ltd. v R.T.M.C.R.S*[19], insisted that there is the need to spell out the public purpose in the notice of revocation. It is therefore imperative that the reason for revoking any person's Right of Occupancy must be stated in the Notice.[20]His constitutional right in this regard is eternal and cannot be waived.

Revocation of the Right of Occupancy or title to landed property is not just a mere executive or administrative act that can be done in secret or in any surreptitious manner and later conveyed in official Government gazette. Eko, JSC in *Orianzi* v *A.G Rivers State*&ors[21] affirmed that the title holder is not only entitled to the notice of the proposed revocation with the public purpose for the revocation clearly spelt out therein, he is also entitled to be heard on the proposed revocation of his title. Even where no label of judicially or quasi-judicially may be placed on the Governor to so act, his duty to act fairly cannot be denied since he has a duty to

13LUA 1978, s 28 (5).
14ibid, ss 28 (2) (a) & 28 (3) (d).
15ibid, s 28 (5) (c).
16ibid, s 28(6).
17*Provost Lagos State College of Education &orsvEdun&ors*.[2004] All FWLR (pt.201) 1628.
18LUA, s 28 (7).
19(2006) 11 NWLR (pt.992) 530.
20*AdukwuvCommissioner for Works, Land &Transport, Enugu State* [1997] 2 NWLR (pt.489) 588; *Nigeria Engineering Works Ltd.* v *DENAP Ltd.* (1997) 10 NWLR (pt. 525) 481.
21(2017) LPELR-41737(SC) Pp. 78-89, Paras. E-A

give notice of the intended revocation wherein he must spell out the public purpose of the intended revocation to the title holder. The apex court is however silent on the manner such a hearing should take. It is submitted therefore it will not be disservice to either party if the prospective dispossessed is afforded the right of audience in the acquisition not minding the overriding expropriation power of the State.

In respect of a statutory right of occupancy, it is provided that its revocation by an acquiring authority does not operate to extinguish any debt due to the Government under or in respect of such a right of occupancy.[22] Accordingly, where a landowner is in arrears of ground rent for example, before the revocation of his interest in the land, he cannot set up the fact of the revocation as a defence.[23] In that case, it is one of double jeopardy. He will lose his land perhaps justifiably and he will still have to pay his debts! As this provision specifically refers to statutory rights of occupancy, it follows that it does not apply to a customary right of occupancy, actual or otherwise.[24]

## 3.0 DISPUTE SETTEMENT SYSTEM UNDER THE LUA

Basically, there are two windows of ventilating disputes under the LUA. The first leg relates to disputes as to the amount of compensation payable to affected persons in the course of government exercise of expropriation power.[25] The other aspect relates to incident of persons entitled to the compensation payable for improvements on land; declaration of title to land (customary or statutory rights) and payment rents in respect of the land.[26] Whilst the LUAC is saddled with the powers to assume jurisdiction over the first leg, the second leg is within the ambit of the jurisdiction of the regular courts (High Court or Customary Court and Magistrates Court respectively).

### 3.1 Powers and Functions of the Land Use and Allocation Committee

The LUA provides for the establishment of the Land Use and Allocation Committee (LUAC) which shall consist of such number of persons as the Governor may determine.[27] The membership of the committee shall include not less than two persons of not less than five years as estate surveyors or land officers possessing qualifications approved for appointment into the public service; and a legal practitioner.[28] The committee shall be presided over by such one of its members as may be designated by the Governor and, subject to such directions as may be given

22LUA s 32.
23Sholanke, O.O .23
24ibid.
25LUA, s 30.
26ibid, ss 39 – 42.
27ibid, s 2 (3).
28*ibid.*

in that regard by the Governor, the committee shall have power to regulate its proceedings accordingly.[29] The establishment of the LUAC is for each State while a similar body is to be set up at the local government level by the Governor after due consultation with the Local Government and it shall be known as "the Land Allocation Advisory Committee (LAAC)".[30] The LAAC shall have the responsibility of advising the Local Government on any matter connected with the management of land within the jurisdiction and control of the local government- all other land other than land in the urban areas of the State.[31]

There are three distinct responsibility vested on the LUAC. Section 2 (2) of the LUA provides:

> There shall be established in each State a body to be known as "the Land Use and Allocation Committee" which shall have responsibility for –
>
> (a) advising the Governor on any matter connected with the management of land to which paragraph (a) of subsection (1) above relates;
>
> (b) advising the Governor on any matter connected with the resettlement of persons affected by the revocation of rights of occupancy on the ground of overriding public interest under this Act; and
>
> (c) determining disputes as to the amount of compensation payable under this act for improvement on land.

### 3.2 Jurisdictions of the High Court and The LUAC over Disputes Arising from Compulsory Land Acquisition

The judicial powers of the Federation and the States are vested in the Courts so listed in the Constitution of the Federal Republic of Nigeria (CFRN), 1999, (as amended).[32] Though the term "judicial powers" used in the Constitution is nowhere defined nevertheless, and according to Miller[33], 'it is the power of the Court to decide and pronounce a judgment and carry it into effect between parties

29ibid, s 2 (4).
30ibid, s 2 (5).
31*ibid.*
32ibid, s 6 (1) & (2).
33On the Constitution adapted from KM, Mowoe, *Constitutional Law In Nigeria* ( Malthouse Press Ltd. 2008) 178.

who bring a case before it.' In *Muskrat* v *US*[34], it is defined as the 'right to determine actual controversies arising between diverse litigants duly instituted in courts of proper jurisdiction'. Accepting this line of pronouncement, the Supreme Court in *Abraham Adesanya* v *FRN*[35]adopting the definition of Griffith CJ.[36] which was culled from the decision of the Privy Council in the case of *Shell Co. of Australia* v *Federal Commissioner of Taxation*[37], said, *inter alia:*

> The words "judicial power" as used in the Constitution means the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subject, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding authoritative decision (whether subject to appeal or not) is called to take action

The exercise of this power therefore is further amplified by the 1999 Constitution, which like its predecessors, prohibits the ouster of the jurisdiction of the courts by any federal or state legislature,[38] and extends the power to all matters between persons or between government or authority and to any person in Nigeria, and to all actions for the determination of any question as to the civil rights and obligations of that person. The High Court by virtue of the provision is not precluded from determining any question as to the persons entitled to compensation payable for improvements on land under the LUA.[39] It is also within the competence of the court to entertain any issue challenging the validity or otherwise of the Governor's exercise of the expropriation power as well as whether the procedure so followed by the acquiring authority is in tandem with the enabling statute. However, the LUA by virtue of the provision of section 47(2) renders the issue of compensation payable to parties affected by the expropriation power of the Governor non-justiciable. This shall be reviewed subsequently.

The jurisdiction of the LUAC is restricted to land in the urban areas of the State while all other lands are within the purview of the control and management of the local government.[40] In most States of the Federation, the Governors have

34 219 US. 346, 361 (1911).
35(1981) 5 SC 112.
36*Hudart Parker &Co.*v*Mooreand*, 8 CLR 330 at 357.
37(1981) 5 SC 112.
38CFRN 1999, s 4 (8).
39LUA 1978, s 39 (1) (b).
40LUA 1978, s 2 (1).

refused to set up the body and where it is set up, the independence of the committee from the political whim and caprices of the Governors is in doubt thereby making the decisions of the body susceptible to political manipulations. Lack of confidence and trust in the government expropriating and adjudicating on issue of quantum of compensation payable to dispossessed landowners has resulted in affront and stiff resistance to acquiring authorities during acquisition.

Section 47(2) of the LUA provides that:

> no court shall have jurisdiction to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under the Act

The implication of the above section of the Act is to make the issue of compensation payable to any dispossessed person non-justiciable and therefore an attempt by any aggrieved party to challenge the quantum of compensation payable to him in the High Court fruitless. Onalaja[41] criticises this notion and submitted that the composition of the LUAC is an infringement on the rule of natural justice. According to the learned jurist, the person to settle the dispute being the Land Use and Allocation Committee, there is conflict with the principle, *nemo judex in causa sua*. Also, he was quick to point out that there was no provision in the LUA as to appeal or rejection of the decision of the Land Use and Allocation Committee in relation to their findings on the amount of compensation for improvements on land. He however submitted that any aggrieved party could invoke the provision of section 236(1) of the Constitution of 1979 Nigeria (now in*parimateria* with section 272 (1) of the 1999 Constitution) to seek justice. Taiwo aligns with the submission of the learned jurist but submitted further that section 47(2) of the Act is void having regards to the provisions of section 6(6)(b) and sections 272 and 1(3) of the 1999 Constitution of Nigeria.

In the 1986 case of *The Governor of Kaduna State v Dada*,[42] where one of the grounds of appeal at the Supreme Court raised the question on whether section 47 (2) of the Act which purports to oust the jurisdiction of the court to inquire into any question concerning or pertaining to the amount of compensation paid or to be paid under the Act, is unconstitutional, the Supreme Court declined to pronounce on the issue one way or the other claiming that it was an academic question and that a court should avoid declaring a law to be unconstitutional unless it is necessary for the resolution of the controversy between the parties in the case. The

41 In JA Omotola, (ed.) (1982).The Land Use Act.
42*Supra*.

Supreme Court stated that such a course was unnecessary in the instant case and so the question remained unanswered. In the case of *Makun v Federal University of Technology Minna*,[43] one of the issues formulated for determination at the High Court was whether sections 30 and 47(2) of the LUA ousted the jurisdiction of the High Court as to the reliefs sought by the Appellants. The Appellants had sued the Respondents for, among other things, an order to pay a certain sum of money being the balance due to the Appellants for the compulsory acquisition of their land for a public purpose. Clearly, this was a matter bordering on or pertaining to the quantum of compensation payable under the Act and covered by section 2(2)(c), 30 and 47(2) of the Act. However, both the High Court and the Court of Appeal dismissed the Appellants' claims based on the doctrine of *res judicata* having established that there were two earlier cases where the parties, the issues and the subject matter were the same as the case at hand. Unfortunately, the Supreme Court of Nigeria also agreed that the appeal lacks merit based on the same doctrine. So the opportunity to pronounce on the constitutionality or otherwise of sections 30 and 47 of the Act was again lost.

The Court of Appeal however in *Lemboye v Ogunsiji*[44] declared that section 47 of the Act does not have the same legislative force as section 236 of the 1979 Constitution (Section 272 of the 1999 Constitution) on the strength that the Act is an existing law which cannot be inconsistent with any of the provisions of the Constitution. This will appear to be in consonance with the interpretation canon that the language of any statute that has the effect of ousting the jurisdiction of the courts is to be jealously watched.[45] Since the LUA ranked below the Constitution and as such it must not be inconsistent with the provisions of the latter and where such exists, the court is left with no other option than to declare such law null and void.[46] The power of the court to determine any questions as to the civil rights and obligations of any person is constitutionally sacrosanct,[47] thus the Act cannot curtail these powers given by the Constitution in any manner whatsoever.

## 4.0 A PARADIGM SHIFT TO ALTERNATIVE DISPUTE RESOLUTION (ADR)

A functioning and modern justice system has been said to rest upon four principles guiding its planning and operation.[48] These are accessibility[49],

43(2011) LPELP-SC.241/2002.
44(1990) 6 NWLR (Part 155) 210 CA.
45*Governor of Ondo State vAdewunmi*(1988) LPELR – SC 130/1986.
46*A. G Abia&orsv AG Federation* [2002] 17 WLR 1.
47CFRN 1999, s 6( 6) (b).
48 United Nations Office of Drugs and Crime (UNODC), (2007) *Training Manual on Alternative Dispute Resolution and Restoration Justice* 15.
FAO, Good Governance in Land Administration, (Rome: FAO Land Tenure Studies, 2009)

transparency[50], efficiency[51] and strong institutional capacity[52]. Given the nature and complexity of issue of compulsory land acquisition in the country and the attendant crises, notwithstanding that the LUA has provided for an inbuilt administrative body to handle disputes arising from the payment of compensation to the affected persons, parties have not fared better. This is partly owing to lack of trust and confidence in the LUAC itself to guarantee fairness and perhaps because in most of the States of the Federation, the LUAC is not in existence. In the famous case of *R* v *Sussex Justices, ex p McCarthy*, Lord Hewart CJ in his landmark decision said that in every matter brought the court

> …it is not merely of some importance but is fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done…

Therefore, the need for an alternative mechanism for resolving disaffection arising from the incident of expropriation is imperative if fairness is to be maintained and attendant crises characterising many of the incidents of expropriation in the country are to be addressed.

The various communities in Nigeria have their own informal ways of resolving dispute even before colonization, as was the case in other African

49**Accessible** to all citizens, businesses, civil society groups and government agencies, with variety of different avenues of providing justice services according to the needs of the parties, and dynamics of the dispute, the financial capabilities of the parties and the greater interests of society; consistency with diverse social norms held by civil society, religious groups and other norm-generating parts of society

50**Transparent** in operations with equal provision of justice for all citizens and legal entities; procedural information simplified, use of oral procedures; rules and information available to all through a variety of channels for distributing information on cases, laws, regulations, procedures, filings, etc. The outcomes of judicial procedures are devoid of arbitrariness and not determined by the relative 'power' of the parties, but rather by the merits of their cases, the public interest, the legal context as well as norms of fairness and equity, as well as other standards

51**Efficient** in the provision of services and utilization of resources, including systematic functioning of judicial processes and services, provision of specialized and alternate forms of dispute resolution to increase appropriateness of proceedings and decongest courts, and utilization of diagnostics of performance and capacity for continual improvement. When users of judicial services come to the courts and other justice related agencies, they are able to speedily obtain information, instructions, file proceedings, settle cases and have decisions upheld and enforced without undue delay, expense or other hardship.

52**Founded on strong institutional capacity** that includes enhanced human resource skills and knowledge, data-collection and performance evaluation, service orientation, physical infrastructure, judicial independence, professional advancement and training, modernized technological capacity, processes and creativity.

communities.[53] Customary law of the different communities was the law that regulated the life and transactions of the people of Nigeria.[54] In *Okpuruwu* v *Okpokam*[55], Hon. Justice Oguntade held that:

> In the pre-colonial times and before the advent of the regular courts, our people (Nigerians) certainly had a simple and inexpensive way of adjudicating over disputes between them. They referred them to elders or a body set up for that purpose. The practice has over the years become strongly embedded in the system that they survive today as custom.

This mode of dispute resolution by elders, Chiefs and King is common in Nigeria and generally in Africa[56], where chiefs sit to resolve disputes amicably. The orientation of the people of Africa at large, in terms of law is towards the reconciliation of dispute vide arbitration, mediation and conciliation. A typical example of this in Nigeria is the ancient Benin Empire where the family head or village head served as mediator and arbitrator.[57] In the Yoruba settings, the Oba, Chiefs and the elders play this role, while in the North, the Emir, or the District, Village or Ward Heads were saddled with the responsibility.

Arbitration is a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decisions are binding on the parties. Thus, arbitration is adjudicatory. In Nigeria, it is regulated by the Arbitration and Conciliation Act.[58] Arbitration is anchored on fundamental principles like that of party autonomy,[59]arbitrability,[60]separability and judicial non-intervention. An arbitral award is not appealable but can be set aside under certain conditions. If not set aside, it can be enforced like a court judgement. An arbitral award is *res judicata*.

The arbitral process is not a challenge to or in competition with the judicial powers vested in the courts. To be enforceable, the agreement to arbitrate

53AM Sani, 'Modern Trends in commercial dispute resolution through Arbitration in Nigeria: Prospects and Constraints' (2015) 8*Journal of Marketing and Consumer Research*14.
54*ibid.*
55[1998] 4 NWLR (pt. 90) 554 at 572.
56 HS Daannaa, 'The Acephalous Society and the Indirect Rule System in Africa'(1994) 34 *Journal of Legal Pluralism* 61.
57 A Ephraim, *The Nigeria Arbitration Law in Focus*( West African Publishers Ltd.,1997) 1.
58Cap 19 LFN, 1990 Cap A 18 LFN, 2004.
59POIdornigie 'The Principle of Party Autonomy in Arbitral Proceedings: A Myth or Reality?
60PO Idornigie 'The Principle of Arbitrability Revisited' (2004) 21 (3) *Journal of International Arbitration*

must be in writing and signed.[61] The agreement is irrevocable except by agreement of the parties or by leave of court.[62] Arbitration can be of two types, namely, arbitral clause in a contract which refers future disputes to arbitration or a submission agreement that refers existing disputes to arbitration. Arbitration can also be ad hoc or institutional – administered by an arbitral institution like the International Chamber of Commerce (ICC) or London Court of International Arbitration (LCIA). If there is an arbitration agreement and one of the parties commences action in court, the other party can apply under sections 4 and 5 of the Act for a stay of proceedings. It should be noted that the party wishing to stay proceedings must apply for stay before delivering any pleadings or taking any other steps in the proceedings.

ADR is therefore a modern version of an ancient set of practices of resolving disputes amicably without recourse to the formal institution- court system. Traditional societies global-wide have featured variations of third-party arbitration and mediation. Western societies saw these practices subsumed by the rise of modern judiciary. The increased complexity of these processes, however, saw reduced satisfaction with legal outcomes among the disputants, leading to a rediscovery of ADR in the 1970s in many parts of the world.[63]

Alternative Dispute Resolution Mechanisms are currently extremely popular in justice sector reform programs throughout the developing world. They are primarily seen as a method for relieving the crisis of overburdened state courts facing impossible backlogs of unresolved cases. The goals of ADR have been described among others as relieving court congestion, reducing undue cost and delays, enhancing community involvement in the dispute resolution process, facilitating access to justice and providing a more effective resolution of dispute. More positively they are also advocated as offering a cheaper, faster and more accessible form of justice for ordinary citizens, particularly the rural and urban poor who do not have access to state justice either because of lack of resources, social exclusion or lack of physical access (distance).

A major feature of arbitration is that it is consensus. The parties have a choice. They may decide to have their disputes resolved by a Court of Law or they may choose to have it decided by an arbitrator.[64] It focuses attention on the differences between positions and interests. According to him, whilst position is something a party has to decide upon, interests are made up of needs, desires and concerns that motivate people. It is generally believed that negotiation works best

61Arbitration and Conciliation Act, Cap A LFN, 2004, s 1.
62ibid, s 2.
63 'Training Manual on Alternative Dispute Resolution and Restorative Justice" published by United Nations Office on Drugs and Crime in 2007 at 16
64Mainstreet *Bank Capital Ltd. v Nig. RE* (2018) 14 NWLR (pt. 1640) 423 at 429.

where interests are involved as there is always room to explore alternatives, especially when particular needs and interests may be shared among the parties. ADR approaches therefore place emphasis on finding options that are acceptable to both parties. It is also less intrusive, less costly in monetary and social terms than any sort of third party decision making.

### 4.1 Methods/Approaches of ADRS

Herrera *et al*[65] classify conflict resolution strategies or methods into two main groups, consensual and non-consensual methods. Strategies that require the intervention of a recognized formal or informal third party, in charge of taking a final decision, are considered non-consensual (formal methods). The final resolution in these methods depends entirely on the third party and the validity and enforcement depends on his authority, power and legitimacy. Adjudication and arbitration are examples of this category. The main strength of non-consensual methods is that the rules that regulate the conflict are clearly stated from the beginning. On the other hand, consensual methods use a consensus building approach that involves community consultation, negotiation, facilitation, conciliation or mediation. The methods work by bringing all the stakeholders into the process as early as possible to work towards an agreement. Consensus' building procedures can be effective in resolving major multiparty, multi-agency, and multi-government conflicts.

Herrera emphasise that consensus building in conflict resolution is more sustainable where legal frameworks support community decision making and the management of land resources. This means that there must be policies and enforceable regulations in support of consensus building in conflict resolution, accompanied by laws that protect the community's rights to resolve the conflict. Consensual methods are most commonly adopted in ADR procedures.

Alternative dispute resolution mechanisms or methods are considered to be alternatives to litigation because they are not adjudicatory or judicial in nature. It is therefore argued that in ADR mechanisms, there is no person or body or authority which hears and decides the dispute between the parties. Key components of the methodologies or strategies deployed by ADR include Negotiation,[66]Mediation,[67]Conciliation[68]andArbitration[69]. The methods attempt an

65A Herrera *et al.*Land tenure alternative conflict management.*FAO Land Tenure Manuals* 2, Rome, FAO, 2006

66 It is a conflict resolution method freely chosen by the stakeholders, in which they manage to meet and personally find a joint solution to their conflict. Thus, negotiation is done directly between the parties with or more often without a facilitator. Negotiations are typically private and controlled by the parties themselves. The decision making authority lies directly with the parties as well as the content, structure, timing and outcome. In negotiation therefore, the desired objective is the agreement, which may or may not be enforceable under formal and or customary law.

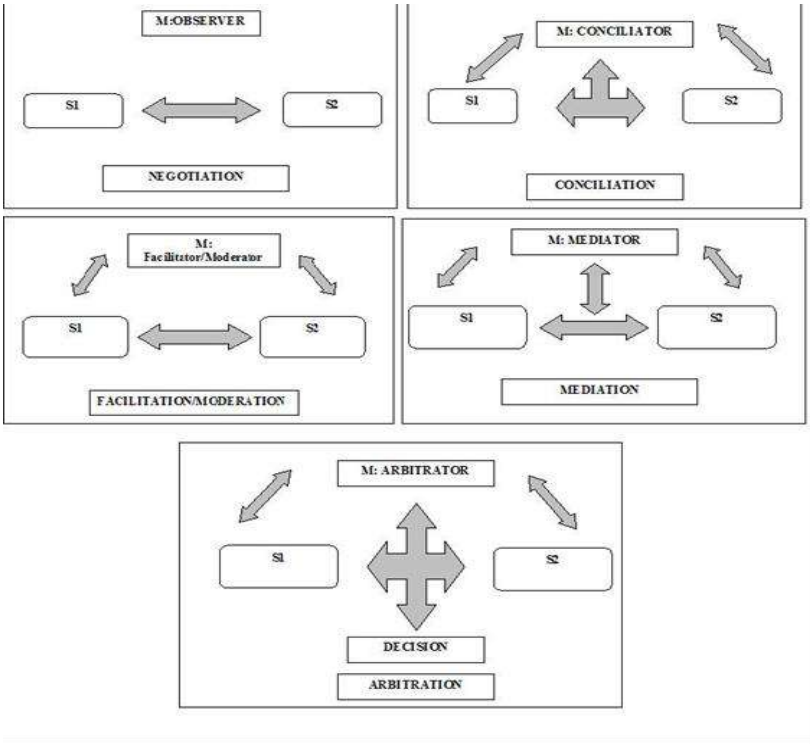
agreement between the parties through persuasion, convincing and telling both parties the strengths and weaknesses in their respective approaches. They explain to each party what they stand to gain and what they stand to lose if they agree to the mutually agreed solution to the dispute. They are mostly in the nature of bringing a mutually agreed solution by the parties to the dispute. The main characteristic of these approaches is that none of them has the objective of reaching a *win-lose* position. The purpose is to help stakeholders understand each other's position and find together a possible resolution to the conflict. This strategy makes stakeholders responsible for the resolution of their own conflicts, thus a *win-win* position. The methods are now discussed in more detail in figure below showing the common processes of ADR mechanisms.

67 It is a process that employs a neutral or impartial person or persons to facilitate negotiation between parties to a dispute in an effort to reach a mutually accepted resolution. The intervention of a neutral third party (who may have previously acted as conciliator or facilitator) with no decision making power, whose duty is to follow the entire negotiation process, improve communication between the parties, and help them reach the most appropriate resolution. The objective of the intervention is to assist the parties in voluntarily reaching an acceptable resolution of the conflict. Mediation can be said to be a process which is similar to negotiation and facilitation. It actually builds on these processes.

68 Conciliation as a process is where a neutral party tries to engage the stakeholders separately in a network to promote communication and help them to jointly choose a conflict resolution method. The process of conciliation is based on negotiations between the parties. The conciliator tries to resolve the dispute on mutually acceptable terms between the parties. He negotiates the dispute with parties separately. If no settlement is reached, the process is said to have failed. In conciliation the number of conciliators is not limited. They can be one or more since they do not give any decision but only try to resolve the dispute by mutual consent and agreement between the parties

69 In arbitration the adjudicator, called arbitrator(s) hears the parties and gives his decision on the dispute. Arbitration as one of the methods of ADR has all the advantages of ADR. It renders justice very fast. The parties need not waste a lot of time, energy and man hours. Again Arbitration is less expensive; the parties have a choice in the selection and appointment of the arbitrator and can also hold the hearing at any place convenient to them. It is a process in which a qualified third party listens to the facts and arguments presented by the stakeholders or their representatives and renders a decision_. Arbitrators are usually substantially trained in legal matters and their decisions may or may not be binding, depending on previous agreements between the parties.

**Common Processes of ADR Mechanisms**




In the above Odametey's diagrammatical illustration[70], S1and S2 represent the parties and their respective powers. Under this first cell showing "Negotiation' as process, there is no third party mediation (M). Negotiation would probably be inefficient if the power of the stakeholders is not balanced. The mediator in a negotiation process is only an observer. He may be responsible for ensuring that the parties agree to come to the negotiation table but during the process itself, he is not responsible for the process or outcome of the negotiation. Directly below it is the illustration showing the role of the facilitator (M) which is simply to help and facilitate a dialogue that already exists between the parties. To the right of the Negotiation is the "Conciliation", where the parties have the option of communicating with the third party, the conciliator, who is in charge of opening and maintaining a channel of dialogue between the parties.

[70]C Odametey, 'The Regulation of Land Disputes: Promoting the Option of Alternative Dispute Resolution Mechanisms: The Case of Ghana in G, Sackey (edn), *Investigating Justice Systems in Land Conflict Resolution: A Case Study of Kinondoni Municipality, Tanzania*(unpublished M.SC thesis)available online https//www./.itc.nl/library/papers_2010/msc/la/sackey.pdfaccessed 12 August 2018.

Directly below the Conciliation is the "Mediation". The mediator (M) has the most significant role in the mediation process. He has the power to intervene in every stage of the process, from the beginning when he may have to act as the conciliator through the dialogue to the final decision. Mediation just like the other methods of ADR has the advantage of being flexible, informal, confidential, non-binding in nature, makes savings on resources and ensures maintenance and often improvement of the relationship. Where all the above discussed methods have been explored and an attempt to resolve the disputes prove unsuccessful, the last resort under ADR will be to submit same before an arbitrator. In the figure above, (M) acts as the arbitrator(s). His role is to adjudicate and come out with a decision. He is required to listen to both parties, study the evidence and documents if any and also cross examine the parties and their witnesses in order to come out with a decision. He controls the process, content and outcome of the conflict.

**4.2 Prospecting ADR in Nigerian Expropriation Crises or Disputes**

Entrenching the options for ADR in handling disputes arising from compulsory land acquisition in Nigeria is of vital importance. In Hong Kong, the claimant or the Government may refer cases of similar nature to the Lands Tribunal for final determination if they cannot agree on the amount of statutory compensation for land expropriation. Nonetheless, some members of the public have suggested that the Government considers introducing ADR procedures.[71] In England, parties in expropriation disputes may refer such matter to the Lands Chamber of the Upper Tribunal for determination.[72] The tribunal over the years has been encouraging the parties to explore the ADR options.[73] The position in the New South Wales of Australia is that property owners affected by land resumption can lodge their objection to the Land and Environment Court ("LEC") if they oppose the compensation offered by the acquiring authority. A claimant may appeal to the Court of Appeal against a decision of LEC on a question of law. LEC has implemented an ADR system since 2006 for handling specified classes of dispute, including claims for compensation for land resumption.[74] These disputes are screened, diagnosed and referred to an appropriate ADR procedure, such as conciliation, mediation and neutral evaluation, for resolution after proceedings are commenced in LEC.

Furthermore, the wave of encouraging the adoption of ADR in many other jurisdictions have been on the rise and quite commendable. In Ontario (Canada), the

71I Cheng, 'Information Note on Resolving Disputes arising from Land Resumption'www.legco.gov.hk/index.html.
72*ibid.*
73*Tribunal Procedure (Upper Tribunal-Lands Chamber) Rules, 2010* stipulate that the Lands Chamber "should seek, where appropriate (a) to bring to the attention of the parties the availability of any appropriate alternative procedure for the resolution of the dispute; and (b) if the parties wish and provided that it is compatible with the overriding objective, to facilitate the use of the procedure".
74 I Cheng, *op.cit*atp.5

*Expropriation Act* requires the settlement of disputes about compensation for land resumption through mediation and/or arbitration. Either the aggrieved property owners or the acquiring authority may lodge disputes arising from land resumption to the Board of Negotiation (BON), an informal tribunal established under the Environment and Land Tribunals Ontario[75]. BON aims to provide a fair, accessible and informal forum for the parties involved to reach a resolution through mediation. There is no cost to the parties to apply or have a matter proceed before BON. To facilitate quicker resolution of disputes relating to compensation for incident of compulsory land acquisition in Singapore, parties who have lodged an appeal with the Appeals Board may seek mediation services in case the statutory compensation offered is less than $500,000 and the property concerned is residential.

Flowing from the above is the fact that all the considered jurisdictions have promoted the use of ADR procedures for resolving disputes arising from expropriation either under the relevant expropriation laws, or under arrangements or schemes introduced by the judicial bodies responsible for handling such disputes. The gains have been identified and helpful to these countries while minimal frictions have been reduced between the acquiring authorities and the landowners. Where the key challenger to the expropriation power of the State can be rest assured of achieving justice with minimal or no cost, less affront is expected to government's step of acquiring private property for the public benefits.

## 5.0 SUMMARY, CONCLUSION AND RECOMMENDATIONS

This work has examined the processes and procedures allowed by the LUA to handle incident of disputes which may arise from the issue of expropriation (compulsory land acquisition) in the country. It was found that the LUA provides for a referral of dispute on payment of compensation to the landowners to the LUAC which composition may not safeguard fairness and fair hearing. Even with the invocation of the judicial powers as provided under the Constitution, it is not cost effective and in most cases time consuming while legal technicalities may defeat the interest of justice. It is in the light of these challenges that the study seeks to advocate a paradigm shift from the formal litigation processes to exploring the options of ADR.

It is recommended that there is no better time to amend the LUA than now to inculcate the options of ADR into the statute in addition to either provide for the establishment of Land Tribunal or the High Court as an Appellate Body in expropriation matters. As regulatory guidelines, the Tribunal should endorse the options of ADR for the aggrieved expropriation parties. Where the parties have submitted themselves to an Arbitration, the arbitral award may be taken as consent judgment.

75*Ibid.*

The LUAC should be restricted to administrative roles as provided under the LUA but should be stripped off the adjudicatory power. Worst still, the provision of section 47 (2) of the LUA which ousts the regular court of having jurisdiction over disputes arising from incident of compensation payable to the dispossessed as well as making the decision of the LUAC final. The earlier these are done; the better for various interests in compulsory land acquisition scheme of the government. An aggrieved party to the decision of the Tribunal should have a right of appeal to the Court of Appeal

While one must acknowledge the importance and benefits of government's act of acquiring private land for the public use, disputes and likely frictions that may arise from the exercise need to be resolved amicably. Parties must be given a fair hearing in such matters. Though, the interest of the public overrides that of an individual, there may not be a peaceful atmosphere for development where there exist frictions between the government and the landowners. The best option for resolution of parties' differences is ADR.

# THE SUPREME COURT OF NIGERIA AND DEVELOPMENT OF LEGAL PRACTICE: THE SUPREME COURT'S VOYAGE OF DISTINCTION WITHOUT A DIFFERENCE

**MARY-ANN O. AJAYI, PhD***

**DAVID TARH-AKONGEYONGNDI, LLM****

**Abstract**

*This article reviews the Supreme Court's (SC) decision in Heritage Bank Ltd. v Bentworth Finance (Nig.) Ltd. where the Court held that a Statement of Claim signed by a legal practitioner unknown to law contrary to the provisions of sections 2(1) and 24 of the Legal Practitioners Act 1962 do not render the proceedings null and void. According to the Apex Court, such franking, is a procedural as opposed to substantive irregularity and that failure to have raised the point at the trial court amounts to waiver and the point cannot be raised at the Supreme Court having not been canvassed at the Court of Appeal(CA). This is so even though it is contrary to the trite position of the law that issue of jurisdiction can be raised at any time and even at the SC for the first time. This paper through doctrinal methodology argues that this decision obliterates from the trite position of the law as enunciated in the SC's earlier decisions in Nweke v Okafor, SLB Consortium v NNPC, First Bank v Maiwada, Oketade v Adewunmi and that the decision is a fruitless voyage of a distinction without a difference. It also encourages irresponsibility on the part of counsel in signing court documents which is aided by lack of judicial foresight. It therefore urges the SC whenever the opportunity presents itself, to revert to its earlier position which is in tandem with the law.*

**Keywords:** Supreme Court, Substantial Justice, Jurisdiction, Nigeria, and Judicial Consistency

## 1.0 INTRODUCTION

Section 6 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), vests the judicial powers of the Federal Republic of Nigeria in the

Courts to which the section relates.[1] These courts are listed in sections 6(5) of the 1999 CFRN and 2 of the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010 which are known as superior court of record.[2] By virtue of section 230 of the Constitution of the Federal Republic of Nigeria, 1999[3] , the Supreme Court is established as the highest court in the judicial hierarchy in Nigeria and its decision binds all other courts below.[4] It exercises appellate jurisdiction over the decision of the Court of Appeal and its decision on all matters, is final.[5] The finality of the decisions of the Supreme Court is not synonymous to infallibility[6] since the Court is mounted by humans who are not immune from mistake making it possible, in certain instances, for the court to overrule itself.[7] Thus, since courts are created by statute, a statute that creates a court gives it jurisdiction and whatsoever jurisdiction that is not expressly given to a court is deemed to have been taken away from the court[8] hence; neither the court nor parties can confer nor take away jurisdiction from a court vested in it.[9]

More so, jurisdiction is so fundamental to any adjudicatory process to the extent that any proceedings no matter how well conducted in want of jurisdiction, at best, is an exercise in futility and once the jurisdiction of court is challenged, the only jurisdiction that court has is the jurisdiction to determine its jurisdiction one way or the other.[10] Because of its importance, the question of a court's jurisdiction can be raised at any stage of the proceedings either by the parties or the court *suomotu*even at the Supreme Court for the first time.[11]

In exercise of its appellate jurisdiction over the decisions of the Court of Appeal, the Supreme Court in *Heritage Bank Ltd. v Bentworth Finance*[12]held that a writ of Statement of Claim signed by a lawyer unknown to law contrary

*LLB (Hons) LLM, PhD (Ibadan) BL, Senior Lecturer, Department of Public and International Law, Faculty of Law, Bowen University, Iwo, Osun State. Email: maryann.ajayi@bowenuniversity.edu,ng Telephone: +2348116282595.
**LLB (Hons) UNICAL, LLM (Ibadan) BL, Department of Private and Commercial Law, Faculty of Law, Bowen University, Iwo, Osun State. Email: david.eyongndi@bowenuniversity.edu.ng Telephone: +2347033252212. He is currently a Doctoral Candidate at University of Ibadan.

[1]Constitution of the Federal Republic of Nigeria (CFRN) Cap. C38 LFN 2004, s 6..
[2]ibid, s 6(5).
[3]Otherwise referred to subsequently in this paper as "the Constitution".
[4]These courts include the Supreme Court, Court of Appeal, Federal High Court, State High Court, High Court of the Federal Capital Territory, Abuja, Sharia Court of Appeal, Customary Court of Appeal.
[5]CFRN 1999, s 235.
[6]*Adegoke Motors Ltd. vAdesanya*[1989] 3 NWLR (Pt. 109) 250.
[7]*ibid.*
[8]*Governor of Oyo State v Oba OloladeAfolayan*[1995] 8 NWLR (Part 413) [292].
[9]*Felix Onuora v Kaduna Refining and Petrochemical Co. Ltd* [2005] 6 NWLR (Part 921) 393.
[10]*Standard Chartered Bank vAdegbite*[2019] 1 NWLR (Pt.1653) 348.
[11]*UtihvOnoyivwe*[1991] 1 NWLR (Pt. 166) 166.
[12][2018] 9 NWLR (Pt. 1625) 420.

to the extant provisions of section 2(1) and 24 of the Legal Practitioners Act 1962 which require only lawyers whose names are kept at the Roll in the Supreme Court to frank legal document is a procedural irregularity and as such, does not rob the court of jurisdiction because it runs afoul of the procedural as opposed to the substantive jurisdiction of the court. Also, failure to have raised the issue at the Court of Appeal robs the Supreme Court of the jurisdiction to entertain the objection since the Supreme Court lacks the jurisdiction to entertain any issue not canvassed at the Court of Appeal contrary to the trite position of the law that an issue of jurisdiction can be raised anyhow and at any time by either the parties or the court *suomotu*and by or at the Supreme Court for the first time.[13] The Court in obliterating from the immutable provisions of section 2(1) and 24 of the LPA held that its previous decisions in cases such as *Nweke v Okafor*[14] *SLB Consortium Ltd. v NNPC*[15], *First Bank v Maiwada*[16]and*Oketade v Adewunmi*[17]which are *in tandem* with the law do not apply and are distinguishable.

In fact, the Supreme Court in taking a diametrically opposed position to its established position in the cases above cited, reasoned that since at the time the incurably defective statement of claim complained about was signed that was the procedure and as at then it had not rendered the decision in *Nweke v Okafor.*[18]Hence, same having not been decided cannot be applied retrospectively. This is despite the fact that the decision in *Nweke v Okafor*[19]merely espoused the law as contained in Sections 2 (1) and 24 of the LPA which has been in existence since 1962 but had not been set in motion by the Court. The distinction of procedural and substantive jurisdiction with regard to the extant provisions of Sections 2(1) and 24 of the LPA is rather curios, appalling, misconceived and an at best, a distinction without a difference.

The reasoning that the irredeemably defective manner in which legal practitioners frank legal documents especially originating processes in the reprehensible manner of "& Co." had become an entrenched long standing practice does not by any strand of legitimate imagination makes the long standing yet abnormal procedure normal, valid and legal. No matter how notorious an abnormality has become, its notoriety cannot translate it to normalcy. The question therefore is; between its earlier decisions in the cases of *Nweke v Okafor*[20] *SLB Consortium Ltd. v NNPC*[21], *First Bank v*

[13]*N.U.R.T.W v R.T.E.A.N.* [2012] 10 NWLR (Pt. 1307)170.
[14][2007]10 NWLR (Pt.16534) 348.
[15][2011] 9 NWLR (Pt. 1252)317.
[16][2013] 5 NWLR (Pt. 1348) 444.
[17][2010] 8 NWLR (Pt. 1195) 63.
[18][2007]10 NWLR (Pt.16534) 348.
[19]*ibid.*
[20][2007]10 NWLR (Pt.16534) 348.

*Maiwada*[22]and*Oketade v Adewunmi*[23]and its decision in *Heritage Bank Ltd. v Bentworth Finance*[24]which represents the correct state of the law? Are the reasons advanced by the Supreme Court in departure from its established position that Court processes can only be validly signed by an animate legal practitioner whose name is contained at the Roll kept at the Supreme Court justified in view of the extant provisions of the LPA? What are the effects of this later decision on the need for accountability on the part of legal practitioners and the growth of Nigerian legal jurisprudence?

These issues form the crux of this paper which is divided into five parts. Part one contains the introduction. Part two reviews the decision of the Supreme Court in *Heritage Bank Ltd. v Bentworth Finance*[25]where it categorically upturned its earlier position on the appropriate and valid way of franking legal documents. Part three examines earlier Supreme Court decisions in respect of the "& co" quagmire such as *Okafor v Nweke*[26] *First Bank v Maiwada*[27]and *SLB Consortium Ltd. v NNPC.*[28]Part four discusses the thesis, antithesis and synthesis of the decision under review while part five contains the conclusion and recommendations.

## 2.0 THE LAW BEFORE HERITAGE BANK LTD. V BENTWORTH FINANCE

This section of the paper examines the state of the law hitherto to the decision under review as a prelude to its review.

It is apposite to state that sections 2(1) and 24 of the LPA have been in existence since 1962 when the Act was promulgated and what the Court did subsequently is not making it but merely setting it in motion by giving it the due recognition it deserved. As stated above, the Supreme Court alas, the Court of Appeal, in an avalanche of cases has made pronouncements on the effect of sections 2(1) and 24 of the LPA.

The foremost of these cases is *Okafor v Nweke.*[29]In the case, on the 19th day of December, 2005, the Applicants filed a motion on notice at the Supreme Court seeking *inter alia* an order of extension of time within which to apply for leave to cross appeal, leave to appeal against the judgment of the Court of Appeal, Enugu Division delivered on 25 January 2001; and extension of time within which to file applicant's notice of cross appeal. The motion was

[21][2011] 9 NWLR (Pt. 1252)317.
[22][2013] 5 NWLR (Pt. 1348) 444.
[23][2010] 8 NWLR (Pt. 1195) 63.
[24][2018] 9 NWLR (Pt. 1625) 420.
[25][2018] 9 NWLR (Pt. 1625) 420.
[26][2007]10 NWLR (Pt.16534) 348.
[27][2013] 5 NWLR (Pt. 1348) 444.
[28][2011] 9 NWLR (Pt. 1252)317.
[29][2007]10 NWLR (Pt.16534) 348.

signed by J.H.C. Okolo SAN & Co., applicants' counsel of 162B Zik Avenue, Uwani, Enugu, as the applicants' counsel. The motion was traditionally accompanied by an affidavit to which the proposed notice of appeal signed byJ.H.C. Okolo SAN & Co., applicants' counsel was attached as exhibit. A written address was filed in respect of the motion of notice and same was signed by J.H.C. Okolo SAN & Co., applicants' counsel.

