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The Editor-in-Chief,
Nigerian National Human Rights Commission Journal
National Human Rights Commission
19 Aguiyi Ironsi Street, Maitama,
Abuja, FCT

Email: nhrcanigeria@yahoo.com

PROFILE OF CONTRIBUTORS IN THIS EDITION

Dr. Yakubu Inuwa Adamu Fobur was called to the Nigerian Bar Association on August 22, 1985 after graduating from the Law Faculty of the ***prestigious*** Ahmadu Bello University, Zaria in 1984 with a Second Class (Upper) Division in Civil Law. He holds a Doctor of Philosophy Degree in Law from the University of Jos obtained in 2000. He was a Senior Research Fellow and Acting Head of Department, Africa and Comparative Laws, Nigerian Institute of Advanced Legal Studies Lagos between 2001-2006. Presently he is a private consultant in International Law especially International Criminal Law, Human Rights, Law of the Sea, Oil and Gas Law to Constitutional Law. Dr. Fobur has many published articles in local and international journals. He is the author of the book titled **"Nigeria and the Global Fight Against Drugs"** published by the University of Jos Press Ltd in 2009. For correspondence, he can be reached through: **Mobile Phone Nos.** 08060067212/07036260076 e-mail: dryakubufobur@yahoo.com

Rufus Mmadu; LL.M., LL.B. (Lagos), BL.
Law Lecturer, College of Law, Osun State University, Osogbo-Nigeria
Postal Addres: *Mmadu, Evbodi & Co, Suite 8, 2nd Floor, Ariket Plaza, By Alake Bust Stop, Along Idimu/Ikotun road, Ikotun-Lagos, Nigeria*
Phone No: +2348035319283, +2348127017430
Email Address: rufusmmadu@uniosun.edu.ng OR mmadurufus@yahoo.com

Chinenye Augusta Nwevo graduated from Ebonyi State University with an LLB in 2006 and was called to the Nigerian Bar in 2007. She has an LLM from University of Lagos, Akoka with special interests in Constitutional law and Democracy. Chinenye is an experienced Mediator and a Member of the Body of Neutrals of the Lagos Multi-Door Court House. She is likewise a member of Standing Conference of Mediation Advocates (SCMA UK) Nigeria.

Chinenye is very knowledgeable in charity and philanthropy management with over 8years experience in criminal justice

administration and management of ex-prison inmates under the auspicies of the Rock Foundation; the CSR arm of the House on the Rock Churches Nigeria. Chinenye has been heading the rehabilitation/counselling department since 2010 and has been working with the legal department since 2009.

A PRINCE2 certified Project Manager, Chinenye has successfully managed various projects including the Access Bank Plc, Wealth Management Group Back-to-Work Project 2012 and Pressplay Project 2015 where she served as the South-East and South-South Coordinator.

She has also worked with the law firms of Adebayo Osho& Co, Amobi Ogudu& Associates and Equity House Attorneys. Her practice areas have covered commercial transactions, company regulations, capital markets regulations, assets management, real estate and property management.

Bamson, Tamunoene Jones,
B.Sc Accountancy, MBA Management, M.Sc Accounting, PGD Education, CIPSMN Part-Time Lecturer/Facilitator, Graduate Conversion Programme of the Chartered Institute of Purchasing And Supply Management of Nigeria.
Address: *No. 6 Warri Street, Off Aba Road, (Leventis Bus Stop), D/line, Port Harcourt, Rivers State.*
E-mail: *tamunoenebamson@gmail.com*
Tel.: *+234 (0) 8063308821*

Mr. Tamunoene Jones Bamson hails from Abam-Ama in Okrika Local Government Area of Rivers State. He is a trained Accountant from the Rivers State University of Science and Technology and the University of Port Harcourt, where he obtained his B.Sc Accountancy and M.Sc Accounting Degrees respectively. Also, he has an MBA Degree in Management from the University of Port Harcourt. Mr Tamunoene Jones Bamson is currently an employee of the Rivers State Senior Secondary Schools Board (RSSSB). As a result of his job with the RSSSB, he enrolled with the National Teachers' Institute, Kaduna and obtained a Post Graduate Diploma (PGD) in Education. In addition, he is a Graduate Member of the Chartered Institute of Purchasing and Supply Management of Nigeria

(CIPSMN). Furthermore, Mr. Tamunoene Jones Bamson is a Part-Time Lecturer/Facilitator in the Graduate Conversion Programme of the Chartered Institute of Purchasing and Supply Management of Nigeria, Port Harcourt Study Centre, Rivers State. He has published numerous articles in reputable journals on Accounting, Auditing, Procurement and Education. Lastly, he is happily married to Mrs. Peace Chinemerem Tamunoene (nee Enyioko).

Bawa Sahabi Tambuwal, Ph.D; BL; is a lecturer at the department of Sharia Law, College of Basic and Advanced Studies Yelwa-Yawuri, Kebbi State, Nigeria. He teaches Islamic Law, the Law of Evidence, Criminal Procedure and Criminal Law. Ardently interested in research with a number of publications and papers which touch on various aspects of Islamic Law, presented in academic fora. He has published over a dozen of journal articles as well as two books in the areas of Islamic Law. Dr. Tambuwal is a member of the International Research and Development Network. He is a Fellow, of the Strategic Institute forNatural Resources and Human Development of Nigeria.

Bawa Sahabi was an Area Court Judge, Upper Area Court Judge, Upper Sharia Court Judge and Chief Wali (Chief Inspector) of Sharia Courts, with Sokoto State Judiciary. He was a member of the Governorship and Legislative Houses Election Tribunal in the year 2003 (Kaduna State). He was a qualified National Health Extension Worker (Community Health Officer).

Dr. Sahabi holds Doctor of Philosophy(Ph.D)Degreein Law from Usmanu Dan Fodiyo University Sokoto, a Master's Degree in Sharia Law, Usman Dan Fodiyo University Sokoto. He graduated with Second Class UpperHonours Degree in Law from Usmanu Dan Fodiyo University Sokoto Nigeria. He was called to the Nigerian Bar in the year 1998. He is the Dean of Law, school of Legal & Islamic Studies, College of Basic and Advanced Studies, Yelwa-Yawuri Kebbi State Nigeria. He is currently an Editor-in-Chief of the ***Yawuri Journal of Arts and Science*** (YARJAS).
Mobile Phone Nos.: 07032222920, 08094367736.
E-Mail: bawasahabi4real@naij.com

Stanley Ibe is a human rights lawyer and student of democracy. He was a fall 2016 Reagan-Fascell democracy fellow at the National Endowment for Democracy, Washington DC. His articles on diverse subjects have appeared in reputable platforms across the world.

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BENCHMARKING THE RIGHTS OF INTERNALLY DISPLACED PERSONS IN THE FIGHT AGAINST BOKO HARAM INSURGENCY IN NIGERIA

BY

Dr. Yakubu A. Fobur*

Abstract

The fight against Boko Haram insurgency in North East Nigeria began in 2009 and has resulted in turning millions of people into internally displaced persons. These internally displaced persons include men, women and children who have been forced to abandon their places of usual habitation to the wilderness. Most of the internally displaced persons have been faced with challenges such as lack of shelter, food, education, health and others. Though Nigeria's governments and other Non-governmental organizations have attempted to assist and protect them, yet the aid/assistance and protection seem to be insignificant.

The exposition defines internally displaced persons to the causes of internal displacement. The rights of the internally displaced persons under Nigerian laws are extensively examined as well as the duties/obligations of Nigeria as a nation (under the African Union Convention for the Protection and Assistance to Internally Displaced Persons, 2009) to internally displaced persons are also discussed. The exposition narrows down to the internally displaced persons by the Boko Haram insurgency in North East Nigeria Options for Nigeria are suggested after a conclusion.

KEYWORDS – *Internally Displaced Persons, Rights and Boko Haram Insurgency*

INTRODUCTION

At no time has the global village been enveloped by internal displacements than by the end of the 20th and the beginning of the 21st centuries. From Asia, especially India, China, Nepal, Pakistan, Afghanistan, Iraq, Yemen, Iran to Syria, it has been incidences of internal displacements. In Africa, particularly Sudan, Southern Sudan, Eritrea, Somalia, Central African Republic, Congo Democratic Republic, Nigeria to Niger Republics, not a day passes by without reported cases of internal displacements for one reason or the other. The cases of internal displacements have crossed the Atlantic Ocean to South America especially Columbia, Peru to Venezuela. Europe has been no exception either, in view of the exodus of Syrians running away from their civil war through Turkey and Balkan states to Western Europe.[1]

By December 2014, a record of 28 million people had become internally displaced globally within their own nations as a result of one cause of internal displacement or the other. Out of this figure, it was reported that the protracted crises in Democratic Republic of Congo, Iraq, Nigeria, South Sudan and Syria accounted for 60% of the new displacements. Internal displacement is a global crisis affecting about twenty to twenty five million people in over forty nations, literally on all regions of the globe. Africa, with half of the world's displaced population in some twenty one nations is worst hit.

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* Yakubu Inuwa Adamu Fobur, Ph.D.BL is a legal practitioner having been called to the Nigerian Bar on August 22, 1985. He holds a Bachelors Degree in Law LL.B.(Hons) 2/1 in Civil Law from the Faculty of Law of the prestigious Ahmadu Bello University, Zaria in 1984. He also holds a Masters and Doctor of Philosophy Degrees in Law from the University of Jos obtained in 2000. Mobile Phone Nos. 08060067212/07036260076
E-mail dryakubufobur@yahoo.com

1. Global Report on Internal Displacement June, 2016 by the Internal Displacement Centre (IDMC) of the Norwegian Refugee Council (NRC). This report is the most authoritative report on internal displacements globally and recognized by the United Nations.

The situation in Africa continues to worsen with every crisis that ensues. It is a humanitarian and human rights tragedy[2].

In the Year 2015, the Global Report on Internal Displacement (hereinafter referred to, as the ***Report***) showed that 40.8 million people were internally displaced as a result of conflict, violence and disasters subjecting a record number of people to the trauma and upheaval of being forcibly displaced within their own nation.[3] This is the highest figure ever recorded in the global history of internal displacement of human beings. Five (5) nations have been in the top ten (10) list with the largest displaced populations every year since 2003. These nations are Columbia, Democratic Republic of Congo, Iraq, Sudan and South Sudan. The Report for the middle of the Year 2016 showed that the number of internally displaced persons was on the increase and by the end of the year, the figures were over and above those of the Year 2015.[4]

Nigeria has 3.3 million internally displaced persons mainly as a result of conflicts and violence, thus, having the highest number in Africa. The Report's global overview in 2016 attributed violence, abuses and forced evictions to the conflict mix in many of these situations, while in places such as Nigeria, evidence abound about how challenging life becomes for those already displaced by conflicts when they are struck down again by severe floods and storms.[5]

On a global scale, Nigeria is only ranked behind Syria with 6.5 million internally displaced persons and Columbia with 5.7 million internally displaced persons. Thus, Nigeria has overtaken Congo

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2. Roberta Cohen & Francis M. Deng, Masses in Flight: The Global Crisis of Internal Displacement Washington, D.C: Brookings Institution Press, 1998, P. 16.
3. *Ibid.*
4. *Ibid.*
5. *Ibid.* See also National Emergency Management Agency (NEMA), Abuja 2015 Records of Internally Displaced Persons 2015. See further National Commission for Refugees in Nigeria (NCFR), Abuja 2015 Report, Table 2. In May the Commission revealed the existence of about 3.2 million Internally Displaced Persons in Nigeria due to complex causes.

Democratic Republic, Central African Republic, Sudan and even South Sudan on the number of internally displaced persons in Africa. Indeed, this should be a source of concern to any right thinking Nigerian and government.[6]

This discourse begins with the definition of an internally displaced person to the causes of internal displacement. The backbone of the discourse is essentially a thorough examination of the rights of internally displaced persons within Nigerian laws. It also X-rays the rights of internally displaced persons vis-a-viz the duties of the Nigerian state towards them under Nigeria's legislation as well as under the African Union Convention for the Protection and Assistance to Internally Displaced Persons, 2009 otherwise known as the Kampala Convention.[7] Options are suggested after a conclusion as to the efficacy or otherwise of the rights.

2. DEFINITION OF INTERNALLY DISPLACED PERSON/S (IDPs)

Internally displaced persons (IDPs) are people who have been forced to flee their homes but who remain within their country's borders. They are often ***albeit*** wrongly referred to as refugees, although they do not fall within the current legal definition of refugees in international law. Whereas ***"Refugees"*** have an authoritative definition under the United Nations Refugees Convention, 1951, there is no globally acceptable legal definition of internally displaced persons. However, the United Nations Guiding Principles on Internal Displacement, 1998 defines internally displaced persons as:

People or group of people who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human made disasters and who have not crossed an internationally recognized state border.[8]

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6. *Ibid.*
7. The Convention came into force in 2012.
8. Principle 1.

This definition is on all fours with the definition of internally displaced persons under the African Union Convention for the Protection and Assistance to Internally Displaced Persons, 2009. The UN Guiding Principles definition or description of internally displaced persons stressed two (2) important elements of internal displacement (coercion and the domestic/internal movement). It is important to observe that, rather than strict definition, the Guiding Principles offer a descriptive identification of the category of persons whose needs are the concern of the Guiding Principles. In this manner, the Principles intentionally steers towards flexibility rather than legal precision as the words "in particular" indicate that the list of reasons for displacement is not exhaustive. Curiously, no Nigerian local legislation defines what internally displaced persons are. However, as a party to the African Union Convention for the Protection and Assistance to Internally Displaced Persons, 2009 the definition of internally displaced persons contained in that document bind it and is adopted for the purpose of this discourse. .

3. CAUSES AND NATURE OF INTERNAL DISPLACEMENT

Various reasons have been advanced by scholars and legislations both local/ municipal and international laws as the causes of internal displacements in Nigeria. Some of the causes include internal armed conflicts especially the Boko Haram insurgency which began in 2009 to the perennial Fulani/herdsmen attacks on farmers as the primary causes of internal displacements in Nigeria of recent.[9] As at

9. M. T. Ladan, Diagnostic Review of Insurgency in Nigeria: The Legal Dimension in Bayero University Journal of Public Law (BUJPL) Vol. 2, No. 2, December, 2010, 1, 4. See also Ladan, M. T. (2011) "Overview of International and Regional Frameworks on International Displacement: A Case Study of Nigeria" Paper presented at a 2 day Multi stakeholders conference on International Displacement in Nigeria. Organized by the Civil Society Legislative Advocacy Centre, Abuja in Collaboration with IDMC and the Norwegian Refugee Council, Geneva, held on November 21 – 23 at Bolton White Hotels, Abuja, Nigeria.

December 2015, Nigeria had 3.3 million persons internally displaced by conflicts and violence.[10] Violence, human rights abuses and forced evictions all add to the conflict mix in many of the aforementioned situations in the opinion of this author. The unprecedented rise in internally displaced persons in Nigeria in 2015 owed it to increased number of Boko Haram attacks, heavy/high handedness in counter insurgency operations as well as inter communal violence especially between Fulani herdsmen and farmers in the Middle Belt, South West, North West, South South and South East parts of Nigeria.[11]

After the Boko Haram insurgents were pushed out of major towns in the North East region of Nigeria i.e. Borno, Yobe and Adamawa States following collaborative efforts between other security agents and the Nigerian Armed Forces, they focused their attacks with increased brutality on towns and villages close to Nigeria's borders with Cameroon, Niger and Chad Republics.[12]

4. CHALLENGES OF INTERNALLY DISPLACED PERSONS

Despite efforts of the United Nations (UN), its organs and non-governmental organizations collaborating with the government of Nigeria through the National Emergency Management Agency (NEMA) in order to ameliorate the conditions of internally displaced persons and rehabilitate the victims, there are daunting challenges confronting victims of the terrorist attacks in Nigeria. The thoroughly poor conditions of internally displaced persons in Nigeria reflects the impecunious conditions of millions of Nigerians. In the words of Roberta Cohen and Francis M. Deng:

An effective response to the crisis of internal displacement should not be limited to addressing it as a symptom. An effective response must go to the deeper root causes that lie in the structural problems of nation building. Management of identity conflicts, gross inequities in

10. The Report, op. cit.
11. *Ibid.*
12. Abdulkareem Mohammed, The Paradox of Boko Haram Kano: Moving Image Ltd 2010, 20.

the shaping and sharing of power, national wealth, opportunities for development, and chronic abuse of power resulting in egregious violations of human rights. Indeed the crisis of displacement should be seen as a wake-up call and an opportunity for addressing the deeper, structural ills of the nation to forge a national common ground and collective vision for national building[13].

There is wide gap of commitment to the welfare, security and rehabilitation of internally displaced persons from the Federal and state government authorities. The following are the three (3) major problems confronting government recognized internally displaced persons camps in Nigeria.

The first problem is the welfare of the displaced persons. Indeed, they are finding it difficult to regain pre-conflict way of living because of post conflict living conditions; poor sanitation which exposes members of the camps to infectious diseases, poor medical facilities which accommodate growth of infectious bacteria, fungi and virus in their bodies, poor feeding which exposes them to malnutrition and poor condition of infrastructure such as power, water, roads etc. Considering the population of nursing mothers and children, several appeals have been made to previous and incumbent governments to ameliorate the condition of internally displaced persons but created little or no result. Displacement deprives them of the basic necessities of life such as shelter, food, medicine, education, or employment opportunities. Displaced persons, face discrimination and often find their family and communal ties shattered. Worst of all, they are often trapped within the zone of the very conflict which they seek to flee forcing masse them to move again and again[14].

Security is arguably the most challenging problem of the displaced persons. They have been exposed to the danger of attacks

13. Roberta Cohen & Francis M. Deng, Masses in Flight, *Op. Cit.* P. 28.
14. Roberta Cohen & Francis M. Deng, The Forsaken People: Case Studies of the Internally Displaced, Washington, D.C: Brookings Institution Press, 1998, P. 16.

by the insurgents. For instance, in September, 2015 the deadly terrorist group, Boko Haram, in a suicide mission, attacked members of internally displaced persons camps in Madagali and Yola, Adamawa state killing 12 persons. In one of the attacks, bombs were reported to have been detonated inside a tent at the internally displaced persons camp. This and similar acts constitute security threats to the internally displaced persons yet to recover from the psychological trauma from loss of families, friends and properties coupled with a responsibility to protect themselves in their various unprotected camps. The inadequacy of security at the internally displaced persons camps makes them vulnerable to attacks from terrorists and other criminals.

No doubt internally displaced persons need protection, assistance and rehabilitation. In the words of Cohen and Deng:

Hosting internally displaced persons in camps without solid rehabilitation plans makes them vulnerable to crime in a bid to survive. Members of internally displaced persons camps must be kept busy psychologically and rehabilitated economically to assist them recover from the scourge of conflict. Rehabilitation process of internally displaced persons camps members in the North East geopolitical zone have been grossly inadequate[15].

Female internally displaced persons in almost all the internally displaced persons camps in the affected areas have been turned into sex slaves by fellow adult male internally displaced persons or even by security agents who are supposed to protect them. Amnesty International in its January, 2017 reported cases of sex abuses against security agents especially by the military in most internally displaced persons camps in North East, Nigeria. Female internally displaced persons have been turned into sex slaves by those who are supposed to protect them. Money, foodstuff and offer of protection are some of the methods use to lure the female internally displaced persons into sex abuse.

15. *Ibid.*

It would appear that there is a deliberate attempt from the governments to ignore the internally displaced persons. This is evident in several failed, unfulfilled promises made by governments and the politicizing of internally displaced persons. The camps have emerged as grounds for politicians to score cheap political popularity by visiting to donate scanty food items while leaving long term solutions. In addition to the comprehensive challenges analyzed above, it is pertinent to further note that there are some internally displaced persons camps that are unrecognized by the Federal and state governments. This implies that the figures of internally displaced persons projected by the governments are not comprehensive since they are limited to camps recognized or organized by the governments. Thus, internally displaced persons in such camps are left to their fates.

5. DUTIES/OBLIGATIONS OF STATES TO INTERNALLY DISPLACED PERSONS

The laws governing the rights and obligations of internally displaced persons in Nigeria also creates rights to and obligations against the state. Nigeria as a nation has been placed under certain obligations/responsibilities to internally displaced persons as a result of violent, armed conflict, human right abuses to even displacement by other causes. As examined elsewhere in this discourse, Nigeria has no specific local legislation that confers rights to internally displaced persons and imposes duties upon it as a state to protect and assist internally displaced person. The convention which creates and confers specific rights upon internally displaced persons as well as imposing duties upon Nigeria to protect and assist internally displaced persons is the African Union Convention for the Protection and Assistance to Internally Displaced Persons, 2009 otherwise known as the Kampala Convention. Nigeria has ratified but yet to domesticate it.

The Convention, in the opinion of author is a comprehensive legislation on the protection and assistance of internally displaced

persons. It creates rights and obligations for internally displaced persons vis-a-viz obligations against nation states which are parties to it- including Nigeria notwithstanding the cause or source of internal displacement. The Convention it is further observed provides a comprehensive and detailed analysis of the causes and consequences of internal displacement, the current political normative and institutional frameworks for addressing the problem, and numerous recommendations to improve the current response. It is also a unique, well written and well researched legislation on the phenomenon of internal displacement. A must for any nation state in Africa wanting to acquire a full understanding of what internal displacement is all about, and constitutes a solid basis for those who are to formulate appropriate policies and strategies for handling specific situations. Consequently, it deserves a prominent place in any exposition dealing with humanitarian assistance in complex situations like internal displacement. In view of the number of African States including Nigeria being aggressively affected by internal displacements, the ratification and domestication of the convention is a necessity by each nation. It is in view of the comprehensiveness of the Kampala Convention in terms of the coverage of the rights of internally displaced persons and duties it has imposed on nation states parties to it including Nigeria that the rights and duties therein created are extensively examined in this exposition.

