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EDITOR'S NOTE

I present, with great joy, the second edition of volume five of the UNILAG Law Review. Evident in the receipt of the Acquisition International Best Law Student Publication (Nigeria) award, the UNILAG Law Review continues to prove itself as a legal and academic force to be reckoned with. Despite the debilitations presented by the ongoing ASUU strike, I am delighted that we have been able to continue the tradition of excellence of the UNILAG Law Review.

I consider it an honor to have served as Editor-in-Chief and I applaud the group on a job well done. We have worked over the past five years to add to the academic conversation surrounding current legal concerns in Nigeria and throughout the world by publishing thoroughly researched papers written by authors home and abroad, students and legal professionals alike.

The articles in this edition provide fresh insight on various legal matters that cut across different fields. In this volume we explore socioeconomic rights, money laundering and finance terrorism, human trafficking, corporate commercial transactions and more. This issue aims to leave readers feeling informed and motivated to learn more about the numerous legal topics and problems covered in its articles. Without a doubt, this journal is a great asset to any legal library. I am excited about it and the brilliant discourse on legal issues by legal scholars and seasoned professionals.

I appreciate our patron – Professor Fabian Ajogwu SAN and the law firm of Kenna Partners for the unwavering support and commitment to the improvement of the UNILAG Law Review. I am also appreciative to the Editorial Board members who worked tirelessly to guarantee the papers were error-free despite academic uncertainties in our country. I would also like to extend my gratitude to the Faculty of Law for its support and tutelage through our staff adviser, Dr. Edefe Ojomo. I thank all the authors for their contribution to this volume, as it is your work that makes the journal.

Oludayo Olufowobi,
Editor-in-Chief '22

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A COMPARATIVE APPROACH TO THE FIGHT AGAINST POVERTY IN AFRICA: ANY ROLE FOR SOCIO-ECONOMIC RIGHTS?

By Stanley Ibe*

Abstract

Socio-economic rights (ESCR) have not enjoyed the same primacy as civil and political rights because some view them as policy statements. In contexts where there are sound social security safety nets, this could be tolerable, but in most of Africa where poverty is prevalent, a different approach is desirable. This article seeks to reflect on the role that effective implementation of socio-economic rights can play in reducing poverty and powerlessness. It begins with a brief reflection on the state of poverty in the region and then assesses the three predominant traditions of socio-economic rights on the continent - justiciable (e.g., South Africa), non-justiciable (e.g., Nigeria), and mixed model (e.g., Ghana) - as potential tools for addressing the current drift below the poverty line. Finally, it provides some ideas on transforming theoretical principles into practical realities for the vast majority of Africa's peoples.

Keywords: Constitution, development, implementation, justiciability, poverty, rights, and socio-economic.

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1.0 INTRODUCTION

Poverty is often difficult to define[1] but easy to recognise.[2] A visit to any of the continent's informal settlements such as Alexandra, Gauteng (South Africa), Ezbet-el-Haggana (Egypt), Kibera (Kenya), Makoko (Nigeria) or Nima Slum (Ghana) [3] illustrates the dire circumstances under which inhabitants earn a living. Indeed, upon careful reflection, one need not leave the comfort of their immediate environment to find poverty.

As pervasive as poverty is, it is a tricky subject to study. For one, there are probably as many approaches to the subject as there are scholars on it. However, the focus of our approach for the purpose of this article – the human development approach- is important because it makes individuals the core of its assessment. In recognition of the importance of this approach, the United Nations Development Programme (UNDP) established the 'Human Development Index' to regularly monitor how states fare on three key indicators – life expectancy, educational attainment and standard of living as measured by income in terms of its purchasing power parity.[4]

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[1] Several authors and researchers have grappled with the question of definition both of poverty and the poor. To give some examples, see S. Alaxander, 'Poverty may not actually mean what you think.' ONE, 16 March, 2020 available at <https://www.one.org/us/blog/extreme-poverty-definition-meaning-explained/> (accessed 18 May, 2022); Banerjee, A. V, 'Why Fighting Poverty is Hard.' available at <http://economics.mit.edu/files/6605> (accessed 18 December , 2021); 'Poverty: Hard to Define, Harder to Solve.' *The Economist*, April 1, 1999 available at http://www.economist.com/node/195717 (accessed 18 May 2022).

[2] M. Orshansky, the economist who set up the 1st United States poverty line, reportedly said: "Poverty, like beauty, lies in the eyes of the beholder." See reference in *Malaysia – Measuring and Monitoring Poverty & Inequality* (United Nations Development Programme, 2007), p. 1.

[3] These locations are among the 20 Worst Slums in Africa according to *Africa Ranking* http://www.africaranking.com/20-worst-slums-in-africa/ (accessed 19 May 2022).

[4] It must however be observed that HDI is not a comprehensive measure of human development. See Salim Jahan, 'The Human Development Index – What it is and what it is not' available at http://hdr.undp.org/en/hdi-what-it-is (accessed 20 May, 2022).

Regardless of the conceptual difficulties briefly highlighted above, it is fairly clear that in the context of rights, socio-economic rights reflect and protect the poor more than civil and political rights. Although this statement normally triggers a long-drawn debate about the indivisibility of human rights, fundamental rights should be recognized as a composite because they otherwise lose their essence.[5]

However, in the development of rights, there was a classification, which gave rise to separate treatment and therefore different implications for these rights. Therefore, civil and political rights are supposedly more amenable to the question of judicial scrutiny (*justiciability*) than socio-economic rights even though the arguments for this could easily apply to every category of rights. The bifurcation of rights under the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) provides a fitting context for the classification and also reflects the comfort level of states at the time the covenants were adopted in 1976. Nonetheless, the debate over the place of socio-economic rights in the scheme of human rights will probably continue for a long time.[6]

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[5] All rights are interconnected. The right to life (civil and political) is recognized as the most important one for obvious reasons. Nonetheless, that right loses its essence in the absence of a right to food, health, and shelter (socio-economic). Therefore, all rights are best treated as interconnected and indivisible.

[6] In 2014, *Open Global Rights* explored the theme: "Debating Economic & Social Rights: Are Legal Protections Useful to Activists fighting Poverty," which attracted over 30 articles. For summaries and full articles, see https://www.opendemocracy.net/openglobalrights/debating-economic-and-social-rights (accessed 20 May 2022. In his contribution to the debate, the current author responded to an earlier piece in which Pedro Pizano argued that socio-economic rights are not human rights at all because they are not immediately enforceable in a court of law, as if immediate judicial enforcement is the only ingredient required to translate an aspiration into a right. For more on the interesting debate, see Stanley Ibe, 'Yes, Economic and Social Rights Really are Human Rights.' *Open Global Rights,* 8 August 2014 available at https://www.opendemocracy.net/openglobalrights/stanley-ibe/yes-economic-and-social-rights-really-are-human-rights (accessed 21 May 2022 and Pedro Pizano, 'Does Social Justice work against Human Rights.' *Open Global Rights*, 5

By virtue of its intersection with poverty, socio-economic rights stand a better chance of addressing the perennial problem of poverty in Africa. This paper argues along this line and specifically makes a case for refining some of the existing socio-economic rights regimes on the continent with a view to using them as tools to ameliorate poverty. Perhaps a good starting point is to examine the state of poverty on the continent.

2.0 THE STATE OF POVERTY IN AFRICA

In their analysis of the 2020 *World Bank Poverty & Shared Prosperity Report*, Marta Schoch and Christoph Lakner[7] highlighted the paradox between decreasing regional poverty rate (1.6% between 2015 and 2018) and increasing number of poor people in Sub-Saharan Africa (433 million in 2018 compared to 248 million in 1990 – a 75% increase). One factor responsible for this state of affairs is the high population growth rate[8] which makes it difficult for an unprecedented average annual economic growth rate of 5.2 percent over the last 20 years to make appreciable impact on ordinary citizens across the continent.

June 2014 available at https://www.opendemocracy.net/openglobalrights/pedro-r-pizano/does-social-justice-work-against-human-rights (accessed 21 May 2022).

[7] M. Schoch & C. Lakner, 'The number of poor people continues to rise in sub-Saharan Africa, despite a slow decline in the poverty rate' (World Bank Blogs, 16 December 2020). Available at https://blogs.worldbank.org/opendata/number-poor-people-continues-rise-sub-saharan-africa-despite-slow-decline-poverty-rate (accessed 22 May 2022).

[8] Statista estimates that the average annual population growth rate for Africa during the twenty-one-year period (2000-2021) was 2.5%. Concretely, this meant that the total population of 811 million in 2000 became 1.37 billion in 2021. Available at https://www.statista.com/statistics/1224205/forecast-of-the-total-population-of-africa/ (accessed 23 May 2022).

Laurence Chandy[9] identifies five reasons why economic growth does not seem to translate into lifting people out of poverty. The first is rapid average population growth rate, which stands at 2.6 percent per annum. What this means is that as the economy improves, so does the number of people relying on families for care and support. Unfortunately, the high population growth numbers plunge more people into poverty than are rescued by the growth in the economy.

The second point relates to the depth of Africa's poverty compared to poverty elsewhere. Here the poverty level is so far behind other continents and the poverty line that those modest improvements do not make any significant difference in the lives of the average poor.

Similar to the argument above is a third point on unusually high inequality in a context in which inequality is not rising. The sub-text here is that fairly stable inequality rates may not impact positively on an already severely unequal continent.[10]

The penultimate reason is the degree of mismatch between where growth is occurring and where the poor are on the continent. There is an interesting analogy on this point with presumably poor countries such as Rwanda and Ethiopia making significant progress on the economic front versus fragile states such as Democratic Republic of the Congo and Madagascar in which there has been little or no economic growth over the last two decades and in which more people have become poor.

[9] L. Chandy, 'Why is the number of poor people in Africa increasing when Africa's economies are growing?' *Africa in Focus*, 4 May, 2015, Brookings available at http://www.brookings.edu/blogs/africa-in-focus/posts/2015/05/04-africa-poverty-numbers-chandy (accessed 23 May 2022).

[10] Masego Madzwamuse also makes this argument in the context of women's empowerment in Africa. See M. Madzwamuse, 'Economic Justice as a Site for Women's Empowerment – What Transformative Shifts Are Required?' (2014) *BUWA* – Women's Economic Justice: Putting Women at the Centre (A Journal on African Women's Experiences), Vol. 1, Issue 1 December, pp. 8-13.

The final reason is poor data quality. This point actually calls into question the fundamental assumptions in Chandy's essay. Information relied upon to classify countries as poor or wealthy emerged out of data collected and analyzed in those countries. The data on poverty, for example, is often extracted from household surveys, which are often infrequently conducted or totally absent in many countries on the continent. Besides, the informal sector in Africa is huge[11] and may not be captured in the data available for making these assessments. Regrettably, such assessments will continue regardless of Africa's preparedness to embrace the data revolution. Does this suggest that Africa is not poor? Of course not! It might actually suggest that poverty in Africa is under-estimated/under-reported. How is this relevant to ESCRs?

3.0 WHY ARE ESCRS CRITICAL TO ADDRESSING THE POVERTY QUESTION?

Available literature clearly suggests that sustainable development is not possible in the absence of substantial reduction in the number of poor people. [12] One tool for achieving poverty reduction is empowerment, which often reflects a recognition of the concept of rights.

The rights-based approach to development was popularised by former UN Secretary General, Kofi Annan, who championed the mainstreaming of human rights across all areas of the organisation's work in 1997 and saddled former President Mary Robinson of Ireland

[11] The International Labour Organisation statistics suggested that 85.8% of employment in Africa was informal in 2018. Globally, 61% of the employed population – about 2 billion people – operated in the informal economy in the same year. See International Labour Organisation, 'More than 60% of the world's employed population are in the informal economy.' Available at https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_627189/lang--en/index.html (accessed 23 May 2022).

[12] See for example, 'Unit One: The Challenge of Sustainable Development' in *Understanding Sustainable Development*, p. 18 available at https://www.soas.ac.uk/cedep-demos/000_P501_USD_K3736-Demo/module/pdfs/p501_unit_01.pdf (accessed 23 May 2022).

with the responsibility of ensuring that, through establishing a new Office of the High Commissioner on Human Rights (OCHR).

Writing in the annual report of the UN in 1998, Kofi Annan observed that:

> The rights-based approach…describes situations not simply in terms of human needs or of development requirements, but in terms of societal obligations to respond to the inalienable rights of individuals. It empowers people to demand justice as a right, not as charity and gives countries a moral basis from which to claim international assistance where needed.[13]

In the context of Annan's statement, sustainable development embraces two dimensions – the national, according to which states owe a responsibility to people within their jurisdictions to protect and promote rights. The second dimension relates to the obligation to cooperate internationally and afford assistance where necessary to ensure realization of human rights across the world.

There is a sense in which a curious reader might raise the question of violation in relation to poverty. The assumption here might be that rights' violations are often associated with violators – individuals, institutions and states.[14] While this may be true to a reasonable degree, it is also the case that it is not in all rights violation cases that

[13] 25 Questions & Answers on Health and Human Rights. Health and Human Rights Publication Series, Issue No. 1, July 2002, p. 28 available at http://www.who.int/hhr/information/25_questions_hhr.pdf (accessed 24 May 2022).

[14] This is a bit like Audrey Chapman's "violations approach" for monitoring the International Covenant on Economic, Social and Cultural Rights. Chapman's violations approach focuses on three types of violations – (i) violations resulting from actions and policies on the part of government (ii) violations related to patterns of discrimination and (iii) violations taking place due to a state's failure to fulfill a minimum core obligation contained in the Covenant. See A. Chapman, 'A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights.' *Human Rights Quarterly*, Vol. 18, No. 1, February 1996.

you can accurately predict who the right violator is or what violation led to the hurt for which redress is being sought. In the same vein, it is sometimes difficult to pin-point exactly who is responsible for mass poverty in Africa.

We can hazard a few guesses – corrupt government officials; private contractors who collude with these government officials to manipulate the system; foreign partners who take advantage of poor regulatory environment to defraud tax and other authorities, tax havens in Europe and the Americas where corrupt leaders hide their loot; poor regulatory and law enforcement regimes, etc.

While these may constitute contributors to poverty in any given setting, it is often difficult to directly link the activities of any one of these entities to the poverty of a resident as to enable him or her trigger an action against these individuals, institutions or governments. This does not however detract from the fact that we can find violators if it becomes absolutely necessary. Neither does inability to identify a specific violator, as against generic violator (e.g., government) make poverty any less a human rights issue.

Socio-economic rights have been described as the 'rights of the poor'[15] because they reflect the basic necessities for life and sustenance – right to health, food, water, education, etc. It is interesting that even the right to life cannot be fully expressed in the absence of the right to the bare necessities of life. It is for this reason that prioritising socio-economic rights is crucial to addressing the poverty question in Africa.

To get a better sense of what exists, we shall be reflecting on three of the major socio-economic rights traditions on the continent – one that is represented by South Africa, which embraces constitutional and justiciable socio-economic rights. A second represented by Nigeria, which constitutionalizes socio-economic rights but makes them non-

[15] Professor Paul Farmer uses this phrase in his seminal work. See P. Farmer, *Pathologies of Power – Health, Human Rights and the New War on the Poor* (University of California Press, 2003).

justiciable and a final tradition represented by Ghana, which appears to take a middle course.

4.0 REFLECTIONS ON THE PREDOMINANT ESC RIGHTS TRADITIONS

In this section, we reflect on three of the more predominant ESCR traditions on the continent – constitutionally guaranteed and justiciable; constitutionally guaranteed and non-justiciable; and hybrid. Before that, it is important to note that the African Charter on Human and Peoples' Rights clearly recognises civil and political rights as well as ESCRs. Furthermore, the Charter places the two categories of rights on equal footing.[16] In this regard, both categories of rights are justiciable. In principle, this means that all state parties to the African Charter should have justiciable ESCRs in their domestic laws. Regrettably, this is not the case in practice. The reason for this is beyond the scope of the current paper but it suffices to know that the lukewarm attitude of states to international treaties[17] and the different approaches to adoption i.e., dualism and monism [18] are partly responsible.

4.1 Constitutionally Guaranteed and Justiciable ESCRs – South Africa

The term 'justiciability' is generally understood to refer to a right's faculty to be subjected to the scrutiny of a court of law or another (quasi-) judicial entity. A right is said to be justiciable when a judge can consider the right in a concrete set of circumstances and when this

[16] African Charter on Human and Peoples' Rights, article 2.

[17] R., Nielsen & B., Simmons "Rewards for ratification: Payoffs for participating in the international human rights regime?" (2015) International *Studies Quarterly* 59, pp. 197-208 available at https://academic.oup.com/isq/article/59/2/197/1787556

[18] See M., Kebede, "Beyond dualism and monism: Bergson's slanted being" (2016) 24 *Journal of French and Francophone Philosophy*, No. 2, pp. 1-35 available at https://ecommons.udayton.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1116&context=phl_fac_pub (accessed 27 May 2022).

consideration can result in the further determination of this right's significance.[19] In simple terms, a right is justiciable to the extent that it can become the subject of a court's adjudicatory process.

The above description is important in the context of the first of three predominant ESCR traditions namely, constitutionally guaranteed and justiciable ESCR. This typology guarantees ESCR as constitutional rights for which aggrieved parties can approach the courts for remedies. South Africa is the focus of our attention in this category[20] as its 1996 constitution recognizes[21] and admits of claims arising out of breach of ESCR. In addition, there are several independent commissions set up by the government to monitor the implementation of these rights.[22]

Even with this carefully developed architecture, there are problems of implementation and enforcement. One only needs to consider the

[19] See K., Aramulo, Review of I. Merali & V. Oostereld (eds.) *Giving Meaning to Economic, Social and Cultural Rights: A Continuing Struggle*. (2001) 3 University of Pennsylvania Press, USA. Human Rights & Human Welfare, p. 114 available at http://www.du.edu/korbel/hrhw/volumes/2003/arambulo-2003.pdf (accessed 27, May 2022)

[20] Kenya is another great example as its 2010 Constitution provides for justiciable ESCR. Article 43 spells out right to health, housing, food, water, social security and education. Article 53(1) specifically provides for children's right to free and compulsory education as well as basic nutrition, shelter and healthcare. For its part, Article 21(2) incorporates the principle of progressive realisation of these rights. For a reflection on the limits on socio-economic rights in this constitution, See N., Orago, "Limitation of Socio-economic Rights in the 2010 Kenyan Constitution: A Proposal for the Adoption of a Proportionality Approach in the Judicial Adjudication of socio-economic Rights Disputes." (2013) *Potchefstroom Electronic Law Journal* (PER) 71 <http://www.saflii.org/za/journals/PER/2013/71.html> (accessed 28 May 2022).

[21] See the 1996 Constitution of the Republic of South Africa, Chapter 2, which recognises economic, social and cultural rights under the Bill of Rights as enforceable rights. The Constitution is available at https://www.ru.ac.za/media/rhodesuniversity/content/humanresources/documents/employmentequity/Constitution%20of%20the%20Republic%20of%20South%20Africa%201.pdf (accessed 29 May 2022).

[22] The South African Human Rights Commission is one of such commissions.

housing crisis in Cape Town to realize this. In the *Grootbroom* case,[23] Justice Yacoob of the South African Constitutional Court made the unassailable point that the critical issue is not whether or not the right to access to housing, guaranteed under Section 26 of the Constitution, like other ESCR is *justiciable*, but how they can be enforced.[24] Indeed, his apprehension has proved true over the course of time. Despite a plethora of decisions affirming the right of citizens to specific ESCRs recognized by the Constitution,[25] several South Africans have yet to realize their ESCRs.

In the light of above, there has been a raging debate about how best to assess states' commitment to fulfilling obligations arising out of ESCR claims. Indeed, standards and approaches have been identified for this purpose.[26] Given that this section focuses primarily on South Africa, it is helpful to briefly examine one standard and an approach employed by institutions within the country to respond to the question of assessment.

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[23] *Government of the Republic of South Africa & Others* v *Grootboom & Others* 2000 11 BCLR 1169 (CC).

[24] *Ibid*, para. 20.

[25] See *Port Elizabeth Municipality* v *Various Occupiers* 2004 (12) BCLR 1268 (CC) (Right to housing, especially, right not to be evicted from one's home without an order of court); *Bon Vista Mansions* v *Southern Metropolitan Local Council* 2002 (6) BCLR 625 (Right to water and health); *Minister of Health & Ors* v *Treatment Action Campaign & Ors,* South African Constitutional Court, Case CCT 8/02 (Right to health and food for HIV positive citizens); *Manquele* v *Durban Transitional Metropolitan Council* (2001) JOL 8956 (D) (Right to water) and *Vanessa Ross* v *South Peninsula Municipality (*1999) JOL 5298 (C) (Right of access to adequate housing).

[26] See for example, St. Ibe, 'Assessing Standards of Review and Approaches to Remedies for socio-economic Rights.' (2015) Paper submitted to the Institute of Human Rights, Abo Akademy University, Turku, Finland for the award of Postgraduate Diploma in Justiciability of Economic, Social & Cultural Rights, December.

The South African Constitutional Court is believed to have developed the standard of *reasonableness,*[27] which seeks to inquire into the 'reasonableness of a state's conduct in the light of its obligations.'[28] The leading cases for this standard are *Soobramoney,*[29] *Grootboom,*[30] *TAC*[31] and *Khosa*.[32]

Following these cases, the reasonableness review has been touted as good to the extent that it is realistic (for being context-specific); respectful of separation of powers principle in that it allows the court to defer to the other branches of government where questions of policy options and choices and decisions about spending levels arise; strict and concrete as it requires governments to indicate specific legislative and policy measures taken to comply with the obligations; and as a result, easy to monitor and evaluate.

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[27] S. Yeshanew, "Approaches to the Justiciability of Economic, Social & Cultural Rights in the Jurisprudence of the African Commission on Human and Peoples' Rights: Progress and Perspectives." (2011) 11 *African Human Rights Law Journal*, pp. 317-340 @ 326. See also Katharine Young, "Proportionality, reasonableness and economic and social rights in Vicki Jckson & Mark Tushnet (eds) *Proportionality: New Frontiers, New Challenges* (2017) Cambridge University Press.

[28] The South African Constitutional Court identified seven requirements that the state's conduct or programme must meet to qualify as reasonable. They must be comprehensive, coherent, coordinated, balanced and flexible; should make appropriate provision for short, medium and long-term needs; should not exclude a significant sector of society, and take account of those who cannot pay for the services; have appropriate human and financial resources; be both reasonably conceived and implemented; be transparent and involve realistic and practical engagement with concerned communities; provide relatively short-term relief for those whose situation is desperate and urgent; and be continually reconsidered to meet the needs of relatively poorer households. See Yeshanew (n.24), p. 326.

[29] *Soobramoney* v *Minister of Health, Kwazulu-Natal* (1997) 12 BCLR 1696

[30] Supra note 23.

[31] *Minister of Health & Others* v *Treatment Action Campaign & Others* 2002 (5) SA 721.

[32] *Khosa & Others* v *The Minister of Social Development & Others* CCT 12/03.

As interesting as it seems, this standard also has a few drawbacks – it is considered vague on account of its context-specificity. It is therefore often difficult to assess across different contexts. In addition, it does not necessarily offer immediate individual relief, which is guaranteed under the *minimum core* standard, for instance. Despite this, regrettably, it also imposes the burden of proof on the litigant. In many contexts in which the state is not as transparent as it should be and where the power relations between the state and potential litigant is skewed in favor of the former, there is little chance that the litigant can discharge this burden.

Nonetheless, the European Committee of Social Rights has adopted the reasonableness standard. In addition, the *Optional Protocol to the International Covenant on Economic, Social & Cultural Rights* (OP-ICESCR) makes it a prerequisite for accepting communications.[33] To that extent, Bruce Porter[34] describes article 8(4) OP-ICESCR as 'a clear rejection of attempts to limit the justiciability of claims relating to the substantive obligations of realising rights under article 2(1).'[35]

For its part, the 'meaningful engagement' approach aims to encourage participation of citizens in decisions that affect them. Although the

[33] OP-ICESCR, article 8(4) provides: "when examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the state party in accordance with Part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of rights set forth in this Covenant."

[34] B. Porter, 'The Reasonableness of Article 8(4) – Adjudicating Claims from the Margins.' *Nordisk Tidsskrift for Mennekerettgheter*, Vol. 27, No. 1, pp 39-53 available at <https://www.escr-net.org/sites/default/files/Bruce_Porter_The_Reasonableness_0.pdf> (accessed 30 May 2022).

[35] To this end, he identifies four A's elements required of a reasonable policy – Availability (access to relevant services); Accessibility (physical and economic accessibility and non-discriminatory access); Acceptability (based on qualitative standards) and Adaptability (flexible and geared to meeting of particular cultural and other needs, as well as responsive to changes in circumstances). See Porter B, (n. 34), pp. 25-26.

Constitutional Court of South Africa applied a variant of this approach in its decision in the *Grootboom* case,[36] it fully enunciated the approach in the case of *Occupiers of 51 Olivia Road & Others* v *City of Johannesburg & Others*[37] In the latter case, the court held that it was unconstitutional for the City of Johannesburg to evict people from their homes without first 'meaningfully engaging' with them.[38]

The duty to engage meaningfully was said to have been predicated on a number of things – the constitutional obligation to provide services in a sustainable manner and significantly, to fulfil the objectives in the preamble to the 1996 Constitution of South Africa, namely, to respect, protect, promote and fulfil the rights in the bill of rights, including socio-economic rights.[39] It is remarkable that the Court in the case issued an interim order requiring parties to 'engage with each other meaningfully and report back to the Court.'

More interesting is the fact that they actually did and the meaningful engagement approach helped parties arrive at mutually acceptable outcomes. Like the *dialogic justice*[40] approach, this approach is not easy to implement in contexts where courts do not have a culture of engaging beyond judgment. It could also be perceived as encroaching into executive turf to seek to monitor implementation of your own decision. Nonetheless, the benefit of engaging in such a way as to get concrete implementation must weigh higher than leaving implementation to parties and risking complete non-implementation or minimal implementation.

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[36] Supra note 23.

[37] 2008 (3) SA 208 (CC) <http://www.saflii.org/za/cases/ZACC/2008/1.pdf> (accessed 31 May, 2022).

[38] *Ibid*, para. 14.

[39] Section 7(2) of 1996 Constitution (n. 21 above).

[40] Made popular by the Colombian Constitutional Court, this approach enables the Court to retain jurisdiction to monitor implementation of its decisions through public hearings, informal meetings etc. Consequently, government is required to report on progress made and citizens may confirm or deny these reports. See Stanley Ibe (n. 26 above), p. 6.

4.2 Constitutionally Provided but Non-Justiciable - Nigeria

Nigeria's 1999 Constitution is often perceived as one which constitutionally recognizes some ESCRs but proceeds to make them non-justiciable.[41] This statement is not difficult to corroborate, to some extent. Chapter II of the referenced constitution contains some ESCR but is generally not about these rights but 'fundamental objectives and directive principles of state policy.'

Solomon Ebobrah[42] argues that the language of these objectives suggests that they were not designed to create any binding obligations. He reached this conclusion by contrasting the language in Chapter II, for example – "government shall direct its policy towards ensuring…." to the more rights-specific language of Chapter IV (fundamental rights) thus: "Every person shall…"[43]

On the surface, this position seems unassailable. However, a careful reading of the section implicated for non-justiciability of Chapter II – section 6(6)(c)[44] suggests that, language apart, Chapter II provisions could become the valid subject of adjudication before a court of law where the national parliament takes a further step of enacting a legislation holding government accountable for any of the objectives set forth there.[45]

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[41] But it is not the only one. Sierra Leone's 1991 Constitution is similarly styled. See Constitution of Sierra Leone, Chapter II <http://www.sierra-leone.org/Laws/constitution1991.pdf> (accessed 31 May 2022).

[42] S. Ebobrah, 'The Future of Economic, Social and Cultural Rights Litigation in Nigeria' (2007) 1(2) *CALS Review of Nigerian Law and Practice,* pp. 108-124.

[43] *Ibid*, p.118.

[44] Section 6(6)(c) provides that: "The Judicial powers vested in accordance with the foregoing provisions of this section…. shall not, *except as otherwise provided by this Constitution,* extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the fundamental objectives and directive principles of state policy set out in chapter II of this Constitution."

[45] The Court in *Attorney General of Ondo* v *Attorney General of the Federation* (2002) 28 WRN 1-231 firmly established this principle with respect to the promulgation

Regardless of the position one adopts with respect to the above, there is no doubt that the challenge of justiciability[46] has been a subject of considerable review. In this author's view, what is important is not whether or not the state adopts a justiciable ESCR regime. It is how the state addresses the question of poverty and impoverishment within its territory because in the final analysis, ESCR is designed to redress these. However, ESCR is too important to be left to the whims of governments alone.

Citizens and civil society also have important roles to play in realising ESCR. One tool by which to measure a state's commitment to

by the national parliament of the Independent Corrupt Practices and Other Related Offences Act, 2000, which was made pursuant to Section 15 (Chapter II of the 1999 Constitution) – "The state shall abolish all corrupt practices and abuse of office." In its decision, the Court made the following observation: "…Under the circumstance, the national assembly, may, in the exercise of the substantive powers given by section 4 of the Constitution in relation to item 60(a) make all laws which are directed to the end of those powers and which are reasonably incidental to their absolute and entire fulfilment." See also Stanley Ibe, 'Some recent developments on justiciability of economic, social and cultural rights' (2019) *ESR Review*, Vol. 20, No. 2 available at https://journals.co.za/doi/pdf/10.10520/EJC-1b57e52c98 (accessed 1 June 2022).

[46] See Fons Coomans, (ed.) *Justiciability of Economic and Social Rights – Experiences from Domestic Systems*. (2007) Intersentia, Antewep; S. Ibe, "Beyond Justiciability: Realizing the Promise of Socio-Economic Rights in Nigeria" (2007) 1(1) *African Human Rights Law Journal*, ; Yash Ghai & Jill Cottrell (eds.) *Economic, Social and Cultural Rights in Practice – The Role of Judges in Implementing Economic, Social and Cultural Rights.* (2004) INTERIGHTS, London; S. Muralidhar, 'Implementation of Court Orders in the Area of Economic, Social and Cultural Rights: An Overview of the Experience of the Indian Judiciary', A Paper presented to the First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 1-3 November 2002 available at http://www.ielrc.org/content/w0202.pdf (accessed 1 June 2022); S. Liebenberg, "The Protection of Economic and Social Rights in Domestic Legal Systems" in: Asbjorn Eide, Catarina Krause, et al.(eds.) (2001), *Economic, Social and Cultural Rights* (2nd Revised Edition) Martinus Nijhoff Publishers, Netherlands; S. Gutto, 'Beyond Justiciability: Challenges of Implementing/Enforcing Socio-Economic Rights in South Africa' 4 *Buffalo Human Rights Law Review* 79 (1998).

realizing ESCR is the budget.[47] Citizens and civil society must take budget tracking seriously if they must hold states accountable for budgetary expenditure. Groups such as BudgIT[48] in Nigeria are leading the way in promoting citizens participation in public finance through infographic representation of budgets and public spending in Nigeria and the use of *ebola* funds in Nigeria, Liberia and Sierra Leone.[49] This is of course possible because they have access to information.

4.3 Hybrid - Ghana

The third ESCR regime is the one represented by Ghana. Like Nigeria, Ghana has a chapter of its Constitution devoted to 'fundamental human rights and freedoms'[50] but unlike Nigeria, the chapter contains justiciable ESCR[51]. Article 12(1) of the Constitution makes provisions of Chapter 5 enforceable by the courts (i.e., justiciable). By Article 33(1), persons whose rights have been, is being or is threatened with violation, may apply to the High Court for redress.

Article 33(5) provides that the rights, duties, declarations and guarantees relating to fundamental human rights and freedoms

[47] See J. Shultz, 'Promises to Keep – Using Public Budgets as a Tool to Advance Economic, Social and Cultural Rights.' Reflections & Strategies based on a three-day dialogue between international human rights and budget activists convened by the Mexico City office of Ford Foundation and FUNDAR-Centre for Analysis and Research in Cuernavaca, Mexico, January 2002 available at http://www.internationalbudget.org/themes/ESC/FullReport.pdf (accessed 2 June 2022).

[48] Founded in 2011, BudgIT is "a civic organization that applies technology to intersect citizen engagement with institutional improvement, to facilitate societal change." To learn more about their work, please see http://yourbudgit.com/about/ (accessed 3 June 2022).

[49] The outcome of this project supported by Open Society Initiative for West Africa is available at http://yourbudgit.com/impactreport/Ebola.html (accessed 4 June 2022.)

[50] Chapter 5, 1992 Constitution of the Republic of Ghana available at http://www.politicsresources.net/docs/ghanaconst.pdf (accessed 4 June 2022).

[51] See Article 18 (right to property); Article 24 (right to work under satisfactory, safe and healthy conditions); and Article 25 (right to equal education opportunities).

specifically mentioned in Chapter 5 are not exhaustive. Consequently, such rights, duties, declarations and guarantees as may be *inherent in a democracy* and *intended to secure the freedom and dignity of man* but are not expressly recognized under the Constitution, are justiciable.

Uniquely, the Ghanaian Constitution provides more extended protections of economic and social rights under its chapter on 'directive principles of state policy'. Although these principles provide guidance in constitutional interpretation, the Ghanaian Supreme Court has held, against predominant jurisprudence elsewhere that ESCR in 'directive principles' are justiciable where they are clearly linked to the rights established in the Bill of Rights[52]. Despite the aforementioned provisions of the Ghanaian Constitution, the proclamations have been described as "rather too loud that they drown the dearth of their realization."[53]

5.0 CONCLUSION & RECOMMENDATIONS

In this article, we have established that poverty is prevalent in Africa. We have also labored to make the point that a virile ESCR regime is crucial to addressing unacceptably high levels of poverty in view of the clear connection between this category of rights and the subject. In offering some recommendations as to how to enhance existing ESCR regimes, we are fully cognizant of the diversity of the continent and

[52] See Ghana Justice Sector and the Rule of Law: A Discussion Paper prepared by AfriMap, Open Society Initiative for West Africa (OSIWA) and The Institute for Democratic Governance (OSIWA, 2007) available at http://www.aprmtoolkit.saiia.org.za/component/docman/doc_view/65-atkt-ghana-justice-sector-rule-of-law-2007-en (accessed 8 June 2022). See also B. Kunbuor, "Is there a right to health in Ghana? The case of Ghana's 1992 Constitution (2021) *UCC Law Journal*, Vol. 1, Iss. 2 available at https://journal.ucc.edu.gh/index.php/ucclj/article/download/412/246/1385 (accessed 8 June 2022) referencing the case of *Ghana Lotto Operators Association & Others* v *National Lotteries Authority* [2007-2008] 2 SCGLR 1088.

[53] See B. Kunbor, 'Epistolary Jurisdiction of the Indian Courts and Fundamental Human Rights in Ghana's 1992 Constitution: Some Jurisprudential Lessons' (2001) *Law, Social Justice & Global Development Journal* available at http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2001_2/kunbor/ (accessed 8 June 2022).

particularly, the different constitutional histories responsible for the diversity. We will therefore focus, for the most part, on ideas that are cross cutting and to the extent necessary, ideas that implicate specific ESCR regimes.

There is no doubting the fact that to effectively determine progress forwards or backwards, we have to have a system of measurement backed by data. Earlier in this piece, we identified poor data as a huge challenge. Regrettably, there is no other way to begin digging deeper into our problems without returning to the question of good data.

Across the board, states need to be encouraged to collect data on the different ESCRs protected within their jurisdictions. The idea of *progressive realisation*[54] cannot be mainstreamed into individual system absent this. Besides, good data will provide a basis for planning, monitoring, evaluation and reporting. To the extent that they wish to make measurement more systematic, states may wish to consider developing, either alone or in association with civil society, annual ESCR reports. These could be stand-alone reports or part of periodic reports routinely submitted to human rights bodies such as the African Commission on Human and Peoples' Rights.

Obviously, the question that immediately follows data collection is: so, what do you do with the data and reports? The best reports are only as good as the follow-up action they elicit. This is where political support plays a crucial role. Whichever system we consider, ESCRs will not advance unless political leadership at all levels prioritises them. They can demonstrate that these issues matter in the way that they figure them into development plans and budgets but we should not stop there. Steps must also be taken to ensure that commitments translate into tangible action that positively affects the lives of people.

54 "Progressive realization of ESCR does not mean that governments do not have obligations in terms of these rights until a certain level of economic development is reached but rather that there will be continual progress on the status of these rights and therefore states should take deliberate steps immediately and in the future towards the full realisation of ESCR." See 'Progressive Realization and Non-Regression'. ESCR-Net available at https://www.escr-net.org/resources/progressive-realisation-and-non-regression (accessed 9 June 2022).

This raises another point that must be addressed if ESCR will become meaningful for people everywhere – corruption.

Across the continent, corruption often means that great intentions do not translate into tangible outcomes on the ground. Unfortunately, highly influential and politically exposed individuals both within and outside government have been implicated. Clearly, governments alone, however well-intentioned, cannot fight corruption. They require the support and collaboration of every segment of society. Citizens must recognize that there is a price for every corrupt act perpetrated by anyone – within or outside government. Therefore, they have to be supported through access to information and whistle-blower protection legislation to report acts of corruption to relevant law enforcement institutions. In turn, these institutions need to be empowered to deliver on their mandates.

The doctrine of separation of powers is useful in checking the excesses of different arms of government. However, in the context of ESCR, the collective responsibility of every arm and institution of government is required. These units need to realize that they exist at the pleasure of the people, and therefore the welfare and security of the people should be of utmost priority. Whether or not ESCRs are perceived as justiciable, the legislative, executive and judicial arms of government should work together in support of promoting and protecting ESCR.

States with deficient ESCR regimes can draw from good practices within regional and international systems to address these deficiencies. The African Charter on Human and Peoples' Rights offers a good template in that it does not distinguish between civil and political rights on the one hand and ESCRs on the other. This is a good model to the extent that states can adopt it. The African Charter is also unique amongst international treaties to the extent that it does not contain "claw-back" clauses, which essentially attempt to take back what has already been provided in legislation. In the context of domestic ESCR legislation, states might wish to keep this idea in mind when law reform opportunities show up.

On the whole, Africans must demand good governance from their leaders because that is the surest path to ensuring the promise of ESCRs. Good governance is the product of an accountable government that takes its social contract with the people seriously. Perhaps the best way to guarantee the aforementioned is through protecting the sanctity of the ballot everywhere across the continent.

ANTI-MONEY LAUNDERING AND COMBATTING THE FINANCING OF TERRORISM REGULATIONS FOR CRYPTOCURRENCY: A CLASH OF IDEOLOGIES.

By Pelumi Omoniyi*

ABSTRACT

With the growing adoption of cryptocurrency, it is unyielding to maintain the idiosyncrasy that cryptocurrency is another financial bubble that will soon burst. Cryptocurrency has become widely adopted by investors, merchants, and even educational institutions. This has created a demand for cryptocurrency either as a store of value, to make payments and even for remittances. However, unscrupulous characters have been able to use cryptocurrency for a myriad of criminal activities. This has forced the hands of various stakeholders in the cryptocurrency ecosystem to apply traditional Anti-Money Laundering and Combatting the Financing of Terrorism (AML/CFT) regulations to cryptocurrency. This article seeks to explore why AML/CFT regulations have been adopted in the world of cryptocurrency and ends with a reflection on whether regulations for traditional financial institutions can effectively be used on a system that promises to break away from centralization.

1.0 FRAUD, MONEY LAUNDERING AND THE BLOCKCHAIN

In 2021, cybercriminals stole over $14,000,000,000 worth of cryptocurrency through various means such as scams, darknet markets and ransomware,[55] and laundered $8,600,000,000 of the

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[55] M. Sigalos, "Crypto scammers took a record $14 billion in 2021", available at https://www.cnbc.com/2022/01/06/crypto-scammers-took-a-record-14-billion-in-2021-chainalysis.html (accessed 8 June 2022).

illegally obtained funds through cryptocurrency.[56] Losses from cryptocurrency related crimes jumped up by 79% within 2020 to 2021[57] and from the number of reported hacks, thefts, and ill-gotten cryptocurrency reports this year, the numbers may rise again in 2022.

As the number of crypto-related crimes escalate, cryptocurrency adoption also skyrockets. Estimations project that at least 4% of the world's population actively trades cryptocurrency[58] (about 300 million users), with Nigeria swinging between the top five and the top ten.[59] Consequently, the more cryptocurrency is being used by retail investors and individuals with little or no knowledge about the ecosystem, the more targets are created for cryptocurrency fraudsters and cybercriminals. The question now is what makes cryptocurrency so appealing for money laundering and fraud? The answer lies within the characteristics of cryptocurrency and the beliefs powering its use.

1.1 Characteristics of Cryptocurrency

Defining cryptocurrency is quite a Herculean task because there are several definitions, but I believe simply put, cryptocurrency is a digital asset that is secured by a mathematical computation

[56] Chainalysis Team, "DeFi Takes on Bigger Role in Money Laundering But Small Group of Centralised Services Still Dominate", available at https://blog.chainalysis.com/reports/2022-crypto-crime-report-preview-cryptocurrency-money-laundering/ (accessed 8 June 2022).
[57] Supra note 55.
[58] Triple A, "Cryptocurrency Across the World" available at https://triple-a.io/crypto-ownership-data/#:~:text=Global%20crypto%20adoption&text=As%20of%202022%2C%20we%20estimated,320%20million%20crypto%20users%20worldwide (accessed 8 June 2022).
[59] Chainanalysis Team, "The 2021 Global Crypto Adoption Index: Worldwide Adoption Jumps Over 880% With P2P Platforms Driving Cryptocurrency Usage in Emerging Markets" available at https://blog.chainalysis.com/reports/2021-global-crypto-adoption-index/ (accessed 8 June 2022).

procedure that exists on a blockchain and is not reliant on any traditional financial institution. Instead of centralization with a central bank or a financial institution, cryptocurrency transactions are recorded on a decentralized (separate network of computers) network. If you do not like my definition, we could look at one of the most succinct definitions by PricewaterhouseCoopers (PwC):

> Cryptocurrency is a medium of exchange, created and stored electronically in the blockchain using encryption techniques to control the creation of monetary units and to verify the transfer of funds.[60]

Through defining cryptocurrency, we can pick out some of its characteristics that have bolstered its adoption globally.

1.1.1 Cross-border Transferability

Almost every individual has experienced the pains of sending money to another continent or country within a continent. It can take aeons before a cross-border transfer is completed usually because of the complexity of each country's banking systems and the number of financial institutions or intermediaries the funds must pass through as each of the banks or financial institutions processing the cross-border transfer have their own rules that have been put in place to confirm the legality of such transfers such as AML/CFT procedures. For example, in Nigeria the *Money Laundering (Prevention and Prohibition) Act* 2022 prescribes Identity Verification procedures popularly known as Know-Your-Customer (KYC) verification, due diligence to ensure that a transaction is not suspicious, and other procedures. And that's just one country. So, imagine a means of exchange where cross-border transfers are instantaneous. It takes approximately 2 days and sometimes even 5 days for a recipient to receive funds

[60] PwC, "Making sense of bitcoin, cryptocurrency and blockchain" available at https://www.pwc.com/us/en/industries/financial-services/fintech/bitcoin-blockchain-cryptocurrency.html (accessed 8 June 2022).

from a cross border transaction. Cryptocurrency remittances take at most an hour[61].

In emerging markets such as Africa, Latin America, and some parts of Asia, cryptocurrency has taken center stage because apart from acting as a hedge for their failing fiat currencies, individuals in diaspora can easily make remittances to their family members with just a mobile phone and internet connectivity. Anywhere and anytime, cryptocurrency transfers can be made and received almost immediately barring any technical difficulties.

1.1.2 Anonymity

In the original whitepaper that introduced the first ever publicly known cryptocurrency, Bitcoin, its famous but unknown founder, Satoshi Nakamoto stated that:

> The traditional banking model achieves a level of privacy by limiting access to information to the parties involved and the trusted third party. The necessity to announce all transactions publicly precludes this method, but privacy can still be maintained by breaking the flow of information in another place: by keeping public keys anonymous. The public can see that someone is sending an amount to someone else, but without information linking the transaction to anyone.[62]

Simply put, cryptocurrency transactions are recorded on a blockchain (a record of transactions maintained across a system

[61] Coinbase, "What is cryptocurrency?" available at https://www.coinbase.com/learn/crypto-basics/what-is-cryptocurrency (accessed 8 June 2022).

[62] S. Nakamoto, "Bitcoin: A Peer-to-Peer Electronic Cash System" (2008), available at *www.bitcoin.org*, https://bitcoin.org/bitcoin.pdf. (accessed 8 June 2022).

of computers) that is publicly available, but transactions are carried out without the use of real names. As described in Satoshi's white paper, "a new key pair should be used for each transaction to keep them from being linked to a common owner."[63] Satoshi's suggestion was that Public and Private Keys should always be changed every time a transaction is carried out but in practice, individuals usually use one Public Key linked to their crypto wallet like a bank account number, rather than their actual names or address and decrypt the transaction tied to the Public Key with a Private Key.

However, some scholars believe that cryptocurrency does not guarantee complete anonymity. Dr. Steven Gordon, Babson College; and Feng Hou, Maryville University believe that while cryptocurrency transactions are secured through cryptography (hence the use of Public and Private Keys), and some entities accept cryptocurrency as a means of exchange without changing to a government backed fiat currency, at some point, cryptocurrency will have to be swapped for fiat currency and at that moment of exchange, a paper trail is created that can be used to trace a cryptocurrency transaction. [64] Therefore, cryptocurrency may be more pseudonymous rather than anonymous.

1.1.3 Absence of Regulated Intermediaries

Satoshi Nakamoto's vision for Bitcoin is essentially captured in the abstract of their white paper;

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[63] *Ibid*.

[64] J. Dossett "Are Cryptocurrency Transactions Actually Anonymous?" available at https://www.cnet.com/personal-finance/crypto/are-cryptocurrency-transactions-actually-anonymous/ (accessed 8 June 2022).

> A purely peer-to-peer version of electronic cash would allow online payments to be sent directly from one party to another without going through a financial institution.[65]

Cryptocurrency has no affiliation with financial institutions and intermediaries which is one of its core tenets. A Peer-to-Peer system that is verified by a decentralized network of miners is what keeps the cryptocurrency in check as well as the number of coins available in the market. Hence, because there is no regulated intermediary, the traditional financial rules, regulations, practices, and extant laws that keep the financial ecosystem afloat are absent.

So, picture a means of exchange that:

- allows for pseudonymity;
- does not request for any means of identification like financial institutions;
- can be traded easily over the internet;
- requires no face-to face interaction; and
- permits pseudonymous transfer and receipt of funds through unregulated entities.

Does it not sound like a haven for everything and anything fraudulent? These key concepts that back cryptocurrency have made it a prime target for fraudsters, individuals participating in illegal activities, and money launderers which is why the Financial Action Task Force (FATF or Groupe d'Action Financière), an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction, in 2014, released

[65] Supra note 62.

its report on the Potential AML/CFT Risks surrounding virtual currencies.

1.2 FATF REPORT ON POTENTIAL AML/CFT RISKS OF VIRTUAL CURRENCIES

After releasing their report on Guidance for a Risk-Based Approach to Prepaid Cards, Mobile Payments, and Internet-Based Payment Services (NPPS Guidance) in 2013,[66] the FATF generated a report on Virtual Currencies - Key Definitions and Potential AML/CFT Risks (AML/CFT VC Report) in 2014,[67] which built on the risk factors highlighted in the NPPS Guidance which did not focus on virtual currency and cryptocurrency but spoke about payment gateways and payment services. The AML/CFT VC Report confirmed that two narratives had emerged for cryptocurrency. The first narrative being that cryptocurrency is the future of finance, the second narrative posits that:

> Virtual currencies provide a powerful new tool for criminals, terrorist financiers and other sanctions evaders to move and store illicit funds, out of the reach of law enforcement and other authorities.[68]

The AML/CFT VC Report also rightly mentioned that cryptocurrency has legitimate uses which can transform the global payments industry such as the lowering of costs for payment transactions as cryptocurrency requires little or no charges when making payments, supporting international remittances, and developing products and services that can serve

[66] FATF/OECD, "Guidance for a Risk-Based Approach to Prepaid Cards, Mobile Payments and Internet-Based Payment Services", (FATF/OECD, June 2013).
[67] FATF/OECD, "Virtual Currencies - Key Definitions and Potential AML/CFT Risks" (FATF/OECD, June 2014).
[68] *Ibid*, p. 3.

support financial inclusion[69]. However, the FATF warned that cryptocurrencies are very vulnerable to money laundering and terrorist financing abuse due to many of the risk factors identified in the NPPS Guidance.