The 1st to 3rd Respondents filed a counter-affidavit in opposition to the application and in the written address in support of the counter affidavit, the raised and argued the issue of the competence of the applicants' motion on notice, proposed notice of appeal and other processes signed by J.H.C. Okolo SAN & Co., applicants' counsel, for failure to comply with sections 2(1) and 24 of the LPA. Their contention was whether, aside legal practitioners called to the Nigerian Bar whose names are contained in the roll kept by the Registrar of the Supreme Court at the Supreme Court, a law firm of such legal practitioners can legally signed legal documents. Section 2 (1) of the LPA allows a person to practice as a Barrister and Solicitor if, and only if, his name is on the roll while section 24 thereof defines who a legal practitioner is under the Act.

The Supreme Court per Onnoghen JSC (as he then was) delivering the ruling held that only a person entitled to practice law as a Barrister and Solicitor of the Supreme Court of Nigeria, either generally or for the purpose of any particular proceedings is a legal practitioner. A law firm is not a legal practitioner and therefore cannot practice as such by filing processes in Nigeria Courts. Only human beings actually called to the Bar can practice or practice by signing documents.[30] Thus, J H C Okola SAN & Co. for all purposes and intent is not a legal practitioner and therefore cannot practice law, so held the Supreme Court.

On the competence of court processes signed in the name of a law firm, the Court unambiguously held that 'legal practitioners have formed the habit of signing court processes in their partnership or firm's name without indicating the name of the legal practitioner signing the process. Such documents are incompetent and liable to be struck out.'[31] It is worthy to note that, the Applicant had raised the argument of technicality and that signing of documents by a legal practitioner via his law firm is an act of the legal practitioner for which negative outcome should not be visited on the litigant as was held in *Majekodunmi v Chrislieb Plc.*[32]Substantial justice demands that a litigant should not be punished for the mistake or sin (s) of his counsel. In response to this pristine argument, the Court held that:

[30][2007]10 NWLR (Pt.16534) 348 at Pp. 531, Paras.B-E; 534, Paras.D-E.
[31]*ibid*at 533, paras. B, G-H.
[32][2008] 9 NWLR (Pt. 1145) 121.

> In arriving at the above conclusion, which is very obvious having regard to the law, I have taken into consideration the issue of substantial justice which is balanced on the other side of the scale of justice with the need to arrest the current embarrassing trend in legal practice when authentication or franking of legal documents, particularly processes for filing in the court have not been receiving the serious attention they deserve from some legal practitioners. Legal practice is a very serious business that is to be undertaken by serious minded practitioners particularly as both the legally trained minds and those not so trained always learn from our examples. We therefore owe the legal profession the duty to maintain the very high standards required in the practice of the profession in this country. The law exists as a guide for actions needed for the practice of law, not to be twisted and turned to serve whatever purpose, legitimate or otherwise which can only but result in embarrassing the profession if encouraged.[33]

Thus, this decision became the forerunner on judicial interpretation on sections 2 (1) and 24 of the LPA. A similar situation arose in *Mr. Amos Oketade v Mrs. OlayinkaAdewunmi& 4 Ors.*[34]The Appellant was a tenant of the Respondent and on the 31st day of May, 1994, the Chief Magistrate Court, Ibadan delivered a judgment whereby it ordered him to deliver possession of the Respondent property he was occupying. Instead of obeying the order, he filed an application for stay of execution which was refused.

> Aggrieved by the refusal, he appealed to the High Court, Ibadan and brought the same application for stay of execution which was granted. The Respondent filed an application at the Court of Appeal to set aside the order of stay of execution granted by the High Court. The Court of Appeal found from the affidavit evidence that the Respondent/Appellant had been indolent in prosecuting his appeal at the High Court since he was granted stay of execution, he being in constant breach of the conditions the stay was granted. It therefore granted the application to set aside the stay of execution and awarded cost in favour of the Respondent/Applicant.
>
> Dissatisfied, the appellant appealed to the Supreme Court. The Respondent raised a preliminary objection to the competence of the appeal on the grounds that both the notice of appeal and brief of argument were signed by a legal practitioner unknown to law i.e. "Olujimi and Akedolu." In determining the objection, Supreme Court took cognizance of the

[33][2007]10 NWLR (Pt.16534) 348 at 532, Paras.A-D.
[34][2010] 8 NWLR (Pt. 1105) 63.

provisions of sections 2(1) and 24 of the LPA and reiterated the trite position of the law as espoused in *Okafor v Nweke*.[35] The position which is that only a legal practitioner called to Bar as Barrister and Solicitor whose name is on the roll kept at the Supreme Court can practice law generally or for a particular office.[36]

On the competence of a court process issued in the name of a law firm, the court held that 'where a court process is issued in the name of a firm and not in the name of a legal practitioner, it is not a mere technicality that can be brushed aside. It is fundamental to the judicial process. Such a process is incompetent, invalid, null and void.' To buttress this point, the court placed reliance of *N.N.B. Plc. v Denclag Ltd.*[37], *Registered trustees, Apostolic Church, Lagos Archdiocese v Akindele*[38]and *Bamaiyi v Galla.*[39]Hence, the notice of appeal and brief filed by the appellant signed by 'Olujimi and Akeredolu& Co.' were null and void and of no effect whatsoever.

Another case in which the quagmire of sections 2(1) and 24 of the LPA have resonated is *SLB Consortium Ltd. v Nigerian National Petroleum Corporation.*[40]The appellant sued the respondent at the Federal High Court for breach of contract and won hence, was awarded damages of $19, 840, 467. 00 (Nineteen Million, Eight Hundred and Forty Thousand, Four Hundred and Sixty Seven) Dollars. The Respondent appealed against the judgment and same was upheld but the Court sent back the matter for rehearing on the damages awarded. After the re-hearing, the damages were reduced to $ 7, 155, 053. 00 (Seven Million, One Hundred and Fifty Thousand, Fifty Three) Dollars. On appeal to the Court of Appeal, it held that the Federal High Court lacks jurisdiction to hear the case because it is a simple contract and it is the High Court that has the vires over it.

The appellant was dissatisfied and appealed to the Supreme Court. Parties filed and exchanged briefs for the hearing of the appeal. The respondent in its brief raised a preliminary objection to the competence of the appeal on the ground that the originating process in the action was signed by a law firm instead of a qualified legal practitioner as required by law. The processes complained of were signed by AdewaleAdesoka& Co. In determination of the objection, the Supreme Court reiterated the settled

[35][2007]10 NWLR (Pt.16534) 348.
[36] [2010] 8 NWLR (Pt. 1105) 63 at
[37][2005] 4 NWLR (Pt. 916) 549.
[38](1967) NMLR 263.
[39]Unreported Appeal No. CA/J/234/2000 delivered 7/12/04.
[40][2011]9 NWLR (Pt. 1252) 317.

position of the law that a law firm cannot signed court document only a legal practitioner whose name is on the roll having been called to Bar. Thus, the court processes purportedly signed by AdewaleAdesokan& Co. are not just bad but incurably bad and all proceedings, including the appeal founded on them, are a nullity as the courts had no jurisdiction to be seized on the matter.[41] The court further held that the provisions of the LPA are statutory and therefore matters of substantive law which cannot be waived.[42]

This issue came to its climax in *First Bank of Nigeria Plc. & Anor. v Alh. SalmanuMaiwada*[43]The respondent in Appeal No. 204/2002 sued the appellant seeking declaration of title to a landed property situated in Jos, an order setting aside warrant of possession and damages for trespass. The appellants raised a preliminary objection seeking to dismiss the respondents claim on the ground that the subject matter has been determined in an earlier suit between the parties whereby the suit was dismissed in its entirety.

After hearing of the objection, the trial court dismissed same because there was an appeal on the earlier suit between the parties which was dismissed in its entirety and can therefore not sustain a plea of *res judicata*. Being dissatisfied with the ruling, the appellants appealed to the Court of Appeal via a notice of appeal signed by "David M. Mando& Co." The respondent raised a preliminary objection challenging the competence of the appeal on the ground that the notice of appeal was neither signed by appellants nor by a legal practitioner acting on their behalf but by a law firm. The Court of Appeal upheld the objection and struck out the notice of appeal. The appellant then appealed to the Supreme Court. There was another appeal pending and the notice of appeal was signed by "O. E. Abang& Co." The Supreme Court decided that the decision in one of the appeals will bind the other.

To put this lingering issue to rest, the Chief Justice of Nigeria (CJN) empanelled a full court and invited a host of *amici curiae* to address the court on the issue. The *amici curiae* were divided into two groups with one arguing that the decision in *Okafor v Nweke*[44]should be affirmed as same is a requirement of the law and not procedural or technicality. This side was led by J.B. Duadu SAN and others like Mr. S. E.Elena, Mr. Wale Taiwo and Mr. G. A. Oyewole while the other side was led by Chief

[41]*Cole v. Martins* (1968) 1 All NLR 161..
[42][2011]9 NWLR (Pt. 1252) 317at 332, Para. E.
[43][2013] 5 NWLR (Pt. 1348) 444.
[44][2007]10 NWLR (Pt.16534) 348.

WoleOlanipekun, SAN who adopted his *amiccurier*brief and urged the Court in the interest of justice to depart from its earlier decision in *Okafor v Nweke*[45]or where it is opposed to, cases instituted before the decision was given should be an exception to its applicability. His position was supported by Dr. O. Ikpeazu SAN, Dr. Paul Ananaba, Dr. O. O. Olatawura, Chief O. J. Onoja and Mr. A. A. Adedeji Esq.

The Court held that the utilitarian value of section 2(1) of the LPA is to ensure that only legal practitioners whose names are on the roll at the Supreme Court signed court processes and it is so in order to achieve responsibility and accountability on the part of legal practitioners who sign a court process. It is also to ensure that fake lawyers do not invade the profession.[46] The argument that insistence on the observation of the position laid down in the *Nweke's Case*[47]is technicality was strenuously refuted correctly by the Court when it held that:

> The Legal Practitioners Act seeks to make legal practitioners responsible and accountable more especially in modern times. There is nothing technical in insisting that a legal practitioner should abide by the dictates of the law in signing court processes. The issue is not in the domain of public policy. The convenience of counsel should have no pre-eminence over the dictates of the law. The law as enacted should be followed.

The Court in response to the appellant argument that registration of a law firm under section 573 (1) of the Companies and Allied Matters Act (CAMA) clothes same with the vires to sign court documents, held that:

> It is a misconception of the law to contend that a law firm registered as a business name under section 573 (1) of the Companies and Allied Matters Act is entitled to practice and sign processes in its registered name. Section 573 (1) of the Companies and Allied Matters Act is not an authority that can be relied upon to uphold the view that a process signed and filed by a firm of legal practitioners which has no life is valid in law. The general provision of section 573 (1) of the Companies and Allied Matters Act is subject to the

[45][2007]10 NWLR (Pt.16534) 348.

[46]*Ibrahim vBarde*[1996] 9 NWLR (Pt. 474) 513; *United Agro Ventures v F. C. M.B.* [1998] 4 NWLR (Pt.547) 546. The court held at page 483, paras. F-G.that "the words employed in drafting sections 2(1) and 24 of the Legal Practitioners Act are simple and straightforward. The literal construction of the law is that legal practitioners who are animate personalities should sign court processes and not a firm of legal practitioner which is inanimate and cannot be found in the roll of the Supreme Court."

[47][2007]10 NWLR (Pt.16534) 348.

specific provisions of sections 2(1) and 24 of the Legal Practitioners Act[48]

In fact, the pronouncement of Odili JSC in his concurring judgment is profound on the issues articulated in the case. As to the personality of "David M. Mando& Co." who allegedly signed the court processes the crux of the appeal, the law Lord queried:

> I am not told that David M. Mando& Co whose signature appeared in the notice of appeal is a duly registered legal practitioner. Even if that is proved, I would have to be further convinced that in Nigeria, juristic persons are eligible to be registered as legal practitioners.

He systematically analyzed the arguments for and against as presented by the parties as well as the friends of the court invited to help the court resolve the appeal and came to the conclusion that 'from what I can see, the contending parties are basically on either side of the fence which in brief is whether or not the case of *Okafor v Nweke*[2007] 3 SCNJ 185[49]… should be overruled or reviewed.' He recounted the facts of *Okafor v Nweke*[50]as well as the unshakable decision of the court therein which has been rightly followed in an avalanche of cases subsequently decided on the same issue. As to the interpretation given to the provisions of sections 2(1) and 24 of the LPA to the effect that only an animate legal practitioner whose name is on the roll kept at the SC can practice law (including signing court documents) which was attacked as being draconic, he thought otherwise. To his Lordship's judicial and judicious mind, he concluded that:

> It is indeed clear in my humble opinion that the interpretation of the above provisions (i.e. sections 2(1) and 24 of the LPA, Order 51 Rule 1 of the Federal High Court (Civil Procedure) Rules, 2009) is that it is the human person legally trained or termed a legal practitioner that is meant under those legislations above and only such persons and not a firm or group in the firm of legal practitioner come within the ambit of those two sections of the law. Therefore for the purpose of the authorizing signature, it is either the litigant himself or the human person who is the legal practitioner that can sign.

With the above eloquent summation, His Lordship sympathized with the litigant who is not in a position to know that his process had not and

[48]*F. M. B. N. vOlloh* [2002] 9 NWLR (Pt. 773) 475; *Kraus Thompson Org. Ltd. v N.I.P.S.S.* [2004] 17 NWLR (pt. 901) 44.
[49][2007] 3 SCNJ 185.
[50]*ibid.*

> cannot take off having not been signed either by himself or his counsel. However, 'the pride of place of the law remains standing and cannot be shaken but obeyed.' The unimpeachable conclusion reached by His Lordship was that 'the call to whittle down the effect of the strict compliance of the law in relation to who should sign and if not what the effect would be cannot be countenanced. By the same token, the principle enunciated in *Okafor v Nweke*(supra) remain and the issue of a review is still born and there is no overruling of itself for the Supreme Court on what *Okafor v Nweke*(supra) portend'

Mohammed JSC on his own part, correctly conceded to the fact of the correct consistency and persistency of the Supreme Court in following its correct decision laid down in *Okafor v Nweke*[51]in a pungent manner as follows:

> Additionally, I would add that the decision in *Okafor v Nweke*(supra), had since 2007 been consistently followed and applied by this court in several other cases that came before this court after that decision. Such cases include *Ogundele v Agiri*[2009] 18 NWLR (pt. 1173) 219; *Oketade v Oyewunmi*[2010] 8 NWLR (pt. 1195) 63; *SLB Consortium Ltd. v NNPC* [2011]9 NWLR (pt. 1252) 317, just to mention a few. All these decisions, as far as I am concerned, were arrived at on the correct interpretations given to the provisions of the various statutes particularly sections 1, 2 and 24 of the Legal Practitioners Act and Interpretation Act. Would it not result in re-writing the law leading to our creeping into the domain of the National Assembly, if we are to depart from our decision in *Okafor v Nweke*(supra)? The answer is obviously in the negative.[52]

The irresistible conclusion from the above profound judicial articulations is that the case of *Okafor v Nweke*[53]has been subjected to severe judicial scrutiny and it has stood unscratched like a rock. Several arguments including technicality and need to prevent the visitation of the sins of counsel on the litigant have not been strong enough to dismantle the *Okafor v Nweke*[54]legal construct.

## 3.0 PERESCOPING THE CASE OF HERITAGE BANK LTD. V BENTWORTH FINANCE

This section discusses the facts and principle of law enunciated by the Supreme Court in *Heritage Bank Ltd. v Bentworth Finance*[55] with regard to the

[51][2007]10 NWLR (Pt.16534) 348.
[52][2013] 5 NWLR (Pt.1348) 444 at 498, Paras.F-H.
[53][2007]10 NWLR (Pt.16534) 348.
[54]*ibid.*
[55][2018] 9 NWLR (Pt. 1625) 420.

legal effect of legal document signed in violation of section 2(1) and 24 of the LPA particularly grounds for which the Supreme Court would overrule itself.

The brief facts of this case are as follows: one Mr. R. Simonet was the Managing Director of Teko Fishing Industries Ltd. Teko Fishing Industries Ltd. maintains a corporate current account with the Appellant and Mr. Simonet also maintains his personal deposit account with the Appellant. Both accounts were domiciled with the Appellant at its Lagos Branch at No. 126-128, Broad Street, Lagos.

The Respondent was a customer of Teko Fishing Industries Ltd. and bought a Wema Bank draft of the sum of ₦ 1, 000, 000, 00 (One Million naira) onlyinfavour of Teko Fishing Industries Ltd. for services it rendered to the Respondent. However, Mr. Simonet intercepted the bank draft and paid it into his personal deposit account with the Appellant notwithstanding that the draft was cross cheque payable only to Teko Fishing Industries Ltd. The Appellant paid the amount stated on the draft meant for Teko Fishing Industries Ltd. into the account of Mr. Simonet.

Being aggrieved by the Appellant decision of paying into Mr. Simonet account the cheque meant for Teko Fishing Industries Ltd., the Respondent instituted proceedings against the appellant at the Lagos State High Court. It claimed *inter alia,* damages for the tort of conversion of the sum stated in the draft had and received. The Statement of claim filed by the Respondent/Claimant on the 19 September, 1990 was not signed by a person whose name is on the roll call of Legal Practitioners kept at the Supreme Court as required by sections 2(1) and 24 of the LPA. It was signed by Beatrice Fisher & Co., a firm of legal practitioners. The Appellant as Defendant did not raise any objection to the defect on the Statement of Claim but condoned same and joined issues with the Respondent/Claimant.

The trial proceeded unhindered and the trial court delivered its judgment in favour of the Respondent.

Aggrieved with the decision of the trial court, the Appellant appealed to the Court of Appeal which heard the appeal and dismissed same for lack of merit. Further dissatisfied, the appellant appealed against the decision of the Court of Appeal dismissing its appeal to the Supreme Court. In its appeal before the SC, it raised the issue of the defect of the Respondent/Claimant Statement of Claim which was not properly franked. It argued that the defect is fatal and it had robbed both the trial and CA jurisdiction to be seized of the matter and their decisions on same, are null and void and of no effect whatsoever.

The Supreme Court heard the appeal and unanimously dismissed same for lack of merit. The Supreme Court in a surprising manner, jettisoned all its

previous decisions (discussed above) on the settled effect of legal documents signed in the name of law firm against animate legal practitioners. The Court per Eko JSC dichotomized between procedural and substantive jurisdiction in the following manner 'procedural jurisdiction is secondary to substantive jurisdiction. The distinction between the two lies in the fact that while procedural jurisdiction can be waived, substantive jurisdiction cannot be waived' as was held in *Attorney General of Kwara State v Adeyemo.*[56]The Court further held that "a jurisdictional defect that renders an adjudication incompetent, *ultra vires,* null and void is substantive jurisdiction because such jurisdictional issue is extrinsic to the adjudication" as was decided in *Madukolu v Nkemdilim*[57]By this posture, the Supreme Court declared that a defect in procedure is not the same as a defect in competence or jurisdiction. It is a mere irregularity which can be waived as was decided in *Saude v Addullahi.*[58]The Supreme Court went ahead and declared that sections 2(1) and 24 of the LPA are procedural and not substantive and a breach of same is a mere procedural irregularity which is waivable. In fact the court strenuously but unconvincingly held as follows:

> The fact of this case, particularly on this objection, are that in spite of the fact that the statement of claim was allegedly not signed by a known legally qualified Legal Practitioner, but by a firm of Legal Practitioner, the appellant, as the defendant, condoned the defective process. They participated in the proceedings and evidence arising from the statement of claim was called after the statement of defence joining issues with the defective statement of claim was filed. Judgment of the trial court, based on the evidence elicited from the statement of claim, was delivered without objection. Even at the Court of Appeal no issue was made of the alleged defective statement of claim. The appellant, as the defendant, had clearly condoned the defective statement of claim and waived his right to object to this defective process. The right of the defence to object to the irregularity *ex facie* the statement of claim is a waivable right, being a private right.[59]

The Court strangely decided that a Statement of Claim does not come within the category of court process that if signed in the name of a law firm instead by an animate legal practitioner, would be regarded as null and void. It held thus 'whether an irregularity renders a process void or merely voidable

[56][2017] 1 NWLR (Pt. 1546) 210.
[57](1962) 2 SCNLR 341.
[58][1989] 4 NWLR (Pt. 116) 387.
[59]*Ariori v Elemo* (1983) 1 SC 13; (1983) C1 SCNLR 1.

depends on the type of irregularity. An irregularity affecting an originating process is a fundamental irregularity that goes to the roots. The statement of claim is not such an originating process.'[60]

In fact, to a rather ridiculous extreme, Odili JSC in concurring with the lead judgment which dismissed the appeal rationalized her decision for dismissing the issue of the defective statement of claim in the following manner:

> This issue needs no elaborate consideration since at the time of the writ of summons the procedure then allowed for signature of legal firms and so the process leading to this appeal which took place way before 2007 when the Supreme Court judgment of *Okafor v Nweke*(2007) 10 NWLR (pt. 1043) 521 was delivered and showed the new way in compliance with section 2 (1) and 24 of the Legal Practitioners Act, Cap. 207, LFN, 1990 which is that legal processes are to be signed by the human Legal Practitioner whose name is on the Roll or the party himself. It is in that light that the validity of the writ of summons in this appeal cannot at this stage be questioned. Apart from that, this court has no jurisdiction to entertain an appeal from the High Court where the issue of the competence of the originating process to wit, writ of summons would be considered when it did not come up at the Court of Appeal which is the court from which an appeal can travel to the Supreme Court.[61]

The reasoning that the Supreme Court lacks the jurisdiction to entertain the objection (i.e. the defectiveness of the Statement of Claim) because it was not argued at the Court of Appeal but at the High Court, with due respect is misconceived, unsustainable and a clear case of being wise by half borrowing the immortal words of Pat-Acholonu JSC in *Mainagge v Gwamma.*[62]It is not only strange to Nigeria's *corpus juris* but it does not have any place in it. It is trite law that jurisdiction is the life wire of adjudication and it is intrinsic to the adjudicatory process to the extent that any proceeding, conducted in want of jurisdiction, no matter how well conducted, is an exercise in futility.[63] As a result of its paramount nature, the issue of jurisdiction is not subject to judicial statute bar, it is not extinguished by time as same can be raised at any time even

[60]*Braithwaite v Skye Bank Plc.* [2013] 5 NWLR (pt. 1346) 1; *Nigerian Army v Samuel* [2013] 14 NWLR (pt. 1375) 466; *Thomas v Maude* [2007] All FWLR (Pt. 1361) 1749.
[61][2018] 9 NWLR (pt. 1625) 420 at P. 441, Paras.C-E.
[62](2004) 7 SCNJ 369.
[63]*Attorney General of Ogun State v Coker* [2002] 17 NWLR (Part 796) [304] - [330]; *Ladejobi v Odutola Holdings Ltd* [2002] 3 NWLR (Part 753) [121]-[162]; *National Electoral Commission & Anor v Izuogu*[1993] 2 NWLR (Part 275) [270] - [293].

at the Supreme Court on appeal for the first time as was held in *Felix Onuora v Kaduna Refining and Petrochemical Co. Ltd*[64]

In fact, the reasoning of Justice Odili on which the appeal was dismissed that the defective process was filed before the decision in Okafor v Nweke, was the response of the Respondent to the objection. In reprimanding the Respondent, Eko JSC, in the strongest of terms yet correctly so, described this defence as "rather lazy and *laiser faire.*"[65] Curiously, that which was described as "lazy and *laiser faire"* became the bedrock upon which Odili JSC based her decision despite his allusion to the fact that he has had the privilege of reading in draft the lead judgment delivered by his learned brother Eko JSC.

## 4.0 HERITAGE BANK LTD. V BENTWORTH FINANCE: THESIS, ANTITHESIS AND SYNTHESIS

Extrapolating from the preceding sections, few deductions can be safely made, from the time the Supreme Court decided the case of *Okafor v Nweke*[66]the law on signing of court document is as contained in sections 2 (1) and 24 of the LPA. Subsequent decisions of the Supreme Court have affirmed and re-affirmed the trite position in the case and the same arguments hashed in the case immediately after the Nweke's Case has been the same argument rehashed in other like cases as seen above. This pattern is the thesis on the law on who can and should sign court processes.

However, in *Heritage Bank Ltd. v Bentworth Finance*[67]the Supreme Court in a very surprising manner, took a diametrically opposed position to its settled position in the *Nweke's Case.*[68]This resulted in the antithesis on the law on signing of court processes. It is worthy to note that in reversing itself, there was no new argument presented to the court from the arguments which had been presented in the cases decided subsequently after the *Nweke's Case.*[69]In fact, the court process that was in issue in the *Nweke's Case*[70]was a mere motion on notice and not an originating process and the court declared sameinvalid for it offends sections 2 (1) and 24 of the LPA. However, in *Heritage Bank Ltd. v Bentworth Finance*[71]it was a statement of claim. Between this two processes, the later carries more legal weight than the former and requires stricter compliance with the law. The reason given by the Court for its departure that the provisions

[64][2005] 6 NWLR (Part 921) 393.
[65][2018] 9 NWLR (Pt. 1625) 420 at 433, Para. H.
[66]*ibid.*
[67][2018] 9 NWLR (Pt. 1625) 420.
[68]Nweke (n 62).
[69]*ibid.*
[70]*ibid.*
[71][2018] 9 NWLR (Pt. 1625) 420.

of section 2 (1) and 24 of the LPA are procedural and not substantive and therefore waivable was advanced in the earlier cases with the court coming to the right conclusion that the provisions are substantive and not procedural.[72] Hence, the argument was rightly rejected.[73] The provisions of the LPA in issue, for all intent and purposes and by any stretch of legal imagination, are substantive and can never be construed as procedural because, they specify 'who' and not 'how' court processes are to be validly signed. Also, Odili JSC justified his reversed position from the *Nwekes'Case*[74]on the justification that:

> This issue needs no elaborate consideration since at the time of the writ of summons the procedure then allowed for signature of legal firms and so the process leading to this appeal which took place way before 2007 when the Supreme Court judgment of *Okafor v Nweke*(2007) 10 NWLR (Pt. 1043) 521 was delivered and showed the new way in compliance with sections 2 (1) and 24 of the Legal Practitioners Act, Cap. 207, LFN, 1990 which is that legal processes are to be signed by the human Legal Practitioner whose name is on the Roll or the party himself.

With due respect, this is neither convincing nor correct. This reason, which was the Respondent's response to the Appellant's objection was described by Eko JSC in the same case as "lazy and *laiser faire*" response to a weighty submission. The LPA was not enacted in 2007 but 1962 and since then, the law has been as it is contained in the statute and it was only ignited in 2007. One fails to see any new or profound argument advanced by the parties in *Heritage Bank Ltd. v Bentworth Finance*[75]that made the Court to depart from its established decision in the *Nweke's Case.*[76]

The decision has violently upset the correctly established position on who can sign court processes in Nigeria, to say the least, without any justification. While the decision despite is unjustifiable nature subsists until it is judicially jettisoned, it is our vehement contention that same does not come within the circumference of instances under which the Supreme Court or any other court would depart from its previous decision as enunciated in the cases of *Long-John v Blakk*[77]*;*

[72]*Dada vDosunmu*[2006] 18 NWLR (Pt. 1010) 134.
[73] See the decisions of Fabiyi JSC in *F.B.N. Plc. v. Maiwada* [2013] 5 NWLR (Pt.1348) 444 at Pp. 485-488, Paras.E-D; Odili JSC at P. 533, Paras. A-C. the court held that "although the age of technical justice is gone, and the current vogue is substantial justice; but substantial justice can only be attained not by bending the law but by applying it as it is, not as it ought to be. There is nothing technical in applying the provisions of section 2(1) and 24 of the Legal Practitioners Acts drafted by the legislature. The law should not be bent to suit the whims and caprices of parties and counsel. The issue of technicality does not arise where substantive provision of the law is rightly invoked."
[74]*ibid.*
[75][2018] 9 NWLR (pt. 1625) 420.
[76]*ibid.*
[77][1998] 6 NWLR (pt. 555) 524.

*Bamgboye v Olusoga*[78]and *Okulate v Awosanya*.[79] In fact, in *Buknor-Maclean v Inlaks Ltd.* [80]and *Abdilkarim v Incar (Nig.) Ltd.*[81] the Supreme Court held that it will not depart from its previous decision unless the party calling for it to do so is demonstrably able to show that:

> the earlier decision is manifestly wrong and there is a real likelihood of it constituting a vehicle for perpetuating injustice by a rigid adherence to it; or that the decision was given *per incuriam;* or that it hinders the proper development of the law in which a broad issue of public policy was involved; or that it is inconsistent with the provisions of the Constitution; it will cause temporary disturbance of rights acquired under it and it will continue to fetter the exercise of judicial discretion of a court.[82]

The above conditions were stressed in the cases of *Ewete v Gyang*[83]and *Adegoke Motors Ltd. v Adesanya.*[84]The conditions enumerated above are not inexhaustive as it depends on the facts and circumstances of the individual case. However, the onus is squarely on the party seeking a departure to present the grounds necessitating the departure. Thus, the party who desires that the court departs from its previous decision has the exclusive duty to bring his case within one of the grounds established for doing so or another acceptable ground.

Interestingly, the appellant in *Heritage Bank Ltd. v Bentworth Finance*[85]did not invite the Supreme Court to depart from its decision in *Okafor v Nweke*[86]like the appellant in *First Bank v Maiwada.*[87]None of the grounds of appeal was related to the issue of the court reversing itself nor did the issue raised and argued in the appellant's brief of argument touch on it. It therefore becomes curious why and how the court came about the issue of reversing itself.

Though one may seek to justify the attitude of the Supreme Court on the basis that a court has the inherent power to raise an issue *suomotu,* this power is not to be exercised at large. The need to do justice is the consideration for a court raising issue *suomotu*as was held in *Y' Adua&Ors. v Yandoma.*[88]However, where the court raises an issue *suomotu,* it is under a duty to give the parties an opportunity to address the court before it makes its decision on the issue as was

[78][1994] 4 NWLR (pt. 444) 520.
[79][2000] 2 NWLR (pt. 646) 530.
[80](1980) 8-11 SC 1.
[81][1992] 7 NWLR (pt. 251) 1.
[82]*OdivOsafile*[1985] 1 NWLR (Pt. 1) 17; *AdisavOyinwola*[2000] 10 NWLR (Pt. 674) 116.
[83][2003] 6 NWLR (Pt. 816) 345.
[84][1989] 3 NWLR (Pt. 109) 250.
[85][2018] 9 NWLR (Pt. 1625) 420.
[86]*Ibid.*
[87][2013] 5 NWLR (Pt. 1348) 444.
[88](2014) LPELR-24217 (SC).

held in *Omokuwajo v Federal Republic of Nigeria.*[89]Despite this the court did not invite the parties to address it on the issue but made a ruling on it. This in itself is a grave infraction which cannot be sustained. Besides, the issue of reversing itself from its previous decision raised *suomotu*by the Supreme Court does not come within any of the exceptions to the *suomotu*requirements as enunciated in *Ojukwu v Yar' Adua*[90]

Interestingly, when the decision of the Supreme Court in *Heritage Bank Ltd. v Bentworth Finance,*[91]is juxtaposed with its earlier decision in *Hamzat v Sanni*[92]both of which relate to a defective franking of a statement of claim, the inconsistency becomes more apparent, perplexing and suspicious. The similarity between these cases is striking. In the *Sanni's Case*[93], the Appellants writ of summons was signed by MuyiwaObanewa Esq. of Olumuyiwa Obanewa& Co. Legal Practitioners, Solicitors to the Plaintiffs while the statement of claim was signed by Olumuyiwa Obanewa& Co. Legal Practitioners, Solicitors to the Plaintiffs. The matter went on trial and the trial court entered judgment in favour of the Plaintiff/Appellant. Being dissatisfied, the Defendant appealed to the Court of Appeal which upheld the appeal and held that the Respondent had failed to prove their claim before the trial court.

Being dissatisfied with the judgment of the Court of Appeal, the Appellants filed an appeal to the Supreme Court. Parties filed and exchanged their briefs. However, the Respondents filed a notice of preliminary objection. The objection was based on the ground that the trail court lacked the jurisdiction to entertain the suit as due process of the law as well as a condition precedent was not met as the statement of claim was not signed by a legal practitioner known to law. They contended that Olumuyiwa Obanewa& Co. is not a legal practitioner within the contemplation of sections 2(1) and 24 of the LPA and therefore cannot sign court processes and any so signed, is null and void and of no effect whatsoever. They further contended that it was upon this defective and incurably bad statement of claim that evidence was led pursuant to which the trial court found in favour of the Plaintiff/Respondent. Since the statement of claim was defective, the evidence led in support of it has no basis to stand as you

[89][2013] 9 NWLR (Pt. 1359) 300.
[90][2009] 12 NWLR (Pt. 1154) 50. The court held as follows "Though a court would be wrong to decide on issues not raised by the parties, without giving the parties a hearing; it will not be necessary to give the parties a hearing when a court raises an issue on its own motion or *suomotu*, if: (a) the issue relates to the court's own jurisdiction (b) both parties are or were not aware or ignore a statute which may have bearing on the case. That is to say where, by virtue of statutory provision, the court is expected to take judicial notice under section 73 of the Evidence Act and (c) on the face of the record, serious questions of the fairness of the proceedings is evident."
[91][2018] 9 NWLR (Pt. 1625) 420.
[92][2015] 5 NWLR (Pt. 1453) 486.
[93][2015] 5 NWLR (Pt. 1453) 486.

cannot put something on nothing and expect it stand but the something put on the nothing must helplessly and hopelessly crumble like a pack of card.

While the fact that the statement of claim was signed by OlumuyiwaObanewa& Co. was admitted by both parties, the Respondents however argued that the objection is a misnomer. Their reason was that the issue was neither raised at the trial court nor at the Court of Appeal. To the Respondents, the issue having not emanated from the CA, the SC lacks the vires to entertain it by virtue of section 233(1) of the Constitution which empowers the SC to be seized of appeals only from the decision of the CA. The Appellants conceded to the fact that the subject matter of the objection was not made an issue before the trial court and the Court of Appeal. However, since it is an issue of jurisdiction, it can be raised at any time even at the SC for the first time placing reliance on *Pan Asian African Co. Ltd. v NICON.*[94]

In resolving the objection, the SC per Galadima JSC held that the Respondents response that the objection was not raised before the trial court and Court of Appeal is of no moment because the issue of jurisdiction is intrinsic to adjudication and can therefore be raised at any time of the proceedings and even for the first time at the appellate court inclusive of the Supreme Court[95] placing reliance on *Tiza v Begha*.[96] It further held that any defect in competence of a court process is fatal and the proceedings arising there from will be rendered a nullity, no matter how well conducted as was held in *Skenconsult (Nig.) Ltd. v Ukey.*[97]The learned Justice in upholding the objection held, *inter alia*, thus:

> In view of our clear position in *Okafor v Nweke (supra)* and other similar cases, I hold that the appellant's statement of claim on which evidence was led, were a nullity, same having been signed in the name of a law firm which, is not by the provisions of sections 2(1) and 24 of the Legal Practitioners Act, Cap. 207, Laws of the Federation, 1990, a person entitled to practice as a Barrister and Solicitor. Consequently, the statements of claim are hereby struck out.

Peter-Odili JSC who was on the panel agreed with the lead judgment ditto his learned brother, Galadima JSC. After reviewing the arguments of the parties, the Law Lord came to the conclusion that:

> From what is put across by learned counsel for the respondent to which learned counsel for the appellant merely glossed over and in doing that failed to appreciate the danger their processes and competence were in, I find it easy to go along with the contention of

[94][1982] 9 SC 1.
[95]*HamzatvSanni*[2015] 5 NWLR (Pt. 1453) 486 at 497 Para. D.
[96][2005] 15 NWLR (Pt. 949) 616.
[97][1981] 1 SC 6.

> the respondent that the appellants' statement of claim on which evidence was led is a nullity having not been signed by a legal practitioner as known by the definition of section 24 of the Legal Practitioners' Act and so the statement of claim has to be struck out as a nullity and of course along with that striking out would be the evidence hanging on the purported pleadings, this is a situation well established by this court in *Okafor v Nweke [200] 10 NWLR (Pt. 1043) 512.*

The Writ of Summons being competent and valid, save the suit itself however the statement of claim which is the brick and mortal of the case was struck out together with the evidence given on it. It is apposite to note that the decision striking out the statement of claim and the evidence led thereon was a unanimous decision.

The only insignificant difference between these cases was the time of their commencement vis-a-vis the decision in *Okafor v Nweke.*[98]The case of *Heritage Bank Ltd. v Bentworth Finance*[99]was commenced before 2007 when *Okafor v Nweke*[100]was decidedwhile*Hamzat v Sanni*[101]was commenced in 2012 after. This in fact and in law, is inconsequential as the law espoused by the decision in *Okafor v Nweke*[102]has been in existence since 1962 when the LPA was made and was only set in motion by the decision in the case. The issue of procedural and substantive jurisdiction dichotomy raised by the court to justify its decision with the greatest respect, was misconceived as far as sections 2(1) and 24 of the LPA are concerned. The sections do not prescribe how court documents are to be signed but who can sign court document which is substantive. Thus, the present decision beats every iota of legal imagination and remains an uncommon precedent.

What even makes the position of the Supreme Court in *Heritage Bank Ltd. v Bentworth Finance*[103] more worrisome is that the Court by its decision in *First Bank v Maiwada*[104]has no doubt finally rested the issue of counsel signing Court process in a corporate name as the decision was given by a full panel of the Court. Now, with the decision in *Heritage Bank Ltd. v Bentworth Finance,*[105]is a panel of five justices upturning a decision of a full court under questionable

[98][200] 10 NWLR (Pt. 1043) 512.
[99][2018] 9 NWLR (Pt. 1625) 420.
[100][200] 10 NWLR (Pt. 1043) 512.
[101][2015] 5 NWLR (Pt. 1453) 486.
[102][200] 10 NWLR (Pt. 1043) 512.
[103][2018] 9 NWLR (Pt. 1625) 420.
[104][2013] 5 NWLR (Pt. 1348) 444.
[105][2018] 9 NWLR (Pt. 1625) 420.

circumstances. With the greatest respect to their Lordships, that is nothing but an aberration taken too far. Being the Apex Court of the land, it is very essential for the Supreme Court of Nigeria to be very careful not to be seen as being inconsistent in its pronouncements. The Court, like Ceaser's wife, must be above board as whatever emanates from its hallowed chambers remains largely sacrosanct irrespective of its frailties. The immortal words of Oguntade JSC (as he then was) in *Inakoju v Adeleke*[106]should always guide the Court in coming to a conclusion. His Lordship held as follows:

> The Supreme Court is the last court in Nigeria. Our decisions in appeals are binding over all the courts in Nigeria on the principles decided. The duty on us is onerous. The principle in a case wrongly decided quickly spreads across the system and is repeated from court to court and difficult to recall. This flows from the doctrine of precedent and what lawyers call *stare decisis.* The doctrine ensures that the decisions in courts are stable and easy to predict. Lawyers are thus better positioned to give suitable advice to their clients in the light of the position of the law. When we give judgments that bear no semblance of affinity with previous case law and for no good reason, this court is exposed to ridicule and contempt. The international community thinks little of us as a court.

The Court should also avoid a situation whereby to the larger society, it would be seen as if different rules are applicable to different individuals or personalities. Whatsoever is sourced for the Jews should be sourced for the Proselytes. In this regarded, Oguntade JSC (as he then was) is the *Inakoju's Case*[107]opined thus, 'that is why the image of the court is depicted with a scale which typifies equal balance. Sometime it is depicted with the image of a blindfolded man. The import is that there should be common standard for all who come before us.'

The decision has only succeeded in distorting the law rather than settling it and same should not be allowed to subsist where the Supreme Court gets the opportunity to adjudicate on the subject.

## 5.0 CONCLUSION AND RECOMMENDATIONS

From the above, there is a known way by the Supreme Court from its decision in *Okafor v Nweke*[108]on who is competent to sign court processes as between a law firm and an animate legal practitioner called to Bar and having his name on the roll at the Supreme Court. From the time of the decision in *Nweke's Case*[109],

[106] [2007] 4 NWLR (Pt. 1025) 423 at 748-749.
[107][2007] 4 NWLR (Pt. 1025) 423 at 753.
[108][2000] 2 NWLR (Pt. 646) 530.
[109]*Ibid.*

subsequent cases had taken their bearing from it until the decision in *Bentworth Finance Case* ruptured the *status quo*. All the arguments presented in the later case, had been presented in the earlier ones to no avail thus, the persuasion of the court to reverse itself becomes doubtful and questionable. However, until it is reversed, the law established by the *Bentworth Finance Case* remains valid and subsisting.

Based on the findings above and the need to entrench responsibility and accountability in the legal profession for the overall welfare of the society, it is recommended that whenever the opportunity presents itself, the Supreme Court should overrule itself in the *Bentworth Finance Case* and revert to its previous (correct)) position in *Nweke's Case* because the former was reached *per incuriam*which is a basis for any court reversing itself.