5.1 General Obligations of States

The African Union Convention for Protection and Assistance to Internally Displaced Persons, 2009 otherwise known as the Kampala Convention makes general obligations relating to states parties to it relating to internally displaced persons. It provides that states parties undertake to respect and ensure respect for the Convention.[16] In particular, parties shall: refrain from, prohibit and prevent arbitrary displacement of populations; prevent political, social, cultural and economic exclusion and marginalization, that are likely to cause

16. Article 3 (1) African Union Convention for Protection and Assistance to Internally Displaced Persons, 2009.

displacement of populations or persons by virtue of their social identity, religion or political opinion; respect and ensure respect for the principles of humanity and human dignity of internally displaced persons; respect and ensure respect and protection of the human rights of internally displaced persons, including humane treatment, non-discrimination, equality and equal protection of law; respect and ensure respect for international humanitarian law regarding the protection of internally displaced persons,; respect and ensure respect for the humanitarian and civilian character of the protection of and assistance to internally displaced persons, including ensuring that such persons do not engage in subversive activities. It also provides that states shall ensure individual responsibility for acts of arbitrary displacement, in accordance with applicable domestic and international criminal law. It further ensures the accountability of non-State actors concerned, including multinational companies and private military or security companies, for acts of arbitrary displacement or complicity in such acts; ensure the accountability of non-State actors involved in the exploration and exploitation of economic and natural resources leading to displacement, ensure assistance to internally displaced persons by meeting their basic needs as well as allowing and facilitating rapid and unimpeded access by humanitarian organizations and personnel; promoted self-reliance and sustainable livelihoods amongst internally displaced persons, provided that such measures shall not be used as a basis for neglecting the protection of and assistance to internally displaced persons, without prejudice to other means of assistance.[17]

5.2 Obligations of States Parties Relating to Protection From Internal Displacement

The Kampala Convention obligates states parties to respect and ensure respect for their obligations under international law, including human rights and humanitarian law, so as to prevent and avoid

17. Article 3 (1) (a) – (j).

conditions that might lead to the arbitrary displacement of persons.[18] States parties shall devise early warning systems, in the context of the continental early warning system, in areas of potential displacement, establish and implement disaster risk reduction strategies, emergency and disaster preparedness and management measures and, where necessary, provide immediate protection and assistance to internally displaced persons.[19] Parties may seek the cooperation of international organizations or humanitarian agencies, civil society organizations and other relevant actors.[20] All persons have a right to be protected against arbitrary displacement. The prohibited categories of arbitrary displacement include but are not limited to: displacement based on policies of racial discrimination or other similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the population; individual or mass displacement of civilians in situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand, in accordance with international humanitarian law; displacement intentionally used as a method of warfare or due to other violations of international humanitarian law in situations of armed conflict; displacement caused by generalized violence or violations of human rights; displacement as a result of harmful practices; forced evacuations in cases of natural or human made disasters or other causes if the evacuations are not required by the safety and health of those affected; displacement used as a collective punishment; displacement caused by any act, event, factor, or phenomenon of comparable gravity to all of the above and which is not justified under international law, including human rights and international humanitarian law.[21]

5.3 Obligations of States Parties Relating to Protection and Assistance

States parties to the Kampala Convention shall bear the primary duty and responsibility for providing protection of and humanitarian

18. Article 4 (1).
19. Article 4 (2).
20. Article 4 (3).
21. Article 4 4 (a) – (h).

assistance to internally displaced persons within their territory or jurisdiction without discrimination of any kind.[22] States parties shall cooperate with each other upon the request of the concerned State Party or the Conference of State Parties in protecting and assisting internally displaced persons.[23] States parties shall respect the mandates of the African Union and the United Nations, as well as the roles of international humanitarian organizations in providing protection and assistance to internally displaced persons, in accordance with international law.[24] States parties shall take measures to protect and assist persons who have been internally displaced due to natural or human disasters, including climate change.[25] States parties shall assess or facilitate the assessment of the needs and vulnerabilities of internally displaced persons and of host communities in cooperation with international organizations or agencies.[26] States parties shall provide sufficient protection and assistance to internally displaced persons, and where available resources are inadequate to enable them to do so, they shall cooperate in seeking the assistance of international organizations and humanitarian agencies, civil society organizations and other relevant actors. Such organizations may offer their services to all those in need.[27]

The Kampala Convention further obligates states parties to take necessary steps to effectively organize relief action that is humanitarian, and impartial in character, and guarantee security. States Parties shall allow rapid and unimpeded passage of all relief consignments, equipment and personnel to internally displaced persons. States Parties shall also enable and facilitate the role of local and international organizations and humanitarian agencies, civil

22. Article 5 (1).
23. Article 5 (2).
24. Article 5 (3).
25. Article 5 (4).
26. Article 5 (5).
27. Article 5 (6).

society organizations and other relevant actors, to provide protection and assistance to internally displaced persons. States Parties shall have the right to prescribe the technical arrangements under which such passage is permitted. States parties shall uphold and ensure respect for the humanitarian principles of humanity, neutrality, impartiality and independence of humanitarian actors. States parties shall respect the right of internally displaced persons to peacefully request or seek protection and assistance, in accordance with relevant national and international laws, a right for which they shall not be persecuted, prosecuted or punished. States parties shall respect, protect and not attack or otherwise harm humanitarian personnel and resources or other materials deployed for the assistance or benefit of internally displaced persons.[28]

5.4 Obligations Relating To International Organizations and Humanitarian Agencies

International organizations and humanitarian agencies shall discharge their obligations under the Kampala Convention in conformity with international law and the laws of the country in which they operate. In providing protection and assistance to internally displaced persons international organizations and humanitarian agencies shall respect the rights of such persons in accordance with international law. International organizations and humanitarian agencies shall be bound by the principles of humanity, neutrality, impartiality and independence of humanitarian actors, and ensure respect for relevant international standards and codes of conduct.[29]

5.5 Protection and Assistance to Internally Displaced Persons In Situation Of Armed Conflict

The provisions of the Kampala Convention shall not, in any way whatsoever, be construed as affording legal status or legitimizing or recognizing armed groups and are without prejudice to the individual

28. Article 5 (7) – (10).
29. Article 6 (1) – (3).

criminal responsibility of the members of such groups under domestic or international criminal law.[30]

Nothing in the Kampala Convention shall be invoked for the purpose of affecting the sovereignty of a state or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the state or to defend the national unity and territorial integrity of the state.[31] The protection and assistance to internally displaced persons under Article 7 shall be governed by international law and in particular international humanitarian law.[32] Members of armed groups shall be held criminally responsible for their acts which violate the rights of internally displaced persons under international law and national law.[33] Members of armed groups shall be prohibited from: carrying out arbitrary displacement; hampering the provision of protection and assistance to internally displaced persons under any circumstances; denying internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter, and separating members of the same family; restricting the freedom of movement of internally displaced persons within and outside their areas of residence; recruiting children or requiring or permitting them to take part in hostilities under any circumstances; forcibly recruiting persons, kidnapping, abduction, or hostage taking, engaging in sexual slavery and trafficking in persons especially women and children; impeding humanitarian assistance and passage of all relief consignments, equipment and personnel to internally displaced persons or attacking or otherwise harming humanitarian personnel and resources or other materials deployed for the assistance or benefit of internally displaced persons and shall not destroy, confiscate or divert such materials; and violating the civilian and humanitarian

30. Article 7 (1).
31. Article 7 (2).
32. Article 7 (3).
33. Article 7 (4).

character of the places where internally displaced persons are sheltered and shall not infiltrate such places.[34]

5.6 Obligations of States Parties To Protection And Assistance During Internal Displacement

The Kampala Convention further obligates states parties to protect the rights of internally displaced persons regardless of the cause of displacement by refraining from or preventing the following acts, amongst others: discrimination against such persons in the enjoyment of any rights or freedoms on the grounds that they are internally displaced persons;[35] genocide, crime against humanity, war crimes and other violations of international humanitarian law against internally displaced persons;[36] arbitrary killing, summary execution, arbitrary detention, abduction, enforced disappearance or torture and other forms of cruel, inhuman or degrading treatment or punishment;[37] sexual and gender based violence in all its forms, notably rape, enforced prostitution, sexual exploitation and harmful practices, slavery, recruitment of children and their use in hostilities, forced labour and human trafficking and smuggling;[38] and starvation.[39]

States parties to the Kampala Convention shall: take necessary measures to ensure that internally displaced persons are received, without discrimination of any kind and live in satisfactory conditions of safety, dignity and security;[40] provide internally displaced persons to the fullest extent practicable and with the least possible delay, with adequate humanitarian assistance, which shall include food, water, shelter, medical care and other health services, sanitation, education, and any other necessary social services, and where appropriate,

34. Article 7 (5), (a) – (i).
35. Article 9 (1), (a).
36. Article 9 (1), (b).
37. Article 9 (1), (c).
38. Article 9 (1), (d).
39. Article 9 (1), (e).
40. Article 9 (2), (a).

extend such assistance to local and host communities;[41] provide special protection for and assistance to internally displaced persons with special needs, including separated and unaccompanied children, female heads of households, expectant mothers, mothers with young children, the elderly, and persons with disabilities or with communicable diseases;[42] take special measures to protect and provide for the reproductive and sexual health of internally displaced women as well as appropriate psycho-social support for victims of sexual and other related abuses;[43] respect and ensure the right to seek safety in another part of the State and to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk;[44] guarantee the freedom of movement and choice of residence of internally displaced persons, except where restrictions on such movement and residence are necessary, justified and proportionate to the requirements of ensuring security for internally displaced persons or maintaining public security, public order and public health;[45] respect and maintain the civilian and humanitarian character of the places where internally displaced persons are sheltered and safeguard such locations against infiltration by armed groups or elements and disarm and separate such groups or elements from internally displaced persons;[46] take necessary measures, including the establishment of specialized mechanisms, to trace and reunify families separated during displacement and otherwise facilitate the re-establishment of family ties;[47] take necessary measures to protect individual, collective and cultural property left behind by displaced persons as well as in areas where internally displaced persons are located, either within the jurisdiction

41. Article 9 (2), (b).
42. Article 9 (2), (c).
43. Article 9 (2), (d).
44. Article 9 (2), (e).
45. Article 9 (2), (f).
46. Article 9 (2), (g).
47. Article 9 (2), (h).

of the state parties, or in areas under their effective control;[48] take necessary measures to safeguard against environmental degradation in areas where internally displaced persons are located, either within the jurisdiction of the state parties, or in areas under their effective control.[49]

States parties are again obliged to consult internally displaced persons and allow them to participate in decisions relating to their protection and assistance;[50] take necessary measures to ensure that internally displaced persons who are citizens in their country of nationality can enjoy their civic and political rights, particularly public participation, the right to vote and to be elected to public office;[51] and put in place measures for monitoring and evaluating the effectiveness and impact of the humanitarian assistance delivered to internally displaced persons in accordance with practice, including the sphere standards.[52] States parties shall discharge these obligations, where appropriate, with assistance from international organizations and humanitarian agencies, civil society organizations, and other relevant actors.[53]

5.7 Obligations of States Parties Relating to Sustainable Return, Local Integration or Relocation

States parties to the Kampala Convention shall seek lasting solutions to the problem of displacement by promoting and creating satisfactory conditions for voluntary return, local integration or relocation on a sustainable basis and in circumstances of safety and dignity.[54] They shall enable internally displaced persons to make a free and informed choice on whether to return, integrate locally or relocate by consulting them on these and other options and ensuring

48. Article 9 (2), (i).
49. Article 9 (2), (j).
50. Article 9 (2), (k).
51. Article 9 (2), (l).
52. Article 9 (2), (m).
53. Article 9 (3).
54. Article 11 (1).

their participation in finding sustainable solutions.[55] They shall further cooperate, where appropriate, with the African Union and international organizations or humanitarian agencies and civil society organizations, in providing protection and assistance in the course of finding and implementing solutions for sustainable return, local integration or relocation and long-term reconstruction.[56] States parties shall establish appropriate mechanisms providing for simplified procedures where necessary, for resolving disputes relating to the property of internally displaced persons.[57] Such states parties shall take all appropriate measures possible, to restore the lands of communities with special dependency and attachment to such lands upon the communities' return, reintegration and reinsertion.[58]

5.8 Duty of Registration And Personal Documentation

States parties to the Kampala Convention shall create and maintain an up-dated data/statistics of all internally displaced persons within their jurisdiction or effective control. In doing so, states parties may collaborate with international organizations or humanitarian agencies or civil society organizations. They shall ensure that internally displaced persons shall be issued with relevant documents necessary for the enjoyment and exercise of their rights, such as passports, personal identification documents, civil certificates, birth certificates and marriage certificates. They shall further facilitate the issuance of new documents or the replacement of documents lost or destroyed in the course of displacement, without imposing unreasonable conditions, such as requiring return to one's area of habitual residence in order to obtain these or other required documents. The failure to issue internally displaced persons with such documents shall not in any way impair the exercise or enjoyment of their human rights. Women and men as well as separated and unaccompanied

55. Article 11 (2).
56. Article 11 (3).
57. Article 11 (4).
58. Article 11 (5).

children shall have equal rights to obtain such necessary identity documents and shall have the right to have such documentation issued in their own names.[59]

5.9 Duty Of Compensation

The Kampala Convention further obligates state parties to provide persons affected by displacement with effective remedies.[60] They shall establish an effective legal framework to provide just and fair compensation and other forms of reparations, where appropriate, to internally displaced persons for damage incurred as a result of displacement, in accordance with international standards.[61] They shall further be liable to make reparation to internally displaced persons for damage when such a State Party refrains from protecting and assisting internally displaced persons in the event of natural disasters.[62]

6. THE RIGHTS OF INTERNALLY DISPLACED PERSONS

Before the exposition of the core rights of internally displaced persons, it must be clearly understood that internally displaced persons are first and foremost, Nigerians and legally remain under the protection and guardiance of the Nigerian government; even though the government might be the cause of their flight or displacement. Thus, internally displaced persons in Nigeria, as citizens of Nigeria, are eminently entitled to every right and protection under any law/s binding on Nigeria as regards their rights. Thus, internally displaced persons enjoy fundamental rights conferred upon them either by local legislations or by treaties which Nigeria has ratified and domesticated.

In this exposition, there is the need to differentiate between general rights of all Nigerian citizens and special rights of internally displaced persons even though, they are also Nigerians. The

59. Principle 31. (1) – (5).
60. Article 12 (1).
61. Article 12 (2).
62. Article 12 (3).

difference between the two (2) rights owes its origin to the special but difficult conditions/situations internally displaced persons have found themselves in. General rights of Nigerian citizens are rights enjoyable and exercisable by all Nigerians including internally displaced persons as well whilst special rights are exclusively reserved for internally displaced persons[63].

4.3 General Rights of Internally Displaced Persons

The 1999 Constitution of the Federal Republic of Nigeria (as amended) guarantees certain fundamental rights to all Nigerian citizens. These rights include the right to life,[64] right to dignity of human person,[65] right to personal liberty,[66] right to fair hearing,[67] right to private and family life,[68] the right to freedom of thought, conscience and religion,[69] right to freedom of expression and the press,[70] right to peaceful assembly and association[71], right to freedom of movement,[72] right to freedom from discrimination[73] and the right to acquire and own immovable property anywhere in Nigeria.[74] These rights are fundamental to Nigerian citizens that may not be arbitrarily

63. Ladan, op, cit p. 24.
64. Section 33. See also Article 7 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act Cap. A9 Laws of the Federation of Nigeria 2004
65. Section 34. See also Article 5 of Cap. A9 Laws of the Federation of Nigeria, 2004.
66. Section 35. See also Article 6.
67. Section 36. See also Article 7.
68. Section 37. See also Article 9(1).
69. Section 38. See also Article 8.
70. Section 39. See also Article 9 (1).
71. Section 40. See also Article 11.
72. Section 41. See also Article 12.
73. Section 42. See also Article 3.
74. Section 43. See also Article 14.

taken away by any person or authority save by the due process of law.[75]

6.2 Special Rights of Internally Displaced Persons

Special rights are those rights which the law exclusively preserved for internally displaced persons. Curiously, no Nigerian local legislation specifically creates and preserve any special rights for internally displaced persons. The rights that are exclusively preserved for internally displaced persons in Nigeria are drawn from conventions/protocols which Nigeria has either ratified only or ratified and domesticated same. For instance, Nigeria has not only ratified the Geneva Conventions 1949 and their Additional Protocols of 1977 and 2005 as well as the African Charter on Human and Peoples Rights, 1981.[76] It has also ratified but not domesticated the African Union (Kampala) Convention for the Protection and Assistance to Internally Displaced Persons, 2009. The United Nations Guiding Principles on Internal Displacements 1998 also serve as a guide to Nigeria on the rights and obligations of internally displaced persons. Though the last two (2) legal documents have not been domesticated by Nigeria and therefore, not legally binding on it, the two (2) create extensive and almost comprehensive special rights for internally displaced persons. Indeed, no other legally binding document to the knowledge of this author creates rights and obligations to internally displaced persons and against the state at the global level than the African Union (Kampala) Convention for the Protection and Assistance to Internal Displaced Persons, 2009.

It is in the area of fundamental human rights protection, defence and preservation that international human rights and international humanitarian law or the law and customs of war converge and overlap. They are binding on all states and nations which are engaged

75. Y.A. Fobur, Balancing the Same Sex Marriage (Prohibition) Act, 2014 within Fundamental Human Rights in Nigeria in Nigerian National Human Rights Commission. Vol. 4, December, 2014, 79, 87.
76. Nigeria has not only ratified but also domesticated the African Charter on Human and Peoples Rights, 1986.

in either interstate or intrastate wars.[77] States which are engaged in armed conflicts either local or international are bound to maintain certain minimum standard i.e. humane treatment in the conduct of hostilities with the other party.[78] In the fight against Boko Haram insurgents, internally displaced persons are entitled to certain minimum standard of treatment from members of the Nigerian armed forces and its militias especially the Civilian Joint Task Force (JTF) in the prosecution of the war against them. The breach of any or all the fundamental rights in the prosecution of the war, amount to either genocide, war crimes or crimes against humanity.[79]

The UN Guiding Principles address the specific needs of internally displaced persons globally. They identify rights and guarantees relevant to the protection of persons from forced displacement and to their protection and assistance during displacement as well as during return or resettlement and reintegration. The Principles shall be observed by all authorities, groups and persons irrespective of their legal status and applied without any adverse distinction.[80] The observance of the principles shall not affect the legal status of any authorities, group or persons involved. National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.[81] Internally displaced persons have the right to request and to receive protection and humanitarian assistance from national authorities. They shall not be persecuted or punish for making such a request.

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77. Nigeria has not only ratified but also domesticated all the Geneva Conventions, 1949 in the Geneva Conventions Act Cap. G3 Laws of the Federation of Nigeria, 2004 and therefore bound by them.
78. Article 22, of the First Geneva Convention, 1949 as amended. See also Green, The Contemporary Law of Armed Conflict, 2nd Edition, Manchester, 2008, 461.
79. Article 17 of the First Geneva Convention, 1949 (as amended).
80. Principle 2, (1).
81. Principle 2, (2).

6.2.1 Right to Humane Treatment

Internally displaced persons shall be protected in particular against genocide, murder, summary or arbitrary execution, and enforced disappearance, including abduction or unacknowledged detention threatening or resulting in death.[82] Threats and incitement to commit any of those acts shall be prohibited.

Attacks or other acts of violence against internally displaced persons who do not or no longer participate in hostilities are prohibited in all circumstances.[83] Internally displaced persons shall be protected, in particular against direct or indiscriminate attacks or other acts of violence, including the creation of areas wherein attacks on civilians are permitted; starvations as a method of combat; their use to shield military objectives from attacks or to shield, favour or impede military operations; attacks against their camps or settlements; and the use of anti-personnel landmines.[84]

Internally displaced persons, whether or not their liberty has been restricted, shall be protected in particular against: rape, mutilation, torture, cruel, inhuman or degrading treatment or punishment, and other outrages upon personal dignity, such as acts of gender specific violence, forced prosecution and any form of indecent assault; slavery or any contemporary form of slavery such as sale into marriage, sexual exploitation or forced labour of children; and acts of violence, intended to commit any of the actions mentioned above shall be prohibited.[85]

Internally displaced persons have the right to liberty and security of persons. Hence they shall not be interned in or confined to a camp.[86] If in exceptional circumstances such internment or confinement is absolutely necessary, it shall not last longer than required by the circumstances.[87] Internally displaced persons shall be

82. Principle 10, (1).
83. Principle 10, (2).
84. Principle 10, (2) (a) – (e).
85. Principle 11, (2) (a) – (c).
86. Principle 12, (1).
87. Principle 12, (2).

protected from discriminatory arrest and detention as a result of their displacement[88]. In no case shall internally displaced persons be taken hostage.[89]

The Geneva Conventions of 1949 and their Additional Protocols of 1977 and 2005 especially Protocol II, seek to provide protection to a wide range of persons who are engaged in armed conflict such as internally displaced persons in the fight against Boko Haram insurgents. The basic distinction has always been between combatants and those who are not involved in actual hostilities. The Geneva Conventions and their Additional Protocols in the main seek protection for war victims such as the wounded and sick in land warfare;[90] the wounded sick and shipwrecked in warfare at sea;[91] prisoners of war;[92] and civilians.[93] The First Geneva Convention provides that the conventions "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the high contracting parties, even if the state of war is not recognized by them and to all cases of partial or total occupation of the territory of the high contracting party, even if the said occupation meets with no armed resistance.[94] The First Geneva Convention deals with the protection of the wounded and sick on land warfare as is the case with internally displaced persons in the fight against Boko Haram insurgency in Nigeria. It provides that all civilians, prisoners of war and others including internally displaced persons shall be respected and protected in all circumstances.[95] They are to be treated humanely by the parties to the conflict into whose power they have fallen on a non-discriminatory basis and any attempts upon their lives

88. Principle 12, (3).
89. Principle 12, (4)
90. First Geneva Convention, 1949 as amended.
91. Second Geneva Convention, 1949 as amended.
92. Third Geneva Convention, 1949 as amended.
93. Fourth Geneva Convention, 1949 as amended.
94. Common Article 2.
95. Article 7 of the First Geneva Convention, 1949 as amended.

such as violence on their person is strictly prohibited.[96] Torture or biological experimentation upon them is forbidden, nor such persons to be willfully left without medical assistance and care.[97] Further, parties to a conflict as the war against Boko Haram insurgents shall take all possible measures to protect the wounded and the sick and ensure their adequate care and to search for the dead and prevent their being despoiled.[98] The parties to the conflict shall give details of any wounded, sick, or dead persons of the adversary party and to transmit them to the other side through particular means. The Convention also includes provisions relating to medical units and establishments noting in particular that these should not be subject of attacks.[99]

The Second Geneva Convention concerns the conditions of the wounded sick and shipwrecked member of the armed forces at sea and is very similar to the First Convention. For instance, it provides that members of the armed forces and organized militias including those accompanying them where duly authorized, and who are wounded or sick or shipwrecked are to be treated humanely and cared for on a non – discriminatory basis and that attempts up their lives and violence and torture are prohibited[100].

The Third Geneva Convention is concerned with prisoners of war and consists of a comprehensive code centred upon the requirement of humane treatment in all circumstances. The definition of prisoners of war under the convention covers members of the armed forces of a party to the conflict (as well as members of militias and other volunteer corps forming part of such armed force) and members of other militias and volunteer corps, including those of organized resistance movements, belonging to a party to the conflict provided the following conditions are fulfilled: (a) being commanded by a person responsible for his subordinates; (b) having a fixed distinctive sign recognizable at a distance; (c) carrying arms openly;

96. Article 8.
97. Article 9.
98. Article 10.
99. Article 11 of the Third Geneva Convention, 1949 as amended.
100. Article 4 of the Second Geneva Convention, 1949 as amended.

(d) conducting operations in accordance with the laws and customs of war.[101]

The Third Geneva Convention further provides that where there is any doubt as to the status of any person committing a belligerent act and falling into the hands of the enemy, such person shall enjoy the protection of the convention until such time as their status shall be determined by a competent authority.[102] However, Additional Protocol I has qualified Article 18 by providing that any person who takes part in hostilities and falls into the powers of an adverse party shall be presumed to be a prisoner of war and therefore shall be protected by the Third Convention.[103]

The rationale for obligations covering prisoners of war in all armed conflicts is founded upon certain principles under the Third Geneva Convention. These include prisoners of war must at all times be humanely treated and must at all times be protected particularly against acts of violence or intimidation and against insults and public curiosity. Thus, displaying prisoners of war on television in a humiliating fashion confessing to crimes or criticizing their own government is a total breach of the convention. Prisoners of war are entitled in all circumstances and at all times to respect to their persons and honour.[104]

Prisoners of war are bound only to disclose their names, date of birth, rank and serial number to their adversary.[105] There must be no physical or mental torture nor may any other form of coercion be inflicted upon a prisoner of war to secure from them information of any kind whatsoever.[106] Prisoners of war who refuse to answer any question may not be threatened, insulted, or exposed to unpleasant or

101. Article 6 of the Third Geneva Convention, 1949 as amended.
102. Article 18.
103. Rule 10.
104. Article 16.
105. Article 17.
106. Article 18.

disadvantageous or dishonourable treatment of any kind.[107] Once captured, prisoners of war are to be evacuated as soon as possible to camps situated in an area far enough from the combat zone for them to be out of danger.[108] No prisoner of war shall be sent to, or detained in an area where he may be exposed to the fight or within the combat zone, nor may his presence be used to render certain points or areas immune from military operations.[109] However, prisoners of war are subject to the laws and orders of the state or party holding them.[110] They may be punished for disciplinary offences and tried for offences before capture i.e. war crimes.[111] They may also be tried for offences committed before capture against the law of the state holding them.[112]

The Fourth Geneva Convention deals with the protection of civilians in times of war. A civilian has been defined as any person who is not a combatant and in cases of doubt as to the status of such a person, he is to be considered and treated as a civilian.[113] The Convention provides a highly developed set of rules for the protection of such civilians, including the right to respect for person, honour, convictions and religious practices and the prohibition of torture and other cruel, inhuman and degrading treatment, hostage taking and reprisal attacks. The wounded and the sick shall be the object of particular protection and respect.