1.2.1 Anonymity (Pseudonymity) of Cryptocurrency

The first risk factor identified was the anonymity of cryptocurrency transactions; in the AML/CFT VC Report, the FATF stated that;

> Virtual currency systems can be traded on the Internet, are generally characterized by non-face-to-face customer relationships and may permit anonymous funding (cash funding or third-party funding through virtual exchangers that do not properly identify the funding source). They may also permit anonymous transfers if sender and recipient are not adequately identified.[70]

Anonymous transfers through exchanges or Virtual Asset Service Providers (VASPs) create a conundrum for anti-money laundering policies and procedures which usually require some form of KYC to identify the sender and the recipient. Also, entities that move large amounts of a means of exchange that a group of people have placed their trust in, usually need some form of regulation and oversight because financial positions are at stake.

However, with crypto exchanges and VASPs, there is no law or regulation that mandates them to collect further information from their users which makes them a hotbed for pseudonymous transactions. Another concern highlighted by the FATF is the

[69] *Ibid*, p. 9.
[70] *Ibid*.

ease in which money laundering can occur through cryptocurrency transactions due to the lack of systems and procedures to identify funding sources. Usually, money launders or individuals who wish to finance illicit activities including terrorism first *Place* the illicit funds or funds to sponsor illegal activities through purchasing cryptocurrency from a cryptocurrency exchange. Once it is purchased, *Layering* commences where the coins purchased initially are placed into the cryptocurrency transaction stream, i.e., using the coins purchased to buy other coins or use them for cryptocurrency activities until the coins are slowly moved away from the original wallet that purchased it, making it harder to trace and then the final stage is where the funds are *Integrated* into the legal financial system by purchasing fiat currency with the cryptocurrency or ensuring that the recipient of the funds can purchase fiat currency without worrying about financial crimes agencies and bodies breathing down their necks.

As opposed to the legal financial system where laundering illicit funds or funding illegal activities takes a good amount of time, the stages mentioned above can take approximately a week or two weeks to complete.[71] The report goes ahead to describe how the decentralized network that powers cryptocurrency enhances AML/CFT risks;

> Decentralized systems are particularly vulnerable to anonymity risks. For example, by design, Bitcoin addresses, which function as accounts, have no names or other customer identification attached, and the system has no central server or service provider. The Bitcoin protocol does not require or provide identification and

[71] AML UAE, "How money laundering is messing up the world of cryptocurrency" available at https://amluae.com/how-money-laundering-is-messing-up-the-world-of-cryptocurrency/ (accessed 9 June 2022).

> verification of participants or generate historical records of transactions that are necessarily associated with real world identity. There is no central oversight body, and no AML software currently available to monitor and identify suspicious transaction patterns. Law enforcement cannot target one central location or entity (administrator) for investigative or asset seizure purposes (although authorities can target individual exchangers for client information that the exchanger may collect).[72]

A decentralized system, a lack of a central body for exchanges and VASPs to report suspicious transactions to, and little or no involvement of AML/CFT procedures caused cryptocurrency to become a hotbed for illicit activities. The second risk factor identified by the FATF was the global reach of cryptocurrency.

1.2.2 Cross-Border Nature

In the NPPS Guidance, the FATF rightly mentioned that the geographical reach of new payment systems largely because of the borderless nature of the internet, greatly increased AML/CFT Risks. The concern of the boundless nature of new payment systems was also transmitted to the AML/CFT VC Report as the FATF highlighted the complexity of VASPs and exchanges. Most VASPs or exchanges have no physical office, are spread across several countries, have clients all over the globe, create complex corporate vehicles that are almost impossible to understand and warehouse their funds in financial safe havens.

Due to the fragmentation of cryptocurrency exchanges and VASPs, there may also be issues surrounding which entity of an

[72] Supra, note 67, p. 9.

exchange or VASP is responsible for AML/CFT mitigation. Furthermore, law enforcement officials have reported situations where investigations cannot be carried out completely because the exchanges or VASPs solely reside on the internet which has no AML/CFT regulations and control. Interestingly, the year before the FATF released their report on cryptocurrency, one of the most intriguing uses of cryptocurrency for illicit transactions happened. This occurrence would become the starting point for every case study on crypto fraud and AML/CFT occurrences associated with crypto.

2.0 THE SILK ROAD AND OTHER CRYPTOCURRENCY STORIES OF FRAUD

Ross Ulbricht is a name that rings a bell, and the sound reverberates through the halls of the cryptocurrency economy. After finishing with a masters from the University of Pennsylvania and spearheading a video game start-up (which failed) and seeing two businesses he participated in collapse, Ross had an epiphany. An excerpt from his journal reads; "to create a website where people could buy anything anonymously, with no trail whatsoever that could lead back to them".[73] To host this website, he decided to build it on the part of the world wide web that cannot be easily accessed by conventional means like search engines called the Dark Web. To access the Dark Web, specific encryption software that cloaks users and obscures the sites they visit is needed. So, Ross decided to go with a browser that can access the Dark Web called Tor (interestingly this browser was

[73] J. Bearman, T. Hanuka, J. Davis, S. Leekart, "The Rise and Fall of Silk Road" available at https://www.wired.com/2015/04/silk-road-1/ (accessed 10 June 2022).

built by the American Navy),[74]or more popularly known as the 'Onion Router' because of its ability to shield users IP Addresses and any other technical information that can be used to trace their digital footprints on the internet by routing internet traffic anonymously until the source of the traffic becomes impossible to trace.

An alternative was also the use of Virtual Private Networks (VPNs) which can hide your location as you surf the web, but Ross hit a roadblock. How could he ensure users made anonymous payments that could not be traced as well as the commission made from the sales on the website? Enter Bitcoin. Ross was able to create a system where a Buyer would transfer Bitcoin to their bitcoin wallet associated with the website and then make an order which would automatically transfer the bitcoin to an escrow account where it would be held till the order is complete. Once the product ordered was transferred successfully to the Buyer, Ross would take out a commission, and the funds would leave the escrow account to the Sellers Bitcoin wallet on the website. The Seller can proceed to withdraw the Bitcoin kept in their website wallet or leave it there.

In 2011, the website went live and was named after one of the largest trading network routes of the 15th century. The Silk Road. The website gained massive prominence garnering media

[74] The creators of Tor — David Goldschlag, Mike Reed and Paul Syverson at the U.S. Naval Research Lab — sought a way to route internet traffic anonymously. Eventually, they developed the idea of encrypting and routing traffic via multiple servers, thereby making it extremely hard to track the source and destination of such traffic. They called this technique "the onion routing," aka TOR, and released the open-source Tor software in 2002. Andrey Sergeenkov, "How Are the Silk Road, the Dark Web and Bitcoin Connected?" available at https://coinmarketcap.com/alexandria/article/how-are-the-silk-road-the-dark-web-and-bitcoin-connected (accessed 10 June 2022).

attention using bitcoin forums, and even gained recognition about the risk it posed from Senator Chuck Schumer[75] who called for its closure. After scaling through several hurdles like hacks and outages caused by massive internet traffic, Silk Road became an online bazaar for everything and anything illicit, from drugs to weapons to child pornography and so much more. Operating under the moniker 'Dread Pirate Roberts', Ross and his team attracted the attention of the European Union and the American Department of Justice because Silk Road became a dangerous marketplace that brokered criminal transactions anonymously, through a large network of distributors, vendors, and buyers largely resident in Europe and the United States of America (Silk Road had approximately 1 million users including the Federal Bureau of Investigation who were using accounts to track down the minds behind Silk Road). Silk Road generated over USD$ 1,200,000,000 (more than 9,500,000 bitcoins) in revenue and USD$ 80,000,000 (more than 600,000 bitcoins) in commissions with millions of dollars successfully laundered through the website.[76]

In 2013, after a criminal complaint, a 'Hollywoodesque' [77] investigation and the subsequent arrest of Ross Ulbricht in 2014, The Justice Department shut down the website and retrieved about 173,991 bitcoins, worth more than USD 33.6 million at the time of the seizure, from seized computer hardware.[78]Ulbricht was convicted of four narcotics charges and three charges related to money laundering, computer hacking and trafficking

[75] NBC, "Schumer Pushes to Shut Down Online Drug Marketplace", available at https://www.nbcnewyork.com/news/local/123187958.html (accessed 10 June 2022).
[76] Supra, note 67, p 11.
[77] D. Adler, "Silk Road: The Dark Side of Cryptocurrency" (2018) *Fordham Journal of Corporate and Financial Law.*
[78] *Ibid* p. 11.

fraudulent identity documents. He was sentenced to life in prison without the possibility of parole and is serving at the United States Penitentiary in Tucson, Arizona.[79]

2.1 Hack First, Launder Later

While crypto-maximalists were still trying to convince people to see cryptocurrency as a valid means of exchange and a potential store of value regardless of its association with the now infamous Silk Road, several crypto-related hacks occurred which continued to give cryptocurrency a bad reputation.

2.1.1 Magic: The Gathering Online eXchange also known as 'Mt. Gox'

Magic: The Gathering Online eXchange known commonly as 'Mt. Gox', at its peak, was handling over 70% of all cryptocurrency transactions globally.[80] So, it came as a shock to cryptocurrency enthusiasts and the users of Mt. Gox when one of the largest exchanges in the world suddenly just stopped working. All their social media pages were wiped clean, and the exchange's website suddenly stopped working. Almost every user had lost their coins. Then the news reached the public sphere that Mt. Gox had been hacked and it may be one of the largest crypto-related hacks to occur since the beginning of the adoption of Bitcoin in 2008.

The hackers accessed and stole over 700,000 bitcoins from Mt. Gox customers and 100,000 from the company itself (this is

[79] J. Metais, "Silk Road" available at https://www.coindesk.com/company/silk-road/ (accessed 10 June 2022).
[80] J. Tuwiner, "What was the Mt. Gox Hack?" available at https://www.buybitcoinworldwide.com/mt-gox-hack/ (accessed 10 June 2022).

estimated to be about USD$460,000,000 at that time).[81] The hack was so devastating, the company behind the exchange had to file for bankruptcy immediately.[82] Investigations showed that the Private Key of Mt. Gox's wallet which held almost every bitcoin on the exchange was obtained by the hackers who proceeded to skim off Bitcoins from user's crypto wallets. Mt. Gox did not suspect any foul play as they assumed the movement of Bitcoin were transactions being carried out by their users. Mt. Gox struggled to satiate the users of the exchange and tried various methods to recoup back the lost cryptocurrency such as liquidating all their crypto-assets and taking up various schemes to pay off users.[83]

In 2017, while Mt. Gox was still in court slugging it out with their aggrieved users, the United States Department of Justice through a grand jury in the Northern District of California, indicted a Russian national operating an unlicensed money service business. Further investigation showed that Alexander Vinnik, the owner of the now defunct cryptocurrency exchange, BTC-e, was also involved in financial crimes such as assisting hackers and fraudsters with laundering illegally obtained cryptocurrency. As the investigation proceeded, law enforcement found out that Alexander was using his exchange to facilitate drug trafficking, identity fraud and theft. In a press release describing the indictment, one paragraph stands out;

The indictment alleges that he (Alexander) received funds from the infamous computer intrusion or 'hack' of Mt. Gox – an earlier digital currency exchange that eventually failed, in part due to

[81] *Ibid*.
[82] *Ibid*.
[83] *Ibid.*

losses attributable to hacking. The indictment alleges that Vinnik obtained funds from the hack of Mt. Gox and laundered those funds through various online exchanges, including his own BTC-e and a now defunct digital currency exchange, Tradehill, based in San Francisco, California. The indictment alleges that by moving funds through BTC-e, Vinnik sought to conceal and disguise his connection with the proceeds from the hacking of Mt. Gox and the resulting investigation.[84]

Alexander Vinnik helped the hackers of Mt. Gox launder their illicitly gotten cryptocurrency successfully and from all indications, it seems that he knows who the hackers are because as of 2021, a Russian law firm representing Mt. Gox is still trying to strike a deal with him to expose the hackers. [85] While negotiations are going on with Mr Vinnik, Mt. Gox has promised to reimburse users that lost their cryptocurrency. They are yet to fulfil this promise.[86]

2.1.2 The Hack of Bitfinex

In 2016, another crypto exchange began to amass users and within a short period, Bitfinex became a behemoth in the cryptocurrency ecosystem, serving as the largest link for traders to make trades and exchange coins. Bitifinex created its own wallet called BitGo promising users that it had an additional layer of security as cryptocurrency enthusiasts were still wary after the Mt. Gox hack and a string of other incidents that had occurred between 2014 to 2016.

[84] Department of Justice, U.S. Attorney's Office, Northern District of California, "Russian National And Bitcoin Exchange Charged In 21-Count Indictment For Operating Alleged International Money Laundering Scheme And Allegedly Laundering Funds From Hack Of Mt. Gox" available at https://www.justice.gov/usao-ndca/pr/russian-national-and-bitcoin-exchange-charged-21-count-indictment-operating-alleged (accessed 10 June 2022).

[85] Supra note 80.

[86] *Ibid*.

The system that Bitfinex and BitGo created required multi-key signatures (recall the observation made above about Private and Public Keys) that would ensure that the keys are divided among its users. Two keys would be used on the Bitfinex platform while a third key would have to be used to sign off on large transactions that were used only with the BitGo wallet. Users even mentioned that the platform offered Two-Factor Authentication (presenting two forms of evidence to gain access to a platform or website).[87] So, it came as a surprise to cryptocurrency stakeholders when over 2,000 transactions were approved from users' accounts, sending 119,754 BTC to one wallet. In the cryptocurrency market of 2016, that is roughly USD$72 million. In today's market (using rates as of February 2022), that is USD$4.5 billion worth of Bitcoin.[88] It was one of the largest cryptocurrency cyber security breaches to be recorded and it sent ripples throughout the cryptocurrency ecosystem (Bitcoin lost over 20% of its value after the hack became public).[89]The hackers were able to obtain the keys required to approve transactions and syphoned coins from various wallets and then vanished. Or so they thought.

In the first quarter of 2022, the Department of Justice announced that they arrested a couple, Ilya Lichtenstein and Heather Morgan, and charged them with conspiracy to commit money

[87] S. Higgins, "The Bitfinex Bitcoin Hack: What We Know (And Don't Know)" available at https://www.coindesk.com/markets/2016/08/03/the-bitfinex-bitcoin-hack-what-we-know-and-dont-know/ (accessed 14 June 2022).
[88] A. Chow, "Inside the Chess Match That Led the Feds to $3.6 Billion in Stolen Bitcoin" available at https://time.com/6146749/cryptocurrency-laundering-bitfinex-hack/ (accessed 14 June 2022).
[89] *Ibid.*

laundering and conspiracy to defraud the United States.[90] After the hack, law enforcement was able to determine that the BTC sat in a wallet for a considerable amount of time, until it started to leave the wallet in tranches through a cryptocurrency exchange hosted on the Dark Web.

After about three years, the unknown individuals started to Layer the money through a process known as a "Coinjoin" commingling it with other cryptocurrency transactions and using a wallet that prevents tracing of transactions. The US Deputy Attorney General alleges that it was Lichtenstein and Morgan who undertook these operations and not unknown individuals.[91]The US Deputy Attorney General also posited that the couple finally moved the money into the traditional financial system through purchasing gift cards, NFTs, and gold. All the while this was going on, law enforcement was able to trace and track their activities which led to their eventual arrest.[92] In the Press Release from the Department of Justice, it was stated that;

> Lichtenstein and Morgan employed numerous sophisticated laundering techniques, including using fictitious identities to set up online accounts; utilising computer programs to automate transactions, a laundering technique that allows for many transactions to take place in a short period of time; depositing the stolen funds into accounts at a variety of virtual currency exchanges and darknet markets and then withdrawing the funds, which obfuscates the trail of the transaction history by breaking up the fund flow; converting bitcoin to other forms of virtual currency, including anonymity-

[90] The United States Department of Justice, "Two Arrested for Alleged Conspiracy to Launder $4.5 Billion in Stolen Cryptocurrency Government Seized $3.6 Billion in Stolen Cryptocurrency Directly Linked to 2016 Hack of Virtual Currency Exchange" available at https://www.justice.gov/opa/pr/two-arrested-alleged-conspiracy-launder-45-billion-stolen-cryptocurrency (accessed 14 June 2022).

[91] Supra note 88.

[92] Supra note 90.

> enhanced virtual currency (AEC), in a practice known as "chain hopping"; and using U.S.-based business accounts to legitimize their banking activity.[93]

The Silk Road, Mt. Gox, Bitfinex, and even the Colonial Pipeline Ransomware attack which froze the systems that manage the oil and gas pipelines that supply the south-eastern states of the United States, (the hackers demanded that the ransom should be paid in BTC. More than half of it has been recouped by the Department of Justice)[94] all point to certain positives. First, illicit cryptocurrency transactions can be traced, though it is a Herculean task. Secondly, law enforcement agencies and international bodies started becoming increasingly aware of the adoption of cryptocurrency by its citizens.

Consequently, there was a fiduciary duty on them to protect their citizens by ensuring that AML/CFT regulations and procedures were applicable to cryptocurrency as well. Thus, a new era began to take shape where cryptocurrency was beginning to fall under the regulatory purview of the institutions that cryptocurrency maximalists wanted none of their involvement in the ecosystem. Regulation to cryptocurrency stakeholders meant the beginning of the centralization of the decentralized future of cryptocurrency.

3.0 A CLASH OF IDEOLOGIES

Cryptocurrency has been a buzzword since 2013 and with its ever-rising popularity, other words associated with it have joined

[93] *Ibid*.
[94] C. Osborne, "Colonial Pipeline ransomware attack: Everything you need to know" available at https://www.zdnet.com/article/colonial-pipeline-ransomware-attack-everythintg-you-need-to-know/ (accessed 14 June 2022).

the fray. NFT's, Web3, Blockchain, The Metaverse, Gas Fees, Ethereum and so much more. There is a hype about cryptocurrency and its affiliates but underneath the noise are enthusiasts who believe that cryptocurrency is about social change, trusting in a system that is not corrupt and biased, and eliminating the reliance on traditional institutions. To several individuals who trust in cryptocurrency, they believe placing their trust with technology is a system that is pure and untainted unlike corrupt governments and corporate entities. Rick Walsh, an Associate Professor of Information Science and Cybersecurity, Michigan State University, believes that cryptocurrency enthusiasts or 'true believers' see cryptocurrency and Bitcoin as an alternative to corrupt institutions that set and enforce rules that push their own agenda. To them, cryptocurrency is 'trustless' and does not need such rules in place.[95] In his article Professor Walsh states that:

> For many of these enthusiasts, recommending crypto to other people is not just a technology recommendation. To them, buying and selling crypto is a form of political and social activism. They argue that buying crypto will remove corruption and change society to trust technology over government. This ideology is a more extreme version of technolibertarianism, which seeks to replace government with technology. [96]

'Technolibertarianists' do not accept the law and regulations since it comes from the corrupt government bodies and institutions that are flawed. So, there is some empathy felt when you realize that these same laws and regulations they distrust,

[95] R. Walsh, "Behind the crypto hype is an ideology of social change", available at https://theconversation.com/behind-the-crypto-hype-is-an-ideology-of-social-change-177981#:~:text=To%20them%2C%20buying%20and%20selling,to%20replace%20government%20with%20technology (accessed 14 June 2022).
[96] *Ibid*.

these bodies they wish to remove power from are beginning to encroach on their territory by creating laws and regulations or using extant ones to curtail the risks of cryptocurrency. The question is, should the law be worried about cryptocurrency and its risks? To answer this question, we must briefly enter the realms of Jurisprudence.

3.1 The Necessity of Regulations

In Dr V. D. Mahajan's popular text on Jurisprudence, he explores the purpose of law through the postulations of various legal scholars. The foremost legal positivist, Thomas Hobbes, posits that the Law was brought into the world for nothing else but to limit natural liberty of men in such a manner as they might not hurt but assist on another and join against a common enemy. Justice Holmes understood that the object of the Law is not the punishment of sin but to prevent certain external results, and Jeremy Bentham believed that the Law was to ensure the maximization of the happiness of the greatest number of people in a community.[97] Dr V.D. Mahajan concluded his exploration of the purpose of law according to different legal scholars by simply theorizing that the purpose of law is stability in the society.[98]

Fleeing from the study of the science of law unto other modern-day ideas about the need for law and regulations, on the World Economic Forum Blog, Diane Coyle, Bennett Professor of Public Policy, University of Cambridge, writes on how regulations can support technological innovation through setting standards that allow for the growth of the market. The example she gives is how

[97] Dr V. Mahajan, *Jurisprudence and Legal Theory,* (Eastern Book Company, Lucknow, 1987).
[98] *Ibid* p. 53.

the standard for mobile network communication was set through the mandatory EU technical standard enforced in 1987 which was called Groupe Spécial Mobile which created a worldwide standard for GSM services.[99] She also points out how regulations promote healthy competition. In oligopolistic markets, rules can ensure that market participants provide a good standard for their users and weed out market entrants who cannot, driving compliance to get an industry's low-hanging fruits. Lastly, she states in her article that a society's welfare will never be placed behind the profitability of an entity. Regulations serve to protect the society and put users before profit.

As much as cryptocurrency purists like to look towards cryptocurrency and the technology that powers it as a potential savior of humans, they tend to downplay its risk factors. These risk factors are why the FATF and the Bank of International Settlements decided to recommend approaches to regulate and monitor cryptocurrency.

3.1.1 FATF Standards and Approach

The FATF has developed a robust set of recommendations for countries to implement to tackle money laundering and terrorism called the International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation (FATF Recommendations). The FATF Recommendations set out a comprehensive and consistent framework of measures which countries should implement in order to combat money laundering and terrorist financing, as

[99] D. Coyle, "3 ways that regulation benefits economies" available at https://www.weforum.org/agenda/2018/07/three-cheers-for-regulation/ (accessed 14 June 2022).

well as the financing of proliferation of weapons of mass destruction. The FATF Recommendations were developed to ensure that they are adaptable and flexible regardless of jurisdictional differences and are constantly updated.[100]

In 2018, the FATF Recommendations were amended to take into consideration virtual assets (which cryptocurrency falls under). The FATF Recommendations urged jurisdictions to subject Virtual Asset Service providers to AML/CFT regulations, such as customer due diligence, ongoing monitoring, record-keeping, and reporting of suspicious transactions. The FATF Recommendations also pushed for a licensing regime or registration regime for VASPs.[101] The FATF clarified that the recommendations applicable to Cryptocurrency are not to ensure investor protection or safeguards but are for the purpose of ensuring that money laundering, criminal activities, and funding terrorism are tackled efficiently as cryptocurrency had become the perpetrators preferred mode of transacting.[102]

The FATF also pointed out that the FATF Recommendations for virtual assets does not prohibit certain jurisdictions from outrightly prohibiting cryptocurrency related activities in their jurisdiction based on their risk appetite. Subsequently, in June 2019, the FATF amended the FATF Recommendations again, to

[100] The FATF Recommendations available at https://www.fatfgafi.org/publications/fatfrecommendations/documents/fatfrecommendations.html#:~:text=The%20FATF%20Recommendations,Send&text=As%20amended%20March%202022.,of%20weapons%20of%20mass%20destruction. (Accessed 14 June 2022).

[101] Recommendation 15, FATF (2012-2022), *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, FATF, Paris, France, available at www.fatf-gafi.org/recommendations.html (accessed 14 June 2022).

[102] FATF, "Regulation of virtual assets" available at https://www.fatfgafi.org/publications/fatfrecommendations/documents/regulation-virtual-assets.html (accessed 14 June 2022).

provide a more robust explanation on what procedure the FATF recommends jurisdictions should adopt for AML/CFT purposes and virtual assets. The FATF mentioned that countries need to identify money laundering, and terrorist financing and proliferation financing risks associated with virtual assets and then adopt a risk-based approach (understand the money laundering and terrorist financing risks your jurisdiction is exposed to and how you can mitigate them). Jurisdictions should also inform VASPs to identify the money laundering and terrorism financing risks associated with their business and apply a risk-based approach as well.

The FATF also explained how natural persons and corporate bodies that are VASPs should be licensed or registered, with corporate entities registered in where *they were created*, and natural persons registered in where *their business is situated*. The FATF recommended that: "Countries should take action to identify natural or legal persons that carry out VASP activities without the requisite licence or registration and apply appropriate sanctions".[103] Monitoring VASPs compliance with their AML/CFT obligations was also recommended. If a VASP failed to comply with their AML/CFT obligations, the FATF recommended immediate punitive measures or penalties.

The recommendation also advised that a designated threshold for conducting due diligence on customers should be put in place (any transaction above USD$1000), and regulators of VASPs should develop effective systems to be able to communicate and exchange information regarding VASPs

[103] Interpretive Note to Recommendation 15 (New Technologies), FATF (2012-2022), *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, FATF, Paris, France, available at www.fatf-gafi.org/recommendations.html (accessed 15 June 2022).

promptly. Perhaps the most interesting recommendation made by the 2019 amendment apart from the application of existing FATF Recommendations to VASPs (such as reporting transactions of Politically Exposed Persons and Internal AML/CFT Controls) was the application of Recommendation 16 to VASPs popularly known as the 'Travel Rule'.

3.1.1.1The Travel Rule Explained

The FATF strongly recommended that the name, national identifier (passport or national identification number), date of birth, and account number of the individual sending the funds (originator) and the one receiving the funds (beneficiary) be readily available to be exchanging. The ordering institution accepts the originator's wire transfer request, the intermediary sends the funds to the beneficiary's bank, and financial intelligence units and/or prosecutors assist them in:

- detecting, investigating, and prosecuting terrorists or other criminals, and tracing their assets,
- analyzing suspicious or unusual activity, and disseminating it as necessary to facilitate the identification and reporting of suspicious transactions, and
- implementing the requirements to take freezing action and comply with prohibitions from conducting transactions with designated persons and entities.[104]

Recommendation 16 or the Travel Rule, initially applied to only cross-border wire transfers and domestic wire transfers,

[104] Interpretive Note to Recommendation 16 (Wire Transfers), FATF (2012-2022), *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, FATF, Paris, France, available at www.fatf-gafi.org/recommendations.html (accessed 15 June 2022).

including serial payments, and cover payments. However, the 2019 amendment of the FATF Rules recommended it should also be applicable to VASPs. This meant that the FATF advised jurisdictions to:

> ensure that originating VASPs obtain and hold required and accurate originator information and required beneficiary information on virtual asset transfers, submit the above information to the beneficiary VASP or financial institution (if any) immediately and securely, and make it available on request to appropriate authorities. Countries should ensure that beneficiary VASPs obtain and hold required originator information and required and accurate beneficiary information on virtual asset transfers and make it available on request to appropriate authorities. Other requirements of Recommendation 16 (including monitoring of the availability of information, taking freezing action and prohibiting transactions with designated persons and entities) apply on the same basis as set out in Recommendation 16. The same obligations apply to financial institutions when sending or receiving virtual asset transfers on behalf of a customer.[105]

Simply put, the FATF advised countries to ensure that VASPs collect and record Personal Identifiable Information (PII) (date of birth, national identification number, etc.) of the wallet and the users in a cryptocurrency transaction that is sending or receiving an amount above a certain threshold. The VASP will collect the PII of an individual who initiates a transaction and then promptly send it to the VASP or financial institution that is receiving the cryptocurrency on behalf of the beneficiary. Law enforcement may require the PII to be sent to them promptly if the need arises. Jurisdictions can set any threshold they require to trigger the Travel Rule, but the FATF recommends transactions above

[105] Supra, note 103.

USD$1000. PII that may most likely be collected is the wallet address (Public Key) of the sender and recipient, and information acquired by the VASP from carrying out due diligence on the sender or recipient.

The Travel Rule is being hailed globally as the first policy that may see ubiquitous adoption among countries, but fears persist. Critics of the Travel Rule believe that it will be hard to instantly transfer PII between VASPs and law enforcement as a uniform method of communication is required. Also, because jurisdictions have the flexibility to adopt the Travel Rule as they please, the lack of uniformity may give way to confusion as jurisdictions may set different thresholds and rules for triggering the rule.[106]

Still, the Travel Rule has made it easier for law enforcement to trace illicit activities on the blockchain and allows VASPs build trust with their users as it is a signpost that the VASP is willing to comply with the rules to curb criminal activities on its platform.

Apart from the recommendations from the amendment in 2019, the FATF also wanted to "further assist countries and providers of virtual asset products and services in understanding and complying with their AML/CFT obligations"[107] and updated its Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers.

[106] A. Sergeenkov, "What's the Crypto 'Travel Rule,' and What Does It Mean for You?" available at https://www.coindesk.com/learn/whats-the-crypto-travel-rule-and-what-does-it-mean-for-you/#:~:text=The%20rule%2C%20formally%20known%20as,that%20exceed%20a%20certain%20threshold (accessed 15 June 2022).

[107] FATF, "Public Statement on Virtual Assets and Related Providers" available at https://www.fatf-gafi.org/publications/fatfrecommendations/documents/public-statement-virtual-assets.html (accessed 15 June 2022).

3.1.1.2 Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers

At its 2019 plenary session, the FATF decided to update its Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers (the Guidance) which assists jurisdictions with applying the FATF Recommendations to virtual assets and VASPs. The first Guidance was released in 2015 which focused primarily on exchanges or points that allowed for the conversion of virtual assets to fiat currency.

However, the FATF noticed that new technology had emerged that allowed for the swap of virtual assets (swapping BTC for ETH-the coin native to the Ethereum Blockchain) and other virtual asset services such as providing hard wallets (physical storage devices that hold Private Keys and even cryptocurrency) or Decentralized Finance platforms (platforms that allow users perform financial activities with their cryptocurrency apart from trading and swapping e.g. loans, putting their cryptocurrency in a pool to generate a yield).

Therefore, the need for an update to the guidance arose. The Guidance was updated twice, once in 2019, and then again in 2021 after the FATF conducted a 12-month review of the adoption and implementation of the Guidance in jurisdictions. The Guidance informs countries that an initial risk assessment should be carried out first to identify and assess the potential money laundering and terrorist financing risks with virtual assets that are native to their jurisdiction.
The Guidance then establishes some of the parameters that will aid jurisdictions in their initial risk assessment like the type of

virtual asset services that are prominent in their geography, the ease in which its citizens can use VASPs to transfer funds, the volume of peer-to-peer transactions in their jurisdiction, the cross-border nature of the VASPs in their jurisdiction and so on.[108]

In the Guidance, the FATF emphasizes that jurisdictions need to understand what virtual assets are and how they differ from digital assets (Non-Fungible Token's or collectibles) before they decide to set their respective definitions of what virtual assets are.[109] The services that VASPs carry out are also explained in the Guidance to give jurisdictions an in-depth understanding of the type of services that will be classified as virtual asset services.[110]

The FATF uses the Guidance to give a step-by-step procedure for applying the FATF Recommendations and details how each FATF Recommendation should be applied in the context of VASPs and virtual assets. The Guidance also looks at several activities that jurisdictions would carry out when it comes to VASPs such as licensing of VASPs, prohibition of virtual assets, and customer due diligence, giving jurisdictions advice on how to efficiently carry out these activities. Another interesting part of the Guidance is that it details the PII that VASPs should submit to enable jurisdictions to properly monitor transactions. According to the Guidance;

- The originator's name (i.e., the sending person's name);
- The originator's wallet address;

[108] FATF (2021), *Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers*, FATF, Paris, available at www.fatf-gafi.org/publications/fatfrecommendations/documents/Updated-Guidance-RBA-VA-VASP.html (accessed 15 June 2022).
[109] *Ibid*, p. 23.
[110] *Ibid*.

- The originator's physical (geographical) address, or national identity number, or customer identification number (i.e., not a transaction number) that uniquely identifies the originator to the ordering institution, or date and place of birth;
- The beneficiary's name (i.e., the name of the person who is identified by the originator as the receiver of the transfer); and
- The beneficiary's wallet address,

should be collected immediately (submit the required information prior, simultaneously, or concurrently with the transfer itself) and securely. The FATF through the Guidance, also recommends that the PII should be collected through a proper customer due diligence procedure and that an enhanced due diligence should be applicable to customers of VASPs when there is a sign of a suspicious transaction.[111] The Guidance ends with a review of the jurisdictions that have adopted the FATF Recommendations on VASPs and virtual assets which we will explore later in this article.

Apart from the FATF, another institution also released a report which re-emphasizes the need for the regulation of cryptocurrency.

3.1.2 The Bank of International Settlements Supervisory Approach

The Bank of International Settlements (BIS) is an international financial institution which supports central banks and serves as a bank for central banks. The BIS is owned by 63 banks to assist central banks and financial supervisory authorities with

[111] *Ibid*, p. 59.

policymaking. It also acts as a forum for dialogue and cooperation, where they can freely exchange information, forge a common understanding and decide on common actions.[112]

In April 2019, BIS decided to release a policy framework for supervising crypto assets for anti-money laundering. In the report, the BIS highlighted that the supervision of Crypto asset Service Providers (CSPs) (another fancy name for VASPs) is still at its sunrise stage in countries because regardless of the standards that have been set internationally by the FATF, countries are just setting up their respective AML/CFT regulations for VASPs/CSPs.[113]The report (Supervising crypto assets for anti-money laundering) also highlighted various jurisdictions that have begun to carry out their initial risk assessments regarding crypto assets and have begun to implement AML/CFT procedures and enforcement mechanisms for VASPs.

3.1.3 Jurisdictional Approaches towards AML/CFT Regulations for VASPs

As mentioned earlier, despite the clarion call by the FATF and various international bodies for AML/CFT regulation of VASPs and virtual assets, there is no uniform rule or regulation that has been formulated. However, countries are carrying out assessments and are taking adequate steps to ensure that virtual assets are not a hotbed for illicit activities.

3.1.3.1 The United States of America

[112] BIS, "About BIS" available at https://www.bis.org/about/index.htm (accessed 15 June 2022).

[113] R. Coelho, J. Fishman, and D. Ocampo, *Supervising crypto assets for anti-money laundering, BIS (April 2021) available at* https://www.bis.org/fsi/publ/insights31.pdf (accessed 15 June 2022).

As early as 2013, the Financial Crimes Enforcement Network (FINCEN), a Bureau of the United States Treasury Department, recognized virtual assets as a form of value that substitutes for currency.[114] This meant that any entity that

> accepts and transmits a convertible virtual currency or buys or sells convertible virtual currency for any reason is a money transmitter under FinCEN's regulations, unless a limitation to or exemption from the definition applies to the person. [115]

Entities that performed the actions described above were recognized as money transmitters and are required to obtain a license from the FINCEN. They are also subject to the Bank Secrecy Act, a body of law which requires financial institutions in the United States to assist U.S. government agencies in detecting and preventing money laundering. Therefore, exchanges are required to implement an AML/CFT program, maintain appropriate records, and submit reports to the authorities.[116]

If an Issuer of a coin is carrying out an Initial Coin Offering (ICO) (an ICO is like an Initial public Offering but instead of shares, coins are offered to the public in exchange for money or other coins with the promise that the coins being offered to the public will appreciate) or is offering cryptocurrency that falls under the definition of a security in accordance with the Howey Test,[117]

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[114] Department of the Treasury Financial Crimes Network, (2013) "Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies" FIN-2013-G001, available at https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf (accessed 15 June 2022).

[115] *Ibid*.

[116] Comply Advantage, "Cryptocurrency Regulations in the United States", available at https://complyadvantage.com/insights/crypto-regulations/cryptocurrency-regulations-united-states/ (accessed 15 June 2022).

[117] Whether participants in the offering make an "investment of money" in a "common enterprise" with a "reasonable expectation of profits" to be "derived

then the cryptocurrency would fall under the regulatory purview of the US Security and Exchange Commission (US SEC) and needs to be registered. Although being an issuer of a security does not place an entity squarely under AML/CFT regulations in the United States, the registration of a security requires submitting PII of the issuer to the US SEC.

Also, if an exchange or a VASP is strongly involved in the transmission of a token to the public during an ICO, then the US SEC will treat such VASP as either a dealer or a broker which triggers the Bank Secrecy Act and requires the VASP to comply with AML/CFT regulations as well as obtain a license from the US SEC.[118] The United States financial regulatory framework is very fragmented as a financial instrument that is flexible in nature can fall under the regulatory ambit of over four regulatory bodies and cryptocurrency is not left out. Cryptocurrency can be a means of exchange, a security, and even a commodity which is why even the Commodities Futures Trading Commission (CFTC) can regulate cryptocurrency that is used as a commodity and VASPs that treat cryptocurrency as a derivative or a broker for derivatives that their underlying asset is cryptocurrency will be needed to obtain a license from either the CFTC or SEC and will be subject to AML/CFT Regulations as well.[119]

When the FATF recommended the application of the Travel Rule to virtual assets and VASPs in 2019, the FINCEN immediately instructed VASPs particularly cryptocurrency exchanges to start

from the entrepreneurial and managerial efforts of others, SEC v. W.J. Howey Co., 328 U.S. 293 (1946) SEC.

[118] D. Holman, B. Stettner, Allen & Overy LLP, "Anti-Money Laundering Regulation of Cryptocurrency: U.S. and Global Approaches" ICLG to: Anti-Money Laundering, 2018.

[119] Supra, note 62.

to gather the required information from originators and beneficiaries of cryptocurrency transactions and share between VASPs and US law enforcement where necessary. In the subsequent year, the FATF proposed an amendment to the Travel Rules by adjusting the threshold for recording and reporting transactions, lowering it from USD$3000 to $250 in the instance of cross border cryptocurrency transactions.[120]

In December of 2020, the FINCEN worked on a second set of rules, that required cryptocurrency exchanges and others to file reports when at least $10,000 \-worth of virtual assets is transferred into a wallet not hosted at an exchange. The rules also require recordkeeping for wallet owners to identify themselves when sending more than $3,000 in a single transaction.[121] Now, in 2022, President Joe Biden, has issued an executive order for the development of a cryptocurrency regulatory framework in America [122] which will change the framework for the regulation of cryptocurrency in the United States of America.

3.1.3.2 The European Union

The European Union generally issues Anti Money Laundering Directives to Member States to mitigate money laundering risks and financing terrorism risks. In 2016, the EU issued the Fifth Anti-Money Laundering Directive (5AMLD), with 2018 being the

[120] FINCEN, "Agencies Invite Comment on Proposed Rule under Bank Secrecy Act" available at https://www.fincen.gov/news/news-releases/agencies-invite-comment-proposed-rule-under-bank-secrecy-act (accessed 15 June 2022).
[121] Supra, note 116.
[122] The White House, "Executive Order on Ensuring Responsible Development of Digital Assets" available at https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets/ (accessed 15 June 2022).

year that it was going to come into force. The EU gave Member States 18 months to comply with the 5AMLD which sought to mandate exchanges that convert virtual assets to fiat currency to comply with AML/CFT directives of the EU bringing them under the scope of an 'Obliged Entity' (entities that have an obligation to report transactions). The 5AMLD also contains provisions which instruct EU Member States to subject VASPs to the same requirements as other Obliged Entities including beneficial ownership identification, KYC, transaction monitoring, and suspicious activity reporting.[123]

Recently, the EU passed a draft regulation which seeks to ensure that crypto assets can be traced like traditional money transfers. The draft legislation proposes that all transfers of crypto assets shall include information on the originator or source of the virtual asset and its beneficiary (Travel Rule), which will be made available to the competent authorities. The EU borrowed from the United States approach and mandates unhosted wallets (a crypto-asset wallet address that is in the custody of a private user) to report cryptocurrency transactions as well. [124] The draft legislation also mandates the European Banking Authority to maintain a public register of all businesses involved with virtual assets that have a high risk of money laundering and terrorism financing, compliant VASPs, and provides that

> before making the crypto-assets available to beneficiaries, providers (VASPs) would have to verify that the source of the asset is not subject to restrictive measures and that there are no risks of money laundering or terrorism financing. [125]

[123] Supra, note 118.
[124] European Parliament "Crypto assets: new rules to stop illicit flows in the EU" available at https://www.europarl.europa.eu/news/en/press-room/20220324IPR26164/crypto-assets-new-rules-to-stop-illicit-flows-in-the-eu (accessed 15 June 2022).
[125] *Ibid*.

3.1.3.3 Switzerland

The Swiss Financial Market Supervisory Authority (FINMA) is the regulatory body responsible for overseeing financial activities and entities in Switzerland. FINMA and the Swiss government are cryptocurrency proponents and believe that cryptocurrency can generate immense benefits for the world[126] evidenced through the launch of a Swiss cryptocurrency fund which invests primarily in cryptocurrency assets.[127] However, FINMA mandates all VASPs in the country to comply with their AML/CFT procedures and KYC requirements. Also, FINMA requires all cryptocurrency exchanges to perform Enhanced Due Diligence on users of their platform.[128] In ;2019, FINMA announced that it would apply the FATF Travel Rules to "Blockchain Service Providers" (BSPs) (remember jurisdictions can classify VASPs with any nomenclature they want).

In the publication, FINMA emphasized that BSPs supervised by FINMA are only permitted to send cryptocurrencies to cryptocurrency wallets of their users who have obliged to KYC procedures (PII has been collected and verified) and beneficiaries will only be allowed to receive cryptocurrency if their identity has been verified[129]. The threshold for reporting transactions that FINMA adopted is currently at 1000 Swiss Francs.[130]

3.1.3.4 Singapore

[126] R. Marley, "What you need to Know about Switzerland's Crypto Rules by FINMA" available at https://shuftipro.com/blog/what-you-need-to-know-about-switzerlands-crypto-aml-rules-by-finma/ (accessed 16 June 2022).
[127] FINMA, "Approval of first Swiss crypto fund" available at https://www.finma.ch/en/news/2021/09/20210929-mm-genehmigung-schweizer-kryptofonds/ (accessed 16 June 2022).
[128] Supra, note 126.
[129] FINMA, "FINMA guidance: stringent approach to combating money laundering on the blockchain" available at https://www.finma.ch/en/news/2019/08/20190826-mm-kryptogwg/ (accessed 16 June 2022).
[130] Supra, note 126.

In Singapore, its financial regulatory body, the Monetary Authority of Singapore (MAS), believes in maintaining a balance between regulating the cryptocurrency to combat money laundering and any risk associated with cryptocurrency, and innovation within the cryptocurrency ecosystem. This belief is encapsulated in Singapore's Prime Ministers statement:

> We will continue to encourage experiments in the blockchain space that may involve the use of cryptocurrencies. Some of these innovations could turn out to be economically or socially useful. But equally, we will stay alert to new risks.[131]

Staying alert to risks according to Prime Minister Tharman Shanmugaratnam, MAS is constantly working on regulations to mitigate the risks related to cryptocurrency. In 2020, MAS issued the *Payment Services Act 2019*, (PSA 2019) which seeks to regulate payment systems and methods in Singapore including cryptocurrency. The act mandates VASPs to acquire a license to operate in Singapore and provides for the AML/CFT framework for VASPs.[132]

The PSA contains licensing regimes for any entity providing "digital payment token service". The first tier of the license is for digital payment token services that process USD$3,000,000 per month (standard payment institution license) and the second tier is for entities that process above $3million (major payments institution license).[133] The MAS also released the Prevention of Money Laundering and Countering the Financing of Terrorism –

[131] L. Tassev, "No Strong Case to Ban Crypto Trading, Singapore Says" available at https://news.bitcoin.com/no-strong-case-to-ban-crypto-trading-singapore-says/ (accessed 16 June 2022).
[132] K. Venkatesh and A. Rastogi, "Singapore: Cryptocurrency Regulation In Singapore: Challenges And Opportunities Ahead" available at https://www.mondaq.com/fin-tech/1025630/cryptocurrency-regulation-in-singapore-challenges-and-opportunities-ahead- (accessed 16 June 2022).
[133] *Ibid*.

Holders of Payment Services License (Digital Payment Token Service) Notice in 2019 which advises DPTS's to set up a risk-based approach framework to highlight the risks applicable to them through identifying its customers, the jurisdictions its users operate in, transaction flows etc.

The MAS through the Notice also instructs DPTS to set up an internal AML/CFT Policy which provides for customer due diligence procedures and identity verification, monitoring of customers' transactions, routine screening of customers against relevant financial black lists also known as international sanction lists, and detailed record keeping of customers activities and the creation of a system to report suspicious transactions to MAS.[134] In 2020, the MAS also made its *Securities and Futures Act* (SFA) applicable to ICO's, issuers, and exchanges that host the ICO's. This meant that issuers of coins in an ICO are to register their prospectuses with MAS, and exchanges that host ICO's or allow for their trade need to obtain approval from MAS. VASPs that also engage in capital market activities as described in the SFA (offering cryptocurrency that is similar to a security on an exchange) needs to obtain a license from MAS.[135]

3.1.3.5 Nigeria

[134] *Ibid;* MAS Notice PSN02, "Notice to Holders of Payment Services Licence (Digital Payment Token
Service) Monetary Authority of Singapore Act 1970 Prevention of Money Laundering and Countering the Financing of Terrorism – Holders of Payment Services Licence (Digital Payment Token Service)" December 2019, available at https://www.mas.gov.sg/-/media/MAS-Media-Library/regulation/notices/AMLD/psn02-aml-cft-notice---digital-payment-token-service/Notice-PSN02-last-revised-on-1-March-2022.pdf (accessed 16 June 2022).

[135] Supra, note 132.

Pursuant to the Central Bank of Nigeria's Circular to Banks and other Financial Institutions on Virtual Currency Operations in Nigeria, Ref: FPR/DIR/GEN/CIR/06/10, dated 12 January 2017, and a Letter to all Deposit Money Banks, Non-Bank Financial Institutions, and Other Financial Institutions, BSD/DIR/PUB/LAB/014/001, dated 5 February 2021, all CBN licensed financial institutions and entities such as deposit money banks, payment service providers, and microfinance banks, are prohibited from dealing with cryptocurrencies.

This does not prohibit peer-to-peer trading but does not allow cryptocurrency into the banking ecosystem in Nigeria. Banks who have flouted the circular and the letter have had to pay heavy fines.[136] Interestingly, the Securities and Exchange Commission of Nigeria (SEC) sings a different tune. In 2020, SEC classified virtual crypto assets as securities unless proven otherwise, therefore the regulatory body is mandated to regulate cryptocurrency. The SEC also listed individuals and entities that will be regulated including the issuers of coins through an ICO, and any person, (individual or corporate) whose activities involve any aspect of Blockchain-related and virtual digital asset services, such as reception, transmission, and execution of orders on behalf of other persons, dealers on own account, portfolio management, investment advice, custodian or nominee services.[137]

[136] B. Aduloju, "CBN hits banks with N1.31bn fine for flouting directive on crypto accounts" available at https://www.thecable.ng/cbn-fines-six-banks-n1-31bn-for-flouting-directive-on-closure-of-crypto-accounts#:~:text=Central%20Bank%20fined%20Stanbic%20IBTC,the%20bank's%20financial%20statement%20reads. (accessed 16 June 2022).

[137] SEC Nigeria, "Statement On Digital Assets And Their Classification And Treatment" available at https://sec.gov.ng/statement-on-digital-assets-and-their-classification-and-treatment/ (accessed 16 June 2022).

Two years later, SEC released its *Rules on Issuance, Offering Platforms and Custody of Digital Assets*. The SEC Rules on digital assets provide for different license categories depending on the primary service of a VASP. If a VASP is offering digital assets on its platform like NFTs or is an online marketplace for digital representations of shares, the SEC labels the VASP as a Digital Assets Offering Platform (DAOP) mandated to pay a hefty registration fee of ₦35,000,000 , obtain approval and a license from SEC, carry out customer due diligence on the Issuers using its platform, maintain a register of digital assets on its platform, and carry out other activities that will mitigate money laundering and illicit activities.[138]

VASPs who store cryptocurrency on behalf of persons are labelled as Digital Asset Custodians (DACs) and are mandated to comply with all relevant laws, regulations and guidelines including but not limited to Anti-Money Laundering/Combating the Financing of Terrorism/Proliferation Financing laws and regulations (AML/CFT/PF) of Nigeria.[139] VASPs that provide a platform for the exchange of cryptocurrencies for other coins or fiat currency are recognized as Digital Asset Exchanges (DAX) and must carry out internal audits on the cryptocurrencies listed on their platform. The DAX will send information to the SEC when required and will not host cryptocurrency on its platform that has not gotten a "no objection" letter from the SEC.[140]

The Rules also provides that all VASPs that were not defined in it including DACs, DAOPs, and DAXs must have in place adequate

[138] Part B, SEC Rules on Issuance, Offering Platforms and Custody of Digital Assets, available at https://sec.gov.ng/rules-on-issuance-offering-and-custody-of-digital-assets_sec-nigeria-11-may-2022/
[139] *Ibid*, Part C.
[140] *Ibid*, Part E.

policies, procedures and controls to mitigate against money laundering, terrorism financing and counter proliferation financing requirements and comply with Anti Money Laundering/Combating Financing of Terrorism and Proliferation Financing laws and regulations.[141]

The disjointed nature of the various jurisdictional approaches to mitigate the risks of cryptocurrency is another strong reason why cryptocurrency maximalists are not in tune with the AML/CFT requirements springing up that VASPs have to comply with. This is also coupled with the fact that most jurisdictions are placing the burden of creating a system of communicating information regarding cryptocurrency squarely on the shoulders of the VASPs which is quite an expensive endeavor. These criticisms have not stopped the proliferation of AML/CFT requirements among countries of the world and very soon, all VASPs may have to apply some form of AML/CFT framework. When that day comes will it be the death knell for cryptocurrency as regulation heralds the beginning of centralization?