# NOVELTIES AND PERPLEXITIES OF PLEA BARGAIN IN NIGERIAN CRIMINAL JUSTICE: IN DEFENCE OF HUMAN RIGHTS

**WILLIAM W LONGPOE[1]& SAMUEL OGUCHE[2]**

**Abstract**

*The enactment of the Administration of Criminal Justice Act, 2015 was welcome with great excitement, consequent upon the attendant reform in criminal justice administration in Nigeria. One of the major innovations in the Act is the codification of plea bargain which, hitherto, was hinged on the scanty provisions of the Economic and Financial Crimes Commission (Establishment) Act, 2004. This paper examined the novelties and perplexities of plea bargain under the ACJA, and noted that making the victim of a crime a necessary party to plea bargain is a welcome development as justice is not just to the State or defendant, but to the victim as well. The paper identified some mitigating factors which facilitate plea bargain, such as cooperation of the defendant with the investigation and prosecution of the crime, and agreement by the defendant to return the proceeds of the crime or make restitution to the victim or his representative. In addition to the above, the paper identified perplexities of the practice of plea bargain under the ACJA, which includes the requirement of insufficiency of evidence as a condition precedent, failure of the Act to define 'victim' which is a major stakeholder in the bargaining process; its technical restriction to corruption cases; and lack of sentencing guidelines specifically designed to be applicable to plea bargain, among others. The paper recommended overhaul of plea bargain, with amendment of the ACJA to enable a defendant take full benefit of insufficiency of evidence by way of acquittal. It also recommended definition of 'victim' in the Act to define the scope of the term in order to avoid controversies as the practice advances. It finally recommended domestication of the ACJA by the States of the Federation since the ACJA has no national application. The paper concluded that plea bargain should be extended to all categories of offences, as its practice seems to be restricted to corruption cases. In this case, it would not be seen as an exclusive preserve of the*

[1] Faculty of Law, University of JOS, Nigeria. Email:longpoew@unijos.edu.ug
[2] Research Fellow,National Institute for Legislature and Democratic Studies, National Assembly, Abuja, Nigeria. Email:oguche@nil.gov.ng

*rich, but a system available to all, without necessarily serving as an escape route for a particular class of individuals, thereby creating an atmosphere of 'vaccination against punishment'.*

**Key words**: Plea, Bargain, Prosecution, Conviction, Sentence, Victim, Defendant.

## 1.0 INTRODUCTION

Opinions are divided on the propriety or otherwise of the practice of plea bargaining in the administration of criminal justice. While some view it as positive development, others are of the view that negotiated justice is inimical to justice. Despite the criticisms against it, plea bargaining has become an established practice in the criminal litigation process of Nigeria and most countries of the world. Criminal justice administration is taking new dimensions worldwide. One of the recent developments in the administration of criminal justice is the emergence of plea bargaining. Most criminal prosecutions are concluded even without a trial. This happens in form of compromises between the parties concerned- The prosecutor and the accused. The parties to these compromises trade various risks and entitlements: the Accused relinquishes the right to go to trial, while the prosecutor surrenders the right to seek the highest sentence or pursue the most serious charges possible.[3] It follows therefore, that the accused also yields up any chance of acquittal. The resulting bargains differ predictably from what would have happened had the same cases been taken to trial. Accused who bargain for a plea serve lower sentences than those who do not. On the other hand, everyone who pleads guilty is, by definition, convicted, while substantial minorities of those who go to trial are acquitted.

There is something puzzling about the polarity of contemporary reactions to this practice. Most legal scholars oppose plea bargaining, finding it both inefficient and unjust.[4] Nevertheless, most participants in the plea bargaining process find the practice as a panacea in the administration of criminal justice. In an epoch where the practice of plea bargain has come under opprobrium, especially in relation to the anti-corruption fight, it is only apt to engage in an exercise of self-flagellation and make a few recommendations for that will impact on criminal justice administration.[5]

This work undertakes an examination of the practice of plea bargain in Nigeria, with particular attention on the provisions of the Administration of Criminal Justice

[3]ES Robert and JS William, 'Plea Bargaining as Contract' (1991-1992) 101 *Yale L.J* 1911.
[4]*ibid.* See footnote 4 where the learned authors said the most influential (and prolific) critics are Albert Alschuler and Stephen Schulhofer, both professors at the University of Chicago.
[5]AO Alubo, 'Plea Bargain and the Anti-Corruption Crusade in Nigeria' (2009) 8(2) *University of Jos Law Journal* 1.

Act 2015. It examines salient novel provisions of the Act and also reveals the inadequacies which call for legislative action.

### 1.1 Conceptualising Plea Bargain

Plea bargain is not a concept that is amenable to a precise, accurate and comprehensive definition which is universally acceptable. The impossibility of achieving a precise definition of plea bargain is occasioned by its multitudinous forms and appearance as well as backgrounds of scholars attempting the definition.

A plea bargain is a contract with the state. The defendant agrees to plead guilty to a lesser crime and receive a lesser sentence, rather than go to trial on a more severe charge where he faces the possibility of a harsher sentence.[6] This definition is limited as it only recognises sentence bargain which is only an arm of plea bargain.

Plea bargaining consists of the exchange of official concessions for a defendant's act of self-conviction. These concessions may relate to the sentence imposed by the court or recommended by the prosecutor, the offense charged, or a variety of other circumstances; they may be explicit or implicit; and they may proceed from any of a number of officials. The benefit offered by the defendant, however, is always the same: entry of a plea of guilty.[7]Alschuler demonstrates that a prosecutor may provide leniency to a defendant's accomplices, withhold damaging information from the court, influence the date for a defendant's trial or sentencing, arrange for a defendant to be sent to a particular correctional institution, request that a defendant receive credit on his sentence for time served in jail awaiting trial, agree to support a defendant's application for parole, attempt to have detainers from other jurisdictions dismissed, arrange for sentencing in a particular court or by a particular judge, provide immunity for crimes not yet charged, or simply remain silent when his recommendation might otherwise be unfavourable.[8]

The ACJA defines plea bargain the process in criminal proceedings whereby the defendant and the prosecution work out a mutually acceptable disposition of the case, including the plea of the defendant to a lesser offence than that charged in the complaint or information and in conformity with other conditions imposed by the prosecution, in return for a lighter sentence than that for the higher charge subject to the Court's approval.[9] From the perspective of the ACJA, there are three actors in the plea bargain process: the defendant, the prosecutor and the Court. This means that only the parties in the proceedings are

[6]T Sandefur, 'In Defense of Plea Bargaining' (2003) 26(3) Regulation 28-31, at 28.
[7]AAlschuler, 'On Plea Bargaining and its History' (1979) 79(1) *Journal of Chicago Law School*.3-4.
[8]ibid, 3.
[9]ACJA, s 494(1).

allowed by the ACJA to participate in plea bargaining; the prosecuting authority being represented by the prosecutor.

Any of the parties can initiate a plea bargain where parties weigh their strengths and weaknesses, make concessions and arrive at an agreement which is presented to the Court for approval. The court does not take active part in the bargaining process but exercises authority over the end product of the bargain. Whatever definition proffered for plea bargain must incorporate the element of *quid pro quo*.

*Evolution of Plea Bargain*

The origin of plea bargain is traceable to the American jurisprudence, which promoted the practice as a model that other jurisdictions subsequently adopted. Plea bargain in America became established in the case of ***Robert M. Brady v United States***[10] where in 1959, the accused/petitioner was charged with kidnapping and faced a maximum penalty of death. He was represented by competent counsel and at first, elected to plead not guilty. Information subsequently got to him that his co-accused had confessed to the authorities, would plead guilty and be available to testify against him. As a result of this information, the accused/petitioner changed his plea from 'not guilty' to 'guilty'. His plea was accepted after he was twice questioned as to the voluntariness of the plea and he was subsequently sentenced to 50 years imprisonment. In 1967, he sought for relief under 28 U.S.C 2255 claiming that his plea of guilty was not voluntary. He claimed that his counsel mounted impermissible pressure on him to plead guilty.

The District Court for the District of New Mexico found his contention unmeritorious and consequently denied him the relief; a decision that was subsequently affirmed by the Court of Appeal. The Supreme Court of the United States in affirming the decision of the Court of Appeal had this to say:

> The issue we deal with is inherent in the criminal law and its administration because guilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to the judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious his exposure is

[10]397 U.S 742 (90 S. Ct.1463, 25 L.Ed. 2d 747).

> reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages- the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is substantial issue of the defendant's guilt or in which there is a substantial doubt that the State can sustain its burden of proof.[11]

The Supreme Court of the United States stated further that the fact that the prevalence of guilty pleas was explainable did not necessarily invalidate those pleas or the system which produced them. Consequently, it could not be held to be unconstitutional for the State to extend a benefit to a defendant who in turn extended a substantial benefit to the State and who demonstrated by his plea that he was ready and willing to admit his crime and enter a correctional system in a frame of mind that afforded hope for success in rehabilitation over shorter period of time than might otherwise be necessary.

Subsequently and with the seal of approval by the US Supreme Court, the Courts treated plea bargain as contracts between the prosecutors and defendants. If the defendant breaks a plea bargain, the prosecutor is no longer bound by his or her side of the deal. If a prosecutor reneges on plea bargains, defendants may seek relief from the Court. The Court might let them withdraw their guilty pleas, may force the prosecutor to follow the plea bargain, or may apply some other remedy.[12]

*The Nature of Plea Bargain*

There are three basic types of plea bargain viz:

*Fact Bargain*

This is a bargain whereby the prosecutor agrees to suppress some facts that are likely to serve as aggravating factors in the trial of the defendant in return for the defendant pleading guilty to some counts or some charges. In this type of bargain the parties make concessions and agree on facts to present to the court in proof of the charge against the defendant. It may also extend to the facts that constitute the defence of the defendant. Once parties negotiate facts prior to trial,

[11]ibid.
[12]Daniel McConkie, 'Judges as Framers of Plea Bargaining' (2015) 26(61) *Stamford Law and Policy Review* 66.

the agreed facts are presented at the trial, hence this type of bargain can conveniently be called "evidence bargain".

*Charge bargain*

A charge bargain involves the agreement to drop some charge(s) against the accused if he pleads guilty. It involves offering a reduction of the charges as the dismissal of one or more of the charges in exchange for the guilty plea. For example, in a trial for five charges (or counts as the case may be), it may be agreed that the accused pleads guilty to two in exchange for withdrawal of the remaining three. In the case of charge bargain, it is arranged in a way that the prosecutor takes out a less serious offence or charge which carries a consequent less punishment than what would have been obtainable if the original charge were preferred and the accused successfully prosecuted. In this case the accused person must have pleaded guilty to one or more charges, depending on the bargain. By necessary implication, charge bargain is only possible where there are more than one charge or count against the accused. The ACJA, 2015 provides for charge bargain in section 270(1) where it empowers the prosecutor to receive and consider a plea bargain from a defendant charged with an offence either directly from that defendant or on his behalf; or offer a plea bargain to a defendant charged with an offence. Since the defendant is already charged with an offence

*Sentence bargain*

A sentence bargain is where the prosecution agrees to a lesser punishment for the accused if he can plead guilty to the charge. Sentence bargain includes a wide range of offers that extends beyond merely an offer for a lighter sentence in return for a guilty plea. In this case, the charges or counts need not be more than one. It may be a single charge or count. Here the accused person agrees to plead guilty to the charge in exchange for the prosecution agreeing to a minimal punishment. Under sentence bargain, it is necessary that the offence in question must carry alternative punishments. If the offence carries a single mandatory punishment without any option, then it is the view of the present writer that there is nothing to bargain as the accused person may have nothing to gain from the bargain. Moreover, it will become necessary, where there are alternative punishments, that the judge be involved in the bargain in order to give effect to the bargain by way of lenient punishment.[13] This is because if the judge is jettisoned from the bargain, he chooses what to do in terms of punishment since he is not in the know of the bargain. In the

[13]S Oguche, 'Development of Plea Bargaining in the Administration of Criminal Justice in Nigeria: A Revolution, Vaccination against Punishment or Mere Expediency?' (2012) *NIALS Journal of Law and Development* 59.

case of sentence bargain, although the charge may correctly reflect the conduct for which the accused is charged, the prosecutor recommends a lenient sentence.[14]

Despite the above distinctions, it has been said that there is no strict dichotomy between the charge and sentence bargains. This reasoning has been explained in the following words:

> This is due to the fact that whichever is adopted, the end result is that the accused person is likely to get a lighter punishment for the offence he has committed in consideration for pleading guilty. The above categorization of plea bargain depicts the practice in the U.S. where plea bargaining is deeply entrenched in the administration of criminal justice. In England, Wales, Australia and Scotland,[15]only charge bargain is allowed. In the U.K. two forms of plea bargains similar to charge bargains is practiced. The first is where the prosecution agrees with the accused that if the accused pleads guilty to a lesser offence they will accept the plea. The other is where the prosecution may agree not to proceed on one or more of the counts in the indictment if the accused will plead guilty to the remainder.[16]

Whatever the view, a plea bargain must be a conscious and deliberate act between the prosecution and an accused person, with the plea of guilty being an overt act on the part of the accused person in evidence of the plea bargain. The offence or offences to which the accused person must enter a plea of guilty is or are for the prosecution and the accused person to agree upon. In effect, the concept of plea bargain operates in *personam*, and not by privy or proxy. In other words, a plea bargain must be a deliberate and conscious act taken by the prosecutor and a particular accused person or specific accused persons in a charge wherein the accused person or each of the specified accused persons must suffer a conviction no matter how insignificant or trivial the offence to which the conviction relates.

Plea bargaining is a process of abbreviated treatment of routine cases whereby the defendant charged with the commission of an offence or offences agrees to plead guilty to the charges or any of them in exchange for a lesser punishment without

[14]FP James, *Plea Bargaining* (1 AM, CRM, L. 1972) 187.
[15]SR Moody &J Tomps, 'Plea Negotiations in Scotland' (1983) *Criminal Law Review* 297.
[16]C Oba, 'Plea Bargain in a Developing Nigeria: Merits and Demerits' in AO Alubo et al (edns), *Emerging Issues in Nigerian Law*, Essays in Honour of Honourable Justice B.A. Adejumo (Constellation Publishers, 2009) 33.

going for trial. Sometimes, it may be for a state's agreement to dismiss other charges. For example, a defendant may face the charges of burglary, rape and sodomy. The defendant may agree to the charges of burglary and rape in exchange of the state's agreement to drop the sodomy charge.[17]

*Plea Bargain as a Contract*

Plea bargain is a contract between the parties to a criminal litigation. This is because it possess all the ingredients of a valid contract. A contract is an agreement, which the law will enforce or recognise as affecting the legal rights and duties of the parties, and five ingredients must be present in a valid contract, namely offer, acceptance, consideration, intention to create legal relationship and capacity to contract. All five ingredients are autonomous and equal in the sense that a contract cannot be formed if any of them is absent. What this means is that a contract cannot exist in the eyes of the law unless all the five ingredients are present.[18] For a contract to exist there must be mutuality of purpose and an intention; the two contracting parties must agree. One of the fundamental principles of the law of contract is that the parties must reach a consensus ad idem in respect of the terms thereof for the contract to be regarded as legally binding and enforceable.[19]Thus, the two or more minds must meet at the same point, event or incident. Where they say different things at different times they are not ad idem and, therefore, no valid contract is formed. So, the meeting of minds of the contracting parties is the most crucial and overriding factor or determinant in the law of contract.[20]

Juxtaposing the above with plea bargain, offer takes the form of proposals for bargain presented to the other party for the purpose of deliberation and possible adoption. There are also cross offers and counter offers made by parties to plea bargains before conclusions and agreements are finally reached. It has been said that the offer comes in the form of concessions to the accused that a lesser charge will be substituted for the one he is currently charged with or that some of the charges brought against him are dropped or still that if the accused person pleads guilty, the prosecution will not move for maximum sentences or punishments.[21]

[17] See Alubo (n 3) 7.
[18] Orient Bank (Nig) Ltd. v Bilante International Ltd. (1997) 8 NWLR (pt.515) 37; B.F.I.G v B.P.E (2008) ALL FWLR (Pt.416) 1915; Metibaiye v Narelli International Ltd. (2009) 16 NWLR (Pt.1167) 326;
[19]Njikonye v MTN Nig. Comm. Ltd. (2008) 9 NWLR (pt.1092) 339, P.T.F. v W.P.C. Ltd. (2007) 14 NWLR (Pt.1055) 478.
[20]Dodo v Solanke (2007) ALL FWLR (Pt.346) 576 and Jegede v Mayor Engineering Company Limited (2013) LPELR-20284(CA).
[21]Alubo (n 3) 7.

Acceptance is another vital element in the plea bargaining process. Either the prosecutor or the defendant presents his offer to the other which must be accepted before the said plea bargain becomes effective. It should be noted that parties are free to make counter offers or cross offers in the process, which is also subject to acceptance by the party to whom it is made. On this note, it is significant to say that in the absence of acceptance, plea bargaining is an exercise in futility. Acceptance here simply means approval of the terms of the bargain as presented by the offeror.

Consideration has been said to be a *sine qua non* in every valid contract. It refers to something valuable in the eyes of the law, proceeding from the offeree to the offeror in the performance of the contract. Consideration need not be adequate but has to be valuable. In the context of plea bargain, consideration is the plea of guilty emanating from the accused person in favour of the prosecution. It is valuable since it saves the prosecution the pains of proving the guilt of the accused person during trials since the burden of proof is always on the prosecution,[22] which standard of proof is that of proof beyond reasonable doubt[23]. On the part of the prosecutor, the charge(s) dropped constitute consideration since it lightens the burden of the defendant.

In terms of legality, it is also a matter of common knowledge that every valid contract must pass legality test. This means that a contract is void which the subject is an illegality; hence no action can arise from such a contract. The implication is that every subject of contract must be legal so as to give life to the contract. In the context of plea bargaining, it is also legal for the defendant to decide what his plea should be. In the same way, it is legal for the prosecution to choose what charges to prefer against an accused person. It is also legal for the judge to decide whether or not to pronounce maximum sentence on an accused person or show leniency, in view of availability of mitigating or aggravating factors. On this note, it can be safely said that that guilty plea is enough mitigating factor to justify leniency.

Intention to create legal obligations is an essential element of a valid contract. This means that both parties to a contract must intend that the contract be legally binding and enforceable. This explains why domestic agreements are not enforceable, especially those between spouses. In the same way, parties to a plea bargain also intend that the bargain be binding. However, the level and extend of

[22] Evidence Act 2011, s 135(2).
[23] ibid, s 135(1).

the binding nature of plea bargain is still doubtful. This is consequent upon the fact the parties to a plea bargain are at liberty to change their position.[24]

A defendant has a right to accept or refuse plea bargains. As compared with contract, we earlier submitted that the binding nature of plea bargains is still in doubt, if not zero. An accused person has the right to derogate from plea bargains. He can withdraw from plea bargains even if has been sentenced on his guilty plea as a result of bargain. The danger here is that where a defendant agrees to plead guilty and he is convicted and sentenced accordingly, but later withdraws his guilty pleas; he risks a more severe punishment if he is found guilty of the charge. The case of **Alabama v. Smith**[25]illustrates this fact. In this case, the defendant, Smith, in 1985 was indicted by an Alabama grand jury for burglary, rape and sodomy. All the charges related to a single assault. Smith agreed to plead guilty to the burglary and rape charges in exchange for the State's agreement to dismiss the sodomy charge. The trial court granted the State's motion to dismiss the sodomy, accepted respondent's guilty pleas and sentenced him to a concurrent term of thirty years imprisonment on each conviction. Later the respondent withdrew his guilty pleas, claiming that he had not entered them knowingly and voluntarily. The trial court denied the motion but the Alabama Court of Criminal Appeals reversed, finding that the respondent had not been properly informed of the penalties associated with the crimes to which he had pleaded guilty. The case was reassigned to the same trial judge. The State moved to reinstate the charge for first-degree sodomy, the trial court granted that motion and the respondent went to trial on all the three original charges.

In course of the trial, it was the testimony of the victim that the respondent had broken into her home in the middle of the night, clad only in his under wear and a ski mask and wielding a kitchen knife. Holding the knife to her chest, he had raped her and sodomised her repeatedly and forced her to engage in oral sex with him. The attack which lasted for more than an hour took place in the victim's bedroom, just across the hall from the room in which her three young children lay sleeping. Respondent took a stand and repudiated his post arrest statement, testifying instead that he had been in bed with his girlfriend at the time the attack took place. The jury returned a verdict of guilty on all three count charges. This time, the trial judge imposed a term of life imprisonment for the burglary conviction plus a concurrent term of life imprisonment and a consecutive term of 150 years imprisonment on the rape conviction. The rationale behind this more severe punishment was explained by the court that because the evidence presented at the

[24]See Alabama v Smith, Supreme Court of the United States (1989), 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865.
[25]ibid.

trial, of which it had been unaware at the time it imposed sentence on the guilty pleas, it had heard only the respondent's side of the story, whereas now, it has had a trial and heard all of the evidence including testimony that respondent had raped the victim at least five times, forced her to engage in oral sex within him and threatened her life with a knife. This decision was affirmed both by the Alabama Court of Criminal Appeals and the United States Supreme Court. In particular, the Supreme Court was of the view that when a greater penalty is imposed after a trial than was imposed after a prior guilty plea, the increase in the sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge. Even when the judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than that available at trial. The Supreme Court finally stated that after trial, the factors that may have indicated leniency as consideration for the guilty plea were no longer present.

## 2.0 PLEA BARGAIN AND GUILTY PLEA JUXTAPOSED

It should be noted that there are several options open to accused persons during criminal trials, including plea of guilty, plea of not guilty, refusal to plead, standing mute, and objections to the jurisdiction of the court.[26] There is a close relationship between plea bargains and guilty pleas. A guilty plea is a formal admission in court by the defendant as to his guilt of having committed the criminal act for which he is charged. Not all guilty pleas result from plea bargains, but plea bargains generally result in guilty pleas. Plea bargains come in a variety of forms but generally involve an exchange of concessions from the state for the defendant's guilty plea.[27] It is very important to keep in mind that banning plea bargaining does not include the elimination of all guilty pleas.[28] Guilty plea has been said to be an accused person's formal admission in court of having committed the charged offense. A guilty plea is usually part of a plea bargain. It must be made voluntarily, and only after the accused has been informed of and understands his or her rights. A guilty plea ordinarily has the same effect as a guilty verdict and conviction after a trial on the merits.

Plea bargaining is nothing but a simple expediency. It may approximate (although it cannot repeal) the outcome of the adjudication but at lower cost. The Supreme Court of the United States of America has been mercifully frank in explaining why it feels obliged to treat plea bargaining as "an essential component of the administration of justice … if every criminal charge were subjected to a full

[26]The accused can also raise special defences like autrefois convict, autrefois acquit, pardon etc.

[27] See Alschuler (n 5) 1. See also J Winshingrad, 'The Pleas Bargain in Historical Perspective' (1974) 23 *BUFF. L. Rev.* 499.

[28]Alubo (n 3) 7.

scale trial, the states and the Federal Government would need to multiply by many times the number of judges and court facilities".[29]

## 3.0 BACKGROUND OF PLEA BARGAIN PROVISIONS IN NIGERIA

Nigerian criminal justice system recognises the innocence of a defendant until his guilt is proved by credible evidence. The Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides that 'every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty'[30]. This constitutional provision imposes a duty on the Prosecution to prove the guilt of a defendant. Accordingly, the Evidence Act 2011 places the burden of proof of allegations of crime on the Prosecution and the standard of proof is beyond reasonable doubt. Permutations involved in criminal prosecution lead to cases enduring in the courts for several years, thereby leading to a stalemate in most cases. In some cases, vital witnesses die or are inaccessible and evidence is also destroyed. The overall effect is poor justice delivery. The fact that the cause lists of the courts are lengthy and loaded makes it necessary for adoption of an alternative criminal justice delivery system, which comes in the form of bargain between the defendant and the prosecutor, though other actors are involved. According to Alschuler, *roughly ninety percent of the criminal defendants convicted in state and federal courts plead guilty rather than exercise their right to stand trial before a court or jury. Behind this statistic lies the practice of plea bargaining, in which prosecutors and trial judges offer defendants concessions in exchange for their pleas.*[31]

Plea bargain is certainly a recent development in Nigeria, being alien to criminal justice administration in Nigeria. Arguments have been canvassed that the first attempt at giving plea bargain a legislative backup was the innovation in the Economic and Financial Crimes Commission Act 2004, though some scholars[32] have maintained the position that the provision of the Criminal Procedure Act to the effect that 'when more than one charge is made against a person and a conviction has been had on one or more of them, the prosecutor may, with the consent of the court, withdraw the remaining charge or charges or the court on its own motion, may stay trial of such charge or charges'[33] provided clear legal bases for plea bargain in Nigeria long before the enactment of the EFCC Act in 2004. This line of reasoning is not in line with the meaning and intent of plea bargain. The provision

[29] 272 U.S. 451
[30]CFRN 1999, s 36(5).
[31]Alschuler (n 5) 1.
[32]CA Odinkalu, 'Plea Bargaining and the Administration of Justice in Nigeria' (Daily Trust online 22 April 2012<https://www.dailytrust.com.ng/news/general/plea-bargaining-and-the-administration-of-justice-in-nigeria/92705.html> accessed 27 April 2017.
[33]CPA, s 180(1).

of section 180(1) of the CPA applies after a conviction has been had. It certainly does not envisage an arrangement prior to conviction. Secondly, the defendant who is a key play in a plea bargain is not a participant in the arrangement provided for in the CPA. Plea bargain cannot take place between the prosecutor and the court to the exclusion of the defendant. This is certainly not plea bargain as you cannot shave a person in his absence.

The EFCC Act, 2004 provides that "subject to the provisions of section 174 of the Constitution of the Federal Republic of Nigeria 1999 (which relates to the power of the Attorney-General of the Federation to institute, continue, takeover or discontinue criminal proceedings against any person in any court of law), the Commission may compound any offence punishable under this Act by accepting such sums of money as it thinks fit, exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence."[34]In view of the above, it becomes obvious that plea bargain is essentially a recent development in Nigeria as it cannot be said to have had any legal basis for its practice prior to the enactment of the EFCC Act in 2004.

The first commendable step in giving statutory back up to plea bargain in Nigeria was the enactment of the Administration of Criminal Justice Law 2007, Laws of Lagos State, which institutionalized plea bargain in Lagos State. Section 76 of the Law makes comprehensive provisions for plea bargain, which is required to be entered before the defendant pleads to the charge, and in consultation withPolice Officer responsible for the investigation of the case and if reasonably feasible, the victim. Under the Lagos Law, the victim is not considered a necessary party to a plea bargain, as his involvement is subjected to its being reasonably feasible. Under the Lagos Law, the prosecutor is required, if reasonably feasible, to afford the complainant or his representative the opportunity to make representations to the prosecutor regarding the contents of the agreement; and the inclusion in the agreement of a compensation or restitution order.[35] The first and only national legislation making express and comprehensive provisions on plea bargain is the Administration of Criminal Justice Act 2015 which, among other vital issues, provides for plea bargain in the administration of criminal justice in the federal courts and the courts of the Federal Capital Territory.

## 4.0 LEGAL REGIME OF PLEA BARGAIN UNDER THE ACJA 2015

The ACJA makes robust provisions for plea bargain in section 270, consisting of 18 subsections summarised as follows:

[34]EFCC Act, s 14(2).
[35]Administration of Criminal Justice Law of Lagos (ACJL) 2007, s 76(3).

*General Powers to Enter into Plea Bargains.*

The Act gives general powers to the Prosecutor to receive a plea offer to a defendant or offer same to a defendant.[36] This provision asserts superiority in terms of the power of the Prosecutor to receive or offer a plea bargain in view of the phrase "notwithstanding anything in this Act or in any other law". It should be noted that the word 'may' as used in subsection (1) leaves the Prosecutor with discretion as to whether or not to receive or offer a plea bargain to a defendant. In *Mokelu v FCWH*[37] the Supreme Court held that the word "may" is an enabling or permissive word. In that sense, it imposes or gives a discretionary or enabling power. The use of the word 'may' prima facie conveys that, the authority which has power to do such an act has an option either to do it or not to do it .

Under this provision, it is a mandatory requirement for a plea bargain offer that the defendant has been charged with an offence. The effect is that there can be no plea bargain prior to a charge been preferred against a defendant before a court of competent jurisdiction. This provision does not apply to mere allegation of crime without a formal charge. The Prosecutor is required to consider a plea offer received from a defendant and take decision thereupon. In this case, the Prosecutor should consider factors such as evidence available to prosecute the case, nature of the offence, availability of witnesses, time within which the case is likely to be determined, concession made by the defendant, etc. In considering the plea offer, the Prosecutor is under a duty to make the interest of the state and justice his guiding principle, while also not jettisoning the interest of the defendant in the circumstances. It must be pointed out that where a defendant is represented by counsel, such counsel can offer or receive a plea bargain on behalf of the defendant. Apart from the provision of subsection (1), a party who engages a counsel gives such counsel authority to act on his behalf in the course of the proceedings.[38]

*Conditions Precedent*

Under the Act, the victim of an offence is a major stakeholder in a plea bargain as the Prosecutor and the defendant have no capacity to finalise a plea bargain in the absence of the victim.[39] This is in sharp contrast to the position under the Administration of Criminal Justice Law of Lagos State under which the victim is not a necessary party, but may, subject to reasonable feasibility, be consulted by

[36] ACJA 2015, s 270(1).
[37](1976) 3 SC 60.
[38]Nyako v Adamawa State House of Assembly &Ors. (2016) LPELR-41822(SC); Afegbai v A.-G., Edo State (2001) 14 NWLR (Pt.733)425; Oduneye v FRN &Ors (2014) LPELR-23007(CA) Section 270(2)
[39]ACJA, s 270(2).

the prosecutor.[40] Under the ACJA, a plea bargain cannot be entered into without the consent of the victim, who also has the liberty of being represented by counsel in the bargaining process. The ACJA provides for plea bargain before the defendant pleads to the charge[41], and during or after the presentation of the evidence of the prosecution, but before the presentation of the evidence of the defence.[42] Under the ACJL, Lagos State, a plea bargain can only take place before the defendant takes his plea to the charge.

In addition to the above, the following conditions must be present:

a. Insufficiency of the evidence of the prosecution to prove the offence charged beyond reasonable doubt.
b. Agreement by the defendant to return the proceeds of the crime or make restitution to the victim or his representative
c. Full cooperation by the defendant with the investigation and prosecution of the crime, in case of conspiracy, by providing relevant information for the successful prosecution of other offenders.

Subsection (2) sanctions some sort of blowing hot and cold on the part of the defendant since a bargain can only arise during or after presentation of evidence of the prosecution. This is because for the prosecution to present evidence, the defendant must have pleaded 'not guilty' in which case he is deemed to have put himself upon his trial.[43] Allowing the defendant to enter a plea of 'not guilty' before changing it to guilty plea in consequence of plea bargaining is tantamount to double standards in the administration of criminal justice, which simply portrays the defendant as unreliable and untrustworthy. It clearly manifests a form of traded justice.

Subsection (3) provides extended factors to guide the prosecutor in accepting or offering a plea bargain. The factors are interest of justice, the public interest, public policy and the need to prevent abuse of legal process. The unfortunate thing here is that these factors are subjective and it is the prosecutor that determines the existence of any of them for the purpose of offering or accepting a plea bargain.

*Prevention of Abuse*

[40] ACJL, s 76(2)(a).
[41] ACJA, s 270(4)
[42] ibid, s 270(2)
[43]State v Duke [2003] 5 NWLR (Pt.813)394; Bamaiyi v State (2006) 12 NWLR (Pt.994) pg.221; Ya'u Mohammed vThe Federal Republic of Nigeria (2011) LPELR-9785(CA); Adio v State (1986) 3 NWLR (Pt. 31) 714.

The Act guarantees integrity of the bargaining process and prevents abuse. In this regard, where a plea agreement is reached by the parties, the prosecutor is mandated to inform the court that the parties have reached an agreement and the presiding judge or magistrate shall then inquire from the defendant to confirm the correctness of the agreement. The Court must ascertain whether the defendant admits the allegation in the charge to which he has pleaded guilty and whether he entered into the agreement voluntarily and without undue influence. Where the court is satisfied that the defendant is guilty of the offence to which he has pleaded guilty, it may convict the defendant on his plea of guilty to that offence. Similarly, where the judge is for any reason of the opinion that the defendant cannot be convicted of the offence in respect of which the agreement was reached and to which the defendant has pleaded guilty or that the agreement is in conflict with the defendant's right referred to in subsection (6) of this section (sic), he shall record a plea of not guilty in respect of such charge and order that the trial proceed.[44]

It is obvious that subsections (10) to (11) offer Judicial Officers some discretion, which permits them to look at the sentence recommended under the Plea Agreement and decide whether or not to impose same. Indeed they can impose stiffer sentences where it is felt that the agreed sentence is insufficient.

Similarly, where the defendant has been informed of the heavier sentence as contemplated above, the defendant may abide by his plea of guilty as agreed upon and agree that, subject to the defendant's right to lead evidence and to present argument relevant to sentencing, the presiding judge or magistrate proceed with the sentencing; or withdraw from his plea agreement, in which event the trial shall proceed *de novo* before another presiding judge or magistrate, as the case may be.[45]

*Content and Form of a Plea Bargain Agreement*

There is no oral plea bargain agreement under the ACJA in view of the strict requirement of documentation, as every plea bargain agreement under the Act shall be in writing[46]. In the scheme of interpretation, the use of the word 'shall' carries a mandatory meaning which does not give any discretion. In National Assembly v. C.C.I. Co. Ltd[47], the Court of Appeal held that the word "shall" is a word of command and it denotes direction, compulsion, a mandate, an obligation and gives no room for discretion. In whatever way it is used, whether in a mandatory or directory sense, there has to be fulfilment of such mandate or directive. The word "shall" makes the provision of a statute mandatory and pre-

[44]ACJA, s 270(10).
[45]ibid, s 270(15).
[46]ibid, s 270(7).
[47](2008) 5 NWLR (Pt. 1081) 519 at P.540 paras. D - G (CA

emptory.[48] The implication is that any plea bargain agreement which is not in writing does not qualify as a plea bargain and therefore, void under the ACJA. A plea bargain agreement duly reached under the Act must contain an endorsement to the effect that the defendant was, prior to the conclusion of the agreement, informed of his right to remain silent, the consequences of not remaining silent, and his right not to make any confession or admission that could be used in evidence against him. The right to silence is a constitutional right of a defendant in a criminal trial. The Constitution of the Federal Republic of Nigeria, 1999 (As Amended) provides that "no person who is tried for a criminal offence shall be compelled to give evidence at the trial."[49]

The ACJA also extends this right to silence to arrests by police officers or other persons conducting criminal investigations. Where a suspect is arrested, the police officer or the person making the arrest or the police officer in charge of a police station shall inform the suspect of his rights to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice.[50]A defendant in a criminal trial is at liberty to say nothing during the proceedings and may decide not to call any witness in which case he rests his case on that of the prosecution.[51] This right flows from the cardinal principle of administration of criminal justice that a person charged with a criminal offence is not under any obligation to prove his innocence, rather the prosecution has the burden to prove his guilt beyond reasonable doubt.[52] Where a defendant elects to activate his constitutional right to silence in a trial, the court, prosecution or any other party to the proceeding may comment on the failure of the defendant to give evidence but the comment shall not suggest that the defendant failed to do so because he was, or that he is, guilty of the offence charged.[53] The Supreme Court put the position more succinctly when it held in ***Godwin Igabele v The State***[54] as follows:

> … it is settled that an accused person has the constitutional right to remain silent and leave the trial to the prosecution to prove the charge against him. This is because the citizen's right to remain silent even when arraigned for a

[48]Tanko v Caleb (1999) 8 NWLR (Pt. 616) 606; Amadi v N.N.P.C. (2000) 10 NWLR (Pt. 674) 76; Abimbola v Aderoju (1999) 5 NWLR (Pt. 601) 100; Adewunmi v A.-G., Ekiti State (2002) 2 NWLR (Pt. 751) 474.
[49] CFRN 1999 , s 36(11).
[50] ACJA, s 6(2)(a).
[51]AF Afolayan, *Criminal Litigation in Nigeria* ( 3rdedn, Chenglo Law Publications Ltd. 2016) 218.
[52]YDU Hambali, *Practice and Procedure of Criminal Litigation in Nigeria* (Feat Print and Publish Limited, 2013) 418.
[53] Evidence Act 2011, s 181.
[54] (2006) 6 NWLR (Pt.975) 100

> criminal offence is an inviolable one. The prosecution is bound to prove its case beyond reasonable doubt.[55]

It has been emphasised that a defendant runs a risk of being convicted if there are overwhelming credible evidence against him which are not denied, in which case the court is bound to accept such evidence as undisputed facts are deemed established.[56]

***Execution of the Terms of the Agreement***

It is the duty of the prosecutor under the Act to take reasonable steps to ensure that any money, asset or property agreed to be forfeited or returned by the offender under a plea bargain are transferred to or vested in the victim, his representative or other person lawfully entitled to it notwithstanding the provisions of the Sheriff and Civil Process Act.[57] This is because the responsibility on the prosecutor under the provision which is that of enforcing the terms of the agreement is ordinarily that of the Sheriff under the Sheriff and Civil Process Act

*Prohibition of Future Trial on the Same Offence*

To ensure the integrity of plea bargain, the ACJA provides that any person who has been convicted and sentenced under the provisions of section 270(1) shall not be charged or tried again on the same facts for the greater offence earlier charged to which he has pleaded to a lesser offence.[58] This provision amplifies the the exact juridical import of the common law doctrine against double jeopardy, otherwise known as *autrefois* convict or *autrefois* acquit. As old as the doctrine, it is yet one which sits at the heart of all English common law systems, including Nigeria. The doctrine, which epitomizes the rule against double jeopardy, is revered as a principle vital to the protection of personal freedom. It underpins the legitimacy of thecommon law rule which ordains that a man should not be put in peril twice on a charge for the same or practically the same offence. The Constitution of the Federal Republic of Nigeria recognises this old principle where it codifies that "no person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried

[55]Per Ogbuagu, JSC at 133.
[56]Afolayan (n 49) 219. This position was given judicial approval in *Ajomale v Yaduat* (No.2) (1991) 5 NWLR (Pt.191) 266; *Olateju v Comm. for Lands and Housing, Kwara State* (2010) 14 NWLR (Pt. 1213) 297
[57]ACJA, s 270(3).
[58]ibid, s 270(17).

for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior court."[59]

### 4.1 Perplexities of Plea Bargain under the ACJA, 2015

*Technically Restricted to Corruption Cases*

This is obvious from the language of section 270(2) which stipulates three mandatory preconditions for entering into a plea bargain as follows:

> (a) the evidence of the prosecution is insufficient to prove the offence charged beyond reasonable doubt;
>
> (b) where the defendant has agreed to return the proceeds of the crime or make restitution to the victim or his representative; or
>
> (c) where the defendant, in a case of conspiracy, has fully cooperated with the investigation and prosecution of the crime by providing relevant information for the successful prosecution of other offenders.

In the normal regime of interpretation, the term 'or' after paragraph (b) is suggestive of alternatives, which would ordinarily mean that the presence of any of the three suffices. This is however, far from the position in view of the express qualification in subsection (2) which requires presence of the three conditions above, as follows: "provided that all of the following conditions are present".

*Insufficiency of evidence to prove offence beyond reasonable doubt as a Requirement*

This requirement under section 270(2) is bizarre and contrary to the established principle of criminal litigation which places the substantive burden on the prosecution to prove the guilt of an accused beyond reasonable doubt to secure conviction. The burden and standard of proof in criminal cases as encapsulated in the 1999 Constitution of the Federal Republic of Nigeria[60], and the Evidence Act, 2011.[61] By these provisions, an accused is presumed innocent until proven guilty, and the burden is always on the prosecution to prove the essential ingredients of the offence for which he is charged, beyond reasonable doubt with credible and reliable

[59]CFRN 1999, s 36(9). This has also been given judicial approval in a plethora of cases like NafiuRabiu v Kano State (1980) LPELR-2936 (SC); Imade v IGP (1993) 1 NWLR (PT.271) 608; Barmo v The State (2000) 1 NWLR (PT. 641) 424; Nigeria Army v Brig. Aminu Kano (2010) LPELR-2013 (SC).
[60] Evidence Act 2011, s 36(5).
[61]CFRN 1999, s 135.

evidence. Judicial approval was given to this position long ago in Woolmington v Director of Public Prosecution[62]

Where the Prosecution fails to discharge this burden and onerous duty, a court before whom such an accused is arraigned shall have no other choice than to discharge and acquit him, and if the court proceeds to convict the accused upon the failure of the prosecution to establish the guilt of the accused beyond reasonable doubt, an Appellate Court shall quash such conviction, and discharge and acquit the accused.[63] A significant question that must be asked is "why should the prosecution test the waters of calling witnesses to test the strength of its evidence before embarking on plea bargain?" This requirement is obviously calculated at arm-twisting a defendant to secure conviction at all costs, which is mockery of justice in itself. This position is further buttressed by the fact that there is no corresponding provision expressly enabling a defendant to offer a plea bargain where he adduces evidence in his defence but the evidence is not sufficient to destroy that of the prosecution. This makes the commencement of the bargaining process bias against the defendant.