It is trite law in the law of armed conflicts that civilian population must be protected against the effects of armed hostilities.[114] Thus, parties to a conflict must at all times distinguish between civilian population and combatants and between civilian

107. Article 19.
108. Article 20.
109. Article 21.
110. Article 22.
111. Article 23.
112. Article 24.
113. Article 52 (1) of the Fourth Geneva Convention, 1949 as amended.
114. Green op. cit.

objects and military objectives.[115] Military operations must be directed at all times against military objectives.[116]

The Fourth Geneva Convention further provides that the civilian population as such, as well as individual civilians, 'shall not be the object of attack[117]. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'. Additionally, indiscriminate attacks[118] are prohibited.[119] The Convention further provides that in the conduct of military operations, 'constant care shall be taken to spare the civilian population, civilians and civilian objects'[120]. Civilian objects are all objects which are not military objectives as defined in article 52 (2).[121] Thus, cultural objects and places of worship are also protected, as are objects deemed indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies,

115. *Ibid.*
116. *Ibid.*
117. Article 51 (1) of the Fourth Geneva Convention, 1949 as amended.
118. These are defined in article 51 (4) as: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be as a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by Protocol I: and consequently in each such case are of a nature to strike military objectives and civilians or civilian objects without distinction.
119. See 21 (5) UN Chronicle, 1984, p. 3 with regard to an appeal by the UN Secretary General to Iran and Iraq to refrain from attacks on civilian targets. See also Security Council resolution 450 (1983). The above provisions apply to the use by Iraq in the 1991 Gulf War of missiles deliberately fired at civilian targets. The firing of missiles at Israeli and Saudi Arabian cities in early 1991 constituted, of course, an act of aggression against a state not a party to that conflict: see e.g. The Economist, 26 January 1991, p. 21.
120. Article 57 (1) of the Fourth Geneva Convention, 1949 as amended.
121. This provides that military objectives are limited to those objects which in their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time offers a definite military advantage.

and irrigation works, so long as they are not used as sustenance solely for the armed forces or in direct support of military action.[122]

6.2.2 Right To Personal Liberty/Movement

Every internally displaced person has the right to liberty of movement and freedom to choose his or her residence. In particular, internally displaced persons have the right to move freely in and out of camps or other settlements.[123]

Internally displaced persons have the right to seek safety in any part of the country, the right to leave the country, the right to seek asylum in another country and the right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.[124]

All internally displaced persons have the right to know the fate and whereabouts of missing relations. The authorities concerned shall endeavour to establish the fate and whereabouts of internally displaced persons reported missing, and cooperate with relevant international organizations engaged in this task. They shall inform the next of kin on the progress of the investigation and notify them of any result. The authorities concerned shall endeavour to collect and identify the mortal remains of those deceased, prevent their despoliation or mutilation and facilitate the return of those remains to the next of kin or dispose of them respectively. Gravesides of internally displaced persons should be protected and respected in all circumstances. Internally displaced persons should have the right of access to the gravesites of their deceased relatives.[125]

Internally displaced persons have the right to respect for their family life. Thus, family members who wish to remain together shall be allowed to do so. Families which are separated by displacement should be reunited as quickly as possible. All appropriate steps shall

122. Article 54.
123. Principle 14 (1) – (2) of the United Nations Principles on Internal Displacement, 1998.
124. Principle 15 (a) – (d).
125. Principle 16 (1) – (4).

be taken to expedite the reunion of such families, particularly when children are involved. The responsible authorities shall facilitate inquiries made by family members and encourage and cooperate with the work of humanitarian organizations engaged in the task of family reunification. Members of internally displaced families whose personal liberty has been restricted by internment or confinement in camp shall have the right to remain together.[126]

6.2.3 Right To Adequate Living Standard/Medical Care

All internally displaced persons shall have the right to an adequate standard of living. At the minimum, regardless of the circumstances and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to essential food and potable water; basic shelter and housing, appropriate clothing; and essential medical services and sanitation. Special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies.[127]

All wounded and sick internally displaced persons as well as those with disabilities shall receive to the fullest extent practicable and with the least permissible delay, the medical care and attention they require; without distinction on any grounds other than medical ones. When necessary, internally displaced persons shall have access to psychological and social services. Special attention should be paid to the health needs of women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counseling for victims of sexual and other abuses. Special attention should also be given to the prevention of contagious and infectious diseases, including AIDS, among internally displaced persons.[128]

Every internally displaced person has a right to recognition and identification everywhere before the law. To give effect to this right

126. Principle 17 (1) – (4).
127. Principle 18 (1) – (3).
128. Principle 19 (1) – (3).

to every internally displaced person, the authorities concerned shall issue to them all documents necessary for the enjoyment and exercise of their legal rights, such as passport, personal identification documents, birth certificates, and marriage certificate. In particular, the authorities shall facilitate the issuance of new documents or the replacement of documents lost in the course of displacement, without imposing unreasonable conditions, such as requiring the return to one's area of habitual residence in order to obtain these or other required documents. Women and children shall have equal rights to obtain such necessary documents and shall have the right to have such documentarian issued in their own names[129].

6.2.4 Right To Own/Possess Property

The property or possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts – pillage, direct or indiscriminate attacks or other acts of violence; being used to shield military operations or objectives; being made the object of reprisal; and being destroyed or appropriated as a form of collective punishment. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.[130]

6.2.5 Right Against Discrimination

Internally displaced persons, whether or not they are living in camps, shall not be discriminated against as a result of their displacement in the enjoyment of their rights to freedom of thought, conscience, religion or belief, opinion and expression; rights to seek freely opportunities for employment and to participate in economic activities; rights to associate freely and participate equally in community affairs; right to vote and to participate in government and public affairs, including the right to have access to the means

129. Principle 20 (1) – (4).
130. Principle 21 (2) - (3).

necessary to exercise the right and the rights to communicate in a language they understand.[131]

4.2.6 Right To Education

Internally displaced persons have the right to education. To give effect to this right, the authorities concerned shall ensure that such persons, in particular displaced children, receive education which shall be free and compulsory at the primary level. Education should respect their cultural identity, language and religion. Special efforts should be made to ensure the full and equal participation of women and girls in educational programmes. Education and training facilities shall be made available to internally displaced persons, in particular adolescents and women, whether or not living in camps, as soon as conditions permit.[132]

4.2.7 Right To Protection/Assistance

All humanitarian assistance shall be carried out in accordance with the principles of humanity and impartiality and without discrimination. Humanitarian assistance to internally displaced persons shall not be diverted, in particular for political or military reasons.[133]

The primary duty and responsibility for providing humanitarian assistance to the internally displaced persons lies with the national/Nigerian government. International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced persons. Such offer shall not be regarded as an unfriendly act or an interference in a state's internal/domestic affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance. All authorities concerned shall grant and

131. Principle 22, 1 (a) – (c).
132. Principle 23, (1) – (4).
133. Principle 24, (1) – (2).

facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.[134]

All authorities concerned shall grant and facilitate for international humanitarian organizations and other appropriate actors, in the exercise of their respective mandates, rapid and unimpeded access to internally displaced persons to assist in their return or resettlement and reintegration[135].

6.2.8 Right To Return/Safety

Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons.[136] Special effort should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration[137]. Internally displaced persons who have returned to their homes or places of habitual residence or habitual place of residence or who have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally in public affairs at all levels and have access to public service[138]. Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possession which they left behind or were dispossessed of upon their displacement. When recovery of such property and possession is not possible, competent

134. Principle 25, (1) – (2).
135. Principle 25, (3).
136. Principle 28, (1).
137. Principle 28, (2).
138. Principle 29, (1).

authorities shall provide or assist internally displaced persons in obtaining appropriate compensation or another form of just reparation[139].

All authorities concerned shall grant and facilitate for international humanitarian organizations and other appropriate actors, in the exercise of their respective modes, rapid and unimpeded access to internally displaced persons to assist in their return or resettlement and reintegration[140].

7. CONCLUSION AND OPTIONS FOR NIGERIA

Ironically and despite the avalanche of internally displaced persons not only as a result of Boko Haram insurgency but other causes in Nigeria, curiously it has no local legislation that regulates the rights and obligations of internally displaced persons. Most, if not all the rights that internally displaced persons lay claims to, are general rights that can be claimed by any other Nigerian citizen.

The only international convention or protocol Nigeria has ratified and domesticated which confers special rights on internally displaced persons are the Four (4) United Nations Geneva Conventions, 1949 which apply in terms of armed conflict such as the fight against Boko Haram insurgency. Even with the ratification and domestication of the Geneva Conventions, the rights conferred upon internally displaced persons are very limited and do not cover other aspects of displaced by the war against Boko Haram insurgency. Thus, it is the almost lack of comprehensive legal and institutional frameworks for the protection and preservation of the rights of internally displaced persons that has resulted in the abuses of the human and related rights of internally displaced persons in Nigeria. Such abuses have led to the deaths of hundreds of thousands of internally displaced persons since 2009 when the insurgency began.

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139. Principle 29, (2).
140. Principle 30.

Accordingly, the followings are viable options for Nigeria:

1. The urgent need to identify and track the root cause of the Boko Haram insurgency by neutralizing the philosophy and indoctrination of the teaching of the founder of their set.
2. Addressing the root causes of youth involvement in violent crimes and ethno-religious conflicts.
3. Promotion of good governance and transparency at all tiers of government i.e. from local, state to federal governments.
4. Overhauling the criminal justice delivery system in Nigeria to that cases of terrorism and similar crimes are heard and disposed off within reasonable time.
5. Nigeria must as a matter of urgency domesticate the Kampala Convention for the Protection and Assistance to Internally Displaced Persons 2009 drawn largely from international human rights and humanitarian laws.

CONSTITUTIONAL DEMOCRACY AND THE CONCEPT OF PEACE, ORDER AND GOOD GOVERNMENT

By

Chinenye Augusta Nwevo

Abstract

Constitutional Democracy is a system of government that has become universally accepted as the government that upholds the rule of law, is citizen participatory and defends human rights amongst other things. Democracy is identified by certain key principles and set of institutions and practices through which these principles are realised. Much as the various definitions of constitutional democracy captures the basic principles and acceptable standards, every society practices democracy as a result of their social, political and cultural background in determining what leads to or constitutes peace, order and good government. This paper sought to establish that constitutional democracy in itselfis the concept of peace, order and good government as this ideology cannot properly exist without constitutional democracy. In doing this, the paper analysed the principles of democracy as its contained in the provisions of the Universal Declaration of Democracy while using the Constitution of the Federal Republic of Nigeria 1999 in explaining the concept.

INTRODUCTION

Democracy, and democratic governance in particular, means that people's human rights and fundamental freedoms are respected, promoted and fulfilled, allowing them to live with dignity. Thomas Hobbes said that man's political authority and obligation are based on individual self-interests of members of the society he also argued that in the "state of nature", human life would be "solitary, poor, nasty, brutish and short" in the absence of political order and law; there would be an endless "war of all against all". Consequently, free men contract with each other to establish political community i.e. civil society through a social contract in which they all gain security in return for subjecting themselves to an absolute Sovereign, one man or an assembly of men.[1] This brings to mind the fact that democracy is one of the universal and indivisible core values and principles of the United Nations. It is based on the freely expressed will of the people and closely linked to the rule of law and exercise of human rights and fundamental freedoms.[2]

The preamble to the Constitution of the Federal Republic of Nigeria 1999 provides;"...AND TO PROVIDE for a Constitution for the purpose of promoting the good government and welfare of all persons in our country on the principles of Freedom, Equality and Justice and for the purpose of consolidating the Unity of our people."From the statement above, it is apparent that the purpose of the CFRN 1999 is to promote peace, order and good government in the Federal Republic of Nigeria. It ensures that there is freedom for every citizen. Freedom and democracy are often used interchangeably but the two are not synonymous. Democracy is indeed a set of ideas and principles about freedom but it also consists of practices and procedures that have been moulded through a long, often tortuous history.[3]

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1. http://www.iep.utm.edu/soc-cont/#SH2a last accessed 26/07/2016 13:01pm
2. http://www.un.org/en/globalissues/democracy/democracy_and_un.shtml last accessed 19/07/2016 15:40pm
3. Constitution of the Federal Republic of Nigeria (CFRN) 1999 Sections 33 – 44, *Democracy in Brief* http://photos.state.gov/libraries/korea/49271/dwoa_122709/Democracy-in-Brief_kor.pdf last accessed 19/07/2016

CONCEPTUALISATION

Constitutional Democracy

Generally, constitutional democracy can be defined as a democracy driven by the provisions of the constitution. It is a type of democracy where there are clear limits of political authorities and the people have the power to elect representatives of their choice.[4] On the other hand constitutional democracy is not just a government under a constitution but government under a constitution which has the force of a supreme, overriding law (the Constitution), and which imposes limitations on it.[5]

There are debates as to the definition of constitutional democracy just like most concepts in law, however, there are basic characteristics that are indicative of constitutional democracy to wit; protection of basic and fundamental human rights, there must be freedom of conscience and expression, there must be justice and the rule of law and openness as a philosophy of the government which shall include free marketplace and freedom of information to all citizens.[6] From the foregoing therefore, the presence of above listed characteristics in a system would best confirm if the system is a constitutional democracy or not.

Constitutional democracy can be organised as follows;

a) ***Unitary System:*** this is a system where most of or all the governing power resides in a centralised government and then delegates authority to subnational units and channels policy decisions down through them for implementation.[7]

b) ***Federal System:*** Federalism is a system that unites separate states within an overarching system in a manner as to allow each of them to still maintain its own fundamental political integrity.

4http://www.schoolmattazz.com/constitutional-democracy/ last accessed 18/03/2017 20:08pm

5. Nwabueze B., *Constitutional Democracy in Africa* Vol 1 (Ibadan: Spectrum Books Limited 2003) 7

6. http://www.civiced.org/resources/publications/resource-materials/390-constitutional-democracy last accessed 18/03/2017 20:01pm

7. Encyclopaedia Britannica Last Updated 7-20-1998 https://www.britannica.com/topic/federalism last accessed 18/03/2017 20:30pm

one of its processes requires that the basic policies of the government be made through negotiations and consultations so that all stakeholders can share in making and executing decisions. Some of the characteristics of federalism are written Constitution, noncentralisation, areal division of power and direct line of communication between the citizens and the government. Some examples of federalism are Germany, United State of America, Canada, India and Nigeria.[8]

c) ***Confederations:*** Confederation is a league of independent states, which retain full sovereignty, agrees to allow a central government to perform certain functions, but the central government may not make laws applicable to individuals without the approval of the member states.

d) ***Presidential System:*** The presidential system is a system of government where a head of government is also head of state and leads an executive branch that is separate from the legislative branch.

e) ***Parliamentary System*** is a system of government in which the executive derive their legitimacy and are accountable to the legislature, such that the executive and legislative branches are intertwined.[9]

It is noteworthy that most political organisations in their processes combine above enumerated systems to have for instance, Presidential Federalism etc.

Finally some of the indices for rating a constitutional democracy are popular sovereignty, majority rule and minority rights, limited government and institutional and procedural limitation on powers that is

i. Checks and balances,
ii. Separation of powers
iii. Elections
iv. Protection of economic, social and civil rights and
v. Justice.

8. *Ibid*
9. http://www.dictionary.com/browse/parliamentary-system

Democracy

Democracy is a universally recognised ideal as well as a goal, which is based on common values shared by peoples throughout the world community irrespective of cultural, political, social and economic difference[10]

According Encyclopaedia Britannica, democracy is literally rule by the people. It is a government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections.[11]

The underlining factors of democracy is (1) Power; irrespective of whether it is the use, sharing, control or transfer of power, or the accountability of those who wield it and those who seek it[12] and (2) The People; just like power irrespective of who is using, sharing, controlling or transferring government the entire activity of government is centred on the people therefore citizens representatives are elected to the federal, state and local government to directly represent the interest of the people.

Peace

Peace is defined as a state of tranquillity or quiet; a freedom from disquieting or oppressive thoughts or emotions. It is also a pact or agreement to end hostilities between those who have been at war or in a state of enmity.[13] Peace was also described as a condition for and fruits of democracy and therefore interdependent to development, respect for and observance of the rule of law and human rights.[14]Although peace is usually seen by many as a state of tranquillity or quiet, peace means different things to different people. The capitalist, socialist and fascist see peace from different

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10. Universal Declaration of Democracy, 1997 Article 2
11. *Op cit.*
12. Bassiouni C, et al, 'Democracy: Key Principles, Institutions and Problems' 1998, *Democracy: its Principles and Achievements* 21 http://www.ipu.org/PDF/publications/DEMOCRACY_PR_E.pdf last accessed 19/07/2016 14:50pm
13. http://www.merriam-webster.com/dictionary/peace last accessed 19/07/2016 00:01pm
14. *Ibid* Article 8

perspectives therefore peace is held in the view of an individual's or a nation's reality.

According to Rummel, Peace is the basic foundation of the concept of social contract[15]therefore it interconnects and overlaps divers social contractprinciples of balancing of mutual interests, etc. Democratic peace is the proposition that democracies are more hesitant to engage in war and thereby maintain foreign relations; this is a major proposition connected to the concept of democratic peace, that nations are likely to cooperate with each other and there are more cordial international relations where there is democratic peace. Furthermore, peace has been argued to be an important force for democracy. It is believed that perpetual peace would only occur when states have civil constitutions,[16] Peace is evidently a part of democracy as most characteristics of constitutionnal democracy are aimed towards achieving peace. It could besaid that absence of democracy is the absence of peace. Finally, peace is inherently interwoven with democracy.

Culture of Peace is a set of values, attitudes, modes of behaviour and ways of life that reject violence and prevent conflicts by tackling their root causes to solve problems through dialogue and negotiation among individuals, groups and nations.[17]A nation-state upholding the characteristics of constitutional democracy will strengthen the process of peace-building. Peace-building are activities undertaken on the far side of conflict to reassemble the foundations of peace and provide the tools for building on those foundations something that is more than just the absence of war.[18]

Order

The disposition of things following one after another, as in space or time; succession or sequence: a condition in which each thing is

15. Rummel R. J, 'Understanding Conflict and War: Vol 5: The Just Peace' Beverly Hills, CA: Sage Publications, 1981https://www.hawaii.edu/powerkills/TJP.CHAP2.HTM last accessed 19/03/2017 21:42pm
16. Kant I, 'Perpetual Peace: A Philosophical Sketch' 1795 Cited in Ray J. L, *Does Democracy Cause Peace?* Annual Review Political Science 1998 Vol. 1 28
17. UN Resolutions A/RES/52/13
18. http://www.un.org/en/peacebuilding/pbso/pbun.shtml last accessed 19/07/2016 23:46pm

properly disposed with reference to other things and to its purpose; methodical or harmonious arrangement. Social order can be explained to mean a particular set or system of linked social structures, institutions, relations, customs, values and practices, which conserve, maintain and enforce certain patterns of relating and behaving amongst humans. It is the absence of social chaos or disorder, and refers to a stable state of the society in which the existing social order is accepted and maintained by its member. One key factor of social order is the principle of extensiveness. This states that the more norms, the more important the norms are to a society, the better these norms tie and hold together the social group as a whole[19].

Good Government

Government is defined by the Merriam-Webster Dictionary as an organisation, machinery or agency through which a political unit exercises authority and performs functions and which is usually classified according to the distribution of power within it.[20]

Government and governance have been described as synonyms in most dictionaries, both meaning the exercise of authority in an organisation, institution or state. Government is therefore the name usually given to the institution exercising the authority.[21]

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19. Iroeghu P. E. *The KPIM of Social Order: A Season of Social Uprising* (2013) 118 https://books.google.com.ng/books?id=NDZLRVPbJEC&pg=PA118&lpg=PA118&dq=the+more+norms+and+the+more+important+the+norms+are+to+a+society,+the+better+these+norms+tie+and+hold+together+the+group+as+a+whole&source=bl&ots=dIxBQwqAA&sig=MmUtmPi85bIlzLeyvbe0h_joMIsU&hl=en&sa=X&ved=0ahUKEwjJoZGMsLOAhXMKcAKHSiyDd8Q6AEIIDAB#v=onepage&q=the%20more%20norms%20and%20the%20more%20important%20the%20norms%20are%20to%20a%20society%2C%20the%20better%20these%20norms%20tie%20and%20hold%20together%20the%20group%20as%20a%20whole&f=false last accessed 20/07/2016 19:19pm
20. https://www.google.com.ng/search?q=What+is+government&rlz=1C1CHMO_enNG585NG585&oq=What+is+government&aqs=chrome..69i57.5595j0j8&sourceid=chrome&ie=UTF-8 last accessed 21/07/2016 16:44pm
21. Carino V. L., From Government to Governance, Introductory Notes Page 1 http://unpan1.un.org/intradoc/groups/public/documents/eropa/monograph-worldcog-chap1.pdf last accessed 21/07/2016 15:50pm

Good government comes from leaders who are educated, transparent, have a clear political philosophy, and are able to communicate effectively with their constituents. Good government also emanates from participatory governance, where the citizens are active, aware and engaged in the activities of the government, through advocacy and communicates their desires to their leaders.[22]

CHARACTERISTICS OF GOOD GOVERNANCE[23]

Accountability

Accountability is a fundamental requirement of good governance. It is also one of the principles of democracy. Government has an obligation to report, explain and be answerable for the consequences of decisions it has made on behalf of the citizens.

Transparency

Where the people are able to follow and understand the decision-making process of a government, it enables citizens see how and why a decision is made and also be able to give appropriate feedback with respect to such decisions.

Rule of Law

Rule of Law is one of the principles of democracy that is universally accepted and expected of any society that claims to be practising democracy irrespective of their cultural, religious and economic background as where there is no rule of law there would not be peace and social order.

Responsive

Every democratic government is expected to be responsive to the needs of the citizens. The Merriam-Webster Dictionary defines responsive as 'reacting in a desired or positive way'. Every society expects their government to produce desired results for the betterment of their citizenry.

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22. http://www.goodgov.net/ last accessed 20/07/2016 20:42pm
23. http://www.un.org/en/globalissues/governance/ last accessed 21/07/2016 16:52pm

Equitable and Inclusive

The elected representative of the people are their 'mouth' in the government just like responsiveness, a government should be inclusive and equitable, by ensuring that all groups, particularly the most vulnerable, should have opportunities to participate in the process of governance through their elected representatives.

Effective and Efficient

Government should implement decisions and follow processes that make the best use of the available people, resources and time to ensure the best possible results for their citizenry.

Participatory

Participatory governance endeavours to create avenues for all the citizenry to contribute to governance by increasing the number and calibre of people who have access to the government. This also includes what access and how the access is had to the government. For instance the government of the day in Nigeria has tried to introduce the town hall meeting process, where the members of the executive sits in a room with as many citizens as possible to discuss the affairs of the state.

It can also be done by requesting information from the general public, asking for their opinion, giving them the opportunity to make recommendations or, in some cases, be part of the actual decision-making process.[24]

According to Prof. Lorne Sossin*, the foundation for good governance are; no government authority is unlimited, all legislative grants of power(s) from other sources, in other words, come with limits. The rule of law dictates not only that these boundaries exist, but also that they may be enforced through recourse to the courts.[25]

BASIC PRINCIPLES OF DEMOCRACY

The basic principles of democracy are as Abraham Lincoln had defined democracy a government of the people by the people and for

24. http://www.goodgovernance.org.au/about-good-governance/what-is-good-governance/ last accessed 21/07/2016 17:47pm
25. Lorne Sossin, The Future Of Administrative Law & Good Governance In Nigeria Pg 4 @http://www.nials-nigeria.org/pub/NEWFRONTIERSLECTURE2011.pdf last accessed 12/03/2012

the people; as the people have a right to a controlling influence over public decisions and decision-makers, therefore are in the centre of government and governance and should be treated with equal respect and as of equal worth in the framework of decisions.[26] These are some of the principles of democracy as identified from The Universal Declaration of Democracy;

1) Citizens Participation[27]
2) Equality/Gender Participation[28]
3) Peace and Political tolerance
4) Accountability
5) Transparency
6) Regular Free and Fair elections/Accepting results of elections[29]
7) Social and economic development
8) Separation of Powers/Checks and Balances
9) Fundamental Human Rights
10) Rule of Law

THE PRACTICE AND PROCEDURES OF DEMOCRATIC GOVERNMENT

Democracy is based on the existence of well-structured and well-functioning institutions, as well as on a body of standards and rules and on the will of the society as a whole, fully conversant with its rights and responsibilities[30]

According to Montesquieu[31] the secret of the English constitution was that powers are not concentrated in the hands of an individual or group and that unless power is checked between the executive, legislature and judiciary abuse is inevitable.