4.0 WHEN OPPOSING IDEOLOGIES FIND A COMMON GROUND

Statements from Cryptocurrency Maximalists like "regulators are creating danger for currency developers and retail investors" in the cryptocurrency market, the size of which it estimated at $2 trillion in market capitalization" [142] or "cryptos cannot be regulated" because a number of jurisdictions do not have the capability to chase entities that are domiciled on the internet like

[141] *Ibid*, Part D.

[142] The Editorial Board, wall Street Journal, "The SEC's Cryptocurrency Confusion" available at https://www.wsj.com/articles/the-secs-cryptocurrency-confusion-11618611723 (accessed 16 June 2022).

most VASPs,[143] making the regulation of cryptocurrency a bad thing. I disagree. Cryptocurrency prices are largely volatile. Coins can lose their whole value in a minute. This is usually because of the actions of illicit users and illegal activities on the blockchain. With regulations, criminal activities can be reduced consequently ensuring a true reflection of the value of cryptocurrency in the markets, allowing for more participation and users.

Cryptocurrency was initially seen as a means of exchange but overtime it has evolved into a security or an investment asset. This means that when cryptocurrency is stolen or lost, its people's financial livelihoods are ground into the dust. VASPs, because of a lack of regulatory requirements, can easily escape liability for the loss of their user's money and the story ends there for people. No form of recompense or restitution. Financial Regulators cannot sit idly and watch as money is being lost without any ability to trace it. They need to act to protect people and have a duty to oversee financial investments and securities. If VASPs work hand in hand with financial regulatory authorities and law enforcement, we could see an uptick in the use of cryptocurrency, thereby creating demand for coins which could drive up their prices in the market.

If regulations are applied smartly to an industry after extensive interactions with stakeholders and even users, there is a strong possibility that regulations will not hamper the innovation and development of that industry. If AML/CFT virtual asset Regulations and other cryptocurrency laws are applied smartly in countries, more entities will register in the country, creating an

[143] V. Kaul, " Arguments against regulating cryptocurrencies are very weak" available at https://www.livemint.com/opinion/columns/arguments-against-regulating-cryptocurrencies-are-very-weak-11638289237285.html (accessed 16 June 2022).

ethical haven which could create more revenue for the country.[144]

Among Cryptocurrency Maximalists, there is a popular saying, "Bitcoin is for everyone". This means that cryptocurrency is not for the one percent on Twitter and Discord who use ambiguous terms like HODL, REKT, or Lambos, cryptocurrency is for people who are in developing countries and have hope that it will act as a hedge for their depreciating fiat currency. Cryptocurrency is for family members who need to send money to their family immediately because of an emergency but know that wire transfers will take too long. Cryptocurrency is for everyone. This is the common ground between cryptocurrency and regulations. Helping everyone. If cryptocurrency is for everyone, then let the regulations and the law help it be for everyone.

[144] Switzerland now has over 130 VASPs and more are in the process of registering because of its crypto friendly laws, BIS (April 2021) R. Coelho, J. Fishman, and D. Ocampo, *Supervising crypto assets for anti-money laundering, available at* https://www.bis.org/fsi/publ/insights31.pdf (accessed 16 June 2022).

ENFORCEMENT OF THE SUPPRESSION OF PIRACY AND OTHER MARITIME OFFENCES ACT 2019 FOR THE OFFENCES OF PIRACY AND SABOTAGE OF MARITIME INFRASTRUCTURE: INSIGHTS FOR JUDICIAL ADJUDICATION

By Dr. Emeka Akabogu*

1.0 INTRODUCTION

Nigeria's coast is part of the Gulf of Guinea ("GoG"), a highly diverse and prolific aquatic ecosystem, and one of the richest in the world.[145] The GoG is an important gateway not just for the littoral states along its coast, but for the landlocked states in the region, making it one of the very important global maritime routes for commercial shipping.[146] As a result, it has become the target of criminals who take advantage of suboptimal regional maritime governance. For a long time, an important regional governance deficit was the absence of focused legislation for tackling piracy in any of the countries.[147] The enactment of the *Suppression of Piracy and Other Maritime Offences (*SPOMO) Act 2019 is therefore a milestone for the maritime security regime of Nigeria and the wider west and central African region.

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[145] This part of the Atlantic Ocean is known to be of low salinity arising from the numerous river effluents and high rainfall along the coast.

[146] B. Garba, "Ocean Governance and Maritime Security in the Gulf of Guinea, (editorial of The Maritime Executive published 2/8/2020), available at https://www.maritime-executive.com/editorials/ocean-governance-and-maritime-security-in-the-gulf-of-guinea#:~:text=The%20Gulf%20of%20Guinea%20(GOG)%20provides%20an%20economic%20theater%20to,business%20community%20and%20international%20shipping.&text=This%20is%20more%20so%20as,top%20ten%20crude%20oil%20exporters, (accessed 13 February 2022).

[147] A. Osinowo, "Combating Piracy in the Gulf of Guinea, (2015) 10 *Africa Security Brief* p.6, available at https://apps.dtic.mil/sti/pdfs/ADA618297.pdf (accessed 13 February 2022).

As the first country in the region to enact a specific piracy-focused law, the country may enjoy any associated political benefits but will certainly face challenges of uncharted legal, judicial and forensic waters. This article interrogates the enforcement quotient of the *SPOMO Act* for piracy and sabotage of maritime infrastructure in the context of the adequacy of the Act's provisions, interaction with other domestic and international legal instruments and impact of extant legal principles. It is expected that with the benefit of this review, judges will have an expanded view of the legal issues in the course of adjudicating cases founded on alleged breach of the *SPOMO Act.*

2.0 BACKGROUND OF THE SPOMO ACT

The enactment of the *SPOMO Act* has been preceded by years of significant and often widely reported criminal attacks at sea both in the wider GoG and Nigerian coastal waters. For a good part of the first decade of the millennium, piracy and its incidents gripped the waters of the Gulf of Aden (GoA), largely arising from activities of gang leaders in Somalia, a country without a clear-cut government. Global efforts rallied to stem a tide of piracy with associated impact on operations of shipping lines, trading merchants, crew, multilateral bodies and a range of other actors. With high emotional, financial and human costs, the rampage of piracy had to be contained sooner than later given the aggregation of efforts which were put in place. By 2012, attacks had started abating in the Gulf of Aden.

In the Gulf of Guinea, however, it was gathering steam. The GoG attacks were of different species from those of the GoA, with highlighted differences occasioned not by a lack of government, but something similar – a failure of government and its institutions. Without a coordinated framework for patrolling the waters, suboptimal funding for navies and no legal framework for holding pirates to account, bandits felt it was open season on the waters and merchants were the worse for it. Without a doubt, at the core of the spread and continued challenge of piracy has been a deficit of institutional effort, and with coordinated initiatives towards tackling it comes considerable success as witnessed in Somalia. As stated by

researchers from the London School of Economics about the *modus operandi* of these marine marauders:

> Setting to one side the romanticised image of pirates in fiction, modern day pirates are organised bandits that thrive in areas where law and order is weak, either because particular states provide safe havens or because of poor international cooperation to police them.[148]

One of the core institutional challenges has been legal, with valid questions faced by operators, governments and multilateral bodies that form the theme around the definition of piracy, powers of governments and navies on the high seas, responsibility for prosecution of pirates, and the legality of private security companies and the likes.

3.0 THE LEGAL MISCHIEF CORRECTED BY THE SPOMO ACT

3.1 Mischief of Piracy

Prior to the enactment of the *SPOMO Act,* the prosecution of the persons suspected of maritime piracy posed a challenge in Nigeria. This was understandable as there was no clear-cut municipal law proscribing the act in Nigeria.[149] Given the principle of no punishment without law,[150] prosecution of piratical acts was almost impossible. It is noteworthy that regardless of the *Money Laundering Act* of 2012 which provides for piracy as an offence,[151] there is no provision in the Act which defines it. It may also be argued that Nigeria is a state party to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigations (SUA) 1988, which defines piracy, and

[148] T. Besley, T, Fetzer and Hannes Mueller, "The Economic Costs of Piracy" (2012) *IGC* 6013 *Policy Brief* 1-5. Available at https://www.theigc.org/wp-content/uploads/2015/07/Besley-Et-Al-2012-Policy-Brief.pdf

[149] Recall that upon arrest and seizure of pirates and pirate ships, states were required to prosecute and punish the suspects according to their various municipal laws.

[150] Constitution of the Federal Republic of Nigeria, 1999, as amended (CFRN, 1999), section 36(12).

[151] Money Laundering Act 2021, section 15.

the said Convention is applicable in Nigeria by virtue of the *Merchant Shipping Act 2007*. This argument is however on shaky ground, as it is not clear if indeed SUA was domesticated in Nigeria. The law is that no treaty between Nigeria and any other country shall have force of law unless and until it is enacted as an Act of the National Assembly.[152] While some arguments are that the *SUA* and its Protocols were domesticated by virtue of the *Section 215 (h) of the Merchant Shipping Act* 2007 (MSA), others argue that the provision of *Section 215 (h) MSA* is inadequate to qualify as a domestication of the *SUA*. The latter argument seems more compelling.[153]

For clarity, *Section 215 (h) of the MSA* provides as follows:

> As from the commencement of this Act, the following Conventions, Protocols and their amendments relating to maritime safety shall apply, that is-
> (h) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 and the Protocol thereto…

The clear stipulation of Section 12 of the *CFRN* 1999 is that the treaty or the relevant part thereof must be enacted into law by the National Assembly. A simple reference to the *SUA* as contained in 215 (h) of the *MSA* cannot be said to be an enactment of the *SUA* by the National Assembly. Also, the preamble of the *MSA* clearly states that the *MSA* was to provide for merchant shipping and for related matters.[154]

The same applies to the *United Nations Convention on the Law of the Sea* (UNCLOS), which provides a clear definition of piracy. While Nigeria is a state party to UNCLOS, it is not domesticated, thereby yoking it with the same constitutional constraint that no treaty between Nigeria and any other country shall have the force of law unless and until it is

[152] Constitution of the Federal Republic of Nigeria 1999, as amended (CFRN 1999), section 12(1).
[153] *The Registered Trustees of National Association of Community Health Practitioners of Nigeria & Others* v. *Medical and Health Workers Union of Nigeria,* [2008] 2 NWLR (Pt. 1072), 575.
[154] Compare this with the preamble of SPOMO Act which is clear as to the intention of the National Assembly to domesticate the UNCLOS, the SUA and its Protocols.

enacted as an Act of the National Assembly.[155] It is therefore correct to assert that neither the UNCLOS nor the SUA, having not been domesticated before the SPOMO Act, constituted reliable legal bases at the time which could be called in aid against piracy. This therefore creates a strong need to ensure the creation of an appropriate legal framework in the form of the SPOMO.

3.2 Mischief For Other Maritime Offences

While it is clear that it is the *SPOMO Act* that made prosecution of piracy in Nigeria possible, it is arguable that other maritime offences could not be prosecuted. Section 4 of the *SPOMO Act* sets out a range of maritime offences which need to have been committed within the Nigerian maritime zone or the Nigerian jurisdiction to be properly so-called. It is noteworthy, however, that the maritime offences so created embed some already established crimes in Nigeria. For example, Section 4 (l) lists the usage of a ship or an aircraft in a manner that causes death or serious injury or damage as a maritime offence. Before the enactment of the SPOMO Act, that could easily be described as homicide and or assault. It would therefore not be entirely correct to assert that the SPOMO Act made it possible for these offences to be prosecuted. At the very least, the High Courts of States have unlimited jurisdiction and may try these offences under domestic criminal laws. What the SPOMO Act has done is to broaden the scope of maritime offences and provide specifically for offences which bear directly upon the usage of the Nigerian maritime zone. This has come with its applicational challenges, though, as will be seen later in the article.[156]

In addition to the definition of piracy and the penalties provided in the SPOMO Act, a clear judicial framework for the prosecution of piracy was also established. The *SPOMO Act* identified the relevant

[155] Supra note 152.

[156] The creation of some maritime offences which already exist in municipal law comes with the challenge of determining jurisdiction, as many State High Courts already have constitutional jurisdiction to try such offences. This is in conflict with the exclusive jurisdiction granted to the Federal High Court under the *SPOMO Act*.

prosecuting authorities of the crimes under the Act[157] and conferred exclusive jurisdiction on the Federal High Court.[158] The *SPOMO* Act has started recording success as prosecution and conviction have already been recorded under it.[159]

4.0 PIRACY UNDER THE SPOMO ACT

4.1 Legal Issues in The Definition of Piracy

The definition of piracy under the *SPOMO* Act mirrors the definition provided by UNCLOS.[160]

Section 3

> 3. Piracy consists of any –
> (a) the illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or any passenger of a private ship or a private aircraft and directed -
> (i) In international waters against another ship or aircraft, or against a person or property on board the ship or aircraft;
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
> (b) act of voluntary participation in the operation of a ship or of an aircraft with the knowledge of facts making it a pirate ship or aircraft; and
> (a) act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

From the above, there are a number of requirements for an act to qualify as piracy under international law, to wit:

i. It must be an illegal act of violence, detention or depredation
ii. The act must occur on international waters or in "a place outside the jurisdiction of any State".

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[157] See S*POMO Act*, section 5(1).
[158] See *SPOMO Act*, section 5(2).
[159] In 2020, the Federal High Court sitting in Port Harcourt convicted three pirates who pleaded guilty in the case of the hijacking of ***MV Elobey VI*** in March 2020. In July 2021, the same court sitting in Lagos per Justice Ayokunle Faji, convicted 10 pirates in the first full trial for piracy in Nigeria in the case of the hijack of the *FV Hai Lu Feng II*, a Chinese vessel.
[160] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force in 16 November 1994) (UNCLOS), article 101.

iii. The act of piracy must be committed for private ends.

iv. The illegal act must be directed against another ship or aircraft or against persons or property on board such ship or aircraft (the two-ship rule).

5.0 VIOLENCE, DETENTION OR DEPRADATION

While the definition of violence may seem obvious, it is appropriate to examine it at least cursorily, for perspective on its application in the context of piracy. Black's Law Dictionary defines violence as "the use of physical force, usually accompanied by fury, vehemence or outrage". Cambridge Advanced Learner's Dictionary defines violence as "actions or words which are intended to hurt people". The implication is that violence could be physical or otherwise. The UNCLOS does not define the type of violence which may constitute piracy. It would seem reasonable though, that piracy for our purposes, will indicate physical harm, threatened or actual. Nonetheless, the question of whether or not there has been violence may arise, which will impact the validity of the categorization of an act as piracy. Illegal violence will refer to such violence that is not sanctioned by a state nor justified by law, for example, in self-defense. The act could equally be an act of detention, which may or may not involve violence. However, where the very threat alone of violence or harm leads to the crew's voluntary submission, it would seem that the impact of the threat or prospect of violence will suffice.

5.1 'International Waters' or 'High Seas': The Limits of Territorial Jurisdiction

While the SPOMO Act refers to the term *international waters*,[161] Article 101 of *UNCLOS* prefers *high seas.* These terms both essentially refer to a place outside the jurisdiction of any state.[162] The jurisdiction of a state over which it may exercise sovereignty extends to but does not go beyond the territorial sea and or archipelagic waters of that state, where applicable.[163] Therefore, the UNCLOS limited the

[161] *SPOMO Act,* section 3(a)(i).
[162] *SPOMO Act*, section 3(a)(ii).
[163] See United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force in 16 November 1994) (UNCLOS), articles 2, 3 and 49.

exercise of the universal jurisdiction to the high seas - that is, waters outside the territorial sea of a state. International waters are often in contradistinction to internal and territorial waters which refers to those water bodies over which the coastal state has jurisdiction. Strictly speaking however, the scope of internal waters is narrower. Also called inland waters, internal waters are on the landward side of the baseline,[164] and include rivers, lakes, and tidewaters. Coastal States have sovereignty over their internal waters as with their land territory, even though the SPOMO Act by its provisions covers internal waters. [165] This means the rules of general international law, concerning the legal order of the seas, do not affect these internal waters[166], thus, these waters have not been a subject for codification in international law.

On the seaward side of the baseline however, coastal states still have other maritime zones which are of relevant application before the international waters. These include the territorial waters, the contiguous zone, the Exclusive Economic Zone and the continental shelf. Generally, the closer a zone is to the coastline, the more rights and powers a state has over it. Maritime zones are determined using a "baseline".[167] A baseline is a line along the coast from which the seaward limits of a state's territorial sea and certain other maritime zones of jurisdiction are measured. The normal baseline is fixed to begin at the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State. The unit of measurement for maritime zones is the "nautical mile" (nm); one nautical mile equals 1.852 kilometres and about 1.151 miles on land.

[164] *Ibid,* article 8.
[165] *SPOMO Act*, section 2(1).
[166] In *Attorney-General of the Federation* v *Attorney-General of Abia State & Ors.* [2002] LPELR-632(SC). It was held that it is only the seaward boundary of Nigeria as well as the international boundaries of Nigeria that are the subject of international law.
[167] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force in 16 November 1994) (UNCLOS), article 5.

5.2 **Territorial Sea**

Waters up to a limit not exceeding 12 nautical miles, measured from baselines is known as a State's territorial sea.[168] Coastal states have sovereignty and jurisdiction over the territorial sea also.[169]These rights extend both to the surface and the seabed and subsoil, as well as the airspace. Though territorial seas are under the jurisdiction of the coastal States, this jurisdiction is limited by the passage rights of other States, which includes innocent passage through the territorial sea.[170]

5.3 **Contiguous Zone**

The zone contiguous to a state's territorial sea is described as the contiguous zone and may be established from the outer edge of the territorial seas to a maximum of 24 nautical miles from the baseline. Control over this zone is necessary to prevent infringement of a state's customs, fiscal, immigration or sanitary laws and regulations[171] within its territory or territorial sea as well as punish such infringement.[172] Unlike the territorial sea, the contiguous zone only gives jurisdiction to a State on the ocean's surface and floor and does not provide air and space rights.[173]

5.4 **Exclusive Economic Zone (EEZ)**

This refers to an area beyond and adjacent to the territorial sea. This zone was created by the UNCLOS.[174] States' *EEZ* shall not extend beyond 200 nautical miles from the baselines.[175] In this zone, the coastal state has sovereign rights for the purpose of exploring and

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[168] *Territorial Waters Act 1967*, s.1.
[169] *Ibid,* section 2.
[170] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force in 16 November 1994) (UNCLOS), article 17 *op cit.*
[171] See for example the Harmful Waste (Special Criminal Provisions, Etc.) Act 1988 section 12.
[172] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force in 16 November 1994) (UNCLOS), article 33 *op cit.*
[173] U.S. Department of the Navy, 'Annotated Supplement for the Commander's Handbook on the Law of Naval Operations', NWP 9 (Rev. A)/FMFM 1-10), paras. 1.5.1 & 2.4.1 (1989).
[174] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force in 16 November 1994) (UNCLOS), pt. V *op cit.*
[175] *Ibid,* article 57.

exploiting, conserving and managing the natural resources, whether living or non-living, of the waters suprajacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.[176] It also has jurisdiction as provided for in the relevant provisions of the *UNCLOS* with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; the protection and preservation of the marine environment and other rights and duties provided in *UNCLOS*.[177]

Article 58 declares that all States, whether coastal or land-locked, enjoy freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions. Articles 88 - 115 of the *UNCLOS* relating to high seas rights apply to the EEZ as long as they are not incompatible with Part V.

[176] *Exclusive Economic Zone Act* 1978, ss. 2 & 3.
[177] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force in 16 November 1994) (UNCLOS), article 33 *op cit.*

5.5 **Continental Shelf**

The continental shelf is a natural seaward extension of a land boundary that is geologically formed as the seabed slopes away from the coast. It comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of 200 nautical miles from the baselines.[178] The UNCLOS allows a coastal state to conduct economic activities for a distance of 200 nautical miles from the baseline, or the continental margin where it extends beyond 200 nautical miles. The UNCLOS established the Commission on the Limits of the Continental Shelf (CLCS).[179] The CLCS uses scientists to evaluate states' claims about the extent of their continental shelves and whether they conform to the Convention's standards. This is to prevent abuse of the provisions in UNCLOS regarding the continental shelf.

The coastal state exercises control over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.[180] The state's economic rights are restricted to natural resources referred to in Part VI and consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species. The coastal state has the exclusive right to authorize and regulate drilling on the continental shelf for all purposes.[181] It can build artificial islands, installations, and structures. The other states are allowed to exploit non-sedentary living resources; they are also allowed to lay submarine cables and pipelines and to conduct marine research as if it were international waters. Continental shelf rights do not grant a right to restrict navigation.

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[178] *Ibid,* article 76.
[179] *United Nations Convention on the Law of the Sea* (adopted 10 December 1982, entered into force in 16 November 1994) (UNCLOS), Annex 2, art1.
[180] *United Nations Convention on the Law of the Sea* (adopted 10 December 1982, entered into force in 16 November 1994) (UNCLOS), article 77 (1) *op cit.*
[181] *United Nations Convention on the Law of the Sea* (adopted 10 December 1982, entered into force in 16 November 1994) (UNCLOS), article 81.

5.6 **High Seas**

The High Seas is the ocean surface and the water column beyond the *EEZ*. It has also been defined as all parts of the mass of saltwater surrounding the globe that are not part of the territorial sea or internal waters of a state. The *UNCLOS* emphasizes freedom of the high seas and that it should be reserved for peaceful purposes.[182] It further states that claims of sovereignty over the high seas shall be invalid.[183] Every state, whether coastal or not possess a right of navigation on the High Seas.[184] *UNCLOS,* article 112 vests right to lay submarine cables and pipelines on the bed of the high seas beyond the continental shelf and the *UNCLOS* imposes no limitations on fishing in the high seas, but encourages regional cooperation to ensure conservation and sustainability.

This statelessness and freedom of the high seas is the reason why piracy as an offence exists, to prevent impunity which may trail the appearance of lawlessness. As a result, even though there is no individual state control over the high seas, the offence of piracy which is only possible there is conferred with the unique 'universal jurisdiction', by virtue of which it can be tried in any country that is willing to assume jurisdiction. There is a definitional void in the application of piracy though, as the Article 101 definition suggests that piracy cannot be committed in waters outside the high seas. This is not the case, as piracy is extended to equally cover waters which are not the high seas but over which the coastal state exercises no sovereignty, such as the contiguous zone and the Exclusive Economic Zone.[185]

[182] *Ibid,* article 87, 88.
[183] *Ibid,* article 89.
[184] *Ibid,* article 90.
[185] D., Guilfoyle, & R. McLaughlin, (2019). The Crime of Piracy. In C. Jalloh, K. Clarke, & V. Nmehielle (Eds.), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (pp. 388-408). Cambridge: Cambridge University Press. doi:10.1017/9781108525343.015, p.397.

6.0 INTERNATIONAL COOPERATION

In the context of both the 'freedom of the seas' and 'universal jurisdiction', putting a check on the activities of pirates in the high seas and international waters generally requires international cooperation between nations through bilateral and multilateral frameworks. This is founded on the common interests of countries not only which are within the same region, but which trade together. Recently, Denmark deployed its frigate the 'Esberne Snare' in the Gulf of Guinea. Following a controversial incident where four alleged pirates were killed by the crew of the frigate and another four captured, the Danish authorities had to release three of them because 'they failed to find a country in the region which would take the alleged pirates', [186] resulting from the absence of a framework of international cooperation between Denmark and countries in the Gulf of Guinea.
Governments of West and Central Africa and others across the globe have invested in finding means of getting round this scourge and improving the state of maritime security, resulting at least in deliberate commitment to combined efforts geared towards proffering solutions at regional, continental and global levels. Notable examples of regional cooperation agreements in West Africa include the *Yaounde Code of Conduct* and the *Lome Charter*.

6.1 Yaounde Code of Conduct

Regionally, further to the adoption of resolutions 2018 and 2039 in October 2011 and February 2012 respectively by the United Nations Security Council which, among other things, encouraged states of the Economic Community of West African States (ECOWAS), the Economic Community of Central African States (ECCAS) and the Gulf of Guinea Commission (GGC) to work together in fashioning a comprehensive regional strategy against piracy, twenty-five countries from the GoG met in Yaoundé in June 2013 to formalise the adoption of an integrated response to the maritime security challenge of the region. The outcome of this effort was the endorsement of the Yaoundé Code of Conduct Concerning the Repression of Piracy,

[186] 'Denmark frees suspected pirates in dinghy in Gulf of Guinea', BBC World News, 7 January 2022.

Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa, also known as the Yaoundé Code of Conduct of June 2013.

Article 2 (1) (a) of the *Yaoundé Code of Conduct* provides that signatories intend to cooperate to the fullest possible extent in the repression of transnational organized crime in the maritime domain, maritime terrorism, IUU fishing and other illegal activities at sea.

It has been posited that the signing of the Yaoundé Code of Conduct catalysed an intensive process of national, zonal, regional, and interregional improvement that continues to gain momentum. States are engaging in an increasingly integrated, multilateral architecture that facilitates seamless cooperation. [187]

6.2 **Lomé Charter**

At the continental level, the African Charter on Maritime Security, Safety and Development (Lomé Charter) was adopted in a session of the African Union in Lomé, Togo on the 15th day of October 2016, and focuses on the protection of the region's oceans, seas and waterways from criminal activities, and advancement of equitable exploration that is both beneficial to the region as well as ensures the sustainability of the oceans, seas, waterways and their associated resources like a fishery. Amongst the primary objectives of the *Lomé Charter* is a commitment by African countries to "prevent and suppress national and transnational crime, including terrorism, piracy, armed robbery against ships, drug trafficking, smuggling of migrants, trafficking in persons and all other kinds of trafficking transiting through the sea and IUU fishing."[188]

7.0 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

[187] C. Nwangwu,Implementation of the Yaounde Code of Conduct and Maritime Insecurity in the Gulf of Guinea (2015) 5 *Research on Humanities and Social Sciences*, 54-64.

[188] *African Charter on Maritime Security, Safety and Development* (Lomé Charter), Article 3.

At the global level, not many commitments can trump the declarations under the United Nations Convention on the Law of the Sea (UNCLOS), in which the commitment is to the effect that "all states shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state."[189] Despite the expressions of commitment by nations, it seems that piracy has persisted largely due to the non-correlation of the expressions of commitment with actual efforts in translating those commitments by national governments, in addition to a deficit in mechanisms by bilateral and multilateral organisations for holding nations to account.

8.0 PRIVATE ENDS

The requirement in the definition of piracy that the act must be for private ends suggests that an act of piracy must be to the individual benefit of the persons undertaking it. It is suggested that the term *private ends* were first introduced to exclude insurgent and independence movements. Hence, due to the potential they could become recognised states, they were not suitable to be subject to the universal jurisdiction of all states in the event they pursue their interests at sea.[190] This has been a subject of continuing controversy. The International Law Commission has stated that *animo furandi* is not required, as piracy may be committed by a feeling of hate or revenge and not for private gains.[191] Two broad tendencies have been identified in the debate on *private ends*, with both suggested to be mutually exclusive positions.[192] One group argues that those pursuing political motives could be deemed to be performing 'public' ends for

[189] *United Nations Convention on the Law of the Sea*, article 100.
[190] M. Matsuda and M. Wang Chung-Hui, "Report by the Sub-Committee of Experts for the Progressive Codification of International Law, questionnaire No. 6", (1926) 20 *American Journal of International Law Supplement*, pp. 223-224.
[191] Yearbook of the International Law Commission 1956: *Documents of the Eighth Session including the Report of the Commission to the General Assembly*. (New York: United Nations).
[192] N. Honniball, 'The 'Private Ends' of International Piracy: The Necessity of Legal Clarity in Relation to Violent Political Activists', (2015) 13 *International Crimes Database ICD Brief*, p.3.

the purposes of international piracy.[193] The other school of thought which is more restrictive argues that *private ends* are those activities without 'state sanctioning'.[194] This position was adopted by the United States Court of Appeals which defined acts taken for private ends as those not taken on behalf of a state.[195]

8.1 Two-ship rule

This element of the definition of piracy is to the effect that two ships have to be involved in the incident for it to be considered piracy. Thus, the crew or passengers of a private ship must direct their actions against another ship or persons or property on board another ship.[196] In that event, where the acts are acts of crew seizure, mutiny or passenger take-over of the same ship, it does not constitute piracy. The challenge of this definition is illustrated by the *Achille Lauro* hijacking. On October 7, 1985, the *Achille Lauro*, an Italian-flag cruise ship, was seized while sailing from Alexandria to Port Said. The hijackers, members of the Palestine Liberation Front (PLF), a faction of the Palestine Liberation Organization (PLO), had boarded the ship in Genoa, posing as tourists. They held the ship's crew and passenger's hostage, and threatened to kill the passengers unless Israel released 50 Palestinian prisoners. They also threatened to blow up the ship if a rescue mission was attempted. When their demands had not been met by the following afternoon, the hijackers shot Leon Klinghoffer, a Jew of U.S. nationality who was partly paralyzed and, in a wheelchair, and threw his body and wheelchair overboard. The United States characterized the seizure as piracy, a position that has been supported by some commentators and opposed by others.[197]

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[193] A. Kolodkin et al. (translation: W.E. Butler), *The World Ocean: International Legal Regime,* (Eleven International Publishing, 2010), p.150; see also D. Rothwell and T. Stephens, *The International Law of the Sea* (Hart Publishing, 2010), p.162.

[194] D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2011), pp. 32-42; M. Bahar, Attaining Optimal Deterrence at Sea: A Strategic Theory for Naval Anti-Piracy Operations, (2007) 40(1) *Vanderbilt Journal of Transnational Law* 1, p.40.

[195] *The Institute of Cetacean Research* v *Sea Shepherd Conservation Society*, Case No. 12-35266, US Court of Appeals for the Ninth Circuit, 25 February 2013

[196] *SPOMO Act*, section 3(a)(i).

[197] Extract of M. Halberstam, 'Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO.

8.2 Private Ship

The definition of piracy also requires that the illegal act of violence should be by crew or passengers of a *private ship*.[198] It would appear that the reference to *private* ship is in contradistinction to a *warship,* which is defined in the SPOMO Act as a ship belonging to the Armed Forces of a State under the command of a government commissioned officer,[199] or a *government vessel,* which the Act defines as a ship owned or operated by a State and used only on government non-commercial service.[200] The definition suggests that where the ship involved is a government ship, the act may not be deemed to be piracy. The idea may be to insulate sovereign entities which may be acting validly for the protection of national interests. Nonetheless, the SPOMO Act, ostensibly to avoid abuse of such privilege, makes it an offence for a commander or crew member of a government ship to aid, abet or counsel the commission of an offence under the Act or even to threaten the commission of such an offence.[201]

9.0 SABOTAGE OF MARITIME INFRASTRUCTURE

Section 4 of the *SPOMO Act* defines a maritime offence under the Act to include armed robbery at sea and a range of other acts other than piracy, committed by a person or group within the Nigerian maritime zone or jurisdiction.[202] While sabotage to maritime infrastructure is not defined under the Act, some offences created in section 4 of the *SPOMO Act* may amount to a sabotage of maritime infrastructure. These include -

> (a) the acts of a group or person who forcefully or by threat seize or exercise control over a ship or platform;
> (b) acts of violence against persons on board a ship or platform likely to cause danger;

Convention on Maritime Safety', (1988) 82 (2) *American Journal of International Law*, pp. 269-310.

[198] *SPOMO Act,* section 3(a).

[199] *SPOMO* Act, section 22.

[200] *Ibid*.

[201] *SPOMO Act,* section 12(5).

[202] *SPOMO Act,* section 4.

> (c) destruction of or damage to a ship or an aircraft or its cargo likely to endanger the safe navigation or safety of the ship;
> (d) placement of a device or substance on the vessel which is likely to destroy or damage it or endanger its safe navigation;
> (e) destruction or damage to or serious interference with operation of any maritime navigational facility likely to endanger the safe navigation of a ship or the safety of a platform;
> (f) deliberate communication of false information, thereby endangering the safe navigation of a ship or the safety of a fixed or floating platform.[203]

It is noteworthy however, that there are other statutory provisions under which sabotage of maritime infrastructure in different forms is criminalized, with differing regimes of punishment. These include the *National Inland Waterways Act*[204] and the *Nigerian Ports Authority Act.* The *National Inland Waterways Act* makes it an offence to tamper with the Authority's *structures,* including gauges, buoys, kilometre boards, navigation aids, horizontal and vertical control marks. Punishment of a fine or imprisonment are included.[205] On its part, the NPA Act makes it an offence to damage, remove, ride by, make fast or run afoul of any lighthouse, buoy or beacon.[206]

The existence of this conflict situation implicates certain constitutional issues. Where an act qualifies as an offence under these three separate statutes, under which law should the offender be punished? And if he is punished under one law, how can it be ensured that he is not thereafter punished under another law for the same act/omission? The Constitution of the Federal Republic of Nigeria (as amended) forbids double jeopardy,[207] so it is doubtful that more than one prosecution

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[203] *Ibid.*
[204] *National Inland Waterways Authority Act,* Chapter N47 Laws of the Federation of Nigeria 2004.
[205] *National Inland Waterways Authority Act*, section 23.
[206] *Nigerian Ports Authority Act* Cap. N126 LFN 2004, section 97.
[207] Constitution of the Federal Republic of Nigeria, 1999, section 36(9). See also *PML (Securities) Co. Ltd* v. *FRN* (2018) LPELR-47993(SC); *Nigerian Army* v. *Aminu-Kano* (2010) LPELR-2013(SC).

will proceed from the same act. Nonetheless it remains a moot point whether prosecution will be founded on one provision or another. None of the maritime agencies currently undertake prosecution for offences, so this may be within the discretion of the Attorney General of the federation where prosecution will proceed.

10.0 LIMITS OF JUDICIAL JURISDICTION UNDER THE SPOMO ACT

The *SPOMO Act* asserts that the Federal High Court shall have exclusive jurisdiction to hear and determine any matter under the Act. However, there are offenses under the Act which are not exactly new, and for which jurisdiction is already conferred on other courts. The implication of such existing jurisdiction needs to be reviewed against the application of section 5 of the *SPOMO* Act. Section 272 of the *1999 Constitution* confers jurisdiction on the High Court of a State to determine any criminal proceedings involving or relating to any liability in respect of an offence committed by any person.

The *situs* of piracy going by the provisions of section 3 of the *SPOMO Act* must be international waters or waters beyond the jurisdiction of any state. To this extent, the question of conflict between the *SPOMO Act* and section 272 of the *1999 Constitution* does not arise since such locations are clearly beyond the territorial jurisdiction of any State High Court or High Court of the FCT. Maritime offences and unlawful acts at sea on the other hand may, pursuant to section 4 of *SPOMO Act*, be committed within "Nigerian Maritime Zone or Nigerian Jurisdiction". To the extent that Section 4 of *SPOMO* provides that a maritime offence "includes armed robbery **at sea** and any other act…", such other acts must by application of the *ejusdem generis* canon relate to acts committed at sea or at least within a maritime environment.[208] In this regard therefore, the maritime offences under SPOMO must be acts done or acts connected with acts done within either of the territorial waters of Nigeria (Maritime Zones) or inland waters (part of Nigerian jurisdiction).

[208] *Enyi* v. *Benue State Judicial Service Commission & Ors* (2021) LPELR-54437 (CA) at p. 67. See also para (A-D).

In considering whether the jurisdiction granted by Section 5 of *SPOMO* conflicts with the criminal jurisdiction of State High Courts and the High Court of the FCT granted under Section 272 of the *1999 Constitution*, a key question to consider therefore may be whether the boundaries of any such states or the FCT extend to any of the maritime zones earlier discussed that are within the Nigerian jurisdiction. Section 2(1) and (2) *CFRN 1999* provides that Nigeria is one indivisible and indissoluble sovereign state consisting of States and a Federal Capital Territory. The logical implication of this is that every part of the entity known as Nigeria must fall within one, more or all of its constituent states. In other words, as far as the issue of the territory within which an act done in Nigeria is concerned, such acts must necessarily be such as was done within a constituent state or the FCT. It follows that the territorial jurisdiction of State High Courts may thus extend to the territorial waters or inland waters within its boundaries.

The temptation to ascribe jurisdiction to the Federal High Court undue to it is not new and must be resisted. In *African Newspapers of Niger & Ors* v. *FRN* [209] Oputa JSC of blessed memory was unequivocal when he invoked the dicta of Sowemimo C.J.N. in *Mandara* v. *Attorney-General*[210](1984) 1 S.C.N.L.R. 311 to hold that any attempt must be resisted to extend by misconstruction of the Constitution, the jurisdiction of the Federal High Court. "...its jurisdiction as set out in subsection 1 of Section 7 has never been altered. All criminal matters which the court has jurisdiction to deal with under subsection 3 must be within the compass of Section 1.

The suggestion that the criminal jurisdiction of that court is unlimited is fallacious and not supported by law... It is the duty of our courts to observe the different jurisdictions which are imposed on those courts.

[209] *African Newspapers of Niger & Ors* v. *FRN (1985) LPELR-211(SC) at Pp 43 - 44. See also para (B-A).*

[210] *Mandara* v. *Attorney-General (1984) 1 S.C.N.L.R. 311*

The case referred to by Oputa JSC held that the Federal High Court has no jurisdiction to try the appellant who was charged with offences of treasonable felony, incitement to mutiny and attempting to cause disaffection amongst members of the armed forces punishable under sections 41(a), 44(a), 44(b) and 46(1)(a) of the criminal code cap. 42 of the 1958 respectively."[211]

The implication of the reasoning behind these authorities – especially in the light of section 2 of the constitution – is to the extent that Nigeria as a coastal state may exercise criminal jurisdiction[212] over parts of its maritime zones or internal waters, subject to the constitutional limitation imposed by section 251 of the *CFRN.* A State High Court may exercise criminal jurisdictions where the crime is committed within water bodies abutting or contiguous to the territory of such a littoral state. Thus, if for instance, a crime of simple assault or obtaining money by tricks committed or even forgery is committed on a Nigerian flagged boat stationed offshore Lagos, the offence may be validly tried in the High Court of Lagos State.

Notwithstanding the above position, it is noted that the offences provided for under section 4 of the SPOMO Act (with sub paragraphs g, h and i as notable exceptions) all relate in some way to use, control and/or navigation of a ship, aircraft or floating platform. With respect to these offences therefore, it can be argued strongly that a joint reading of Sections 251(1)(g) and 251(3) of the constitution[213] bring these offenses within the constitutionally guaranteed exclusive criminal admiralty jurisdiction of the Federal High Court. [214] In

[211] *Ibid.*

[212] Under International Law of the Sea, A coastal state can exert almost the same full range of powers and jurisdictions over its internal waters as it can over its land territory. The criminal jurisdiction that a coastal state can exercise over or on another state's vessel located in the coastal state's territorial sea essentially depends upon whether the act has an effect on the coastal state, or whether a representative of the flag state or the master of the vessel requests assistance from the coastal state.

[213]Constitution of the Federal Republic of Nigeria 1999, s. 251(1)g-(3).

[214] As well as *Admiralty Jurisdiction Act (AJA)*, section 19.

Wagbatsoma v. *FRN*[215] it was held that section 251(1) (3) of the 1999 constitution recognizes the exclusive criminal jurisdiction of the Federal High Court in admiralty cases.

Section 1 of the *Admiralty Jurisdiction Act* provides that admiralty jurisdiction includes any jurisdiction connected with any ship or aircraft which is vested in any other court in Nigeria immediately before the commencement of this Act and any matter arising from shipping and navigation on any inland waters declared as national waterways as well as any matter arising within a Federal port or national airport and its precincts. These provisions make it most likely that courts will in addition to the express provisions of Section 5 (2) of *SPOMO* hold that the offenses defined under section 4 (a-f) (j-r) fall within the criminal admiralty jurisdiction of the Federal High Court and thus beyond the realms of any conflicts with any jurisdiction of State High Courts or High Court of the FCT.

With regards to Sections 4(g, h and i), it is noted that the offenses defined therein may also in many respects amount to money laundering (4(g)), obtaining by tricks or false pretences (4(h)) and breach of the peace (4(i)). State High Courts are empowered by the constitution and other statutes[216] to adjudicate these matters and any objection that an otherwise proper charge brought at a State High Court is incompetent on the ground that the act(s) complained of may also constitute an offence under Section 4(g, h, i) of *SPOMO Act* will hardly be sustained. The *SPOMO Act* cannot take away jurisdiction vested on a State High Court by the Constitution by purporting to make such exclusive to the Federal High Court.

10.1 The Implication of Maritime Offences Under SPOMO Also Constituting Offences Under Other Laws

[215] *Wagbatsoma* v. *FRN* (2015) LPELR-24649 (CA) at pp. 77-29. See also paras F-E.

[216] *Economic and Financial Crimes Commission Act, 2004*, section 19 for instance.

It is not uncommon in the criminal jurisprudence of Nigeria[217] for different legislations to provide for what will be considered as duplication of offences. The constitution however clearly prohibits double jeopardy. Thus, once a person has been tried in a court of competent jurisdiction for an offence, he may not be subjected to another trial on the same facts. *Abacha* v. *FRN*[218] held thus:

> ...no person shall be subject for the same offence to be tried twice and put in jeopardy of life or limb. See: Nafiu Rabiu v. The State (1980) 8 - 11 SC. 130; (1981) 2 NCLR 293. Same is also captured by the provision of Section 36(9) of the 1999 Constitution of the Federal Republic of Nigeria.

It must be noted however that on the authority of *Igbinedion* v. *FRN*[219] to be availed the defence of double jeopardy, an accused person must show that -

> a) He must have been earlier tried by a competent court of law.
> b) The facts of the earlier matter and the new one must be same.
> c) The earlier trial must have resulted either in the discharge, acquittal, or some other form of punishment of the accused person.

There is therefore nothing in law which generally forbids concurrent prosecution of an accused person for different crimes on the same facts. Thus, until a conviction, discharge or acquittal is obtained in any one of the charges, double jeopardy will not arise. In this regard, the offences which amount to sabotage of maritime infrastructure under the SPOMO Act which also amount to similar offences under other legislation like the NIWA Act and the EFCC Act for instance pose a real risk of multiplicity of trials on the same facts.

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[217] See for example, *Criminal Code Act Chapter 77, Laws of the Federation of Nigeria 1990,* section 402(2) which prescribes the offence of Armed Robbery which offence is also prescribed by Section 1 of the Robbery and Firearms (Special Provisions) Act.

[218] *Abacha* v. *FRN* (2014) LPELR-22014 (SC) (Pp 73 - 74 Paras E – B).

[219] *Igbinedion* v. *FRN* (2014) LPELR-22766 (CA) (Pp 44 - 44 Paras D – E).

10.2 LIABILITY UNDER SPOMO ACT- BETWEEN INTENTION, NEGLIGENCE AND INNOCENCE

It must be noted that as a general rule, proof of a guilty mind is required for conviction on all offences except those specifically denoted as strict liability offences. In *Nwakire* v. *COP,*[220] the court held that - "In order to be criminally liable in all offences other than those rare cases of strict liability, *mens rea* is required.

In *Adekoya* v. *State*[221](2017) the Supreme Court held that –

> ...while the presumption of *mens rea* or evil intention or knowledge of the wrongfulness of an act, is an essential ingredient in every offence, the presumption is subject to be displaced either by the words of the Statute creating the offence, or by the subject matter with which it deal, and both must be considered.

Relating these cases to the offences created in Section 4 (g, i and k), it can be observed that the said offences relate to receipt of proceeds of piracy, causing death or serious injury and pollution of marine environment. The words of the statute, the subject matter dealt with and additionally the perceived mischief sought to be cured all point to the fact that the legislative intent was actually to create strict liability offenses. It appears that in such instances, proof of *mens rea* may be dispensed with in proving the stated offences. In exercise of their discretion in such instances, judges may adopt a position that while applying the law, as much as is possible, does not occasion injustice.

11.0 Conclusion

The article has reviewed the *SPOMO Act* through the prism of the legal mischief sought to be cured in its enactment. It has identified legal issues in the enforcement of the Act that arise from the definition of piracy and other maritime offences, exploring the notions of violence

[220] *Nwakire* v. *COP* (1992) LPELR-2097(SC) (Pp 23 - 23 Paras B - C)
[221] *Adekoya* v. *State* (2017) LPELR-41564(SC) (Pp 9 - 10 Paras A – A).

and detention, high seas, private ends, private ships and the two-ship principle. It reviews acts that could constitute sabotage of maritime infrastructure under the Act in juxtaposition to similar offences under other laws and explores the likelihood of conflicts in the course of adjudication. Such conflicts also extend to judicial jurisdiction over offences which already existed before the enactment of the Act and finds that there will potentially be conflicts in the jurisdiction of the Federal and State High Courts. It equally finds that offences of strict liability are created under the Act and urges judicial alertness to ensure adjudication with fairness and avoid decisions that occasion injustice.

HUMAN TRAFFICKING IN NIGERIA AND SOUTH AFRICA: POSITION OF DOMESTIC, REGIONAL AND INTERNATIONAL LAWS

By Dr. Taiwo Abiodun Oni.*

ABSTRACT

Human trafficking is one crime that has defied age and borders and has unfortunately continued to thrive around the globe. Many questions come to mind as to why this crime continues to thrive. Could it be as a result of inadequate laws, lack of commitment from national governments or a lack of collaboration amongst key international players, regional governments and the State governments? This study therefore aims to appraise the legislations that exist on human trafficking and the protection of migrants from human trafficking. This paper finds that Nigerian anti-trafficking laws are inadequate with regards to handling the scourge of human trafficking and that the same conclusion can be drawn from the South African laws. The study advocates for a stronger centre and a thicker collaboration between countries and the international community to bring to its infinitesimal or, if possible, end the spate of human trafficking in the wider world.

Keywords: Human Trafficking, Nigeria, South Africa, International Law.

1.0 INTRODUCTION

Without a doubt, trafficking in humans is a gross violation of many human rights and has been described as reprehensible by requisite international law frameworks and the international law community in general. This international law framework makes it a matter of necessity for States to combat trafficking in humans and to protect and assist its victims. Trafficking of human beings has become a billion-dollar criminal 'industry' and not one country is immune from it. While one cannot say for certain the continent where trafficking in humans is highest, one can say for certain that it continues to be dominant in Africa, occurring in different dimensions.

Day in and day out, baby factories are uncovered in the different regions of Nigeria. Child laborers, especially from poorer African countries, are on the rise in Nigeria. It is currently common practice in the international community to refer to prostitution, both domestic and international, as a Nigerian phenomenon. These are a few of the ways in which trafficking occurs in this part of sub-Saharan Africa.

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Using the above as a premise, we will realize that most African countries are developing nations and not many members of their respective populations believe in achieving prosperity if they sit still in their home states. Therefore, many find legal and illegal means to migrate from their home countries to another in search of better lives. It is in this quest, that these set of migrants are, with or without their knowledge, plunged into the world of human trafficking. Nigerians, being one of the most emigrational people in the world today, find themselves using uncanny methods such as crossing the desert and risking their lives on the high seas in unstable boats in a bid to illegally enter Europe.[222]

2.0 MEANING AND NATURE OF HUMAN TRAFFICKING

The conceptualization of human trafficking has been given both domestic and international attention by scholars. A major similarity in most of the existing literature on this subject is the attempt to deviate from existing myths and misconceptions about human trafficking. These myths and misconceptions include the following: that human trafficking is limited to sex trafficking, individuals can only be forced or coerced into commercial sex acts to be victims of human trafficking, and that human trafficking and human smuggling are the same.[223]

Generally, human trafficking refers to a situation where a person or group of persons, having been transported from one place to another, are exploited for economic gain. According to the United Nations Office on Drugs and Crime (UNODC), Human trafficking refers to human trading for the purpose of forced labor, sexual slavery, economic benefits or wherein other forms of benefits arising from exploitation accrues to the trafficker.[224] Significantly, this position by

[222] Office of the High Commissioner for Human Rights, "Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya" available at https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf (accessed 8 April 2022).