*Inelegant Drafting and Attendant Confusion*

The significant role of the Prosecutor in plea bargain calls for elegance in drafting to avoid ambiguity and consequent crisis of interpretation. The terms 'Prosecutor' and 'prosecution' are muddled up in their usage under section 270. Subsection (1) of section 270 generally empowers the 'Prosecutor' to enter into plea bargains with a defendant. On the other hand, subsection (2) empowers the 'prosecution' to enter into plea bargaining with the defendant, with the consent of the victim or his representative. Legislative intent here is far from being clear. Does it mean that under subsection (1) the Act envisages a situation where there is a sole prosecutor while it envisages a team of prosecutors referred to as 'prosecution' in subsection (2)? Could it be that under subsection (1) it envisages a team of Prosecutors with a Lead Prosecutor who is to enter into a plea bargain? If the intention under subsection (2) is a team of Prosecutors, does it mean that all of them must participate in a plea bargain and agree to it with their signatures? Apart from subsections (1) and (2), the terms are used in many subsections of section 270. This crisis of interpretation is further created by the failure of section 494, which is the

[62](1935) AC 402 (2).
[63]*OchemajevThe State* (2008) 36 NSCQR (pt.2) 826 @ 881 per Aderemi JSC; Ndukure v The State (2009) 37 NSCQR 425 @ 459 – 460; Arogundade v The State (2009) ALL FWLR (pt. 469) 409; AbinfonvThe State (2009) ALL FWLR (pt. 471) 873; OmololavThe State (2009) ALL FWLR (pt.464) 1490 @ 1603 - 1604 and OnachukwuvThe State (1998) 4 SCNJ 36 49.

interpretation section, to define the terms. The fear is that a situation will definitely present itself in the practice of plea bargain under the Act where the courts will be left with interpretation of legislative intent.

Apart from the above, subsection (10) (b) makes reference to subsection (6) as providing for the rights of the defendant. However, subsection (6) does not provide for the defendant's right, but rather provides for the victim's right to be afforded opportunity by the prosecution make representations to the prosecutor regarding the content of the agreement; and the inclusion in the agreement of a compensation or restitution order.

## 5.0 PRACTICE OF PLEA BARGAIN IN NIGERIA

The Economic and Financial Crimes Commission (EFCC) is basic promoter of plea bargain in Nigeria, having invoked the provisions of section 14(2) of the EFCC Act earlier cited to enter into plea bargains in several cases in Nigeria, especially high profile economic crimes cases in Nigeria. For instance, it was invoked in cases TafaBalogun, Emmanuel Nwude and NzeribeOkoli and the rest. *TafaBalogun*, a former Inspector-General of Police, approached the court after his arrest and arraignment by the EFCC, challenging the powers of the EFCC to prosecute him. The said lawsuit was later withdrawn and this led to speculations from various quarters that the withdrawal was based on a plea bargain,[64]as a result of which he was sentenced to a prison term of (6) months which he already served in detention. The outcome of TafaBalogun's case was clearly a result of plea bargaining.

It was also reported that Emmanuel Nwude and NzeribeOkoli, who stood trial for defrauding a Brazilian bank of the sum of $242 million pleaded guilty and were convicted. It seems that charge bargain was embarked upon first in Nwude and Okoli's case to reduce the original charges against them from 91 to 16.[65] The most recent incident of the practice of plea bargain under the EFCC Act is the trial of the former Governor of Bayelsa State. Ironically, the officials of the EFCC have consistently denied the existence of any plea bargaining with any of the accused persons.[66]

One of the notable manifestations of plea bargaining was experienced in the trial of Cecilia Ibru, the former Chief Executive Officer and Managing Director of Oceanic Bank. Mrs Ibru was arraigned by the Economic and Financial Crimes Commission in Court on the 31st day of August, 2009 on a 25- count charge, all

[64]E Soniy, 'Balogun Withdraws Suit Against EFCC' (*The Punch* Lagos, Nigeria, 18 November 2005) 8.
[65]K Kotefe, '@242m Scam: Nwude, Okoli Bag 22 Years Respectively' (*The Punch* Lagos, Nigeria, 19 November 2005) 1.
[66] See A Adeshina, 'EFCC Breached Pact with Bayelsa – Abayomi',(*The Punch*, Lagos, Nigeria, 19 December 2005) 5.

bothering on corrupt practices in office. The charge was subsequently reduced to three and this cannot be unconnected with plea bargaining. Consequent upon plea bargaining between the EFCC and Ibru, the latter decided to plead guilty to the said amended three-count charge of alleged abuse of office and mismanagement of depositor's funds levelled against her by the former.

Specifically, the anti-graft agency alleged in the amended charge that Ibru granted a credit facility in the sum of 20 million US dollars to Waves Project Limited which sum was above her credit approval limit as laid down by the bank. She was also accused of failing to take all reasonable steps to ensure the correctness of Oceanic Bank monthly bank return to the Central Bank of Nigeria (CBN) between October 2008 and May 2009. Mrs Ibru was also accused of approving the granting of a credit facility in the sum of N2 billion by the bank to Petosan Farms Limited without adequate security as laid down by the regulations of Oceanic Bank, thereby committed an offence punishable under Section 15 of Failed Bank and Financial Malpractice in Bank Act.[67]

As stated above, the accused pleaded guilty as a result of plea bargain between her and the EFCC. In the course of the proceedings, counsel to the prosecution, Kola Awodein (SAN), informed the court that the Commission had reached an agreement with Ibru. He disclosed further that the formal agreement had also been filed before the court. In his own submissions, counsel to the accused, Professor TaiwoOshipitan (SAN), urged the court to consider the action of her client to see to the conclusion of the matter as soon as possible. He posited that this was because of her love for the bank and urged the court to be lenient with her.[68]

In his judgment on Friday the 8th day of October, 2010, Justice Dan Abutu of the trial Federal High Court Lagos sentenced the accused to six months imprisonment on all the three counts, amounting to eighteen (18) months imprisonment. The sentences however, are to run concurrently and this means that the convict would spend only six months in prison. The judge also ordered that the former bank chief should forfeit properties and assets valued at **₦191 billion**. These properties included those in Nigeria, United States of America and Dubai in addition to shares in over 100 firms listed and not listed with the Nigeria Stock Exchange (NSE). Justice Abutu ordered that Mrs. Ibru should be taken to Reddington Hospital, Victoria Island, Lagos, by the prison's authority within two

[67]N Akeem and O Tunde, 'Cecilia Ibru Jailed, To Lose N191bn' (Saturday Tribune, Ibadan, Nigeria, 9 October 2010 <http://www.tribune.com.ng/sat/index.php/front-page-articles/2237-cecilia-ibru-jailed-to-lose-n191bn.html>.accessed 11 October 2010.
[68]*ibid.*

hour after they receive a copy of the judgment. According to the judge, she is to remain in the hospital until she is certified fit to be remanded in prison custody.[69]

This very case shows the level of abuse of plea bargaining in the context of its application to corruption cases in Nigeria. It shows that plea bargain is an escape route for criminals who embezzle public funds. The true situation cannot be far from vaccination against punishment since culprits are allowed to keep a large portion of their loots. It is the view of the present writer that the judgment of Justice Dan Abutu in this case is mockery of justice and a shame to our criminal justice administration. The attitude of our courts to sentencing in corruption cases as a result of plea bargaining leaves much to be desired. A pertinent question that the present work wishes to ask here against the backdrop of the fact that the judiciary is the last hope for the common man is ***"is the shepherd becoming the wolf?"*** Much is needed in this area of law, especially as it relates to sentencing so that the society does not feel insecure in the hands of the judiciary.

## 6.0 CONCLUSION

The introduction of plea bargaining into our criminal justice system is, no doubt, revolutionary. We have no doubt that the practice of plea bargaining in Nigeria is still very embryonic, yet the gains are legion. Plea bargain is very necessary in this country going by the fact that our prisons are overcrowded. It will surely help to decongest the prisons. If we do not have plea bargain as an option in our criminal justice system, the courts and prisons would continue to be so overloaded with cases that nothing would ever get done and justice delayed is justice denied. Plea bargain is an effective cure for a myriad of problems of criminal justice administration. Plea bargain should not be practiced in such a manner that would serve as escape route to accused persons. It should not be done in a manner that would allow an accused person to escape justice; rather it should be done in a way that would serve its original intent and purpose. Achieving enhanced practice of plea bargaining in Nigeria will be boosted with the following recommendations:

a. Plea bargain should not be practised as an exclusive preserve of the rich. It should be applicable to all criminal cases but with great caution when it comes to corruption cases. Going by what we have seen in corruption cases in Nigeria, we say that the application of plea bargaining in this area is very premature and caution should be taken, especially with the international notoriety of Nigeria in the context of corruption, to avoid making plea bargain an escape route for corrupt officials. It should be made available to all defendants in criminal cases, particularly, first offenders, irrespective of class and status.

[69] *ibid.*

b. Heads of the various courts should put some measure of sentencing guidelines in place, specifically designed for plea bargaining, in order to ensure impartiality of judges and magistrates in the practice of plea bargaining, especially when it comes to the issue of concessions. There should be a benchmark that will serve as a guide to judges/magistrates in sentencing accused persons who have pleaded guilty as a result of plea bargains. This would ensure that judges do not pronounce ridiculous sentences that would make mockery of justice.
c. The National Assembly should immediately activate its legislative powers to amend the ACJA, particularly section 270, to remove the requirement of insufficiency of evidence as a reason for plea bargain. This will give the benefit of such insufficiency to a defendant who is, in line with the long established principle of criminal law, entitled to failure to prove an alleged criminal offence beyond reasonable doubt. Subjecting a defendant to plea bargain even in the absence of evidence to secure conviction occasions injustice to the defendant.
d. The ACJA should be amended to correct ambiguities created in the Act, especially as regards lack of definition of key terms used in the Act. The term 'victim' should be defined in the Act as its non-definition creates a lot of problems in view of the fact that the 'victim' of a crime is a major stakeholder in the bargaining process. The extent of damage or loss that qualifies one as a 'victim' is not provided in the Act. An Amendment of the ACJA in this respect is the best way to settle this controversy as plea bargain continues to gain prominence in Nigerian criminal justice system.
e. The states of the federation should take urgent legislative steps to domesticate the ACJA in view of the laudable innovation in plea bargaining. This is a task for both the Houses of Assembly of the States, as well as the executive arms, in view of the obvious fact that the ACJA does not have national application.

# JUSTIFICATION FOR THE LAW OF ATTEMPTS

**OLAIDE ABASS GBADAMOSI∗& HALIMAT ADENIRAN∗∗**

**Abstract**

*Whether criminal law is justified in imposing criminal liability upon an actor who has caused no such harm is the pertinent question that this paper attempts to examine. The essence of the law of attempt derives from the accused person's intention to carry out the substantive offence. The law of Attempt exists to punish unsuccessful efforts to commit a crime. Criminal law would lose its coercive powers as a means of protecting lives and properties from harm if it could only intervene after the harm has been inflicted. The paper examines the justification of the law of attempts and proffers plausible arguments as to why the law will intervene to stop this inchoate offence.*

**Keywords -** Inchoate Offences, Attempts, Harm, Criminal law

## 1.0 INTRODUCTION

Inchoate crimes are incomplete crimes which must be connected to a substantive crime to obtain a conviction. Examples of inchoate crimes are criminal conspiracy, criminal solicitation, and attempt to commit a crime, when the crime has not been completed. It refers to the act of preparing for or seeking to commit another crime.[1]

An i*nchoate* offence requires that the accused have the specific intent to commit the underlying crime. An *inchoate* crime may be found when the substantive crime fails due to arrest, impossibility, or an accident preventing the crime from taking place.[2]

Strictly *inchoate* crimes are a unique class of criminal offences in the sense that they criminalize acts that precede harmful conduct but do not necessarily inflict harmful consequences in and of themselves. Every *inchoate* crime or offense must have the *mens rea* of intent or of recklessness, but most typically intent. Specific

∗ OlaideAbassGbadamosi, Ph.D, LL.M; B.L; LL.B; ACIArb, MCIM; MCIPS; Professor and Provost/Dean,
College of Law, Osun State University, Nigeria. Email: olaide.gbadamosi@uniosun.edu.ng. and
∗∗HalimatAdeniran LL.B (Ibadan) LL.M (Swansea) B.L, Lecturer, College of Law Osun State University, Nigeria. Email: halimatadeniran21@gmail.com

[1]*Moses KabueKaruoya v Republic* [2016] KLR. per John M. Mativo J.

intent may be inferred from circumstances.[3] It may be proven by the doctrine of 'dangerous proximity', and the presence of a 'substantial step in a course of conduct'.[4]The dividing line between legal and illegal conduct is whether there is a *"substantial step"* towards committing a *specific* crime.

When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is said to attempt or to prepare to commit the offence.

### 1.2 Definition of Attempt

The doctrine of attempt to commit a substantive crime is one of the most important, and, at the same time, most intricate, titles of the criminal law[5]. An attempt is a crime because it results in damage or reasonable danger of damage. In recent years, the law of criminal attempts has been a subject of intense debates in criminal law. Over the same period, there has also been an increasing criminological interest in the prevention of crime which has manifested itself in various areas and aspects on crime prevention, and few would argue the general proposition that successful prevention is preferable to *post hoc* efforts to reform or deter offenders.[6]

The criminal law does not only deal with offenders who complete crimes (i.e. the *actus reus* and *mens rea* is completed resulting in harm or loss), it also deals with attempts to commit crime and conspiracies to commit crime.[7] Criminalizing inchoate offences raises particular difficulties because the conduct involved will often be far removed from the type of harm that would be needed to give rise to a crime under the relevant substantive offence.[8]

Attempt has been defined as the act or an instance of making an effort to accomplish something especially without success.[9] An overt act that is done with the intent to commit a crime but that falls short of completing the crime. From this definition it shows that if a person's intention is to execute by means he has adopted

---

[2]*ibid.*
[3]*See People v Murph*, 235 A.D. 933, 654 N.Y.S. 2d 187 (N.Y. 3d Dep't 1997)
[4] James WH McCord and Sandra L McCord, *Criminal Law and Procedure for the paralegal: a systems approach*, (3rd ed. Thomson Delmar Learning 2006) 189-190,

[5]Peyton, CJ, in *Cunningham v State*, 49 Miss. 685, 701 (1874).
[6]P. Mayhew, *Trends in Crime: Findings from the British Crime Survey*. (London, HMSO 1994).
[7]'../../../../HALIMAT ADENIRAN/Documents/Criminal Law,http://cw.routledge.com/textbooks/unlockingthelaw/content/Criminal-Law/private/course-notes/additional-chapters/CrimLaw_C015.pdf. accessed 4 March 2018.
[8] See generally, "the Law Commissions Consultation paper No. 183, Conspiracy and Attempt (2007)." lawcommission.justice.gov.uk/.../cp183_Conspiracy_and_Attempts_Con. para. 15.7.
[9]Bryan A Garner, *Black's Law Dictionary (*10th ed. St Paul West Publishing 2014) 146.

to its fulfillment, and thereby manifests his intention by some overt act, but actually falls short of his intention to commit the offence intended either through an intervening act or of involuntary obstruction such a person is said to commit the attempt of the offence intended.[10]

It is an inchoate offence distinct from the intended crime. It includes any act that is a substantial step towards commission of a crime.[11] It may equally be described as an act so proximate to the commission of the substantive offence that if not interrupted, it will result in the commission of that offence.[12] It is an act falling short of the thing intended.

The person may have carried out all the necessary steps (or thought they had) but still failed, or the attempt may have been abandoned or prevented at a late stage.[13] The attempt must have gone beyond mere planning or preparation, and is distinct from other inchoate offenses such as conspiracy to commit a crime or solicitation of a crime.[14] In each case, it is a question of fact whether the accused has gone sufficiently far towards the full offence to have committed the *actus reus* of the attempt.[15] If the accused has passed the preparatory stage, the offence of attempt has been committed and it is no defence that s/he then withdrew from committing the completed offence.[16] An attempt to commit a crime is an offence when an accused makes a substantial but unsuccessful effort to commit a crime.[17] Between preparations and attempts to commit a crime, the distinction is in many cases, very indeterminate.[18]

A man who buys poison for the purpose of committing a murder, and mixes it in the food intended for his victim, and places it on a table where he may take it, will or will not be guilty of an attempt to poison, from the simple circumstance of his taking back the poisoned food before or after the victim has had an opportunity to take it; for if immediately on putting it down, he should take it up, and, awakened to a just consideration of the enormity of the crime, destroys it, this would amount only to preparations and certainly if before he placed it on the table, or before he mixed the poison with the food, he had repented of his intention there would have been no attempt to commit a crime; the law gives this as a *locus penitentiae*

[10] *Orija v Police* (1957) NRNLR189..
[11] ibid.
[12] *Lawrence A. Graves v COP* (1975) 2 CCHCJ 209 at 213.
[13] Attempthttp://www.kamus.net/english/attempt accessed 14 June 2019.
[14] ibid.
[15] 'Inchoate offences - Crown Prosecution Service' <www.cps.gov.uk>accessed 17 March 2019.
[16] ibid.
[17] "Attempt", (legal-dictionary.thefreedictionary.com/attempt).accessed 3 March 2019.
[18] "Attempt an act". http://www.lectlaw.com/def/a087.htm. accessed 5 April 2019.

(abandoning the intention of committing a crime, before it has been completed.[19] The essence of the crime of attempt in legal terms is that the defendant has failed to commit the *actus reus* (the Latin term for the "guilty act") of the full offence, but has the direct and specific intent to commit that full offence.[20]

## HISTORICAL BACKGROUND OF THE CRIME OF ATTEMPT

There was no general crime of attempt in the early English common law, different decisions had been taken in which the courts did convict of felony the perpetrator of an unsuccessful attempt, but punishment of attempt was scattered and was limited to cases in which rather serious harm had occurred in any event.[21] The law of attempts was finally recognized by the common law in the decision of *Rex v Scotfield*[22]where the defendant was properly charged with a misdemeanor for an unsuccessful attempt to burn down a house. Also in the case of *Rex v Higgins,*[23] it was settled that an attempt to commit either a felony or a misdemeanor was indictable as a crime.

In English law, an attempt is defined as 'doing an act which is more than merely preparatory to the commission of the offence.'[24] The test of proximity was that the defendant must have '*...crossed the rubicon, burnt his boats, or reached a point of no return'*.[25] So the defendant has reached that part of the series of acts, which if not interrupted, frustrated, or abandoned, would inevitably result in the commission of the intended offence.[26]

Under the Model Penal Code, for a defendant to be convicted of attempt requires that he performs a 'substantial step in a course of conduct planned to culminate in the defendant's commission of the crime.'[27]

In *People v Perez,*[28] the court held that attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act towards accomplishing the intended killing. In *Inspector General of Police v Fowowe*,[29] the appellant was charged with an attempt to obtain money by false pretences. Evidence was led that he produced a contraption for printing currency notes, but before he could set up the contraption for printing, he was arrested by the police. The court

[19] ibid.
[20] "Attempt"<http://legal-dictionary.thefreedictionary.com/attempt> accessed 18 January 2019.
[21] "Attempt"<http://www.encyclopedia.com/topic/Attempt.aspx>accessed 18 February 2019.
[22](1784) Cald 397.
[23](1801) 2 East 5.
[24]Criminal Attempts Act, England 1981.
[25][1977] 2 All ER 909 per Lord Diplock.
[26]JF Stephens, *A Digest of the Criminal Law (Crimes and Punishments)* (Macmillan 1887).
[27]America Model Penal Code, 5.01(1)(c).
[28]50 Cal. 4th 222, 230 (2010).
[29](1957) WRNLR, 1888.

held this was only a preparation and not an attempt and therefore set aside his conviction.

In *R v Ogunogu*[30], the appellant, while in lawful custody, got his handcuffs broken with his consent. The Court of Appeal held that he was rightly convicted of attempt to escape as he was only waiting for any available opportunity to do so.

## 2.0 **TYPES OF ATTEMPT**

Attempt includes complete, incomplete, and impossible attempts. Complete attempts occur when the perpetrator takes every necessary step in the commission of a crime and yet is unable to commit it.[31] An incomplete attempt occurs when the perpetrator takes some steps towards committing the crime but is stopped by some intervening force outside of their control before they are able to complete the attempt.[32] An impossible attempt occurs when a perpetrator takes steps towards committing a crime, only to realize that there is something in the way making it impossible for the crime to be completed. This would include something like trying to commit murder when the target is already dead.[33]

There are three tests that are used in trying to determine whether a person truly carried out an attempt:[34]

In the first, the perpetrator must have the physical proximity necessary to have completed the crime, with the emphasis being on what steps remain to be taken.

In the second, it is considered whether any ordinary person witnessing the acts of the perpetrator would undoubtedly conclude that the perpetrator was intending to commit the crime in question. Finally, under the standard of the Model Penal Code, it must be examined whether the perpetrator has taken significant steps that clearly indicate intent to commit the crime. An example of incomplete attempt is where the accused person has planted a bomb and he is arrested as he is about to detonate the bomb.[35] There is also an impossible attempt where an individual cannot physically complete the offence (e.g. the trigger is pulled, yet it is not loaded).[36]

---

[30](1944) 10 WACA 220.
[31] "Attempt, Conspiracy and Solicitation"<http://www.sagepub.com/lippmanccl2e/study/supplements/Florida/FL07)> accessed 6 April 2019.
[32] ibid.
[33] ibid.
[34] 'Attempt, Conspiracy and Solicitation'<http://www.sagepub.com/lippmanccl2e/study/supplements/Florida/FL07) > accessed 6 April 2019.
[35] ibid.
[36] ibid.

Attempt is punished, though to a lesser degree than had the offence been completed, for three purposes:[37]

(a) Retribution against an individual who is as morally blameworthy as one who successfully commits the offence;

(b) The utilitarian perspective, which provides that punishing attempts as a lesser offense gives incentive to an individual to abort an act before it is completed;

(c)The incapacitation perspective that the individual has already shown himself to be a threat to society.[38]

The law of criminal attempts covers three separate factual situations:[39]
The first, a thwarted attempt, is when the attempter's criminal object is frustrated in some way prior to his executing the offence.[40] Thus:[41]
Case 1. Adam, intending to shoot and kill Eve, raises his gun and cocks the firing pin. Before he has a chance to pull the trigger, Cain knocks the gun from his hand and Eve escapes injury.[42]
The second, a failed attempt, is when the attempter does everything he intended to do in order to effect his criminal project but this was inadequate to the task.[43]
Case 2 Adam, intending to shoot and kill Eve, pulls the trigger. At the same time Eve bends over thus causing the bullet to miss its target.[44]
The third, an impossible attempt, occurs where the course of conduct embarked upon by the attempter to achieve a supposed criminal ambition was incapable of resulting in the commission of the substantive offence.[45]
Case 3. Adam, intending to shoot and kill Eve, fires a gun at her sleeping form. Unknown to him Eve had died five minutes earlier.

In each one of the above three situations, Adam will be guilty of attempted murder.[46]

## 3.0 PHILOSOPHICAL PROBLEMS SURROUNDING ATTEMPTED CRIME

Attempt law poses two philosophical problems:[47] First, why punish attempts at all? Is it because the conduct of the accused is dangerous, even though no harm was inflicted on the target?

[37] ibid.
[38] ibid.
[39] W. William, *Criminal Law Doctrine and Theory.* (London : Longman Publishers, 1998)
[40] ibid.
[41] ibid.
[42] ibid.
[43] ibid.
[44] ibid
[45] ibid.
[46] ibid.

Second, why punish the attempt to commit a target crime with less severity than successful completion of the target crime?

As to the first issue, is it because the person who attempts crime is a socially dangerous person? As to the second issue, we find that many jurisdictions punish attempt crimes with a range of punishment less severe than the completed crime. Is this leniency due to considerations of proportionality?[48]

## 4.0 ELEMENTS OF ATTEMPT

The essential ingredients of an attempt to commit an offence have been laid down in the following words:-

> In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An 'attempt' is made punishable because every attempt, although it fails of success, must create an alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded.[49]

Thus, for there to be an attempt to commit an offence by a person, that person must:-

(i) Intend to commit the offence.

(ii) Begin to put his intention to commit the offence into execution by means which are adapted to its fulfillment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve.

(iii) Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence.[50]

For the offence of or attempting to commit an offence to be proved, the prosecutor must prove each of those three elements beyond reasonable doubt. The act relied upon as constituting the attempt to commit an offence must be an act immediately,

---

[47] 'Inchoate Crimes and Complicity Theory - Criminal Law'<www.crimesanddefenses.com >accessed 4 March 2017.
[48] ibid.
[49] The Indian Penal Code ( Act XLV OF 1860).
[50] See*R v Barbeler*{1977} QD 80.

not merely remotely, connected with the contemplated offence. This was enunciated in the case of *Williams, Ex parte The Minister forJustice and A-G.*[51] The act must go beyond mere preparation to commit the crime and must amount really to the beginning of the commission of the crime. But it is necessary that the accused should have done his best or taken the last steps towards the intended offence. There can be an attempt to commit an offence where the failure to complete the commission of it is due to ineptitude, inefficiency or insufficient means on the part of the accused person. In fact, the fact that a person, having done something which amounts to an attempt, then voluntarily desists from continuing the attempt, does not relief him from criminal responsibility for the attempt which he made before desisting.

The elements of attempt include:

(1) Specific intent -- this means that 'purposely' is the only *mens rea* that qualifies. All inchoate crimes are specific intent crimes, and all specific intent crimes do not allow such states of mind as reckless, negligent, or strict liability.[52]
(2) An overt act toward commission -- this is intended to weed out the plotters from the perpetrators, but the standards vary widely by jurisdiction. Acts of preparation do not count.[53]

Section 4 of the Nigerian Criminal Code, for example, requires three elements for the *actus reus* of attempt:

**(i)** that the accused has begun to put his intention into execution by means adapted to its fulfillment;
**(ii)** that he has not fulfilled his intention to such an extent as to commit the offence, he is said to attempt to commit the offence; and
**(iii)** that he has manifested his intention by some overt act..

The sufficiency of an act to prove attempt is an extremely controversial issue on many levels.[54] Firstly, at a practical level, the more broadly the law extends the scope of attempt liability to include even the slightest conduct towards the commission of an offence, the greater the protection that can be afforded and the earlier the police can intervene.[55] The cost of that approach is in potentially overbroad criminalization and oppressive policing.[56]

[51]*Williams, Ex parte The Minister for Justice and A-G.*[8]{1965}Q B R 86.

[52]"Inchoate crimes", http://www.sagepub.com/lippmanccl2e/study/chapters/Outlines/Ch07Outline.pdf.accessed 17 January 2019.
[53] ibid.
[54]DOrmerod, *Smith and Hogan's Criminal Law(*13th edition University Press 2011) 415.
[55] ibid.
[56] ibid.

Secondly, on a theoretical level, there is a division between the subjectivist and the objectivist schools of thought. It has been said that the subjectivists require the relevant acts to manifest an intention to commit the substantive offence whereas objectivists require the relevant acts to manifest the actual attempt.[57] Thirdly, there is an even broader related question which is why the criminal law places as much emphasis as it does on the consequences of the criminal actor's conduct. Why should the outcome of the defendant's intentional conduct make so much difference to his criminal liability?[58] In the context of attempt, this raises specific questions whether and why a person ought to be treated differently in terms of liability and punishment when he embarks on carting out his criminal intentions, but the proscribed harm does not occur.[59]

## 5.1 *Actus Reus* of Attempt

There are two different approaches to the *actus reus* of attempt:[60]

(a) The objective approach to criminal attempt requires an act that comes extremely close to the commission of the crime, which stresses the danger posed by a defendant's acts.

(b) The subjective approach to criminal attempt focuses on an individual's intent rather than on his or her acts, which stresses the danger to society presented by a defendant who possesses a criminal intent.

### 5.1.1Tests Required to Prove the *actus reus* of Attempt

There are at least four tests used to prove the *actus reus* of Attempts:[61]

(i) physical proximity doctrine -- this focuses upon space and time, establishes the 'last act' standard which requires looking at the remaining steps;

(ii) probable desistance approach -- this considers whether the attempt would naturally lead to commission but for some timely interference not related to bad luck;

(iii) equivocality approach -- this looks at whether the attempt can have no other purpose than commission of a crime; and

(iv) substantial steps test – this approach looks for corroborating evidence in the form of conduct which tends to concur or verify a criminal purpose.[62]

---

[57] ibid.
[58] ibid.
[59] JC Smith, 'The Elements of Chance in the Criminal Law.' (1963)*Crim LR*63.
[60]"Inchoate crimes", http://www.drtomoconnor.com/3010/3010lect03a.htm.accessed 11January 2019.
[61]"Inchoate crimes", http://www.sagepub.com/lippmanccl2e/study/chapters/Outlines/Ch07Outline.pdf.accessed 17 January 2019.
[62] ibid.

The substantial steps test is as follows: "if, acting with the kind of culpability otherwise required for commission of the crime, the offender ... purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.'[63]

Under the New York law, the element of *actus reus*is that the person engages in conduct that '...tends to effect the commission of such crime.'[64]

The test this requires either:

An action that reveals a criminal intent, or

the person has dangerous proximity, or is 'dangerously near and close to the accomplishment of the crime.'[65]

### 5.1.2 The Proximity Doctrine

Attempt is an act so proximate to the commission of the substantive offence that if not interrupted, it will result in the commission of that offence. When an act is proximate to the commission of the substantive offence, it is immaterial except so far as regards punishment whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will or whether he desists of his own motion from the farther prosecution of his intention.[66]

By the provision of section 4 of the Criminal Code Act, it is immaterial that by reason of the circumstances not known to the offender it is impossible in fact to commit the offence. The same facts may constitute an offence and an attempt to commit another offence. The graphic description of the following was given- "The*acteusreus* necessary to constitute an attempt is complete if the prisoner does an act which is a step towards the commission of the specific crime which is immediately and not merely remotely connected with the commission of it and the doing of which cannot reasonably be regarded as having any other purpose than the commission of a specific crime. Where the act concerned is equivocal, the intention of the defendant is relevant to see to what end the act was directed. When that is decided, it still remains for the

[63]*United States v Hsu*, 3d Cir, 1998.
[64] New York Penal Law, section 110. See also the Texas Penal Code,1973, s 15.01(a) TPC, which defines attempt as 'a person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended.'
[65]*People v Acosta* (N.Y. Court of Appeals 1993).
[66]Sonia Akinbiyi,*Criminal law & Procedure in Nigeria* (Kofo-Davids Graphics 2009) 94

prosecution to know that the act itself was sufficiently proximate to the crime which the defendant intended to commit to amount to an attempt.[67]

For an act to amount to an attempt, it must be the very last act before the commission of the offence, as seen in the case of *Sunday Jegede*v *The State*,[68] where the Supreme Court of Nigeria held that to constitute attempted rape, the act of the accused person must be the last act necessary to fulfill his intention. The end to which the accused arrived must have been substantially attained but for intervention.

### 5.2 Mens rea of Attempted Crime

To show *mens rea* of attempt, the prosecution must show intent to commit the attempted act as well as specific intent to achieve a criminal objective.[69] Intent is the essence of attempt. Only a direct and specific intent will support a conviction.[70] Attempts are defined as situations where an individual who intends to commit an offence does an act which is 'more than merely preparatory' in the offence's commission.[71] An attempt to commit a crime is conduct intended to lead to the commission of the crime.[72] It is more than mere preparation, but it falls short of actual commission of the intended offence.[73]

An intent to commit a crime is not the same as an attempt to commit a crime. Intent is a mental quality that implies a purpose, whereas attempt implies an effort to carry that purpose or intent into execution.[74] The mere intention to commit a misdemeanor is not criminal, some act is required. Acts remotely leading to the commission of the offence are not to be considered as attempt to commit it.[75] An attempt goes beyond preliminary planning and involves a move toward commission of the crime. In an attempt case, the prosecution must prove that the defendant specifically intended to commit the attempted crime that has been charged with.[76]

---

[67]ibid
[68](2001) 7 SCNJ 135.
[69]"Inchoate crimes", http://www.sagepub.com/lippmanccl2e/study/chapters/Outlines/Ch07Outline.pdf.accessed 17 January 2019.
[70] ibid.
[71]Criminal Attempts Act, England 1981, s 1 (1).
[72]"Criminal Law", http://legal-dictionary.thefreedictionary.com/Criminal+Law.accessed 7 January 2019.
[73] ibid.
[74] "Criminal Law - Attempt - Crime, Intent, Commit law".jrank.org/pages/5869/Criminal-Law-Attempt.html). accessed 20 March 2019.
[75]*Bello Shurumo v The State* (2010) 12 SC (Pt 11) 73.
[76]"Criminal Law", http://legal-dictionary.thefreedictionary.com/Criminal+Law.accessed 27 February 2019.

> As a general rule, an attempt to commit a crime is a misdemeanor, whether the crime itself is a felony or a misdemeanor.[77] Attempted murder and attempted rape are examples of felonious attempts.[78] In an attempt case, the prosecution must prove that the defendant specifically intended to commit the attempted crime with which has been charged.[79] General intent will not suffice, for example, in an attempted-murder case, evidence must show a specific intent to kill, independent from the actual act, such as a note or words conveying the intent. In a murder case, intent may be inferred from the killing itself.[80]

In *R v Moham*[81], the court held that it is well established that intent (*mens rea*) is an essential ingredient of the offence of attempt. An attempt to commit a crime is itself a crime. Often it is a grave offence. Often, it is morally culpable as the completed offence which is attempted but not in fact committed.

## 5.0 SUBSTITUTION OF SUBSTANTIVE CRIME WITH ATTEMPT

In matters of attempt, a mere preparation will not suffice. In *Rex* v*Offiong*[82], it was held that expression of the desire to have unlawful carnal knowledge by the appellant constitutes mere preparation to have unlawful carnal knowledge, his conviction was quashed. Where a person is accused of a substantive offence, he may where prosecution fails to prove the substantive offence, and the evidence supports an attempt, be convicted of an attempt to commit the offence.

Before such substitution is made, the evidence must establish an attempt which must be the proximate act, the penultimate act, the last act in the series of acts. The substitution was set aside in the case of *Jegede*v *State*[83] as delay in medical examination and lack of corroboration marred the case for the prosecution in a charge of rape for which conviction for attempted rape was made by the Court of Appeal.

In *R* v *Owe*[84]on substitution in a charge of murder the court held :

> Where a person is charged with an offence but that evidence establishes an attempt to commit the offence only, he may be convicted of having attempted to commit the offence, although the attempt is not separately charged,…where the evidence on

[77] *Gale Encyclopedia of American Law*(3rd edition Volume 3) 123.
[78] ibid.
[79] ibid
[80] ibid.
[81] (1976) QB 1, per James L. J
[82] (1963) 3 WACA 83.
[83] (2001) 7 SCNJ 139.
[84] (1961) ALL NLR 680-681.

> record fails to support a conviction of the offence charged but would be sufficient to support a conviction of an attempt to commit the offence, the Federal Supreme Court will on appeal allow it and set aside the conviction but will substitute therefore a conviction of attempting to commit the offence

Similarly, the Supreme Court also substituted in the case of *Simon Okoyomon v TheState.*[85]The Supreme Court found that there was no evidence of penetration; the complainant mere said the accused inserted his penis into her vagina and in the absence of such evidence of penetration, the accused was found guilty of attempted rape by the Supreme Court.

## 6.0 JUDICIAL INTERPRETATIONS OF THE CRIME OF ATTEMPT

A number of tests have been proposed at one time or another: [86]

1. Whether D's act is the last necessary; i. e. for there to be a completed attempt, not the completed crime. It would be enough for attempted murder that D was about to pull the trigger; there is no need for the victim to have died, which is the last act of murder.
2. Whether D's act is proximate to the commission of the full offence.
3. Whether D's act was one of a series which would lead to the crime if uninterrupted.
4. Whether D's act was immediately connected with the substantive offence.[87]

The narrowest interpretation was that of Lord Diplock in *R v Stonehouse*[88]where he held that only acts immediately connected with the offence can be attempts. According to Lord Diplock in that case, *the offender must have crossed the rubicon and burnt his boats*.[89]

## 7.0 JUSTIFICATION OF LAW ON ATTEMPT

Criminal law seeks to restore order, decency and social equilibrium in society. It is aimed at curtailing or reducing to the minimum grave incidents of anti-social conduct.[90] Punishment of an offender lies at the root of criminal law. Where an offence is committed, the offender or wrong-doer is punished. However, the criminal law also seeks to punish those who intend to commit offences but could not successfully do so. That is, they merely attempted to commit an offence. The fact remains that they intended to commit an act which they know is unlawful and

[85](1973) 1 SC 21 and 33.
[86]DOrmerod, *Smith and Hogan's Criminal Law*.(13th edition, Oxford University Press 2011) 415.
[87] ibid.
[88][1977] 2 All ER 909 per Lord Diplock.
[89]*R v Stonehouse supra.*
[90]*Moses KabueKaruoya v Republic*supra.

prohibited, but the completed offence was never accomplished. The offence remains *inchoate* because the accused could not accomplish his desires, or that the end result of his acts or omission is not what he envisaged. He has all the same attempted to commit an offence.[91] It is a criminal attempt and therefore an offence. Will an accused person be allowed to go scot-free because he could not finish his plans? No. He would be made to face some form of punishment even though he never completed the offence.[92]

Attempts are punishable even if the desired results are impossible of achievement and no harm has occurred.[93]In order to prevent harm, the law should identify and intervene promptly, the dangerous individual who is likely to cause harm. The objectives of the Criminal Law include amongst others - to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests and to subject to public control persons whose conduct indicates that they are disposed to commit crimes.[94]

Without a law of attempt, these objectives would be defeated as threats to security of lives and properties would reign in the society.[95] The fact that the law should not wait until an intending criminal actually carries out his intention and consummates his anti-social plans before being adjudged fit for criminal sanctions, calls for the need for inchoate offences in our legal system in order to bring corrective control in the society at large.[96]

Generally, criminal liability is imposed upon a blameworthy actor who causes a prohibited harm. With attempts, the blameworthiness element is clearly satisfied.[97] The person who attempts to commit an offence clearly has the *mens rea* of that full offence.[98] But no harm has been caused in the usual sense of the word; for instance, the victim has not died or has not lost any property.[99]

(i) In terms of desert, an attempter's moral culpability is (broadly) comparable to that of a successful defender.[100]

[91]*Moses KabueKaruoya v Republic* supra.
[92]*Moses KabueKaruoya v Republic* supra.
[93]National Open University of Nigeria, "Criminal Law I Notes" .www.nou.edu.ng. accessed 23 March 2019.
[94]"Defenses-to-incomplete-crimes", http://www.legalmatch.com/law-library/article/defenses-to-incomplete-crimes.html.accessed 10 January 2019.
[95] ibid
[96]DOrmerod, *Smith and Hogan's Criminal Law* (13th Edition, Oxford University Press,2011) 415.
[97] CMV Clarkson, HM. Keating and SR Cunningham, *Criminal Law: Text and Materials* (6th edition, Sweet and Maxwell 2007) 472.
[98] ibid.
[99] ibid.
[100] Law Commissions Consultation paper No. 183, Conspiracy and Attempt (2007). para. 15.7.

According to Ashworth:

> A person who tries to cause a prohibited harm and fails is, in terms of moral culpability, not materially different from the person who tries and succeeds: the difference in outcome is determined by chance rather than choice, and a censuring institution like criminal law should not subordinate itself to the vagaries of fortune by focusing on results rather than culpability.[101]

Further, where a crime is attempted, there is harm, namely a threat to security.[102] An attempt to commit a crime represents a danger to these rights. This infringement of our rights constitutes, in itself a harm that the criminal law seeks to punish.[103] Gross expressed the point well as follows:

> Where there is only attempt liability, the conduct itself may usefully be regarded as a second order harm; in itself it is the sort of conduct that normally presents a threat of harm; and that, by itself, is a violation of an interest that concerns the law. The interest is one in security from harm and merely presenting a threat of harm violates that security interest[104]

As a general principle of the law, criminal liability is normally only imposed upon 'a blameworthy actor who causes a prohibited harm', and while those who attempt crimes may be blameworthy, it can be argued that there is no harm caused; attempted burglary, for example, does not lead to anything being stolen.[105]

Many theorists who make the distinction between successful and failed attempts do still consider the defendant partially liable, for example advocating a lesser punishment.[106] However, there have been two distinct counterarguments advanced against making such a distinction:[107] The first is that when a crime is attempted, there is harm, namely a threat to security. Individuals have the right to security, both of themselves and their property, and an attempt to commit a crime infringes on this right. The second is that, regardless of the harm principle, criminal liability for attempts can be justified in utilitarian terms.[108]

[101] A Ashworth, Principles *of Criminal Law*(6th edition, OUP 1979) 438.

[102] ibid.
[103] ibid.
[104] H Gross, *A Theory of Criminal Justice*, (Oxford University Press 1979) 125, 386.
[105] Clarkson, et al (n 97).
[106] AP Simester, et al, *Criminal Law: Theory and Doctrine*(4th edition, Hart Publishing 2010) 922.
[107] ibid.
[108] ibid.