There is separation of powers under the Constitution of the Federal Republic of Nigeria, 1999. Section 4 of the Constitution

26. *Ibid Toward a Universal Declaration on Basic Principles of Democracy From Principles to Realisation* Pg 1
27. https://www.ndi.org/citizen-participation last accessed 19/07/2016 20:50pm
28. Fourth World Conference on Women Beijing Declaration, 1995
29. International Covenant on Civil and Political Rights 1966 Article 25
30. Universal Declaration on Democracy 1997 Article 9
31. 1689-1735 and L'espirit de Lois, 1748, 11, 46, 76 quoted from Mowoe, K. *Constitutional Law in Nigeria*, (Malthouse Press Limited 2008) Pg 24

vested exclusively in the National Assembly the legislative powers of the Federal Republic of Nigeria while Section 5 of the Constitution vests the executive powers in the President and section 6thereof vests the judicial powers of the federation of Nigeria in the Courts to which the section relates being the courts established for the Federation, that is the courts of superior records. No arm of government can legitimately perform the function donated to and vested in the other by the Constitution.

Legislature

A legislature can be defined as a deliberative body of persons, usually elective, who are empowered to make, change, or repeal the laws of a country or state; the branch of government having the power to make laws as distinguished from the executive and judicial branches of government.[32] The Legislature is responsible for gauging, collating and representing the views and needs of the people it is representing in the house by articulating their expectations and aspirations in determining good government and meeting the needs of the people. Furthermore the legislative power of the Federal Republic of Nigeria is vested in the National Assembly which consists of a Senate and a House of Representatives.[33] While Section 4 subsection (2) [34] empowers the National Assembly to make laws for the peace order and good government of the federation or any part with respect to matters in the exclusive list.Other powers are also set out in the subsequent subsections[35] including powers to make laws in matters in the Concurrent Legislative list in concurrently with the State Houses of Assembly[36] which was also empowered to make laws for the peace, order and government of the State.[37]Generally the functions of the legislature are identified as representative of the people, law makingfor the betterment of the citizenry and watchdog function over the government.

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32. http://www.dictionary.com/browse/legislature last accessed 22/07/2016 12:00pm
33. CFRN 1999 Section 4
34. *Ibid*
35. *Ibid* subsection (3) and (4)
36. *Ibid* (5)
37. *Ibid* subsection (6), (7)

Executive

The executive arm is the arm of government responsible for the authority and in charge of governance of the state. In a presidential system, the executive powers of the government is vested in the President.[38] The powers of the executive include the execution and maintenance of the Constitution and all laws made by the legislature.

The President must make sure that the other two branches of government does not override the president. The process of one branch of government overseeing other branches of government is known as checks and balances.[39]

Some of the functions of the executiveincludes;

a) Execution of the constitution and laws made by legislature[40]
b) Spending and Budgeting[41]
c) Negotiating Treaties[42]
d) War powers and deployment of soldiers[43]

It is worthy of mention that executive powers are most in generally intertwined with legislature as it appears the legislature will have to give the final approval before any such function is implemented. This is in the spirit of democracy and to uphold the principles of checks and balance.

Judiciary

The Judicial powers of the federation are vested in the Courts established for the federation, being Courts established subject to the provisions of the Constitution.[44] The powers are vested in the superior courts of records as listed in the Constitution Section 6(4) (a) - (k).

The powers and functions of the judiciary as vested in courts include:

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38. *Ibid* 5
39. http://study.com/academy/lesson/executive-branch-of-government-definition-responsibilities-power.html last accessed 22/07/2016 17:47pm
40. *Ibid* Subsection (b)
41. *Ibid* Section 162
42. *Ibid* Section 12
43. *Ibid* Section 5 (4) and (5)
44. *Ibid* 6(1), (2)

a) Powers and sanctions of a court of law
b) Matters between persons
c) Matters between persons and the government authority
d) Determination of the civil right and obligation of a persons, with exception to matters regarding conformity or otherwise of the authorities with the provisions of Chapter 2 of the 1999 Constitution on fundamental objectives and directive principles of state policy.

Section 6[45] also makes an exception on matters relating to any existing law made on or after 15th January 1966 for determining any issue or question as to the competence of any authority or person to make any such law.

EVALUATION OF THE CONCEPT OF PEACE, ORDER AND GOOD GOVERNMENT

The constitution in Section 4 provides that the National Assembly shall make laws for the peace, order and good governance of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List. This provision when read together with the provision of Section 5(1) (b) implies the executive function of ensuring the peace, order and good governance of the federation and the state (by subsection 5 (2)(b)). Section 11 further provides that the National Assembly shall make laws to maintain and secure public safety and public order and providing maintaining and securing supplies and services as may be designated by the National Assembly as essential supplies and services. It provides for such powers for the House of Assembly of a state but further provides that in time of war the National Assembly can make law for peace, order and good governance with respect to matters not included in the Exclusive Legislative List where it is necessary for the defence of the federation. It also gave the National Assembly power to make laws for the peace, order and good governance for the House of Assembly where the state is in a situation that the House of Assembly cannot

45. *Ibid* (6)(d)

resume its functions and such laws will have effect as if it were enacted by the House of Assembly.[46]

The Constitution Act 1986 is the Principal formal statement of New Zealand's Constitution. It ended the last remaining association of New Zealand with the British Parliament. Peace Order and Good Government was contained in New Zealand Constitution Act of 1947 that the parliament can make law for Peace, Order and Good Government so long as it is not inconsistent with the laws of England.

The Canadian Constitution Act 1867,Section 91, provides that the federal government has the power "to make laws for the Peace, Order and Good Government of Canada". A similar provision in the Constitution of the Federal Republic of Nigeria 1999is Section4(2) of the Constitution.Generally, the debates on Peace, Order and Good Government in Canada are mostly on the issues of division of legislative powers between the federal and the provincial levels of government, the principles under which the Canadian Parliament should legislate andthe strategic means by which the federal government could legislate in matters of provincial jurisdiction etc[47] which is not the focus of this paper. Peace, order and good government are the constituents of a constitutional democracy and for peace, order and good government to exist the various arms of government must endeavour to uphold the fundamental objectives and directive principles of state policy. Under the 1999 constitution sections 13 provides:

"It shall be the duty and responsibility of all organs of government and all authorities and persons exercising legislative, executive or judicial powers to conform to observe and apply the provisions of this Chapter of this Constitution"[48]Although the 1999 Constitution

46. Section 4 (2) (3), 5 (1) (b) and (2) (b) also Section 11 (1) (3) (4) and the proviso to subsection (4)
47. Reynolds N., Peace, Order and Good Government, the Constitutional Cudgel - http://www.theglobeandmail.com/report-on-business/rob-commentary/peace-order-and-good-government-the-constitutional-cudgel/article4210106/ last accessed 25/07/2016 12:57pm
48. That is referring to the Fundamental Objectives and Directive Principles of State Policy chapter2 of the Constitution of the Federal Republic of Nigeria 1999.

vested the powers to make law for the peace, order and good government in the National Assembly but it is apparent that the executive is to implement the laws the legislature makes while the judiciary is to interpret the law therefore every arm of government is supposed to work towards the peace, order and good government of Nigeria in the exercise of their function.[49]

The phrase peace, order and good government is common in the constitutions of most commonwealth countries.[50] According to Nwabueze, peace, order and good government is the form of words employed to express the plenitude of legislative power in that the legislature should make laws for the peace order and good government of the country. The phrase does not delimit the extent of the power or the purposes for which it is to be used in the sense that a law must be for peace order and good government for it to be valid but it is a formula for expressing the widest plenitude of legislative power exercisable by a sovereign legislature.[51] Also Mowoe opined that the phrase implies the fact that in exercise of its powers to make laws in relation to the sixty-eight matters in the exclusive legislative list, the National Assembly must be motived by the desire for peace, order and government of Nigeria.[52]

Accurate as the Learned Professors are it is my opinion that the phrase is basically the principles or an end to democracy as has earlier on been established. Consequently, the National Assembly (and certainly the executive and judiciary) in the exercise of their function should and must indeed be inspired by the principles of democracy.

CONCLUSION

Constitutional Democracy is a system of government in which the supreme power is vested on the people while the constitution is the supreme law guiding both the people and their leaders. The

49. *Okungbowa v. Governor Of Edo State* (2015) 10 NWLR (1467) 257
50. Australian Constitution 1901 S.51 of the Constitution provides for POGG New Zealand Constitution Act 1947 as amended 17 May 2005
51. Nwabueze B., *Constitutional Democracy in Africa* Vol. 1 (Ibadan: Spectrum Books Limited 2003) 183
52. Mowoe K. M., *Constitutional Law in Nigeria* (Lagos: Malt house Press limited 2008) 103

legislature is elected representation of the people whose functions are amongst other things representing the interest of the people in government. The interests of the people may be represented by making laws, investigations for making new laws or correcting any defects or omissions or even to expose corruption, performing watchdog function over public finance and spending etc in all of these the principles of democracy are observed and respected to avoid anarchy. The executive arm of government seems to be the most popular arm of government, as it is what comes to mind when government is mentioned. It is expected of it to be seen upholding and implementing the laws made by the legislature of the nation and to ensure good government.

Constitutional democracy and the concept of peace, order and good government are intertwined and cannot be separated because every ideology or principle that makes a government a constitutional democracy are principles that promotes peace, order and good government.

COMBATING PUBLIC PROCUREMENT FRAUD IN NIGERIA: AN ANALYSIS OF THE LAW, ETHICAL PRACTICES AND DUE PROCESS MECHANISM

By

Bamson, Tamunoene Jones

Abstract

The paper examines "Combating Public Procurement Fraud in Nigeria: An Analysis of Law, Ethical Practices and Due Process Mechanism". The study adopted the explorative research design. The study gave account of how good and effective procurement system devoid of fraud is essential for good governance and national development. This is because, public goods and services can be enjoyed by all citizens when corrupt and fraudulent practices in procurement are eliminated. The paper concludes that ethical practices and due process mechanisms are appropriate approaches of anti-corruption policies that should be backed with legal provisions for the promotion of good governance and the elimination of fraud in public procurement in order to achieve value for money. This is because, it is very vital for organizations to formulate and implement anti-corruption policies in order to eliminate fraud in public procurement. The organizations should conduct procurement functions in compliance with the anti-fraud laws of the public procurement system in Nigeria as well as the African Development Bank and the World Bank in the regulations of public procurement systems. The study recommended that the legal profession has professional ethical code to effectively carry out public procurement in organizations. Therefore, legal practitioners should be given appointments to carry out public procurement duties in order to achieve set objectives. In addition, the application of due process should be followed by legal practitioners in order to achieve integrity, transparency and accountability in public procurement. Lastly, the Nigeria Bar Association (NBA) should be a key stakeholder in the crusade for the elimination of frauds in public procurement. This is because of the number of legal luminaries and custodians of law in the membership of the NBA and the availability of the anti-corruption unit in the NBA.

KEYWORDS: *Due Process Mechanism, Ethical Practices, Public Procurement Fraud, the Law*

INTRODUCTION

The violation of procurement rules by public officials in-charge of public procurement remains one of the main sources of procurement irregularities and fraud in Nigeria.[1] The definitive aim of public procurement is to efficiently spend public money in a proper manner so as to realize best value for money.[2] Consequently, given the economic significance of public procurement in a developing country as Nigeria, the prevention and control of fraudulent practices in public procurement through effective implementation of the legal requirements, ethical practices and due process mechanisms of public procurement are very vital. This is because, fraud and corruption has caused huge wastages of public finance and gross harm to the economy.[3] Thus, the paper intends to examine "Combating Public Procurement Fraud in Nigeria: An Analysis of Law, Ethical Practices and Due Process Mechanism." The paper is divided into ten sections. The first section provides the introduction. The second section explained the desideration for public procurement due process. The third section discussed the causes of fraud in the Public Procurement System of Nigeria. The fourth section briefly exposed the theoretical framework of fraud. The fifth section discussed the empirical evidence on the ills of fraud in public procurement. The sixth section explained the research methodology adopted for the paper. The seventh section explained an analysis of the law for public procurement. The eighth section gave highlights on the analysis of ethical practices for public procurement. The ninth section gave an analysis of due process mechanism for public procurement, and the last section provided the conclusion.

THE DESIDERATION FOR PUBLIC PROCUREMENT DUE PROCESS

Public procurement controls over 70 percent of a nation's budgetary estimates.[4] Consequently, those handling the public procurement

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1. Briggs and Bamson T.J. Value for Money and Anti-Procurement Fraud Management of Companies in Rivers State; Journal of Management and Entrepreneurial Development. Vol. 3, No.2. pp.21-35: 2013
2. *Ibid* at. 21
3. *Ibid* at 28
4. *Ibid* at 29

functions in public offices must show some form of integrity, accountability and transparency in dealing with it. This is because, public procurement is very vulnerable to corruption crime. A public officer is a symbol of any civil society.[5]

Thus, any society that sacrifices the issue of public procurement in the care of fraudulent and corrupt people who do not exhibit ethical responsibility to eschew corruption crime is doomed to fail. Crime is a behavioral and legal phenomenon. In the legal parlance, different classes of crime exist. These are ordinary crime and economic crime.[6] Managing crime, especially economic crime in the society is the business of government and the organized private sector. Fraud is a form of economic crime. Fraud is detrimental to the development of any nation.[7] Thus, the Nigerian government has taken steps to fight fraud in the country by establishing anti-corruption institutions.[8] The essence of this is to protect business, including procurement. Typically, the government established the Budget Monitoring and Price Intelligence Unit (BMPIU) an institution with the specific mandates to promote transparency in financial transactions and the government procurement system through the application of due process mechanism.[9]

The fundamental idea of this paper is that, from a public policy and process perspective, the government and private sectors contributes to national development whenever effective procurement system, which is devoid of fraud, are practiced. A good public procurement system is of immense benefit to the citizens of any country. Consequently, it is essential for institutions and

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5 *Ibid* at 30

6 Briggs & Bamson, Op. Cit at 30

7 Jaja, S.A., & Okwandu, G.A. Understanding Business Management: Insights and Critical Issues (Port Harcourt: Pearl Publishers, 2006), pp. 150

8 Ibid at 150

9 Adeyemi, O.G. "The Myth or Cultural Differentiation in Law Enforcement System in Africa", Journal of Social Studies, Vol. 43, No. 9, (1998), pp. 24.

organizations to establish rules and procedures that will promote good governance by giving high priority to the laws of the land and principles such as transparency, accountability, ethical practices and due process mechanism in their procurement systems.

One of the legal control over businesses - be it procurement is to protect investors and the general public against sharp practices and fraud.[10] Laws provide rules of conducts that will promote a common good in the society.[11(11)] Fraud is a fraudulent act. The act of fraud causes a lot of breach of trust. Any form of breach is central to the breaking of rules and regulations. The breach of a law is subject to social penalties. Consequently, when public laws are violated, it is considered a crime against society.[12]

There is Criminal Code in Nigeria which controls how people and institutions practice their professions and carry out activities in order to prevent sharp and unwholesome practices. Specifically, the criminal codes provide punitive measures aimed at preventing the institutionalization of criminal behaviors in the society. Fraud is an intentional misrepresentation of material existing fact made by one person to another with knowledge of its falsity and for the purpose of inducing the other person to act, and upon which the other person relies with resulting injury or damage. Fraud in public procurement, has caused a lot of political, economic and social problems in Nigeria. These problems have also given the judicial system and legal profession a lot of worry in the country because the punitive measures given to the culprits do not reflect the degree of crime committed. Procurement fraud in Nigeria has been practically institutionalized as the foundation of governance.[13(13)] Public procurement fraud occurs when public office holders' demand for 10 percent kickback or more of any contract sum before contracts are approved.[14(14)] In addition, fraud in public procurement, occur when there is conflict of interest, bribery, demand for gifts, nepotism,

10 Jaja, & Okwandu, *Op. Cit* at 150.

11 *Ibid* at 150

12 *Ibid*. at 78

13 Jaja, & Okwandu. *Op. Cit*, at 136

14 Nwachukwu. C.C. Management: Theory and Practice Revised Edition (Onitsha: Africana First Publishers Limited, 2006), pp. 18

favoritism and ethnic or tribal sentiments in the award of contracts. In most cases, no contracts are advertised on notice board of organizations or national dailies. In some cases, the jobs are already awarded to the cronies of the public office holders before they are advertised to the public. Thus, with these developments, due process policies are not followed. More so, the people awarded the contracts could not execute the jobs given to them as a result of the "10 percent", they have earlier given to those who awarded the contracts to them. Consequently, this leads to the execution of poor jobs or the supply of substandard goods or the outright abandonment of projects. It is worrisome to note that fraud, mainly in public procurement has made Nigeria to be classified by Transparency International as one of the highly corrupt countries in the world.[15] Thus, the need to combat fraud in procurement is very important so as to promote value for money, and ensure the development of the country by minimizing the huge financial losses the country suffers as a result of fraud. Hence, it is very vital for public procurement systems to be strengthened with governance reforms so as to promote better public sector performance across Nigeria. This can better be attained by having officials who can manage public finances through the application of "due process".

Practically, whenever due process is not followed in public procurement, it invariably means the procurement process is not in compliance with the best practices.[16] The Due Process" Policy is a transparent, efficient, and effective mechanism which can deliver value for money in public finance budgeting and expenditure. However, a lot of corporate and government officials have not shown transparency in the award of contracts. In most cases, contract costs are inflated, closed, discretionary and well-designed for the abuse of public offices.[17]

Consequently, the key officials use their positions and powers to accumulate wealth unjustly without any commitment of loyalty to their

15 *Ibid* at 18
16 Jaja & Okwandu *Op. Cit* at 137
17 Nwachukwu' *Op. Cit* at 18

organizations in order to fight fraud. These challenges are also central to the non-adherence to ethical principles of good procurement system and procedures. Ethics is the moral values of human conduct and the rules that govern the way people should behave. Each profession has its own ethics that define the correct way of behaving.[18]

Thus, legal profession is a sacred one that strictly adheres to principles, rules and regulations that can promote truth, fairness and equity. The legal profession reflects the mirror of the society in terms of maintaining probity, order, justice, substance protection, transparency, accountability and hope. Thus, it is very vital for people who can exhibit these qualities to handle public procurement in Nigeria. It is very detrimental to use quacks to execute any procurement activity in any organization. This is because a lot of financial wastages could occur. Hence true professionalism from legal practitioners is required to execute public procurement functions. Legal practitioners have ethical principles that reveals the moral norms which business must strive to implement legally and professionally.[19] The application of good moral and professional conducts by lawyers in public procurement is central to the observation of all the due process mechanisms that public officials must strictly follow in the award of contracts.[20]

However, non-compliance with corporate ethical principles and due process mechanisms approved by the government has been identified as the major causes of fraud in public procurement.

THE CAUSES OF FRAUD IN THE PUBLIC PROCUREMENT SYSTEM OF NIGERIA

The crime of fraud is an antithesis of development. Corrupt habits have made Nigeria to lose a lot in terms of financial resources. In 2014, Nigeria was ranked 136th out of 175 countries of the world surveyed by Transparency International. This position was due to the 27% Corruption Perception Index (CPI) as classified by Transparency International. More so, any country with a CPI that is below 50% is categorized as a highly corrupt country.[21] Most corrupt

18 *Ibid* at 18
19 Jaja & Okwandu, *Op. Cit*, at. 137
20 *Ibid* at 137
21 Corruption Perception Index (CPI) as classified by Transparency International, 2014

habits occur in the area of procurement. A procurement fraud is any fraudulent act relating to the purchase of goods, services or works. Fraud in public procurement comes in the form of bribery, cost or labor mischarging, defective pricing, supplying of sealed defective parts, price fixing, bid rigging, conflict of interest and product substitution.[22] In Nigeria, there is lack of transparency and flagrant abuse of procedures for public contracts. With these problems, billions of Naira goes down the drain, which could have been used to provide goods and services for the welfare of the citizens. [23] Proving fraud is very difficult. A lot of resources are spent to investigate fraud. Thus, the government of Nigeria in its wisdom, set up relevant anti-corruption institutions to fight fraud for the good of the general public so as to prevent economic crimes and corruption for the promotion of good governance. The anti-corruption agencies enforce the laws against fraudulent practices perpetuated by officials of government and the private sectors.[24]

In spite of the presence of the anti-corruption bodies, most Nigerians see public procurement as either administrative minutiae, or a hotbed of fraud and corruption. As a result, they either fail to push for increased safeguards in the policies and procedures governing bid and award of contracts. The crux of the matter now is, are due process policies obeyed in the public procurement system of Nigeria? Can ethical practices combat fraud in public procurement?

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22 Combating Corruption in government. Retrieved on July 27, 2015; at: http: //www.etu.org.za /toolbox /docs /govern/corruption.html

23 Olaniyan, K. How corrupt is Nigeria? The Guardian,. Vo. 31, No. 13,164, Tuesday January 13, 2015, pp.17

24 African Development Bank. Summary of Literature on Fraud and Corruption in Public Procurement.
Retrieved on July 27, 2015; at: http://www.afdb.org/
fileadmin/uploads/afdb/Documents/
Procurement/Project-
relatedProcurement/Summary_of_Literature_on_Fraud_and_Corruption_in
_Public_Procurement.pdf

Have criminal codes punitive measures to prevent and control fraud in Nigeria's public procurement system?

THEORETICAL FRAMEWORK

The theory underpinning this paper is the fraud triangle element. The fraud triangle element has been a phenomenon that exposes why corrupt and fraudulent activities are conceived by officials in organizations. [25] The fraud triangle reveals how fraud is perceived and carried out by people or officials in organizations. The fraud triangle is a structure that is implemented within the analysis of fraud and it has three components, which are opportunity, rationalization, and pressure that depicts the reasons behind the causes of fraud in organizations.

Mostly, instances of fraud and corruption in the procurement cycle are not easy to detect, prove or prosecute. They are often dealt with internally, and implicated employees are allowed to "resign", with their reputations intact. During a normal business cycle, a high-risk fraud environment is typified by pressure, rationalization and opportunity. [26]

The fraud triangle elements are the recipes of any type of fraud. Fraud causes a lot of damage. It erodes financial and monetary resources, damages corporate and countries reputations and causes the loss of trust from investors, customers, suppliers and international donors. Fraud triangle studies embezzlers. Embezzlers are fraudulent people who siphon resources put in their care for their personal use. Fraud can take place in one or two forms, which are either defalcations or manipulations.[27]

The need for a good procurement system is central to the fight against fraud. In Nigeria, the issue of professionalism in procurement has been relegated to the background as quacks are highly utilized to perform procurement and other related functions in organizations.

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25 Briggs, D., & Bamson, T. J.. "Fraud Triangle Elements and White Collar Crime Among Civil Servants in Rivers State"; Trend Journal of Management and Social Sciences, Vol. 5, No. 1., (2012), pp. 52-75.

26 *Ibid* at 53

27 *Ibid* at 54

[28][29] This is because, there is a state of complete ethical and moral breakdown in Nigeria. [29][29]

EMPIRICAL EVIDENCE

Procurement fraud is any form of deception which is intended to influence any phase or stage of the procurement lifecycle for the purpose of fraudulently achieving financial gain or cause a loss. Procurement fraud can be committed by contractors or sub-contractors external to the organization, as well as officials within an organization. [30] Studies by the KPMG's Forensic professionals identified that fraud have caused great underdevelopment to countries. [31]

In 2009, a research in the United State of America, carried out by the KPMG found out that of the respondents surveyed, 65% perceived fraud as a significant risk in their industry; while 32% expect that fraud will continue to increase. The research also found that 31% agreed that the most significant risk of fraud is bribery, corruption, market rigging, and/or conflicts of interest. The US survey noted that this perception is more predominant in government and healthcare industries with a 39%, which is more than consumer markets with a 21%, while, information, communication, and

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28 Bliss, G. Fraud Facts: The Fraud Triangle- A tool to access risk of fraud. An Article of My Daily Record (Friday, July 6, 2012). Retrieved on July 26, 2015; from: http://mydailyrecord.com/fraud-facts-the-fraud- triangle-a-tool-to-assess-risk-of-fraud /#ixzz2eiy83p6p.