[223] *Ibid.*

[224] C. Leo, "Marriage in Form, Trafficking in Content: Non-Consensual Bride Kidnapping in Contemporary Kyrgyzstan", available at: https://www.academia.edu/30530548/Marriage_in_Form_Trafficking_in_Conten

the UNODC places economic benefits and commercial sexual exploitation at the fore of major instances of human trafficking. There are other reasons like the provision of a spouse for a forced marriage.[225]

Another view of the concept of human trafficking defines it in the light of the means by which the perpetrators carry out the criminal act, that is, as the use of force, fraud or coercion to obtain some type of labor or commercial sex act.[226] The foregoing definition will not be sufficient to give a complete picture of what human trafficking entails as it does not acknowledge the fact that other means could be engaged to secure or achieve a trafficking process. Similar to the definition by UNODC, the movement of people is not recognized. However, this omission evinces that human trafficking may not necessarily entail the migration or movement of people.

However, the United Nations in the Protocol to Prevent, Suppress and Punish Trafficking in Persons,[227] Especially Woman and Children proffers a more comprehensive definition of the concept.[228] The Protocol emerges as the frontliner in terms of a global legal instrument with an agreed definition of the concept of trafficking of persons. Apart from its notoriety for the elaboration of the concept discussed herein, it makes provisions for other salient coverage which include its stipulation that contracting parties must adopt measures and beef up legislative provisions aimed at discouraging the demands which promote various forms of exploitation of persons.

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t_Non_consensual_Bride_Kidnapping_in_Contemporary_Kyrgyzstan (accessed 6 March2022).

[225] *Ibid.*

[226] United States Department of Homeland Security, "What Is Human Trafficking?" available at: https://www.dhs.gov/blue-campaign/what-human-trafficking (accessed 6 March 2022).

[227] United Nations Human Rights Office of the High Commissioner, "Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime", available at https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons

[228] General Assembly resolution 55/25, Adopted 15th November, 2000.

According to the International Organization for Movement, the word 'migration' connotes the movement of people or a population movement, whatever the length, causes or composition of such movement. [229] Instances of such migration for the purpose of trafficking are seen in cases of the Nigerians and Libya, as well as trafficking between Benin and Gabon.[230]However**,** trafficking includes not only the recruitment, transportation or transfer of persons. It also encompasses the 'harboring or receipt of persons', so that anyone not directly involved in the migration or movement of persons or a group of persons, but instrumental in keeping or receiving them for the purposes highlighted in the Protocol, could be said to be part of the trafficking process.[231] In essence, there could be trafficking of persons without migration.

Another element from the definition above is the "means" by which such movement is facilitated, that is, through the use of deception, threat, coercion or the use of force. Giving of payments or benefits to persons in control of the victims has also been considered as part of the means towards facilitating the crime.[232]
Lastly, another element of the definition of human trafficking is the reason or purpose for such act, which is exploitation *simpliciter*. Exploitation of victims could arise in following ways: sexual exploitation, slavery, servitude, forced labor and the removal of organs.

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[229] International Organization of Migration, "Children on the Move" available at https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/StudyMigrants/IOs/IOMChildrenOnTheMove.pdf (accessed 30 August, 2022).
[230] Nations Encyclopaedia, "The Gambia - Migration" available at: https://www.nationsencyclopedia.com/Africa/The-Gambia-MIGRATION.html(accessed 6 March 2022). The nation Gabon has a limited population but a very booming economy. It heavily places reliance on labourers through migration from other African nations like Benin, Cameroon, Equatorial Guinea, Mali and Senegal. Largely, the population of foreigners in Gabon is about 20% of the entire population.
[231] Anti-Slavery International, *The Migration-Trafficking Nexus: The Combating Trafficking through the Protection of Migrants' Human Rights*, (The Printed Word: United Kingdom, 2003).
[232] UNODC, "Human Trafficking" available at https://www.unodc.org/nigeria/en/human-trafficking.html (accessed 6 March 2022).

A more prominent means of exploitation is sexual exploitation, which leaves women and children as its major victims.[233] According to UNODC, trafficking for the purpose of forced labor is not often discovered and reported as compared to trafficking for sexual exploitation.[234] Also, distinguishing victims trafficked for forced labor from migrant laborers may pose a little challenge. These victims are often engaged to work in hidden locations, such as agricultural fields in local areas, mining camps, factories and the private houses. As a result, persons who are trafficked for the purpose of forced labor are less likely to be identified than victims of sexual exploitation.[235] Victims of forced labor comprise adult men, women, boys and girls.

The perspective of Shelley on the UN definition of trafficking is very instructive. He stated that the definition "focuses on border security, illegal migrants and organized crime."[236] He further opined that it does not address the needs of trafficking victims as do some national and regional legislations on human trafficking that were developed subsequently. Unfortunately, this paper disagrees with Shelley, in that the purpose of the UN definition was not to make provisions for the rights of victims, but to give it a perspective and accordingly prompt States to ensure that their laws and policies align with the description of the problem.[237]

A closely related concept to human trafficking is migrant smuggling, such that Szczerba-Zawada and Rogalska have described the former to be inclusive of the latter.[238] Smuggling of migrants means the

[233]Supra, note 229 at p. 4.
[234]R. Johansen, "Global Report on Trafficking in Persons" available at https://www.unodc.org/unodc/en/human-trafficking/global-report-on-trafficking-in-persons.html(accessed 6 March2022).
[235] M. Megumi, "Human Trafficking: A Brief Overview" available at https://openknowledge.worldbank.org/handle/10986/11103 (accessed 6 March 2022).
[236]L. Shelley, *Human Trafficking: A Global Perspective*10th ed. (Cambridge University Press: New York, 2010).
[237]*Ibid.*
[238] A. Szczerba-Zawada, A. Rogalska, "Trafficking in Women in a Human Rights Perspective", available at

procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident.[239]

3.0 HISTORICAL EXAMINATION OF HUMAN TRAFFICKING ON THE AFRICAN CONTINENT

Human trafficking in the form of slave trading has long been written on the walls of history to be a common form of everyday life worldwide, prior to 1200. Slave trading has been a widespread global act. Picarelli recognizes its existence in ancient Rome and Greece, even in Africa in the forms of slavery for domestic purposes, debt slavery, enslavements of war captives, military slavery, slavery for prostitution and for labor and criminal slavery.[240]High birth rates, large youth populations and having economies which are unable to accommodate the growing population of the workforce are some of the factors which make Africa vulnerable and a conducive market for human traffickers.[241]

Some authors, the likes of Shivley have concluded that slavery has been an integral part of the economic structure of African societies for many centuries.[242] Merchants from Islamic Arab countries have also been recorded to have been involved in trade of human slaves since the year 900.[243] Shively's major work on this point stems out of two divergent views of African social history and the Atlantic slave trade. He came up with the idea of 'slave mode of production', which he posited emerged in some African societies which are mostly affected by the export trade in slaves. However, on the heels of the work by

https://www.researchgate.net/publication/329970528_Trafficking_in_women_in_a_human_rights_perspective (accessed 6 March 2022).

[239] *Protocol against the Smuggling of Migrants by Land, Sea and Air*, Article 3.

[240] E. Foner, *Give Me Liberty! An American History,*(W.W. Norton: 2012).

[241] Supra, note 234.

[242] M. Shively, "A National Overview of Prostitution and Sex Trafficking Demand Reduction Efforts, Final Report" available at https://www.ojp.gov/pdffiles1/nij/grants/238796.pdf (accessed 6 May 2022).

[243] South African History Online, "The Atlantic Slave Trade", available at https://www.sahistory.org.za/article/atlantic-slave-trade (accessed 6 March 2022).

Loveday are several works aimed at contributing to the historical framework in the reconstruction of slave history.[244]

Similarly, the long romance of slavery with Africa since 1500s has also been further established by Leo Africanus in his record, *The Description of Africa and of the Notable Things Therein Contained* that "slaves are the next highest commodity in the marketplace.[245] There is a place where they sell countless slaves on market days."[246]

3.1 Human Trafficking in the Colonial Era

Trafficking in persons in Africa has been in practice even prior to the era of colonization or the advent of Europeans at the shore of African countries.[247]In the work of Karen, history has record of the activities of rebels in Africa who traffic remnants of their enemies, mostly women and children, to be sold to slavery for humiliation and profit.[248] During the colonial era in Africa, a large number of Africans were engaged as slaves in farms and mines in Rhodesia and Kenya. It was equally recorded that millions lost their lives under forced labor in Congo.[249] Shelley referred to a period of slave trade activities in Africa which he described as illegal slave trade. This was a period of slave trade after antislavery authorities had been introduced by colonial powers.[250] This illegal trade largely includes girls from very poor families or high vulnerability.

3.2 Human Trafficking Post African Independence

Largely, this is the era we are at the moment, where the prevalence of human trafficking activities has attracted the name modern-day slavery. Despite the abrogation of trans-Atlantic slave trade in 1807, records show that history is being replayed on the plate of many

[244] R. Austen, *African Economic History: Internal Development and External Dependency*, (J. Currey: Heinemann, 1987).
[245]Supra note 224.
[246] South African History Online, "The Atlantic Slave Trade", available at https://www.sahistory.org.za/article/atlantic-slave-trade(accessed 6 March 2022).
[247] K. Bravo, "Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade" (2002) 25 *Boston International Law Journal*, 207-295.
[248]*Ibid*.
[249] A. Hochschild, B. Kingsolver, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa,* (Houghton Mifflin: Boston, 2020).
[250]Supra note 234.

African countries as millions of African citizens are being enslaved, not only in other countries but also in their own countries. Thipanyane[251] mentioned the pursuit of wealth and accompanying power and the command of influence, as well as the attraction of the huge profits made from slavery as major reasons that spur the continuation of human trafficking even in the 21st century.

The International Labor Organization estimates that over US$150 billion in illicit profits is made annually by the private economy involved in human trading for commercial sex or forced labor.[252] Several African countries are among the world leading countries where human trafficking thrives. Examples are Mauritania, the Democratic Republic of Congo, Sudan and South Africa. Notwithstanding the reasons given by Thipanyane as an impetus for the crime, the factors of poverty, disability, homelessness, inequality, discrimination, language barriers, religious and cultural beliefs embodied in the larger concept of vulnerability are of more priority.[253] This is because the quest for power, whether economic or positional, has always been with man, hence exercising same under the guise of human trafficking save vulnerability is not a tenable excuse. In essence, the controversy on what fuel the activities of human trafficking in modern day should still be resolved in favor of vulnerability factors.

Similarly, the above conclusion is further strengthened with the position of Borgen Magazine that Africa is the home of armed conflict, government corruption and extreme poverty in which its inhabitants are living in or seeking to escape the conditions by all means. However, owing to the level of awareness generated, States and international organizations have begun to give the desired reaction to the issue of human trafficking in this era.[254]

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[251] T. Thipanyane, "Human Trafficking: African Perspective" available athttps://www.jurist.org/commentary/2015/03/tseliso-thipanyane-trafficking-africa/ (accessed 6 March 2022).

[252] *Ibid.*

[253] Council of Europe, "Explanatory Report to the Council ofEurope Convention on Action against Trafficking in Human Beings", available at https://www.coe.int/t/dghl/monitoring/trafficking/Docs/Convntn/CETS197 (accessed 6 March 2022).

[254] F. Massarath, "Top 10 Facts about Human Trafficking in Africa" available at https://www.borgenmagazine.com/top-10-facts-about-human-trafficking-in-africa/ (accessed 6 March 2022).

4.0 TYPES AND FORMS OF HUMAN TRAFFICKING

Generally, human trafficking could either be the trafficking of women, girls, men or boys. According to Szczerba-Zawada and Rogalska, trafficking in women takes several forms and manner, with the most common being sexual exploitation.[255] Other forms of trafficking are labor exploitation, domestic servitude, forced marriage, forced criminality, child pornography, child soldiers and organ harvesting. While some authors hold sexual exploitation on top of the echelon, Zimmerman and Kiss are of the opinion that different forms of abuse, such as extensive hours, poor pay, extortionate debt, physical confinement, violence and threats are becoming increasingly prevalent.[256]

The forms of trafficking, according to Shelley's work is restricted to the consideration of sub-Saharan Africa are:

> child trafficking for domestic and agricultural work; sexual trafficking of women and children within the region and overseas; and the trafficking of foreign women into the region, primarily into South Africa.[257]

The reports in Latin America are inverse to the state in Africa, in that sexual exploitation edges other forms of trafficking.

However, Guidroz went ahead to give a breakdown of forms of labor exploitation into bonded laborers, forced labor, child labor.[258] He argued that victims become bonded laborer when their labor is demanded as a means of repayment for a loan or service. A case of forced labor is where victims are coerced to work against their free will, usually fueled by one form of threat or the other. Examples of places where victims of these labor are engaged are farmlands, factories, construction sites, nail salons, housekeeping and domestic servitude.[259]

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[255] Supra note 236 at p. 149.

[256] C. Zimmerman, L. Kiss, "Human Trafficking and Exploitation: A Global Health Concern" (2017) 14 *PLOS Medicine*.

[257] Supra note 234.

[258] INTERPOL, "Types of Human Trafficking" available at https://www.interpol.int/en/Crimes/Human-trafficking/Types-of-human-trafficking (accessed 6 March 2022).

[259] B., Guidroz, "The Different Types of Human Trafficking" available at https://www.dailyworld.com/story/news/local/2017/09/12/different-types-human-trafficking/653825001/ (accessed on 28 October, 2019)

Shelley also made contributions in the area of organ harvesting or trafficking. This form of trafficking could either be for rituals, which is inextricably linked to African trafficking, or non-ritual purposes.[260]The practices of the former has been identified by the United Nations, in Chad and Liberia,[261] countries like Tanzania and Burundi are also not left out. However, trafficking of organs for medical purposes forms part of the non-ritual purposes. Trafficked victims in Argentina, Brazil, Mexico, and Ethiopia have been so exploited for this purpose.[262]

5.0 THE HUMAN RIGHTS OF TRAFFICKED PERSONS

It must be pointed out that trafficked persons or victims of human trafficking are also entitled to the full scale of human rights. Both the Charter of the United Nations and the Universal Declaration of Human Rights, as well as other instruments on this point, confirm that human rights are universal. That is, they apply to everyone, irrespective of their race, sex, ethnic origin or other distinction. It is on this foundation that there exists the extension of rights to trafficked persons.

Emphatically, the existence of rights produces corresponding duties and obligations on another party to which there exists a relationship. Hence, the availability of rights to trafficked persons matches with the obligations of States to make available certain remedies.

The United Nations Office on Drugs and Crime, through the Inter-Agency Coordination Group Against Trafficking in Persons (ICAT) recognises the classification of the rights of victims into substantive and procedural rights to justice. Substantive rights include the right to privacy,[263] right to safe and voluntary return, right to physical and

[260] Supra note 234.
[261] UNODC, *Global Report on Trafficking in Persons,* 2016 53.
[262] *Ibid* at 113.
[263]The Recommended Principles and Guidelines on Human Rights and Human Trafficking, Guideline 6(6) provides for non-disclosure of the identity of trafficking victims, accordingly, this should be respected and protected in relation to the right of the accused persons to a fair trial. Similar provisions are contained in Article 6 and Article 11 of the Palermo Protocol and the European Trafficking Convention respectively.

psychological care [264] and the right to remedy or compensation. Procedural rights include the right not to be detained or prosecuted for status-related offences, right to receive information and legal assistance and the right to remain. It must be mentioned and rightly so that this classification is apt, in that the denial of the procedural rights will invariably violate the substantive rights. To put differently, the guarantee of the procedural right safeguards the victims all the way into his or her substantive rights.

On the other hand, Szczerba-Zawada and Rogalska in their work did not make any distinction of the right into substantive and procedural rights.[265] They used the word right to "safety" as against the right to protection as contained in the United Nations Guidelines and Protocol. In addition to the above, Global Alliance Against Traffic in Women view the protection of the rights of victims of human trafficking from another perspective. The organization posits that the rights of victims must be protected not only from retaliation by the traffickers, but also from re-victimization by governments and the judicial system itself.[266]

It was started by the organization that the protection of rights should include support and sustainable incomes. Unfortunately, this approach is faulted because it amounts to extending the rights to including the civil, political, economic and social rights which is, in the case of Nigeria, plagued with non-justiciability.

[264] This right has been widely regarded as a non-negotiable right of the victim, which should be recognized and implemented notwithstanding the situation where a victim shows noncooperation with appropriate criminal authorities.
[265] Supra note 236.
[266] Global Alliance Against Traffic in Women, *Human Rights and Trafficking in Persons: A Handbook*, (Global Alliance Against Traffic in Women: Bangkok, 2000), available at https://www.gaatw.org/books_pdf/Human%20Rights%20and%20Trafficking%20in%20Person.pdf (accessed 6 March 2022).

5.1 International Instruments

5.1.1 Universal Declaration on Human Rights (1948)

The *Universal Declaration on Human Rights (UDHR*), 1948 is the most renowned and domesticated international bill of rights.[267] The declaration was one of the efforts to repair the tear caused by the earlier efforts to repair the damages that the Second World War caused.[268] The *UDHR*, like many other international instruments, does not exactly or directly treat the subject of human trafficking. However, it could be inferred that the UDHR also prohibits the vice of human trafficking. In Article 4, the *UDHR* forbade all forms of slavery[269] while the provisions of Article 23 of the declaration addressed freedom of choice in employment with the directive that everyone must have the right to a just and favorable conditions of work.[270]

5.1.2 International Covenant on Civil and Political Rights (1976)

The *International Covenant on Civil and Political Rights*[271] is one of the three most important bills of Rights known to international legal jurisprudence. The covenant in Article 49 addressed the right of a person not to be subject to any form of servitude, slavery and non-consensual labor. In the same vein, Article 7 of the *Covenant* also in strong terms prohibits the subjecting of persons to cruelty, torture or inhuman or degrading treatment or punishment.[272]

Article 8 of the foregoing Covenant also prohibits any form of trading in slaves[273] and Article 2 also prohibits the use of state sanctioned

[267] Universal Declaration of Human Rights, G.A. Res. 217A, Article 4, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (12 Dec., 1948).
[268]'Rebuilding the world after the second world war', *The Guardian*, 11 September 2009, available at https://www.theguardian.com/world/2009/sep/11/second-world-war-rebuilding (accessed on 3 March 2022).
[269]*Universal Declaration on Human Rights* 1948, Article 4.
[270]*Universal Declaration of Human Rights* 1948, Article 23.
[271]*International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171. The ICCPR was concluded at New York and entered into force on 23 March 1976.
[272] *Ibid*, Article 7.
[273]*Ibid*, Article 7 and 8.

slavery while also condemning States who fail to exert due diligence in ending slavery caused by private parties.[274]

Unlike the other types of conventions, the ICCPR established a procedural body that supervises the compliance of human rights: the Human Rights Committee (HRC).

5.1.3 UN Office on Drugs and Crime (UNODC) Global Report on Trafficking in Persons

The *UNODC* is the United Nations' model on human trafficking which approaches human trafficking from the criminal aspect. [275] The UNODC's major focus is on the protection, [276] prevention [277] and punishment[278] as the "watchdog of the United Nations Convention against Transnational Organized Crime (UNTOC) and the Protocols thereto.[279] The UNODC Global Report on Trafficking in Persons of 2009 is the UNODC's sequel attempt to analyze, categorize and catalogue trafficking in persons. [280] It focused on the institutional, legislative and the scale of responses and enforcement in criminal justice.[281] This report however does not espouse the nature, patterns and scale of human trafficking. It does not expound on the scale, nature, or patterns of the human trafficking issues.

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[274] *Ibid.*

[275] UNODC, "Human Trafficking and Migrant Smuggling", available at https://www.unodc.org/unodc/en/human-trafficking/index.html (accessed 22 December 2019).

[276] UNODC, "Protecting Victims of Human Trafficking", available at https://www.unodc.org/unodc/en/human-trafficking/index.html (accessed 6 March2022).

[277] UNODC, "Preventing Human Trafficking", https://www.unodc.org/unodc/en/human-trafficking/index.html (accessed 6March 2022).

[278] UNODC, "Prosecuting Human Traffickers", https://www.unodc.org/unodc/en/human-trafficking/index.html (accessed 6 March2022).

[279] Supra note 230.

[280] UNODC, *Global Reporton TraffickinginPersons,* (2009); Traffickingin Persons: Global Patterns (2006), available at: http://www.unodc.org/documents/human-trafficking/HT-globalpatterns-en.pdf (accessed 6March 2022).

[281] *Ibid.*

5.1.4 UN Inter-Agency Project on Human Trafficking (UNIAP)

The purpose for the creation of UNIAP was to improve efforts exerted at counter-trafficking in the Greater Mekong Sub-region.[282] The subsequent history of the UNIAP is divided into three phases. During Phase One, 2000-2003, UNIAP supported small-scale projects.

5.1.5 The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography[283]

This instrument is an addendum to the Convention on the Rights of the Child.[284]The Protocol has a modernistic approach towards the stemming of trafficking in children. It focuses on the rehabilitation and protection of possible child victims.[285] Sale of children was put into context by the Protocol as it defines it as 'the transaction or act of the transfer of a child from a group to another for pecuniary benefits.'[286]

The Protocol goes further to criminalize certain acts against children, which include accepting, offering and delivering of a child by a person to another person for sexual exploitative purposes, engaging a child in forced labor, forcing the consent of a child, violation of the terms of lawful adoption in adoption of a child, obtaining and procuring a child for prostitution.[287]

Article 8 of the *Protocol* succinctly addresses child victim protection as well the process for the reintegration of a child victim into the society. The Protocol also stipulates the procedure for taking down witness

[282] UNIAP, "About UNIAP", available at: http://www.no-trafficking.org/how.html(accessed 6 March 2022).

[283]*Optional Protocol to the Convention on the Right of the Child on the Sale of Children, Child Pornography and Child Prostitution*, May 25, 2000, S. Treaty Doc. No. 106-37, GA Res. 54/263, U.N. GAOR, 54th Sess., U.N. Doc. A/54/49, available at: http://www.unhchr.ch/html/menu2/6/crc/treaties/opsc.htm [hereinafter Optional Protocol on the Sale of Children.

[284] *Convention on the Rights of the Child,* 1981.

[285]Supra note 60.

[286]*Optional Protocol on the Sale of Children*, Article 2(a).

[287]*Optional Protocol on the Sale of Children*, Article 3(1).

statements and even engaging a child in the criminal justice system on the trial of trafficking. These procedures are given as follows:

(a) First of all, the vulnerability of children must be recognized by recognizing the limitation in the ability of children and their need for constant care;

(b) Reading the rights of children witnesses to them and informing them of their roles, their progress and the timing of the trials;

(c) Always bringing the needs and concerns of these children to the appropriate authorities;

(d) The provision of physiological and psychological support to the child throughout the process of the trial;

(e) Making sure that the identity and privacy of the child victims are kept under lock and key at all times making it impossible for the identification of the children;

(f) Providing security for the safety of the child and his/her family in order to stem reprisal attacks; and

(g) The counsels and courts should make sure that no undue delay in the trial surfaces at all and this extends to the duration in carrying out the orders of the court.[288]

Furthermore, by way of addition, the reintegration of the child through social, psychological and physical support needed for the recovery.[289] The Protocol also mandates that the child victim has without any hindrance, access to compensation and to claim damages from the perpetrators.[290] The Protocol bounds State Parties from refraining from prosecuting such offences, citing the excuse of the tenderness of age of the child[291] and make sure that the best interest of the child was prioritized.[292]

The Protocol also discussed social control mechanisms by stipulating the necessity of creating an ambience where citizens have a background on the consciousness of the need to prevent and repress trafficking in any form.[293]

[288] *Optional Protocol on the Sale of Children*, Article 8(1).
[289] *Optional Protocol on the Sale of Children*, Article 9(3).
[290] *Optional Protocol on the Sale of Children*, Article 9(4).
[291] *Optional Protocol on the Sale of Children*, Article 8(2).
[292] *Optional Protocol on the Sale of Children*, Article 8(3).
[293] *Optional Protocol on the Sale of Children*, Article 9(5).

Finally, the Protocol places emphasis on the need to strengthen and promote cooperation amongst actors of the international community with the sole purpose of helping each other achieve the physical and psychological recovery of the child victim as well as help in the repatriation of trafficked children'.[294]

5.1.6 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), 2000

This seems to be the most complete sub-international instrument on the trafficking of humans especially women. In the preamble to this Protocol, the fact that it is the first of its kind was restated while also restating its importance as a cardinal instrument towards stemming the tide of trafficking in women and children.[295]

By way of expansion, the purpose of the protocol was given as follows: (a) for combating and prevention of trafficking in women and children; (b) for the protection and assistance of women and child victims especially on the front of human rights; and (c) for the promotion of cooperation among State parties for the full fulfilment of its objectives.[296]

This Protocol gave a wider definition on trafficking than the Protocol to the Convention on the Rights of the Child[297] gave, it defined trafficking in persons as the transportation, recruitment, transfer, receipt and harboring of women and children either by means or coercion, deception or conscription or exploitation and receiving or giving payments or benefits to gain consent of a person holding them for the purpose of exploitation.[298] In order to get the full picture, the Protocol went ahead to set the minimum variation for understanding

[294]*Optional Protocol on the Sale of Children*, Article 10(2).
[295] Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, G.A. Res 55/25, U.N. Doc. A/RES/55/25 (January 8, 2001)
[296]*Protocol to Prevent, Suppress and Punish Trafficking in Persons*, Article 2.
[297]*Convention on the Rights of the Child,* 1989.
[298]*Protocol to Prevent, Suppress and Punish Trafficking in Persons*, Article 3.

exploitation. These include sexual exploitation, forced labor, slavery and allied practices and organ harvesting without consent.[299]

The Protocol in Article 6 stipulates the process by which the protection and the assistance of victims come to reality. It outlined the process thus:

(a) that proceedings that concern the victims of trafficking should be made confidential, likewise that the national laws of each State Party should ensure that women and child victims remain anonymous;[300]

(b) to ensure that State parties provide the legal, technical and administrative know how for the proper presentation and citation of the view and opinions of the victims;[301]

(c) that each State Party would prepare measures for the protection and recovery of the child victims, that is, through the use of psychological (counselling) and physical (housing, employment, education) methods;[302]

(d) that the needs of the victims are taken into consideration bearing in mind the gender and age of the victims;[303]

(e) that state parties should do everything it can to guarantee the safety of the victims;[304]

(f) that State Parties should stipulate in their domestic laws the right of a victim to adequate damages or compensation for the events suffered;[305]

(g) that each State parties should pursue legislations that will permit for victims of trafficking to remain in the status quo country on a temporary or permanent basis;[306] and

(h) that in repatriating the victim back to his state of origin, recourse should be had to his person as regards his/her willingness to go back.[307]

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[299] *Ibid.*

[300] *Protocol to Prevent, Suppress and Punish Trafficking in Persons*, Article 6(1).

[301] *Protocol to Prevent, Suppress and Punish Trafficking in Persons*, Article 6(2).

[302] *Protocol to Prevent, Suppress and Punish Trafficking in Persons*, Article 6(3).

[303] *Protocol to Prevent, Suppress and Punish Trafficking in Persons*, Article 6(4).

[304] *Protocol to Prevent, Suppress and Punish Trafficking in Persons*, Article 6(5).

[305] *Protocol to Prevent, Suppress and Punish Trafficking in Persons*, Article 6(6).

[306] *Protocol to Prevent, Suppress and Punish Trafficking in Persons,* Article 7.

[307] *Protocol to Prevent, Suppress and Punish Trafficking in Persons*, Article 8.

This protocol also records in it the measures to be taken to in the first place prevent the occurrence of human trafficking especially in children and women. These measures as are listed in the Protocol as follows:

(a) through the use of campaigns on the mass media and research books;

(b) through the fostering of a working relationship with governmental and non-governmental bodies;

(c) through cordiality in the different levels of international relationships beating in mind the goal of addressing the vulnerabilities of women and children to trafficking due to poverty, lack of equal opportunity and unemployment;

(d) measures are to be taken to plug the holes with which criminal elements exploit in perpetrating the crime of trafficking;[308]

(e) the adequate and timeous exchange of information between states on the how, why and when on the attack tactics of;[309]

(f) State Parties should strengthen their State borders and place more scrutiny to the grant of Visas without recourse to the position of initial binding international agreements;[310] and

(g) that State Parties should take adequate measures towards checking the sporadic falsification and alteration of their immigration documents.[311]

5.1.7 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[312]

[308] *Protocol to Prevent, Suppress and Punish Trafficking in Persons*. Article 9.
[309] *Protocol to Prevent, Suppress and Punish Trafficking in Persons*, Article 10.
[310] *Protocol to Prevent, Suppress and Punish Trafficking in Persons*, Article 11.
[311] *Protocol to Prevent, Suppress and Punish Trafficking in Persons*, Article 12.
[312] United Nations Human Rights Office of the High Commissioner, 'International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families' via GA Resolution 45/158, available at https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers (accessed 1 September, 2022).

This Convention was adopted by General Assembly[313]in 1990. In the Preamble of this Convention, State parties are enjoined to bear in mind the fact that there are more issues with illegitimate migration that there are with legitimate migrations. In the same Convention, there is also the fact that State Parties are enjoined to place regular checks on the name on the use of clandestine migration with a hope of eliminating the likelihood of trafficking. However, in the course of carrying out these operations, State Parties should make sure that the rights of persons are guaranteed.

The provision of the foregoing Convention also prohibits the use of slavery in any form in migrant workers[314] mandating that the family of every migrant worker also must be protected.[315]Paragraph 3 of the Convention also stipulates that for everyone who is found to be complacent or involved in the forcing a migrant worker or his family to labour must be punished by a competent court of law in the State where the offence is being committed.[316]

5.2 **Nigerian National Laws and Policies**

5.2.1 **Constitution of the Federal Republic of Nigeria,1999 (as amended)**

The 1999 *CFRN* in Chapter II provides for fundamental rights that should be availed to every citizen and alien.[317] Some of these rights are provided for in Section 34[318], 35[319] and 42.[320] Now, it must be mentioned here that even though these cited provisions do not expressly state the word, 'human trafficking' but by inference in its prohibition of slavery and in the guaranteeing of a person's right to personal liberty and to his dignity of human person, it would be circumspect to state that the Nigerian Constitution[321] has given good foundation to stemming the tide of human trafficking.[322] It is because

[313]Via Resolution 45/158 of 18 December 1990.
[314]*International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, Article 12(1).
[315]*CRMW*, Article 11(2).
[316]*CRMW,* Article 11(3).
[317]*Constitution of the Federal Republic of Nigeria*, 1999 (as amended), Cap.C23, Laws of the Federation of Nigeria, 2004, Chapter II.
[318] Right to Dignity of a Human Person.
[319] Right to Personal Liberty.
[320] Right to Freedom from Discrimination.
[321] Supra note 317.
[322] *Ibid*, section 34(1)(b), s.35, and s.42(1).

of this non-precise nature of the Nigerian Constitution[323] that there is the need for international laws to supplant the lapses occasioned here.

5.2.2 **The Criminal Code**

The Criminal Code is the criminal legislation applicable in Southern Nigeria as opposed to the Penal Code which applies in the Northern part of Nigeria. The Criminal Code seems to succinctly prohibit one of the constituent acts of human trafficking, that is, 'slave-dealing'. In precise terms, the provision of the Criminal Code is reproduced below:

Any person who—

1. unlawfully imprisons any person, and takes him out of Nigeria, without his consent; or
2. unlawfully imprisons any person within Nigeria in such a manner as to prevent him from applying to a court for his release or from discovering to any other person the place where he is imprisoned, or in such a manner as to prevent any person entitled to have access to him from discovering the place where he is imprisoned; is guilty of a felony, and is liable to imprisonment for ten years.[324]

Any person who unlawfully confines or detains another in any place against his will, or otherwise unlawfully deprives another of his personal liberty, is guilty of a misdemeanor, and is liable to imprisonment for two years.[325]

From the foregoing provision, we come to the conclusion that if anyone so much as unlawfully takes another and detains such a person whether within the shores of Nigeria or outside Nigeria[326] so that the detained person is rendered incapable of reporting the detention, such perpetrator will be liable to have committed a misdemeanor and will be liable to a term of two years in prison.[327]

It seems from the provision of this legislation that non consent of the detained person is the prime qualification for the offence of slave

[323] *Ibid.*
[324] *Nigeria Criminal Code Act*, Cap. C77, Laws of the Federation of Nigeria, 2004, s.364.
[325] *Ibid,* section 365.
[326] *Ibid*, section 365(1)(a).
[327] *Ibid*, section 365(1)(b).

trading.[328] It is however appalling that the term of imprisonment for such a gruesome offence is as little as a two-year term in prison.

5.2.3 The Trafficking in Persons (Prohibition) Enforcement and Administration Act

The Trafficking in Persons (Prohibition) Enforcement and Administration Act was passed into law in 2003 and was repealed in 2015 by a law with the same title. The prime objectives that the Act sets out to achieve are:

> (a) to make sure that there is for Nigeria a comprehensive, effective legal framework which will address the prohibition, detection, prevention, punishment and prosecution of the offence of trafficking and its allied offences;
> (b) for the protection of human trafficking victims; and
> (c) to promote and facilitate national and international cooperation of a good legal and working relationship with other countries.[329]

The Act under review established the *National Agency for the Prohibition of Trafficking in Persons (NAPTIP).* In furtherance of the objectives that the law set out to achieve, the Act in clear terms prohibits certain offences, these offences are the procurement and recruitment of persons for fight in armed conflict, the trafficking in persons for sexual exploitation, the trade in human organs and the procurement of same, forced labor and the engagement of a child who is under the age of 12 to serve as a domestic help (house help). The Act, in furtherance of naming these offences, guarantees the rights of persons who are victims of human trafficking inclusive of the right of these persons to receive monetary compensation and the equity of restitution as well as push for the punishment of these offenders.[330]

The Act did not go without proffering a definition to the menace of human trafficking. It defines human trafficking in person as the

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[328] Supra note 102.

[329] *Trafficking in Persons (Prohibition) Enforcement and Administration Act*, 2015, section 1.

[330] The Act prescribes a minimum penalty of five years imprisonment and a million naira (approximately US$2,790) for both sex and labor trafficking, but the minimum penalty for sex trafficking increases to seven years of imprisonment when a child is involved.

transportation, recruitment, harboring and transfer, as well as the receipt of persons either by way of coercion, deception, abduction or conscription or exploitation and receiving or giving payments or benefits to gain consent of a person holding them for the purpose of exploitation.[331]

Under the Act, exploitation is defined also in the light of the minimum acceptable threshold acceptable in any sane society, these includes the following: the deprivation of the right to give birth of any person,[332] forced labor, servitude, slavery and the harvesting of the organs of humans.[333] This Act introduced the crime of debt bondage as a constituent part of the offence of human trafficking.[334]

Unlike some other international legislation treated above, the Trafficking in Persons (Prohibition) Enforcement and Administration Act is not gender-specific. However, it is disappointing to say the least that the major law on human trafficking in Nigeria appears to be limited in scope.

5.2.4 **The Child Rights Act 2003[335]**

The Child Rights Act was passed into law in 2003 by the federal legislature and in the usual fashion many states, especially states of Northern Nigeria, are yet to domesticate its contents. The Child Rights Act is a direct replica of the Convention on the Rights of the Child.[336] This Act prohibits amongst many other vices, human trafficking, slavery, hawking, begging, female genital mutilation, serfdom and other offences.[337] The Act also criminalizes child marriage and sexual abuse and exploitation, child marriage, and forced or

[331] *Trafficking in Persons (Prohibition) Enforcement and Administration Act 2015,* section 82. This definition is similar to that in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, explained below.

[332] Compare this with the position of the *Rome Statute*, Article 6 as one of the constituents of Genocide.

[333] *Trafficking in Persons (Prohibition) Enforcement and Administration Act 2015,* section 5,6, and 82.

[334] *Trafficking in Persons (Prohibition) Enforcement and Administration Act 2015,* section 82.

[335] *Child Rights Act,* 2003.

[336] *Convention on the Rights of the Child*, 1989.

[337] *Child Rights Act*, 2003, section 28, 29 and 30.

compulsory labour.[338] The Act focuses on the best interest of the child.[339]

5.2.5 The National Policy on Protection and Assistance to Trafficked Persons in Nigeria, 2008[340]

It has been established above that the Trafficking in Persons (Prohibition) Enforcement and Administration Act established the NAPTIP. It therefore follows that the National Policy on Protection and Assistance to Trafficked Persons in Nigeria would serve as the policy document that guides the workings of the officials of the agency as well as the guiding document for Non-Governmental Organizations, government departments and victims that have connections or deal with human trafficking.

The prime objective of the policy is for the restoration of persons who are or have been victims of human trafficking or persons who have been victims of gross abuse of child labor and are in a state of psychological and physical wear-out. The intention of the policy is to explore economic, social and vocational programs that will help sustain these victims.[341] The Policy also highlights the importance of taking a circumspect look at the methods in which assistance and protection are to be given to these persons, be it in the form of identification, repatriation, shelter or clothing.[342]

6.0 HUMAN TRAFFICKING IN SOUTH AFRICA

The South African draft anti-trafficking regulation, the Prevention and Combating of Trafficking in Persons Bill, was brought before Parliament on March 16, 2010, after a prolonged consultative

[338] *Ibid.* The Child Rights Act only operates in the Federal Capital Territory, Abuja. States have the power to enact their own laws and only 24 out of 36 states have passed versions of the Child Rights Act.
[339] *Child Rights Act,* 2003, section 19.

[340] International Organization for Migration, "National Policy on Protection and Assistance to Trafficked Persons in Nigeria" (National Agency for the Prohibition of Traffic in Persons and other Related Matters, Abuja, 2008).
[341] NAPTIP, *National Policy on Protection and Assistance to Trafficked Persons in Nigeria*, (2008), p. 4.
[342] *Ibid.*

procedure by the South African Law Reform Commission (SALRC) since 2003. It has actually been acknowledged, nevertheless, that:

> The Bill, once it becomes an Act on Parliament and is completely functional, will certainly be one of the most comprehensive legislations in the battle against human trafficking in this country.[343]

The present legislation concerning trafficking in persons in South Africa is fragmented. The *Criminal Law (Sexual Offences and Related Matters) Amendment Act (the Sexual Offences Amendment Act)*[344]and the *Children's Act*[345] contain provisionary actions connected to trafficking.

The *Sexual Offences Amendment Act 32 of 2007* criminalizes an act of trafficking face to faces for sex-related objectives only, whereas the Children's Act addresses the trafficking of kids more thoroughly. The two Acts have limited operational scope. The stipulations of the Children's Act connecting to trafficking of children entered operation in April 2010. Along with the regulations referred to earlier, various parts of the criminal activity are criminalized under other pieces of South African regulation that include the Sexual Offences Act,[346] the Riotous Assemblies Act, [347] the Immigration Act, [348] the Basic Conditions of Employment Act,[349] the Intimidation Act, 1982; the Domestic Violence Act, 1998, the Films and Publications Act,[350] and the Prevention of Organized Crime Act.[351]

Under the common law, depending on the conditions of each situation, individuals suspected of trafficking could be charged with kidnapping, usual attack, attack with intent to do calamitous bodily damage, extortion, tried murder, and murder.

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[343] Department of Justice and Constitutional Development (DJCD), "Anti-human trafficking bill introduced to parliament; Media statement by Justice and Constitutional Development Minister Jeff Radebe available at https://www.gov.za/media-statement-justice-and-constitutional-development-minister-jeff-radebe-during-introduction (accessed 1 September, 2022).

[344]*Criminal Law (Sexual Offences and Related Matters) Amendment Act (the Sexual Offences Amendment Act* 2007 (Act No. 32 of 2007).

[345] *The Children's Act* 2005 (Act No. 38 of 2005) (the Children's Act).

[346] *Sexual Offences Act,*1957.

[347] *The Riotous Assemblies Act,* 1956.

[348]*The Immigration Act,* 2002.

[349] *The Basic Conditions of Employment Act,*1997.

[350]*The Films and Publications Act 65 of* 1996.

[351] *The Prevention of Organized Crime Act,* (No. 21 of 1998).

Fragmented and restricted regulations add to confusion concerning the meaning of trafficking. Defining trafficking in all its components in nationwide regulations is key to identifying cases and developing plans to attend to the problem and secure the sentence of traffickers.[352] At present, South Africa has no main system of information management which would certainly enable, inter alia, for the generation of data on trafficking victims and traffickers. The only reliable numbers that have been generated are those of the IOM that help internationally trafficked victims, but this represents a tiny number of targets. The problem of the absence of promulgated regulations and inadequate record-keeping not just hinders the identification of the crime. It triggers added problems as situations are not captured and signed up as trafficking situations and consequently, no exact information associated with the criminal offence is available.[353]

6.1 How is Human Trafficking Defined in South Africa?

The country's legal position on human trafficking is established out in the Prevention and Combating of Trafficking in Persons Act 2013. According to the Act, a person is guilty of trafficking if he or she delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the boundaries of the Republic for the purposes of exploitation.[354] This might be done via the hazard of harm; the risk or use of pressure or browbeating; the abuse of susceptibility; fraud; deception; abduction; kidnapping; abuse of power; directly or indirectly giving or getting payments or benefits to acquire the authorization of a person having that has control or authority over one more; or directly or indirectly giving or getting repayments, compensation, benefits, advantages or any other benefit.

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[352] Human Sciences Research Council (HSRC) 2010. Tsireledzani: understanding the dimensions of human trafficking in South Africa. Pretoria: Human Sciences Research Council.

[353] J. Horne, "The Investigation of Human Trafficking: An Impossible Mission Without Elemental Identification of the Crime" (2011) 24 *Southern African Journal of Criminology*, available at https://nfnresources.yolasite.com/resources/2011%20-%20Article%20-%20Horne%20-%20Investigate%20TIP%20Crime.pdf (accessed 6 March 2022).

[354] South Africa. (2013, July 29). *The Prevention and Combating of Trafficking in Persons Act* (No. 7 of 2013). 577, 36715.

These actions might be focused on the trafficked person, an instant family member or any other individual in a close relationship with the sufferer.

The Act further states that a person is guilty of human trafficking if he or she gets in or adopts a child into a forced marriage with an additional individual for the purpose of manipulating that child or other individual "in any kind of kind or fashion."

6.2 How Prevalent is Human Trafficking in South Africa?

Currently, there is no systematic study readily available that supplies extensive insight into the frequency or patterns of trafficking right into or out of South Africa or the Southern African region. The most methodologically audio study, Chandre Gould and Nicole Fick's 2008 research work, "Selling sex in Cape Town" concentrated particularly on sex trafficking in the city. The study found only eight feasible instances of trafficking for sexual exploitation in Cape Town, as opposed to prior cases that trafficking was a major issue there.[355]

The Human Sciences Research Council (HSRC) consequently carried out research study right into human trafficking, but made no effort to quantify the level of the sensation, except to keep in mind that the International Organization for Migration (IOM) had actually located eight situations of trafficking from South Africa between 2004 and 2008.[356] The HSRC report has been criticized for methodological troubles and presumptions, as well as being based on little original research study.[357] Other kinds of exploitation that are often considered trafficking, such as compelled work, bonded work, financial debt chains, child soldiers and spontaneous domestic servitude, have actually not received much study or media rate of interest in South Africa.

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[355]T. Reitano, "Does 'Human Trafficking' Need a New Definition?" available at https://issafrica.org/iss-today/does-human-trafficking-need-a-new-definition(accessed 6 March 2022).

[356]C. Allais, H. Combrinck, D. Connors, et al, "Tsireledzani: Understanding the Dimensions of Human Trafficking in South Africa. Pretoria" available at http://www.hsrc.ac.za/en/research-data/view/4940 (accessed 6 March 2022).

[357] C. Gould, M. Richter, I Palmery, "Of Nigerians, Albinos, Satanists and Anecdotes: A Critical Review of the HSRC Report on Human Trafficking" (2010) 32 *South African Crime Quarterly* 37.

The IOM has been helping victims of trafficking since 1994 and has projects in 85 nations. In a 2010 record, the organization noted that it had aided 306 targets of trafficking in Southern Africa between understanding human trafficking.[358]

6.3 **Southern African Development Community (SADC) Regulations and Policy Measures**

To date, 13 out of 15 SADC Member States have particular regulations dealing with the criminal offense of human trafficking. In addition, Member States have critical nationwide structures and activity on human trafficking, standard operating procedures, reference systems, and standards to determine victims of human trafficking. While 86.7% of Member States have regulation in place, the implementation of their corresponding legislations is still in the infancy phases, with a lot of Member States yet to establish implementing regulations.[359]

As long as the States of Southern Africa act individually of one another, criminals will certainly remain to make use of both this situation and the loopholes that exist in between the different legislative regimens. The harmonization of regulation within the region will promote collaboration between participant states to share knowledge and also to take an aggressive position towards combating human trafficking.

6.4 **South African Anti-Human-Trafficking Law**

The Republic of South Africa has several regulations to battle human trafficking within and also past the boundaries of South Africa. The research study in this section looks at some of the regulation that existed before the Prevention and also Combating of Trafficking in Persons Act 2013 came into force. They are:

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[358] NORAD, "Southern Africa Counter-Trafficking Programme (SACTP) Review", available at https://www.norad.no/globalassets/import-2162015-80434-am/www.norad.no-ny/filarkiv/vedlegg-til-publikasjoner/southern-africa-counter--trafficking-programme-sactp-review.pdf (accessed 6 March 2022).

[359] United Nations Office on Drugs and Crime, "Trafficking in Persons in the SADC Region: A Statistical Report" available at https://www.unodc.org/documents/southernafrica/Stories/EN_-_TIP_Statistical_Report.pdf (accessed 6 March 2022).

6.4.1 **Prevention and Combating of Trafficking Act 2013**

The Preamble section of this Act[360] acknowledges that the search for boosted socio-economic circumstances and the need for the solutions of targets of trafficking add to making individuals prone to becoming victims of trafficking'. The Act is warranted, given that the South African common law and legal legislation do not take care of the issue of trafficking in persons effectively. In addition, the Bill of Rights in the Constitution of the Republic of South Africa[361] preserves the right to human self-respect, equal rights, the right to freedom and also security of the person, which includes the right not to be denied of freedom arbitrarily or without simply reason, and also not be dealt with in a terrible, derogatory or merciless way, the right not to be subjected to slavery, bondage or required labor, and the right of children to be shielded from injustice, abuse, neglect or destruction.
The Objectives of the Act are:

a. Give result to the Republic's obligations concerning the trafficking of individuals in regards to international agreements;
b. Provide for the prosecution of persons who commit offences referred to in this Act and for appropriate fines;
c. Provide for the avoidance of trafficking of persons and the security of and support to victims of trafficking;
d. Provide solutions to targets of trafficking;
e. Provide for effective enforcement measures;
f. Provide for the coordinated application, application and management of this Act, consisting of the growth of a draft national policy structure; and
g. Combat trafficking in persons in a coordinated fashion.

The Act defines trafficking in persons under Section 4(1) as anyone who supplies, hires, transportations, transfers, harbors, markets, exchanges, leases or receives one more person within or throughout the boundaries of the Republic, using threat of injury;[362] the hazard or use force or other types of threat;[363] the misuse of vulnerability;[364]

[360]*Prevention and Combating of Trafficking Act*, 2013.
[361] *Constitution of the Republic of South Africa*, 1996.
[362]*Prevention and Combating of Trafficking in Persons Act,* 2013, section 4(1)(a).
[363]*Prevention and Combating of Trafficking in Persons Act 2013,* section 4(1)(b).
[364]*Prevention and Combating of Trafficking in Persons Act* 2013, section 4(1)(c).

fraud;[365] deception;[366] abduction;[367] kidnapping;[368] and the abuse of power.[369]

The straight or indirect obtaining or offering of settlements or advantages to acquire the approval of a person having control or authority over another person; or the direct or indirect obtaining or offering of payments, payment, benefits, advantages, or any other advantage.

Anybody targeting either the individual or an instant relative of that person or any other person in close relationship to that person, for any type or fashion of exploitation, is guilty of the offence of trafficking in persons.

The scientist believes, having researched the provisions of the Act above, that it is a thorough piece of legislation. Human trafficking in South Africa will be combated effectively as the Act itself is definitely a very beneficial piece of anti-human-trafficking regulations if the Act is effectively executed. All South Africa requires is an effective authority to impose the legislation and establish durable and also reliable border control units to apprehend believed traffickers and trafficked persons.