A person who tries to commit a crime has shown himself to be dangerous, and must be restrained and rehabilitated to provide deterrence for them and for others.[109]

(ii) Another justification is that the police should be given every encouragement to prevent crimes, not simply to detect it.[110] On the basis of this, the police should be empowered to arrest and prosecute for attempts to commit crimes.[111]

(iii) If the general purpose in punishing is to prevent harm, the law should identify, at the earliest feasible moment, the dangerous individual, who is likely to cause harm.[112] It is immaterial in a conviction for an attempt that by reason of circumstances not known to the offender, it is impossible in fact to commit the offence.[113] Thus, a man is guilty of attempted stealing if he puts his hands in an empty pocket intending to steal from it,[114]or of attempted murder if he places poison in a drink with intent to kill anyone,[115] even though in fact the dose could not possibly have killed anyone.[116]

**(iv)** The interests of crime prevention would not be well served if a man intending to commit a crime were held to be innocent until he had actually committed the crime intended. Mere intention is not criminal; but a man who has begun to put his intention into effect may well be guilty of an offence before ever he has achieved his aim.[117]

**(v)** The law on attempts is justified because of the social need to prevent crimes before they occur. Attempt law authorizes police intervention to prevent the commission of crimes.[118]Intervention protects society by arresting individuals before they commit a dangerous crime.[119]

(v) The Model Penal Code theory is that the 'dangerousness of the actor' justifies the prohibition of attempts.[120]

(vi) A theory, proposed by Professor Gross, relies on the dangerousness of the attempter's conduct to justify attempt liability. Conduct can be an attempt, only if it poses a threat of harm.[121]

---

[109]Clarkson, et al (n 97).
[110] ibid.
[111] ibid.
[112]JBardy, 'Punishing Attempts' (1980) 63 *The Monsit*246.
[113] CO Okonkwo, *Criminal Law in Nigeria* (Second Edition, Spectrum Books Ltd. 1980)184, 193.
[114]*R v Ring* (1892) 8 TLR 326.
[115]*R v White* (1910) 2KB 124.
[116]*R v Osborne* (1920) 84 JP 3.
[117]Okonkwo (n 113).
[118]PJ Fitzgerald, *Criminal law and Punishment* (Clarendon Press 1962)98.
[119]"Inchoate Crimes", http://www.sagepub.com/lippmanccl2e/study/chapters/Outlines/Ch07Outline.pdf.accessed 11 March 2019.
[120] Model Penal Code § 5.01 comment at 26 (Tent. Draft No. 10, 1960).
[121] H Gross, *A Theory of Criminal Justice*(Oxford University Press 1979) 125, 386.

(vii) Attempts are socially harmful, and therefore properly prohibited, because they provoke public alarm and disturb the public sense of security.[122]

(viii) A popular justification for punishment is the just deserts rationale.[123] A person deserves punishment proportionate to the moral wrong committed.[124] Punishing an offender reduces the frequency and likelihood of future offences.[125] If an accused person cannot be apprehended until a crime is successfully executed, law enforcement agencies would not be able to intervene and avert harms to victim's lives or their properties. Furthermore, the accused person who is unable to complete a crime would continue to make future trials, if he knows that no criminal sanctions would follow his attempts to commit crime.

(ix) From a utilitarian point of view, it is possible to justify criminalization and punishment even in the absence of harm. Punishing attempts may act as a separate deterrent to punishing the substantive offence for those who lack confidence of success.[126] It may also enable offenders to be isolated before they have the chance to cause harm. This both incapacitates dangerous offenders and may provide the context within which s/he may be rehabilitated.

(x) Punishing attempts may act as a separate deterrent to punishing the substantive offence for those who lack confidence of success.[127] Invoking criminal sanctions for attempts enables offenders to be arrested, investigated and punished before they have the chance to cause harm.

(xi). Someone who attempts a crime but fails to do the harm characteristic of success still (ordinarily) risks doing the harm. He deserves punishment for risking the harm because risking the harm is an advantage the law abiding does not take.[128]

## 9.0 LAWS OF ATTEMPT IN SELECTED JURISDICTIONS

### (i) Criminal Code (Nigeria)

Under the Nigerian Criminal Code:

[122]HSilving, *Constituent elements of crime.* (Springfield : Charles C.Thomas 1967) 108.
[123]KMCarlsmith, JMDarely and PH Robinson, 'Who do we punish? Just Deserts as motives for punishment' (2002) 83(2)*Journal of Personality and Social Psychology* 284.
[124] ibid.
[125] ibid.
[126]HLAHart,*Punishment and Responsibility* (Clarendon Press 1968) 128.
[127]Bardy (n 112).
[128]M Davis, 'Why attempts deserve less punishment than complete crimes' (1986) 5 *Law and Phil.* 1 at 28 -29.

> When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is said to attempt to commit the offence. It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the Commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention. It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence. The same facts may constitute one offence and an attempt to commit another offence.[129]

An important case which illustrates the meaning and application of the first paragraph of section 4 of the Criminal Code applicable in the Southern States of Nigeria is *Jones and Brooks v Brooks*[130]*, the head note which* reads:

> Where the act alleged to constitute a crime is equivocal, evidence of the intention of the defendant is relevant in order or establish towards what object the act was directed. Once the intention of the defendant has been proved, it still remains for the prosecution to prove that the act itself was sufficiently proximate to amount to an attempt to commit the intended crime.

Mr Justice Smith in *Orija v Inspector General of Police*[131] had this to say on section 4 of the Criminal Code;

> … it is not necessarily the last act in every case which proves the attempt, All that is required is an act immediately connected with the particular offence which clearly shows that the offender was attempting to commit it. That is what section 4 of the criminal code requires. i.e an overt act which clearly manifests the intention but which does not amount to its fulfillment.

The Penal Code, applicable in Northern states of Nigeria, similarly provides in section 95 that:

[129]Criminal Code, Cap C 38, Laws of the Federation of Nigeria 2004.s 4.
[130]*Jones and Brooks v Brooks* (1968) 52 Crim App R 614.
[131](1957) NRNLR 189.

> Whoever attempts to commit an offence punishable with imprisonment or to cause such an offence to be committed and in such attempt does an act towards the commission of the offence shall where no express provision is made by this Penal Code or by any other Ordinance or Law for the time being in force for the punishment of such attempt, be punished with imprisonment for a term which may extend to one half of the longest term provided for that offence or with such fine as is provided for the offence or with both.[132]

**(ii) California Penal Code**

Every person who attempts to commit any crime, but fails, or is prevented, or intercepted in its perpetration shall be punished, where no provision is made by law for the punishment of those attempts as follows: [133]

> If the crime attempted is punishable by imprisonment in the state prison, the person guilty of such attempt shall be punished by imprisonment in the state prison for one half the term of imprisonment prescribed upon a conviction of the offence so attempted. However … if the crime attempted is any other one in which the maximum sentence is life imprisonment for death, the person guilty of the attempt shall be punished by imprisonment in the state prison for five, seven or nine years.[134]

**(iii) Florida Statute (section 777.04)**

A person who attempts to commit an offence prohibited by law and in such attempt does any act toward the commission of such offence, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offence of criminal attempt. [135]

**(iv) Uganda Penal Code (Amendment) Act 2007**

Section 386 provides for Attempt as follows

1) When a person, intending to commit an offence, begins to put his or her intention into execution by means adapted to its fulfillment, and manifests his or her intention by some overt act, but does not fulfill his or her intention to

[132] Penal Code Law, cap P 89 Laws of the Federal Republic of Nigeria, 2004.
[133] See California Penal Code 2011, s 664.
[134] ibid.
[135]Florida Statute, 2019. section 777.04

such an extent as to commit the offence, he or she is deemed to attempt to commit the offence.

(2) It is immaterial—

(a) except so far as regards punishment, whether the offender does all that is necessary on his or her part for completing the commission of the offence, or whether the complete fulfillment of his or her intention is prevented by circumstances independent of his or her will, or whether the offender desists of his or her own motion from the further prosecution of his or her intention;

(b) That by reason of circumstances not known to the offender, it is impossible in fact to commit the offence.

Any person who attempts to commit a felony or a misdemeanor commits an offence, which unless otherwise stated, is a misdemeanor.[136]

**(v) Criminal Attempts Act (England) 1981**

If with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory, to the commission of the offence, he is guilty of attempting to commit the offence.[137] Section 1(1) provides that the *actus reus* must be "more than merely preparatory". In practice, "there is no hard and fast rule about when an act may be more than merely preparatory", although there are several cases which give broad guidance.[138] For example in *R v Geddes,*[139] a man entered the toilets in a school in Brighton with a large knife, some rope and a roll of masking tape; it was alleged that he was intending to kidnap a pupil. The Court of Appeal confirmed that this was not enough for a conviction. However, certain general rules have been laid down; if the defendant has committed the last act before completing his offence, it constitutes an attempt, as in *R v Jones*[140].

In *R v Toothill*[141], the defendant was charged with attempted burglary after trespassing into the victim's garden and knocking on their door. He was found guilty, because he had entered the property – the *actus reus* for burglary – and his actions were thus more than merely preparatory.[142]

[136]Ugandan Penal Code (Amendment) Act 2009, s 387.
[137] Criminal Attempts Act, England, 1981.
[138] J Herring, *Criminal Law: Text, Cases and Materials* (3rd edition, Oxford University Press 2008) 778.

[139](1996) Crim LR 894.
[140]*R v Jones* (1990) 1 WLR 1057.
[141] *R v Toothill* (1990) 3 All ER 882
[142]Herring (n 138) 781.

vi. **Model Penal Code**

A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he-[143]

(a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

Under the Model Penal Code, a defendant is generally guilty of attempt in one of two situations: (1) when it was their purpose (i.e., conscious object) to engage in the conduct, or to cause the result, which constitutes the target offence, or

(2) when they believe the result implicated in the target offence will occur, even if not their conscious object to cause that result.[144]

**9.1 Punishment for Attempts in Selected Jurisdictions**

Under the Nigerian Criminal Code, punishments are fixed for different kinds of Attempts. For instance, Attempt to commit unnatural offences is punishable with seven years' imprisonment;[145]attempt to commit murder carries life imprisonment;[146] attempt to kill oneself carries imprisonment for one year[147]; attempt to commit the offence of rape is liable to imprisonment for fourteen years, with or without caning[148]and 14 years for attempted arson.[149] Other sections for attempts under the Criminal Code are listed as follows:

Section 510 of the Criminal Code provides that:

> Any person who attempts to commit a misdemeanor is liable if no other punishment is provided, to a punishment equal to one-half of the greatest punishment to which an offender convicted of the offence which he attempted to commit is liable.[150]

Section 512 provides:

> When a person is convicted of attempting to commit an offence, if it is proved that he desisted of his own motion from the further

[143]American Model Penal Code, s 5.01(1).

[144] ibid.

[145]Criminal Code, Cap C 38 Laws of the Federation of Nigeria 2004, s 214.

[146]ibid s 320.

[147]ibid s 327.

[148]ibid.

[149]ibid s 359.

[150]ibid s 510.

> prosecution of his intention without its fulfillment being prevented by circumstances independent of will, he is liable to one-half only of the punishment to which he would otherwise be liable. If that punishment is imprisonment for life, the greatest punishment which he is liable is imprisonment for seven years.[151]

Equally, an attempt to commit any of the offences under the Penal Code, section 95[152] provides that such person shall be punished with imprisonment for a term which may extend to one-half of the longest term provided for that offence or with such fine as is provided for the offence or both.

The Penal Code by virtue of section 229 provides for the punishment for attempting culpable homicide punishable with death that such person shall be punished with imprisonment for life or with any less term or with fine or with both. Section 229 (2) provides: 'When a person being under a sentence of imprisonment for life commits an offence under this section, he shall if hurt is caused, be punished with death'.

Furthermore section 230 provides that whoever attempts to commit the offence of culpable homicide not punishable with death, shall be punished:

(a)

ith imprisonment for a term which may extend to three years or with fine or with both.

(b)

f hurt is caused to any person by such act with imprisonment which may extend to seven years or with fine or with both.

The Uganda Penal Code in section 388 provides the punishment of attempts to commit certain felonies as follows:

> Any person who attempts to commit a felony of such a kind that a person convicted of it is liable to the punishment of death or imprisonment for a period of fourteen years or upwards, with or without other punishment, commits a felony and is liable, if no other punishment is provided, to imprisonment for seven years.[153]

The Criminal Attempts Act, England 1981 in section 4 provides punishment of attempts to commit an offence as follows:A person guilty of attempting to commit an offence shall

[151]ibid s 512.
[152]Penal Code Law, Cap P 89 Laws of the Federation of Nigeria, 2004.
[153]Uganda Penal Code (Amendment) Act 2007, s 388.

a) f the offence attempted is murder or any other offence the sentence for which is fixed by law, be liable in conviction on indictment to imprisonment for life; and
b) if the offence attempted is indictable but does not fall within paragraph (a) above, be liable on conviction on indictment to any penalty to which he would have been liable on conviction on indictment of that offence; and
c) if the offence attempted is triable either way, be liable on summary conviction to any penalty which he would have been liable on summary conviction of that offence.

In California, the California Penal Code in section 664 provides as follows:

Every person who attempted to commit any crime but fails or is prevented or intercepted in its perpetration shall be punished where no provision is made by law for the punishment of those attempts as follows:

(a) If the crime attempted is punishable by imprisonment in the state prison, or by imprisonment, the person guilty of the attempt shall be punished by imprisonment in the state prison or in a county jail for one-half the term of imprisonment prescribed upon a conviction of the offence attempted. However…if the crime is any other in which the maximum sentence is life imprisonment for death, the person guilty of the attempt shall be punished by imprisonment in the state prison for five, seven or nine years.[154]

## 10.0 DEFENCES TO THE CRIME OF ATTEMPT

To be held responsible for a crime, a person must understand the nature and consequences of his or her criminal act.[155] Under certain circumstances, a person who commits a crime lacks the legal capacity to be held responsible for the criminal act.[156] Examples of legal incapacity are insanity, infancy and impossibility amongst others.

### (i) Insanity

[154]California Penal Code 2011, s 664.
[155]"Criminal Law", legal-dictionary.thefreedictionary.com/Criminal+Law.accessed 4 April 2019.
[156]"Criminal-Law-Defenses", law.jrank.org/pages/5866/Criminal-Law-Defenses.accessed 1 April 2019.

The accused is entitled to acquittal only if due to his mental illness, at the time of his conduct, he lacked the ability to -

(a) know the wrongfulness of his actions or

(b) understand the nature and quality of his actions.[157]

**(ii) Infancy**

Children are not criminally responsible for their actions until they are old enough to understand the nature of their actions. Children under the age of seven are presumed to lack the capacity to commit a crime and not criminally responsible for any act or omission.[158]

(iv) **Abandonment Defence**

Abandonment of the attempt may constitute a defence, depending partly on the extent to which the attempt was abandoned freely and voluntarily.[159] Courts that do recognize this defence generally apply it only where the defendant completely and voluntarily renounces any criminal purpose.[160]It should be noted, however, that the abandonment is not complete and voluntary where the defendant desists from criminal efforts due to unexpected resistance (e.g., from victims), the discovery of the absence of an instrumentality needed for the completion of the offense, or other circumstances that increase the probability of arrest, or decrease the probability of successful completion of the crime (e.g. proximate arrival of police).[161]Abandonment is also invalid where the defendant simply postpones the criminal plan until another time.[162] For abandonment to be a successful defence, the actor must have given up for moral reasons, not just because of the risk of apprehension.[163]

Under the Model Penal Code, the defendants are not guilty of an attempt if they:

(i) Abandon the effort to commit the crime or prevents the crime from being committed, and

(ii) their behavior manifests a complete and voluntary renunciation of the criminal purpose.[164]

However, the renunciation is not complete if motivated in whole or part by one of the following:[165]

[157] 'Insanity Defense' <legal-dictionary.thefreedictionary.com/Insanity+Defense)> accessed 2 April 201.

[158]Criminal Code, Cap C 38 Laws of the Federation of Nigeria 2004, s 30.

[159] 'Attempt'<en.wikipedia.org/wiki/Attempt> accessed 12 June 2019.

[160] J Dressler, *Understanding Criminal Law* (California : Lexis- Nexis, 2006).

[161] 'Attempt'<en.wikipedia.org/wiki/Attempt> accessed 20 December 2018.

[162] 'Inchoate crimes'<http://www.drtomoconnor.com/3010/3010lect03a.htm> accessed 6 June 2019.

[163] ibid.

[164]American Model Penal Code s 5.01(4).

[165] ibid.

(a) They postpone the criminal conduct to a more advantageous time, or to transfer the criminal effort to another but similar objective or victim.
(b) They are merely reacting to circumstances that increase the probability of detection or apprehension.
(c) They are reacting to a change in circumstances that makes the crime harder to commit.[166]

**(v) Impossibility Defence**

An Impossibility defence is a criminal defence occasionally used when an accused is accused of a criminal attempt that failed only because the crime was factually or legally impossible to commit.[167] You cannot murder someone that is already dead, but you can be charged and convicted of attempted murder instead.[168] In *R v White*[169], the defendant tried to poison his mother, but before the cyanide could take effect she had a heart attack and died of natural causes.

Impossibility occurs when, at the time of the attempt, the facts make the intended crime impossible to commit although the defendant is unaware of this when the attempt is made.[170]In *People v Lee Kong,*[171] the defendant was found guilty for attempted murder for shooting at a hole in the roof, believing his victim to be there, and indeed, where his victim had been only moments before but was not at the time of the shooting. Another case involving the defense of factual impossibility is *Commonwealth v Johnson*[172], in which a wife intended to put arsenic in her husband's coffee but by mistake added the customary sugar instead. Later she felt repentant and confessed her acts to the police. She was arrested, tried, and convicted of attempted murder. In *United States v Thomas*[173], the court held that men who believed they were raping a drunken, unconscious woman were guilty of attempted rape, even though the woman was actually dead at the time sexual intercourse took place.[174]

(v) **Legal impossibility**

An attempt is considered to be a 'legal' impossibility when the defendant has completed all of his intended acts, but his acts fail to fulfill all the required elements of a crime in common law.[175] An example of a failed attempt of law is a

[166] ibid.
[167] B Richard, et al, *Criminal Law* (Westbury 1997).
[168] 'Criminal Lawhttp://cw.routledge.com/textbooks/unlockingthelaw/content/Criminal-Law/private/course-notes/additional-chapters/CrimLaw_C015.pdf accessed 7 August 2019
[169](1910) 2 KB 124.
[170]G P Fletcher, *Rethinking Criminal Law* (Oxford University Press 2000) 149–151.
[171]95 Cal. 666, 30 P. 800 (1892).
[172]*Commonwealth v Johnson* 167 A. 344, 348 (Pa. 1933).
[173]*United States v Thomas* 13 U.S.C.M.A. 278 (1962).
[174] ibid.
[175] 'Attempt' <en.wikipedia.org/wiki//Impossibility defense' >accessed 20 December 2018.

person who shoots at a tree stump, believing that he is committing murder; that person cannot be prosecuted for attempted murder as there is no manifest intent to kill by shooting a stump.[176] The underlying rationale is that attempting to do what is not a crime is not attempting to commit a crime.[177] If the defendant acts or intended acts, if they were completed, do not constitute a crime under any circumstances, then the defendant cannot be charged with that crime.[178] For example, if the defendant thought that the act he is committing or attempting to commit was a crime, but under the state's laws it was not even an actual crime, the defendant cannot be charged with attempt.[179]

## 11.0 CONCLUSION

The essence of the crime of attempt in legal terms is that the defendant has failed to commit the *actus reus*(the Latin term for the 'guilty act') of the full offence, but has the intent to commit that full offence. The law on Attempt is justified because courts want to prevent harms, disruption and social instability. The old saying that prevention is better than cure holds true even in criminal law; hence there is need for criminal law to sanction attempt to serve as a deterrent or to discourage the commission of the full offence. Penalties and sentences for attempts should remain the same as committing the full offence.

The law of attempt provides a unique window of opportunity to timely restrain an actor who is attempting to commit a crime in order to protect and preserve the society from harm. The law of attempt intervenes readily in order to balance the society's right to be protected against danger and the accused person's right not to be prematurely arrested if he has not manifested, by overt acts, any intention he might have had in committing an offence.

[176] ibid.
[177] ibid.
[178] ibid.
[179] 'Defenses-to-incomplete-crimes'<http://www.legalmatch.com/law-library/article/defenses-to-incomplete-crimes.html> accessed 10 January 2019.

# THE ROLE OF THE JUDICIARY IN BUILDING A FOUNDATION OF CONSTITUTIONALISM IN AFRICA: A COMPARATIVE ANALYSIS OF NIGERIA AND UGANDA

**CHUKWUMA CHINWO, PhD* & DANIEL RUHWEZA, PhD****

**Abstract**

*African has passed through several phases in its political and constitutional evolution. The natural evolution of African States did not proceed in its course as a result of colonialism which brought together many disparate communities under one colonial state and administered them as one. On attainment of political independence it seemed no surprise that conflicts of interest and different interpretation of issues based on the Constitutions and laws of the new States arose. The judicial arms of Government in many African States, especially the Supreme Courts, rose up to the challenge but failed in some others where the laws and the Constitutions were interpreted to suit the fancy of the government. In this article, the authors examine the role the judiciaries of Nigeria and Ugandan played on several occasions towards the attainment of culture of constitutionalism where the powers of the government are limited and organized in line with the rule of law. They identify some specific issues on which the Supreme Courts of both countries have intervened with varying degrees of success and propose the philosophies or principles that should guide the judiciary in Africa in steering their nations on the path of constitutionalism*

**Keywords –** Judiciary – Constitutionalism – Democracy –Judicial Philosophy

## 1.0 INTRODUCTION

Africa has passed through several phases in its constitutional and democratic evolution from the decade of independence to the era of militarism and now in the era of 'democratic acculturation.' At every stage several personalities and institutional actors have played different critical roles in that evolution. As the continent tentatively moves towards the stage of growth on the foundation of rule of law, it seems necessary to examine the roles of different state actors towards the development of the continent and its component parts. The importance of this exercise, it seems, cannot be over-emphasized. If the nations of the continent would transit from the phase of the big and strong men who overwhelm the society to that

of strong institutions[1] in positions to serve all categories of persons in the nation without pandering to particular interests, each facet of the society must play its part. The judiciary is one institution from which all persons would expect commitment to this ideal. In this paper, using Nigeria and Uganda as case studies, we examine the position of the judiciary in advancing the spirit of constitutionalism and fostering and engraving the rule of law and its tenets in society.

This article is divided into the following parts: 1. African Nations and the Challenges of Democracy. 2. Constitutional Development in Nigeria and Uganda from Independence to Date3. Political and Constitutional Conflicts in Nigeria and Uganda from Independence. 4. Resort to the Courts and Decisions in Crucial Matters that affect the Constitutions. 5. Need for Guiding Principles ofJudicialism in African Constitutional Development; and 6. Conclusion.

## 2.0 AFRICAN NATIONS AND THE CHALLENGES OF DEMOCRACY

Democracy, once cryptically described by Winston Churchill as 'the worst form of government, except for those other forms that have been tried from time to time',[2] is virtually romanticized all over the world, particularly the Western world, as the best form of government. However, democracy is not without its problems. These range from its conception, foundation, form, structure, operation and substance in different nations. It seems that constitutionalism in its proper comprehension means little, if anything, without that form of government known as democracy, which was made popular by the Athenians of old. The operation of the concept of democracy in many nations across the world has made it impossible to relay or attribute its form of practice to the Athenians. If we understand democracy as referring to the system of government where political authority and power flow from the citizens and is exercised for their benefit, many ancient nations and people, including Africans, could lay claim to having been practitioners of it albeit to varying degrees and contents. In some societies the citizens actually dictated and still do dictate what happens, not as in a mob but in an orderly fashion with

*Chukwuma A.J. Chinwo, PhD, is a Senior Lecturer in Public Law at the Rivers State University, Port Harcourt, Nigeria and legal practitioner.Email:Chinwo.chukwuma@ust.edu.ng; cajchinwo@gamil.com.

**Daniel Ruhweza, PhD, School of Law, Makerere University, Uganda. Email:druhweza@gmail.com druhweza"law.mak.ac.ug

[1]The problem of the big strongmen and women vis-à-vis strong institutions have been one of the identified most persistent and enduring problems of Africa. During his visit to the continent in 2010 President Barack Obama of the United States while addressing the Ghanaian Parliament harped on the problem.

[2]In a speech in the House of Commons in 1947 quoted in *Book of Quotations* (Geddes &Grosset, 2004), 232.

identifiable lines or hierarchies of authority.[3] The distinguishing feature in such societies is that decisions ultimately lay with the majority of the citizens freely identifying with one line of reasoning or decision or the other.

Where the ultimate decision lay elsewhere than in the free majority of the people it has been difficult to accept such systems as democratic. The Athenians were famous for their town meetings where all free male citizens gathered to deliberate on issues and take decisions by show of hands.[4]Over time however, representative government evolved.[5] By this process, the generality of the citizenry elected from among them persons who were nominated or who presented themselves for such elections, to represent them in the decision-making organs of the city-states or nations. These representatives were mandated to present or represent the views of the people and vote on decisions on behalf of the people. Their actions were deemed to be those of all the people. In true democracies the people by law have great control on the tenure and conduct of their representatives. In nations where democratic practices are not real, on the other hand, the people have less control over their representatives. This is the unfortunate situation in many African countries. The representatives in such situations consider themselves more obliged and accountable to higher powers, which may have been elected by the generality of the people, but abuse the powers vested in them.

Efforts to make the term 'democracy' have an objective meaning have not been successful as it is still fundamentally a subject differing in its practical operation, if not conceptual appreciation, from one nation to the next and from one proponent to the other. When Abraham Lincoln was consecrating and dedicating part of the Gettysburg battlefield for the burial of American fallen soldiers he did not set out to engage in a dialectical or polemic endeavour on the definition of the word 'democracy', and he did not know that he would be so widely quoted, when he told his audience that the soldiers had been fighting and some of them had died and that all of the nations had resolved 'that this nation under God shall have a new birth of freedom and that the government of the people by the people for the people shall not perish from the earth'.[6] He did not even mention the word 'democracy' in

[3] In traditional Yoruba society in present day Nigeria, particularly the Oyo Kingdom, the people through the Oyomesi, the Senate of the Kingdom, had the power to remove the king not only from the throne but even from the earth by presenting to him a calabash as sign of their vote of no confidence and thereby require him to take his life.

[4] This method of decision making is still prevalent in many African communities and families.

[5] C Oputa, 'The Challenge of Democracy: The Welfare of the Governed; the Ultimate Challenge' (2000) in C Okeke (Ed.), *Towards Functional Justice: Seminar Papers of Justice ChukwudifuOputa*, (Ehuka Publishers 2007) 274-275. Oputa retired in 1989 as a Justice of the Supreme Court of Nigeria.

[6] In fact, he ironically said that 'The world will little note nor long remember what we say here, but it can never forget what they (the soldiers) did here'. SS Montefiore, Speeches *that Changed the World*, (QuercusPublishing Plc, London (2007) 50.

his address. 'Government of the people by the people for the people' has since become the most iconic yet simplest definition of democracy.

Several others have attempted to define the concept.[7]According to Oputa:

> Democracy does not express itself in clever manoeuvres by which a handful of men remain in power against the wishes of the electorate. Rather, it expresses itself in free and fair elections and the willing acceptance of the people. This is the democratic spirit.[8]

To William Brennan Jr, Associate Justice of the United States Supreme Court, the 'sparkling vision of the supremacy of the human dignity of every individual…is reflected in the very choice of democratic self-governance: the supreme value of democracy is the presumed worth of each individual'.[9]

The strong inclination to retain power in some leadership regimes has distorted the meaning of democracy as espoused by Abraham Lincoln,[10] which presents the United States of America to date as the most ideal representation and yardstick of democracy to the world. That is why President Barack Obama, the most unlikely candidate, as he put it, could emerge in the United States in 2008. And that is the challenge for Africa. The true participation of the people in the choice of their representatives and leaders is still an unrealized dream in many African countries.

Democracy founded on constitutionalism is, however, a practical reality only in a society where certain conditions are present. We may not fully elaborate on these conditions for want of space. They include:

(a) *Existence of Servant-Leadership Culture*

Lack of the servant-leader attitude has been one of the very banes of democracy in Africa.[11] It seems that a league of leaders on the continent desire dominance not of their environment for the overall betterment of its inhabitants, but for man and to bow and tremble before him. Most of the traditional government institutions in Africa are skewed in the direction of leaders as kings and lords and the people as servants. Attainment of political ascendancy in Africa by any means implies getting the status to 'rule'. This is the reason why elections a very important fulcrum on which democracy thrives being the most viable opportunity for the people to exercise their sovereignty, appear to be such a difficult task in most of

[7]Oputa(n 5) 177: Paper presented at a workshop of State House Press Corps in collaboration with the office of the Chief Press Secretary to the Head of State on 17 and 18 September 1997.

[8]ibid 178.

[9] W Brennan, Jr., 'The Constitution of the United States: Contemporary Ratifications', a speech given at the Georgetown University 12 October 1985.

[10]RAbati, 'Africa: A Continent Without Democrats' in *The Beacon* Friday March 9-15, 2018, back page. The Beacon is a Port Harcourt, Nigeria based weekly newspaper. Reuben Abati, a former Presidential Spokesman in Nigeria, is a renowned syndicated newspaper columnist.

[11]WMaathai, *The Challenge for Africa*(Arrow Books 2009) 24. See also Chinua Achebe, *The Trouble with Nigeria*, 1

African States. Public offices are seen as desperately sought-for opportunities to 'chop' and lord it over others.[12]

(b) *Educated or Enlightened Citizenry*

Illiteracy or the lack of enlightenment leaves room for deception, rumour and propaganda on which dictatorships thrive. For true democracy to thrive, it is therefore imperative to have a well, or at least fairly educated, population of citizens who have the ability to understand issues of constitutional or political rights and responsibility and appreciate their values to their survival.[13]

It may or may not be deliberate, but it seems that politicians understand that an educated citizenry will not be conducive and amenable to the kind of democracy they have to offer. That perhaps is why democracy is mostly abused in regions where education levels are low in Africa.

Another aspect of the issue of education as an important ingredient of democracy is the willingness and readiness to read. Unfortunately, the culture of reading seems very far from most African countries including Nigeria.[14] It actually appears that there is a direct relationship between the level of democratic advancement of a people and their reading culture. Even in the advanced countries, where reading culture diminishes, democratic culture also takes a nose-dive as the people show a lack of interest in matters that concern the advancement of the society. Voter education and mobilization is now a major electoral activity in the United States particularly among the minorities. Uneducated people can easily be manipulated by propaganda which thrives on unreasoning acceptance of falsehood and exaggeration. Social media has become a veritable platform for this kind of propaganda in Africa. However, the role of social media in advancing democracy cannot be under looked given the fact that it has facilitated creation of free spaces allowing tolerance of varying opinions checking dictatorship tendencies.

(c) *Good standard of living*

Low standards of living have played a major role as an enabling factor for abuse of the concept and practice of democracy. In the Twenty-First Century the level of the standard of living of the citizenry in each nation, especially in Africa, Europe and the Americas, seems to be almost directly proportional to the extent or level of true democratic practice and experience.

(d) *Citizen Participation*

[12]Many identify the lopsided benefits of political offices as the reason why politicians are desperate and would do all things including pursuing every matter to the Supreme Court, to gain office.

[13] 'Zik on Education' in *Zik: A Selection from the Speeches of NnamdiAzikiwe,*(Cambridge University Press 1961) 23-47.

[14] C Chinwo, 'Boko Haram as a National Culture Coming to Rivers State' in C Chinwo (edn)*Speak Up, Rivers State: Essays in Memory of MinereAmakiri,* (Life, Law and Grace Bookhouse 2011) 51; BONwabueze in his foreword to C Omehia, *Right to be Wrong,* (Author House 2011) xiii.

Active participation of the citizens in the choice of those who constitute the government and in issues of the terms and conditions of their service and tenure is an essential ingredient in true democracy. There is no democracy where the people are denied by hook or crook, as by rigging of elections, of the opportunity to participate in their government at any level. This has been rampant in nations like Nigeria and Uganda where the intervention of the military in the political system is well pronounced. Militarisation of politics has stifled realisation of basic tenets of democracy such as free and fair participation of all members in political spheres, in Uganda it is characterised by politicisation of the army and has manifested itself in nomination of members of the army into parliament hence entrenching the military in Uganda's political psyche. This makes the army susceptible to partisan tendencies. Elections in Uganda have been constantly marred with electoral malpractice and irreconcilable irregularities. Since 2006 the courts in Uganda have witnessed a rise in the number of presidential election petitions and have not been hesitant to dismiss them not on the basis of merits of the petitions, but on technicalities.

The ruling factions have consolidated their stay in power by monopolizing the political space. The Lack of organized political contest and open, free campaign platforms has been a leading characteristic of all post-1986 elections in Uganda[15] In countries like Cote d'voire, Cameroon, Kenya and Zimbabwe, while the military have never taken over government the incumbent governments have used them to emasculate the citizenry and perpetuate themselves in government. In November 2017 the military in Zimbabwe deftly escorted President Mugabe, whom they had propped up in office for 37 years, out of the Presidency of the country. In all these and other nations like Rwanda and Burundi the participation of the citizens has been reduced to those of hapless bystanders where they have not been corralled to personality cult worship and frenzied defenders of the incumbent irrespective of the effect of bad governance on them. Where citizens tend towards indifference and apathy as a result of 'a feeling of ineffectiveness in the face of anonymous forces that control their destiny… (t)he result may be … a decay in democratic vitality, even when democratic forms are preserved.'[16]

(e) *Equal Rights of all Citizens*

There cannot be true democracy where the citizens do not enjoy the same and equal rights in the same circumstances, irrespective of their differences in terms

[15]CN Bwana, 'Voting Patterns in Uganda's Elections: Could it be the end of the National Resistance Movement's (NRM) domination in Uganda's politics?', ***Les Cahiers d'Afrique de l'Est / The East African Review*** [Enligne], 41 | 2009, misenligne le 07 mai 2019, consulté le 09 octobre 2019. URL : http://journals.openedition.org/eastafrica/582

[16]*Encyclopedia Americana*, Vol.8 (2000) 685.

of race, gender, religion, social class or other differences.[17] A true democracy is one in which every citizen has the right to aspire to the highest and any office in the land and has equal rights with others to decide who can hold any office in free and fair elective processes. Even if the majority have their way the minority must be protected to have their say by their votes and not be victimised for it.

(f) *Protection of Minority Rights*

Democracy as a government by the people for the people must be alive to the rights of the minorities and not only protect majorities. It should seek to strike a balance between majority and minority interests. This allows tolerance of varying opinions and thus checks dictatorship tendencies.

The acceptance of the inviolable rights of minorities reduces the danger of dictatorship by the majority in a democracy.[18]The Ugandan Constitution has seen a shift towards an inclusive democracy. Inclusive not only to the majority but towards minority groups, recognizing women rights and the rights of disabled persons and affording all persons' equal protection under the law in the spirit of Article 21

(g) *Inherent Democratic Culture*

This is a corollary to the first factor identified above. Even where the Constitution of a nation is very explicit in its provisions to ensure true democracy, it will always be difficult to ensure true democracy where the politicians and the citizenry do not have a democratic culture. We may define democratic culture as that in which the people accept as a fact of life that everyone is entitled to his opinion and to exercise his right in the choice of the direction of the community provided that all will accept the decision of the majority freely exercised. This is why it is possible to say that a republic like Nigeria can have an undemocratic civilian government while a monarchy like Britain can be and is indeed a democracy.

Constitutional democracy in Africa has been difficult to evolve largely due to the absence of democratic culture. The tendency is still to urge everyone to say

[17] Section 42 of the Constitution of the Federal Republic of Nigeria (CFRN),1999 prohibits discrimination against any citizen on grounds of any of these factors. The Constitution of the Nigeria has been amended for the fifth time between 2010 and 2019. The authors have avoided the use of the term 'as amended' to describe it. It has been said that, being an organic document, the Constitution remains what it is even when amended. And amendment relates back to the date of the commencement of a statute including the Constitution. Thus the Constitution of the United States which has been amended over 30 times is still simply described as the 'Constitution of the United States of America'.

[18]CAJChinwo, 'Minority Protection through the Law: 1999 Constitution, Niger Delta and Resource Control', (1999) *5Property &Contemporary Law Journal (PCLJ)*133 –144; CAJ Chinwo (Ed) *Towards a Just Society Through Just Laws: Selected Papers of BM Wifa, SAN*, 'The Nigerian Federalism and the Niger Delta Crisis: Echoes of the Minority Question' (Fourth Dimension Publishing Co., Ltd. 2003) 148-175.

the same things and see everything the same way. Those who persist in their contrary views, which may be the objectively right views, are described as 'controversial', 'rebels', 'radical', 'unpatriotic' and 'saboteurs' to be ostracised or barely tolerated. Sometimes they are killed. That is why opposition or minority partisan politics has become an endangered occupation in Africa as a whole. The winners not only take all that belong to all but use the powers of government to take the things that legitimately belong to the losers for not being 'loyal' and belonging to the 'wrong' parties. Consequently, losing politicians are forced to sing new songs after elections and abandon their parties to join the winning party while those who swore to defend the Constitution of the nation gleefully receive them and commend them for realising their 'mistakes'.

(h) *Culture of Integrity in Public Life*

A public and political culture where corruption of all kinds, including lack of respect for laws, disobedience of court decisions, flouting of rules and regulations by political leaders and abuse of powers, is absent is one that is conducive to democracy. Corruption does not thrive in a true democracy[19] and a corrupt system does not encourage democracy notwithstanding the pretention of political leaders to democratic credentials. Such a system does not have accountability by public office holders as a valuable proposition. Rather government and its resources, including public offices, are personalised and the political office holders use and abuse them more than they would abuse their personal resources. Patronage is the accepted practice of such a government and there is no sector that is not touched, so that even such serious offices as judgeship are given out to persons on that basis whether they deserve it or not. This type of politics is often described as pre-banal, that is based on patronage rather than merit and fairness. Everyone is either 'settled' (compromised) for being loyal or unsettled for daring not to see the political leader as God-sent or even a demigod.[20]

(h) *Respect for Fundamental Human Rights*

A true democracy is one in which the fundamental human rights of citizens are not only spelt out in the organic law, where it is written, but given primary and paramount place in practice.[21] In Uganda, the road to create a true democratic state

[19]The World Justice Project 2019 highlights key areas which include absence of corruption.This is gauged on how government officials in the executive, judiciary, police and military, legislative interract with public offices.*World Justice Project*(2019) 11.

[20]KayodeEso, retired Justice of the Supreme Court of Nigeria discussed the issue in his treatise, 'Leadership, Democracy and Corruption: Snapshots from Nigerian Constitutional History', in K Eso, *Thoughts on Human Rights and Education, (*St. Paul's Publishing House 2008) 1-55; See also ChukwudifuOputa, 'The Challenge of Democracy: The Welfare of the Governed; the Ultimate Challenge', in C Okeke(n 5) 273-278.

[21]KayodeEso, 'Human Rights in Nigeria in the 60th Year of the Universal Declaration of Human Rights', in K Eso, (n20) 258-311: See also CFRN 1999, s 46 and the Fundamental Rights Enforcement Procedure Rules 2009.

has been met with very strong opposition varying from corruption and election malpractice to intimidation and dictatorships that have no regard for constitutional provisions resulting in gross human rights violations. However, under the Constitution of the Republic of Uganda,1995 (as amended), the courts are empowered to enforce the rights and freedoms of the citizens and also compensate victims. These constitutional provisions have been consolidated by the enactment by Parliament of the Human Rights Enforcement Act which creates personal liability for perpetrators of human rights violations. Provisions allowing for derogation from human rights should, however, be cautiously approached limiting their derogation in a manner acceptable and demonstrably justifiable in a democratic society as espoused by Twinomujuni JA in the case of *Charles Onyango Obbo and Andrew MujuniMwenda v Attorney General*:[22]

> …they must not be arbitrary, unfair or based on irrational considerations…they should impair as little as possible the right or freedom in question…and there must be a proportionality between the effects of the measures which are responsible for limiting the charter right or freedom and the objective which has been identified as of sufficient importance.

(i) *Patience and Moderate Expectations*

Democracy has a better chance of survival and growth in a society where the politicians and the people are patient and moderate in their expectations. Where all the politicians desire to be in government at the same time and do everything they can to discredit those who succeed ahead of them and the people expect too much from the government and thus get too quickly disappointed when the government fails to deliver what it may not have had the resources or the capacity to deliver in any event, the chance of survival of democracy is slim. In some cases, democratically elected leaders cash in on this and blame democratic structures like the parliament, opposition political parties or the judiciary for their inability to perform as expected. They move the people to support them in dismantling the constitutional democratic structure and institutions. This has happened often in Uganda, as was the situation in Zimbabwe under Mugabe that led to the military interventions. In Nigeria, well-known democracy advocates called for military intervention between 1982 and 1983 only to be disappointed with the return of military dictatorship with adverse effects on constitutionalism in the country. It appears to be the method of the present government in Nigeria which has attacked

[22]Constitutional Petition NO.15 of 1997.

both the judiciary, including the Supreme Court, and National Assembly and almost successfully demonised them in the eyes of the people.

The opposite of democracy is totalitarianism, be it by a monarch, military despot or a civilian dictator. It must be noted that the absence of democracy is not an exclusive African or black race challenge. Advanced societies, as shown in Russia and China, are as vulnerable to despotic authoritarianism as any other human society. It is also clear that there is no systematic uniformity on the practice of democracy even within the same society at any given point of its history.[23]

There is, however, no doubt that Africa can do with a greater dose of true multi-party, diverse-opinions democracy as the situation in Ghana and some other nations is giving hope. There had been some promising signs in Nigeria exemplified by the willing acceptance of defeat and congratulation of the winner by a sitting President, Dr. Goodluck Jonathan, in a poll that was hailed to be relatively credible.[24]

On occasions where the politicians and other persons and institutions involved have failed to live by the tenets of democracy, the courts, especially the Supreme Court, have risen up to the democratic demands of such occasions to ensure that democracy is upheld at least substantially.[25]

## 2.0 CONSTITUTIONAL DEVELOPMENT IN NIGERIA AND UGANDA FROM INDEPENDENCE TO DATE

The constitutional development of a nation usually follows the trajectory of its political development. That has been the pattern in Africa and developments both in Nigeria and Uganda are typical. Both nations were colonised by Britain and did not have to go to war to attain independence. In each of the nations, constitutional development can be categorised into pre-colonial ethnic, colonial amalgamation of ethnic groups, immediate post-colonial national, military and post military. The various indigenous communities had their forms of democracy and had principles and rules by which their political leaders such as chiefs and others in authority emerged and by which their powers and actions were limited in their scope and extent. They we duly sanctioned where their exercise of power amounted to abuse. The colonial era government was, however, not structured to give

[23]Abdullahi An-naim of Emory State Law School, Atlanta, Georgia, U.S.A., in a lecture titled 'The Incremental Success of African Constitutionalism and the Challenges of Consolidation and Maturity' delivered at the 2006 Annual Conference of the Nigerian Bar Association held in Port Harcourt, Nigeria, p.5 of the Conference papers.