29 *Ibid* at : http://mydailyrecord.com/fraud-facts-the-fraud-triangle-a-tool-to-assess-risk-of-fraud /#ixzz2eiy83p6

30 Deloitte Preventing procurement fraud and Corruption, October 2014. Retrieved on July 27, 2015; from:http://www2.deloitte.com/content/dam/Deloitte/za/Documents/risk/ZA_Preventing_procurement_fraud_13102014.pdf

31 KPMG. Procurement Fraud, Are You Prepared? Retrieved on July 28, 2015; from: http://www.kpmg.com/ca/en/topics/at-risk-magazine/pages/procurement-fraud-are-you-prepared.aspx

entertainment has 15%; but an admitted prevalence of fraud within 15% of companies is not something to ignore, the KPMG noted in the US.[32] In 2008, a survey on fraud carried out by the KPMG in Australia and New Zealand, found out that there is a significant increase in the occurrence of fraud, where 45% of respondents to that survey, had experienced at least one fraud during the survey period. When reported, the average losses amounted to AUD$1 million.[33] Similarly, a study in 2010, conducted by the KPMG in India, also noted a rise in the prevalence of fraud, especially in the area of supply chain fraud and procurement functions. Seventy-five percent of respondents to that survey agreed that fraud in corporate India is on the rise. More so, the respondents from the real estate and industrial markets industries identified the procurement process as the most vulnerable to fraud, 57% and 39% of the time respectively [34]

In the UK, some frauds in procurement, which are difficult to detect occurs. These fraudulent practices include: Supplier 'cartels' and 'cover pricing', Price Fixing, Bogus invoicing on existing supplier contract, and False invoicing. These fraudulent acts in procurement had caused a lot of financial losses in the UK's economy. [35] In fact, fraud and corruption in procurement are currently global problems. [36(36)]

The 2007 African Peer Review Mechanism Report noted that in Uganda, corruption and fraud led to the loss of USD 258.6 million annually. In the Assessment of the country's Auditor General,

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32 National Fraud Authority. Procurement Fraud in the Public Sector, October 2011. Retrieved on July 27, 2015; from: https://www.gov.uk/government /uploads /system /uploads /attachment _data /file /118460 /procurement-fraud-public-sector.pdf

33 *Ibid* at: http://www.kpmg.com/ca/en/topics /at-risk-magazine/pages/procurement-fraud-are-you-prepared.aspx

34 *Ibid* at: http://www.kpmg.com/ca/en/topics /at-risk-magazine/pages/procurement-fraud-are-you-prepared.aspx

35 KPMG. Op. Cit. at: http://www.kpmg.com/ca/en/topics/at-risk-magazine/pages/procurement-fraud-are-you -prepared.aspx

36 *Ibid* at: http://www.kpmg.com/ca/en/topics/at-risk-magazine/pages/procurement-fraud-are-you -prepared.aspx

procurement accounts for 70 percent of public spending of which an estimated 20 percent is lost via corruption[37]. The World Bank identifies that procurement fraud and corruption in public procurement alone have wasted over $1.5 trillion. [38] Procurement is a particularly high risk area in terms of fraud. It is important that corporate officials are aware of procurement fraud risks and able to recognize and report potentially fraudulent activity.

Procurement fraud can take a number of forms; collusion between procurer and supplier; collusion between suppliers; procurer acting alone, for example, creating a fictitious supplier with payments to their own bank account, or spending money for private gain, and external fraudster acting alone, for example, purporting to be a genuine supplier in order to arrange payments to their own bank account. [39] Nigeria is a developing nation. The main duty of governance from the country's constitution is to promote good governance. Effective good governance can be used to prevent the devastating effect of corruption on poor Nigerians. [40]

Public procurement fraud costs the Nigerian government millions every year, money that could have been spent on delivering services. The act of fraud has made few officials in positions of trust to get an unfair advantage to embezzle public resources to the detriment of millions of people. In Nigeria, a lot of organizations have rules and regulations that govern their operations.

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37 National Fraud Authority.Op. Cit . See https://www.gov.uk/government /uploads /system /uploads /attachment_data/file/118460/procurement-fraud-public-sector.pdf

38 Kalubanga, M., Kakwezi, P & Kayiise, D. "The effects of fraudulent procurement practices on public procurement performance". International Journal of Business and Behavioral Sciences Vol. 3, No.1; January, (2013), pp. 17. Retrieved on July 28, 2015; from: http://cprenet.com/uploads/archive/IJBBS_12 -1193.pdf

39 Olaniyan, *Op. Cit* at 17

40 *Ibid* at 17

Similarly, there are anti-corruption regulations and agencies such as the Public Procurement Act, Criminal Code, the Economic and Financial Crimes Commission (EFCC), Independent Corruption Practices and related offences Commission (ICPC), the Budget Monitoring and Price Intelligence Unit (BMPIU) and Public Procurement Bureau (PPB) which regulates and controls the processes of doing businesses and other financial transactions in order to reduce fraud, especially in Public Procurement. [41]
However, corruption has continued to thrive. Fraud causes the loss of corporate resources. So many African countries have wasted 2.7 billion US Dollars in revenue as a result of fraud. Nigeria alone accounts for the second highest rate of fraud in Africa out of 23 countries surveyed by the KPMG Africa in 2011.[42]

RESEARCH METHODOLOGY

The study used literature review and empirical literature to expose real-life problems. The essence is to give an explorative research design in order to describe perceived problems so as to proffer appropriate solutions to correct the problems. Typically, documentary sources (documents published by the Bureau for Public Procurement (BPP), the Economic and Finance Commission (EFCC), the Independent Corruption Practices and related offences Commission (ICPC), the Budget Monitoring and Price Intelligence Unit (BMPIU), the Institute of Chartered Accountants of Nigeria (ICAN), the Chartered Institute of Purchasing and Supply Management of Nigeria (CIPSMN) and the comments of many scholars were provided in details regarding the current strategies on the functions of anti-corruption agencies in Nigeria.

In addition, information collected from existing sources (secondary data) which includes books, academic journals, current media reports, bulletins, internet articles and Government Acts and policies were used in this study. The documentary sources were scrutinized and analyzed to get the viewpoints of different authors on

41 Jaja & Okwandu, *Op. Cit*, at. 137

42 KPMG. *Op. Cit*. at: http://www.kpmg.com/ca/en/topics/at-risk-magazine/pages/procurement-fraud-are-you -prepared.aspx

fraud and corruption, how to effectively manage and control corruption and will also enable the researcher to formulate an overall description of the case that was studied.

ANALYSIS OF THE LAW AND PUBLIC PROCUREMENT

The procurement business has laws categorized under business or commercial law. The business law deals with a lot of subjects such as contracts, agencies, sales of property, negotiable instruments, sales of goods, lease, hire purchase, buying merchandise, and many more.[43] All these business transactions that can be handled by lawyers who have the knowledge of the law in relation to procurement.[44]

Practically, the Federal Government of Nigeria set up the Independent Corrupt Practices and Other Related Offences Commission (ICPC) in 2000 to eliminate corruption and regulate contracts and public procurement related frauds. The ICPC Act provides that any Public Officer who, in the course of his official duties, inflates the price of any goods or service above the prevailing market price or professional standards, shall be guilty of an offence by the provision of the Act and be liable on conviction to imprisonment for a term of seven (7) years and a fine of one million Naira.[45]

Similarly, the Public Procurement Act of 2007 in Nigeria, defines and sets out the mechanism for combating corruption in public procurement, including the legal rules and regulations as well as the guiding principles of the why, who, when, what and how of public procurement of goods, works and services, disposal of public property and management of public funds. Also, the Public Procurement Act highlights the guidelines for the award of contracts

43 Okene, O.V.C., Legal Aspect of Business (Port Harcourt: Claxton and Derrick Limited, 2001), pp. 14.

44 *Ibid* at 14.

45 The Independent Corrupt Practices and Other Related Offences Commission (ICPC) Act of 2000, at: section 22, sub-sections 4 and 5

and services, but a lot of questions, misconceptions, doubts, criticisms and cynicism have trailed its implementation. [46]

Furthermore, there is the Criminal Code which also makes provisions for the elimination of fraudulent practices by imposing various degrees of punitive measures on people who are involved in illegal and corrupt practices capable of defrauding. The penal code, also contains relevant provisions such as, corruption and abuse of office, amongst others.

ANALYSIS OF ETHICAL PRACTICES FOR PUBLIC PROCUREMENT

Ethics is related to law. Good conduct and ethical responsibility is the watchword of lawyers. Ethics must be applied by legal practitioners in order to fight corruption. Ethics depicts the behavior and conscience of legal luminaries' and it enables them to manage any office of trust with high moral standards and principles.[47] [47] Legal practitioners are not willing to throw away their hard-earned reputation as a result of non-compliance with ethical principles. This is because, any unethical act may be unlawful and may violate a moral standard in the discharge of duties. Both law and ethics deal with rules of right and wrong. Laws can be enforced; whereas ethics cannot. [48] The lawyer exhibits workplace ethical principles in order to be of good conduct at all times. Typically, ethics is the science of conduct. Ethics is the science relating to moral action and one's value system.[49] It involves learning what is right and doing the right thing.[50] Ethics is the science relating to moral action and one's value

46 Briggs & Bamson, *Op. Cit* at 30

47 Jaja, S.A., & Okwandu, G.A., *op. cit* . pp.150

48 *Ibid* at 150

49 Ladan, M. T. "The Role of Law in Combating Public Procurement Corruption in Nigeria", Being a Presentation made at the Second Phase of National Sensitization and Enlightenment Programme on the Public Procurement Act 2007 for North-West Zone of Nigeria Organized by the Bureau of Public Procurement, the Presidency, Due Process Office, Abuja in Collaboration with CISLAC, Abuja, Held At Command Guest House, Kaduna, 10th September, 2009, pp.2

50 Ofurum, C.O & Ogbonna, G. N. Accounting Information Systems: A Functional Approach (Owerri

system. Ethics deals with what it takes to be a good person by the observance of ideal societal norms, practices and rules that govern and limit conducts. [51]

A good procurement system can be achieved when professional ethics are adhered to by public procurement experts. [52] In the business environment, there are lots of ethical principles that must be observed for business to achieve common good. These principles include respect for persons, autonomy, freedom, beneficence, avoiding harm to others, veracity, justice, right, fidelity and confidentiality. [53][53] Other core moral values are honesty, integrity, trustworthiness, respect, responsibility, justice and fairness, caring, civil virtue and citizenship. [54]

Similarly, other identified professional ethical standards include reliability, confidentiality, trustworthiness, integrity, objectivity, independence and competence. [55] These ethical values are effective principles that can promote good governance. Public Procurement is the business activity directed at acquiring, purchasing, buying, leasing or the use of any other legal means to obtain materials, supplies, equipment and services (basic amenities and infrastructure) for the welfare and benefit of the citizenry. [56]

Procurement functions in Nigeria cover the whole gamut of the capital component of the national or state government budget. [57] Fraud erodes the finances and resources of countries and organizations. It occurs as a dishonest act that is carried out with the intention to steal and embezzle funds or property of one party by

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Sun Publications, 2008) pp. 364

51 *Ibid* at 364

52 Ibunda, C.C., Materials Management and Procurement: Concepts, Techniques and Practices (Owerri: Odesaa Educational Books Nigeria Publishers, 2004), pp. 22

53 *Ibid* at 6

54 Ofurum, & Ogbonna, *Op. Cit* at 365

55 Inje, & Okwandu,, *Op. Cit*. at. 63

56 *Ibid*. at 64

57 Ibid at 51

another party for unlawful enrichment.[58] As a point of fact, fraud is insidious and can have seriously debilitating consequences for businesses and communities. Consequently, in order to save corporate cost and prevent wastages that could arise from fraudulent procurement practices, the application of due process mechanism is required. Due process is the procedure and rules of the contract awarding process. [59] The due process is a mechanism used to certify public funding on projects that have complied with the proper project implementation process. [60]

ANALYSIS OF DUE PROCESS MECHANISM FOR PUBLIC PROCUREMENT

The due process mechanism is an approach for achieving value for money. The application and implementation of due process mechanism has enabled the Federal Government to make huge savings estimated in hundreds of millions of US Dollars. [61] Due Process is a systematic approach used in governmental activities and businesses to encourage open, economical and transparent contracting process that are devoid of favoritism and corruptible tendencies. The essence of this is to ensure that rules and procedures for procurement are made in such a way as to be implementable and enforceable. [62]

Practically, the lawyer is one who has been trained on the due process of law. So, lawyers have the vision or mission of the "due Process" for carrying out good management of public money and assets to reduce corruption, improve system planning and project preparation work to achieve accuracy of costing, cost-benefit analysis and prioritization in deciding the spending pattern and plan for any given year. Also, due process can bring about improved fiscal management through more effective expenditure management, institutions, processes and control mechanisms which can be

58 Nwachukwu, Op. Cit, at 19
59 Ofurum, & Ogbonna, Op. Cit. at 365
60 Ihunda, *Op. Cit*, at. 6
61 Mnioh, T., Consultants, Contractors and Due Process. The Tide, Thursday, March 30, (2006), pp.19.
62 *Ibid*. at. 19

exhibited by lawyers. Apart from more optimal resource allocation using due process mechanism, lawyers have the ability to make decisions to achieve public policy objectives through enhanced identification of laws and policies that can guarantee good decision making. Essentially, Public procurement is the process by which governments buy goods, services, and works for the public. Procurement is grouped into three categories such as civil works; goods; and services. [62]

Also, Public procurement takes the form of contracts, consultancy, supplies, works and project execution. The "project cycle" generally consists of three broad phases, each of which contains a number of stages: They are: Pre-Tendering Phase; Tendering Phase; and Post-Tendering Phase. Because, all these stages are procurement-related, the term "procurement cycle" often corresponds to the entire project cycle.

To outline the most common manifestations of corruption and fraud within the project cycle, emphasis is made to examine the procurement cycle, namely: Identification of Needs, Project Preparation, Bidding and Contract Award, Contract Implementation and Contract Supervision. [64] The Due Process mechanism was conceived among other things to bring sanity to public procurement system in the country, through the attainment of these performance targets: ensuring sustainable participation by reputable, competent and reliable contractors; settlement of contract price at near marginal cost; faith by tenders in the tendering mechanism and value for money in projects execution and delivery. [65]

Due process involves six basic processes and they are: advertisement requirement, prequalification process and criteria, invitation to tender, opening of tender, the bid evaluation process and determination of winning bid. [66] The advert guideline for contracts is

63 Briggs, & Bamson, *Op. Cit* at 22
64 Ibunda, *Op. Cit*, at. 6
65 Mniob, *Op. Cit* at 19.
66 Mniob, *Op. Cit* at 19

categorized into two: those below ₦ 10 million and those above ₦ 10 million. For the contracts below ₦ 10 million, their adverts are placed on the notice boards of the procuring entities; whereas, those above ₦ 10 million are advertised in at least two national dailies or government gazette with a call for pre-qualification of contracts. A Request for Pre-Qualification is used for pre-qualification of suppliers and contractors to assess their experience, qualifications and resources prior to a formal competitive process. The prequalification process and criteria is the elimination stage of would be contractors. After this process, the qualified contractors are moved to the next stage of the contracting process. Essentially, the would-be contractors are screened in line with the provision of the following: evidence of incorporation or registration of business name, registration with the federal ministry of works or other governmental agencies at the state or local government levels in relevant categories, evidence of company audited accounts for three years, evidence of financial capability and banking support, experience/ technical qualification and experiences of key personnel, similar projects executed and evidence of knowledge of the industry, equipment and technology capacity, annual turnover, evidence of local content policy and corporate social responsibility policy. An invitation to tender is a formal invitation to make an offer for the supply of goods or services. It consists of the steps initiated in a competitive tendering process in which qualified suppliers or contractors are invited to submit sealed bids for various types of procurement contracts during a specified timeframe of six weeks.

Typically, in response to an invitation to tender, invited tenders will submit their tender, which will include their price for supplying the goods or services along with proposals for how the clients' requirements will be satisfied. After tenders have been received in line with the standards of the procuring entity, they are opened. The opening of tenders is witnessed by the bidders and members of the civil society. A practical feature of open tendering is that, as soon as all the bids are received, all the bids are opened and evaluated publicly. This process ensures transparency and increases the

likelihood that a competent, low-cost service provider is selected.

Typically, the opened bids are evaluated in order to arrive at the selection of the preferred bidder. Bids are assessed first on a number of pass/fail criteria before the single preferred bidder is decided on. The evaluation and determination of winning bid is based on technical capabilities, financial structure and other competencies in the advertisement for contracts.[69] [70] The aim of bid evaluation is to determine the lowest evaluated responsive bid from amongst the substantially responsive bids received without compromising quality. The awarded contract is monitored or supervised by the procuring entity which funds the contract. This process is carried out ensure compliance with the contract and to encourage cost effectiveness and to avoid corruption.[70](71)

CONCLUSION

Procurement fraud is perpetrated by corrupt people who have the intent to deceive and negatively influence any stage of the procurement cycle for the purpose of making financial gain or cause a loss. The principles for enhancing integrity in Public Procurement are structured around four pillars: transparency, good management,

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67 *Ibid* at 19.

68 African Development Bank. Summary of Literature on Fraud and Corruption in Public Procurement.
Retrieved on July 27, 2015; from: http://www.afdb.org/ fileadmin /uploads /afdb /Documents/Procurement / Project-relatedProcurement/Summary_of_Literature_on_Fraud_and_Corruption_in_Public_Procurement.pdf

69 The Budget Monitoring and Price Intelligence Unit (BMPIU), A Manual on Public Procurement Reform

70 National Fraud Authority.Op. Cit . at| https://www.gov.uk/government /uploads /system /uploads/attachment_data/file/118460/procurement-fraud-public-sector.pdf

prevention of misconduct, and accountability and control for ensuring that procurement fraud is eliminated. [71(72)]

Effective detection and prevention of corruption in public procurement is possible if the administrative data on tenders, bidders, projects and contractors are collected and stored in a structured way, accessible for controls, investigations and analyses. This is made possible by the application of due process mechanism.[72] The due process mechanism ensures that a profile and records of all qualified would-be contractors are gathered and screened for an economical, effective and efficient procurement system that can guarantee value for money.[73]

Due process mechanism provides procedures and rules that could encourage true and open competition in tendering and contract award, open meetings and equitable and fair distribution of information, effective monitoring and auditing of all processes and implementation procurement activities. The essence of ethical practice is to institutionalize a workable code of conduct that can serve as an anti-corruption policy that could make corporate officials to eschew all manner of fraudulent acts in the discharge of their duties in order to promote good governance. As a matter of fact, a good and effective procurement system, devoid of fraud, is essential for good governance and nation development. This is because public goods and services can be enjoyed by all citizens. The role of government is to promote the good of all. Effective laws that could guarantee the success of business in line with the provisions of the Nigeria's constitution and fight against fraud are critical for salvaging the corrupt situation in the country.

Thus, the paper concludes that ethical practices and due process mechanism are appropriate approaches of anti-corruption policies that should be backed with legal provisions for the promotion of good

71 *Ibid* at https://www.gov.uk/government /uploads /system /uploads /attachment_data/file/118460 /procurement-fraud-public-sector.pdf Corruption_in_Public_Procurement.pdf

72 Ezekwesili, O. Welcome Speech at the Public Procurement workshop, held at Abuja, (2004), Nigeria.

73 Mniob, *.Op. Cit* at 19.

governance and the elimination procurement irregularities and fraud for the achievement of best value for money in Nigeria. This is because, it is very vital for organizations in Nigeria to formulate and implement anti-corruption policies in order to eliminate fraud in public procurement. Nigerian organizations should conduct procurement functions in compliance with the anti-fraud laws of the public procurement system in country as well as that of the African Development Bank and the World Bank in the regulations of public procurement systems. The study recommends that the Nigerian Bar Association (NBA), as a body representing the legal profession in Nigeria, has professional ethical code and anti-corruption unit to effectively carry out public procurement in organizations. More so, most procurement fraud could be ascertained through the traditional enforcement model of investigation, prosecution and sanction. This model is well understood by legal professionals based on their training. Therefore, legal practitioners should be given appointments to carry out public procurement duties in order to achieve set objectives. In addition, the application of due process should be followed by legal practitioners in order to achieve integrity, transparency and accountability in public procurement. Adequate ant-corruption policies should be formulated and implemented in Nigeria by the three tiers of government and organizations.

More so, the formulation and implementation of anti-corruption policies should be effected to enable the government and organizations to monitor and supervise all procurement acts in line with the anti-fraud bodies in Nigeria and that of Transparency International.

Specifically, in Nigeria, anti-corruption bodies like the Independent Corruption Practices and related offences Commission (ICPC), the Budget Monitoring and Price Intelligence Unit (BMPIU) and Public Procurement Bureau (PPB), the Economic and Financial Crimes Commission (EFCC) are set up to help regulate and control the procurement, economic, commercial, business, and governance processes so as to combat corruption. The establishment of the Chartered Institute of Purchasing and Supply Management of Nigeria in 2007 to promote professionalism in procurement and its related functions is a welcome development. Lastly, the Nigeria Bar

Association (NBA) should be a key stakeholder in the crusade for the elimination of frauds in public procurement. This is because of the number of legal luminaries and custodians of law in the membership of the NBA and the availability of the anti-corruption unit in the NBA.

HUMAN RIGHTS VIOLATION IN NIGERIA'S NIGER DELTA: WHITHER THE RIGHT TO LIFE WITHOUT THE DIGNITY OF LIVING?

By

Rufus Akpofurere Mmadu

Abstract

This paper examines the nexus between human induced oil spillages and human rights violations in the Niger Delta. The paper recognizes that sabotaged induced oil spillages produces two separate victims – the oil company whose facility is damaged with attending loss and the people whose property including natural vegetation, fishing life and aquatic splendors are destroyed. The paper contends that the policy which denies compensation for sabotage-induced spills violates economic rights and the cardinal pillar of natural justice – where there is a right there is a remedy. The paper argued that it is against the tenet of justice to deny claimants or victims of oil spillages compensation when their complicity is not established on the ground that the spill was caused by an act of sabotage. The paper posits that while victims of oil spillage are entitled to compensation on the one part, the contending right of oil companies to the ownership, security and safety of their equipment, oil pipelines and facilities against damage and destruction by saboteur must also be protected and guaranteed. The paper reasons that the integration of the people into the oil economy will make them have proprietary interest in the companies and take interests in protecting oil installations. Lastly oil pipelines should be buried deeper while ensuring that their safety is guaranteed by security agencies and experts.

KEYWORDS: *Sabotage, Oil Spillage, Human Rights, Niger Delta*

1. INTRODUCTION

The Niger Delta region of Nigeria lies within the Ibo Plateau and the Cross River valley.[1] It is one of the world's largest wetlands and Africa's delta covers some 70,000 km.[2] The area is the mainstay of Nigeria's oil industry, which accounts for about 75 percent of national revenue.[3] But what has been the impact of oil on the people and environment of the Niger Delta? Today more than ever, society has come to recognize that the anthropogenic destruction of our planet's sustainable biodiversity negatively impacts humankind, placing *human life* at great risk. The cause-and-effect relationship that exists between environmental collapse and the subsequent risk to our existence can no longer be ignored. World Resources' Annual Report 2000-2001, which focuses on people and ecosystems, points out that people of all nations — rich and poor — are experiencing the effects of ecosystem decline in one form or another; water shortages, soil erosion, fish kills, landslides on deforested slopes, and fires in disturbed forests are but a few manifestations of environmental degradation that have a direct impact on human beings.[4]

The magnitude and severity of the problem are overwhelming, and the impact on human rights is alarming. The links between environmental degradation and human living conditions are of even greater relevance when one considers that the victims of environmental degradation tend to belong to the more vulnerable

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1. The Willink Commission Report, 1958 Report of the Commission Appointed to Enquire into the Fears of Minorities and the Means of Allaying Them. Presented to Parliament by the Secretary to State for the Colonies by Command of Her Majesty, Her Majesty's Stationery Office, London.
2. World Bank (1995), Defining an Environmental Development Strategy for the Niger Delta, Volume I and II Report.
3. Okowa, W. I. (2007), 'Niger Delta in the Economy and Politics of Nigeria', A lecture delivered at the Convocation Ceremony of Niger Delta University.
4. UNEP et al, World Resources 2000-2001: People and Ecosystems: The Fraying Web of Life (Washington, D.C., 2001), viii.

sectors of society, who regularly share a disproportionate burden of environmental contamination.[5]

This paper takes interest in sabotage induced oil spills, due to its catalytic role in conflicts involving oil companies and Oil Producing Communities and the destructive potentials on the environment.[6] It gives primacy to human induced oil spillages and the contending rights of the victims – the host communities on the one side and the oil companies on the other. Oil exploration and production have induced environmental degradation that has resulted to productivity losses, the exacerbation of poverty, social conflicts, population displacement, occupational disorientation, and the violation of human rights.[7]

Many a time the incidence of oil spills have been blamed on equipment failure which, according to the Department of Petroleum Resources (DPR), account for 88 percent of oil spillages[8] and sabotage. Researchers have acknowledged the menace of oil spills caused by sabotage. Sabotage spills are caused by deliberate damage to crude oil installations, such as pipelines and manifolds.