Section 9(1) of the Act states that:

> A carrier who moves an individual within or across the borders of the Republic, and also that recognizes that the person is a victim of trafficking or ought reasonably to have understood that the individual is a victim of trafficking, is guilty of an offence.' [370]

Section 9(2) specifies that:

> A carrier who, on reasonable grounds, presumes that any one of its passengers is a target of trafficking has to immediately report that uncertainty to a law enforcement officer for investigation.'[371]

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[365] *Prevention and Combating of Trafficking in Persons Act* 2013, section 4(1)(d).
[366] *Prevention and Combating of Trafficking in Persons Act 2013*, section 4(1)(e).
[367] *Prevention and Combating of Trafficking in Persons Act 2013*, section 4(1)(f).
[368] *Prevention and Combating of Trafficking in Persons Act* 2013, section 4(1)(g).
[369] *Prevention and Combating of Trafficking in Persons Act 2013*, section 4(1)(h).
[370] Supra, note 355
[371] Supra, note 355.

Section 9(3) specifies that 'A service provider that falls short to comply with the provisions of subsection (2) is guilty of an offence.'[372]

Section 9(4) states that:

> A carrier is liable to pay the expense incurred or fairly expected to be incurred about the treatment, transport, holiday accommodation, and repatriation or return of the target to his/her very own country of origin or country or area from where she or he was trafficked, if the court discovers, on a balance of possibilities, that the service provider has actually intentionally moved a victim of trafficking or ought sensibly to have actually known or thought that it was transferring a victim of trafficking.[373]

Fines under this Act vary from R100 million penalty or life jail time to 15 years, 10 years, and 5 years in jail. The scientist suggests that these severe sentences have sent a clear message to the globe that South Africa is no more a place for human traffickers.

6.4.2 **Criminal Law (Sexual Offences and also Related Matters) Amendment Act 32 of 2007**

This Act[374]criminalizes sexual assault or exploitation comprehensively in a solitary statute. The Act criminalizes conduct constituting trafficking in persons for sexual exploitation. The Act bans an individual from trafficking any other individual, without the approval of that person, for sex-related exploitation. The Act states that children below the age of 12 years are not able to consent validly, due to the fact that their authorization is not regarded as being offered "voluntarily or without coercion." This conflicts with the Palermo Protocol, which specifies a child as anybody under the age of18 years.[375]

6.4.3 Children's Act 38 of 2005

[372]Supra, note 355.
[373]Supra, note 355.
[374]*Criminal Law (Sexual Offences and also Related Matters) Amendment Act 32 of 2007*.
[375]*Palermo Protocol, 2000*, Article 3(d).

One of the major purposes of this Act[376] is to fight trafficking in children and to give impact to the Palermo Protocol 2000.[377] The trafficking of children lugs a maximum sentence of approximately twenty years. In contrast with the Palermo Protocol, the Act includes and criminalises debt bondage, compelled marriage, child work and the removal of body parts. The researcher locates the trade in body components a callous and despicable criminal activity and questions whether traffickers who sell body parts are human beings from one more world.

7.0 CONCLUSION

Human trafficking is real and still exists till this very day, although it has existed for long. The scourge is far from being over, especially in the African continent.

The desperation with which many Africans, especially Nigerians as is the focus of this study, seek greener pastures in other countries seems to be the central point on which they are exploited and snatched up for sexual slavery, human slavery, human body part sale or even human games. The Nigeria-Libya experience was an eye opener and this experience reawakened the humanity in the international community in restating their commitments to ending human trafficking.

Putting the final nails in the coffin of human trafficking is highly necessary as it forms a constituent part of much more dangerous international crimes, such as war crimes, crime of genocide, crimes against humanity and the drug trade. It is therefore necessary that the international community in collaboration with specialised bodies tackle this menace progressively.

South Africa's response to human trafficking is still in its infancy. Attempts to estimate the size of the problem at both country and regional levels are still a long way off. Better estimates of numbers and flows involve systematic and well-documented collection of data from a variety of sources, on an ongoing basis of agreed core items (in particular, definitions), across regions (domestic and cross-border) and by stakeholders within countries. At present, the greatest

[376] *Children's Act 38* of 2005.

[377] H. Kruger, "The Protection of Children's Right to Self-Determination in South African Law with Specific Reference to Medical Treatment and Operations" (2018) 21 *Potchefstroom Electronic Law Journal* 1.

impediment to the collection of quantitative data on trafficking (with particular reference to the number of victims in the identified trafficking streams) is the lack of a comprehensive stand-alone national law on human trafficking. Once promulgated, such a law would allow for a human trafficking database or human trafficking information management or reporting system which allows law enforcement, prosecutors, victim service providers, labor inspectors and others working collaboratively to enter information about cases of trafficking.

8.0 RECOMMENDATIONS

Based on the summary of the study and the conclusion, the study recommends the following:

a. Nigeria should inaugurate socio-economic policies that will bolster the economy and reduce to its infinitesimal the rate at which persons seek to illegally migrate out of Nigeria.

b. Nigeria needs to work with the African Union and ECOWAS for a safer inter country border where international police from African countries will man in order to intercept any activity or plan of human traffickers.

c. The International community and its specialised agencies such as the UNODC, UN, ILO and a host of others need to do more in the terms of technical support to aid the investigation and easy identification of the operations of human traffickers in Africa and also to aid the easy and non-bureaucratic repatriations of trafficked persons to their countries of origin if they so wish.

d. Countries in Europe need to relax their immigration policies so that persons with genuine reasons can secure visas into their countries without too much hassle. This will go a long way to help curb the rate at which persons employ desperate measures to emigrate into European countries.

e. There is need for the international community and the African regional bodies to extend economic and political sanctions on nations that are complacent with human trafficking.

f. This study also recommends that Nigeria should empower the NAPTIP with more budgetary allocations and right of way to aid their tasks in dealing with the aftermath of rescuing victims of human trafficking who have been repatriated to Nigeria.

TOWARDS THE CANONIZATION OF THE RIGHT OF HUMANITARIAN INTERVENTION

By Mofoluwawo Oluwapelumi Mojolaoluwa*

ABSTRACT

The concept or idea of responsibility to protect, is simply put, a balancing mechanism in international law which addresses the often-conflicting questions of prohibiting the use of force on the one hand; and protecting fundamental human rights on the other. Essentially, states have the responsibility to protect their citizens' fundamental human rights, and the international community has a duty to step in when the state fails to do so. This is the crux of humanitarian interventions. This paper seeks to examine the origin, scope and necessity of humanitarian intervention, its trajectory across modern history, as well as its contemporary application and usefulness. The paper recommends a careful approach to ensuring that this right becomes a right properly so called, without usurping state sovereignty or neglecting the duty to protect.

***Keywords**: Humanitarian Interventions, Responsibility to Protect, Fundamental Human Rights, Sovereignty.*

1.0 INTRODUCTION

As an aftermath of the barbaric murder of six million Jews by Hitler's dictatorship in Nazi Germany, the *Genocide Convention*[378] was adopted in 1948.[379] This convention was a proactive approach by nations of the world, aimed at preventing a repeat of such genocidal acts across the world. But despite this, there has been a string of genocidal warfare across the globe since the end of Second World War. The world has witnessed genocides in Indonesia, Uganda, Bangladesh, Rwanda and Burundi, Biafra (Nigeria), and Kampuche, in circumstances that

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[378] UN General Assembly, "Convention on the Prevention and Punishment of the Crime of Genocide", (1948) 78 *United Nations, Treaty Series*, p. 277, available at: https://www.refworld.org/docid/3ae6b3ac0.html (Accessed 9th August, 2022).

[379] United Nations Office on Genocide Prevention and the Responsibility to Protect., "The Genocide Convention", available at https://www.un.org/en/genocideprevention/genocide-convention.shtml (Accessed 10th August, 2022).

rendered the Genocide Convention ineffective, and saw the world watch, as its occupants turned on themselves in deadly conflicts. Apparently, stopping a nation from destroying its own people has defied peaceful settlements and appeals over the years; and while state sovereignty cannot be usurped, the world has seen how fatal it can be to completely turn the other eye, leaving the state to conduct its own affairs, to the detriment of its people. This necessitated forceful interventions to prevent complete carnage and total annihilation of a state by itself. These are the origins of humanitarian interventions.[380]

During the nineteenth century, and early twentieth century, the doctrine of humanitarian intervention, gained wide acceptance as a customary principle of international law. Its origin is traceable to the inception of the modem period, and finds its support in the writings of such classical theorists as H. Grotius and E. De Vattel. At the time, there existed a permissive custom of intervention condoned by the powers in Europe and thus rooted in the *jus publicum europaeum*. But it was not until the late nineteenth and early twentieth centuries that a substantial body of state practice arose in which the great powers justified their forceful interventions abroad by alleging a need to protect individuals and groups of individuals against their own states. One must note that the world was not as democratic as it is today, then. And the great powers of Europe held a lot of sway and could determine what international custom would be, by simply acting it out.

For instance, in 1827, France and Britain intervened in Greece 'in order to stop the shedding of blood and mischiefs by the Turks'. They as well intervened in the Kingdom of the Two Sicilies in 1856, when the Kingdom began to witness a series of politically motivated arrests, and alleged cruel and arbitrary treatment of the political prisoners concerned.[381] The five powers namely Britain, France, Austria, Prussia and Russia also carried out a humanitarian intervention in Syria after about six thousand Christian Maronites were murdered by Syrian

[380]D. Wolf, "Humanitarian Intervention", (1988) 9 *Michigan Journal of International Law*, 333.

[381] K. Robert Kolb, "Notes on Humanitarian Intervention: Current Issues and Comments", (2003) 85(849) *International Review of the Red Cross*, 119.

Druses in 1860. The European powers also staged certain interventions in Crete in 1866, Bosnia in 1875, Bulgaria 1877 and Macedonia 1887; against persecutions committed by the Turks. These interventions are not limited to Europe. Outside the European continent, humanitarian grounds were cited to justify intervention. In 1898 for example, the United States carried out an intervention in Cuba.

More recently, the United Nations through the Security Council has, on several occasions in the 1990s, authorized the use of force with the aim to protect civilians in humanitarian crises. In some of these situations, military intervention was decided by the interim government of the state concerned. Examples are the humanitarian interventions with consent carried out in East Timor in 1999 and that of Dafur, Sudan in 2006.[382] In other situations, the interventions were decided and carried out without the consent of the government. This occurred in Somalia in 1992, where there was no government in place, Bosnia (1992-1993), Rwanda in 1994, and in Libya, which was undertaken against the will of the ruling regime. In Libya's case, some members of the Security Council such as China and Russia refused to vote on the matter.[383] Suffice it to say that consent of the local government is not important or necessary for the exercise of a humanitarian intervention, once it is done according to Chapter VII of the UN Charter. [384]

Now, one cannot make the mistake of hasty generalization by assuming or conceding that all these interventions, named and unnamed, were altruistic in nature. No. Neither can one accuse the interventionists as proceeding in each case for purely selfish,

[382] F. Francioni & C. Bakker, "Responsibility to Protect, Humanitarian Intervention and Human Rights: Lessons from Libya to Mali", (2013) *The Transatlantic Relationship and the Future Global Governance, Transworld, Working Paper*, pp. 15. Available at https://www.iai.it/sites/default/files/TW_WP_15.pdf. (Accessed on 11th Augsut, 2022).

[383] *Ibid.*

[384] S. Chesterman, "Leading from Behind: The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya" (2011) 25 (3) *Ethics & International Affairs*, pp. 279-285.

exploitative reasons. No. These interventions were a manifestation of different reasons and reasoning, but undeniably underlining them, was the humanitarian need for man to rescue man from destroying himself. They were rooted and grounded in core humanitarian values, a viewing of the world as one community that must not be watched unchecked, while it turned on and destroyed itself.

2.0 CONCEPTUAL CLARIFICATION

2.1 Humanitarian Intervention

Humanitarian intervention is defined as coercive action by states involving the use of armed force in another state without the consent of its government, with or without authorization from the United Nations Security Council, for the purpose of preventing or putting to a halt, gross and massive violation of human rights or international humanitarian law.[385] This is a pointer to a few key points, the first being that humanitarian intervention is not a voluntary but a necessary act; the second being that humanitarian intervention connotes a temporary 'near invasion' of another state's sovereignty; and the third being that humanitarian intervention seeks to protect the citizens of a state from their own government by putting a stop to the trampling upon of their inalienable human rights by that government.

> Without prejudice to the functions and powers which the Charter attributes to the organs of the United Nations in the case of violation of obligations assumed by the members of the Organization, States, acting individually or collectively, are entitled to take diplomatic, economic and other measures towards any other State which has violated the obligation set forth in Article 1 (respect for human rights), provided such measures are permitted under international law and do not involve the use of armed force in violation of the Charter of

[385] Danish Institute of International Affairs, *Humanitarian Intervention Legal and Political Aspects*, 2nd ed. (Gullanders Bogtrykkeri a-s, Skjern: Denmark, 1999), p.11

> the United Nations. These measures cannot be considered an unlawful intervention in the internal affairs of that State.[386]

This essentially permits and makes lawful, the use of force in situations within the contemplation of the Charter of the United Nations.

2.2 Responsibility To Protect

In certain instances of armed conflict in the early 1990s, the international community assumed a state of inertia as opposed to proactively protecting its members in warring States. States such as Rwanda and the former Yugoslavia recorded mass murders in genocidal wars and ethnic cleansing while the world looked on.[387] This consequential inaction has now led to the formulation of the concept of responsibility to protect, which mandates the international community to step in and act, where and when a State fails in its responsibility to protect its own citizens. Two things are clear; the first is that each state owes its citizens a responsibility to protect their fundamental human rights; the second is that where a state fails in this responsibility, the international community must step in to protect the citizens from their own government.

The concept of "responsibility to protect" (RtoP/R2P),[388] expands the pre-existing scope of humanitarian intervention. As an offshoot of the meaning and scope of humanitarian intervention, intervening States are saddled with the responsibility to protect States going through internal conflict, and repression and abuse of their fundamental human rights by their government.

According to the Global Centre for the Responsibility to Protect which was set up in 2008, "The responsibility to protect is a principle

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[386] Yearbook of the Institute of International Law, Resolutions, 1957-1991, Paris, (1992), articles 2(2) p. 209.

[387] P. Sharma "From Humanitarian Intervention to the Responsibility to Protect (R2P)", (2020) *Diplomatist,* available at https://diplomatist.com/2020/09/28/from-humanitarian-intervention-to-the-responsibility-to-protect-r2p/(accessed 11th August, 2022).

[388] "What is R2P? Global Centre for the Responsibility to Protect", available at https://www.globalr2p.org/what-is-r2p/ (accessed on 11th August, 2022).

which seeks to ensure that the international community never again fails to act in the face of genocide and other gross forms of human rights abuse." This principle was adopted by heads of state and government at the World Summit in 2005 sitting as the United Nations General Assembly. The principle stipulates, "first, that states have an obligation to protect their citizens from mass atrocities; second, that the international community should assist them in doing so; and, third, that, if the state in question fails to act appropriately, the responsibility to do so falls to that larger community of states. R2P should be understood as a solemn promise made by leaders of every country to all men and women endangered by mass atrocities."[389]

2.3 Sovereignty

Sovereignty is the complete power and control a state has over its own affairs without external interference or control. The idea of sovereignty bestows on each state government, independence. Sovereignty is the bedrock of international relations. It implies that states can control what happens within their borders and can't interfere in what happens elsewhere. Conversely, no other state can interfere in their own internal affairs as well.[390]

2.4 Human Rights

These are inalienable rights of all human beings, given rise to by virtue of being human. Human rights are basic rights and freedoms that all people are entitled to regardless of nationality, sex, national or ethnic origin, race, religion, language, or other status. They are necessary in order for us to live with dignity.[391] Everyone is entitled to these rights,

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[389] S. Adams, "Libya and the Responsibility to Protect" (2012) 3 *Global Centre for the Responsibility to Protect Occasional Working Paper Series.* Available at http://www.globalr2p.org/wp-content/uploads/2020/07/LibyaAndR2POccasionalPaper.pdf (accessed 11th August, 2022).

[390] Building Blocks "What is Sovereignty? How the World Works and Sometimes Doesn't" available at https://world101.cfr.org/how-world-works-and-sometimes-doesnt/building-blocks/what-sovereignty (accessed 15th April 2022).

[391] "What are human rights?" available at https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx (accessed 15th April, 2022).

without discrimination.[392] According to Jack Donnelly, human rights are the right one has simply because one is a human being.[393]In the words of Boutros Boutros-Ghali (1993), human rights are the irreducible human element, in other words, the quintessential values through which we affirm together that we are a single human community. As an absolute yardstick, human rights constitute the common language of humanity.[394]

The body of rights now known as fundamental human rights globally, is now canonized and enshrined in the Universal Declaration of Human Rights (UDHR), a foundational human rights document for the United Nations, and the cornerstone for the international human rights system. Examples of human rights are right to life, right to liberty and freedom of movement, right to freedom of expression, right to freedom from torture and inhumane treatment, etc.

3.0 TOWARDS THE CANONIZATION OF THE RIGHT OF HUMANITARIAN INTERVENTION

Humanitarian intervention has been quite controversial as an international law concept. It is at the moment, not a right provided for under any law, the UN Charter inclusive. Article 2 of the UN Charter prohibits the use of force and interference in States' domestic affairs, even by the UN itself. According to the Charter, there are only two permissible bases for the use of force: in exercise of a State's right of self-defense and, when authorized by the UN Security Council, in accordance with Chapter 7 of the UN Charter, to combat a threat to international peace and security.[395] These are the only two lawful bases for the use of force, at present. However, a third basis for the

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[392] "United Nations: Peace, Dignity and Equality on a Healthy Planet", available at https://www.un.org/en/global-issues/human-rights (accessed 15th April, 2022).
[393] J. Donnelly, "The Relative Universality of Human Rights" (Revised) (2007) 29(2) *Human Rights Quarterly,* 281-306.
[394] Address by the Secretary-General of the United Nations at the opening of the World Conference on Human Rights available at https://newsarchive.ohchr.org/AR/NewsEvents/Pages/DisplayNews.aspx?NewsID=7906&LangID=E (accessed on 15th April, 2022).
[395] U.N Charter 1945, article 2.

use of force, which has begun to wear the semblance of a lawful right in international law and custom, is the controversial doctrine of humanitarian intervention. Although differently interpreted over the years, the age long concept of humanitarian intervention generally connotes the use of both hard and soft power by the international community within a state in order to combat and end gross human rights abuse, without seeking or obtaining permission from said State.[396] In the legal sense, humanitarian intervention is one form of foreign forcible intervention, provided that the victims of abuse are not citizens of the intervening State and there is no lawful authorization by either their state or an appropriate international organization such as the UN.[397]

Humanitarian intervention was a recognized and viable option before the 1990s. Thereafter, the world went through a phase of notable inertia in situations of internal conflict. The hazardous effects of international inaction are self-evident in the destruction wrecked on Cambodia by Khmer Rouge in the late 1970s. The Cold War rendered humanitarian considerations, including humanitarian military intervention, insignificant in relation to political exigencies.[398]

Consequently, confidence in the United Nations (U.N.) as an organization capable of standardizing and implementing humanitarian intervention completely shattered after its inability to stop genocides in Somalia, Srebrenica, and Rwanda. The U.N. was depicted as lacking the most basic requirements for successfully initiating humanitarian intervention, namely, authority, military resources, and political will. This was the background against which Kofi Annan, the then United Nations Secretary General asked the question in 1999, "How should we respond to a Rwanda, to a Srebrenica, to gross and systematic violations of human rights that affect every precept of our common

[396] D. Jemirade. "Humanitarian intervention (HI) and the responsibility to protect (R2P): The United Nations and international security" (2020) 30 (1) *African Security Review*, pp. 48-65.

[397] K. Robert Kolb, "Notes on Humanitarian Intervention." Current Issues and Comments, (2003) 85(849) *International Review of the Red Cross*, 119.

[398] Supra note 385.

humanity?"[399] In September 2000, the Canadian Prime Minister Jean Chretien announced the establishment of the independent International Commission on Intervention and State Sovereignty (ICISS) at the U.N. Millennium Summit. This committee's final report released in December 2001 was titled- The Responsibility to Protect.[400]

The central thesis of the ICISS is that 'sovereign States have a responsibility to protect their citizens from avoidable catastrophe…but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states'[401]. When states do not act to protect their citizens against massive human rights abuses, responsibility shifts to the international community and the U.N. Security Council to ensure that human rights are protected.[402]

It would then seem, on the face of it, that the concepts of humanitarian intervention, and the responsibility to protect, are one and the same? Not true. While both concepts agree on many fronts, the major difference is that the former focuses more on the duty on the international community to intervene, while the latter focuses on the victims i.e., it dwells more on the need to protect victims of abuse from their own government. Thus, one is state centered while the

[399] Address by the Secretary-General of the United Nations at the opening of the World Conference on Human Rights available at https://newsarchive.ohchr.org/AR/NewsEvents/Pages/DisplayNews.aspx?NewsID=7906&LangID=E (accessed on 15th April, 2022)

[400] E. Massingham, "Military Intervention for Humanitarian Purposes: Does the Responsibility to Protect Doctrine Advance the Legality of the Use of Force for Humanitarian Ends?" (2009) 91(876) *International Review of the Red Cross*, 803–31.

[401] International Commission on Intervention and State Sovereignty, "The Responsibility to Protect: Research, Bibliography, Background" (Canada: International Development Research Centre).

[402] U.N. General Assembly. 59th Session. In Larger Freedom: Towards Development, Security and Human Rights for All (A/59/2005), available at https://www.ohchr.org/sites/default/files/Documents/Publications/A.59.2005.Add.3.pdf (accessed on 14th April, 2022).

other is people centered. They however agree that sovereignty in the instances of human rights abuse cannot and must not be absolute.

Humanitarian intervention derives from the human right to life and liberty. No government which turns against its own citizens can morally or lawfully justify such acts of inhumanity. As such, since the right to life is already entrenched in the Universal Declaration of Human Rights, an intervention which seeks to protect it ought to equally enjoy legal backing. Large scale human rights abuse can morph into a global menace in no time, and must be nipped in the bud by the instrumentality of law. If, however, nations of the world have to watch while one of them implodes because of lawful barriers to any helpful action, humanity is done for. The question is this, should the right to use military force to necessarily avert and prevent human rights abuses exist? The answer to that is a resounding **YES!** As long as the propensities for human rights abuse exist, there must equally exist, a right addressing this ill. There must exist in international law, a right of humanitarian intervention. The pros of having this right canonized and settled in law, far outweigh the cons. Admittedly, there have been identifiable shortcomings in the manner in which certain acts of humanitarian intervention were carried out in times past, case in point the Libyan intervention in which the West has been accused of pursuing personal interest and failing to set up a post war democracy. However, should we really judge Lybia by the post intervention outcome, or the dire possible consequences of non-intervention as observable in Syria and Rwanda?

Admittedly, the danger of an apathetic world in instances of human rights abuse on domestic soil, will always be greater than the danger of an imperfectly executed intervention. The right to humanitarian intervention need not be absolute nor inalienable. There must be adequate safeguards to ensure that intervening states do not go rogue and hide behind humanitarian intervention to pursue ulterior motives or personal vendetta against sovereign governments. And the safeguards must not be so rigid they prevent actual exercise of the right where necessary, resulting in inaction, and loss of human lives and property.

4.0 HUMANITARIAN INTERVENTION, SOVEREIGNTY AND THE OPTION OF NON-INTERVENTION

Humanitarian intervention can take various forms: diplomacy, humanitarian measures or other peaceful means; it can also, as a last resort, involve the use of force, but only after the UN Security Council's authorization. On the face of it, this goes against the principle of State sovereignty. Sovereignty implies that a State has absolute control over its own internal affairs, as well as external autonomy. This includes control over the governance style, policy making and its disposition towards its citizenry. It has a duty to prevent abuse of human rights within its territory and amongst its people. But what then happens where this abuse is being perpetrated by the state apparatus itself as in cases of genocide and ethnic cleansing? The State here, cannot save itself. It must be rescued from implosion, and its people from destruction. This is where humanitarian intervention becomes necessary. It limits the exercise of State sovereignty by allowing external intervention in protection of human rights. Yet non action is no longer an option.

The humanitarian intervention in Libya revealed that the international community can act in a timely fashion to halt mass atrocity crimes when sufficient political will and operational capacity exists.[403] The swift and unanimous adoption of Resolution 1970 contrasts sharply with the paralysis that overtook the UN during the Rwandan genocide and the painful dithering during the Balkans wars of the 1990s. For context, amidst the repression, violence and mass atrocities that trailed the rule of terror of Muamar Ghaddafi in Libya in the early 2000s, the United Nations invoked Resolution 1970, first mandating the Libyan government to fulfil its responsibility to protect its citizens, and then Resolution 1973 permitting itself to intervene on humanitarian grounds to stem and stop the continued human rights abuse by the Ghaddafi led government.[404] The speed with which both

[403] Supra note 386.
[404] *Ibid.*

resolutions were adopted lends credence to the necessity of action by the UN to prevent the destruction of a State's people by their own government. On a military level, it took two days between the adoption of Resolution 1973 and the imposition of the no-fly zone. When compared to how long it took NATO to initiate operations over Bosnia two decades earlier.[405]

In this sense, Libya represents an important demonstration of what can happen when political will and operational capacity align. When a regime is already committing atrocities against its own people the options for policymakers are narrow, but that does not mean that they do not exist. What must be embraced is timely and proportional responses to all situations warranting humanitarian interventions. Inaction has in the past been too costly for the UN, it will most probably be too costly in the future. Therefore, what must be embraced is commensurate and proportionate action given the merits of each situation. Since no two conflict situations will ever be the same, the right to proportionate and timely humanitarian intervention must be enshrined in international law, and the mechanism for enforcing/exercising same must be put in place and so has to ensure that lives are not irredeemably lost in deference to State sovereignty and due to inertia.

It is important to underline the fact that in the history of the United Nations, the most catastrophic and ignoble decision was not borne out of overreaction or misdirected action, rather out of inaction. The world must never again look on, as mass slaughters are committed on domestic soil as in the Rwandan genocide which recorded almost one million deaths. Perhaps, the morality and ethics of action/inaction should be another consideration. It is amoral for a world that has established a so-called brotherhood in an organization as the UN to ignore the deadly implosions within member States in the name of sovereignty. It is equally amoral for the UN to plunge into unnecessary intervening actions for ulterior or imperialist motives, on domestic soil. It is completely wrong for the UN as well, to place different premium

[405] *Ibid.*

on human lives such that it is swift to respond to one State's failure to live up to its responsibility to protect its citizens, whilst embracing inaction in the instances of some other States. The right to humanitarian intervention must be equitably exercised in the interest of common good. There must be no shortcomings or excessiveness in the exercise of this right. It must not be used as a ploy to rob independent States of their sovereignty.

5.0 CONCLUSION

While the responsibility to protect has become popular and acceptable with time, it is still largely a norm rather than a right or legally binding principle. It is still very much within the realms of persuasion. Ultimately, then, the responsibility to protect is more accurately reflected as a political or moral concept, rather than a legal one.[406] From the perspective of international law, the responsibility to protect, as both doctrine and practice, is seen as 'non-legislative.' That is, it did not institute the equivalent of an amendment to the U.N. Charter or an existing international treaty. The responsibility to protect does not meet the criteria under *opinio juris vel necessitatis*, which would render any action carried out from its guiding foundations to have been a consequence of its legal obligation.[407]

Humanitarian intervention however ought to be a right in international law. This is because it has to do with the use of military force, which must be properly regulated. As a right, it must be balanced out with appropriate safeguards and mechanisms for enforcement and the seeking of redress in the event of its abuse. But perhaps one is merely jumping the gun by advocating for the entrenchment of a right to humanitarian intervention; for in the words of Ian Hurd, there is no consensus over the legality of humanitarian intervention, in part

[406] C. Luck, "The Responsibility to Protect: Growing Pains or Early Promise?". (2010) 24(4) *Ethics & International Affairs*, 349–66.
[407] M. Doyle, "International Ethics and the Responsibility to Protect." (2011) 13(1) *International Studies* Review, 72–84.

because there is no consensus over the sources of international law more generally".[408]

[408] I. Hurd, "Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World," (2011) 25(3) *Ethics & International Affairs*, 293-313.

APPRAISING NIGERIA'S LEGAL FRAMEWORK FOR RENEWABLE ENERGY – A CALL FOR ENVIRONMENTAL FRIENDLINESS

By Oluwatobi Fagbemi*

ABSTRACT

Over the years, *Nigeria's primary source of energy and earnings has been fossil-type energy resources such as crude oil, natural gas, coal, lignite, and tar sands. As the negative effects of pollution and greenhouse gas emissions become more apparent, key players throughout the world agree that it is time to shift the focus to renewable energy. In comparison to traditional energy sources like coal, oil, and natural gas, renewable energy sources like biomass, geothermal, hydropower, solar, and wind are limitless and environmentally friendly. Furthermore, the utilization of renewable energy in Nigeria will offer energy security while also promoting economic development and combating climate change. Renewable Energy (RE) resources are abundant in Nigeria, and it is high time the country utilised its abundant RE resources. This paper analyses the legal framework for renewable energy in Nigeria in calling for a more environmentally friendly approach to sourcing for energy.*

1.0. INTRODUCTION

In each country or region, energy is a critical component for growth and a potent social and economic transformation engine.[409] It is crucial to the overall quality of life and plays an important role in economic progress. The importance of energy in today's world cannot be overstated; it is critical to meeting important individual and communal demands in modern civilization. Lighting and heating a home, running a factory, lighting a street, keeping a hospital open and operational, supplying drinkable water, among other activities, all require energy.[410] The services listed above are the indicators by which a country's progress and degree of development are assessed. Consequently, the quantity of energy consumed by a country at a given point in time greatly influences its economic and social growth.

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[409] M. Akorede et al., "Current Status and Outlook of Renewable Energy Developed in Nigeria" (2017) 36 *Nigerian Journal of Technology (NIJOTECH)*.

[410] *Ibid*.

Over the years, Nigeria's principal source of energy and revenue has been fossil-type energy resources such as crude oil, natural gas, coal, lignite, and tar sands.[411] However, there has been a global trend in favor of renewable energy promotion.[412] As the detrimental impacts of pollution and greenhouse gas emissions become increasingly obvious, and the need for sustainable development becomes more essential in the global energy discourse, key parties throughout the world agree that it has become expedient to shift the focus to renewable energy and other clean energy sources.[413]

Renewable energy is energy derived from renewable resources that are replenished naturally on a human timeline. When compared to traditional energy sources such as coal, oil, and natural gas, renewable energy sources such as biomass, geothermal, hydropower, sun, and wind are unlimited and ecologically benign.[414]

Consequently, renewable energy has come to represent the polar opposite of the bleak prospects of fossil fuels' exhaustibility and hope for humanity's insatiable thirst for energy. In addition, they serve as a panacea of sorts, offering solutions to every challenge posed by conventional energy sources in the sense that they are safe, clean, and inexhaustible. Furthermore, the use of renewable energy in Nigeria would provide energy security to combat climate change and promote economic development.

[411] O. Ojo, "An Overview of the Legal and Regulatory Framework for Renewable Energy Projects in Nigeria: Challenges and Prospects" (2017) 1 *University of Lagos Law Review*, 1.
[412] P. Oniemola, "Legal Response to Support Renewable Energy in China" (2014) 32 *Journal of Energy, Environment and Natural Resources (International Bar Association)*.
[413] W. Esan et al, "Renewable Energy in Nigeria: Law, Regulation, Trends and Opportunities", available at <https://www.ibanet.org/renewable-energy-nigeria> (accessed 22 April 2022).
[414] O. Ajayi, "Nigeria's Energy Policy: Inferences, Analysis and Legal Ethics toward RE Development" (2013) 60 *Energy Policy*, pp. 61-62.

Further to this, Nigeria has an abundance of renewable energy resources such as wind, sun, biomass, and hydropower.[415] However, the blessings are insufficient to ensure that the advantages are reaped. Comprehensive and realistic legal frameworks are required to maximise the efficiency of these renewable energy sources. This article examines the legal frameworks in the form of legislative enactments, regulations, and policies in subsequent subheadings.

2.0 THE LEGAL FRAMEWORK

2.1 Legislative Enactments

The National Assembly is mandated by law to make legislation under Section 4 of the *1999 Constitution of the Federal Republic of Nigeria*. The country's legislature has passed certain legislation pertaining to renewable energy. They are as follows:

2.1.1 The Nigeria Climate Change Act of 2021

Nigeria's *Climate Change Act of 2021* establishes an objective framework for popularizing climate initiatives in accordance with national development aspirations and a net-zero target for the period 2050-2070. The Act codifies national climate policies by requiring the Ministry of Environment to establish a carbon budget, restrict average world temperature increases to two degrees Celsius, and pursue efforts to limit temperature increases to one point five degrees Celsius over pre-industrial levels.[416] It also approves the development of a National Climate Change Action Plan every five years to guarantee that the national emission profile is compatible with the carbon budget targets and measures for identifying climate adaptation and mitigation efforts.[417]

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[415] M., Shaaban, and J., Petinrin,"Renewable energy potentials in Nigeria: Meeting rural energy needs" (2014) 29 *Renewable and sustainable energy reviews* pp.72-84 available at <https://www.sciencedirect.com/science/article/abs/pii/S1364032113006187#:~:text=Nigeria%20is%20equally%20blessed%20with,for%20small%20hydropower%20(SHP)> (accessed 22 April 2022).

[416] *Climate Change Act*, section 19.

[417] *Climate Change Act,* section 20.

The Act mandates both public and private organizations within Nigeria's territorial authority to adopt measures encouraging a low-carbon emission, ecologically sustainable, and climate-resilient society. The Act requires any private entity with 50 or more employees to implement measures to meet the annual carbon emission reduction targets outlined in the Action Plan. The Act also requires such entity to designate a climate change officer responsible for submitting annual reports to the National Climate Change Secretariats on its progress toward meeting its carbon emission reduction and climate adaptation goals.[418]

The Act also creates the National Council on Climate Change,[419] which is to be led by the President of Nigeria and include members from both the public and commercial sectors, civil society, women, youth, and people with disabilities.[420] It gives the Council broad authority to coordinate national climate activities, administer the newly formed Climate Change Fund, collect resources to support climate initiatives, and work with the Nigerian Sovereign Green Bond to fulfil Nigeria's Nationally Determined Contribution (NDC). The Climate Change Fund is intended as a funding source for priority climate activities and initiatives. Promoting and implementing nature-based solutions to reduce GHG emissions and mitigate climate change is recommended.[421]

The Secretariat's obligation to collaborate with civil society organizations, promote climate education, report annually to the National Legislative Assembly on the state of the nation's climate change activities and evaluate reports on the performance of climate change duties by private and public entities in Nigeria enables legislative oversight. The Act also requires ministries, divisions and agencies to appoint desk officers to ensure compliance with the National Climate Change Action Plan. The Council may impose

[418] *Climate Change Act 2021,* section 23, 24.
[419] *Climate Change Act 2021,* section 3.
[420] *Climate Change Act 2021,* section 5.
[421] *Climate Change Act 2021,* section 15.

additional climate-related requirements on public and private enterprises.

2.1.2 *Electric Power Sector Reform Act of 2005*

In 2005, the National Assembly approved the *Electric Power Sector Reform Act (EPSRA)*, which was signed into law by then-President Olusegun Obasanjo (GCFR). The Act is the primary piece of legislation that regulates the Nigerian electricity sector. The Act allows firms to take over the National Electric Power Authority's functions, assets and liabilities and employees in order to promote a competitive power market.[422]

Furthermore, the Act established the Nigerian Electricity Regulatory Commission (NERC) ("the Commission") as the primary regulatory authority to oversee compliance with all of the Act's rules, regulations, and procedures. The Commission is a corporate entity with perpetual succession and the ability to sue and be sued in its corporate name, as well as execute any acts required of corporate bodies by law.[423]

The Act provides a platform for private electricity producers to enter into commercial agreements with now-privatized distributors or even end-users for the sale of power generated by private producers and licensing of electricity generation, including renewable electricity, exceeding One Megawatt (1MW).[424] As a result, any renewable power generation, distribution, or transmission project will only be undertaken with the permission of the Commission.[425] The National Assembly is presently considering a bill to amend the Act.[426]

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[422] O. Jegede, W. Idiaru "Nigeria: Legal Frameworks For Renewable Energy In Nigeria" available at <https://www.mondaq.com/nigeria/renewables/1088088/legal-frameworks-for-renewable-energy-in-nigeria> (accessed 22 April 2022).
[423] Climate Change Act, section 31.
[424] Supra note 408.
[425] *Electric Power Sector Reform Act*, section 62-65.
[426] O. Omonfoman, "EPSRA Bill 2021: Amending an Act to make it worse (1)" *Premium Times*, 27 October 2021.

2.1.3 Environmental Impact Assessment Act (Federal Enactment, 1992)[427]

The Act requires the conduct of environmental impact assessments for projects that are considered to have a major environmental impact, such as the establishment of power plants.[428]

A power developer planning to conduct operations relating to the production of renewable energy power must register the project with the Federal Ministry of Environment for an environmental impact assessment. The Act provides for the evaluation of public or private initiatives that are likely to have a substantial environmental impact.[429]

Furthermore, whenever the Federal Environmental Protection Council determines that an environmental assessment on any renewable energy project is required prior to project start-up, the environmental assessment process may include:

(a) a screening or mandatory study and the preparation of a screening report; or

(b) a mandatory study or assessment by a review panel as provided in Section 35 of the Act and the preparation of a report;

(c) the design and implementation of a follow-up program.[430]

2.1.4. Nigerian Electricity Management Services Agency (NEMSA) Act 2015

Section 6(a)-(x) of the *NEMSA Act* clearly outlines the NEMSA's functions. The National Electricity Management Services Agency (NEMSA) is established by the Act to carry out these tasks. The agency is in charge of enforcing NERC-mandated technical electrical standards and regulations, such as technical inspection, testing, and certification of electrical installations, electricity meters and instruments to ensure the efficient production and delivery of safe, reliable, and sustainable electric power supply, as well as the protection of lives and properties in the Nigerian electricity supply industry.

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[427] *Environmental Impact Assessment (EIA) Act, 1992,* Cap. E2, Laws of the Federation of Nigeria, 2004.

[428] *Ibid*, section 2(1).

[429] *Ibid.*

[430] *Ibid*, section 15.

2.2. Regulations

The NERC is the regulatory body in charge of enforcing the laws outlined in the *Electricity Power Sector Reform Act of 2005*. To that end, Section 96 of the EPSRA authorizes NERC to issue rules that, in the Commission's discretion, are necessary or expedient to be prescribed for carrying out or giving effect to the Act. NERC has enacted a number of regulations to govern the energy sector. These are some examples of regulations:

2.2.1. NERC mini-grid Regulation (2016)

According to the Mini-Grid Regulation's interpretation section, a mini-grid is any electricity supply system with its own power generating capacity, capable of supplying electricity to more than one customer, and capable of operating in isolation from or connected to a Distribution Licensee's network. The term, 'mini-grid' is used in this Regulation to refer to any isolated or interconnected mini-grid producing between Zero Kilowatt (0KW) and One Megawatt (1MW) of Generation Capacity.[431]

With energy demand outstripping supply, transmission constraints, and other issues plaguing Nigeria's on-grid electricity market, the country has begun to implement policy initiatives to support the commercialization and rapid deployment of mini-grids across the country, particularly in rural and exurban areas.[432]

The Regulation specifies a mini-grid regulatory system intended to shelter mini-grid developers from the existing constraints of the country's on-grid energy market and to encourage investment in rural electrification. The Regulation primarily establishes a framework for:

(i) engagement between mini-grid developers and existing distribution companies,

(ii) private retail tariff arrangements for certain operators, and

[431] *Mini-Grid Regulation 2016*, section 3.

[432] Olaniwun Ajayi LP, "The NERC Regulations for Mini-Grids", available at <https://www.olaniwunajayi.net/blog/the-nerc-regulations-for-mini-grids/ > (accessed 22 April 2022).

(iii) compensation for developers in the event of operational expansion by the distribution company licensed to serve the relevant community.[433]

Furthermore, the Regulation mandates that all mini-grid operators must follow current environmental legislations.[434] While the Mini-Grid Regulations are not restricted to renewable projects in theory, the common practice is for mini-grids to be developed as solar-powered projects owing to a variety of technical and commercial issues. It is no surprise that the Mini-Grid Regulations are recognised as a crucial component of Nigeria's renewable energy regulatory framework.[435]

2.2.2 NERC Renewable Energy Feed-in-Tariff Regulations (2015)

In November 2015, the Nigerian government adopted the feed-in tariff regulation (REFIT). The Regulation took effect in February 2016 and replaced the Multi-Year Tariff Order (MYTO) II (2012-2017).[436]

The goal of REFIT is to encourage investment in the industry so that Nigeria's large, mostly untapped renewable energy potential may be realised. It states that 1,000MW by 2018 and 2,000MW by 2020 shall be generated and linked to the grid using renewables such as biomass, small hydropower, wind, and solar. Renewables should account for 50 percent of total power supply for power distribution firms.[437]

In keeping with the policy's aim of diversifying Nigeria's on-grid energy mix, REFIT also provides a specific pricing structure for renewables in the form of feed-in-tariffs, which are intended to be appealing to

[433] *Ibid.*
[434] *Mini-Grid Regulation 2016*, section 17.
[435] Supra note 410.
[436] IEA/IRENA Renewables Policies Database, "Nigeria Feed-in Tariff for Renewable Energy Sourced Electricity", available at <https://www.iea.org/policies/5974-nigeria-feed-in-tariff-for-renewable-energy-sourced-electricity> (accessed 22 April 2022).
[437] Grantham Research Institute on Climate Change and the Environment, "Regulations on feed-in-tariff for renewable energy sourced electricity in Nigeria 2015", available at <https://www.climate-laws.org/geographies/nigeria/laws/regulations-on-feed-in-tariff-for-renewable-energy-sourced-electricity-in-nigeria-2015> (accessed 22 April 2022).

private investors. The feed-in tariff must be approved and determined by the NERC (subject to periodic reviews). REFIT, however, has limits in that it only applies to renewable projects with capacities ranging from 1MW to 30MW.[438]

Notably, off-grid renewable energy initiatives are not covered by the legislation. Given the nature of such projects, where tariffs are planned and negotiated on a strictly bilateral basis with no regulatory participation, this is acceptable.[439]

2.3. POLICIES

2.3.1 National Electric Power Policy (Electric Power Implementation Committee, 2001)

The policy's goal is to guarantee that Nigeria has an electricity supply sector that can satisfy the needs of its citizens in the 21st century in an efficient and cost-effective manner. The National Electric Power Policy establishes the basis for Nigeria's power reform strategy. It also establishes a target of 10 percent renewable energy mix for all new connections by 2020.[440]

2.3.2 Renewable Energy Master Plan (ECN, 2005)

The Renewable Energy Master Plan (REMP) articulates Nigeria's vision and lays out a strategy for enhancing renewable energy's role in achieving sustainable development. The REMP aims to raise renewable power supply from 13 percent of total electricity output in 2015 to 23 percent by 2025 and 36 percent by 2030. By 2025, renewable electricity would account for 10 percent of total Nigerian energy consumption.[441]

The REMP defines Nigeria's vision and lays forth a strategy for boosting renewable energy's role in achieving sustainable development. The REMP is based on the growing convergence of values, principles,

[438] Supra note 429.
[439] *Ibid*.
[440] K. Wong (ed), "Renewable Energy Law Review" (Law Business Research Ltd; 2018).
[441] IEA/IRENA Renewables Policies Database, "Nigeria Renewable Energy Master Plan", available at <https://www.iea.org/policies/4974-nigeria-renewable-energy-master-plan> (accessed 22 April 2022).

and targets embodied in the National Economic Empowerment and Development Strategy (NEEDS), National Energy Policy, National Policy on Integrated Rural Development, Millennium Development Goals (MDGs), and international treaties to reduce poverty and reverse global environmental change.[442]

2.3.3 National Renewable Energy and Energy Efficiency Policy 2015

The National Renewable Energy and Energy Efficiency Policy (NREEEP) is a policy statement established by Nigeria's Federal Executive Council (FEC) in 2015 that serves as the country's overall renewable energy and energy efficiency policy. It lays out the Nigerian government's strategy for boosting the use of renewable energy and energy efficiency resources to drive long-term development across the country. The NREEEP, which was created in accordance with the country's national energy strategy, specifies the government's plans and policies for implementing renewable energy and energy efficiency technologies and practices in order to facilitate Nigeria's green transition.

Among the goals of this strategy are:

- To achieve the national relevance of renewable energy and energy efficiency (particularly in terms of energy security).
- Increase the renewable energy mix to meet or exceed ECOWAS regional policy targets and establish national renewable energy and energy efficiency goals.
- Integrating renewable energy and energy efficiency into national and state-level planning, as well as establishing the enabling environment.

The policy also gives incentives to energy industry participants. There are incentives for local businesses to produce biomass energy conversion systems, solar energy conversion systems, and domestic development of energy storage technology. It also facilitates federal

[442]N. Emodi, N. Ebele, "Policies enhancing renewable energy development and implications for Nigeria" (2016) 4(1) *Sustain Energy*, pp.7-16, available at <http://pubs.sciepub.com/rse/4/1/2/index.html> (accessed 22 April 2022).

and state governments' allotment or gift of land to producers of energy-efficient products and renewable energy projects.

Incentives for customers include tax rebates for households that install energy-efficient appliances and lights. All of these are aimed at creating a favorable climate for investments in renewable energy and energy efficiency.

2.3.4 Renewable Electricity Policy Guidelines 2006

The Renewable Electricity Policy Guidelines (REPG), developed by the Federal Ministry of Power and Steel in December 2006, mandated the Nigerian government to increase renewable electricity generation to at least 5 percent of total electricity generated and a minimum of 5 Terawatt-Hour (TWh) of electricity generation in the country.[443]

The policy guideline aims to achieve the following specific goals:

- Expand electricity generating capacity to meet national economic and social development goals;
- Encourage the diversification of sources of electricity supply through renewable energy and thus improve the country's energy security;
- Increase access to electricity services nationwide, particularly in rural areas;
- Stimulate growth in employment generation through an expanded renewable electricity industry;
- Encourage competition in the delivery of renewable electricity;
- Promote rapid expansion of the renewable-based electricity market through cost-cutting supply-side and demand-side incentives;
- Develop regulatory processes responsive to the unique characteristics of renewable energy-based power supply;
- Create a stable and predictable investment climate in the renewable electricity market; provide adequate protection for electricity consumers through effective regulation; and

[443] *Ibid*.

- Reduce household and outdoor air pollution and greenhouse gas emissions, thereby contributing to improved health and overall social development.

3.0 CHALLENGES OF RENEWABLE ENERGY DEVELOPMENT IN NIGERIA

Challenges to renewable energy development in Nigeria persist despite the laws, rules, and policies highlighted above. Some notable challenges include:

3.1 Cost of Purchase by Consumers

Most renewable energy projects are constructed mostly in unserved, rural regions with lower incomes, resulting in electricity affordability issues. This predicament is exacerbated by the fact that public goods are not supposed to be paid for by citizens of Nigeria.[444]

To mitigate the possible revenue risk, developers may need to explore reasonable consumer financing arrangements, link productive users on-site and maintain a balance of important users and household users who can sustain cycles in demand for power among major users.[445]

3.2 Profitability Concerns by Investors

Another related issue is the high cost of renewable energy solutions. Renewable energy initiatives in the nation have a greater initial capital cost than conventional energy projects.[446] This may persuade a typical Nigerian to buy petrol for 500 naira rather than recharge his solar inverter. This difficulty has an impact on possible investors. They are less inclined to invest in renewable energy sources because they are concerned that they will not be able to generate profit due to the high start-up costs.

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[444] P. Oniemola," "Legal Response to support Renewable Energy in China", (2014) 32 *Journal of Energy, Environment and Natural Resources* (International Bar Association), 179

[445] *Ibid*.

[446] National Planning Commission (NPC), "Report of the Vision 2020 National Technical Working Group on Energy Sector (NPC, 2009) 57.

Other problems include, among others, insufficient legislative enforcement mechanisms, an inadequate finance structure, and a lack of public knowledge of renewable energies.

4.0 RECOMMENDATIONS

4.1 Consumer Financing Arrangements

The problem posed by the inability of a lot of people to pay for renewable energy can be curtailed by financing arrangements. Such arrangements may include instalment payments or loan financing. This method reduces the burden of bulk payment that may otherwise discourage the consumer from purchasing. Consequently, more people will be willing to subscribe to renewable energy products such as solar panels.

4.2 Government Incentives for Investors

Similarly, the government may create incentives such as tax reliefs or grants to investors who contribute to renewable energy sources. This will aid in allaying the fears of non-profitability which investors may have. Such fear is traceable to the purchasing power of consumers. Accordingly, if investors are confident of breaking even in their enterprise, they will be more inclined to remaining in the market and providing various products to the consumers.