[24]Unfortunately, the Presidential and Governorship elections held February 16 and March 9, 2019 proved that the Commission maintained consistency in failure to deliver a credible election. The election was condemned by local and international observers as being less than acceptable standards. Two weeks after the Governorship election it could not conclude and declare the governorship results in many States including Rivers State where the ruling party at the center was losing.

[25]*Olofu v Itodo*[2011] All FWLR (Pt. 572) 1637, 1660 A-C.

paramount place to the rights of the natives nor was the power of the colonial governments limited except to the extent that it was not to go contrary to any law of England or the directions of the colonial government.

These omissions of fundamental concepts of constitutionalism and democracy led to the agitations for political independence in most of the countries of Africa. The advent of the 2nd World War and the proclamations of the Allied Powers, including Britain and France, that they were fighting for constitutionalism and the rights of their people stirred up or escalated the agitations for constitutional development towards the attainment of independence. Before it attained independence, Nigeria had many attempts at making constitutions for the nation in 1922, 1946, 1951 and 1954. The 1960 Independence Constitution, made under the supervision of the colonial masters, ushered in the political independence in October 1, 1960. Uganda also had its own process of constitutional development which followed a similar trajectory like that of Nigeria. In response to agitations by nationalists for political independence the colonial government made constitutions in 1966, 1967 and 1971. The nation attained independence 9 October1962, by virtue of the Independence Constitution of 1962.

Nigeria and Uganda, however, soon sought to assert their true independence by devising constitutions that suited them. They did not accept the independence constitutions made under the supervision of the British as autochthonous and meeting the needs of the emergent nation.[26] The political upheavals in Western Nigeria led to the repeal of the Independence Constitution in Nigeria and abrogation of the ceremonial monarchical status and assumption of republicanism.[27] In 1966 the government of Uganda which was a parliamentary one changed the Constitution. The Prime Minister transmuted to President with full executive powers. The issue confronted the Supreme Court of Uganda and it fell on the Court to hold that what happened gained legitimacy by its success and acceptance.[28]

Beyond the immediate post-independence era the military soon overthrew the governments in Nigeria and Uganda in 1966 and 1968 respectively. Those were eras in the two nations when the judiciary existed and functioned only to the extent they were permitted. When the Supreme Court of Nigeria tried to give the

[26]CAJChinwo, 'Constitution Making, Constitutional Governance and Constitutional Behaviour in Nigeria' *(*2007) 2(1)*Ebonyi State University Law Journal*85; CAJ Chinwo, 'The Problem of Autochthony in Nigeria's Constitutional Democracy' (2019) 2(1) *Yenagoa Bar Journal* 1.

[27]*Adegbenro v AG Federation* (1962) All NLR 337; *Adegbenro v AG Federation* (1962) All NLR 428; *Adegbenro v Akintola*(1962) All NLR 411; *Adegbenro v Akintola*[1962] 1 All NLR 465;*Akintola v Aderemi*(1962) All NLR 458, FSC were some of the cases that arose from that crisis which confronted the judiciary in Nigeria and the Privy Council in England.

[28]*Uganda v Commissioner of Prisons, Ex Parte Matovu* [1966] EA 514 at 535 (Uganda). Similar issues arose in *The State v Dosso* [1958] 2 PSCR 180 (Pakistan) and *Madzimbamuto v Lardner-Burke* [1969] AC 645 at 724, 725 (Zimbabwe, formerly Rhodesia).

impression that there was any other authority beyond the military in the case of *Lakanmi v Attorney-General of Western Region*,[29]the Military Government of Nigeria came out blazing and enacted a decree that put it beyond question that what happened in 1966 was a revolution and derived its legitimacy not from the overthrown Constitution.[30] Years later, the Supreme Court admitted that it was wrong. According to Uwaifo, JSC, speaking in the Supreme Court thirty-one years later:

> This court proceeded on an assumption which turned out to be unacceptable to the Military Government, namely that what took place in Nigeria in 1966 was not a revolution. It must now be conceded, I think, that it was obviously a presumption, factually and legally, which other jurisdictions would find difficult to make…It seems it must be acknowledged that when there is a successful abrupt change of government in a manner not contemplated by the Constitution, a revolution is deemed to have taken place. It follows that if such change was brought by the military, it is a military revolution, even if it was a peaceful change.[31]

The efforts of the Supreme Court of Uganda to assert its position and uphold the sanctity of the rule of law was fatal, especially during the era of Idi Amin that ushered Uganda into the age of militarism and unprecedented brutality. Amin made vast constitutional changes with many having adverse effects of stifling operation of the judiciary; the courts having their hands tied by bad precedent could only justify Amin's actions. The trend continued throughout Amin's reign. In 1971 with the issuance of a legal decree various human rights were significantly curtailed and the power of the judiciary limited.[32] This resulted in numerous human rights violations, extra judicial acts and disregard for human life; it was in this period that a judge was daringly kidnapped from his High Court chambers and murdered,[33] this trend had far reaching effect beyond just the judiciary as prominent religious leaders also met

[29]*Lakanmi v Attorney-General of Western Nigeria* [1971] 1 UILR 201.
[30]Federal Military Government (Supremacy and Enforcement of Powers) Decree, No. 28 of 1970.
[31]In *Attorney-General of the Federation v Guardian Newspapers Ltd* [2001] FWLR (Pt. 32) 87 at 124-125.
[32]These decrees were characterised by limitations on basic rights such as liberty, involving in political activities, limitations placed on legal remedies for accused persons for instance section 5 which denied a person under the decree any action or any legal remedy of a civil nature arising out of the detention or anything done to them during such detention. Kanyeihamba at page 124-125(Decree number 14 of 1971).
[33]Justice Ben Kiwanuka

their death at the hands of a tyrannical regime thus a total breakdown of the rule of law.

Unfortunately, this status quo has subsisted even after the enactment of the1995 Constitution where democracy moved from inclusiveness to decay especially in the period of 1986-2003 where the multi-party system had been subdued. Even though 'political parties were normally allowed to exist, they could not practise party politics outside their own party headquarters thus all citizens declared as members of one non- partisan block called the National Resistance Movement'[34].

## 3.0 POLITICAL AND CONSTITUTIONAL CONFLICTS IN NIGERIA AND UGANDA FROM INDEPENDENCE

It is in the nature of politics, being an important aspect of human relations which involves the meeting of all sorts of interests, that disputes would arise. Even when a nation has documented the aspiration and decision of the people to live together and the terms and conditions for that in a Constitution, many factors result in disputes. Some of them are genuine and would require disciplined and altruistic approach to resolve while others may be driven by less than altruistic motives. No society can afford to ignore such conflicts. In many African countries, including Nigeria and Uganda, political and constitutional disputes have ranged from issues of the political structure, political offices and tenure, revenue allocation, resource use, elections, human rights, intra and inter party conflicts and so forth. It is our view that the survival and thriving of African nations would not depend on the absence of these conflicts, as no society is immune to them, but in the imaginative and effective handling of the conflicts when they arise.

Many of these conflicts have had their root in breach of the principle of separation of powers by the fusion of the various arms of government making it impossible to judiciously reach amicable decisions without necessarily infringing on the interests of another institution. This has been the case in Uganda where the distinction between powers vested in the judiciary and the executive have taken an amorphous form;[35] for instance the executive condemning the courts power over granting bail to suspects.[36]

[34]https://www.cmi.no/publications/file/6434-the-Impact-of-Elections:-The-Case-of-Uganda.pdf''

[35]Uganda Law Society,'The State Of Rule Of Law In Uganda; Second Quarterly Report'' (April-June 2018)

[36] http://www.monitor.co.ug/News/National/State-of-the-nation-address-2018/688334-4598544-view-asAMP-4v6tglz/index.html

## 4.0 RESORT TO THE COURTS AND DECISIONS IN CRUCIAL MATTERS THAT AFFECT THE CONSTITUTIONS

When conflicts arise attempts are made to solve them by different means. The means have included organising of political and constitutional conferences, resort to international organisations at regional or global levels, engagement of statesmen and leaders of other nations or officials of internationalorganisationswho conduct mediatory interventions. Where these fail, short of going to war, which results in very deadly consequences, the other means of resolution is resort to Courts.

The Courts in Nigeria and Uganda have been involved in the resolution of many political and constitutional conflicts and, by that, made very critical contributions towards developing a culture of constitutionalism in the nations. While not all disputes have been taken to the courts and the people have led their lives without conflicts on most of the provisions of the Constitution and other laws, the intervention of the Courts, by means of interpretation and decisions based on the interpretations, have in many cases strengthened the evolution of the culture of democratic constitutionalism in the nations.

The judiciary, and ultimately, the Supreme Court, has intervened to ensure that:

(a) Political parties respect their settled process as stipulated by the Electoral Act such as affirming result of primary elections and avoiding arbitrary substitution of candidates by party leaders who do not respect the democratic process.[37]

(b) The candidate with the majority of credible and verified votes is returned as the winner even where the Electoral Commission had declared the wrong party.[38]

(c) The expressed will of the electorate is not subverted by rules, systems and mechanisms introduced by the Electoral Commission outside the provisions of the Constitution and or the Electoral Act.[39] It has also ensured that elections are not just overturned on mere technicalities where the petitioner is not able to substantiate his claims and allegation up to the required standard of proof.[40]

[37]*Ugwu v Araraume* (2007] All FWLR (Pt.3777) 807; (2007) 12 NWLR (Pt.1048) 365; *Amaechi v Independent National Electoral Commission* [2008] All FWLR (Pt. 407) 1; (2008) 5 NWLR (Pt.1080) 277.

[38]*Osunbor v Oshiomole* (2009) All FWLR (Pt. 463) 1363; *Agagu v Mimiko* (2009) All FWLR (Pt.462) 1122; (2009) NWLR (Pt. 740) 342.

[39]*Independent National Electoral Commission v Musa* [2003] FWLR (Pt.145); *Nyesom v Peterside* [2016] All FWLR (Pt.842) 1573; *Emmanuel v Umanna*[2016] All FWLR (Pt.856) 214.

[40] See the following(Buhari) cases: *Buhari v Obasanjo* [2003] FWLR (186) 709; [2003] 17 NWLR (Pt. 850) 587; *Buhari v Obasanjo* [2005] All FWLR (273) 1; [2005] 13 NWLR (Pt. 941) 1; *Buhari v Yusuf* [2003] FWLR (Pt. 174) 329; (2003) 14 NWLR (Pt. 841) 446; *Buhari v INEC* [2008] All FWLR (459)

(d) Duly elected political office holders are not removed from office contrary to the constitutional or democratic process and procedure such as impeachment by the representatives of the people in the legislature in a duly constituted manner following due process and in the right time and place.[41]

(e) The expectations of the people in electing public officials into public office for the period stipulated by the Constitution are not scuttled by any malfeasance by the Electoral Commission or mischievous opponents who abuse the system.[42]

(f) The democratic process is not stressed and perturbed by the activities of busybodies, sometimes engaged in proxy wars, out to scuttle the process based on one motive or the other.[43]

(g) Unnecessary technical construction or crass legalism does not create tensions in the political system by following methods of interpretation that ensure the stability of the society and attain the ultimate aspiration of the law makers.[44]

---

419; [2008] 19 NWLR (Pt. 1120) 246; *Yusuf v Obasanjo* [2005] 18 NWLR (pt. 956) 96; [2006] All FWLR (Pt.294) 387. It is humbly submitted that the situation in the Buhari cases were far from the case in *Odinga v Kenyatta* (2017) in Kenya in which the Supreme Court of Kenya on September 1, 2017, nullified the Presidential election. In that case the burden of proving that the Electoral body complied with the statute was statutorily on it and yet it refused, notwithstanding demands, to produce the electoral materials it claimed to have used in the election which the petitioner made an issue. Again, the Supreme Court has original jurisdiction in the case. In Nigeria, the burden of proving any irregularity is on the one alleging and the Supreme Court exercises an appellate jurisdiction and as such hears matters only on the record of appeal before it. On Wednesday September 11, 2019, the Court of Appeal, sitting at first instance, dismissed the petition of AlhajiAtikuAbubakar and his Party against the election of President Muhammadu Buhari in the February 23 2019 general election held in Nigeria on the ground of failure to prove his allegations beyond reasonable doubt. This, however, is not discountenancing that the decisions of the Court may be influenced by some of other factors. See generally CAJ Chinwo, *Influence of the Supreme Court in the Political Development of Nigeria from 1963 to 2018,* PhD thesis submitted at the Rivers State University, Port Harcourt Nigeria in March 2019, Chapter 4.

[41]*Adeleke v Oyo State House of Assembly* [2007] All FWLR (Pt.345) 211; *Inakoju v Adeleke* [2007] All FWLR (Pt.353) 3; *Obi v Independent National Electoral Commission* [2007] All FWLR (Pt.378) 1116; (2007) 11 NWLR (Pt. 1046) 565.

[42]*Obi v Independent National Electoral Commission*(n42).

[43]*Egolum v Obasanjo* (1999) 7 NWLR (Pt. 611) 355.The Babangida military Government in 1993 relied on actions filed by clear busy bodies such as Arthur Nzeribe's Association of Better Nigeria (ABN) and decisions taken by some unscrupulous Judges of the High Court to scuttle the transition program which had reportedly gulped over N40 billion and put the nation through an unending cycle of uncertainty which the Federal Government appeared, under thin veil, to be encouraging or at least conniving at.

[44]*Awolowo v Shagari* [1979] 6-9 SC 51; N.B. Graham-Douglas, *'The Judicial Process Today: Constitutional Interpretation',* paper presented at the Sixth Commonwealth Law Conference, Lagos, p.46. For a discussion of that case and the issues of interpretation behind it see BMWifa, 'The Electoral Process and Judicial Responsibility in the Nigerian Society' paper delivered at the Nigerian Bar Association, Port Harcourt Branch Law Seminar in August, 1989 published in CAJ Chinwo (Ed),

These decisions had affected the political direction of the nation. In a few cases the legislature has made attempts to overturn the effect of the decision. For instance, the decision in *Amaechi v INEC*[45] which had the unprecedented and unusual effect of allowing a candidate for an election, who had his party's ticket but was prevented from running in the general election, being ordered to be sworn in while the person who did not contest in the party primary but was the party's candidate in the general election and won the election was thrown out, has been changed in the Electoral Act 2010. By the Act, no court can declare any candidate duly elected if he did not undergo the entire processes involved in the election.[46]

The judiciary in Uganda has also made similar interventions. However, there has been more activity in the legislative front where there have been electoral reforms in specific areas that have on previous occasions led to unsatisfactory and questionable outcomes from elections at all levels in the country.[47] This is mainly to ensure that all candidates enjoy equal protection under the law. Thus, these amendments have been given force of law in the passing of the Electoral Law and are to apply in the forthcoming 2021 elections.[48]

## 6.0 NEED FOR GUIDING PRINCIPLES OF JUDICIALISM IN AFRICAN CONSTITUTIONAL DEVELOPMENT

What are and what should be the guiding principles for the judiciary in the interpretation of the law in political and constitutional matters. It is always necessary to identify the theoretical or philosophical foundation – the *principium* – behind action especially one that has impact not just on the immediate persons involved or for the moment. Every judgment of a Court, especially those of a superior court of record, more particularly on a political and constitutional matter, is foundational and impacts much more than the parties before the court.

The Courts in Nigeria and Uganda have not yielded to temptation of surrendering without firing any shot whenever any matter raises the so-called political question. It has been said that political question doctrine is 'potentially the widest and most radical avenue of escape from adjudication'.[49] While the courts

*Towards a Just Society through Just Laws* (Fourth Dimension 2003) 176, 191-196. See generally GbengaOjo, 'The Role of Supreme Court in Sustenance of Democracy in Nigeria' in OA Ikedinma (Ed) *The Role of the Judiciary in Nigerian Democratic Process, Essays in Honour of Sir, Hon. Justice Iche N. Ndu*(Vox Nigeria Ltd, 2008) 362.

[45] (n38).

[46]Electoral Act 2010, s 141(3)The provision is now section 285 (13) by virtue of the Constitution of the Federal Republic of Nigeria (Fourth Alteration) Act.

[47]Prof. Frederick E.Ssempebwa, SC, Prof. *Frederick W Jjuko and Kituo Cha Katiba v Attorney General* 2019

[48]These reforms are set to materialise with the passing of the Electoral Commission (Amendment) Bill of 2019 containing all reforms advocated for in the past regimes.

[49] AM Bickel, in his Foreword: 'The Passive Virtues' to 'The Supreme Court 1960 Term' in the *Harvard Law Review*, (75) 40, 45. According to the learned Professor, 'The explanation is that when the Court

should not be too eager to jump into the fray of political issues, it is submitted that in a developing democracy it would be wrong for the acknowledged body of learned men and women trained in the art of interpretation and resolution of disputes to shirk the responsibility of interfering to bring about at least a ceasefire when the desperate politicians begin to throw around fire flints in an environment soaked with highly inflammable liquids of rumour, ignorance and deceit. Political question has been described as controversies that can or should only be settled by the avowedly political branches of government particularly between segments of governments.[50]

Some political questions raise serious issues of legal rights and obligations sometimes going to the foundation of the nation. Such questions get to the Courts and it is necessary that the Courts should attend to them at least at the highest level where definite pronouncements can be made to guide all the actors and interested parties. It has been suggested that this genre of cases should rather be described as 'constitutional cases'. This is because:

> ...in the constitutional case, it is always a "can't help" that is involved; there is always a conflict in ultimate values present, making inevitable a judicial choice between competing goals. … All constitutional questions being polycentric,[51] they can be approached only by facing the unavoidable requirement of valuations and value-judgments, and never by an impossible effort to evade them.[52]

'Constitutional'[53] adjudication in the lower courts is not the equivalent of what can be had in the Supreme Court. It lacks the general authoritativeness. And judgment, even as it affects the immediate litigant, is constrained'[54] It is the Supreme Court that either in its original or appellate or constitutional question reference jurisdiction that is most usually confronted with the political cases and necessarily has to take the final and authoritative decisions on the issues.

---

(U.S. Supreme Court) declines jurisdiction of a case as "political" or when, having taken the case, it declines to adjudicate the merits of a particular case on the same ground, what it does, in conformity with *Marbury v Madison* is to render a constitutional adjudication that the matter in question is confided to uncontrolled discretion of another department'

[50] AS Miller, 'A Note on the Criticism of Supreme Court Decisions' (1961) 10 *Journal of Public Law* 139, 146. Further discussions on the Doctrine of Political Question can be seen in HM Seervai, *Constitutional Law of India: A Critical Commentary* (Third Edition, NM Tripathi Private Ltd, Bombay, Sweet & Maxwell Ltd) 2205-2215.

[51] 'A polycentric question is one which one or more is involved than consequences for the value position of the two private individuals. It permeates into and is derived from the very interstices of society.' Miller (n 51) 146.

[52] Miller (n 51) 146-147.

[53] Political cases invariably raise constitutional issues.

[54] Bickel (n 40) 46.

Constitutions have been stated to be more of political than legal documents but the legal issues are fundamental.[55] In interpreting them the Courts should be guided by some principles. The principles may bring to focus consideration of the legal theories. There is no doubt that the view of the legal positivist would be different from that of the realist or of an adherent of the sociological, historical, economic/Marxist, natural. It may also affect how a judge views what is in line with constitutionalism, especially if he is not a text originalist who is stuck to the literal content of the law.

The views of Lord Denning and those of Oliver Wendel Holmes or Antonio Scalia as to what is consistent with constitutionalism would definitely differ as they belong to different schools. It may also determine the question in several nations of Africa including Uganda and Nigeria. In Nigeria for instance, it is certain that the view of constitutionalism by Chief Justices Ademola and Elias, who were decidedly positivist and conservative, was different from those of Justices KayodeEso and ChukwudifuOputa, both liberal and activist judges. Thus the school of thought of the place, function and nature of law and of the Courts often influence the contribution of the courts to the evolution of constitutionalism in any nation's legal system.

It is however, our view that in the developing nations of Africa, including Nigeria and Uganda, the following principles should guide the Courts:

1. Preservation of the unity of the Nation: The constitutions of virtually all the African nations place emphasis on unity of the different people that make up the nation and have provisions intended to preserve and protect unity in their diversity.[56]
2. Guaranteeing of the rights of the citizens of the nation – Acknowledgment of the sovereignty of the nation being in the people should mean that the Courts should give ascendancy to the rights of the citizens except to the extent that such rights are derogated from by the Constitution itself. Sometimes the Courts tend to be too pro-government and power and fail to acknowledge that the security of the rights and welfare of the citizens is the primary and paramount purpose of government.[57]That, in our view is a disservice to the Constitution. Constitutionalism would be enhanced if the rights of the people are protected by the Courts. This is reflected in the

[55] BO Nwabueze, *Constitutionalism in the Emergent States,* (C Hurst and Company 1973)
[56] See Kenyan Constitution 2010, Clause 3; Preamble and ss 7(3)(a) and 10; Constitution of the Republic of South Africa 1996, s 1.
[57]CFRN 1999, s 14(1) & (2).

Supreme court decision of Uganda in the matter between *CEHURD and others v The attorney general*.[58]where the court opined that:

> Under the Constitution of Uganda, when a person claims that anything done under the authority of any law or any action or inaction on the part of any person or authority is inconsistent with or in contravention of the Constitution, the constitutional court is the appropriate court to determine whether the person's claim has substance or not. Therefore, the constitutional cannot abdicate this duty by declining to entertain a petition filed under article 137[59] of the Constitution on grounds that the matter will be infringing on the discretionary powers of another organ of the State.

The courts have striven to maintain strict adherence to provisions of the Constitution relating to affording the citizens protection under the law despite pre-existing technicalities involved in dispensing such justice.

3. Give all Persons Free Access to the Courts to Ensure Constitutionalism – In *Adesanya v President of Nigeria*,[60] the Chief Justice of Nigeria after holding that:

> In the Nigerian context, it is better to allow a party to go to Court and be heard than to refuse him access to our courts. Non-access, to my mind, will stimulate the free-for-all in the media as to which law is constitutional and which law is not. In any case, our courts have inherent powers to deal with vexatious litigants on frivolous claims. To re-echo the words of Learned Hand, if we are to keep our democracy, there must be one commandment – thou shall not ration justice…

curiously, in our view, went on to hold that a Senator of the Federal Republic, who challenged the constitutionality of the appointment of a person to a constitutionally-created office for not conforming to the provision of the Constitution, had no *locus standi*. And that decision is considered the *locus classicus* on *locus standi* in Nigeria! We submit that

[58]Constitutional Appeal No 01 of 2013.
[59]Article 137 of the Constitution provides for procedures to be followed as to questions requiring interpretation by the constitutional court on behalf of the citizens.
[60][1981] All NLR 1, 24.

such an inexplicable conclusive or the ultra-conservative stance of some of the other justices on the panel, such as Sowemimo and Bello, JJSC, both of whom later became Chief Justices, frustrates every effort of citizens to contribute towards moving the society on the path of democratic constitutionalism.

It is humbly suggested that the position in Ghana is worthy of commendation for African nations. The Constitution of the Republic of Ghana provides:

> (1) A person who alleges that - (a) an enactment or anything contained in or done, under the authority of that or any other enactment; or (b) any act or omission of any person; is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.
>
> (2) The Supreme Court shall, for the purposes of a declaration under clause (1) of this article, make such orders and give such directions as it may consider appropriate for giving effect, or enabling effect to be given, to the declaration so made.[61]

4. Social Engineering or Balancing of Interests for Justice – The Sociological theory of law as led by Roscoe Pound emphasizes the social engineering role of the law by means of the balancing of interests of the individual's citizen vis-à-vis those of others and of the wider society. It is our view that the realist view that the prophecies of what the Courts would do and nothing more pretentious being the law would have greater efficacy in African society where the Courts take seriously as a guiding principle the need to always balance the interest of parties for the sake of securing respect of their interests while ensuring that laws and actions justifiable in a democratic society (a) in the interest of defense, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom or other persons; are upheld.[62]
5. Limiting of Government – The Courts must, not by arbitrary means or ultra-activist intervention but by the bold interpretation and application of the Constitution, ensure that as long as the Constitution endures dictatorship does not emerge in the society. When a Court holds, as Uwaifo JSC did in *Attorney-General Lagos State v Attorney General of the Federation*,that

[61]Constitution of Ghana, s 2.
[62]CFRN 1999, s 45.

> 'the President exercises powers under the Constitution. They are, without dispute, awesome powers but even so they have known limits. The exercise of the powers is kept within bounds by the intervention of the rule of law,'[63]

it is upholding the separation of powers. In a Federation, the Court should ensure that all the legislatures, including the national legislature, restrict themselves to the scope and extent vested in them by the Constitution. The Supreme Court of Nigeria has done commendably well in this regard. It has since the commencement of the Constitution in 1999 been watchful to ensure that the federal legislature does not exceed its limits especially against the background of the nation's emergence from over sixteen years of unitary military governance.[64]

Similarly in Uganda the courts have tried adhesively to limit arbitrary exercise of the legislative function mainly relying on the principal of constitutional supremacy.[65] The court has tended to strike out unconstitutional legislation.[66]

## 6.0 CONCLUSION

We make bold to say that Africa cannot enjoy sustainable and credible democracy if there is no effective operation of constitutionalism.[67] And the culture of constitutionalism would not hold firm if the judiciaries in the different nations of Africa do not determine to hold the executive and the legislature accountable and subject to the Constitution. The fear of the judiciary is the beginning of constitutionalism in any nation. It is therefore our submission that the judiciary is critical to the building of the foundation of democratic constitutionalism in Africa.

---

[63][2005] All FWLR (Pt. 244) 805 at 877.

[64]*Att.-Gen., Abia State v Att.-Gen., Federation* [2002] FWLR (Pt.101) 1419; *Att.-Gen, Abia State v Att.-Gen., Federation* [2006] All FWLR (Pt. 338) 604; *Attorney-General of the Federation V Attorney-General of Abia State* (2002) FWLR (Pt. 102) 1; *Attorney-General of Lagos State V Attorney-General of the Federation* [2003] FWLR (Pt. 168) 909; *Attorney-General of Lagos State V Attorney-General of the Federation* [2005] All FWLR (Pt.338) 604, etc.

[65]Article 2 of the Uganda Constitution of 1995 provides that the Constitution is the supreme law of the land and shall have binding force and any law or custom inconsistent with any provision of the Constitution, the Constitution shall prevail.

[66]*Attorney General v Osotraco Ltd* 2002. This case challenged the validity of section 15(1)(b) of the Governmentproceedings Act arguing that it was innconsistent with the provisions of the Constitution. The court held that "the Constitution has primacy over all other laws and the historic common law doctrines restricting the liability of the State should not be allowed to stand in the way of constitutional protection of fundamental rights''

[67] See generally CJDDakas, *From Constitutions to Constitutionalism: A Constitutional Imperative in Nigeria* (Nigerian Institute of Advanced Legal Studies 2013).

The efforts of the apex Courts in Nigeria and Uganda are commendable but we acknowledge that the extent of operation of the multiparty systems in the two countries does affect the extent the courts go for interpreting the Constitutions. The judges, no matter how bold and activist, are still bound by the express provisions of the Constitution. There must therefore be a determination in the people, the press and the politicians in particular to see that constitutionalism is operative in each nation. We see a direct relationship between the growth and stability of nations with the extent they are known for democratic constitutionalism.

# BOKO HARAM'S ABDUCTION OF THE CHIBOK SCHOOLGIRLS IN NORTH EAST NIGERIA: FROM INSURGENCY TO CRIME AGAINST HUMANITY

**O A OLASEENI, PhD*& M O MIMIKO, LLM****

**Abstract**

*Despite the humanitarian and security challenges which the Boko Haram terror activities in North East Nigeria posed for those directly affected by them, events following the abduction of the more than200 schoolgirls from their hostel in the Government Secondary School, Chibok, Borno State, on 14 April 2014, also raised a new question for international humanitarian law, relative to crime against humanity. Without dealing with the specifics of the Boko Haram's terror activities in North East Nigeria, this article examines the criminal responsibility of the sect for crime against humanity, the obligation of the State to punish those liable for crime against humanity and the principle of universal jurisdiction by which the international community can assist Nigeria to defeat terrorism, among others. However, the article first situates the abduction of the schoolgirls within its historical contexts.*

## 1.0 INTRODUCTION

It is no news that, since 2009, the popular *Boko Haram* sect has been unleashing deadly terror attacks onmilitary and police installations, and carrying out senseless killings of innocent civilians in north east Nigeria. However, while the sect's terror wars endured unabated till today, it added a serrated edge to its terror wars in north east Nigeria by shifting its tactics to abduction. As a result of this, in 2013, a newly-formed 'special kidnapping squad', which was part of the *al-Barnawi's* faction of the sect, made the first preliminary move to abduct 7 French foreigners in northern Cameroon.[1]

After the abduction, the *Nur's* faction of the *Boko Haram* sect used its guerrilla expertise and contacts with the Kanuri tribal elders in the border region of

*Faculty of Law, Obafemi Awolowo University, Ile-Ife, Nigeria. Email: oaolaseeni@gmail.com
** Faculty of Law, Adekunle Ajasin University, Akungba-Akoko, Nigeria. Email: kaymimiko@gmail.com

[1]*The Nation*, (20 February 2013)6.

Nigeria with Cameroon to facilitate the easy transfer of these abducted foreigners to Maiduguri, Borno State.[2] The heavy ransom received from this abduction as hostage taking and negotiation incentivized the members of the *Boko Haram* sect to carry out more operations in north east Nigeria, including those of the 12 women in Bama village and the 350 children in the popular Mubi town, Adamawa State.[3]

**1.1 Boko Haram's Abduction of the Chibok Schoolgirls**

On 14 April 2014, the sect abducted 276 schoolgirls from their hostel in the Government Secondary School, Chibok, Borno State. The abduction marked a watershed in the history of the sect's abduction.[4]Ibrahim Tada Ngalyike, the sect's local unit leader in Gwoza, may have been in the frontline of this major abduction in coordination with other factional leaders like Nur, al-Barnawi, Aminu 'Tashem-Ilmi' and Shekau. It is not unlike that the Nigerian factional leaders may have leveraged contacts with their counterparts in northern Cameroon to mastermind the Chibok abduction and eventual cross-border transfer of the girls through the 'Sambisa' forest (along the Nigerian-Cameroonian border) and deeper into the Sahel region in the Central African Republic, near Sudan. Five years after, a large swathe of the girls has not been found.

**2.0 ABDUCTION AS A CRIME AGAINST HUMANITY**

The*Boko Haram's* abduction of the Chibok schoolgirls is significant not just of itself but because of what it represents regarding the crime which the members of the sect have committed. By the abduction, for which some of the schoolgirls are still being held in captivity till today and deprived of their individual freedom and liberty, the members of the sect have committed crimes against humanity. The pronouncements by the leadership of the sect that the girls would be sold off and the subsequent acts of forced marriages, conversion from Christianity to Islam, slavery or servitude, torture (whether physical or psychological) and inhuman and degrading treatments, all amounted to nothing but crimes against humanity.[5]

[2]*ibid* 6.

[3]Amnesty International reported that between January 2013 and April 2014, *Boko Haram* has abducted about 2,000 girls and women in north east Nigeria. See *The (Sunday Punch*, 21 September 2014) 58.

[4]While the schoolgirls were being moved, 57 of them took advantage of the time when the truck which was conveying them broke down to escape. Till date, the remaining 219 schoolgirls are still in captivity, with no traces concerning their whereabouts. However, in November, 2016, the sect released 21 out of the schoolgirls. Their release may not have come as a surprise but as a result of the campaign by the #bringbackourgirls# group, led by luminaries like Obi Ezekwesili, former Vice-President of the World Bank and former Nigerian Minister of Education and HadizaBalaUsman, a Nigerian foremost activist. Their messages and interviews, flashed across the various social media platforms, satellite television stations and multiple demonstrations in the major cities across the country, assisted in the release of the 21 out of the schoolgirls. See *The Punch*, (17 September 2015) 9.

[5]While accepting responsibilities for the abduction of the Chibok schoolgirls through a video announcement, the sect's factional leader,AbubakarShekau, threatened that if the government refused to

**2.1 What the Law says About Crimes against Humanity**

According to the law promulgated by the Allied Control Council for the prosecution and punishment of the major war criminals of the European Axis, crimes against humanity have been defined succinctly as:

> Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts committed against any civilian population before or during the War, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[6]

Article 7 of the Statute of the International Criminal Court (ICC) extends the definition of crimes against humanity further to include, *inter alia*, any of the following acts or conducts when committed as part of a widespread or systematic attack directed against any civilian population:

*(a) Murder;*
*(b) Extermination;*
*(c) Enslavement;*
*(d) Deportation or forcible transfer of population;*
*(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*
*(f) Torture;*
*(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;*
*(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;*
*(i) Enforced disappearance of persons;*
*(j) The crime of apartheid;*

cede to the sect's demands for prisoners' exchange, the sect will "sell" the girls off as "slaves in the market" as war booty or "force them into marriages". See *Saturday Tribune*, (7 June 2014) 41.
[6]See Law No. 10 of the Allied Control Council for Germany, 1945.

*(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health..*[7]

It should be noted that international law, and by extension international humanitarian law, prohibits crimes against humanity. They are impermissible and of the gravest character not only against the life and liberty of the individual or nation in question, but as affecting humanity in general.[8] Their commission shocks the conscience of mankind or what is to be human.[9] It is for this reason that the Rome Statute of the ICC characterises crimes against humanity within the wider categories of international crimes[10] and among 'the most serious crimes of concern to the international community as a whole.'

**2.2 'Individual' Criminal Responsibility for Crimes against Humanity**

It is clear that the rules of international humanitarian law are not binding only on States, which would therefore be held solely responsible for not respecting the body of law, but are also binding on individual persons, who could violate them directly by their conduct and therefore be held responsible. In other words, the provisions of the body of law assigns criminal responsibility to the individual, and not just the State, for his or her own acts and the crimes which he or she ordered to be committed during the armed conflict, regardless of whether the armed conflict is international or internal in nature.[11]In certain cases, this well-established principle

[7]See the ICC's Elements of Crimes, U.N.Doc. PCNICC/2000/Add.2 (2000). Following the Nuremberg and Tokyo Trials, the definition and scope of the notion of crimes against humanity underwent positive developments in statutory provisions and case-law jurisprudence. As for the treaty-based definitions of crimes against humanity, see the four Geneva Conventions of 1949 and their Additional Protocols of 1977, the Convention against the Taking of Hostages, 1979, the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, 1984, the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, 1993 and 1994 respectively, the Convention on the Rights of the Child, 1989, the Convention for the Protection of All Persons from Enforced Disappearance, 2006, and other Conventions which deal copiously with specific crimes, such as enslavement and apartheid. For post-World War II case-law definitions of crimes against humanity, see the *Eichmann* case (1961), *International Law Reports*, vol. 36, pp. 5, 48-49 and the *Tadic* Case (Case No. IT-94-I-T), 17 July, 1995, pp. 32-38.

[8]I Oppenheim, *International Law*, (8th ed., Longmans London,1955) 752-753.

[9]Michael Akehurst, *A Modern Introduction to International Law*, (3rd ed., George Allen & Unwin Publishers Ltd., London, 1977) 256-258. See also, MT Ladan, *Introduction to International Human Rights and Humanitarian Law*, (1st ed., Ahmadu Bello University Press Ltd., Zaria 1999) 241.

[10]For the recent categorization of international crimes, see Rome Statutes, 1998, Article 5 which lists the crimes that will be within the jurisdiction of the International Criminal Court, namely, genocide, crimes against humanity, war crimes and the crime of aggression.

[11]Geneva Conventions and Additional Protocol I relating to grave breaches, the Genocide Convention and other international humanitarian law treaties, the Statutes of the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda, and the Statute of the International Criminal Court.

of individual criminal responsibility may be extended to an omission or the failure to act when one is under a duty to do so.[12]

The first significant milestone in the development of this principle of individual criminal responsibility for grave breaches, and by extension, crimes against humanity, was the trials of the major war criminals held in Nuremberg and Tokyo which took place after World War II in 1945. These trials firmly established the idea of individual criminal responsibilityfor certain serious violations of the rules of humanitarian law applicable during armed conflicts. Commanders and superiors were held criminally liable for the serious violations committed by their subordinates. The reason was to deter further violations of the law of war and ensure that there is no safe haven for individuals who have committed grave breaches in the context of an armed conflict, whether the armed conflict is international or internal in nature.

**2.3 The Obligation to Punish Crimes against Humanity**

Having established above that individual can be held criminally liable for the crimes he or she has committed, the question now arises as to who the law foists the obligation to prosecute and punish the individual on. In this regard, the rules of international humanitarian law impose an obligation on the States to punish the perpetrators of grave beaches of the law of war. States are required to take a number of disciplinary measures at their national levels to prevent and, where necessary, punish grave breaches of international crimes. Such disciplinary measures may include enacting legislation or initiating legal proceedings against perpetrators of grave breaches, and must apply to all persons involved in the serious violations, wherever they may be found. Through the adoption of national implementation mechanisms, States should search for and punish individuals' alleged grave breaches of international humanitarian (or the law of war) or its rules.[13]The actions may be maintained in national or international courts.[14]

As with crimes against humanity, the adoption of the Rome Statute of the ICC has made it easier for some States to adopt laws for punishing crimes against

[12]SannaSegall, '*Punishing Violations of International Humanitarian Law at the National Level - A Guide for Common Law States'*, (ICRC, Geneva, 2001)49-50.

[13]'4-Year Action Plan for the Implementation of International Humanitarian Law'< (RCRC, 2015) http://www.rcrcconference.org/docs_upl/en/R2_4-Year_Action_Plan_EN.pdf>accessed 10thJanauary 2019.

[14]For many years now, national courts have heard charges of crimes against humanity involving individuals. On the heels of the aftermath of the Nuremberg and Tokyo trials, it is noted that national courts and a small number of ad hoc international criminal tribunals with extremely criminal jurisdictions were created to try perpetrators of the most atrocious crimes, such as genocide, war crimes and crimes against humanity. See Theodore Meron, *Human Rights and Humanitarian Norms as Customary Law*, (Oxford University Press, New York, 1989) 208-209.

humanity.[15] States wishing to take advantage of the principle of complementarities (which the ICC has jurisdiction over when a State which would otherwise have jurisdiction is unable or unwilling to act) needs to ensure that their national laws allow them to try alleged offenders. Besides, the Statute of the ICC provides a detailed and comprehensive definition of crimes against humanity, thus making the task of legislating on the crimes easier. Once legislated upon, States' criminal laws would therefore apply to crimes committed on their territories by their own nationals.

**2.4 The Principle of Universal Jurisdiction**

It is the duty of every State within the international community to deal with matters of law and order arising within its territory. This duty is known as jurisdictional sovereignty. However, the idea of jurisdictional sovereignty is set aside whenever there are acts or omissions which have the potential to gravely distort or undermine international peace and security. In such cases, the principle of universal jurisdiction may be invoked essentially to guarantee that serious violations of humanitarian law are effectively repressed. It is a principle which entitles a State to prosecute offenders even in the absence of any connection between the crime committed and the *locus in quo*, that is, forum. The principle provides the basis for State laws that enable courts in one States to prosecute persons who have committed one or all of the international crimes in a different State from his or her.

By definition, the principle of 'universal jurisdiction' refers to the assertion by one State of its jurisdiction over crimes allegedly committed outside of its territory by the nationals of another State, where the alleged crime poses no direct threat to the vital interest of the State asserting jurisdiction. The claim of jurisdiction by a State to prosecute a crime is regardless of the place of commission of the alleged crime or the nationality of the perpetrator. The principle is rested on the premise that, certain crimes, because of their gravity or magnitude, have traditionally been regarded as so heinous or egregious that they warrant prosecution and repression by every State in this world.

IHL imposes an obligation on State Parties to exercise universal jurisdiction over violations of grave breaches of humanitarian law.[16] The incorporation of the principle of 'universal criminal jurisdiction' into that body of law is one means of facilitating and securing the repression of the violations of the

[15] The Israeli Nazis and Nazi Collaborators (Punishment) Law, 1950; The Canadian Criminal Code, 1987; The Canadian Crimes against Humanity and War Crimes Act, 2000; The New Zealand's International Crimes and International Criminal Court Act, 2000; and The United Kingdom International Criminal Court Act, 2001.

[16] GC and AP I.

law. As a matter of international public policy, and in circumstances where none of the traditional links (or ingredients) of nationality, passive personality, territoriality and the protective principle exists at the time of the commission of the alleged offence, States are now increasingly passing laws which enable their courts to prosecute crimes committed outside their territory's obligation.