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5. See R. Picolotti & J.D. Taillant (ed.), *Linking Human Rights and the Environment*, 2003 The University of Arizona Press p 14. See also Woods, Kerri, *Human Rights and Environmental Sustainability*, Edward Elgar Publishers, 2010; Boyd, David, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, University of British Columbia Press, 2011.
6. Okoko, Kimse (1998), SPDC – Host Communities Relations Survey (Unpublished Report); Ikporukpo, C. O. (2004), 'Petroleum, Fiscal Federalism and Environmental Justice in Nigeria', in *Space and Policy*, Vol. 8, No. 3, Pp. 321–354; Aaron, K. K. and Ibaba S. (2004), 'Analyzing the Social Sciences: Some contemporary Themes', in K. K. Aaron (eds), *Science in Social Relation: An Introduction to the Social Science*, Kemuela Publications, Port Harcourt, Pp.142–156.
7. Ikporukpo, C. O. (1983), 'Petroleum Exploitation and the Socio-economic Environment in Nigeria', *International Journal of Environmental Studies*, No. 21, Pp. 119 – 206; Ikein, Augustine A. (1991), *The Impact of Oil on a Developing Country: The Case of Nigeria*, Evans Brothers Limited, Ibadan; World Bank (1995), Defining an Environmental Development Strategy for the Niger Delta, Volume I and II Report.
8. The *South-South Express*, June 17, 2002.

Oil industry operators blame a substantial part of oil spills on sabotage.

For example, the SPDC blamed 40 percent of oil spills resulting from its operations in 2000 on sabotage.[9] Although local communities dispute such claims, the fact of the matter is that such incidents do take place. But what are the causes? The answer to this question has elicited differing views. According to Aaron:[10]

The official explanation is that petroleum pipeline vandalism is the handiwork of criminals, usually indigenous contractors and local chiefs who expect to be awarded clean-up contracts, or the evil machinations of detractors determined to derail the democratic projects in Nigeria.

Aaron's argument here is premised on the assumption that the sabotaging of oil installations is a community project, which it is not. This paper contends that although sabotage induced oil spillages is a way of protest against deprivation, as well as an economic venture, it is an activity of groups, and not communities. 'Group' here mean organized persons who came together for the purpose of interfering with oil production and activities of oil companies in the Niger Delta either by preventing oil exploration activities or by outright destruction of oil exploration facilities. Such group includes the Niger Delta Avengers and Movement for the Emancipation of the Niger Delta, among others. Community on the other hand relates to the host communities where the oil exploration takes place.

Indeed, the economic motive is central. The official position, which attributes such incidents to the activities of people who

9. Shell Petroleum Development Company (2000), *People and the Environment*, Annual Report.

10. Aaron, K. K. (2006), 'Human Rights Violation and Environmental Degradation in the Niger Delta Region of Nigeria', in Elizabeth Porter and Baden Offord (eds), *Activating Human Rights*, Peter Long, Oxford, Borne, New York, Pp.193–215.

expect economic gains from the oil spills, is therefore plausible. This viewpoint is supported by Okoko[11] when he declared that:

The entire issue of sabotage appears perplexing, since the communities protests the destruction of farmlands and fishing grounds by oil spillages. The question therefore arises, why do we still have these acts of sabotage? ...this seeming paradox lies in the types of persons engaged in these acts of sabotage... these individuals have no stake in the consequences of spillages. They are neither farmers nor fishermen. They are landless and have no claim to fishing ponds... sabotage to these groups is simply a form of 'business', the credibility of which is not of concern to them. Those who support such acts feel justified in line with the national syndrome of national cake-sharing, besides the prevailing feeling of discontent occasioned by neglect and deprivation.

This paper contends that it is not all members of the Oil Producing Communities take part in acts of sabotage. Significantly, however, even those who do not take part are victims of the devastating impact of the resulting oil spills. It can be argued that those who do not take part condone such acts, since they do not report culprits to relevant authorities. This will mean that they are as guilty as the actual saboteurs. The point must be made that the sabotage of crude oil installations is a clandestine activity that is not done in the open. This raises the questions that this study attempts to address – Is it just not to pay compensation for damages caused by sabotage induced oil spillages? Should oil companies whose facility have been deliberately damaged by saboteurs be made to go through another round of loss in paying out its income as compensation to victims of human-induced oil spillages? The paper argues that the policy, which excludes damages caused by sabotage from compensatory payments, infringes on the economic rights of third party victims who are not culprits in the unholy act of sabotage while at the same time deliberate efforts must be made to protect oil installations by not only the oil companies but through complementary security measures by the government and the host

11 Okoko, Kimse (1998), SPDC – Host Communities Relations Survey (Unpublished Report).

communities as well. Given these points, the paper addresses the following issues:

i. What is the impact of sabotage-induced oil spillages on third party victims?
ii. To what extent does state legislation/policy on the payment of compensation for sabotage-induced oil spillages violates the human rights of third party victims.
iii. To what extent are the oil companies required to secure their facilities and the level of security cover expected of the government?

The remaining part of this paper is divided into four sections. The next section discusses the effect of oil spills on the economy and society of the Oil Producing Niger Delta Communities, while the subsequent section discusses the legislative framework that governs the oil industry. The third section analyses the interconnectedness between the government's policy on compensatory payments for sabotage related oil spillage and human rights violation in the Niger Delta. The section also examines the issue of securing the oil facilities by the oil companies as well as by the host communities and the government. The last section concludes and suggestions are offered.

2. LEGAL FRAMEWORKS FOR COMBATING OIP SPILLAGES IN NIGERIA

The Nigerian oil industry is governed by laws that are seen as instruments of disempowerment.[12] This section discusses some of these legislations, with a view to situating the context of this paper.

2.1 The Petroleum Act Cap P10 LFN 2004.

The Petroleum Act vests the ownership and control of oil resources on the Federal Government. Accordingly, the Federal Government legislates on all matters relating to the oil industry. Section 17 of

12. Nna, N.J (1998), *The Niger Delta: State Legislation and Disempowerment*, Springfield Publishers, Owerri, Nigeria.

the Petroleum (Drilling and Productions) Regulations Cap P10 LFN 2004 prohibits oil-based activities in the following areas:

i. Any area held to be sacred;
ii. Any part set apart for, used, appropriated, or dedicated to public purposes;
iii. Any part occupied for the purposes of the government of the federation or a state;
iv. Any part situated within a township, town, village, market, burial ground, or cemetery;
v. Any part consisting of private land.[13]
vi. Any part which is the site of or within fifty yards of any building, institution, reservoir, dam, public road, tramway, or which is appropriated for, or situated within, fifty yards of any railway; or
vii. Any part under cultivation.

It is important to note two observations here. First, the authority to recognize or certify an area to be sacred lays with 'state authority' and not the people whose culture defines such areas to be sacred. Secondly, the restrictions (in v and vi above) can be set aside by seeking the written consent of the minister of petroleum resources; again, not the consent of the people.

It is discernible here that the Petroleum Act places emphasis on operational issues. The environmental costs of oil exploration and exploitation are not adequately addressed. Worse, it denies the people the right to negotiate the value of their properties destroyed by the oil companies through their operational activities. Communities are, thus, shortchanged despite loss of livelihoods that results from such damages.

2.2 The Oil Pipeline Act Cap O7 2004

The Oil Pipelines Act governs the laying of oil pipelines. Section 4 (2) of the law provides that a permit should be sought from the Department of Petroleum Resources (DPR) for the purpose of

13. Private land means any land in respect of which a person is entitled to exercise a right of occupancy under the Land Use Act of 1978.

surveying pipeline route and actual laying of oil pipelines. This implies that an oil company can only lay a pipeline after it has been given permission. Oil Producing Communities, whose farmlands and livelihoods are impacted by these oil pipelines, have no powers to grant permission or object to the laying of oil pipelines. The communities are only allowed to raise claims and objections on issues that include:

i. Any land occupied by any cemetery;
ii. Any land containing any grave, tree, or thing held to be sacred or the object of veneration; and;
iii. Any land under actual cultivation.

Again, the issue of disempowerment is clearly discernible.

On compensation, section 115 (c) provides that;
The holder of a license shall pay compensation – (i) to any person suffering damage (other than on account of his own default or account of the malicious act of a third person) as a consequence of any breakage from the pipeline or an ancillary installation, for any damage not otherwise made good.

It is clear that the policy of not paying compensation for damages caused by oil spillages is derived from this provision of the Oil Pipelines Act. The next section discusses the implications of this on the human rights of those who inhabit the Oil Producing Communities.

The paper notes that Nigeria has a very good infrastructure for the transportation of refined petroleum products which is about 5,120km pipelines network connecting 21 oil depots and 19 pump stations. Regrettably, the pipelines are not in maximum economic utilization due to three main factors:

1. Incessant illegal tapping by oil thieves
2. Sabotage
3. Poor management of pipeline.

3. OIL SPILLAGES, OIL PRODUCING COMMUNITIES AND THE OIL COMPANIES

The impact of oil spillages in the oil producing communities of Nigeria is devastating and it has been well documented.[14] Oil spills

14. Ikporukpo, C. O. (1983), 'Petroleum Exploitation and the Socio-economic Environment in Nigeria' in International Journal of Environmental Studies, No. 21, Pp. 119 – 206; Aaron, K. K. (2006), "Human Rights Violation and Environmental Degradation in the Niger Delta Region of Nigeria", in Elizabeth Porter and Baden Offord (eds), *Activating Human Rights*, Peter Long, Oxford, Borne, New York, Pp.193–215; Ikein, Augustine A. (1991). *The Impact of Oil on a Developing Country: The Case of Nigeria*, Evans Brothers Limited, Ibadan; Worika, I. L. (2002). *Environmental Law and Policy of Petroleum Development: Strategies and Mechanisms for Sustainable Management in Africa*, Anpez Centre for Environment and Development, Port Harcourt, Nigeria; Satau, A. T. (1993). *Environmental Crisis and Development in Nigeria*, (University of Port Harcourt Inaugural Lecture), University of Port Harcourt Press, Port Harcourt; Ibaba, Ibaba S. (2005), *Understanding the Niger Delta Crisis*, Amethyst and Colleagues Publisher, Port Harcourt; World Bank (1995). Defining An Environmental Development Strategy for the Niger Delta, Volume one and two Report; The United Nations Development Programme (2006), *Niger Delta Human Development Report*, Lagos, Nigeria; Adeyemo, A. M. (2002), "The Oil Industry, Extra-Ministerial Institutions and Sustainable Agricultural Development: A Case Study of Okrika L.G.A. in Rivers State", in *Nigeria Journal of Oil and Politics*, Vol.2, No.1, Pp.60–78; Human Rights Watch (1999). The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities, Human Rights Watch, New York; Ibeanu, O. (1997). Oil, Conflict and Security in Rural Nigeria: Issues in the Ogoni Crisis, African Association of Political Science, Occasion Paper Series I, Harare; NDES (Niger Delta Environmental Survey), abridged version of phase I Report, vol. 4, September, 1997; Peel, Michael (2005). Crisis in the Niger Delta: How Failure of Transparency and Accountability are Destroying the Region, Chatham House Briefing Paper, July; Clark, H., *et al.* (1999). Oil for Nothing: Multinational Corporations, Environmental Destruction, Death and Impunity in the Niger Delta, A United States, Non-Governmental Delegation Trip Report, 6th – 20th September; African Network for Environment and Economic Justice (2004). Oil of Poverty in Niger Delta, Lagos, Nigeria; Naanen, B. B. B. (1995).

pollute the environment, consequently destroying vegetation, marine life, mangrove forests, and food/cash crops, reducing nutrient value of the soil, and inducing land fragmentation. Oil spills impact directly on the productive base of the local economies of the communities. Thus, fishing and farming, the mainstay of the local economies suffer destructions that have set in declining productivity. However the World Bank[15] has consistently contested the linkage between oil pollution and declining productivity when it noted that:

> *Oil pollution, contrary to common perception, is only of moderate priority when compared with the full spectrum of environmental problems in the Niger delta... many residents assign a direct cause and effect relationship between oil development and declines in fisheries and agricultural productivity because both phenomenon began at roughly the same time. However, the timing may be largely coincidental...*

However, the fact of the matter is that oil spills have induced environmental degradation. When spills occur, farmlands, forests, and bodies of water are rendered useless.[16] Similarly, oil spills have contaminated and destroyed mangrove forests that are important for sustaining local communities.[17] It is instructive to note that total recovery for an oil spill impacted land takes as long as 10 to

'Oil Producing Minorities and the Restructuring of Nigerian Federalism: The Case of the Ogoni People', in Journal of Commonwealth and Comparative Politics, Vol. 33, No. 1, March, Pp. 46–78.

15. World Bank (1995). Defining An Environmental Development Strategy for the Niger Delta, Volume one and two Report.
16. Aaron, K. K. (2006). "Human Rights Violation and Environmental Degradation in the Niger Delta Region of Nigeria", in Elizabeth Porter and Baden Offord (eds), *Activating Human Rights*, Peter Long, Oxford, Borne, New York, Pp.193–215.
17. Clark, H., *et al.* (1999). Oil for Nothing: Multinational Corporations, Environmental Destruction, Death and Impunity in the Niger Delta, A United States, Non-Governmental Delegation Trip Report, 6th – 20th September;

15 years.[18] Adeyemo[19] supports the negative impact of oil spills on farmlands by noting that oil spills contaminate the topsoil and destroy its suitability for plant growth. This is attributed to two major effects, listed as:

i. Reduced availability of soil nutrients, such as nitrogen; and
ii. The introduction of toxic contents into the soil.

It is imperative to point out that the effects of oil spills on the environment are made worse by delay in clean-up. There are examples of oil spills that were not cleaned for months or years. In Epubu community, an oil spill that occurred in December 1998 was not cleaned until about a year later.[20] Also, at Alcibiri community, a spill that occurred in March 1997 was not attended to for six months.[21] Again, in 1995, a spill that occurred at Akenfa and Ogboloma communities in October was left till December of the same year.[22]

Experience has shown that sabotage spills suffer delay in cleanups more than those resulting from operational faults. This is attributable to disagreements that usually occur. But what is the impact of this on the rural population? The loss of livelihoods has exacerbated poverty and induced population displacement. Forced

18 Ekekwe, Eme (1986). *Class and State in Nigeria*, Longman, Nigeria; Akpofure, E. A. *et al.* (2000). Oil Spillage in Nigeria's Niger Delta: Psycho-Morphological and Empirical Overview, International Association of Impact Assessment (2), Opulence Environmental Services Ltd, Psycho-Morphological Learning Exchange Network.

19. Adeyemo, A. M. (2002). 'The Oil Industry, Extra-Ministerial Institutions and Sustainable Agricultural Development: A Case Study of Okrika L.G.A. in Rivers State', in *Nigeria Journal of Oil and Politics*, Vol.2, No.1, Pp.60–78.

20. Clark, H., *et al.* (1999). Oil for Nothing: Multinational Corporations, Environmental Destruction, Death and Impunity in the Niger Delta, A United States, Non-Governmental Delegation Trip Report, 6th – 20th September.

21. Aaron, K. K. (2006), 'Human Rights Violation and Environmental Degradation in the Niger Delta Region of Nigeria', in Elizabeth Porter and Baden Offord (eds), *Activating Human Rights*, Peter Long, Oxford, Borne, New York, Pp.193–215.

22. Ibaba, Ibabu S. (2005), *Understanding the Niger Delta Crisis*, Amethyst and Colleagues Publisher, Port Harcourt.

migration has dislocated families, thus, undermining the social structure of affected communities. Indeed, oil spills have alienated affected individuals from their environment and species being. The enabling laws governing the oil industry define the plight of the communities.

On the other side, the question is asked: What is the effect of human induced spillage on the oil companies? How justifiable is it that Oil Company who has its oil installations vandalized or damaged is held liable for millions of dollars as compensation to the oil communities which may ultimately be a collaborator in events leading to the spill? The process of oil and natural gas (ONG) exploration, extraction, and transportation often impinge on the lives of the people and their environment, the negative effects are usually taken for granted by the Multinational Oil Companies (MNOCs) and the federal government until there is protests. The protests are then suppressed through obnoxious laws. This frustrates the people and makes them intensify the level of their protests, and eventually vandalize the pipelines conveying the crude oil.[23] Ayida likens this vicious cycle to the 'rise and fall of Nigeria.' To Ibaba and Olumati, the vicious cycle is perpetrated that the activity is carried out by 'individuals, and not communities', and the 'economic motive is central in their actions.'[24] They emphasize that, while serving a social purpose in terms of protesting against deprivation, the economic gains from vandalization is paramount in the minds of the actors. Arguing in the same vein, Okoko contends that '... those who support (pipeline vandalization) feel justified in line with the national syndrome of national cake-sharing, hence the prevailing feeling of discontent occasioned by neglect and deprivation.'[25] Be that as it may, the act is perpetrated by few persons, commonly known as militants, but the entire community

23. Ayida, A. A., *Rise and Fall of Nigeria*, Lagos: Malthouse Press Ltd, 1997.
24. Ibaba S. Ibaba and Olumati, J. 'Sabotage Induced Oil Spillage and Human Rights Violation in Nigeria's Niger Delta,' *Journal of Sustainable Development in Africa*, 2004.
25. Kaddor, N., *New and Old Wars: Organized Violence in Global Era*, Cambridge: Polity Press, 1999; See also Ibaba & Olumat (2004)

becomes victim in one form or the other.[26] While pipeline vandalism and illegal bunkering have been featured in the literature on the Niger Delta, the various phases, causes, end effects are less understood.[27]

Actors and Causes in recent research findings[28] identified three categories of actors responsible for oil pipelines vandalization in the Niger Delta region (NDR). They are: a) Sabotage for Economic Gains. Here, the local actors (militants) collaborate with some of the staff of the multinational oil companies (MNOCs), especially in the Production Department and Liaison Offices in their flow stations to break pipelines, and later recommend the same 'criminals' to the company's Management for 'clean-up' at exorbitant cost. This is very rampant in SPDC and NAOC. b) Corrosion Due to Aging Pipes. Here, SPDC; admitted in its Briefs in 1995 and later in 2004, that it 'recorded an average of 221 spills per year since 1989 in its operational areas. This involved a total of 7,350 barrels of oil a year'.[29]

The third group of actors is the militants. The group is new phenomenon, but has over-shadowed the other two groups. Their argument is that after the Niger Delta has been the economic life wire of the country from the tune of oil boom in 1973, the oil producing/bearing communities in are increasingly worst-off. This shows that nothing has significantly changed since Henry Willink's Commission report 50 years ago that the people of the Region are, 'poor, backward and neglected'. This angered people like Boro, to the point where he recruited 159 youths to form the Niger Delta Volunteer Force (NDVF) and revolted against the Federal Government on February 23, 1966. The revolt was to draw the national and the international attention to the plight of the people in

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26. Heinecke, P. *Freedom from the Grave – Nigeria and the Political Economy of Africa*, (Zaria: Gaskiya Corporation Ltd. 1986).
27. *Ibid.*
28. Etekpe, A., 2007, pp. 108-9, Also, see Etekpe, A., "An Examination of State-Induced Violent Conflicts", in Ijo 'Nation of Nigeria' *Journal of Oil and Gas Politics*, Vol. 2(2), April.
29. Blandel, Jean, Comparing Political System, *London: Weider Feild and Mcelin, 1979.*

the Region.[30] This seemed to have opened the floodgate for [illegible] militancy, and the Ogoni people took advantage of it.[31] The Ogoni people formed the Movement for Survival of Ogoni People (MOSOP) in 1990 and frontally challenged the evils of SPDC, Wilbros West African Ltd, and the Federal Government. MOSOP even introduced the concept of writing Bills of Right as a form of new social contract. This radical approach quickly spread to over 500 communities in the Ijaw Nation, and in 1998, the youths assembled at Kaiama town in Bayelsa State to take decisions on how to challenge the continual criminal act of the Federal Government. The outcome of that decision is known as the Kaiama Declaration on December 11, 1998. Following the Kaiama Declaration, over 30 militants youth organizations emerged, and the most visible ones are Ijaw Youth Council, Niger Delta People Volunteer Force (NDPVF), Meinbutu Group, Movement for Emancipation of the Niger Delta (MEND), Front for Izon Survival and Hope, Niger Delta Vigilante, Martyrs Brigade, Iduwini Volunteer Forces, and Niger Delta Peoples Salvation Front. The goal of these organizations is to increase the spate of oil pipelines vandalization and other forms of disrupting the activities of MNOCs in the region. The essence is to encourage the Federal Government to negotiate with them for purpose of developing of the region.[32]

Thus, faces of Militants in Niger Delta from the humble beginning of Isaac Boro in 1966, the seed for armed struggle

30. Etekpe, A., 2007, pp. 108-9, Also, see Etekpe, A., "An Examination of State-Induced Violent Conflicts" in Ijo 'Nation of Nigeria', *Journal of Oil and Gas Politics*, Vol. 2(2), April.
31. Human Right Watch, 1999, p. 82.
32. Ibaba, S.I. & Okolo P.O. (2008), 'Resolving Militia conflicts in the Niger Delta: The Role and Strategies of Mediation', *Martin Paper, Martin Institute*, Article. Available at http://www.class.uidaho.edu/martinarchieves/Martin%20paper.html, p. 18. Accessed 25 July 2016. See also Fiakpa, C., 'The Niger Delta Looming War in the Oil Fields', *Tell*, April 7, 2003. pp. 42-47. Also see Schon, D. A. *Beyond the Stable State*, New York: W.W. Norton, 1971. See also Aham, Uba, '50 Years of Oil in Nigeria.' *Tell*, February 28, 2006, pp.26-28.

including oil pipelines vandalization to press for socio-economic development, gainful employment, improvements in social infrastructure, and resource control and management have attracted national and international sympathy. As Steve Azaiki[33] argues, the arms struggle has eventually grown in the minds of the people of the Niger Delta, and the MNOCs and the Federal Government are now harvesting the product in form of an unprecedented spate of oil pipelines vandalization.

The Coalition of Niger Delta Organizations in Diaspora (CNDOD)[34] wrote:

Beginning from 1976, under the government of General Olusegun Obasanjo, pipelines were laid in the Niger Delta to take oil to Kaduna in extreme Northern Nigeria. Since then the Niger Delta is mapped into pipelines which criss-cross the entire region. Many of the pipes have aged and are without proper maintenance. Moreover, they have been vandalized by sophisticated thieves... secured by privileged millionaire – thieves.

In addition to the issues raised by CNDOD, Onuoha, Freedom[35] has identified five key factors responsible for the 'growing incidence of pipeline vandalization in the country.'[36] They are:

1. The prevalence of poverty and unemployment in the region and country;
2. The emergence of barons or godfathers who induce the vandalization;
3. The defective security apparatus;
4. The official negligence of MNOCs and federal government; and
5. The weak legal framework.