4.3 Public Sensitization

This is a very important action that will largely impact the development renewable energy. It is noteworthy that consumers act on the information they have on various products, and this is why several corporates advertise the benefits of their products to consumers to influence the consumer's decision to purchase. This strategy will replicate the same effect with consumers of energy. Sensitization of the public on the advantages of renewable energy will greatly influence them to subscribe more to renewable energy. This is why the government and investors alike should sensitize and encourage the public to subscribe to renewable energy.

5.0 CONCLUSION

This paper has examined a critical aspect of renewable energy in Nigeria, which is the legal framework. The approach to the examination was to categorize them under various subheads, namely legislations, regulations and policies, whilst noting the major provisions of the various legal framework. A brief voyage into some other challenges and recommendations for solving such challenges was likewise considered. The underlying theme of the article is to join several stakeholders in promoting an environmentally friendly regime in sourcing for energy.

As the global concern shifts from conventional energy sources to renewable energy, stakeholders in the Nigerian energy sector must set the pace by meeting the standards and lofty aspirations projected in the laws, regulations, and policies identified above in order to have a sustainable and environmentally friendly country.

ASSESSING CORPORATE SOCIAL RESPONSIBILITY UNDER THE PETROLEUM INDUSTRY ACT

By Israel Adekunle Adeniyi*

ABSTRACT

Over the years, the operational activities of oil companies have culminated into serious environmental degradation, deprivation of means of livelihood, distraught protests, and other violent activities in host communities. Many of the multinational corporations (MNCs) have resorted to the practice of corporate social responsibility (CSR) through interventionist agencies. Remarkably, the recently enacted Petroleum Industry Act, 2021, has been regarded as a watershed in the chronicles of the government's efforts towards meeting international best practices in the oil and gas sector in relation to environmental sustainability and CSR. This paper adopts a doctrinal research method. This paper examines the concept of CSR; that is, how MNCs manage their operational activities to ensure positive impact on the society. The kernel of this paper is the need to further the reassessment of CSR in the sector in light of the host community development trust under the Petroleum Industry Act.

1.0 INTRODUCTION

Nigeria has some of the largest natural gas deposits in the world, with 180 trillion cubic feet of proven reserves.[447] However, the country does not have the capacity and indigenous expertise to develop its oil reserve.[448] The Nigerian government contracts with multinational corporations (MNCs)[449] in the production of oil, and takes a portion

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[447] International Trade Administration, "Nigeria – Country Commercial Guide" available at https://www.trade.gov/nigeria-country-commercial-guide (accessed 07 March 2022).

[448] See O. Mbalisi and C. Okorie, "Implementation of Corporate Social Responsibility by Oil Companies in the Niger Delta Region of Nigeria: Myth or Reality" (2020) 14(1) *African Research Review: An International Multidisciplinary Journal, Ethiopia,* p. 119-132.

[449] These are Shell Petroleum Development Company of Nigeria Limited (SPDC), Chevron Nigeria Limited (CNL), Mobil Producing Nigeria Unlimited (MPNU), Nigerian Agip Oil Company Limited (NAOC), Elf Petroleum Nigeria Limited (EPNL), Texaco Overseas Petroleum Company of Nigeria Unlimited

of the revenue derived from oil production. As the largest oil producer in Africa, Nigeria's oil and gas sector is its largest economic sector. The ever-growing presence of these MNCs and their increasing operational activities has led to unrest, which has been remedied by the adoption of CSR.

Indubitably, CSR has increasingly and unavoidably become important in light of the repressive influence of MNCs as a backlash of globalization amidst the absence of enforceable international legal instruments and weak domestic laws to control the unconscionable exercises of MNCs. Over the years, management of oil companies have often shirked responsibility for the problems and hazardous consequences of their operational activities which threaten lives and means of livelihood, and make life unbearable for the host communities. An instance is the intermittent crises present in the Niger Delta Region of Nigeria.[450]

Another instance is the Bodo oil spill, amongst many other oil spills in Nigeria. The environmental impact of the exploratory activities of these oil corporations has affected their host communities in adverse ways, and as a means of reprisal, members of the host communities sabotage and vandalize operating facilities, engage in violent activities such as kidnapping of top staff of MNCs, while some resort to suing the company for damages.[451] Indeed, this malaise has prompted the MNCs to retrace their steps and consider not just what they can take from the society, but also what they can give back. The defunct ideology was exploitation for maximum profitability and wealth maximization.[452] The operative idea is now based on CSR – how these

(TOPCON), B.P, Statoil, Total, Pan Ocean, British Gas, Tenneco, Deminex, and Sun Oil. SPDC, nonetheless, is the biggest oil producer in Nigeria.

[450] The Niger Delta is located in Southern Nigeria. It comprises Akwa-Ibom, Bayelsa, Cross-River, Edo, Rivers and Ondo States. The region is of great value to the nation, given the region's massive oil wealth which has over four decades accounted for more than two-third of the national income.

[451] O.J. Chukwuebuka, O.O. Obiora and O.E. Ikechukwu, "Corporate Social Responsibility and Financial Sustainability of Oil and Gas Firms in Nigeria" (2021) Vol. 21(19) *Asian Journal of Economics, Business and Accounting,* p. 48.

[452] *Ibid*.

corporations can reduce litigation risks and societal plaints by diverting their resources to improving the lives of their host communities.

In March 2007, an attempt was made to introduce the Corporate Social Responsibility Bill as a legalized framework. Another attempt was made in 2011, when the Federal Government of Nigeria and SPDC invited the United Nations Environmental Program for an independent assessment and recommendation, which was corresponded in 2014. Various other attempts towards reforming the oil and gas sector in 2009, 2012, 2018, and 2020 were similarly futile. Finally, the much-anticipated reform came in 2021, with the enactment of the *Petroleum Industry Act* (PIA). Thus, this paper examines the concept of CSR; that is, how MNCs manage their operational activities to ensure positive impact on the society. Remarkably, the recently enacted *Petroleum Industry Act, 2021*, has been regarded as a watershed in the chronicles of government efforts toward meeting emerging best practices in the oil and gas sector in relation to environmental sustainability and CSR.

This paper examines the concept of CSR. Specifically, it examines how MNCs manage their operational activities to ensure positive impact on the society. This paper provides a concise overview of the oil and gas sector, as well as the legal status of CSR in the sector. The kernel of this paper is the need to further the finetuning of CSR, in light of the Host Communities Development Trust as CSR contrivance under the *Petroleum Industry Act*. As a matter of fact, since the emergence of the CSR concept in Nigeria, it was espoused mainly as an optional and non-obligatory responsibility for oil companies.[453] This was the status quo until the passing of PIA. This paper canvasses for a reassessment of extant CSR frameworks.

[453] H. Ijaiya, "Challenges of Corporate Social Responsibility in the Niger Delta Region of Nigeria" (2014) Vol. 3(1) *Afe Babalola University: Journal of Sustainable Development Law and Policy*, p. 62.

2.0 CSR CONCEPT

In the international fora, the concept of corporate social responsibility has gained massive approval. In Nigeria, CSR is becoming, at a fast pace, an intriguing discourse, as there has been a noticeable interest and growing literature on the subject. While there is absence of a universally accepted definition of the concept, there appears to be a consensus on its contextual meaning – the demonstration of responsible behavior on the part of a business or an organization toward the society and the environment. There is a plethora of definitions of CSR.

The World Business Council for Sustainable Development (WBCSD)[454] defines CSR as:

> the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large.[455]

The European Green Paper views CSR as

> a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with stakeholders on a voluntary basis.[456]

[454] This is one of the international institutions at the vanguard of CSR compliance by governments and companies.

[455] O. Amao, "Emergent state practice on the creation and practice of standards on corporate social responsibility" (2014) 1(1) *State Practice and International Law Journal*, 118; J.G. Frynas, "Beyond corporate social responsibility: Oil multinationals and social challenges" (2009) Vol. 10 (Cambridge: Cambridge University Press, 2009) p 499; E. Ekhator and I. Iyiola-Omisore, "Corporate Social Responsibility in the Oil and Gas Industry in Nigeria: The Case for a Legalised Framework" in E.G. Periera, R. Spencer and J.W.. Moses (eds), *Sovereign wealth funds, local content policies and CSR: developments in the extractives sector*, (London: Springer, 2021), pp 438-458; E. Ekhator, "Corporate Social Responsibility and Chinese Oil Multinationals in the Oil and Gas Industry of Nigeria: An appraisal", (2014) Vol. 28 *Cadernos de Estudos Africanos*, pp 118-140.

[456] E. Ekhator, "Corporate Social Responsibility and Chinese Oil Multinationals in the Oil and Gas Industry of Nigeria: An appraisal"; K. Amaechi, et al , "Corporate social responsibility in Nigeria: Western mimicry or indigenous influences?" (2006) 24 *The Journal of Corporate Citizenship*, p. 88.

Mallam Baker, in a similar vein, succinctly describes CSR as "how companies manage the business processes to produce an overall positive impact on society".[457] In essence, CSR can be defined as a measure of ethical, legal, moral, and philanthropic obligations which an organization owes to the society. The metric of CSR involves making impact through the provision of sustainable projects and improving the overall welfarism of the host communities. It is desirable that CSR is holistically viewed, not as the obligation of only stockholders, but also of the various functional parts of the organizations, as well as relevant external constituencies.

3.0 AN OVERVIEW OF NIGERIA'S OIL AND GAS SECTOR

Nigeria is the largest producer of oil in Africa, ranked 15th largest producer in the world with approximately 1.9 million barrels produced daily.[458] It is beyond doubt that the oil and gas sector is the largest economic sector in Nigeria. Being among the world's top exporters of liquefied natural gas (LNG), the Oil and Gas sector is the largest source of government revenue, as Nigeria's largest export product is produced from the sector. The oil and gas sector remains the mainstay of the Nigerian economy as a result of the excessive dependence on revenue generated from crude oil exports by the government.[459]

The Niger Delta Region, where the bulk of oil exploration activities take place, has a significant presence of MNCs. Perennially, environmental neglect, crumbling infrastructure and services, high unemployment, social deprivation, and abject poverty have become the scourge of the region.[460] Over the years, the region has turned

[457] *Supra* note 450 at p. 62.
[458] Worldometer, "Nigeria Oil Reserves, Production and Consumption Statistics" available at https://www.worldometers.info/oil/nigeria-oil/ (accessed 10 March 2022).
[459] It is estimated that revenues from Nigeria's oil and gas sector represent about 65% of government total revenues, and accounts for 90% of the country's foreign exchange earnings.
[460] *Supra* note 450 at p. 61.

into a hotbed of conflict and violent activities by local agitators. The host communities have been relegated to the background in the process of decision-making on matters affecting their lives and environment.[461] The negative impacts of the activities of the MNCs in the oil and gas industry in Nigeria include gas flaring, oil spills, environmental pollution, negative social impacts, conflict and violence, amongst others.[462] CSR has thus been viewed by many MNCs as a means of addressing these pressing problems facing the host communities.

4.0 THE SIGNIFICANCE OF THE PETROLEUM INDUSTRY ACT AS CSR FRAMEWORK IN THE OIL AND GAS SECTOR OF NIGERIA

For nearly twenty years, the Nigerian government was in pursuit of a consolidation of legislation with amendments that reflected contemporary issues arising in the oil and gas sector. Irrefragably, previous attempts to pass the *Petroleum Industry Bill* in 2009, 2012, 2018, and 2020 proved futile. However, 2021 was a notable year in the travails of the government toward meeting emerging best practices in the oil and gas sector in relation to environmental sustainability and CSR.[463] The *Petroleum Industry Act* (PIA) (hereinafter referred to as the Act), which is divided into four major sections, provides a legal regulatory and fiscal governance framework for the oil and gas sector through a commercialization approach.

Chapter three of the Act makes provisions with regard to the host community.[464] The host communities are important stakeholders for successful and seamless operations in the oil and gas sector, and as

[461] This is unfortunately the case because by virtue of the relevant extant laws, it is the Federal Government of Nigeria that can negotiate or give concessions for oil explorations by MNCs. Section 44(3) of the 1999 Constitution of the Federal Republic of Nigeria, as altered, vests the ownership and control of all mineral oils and natural gas in the Federal Government of Nigeria.
[462] *Supra* note 453 at p. 123.
[463] President Muhammadu Buhari signed the Petroleum Industry Bill into law as the *Petroleum Industry Act, 2021* on 16th August, 2021.
[464] *Petroleum Industry Act, 2021*, ss. 234-257.

such, the Act has made provisions to cater to the needs of the host communities, and foster the development and sustainability of their environment. By virtue of the provisions, the host communities are the littoral communities or any other community as determined by the settlor.[465] The settlor refers to "a holder of an interest in a petroleum prospecting license or petroleum mining lease, whose area of operation is located in or appurtenant to any community or communities".[466]

Importantly, the Act establishes the host communities' development trust (hereinafter referred to as the Trust). The settlor is to be responsible for the trust and administer the same for the benefit of the host communities. Pursuant to the *Companies and Allied Matters Act* 2020,[467] the Trust is expected to be incorporated by a board of trustees who shall be appointed and authorized by the settlor.[468] The board of trustees, which is appointed by the settlor, shall appoint a management committee that shall be saddled with the general administration of the Trust on an ad hoc basis.[469] With respect to upstream operations, in cases where there is more than one entity that rightly fits under the definition of a "settlor" who are apparently operating under a joint operating agreement, collective responsibility of the settlors shall be undertaken.[470]

The Act mandates the settlor to make an annual contribution to the applicable host communities development trust fund of an amount equal to 3% of its annual operating expenditure of the preceding financial year.[471] This contribution is to be tailored in line with upstream petroleum operations of the settlor affecting the host communities. Notably, the Trust fund is to be expended for the benefits of the host communities by the board of trustees, according to the direction of the settlor. The settlor also oversees the budget

[465] *Ibid,* section 235(3).
[466] *Ibid*, section 318.
[467] *Companies and Allied Matters Act,* 2020.
[468] *Supra* note 461, section 235(4).
[469] *Ibid* section 248.
[470] *Ibid* 18, section 235(2).
[471] *Ibid* 18, section 240(2).

and development plan drawn by the board of directors for the host communities the Trust fund. The Trust fund can be funded by donations, gifts, grants or honoraria and profits which accrue to the Fund's reserve.

Reflecting its CSR inclination, the Act outlines the objectives of the Trust to include:

> the undertaking of infrastructural development of the host communities; the facilitation of economic empowerment opportunities for the host communities; the advancement and propagation of educational development for the host communities; supporting healthcare development for the host communities; supporting local initiatives within the host communities while enhancing environmental protection; supporting local initiatives within the host communities which enhance security; investment of excesses from the Trust fund on behalf of the host communities; and assisting in any other beneficial development purpose for the host communities as may be determined by the board of trustees.[472]

Furthermore, the Act provides that the board of trustees shall annually allocate funds received under the Trust in streamlined proportions.[473] 75% of the Trust fund shall be allocated to the capital fund for capital projects. 20% shall be allocated to the reserve of the Trust fund to be invested for use in case the settlor ceases contributions. An amount not exceeding 5% shall be allocated for the costs of administration of the fund. It is noteworthy that the Trust funds are to be exempted from taxation. However, payments made by settlors to the fund are taxable.

The penalty for non-compliance by a settlor with the provisions in the foregoing, that is, upon failure to incorporate a Trust or comply with its obligations with respect to host communities, is revocation of the settlor's operating license or lease.[474]

[472] *Ibid*, section 239(3)(a)-(i).
[473] *Ibid,* section 244.
[474] *Ibid,* section 238.

The Act is laudable in this respect because it devises a sustainable framework by which license holders and other stakeholders in the petroleum industry can administer their corporate social and environmental responsibilities.[475] The creation of an environmental remediation fund with monies to be set aside by licensees and independently managed, as a condition for grant of a license or lease and prior to the approval of the environmental management plan, is salient. It is an important measure to revamp the environment and remediate damage in the event of pollution or degradation from oil exploration.

The Act is, commendably, novel with its initiation of a pattern of interventionist trusteeship in the oil and gas sector, as seen with the Trust. The Trust, by necessary implication, seeks to formally create a binding memorandum of understanding (MoU), and to legalize the traditional CSR obligations between the international oil companies on the one hand and the host communities on the other hand.[476] This makes feasible the attainment of sustainable socio-economic and infrastructural development in line with the needs of the host communities. This also does not exempt appurtenant communities which may be affected by the activities of the settlor but are not host communities per se.

With the establishment of the Trust, and given that political interference in the administration of the trust is minimized, the incidence of vandalism, bunkering and other violent activities would be a thing of the past. Some of the causes of these destructive acts are directly proportional to the level of underdevelopment and disproportional utilization of the lean resources usually approved and released to the intervention agencies.[477] The MNCs are notorious for reneging on their MoUs and CSR to the host communities. These

[475] PWC, "The Petroleum Industry Act: Redefining the Nigerian Oil and Gas Landscape" available at https://pwcnigeria.typepad/com/files/the-petroleum-industry-act-insights-series_august2021.pdf (accessed 11 March 2022).
[476] J. Akpan, "Petroleum Industry Act in Nigeria: An Analysis of the Impact of the Novel Host Communities Development Trusts Provision" (2021) Vol. 9(7) *Global Journal of Politics and Law Research, p.* 42.
[477] *Ibid*.

impetuously foment violent responses from the host communities. However, with the Trust in place, there is full optimism that all of these will cease and become a thing of the past.

5.0 GAPS IN THE PETROLEUM INDUSTRY ACT

Notwithstanding the novel provisions of the Act as a CSR legal framework in the petroleum industry, some of its provisions are fraught with lacunae and potential challenges. Incontestably, the Act advances the goals and objectives of CSR and environmental sustainability which were previously highly disputed in political spheres and in scholarly discourses over the years. There is however a cloud of pessimism hovering over the efficacy of some novel provisions of the Act in fine tuning the erstwhile unpalatable state of CSR in Nigeria's oil and gas sector.

The Act, in its provisions, portends potential harm to the host community. By virtue of section 257(2), a host community is liable to forfeit its entitlement in the event of vandalism, sabotage or other forms of civil unrest which result in damage to facilities used in oil production or other designated equipment within the vicinage of the host community. The intention of the drafters of the Act in this provision is to stimulate the host communities to regard these facilities as their own or as jointly owned properties, and forbid any act of infraction or malfeasance against the settlor. However, consequent culpability may bring a sense of loss of legitimacy in the host communities and thereby result in further proprietary damages and mayhem at a larger scale. More so, the MNCs are notorious for reneging on their MoUs and CSR to the host communities.

Ordinarily, the creation of the Trust increases the administrative responsibilities of settlors. However, the Act is in reality riddled with bottleneck bureaucracy. Foremostly, the host community development plan is subject to the approval of the commission.[478] The commission also superintends the administration, management, and

[478] *Supra* note 461, section 251(4).

utilization of the Trust fund.[479] The settlor is saddled with determining the selection process, meeting procedure, financial regulations, administrative procedures, remuneration, discipline, qualification, suspension, removal, and other allied matters relating to the activities of the Board of Trustees.[480] The board of trustees is similarly required to set up management committees for the Trust.[481] In the same vein, the management committees shall also set up an advisory committee [482] which has similar functions to the management committee. This excessive chain of bureaucracy may eventually defeat the purpose of achieving CSR in the sector, as bureaucratic elements impede efficiency.

Corruption is endemic in the Nigerian petroleum industry. Execution of CSR initiatives have more often than not been subterfuges of corrupt exploits by MNCs. For instance, development projects in the oil-producing communities in the Niger Delta region have either been diverted or abandoned, often as a result of corruption.[483] The PIA is a new law and at this time, one cannot state categorically that the law will or will not be subject to the corrupt practices and maladministration that have dogged the Nigerian oil and gas industry.[484] Notwithstanding, the efficacy of the Act remains to be tested.

Section 240(2) of the Act provides that the settlor makes an annual contribution to the applicable host communities development trust fund of an amount equal to 3% of its annual operating expenditure of the preceding financial year. This may pose as a cover for graft and corruption. The subsection is vague with regard to the applicable

[479] *Ibid*, section 235(6).
[480] *Ibid,* section 242(3).
[481] *Ibid,* section 247.
[482] To be referred to as the host communities advisory committee.
[483] *Supra* note 445 at p. 129; See also B. Naanen and P. Tolani, *Private gain, public disaster: Social context of illegal bunkering and artisanal refining in the Niger Delta* (Port Harcourt: Panam Nigeria, 2014) p. 16.
[484] J. Debski, "Corporate Social Responsibility under the Petroleum Industry Act 2021: Achieving Environmental Sustainability through Multi-Stakeholder Partnership" (2022) Vol.3 (1) *African Journal of Engineering and Environment Research,* p. 11.

operator through which a settlor is to make its annual contribution. This dubiety created by the vagueness of the provision of the subsection may be used as a leeway by an unscrupulous settlor for laundering funds in the guise of making contribution, when it is not required of such settlor by the Act.

In another vein, the Act defeats the importance of achieving corporate and community engagement between the settlor or MNCs and the host communities. This is because the host community development plan is subject to review and reporting to the commission.[485]

6.0 THE NEED FOR REJIGGERING

In light of the challenges highlighted above, there is a need for rejiggering the existing and defective CSR provisions under the PIA. The rationale is not far-fetched. In order to achieve environmental sustainability and vibrant CSR practice in the oil and gas sector, some of these provisions need to be amended.

In some other quarters, it has been argued that contribution made by settlors in the form of host community trust is a duplication of the existing Niger Delta Development Commission (NDDC) levy.[486] If coexistence between the development commission and the host community trust administrations to enhance economy of scale in providing infrastructural development is not feasible, it may become necessary to collapse the NDDC arrangement to accommodate the host community structure. Especially, should the host community trust prove to be more effective in fostering development in the host communities, it would become compelling to abrogate the NDDC arrangement.

As earlier posited, there is excessive bureaucracy in the administration of CSR initiatives, as provided in the PIA. Bureaucratic processes are often riddled with political interference and also undermine the

[485] See *PIA*, section 252(a)-(g). The commission refers to the Nigerian Upstream Petroleum Regulatory Commission.
[486] *Supra* note 472.

efficiency of the apparatuses that are set up. This would no doubt impede the efficiency of the commission and the trust. It is most probable to be a constraint to actualizing the aims and objectives of CSR in the industry. For the CSR objective to be realized, facilitation must be embarked on in lieu of the mandate approach that is espoused in the Act. The Nigerian government can provide enabling legislation and funding support. An example of enabling legislation is incentivizing CSR performance. This is a very strong strategy the Chinese government uses.[487] Through partnership between the government and the oil companies, funding can be combined and collaboration engaged in, without politicization, so as to better achieve CSR objectives.

Since the board of trustees is to be appointed by the settlor, the affairs of the board must be insulated from all forms of political interference. That is, transparency must be ensured in the appointment and composition of the board to ensure that it performs its duties diligently and without external influence. Similarly, the persons who are to be appointed unto the board and the management committee of the trust should be credible and professional indigenes of the host communities.

Importantly, there is a need to increase the 20% reserve fund. Similarly, the 3% annual expenditure contribution by the settlor should also be increased. The former may be increased to 30% while the latter should be increased to 5%. Most CSR projects undertaken by oil companies are usually half-completed or total failures. This increment will thus ensure financial adequacy in the execution of the various CSR initiatives.

The importance of multi-stakeholder partnership amongst relevant actors cannot be overstressed. Traditionally, the Nigerian oil and gas industry has been bedeviled with excessive governmental control. The federal government controls and commands the hook and sinker of the sector. This is unsuitable for fostering development of CSR, creativity, and maximization of resources in the industry. An enabling

[487] *Supra* note 481.

environment is necessary to further CSR objectives and achieve environmental sustainability. An enabling environment implies a synergy of corporate responsibilities and engagement by the government, oil and gas companies, and host communities, as well as key players in the industry. Using this method, the best CSR policies can be actualized and environmental sustainability guaranteed.

7.0 **CONCLUSION**

The advent of the PIA has brought a paradigm shift from superficial and delusory compliance with international CSR guidelines by oil companies to a (mandatory) domestic legalized framework for the adoption of CSR. Through the enactment of the PIA, CSR has transformed from its erstwhile status as soft law to hard law. That notwithstanding, its being a hard law does not guarantee full implementation. Indeed, the mandatory nature of CSR under the PIA remains to be tested.[488] The suggested multi-stakeholder partnership between the government, oil and gas companies, and host communities through an enabling environment will indubitably propel the achievement of the objectives of CSR and environmental sustainability. Supplementing the requisite fund contribution by the settlors – a need for the amendment of the PIA – will help to forestall the recurrence of a dearth of financial resources to complete or execute CSR projects in host communities. Insulating the processes for the appointment and composition of the board of trustees from political interference will also go a long way in enhancing the efficiency of the board, and bolstering the aims and objectives of the establishment of the trust by the board of trustees who are saddled with the administration and management of the trust. The need to rid the existing CSR framework of excessive and bottleneck bureaucracy also cannot be overemphasized.

[488] *Ibid*.

SIMPLIFYING THE DOCTRINE OF RENVOI UNDER CONFLICT OF LAW RULES

By Philip Oladimeji*

Abstract

The doctrine of Renvoi is a topic in Conflict of Laws that posits a stumbling block to students seeking to understand its extent and how it applies to international matters. This paper attempts to simplify the concept of Renvoi, its applicability, and its suppositions as stated by early 20th-century English legal scholars. The paper begins with an introduction to the doctrine of Renvoi and its meaning per Private International Law; and then proceeds to distill the doctrine further by evaluating the theories concocted by early scholars as to its functionality in law.This paper also looks at the often-quoted types of Renvoi and simplifies the difference(s) between these types as much as possible. Following this, the paper analyses the challenges brought to bear by the application of Renvoi in international matters – challenges that have led to rising arguments for and against the application of the doctrine as is.

1.0 INTRODUCTION

An understanding of the concept of Conflict of Law Rules begins with comprehending what International Law entails, as International Law is the foundation upon which the topic of Renvoi is built. Although much difficulty may not exist in arriving at a universally acknowledgeable definition of International Law, this does not mean that significant effort will not be required in concocting an umbrella-like meaning of the term, covering all its aspects and subsets. Nonetheless, the object of International Law itself provides a premise upon which a definition can be concocted that may be universally accepted; for what is International Law but a stratum of comprehensive rules, policies, resolutions, and instruments governing correspondence amongst sovereign states, international organizations, and multi-national private associations?

According to the United Nations, International Law clarifies the legal responsibilities of States in their interrelationship and their treatment

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of individuals within their territories.[489] Recourse can also be made to the definition given by Robert Beckman and Dagmar Butte, which is of trite significance to this discourse. According to the learned scholars, International Law consists of:

> The rules and principles of general application dealing with the conduct of states and international organizations in their international relations with one another and with private individuals, minority groups, and transnational companies.[490]

Besides dealing with relations amongst states, international organizations, and private bodies, International Law also deals with a wide range of issues on a trans-border scale, including respect for fundamental human rights, migration, war, and problems of nationality, among others.[491] These issues are ably addressed regularly because within the field that is International Law, the entities referenced above – states, international organizations, and private entities – are vested with international legal personality, giving them necessary rights and obligations which can be enforced within a transboundary sphere.[492]

In understanding International Law further, it is noteworthy that the field may be viewed from two separate but interdependent perspectives: Public and Private International Law. Public International Law consists of the many conventions and treaties that regulate state-state relations and acts performed by international organizations. In contrast, Private International Law consists of domestic or national laws within states that regulate transboundary relations initiated by private entities vested with international legal personality.

Private International Law, which is the focus of this discourse, is defined as "a collection of procedural rules which determine which

[489] United Nations, "What is International Law?" available at https://www.un.org/en/our-work/uphold-international-law (accessed 8 March 2022).
[490] Robert Beckman and Dagmar Butte, "Introduction to International Law" available at https://www.ilsa.org/Jessup/Jessup%20Competitor%20Resources/intlawintro.pdf (accessed 8 March 2022).
[491] *Supra* Note 486.
[492] *Supra* Note 487.

legal system and jurisdiction shall apply to a particular dispute."[493] Private International Law is also regarded as Conflict of Law Rules because it comprises of domestic laws that provide directives applicable to cases wherein two or more laws from different countries are related and the appropriate law to be applied to the case must be determined.

Private International Law of Conflict of Law Rules thus governs cross-border transactions initiated by private entities. An excellent example of a cross-border transaction would occur where a Nigerian decides to purchase ten cars from Tesla headquartered in the U.S.A, and the cars are delivered in bad condition. If the Nigerian desires to sue Tesla, specific questions will arise about the proper court or forum at which the Nigerian should issue his or her case – a Nigerian Court or an American Court? Also, what law should govern the case, Nigerian law or American law? If a judgement is given in a Nigerian Court, how will it be enforced in the U.S.A and vice versa? These questions are answered by Conflict of Law Rules or Private International Law, which is both substantive and procedural and sets out important elements to the determination of such matters, including the proper court or forum for conflict resolution, and rules on the enforcement of a foreign judgement, amongst others.

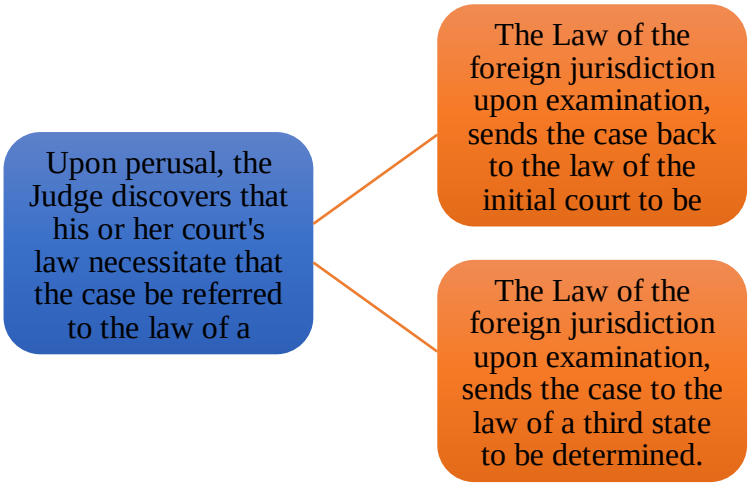
2.0 THE DOCTRINE OF RENVOI

The word 'Renvoi' originates from the French language and translates to 'dismissal', 'send back' or 'return unopened'.[494] When a case with foreign elements like the example given above arises before a court, it is expected that a conflict of laws will arise – a conflict as to which law should be applied in determining the matter. The process whereby the initial court resolves this conflict of laws by recourse to a foreign jurisdiction's rules, which then sends the case either back to the law of the initial court or the law of a third state, is the doctrine of Renvoi.

[493] Abhay, "Public international law *v.* private international law" available at https://blog.ipleaders.in/public-international-law-v-private-international-law/ (accessed 8 March 2022).
[494] Pearse Trust, "The Rule of Doctrine of Renvoi Explained" available at https://www.pearse-trust.ie/blog/bid/110454/the-rule-of-doctrine-of-Renvoi-explained (accessed 8 March 2022).

Renvoi is a system that allows the possibility for the foreign law declared as competent by the conflicting norm of the forum court, to decide in turn, to make a Renvoi through its own conflicting norms, to another law, either to the approached court's law or to the law of a different legal system.[495]

See the following illustration below simplifying the process that is Renvoi:



Note that under the doctrine of Renvoi, it is not just the ordinary law of the foreign jurisdiction administering it that is taken into account by the domestic or initial court but the rules which the courts of that foreign jurisdiction will apply in the given case i.e., its Conflict of Law Rules or Private International Law. This is the reason why upon examining the law of the foreign jurisdiction, the case can be sent back to the initial court or the law of a third state for determination because according to the Conflict of Law Rules of the said foreign jurisdiction, the case must be transferred to another jurisdiction – the question that arises is if it is the jurisdiction of the initial court or a third one. In situations where the law of a jurisdiction is applied excluding its conflict of law rules, Renvoi is said to have been rejected.[496]

[495] B. Daniel, "The Renvoi in Private International Law" (2013) 3 *International Journal of Social Science and Humanity*, p. 66.

[496] Dr. H. Olaniyan & E. Ojomo, "Explanatory Notes and Diagrams on Renvoi" available at http://www.yararena.org/uploads/Explanatory%20Notes%20on%20Renvoi.pdf (accessed 20 March 2022).

The doctrine of Renvoi holds the benefit of preventing forum shopping, which is when a party attempts to have his or her action tried in a particular court or jurisdiction where they feel they will receive the most favorable judgment.[497] It also ensures that the appropriate law is applied to a case, regardless of the venue where the case is dealt with.

2.1 Theories of Renvoi

According to a learned scholar, Ernest G. Lorenzen, there are two prominent forms and theories in which the doctrine of Renvoi has appeared since its inception under English law and Jurisprudence and through which the doctrine of Renvoi can be analyzed: the theory of Renvoi proper, and the Mutual Disclaimer of Jurisdiction theory.[498]

2.1.1 The Theory of Renvoi proper

Under this theory, the term "Renvoi" has two notions – the notion of a return reference and the notion of a forward reference. The notion of return reference is regarded as the narrower form of the theory of Renvoi proper and has the following meaning:[499]

> If, for example, the English law directs its judge to distribute the personal estate of an Englishman who has died domiciled in Belgium per the law of his domicile, he must first inquire whether the law of Belgium would distribute personal property upon death per the law of domicile and if he finds that the Belgian law would make the distribution per the law of nationality – that is, English law, – he must accept this reference back to his law.

From this, it is seen that the notion of a return reference involves initial recourse to the law of the forum (*lex fori*) before foreign law is consulted, which then returns the determination of the case to the law of the initial forum. This is Renvoi by remission.

[497] Black's Law Dictionary, p. 590 (5th ed. 1979).
[498] E. Lorenzen, "The Renvoi Doctrine in the Conflict of Laws. Meaning of 'The Law of a Country'" (1918) 27 *Yale Law Journal*, p. 509.
[499] *Ibid.*

What makes this perspective to the theory of Renvoi proper unique is the obvious prevalence of the internal law of the forum in all cases where there is a requirement to consult the law of a foreign jurisdiction, and the Conflict of Law Rules of the forum differ from those of the foreign law, which is incorporated by reference. The Renvoi here is a reference back, not to the foreign country's whole law including its different rules of Private International Law, but simply to its internal law. Thus, the Renvoi doctrine of the foreign jurisdiction or its conflict of law rules is not taken into account, just the ordinary law administering that jurisdiction. However, this narrower form of the theory has no special basis unless there is a desire on the part of the judge to apply the forum's internal law.

Bentwich, who appears to accept the Renvoi theory in this form, advances the following argument in its support:

> Suppose a case where the *lex fori* (hereinafter called A) submits the matter to the *lex domicilii* (B), and B refers the matter back to A as the law of the nationality. A accepts the *Renvoi* and applies its law. If we regard first principles, we see that what has happened is this. Law is primarily sovereign over all matters occurring within the territory, and so A would ordinarily apply to the succession. A from motives of international comity and to secure a single system of succession resigns its ordinary jurisdiction to B. But B, because of its special juristic conceptions, does not take advantage of the sacrifice or accept jurisdiction. A's primary jurisdiction consequently is properly exercised, and there is no ground for A to decline to accept the renunciation of B since it thereby puts into operation its fundamental principle of regulating every matter within the territory.[500]

On the other hand, under the broader form of the theory of Renvoi i.e., the notion of a forward reference, the law of the initial forum refers to the determination of the case to the jurisdiction or legal system of the foreign country whose law is incorporated. Then, the Judge of the forum is expected to determine the case as the courts of the foreign country would have done it if faced with the matter. The

[500] N. Bentwich, *The Law of Domicile in its Relation to Succession and the Doctrine of Renvoi* (Sweet & Maxwell: London, 1911) p. 184.

early English and American cases of the 1910s expressed this wider form of the theory of Renvoi proper, as much as they sanctioned the use of the doctrine of Renvoi at the time.

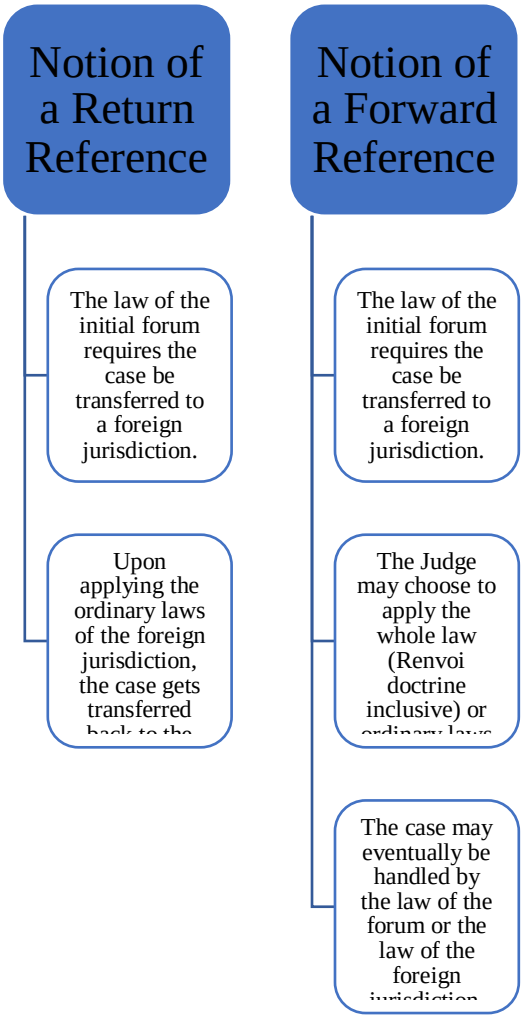
In *Collier* v. *Rivias*,[501] the attitude of the courts was well reflected in the words of Sir Herbert Jenner, where the learned justice, speaking of Belgian law, said: "The court sitting here…decides as it would if sitting in Belgium". However, this statement by Sir Herbert Jenner should not be taken literally. The domestic court does not decide the case as the foreign court would. The following illustration given by Ernest G. Lorenzen will make this plain:[502]

> Suppose that an English Judge is called upon to distribute the personal estate of an Englishman whose domicile at the time of his death was Belgium. The English law would direct the Judge to apply the *lex domicilii*, that is, the law of Belgium. If Sir Herbert Jenner's statement is to be taken in its literal meaning, the English Judge would be compelled to ascertain how the Belgian Judge would decide the case. Upon investigating the law of Belgium he would find that it would distribute the property following the principle of nationality, that is, per English law. He would also discover that the courts of Belgium have followed the *Renvoi* theory consistently since 1881 and that in consequence the distribution would be made by them per the Belgian statute of distributions. The English Judge should consequently apply the same statute of distributions. Although the English Judge purports to sit in Belgium, he would apply the English statute of distributions. He would not decide the case as the Belgian Judge is obliged to do under Belgian law, ignoring the existence of the *Renvoi* doctrine in Belgian law. The reason why the *Renvoi* doctrine of the foreign state is ignored is very plain. No decision could be reached if both judges should attempt to apply the *Renvoi* doctrine existing in the foreign system. Each law would refer the Judge to the law of the other state. There would thus be an endless series of references from which there is no escape.

[501] *Collier* v. *Rivias* (1841) 2 Curt. Eccl. 855, 862-63.
[502] *Supra* Note 495.

The notion of a forward reference is signified by the courts having the option to ignore a foreign Renvoi doctrine, unlike in the case of a return reference where reference is made only to the internal law of the foreign jurisdiction and not its Renvoi doctrine under its Conflict of Law rules. Also, while the notion of a return reference leads to applying the law of the initial forum, the notion of a forward reference may lead to the application of the law of the initial forum or the case being handed over to the foreign law.

See the following illustrations simplifying the two notions under the theory of Renvoi proper:



2.1.2 Mutual Disclaimer of Jurisdiction theory

According to the learned German lawyer, Von Bar, who was the first to theorize the doctrine of Renvoi in this form, all conflict of law rules is in effect, rules by which a state, to administer private international law, defines its jurisdiction and the jurisdiction of foreign states. Flowing from this premise, he reasoned as follows:

> Due respect for the sovereignty of the state of X should forbid the state of Y to ascribe to the state of X a jurisdiction which

> the state of X declines. Since Italy applies the principle of nationality to the determination of capacity, England has no right to say that the capacity of an Englishman domiciled in Italy should be determined by the internal law of Italy relating to capacity. Italy having declined jurisdiction in the case, England must accept the reference back to its own law and determine the capacity of the Englishman in question by English law. If the Renvoi is not accepted and the question is decided according to the internal law of Italy, Italian law is applied to cases for which it is not enacted. In so doing, England would usurp the function of the Italian legislator, filling an assumed gap in the Italian law, directly contrary to the will of the Italian legislator.[503]

At the meeting of the Institute of International Law at Neuchatel in 1900, Von Bar presented his views in the form of the following principles:[504]

> (1) Every court shall observe the law of its country as regards the application of foreign laws.
> (2) Provided that no express provision to the contrary exists, the court shall respect:
> (a) The provision of a foreign law which disclaims the right to bind its nationals abroad as regards their personal statute, and desires that said personal statute shall be determined by the law of the domicile, or even by the law of the place where the act in question occurred.
> (b) The decision of two or more foreign systems of law, provided it is certain that one of them is necessarily competent, which agrees in attributing the determination of a question to the same system of law.

Von Bar posited that the doctrine of Renvoi exists to draw eminent lines between jurisdictions of states each state must respect in any equation requiring the incorporation of foreign law to determine matters within any domestic court. In applying the Renvoi doctrine,

[503] Von Bar, 8 NIEMEYER, pp. 177-188. - Also in 2 Holtzendorff, Encyclopddie der Rechtswissenschaft (6th ed. by Kohler) 19.
[504] *Supra* Note 495.

countries must follow what their domestic law states on applying foreign laws and must also respect the laws of foreign jurisdictions, ensuring they do not ascribe unadopted positions to these jurisdictions. Also, whenever the rules of the conflict of laws of the forum diverge from those of another state whose law has been incorporated by reference, the ordinary or internal law of the forum prevails.

Westlake expounded on this theory after initially rejecting the Renvoi doctrine's general application but later accepting it. His understanding of this theory of the doctrine of Renvoi was expressed in a note addressed to the Institute of International Law clearly and logically as follows:[505]

> Suppose two citizens of New York (capacity to contract being governed there by the *lex loci*) enter into a contract in Italy, being at that time domiciled in France, and that litigation with respect thereto arises in England. The *lex fori* (England), applying the law of the domicile at the time of the making of the contract to determine the capacity of the parties to enter it, will refer the matter to France. France has adopted the principle of nationality concerning capacity and will answer: 'The case does not belong to me; it belongs to the New York legislator.' Should the English Judge, following the direction of the French law, ask the New York law, it would tell him that, in its opinion, the case did not belong to New York, but (under the rule *lex loci*) to the Italian legislator.

As illustrated above by Westlake, under the Mutual disclaimer of jurisdiction theory, there is a reverence for the jurisdiction of sovereign states and their laws. It is the judge's duty to determine in the first instance to which country the legal relationship presented to him belongs; if the law of the country, based upon its conflict of law rules, says that the case does not belong to it, there should be no further reference to that country or a jurisdiction ascribed to that country which it does not have.

[505] *Ibid.*

It is noteworthy that this theory also posits the prevalence of laws of the internal forum over foreign laws, similarly to the narrower form of the theory of Renvoi proper. As stated, before a foreign law is applied in determining a matter under the doctrine of Renvoi, the Judge must ascertain whether the law of the foreign country which is incorporated claims jurisdiction over the case. Suppose it does not, then by the coinage of the Renvoi doctrine forming part of the law of the forum, the domestic law usually directs the Judge to apply its internal law. The Judge is not required to regard himself as sitting in the foreign country – as would occur under the wider form of the theory of Renvoi proper – nor is he required to follow the directions of the foreign law.

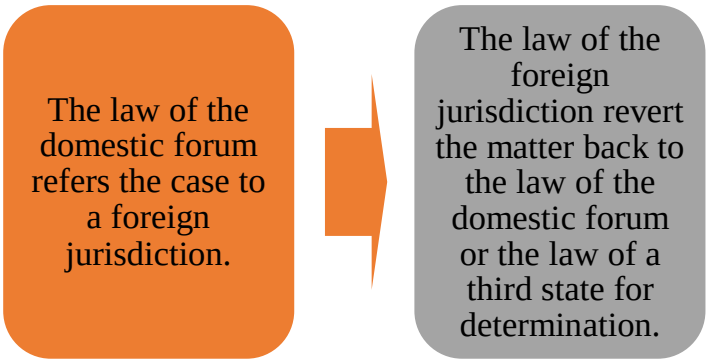
2.2 Forms or Types of Renvoi

As is often reflected in academic publications regarding the topic of Renvoi, the two forms in which the process of Renvoi takes place are stated hereunder: Single Renvoi and Double Renvoi.

2.2.1 Single or Partial Renvoi

Single Renvoi takes place when a judge following the internal law of his or her court, looks to determine the matter by referral to the law of a foreign jurisdiction but upon examining the conflict of law rules of the foreign jurisdiction, realizes that according to the conflict of law rules of the foreign jurisdiction, the case must be sent back to the initial court (single renvoi by remission) or the law of a third state (single renvoi by transmission). Here, there is one remission or transmission of the case occurring in determining the matter. Countries like Spain, Italy, and Luxembourg operate a Single Renvoi system.

See the following illustration below:



An excellent example of single renvoi took place in *Re Ross: Ross* v. *Waterfield*,[506] a landmark case handled by the Chancery Court in England. The matter revolved around the succession of one Mrs Ross, an Englishwoman who had obtained a domicile in Italy. Before her death in 1927, she wrote her will in English form and left two copies of the will in two languages, English and Italian. She disposed of the bulk of her property through the will – movable and immovable – to her nephews and nieces. Upon her death, Mrs Ross' son brought the action, contending that the will was invalid because, by Italian law (or Maltese law), he was entitled to half of the estate as his *legitima portio*.

The primary question before the court as to the disposition of her property was thus whether the will she had made in English form before her death was good enough to dispose of all her property or her power of disposition was restricted *per* Italian law. The court sought to answer this question by recourse to its domestic (English) law provisions, which provided that the law of domicile should govern such matters. The court then had to determine what constitutes the law of domicile? Is it the ordinary Italian municipal law limiting the power of disposition? Or was it the law that the Courts in Italy would apply in the particular case, including the Conflict of Law Rules administered in Italy? The learned Judge, after examining some English decisions, decided on the latter, which had the effect of referencing

[506] *Ross* v. *Waterfield*, 930 I Chancery 377; N. Bentwich, "The development of the Doctrine of Renvoi in England in cases of Succession" (1930) 4 H. 3/4 *Journal of Foreign and International Law*, 433.

the case back to English law, since the Italian doctrine on succession both to movable and immovable property involved a thorough-going application of the law of nationality in all matters of personal status. The court, therefore, held that the testatrix's will was good and valid by English law.

Another significant case is the famous *Forgo case*[507] which concerned succession to the movable properties of a Bavarian-born man who lived most of his life in France but never acquired an official domicile until his death because he never met the French law conditions. So, according to French law, he remained a Bavarian citizen legally residing in Bavaria. Upon his death, his collateral relatives (relatives that are neither direct ancestors nor direct descendants of an individual) brought a petition for an inheritance to the French Court. According to the law of the forum (French law), the law governing the movable property of the deceased was his national law (Bavarian law). However, Bavarian Law dictated that the determination of the succession of the deceased' movable properties should be governed by the law of his actual domicile, which was French law. Thus, despite the absence of an official domicile attained by the deceased, the French Court received the renvoi and applied French succession law in determining the matter.

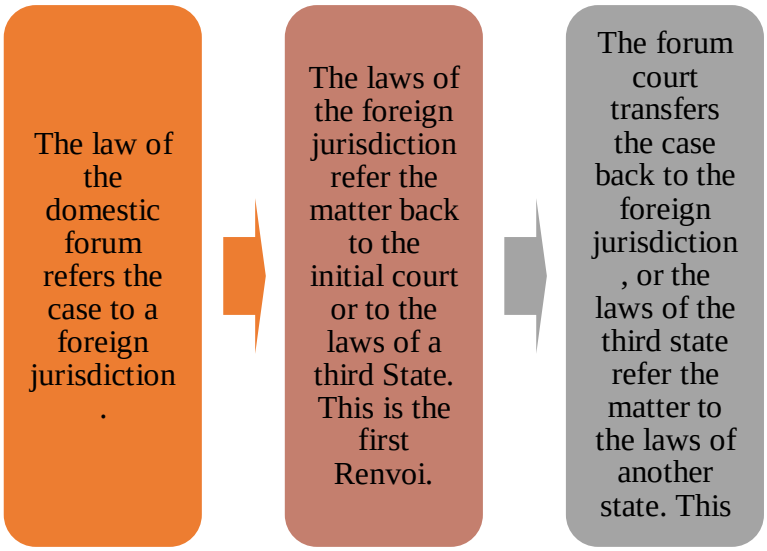
2.2.2 Double Renvoi

This is also known as Total Renvoi, Second Degree Renvoi, or Complex Renvoi.[508] Here, the forum court employs the entirety of the foreign jurisdiction's laws, including its conflict of law rules and principles on the acceptance of renvoi which forms part of its renvoi doctrine. Thus, the court sits as though it were the foreign court accepting renvoi and goes on to apply the conflict of law rules of the foreign jurisdiction, which transfer the case back to the forum court or a third state.[509] Then, the conflict of law rules of the ensuing jurisdiction (initial forum or third state) is applied to transfer the case

[507] *Forgo Case* 10 Clunet (1883), 64; *Supra* Note 492.
[508] I. Macovei, *Private international law*, 2nd edition, (Ars Longa, Iasi, 2001), p. 79.
[509] *Supra* Note 493.

to another jurisdiction (the initial foreign jurisdiction or another jurisdiction).