**2.5 Consequences of Boko Haram's Crimes against Humanity**

The corollary of the foregoing is that the *Boko Haram* insurgents have clearly committed crimes against humanity and its constituent elements, such as torture, slavery and inhuman or degrading treatment or punishment which involves outrages upon personal dignity and religious convictions, using civilians as human shield, the taking of hostages, subjecting children to sexual violence, rape or any form of indecent assault, deprivation of liberty, among others. These crimes are specifically prohibited by international humanitarian law and international criminal law. On its part, international criminal law prohibits certain conduct and also holds individual perpetrators accountable for violations of these rules. In the light of international criminal law and as defined in Article 7 of the Rome Statue,[17] crimes against humanity are among the traditional range of crimes incurring individual criminal responsibility.[18]

On the question whether crimes against humanity can be committed during internal armed conflict, the report by the Secretary General of the United Nations on the Draft Statute for the International Criminal Tribunal for the former Yugoslavia (ICTY) indicated that crimes against humanity can occur either in the course of an internal conflict or an international conflict.[19] This assertion was further reinforced by the subsequent adoption of the statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda[20] and by the Appeals Chamber in the *Tadic* Case as follows:

> *It is now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict.*[21]

[17]The Rome Statute, 1998.
[18]Thomas Graditzky, 'Individual Criminal Responsibility for the Violations of International Humanitarian Law Committed in Non-international Armed Conflicts'.38 (322) *IRRC*30.
[19]UN Doc. S/25704, *TheReport of the Secretary-General pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, 3 May 1993, p. 13, Para. 47.
[20]The first expressly stipulates in Article 3 that both categories of armed conflict are covered by this provision, and the second mentions crimes against humanity in Article 3.
[21]ICTY, *Prosecutor v. DuskoTadic, 'Decision on the defence motion for interlocutory appeal on jurisdiction'*, [1995], Case No. IT-94-1-AR72, p. 72, para. 141.

It should also be pointed out here that individual perpetrators of crimes against humanity during internal conflicts incur international criminal responsibility in the same way that individual perpetrators of crimes against humanity in the context of international armed conflicts can incur international criminal responsibility This assertion becomes pertinent against the backdrop that, as for crimes against humanity committed in the context of an international armed conflict, universal jurisdiction do obviously exists for the prosecution and punishment of those individuals who are criminally responsible for their perpetrations.

**3.0 CONCLUSION**

And though some of the schoolgirls are still missing or are still in captivity and may not be found intact again, much still remains to be done to halt the crimes against humanity committed by *Boko Haram* generally. Having agreed that the Nigerian State or government has the duty or obligation to prosecute and punish individuals for the crimes against humanity, she should try to fish out the perpetrators of these heinous crimes and prosecute them accordingly. This will signal a strong commitment to when justice and accountability serve the purpose of criminal punishment and halt the impunity of crimes against humanity in Nigeria.

In addition, if it looks like an impossible mission to be accomplished alone, the government can seek international cooperation and assistance to fairly and effectively prosecute perpetrators of these crimes against humanity. There is no doubt that the abduction of the Chibok schoolgirls and the crimes against humanity committed against them has transcended the internal affairs of Nigeria from which other nations of the world are jurisdictionally excluded from assisting. The government should mobilize support from the entire international community to help destroy acts of terrorism and the evil ideology that underpins its. This is particularly important as the country faces other staggering socio-economic challenges.[22]

[22]The other socio-economic challenges in Nigeria include corruption, unemployment, poverty, kidnapping, armed robbery, cultism, youth restiveness, pipeline vandalism, dwindling oil revenue, police extra-judicial killings, ethno-religious crises, political/election violence, etc. To cite an example from above, in recent times, previous elections had quickly descended into ethnic bloodletting. By all means, these elections results have provoked needless acts of violence characterized by deaths and loss of property worth billions of naira.

# THE PROTECTION OF PERSONS *HORS DE COMBAT* AND CIVILIANS IN INTERNATIONAL HUMANITARIAN LAW

**AMADE ROBERTS AMANA, PhD∗.**

## 1. INTRODUCTION

One major aim of International Humanitarian Law (IHL) is to limit the effects of armed conflict by protecting persons who are not or no longer participating in hostilities.[1] Literally, such persons are "outside the fight," or *hors de combat.* In diplomacy and international law, the term refers to combatants who are incapable of performing their ability to wage war.[2] This category of persons includes fighter pilots or aircrews parachuting from their disabled aircraft, the sick, wounded, detained, or otherwise disabled. The International Committee of the Red Cross has defined IHL as "a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or no longer participating in the hostilities and restricts the means and methods of warfare".[3] IHL has historically been inspired by considerations of humanity and the mitigation of human suffering.

From its inception, humanitarian law has been designed to protect individuals in armed conflicts by imposing obligations and prohibitions on military personnel.[4] The four Geneva Conventions of 1949[5] and their Additional Protocols of 1997[6] and 2005[7] were adopted to ensure that persons who are not combatants are

∗**Senior Lecturer, School of Law, Kampala International University, Kasanga, Kampala, Uganda.**

[1]Michael N. SCHMITT (2010) 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements', International Law and Politics, Vol 42. p699.
[2]Definitions for "hors de combat". See https://www.definitions.net/definion/hors+de+combat Accessed on 13th June 2019.
[3]ICRC (2004), "What is International Humanitarian Law". Advisory Service on Humanitarian Law. 07/2004.
[4]Patrick Knable. The Relationship between International Humanitarian Law and International Human Rights Law in Situations in Armed Conflict. The New Zealand Postgraduate Law e. Journal, Issue 4, p 1.
[5]Convention(I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva 12th August 1949; Convention (ii) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva 12th August 1949; Convention (III) Relative to the Treatment of Prisoners of War, Geneva 12th August 1949; and Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva 12th 1949.
[6]Protocol Additional to the Geneva Conventions of 12th August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 8th June 1977; Protocol Additional to the Geneva Conventions 12th August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8th June 1977.
[7]Additional Distinctive Emblem (Protocol III) 8th December 2005.

treated in a humane manner by prohibiting the taking of hostages, illegal execution of certain categories of those involved in armed conflicts, and the use of reprisals against persons protected by the Conventions.[8]

## 2. PERSONS *HORS DE COMBAT*

Combatants *hors de combat* are normally granted special protections according to the laws of war, sometimes including prisoner of war status, and consequently become non-combatants. In the 1949 Geneva Conventions, unlawful combatants *hors de combat* are granted the same privilege and are to be treated with humanity while in captivity, but unlike lawful combatants, they are subject to trial and punishment.

Article 41 of Additional Protocol I provides as follows:

> *(1) A person who is recognized or who, in the circumstances, should be recognized to be hors de combat shall not be made the object of attack.*
>
> *(2) A person is "hors de combat" if:*
>
> *7.0 He is in the power of an adverse party;*
>
> *8.0 He clearly expresses an intention to surrender; or*
>
> *9.0 He has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;*

*Provided that in any of these cases, he abstains from any hostile act and does not attempt to escape*.[9]

The view has been expressed that in land warfare, a clear intention to surrender may be shown by laying down one's weapons, and raising the hands, or emerging from one's position while displaying a white flag.[10] There is an obligation to accept such surrender.[11] However, the killing, injuring, and capture of an enemy combatant by simulating the *hors de combat status*, amounts to perfidy. Article 37 (1) of the 1997 Additional Protocol I provides that: "Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with the intent to betray that confidence shall constitute perfidy".

[8]Elizabeth Oji (2013), Responsibility for Crimes under International Law, Odade Publishers, Lagos, Nigeria, p81.

[9]Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to Protection of Victims of International Armed Conflicts (Protocol 1), of June 1977. According to Art. 42 (1): No person parachuting from an aircraft in distress shall be made the object of attack during his descent.

[10]The United Nations Human Rights, Office of the Commissioner (2017), "Persons Hors de Combat in Non-International Armed Conflicts," September 2017.

[11]Article 3, Common to the Geneva Conventions of 1949.

## 3. PRISONERS OF WAR

Respect for prisoners of war, is based on the principle that a captured enemy combatant is not responsible for the acts committed by his government. Hence, he should be treated humanely for the duration of his captivity.[12] Generally speaking, a prisoner of war is a soldier who is captured by, or who surrenders to the enemy in wartime.[13] Although combatants and other persons taking a direct part in hostilities are military objectives and may be attacked, the moment such persons surrender or are rendered *hors de combat*, they become entitled to protection. That protection is provided for in Common Article 3 and the Third Geneva Conventions relative to the Treatment of Prisoners of War, supplemented (for international conflicts) by Additional Protocol I. Although, these conventions are binding as treaty law, the key provisions are in any event customary in nature. Humanitarian treatment of prisoners of war was not emphasized until the second half of the nineteenth century. The Hague Regulations did not prevent many of the hardships that prisoners suffered during World War I; they did provide an enlightened basis for regulation. Besides the failure to anticipate the problems that arose in World War I, the chief defect of the regulations were a lack of specificity and the absence of any enforcement procedures.

### 3.1 WHO IS A PRISONER OF WAR IN THE CONVENTION?

The Third Geneva Convention of 1949 is concerned with prisoners of war, and consists of a comprehensive code centered upon the requirement of humane treatment in all circumstances. The definition of prisoners of war in Geneva Convention III, Article 4(a) is of particular importance since it has been regarded as the elaboration of combatant status. It covers members of the armed forces of a party to the conflict, as well as irregulars such as members of militia or volunteer corps that fight alongside a party to the conflict, provided they satisfy four conditions: being commanded by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting operations in accordance with the laws and customs of war, and who have fallen into the power of the enemy. By Article 13 of the Geneva Convention III, prisoners of war must at all times be humanely treated and protected at all times against acts of violence or intimidation, insults and public curiosity.

Under International Humanitarian Law (IHL), combatants' privilege entails three important consequences. First, the privileged combatant is allowed to conduct hostilities and as such cannot be prosecuted for bearing arms or attacking enemy targets, unless the conduct amounts to a war crime. Second, he or she is a legitimate target to the opposing forces. Third, in the event of capture, such

[12]Claude Pilloud. Protection of the Victims of Armed Conflicts: Prisoners of War, International Dimensions of Humanitarian Law, Henry Dunant Institute, Geneva, UNESCO, 1988, p167.
[13]Blacks Law Dictionary, 9th Edition, p1314.

combatants are afforded prisoner of war status. The group of persons entitled to combatant's privilege, and in the event of capture to prisoner of war status, is defined in Article 4 (A) of Geneva Convention III. These include members of the armed forces of another party, as well as irregulars such as members of militia or volunteer corps that fight alongside a party to the conflict, provided they satisfy four conditions mentioned earlier.

Prisoner of war status is therefore automatically due to persons who fought in the armed forces of a state. The fact that the government was not the recognized representative of the state is irrelevant. It should be noted that the criteria set forth by Article 4 of the Third Geneva Convention only apply to irregulars that fight alongside a party to the conflict and not to the armed forces of a party to the conflict itself. In the event that there is an element of doubt on the status of an irregular, the matter must then be determined by a competent tribunal. The prisoners must be presumed to be prisoners of war pending such determination.[14]

### 3.2 RIGHTS OF A PRISONER OF WAR

The Third Geneva Convention is now the authoritative statement concerning prisoners of war. An outstanding innovation of the convention, in addition to its application to all other armed conflicts is that it makes reference to internal wars. The convention defined prisoners in a way calculated to include every person likely to be captured in hostilities. Full and primary responsibility for the treatment of prisoners of war falls upon the Detaining Power, not upon the individuals. The Detaining Power is under a general obligation to treat prisoners humanely and protect them from danger. They must be supplied with food, clothing and medical attention. They should be protected from public curiosity. They are also entitled to elaborate due process guarantees, including trial by the courts that respect the same standards of justice as those respected by the courts that would try the military of the detaining state. Medical and scientific experiments are prohibited. Prisoners are to be treated alike regardless of race, nationality, religious beliefs or political opinions. The prisoner must be permitted contact with his family and correspondence privileges. Article 118 of Geneva Convention III provides that prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

## 4. WOUNDED, SICK AND SHIPWRECKED

The motive for protecting wounded, sick and shipwrecked persons is found in the feeling of humanity. It is significant to note that the wounded, sick and shipwrecked are not necessarily the same as persons *hors de combat.* For illustration, a

[14]Article 5, Geneva Convention III.

combatant may give up fighting without suffering from wounds or diseases, while a wounded or sick person may maintain a hostile attitude, although at his own peril.

Protocol II, Article 7, provides as follows:

(1) All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.

(2) In all circumstances, they shall be treated and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their conditions. There shall be no distinction among them founded on any grounds other than medical ones.[15]

Article 13 of the 1st Geneva Convention lists the category of persons entitled to protection - members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces. Members of other militias and members of other volunteer corps, including those of organized resistance movements belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements are commanded by a person responsible for his subordinates, have a fixed distinctive sign recognizable at a distance, carry arms openly, conduct their operations in accordance with the laws and customs of war, etc.

Under the Protocol II, wounded and sick persons are those who, on account of trauma, disease, or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility.[16] Shipwrecked persons are those who are in peril at sea or in other waters and who continue to hold this ephemeral status during rescue operations.[17] The wounded, sick and shipwrecked shall be protected by the enemy as well as the state on which they depend, as well as upon assistance provided by neutral parties. It is significant to note that the protection extended to the wounded, sick and shipwrecked is extended to the persons caring for them and the property necessary to do so. However, they will become military objectives if they partake in war. The rights of the wounded, sick and shipwrecked are inalienable, as are those of medical and religious personnel.[18]

The wounded, sick and shipwrecked shall be cared for on the basis of equality. They are not to be subjected to willful killing, torture, or inhuman treatment, including biological experiments, willfully caused suffering or serious

[15]Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).
[16]Articles 7 and 8.
[17]Jose Francisco Rezek. Protection of the Victims Armed Conflicts, in International Dimensions of Humanitarian Law. Henry Dunant Institute-Geneva, UNESCO, 1988.
[18]Article.7, Geneva Convention I.

injury to the body or health, or mutilation. These acts constitute grave breaches of the Conventions.[19]

**5. PROTECTION OF CIVILIANS**

IHL accords protection to a wide range of people and objects during armed conflicts. The Geneva Conventions and their Additional Protocols protect the sick, wounded and shipwrecked not taking part in hostilities, prisoners of war and other detained persons, as well as civilians and civilian objects.[20] The Geneva Conventions have their origin in the experiences of Henry Dunant at the battle of Solferino in 1859. Dunant was horrified by the neglect of the sick and wounded on the battlefield, and with four colleagues organized the diplomatic conference that led to the adoption of the First Geneva Convention in 1864. The principles established influenced the treaties that followed, thereby creating the body of IHL that exists today. At the core of these principles was the idea of protected persons and objects. In modern times, civilians are increasingly finding themselves in the middle of armed conflict. Oji Umozurike has pointed out two reasons for this. First, with the rise of notions of popular sovereignty, the army is now subject to the control of accredited representatives of the people, and secondly, on account of improvements in military technology and delivery of harm, it is no longer necessary to range armies against one another in pre-determined battlefields.[21] Previously, civilians were at risk if they ventured near battlefields or if combatants took shelter in their homes after a battle. But in order to encourage humanitarian assistance to armies, the Convention on the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864 provided that inhabitants who brought help to the wounded shall be respected and shall remain free**.**

The First Geneva Convention concerned itself primarily with the care of the sick and wounded on the battle field. The medical services helping them were to be protected from attack and respected as neutral personnel assisting the sick and wounded without discrimination. The Convention established the Red Cross emblem to be used to identify and protect medical personnel from attack. States committed themselves to respect the emblem and those protected by it. Between the two world wars, the conventions were extended to cover prisoners of war. These categories of persons were protected against inhumane or degrading treatment. The consolidated Geneva Conventions of 1949 extended specific protection to civilians, who had suffered extensively during World War II, often from deliberate targeting. Protection to civilians, especially against the effects of hostilities, was also developed through the adoption of the Additional Protocols in 1977. Thus, civilians

[19]Art. 50, Geneva Convention 1, Art. 75, Protocol I.
[20]See https://www.icrc.org/eng/war-and-law/protected-persons/overview-protected-persons.htm (Last viewed on 27th February 2019.
[21]Oji Umozorike, Protection of the Victims of Armed Conflicts in Civilian Populations. International Dimensions of Humanitarian War, Henry Dunant Institute, 1988, p.187.

may not be used as protective shields or forcibly displaced. Additionally, women are protected from sexual abuse, and the special needs of children must be taken into account by combatants. IHL also protects refugees, internally displaced persons (IDPs) and those who have gone missing as a result of armed conflict.

## 5. 1 DEFINITION OF PROTECTED PERSONS

The Civilians Convention protects two classes of civilians, namely: persons who find themselves in the hands of a party to a conflict or occupying power, and generally, civilian populations of countries in conflict. Article 4 of the Geneva Convention IV provides that:

> Persons protected by the Convention are those who at a given moment and in any manner whatsoever find themselves in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral state, who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.[22]

Generally, a civilian is a person who is not a member of the armed forces and does not belong to the militia, volunteer corps or organized resistance movement, whether or not such movement is recognized by the adverse party. However, the term excludes an inhabitant of non-occupied territory who spontaneously takes up arms to resist an invader.[23] Article 27 of the Geneva Convention IV provides for the general treatment of civilians. It states that:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Women shall be especially protected against any attack on their, in particular against rape, enforced prostitution, or any form of indecent assault. Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by a Party to the conflict in whose power they are,

[22]Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva 12th 1949.
[23]Oji Umozurike, p189.

> without any adverse distinction based, in particular, on race, religion or political opinion. However, the parties to the conflict may take such measures as may be necessary as a result of war.

A person may not be punished for an offence he has not personally committed. Collective penalties, pillage, intimidation, terrorism, reprisals and the taking of hostages are also prohibited.[24] The Convention also provides for the protection of civilian populations in general, regardless of nationality, race, religion or political belief.[25] These protections are meant to alleviate the sufferings caused by war. The parties may establish in their own territories, and also in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under 15, expectant mothers and mothers of children under 7. They may upon the outbreak of hostilities conclude arrangements on the mutual recognition of such zones.[26] There are also safeguards for hospital staff, and for land, sea and air transports and conveying wounded and sick civilians, and provisions for the free passage of consignments of medical and hospital stores, essential food-stuffs and clothing, and objects necessary for religious worship intended for civilian populations. All persons are entitled to the exchange of news of a personal nature with their families and such correspondence shall be transmitted speedily. In the case of conflicts not of an international character, the provisions of common Article 3 apply.

### 5.2 CIVILIANS IN OCCUPIED TERRITORY

Article 2 of the Civilians Convention states: "In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance". The initial definition for occupation was contained in Articles 42 and 43 of the Hague Regulations (Hague II) of 1899, which are similar to the definition in the Hague Regulations (Hague IV) of 1907. Under Article 42, "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised". In Article 43, it is provided that: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely

[24]Arts. 33-34, Geneva Convention IV,
[25]Art. 13, Geneva Convention IV.
[26]Art. 14, Geneva Convention IV.

prevented, the laws in force in the country".In simple terms, an occupied territory is one which is under the authority and effective control of a belligerent armed force.[27] Section III of Part III of the Geneva Convention IV deals with the protection of civilians in occupied territories. The deportation, transfer, and evacuations of protected persons from the territory of the occupying power to that of another country, occupied or not, is prohibited. Neither should the occupying power deport or transfer parts of its own civilian population into the territory it occupies.[28] There is a special protection for mothers of young children, for expectant mothers and for children whose identification marks and parentage should be documented. Their continued education, if possible, by persons of their own language and religion should be ensured. Persons protected should not be compelled to serve in the armed forces or auxiliary forces of the Occupying Power, or be compelled to work except in categories of jobs necessary for the occupying army, for public utility services or for feeding, sheltering, clothing, transportation, or health of the population. The destruction of property, public, private or collectively owned is prohibited. The occupying power should ensure that food and medical supplies are available for the civilian population. The occupying power is prohibited from altering the status of public officials or judges in the occupied territory.[29] It should respect the existing penal laws and maintain national tribunals.[30] Accused persons shall have the right of defence, a proper trial; the right of appeal assistance by the protecting power and proper treatment in prison. All civilians deprived of their freedom, enjoy a status similar to that of prisoners of war.

## 6. REFUGEES AND INTERNALLY DISPLACED PERSONS

Internally displaced persons (IDPs) are those who have had to leave their homes in order to avoid the effects of hostilities, other forms of violence, human rights violations, or natural or man-made disasters, but who remain in their own country.[31] IDPs who participate actively in hostilities become fighters and lose their protection under IHL. IDPs are civilians and are entitled to all the general protection provided for civilians under the Geneva Conventions and Protocols. Therefore, attacks against their camps or settlements are forbidden; and should internment be deemed absolutely necessary, they should not be subject to harsher conditions of internment than other civilians. Withholding information from them regarding the fate and whereabouts of their missing relatives is forbidden. Cooperation with authorities or international organizations attempting to establish the fate and whereabouts of IDPs

[27]See occupied territory-The Free Dictionary. Available at www.thefreedictionary.com/occupied%... Last viewed 20st May 2019.
[28]Art. 49, Geneva Convention IV.
[29]Art. 54, Geneva Convention IV.
[30]Art. 64, Geneva Convention IV.
[31]Guiding Principles on Internal Displacement, UN Doc. E/CN./4/1998/53/Add.2, April 17, 1998.

reported missing is required; and families that are separated by displacement should be allowed to reunite as quickly as possible.

Refugees may not be expelled or involuntarily returned to the frontiers of a territory where their life or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political opinion. Those who have committed serious crimes, whether under international or domestic law, are excluded from protection as refugees. Refugees are persons who have left their country of origin owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion, and are outside the country of their nationality.[32] The principle expressed in this rule is known as non-refoulement. It reflects customary international law.[33] Refugees are entitled to the protection of the UN High Commissioner for Refugees.[34]

## 7. EMBLEM OF PROTECTION

An emblem is defined as (1) "a flag, armorial bearing, or other symbol of a country, organization or movement.": (2), "Loosely, something used to symbolize something else."[35] In IHL, it is an obligation for each party to a conflict to ensure that medical, religious personnel, medical units and transports are identifiable.[36] The draftsmen of the Geneva Convention of 1864 foresaw the need for a universal symbol of protection easily recognizable on the battlefield or in times of armed conflict. In honor of the origin of this initiative, the symbol of a red cross on a white background (the reverse of the Swiss flag) was identified as a protective emblem in conflict areas. The Red Crescent and Red Lion and Sun emblems were later recognized by nations at a diplomatic conference in 1929 as additional emblems of humanitarian relief. Of these additional emblems, only the Red Crescent is currently in use. Although not in the Geneva Conventions, the red Shield of David, used by Israel, is also a respected emblem. These emblems are used to identify and protect medical and relief workers, military and civilian medical facilities, mobile units, and hospital ships. They are also used to identify the programs and activities of Red Cross and Red Crescent national societies, and those of the Magen David Adom (Red Shield of David) humanitarian society in Israel. Widespread understanding and acceptance of these humanitarian emblems is crucial in order to save lives and alleviate suffering.[37] The Third Protocol to the Geneva Conventions introduced an

[32]Article 1 (2) of the Convention Relating to the Status of Refugees, 1951.
[33]This rule is drawn from the 1951 Refugee Convention, which remains applicable during non-international armed conflict.
[34]GA res. 428 (V), 14 Dec. 1950.
[35]Bryan A. Garner (2009) Black's Law Dictionary, (9thedn), Thomson Reuters, St. Paul, MN, United States of America. p599.
Protocol I: Art. 18.
[37]A Summary of the Geneva Conventions and Additional Protocols. Facing Fear/6-8/Lesson Plan 8/Facts about Terrorism and War, 2001.

additional distinctive emblem, composed of a red frame in the shape of a square on edge on a white ground, known as 'Third Protocol Emblem".[38] The personnel designated to use the emblem shall wear affixed to the left arm, a water resistant armlet bearing the distinctive emblem issued and stamped by the military authority. Such personnel shall also wear the indentify disc,[39] and shall carry an identity card bearing the distinctive emblem.[40]

Article 38 of the 1st Geneva Convention provides as follows:

> As a compliment to Switzerland, the heraldic emblem of
>
> the Red Cross on a white ground, formed by reversing the Federal colours is retained as the emblem and distinctive sign of the Medical services of armed forces. Nevertheless, in the case of countries which already use an emblem, in place of the Red Cross, the Red Crescent or the Red Lion and Sun on a white ground, those emblems are also recognized by the terms of the present Convention.

The Geneva Conventions mention three emblems: the Red Cross, the Red Crescent and the red lion and sun. The Conventions and their Additional Protocols contain several articles on the emblem. Chapter VII of the 1st Geneva Convention, is titled "distinctive emblem." It specifies inter-alia, the use, size, purpose and placing of the emblem,[41] the persons and property it protects, who can use it,[42] what respect for the emblem entails and the penalties for misuse.[43] Medical units and establishments making use of the emblem should be properly marked.[44]

---

[38]Art. 2 (1): Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Adoption of Additional Distinctive Emblem (Protocol III) Geneva, 8 December 2005.

[39]GC 1: Art. 16.

[40]GC 1: Art. 40.

[41]GC 1, Art. 39:Under the direction of the competent military authority, the emblem shall be displayed on the flags, armlets and on all equipment employed in the Medical Service.

[42]GC 1: Arts 24-27. Medical personnel, members of armed forces specially trained as hospital orderlies, nurses, auxiliary stretcher-bearers, staff of National Red Cross societies and Voluntary Aid Societies duly recognized and authorized by their Governments, and Societies of Neutral Countries, relief agencies subject to the same conditions as National Societies, etc., may use the emblem for protective purposes only for those of their personnel and equipment assisting official medical services in wartime.

[43]Chapter VII, Arts. 38-43. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

[44]GC 1, ART. 42. The distinctive flag of the Convention shall be hoisted only over such medical units and establishments as are entitled to be respected under the Convention, and only with the consent of the military authorities. In mobile units, as in fixed establishments, it may be accompanied by the national flag of the Party to the conflict to which the unit or establishment belongs. Nevertheless, medical units which have fallen into the hands of the enemy shall not fly any flag other than that of the Convention. Parties to the conflict shall take the necessary steps, in so far as military considerations permit, to make the distinctive emblems indicating medical units and establishments clearly visible to the enemy land, air or naval forces, in order to obviate the possibility of any hostile action.

IHL also requires each State party to the Geneva Conventions to take steps to prevent and punish the misuse of the emblem in wartime and peacetime, alike, and to enact a law on the protection of the emblem. The use of the emblem for protective purposes is a visible manifestation of the protection accorded by the Geneva Conventions to medical personnel, units and transports. Use of the emblem for indicative purposes in wartime or in times of peace shows that a person or item of property has a link with the International Red Cross and Red Crescent Movement. The ICRC is entitled at all times to use the emblem for both protective and indicative purposes.

Any use not expressly authorized by IHL constitutes a misuse of the emblem. There are three types of misuse:

i. Imitation, meaning the use of a sign, which by its shape and, or colour may cause confusion with the emblem.
ii. Usurpation, that is, the use of the emblem by bodies or persons not entitled to do so (commercial enterprises, pharmacists, private doctors, non-governmental organizations, ordinary individuals, etc. If persons normally authorized to use of the emblem fail to do so in accordance with the rules in the Conventions and Protocols, this may also constitute usurpation.
iii. Perfidy, i.e., making use of the emblem in time of conflict to protect combatants or military equipment. The perfidious use of the emblem is a war crime in both international and non-international armed conflict.

The misuse of the emblem for protective purposes in time of war jeopardizes the system of protection set up by IHL. Misuse of the emblem for indicative purposes undermines its image in the eyes of the public and consequently reduces its protective power in time of war. The States party to the Geneva Conventions have undertaken to introduce penal measures for preventing and repressing misuse of the emblem in wartime and peacetime alike.

## 8. MEDICAL UNITS, HOSPITAL ZONES AND LOCALITIES

Medical units engaged in the collection, evacuation, transport, diagnosis of wounded, sick and shipwrecked persons, are not military objects, whether stationary or mobile. This protection is also available to civilian medical units.[45] However, the protection ceases the moment the units are used to commit acts harmful to the

[45]Art. 12, Protocol I.

enemy after a warning has been given and has remained unheeded.[46] Only the first Geneva Convention makes provisions for the establishment of hospital zones and localities, in peacetime or war time, organized so as to protect the wounded, sick and shipwrecked from the effects of war.[47] Such zones should be placed as far away as possible from the theatre of war, in order to provide better protection for the wounded and sick. It is left for the parties concerned to conclude agreements on the mutual recognition of such zones after the outbreak of hostilities.

### 8.1 MEDICAL AND RELIGIOUS PERSONNEL

It is obligatory under the 1949 Conventions to respect and protect personnel responsible for the collection, evacuation, transport or treatment of wounded, sick and shipwrecked persons, and for the prevention of diseases.[48]The staff of National Red Cross Societies and of other Voluntary Aid Societies duly recognized and authorized by their governments, and are subject to military laws and regulations are subject to the same protection. They are not considered as prisoners of war, but should benefit from the rights of prisoners of war under the Geneva Convention III. They are subject only to retention.

### 8.2 HOSPITAL SHIPS AND MEDICAL AIRCRAFT

Hospital ships remain inviolable. But his presupposes that the state using them communicates this fact to the other parties to the conflict at least 10 days before putting them into commission, specifying the characteristics of such vessels. Thus, Article 35 Geneva Convention I provides that transports of wounded and sick or of medical equipment shall be respected and protected. Similarly, the hospital ships of international humanitarian organizations of neutral states and their relief societies belonging to a State party to t conflict enjoy the same protection as that granted ships of the armed forces, provided that they are not acting on official commission and such use has been notified to the other parties, 10 days in advance.

## 9. CONCLUSION

International Humanitarian Law is inspired by the dictates of humanity. It basically regulates the means and methods of warfare and offers broad-based protections to civilians and persons not taking part in hostilities. The focus of this paper has been to discuss this area of law protects persons hors de combat and civilians. In doing this, we have briefly examined the applicable provisions of the Geneva Conventions of 1949 and their Protocols. International humanitarian law has evolved to mitigate the suffering experienced during war by limiting the methods and means of warfare, and by protecting civilian populations generally.

[46]Art. 13, Protocol I.
[47]Art. 23, Geneva Convention I.
[48]Art. 24, Geneva Convention I.

# THE BURDEN OF PROOF FOR THE NON-CONFORMITY OF GOODS UNDER THE OHADA UNIFORM ACT ON GENERAL COMMERCIAL LAW: A MATTER OF INTERPRETATION

**ROLAND DJIEUFACK, PhD***

**Abstract**

*This article deals with the controversial question of which party bears the burden to proof the non-conformity of the goods at the time the risk passes under a contract of sale of goods as governed by the OHADA Uniform Act on General Commercial Law. It highlights the approach adopted by the Act in attempting to balance the allocation of the burden of proof. This article aims at pointing out the hurdles that beset the uniform working of the OHADA Uniform Act on General Commercial Law, considering the glaring differences between the procedural and evidential laws operating in the member States on matters of proof. Adopting an in-depth content analysis and critical assessment of primary and secondary data, this paper calls for a fundamental harmonisation of the adjectival laws on matters of proof in order to maintain a higher degree of the uniform character of the OHADA laws.*

## 1.0 INTRODUCTION

Most legal systems limit or proscribe a claim being asserted after the lapse of a certain period of time. The legal issues flowing from the claim need to be proven as the case arise in every area of sales law. The rules on conformity are by no means an exception and have, in fact, proved to be a fertile ground for dealing with issues of proof under the OHADA[1]Uniform Act on General Commercial

* Senior Lecturer, Higher Teachers' Training College, The University of Bamenda, Cameroon; Lecturer; Department of English Law, University of Dschang, Cameroon; Part-time Lecturer, Department of English Law, University of Buea, Cameroon. (E-mail: orolly@yahoo.fr)

[1]This French appellation refers to « Organisation pour L'Harmonisation en Afrique du Droit des Affaires ». The Treaty setting-up OHADA was signed at Port-Louis, Mauritius Island on 17 October 1993, as revised at Quebec, Canada, on 17 October 2008. The revisions became effective on 21 March 2010. As of July 7, 2010, the West African members of OHADA are Benin, Burkina Faso, Cote d'Ivoire, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo, and the Central African members of OAHDA areCentral African Republic, Chad, Cameroon, Comoros, Congo, Equatorial Guinea, and Gabon. *See* http://<www.ohada.org > and http://<www.ohada.com>. On February 22, 2010, the Democratic Republic of Congo's president ratified the country's adoption of the OHADA

Law(UAGCL).[2]Many buyers will complain about the conformity of the goods, allege a breach, and invoke remedies. It is essential, therefore, that there be fairly clear legal rules, particularly those applied by default, that are capable of allocating risks, thereby producing legal certainty and possibly reducing litigation. It is now increasingly recognised that one relevant general principle under the UAGCL is that a party who asserts a right must prove the necessary preconditions for the existence of that right. This means that under Article 258 for example, the buyer bears the burden of proving that a particular purpose has been duly communicated to the seller.[3]

The rules on the conformity of goods are not only an integral part of sales law, but they also lie at the core of the seller's primary obligations by being inextricably linked to his obligation to deliver the goods. The goods are the very subject matter of a sales contract and the rules on conformity are what help define this subject matter. The buyer's right to rely on and ascertain the seller's obligation to deliver the goods in conformity with the contract specifications occupies a central place in any sales law. Consequently, any breach of this obligation would entitle the buyer to establish proof. The burden of proof includes the burden of adducing the relevant evidence and the burden of persuasion. The reliance provision is, in other words, an exception to the buyer's entitlement to the goods fit for a particular purpose, and the burden of proof of the preconditions for that exception lies with the seller. Without these rules, it would often be impossible to say what it is that the seller has agreed to deliver. However, the inevitably broad nature of these rules, together with their considerable conceptual and practical significance, still makes them one of the most frequently litigated issues. All this leads to the conformity rules occupying a central place in any sales contract.

With this in mind, this paper seeks in the first place to take a critical look at the rules on conformity in Article 255 of the UAGCL. The objective therefore is to make an expository study of the concept of "conformity" as the basis of the seller's duty in delivering goods in accordance with the contractual terms under the contract of sale as governed by the Uniform Act. The second objective of this paper follows with a critical examination of the UAGCL's approach in allocating the burden of proof of lack of conformity of the goods to the contractual stipulations as agreed by the parties. The article also adopts a critical and analytical approach in interpreting the provisions of the Uniform Act and of foreign instruments regulating sale of goods contracts.

---

treaty. By the treaty's terms, a country becomes a member sixty days after the note has been deposited in Senegal. OHADA Treaty, article52, paragraph 3.

[2]Hereinafter referred variously as 'UAGCL' or 'Uniform Act'. This is known in French as OHADA, *ActeUniformeportant sur le Droit Commercial Général*, found in the Official Gazette of OHADA, No. 23, of 15th February 2011. It is also available *at* http://www.ohada.com/textes.

[3] This is a similar position under CISG, art 35(2)(b).

### 1.1 The Conception of Conformity in Domestic Sales Laws

An understanding of some particularities of domestic law as compared to international instruments is fundamental when interpreting "conformity of goods" in a sales contract, in order to avoid a misleading interpretation.[4] For instance, rules under the Uniform Act differ considerably from those in common law and make more subtle distinctions between the different kinds of defects. Under civil codes[5] as well as under the Uniform Act,[6] a hidden defect [*défautcaché*] is distinguished from an apparent defect [*vice apparent*]; the English Sale of Goods Act (SGA) [1893] distinguishes conditions[7] from warranties.[8]Nevertheless, surely merchantable under common law is a similar concept to conformity as the case under UAGCL.

Implied conditions and warranties are not stated by the parties during negotiations or included in a contractual document, but nevertheless form part of the contractual provisions. Implied terms are classified as terms implied in fact and in law and are implied into every contract of sale. They are implied by law to ensure a minimum of business efficacy,[9] doubtless in accordance with the parties' paramount intention to create a workable contractual agreement.[10]Some contracts of sale are very detailed; the parties deal with all or most eventualities. However, in others, the only element that the parties deal with is identifying the goods to be sold and the price to be paid. Implied terms and other rules are designed in large measure to fill the gaps so as to guarantee an effective transaction for the parties.

The conditions of quantity, quality, description, packaging, particular purpose and sample or model are encapsulated into the concept of conformity in the Uniform Act as contained in its Article 255.[11] Article 255 states thus:

> "The seller shall deliver the goods according to the quantity, quality, specification, and packaging provided for in the contract. Where the contract is silent, the seller shall deliver goods in conformity with the purposes for which goods of that nature are generally used, and the goods must

[4] I Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods (CISG*) (3rd ed, 2010, Oxford University Press) 570.
[5]Cameroon Civil Code, art 1641; Côte d'Ivoire Civil Code, art 1641.
[6]Uniform Act, art 231.
[7] SGA, sec 11(3) provides that a condition is a major term of a contract, breach of which is considered to go to the root of the contract so as to entitle the innocent party to treat the contract as discharged.
[8]ibid, ss 14–15.
[9]*The Moorcock* (1889) 14 PD 64; *Lister v Romford Ice Co Ltd* [1957] AC 555.
[10]Compare with Lord Tomlin in *Hillas*& *Co Ltd v Arcos* [1932] ALL ER 494 at 499: "The problem for a court of construction must always be so to balance matters that, without violation of essential principle, the dealings of men may so far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains."
[11]PG.Pougoué, et al .*Encyclopédie du DroitOHADA*[Encyclopaedia of OHADA law] (2011, Lamy) 55. See English Sale of Goods Act, ss 12–15 and CISG, arts 35–44.

> match the sample or model which was presented to the buyer by the seller. The seller also must deliver the goods that are packaged according to the usual method of packaging goods of the same nature or failing which, in a manner to ensure their conservation, and protection."[12]

These implied conditions deserve careful treatment because of the protection that they now offer the buyer of goods, who is almost invariably in a weaker position than the seller. This can be explained by the fact that, most of the times the seller seems to be the manufacturers of the goods. Thus, these terms provide buyers with a healthier measure of protection against defective and sub-standard goods. This implies that, if any of the parties breaches any of these provisions, that breach shall be treated as a breach of condition and warranty. The terms (conditions and warranties) of a contract of sale of goods can be express or implied. These provisions have in fact moved the common law principle from *caveat emptor* to *caveat venditor*[seller beware].[13]

**1.2 The Concept and Nature of Conformity under the Uniform Act**

The notion of conformity under the Uniform Act is almost identical to that under the CISG.[14] However the Uniform Act provides no definition for this concept. In fact, conformity is a term with a variable content. Neither the Uniform Act nor the CISG actually defines "*conformity*". In English language, conformity is a noun derived from the verb to conform, meaning "agree with".[15] From this, it becomes clear that the goods should agree with the terms of the contract for them to be in conformity. In other words, the concept of conformity concerns the difference between the object agreed in the contract and that delivered.

The term "conformity" under the Act is perceived in a double sense: material and functional.[16] Material conformity relates to the description of the goods, while functional conformity relates to the intended purpose of the goods. For the goods to conform under the Uniform Act, both material and functional conformity must be satisfied. This is the new approach adopted by the Uniform Act,

[12] This is the author's translation.
[13]WH Hamilton "The ancient maxim caveat emptor" (1928) 40 *Yale Law Journal* 1133 at 1186.
[14]CISG, art 35.
[15]PH Collin *Dictionary of Law* (3rded, Peter Collin Publishing 2000) 77; C Mba-Owono "Non-conformité et vices caches dans la ventecommercialeen Droit Uniform Africain" [Non-conformity and hidden defects in commercial sales under the African Uniform Law] (2002) 41 *JuridisPériodique*107at 108.
[16] SK Tameghe"Lavente commercial dansL'ActeUniformeOHADAPortant sur le Droit Commercial Général [Commercial sales under the Uniform Act](unpublished DEA dissertation, Faculty of Law and Political Science, University of Dschang, 1999) at 54 (copy on file with the author).

as opposed to the former provision in the old act. Consequently, the seller has as an obligation to deliver the goods in conformity with the contract stipulation.[17]

While material conformity relates to the quality, quantity, specification and packaging of the goods,[18] functional conformity relates to the fitness of the goods to the usual purpose or purposes for which goods of the same nature are used, or to such particular purpose, expressly or impliedly made known by the buyer to the seller.[19] Material conformity therefore consists of four elements derived from the contract: quantity, quality, description and packaging.

## 2.0 AN INQUIRY INTO THE NATURE OF LACK OF CONFORMITY

### a. Apparent Defects

Pursuant to Article 258 of the Uniform Act, no difficulty arises as to defects which would have been apparent on a reasonable examination of the goods by the buyer immediately after delivery. On this score, the buyer must give notice of a lack of conformity discovered within one month from the date of delivery. Basically, appraisal by the buyer of the seller's compliance with his duty of conformity operates from the moment delivery has been effected.[20] If he fails to observe these requirements, the buyer will be deprived of his right to claim redress for non-conformity.

### b. Hidden Defects

Also, the buyer must give notice of a hidden defect within one year from the moment when it was revealed or ought to be known.[21] To this effect, notice is therefore necessary in order to give the seller the opportunity to cure any deficiency in exercising his duty of conformity. The extension of this timeframe is commendable because it gives the commercial buyer sufficient time to gain full knowledge of any hidden defects. However, the problem is far more extensive, because some sorts of goods are sold that require something to be done to them to make them fit for their commercial purpose. Consequently, in the case of any hidden defects, the buyer will be fortunate to have full knowledge of them.