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33. Azaiki, Steve, *The Evils of Oil*, Ibadan: Y-Books, 2008. See also London Financial Times, 2005, p. 25.
34. Coalition of Niger Delta Organizations in Diaspora, 2006, pp. 5-6.
35. Onuoha, F.C. 2009, Ibid, pp. 374-379 and 369-370.
36. Aroh, K. N. et al, 'Oil Spill Incidents and Pipeline Vandalization in Nigeria', *Disaster Prevention and Management ,Journal*, Vol. 19(1), 2010. Also, see Okolo, P.O., 'Oil Pollution Compensation and Conflict in the Niger Delta: A Case study of Shell (SPDC), MA Thesis (Unpublished), 2004.

He went further to argue that, while the five factors have created so much havoc to communities, the oil pipeline fire disasters rarely consume the vandals themselves. Instead, it is the poor who either come to collect the leaking fuel after a pipeline has been broken. This category of people, are the hardest hit by such disasters. Poverty and vulnerability to pipeline fire in Nigeria are closely linked since the poorest live in the highest risk areas, i.e., where the pipelines traverse. They also constitute the highest number of displaced people in the region.

Incidentally, this underlying socio economic reality is often not considered in official perceptions of oil pipeline vandalization and explosions. Aroh, K. N., et al[37] addressed the manifestation from the perspective of its 'impact on public health and negation to the attainment of the millennium development goal' by studying Ishiagu community in Anambra State. They argue that oil spill can occur through mechanical failure, operational error, as well as, third party activity and sabotage. They observed that oil pollution is one problem for which no effective and final solution has been found anywhere, not only in Nigeria, but in the world inspite of efforts to control it. Ogoigbe[38] thinks that there are solutions, and measures to control pipeline vandalization in the country. As he puts it, 'we'll stop bunkering, vandalism in Niger Delta Creek because the scourge has eaten deep into the fabric of the society.' The group plan to mobilize local communities along the coastal zone and security outfits to fight the problem, insisting that the nation's battered economy must be redeemed. While stopping pipeline vandalization is highly desirable, to what extent Ogoigbe and his group would succeed is difficult to say. This is because the actors (perpetrators) do not know that their action affects the entire livelihood of oil producing communities. It is important that the actors (perpetrators) be properly re-orientated because Nigeria loses N174 billion to pipeline vandals in the past ten years in over 16,083

37. *Ibid.*
38. Ogoigbe, Emmanuel, 'We'll Stop Bunkering, Vandalization in Niger Delta Creeks'. Available at http:/www.sunn.ewsonline.com. Accessed July 25 2016.

pipeline breaks.[39] Barkindo, Sanusi, Group Managing Director of Nigeria's NNPC made the assertion, and supported it with graphic details. The amount is much more than what the federal government has so far spent on the Niger Delta since 1956 when oil was discovered in the region. The consequences or effects of oil pipelines vandalization cannot be exhausted, but we have discussed few of them in this section.

Oil pipeline vandalism has, indeed fueled criminal interests and conflict. The economic interest now overrides that of social which used to be an opposition against the oppressive actors of the MNOCs and federal government. The interplay of economic and social forces has resulted in displacement of a large population after the disaster that accompanies the vandalization. It has also caused social disintegration[40] in a proportion not witnessed in the other deltas of the world namely, Mississippi, Mekong, Nile, Yangtze, Pearl, Okavango, Orinoco, Mahakam, and Mackenzie deltas. All these are translated into scarcity of energy at both local and global levels with its threat on national security.

4. COMPENSATORY PAYMENTS AND HUMAN RIGHTS VIOLATION IN THE NIGER DELTA

Compensatory payments for oil industry related damages in the Niger Delta are an issue of concern to the Niger Delta Oil Producing Communities. Ikporukpo[41] captures these concerns thus: Whereas there are no direct compensatory payments for pollution and associated problems, there is payment for loss of use of land and water resources. In other words, individuals/communities are compensated for destroyed crops, productive trees and fish. There is no compensation for loss of land and water bodies... no compensation are paid if damage is caused through the action of a claimant, or third party... The rates paid are usually low because of

39. Barkindo, Sanusi, 'Nigeria: Country Loses N174 billion to Pipeline Vandals in 10 Years', *Daily Independent*, Lagos, March 2, 2010.
40. Smith, A. 'Socio-Economic Development and Political Democracy: A Causal Analysis.' *Midwest Journal of Political Science*.
41. Ikporukpo, C. O. (2004), 'Petroleum, Fiscal Federalism and Environmental Justice in Nigeria', in *Space and Policy*, Vol. 8, No. 3, Pp. 321–354.

frequent under valuation.... The issue of self-inflicted and third party damage is one of the most contentious aspects of compensation.

The point has been made earlier that not all community members take part in sabotage. Thus, not all claimants or victims are saboteurs. The question is, is it just for innocent victims of sabotage induced oil spillages to suffer losses without compensation? Our answer is no. It is clearly unjust to punish an individual for a crime he did not commit. But how does the compensation policy violate human rights?

Despite claims of sabotage, the oil companies hardly provide evidence to substantiate their claims. Worse, the actual culprits are never identified. Our contention is that in the absence of the establishment of complicity, it is wrong not to pay claimants compensation for their damaged resources. In our opinion, this refusal to pay compensation without the establishment of complicity is a violation of human rights.

Human rights, moral rights belonging to all people by virtue of their humanity.[42] Rights are classified as civil and political rights; Economic, Social, and Cultural Rights (ESCR); and the right to development, peace, and humanitarian assistance. The Economic, Social and Cultural Rights guarantee claims to property and use of resources for self-preservation. In our view, the sabotage law on compensation violates this right.

The United Nations High Commission has noted that human rights and the environment are interlinked, and that effective enjoyment of human rights is predicated on environmental protection.[43] Again, Article 21 of the African Charter on Human and People's Rights accepts that 'all peoples shall freely dispose of

42. Aaron, K. K. (2006), 'Human Rights Violation and Environmental Degradation in the Niger Delta Region of Nigeria', in Elizabeth Porter and Baden Offord (eds), *Activating Human Rights*, Peter Long, Oxford, Borne, New York, Pp.193-215; Ibaba, Ibaba S. (2005), *Understanding the Niger Delta Crisis*, Amethyst and Colleagues Publisher, Port Harcourt.
43. The United Nations Development Programme (2006), *Niger Delta Human Development Report*, Lagos, Nigeria.

their wealth and natural resources', exercised in the 'exclusive interest of the people'.[44] We argue that this include compensatory payments for damages done to such resources. Given that Nigeria is a signatory to the African Charter, the compensation policy on sabotage oil spills is a violation of the relevant section of this Charter, as the law alienates the Oil Producing Communities from their right to 'freely dispose of their wealth and natural resources'.

Perhaps of more significance is the fact that the oil spills and the resultant environmental degradation and destruction violate the people's right to a healthy environment. The refusal to pay them compensation, therefore, amounts to double tragedy or loss. This argument does not support or justify the vandalization of oil pipelines; rather, it highlights the plight of innocent victims.

4.1 The Concept of Environmental Rights

Environmental Rights can be defined as the right that gives human beings a primary right to a sustainable global environment. It has been defined as the right of individuals and peoples to an ecologically sound environment and sustainable management of natural resources conducive to sustainable development.[45] The term manages to be both elusive and controversial: elusive because there is no universal definition, controversial because many from the environmental sector define it from an eco-centric perspective (environment first) while the human rights constituency is predominantly anthropocentric (humans first).

It has however been said that environmental rights encompass three main areas: the right to a clean and safe environment; the right to act to protect the environment and the right to information, to access to justice, and to participate in environmental decision-

44. Shelton, D., (2002), 'Human Rights and the Environment: Jurisprudence of Human Rights Bodies,' Background Paper No. 2, Joint UNEP – OHCHR Expert Seminar on Human Rights and the Environment, Geneva, January 14 – 16.

45. Dr Jona Razzaque, 'Human Rights and the Environment: Developments at the National Level, South Asia and Africa', *Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment* 14-16 January 2002 Geneva.

making. These enable citizens to play an active part in creating a healthy environment, and are linked to several UN Conventions and Declarations.[46] The question that calls for answer is whether the existing human rights regime can adequately take care of these environmental rights or whether there is the need to fashion out a line of new mechanism to ensure the enforcement of these rights?

4.2 The Nexus Between Environmental Degradation and Human Rights

Over the past decades, human rights have been identified and codified in a vast body of international and regional agreements. The best known of these is the 1948 Universal Declaration of Human Rights, which obliges members of the international community to respect the rights of all human beings to life, to an adequate standard of living, to liberty and security, to freedom of opinion and expression, and to participate in the government of the country. In 1976, two additional International Covenants entered into force under the auspices of the United Nations, one covering Civil and Political Rights and the other Economic, Social and Cultural Rights.[47]

In recent years, as a result of the negative impacts of widespread economic globalization on people and the environment around the world, another category of rights has arisen. These new rights often apply to communities or groups of people attempting to achieve healthy and sustainable livelihoods in various parts of the world. The impacts of global exploitation of resources on peoples' rights to property, good health and economic wellbeing have become a cause for concern lately. In the name of 'development' and 'free trade', governments and transnational corporations are

46. Adebowale M. Etal., 'Environment and Human Rights: A New Approach to Sustainable Development', World Submit on Sustainable Development: *International Institute for Environment and Development* 2001.
47. Our Environment, Our Rights: Standing up for People and the Planet,' Friends of the Earth International Report. Available at http://www.foei.org/en/resources/publications/climate-justice-and-energy/2000-2007/human_rights. Accessed 25 July 2016.

steadily seizing control of land, water, forests and minerals. All of these leads to environmental and human rights violations such as the confiscation of land, evictions, pollution, destruction of natural resources, police presence, militarization, violence, intimidation and worse.[48] Thus, human survival is increasingly threatened by the bio-degenerative consequences of human action: expanding deserts; decreasing forests; declining fisheries; poisoned food, water, and air; and climatic extremes such as floods, hurricanes, and droughts.[49]

While environmental degradation in itself is by no means new, the bio-degenerative nature of our current crises presents a number of seemingly insurmountable challenges. One of these challenges involves the need to address the many crises and potential crises resulting from global warming. Another significant challenge is coping with the hazardous byproducts of the nuclear age.[50] The direct consequence of all these is the curtailment and abridgement of peoples' fundamental rights to life, property, participation and good environment.

Linking environmental and human rights is not an entirely novel concept. Some argue there has been an implicit or explicit recognition of the right of humanity to a healthy environment since the Universal Declaration of Human Rights in 1948.[51] However the perception, advocacy and application of the two international concepts and concerns have been diverse and varied overtime. According to a commentator 'whilst there is no doubt that the

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48. *Ibid.*
49. Barbara Rose Johnston, 'The Inseparability of Human Rights and Environmentalism', *Human Rights Dialogue*: "Environmental Rights" (Spring 2004). Available at http://www.cceia.org/resources/publications/dialogue/2_11. Accessed 26 July 2016.
50. *Ibid.*
51. F Kingham, 'Human rights and Environmental rights: Implications of a "right based" approach for mining in Australia', (Paper presented at the Queensland Environmental Law Association Conference 2003, Surfers Paradise, 8 May 2003). Available at http://www.sclqld.org.au/qjudiciary/profiles/fykingham/publications/ Accessed 26 June 2016.

foundation for environmental protection can be traced back to early instruments, the two fields of international law, human rights and the environment, have until recently developed distinctly from each other."[52] In fact it has been asserted that the existing human rights catalogue was drafted in a time when environmental concerns were not yet an issue and hence fail to adequately address all environmental needs."[53]

Over the last decade however, the world community is realizing the importance of the link between human rights and the environment to achieve the full enjoyment of the human rights. Few are the issues of major concern in the international agenda as the ones composed by human rights and the environment. They constitute a common denominator dealt in the course of World Conferences during the last decade of the century; which gave rise to the 1986, the United Nations General Assembly recognition of the relationship between the quality of human environment and the enjoyment of basic human rights,[54] the United Nations Conference on Environment and Development (Rio de Janeiro 1992), the II Universal Conference on Human Rights (Vienna 1993), the International Conference on Population and Development (Cairo 1994), and the UN II Conference on Human Settlements (Habitat II, Istanbul 1996) On the official level, the link between human and environmental rights was first made in 1972 at the Stockholm Conference on the Human Environment. Principle 1 of the *Stockholm Declaration* established a foundation for linking human rights and environmental protection, declaring that man has a fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being."[55] It also announced the responsibility of each person to

52. *Ibid.*
53. Andresson A, Kol, T. 'The Role of Basic Rights in Environmental Protection', *Juridica International* VIII/2003 p 140.
54. UNGA resolution 2398 (XXII) 1986.
55. Dinah Shelton Environmental Rights in Multilateral Treaties Adopted between 1991 and 2001 *Environmental Policy and Law*, 32/2 (2002) p 70. Available at

protect and improve the environment for present and future generations.

4.3 Synergy between Environmental Rights and Human Rights

Aside the United Nations efforts at synchronizing the concepts of human rights and the environment;[56] other international institutions have taken bold steps to synergize the two concepts and fashion a workable relationship between environment and human rights. The World Bank has recognized the environment as one of the key points of its actions redefining its strategy in this direction. The Bank's concern has evolved from a conception of 'not to harm', towards a proactive action in the promotion of environmental sustainability. Recognizing the link between human rights and environment, the 2000-2001 World Bank Report on World Development measures poverty by virtue of four aspects: opportunity, potentiality, security and capacities.[57] By linking poverty alleviation and sustainable development, the Bank is focusing on finding ways to ensure that economic growth does not come at the expense of the world's physical and ecological systems or the world's poor[58]

The World Health Organization, aware of the serious impact of environmental degradation on health, formulated a global strategy

http://iospress.metapress.com/content/9hdpdte11g5e5rty/fulltext.pdf. Accessed 26 June 2016.

56 In the mid 1990s, recognizing the urgent need and importance of deepening the link between human rights and the environment, and of exploring ways to achieve a better collaboration, harmony, and complement the agendas of different United Nations institutions working on both subjects, the UN created the position of Special Rapporteur on Human Rights and Environment. Along with the United Nations Office to fight against Desertification and Drought, the United Nation Development Programme (UNDP) assists countries to combat desertification and plan for future action to prevent drought and hunger. The UNDP supports the application of the Protocol of Montreal which protects the earth ozone layer, sponsoring projects in 64 countries through which 5,667 tons of chemical products that exhaust the ozone layer are eliminated annually

57. The World Bank, Partnerships for Development, 2000, pgs.195-201

58. World Development Report 2000/2001, *Attacking Poverty*, Published for the World Bank, Oxford University Press.

for health and the environment that provides a framework for the fulfillment of three objectives: Achieve a sustainable basis for health for all; to provide an environment that promotes health; and to make all individuals and organizations aware of their responsibility for health and its environmental basis[59]. Also the World Trade Organization in 1994, declares, in the first paragraph of its preamble that the state members to the WTO recognize that, 'Its relation to the field of commerce and economic growth must be directed in view of improving living standards, [and] ensure full employment... *enabling at the same time the very best use of world resources in accordance with the target of sustainable development, aiming at protecting as well as preserving the environment*'[60]

Among human rights treaties only the 1981 African Charter on Human and Peoples' Rights proclaims environmental rights in broadly qualitative terms. It protects both the right of peoples to the 'best attainable standard of health'[61] and their right to a general satisfactory environment favorable to their development. The provisions of this treaty has been interpreted in the Ogoniland case[62] that 'an environment degraded by pollution and defaced by the destruction of all beauty variety is as contrary to satisfactory living conditions and development as the breakdown of the fundamental

59 Adriana Fabra, 'A Review of Institutional Developments at the International Level', Background Paper No. 3, Joint UNEP-OHCHR *Expert Seminar on Human Rights and the Environment*, 14-16 January 2002, Geneva.

60 Emphasis supplied.

61 African Charter on Human and Peoples' Rights, supra note 5, at art. 16.

62 *Soc. and Econ. Rights Action Ctr. v. Nigeria*, OAU Doc. CAB/LEG/67/3 Rev. 5, 52-53. Available at http://www1.umn.edu/humanrts/africa/comcases/155-96.html; Accessed 20 July 2016. See generally Dinah L. Shelton, Decision Regarding Communication 155/96 (*Soc. and Econ. Rights Action Ctr./Ctr. for Econ. and Soc. Rights v. Nigeria*). Case No. ACHPR/COMM/A044/1, 96 AM. J. INT'L L. 937 (2002). The court held, inter alia, that Article 24 of the Charter imposes an obligation on the State to take reasonable measures 'to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources.

ecologic equilibrium is harmful to physical and moral health.[63] In somewhat similar circumstances, the Inter-American Commission and Court of Human Rights have interpreted the rights to life, health and property afford protection from environmental destruction and unsustainable development and they go some way towards achieving the same outcome as Article 24 of the African Convention.[64] The Commission's decision notes the importance of economic development but reiterates that 'development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being.'[65]

At national levels many state constitutions give the environment a stronger human rights focus. The 1996 South African Constitution gives everyone the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically

63. Para. 51. See K.S.A. Ebeku, 'The Right to a Satisfactory Environment and the African Commission', 3 *African Human Rights Law Journal*, 149 (2003) at 163; J.C. Nwobike, 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter, 1 *African Journal of Legal Studies*, 129 (2005) at 139.

64. *Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, IACHR, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004).

65. See e.g., International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), Art. 12 (Dec. 16,.1966); European Social Charter art. 11, Oct. 18, 1961, E.T.S. No. 035, 529 U.N.T.S. 89 (1961); Additional Protocol to the American Convention on Human Rights art. 11, Nov. 17, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 156; Convention on the Rights of the Child, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. U.N. Doc. A/44/49 (Nov. 20, 1989). For fuller discussion of these treaty provisions, see Robin Churchill, 'Environmental Rights in Existing Human Rights Treaties', in *Human Rights Approaches to Environmental Protection*, ch. 5 (Alan E. Boyle & Michael R. Anderson eds., 1996).

sustainable development and use of natural resources while promoting justifiable economic and social development.[66] The constitution addresses the responsibilities of government without necessarily creating justiciable environmental rights, although they may nevertheless influence the interpretation and application of other constitutional rights or of general law.

These constitutional imperatives though not justiciable at law have given birth to national legislative framework for the protection of the environment and the participation of the people in the decision making process at environmental protection. This has led to the evolution of National legislations on Environmental regulations and Environmental impact assessment laws in various countries of the world including Nigeria.[67]

However these developments have not snowballed into any significant constitutional manifestation of right to environment in most jurisdictions and resort to the use and extension of fundamental human rights regime to cover right to a good environment have been on the increase both internationally and locally.

5. CONCLUSION AND RECOMMENDATIONS

The over 50 years of oil exploration and exploitation, the Niger Delta has induced environmental degradation in varying dimensions. Oil spillages, gas flaring, and related activities have undermined environmental quality, destroyed farmlands, and fishing grounds, that has resulted to productivity declines, occupational disorientation, and population displacement. Human rights violations have also been recorded and these have been linked to environmental degradation, state repression, and state policy. This paper examined the compensatory payment policy for sabotage-induced oil spillages and argued that the policy violates human rights. It demonstrated that the vandalization of oil pipelines

66. South Africa Constitution. 1996 Art. 24.
67. For example, Environmental Assessment Act. Laws of Federation of Nigeria 2004

is not a community project, but the actions of few individuals who do so for economic reasons.

Given that the complicity of claimants in the acts of sabotage are hardly established, we argue that the refusal to pay compensation for the damaged properties amount to a violation of their economic rights. Oil companies who cannot protect their oil pipelines from vandalization should not turn round to punish innocent victims. Understandably, the policy seeks to discourage sabotage by making it financially unattractive; it is, however, defective. The most likely option to end the menace is to integrate the communities into the oil economy, so that they will have proprietary interest in the protection of oil installations. In addition, oil pipelines should be buried deeper while communities, not individuals, should be contracted to protect oil pipelines and related oil installations.

What we see in the Niger Delta is a reflection of the human spirit that has a remarkable capacity of rising above oppression. Thus, the people are looking at militancy as a way of solving the unsolved problem. Nevertheless, the matter goes beyond this. Thus, while not denying that the Niger Delta has undeservedly suffered neglect under various administrations, especially under the long years of military despotism, is it now time we ask ourselves why the distressing situation persists, despite series of ameliorative attempts." We do not see pipelines vandalization as the solution, and government, MNOCs, the host communities have to find answers to the Niger Delta question as we do not foresee the 'looming war in the Niger Delta' merely 'wished away' by the Joint Military Task Force of the Federal Government of Nigeria. The paper has discussed how the youths' protests have spill-over to violence and consequent destruction of oil pipelines. The paper also discussed the various actors, causes and manifestation of oil pipeline vandalization, and progressed to examine three case studies to unravel how inadequate infrastructure, and official negligence caused havoc that resulted in the displacement of local population, conflict, and social disintegration. We wish to state that since the Government's interventionist agencies from the Niger Delta Development Board (NDDB), Oil Minerals Producing Areas

Development Commission (OMPADEC) to Niger Delta Development Commission (NDDC) have not produced the desired positive impacts; it is imperative for the federal government to yield to the principles of derivation adopted by the founding fathers of Nigeria. It is important that this is because the 'looming war in the Niger Delta' cannot be merely 'wished away.' The most like option to stop the pipeline vandalization is to integrate the communities into the oil economy, so that they will have proprietary interest in the protection of oil and gas installations. In addition, pipelines should be buried deeper while communities, not individuals, should be contracted to protect oil pipelines and related oil installation.

Recommendations Based on the analysis and discussion, we wish to recommend:

a. The involvement of the stakeholders host communities in the oil economy through Open and frank communications, election of credible leadership at traditional, Local, State and Federal levels, and value re-orientation to imbibe the culture of constructive dialogue. This shall make the local communities maintain their commitment to stop oil pipeline vandalization.
b. The encouragement of the oil producing communities to establish local management board to administer the 13 percent derivation, instead of leaving it to the state governments to manage. This is consistent with the principles of derivation, and the Igbetti Marble Formula.
c. We wish to emphasize that the 13 percent has to be handled by the local communities themselves, who shall incorporate Oil Mineral Producing Development Committees (OMPCODECs), similar to what Chief W.O. Okrika's team was doing in Delta State. It is observed with satisfaction that Chief Okrika's experiment with Delta State Oil Producing Areas Development Commission (DESOPADEC) should be introduced in all the 268 Oil- producing communities in the Niger Delta.
d. Adoption of Citizen-Oriented Community Development Initiation (COCDI) Model. This model brings together for interaction about 1,500 Oil Producing Communities (OPCs)

and relevant stakeholders in the region. The MNOCs are then obliged to evolve or initiate projects, and discuss them with the communities. These projects would then be harmonized with those of the local and state governments along with the NDDC Master plan. The rationale is to prevent waste or duplication, and involvement of the local communities for them to openly own up the programmes and projects in their locale because they are part and parcel of the entire process. The communities would then guard against any vandalization.

HISTORICAL EVOLUTION OF CRIMINAL LAW AND THE ADMINISTRATION OF CRIMINAL JUSTICE IN NORTHERN NIGERIA

By

Dr. Bawa Sahabi Tambuwal

Abstract

Central to the thesis of this paper is crime. Crime has been in existence since antiquity, it is therefore not a new phenomenon to the society at large. However, as the society develops and passes through different stages of development, certain changes emerged in the criminal law system even prior to the Jihad laid by Usman Dan Fodiyo subsequent to the establishment of Sokoto caliphate in Northern Nigeria. This paper explained the various stages of development of criminal law and its administration in Northern Nigeria from pre-colonial, colonial and post-independence periods, up to present period 2017. The paper observed that, in some states of Northern Nigeria, the application of common law rules and doctrine of equity has been repealed in the sharia court. Similarly, the repugnancy and incompatibility clauses already invalidated, were replaced by the provision of Islamic law.