See the following illustration below simplifying the process of Double Renvoi:



In essence, say a case came before a Nigerian court that required recourse to South African law in line with our domestic law, under double or total renvoi, the Nigerian court will sit as though it were a South African court and apply the conflict of law rules of the South African jurisdiction which will then call for the referral of the matter to a foreign jurisdiction which may be Nigeria's or another country. That is the first renvoi. When the court then applies the conflict of law rules of Nigeria's jurisdiction or the jurisdiction of the other country, that will be the second renvoi which leads to the application of the law of another jurisdiction.

Countries like England and France accept double renvoi or remissions occurring twice; however, there can never be more than two remissions. Also, if any of the jurisdictions in the equation operate a single renvoi framework, double renvoi will not be accepted, and the law of the jurisdiction last referenced in the chain of referral will likely be applied.[510]

[510] *Supra* Note 491.

The case of *Re Annesley*[511] is illustrative of double renvoi. The crux of the matter was the will of an Englishwoman who had resided in France for 58 years before her death but never acquired an official French domicile under the French Civil Code. She, however, attained domicile *de facto* and thus had a legal domicile in France in the eyes of English law. She owned movable and immovable property both in France and England. She made a will while in France in English form by which she purported to dispose of all her property and declared that even though she had lived in France for many years, it was not her intention to abandon her English domicile of origin. Since according to English law, the law of the forum, the case was to be determined by the law of domicile, the court then had the challenge of determining what her domicile was at the time of her death and the ultimate task of discerning if it was French law or English law that should be applied to the distribution of her estate. According to French law, she would be able to dispose of will only one-third of her property, but under English law, she would have complete freedom of disposition.

The court decided that a declaration by the testatrix was not sufficient to bypass the operation of law, and based on the facts of the matter, she had obtained a French domicile before her death. The court then applied French law which stated that the succession of a person who has not obtained a legal domicile in France is governed by the law of his or her nationality; this had the effect of sending the case back to English law (the first Renvoi). The English law in applying its Renvoi doctrine again referred to the matter back to French law as the law of the domicile (the second Renvoi). Then the Chancery court applied France's ordinary law without applying its Renvoi doctrine, satisfied that a French Court would have done the same (accept the Renvoi) if it were sitting upon the case. Thus, the testatrix's disposition power was restricted to one-third of the property.

[511] *Re Annelsey*, 1926 Law Reports Chancery 692.

3.0 THE PROBLEM OF RENVOI IN PRIVATE INTERNATIONAL LAW

An application of the doctrine of Renvoi presupposes the existence of a juridical[512] relation that has to be judicially solved by the laws of two or more countries that compete as to its solution so that the Judge must determine which law is applicable in preference to others.[513] When this occurs, the immediate difficulty that arises is determining what is meant when the law of a domestic forum refers to the application of the law of a foreign jurisdiction: Is it the ordinary internal law governing the foreign jurisdiction? Or is it the entirety of its laws (both internal and external) comprising the set of rules of Private International Law that may be in force in the country? Because it is only when the latter is the case that the Doctrine of Renvoi can be said to have been applied.

Say, for instance, a Nigerian die domiciled in Ghana, leaving some personal property there. A case for the deceased's succession is then brought to the Nigerian court, and according to the court's rules, Ghanaian law must be applied to the matter. The question that comes to mind is will the Nigerian Judge have to consider Ghanaian law such as it is applied in Ghana to persons domiciled there, or will he or she have to apply the rules of Ghanian Private International Law? If the latter is the case, the Nigerian Judge will sit as though his or her court is Ghanaian, and the case will be determined by Ghanaian law. Nevertheless, will the court apply Ghanaian internal law or the Conflict of Law rules of the Ghanaian jurisdiction, which may transfer the case back to Nigerian jurisdiction or the jurisdiction of a third state?

For academic purposes, the court's resolution of this apparent challenge has yet to be seen, thus making the rules governing the application of Renvoi all the more complicated as they differ from case to case. It has been recommended that a remedy to this problem lies

[512] Relating to judicial proceedings and administration of the law. Oxford Languages.

[513] F. Allemès, "The Problem of Renvoi in Private International Law" (1926) in *Transactions of the Grotius Society* Vol. 12, Problems of Peace and War, Papers Read before the Society in the Year 1926 (1926), pp. 63-79.

in the court rejecting the Renvoi and applying just the internal law of the foreign jurisdiction, disregarding any conflict of law rules.[514] This remedy has been adopted by many American courts that apply their conflict of law rules only and then proceed to apply the ordinary law of the ensuing foreign jurisdiction, leaving behind the conflict of law rules of said jurisdiction.[515] A reflection of this occurs mainly in situations of double Renvoi.

4.0 ARGUMENTS FOR AND AGAINST THE APPLICATION OF RENVOI

As shown above, the application of the doctrine of Renvoi is not without its challenges; these challenges led to the use of the doctrine being sanctioned by the English Courts in the 20th Century and have raised arguments as to the rightness of its use or benefit it holds in modern times. These varying arguments are presented hereunder:

4.1 Arguments for the application of Renvoi

Arguments for the application of Renvoi revolve around the notion of the doctrine of Renvoi being a proper means to various ends, the ends including the following:[516]

a. the incorporation of the conflict of law rules of a country as part of its laws referred to by the law of the domestic forum as through the doctrine of Renvoi, a reference to foreign law is a reference to the whole system of law, including its conflict of law rules;

b. the application of foreign law to a matter which such law would under normal circumstances, be unqualified for admission;

c. ensuring the enforcement of judgement despite the incorporation of foreign law since the law of the foreign jurisdiction will by the doctrine, be rightly connected with the juridical relation underdetermination; and the

[514] D. Fitwi, The Problem of 'Renvoi' and the Available Remedies: A Theoretical Approach. July 2013, p.27.
[515] H.R Graveson, *The Conflict of Laws*, 6th ed. (Sweet and Maxwell Ltd. London, 1969) p.73.
[516] *Supra* Note 492.

d. coordination of apparent conflict of laws.

4.2 Arguments against the application of Renvoi

It has been earlier posed that the doctrine of Renvoi already yields a challenge to the judge in its application – the challenge of determining whether only the internal law of a foreign jurisdiction should be considered or the entirety of its laws, including its conflict of law rules. Due to this unresolved challenge, the doctrine of Renvoi is presented as a problem of sorts – generating uncertainty – rather than the solution to a matter before the courts. This has led to the recommendation as mentioned above for the courts to apply just the internal law of the foreign jurisdiction and ignore the Renvoi doctrine. Also, in cases of Double Renvoi, the application of the Renvoi doctrine at every turn in which the case is transferred from one jurisdiction to another leads to a continuous loop, without a solution arrived at for the matter at hand. This is a challenge that is often resolved by applying the mere internal law of the foreign jurisdiction and not the Renvoi doctrine under the foreign system's conflict of law rules.

5.0 CONCLUSION

The doctrine of Renvoi does not apply in cases where parties to a contract have chosen the law applicable to their contract or where a testator/testatrix utilizes his or her will autonomy to choose the law applicable to the execution of his or her will. Such chosen law must be respected by the courts, save for the operation of law yielding a different path towards the determination of the contract or will. The application of Renvoi can also be avoided in cases where the court applies the *locus regit actum*.[517] In such instances, any remissions made by the domestic law of the place where the contract is concluded will lead to the application of the ordinary law of the ensuing jurisdiction and not that jurisdiction's conflict of law rules. Also, Renvoi will not apply after a double occurrence; where remission or transmission has occurred twice, to prevent a continuous loop of the same, the Judge

[517] This means that the place where a contract is entered into governs the manner in which it shall be formally solemnized.

will not take the Renvoi doctrine of the ensuing jurisdiction into account in applying its law and determining the matter.

MATERIAL ADVERSE EFFECT CLAUSE IN CORPORATE COMMERCIAL TRANSACTIONS

By Eunice Adekunle*

ABSTRACT

A material adverse effect is capable of putting an end to a contract. The right to this termination which is significantly pegged on the terms of a material adverse effect clause has only been enforced so far in limited cases. This article examines the ways courts have interpreted and enforced these clauses and it analyses the loopholes that have deprived many claimants of the right to back out of contracts. Some of these are the choice of words in crafting the clause, the effect of the act concerned not being material enough or other faults of either of the parties. Although enforcing the clause is fraught with technicalities, it is achievable with careful negotiation, efficient contract drafting and discharge of burdens of proof. With this, an aggrieved party can properly manage its risk exposure by exploring the options of renegotiating or exiting the contract.

1.0 INTRODUCTION

A business will conduct its affairs in such a way to achieve maximal profitability within its capacity and as the law allows, except it is created exclusively for charitable purposes. Thus, entities enter into contracts with a forward-looking perspective to adequately provide for situations that may cause a loss or adversely affect the anticipated gains. As a result, it is not uncommon to find material adverse effect/change (MAE/MAC) clauses in agreements made in the world of commercial transactions. This clause effectively operates to allow a party back out of a contract if there is an event, condition, change in law, or development that individually or in aggregate materially alters the anticipation of the parties or changes the features, assets, finances, liabilities and credit standing of a company and its subsidiaries, taken as a whole.[518]

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[518] *Pan Am Corp. v Delta Air Lines, 1*75 B.R. (S.D.N.Y. 1994)

2.0 MATERIAL ADVERSE EFFECT CLAUSE

MAE clauses are important in varieties of agreements ranging from loan agreements and commitment letters to facility agreements as these transactions are fraught with risks of loss. For a merger or acquisition, the window between the signing the agreement and closing the deal could experience a downturn, leading to loss. A properly drafted MAE clause will determine who will bear the risk[519] between the target company who is still in charge of management or the acquirer who has contracted to take on control[520]. The acquirer usually favors broad terms[521] in the drafting of the MAE to cover a wide range of events while the target company will seek to use more specific terms while favoring exceptions too. Similar adverse situations could arise before the payment of a loan or the expiration of a facility agreement leading to an inability to pay the loan or carry out due obligations under the contract. The other party who would otherwise have suffered a huge loss had the agreement run its full term will be able to completely evade or minimize its loss by utilizing an MAE clause.

3.0 ENFORCING AN MAE CLAUSE

The MAE provision is activated so that an agreement can be terminated in a more orderly fashion. However, in decided cases,[522] it is extremely rare before a party is able to successfully back out based only on this because of the many other criteria involved. sOne of such factors is a high burden of proof that is placed on the party. He must not only prove that the event causing an MAE already exists, but also

[519] R.T. Miller, "The Economics of Deal Risk: Allocating Risk Through MAC Clauses in Business Combination Agreements" (2009) 50 *Mary Law Review,* available at < https://ssrn.com/abstract=1375143 > (accessed 11 May 2022).

[520] S. Davidoff and K. Baiardi, "Accredited Home Lenders v Lone Star Funds: A MAC Case Study" (11 February 2008) *Wayne State University Law School Legal Studies Research Paper Series No. 08-16,* available at < http://www.ssrn.com/link/WayneStateULEG.html > (accessed 10 May 2022).

[521] *Great Lakes Chemical Corp. v Pharmacia Corp.,* (788 A.2d 544 (Del. Ch. 2001). The use of the phrase 'business of the company' covered 'loss of a major customer due to market forces, price cutting in the market, patent infringement by a competitor, diminished sales' for the purpose of determining if an MAE occurred.

[522] *Frontier Oil Corp. v Holly Corp*, C.A. No. 20502 (Del. Ch. April 29, 2005); *Borders v KLRB, Inc.,* 727 S.W.2d 357 (Tex. App. 1987); *Pittsburgh Coke & Chemical Co. v Bollo*, 421 F. Supp. 908 (E.D.N.Y. 1976).

that it has or will cause a material adverse effect. As the courts have held, it is also important that he proves that the event will cause a long-lasting effect that will hinder the flow of anticipated earnings of an ordinary prudent acquirer, businessman or company[523]. Thus, a short-term effect that can be rectified with time will not satisfy the requirement of materiality in the enforcement of an MAE clause. This writer argues, however, that the requirement of a lasting effect may not be equitable in all circumstances, especially transactions that are characterised by short-term investments like those undertaken by venture capitalists. The anticipated period of returns on investment is sometimes short, such that this timeframe will not accommodate serious losses for the startup company even for a short period. Thus, this requirement of a materially significant long-term effect has to be reconciled against the context of the business transaction in question.

On the issue of materiality, in *Frontier Oil Corporation v Holly Corporation*[524]*,* a torts litigation brought against the plaintiff caused the defendant to propose the renegotiation, and if that fails, the termination of a merger agreement, claiming the litigation costs and awarded damages will run into hundreds of millions and cause a drop in the share price of the plaintiff company, which all amount to a material adverse effect on the plaintiff company. The court however held that the litigation didn't cause an MAE because the correct litigation cost estimate of $14million to $20million can be effectively borne by the plaintiff and other damages will be settled with insurance that has been taken for the litigation. Conclusively, the court pronounced that the situation could not be considered to have a material effect.

Another hurdle that is even more difficult to cross is an adequate drafting of the MAE clause. Generally, a party cannot back out of an agreement if the choice of wording cannot withstand the court's scrutiny in interpreting what is regarded an adverse causal event. Commenting on the dispute that arose from the acquisition agreement SLM Corporation had with affiliates of J.C. Flowers & Co., Bank of

[523] *Re IBP, Inc Shareholders Litigation,* 789 A."d 14 (Del. Ch. 2001).
[524] *Supra*

America, and JPMorgan Chase[525], Stephen Davidoff[526] concluded that it would be impossible for the MAE clause to be activated because the agreement did not give room for prospects. This means that for a claim to arise from the agreement in the instant case, the proposed legislation must first be passed into law considering one of the exceptions to the MAE clause was 'proposed legislation and laws'. This is a typical example of exceptions and carve-outs that are included in MAE clauses[527]. The implication of this is the inability of the buyer to end the contract despite the occurrence of a material adverse change/event. This part of the contract is always actively negotiated by the seller who wants to reduce the risks of adverse changes, especially those due to circumstances beyond its control like market fluctuations, acts of God, natural disasters or changes in regulations. Once an event falls under one of the carve-outs, no matter how detrimental its effect on the company, it cannot be the basis of withdrawal from the contract[528]. These carve-outs may also have exceptions that take into consideration instances where the seller is disproportionately affected compared to others in its industry. In such an instance, the buyer will negotiate that such a situation should be considered an MAE. It is unusual for the courts to imply more exceptions than the one already

[525] Quarterly Report for SLM Corporation, Form 10-Q (June 30 2007) available at https://www.sec.gov/Archives/edgar/data/1032033/000095013307003257/w37718e10vq.htm#107 (accessed 11 May 2022).

[526] See A. Choi and G. Triantis., "Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions" (31 March 2010) 119 *Yale Law Journal* available at https://ssrn.com/abstract=1372856 > (assessed 19 May 2022). See S. M. Davidoff, "SLM Corporation's Material Adverse Change Clause" (8 August 2007) *M&A Law Prof Blog*, available at https://lawprofessors.typepad.com/mergers/2007/08/late-last-night.html > (accessed 10 May 2022).

[527] See A. Bonaime, G. Huseyin, and I. Mihai, "Does policy uncertainty affect mergers and acquisitions?" (2018) 129(3) *Journal of Financial Economics* 531-558, available at < https://doi.org/10.1016/j.jfineco.2018.05.007 > (accessed 19 May 2022).

[528] See D.J. Denis and A.J. Macias, "Material Adverse Change Clauses and Acquisition Dynamics" (2013) 48 *Journal of Financial and Quantitative Analysis* 819; *Genesco Inc. v Finish Line, Inc.,* No.07-2137-II(III) (Tenn. Ch. Dec. 27, 2007). A 61% decline in earnings caused by general economic conditions was significant but not enough to cause a termination of the merger since the causal event was one of the exceptions to the MAE clause.

stated, and neither can the parties by expanding or limiting the scope of the terms used.

In contrast to these cases, a party successfully activated an MAE clause to avoid an impending loss. The court in *Cukurova Finance International Ltd (CFI) & Anor. v Alfa Telecom Turkey Ltd (ATT)* [529] validated the respondent's appropriation of the appellant's shares used as security after a default in the loan payments caused by an event leading to an MAE. Clause 17.16 of the Facility Agreement between the parties provided that there will be a default if there is an event or circumstance which in the opinion of the ATT has had/is reasonably likely to have an MAE on the financial condition, assets or business of CFI. Not long after, an arbitration award of specific performance was granted against the appellant company. Due to the impossibility of carrying out the order of specific performance, there was an impending award of damages which could be up to $950million, in lieu of the equitable remedy. ATT believed this was an event that would cause a significant strain on the finance of CIF and thus declared the loan due and payable, leading to an appropriation of the security shares. The court allowed the subjective assessment of what constituted an MAE as stated in the agreement. It was enough if ATT honestly and rationally believed that the event would cause an MAE so the objective test was not employed. Though the award of damages has not been granted yet, ATT is right to consider the occurrence of an MAE because the award was a potential certainty. The subjective test was employed because the party's intention was clear in the contract unless that is unconscionable, the court will not cease to enforce the terms of a contract.

Also, each MAE clause presented in each case will be treated peculiarly, and its enforceability depends on several factors.[530]. The court will be influenced by the nature of the transaction (merger, acquisition, or

[529] *Cukurova Finance International Ltd (CFI) & Anor. v Alfa Telecom Turkey Ltd (ATT)* [2013] UKPC 2.

[530] Banwo and Ighodalo, "The Impact of Covid-19 on Financing Arrangements in Nigeria" (17 April 2020) < https://banwo-ighodalo.com/grey-matter/the-impact-of-covid-19-on-financing-arrangements-in-nigeria > (accessed 10 May 2022).

loan), the negotiating power of each party,[531] the context of the transaction, and the language employed in the drafting of the agreement. If the language of the contract can be reasonably given different interpretations, this breeds ambiguity, and the Court will resort to extrinsic evidence to determine the shared expectations of the parties at the time the contract was made. The extrinsic evidence includes statements and acts of the parties, the business context, prior dealings between the parties, business customs, and usage in the industry.

It should be noted that despite defining what constitutes events that will cause an MAE, the court can rightly hold that this definition is not exhaustive and be ready to construe implied events in the scope of such definition. In a recently decided case, *The American Association Premier League* v *PP Live Sports International*[532], the High Court of Justice in England examined Clause 12.1 of a Live Package Agreement which provided for an MAE situation. The contract between the parties gave the defendant airing rights (in China/Macau) to the 2020 Premier League matches and gave the defendant the right to consider the agreement terminated if there is a fundamental change leading to an MAE. The contract further defined events that would be considered a fundamental change, such as if the number of clubs in the Premier League is less than 18 or the competition ceased to be one played between professional football clubs in England and Wales. Shortly after the agreement was concluded, there were changes to the competition due to the breakout of the COVID-19 pandemic. The timing of matches was changed, fans were not allowed to watch live matches, the match was suspended for a few weeks, and the duration of the competition was shortened. Based on these, the defendant claimed these changes were fundamental enough to cause an MAE and refused to pay the fees due under the contract.

[531] R. Gilson and A. Schwartz, "Understanding MACs: Moral Hazard in Acquisitions" (2005) 21(2) *The Journal of Law, Economics, and Organization* 330–358, available at < https://doi.org/10.1093/jleo/ewi012 > (assessed 19 May 2022).
[532] *The American Association Premier League* v *PP Live Sports International* [2022] EWHC 38 (Comm).

This writer agrees with the court that there were indeed changes to the Premier League matches, but they were not fundamental. According to the High Court, the "English law of contract does not require or expect contracts to be renegotiated or rewritten simply because events transpired differently to what is expected. This would lead to confusion and chaos". In defining a fundamental change, the court was not limited to the definition in the agreement and was ready to include other changes which, though not so defined, are reasonably considered substantial when examined in the context of the entire contract. Consequently, since there was no fundamental change, the court did not proceed to deliberate whether the changes caused an MAE that would justify the defendant evading its responsibility under the contract.

Understandably, the Premier League case agreement was negotiated before the pandemic, so if a significant change had occurred, the court would have readily enforced the MAE clause. This means that in the present situation of the world, where every corporation, businessman, entity and party to a contract is fully aware of the implications and impacts of the Covid-19 pandemic based on the predictions that experts in various industries have made, an MAE clause will be met with a high burden of proof and stricter interpretation from the courts. This is because presently, this type of risk in business and financial dealings is highly probable, and the parties have full knowledge of the effects of the pandemic. Unless there is an unexpected turn of events, it will be very difficult for a party to claim the pandemic has caused an MAE and seek to terminate a contract based on facts that were known before the negotiation and should have been adequately prepared for[533]. This same reasoning can be applied to situations where the unstable nature of a business is known before the signing of an agreement. It is presumed that the other party is well informed of the possibility of a sharp decline in earnings and cannot claim MAE when the risk materializes.[534]

[533] *Supra,* note 14.
[534] *Bear Stearns Co. v Jardine Strategic Holdings,* 533 N.Y.S. 2d 167 (App. Div. 1988).

4.0 PECULIARITIES OF MERGERS AND ACQUISITIONS

In the case of a merger or acquisition, the bar is raised even higher in interpreting MAE clause contained in the agreement. Due to the intense negotiation and heavy drafting of a merger or acquisition agreement, the parties usually negotiate a wide range of damaging situations and expressly make provisions for them, using adequate words that reflect the parties' intention. This practice prompts the court to narrowly interpret an MAE clause and accord it its ordinary meaning. The court believes that if a particular circumstance constituted an MAE, with the level of contemplation and thought process put into the contract, the parties would have expressly included them, using the right choice of words.

In *Travelport Ltd and Ors* v *WEX Inc*[535],the court gave validity to the defendant's assertion of exit rights from a Share Purchase Agreement as the Covid-19 pandemic had caused a material adverse effect on the payment industry of the plaintiff target company. However, the right can only be exercised subject to the defendant proving that the plaintiff was unusually affected, more than others in the industry. The court rejected the argument of the plaintiff that the word 'industry' used in the MAE clause should be limited to travel payment industries alone and not the general payment industry since the plaintiff operates in the latter. This contention was rejected because the court gave an interpretation of the MAE clause based on the ordinary meaning of the word, following the law of contract. The court considered the word 'industry' to imply participants in a broad economic activity. Words like markets, sectors and competitors would have been suitable to reflect a limited category, as intended by the plaintiff. From the foregoing, it is expected that in an event where the clause is drafted in a blanket approach, the court will limit the significant events to those which can be reasonably presumed to be within the contemplation of the parties. The interpretation process also takes into serious consideration the totality of the contract. An MAE clause constitutes a part of a contract, so its interpretation must align with

[535] *Ibid.*

the remaining parts to adjudge the commercial consequence of such interpretation[536].

5.0 IMPROVEMENTS TO CRAFTING AN MAE CLAUSE

From these cases, it is deduced that in drafting an MAE clause, it is important to phrase the wordings as clearly as possible to reflect the intention of the parties. In the *Frontier* case, the court's decision was based on the interpretation of the word 'material' in the MAE clause. The parties, however, gave a poor definition of the MAE in the merger agreement, which did not exactly reflect that the parties intended that 'material' should mean more than the ordinary interpretation of the word. Also, in *Travelport Ltd and Ors v WEX Inc*, the plaintiffs intended that the word 'industry' should be interpreted narrowly, while the defendant intended that the word should assume its ordinary meaning. Parties to contracts containing MAE clauses can also use percentages or a specific figure which they will both agree to be material if the adverse effect of an event is evaluated. Also, an interpretation section that will properly reflect the intention of the parties can be included in the terms of the contract.

6.0 CONCLUSION

Whether an MAE is caused by a self-inflicted act, like failing to file necessary documents with the right authorities, or by occurrences beyond control, like industry, financial or securities market fluctuations, regulations, and political changes/conditions in the country, it will be counterproductive to use terms in an MAE clause that will cause a deprivation of the right to use such clauses as at when needed. Also, it is hoped that henceforth, the clause will be drafted in a way that takes cognizance of the peculiarity of each transaction to create a reinforced clause to stand the strict interpretation adopted by the courts. Drafting and choice of words are, after all, the bedrock of the freedom of contract.

[536] M. E. Brewer, "Material Adverse Change Clauses in Light of the Covid-19 Pandemic" *Appleby* (16 March 2021) available at < https://www.mondaq.com/operational-impacts-and-strategy/1046850/material-adverse-change-clauses-in-light-of-the-covid-19-pandemic> (accessed 12 May 2022).

REVISITING THE SUPREME COURT'S DECISION IN MR. EYITAYO OLAYINKA JEGEDE AND ANOR V INEC AND ORS (2021): A CRITIQUE

By Christopher Ewulum*

1.0. BACKGROUND AND INTRODUCTION

There is no gainsaying the fact that when the Supreme Court, which is at the zenith of hierarchy of courts in Nigeria, hands down a judgement, it remains the law until it is set aside by the Supreme Court itself in future.[537] By virtue of this enviable position of the Supreme Court, it should always be ready to launch deep into the forest of its jurisprudential knowledge, wisdom, and proper appreciation of the facts to give the matter a worthy and merciless scrutiny so that in the end, the people who have approached it as a court of final resort will nod their head in the certainty that justice has been served. Otherwise, a death knell would seem to have been sounded to the hopes of the general populace when the Supreme Court fails to dust and starts romancing itself with judgments that are wanting in reasoning and filled with divergences that could produce absurd results. If it is an electoral matter, according to Justice Centus Nweze, the decision "will continue to haunt our electoral jurisprudence for a long time to come".[538]

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[537] F. Obande, *Guidelines to Interpretation of Nigerian Statutes* (Enugu: Snaap Press Nigerian Ltd, 2019), p. 37. See also *Ogboru* v *Ibori* (2006) 17 NWLR (Pt. 1009) 54, *Auto Import Export* v *Adebayo* (2002) 18 NWLR (Pt. 799) 554.

[538] Halimah Yahaya, "Imo Governorship: Why Supreme Court Dismissed Ihedioha's Application to Reverse Ruling", *Premium Times Newspaper* 3 March 2020.

We were still trying to understand *Hope Uzodimma* v *Emeka Ihedioha*,[539] when we were greeted with another one of such nature. In the case of *Mr. Eyitayo Olayinka Jegede & Anor.* v *INEC & Ors.*, the apex court was approached *inter alia* with a very important question for determination, following the Ondo State Governorship election.[540] The question was – whether in view of the particular facts of this case, the sponsorship of Mr. Akeredolu and his deputy by the All Progressive Congress (APC) is invalid, null and void because what his excellency, Mr. Mai Mala Buni did by signing the letters (exhibit P21) of Akeredolu's sponsorship while acting as a Governor of Yobe state is contrary to the provisions of the Constitution. To determine this issue, the apex court in the majority decision like the electoral tribunal and the Court of Appeal determined the consequences of not joining Mai Mala Buni in the petition.

This issue, which the seven-member panel was visited with, ended up splitting the opinion of the Supreme Court to the extent that there were three dissenting judgments. Nevertheless, we are still in bewilderment as to how the Supreme Court in the majority opinion later concluded that Mr. Buni was a necessary party in this case. Furthermore, that failure to join him renders the determination of the matter impossible and that to proceed to do so would have violated the fair trial of the case. Consequent upon the foregoing, this paper sets out to examine closely the majority judgement of the Supreme Court in this case, with a view of justifying the assertion that if this decision is given a critical analysis, it should not be taken as the gospel truth of the matter. Put starkly, if the Supreme Court in the opinion of the majority had properly appreciated the real issues before it, it would not has come to the conclusion that it was necessary to join Mr. Buni in this case.

[539] *Hope Uzodimma* v *Emeka Ihedioha* SC. 1462/2019. In this case, the Nigerian Supreme Court installed a man who was well beaten into the fourth position as the winner of a gubernatorial election.

[540] *Mr. Eyitayo Olayinka Jegede and Anor* v *INEC and Ors* was delivered on 28 July 2021. The judgement was on the appeal marked: SC/448/21; including the cross-appeals marked: SC/501/21; SC/508/21 and SC/509/21.

2.0 THE FACTS OF THE CASE

For the interest of the readers, the facts which are germane to the issue at hand are as follows: On 10 October, 2020, the First Respondent, Independent National Electoral Commission (INEC), conducted an election to the office of the Governor and Deputy Governor of Ondo State. The third and fourth Respondents, Their Excellencies, Mr. Oluwarotimi Akeredolu SAN and his deputy, Mr. Lucky Aiyedatiwa respectively contested the election on the platform of the 2nd Respondent, All Progressive Congress (APC). The first Appellant (Mr. Olayinka Jegede) was the candidate sponsored in the election by the second Appellant, People's Democratic Party (PDP). After the election, the third and fourth Respondents were declared and returned as the duly elected Governor and Deputy-Governor of Ondo State in accordance with **section 179(2) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) (hereinafter referred to as the CFRN 1999).**[541] Aggrieved, the Appellants on 30 October 2020 (21 days after the election) filed their petition challenging the return of the third and fourth Respondent by INEC (Ist Respondent).

2.1 The Decision of The Electoral Tribunal and Court of Appeal

At the tribunal, several issues were raised for determination, among which are:

> 1. That the second, third, and fourth respondents were not duly elected by the majority of the lawful vote cast of the election.
> 2. That the third and fourth respondents at the time of the election were not qualified to contest for the Ondo State Governorship election held on 10 October 2020.
> 3. That the election of the second, third, and fourth respondents is invalid because of corrupt practices and non-compliance with the provisions of the Electoral Act 2010 (as amended).

[541] Constitution of the Federal Republic of Nigeria, 1999.

Progressively, when the matter was ripe for hearing at the Electoral Tribunal, the petitioners withdrew other issues leaving the 2nd ground as the sole ground which is as follows: "That the 3rd and 4th respondents at the time of the election were not qualified to contest for the Ondo State Governorship election held on 10th of October 2020". The *raison d'etre* was that the acting chairman in the person of Mr. Mala Mai Buni who signed the letters of sponsorship and acting as a representative of the APC was also the Governor of Yobe state. Consequently, the appellants concluded that this action of the 2nd respondent through her agent, Mr. Buni is a serious infraction on the constitutional provision viz section 183 of the *1999 CFRN* which prohibits anybody holding position of the office of the Governor from holding any other political position.

Before the tribunal could commence to hear the petition, the respondents raised a preliminary objection arguing that the Electoral Tribunal lacked the jurisdiction to hear this petition on the ground that the issue raised by the petitioners is a pre-election matter. Interestingly, the electoral tribunal upheld the preliminary objection adding that Mr. Mala Buni, the Governor and the acting chairman who signed those letters that purported to violate the sacred provisions of the Constitution was not joined as a party in this case. In addition, it was held that the appellants have no locus standi to question the constitutionality of Mr. Buni holding the office of the acting chairman for the APC and also as a Governor of the Yobe state.[542] The petition was then struck out. As a matter of practice, it proceeded to determine the sole substantive issue before it. On appeal, the Court of Appeal refused to accept that the Electoral Tribunal had no jurisdiction to hear the petition. This view was strengthened with section 177(c) of the *1999 CFRN* and Section 138(1)(a) of the *Electoral Act 2010* (as amended). The appellants who contested the election with the third and fourth respondents have the right to question the qualification of the third and fourth respondents for the candidates of the second respondent for the Ondo State Governorship election.

[542] Underlining mine for emphasis.

For the avoidance of doubts, section 177(c) of the *1999 CFRN* states as follows**:** A person shall be qualified for election to the office of Governor of a State if he is a member of a political party and is sponsored by that political party" and section 138(1)(a) of the *Electoral Act 2010* states that:

> An election may be questioned on any of the following grounds, that is to say- that a person whose election is questioned was at the time of the election not qualified to contest the election.

Furthermore, it was also held by the Court of Appeal that the issue of whether or not the third and fourth respondents are qualified on the ground that the letter which purported to show sponsorship is not valid cannot be determined if Mr. Buni who acted as the acting chairman and at the same time a Governor is not joined in the petition. And since he was not joined it will be against all known principles of fair hearing to proceed on the matter without him as his rights will be affected. The appeal was then dismissed for lack of merit.

3.0 HOW SOUND IS THE MAJORITY DECISION OF THE SUPREME COURT?

The Supreme Court was divided by a majority of four-to-three as to whether it was necessary to join Mr. Buni on the case.[543] Since it is the majority judgement that affects the appellants rights, [544] we will concentrate fully on the majority judgement having in mind that the minority few had a contrary opinion. The majority held *inter alia* after reviewing the decision of the Court of Appeal that it was necessary to join Mr. Buni in the suit. And that it will be a travesty of justice to proceed to determine the issue based on the serious consequences it will have on the person of Mr. Buni. The Hon. Justice Akomaye Agim JSC who delivered the leading judgement reasoned that:

[543] Emmanuel Agim read the lead majority judgement, which was supported by John Okoro, Lawal Garba and Tijani Abubakar JJSC. The other three Justices, Mary Peter-Odili, Ejembi Eko and Mohammed Saulawa JJSC held otherwise in their dissenting minority judgement.

[544] Section 294(3) of the 1999 *CFRN* states that: A decision of a court consisting of more than one Judge shall be determined by the opinion of the majority of its members.

> The appeal was based on the ground that Mai Mala Buni, the Chairman of the National Caretaker Committee of the party, that is, the second respondent (APC) was holding office as the Governor of Yobe State, contrary to the provision of Section 183 of the Constitution of the Federal Republic of Nigeria (1999) …All the issues raised, revolved around Mala Buni. But, Mala Buni, who is at the centre of the dispute was not made party to the petition. It is obvious that the determination of the said issues will affect him...Therefore, the court below was right to have held that he was a necessary party to this suit. Failure to join him renders the determination of the matter impossible. To proceed to do so would have violated the fair trial of the case.

In addition, the apex court pointed out that since the appellants have not challenged any processes of the nomination of the third and fourth respondents as candidates of the second respondent for the election of the Ondo State Governorship election, such amounts to an admission and the appellants cannot be heard to complain later that the process is invalid simply because the letter was not properly so signed. Hon. Justice Akomaye Agim, JSC captures it thus:

> It is glaring from the entire tenor of the case of the appellants in their petition and appeals up to this court that they have not challenged any aspect of the process of the primary election and nomination of the 3rd and 4th respondents as the Governor and the deputy Governor candidates respectively of the 2nd respondent for the election of the Ondo state on 10 October 2020, that they admit the second respondent sponsored the third and fourth respondents as its candidates for the election but contend that the signatories of the second respondent's letter of 27 July 2020 that submitted their names to the first respondent had no *vires* to sign the letter or were disabled by law from doing so... There is no ground for this appeal or any of the cross-appeals that complain against the holding of the Court of Appeal that in keeping with Article 13.3 of the second respondent's constitution the caretaker/extraordinary National Convention Planning committee was constituted by the National Executive committee of the second respondent to act as the National Working Committee in the interim until the National Working Committee was reconstituted.

Watch out, at a later part of the judgement, his Lordship conceded that:

> The letter was signed by two of its National officers, Mr. Buni as acting National Chairman and senator John Akpan Udoehehe, the acting National Secretary and hence complied with paragraph 17(a) of the first supplementary to regulations and Guidelines for the conduct of election (Exhibit 24) which requires that such a letter and form EC9B be signed by the National Chairman and Secretary.

Armed with this reasoning, it is noteworthy that his Lordship now held that:

> It is preposterous to argue that because one of the true signatures of the letter submitting the selected names had no vires to sign it, assuming that there is such defect,... there is no statutory prescription of such consequence in section 31(1) of the Electoral Act 2010... assuming that the acting chairman did not sign the letter contrary to the first supplementary to regulations and guidelines for the conduct of elections of 9 June 2020, such failure cannot be relied upon as a ground for an election petition to invalidate the election as it is not contrary to the provisions of the electoral Act.

With utmost deference to this majority judgement of the Supreme Court, we find it very difficult to agree with their Lordships that it was necessary to join Mr. Buni in this case. To justify this assertion and drive home our points, two crucial questions will be invoked for examination:

> *1. Whether in the light of the case at hand, it was right for the apex court in the majority judgement to conclude that the provisions of the Manual and Guidelines for the Conduct of the said election cannot override the provisions of the Electoral Act when the same issue affects a provision of the 1999 Constitution?*
>
> *2. Whether in the light of the case at hand, it was necessary to join Mr. Buni in the case when the court is well equipped with the facts to decide properly?*

The arguments in support of our stance will now be taken in accordance with the way the issues have been arranged. Firstly, in x-raying the majority opinion of the Supreme Court in this case, a careful observer would notice where the court remarked that 'paragraph 17(a) of the first supplementary to Regulations and Guidelines for the conduct of election (Exhibit 24) which requires that such a letter and form EC9B be signed by the National Chairman and Secretary is a supplementary rule or guideline that is subject to the *Electoral Act 2010* (as amended)' hence, as far as that breach is not contained in the *Electoral Act* itself but in the Guideline, such breach cannot be a ground for a petition. In this respect, his Lordship the Hon. Justice Akomaye Agim JSC contributed:

> The pleading that Exhibits P21 and form EC9B which the second respondent submitted was signed by non-national officers or members with no competence to sign it contrary to paragraph 17(a) of the first supplementary to Regulations and Guidelines for the conduct for the elections of 9-6-2020 is irrelevant as there is no pleading that it is contrary to any provisions of the *Electoral Act*...failure to obey the directive or instruction of the first respondent in the said regulations and guidelines cannot be relied on as a ground for an election petition to invalidate the election of the third and fourth respondents because such failure is not contrary to the provisions of the *Electoral Act 2010* as amended.[545]

Generally, failure to follow the Manual and Guidelines for the conduct of an election which was made in relation to powers vested by the Electoral Act cannot itself render the election void.[546] This principle is a fine one for even though subsidiary instruments command legal force when situated with statutory provisions, they, nevertheless, lose steam and remain submissive to substantive provisions of any enactments in

[545] By the same token, section 138(2) of the *Electoral Act 2010* prescribes that an act or omission which may be contrary to an instruction or directive of the Commission or of an officer appointed for the purpose of the election but which is not contrary to the provisions of this Act shall not of itself be a ground for questioning the election.

[546] *Nyesom* v *Petersdie and ors* (2016) 1 NWLR (Pt. 1492) 71 (SC).

circumstances of conflicts between them.[547] But like every other principle, this principle is not an inflexible one, hence, should not be applied hook, line, and sinker to every case like the one we have at hand. Incontestably, section 183 of the *1999 CFRN* prohibits the Governor from occupying or acting in any other political position whatsoever, not even under the guise of a caretaker or on a temporary basis. The bar is absolute.

Authoritatively, the Manual and Guidelines for the conduct of elections usually issued by the First respondent, INEC are not mere instructions or directions; rather, they are subsidiary legislations which have the force of law with serious consequences having in mind that their origin can be traced to the Constitution and the Electoral Act.[548] For instance, the powers of INEC by section 15(a-i) under Paragraph F of Part 1, third schedule to the *1999 CFRN* are explicitly spelt out as follows: -

> (a) organise, undertake and supervise all elections to the offices of the President and Vice President, the Governor and Deputy Governor of a state etc…(i) carry out such other functions as may be conferred upon it by an Act of the National Assembly.

Flowing from the last sub-paragraph, Section 153 of the *Electoral Act 2010* an Act of the National Assembly now states that The Commission may, subject to the provisions of the Act, issue regulations, guidelines, or manuals for the purpose of giving effect to the provisions of the Act and for its administration thereof.
This shows that like every subsidiary legislation which have statutory flavor,[549] this manual for the conduct of elections embodies all steps to comply with for a free, fair and hitch free election and aims at

[547] *Auto Import Export* v *Adebayo* (2002) 18 NWLR (Pt. 799).
[548] Per Ogunbiyi JSC in *Hon. James Abiodun Faleke* v *INEC*. Case no: SC. 648/2016, see also *Shinkafa* v *Yari* (2016) 7 NWLR (part 1511) 340; *CPC* v *INEC* (2011) 18 NWLR (part 1279) 493 AT 542; *Agballah* v *Chime* (2009) 1 NWLR (part 1122) 373 at 459.
[549] See *Idoniboye-Obu* v *NNPC* (2003) 2 NWLR (Pt. 805) 589.

achieving the provisions of the substantive law.[550] A *fortiori*, the court ought not be passive and helpless while parties in an election treat these guidelines like worthless pieces of tissue paper and infringe on its provisions with impunity, without any explanation. Otherwise, the purpose of making these guidelines will be defeated. If that is so, what more can be said of this case when the second respondent through her agent not only blatantly breached the constitution but the guidelines meant for the conduct of the said election?

Did their Lordships forget that they have held in a long line of cases that political parties, like their members, are bound by their Constitution?[551] For emphasis, we cannot but call on resemblance, the evergreen words of our noble Lord on this issue. In *Mato* v *Hember,*[552] Kekere - Ekun, JSC reasoned:

> As stated by my learned brother in the lead judgement, this court in a plethora of cases has asserted the fact that political parties must obey their constitution and guidelines and where necessary (as provided by law), the courts will intervene and wield the big stick to prevent arbitrariness. The only way our democratic dispensation can work effectively is where every aspirant for political office, who is qualified to contest an election, is given an even playing field. The failure of internal democracy within our political parties, right from the grassroots level eventually leads to instability in the entire political system. The failure of internal democracy is one of the reasons why the Courts' dockets are congested with pre-election disputes.

Fortunately, this view aligns with the dissenting minority judgement of *Ejembi Eko JSC* who asked and confirmed:

> Is the second Respondent, in appointing his Excellency Mai Mala Buni to deliberately flout and breach the National

[550] That is the *Electoral Act 2010* as amended.
[551] See *APC* v *Karfi* (2018) 6 NWLR (pt. 1616) 479 (SC) at 526, *Gana* v *SDP and ors* (2019) LPELR – 47153 (SC) at 15 – 16, *PDP* v *Slyva* (2012) 13 NWLR (pt. 1316) 85 (SC) at 154; *LAU* v *PDP* (2018) 4 NWLR (pt. 1608) 60 (SC) at 123.
[552] *Mato* v *Hember* (2018) 5NWLR (PT. 1616) 258; (2018) ALL FWLR (PT. 925) 146; (2017) LPELR - 42675 (SC).

> Constitution (Section 183 thereof) and Article 17 (iv) of its own Constitution (Exhibit P22) not *in pari delicto*, that is equally guilty of doing the mischief proscribed? According to Black's Law Dictionary 9th ed, at page 862 "*in pari delicto*, an adverb [Latin: in equal fault] means "equally at fault". I have no doubt, therefore, in holding that 2nd Respondent, in appointing Mai Mala Buni, Governor of Yobe State to concurrently perform and/or discharge the executive office of National Chairman Caretaker Committee concurrently with his office as the Chief Executive Officer of Yobe State was "in equal fault" as His Excellency Mai Mala Buni in the contravention or breach of Section 183 of the CFRN as well as Article 17 (iv) of Exhibit P22, its constitution.

This pronouncement is laudable for it bears eloquent testimony to the view that it will be against public policy or morally despicable for a man to be allowed to benefit from his wrongdoing.[553] Truly, the proposition that a man will not be allowed to take advantage of his wrong is no doubt a very salutary one and one which the court would wish to endorse. The effect is usually that the liberal meaning is departed from where it would result in wrongful self-benefit.[554]

By allowing his Excellency, Mr. Buni, a sitting Governor of Yobe state to act as the National Chairman knowing fully that such action is contrary to the provisions of the Constitution and illegal, and by not finding any reason not to punish the second respondent simply because such breach is not contained in the *Electoral Act*, the court in the majority judgement acted to be supportive to the act of illegality committed by the 2nd respondent. Additionally, it has always been the principle of equity that he who comes to equity must come with clean hands. The court as a court of equity frowns at those who poison and

[553] The concept is oftentimes expressed in these two maxims, that is - *In pari delicto, portio est conditio defendetis and turpi causa non oritur actio*". Support for this view is to be found in the judgement of **Jessel** M. R in *Sykes* v *Beadon* (1879) LR11 Ch.D.170; per Myles J. Abott, Ag CJF in *M.A. Okupe & Co. LTD* v *S. Ligali Sarumi*(1960) SCNLR 264, *Adedeji* v *National Bank of Nigeria Ltd* (1989) 1 NWLR (PT 96).

[554] Per Wiggery, L.J in *Buswel* v *Godwin* (1971)1 ALL E.R 418 at 421.

contaminate its fresh flowing waters. If the majority judgement of the Supreme Court in this case had taken cognizance of all these points of ours, it would have disqualified the second respondent from even participating *ab initio* as her hands were seriously contaminated.

Did I hear you say that Mr. Buni should be allowed to be heard before such a step is taken by the majority decision of the Supreme Court? I don't think so. Now, the provision of the Electoral Act is clear and devoid of any ambiguities as to who can present a petition and who can respond to the same. Far back in 1975, the Supreme Court held in *Na kyauta* v *Thomas*[555] that "in civil matters including election petitions, if an agent is authorized to do an act as in the instant appeal, the principal assumes full responsibility for his conduct". The jurisprudence behind this principle was explained in *INEC* v *A.C*[556] ***and*** *Obasanjo* v *Yusuf*[557] in that:

It is unnecessary to join a presiding officer or agent for carrying out the directive of the Commission. If the proviso holds the Commission responsible for the conduct of its agents, it follows that it has to defend the action.

In *Egenti* v *Nwankwo,*[558] The court added that:

> In determining who a necessary party is; one must not be oblivious of the fact that election matters are sui generis. They are governed largely by the laws and proceedings specially made to regulate its proceedings as against ordinary proceedings.

Now, the Electoral Act is clear and devoid of any ambiguities as to who can present a petition and who can respond to the same. Section 137 of the *Electoral Act, 2010* (as amended 2015) provides that:

[555] *Na kyauta* v *Thomas* (1975) 5 SC 51 at 53.
[556] *INEC* v *AC* All FWLR (Pt. 480) 732, 794.
[557] *Obasanjo* v *Yusuf* (2004) All FWLR (pt. 213).
[558] *Egenti* v *Nwankwo* (2019) LPELR-CA/E/EPT/01/2019.

> **(1)** An election petition may be presented by one or more of the following persons: (a) a candidate in an election; (b) a political party which participated in the election.
> **(2)** A person whose election is complained of is, in this Act, referred to as the respondent.
> (3) If the petitioner complains of the conduct of an Electoral Officer, a Presiding or Returning Officer, it shall not be necessary to join such officers or persons notwithstanding the nature of the complaint and the Commission shall, in the instance, be- (a) made a respondent; and (b) deemed to be defending the petition for itself and on behalf its officers or such persons.

With this section in mind, if the majority judgement had appreciated the real issues before it, it would not have wasted much of its judicial resourcefulness in teaching the public and the academic alike what fair hearing entails. The facts of the case are so simple that even a kindergarten cannot find it very difficult to understand. It is that Mr. Buni acted for the second respondent and signed documents while also acting as a Governor of Yobe state. At nowhere did the second respondent or the third and fourth respondents canvass arguments to the contrary or even denied specifically that Mr. Buni is not the agent of the second respondent, neither did they contend the fact that he was a Governor at the time he signed those documents. The principle of evidence and pleadings in support of this stance stand like the rock of Gibraltar and the points or facts not specifically denied nor appealed against are deemed to be accepted as true. There are galaxies of cases on this point.[559] With this in mind, one wonders what Mr. Buni is coming to court to do; is he coming to deny that he is not a Governor

[559] Only few will be mentioned here, see *Bendel Construction Co Ltd* v *Aglocan Development CO [NIG] LTD* [1972] 1 ALL NLR 153. *Joe Iga* v *Chief Amarki* [1976] 11 SC 1. *Gwani v Ebule* [1990] 5 NWLR (PT.149) 201 *Vaswani* v *Johnson* [2000] 11 NWLR [PT.679] 582, *Utteh* v *State* (1992) LPELR-6239 (SC); *Gira* v *State* (1996) LPELR-1322 (SC), *Trade Bank Plc* v *Chanmi* (2003) 13 NWLR {Pt. 836}, *Enon Petrol & Gas* v *Idrissiya Ltd.* (2006) & NWLR {Pt. 982} 221, *Bellview Airlines Limited v Fatai Fadahunsi and Ors* (2015) LPELR - 25915 (CA); *Mr. Chijioke Onuigbo* v *MR. Nnamdi Azubuike* (2013) LPELR - 22796 (CA); *Niger Aluminium Manufacturing Company Limited and Anor v Union Bank* (2015) LPELR - 26010 (CA).

of Yobe state, or is he coming to deny that he did not sign those documents? Please what exactly is his excellency, Mr. Buni coming to court to do?