---

[17]Under French law, the hidden defect element is dealt with under sales law. This is actually effectively the purport of the text: Pougoué et al *Encyclopedie*, above at note 11 at 55; F. Fourment "Défautscachés de la chose venduequereste-t-il de l'actionengarantie des vices cachés?" [Hidden defects of sold goods: what action to take for hidden defects?] (1997) 3 *Revue Trimestrielle de Droit Commercial et de Droit Economique*416 at 419; J Ghestin, *Conformité et Garantiesdans la Vente (ProduitsMobiliers)* [Conformity and Guarantee in sales (Moveable Goods)](1993, LGDJ); SP. LevoaAwona "Défaut de conformité et défautcachédans la vente commercial OHADA: Retour à la case départ?"[Defects of conformity and hidden defects in the OHADA commercial sale: Coming back to the starting point?] in*Recueild'Étudessurl'OHADA et les NormesJuridiquesAfricaines*vol VI (2013)at 317–20. Mba-Owono "Non-conformité", above at note 15 at 110.

[18]Uniform Act, art 255(1).

[19] C Mba-Owono "Non-conformité"(n 15) 110–16.

[20]Uniform Act, art 257.

[21]ibid, art 259. Under CISG, art 39, the time frame is two years: J Huet, *Contrats Civils etCommerciaux, Responsabilité du VendeuretGarantieContre les Vices Cachés* [Civil and commercial contracts: Responsibility of the seller and guarantee against hidden defects] (1987, Litec) at 42.

There is a problem about hidden defects that are only dangerous because they are hidden. It is not certain that an opportunity to inspect goods conditioned in certain forms of packaging, such as frozen goods or tinned foods, will reveal the true facts about the goods. The question is thus a double one: is a seller or retailer who sells food products in an ordinary tin or other sealed container responsible for injury to his customers either from some foreign article in the can or from unwholesomeness of the food; and is the seller who sells food products in bulk, which are defective in some way for which the retailer cannot reasonably be held at fault, liable for injuries resulting to his customers from the defect?[22] Hence it is understandable why the Uniform Act regulating the quality of goods provides that the seller shall be liable to deliver the goods "in the usual manner" that the goods are packaged.[23]

These examples regarding the determination of hidden defects in goods can never solve all the problems related to quality. The role of article 255(2) of the Uniform Act is to aid in construing the agreement of the parties. The question is this. What was the parties' understanding of the contractual provision describing the quality of the goods? More precisely, in the language of article 255(2), what was the parties' understanding of the "purposes for which goods of the same description would ordinarily be used"? Since the problem concerns fitness for the "ordinary" use of goods described in the contract, serious misunderstandings should be infrequent.

It follows therefore that the nature of the kind of non-conformity that the buyer is expected to reveal are two, namely: apparent and hidden defects. This type of test is likely to pose challenges involving goods of varying grades.

**2.1 Different Quality Test: A Matter of Interpretation**

A further inquiry into the notion of quality is necessary. This discussion points to the various quality tests the buyer may alleged non-conformity of goods. In fact, this raises a debate in trying to clear the confusion surrounding the basis of the seller's liability for the non-conformity of goods. This discussion, in turn, makes it necessary to choose between various quality tests.

In fixing the ultimate default rule of conformity of the goods, many domestic legal systems rely on some notion of quality, such as "average, "merchantable," "acceptable, or "satisfactory quality" which is intended to indicate some level of quality that the buyer can expect. In some of these systems, "fitness for an ordinary or a common purpose" is merely one of the components that make up the notion of

[22]RC Brown "The liability of retail dealers for defective food products" (1939) 23 *Minnesota Law Review*585.
[23]Uniform Act, art 255(2).

quality, or one of the questions to be asked in answering the question whether the goods meet the required standard of quality.[24]Against this background, the Act's default rule in Article 255 para 2 appears narrow and limited in its content and scope. On its face, this provision does not rely on any notion of quality,with the only relevant question seemingly being whether the goods are fit for "the purposes for which goods of the same description would ordinarily be used."In other words, the Uniform Act only seems concerned with whether the goods are fit for their ordinary purposes and not with quality. Rather, quality is a broader notion that may include not only fitness for ordinary purposes, but a number of other aspects such as the goods' physical state and condition, intrinsic qualities and features, safety, durability, appearance, finish, and freedom from minor defects.[25]

As a general rule under the Uniform Act, conformity of the quality of the goods will be met if and only if the usage criterion is also satisfied.[26]In fact, the commercial utility of the goods seems to be the guiding rule to the commercial buyer under the Uniform Law in ascertaining the seller's responsibility. This suggests that there is a breach of contract, as a consequence of the non-conformity of the material or functional quality or of both.[27] Moreover, if essential, such a breach may give rise to a fundamental breach,[28] enabling the buyer to avoid the contract[29] or to claim for substitute delivery.[30]

The above approach can be said to be associated with the merchantability test which obtains with some common law systems. This test is viewed as comprising more than just the saleability of the goods as those terms in the parties' contract (with description, fitness for purpose, and acceptance being other relevant aspects of merchantability).[31]It follows therefore that if the goods can be resold on a market without abatement of the price,[32] the goods are in conformity with the quality and the seller is not in breach. From the standpoint of economic considerations, this commercial utility or saleability test under the Uniform Act seems to be laudable to an extent. The standard is helpful in that the price will often be a powerful signal of a benchmark of quality, and consequently of fitness for the ordinary purposes, which the buyer can reasonably expect. The goods' ability or inability to be resold on a market at the same price as that in the parties' contract is a practically useful

[24] See, e.g., Sale of Goods Act, 1979, c. 54, § 14(2)–(2)(B) (Eng.), available at http://www.legislation.gov.uk/ukpga/1979/54; U.C.C.§ 2-314(2)(c) (1977).
[25] See, e.g., Sale of Goods Act § 14(2)–(2)(B).
[26]ibid. As per the position in the civil codes of Cameroon (art 1641), Côte d'Ivoire (art 1641) and France (art 1641).
[27]Uniform Act, art 281; CISG, art 45.
[28]Uniform Act, art 281.
[29]ibid, arts 283–84.
[30]ibid, art 283.
[31] Michael Bridge, *The Sale of Goods* (Oxford University Press)42 45.
[32] A classic formulation of this approach of the test was made in *Australian Knitting Mills Ltd. v Grant* (1933) 50 CLR 387, 413.

test under the Act. To inject greater certainty into the standard, a key consideration should be that found in the resealibility test, that is, reliance on a market price and focus on whether the goods can be resold to a buyer with full knowledge of the goods' actual state and condition without any reduction in the price. Such a test would be both sufficiently flexible and certain. Without creating any presumption, it draws on the practicality and good sense underlying the merchantability test, while at the same time avoiding not only domestic law associations but, more importantly, the limitations of merchantability.

## 3.0 BURDEN OF PROOF FOR THE NON-CONFORMITY OF THE GOODS WITH THE STANDARD

As a general principle, the allocation of the burden of proof under the Act, starts from the fact whether or not the goods are presently in conformity with the applicable standard as contained in Article 255, which should primarily be governed by the principles of proof proximity.Whoever is in possession of the goods is, in principle, in the most appropriate position to take the necessary evidence to prove their conformity or non-conformity. Thus, until the goods have been delivered, the seller has to prove that the goods are conforming. By contrast, once the buyer has taken delivery of the goods without any complaints or reservations as to their conformity, he has to prove that the goods were non-conforming at the time risk passes.

One relevant general principle under the UAGCL is that the assessment of the conformity of goods sold starts upon delivery.[33]In fact, it is understandable that it is the buyer's obligation to examine the goods in view to reveal any lack of conformity. Therefore, the law grants an opportunity to the buyer to inspect the goods and report to the seller whether or not the goods are in conformity with the contractual obligation as agreed upon with the seller.[34] The question that arises is whether the buyer's knowledge, usually derived from having an opportunity of pre-contractual examination of the goods, should be relevant to deciding what conformity obligations were imposed on the seller by the contract and, even if not, whether the facts of the buyer's inspection or assessment is hardly relevant to determine the content of the seller's obligation.[35]

The background for the application of Article 255 UAGCL is in view that a buyer ought to be able to rely on what the parties have agreed. Therefore, the

[33]Uniform Act,arts 256 and 258.
[34]AP Santos & JY Toé, *OHADA Droit Commercial Général*, Bruylant, collection Droit Uniforme Africain, Bruxelles 2002 at 405.
[35]Uniform Act, art 258.

starting point is that a buyer can assume that the seller will make good any defects if there is any discrepancy between the contract and the goods inspected. The presumptive rule in Article 255 UAGCL must mean that it is the seller who must, in the first instance, show that the parties have agreed that the goods shall have a different quality than that stated (in practice, explicitly) in the agreement; in other words, the fact that the buyer knew of or could not have been unaware of the defect, and those parts of the agreement which conflict with this cannot be relied on by the buyer. In any event, Article 255 of the Uniform Act gives protection to the buyer. The buyer is entitled to expect that the goods will conform to the agreement, in practice the written agreement, and that any variance from what should apply under the agreement and under Article 255 para. 1 will be made good by the seller prior to delivering the goods to the buyer. This applies regardless of whether the buyer knows of a defect, if it is agreed that the seller shall deliver the goods without defects.[36]At this point, the parties must be assumed to have expressed their wishes in their written agreement in relation to the requirements for the goods in question. This means that an analogous or expanded interpretation of the provision so as to apply it to Article 255 para. 1 of the Uniform Act seems in principle to be a restricted application of the *caveat emptor* principle.

When reference is made by the contracting parties, what is normally meant is inspection by the buyer. However, control of quality may also be effected by the seller, in which case its quality certificate is attached to other documents (which is significant in respect of certain goods since quality may be considerably affected during transport by reason of environmental and other circumstances). This method of inspection is provided by some governmental or international bodies. The certificate of inspection is the only proof of what it is bound to furnish under the contract. There is, however, another view to the effect that the other party is always entitled to a further inspection.[37]

The answers to these preoccupations exert an influence on contract interpretation depending on the particular circumstances. Presumably, these points are too obvious for the drafters of the Uniform Act not to have been aware of them considering the fact that Article 255 para. 1 does not concern the terms implied by default, but concerns what the contract itself provides. The buyer has the right to demand fully what the seller has agreed to do and the buyer's knowledge of the actual state of the goods cannot change the content of the seller's obligation. This argument is primarily targeted at the express provisions, which, in commercial

[36]René Franz Henschel, ''Conformity of Goods in International Sales Governed by CISG Article 35: Caveat Venditor, Caveat Emptor and Contract Law as Background Law and as a Comparing Set of Rules'', *Nordic Journal of Commercial Law* 10.
[37]Uniform Act, art 256.

contracts, are powerful evidence of the parties' intentions and agreement. It is much weaker when the terms are implied into the contract from the surrounding facts because the buyer's knowledge is part of these facts and hence cannot be ignored. Nevertheless, no matter the argument, the buyer's evidence as to any lack of conformity can only be validated through his duty to examine.

## 4.0 BURDEN OF PROOF FOR THE NON-CONFORMITY OF THE GOODS AT THE TIME THE RISK PASSES

In practice, the often crucial issue is the allocation of the burden of proof for the question whether an established non-conformity of the goods already existed at the time risk passed, or has at least its origin in circumstances which already existed at that time. Logically, it is often no problem to establish that the present status of the goods is not in compliance with the applicable standard. What cannot be determined with the necessary certainty is whether the present status of the goods is due to events which occurred after the risk has passed or not.

Arguably, the notion of conformity under the Act falls within the meaning of the subjective understanding of a "defect".[38] This raises at some point confusion and uncertainty in determining the seller's liability for non-conforming goods due to hidden, latent or apparent defects. The OHADA law has not adequately dealt with these issues in order to show clearly when the seller may be liable for a lack of conformity. In fact, the strong implication is that the burden of proof has shifted onto the buyer in order to establish the seller's liability when delivery has duly been effected. In practice, the buyer's examination of the goods is not to ascertain their actual condition but rather to reveal any aspects of non-conformity.[39] This basic duty has been rather modified under the new Uniform Act in several respects, imposing on the buyer the duty to give notice of any defects. There remains, however, a serious problem about the kind of defects which the buyer is expected to report to the seller. Nevertheless, a clear right of action has been imposed unto the buyer to establish the seller's responsibility for apparent defects and for hidden defects[40] discovered by the commercial buyer particularly when delivery has taken place. This is the purport of Article 256 UAGCL which suggests the fact that a buyer can only make a case for any lack of conformity after the risk passes irrespective of the nature of the defect.

At this juncture, it would be necessary to make an inquiry into the type of risk that can be transferred or passed to the buyer after delivery before examining the kind of defects the buyer is expected to reveal.

---

[38]AP Santos and JYToé, *OHADA Droit Commercial*,above at note 34 at 392–93; Schwenzer (ed) *Commentary*(n 4) 569.

[39]Uniform Act, art 259(1).

[40] Under art 1641 of the French Civil Code, for the purpose of an implied or legal guarantee, the defects must be hidden defects (*vices cachés*), unknown to the buyer.

### 4.1 Which Risks are Transferred to the Buyer?

Risk of "loss" in a sales context refers to the allocation of financial responsibility for the injury or destruction of goods that occurs while the goods are changing hands from seller to buyer.[41]To identify the appropriate moment for passage of this risk is the task of the law governing risk of loss. That law is currently found in Article 277 *et seq*. of the Uniform Act. The Uniform Act contains no definition of the types of risks governed by the rules on transfer of risk, thus leaving uncertainty. First, one must look at the risks that fall within the scope of the Act.[42]

### 4.2 Liability for loss or damage to the goods

The wording used in the Uniform Act is "loss or deterioration"[43] contained in the Article 277 para. 2. Physical risks to the goods including their destruction are covered by the concept of "loss". The Uniform Act's risk-of-loss rules clearly limit their ambit to loss or damage to "the goods" (that is, the goods sold) or "in respect of goods sold."

By analogy, disappearance of the goods, including theft, misplacing the goods, their transfer to a wrong address or person, and mixing up the goods with other goods are included. Assuming that there is guilt of the seller's fault, which is a broad notion that encompasses: (i)-occurrence in transporting the goods from one party to the other; (ii)-in handling the storage, including the risks of natural processes leading to a decline in quality (resulting from whichever cause, like lack of care, bad packaging or from melting, thawing, shrinking, loss of weight or of strength or taste, or appearance).

This situation was vivid during a field trip conducted by the researcher in markets of some big cities in Cameroon: Douala and Yaoundé.[44] Most big merchant-sellers of second- hand goods like shoes for example find in their bulk of goods damaged shoes and because the risk has already been transferred to them by their supplier in their country, such as Dubai and China, they are unable to return

---

[41] Mitchell Stocks, "Risk of Loss under the Uniform Commercial Code and the Convention on the International Sale of Goods: A Comparative Analysis and Proposed Revision of UCC Sections 2-509 and 2-510'' (1993) 87 *Northwestern University Law Review*1.

[42]For example, in complex agreements, a part concerning services may entail a certain risk in conjunction with a sale but not governed by the Uniform Act. (art 235(b)).

[43]This is the author's translation of the French version of the UAGCL, which uses the words: "*la perteou la deterioration".*

[44]The *Nkoulouloun* and *Mokolo* markets respectively.

the goods. Therefore, because of financial interest, they are forced to sell them at relatively cheap prices.

The risk of loss of a document relating to the goods, in my opinion, passes together with the risk for the goods; and the risk-of-loss rules of the Uniform Act apply as easily to documents as to goods. The time and place to hand documents may at times not reach the buyer concurrently. In a case where there exists no agreement to this effect, the delivery of documents may be expected just in time for their use, for taking delivery of the goods or for their import in accordance with the trade usage.[45] Thus, if the documents are lost before they are delivered; the risk would not be treated similarly as for goods. Consequently, the holding of relevant documents of the goods by the seller does not affect the passing of risk.[46] The buyer could rather be contended to claim remedies for non-conforming delivery of documents, by applying to the courts for avoidance of the contract, which would stop risk relating to those documents from passing.[47]

## 5.0 PROOFS AS A MATTER REGULATED UNDER THE UNIFROM ACT

Article 255 does not contain any express rule on the allocation of the burden of proof. Neither does it regulate explicitly who has to prove the relevant standard for conformity, nor who has to prove that the goods were not conforming to the applicable standard at the relevant time. Nonetheless, one relevant general principle under the UAGCL is that a party who asserts a right must prove the necessary preconditions for the existence of that right. This is clearly evident under Articles 258 and 259 para. 1, which gives the burden to the buyer to notify the seller cases of lack of conformity. The buyer's right to do so is to ensure the seller's obligation in delivering goods in conformity with the express contract terms pursuant to Article 255 para. 1 of the UAGCL. It suggests that the burden of proof includes the burden of adducing the relevant evidence and the burden of persuasion. This comes into play by the reliance of the buyer on the seller's conformity obligation. In other words, an exception to the buyer's entitlement to the goods fit for a particular purpose, and the burden of proof of the preconditions for that exception lies with the seller. However, if the seller does not raise the issue of reliance, the goods' fitness under Article 255 para. 2 will be presumed.

The "rule and exception" principle of the allocation of burden of proof may not always be applied strictly in practice because the burden of adducing evidence is sometimes placed on a party who simply has better access to evidence but who

[45]Uniform Act, art 254.
[46]Uniform Act,art 278 para. 2.
[47]Uniform Act,arts 281 & 296.

would not otherwise bear this burden on strict principles of the allocation of burden of proof.[48]

From the above, as well as in line with Articles 258 and 259 paragraph 1, it can be deduced that the buyer has to prove the factual prerequisites of the provisions upon which he wants to rely for its claim or defense. It follows from the above that in absence of an explicit regulation in the UAGCL, the allocation of the burden of proof in relation to the various factual requirements relating to the seller's liability for non-conforming goods has to be done primarily on the basis of the general principles underlying the UAGCL.

These general principles are to be found first of all in the few provisions which explicitly address the question of burden of proof, in particular Article 294(1). It states:

> *A party is excused from his duty to render performance if he can prove that it is made impracticable without his fault by the occurrence of an event, namely; due to a third party or the occurrence of a force majeure. A force majeure entails events which happen beyond the party's control and which could not be reasonably foreseeable. However, there is no exemption if the failure to perform has been caused by a third party appointed by the defaulting party to perform all or part of his contractual obligations.*[49]

Inherent in these general statements of excuse are four elements: (1) performance has become impracticable; (2) the non-occurrence of the cause of impracticability was due to *force majeure*; (3) the party asserting the excuse is without fault; and (4) the party seeking excuse did not assume greater obligations in the contract.

From this, as well as Articles 235(a) and 282 UAGCL it can be deduced that each party has to prove the factual prerequisites of the provisions upon which it wants to rely for its claim or defense. It is often referred to as 'rule and exception-principle' or using Roman terminology as the *principle eiincumbitprobatio, qui*

[48] "If the buyer rejects the goods by invoking their non-conformity the seller must prove that the goods are in conformity with the contract; if the buyer already accepted the goods the buyer would have to prove their non-conformity."
[49]The author's translation.

*dicit non qui negatoractoriincumbitprobatio*.[50]

This rule is supplemented or modified by considerations of equity according to which each party has to prove those facts which originate from its sphere. The basis for this principle proof proximity in the UAGCL as in the CISG is less clear.[51] Consequently, the courts will presumably generally limit themselves in stating the existence of the principle without giving any further justification. It must be taken into account how close each party is to the relevant facts at issue, that is, a party's ability to gather and submit evidence for that point. Hence, if a buyer takes on a delivery without giving notice for any claimed deficiencies, thus establishing his exclusive possession of the goods, then he, the buyer, has to prove any claim based on a lack of conformity of the delivered goods. This seems to be the spirit surrounding the provision of Article 256 of UAGCL. It states:

> *Conformity of the goods shall be appraised as of the day of delivery, even if defects appear only later.*[52]

The rules on conformity under the UAGCL are by no means an exception in dealing with issues of proof as the case under the CISG. The point to be addressed here in the first place is the burden of proof. The burden of proof is not a legal obligation, but by its legal nature, a duty. The duty represents an obligation to oneself and not to the other party in a contract. The duty to proof is closely connected with the buyer's duty to examine the goods and to notify the seller. Namely, the seller will be liable for the non-conformity of delivered goods only if the buyer gives notice pursuant to Article of the UAGCL.

The main purpose of the examination is to determine whether or not the goods are in conformity with the contract, that is, to reveal defects in quality, quantity, description and packaging. In fact, it is only on the result of the examination that the buyer can make a claim for nonconformity. It follows therefore that, burden of proving non-conformity rests on the buyer.

## 6.0 OVERVIEW OF THE VARIOUS ALLOCATIONS OF THE BURDEN OF PROOF IN PRACTICE

It is expressly clear from the provisions of the Uniform Act that the allocation of the burden of proof for the seller's liability for non-conformity of the goods at the time the risk passes is imposed on the buyer. It is however rare to find

[50]Sometimes this rule is broken down into two separate rules distinguishing between the burden for a party raising a claim and a party claiming an exception or raising a defence.
[51]DjakhongirSaidov, "Article 35 of the ISG: Reflecting on the Present and thinking about the Future" 58*Villanova Law Review*.
[52]The author's translation.

under the Act an apportion of the burden to prove to the seller. There is a lack of necessary specificity and distinction to attribute it clearly to the seller.

In light of that and other considerations, attention should also be given to the fact that the Act is completely silent on the procedure for establishing the burden of proof. This can be explained by the fact that such an issue which is beyond the OHADA's scope of application and consequently be governed by the non-harmonized national laws of member countries. Consequently, such a question must be left to the courts of member states as a matter of procedural law. In addition, it is inappropriate for the Act, which relates to the cross border sale of goods, to deal with matters of evidence or procedure. There are undeniably differences in legal cultures, procedural environments, and views of the purpose of judicial proceedings—that is,

whether they are strictly adversarial or aim to establish the truth at all

costs—which have a direct impact on the way evidence is taken. Therefore, a degree of non-uniformity can be expected in matters of taking evidence and more broadly in allocating burden of proof.

In fact, the allocation of the burden of proof under the Uniform Act rests primarily on the basis of the *actor iincumbitprobatio* principle. Thus, the burden of proof is largely dependent on the position of the parties in the process, that is, who invokes Article 255 in its favour. This heavily is connected to the buyer than the seller. This strand of reasoning is in line with the decision passed by the Swiss Supreme Court stated as follows:

*According to the principle that a party has to prove the elements*
*of a provision it wants to rely on, a seller who demands the purchase price must prove that delivery was effected in conformity with the contract and a buyer who bases a defense(e.g., for rescission of the contract or for a reduction of the price) on the lack of conformity of the goods must prove the lack of conformity. Thereby, according to the principle mentioned, both parties bear the burden of proving conformity with the contract, to the extent that they derive rights from the presence*
*or lack of such conformity" (emphasis added).*

This statement, however, shows that in cases where the seller demands the purchase price and the buyer invokes in this action the defense of non-conforming goods problems arise. If it cannot be established with the required certainty that the goods are non-conforming, the burden of proof, i.e. the burden of persuasion, has to be allocated to one party. It cannot be borne by both parties. In such cases, due to

the particularities of Article 255, the application of the 'rule-exception' principle is fraught with uncertainties. Consequently, in most other jurisdictions, courts and literature pay, at best, lip-service to this rule. De facto the burden of proof is allocated largely independent from the procedural position of the relevant parties.

The prevailing view in practice, however, allocates the burden of proof primarily on the basis of the proof proximity principle. Accordingly the burden shifts from the seller to the buyer in conjunction with the delivery of goods. That means that the seller has to prove the conformity of the goods in cases where the buyer has not yet taken delivery or has made reservations as to the conformity of the goods when taking delivery. By contrast once the buyer has taken delivery of goods without any complaints or reservation as to their conformity the buyer has to prove that the goods were non-conforming at the time risk passes. It is suggested, however, that legal predictability should not be undermined any further by the introduction of the proof proximity principle into the UAGCL. As already alluded to, proof proximity can easily contravene the rule and exception principle, and its introduction necessitates a choice between the

two, either as a matter of general principle or in the particular case. That, in turn, gives rise to an additional layer of complexity and unpredictability.

Reaching a substantial degree of international agreement on the rule and exception principle is a hard-earned achievement, which has potential to promote legal certainty in all areas falling within the Act's scope.

From this standpoint, recognising proof proximity as the Act's general principle would be an unwelcome development.

**7.0 ADMISSIBILITY OF EVIDENCE**

The evaluation and admissibility of evidence are often treated as falling into the procedural law realm peculiar to each member states to the OHADA treaty, which is outside the scope of the UAGCL, a substantive law instrument. In Cameroon, for example, a new Criminal Procedure Code introduced to unify procedural laws in criminal matters in Anglophone and Francophone Cameroon, since there were fundamental differences between the French and English criminal procedures which obtained in the two regions of the country. The French system of criminal procedure in Francophone Cameroon was characterized as "inquisitorial",[53] while the form of procedure based largely on the Anglo American

[53]The inquisitorial system is a system of proof taking used in civil Law, where by the judge conducts the trial, determines what questions to ask and defines the scope and extent of the inquiry.

"adversarial"[54] practice was adopted in Anglophone Cameroon. Regarding the establishment of the truth in order to bring offenders to justice, the new Criminal Procedure Code retains both the adversarial elements of the English system and the inquisitorial pre trial investigation of the French system. This makes an analysis of preliminary inquiry as it obtains in the Code both intriguing and instructive on the current subject under study.[55]

In contrast with a standard of proof, which may be classed as an issue of substantive or procedural law depending on the applicable legal regime, the admissibility of evidence appears, at first sight, to fall more clearly into the procedural law realm. Therefore, it would seem that the applicable procedural law should govern this matter.

It therefore suggests that the requirement regarding the referral of a matter of lack of conformity under the Act must be attest by a report of a third party who could be an expert. In fact, Article 258 of the UAGCL requires the buyer to examine the goods or have them examined. It therefore implies, the law grants an opportunity to the buyer to get the opinion of a third party appointed by him to inspect the goods. The third party could be an expert in the field. Consequently, his opinion could be admissible in proving any lack of conformity. Generally, an expert is a person who is specially skilled in the field in which he is giving evidence and whether or not a witness can be regarded as an expert is a question for the judge to decide.[56] In Cameroon, the Examining Magistrate is empowered to order for expert opinion, where a technical problem arises in the course of the preliminary inquiry. [57] The expert at the end of his investigation, normally, submits his report to the Examining Magistrate, who may serve the parties with copies of the report.[58] Inspection of the goods means not ascertainment of their actual condition but rather, the purpose of the examining of the goods is to reveal any aspects of non-conformity.[59] However, if an examination process is carelessly undertaken by an appointed third party who leaves the defect unnoticed, the buyer bears these responsibilities under the contract even though the buyer is entitled to an action against the appointed examiner.

The reason behind this exercise may be based on the fact that, this is an 'obligation' stipulated not only in the interest of the seller but also in that of the buyer himself. This obligation could be justified in the first place by the need to

[54]The adversary system is a procedural system involving active and unhindered parties contesting with each other to put forth a case before an independent decision maker.
[55]Simon TabeTabe, "A Look at Preliminary Inquiry under the Cameroon Criminal Procedure Code" " in *Readings in the Cameroon Criminal Procedure Code,* Yaoundé, Presse Universitairesd'Afrique, at 51, 2007.
[56]AkinolaAguda, *The Law of Evidence* (2nded.,Sweet& Maxwell, 1974) 87.
[57]Sec 203 (1) of Law No.2005/007 of 27 July on the Criminal Procedure Code.
[58]*ibid*, s 216.
[59]Uniform Act, art 259 para. 1.

obtain a clear situation, for by sending the goods to the buyer the seller is put in an uncertain position which cannot last forever. He must know the fate of the goods.

However, this does not mean that the admissibility of evidence under the UAGCL is purely procedural in nature. The issue requires careful consideration of issues going beyond the scope of the Uniform Act. There are provisions which can, conceivably, be used to develop a general principle that the UAGCL takes a liberal approach in admitting evidence, meaning that all other evidence is to be admitted. Article 240 of the UAGCL provides that a contract "need not be . . . evidenced by writing . . . [,] is not subject to any other requirement as to form," and "may be proved by any means, including witnesses."[60]Article 238 para 2 of the Act requires that in interpreting the parties' statement and conduct, "all relevant circumstances" need to be taken into consideration and can therefore be seen as based on the principle of the admissibility of all evidentiary materials for the interpretation of the parties' declarations.

From the above facts, there is still a strong sense that for the UAGCL to deal with the admissibility of evidence outside the parameters of Articles 240 and 238 is to stretch its scope beyond that intended by the drafters. Had the drafters intended the UAGCL to embrace fully an issue as broad in its reach as the admissibility of evidence, they would have, surely, indicated that with much greater clarity. More so, because the admissibility of evidence is usually regarded as a procedural matter, many countries would be surprised to discover that the UAGCL displaces their procedural law regimes, if the UAGCL is held to deal with this Issue. The relevant domestic rules on the admissibility of evidence are based on a variety of policies and considerations emanating from different spheres, many of which are outside a contract law instrument like the UAGCL.[61]

These arguments notwithstanding, uncertainty as regards the **UAG**C**L**'s relationship with the domestic rules on the admissibility of evidence has led to the emergence of more flexible approaches. Admissibility of evidence should be treated as part of the substantive law regime that ought to be displaced by Article 255 para. 2. Underlying this position is the view that the recourse to domestic evidence rules "must be the exception, not the rule" in order to avoid undermining the **OHADA**'s uniform application. If this standpoint is taken, it would be wrong for a court decision to deprive the buyer of an opportunity to rely on the third party's inspection report to prove a lack of conformity—a piece of evidence which would

[60]Similarly, art11 of the CISG also applies.

[61]The common law of evidence, for example, includes rules: against hearsay evidence; on expert witnesses (who can only give opinion on matters requiring their expertise without expressing views on the ultimate issues of the case); against evidence of bad character; on protecting confidential communications between lawyer and client; against evidence which might be injurious to public interest (the public interest immunity doctrine). Each of these rules is based on its particular rationale.

probably be acceptable in many other jurisdictions.

### 7.1 Time for Examination

As to the time of the examination, of the goods, there is a generally accepted worldwide view that it should be done "immediately", "without delay", "as soon as (conveniently) possible". It should be stressed here that in interpreting these expressions attention should be paid to the circumstances of each case and that the time be limited to what is normal in the trade in that particular kind of goods. These are of course factual questions and a significant role played here by the commercial customs of each branch of trade.

The UAGCL suggests no more than a short period within which the examination of the goods should be carried, if necessary, as quickly as possible.[62] As opposed to the former position under the UAGCL, there now exist a prescribed specific time period for the buyer to conduct examination of the goods. The time preceding this process determines the end of the inspection and it is immaterial whether or not the goods conform to the terms of the contract. Henceforth, the question to be answered is when in fact the inspection or examination starts and ends.

The UAGCL's general rule states that the examination of the goods starts upon delivery or could be as from one month following delivery,[63] or sometimes depending on the circumstances, the time may be different than the delivery time particularly when the goods are in transit or when they are redirected, deviated or re-dispatched.[64]

The examination of the goods at delivery may sometimes be delayed when the contract requires the transportation of the goods. This certainly occurs in many international contracts where the goods have to be handed over to a carrier. This position is dealt with under the UAGCL when it provides that the examination will be delayed to take place once the goods reach destination.[65] Also, unlike the general rule, the time of examination of the goods will be delayed until the goods reach their new destination. In this case, the UAGCL allows for a period of one year for the buyer to report any latent defect from the time the defect may have been discovered. This solution is applied when the goods have been re-dispatched, deviated or redirected by the buyer without him having the chance to inspect the

[62]Uniform Act,arts 258, 259 and 270 para. 1. The predecessor of this was Art 227 (1) of the old version of the UAGCL.
[63]ibid, arts 256 & 258.
[64]ibid, art 270(2).
[65]ibid.

goods. However, this solution will not be applied unless the buyer, at the time of the conclusion of the contract, knew or ought to have known of the possibility of such deviation or re-dispatching.[66] In practice, a buyer operating as a middleman or a buyer who intends to sell is presumed to be aware of either the redirection or deviation. In this case, practice sometimes requires such a buyer to inform the seller beforehand.

**7.2 Time limits (Prescription) for notice**

The question of time limit to the buyer's action must be clearly distinguished from the one addressed in Article 259 UAGCL, where the cut-off period of one year to give notice of non-conformity is provided. The period to give notice runs from the moment the buyer either discovered or ought to have discovered the lack of conformity.[67]

Before he examines the goods, someone may inform the buyer of the lack of conformity. In this case, the time of giving notice begins to run at the moment the buyer acquired this knowledge. It is therefore immaterial whether or not he had examined the goods.

Prescription concerns legal actions and bars a claim even the buyer did give notice. Conversely, a longer time limit for an action does not influence the cut-off period of Article 259 UAGCL. In theory, the buyer would still be able to exercise his claim, but he cannot rely on a lack of conformity if he has not given notice within one year of delivery. Parties may derogate to the latter rule by stipulating a different period of guarantee.

It is important to the seller that notice is not only timely, but also sufficiently specific as to the goods concerned and the nature of the defect. It has been stated by a writer that even if the buyer has bought a single item of a certain kind from the seller, he must give notice referring not only to the type of goods, but also to the specific item in question (serial number, date of delivery), in order for the seller to precisely identify the allegedly defective goods without having to read all sales documents or to gather information.[68]

As in the CISG, the period of time in the UAGCL related to the report on the notice of conformity[69] is independent but additional to the period of the examination

[66]ibid, art 259.
[67]ibid, art 258.
[68]Anna Veneziano,''Non-Conformity of Goods in International Sales; A Survey of Current Caselaw on CISG'', 1 *International Business Law Journal*52.
[69]CISG,art 39(1).

of the goods.[70] In other words, nothing prevents the buyer from examining the goods in spite of the cut-off period of one year. Although the two durations may appear similar, the clear distinction between them lies on the fact that the buyer will lose his right to rely on the lack of conformity, unless the one time period has expired.[71] The buyer up to that period has the right to continue with the examination of the goods, which may reveal some immediate true facts of the goods before a period of one year. It follows therefore that in determining what amount to "one year" is the duration for giving notice which depends on the facts of each case. Most often regard is made as to whether the goods are seasonal or perishable, or whether the goods require an additional expert opinion. Hence, depending on each particular case, the time duration to give notice is defined.[72]

As a general rule, the "1 year" time limit to give notice runs from the moment the goods are handed over to the buyer.[73] Thereafter the time limit elapses, the buyer loses all rights to rely on the lack of conformity. It is irrelevant and immaterial whether or not the buyer could not have knowledge or it was impossible to discover the lack of conformity.[74] The seller is therefore free from any lack of conformity claim as after the time limit has elapsed. However, one year time limit remains a default rule. The UAGCL makes it clear that parties are free to determine their time limit for notice.[75] It therefore appears that parties can either exclude or modify this limitation period but the seller still has the obligation to perform his duties as contained in Article 255 regarding the quality of the goods.

Once the buyer fails to observe the notice requirement as provided by the law, he immediately losses all rights to rely on the lack of conformity.[76] It follows that the buyer losses all available remedies[77] he would have been entitled to if he had performed the requirement of notice.[78] In short, he will be solely responsible if the goods happen to be defective.

From the reading of some provisions of the Uniform Act, parties may derogate by agreement the examination and notice requirements. The case makes it clear that the opportunity of drafting a more complete set of terms on lack of conformity is to be taken into account. One solution might be to distinguish

[70]Uniform Act, art 257 UAGCL; CISG,art 38.
[71]Uniform Act, arts 258-259.
[72]Ingebord Schwenzer (n 4) 630.
[73]Uniform Act, art 259.
[74]Ingebord Schwenzer (n 4) 637.
[75]Uniform Act,art 259.
[76]ibid, arts 282, 283 and 284.
[77]ibid, arts282 -284.
[78]ibid, arts 258 & 259.

between apparent and hidden defects, providing for a longer period of time under the Uniform Act which is one year period.[79] This leaves the courts the task of interpreting when a lack of conformity is easy to discover. Another option is to leave out any reference to the nature of the non- conformity and provide for a short term starting together with a maximum period guarantee starting from delivery: which is one month under the Uniform Act.[80]

Finally, Articles 258 and 259 of the Uniform Act may be derogated also by usage under Article 238 para. 2 UAGCL. When parties have agreed on a contractual time for notice, however, the applicability of usage is excluded.

Also, the examination of the goods by the buyer usually precedes the non-conformity notice and serves for its preparation. The primary function of examination is to recognize defects and prepare the notice of non-conformity. Additionally, the examination of the goods should determine when, in the absence of the examination, the buyer ought to have discovered the lack of conformity and, from that moment, the reasonable time for giving the notice of nonconformity starts to run. Finally, pursuant to Article, the buyer loses the right to declare the contract avoided unless he does within a reasonable time after he knew or ought to have known of the breach.

As to the content of a notice of non-conformity, under the CISG such notice must be sufficiently specific regarding the "nature of the lack of conformity" in order for the buyer to meet the burden. Sufficiency in this respect is determined with the purpose of the notice in mind. As one commentator has suggested, [q]uestions as to what the notice should be answered with regard to the functions served by the notice . . . [and] the principal functions [under the CISG] are to give the seller an opportunity to obtain and preserve evidence of the condition of the goods and to cure the deficiency.[81]

The UAGCL provides two instances where the buyer should give notice to the seller for any lack of conformity over the goods being delivered: the buyer must give notice of a lack of conformity discovered a month later from the day of delivery.[82] Failure to observe these requirements, the buyer will be deprived of his right to claim redress of the non-conformity. Secondly, the buyer must give notice of a hidden defect of conformity within one year from the moment when this was

[79]ibid, art 259.
[80]ibid, art 258.
[81]John OHonnold, *Uniform Law for International Sales*(3rd ed.Kluwer Law International, *1999)*277-278.
[82]Uniform Act,art 257.

revealed or ought to be known.[83] To this effect, notice is therefore necessary in order to exercise all remedies available to the buyer under the Uniform Act.[84]

There is no requirement as to a specific form of notice under the Uniform Act. Notice need not be written,[85] it may be given, by word of mouth, for example by telephone. This problem in the latter case is of course evidence. Pursuant to Article 240 UAGCL, the buyer can prove it simply by all possible means.

However, examination of the goods is not a pre-condition for proper notification. In other words, with the fulfillment of conditions set out in Article, notice of the buyer will have a legal effect even where the buyer has either not examined the goods sufficiently or at all. Furthermore, failure to examine the goods and to give notice of the lack of conformity is not detrimental to the buyer whenever the defect is latent, that is, if the non-conformity could not have been recognised upon an appropriate examination of the goods.

## 8.0 SUGGESTED APPROACH FOR AN ALLOCATION OF THE BURDEN OF PROOF

A proper allocation of the burden of proof, that is, the burden of persuasion, in the context of the seller's liability for non-conforming goods cannot be done in an all or nothing approach which sometimes appears to be adopted in practice. It is by no means necessary that one party has to bear the burden of proof for all factual requirements. In fact, generally the burden has to be allocated separately for every particular factual requirement.

Consequently, in addition to the above mentioned distinction between burden of proof and burden of presenting evidence, three closely related but still separable questions have to be distinguished in allocating the former. In determining whether the seller has complied with his obligation to deliver conforming goods, one has first to determine the applicable standard. The second step relates to the determination of whether the goods are presently in conformity with this standard while at the third step the question arises whether such conformity already existed at the time when the risk passes.

## 9.0 CONCLUSION

The seller's duty in exercising his material duty of conformity under the UAGCL is fraught with some difficulties. One of such difficulties is to establish the seller's liability for the non conformity of goods as to the specifications of a

[83]ibid,art259; under the CISG, the time frame is 2 years (CISG,art39).
[84]Uniform Act,arts282, 283 and 284.
[85]The word 'written' shall mean any communication using a written medium, including the telegram, telex, telefax or e-mail.

contract of sale of goods. There is still some confusion and uncertainty regarding the notion of conformity under the Act. There is really a need to search for a quality standard, which can underpin the ultimate default of the fitness for ordinary purposes.

The seller is equally expected to deliver goods which will satisfactorily serve the purpose for which commercial buyers intend to use them. This suggests therefore that the seller's expected obligation to deliver the adequate requirements to the goods under the contract would hardly in practice be that. This therefore raises the confusion and uncertainty in determining the seller's liability for the non conformity of goods as to the specifications of a contract of sale of goods under the UAGCL. The concept of conformity must be handled in consideration with a number of issues, irrespective of the contractual stipulations agreed by the contracting parties.

It has become necessary to ask a few questions: First, can the issue of proof of lack of conformity under the Act be used to introduce an overarching quality standard? Second, should the rules be more detailed by giving guidance for certain specific cases, such as that given in New Zealand Mussels? Finally, to what extent should a sales law instrument govern the matters of proof, such as burden and standard of proof, and the evaluation and admissibility of evidence? There is no doubting the fact that no consistency in the exercise of this right is available under the UAGCL.It has been argued that the CISG is not capable of dealing adequately with the admissibility of evidence.There are undeniably differences in legal cultures, procedural environments, and views of the purpose of judicial proceedings in the member states.

In conclusion, there is little doubt that the UAGCL has proved to be incapable of resolving the issue of conformity of the goods. Attention should therefore be given to drafting new provisions on conformity. Finally, to what extent should the UAGCL govern the matters of proof, such as burden and standard of proof, and the evaluation and admissibility of evidence? This calls for a fundamental harmonisation of the adjectival laws on matters of proof in order to maintain a higher degree of the uniform character of the OHADA laws.