This, therefore, brings to the fore the point we should pay serious attention to. Without mincing words, the appellants, in this case, are not seeking to disqualify Mr. Buni himself as a Governor, this is because the appellants know fully well that they would be caught up by the issue of *locus standi* having not contested the Yobe state gubernatorial election with Mr. Buni. Perhaps, this was the reason why the appellants thought that it would be unnecessary to join him in the case. This surmise is fortified by the fact that if the appellants challenge the appointment of Mr. Buni as acting chairman of APC, such action would fail woefully because it is firmly established that the court does not have the jurisdiction to question who a political party decides to make its acting chairman.[560] By extension, they cannot even bring an action to disqualify him as a Governor for want of *locus standi.* Excluding instances where the second respondent did not follow the provisions of her constitution in electing her flag bearers in the person of the third and fourth respondents.[561]

We have also observed in several parts of the leading judgement which complains that it was necessary to join Mr. Buni in the suit because of the serious consequence it would have had on him personally as a

[560] In *Onuoha* v *Okafor* (1983) 2 SCNLR 244. The apex court held that courts have no jurisdiction to dabble into the domestic affairs of a political party as courts are not set up to answer political questions.

[561] The appellants have the *locus standi* to question whether the second respondent followed her constitution to nominate the third and fourth respondents including the procedure. But in order to do this, the court that has the appropriate jurisdiction is the Federal High Court or the state High Court as the case may be and not the electoral tribunal. A point which was in our view rightly held by the electoral tribunal and should have struck out the case for want of jurisdiction. It appears that the higher courts on appeal misconceived this point because 87 (10) of the *Electoral Act 2010* (as amended) provides that, "Notwithstanding the provisions of the Act or rules of a political party, an aspirant who complains that any of the provisions of this Act and the guidelines of a political party has not been complied with in the selection or nomination of a candidate of a political party for election, may apply to the Federal High Court or the High Court of a State for redress".

Governor. One would pause to ask; what serious consequences exactly? At this point, it is very clear that the appellants were not seeking to disqualify the Governor, nor do they have the *locus standi* to disqualify him as the acting chairman, so what consequences exactly would the case have on him since he acted as an agent? Assuming but not conceding that Mr. Buni was joined in the suit, will the court proceed to disqualify him? Doing such would amount to turning the court into a father Christmas that dishes out reliefs not claimed by the appellants in the light of this case. Besides, Mr. Buni acted as an agent of the second respondent. This was also not controversial. With all said and done, one would then ask; what exactly have the appellants set out to do in this case? On careful observation, one cannot but land on the irresistible conclusion that the appellants only wanted to show that the letter(P21) which was presented to the first respondent (INEC) is defective because the person who signed it is also a Governor of a state contrary to the Constitution which is the supreme law of the land. Since this particular fact was neither contested, the Supreme Court, in the majority decision, already has enough facts to rely on and infer appropriately.

Going through the whole case, one would notice the grounds of the appellant's petition, reliefs and what the appellants have set out to do in this case. In the words of Hon. Justice Akomaye Agim, JSC who delivered the leading judgement:

> The appellants at the trial withdrew grounds I, III and IV of their petitions and did not elicit any evidence in proof of them. They prosecuted the petition on ground II only and on the sole contention that the sponsorship of the third and fourth respondents by the second respondent for the said election of the Governor of Ondo state was invalid because the letter of 27 July 2020 (exhibit P21) written by the second respondent and submitted to the first respondent was signed by persons who were not national officers of the second respondent and that one of the signatories, Mr. Mai Mala Buni who signed the letter as Acting National Chairman is also the Governor of Yobe state.[562]

[562] Underlining mine for emphasis.

His Lordship continued thus:

> It is glaring from the entire tenor of the case of the appellants in their petition and appeals up to this court that they have not challenged any aspect of the process of the primary election and nomination of the third and fourth respondents as the Governor and the Deputy Governor candidates respectively of the second respondent for the election of the Ondo state on 10 October-2020, that they admit the second respondent sponsored the third and fourth respondents as its candidates for the election but contend that the signatories of the second respondent's letter of 27 July 2020 that submitted their names to the first respondent had no vires to sign the letter or were disabled by law from doing so...[563]

Also, Paragraphs 27- 39 of the appellants petition stated verbatim by his Lordship, Hon. Justice Iyang Okoro JSC did not show anywhere the appellants were seeking to disqualify Mr. Mala Buni as a Governor of Yobe state. In fact, paragraph 30 and 33 of the said petitions categorically states that –

> *The petitioners contend that at all material times in the election of 10 October 2020, in Ondo state, the said Mai Mala Buni was and is the Governor of Yobe state and a colleague of the third respondent who was the Governor of Ondo state and both are at all material times members of the National council of states…..- Further to paragraph 32 supra, the petitioners contend that to the extent that the letter of 27 July 2020 and the form EC9 with which the names of the third and fourth respondents were presented to the first respondent as its sponsored candidates for the Governorship election of Ondo state were signed by his excellency "Mai Mala Buni", the current Governor of Yobe state as National Chairman Caretaker/extraordinary convention committee of the second respondent contrary to section 183 of the constitution of the Federal Republic of Nigeria as amended, the sponsorship of the third and fourth respondents are null and void and of no effect.*[564]

Apart from the fact that the above did suggest that the petition is intended to attack the said letter that was defective and the sponsorship of the third and fourth respondents as can be seen from

[563] Emphasis supplied.
[564] Emphasis supplied.

the aforementioned paragraphs, another point which is quite interesting is that assuming but not conceding that Mr. Buni should be joined in the suit based on the doctrine of fair hearing under section 36 of the 1999 *CFRN,* yet it is this same Constitution that has been accused of giving rights with one hand and taking them away with another hand. What we are saying, in essence, is that the Constitution provides for fair hearing, yet the Supreme Court in the majority decision could not even take note of the fact that there are immunity clauses in the same Constitution.

Assuming that there were serious allegations of illegality against the Governor and complaints to disqualify him as a Governor, one would notice that Section 308 of the *1999 CFRN* prescribes under sub 1 that: Notwithstanding anything to the contrary in this Constitution,[565] but subject to subsection (2) of this section - (a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office.[566] Sub-section 3 further states that-

> This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor; and the reference in this section to "period of office" is a reference to the period during which the person holding such office is required to perform the functions of the office.

This means that Mr. Buni in this case while acting as a Governor is protected by the same Constitution. It is therefore unthinkable how the Supreme Court wanted him to be joined in the suit as a necessary party. Sub-section 2 which creates an exception specifically states that he shall be joined only when he is acting in his a) official capacity or (b)

[565] These phrases were not inserted by the draughtsman for fun because they have serious consequences. In *NDIC* v *Okem Enterprises* (2004) 10 NWLR (Pt.880) 107 at 182 para. H. The supreme court per Uwaifo, JSC; defined the term 'notwithstanding' as thus "When the term 'notwithstanding' is used in a section of a statute, it is meant to exclude an impinging or impeding effect of any other provision of the statute or other subordinate legislation so that the said section may fulfil itself.

[566] Sub 1(c) further states that no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued.

to civil or criminal proceedings in which such a person is only a nominal party. If that is so, then the facts of this case do not present us with a situation we should fix Mr. Buni under the exceptions because it was obvious that he acted as an agent of the second respondent. By the same token, if he should rather be joined as a nominal party, that will also be contrary to the crying need for him to be joined as a necessary party in the case.

4.0 CONCLUSION

In a nutshell, if the Supreme Court in the majority decision had taken due consideration of the true facts before it as we have demonstrated so far, it would have arrived at a different position.

Summarily, going back to our issues for determination; firstly, was it right for the apex court in the majority decision to conclude that the provisions of the Manual and Guidelines for the Conduct of the said election cannot override the provisions of the Electoral Act when the same issue affects a provision of the 1999 Constitution? As we have pointed out, it is true that the subsidiary legislations cannot override their enabling law, but in this case, the matter we are concerned with touches on a constitutional provision, hence the second respondent should not be allowed to benefit from their illegality and even breach her own Constitution with impunity.

Finally, in the light of the surrounding circumstances, was it so necessary to join Mr. Mala Mai Mala in this case? A negative reply should be returned to this question. This is because the facts upon which His Excellency was coming to prove in court is not in contention as they were not denied by the second respondent, his principal which already binds him.

With all said and done, it is our earnest hope that when given the opportunity in the future, the apex court should depart from its majority decision in this case and follow the minority judgement, which not only served justice with a human face but is consistent with sound legal reasoning.

PREJUDGMENT INTEREST IN THE ABSENCE OF STATUTE, CONTRACT OR MERCANTILE USAGE: AN INVESTIGATION OF NIGERIAN SUPREME COURT AUTHORITIES.

By Mujib Jimoh*

ABSTRACT

This article examines five carefully selected authorities of the Supreme Court of Nigeria on prejudgment interest. It investigates whether there are conflicts amongst these decisions or the 'supposed' conflicts are borne out of the failure to engage in the creative exercise that constitutes the reading of law reports to understand the rationes decidendi of these cases. The article finds the points of confluence and divergence in these cases. It commends the on-going efforts of the National Assembly to enact the Federal High Court (Amendment) Act, 2021, which seeks to provide for the award of prejudgment interest in commercial transactions. The article recommends that the appropriate bodies in the various States should also enact laws on prejudgment interest to attain a certainty in law. It also recommends that the laws to be enacted should specify what type of interest rate is applicable – compound or simple interest – to avoid the problems being faced in other jurisdictions.

1.0. INTRODUCTION

It is Bivens' view that one of the qualities of the best lawyers is 'curiosity and staying informed'.[567] A lot of prominent judges[568] and successful lawyers [569] have equally written to underscore the importance of lawyers keeping pace with the development of the law.

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[567] I appreciate Mrs. Abimbola Akeredolu, SAN, Mr. Chinedum Umeche, Mr. Adetayo Talabi and members of the Litigation Team of Banwo & Ighodalo for the thorough discussion on this topic. However, the views expressed here are exclusively mine. Don Bivens, "Five Traits of the Best Lawyers I know" (2013) 40(1) *Data, Documents, and Decision* 4.

[568] For instance, see Eso J. in *Mosheshe General Merchant Ltd.* v *Nigerian Steel Products Ltd.* [1987] 2 NWLR (Part 55) 111; Denning MR in *Roudel* v *Worsley* [1966] 3 All ER 657.

[569] F. Solanke, "The Lawyer and Society: Yesterday, Today and Tomorrow" in Folake Solanke, *A Compendium of Selected Lecturers and Paper (2012)* vol. 1.

For instance, Chief Folake Sholanke, the first lady Senior Advocate of Nigeria, writing in one of her papers posits that 'we are learned because we know the law, but the law is a living thing. Thus, lawyers must keep pace with the law and promote law development'.[570] There is indeed no doubt that one of the best ways to keep pace with the law and understand legal principles is the complete reading of law reports to understand the ratio decidendi of a case.[571] This is because, as the Supreme Court reasoned in *United Bank for Africa Limited* v *Stahlbau Gmbh & Co. Kg.,*[572] the ratio decidendi of a case is not determined from an isolated dictum in the judgment. In fact, the task of understanding the ratio of a case is as much difficult to the judge as it is to practitioners. Professor Niki Tobi (JSC), one of Nigeria's most brilliant judges had written:

> Perhaps, one of the most difficult functions of a Judge in the judicial process is to locate or identify the ratio decidendi of a case. At times, it is easy to locate or identify it. And yet at some other times it is difficult to do so, particularly when it is secreted and embellished with the obiter dictum and or the facts of the case. In such a situation, the Judge must apply a pruning knife to carefully remove the chaff from the grain. It is not always an easy exercise…[573]

Yet, reading law reports in order to determine the ratio is not as simple as reading novels or newspapers.[574] Sometimes, when it is said that two decisions are contradictory, they may in fact not be, but the erroneous conception may be borne out of the failure to engage in the 'creative exercise' that constitutes the reading of a law report to understand the *ratio*.[575]

One of the principles of law which is not clear today in Nigeria is whether prejudgment interest may be claimed by litigants in the

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[570] *Ibid*.

[571] Adlina Ariffin & Ratnawati Mohd Asraf, "The Challenges in the Reading of Legal Cases: Lecturers' Perspective" (2014) Paper delivered at the 3rd International Language Conference, p.4.

[572] *Africa Limited* v *Stahlbau Gmbh & Co. Kg* [1989] 3 NWLR (Pt. 110) 374.

[573] N. Tobi, *Sources of Nigerian Law,* (MIJ Professional Publishers Limited, 1996), p.84.

[574] Adlina Ariffin & Ratnawati Mohd Asraf (n 569) p.4.

[575] *Ibid.*

absence of contract, mercantile usage or statute.[576] There are numerous decisions on this point. However, this article will limit itself to the Supreme Court authorities of: *Ekwunife* v *Wayne (West Africa) Ltd*[577] [*Ekwunife*]; *A.G Ferrero & Co Ltd* v *Henkel Chemicals (Nigeria) Ltd*[578] [*Ferrero*]; *NPA* v *Ibrahim*[579] [*NPA*]; *Julius Berger (Nig) Plc* v *Toki Rainbow*[580] [*Julius Berger*]; and *Cappa & D'Alberto (Nig) Plc* v *NDIC*[581] [*Cappa*].

It is important to note that the decisions considered in this article are by no means the exhaustive list of cases on prejudgment interest in Nigeria.[582] However, the decisions considered are carefully selected based on certain sacrosanct principles of law. First, the Supreme Court is the highest court in Nigeria[583] and in the hierarchy of authority, its decision will supersede any decision from other courts in Nigeria.[584] Thus, since there are Supreme Court authorities on prejudgment interest, it will serve little or no purpose to consider other authorities from other courts, though some might have persuaded the Supreme Court in the decisions considered.[585] Secondly, though there are other numerous Supreme Court decisions on prejudgment interest, this article considers mostly recent Supreme Court decisions. This approach is based on the strict warning given by the Supreme Court in *Osakue* v *Federal College of Education (Technical) Asaba*[586] that:

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[576] This article argues that there is no statute on prejudgment interest in Nigeria. But see *NPA*.

[577] *Ekwunife* v Wayne (West Africa) Ltd [1989] 5 NWLR (Pt. 122) 422.

[578] *A.G Ferrero & Co Ltd* v *Henkel Chemicals (Nigeria) Ltd* [2011] 13 NWLR (Pt. 1265) 592.

[579] *NPA* v *Ibrahim* [2018] 12 NWLR (Pt. 1632).

[580] *Julius Berger (Nig) Plc* v *Toki Rainbow* [2019] 5 NWLR (Pt. 1665) 219.

[581] *Cappa & D'Alberto (Nig) Plc* v *NDDC* (2021) 9 NWLR (pt. 1780) 1.

[582] See some other decisions such as *Nigerian General Superintendence Co. Ltd* v *Nigeria Ports Authority* [1990] 1 NWLR (Pt. 129) 741; *Adeyemi* v *Lan & Baker (Nig) Ltd* [2000] 7 NWLR (Pt. 663) 33.

[583] N. Tobi (1996) (n 571) p. 81; D. Efevwerhan, *Principles of Civil Procedure in Nigeria,* 3rd ed. (Snaap Press Nigeria Limited, 2018), p.25.

[584] *Ibid.*

[585] See *NPA*, where the Supreme Court relied on *Petgas Res Ltd* v *Mbanefo* [2007] 6 NWLR (Pt. 1081) 545, a Court of Appeal authority.

[586] *Osakue* v *Federal College of Education (Technical) Asaba* [2010] 10 NWLR (Pt. 1201) 1.

> Those who think that they are more knowledgeable than this court, if they have listening ears, let them hear and take care. I have gone this far, because the learned Justices of the Court of Appeal in *University of Ilorin v Adeniran*, who claim or assert to be "torn between the two judgments of this court", should please take note and come to terms with the principles or doctrine of stare decisis, precedents and hierarchy of the courts, which are clear and unambiguous… For the umpteen (sic) time, where there appear to be conflicting judgments of this court, the latter or latest, will or should apply and must be followed if the circumstances are the same'.

In addition, each of the considered cases are significant: *Ekwunife* is regarded as the *locus classicus* on prejudgment interest; *Ferrero* is regarded as disruptive;[587] *NPA* seems to stand aloof;[588] *Julius Berger* is thought to restore *Ekwunife*, while *Cappa* is the latest, having been decided on January 22, 2021. This article will investigate the controversy on prejudgment interest in Nigeria by analyzing and investigating these cases and whether the controversy is borne truly on the different rationes decidendi in these cases or the inability to engage in the 'creative exercise' that constitutes the reading of law reports to understand the rationes. It will also suggest solutions to settle the Pandora's Box, if any.

[587] Nzeakor Atulomah, "Case Review: Recovery of Prejudgment Interest: Stretching the Sanctity of Contracts (A review of the Supreme Court decision in *A.G Ferrero & Co Ltd* v *Henkel Chemicals (Nigeria) Ltd*', available at: http://synergylawpartners.com/AG%20Ferrero%20v%20Henkel%20(Supreme%20Court).pdf (accessed June 15 2022)

[588] See pp 7 -9 *infra.*

2.0. JUDGMENT INTEREST[589]

Generally, courts can either award prejudgment or post-judgment interest. On the one hand, prejudgment interest is defined as the interest awarded from the day when payment fell due or when the cause of action accrued[590] or from the date of the loss,[591] until judgment is delivered or payment is made, whichever is the earlier.[592] On the other hand, post-judgment interest is the interest awarded to the successful litigant on the judgment sum until it is paid by the judgment debtor.[593] In other words, post-judgment interest is the interest on judgment debt.[594] A judgment debt is a debt or monetary award which has been pronounced upon by a court and begins when the court has pronounced its judgment in favor of the plaintiff/claimant. Interest on a judgment debt is therefore interest after adjudication and cannot be before that incident.[595] In the United States, Canada and the United Kingdom, the law is clearer on pre/post judgment interest. This is because, unlike Nigeria, there are legislation in these jurisdictions which have made provisions for both pre/post judgment interest.[596]

Interest is important in commercial transactions, as it serves to ensure that a party is compensated for being denied access to their money.[597]

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[589] For a comprehensive discussion in the UK, see 'Pre-Judgment Interest on Debts and Damages' (2004). Law Commission (Law Com No. 287), available at: https://bit.ly/3p6vpCO; In Canada, see Trevor Bant *et. al* "Professional Legal Training Course: Practice Material: Civil"(Law Society of British Columbia, 2022) p.108 available at https://www.lawsociety.bc.ca/Website/media/Shared/docs/becoming/material/Civil.pdf ; In the US, see 'Interest – Pre & Post Judgment'. White and Williams LLP, available at: https://bit.ly/3BPV5L (accessed June 9 2022)

[590] See C. O'Connoer "Jurisdiction Comparative Chart: Pre/Post Judgment Interest" (2010).

[591] *First Bank of Nigeria Plc* v *I.A.S. Cargo Airlines Nigeria Ltd* [2011] LPELR-9827 (CA).

[592] 'Pre-Judgment Interest on Debts and Damages' (n 587) p.1.

[593] *Supra* at 589.

[594] *Ekwunife* (n 575).

[595] *Ibid.*

[596] 'Pre-Judgment Interest on Debts and Damages' (n 587); T. Bant *et. al* (2022) (n 23); 'Interest – Pre & Post Judgment' (n 23).

[597] Pre-Judgment Interest on Debts and Damages' (n 587).

In Nigeria, whilst the law on post-judgment interest is certain, that of pre-judgment interest is not. The reason for this is simple: the Judicature Act, 1838, a statute of general application, having been enacted prior to 1900,[598] makes provision for 'interest… from the time of entering up the judgment… until the same shall be satisfied'.[599] Similarly, the various High Courts rules also empower the court to award post-judgment interest. In Lagos State, for instance, the 'Judge may direct the time within which the payment is to be reckoned, from the date of the judgment or order…' [600] Whereas, the law on prejudgment interest is not based on any known statute in Nigeria, but on common law, [601] which has been subject to different applications by the Supreme Court.

From decided authorities, prejudgment interest may be awarded by the court on two grounds. First, under common law; and secondly, under a statute. In *Ekwunife,* the Supreme Court noted that:

> Interest is not payable or recoverable at common law on ordinary debts in the absence of some contract, express or implied, or mercantile usage (see London, Chatham and Dover Ry., (1893) A.C. 429 at pp.434 et seq.). It may be made payable by some contract, express or implied (Re Anglesey. (1901) 2 Ch/548),[602] or by statute.

However, there is no statute on prejudgment interest in Nigeria.[603] Thus, until a statute is enacted, the extant principles on the award of prejudgment interest in Nigeria is common law. *Ekwunife* and recent

[598] For discussion on Statute of General Application, see John Asein, "*Introduction to Nigeria Legal System"* (1998). Malijoe Ezekiel & Sons. p. 108; Akintunde Obilade, "*The Nigerian Legal System"* (1979). Sweet & Maxwell. p. 69.

[599] *The Judicature Act*, s.17; *Ekwunife* (n 575).

[600] Order 39 Rule 4, High Court of Lagos (Civil Procedure Rule) 2019; see also Order 39 Rule 4, High Court of the Federal Capital Territory, Abuja (Civil Procedure Rules) 2018.

[601] *London Chatham & Dover Railway* v *S. E. Railway Co.* [1893] AC 429; *Ekwunife* (n 575).

[602] In another part of the judgment, the court included 'equity'. See *Ekwunife* (n 575).

[603] However, see *NPA* (n 577) discussed below at pp. 7-9.

authorities,[604] have equated the claiming of prejudgment interest under common law to "as of right". For instance, in *Cappa,* the Supreme Court, citing *Ekwunife,* held that:

> 'Interests may be awarded in a case in two distinct circumstances: (i) as of right and (ii) where there is power conferred by a statute. It may be claimed as of right where it is contemplated by the agreement between the parties or under mercantile custom or under a principle of equity such as a breach of fiduciary relationship…'

It is therefore correct to posit that in Nigeria, there are four ways to claim prejudgment interest: (a) three under common law/as of right – (i) if the agreement provides for it; (ii) if there is a mercantile custom supporting the claim; (iii) under a principle of equity; and (b) under statute. There is no controversy on claiming prejudgment interest under agreement, mercantile custom and statute (since there is no statute providing for the claim of prejudgment interest in Nigeria). In *Ekwunife,* the Supreme Court did downplay the controversy on statute and held that the Plateau State High Court Rules, related to post-judgment interest rather than prejudgment interest. It would seem that the controversy on prejudgment interest in Nigeria is mostly on how the Supreme Court has/is applying the principle of equity to state the law. This article focuses on how the Supreme Court has stated the law in the absence of agreement, mercantile custom, and of course, statute.

3.0. ANALYSIS OF THE SUPREME COURT AUTHORITIES ON PREJUDGMENT INTEREST IN NIGERIA

This section provides the brief facts of the considered cases, the rationes decidendi and some commentaries. The section also exhibits the similarities and differences in these authorities.

[604] See *Cappa* (n 579); *Julius Berger* (n 14).

1. *Ekwunife* v *Wayne (West Africa) Ltd (1989)*

The Defendant/Respondent, by two Local Purchase Orders and by a letter, awarded the work of laying of underground cables for its petrol pumping stations in the same towns to the Plaintiff/Appellant in 1977. The Appellant in accordance with the Local Purchase Order and the letter carried out the projects in the specified areas and made a demand for payment of work done which the Respondent refused to pay. The Plaintiff/Appellant, therefore, instituted an action in the High Court claiming from the Defendant/Respondent the sum of NGN16,000 (Sixteen Thousand Naira) as payment for work done and prejudgment interest on the said sum. The High Court found for the Appellant. Dissatisfied, the Respondent appealed to the Court of Appeal which set aside the decision of the trial court. Dissatisfied with the decision of the Court of Appeal, the Appellant appealed to the Supreme Court.

> On the issue of prejudgment interest, the court held that:
> …it is important to note that interest may be awarded in a case in two distinct circumstances, namely: (i) As of right: and (ii) Where there is a power conferred by statute to do so, in the exercise of the court's discretion. Interest may be claimed as a right where it is contemplated by the agreement between the parties, or under a mercantile custom, or under a principle of equity such as breach of a fiduciary relationship… Where interest is being claimed as a matter of right, the proper practice is to claim entitlement to it on the writ and plead facts which show such an entitlement in the statement of claim.

- **Commentaries**

Ekwunife established some key principles on prejudgment interest. First, it recognizes that it may be claimed either: (i) where there is an agreement to that effect; or (ii) where there is a mercantile custom; or (iii) under a principle of equity; (all together as "as of right") or (iv) under statute. It also recognizes the absence of any statute on prejudgment in Nigeria. *Ekwunife* also requires that where a claim for prejudgment interest is as of right, it must, as a minimum condition, be pleaded. This portion of *Ekwunife* contrasts with *NPA* discussed below.

3. *A.G Ferrero & Co Ltd* v *Henkel Chemicals (Nigeria) Ltd* (2011)[605]

In 1987, the Appellant and the Respondent executed a contract. The Appellant agreed to construct a soap and detergent factory for the Respondent. The Respondent agreed to pay NGN3.8million for the job. The parties agreed that payment would be in stages after a valuation certificate was issued by an Architect stating the amount due. A few of these certificates were issued and the Respondent paid. A valuation certificate for the sum of NGN449,474.45 was issued, but the Respondent refused to pay, and so the Appellant as Plaintiff sued the Respondent/Defendant for the sum and prejudgment interest at the rate of 25 per cent. The trial court gave judgment in favour of the Appellant. Dissatisfied, the Respondent appealed to the Court of Appeal. The Court of Appeal set aside the judgment of the trial court on prejudgment interest. Dissatisfied, the Appellant appealed to the Supreme Court. In upholding the decision of the Court of Appeal, the Supreme Court held:

> I have read the authorities and there is no doubt that *Nigerian General Superintendence Co. Ltd* v *Nigeria Ports Authority* (supra) and *Adeyemi* v *Lan & Baker* (Nig) Ltd (supra) cited by the Appellant were decided on the principle that in purely commercial transactions, a party who holds on to the money of another for a long time without any justification and thus deprives that other of the use of such funds for the period should be liable to pay compensation by way of interests. *Nigerian General Superintendence Co. Ltd* v *Nigeria Ports Authority* (supra) went a step further to decide that even where interest is not claimed in the writ, the court can, in appropriate cases, award interest in the form of consequential order. The question now is whether the principle in these cases adequately applies to the facts and circumstances of this case. The principle in the two cases pertains to normal commercial transactions without reference to any particular agreement, oral or documentary, in contradistinction to the instant case wherein the parties agreed to and are bound by a written contractual agreement.

[605] This case is extensively discussed by Nzeakor Atulomah. See Nzeakor Atulomah (n 585) pp 1-11.

- **Commentaries**

Ferrero deserves all the criticisms levied against it by Atulomah. Atulomah opines that the Supreme Court introduced a very curious dichotomy between contracts (oral or written), on the one hand, and "pure" or "normal" commercial transactions on the other. He then wonders: "what can ever be purer, more normal or more commercial than a written construction contract?" He continues that "building contracts have historically been among the most strictly commercial of all transactions".[606] The purport of the court's reasoning is that where there is an agreement between the parties, then, prejudgment interest cannot be inferred or claimed, if it is not provided in the contract. The implication of this authority is to undermine equity as the basis for claiming prejudgment interest.[607]

4. *NPA* v *Ibrahim* (2018)

The matter commenced at the Federal High Court, Lagos Division, and was appealed to the Court of Appeal and subsequently to the Supreme Court. It was the Respondents' case that they rendered professional services to the Appellant, who refused to pay them the agreed fees in respect of the professional services they rendered in conformity with a contract in which the Appellant employed the services of the Respondents to reconcile the account position regarding concessions which the Appellant gave to Inter Services Limited, Nigerian Liquefied Gas (LNG) and Mobil Oil Producing Unlimited. The Respondents claimed that they satisfactorily executed the job and have thereupon exhibited interim and final bills to the Appellant, but the Appellant latter failed or neglected to pay them despite repeated demands. The failure to settle the claims caused the Respondents to institute the suit under the Undefended List Procedure against the Appellant at the Federal High Court claiming, among other things, the professional fees and prejudgment interest. The Appellant filed a Notice of Intention to defend, raising some facts

[606] *Ibid* at pp. 7-8.

[607] See the concurring judgment of Rhode-Vivour.

in its affidavit, which the trial court did not consider sufficient enough to move the suit to the general cause list. Accordingly, judgment was given in favor of the Respondents. Dissatisfied with this decision, the Appellant appealed to the Court of Appeal, which upheld the decision of the trial court.

Subsequently, the Appellant appealed to the Supreme Court, formulating six issues for determination. Issue 5 is most relevant here: Whether absence of specific agreement or evidence of custom and trade usage on payment of prejudgment interest and on liquidated nature of the claim, the Court below rightly confirmed the pre- and post-judgment interests awarded against the appellant by the trial court.

In resolving this issue, the Supreme Court held that:

> The law is well settled that before a prejudgment interest can justifiably be awarded, a plaintiff often pleads that he is entitled to such interest and also that where he so pleads it, he must prove the basis for his entitlement of same by showing that it was supported either by statute or contract agreement between the parties or based on mercantile custom or on principle of equity. Such claim of interest is normally pleaded and proved, See *AG Ferrero & amp Company Ltd* v *Henkel Chemicals Nigeria Ltd* (2011) LPELR - 12(SC); *Adeyemi* v *Lan and Baker Nig Ltd* (2000) 7 NWLR (Pt 663) 3 at 48. It is however a valid law that a court can still grant prejudgment interest on a monetary or liquidated sum awarded to a successful party, even in a situation where such a party did not plead or adduce evidence in proof of such claim. Such interest, like in this instant case, naturally accrues from the failure or refusal to pay the amount involved over a long period of time, thereby depriving a party from the use of and/or enjoyment of the sum involved which is the fruit of his judgment. See *Petgas Res Ltd* v *Mbanefo* (2007) 6 NWLR (Pt 1081) 545.

- **Commentaries**

NPA raises many legal issues and contrasts with *Ekwunife* in some respects. First, the Supreme Court did not cite *Ekwunife* and the *Petgas Res Ltd* v *Mbanefo* case [*Petgas*] relied on by the court was a decision of the Court of Appeal. Whilst it is generally the law that the

Supreme Court may be persuaded by a lower court's decision, it is surprising that the Supreme Court would do so when there are its own numerous authorities on this point. It would seem from all indications that the Supreme Court deliberately shut its eyes to *Ekwunife*. Secondly, the portion of *Petgas* relied upon by the Supreme Court in holding that a party may claim prejudgment interest, even if not pleaded or adduce evidence, was from the judgment of Justice Adamu, who though presided in *Petgas*, did not give the lead judgment. The lead judgment in *Petgas* was given by Justice Denton-West, who agreed with the Ruling of the trial judge because the trial judge found a custom as the basis for awarding the prejudgment interest. Thus, the ratio in *Petgas* is that prejudgment interest could be awarded where custom in favour of such claim is pleaded and proved. It then means that the Supreme Court relied on an obiter of Justice Adamu, rather than the ratio of Denton-West.

Thirdly, *NPA* downplays the importance of pleading and proving the prejudgment claim when it is claimed as of right. As stated above, and will be restated below, *Ekwunife* and some recent authorities of the Supreme Court are to the effect that where the claim for prejudgment interest is "as of right",[608] it must be pleaded and proved. Since in *NPA,* the claim for prejudgment interest was not based on contract or mercantile custom, the court seemed to suggest that where the claim for prejudgment interest is based on contract, mercantile custom or principle of equity, as in this case, there may be no need to plead and adduce evidence of such claim in certain instances. This greatly contrasts with *Ekwunife*. However, *NPA,* like *Ekwunife,* but unlike *Ferrero,* underscores the award of prejudgment interest based on equity.

Fourthly, *NPA* strongly suggests that there is indeed a statute which gives the court the power to award interest, whether pre/post

[608] In this case, it is as of right based on equity since there is no contract or mercantile usage.

judgment. The court cited *Order 47 Rule 7 of the Federal High Court (Civil Procedure) Rules 2000*[609] and held as follows:

> Again, by Order 42 Rule 7 of the Federal High Court (Civil Procedure) Rules 2000, the trial Court has the power to award judgment interest. The provision read thus: "The Court at the time of making any judgment or Order or at any time afterwards, may direct the term with which the payment is to be made or other act is done, reckoned from the date of the judgment or order, or from some other time as the Court deems fit and may order interest at a rate not exceeding 10% per annum to be paid upon any judgment, commencing from the date thereof or afterwards, as the case may be."

Although it may seem that the rule empowers the court to award prejudgment interest since it may award it 'from some other time', a critical analysis will reveal that such interpretation is incorrect. Fairly, the *Plateau State (Civil Procedure) Rules, 1976*, [610] used to decide *Ekwunife* is differently worded,[611] however, the difference in wordings does not validate the Supreme Court's view in *NPA* that the *Federal High Court (Civil Procedure) Rules 2000* empowered the court to award prejudgment interest. A reading of both rules will reveal that the intent of the *Federal High Court (Civil Procedure) Rules 2000* was to empower the court to direct when post-judgment would begin to accrue. Whereas, under the *Plateau State (Civil Procedure) Rules, 1976*, interest rate began to accrue on the date of judgment, what the *Federal High Court (Civil Procedure) Rules 2000* and other Rules of Court[612] have done is to give the court the discretion to order that the interest rate begin to accrue at some later date after the date of judgment. Thus, the *Federal High Court (Civil Procedure) Rules 2000* did not empower the

[609] This is *in pari materia* with Order 23 Rule 5, Federal High Court (Civil Procedure) Rules, 2019.

[610] Order 27 Rule 8 of the Rules.

[611] Order 27 Rule 8: 'Unless otherwise ordered by the Court, interest shall be paid on outstanding judgment debts at the rate of 10 percent from the date of judgment whether or not the judgment debtor is allowed time to pay or to pay by instalments'.

[612] See for instance, *Order 39 Rule 4, High Court of Lagos (Civil Procedure Rule) 2019*; see also *Order 39 Rule 4, High Court of the Federal Capital Territory, Abuja (Civil Procedure Rules) 2018.*

court to award prejudgment interest. In other words, the words 'from some other time' in the rules related to at 'any time afterwards' (that is, after judgment) and not prejudgment.

5. *Julius Berger (Nig) Plc* v *Toki Rainbow (2019)*

The Respondent, a bank, and as the Plaintiff at the trial court, provided two loans to Pit-a-Pat International Nigeria Limited. The arrangement amongst the parties was that the two Local Purchase Orders were to be issued (secured) by Julius Berger (the 1st Appellant) to Pit-a-Pat International Nigeria Limited. It was the Appellants' case that the arrangement between the parties was a domiciliation agreement rather than an assignment. The Appellants contended that under a domiciliation arrangement, they only agreed to domicile the payment due to Pit-a-Pat International Nigeria Limited with the Respondent as an incentive for the Respondent to grant the loans to Pit-a-Pat International Nigeria Limited; that such arrangement does not make them a party to the loan agreement between Pit-a-Pat International Nigeria Limited and the Respondent; and that the Respondent cannot hold them liable or lay claim against them when Pit-a-Pat International Nigeria Limited defaulted. On the other hand, the Respondent contended that the arrangement was an assignment relying on two exhibits where Pit-a-Pat International Nigeria Limited had instructed the 1st Appellant to pay the Respondent. The trial court gave judgment to the Respondent with respect to the two Local Purchase Orders.

Dissatisfied, the Appellants appealed to the Court of Appeal and one of the issues [Issue 3] canvassed at the Court of Appeal was, having regard to the evidence before the High Court, whether the Respondent established that there was an assignment of the proceeds of the contract to it and whether the condition for domiciliation was not mere security for the loans and the instructions of the 2nd Appellant [Pit-a-Pat International Nigeria Limited] a mere mandate or authority to pay. The Court of Appeal upheld one Local Purchase Order and overturned the second. Further dissatisfied, the Appellants appealed to the Supreme Court and the Respondent cross-appealed. The Appellants formulated five issues for determination; whilst the Respondent formulated four issues in the cross-appeal. Issue five of

the Appellants' issues for determination is about the award of prejudgment interest on the loan.

The Supreme Court per Justice Amina Augie, who delivered the lead judgment, reasoned that the parties' issue one, which dealt with whether there was domiciliation or assignment, is the most important. She reasoned thus:

> From all indications, the Parties' Issue 1 raises a critical question, whether there was an assignment of the proceeds of the contract. The said Issue 1 is on my Priority List because if the answer is Yes, Respondent wins the day, but if the answer is No, then that would be the end of the matter: the Appeal succeeds and Appellants win.

The court then found that courts must consider all exhibits tendered by the parties,[613] and that from all the exhibits tendered by the parties, the arrangement amongst the parties was a domiciliation arrangement rather than an assignment. Justice Augie then concluded that:

> Having so resolved, the remaining issues, including issue 5,[614] waiting in the queue must fall like dominoes, one after the other, because the answer NO to the question posed in Issue 1, says it all.

However, in her concurring judgment, Justice Peter-Odili decided to rule on each of the issues formulated by the Appellant. And on the issue of prejudgment interest, my Lord held as follows:

> With respect to the power to award interest before judgment it is to be reiterated that it is based on statute or a right based on common law or some equitable principle or contract. It is because of the peculiar or special nature of this interest that it is mandatory that before such an award can be claimed, the facts in support must be pleaded and evidence led to support the head of claim and in the same vein the rate of interest and date to calculate from, specified in evidence clearly and that rate being the prevailing rate of bank interest at the time of judgment or award. That is to say that the need for evidence establishing that rate cannot be overemphasised. Therefore, in this instant case where the respondent neither pleaded nor led evidence to show any custom, agreement or statute under

[613] This finding appears to be the ratio of the case.

[614] Issue 5 is on prejudgment interest.

> which it founded its claim of interest against the appellants the Court erred in awarding the prejudgment interest against the appellants. See *Section 97 (1) (h) and 2 (e) of the Evidence Act 1990*.

- **Commentaries**

It is important to consider whether *Julius Berger* is actually an 'authority' on prejudgment interest. This is because the lead judgment in the case was delivered by Justice Amina Augie, and she made no reference to prejudgment interest because she did not consider that issue,[615] having resolved issue one against Respondent. Reference was only made to prejudgment interest by Justice Peter-Odili in her concurring judgment. What then is the status of Justice Peter-Odili's statement on prejudgment interest having not been addressed and considered in the lead judgment? This question is important as the Supreme Court had cautioned that 'it is only the ratio decidendi of a Supreme Court judgment that binds the Court and the lower Courts, and not obiter dicta in concurring judgments.'[616] If Justice Peter-Odili's statement was an obiter, then, *NPA,* despite its flaws, remained the law until at least 2020.[617]

There are two possible ways to see Justice Peter-Odili's statement. A school of thought sees a concurring judgment as equal in ranking to the lead judgment. In *Nwana* v *FCDA*,[618] the Supreme Court held that:

> a concurring judgment, has equal weight with or as a leading judgment and may add to what the writer of the lead judgment did not remember…. insofar as what is contained there is relevant to the issue in the matter, the judgment is acceptable as a concurring judgment.[619]

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[615] That is, Issue 5.

[616] *Yusuf & Ors.* v *Obasanjo & Ors* [2005] 18 NWLR (Pt.956) 96.

[617] On 5 June 2020, the Supreme Court delivered judgment in *Omni Product* v *UBN Plc* [2021] 10 NWLR (Pt. 1783), wherein the court, applying equity, held that a bank which unreasonably withheld a certain sum of money was bound to pay prejudgment interest. I did not consider this judgment here since *Cappa* (n 15), having been decided on 22 January 2021, is latter.

[618] *Nwana* v *FCDA* [2004] 13 NWLR (Pt. 889) 128.

[619] See also *Olufeagba & Ors* v *Abdul-Raheem & Ors* [2009] 18 NWLR (Pt. 1173) 432.

So, according to this school of thought, since Justice Odili's statement on prejudgment is relevant to the fact in issue, it may be said to have equal weight as the lead judgment.

The second school of thought posits that the ratio of a case is contained in the lead judgment. Achike JSC's judgment in *Abacha & Ors* v *Fawehinmi*[620] is usually referenced. His Lordship held:

> The point of jurisprudential interest and of considerable interest in this appeal is the relationship of the bindingness of the ratio decidendi or rationes decidendi contained in the leading judgment on the one hand, and the concurring judgments, on the other hand. Are they at par or are some superior to others? The jurisprudence and practice of law in this country appears to be tolerably clear: it is the ratio or the rationes contained in the leading judgment that constitutes or constitute the authority for which the case stands. All other expressions contained in the concurring judgments, particularly those not addressed in the leading judgment are obiter dictum or dicta.

In my view, the second school of thought better explains the contention here. First, the ratio upon which *Julius Berger* stands is that 'courts must consider all exhibits tendered by the parties' because had the trial court and the Court of Appeal done so, they would have held that the arrangement between the parties was a domiciliation arrangement, which was the crux of the issues between the parties. Hence, Justice Peter-Odili's statement on prejudgment interest constitutes an *obiter.* Secondly, the mere fact that the statement was relevant to a fact in issue does not make it a ratio since it was not expedient to the determination of the case. In any event, it may be better to avoid *Julius Berger* as an authority on prejudgment interest. Moreover, since Justice Peter-Odili's statement reiterates *Ekwunife,* it did not introduce anything new to prejudgment interest jurisprudence in Nigeria.

[620] *Abacha & Ors* v *Fawehinmi* [2000] 6 NWLR (Pt. 660) 299.

6. *Cappa & D'Alberto (Nig) Plc* v *NDIC (2021)*

Cappa deals exclusively with the issue of pre/post-judgment interest. The Appellant's case against the Respondent at the trial court was the refund of the sum of N3,121,446.00 (Three Million, One Hundred and Twenty-One Thousand, Four Hundred and Forty-Six Naira Only) being the total sum of money of the "Crossed Cheques", negligently and fraudulently received and cleared by the Respondent into a fake account. The Appellant claimed both pre/post judgment interest on this amount and was granted by the trial court. The Respondent appealed to the Court of Appeal which arbitrarily reduced the rate of prejudgment interest awarded the Appellant from 25% per annum to 4% per annum and 4% per annum post-judgment interest as opposed to the rate of 21% per annum awarded by the trial court, without giving any reasons or stating the law under which it acted. Dissatisfied, the Appellant sought the reversal of that portion of the Court of Appeal's judgment relating to interest and to restore the judgment of the trial court in respect of the same.

Justice Abba Aji, delivering the lead judgment in favour of the Appellant reversed the Court of Appeal's decision for failure to state the reason for reducing both the pre/post-judgment interest. The court then held:

> By the pleadings of the parties, it is revealed that the transaction was based on normal banking or financial transactions, where interest rates/gains/profits are topmost and uppermost. In fact, where interest is not even claimed on the Writ, but the facts are pleaded as did the Appellant in its amended statement of claim and evidence was given which showed entitlement thereto, the court may award interest as a general rule. See *Ekwunif*e v *Wayn*e (W/A) Ltd (1989) 5 NWLR (PT.122) 428… Interest may be awarded in a case in two distinct circumstances, namely: (i) As of right: and (ii) Where there is a power conferred by statute to do so, in exercise of the court's discretion. Interest may be claimed as a right where it is contemplated by the agreement between the parties, or under a mercantile custom, or under a principle of equity such as breach of a fiduciary relationship. Where interest is being claimed as a matter of right, the proper

practice is to claim entitlement to it on the writ and plead facts which show such an entitlement in the statement of claim.

- **Commentaries**

Cappa reiterates *Ekwunife.* It reemphasizes the four ways of claiming prejudgment interest. It also, like *Ekwunife* and *NPA,* underscores the equitable right of a party to claim prejudgment interest where money has been withheld unjustifiably. But it differs from *NPA* on the pleading and proof of such facts(s) entitling the party to prejudgment interest. In *NPA,* the Supreme Court had held that a court can still award prejudgment interest on a monetary or liquidated sum awarded to a successful party, even in a situation where such a party did not plead or adduce evidence in proof of such claim. This part of the decision in *NPA* appears to have been nullified by *Cappa.* Thus, the extant law is that where prejudgment interest is claimed as of right, it must, at least, be pleaded.

4.0. CONCLUSION AND RECOMMENDATIONS

Though *Cappa* remains the law on prejudgment interest, the inconsistency of the previous decisions makes the law uncertain. Whilst the law is fairly certain in the three other grounds of claiming prejudgment interest,[621] claiming it through equity is not. The law has only recognized two instances where prejudgment interest may be claimed on the ground of equity: (i) in commercial transactions, where money was unjustifiably withheld by a party;[622] and (ii) where there is a fiduciary relationship.[623] In *Ferrero* where the Appellant invited the Supreme Court to determine other equitable instances, the court declined.[624]

One of the ways conflicting authorities of the court may be put to rest is for the legislature to enact a law which settles the conflict. In Nigeria, the legislature can override the decision of the Supreme Court

[621] Through contract, through mercantile usage and through statute.

[622] *Adeyemi* v *Lan & Baker* (supra).

[623] *Cappa* (n 579).

[624] See the lead judgment of Tabai and concurring judgment of Rhode-Vivour.

through an enactment.[625] Thus, in order to attain some certainty in law on prejudgment interest, the legislature may enact a law on this subject. Commendably, there is currently a Bill at the National Assembly seeking to amend the Federal High Court Act to make provisions for prejudgment interest. The Bill is titled *Federal High Court (Amendment) Act, 2021* and it seeks to regulate 'the award of prejudgment interest in commercial transactions'.[626] In Canada and the United Kingdom, the law on prejudgment interest is clear as there are laws making provision for it.[627] *The Federal High Court (Amendment) Act, 2021*, when passed to law will be applicable at the Federal High Court. It is therefore recommended that the appropriate bodies[628] make laws/rules on prejudgment interest in the various states of the federation.

It is also recommended that in order not to create another uncertainty in the law on prejudgment interest, the law should stipulate what type of prejudgment interest rate should be applicable: is it compound or simple interest? Although it is clear that in some mercantile customs, like the banking sector, the law is certain that compound interest is applicable,[629] there is a need to expressly state when compound or simple interest will be applicable when there is no such mercantile custom. This problem is being faced in other jurisdictions. In Canada and the United Kingdom, there are debates on jettisoning simple

[625] *AG (Abia)* v *AG (Federation)* [2006] 16 NWLR (Pt. 1005) 265 at 373-74 per Niki Tobi; *Adigun* v *Governor of Osun State* [1995] 3 SCNJ 1 at 20; see David Igho Efevwerhan (2013) at p.31.

[626] Iwok Iniobong, 'Abiru's Bill on 'Regulations of Award of Prejudgment Interest in Commercial Transactions' scales second reading' *The Business Day February 26, 2022,* available at https://businessday.ng/news/article/abirus-bill-on-regulations-of-award-of-pre-judgment-interest-in-commercial-transactions-scales-second-reading/ (accessed 15 March 2022). Unfortunately, the author could not get a copy of the Bill at the time of writing this article.

[627] In the UK, there are 7 ways to pre-judgment interest. Claiming it under a statute is one of them. See Pre-Judgment Interest on Debts and Damages' (n 588). In Canada, see Court Order Interest Act, s.2(c), s.7.

[628] From case law, it seems there is nothing preventing the Chief Judges of the various courts from making rules on prejudgment interest. See *Ekwunife* (n 575); *NPA* (n 577).

[629] *Barclays Bank of Nigeria Ltd* v *Abubakar* [1977] 10 SC 13; *Adetoro* v *Union Bank of Nigeria* [2007] All FWLR (Pt. 396) 590.

interest due to its flaws on commercial reality, but the courts are handicapped due to statute prohibiting compound interest.[630] In *British Columbia (Forests)* v *Teal Cedar Products Ltd.,*[631] the Supreme Court of Canada noted that "there is no doubt that compound interest is a more accurate way of compensating parties for the time-value of money. However, the legislature has not yet amended the Act to remove the prohibition of interest on interest, so simple interest, despite its flaws, remains the rule in British Columbia courts." Therefore, this article makes a case for clarity on the type of prejudgment interest rate to be awarded by the courts in the absence of mercantile usage in the laws to be enacted on prejudgment interest in Nigeria.

[630] 'Prejudgment Interest on Debts and Damages' (n 588); T. Bant *et. al* (2022) (n 23); 'Interest – Pre & Post Judgment' (n 588).

[631] *British Columbia (Forests)* v *Teal Cedar Products Ltd* (2013) SCC 51.

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