INTRODUCTION

Prior to the advent of Islam, Hausa land, (in what is now part of Nothern Nigeria) no doubt had an inbuilt mechanism by which the conducts of the people were regulated. This means that such system of social control was based on unorganized sanctions, which, as events later revealed, following the dawn of Islam and the subsequent application of Islamic law, were inferior to the highly organized system of social control, which the Islamic legal system represents. As an indigenous community, Hausa land, like any other community, was governed by customary practices, which were wholly unwritten and at times unascertainable. While such customary practices were quite ideal for the social needs of the people, the influx of other settlers into Hausa land with values diametrically opposed to the existing predominant values made it necessary for a law that will meet the challenges brought about by social changes. The immigrants were Muslims, who through the agency of itinerary scholars and merchants reached the *Bilad al-Sudan* (Hausa Land) as far back as the 11th century C.E., (which by that time, both the indigenes and the immigrants were practicing Islam), with varying degrees of understanding.

The practice of Islam had come to be concretized with some identifiable traditional cultism. General ignorance of the religion, crimes and other social ills pervaded the societies. The citizens were heavily taxed, their properties confiscated and freedmen enslaved. Justice was sold at the exception of a few, sided with the traditional rulers had abandoned their primary duties of enjoining people to do good and forbidding them from evil[1]. Ethnic division between the Fulbe people who were mostly nomadic herdsman and the ruling agrarian Hausa people persisted though both groups were Muslims but the Hausa kings practiced traditional "native" religions as such they were seen as insufficiently pious[2]. The situation really called for a reform, the Sokoto jihad was therefore staged and led

1 The Book is edited and translated by Batwing as The Obligation of Princes, Beirut 1932. See also Alhaji M.A, "The Mahadist Tradition in Northern Nigeria" Ph.D Thesis, submitted to Abdullahi Bayero College, Kano, Ahmadu Bello University Zaria, 1973. P.51.

2 www.academia.edu/30538576.

by Sheikh Usmanu Dan Fodiyo, it was framed in a scholarly religious terms.

This paper examined the different stages of the evolution of Islamic law of crime in Northern Nigeria. It should be noted that, since the values of the people of Hausa land differed in fundamental ways from those of the jihadists, it was obvious that the reformers were to some extent, resisted by those to be reformed. How the reform was eventually achieved, will be examined.

HISTORY OF ISLAMIC LAW OF CRIME IN NORTHERN NIGERIA PRE-COLONIAL PERIOD

Before the advent of Islam in Hausa land, both the rulers and the ruled were highly engrossed in all manner of activities and conducts that were antithetical to social tranquility, peace and stability. Yadudu[3] gave an insight into this, thus:

... on the other hand, the traditional leadership in many parts of pre-jihad Hausa land was becoming despotic. It taxed the citizens heavily. It confiscated property unjustly. It threatened to stand in the way of the pursuance of scholarship. What is worse, a representative of this leadership had vowed to stem the tide of mass conversion to an unadulterated Islam by waging war on the Jama'a the community of Shehu Usman Danfodio who was the leading scholar and the force behind the Jihad, or armed struggle initiated to defend the Shehu's community from pillage and aggression, facilitated the establishment of a state which derived its legitimacy from the shari'a and whose leaders governed in accordance with same.

Before the Jihad led by Usman Danfodio and subsequent establishment of Sokoto Caliphate, it was axiomatic that the religion

3 Yadudu, A.H. 'Constitution – Making and the politicization of Shari'a in Nigeria' in Journal of Islamic and Co-operative Law, Institution of Administration, Ahmadu Bello University, Zaria, Vol. 18, 1991 p.22

of Islam was in existence in various parts of Hausa land of Northern Nigeria[4]. It is a common knowledge that
Islam was introduced into Hausa land as early as the 15th century.[5] By the time of the reign of Sarkin Kano Muhammad Rumfa, Islam was well established.[6]
To show how serious the leaders were in establishing Shari'ah, when Mohamad Abdul-Karim al-Maghili, a renowned North African jurist visited Kano, Rumfa (the then Emir of Kano), requested him to write a treatise on the art of Government for him. Al-Maghili responded positively and wrote a book *Taj-al-din fi ma Yajib 'alal Muluk*.[7]

The Shari'ah maintained its status in Northern Nigeria for quite a long period. However, with the passage of time, more particularly in the 18th Century C.E., there was a general reversion of situations.

POST JIHAD PERIOD

The pre-jihad period was followed by post-jihad period (1810-1903).

With the caliph rule, for the first time, Hausa land and beyond, came under a single leader. Power was delegated to the Amir's and other officials for both general administration and the administration of justice. In addition to the offices of judges, the offices of Muhtasibs and Radd al Mazalim were established. The former checks public morality while the latter listens to redress complaints against public officers and judges. Juma'at Mosques were established in villages and towns and proper Zakah (poor due) collections and distribution were instituted. Learning and piety

4 Abdulkadir Sani M. "Weaver, 87 years interviewed in Sokoto at Kofar Marke on 16th May 2009.

5 Trim Ingham J.S, A History of Islam in West Africa

6 Kurawa I.A, Shari'ah and the Press in Nigeria: Islam versus Western Christian Civilization, Kurawa Holding Ltd, Kano 2000, p. 217.

7 The Book is edited and translated by Batwing as The Obligation of Princes, Beirut 1932. See also Alhaji M.A, "The Mahadist Tradition in Northern Nigeria" Ph.D Thesis, submitted to Abdullahi Bayero College, Kano, Ahmadu Bello University Zaria, 1973. P.51.

became the chief criteria for the appointment of personnel and public officers in the caliphate.[8]

In addition, the spread of basic Islamic knowledge, scholarship and intellectual activities were encouraged in the Caliphate. Hundred of literatures were written on both Islamic knowledge and other branches especially by the jihad leaders, in short, Shari'ah was firmly re-established and continued to governed the entire life of the Muslims in Sokoto and Kebbi States. Zaharadden wrote concerning the achievements of the jihaddists on matters of government, law and education, thus:[9]

It is, perhaps, because of the guidance and the strong leadership provide to their communities by the jihadists that the political and social entity, now known as the Sokoto Caliphate, was able to sustain a system of administration that survived other reform movements of a similar nature in west Arica and to some extent even survived the British occupation of Northern Nigeria in the early years of twenticth century.

During this period, Islamic law of crimes was fully in operational in the Emir's Courts. *The Qur'an,* and *the Sunnah*, were the substantive laws that were used to determined an alleged wrong or violation. That there were Courts, ran according to Islamic ideal is buttressed by the contention of Yadudu, thus:

Politically, the caliphate was headed at the centre by the Shehu, the Commander of the faithful, with power dispersed and delegated to flag-bearers, the Emirs, in province. This structure was complemented by other offices such as those of Muhtasib, (keeper of public morals), and the Wazir who served as Chief Adviser to

8 *Ibid*, p.40. For details of achievements of Sokoto Jihad, see U.B. Fodiyo *Nasihat Ahl al Zaman* N.H.R.S., 1811

9 Zaharadeen S. 'The Islamic ideals of the Dan Fodiyo Jihad Movement Lessons for the present and the Future' in University of Sokoto, *Journal Faculty of Arts and Islamic Studies*, Vol. I, 1981 p.45

the leader of the Caliphate. *Courts were set up and judges appointed for the provinces and major centers.*[10]

Nevertheless, towards the end of 19th Century C.E. Shari'ah justice started to be relaxed under the leadership of the subsequent Muslim leaders in Northern Nigeria.

DURING THE COLONIAL RULE

Shari'ah, especially, its legal systems in Northern Nigeria witnessed great set back and decline during the British Colonial rule between (1900-1960 C.E.). Within the period, the Shari'ah civil law was narrowed to the confines of 'Laws, of personal Status'. It's Criminal Law totally ousted and replaced with English Common Law. Despite their promise of non – interference with the "Islamic religion", the British rulers in Northern Nigeria, undermined the Shari'ah Legal System gradually and tactfully through legislatives policies.[11]

The first step the colonialist took towards achieving the above goals was the enactment of the 1900 Native Court Proclamation. Under its provisions, the Shari'ah was equated to Customary Law. In addition, the Alkali's Courts were restricted from the application of certain Shari'ah criminal punishments such as Zina, theft, and robbery under the pretext that such punishments were repugnant to natural justice and humanity. Furthermore, the Courts were made to function under the strict supervision and control of the Colonial Administrative Officers. The subsequent proclamation that came later in 1906 and 1914, all maintained above provision with slight modification.[12]

The next line of action taken which undermined the application of Islamic Law, was the 1933 Native Courts ordinance. Under its provision, new English Courts, namely the Magistrate Courts, the High Courts and the West African Courts of Appeal were established. The Courts were English in nature and exercised

10 Yadudu, op cit. at 22

11 Kumo S., "Shari'ah under Colonialism – Northern Nigeria" in N. Alkali at. al., (eds,) Islam in Africa, (Ibadan Spectrum Books Ltd). pp.1-2.

12 Mohammed A.B, *A Brief History of Shari'a in the Defunct Northern Nigeria, (Jos, University Press Ltd)*, 1938, pp.2-5.

appellate jurisdictions over the Shari'ah Courts on both criminal and civil cases other than matters of Muslim Personal Law. In addition, Criminal Code, consisting English ways of punishment was introduced[13][14]. The effects of these provisions and the restriction of Shari'ah laws are clearer with the 1906 Native Courts Law. One of its provisions reads:

No native court is to apply native law and customs which is repugnant to natural justice, equity and good conscience, nor should they apply laws which are incompatible either directly or by implication with any written law[16] for the time being in force[15]

It is important to note that, it was by the use of these important tools viz: the Criminal Code, the repugnancy Clause and incompatibility test that the superior English Courts exercised an unlimited powers in nullifying or eroding the Shari'ah Civil and Criminal laws and replaced them with the English law.[16]

The 1933 Ordinance further provides:

For offences against any native law or custom, a native court may subject to the provision of this ordinance imposed a fine or imprisonment or both, or may inflict any punishment authorized by native law or customs, *provided it does not involve mutilation or torture and is not repugnant to natural justice and humanity*[17]

In 1933, there was an amendment of section 4 of the Criminal Code Ordinance. This amendment has the effect of ousting the jurisdiction of Islamic Law Courts in matters covered by Criminal Code. Thus, before 1933, section 4 CC reads:

13 Kumo S., OP Cit, at. 7

14 Native Court Law 1906

15 *Ibid* at.11

16 Native Courts here includes the Shari'ah Courts and Native Laws and Customs includes the Shari'ah Law see Kumo at. 7

17 Section 10, 1933 Ordinance

No person shall be liable to be tried or punished in any Court other than native tribunal for an offence except under the express provision of the code or some other ordinances[18]

However, in order to invalidate the application of Islamic law in 1933, in Northern Nigeria following amendment was effected. The section now reads:

No person shall be liable to be tried or punished in any court for an offence except under the express provision of the code or some other ordinance[19]

It is worthy to note here that, the phrase ***other than native tribunal*** has been deleted in order to oust the jurisdiction of Alkali's Court to apply Islamic Law. Therefore, from the above provision, one can conclude that the British Colonial Administration has already ousted or invalidated the application of Islamic law and introduced their own penal policies, which of course were not conducive to the Muslim ways of life. The Code operated side by side with Islamic law of crimes (customary criminal law) whose rules and procedures differed substantially from English modelled Code. Noticeable areas of conflict between this code and Islamic law of crime were that[20][21]:

i. The code did not view the drinking of alcohol and adultery as offences. These conducts were regarded as reprehensible by the Muslims because both the Qur'an and Sunnah made them punishable offences.

ii. The partial defence of provocation codified in section 318 of the Criminal Code and sec 38 and 222 of the Penal Code Law of Northern Region cap. 89 laws of Northern Region, has the effect of reducing the punishment of murder to manslaughter, but the same cannot be said to have been explicitly provided under Islamic Law of Crimes. Thus provocation is not a defence in Islamic law.[21]

18 Section 4 Criminal Code Ordinance 1933

19 Section 4, 1933 Criminal Code (Amendment Ordinance)

20 *Ibid*

21 Abi-Dawood, S. *Sunan Abi Dawood* Vol. 4 Hadith No. 4532 p. 181

iii. Islamic law of Crimes was rendered null and void by virtue of section 4 of the criminal code. The effect of this section is to oust the jurisdiction of Native Courts in matters covered by the Code.

In order to find solutions to these problems, the legislature of the then Northern Region of Nigeria approved a statement issued by the Government of the Northern Region, on the subject of the re-organisation of the legal and judicial system of the region. This statement included the acceptance by the Government of most of the recommendations, which had been made to it by a panel of distinguished jurists, which had been constituted to look at ways to produce another criminal code for the northern region in September 1958. The chairman of the panel was Sayyed Muhammad Abu Renat, Chief Justice of the Sudan and the two overseas members were Mr. Justice Muhammad Sharif, a retired Judge of the Supreme Court of Parkistan and Professor J.N.D Anderson, Professor of Oriental laws of the University of London. The following were also members of the panel: the Waziri of Borno, Shetima Kashim, Mr. Peter Achimugu and Mr. Musa Othman, the Chief Alkali of Bida. The implication of the constitution of that panel was that, while Mr. Peter Achimugu represented the minority group of Northern Region, Mal. Musa Usman represented the Gwandu Emirate and the Waziri of Borno represented the Borno Emirate. One of the outstanding resolutions of the panel, was its advise to the then government of the Northern Region, that the new system to be created should not be in conflict with the injunctions of the Glorious Qur'an and Sunnah. After carefully studying the various systems, the panel recommended that the Northern Region should introduce a Penal Code and a Code of Criminal Procedure based upon the Sudanese code.

In January, 1959, the draft bill was submitted to the scrutiny of a committee of Muslim jurists, presided over by Mallam Junaidu, the Waziri of Sokoto. The committee made numerous recommendations for the amendment of the bill. The draft bill was

published in July and passed through the Northern Region legislature in August and early September, becoming a law on the 26th of September 1960.[22]

Section 68 (1) of the said law provided:

The punishments to which offenders are liable under the provisions of this Penal Code are:

a. Death
b. Forfeiture of property
c. Imprisonment
d. Detention in a reformatory
e. Fine;
f. Caning

(2) Offenders who are of the Muslim faith may in addition to the punishments specified in subsection (1) be liable to the punishment of Haddi lashing as prescribed by Moslem (sic Muslim) law for offences contrary to section 387, 388, 393, 403 and 404 of this penal code.

It is worthy of note that the word "**may**" as used above in sect 68 in law has no binding effect. It is discretionary and not mandatory as opposed to the word **shall** which indicates mandatory provision. Furthermore, the offences stated above involved offences under sections 387 and 388 Adultery, 392 and 393 involve defamation, 402, 403 and 404 which involved drinking of alcohol or wine, which are principally punished by Islamic law.

Sub section (2) above permits the imposition upon Muslim offenders of traditional symbolic punishment of lashing which in real sense, are not the actual provisions in the Qur'an and Sunnah as defined by the Muslim law of Makili School. Hence, Haddi lashing spelt out by sec. 68(2) of Penal Code Law of Northern Region is discretional and not mandatory.

22 Notice 1959 (N.R.I.N. 56 OF 1960)

EFFECTS OF COLONIAL LEGISLATION ON ADMINISTRATION OF THE ISLAMIC LAW

1. Shari'ah was struck down by the enactment of colonial Legislation, which stipulated that any punishment awarded should not he "repugnant to natural justice and humanity". This phrase was applied against the infliction of punishments for Zina and theft. The charges are however that, the punishments are barbaric, inhuman and against the universal convention on human rights. Stoning to death was for example described as... the ultimate form of torture as cruel, inhuman and degrading prohibited by the Constitution of the FRN 1999 in sec. 34(1) which provides inter-alia:
Every individual is entitled to respect for the dignity of his person and accordingly:
(a) No person shall be subjected to torture or to inhuman or degrading treatment.

In any case, we have chosen not to dismiss with a wave of hand, these claims laid against the implementation of Islamic Law. Instead, we have chosen to denounce to some of this claims by exposing their weakness and in most cases unjustifiable stance. To prove the above assertion wrong, we rely on the provision of section 35(1)(a) of the Constitution Federal Republic of Nigeria 1999 which expressly states:
Sec. 35(1) Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following case and in accordance with a procedure permitted by law.
(a) In execution of the sentence or order of a Court in respected of a criminal offence of which he has been found guilty.

In view of this, an execution of sentences or order of Count in respect of a criminal offence of which a person has been found guilty, cannot be a torture or inhuman or degrading treatment of his right to dignity.

2. The machinery for administration of Islamic law, for example, Judicial Councils and Alkalis' Courts were under full control of the

colonial Authority. This control was ensured by following provisions:

(i) All Courts not established by the Resident were prohibited and that adjudication without the authority of the Resident is statutory offence.

(ii) The Resident was vested with the power of appointment, suspension and dismissal of Members of Native Courts.

(iii) Resident has the power of general inspection, review of findings and sentences, transfer of cases and determination of appeals coming from the Alkalis and Emirs Courts.

(iv) Death sentences passed by Emirs courts had to be confirmed by Governor. Section 4(1) of the Criminal Code Ordinance which struck down the application of Islamic law, provides that:

No person shall be liable to be tried or punished in any Court for an offence except under the express provisions of the Code or some other Ordinance...

Sections 3(2) of the Penal Code and 4(1) of the Criminal Code are directly in conflict with Islamic Criminal Law. This conflict led to crisis with far-reaching effects. It started in 1947 with case of *Tsoho Gubba vs Gwandu Native Authority*.[23] In that case, the accused had been convicted of deliberate homicide by a Native Court according to Islamic Law and sentenced to death. On appeal to the Supreme Court, under the Criminal Code, on the same facts, the punishment was reduced to manslaughter. On further appeal to West African Court of Appeal (WACA), WACA considered the power of Native Courts to apply customary Criminal Law. It also considered the provision of section 4 of the Criminal Code Ordinance. The Court held that section 4 of the Criminal Code wherein if a Native Court tried any person for an offence found in the Criminal Code, it was bound to follow the Criminal Code and not Native Law and Custom.

23 (1947) vol. 12 WACA 141

This decision had far-reaching consequences on the growth and development of Islamic law, in that it entrenched the subjugation of Islamic Courts to the control of the English Colonial Courts.

DURING THE INDEPENDENCE PERIOD

The Penal Code of Northern Region of Nigeria came into existence a day before Nigeria attained independence on 1st October 1960. This means that the actual operation of the Code was during the period of independence. The code re-enacted similar provision like section 4 of the Criminal Code, which at that, period, further relegated the operation to the back of mind of punishment of any person in accordance with Islamic law of crime the section states:
After the commencement of this law, no person shall be liable to punishment under any Native Law and Custom.[24]

It was based on this that, the then High Court of Northern Nigeria in the case of *Numan Federation v Samari Numan*[25] upheld the decision of a provincial Court that where an offence was committed before 20th September, 1960 but the trial did not take place until after that date, section 3(2) of the Penal Code prevented any conviction under native law and custom.
During this period, Islamic Law of Crimes was completely subjugated, although the then Area Courts continued to determine issues pertaining to Muslims personal right and, the agitation for a Code of Criminal Law based on the Qur'an and Sunnah continued to generate debate.

THE PERIOD AFTER INDEPENDENCE

During this period, the wave of Islamic resurgence in the North accounted for the Muslims incessant demands to be governed by *Shari'ah* in all aspects of their lives. It was not surprising that during the Constitutional conference of 1976-1978, this agitation by the Muslims therefore became known as *Shari'ah* debate, perhaps

24 Section 3(2) of the Penal Code Northern Nigeria
25 (1961) NMLR 15

out of sheer ignorance or due to the manner the *Shari'ah* issue was presented to the conference. Opposition to it by non-Muslims generated so much rancour among members that Muslim members at that conference had to stage a walk out. It is difficult for one to understand the ground for such opposition. This is because the personal rights of non-Muslims in the country are determined purely in accordance with the customs of the parties concerned. And since the law of the Muslims is *Shari'ah,* it is expected, that others should concede to them the right to be governed by such laws. But religious bigotry, politics and cultural animosity were top on the list of colonialism, in this regard ignorance not-withstanding.

The Qur'an stated that:

> *Never will the Jews or the Christians be satisfied with thee unless thou followed their form of religion. Say: the guidance of Allah that is the (only) guidance wert thou to follow their desires. After the knowledge which hath reached thee than wouldst thou find neither protector nor helper against Allah.*[26]

Similarly, verse 109[27] of the same chapter further explained that: Quite a number of the people of the book, wish they could Turn you people back to infidelity after ye have believed, from selfish envy after the truth has become manifest unto them.

The above authorities were re-affirmed even by the English Colonial Courts. It was an established fact that, when British colonial Masters took control of any Country, they imposed upon the inhabitants what laws they please. For example, it was held by the Privy Council in the case of *Blankard v. Goldie* that:

> *When the king of England conquered a country he may imposed upon the inhabitants what laws he*

26 Qur'an chapter 2: 120
27 Qur'an chapter 2: 109

> *pleases such is that until such laws be given by the conqueror the laws and customs of the conquered Country shall hold pledge except where they are contrary to the established religion.*[28]

This is in conformity with the decision in the case of *Calvin Case*. In that case, Lord Coke has this to say:

> *If a Christian king should conquer the kingdom of an infidel and bring them under His subjection; than Ipso facto the laws of the infidel are abrogated for they are not only against the Christianity but also against the law of God and nature as contained in the Decaloc.*[29]

Although the colonialists were against application of Islamic legal system, they were more careful, systematic, hypocritical and political in their opposition to *Shari'ah* than the indigenous people who wanted it removed completely and immediately. Eventually, the right of any state that desire creating a *Shari'ah* Court of Appeal was retained in the 1979 constitution[30] which in fact was only a reinforcement of the position of the then Northern Region.[31] The relegation of Islamic criminal law meant an important aspect of *Shari'ah* was left out and this continued to be a source of serious concern to the Muslims.

The Area Courts system remained enforced in Northern Nigeria until 1999 when some states in Northern Nigeria decided to embark on total application of Islamic law in all matters relating to Muslim, including civil and criminal matters. The adoption of *Shari'ah* law by some states of Northern Nigeria is founded on the

28 Olawoye, C.O. Customary Law and the Repugnancy Provision The Lawyer. 1970 p.6

29 *Ibid*

30 Sec. 240 Constitution of Federal Republic of Nigeria, 1979.

31 Cap. 122 NRI.N. 136 OF 1960

provision of Sec. 38(1) of the constitution of the Federal Republic of Nigeria which provides:

> *"Every person is entitled to freedom of thought, conscience and religion..."*

Also Sec. 4 (7) and Sec. 6(4) and (5) of the Constitution of the Federal Republic of Nigeria vested the House of Assembly of a state with powers to make laws for peace, order and good government of the state or any part thereof.

In the exercise of this power for example, Sokoto State House of Assembly enacted law No. 2 of 2000. A law to establish Shari'ah Courts to Apply Shari'ah law in Sokoto State. Also, the Kebbi State House of Assembly enacted. The Kebbi State (Administration of Shari'ah Law No. 3 of 2000 (A bill to provide for the Administration of Sharia'a Law and other matters connected with).

Section 5 of said law stated:

1) A Shari'ah Court shall have jurisdiction to hear and determine civil matters and causes, where the two parties are Muslims.
2) The upper Shari'ah Court have appellate and supervisory jurisdiction over the Lower Shari'ah Court.

However the Kebbi and Sokoto States have repealed the application or applicability of the common law. The law provides in sec. 30 of the Shariah Laws No. 2 of Sokoto State and No. 3 of 2000 of Kebbi State, thus:

30. Notwithstanding the provision of section 3 of the Applicable laws (Miscellaneous Provision) Edict, the Common law and the doctrines of equity shall not apply in the Sharia'ah courts.

31(1) The area court law 1968 is hereby repealed.

(2) The provision of the following laws in force in the state, which defined customary law to include Islamic law or Muslim law are hereby repealed.

a) Civil Liability Law (Cap 23)
b) District Court Law (Cap 44)
c) High Court Law (Cap 60)

CONCLUSION

It is very clear from the foregoing that, in some States of Northern Nigeria the repugnancy clause has already been invalidated, it applies also to the incompatibility clause. In legal term the rule have already gone. But because some of our Courts are not respectant of even the Constitution when it comes to Islamic Law, because of their bias and bigotry against Islamic Law.

It is hope that, legislature of all Shari'ah operating states would make laws to invalidate the repugnancy and incompatibility clauses so that there would be no ambiguity about the non-application of the rules.

PROMOTING ACCOUNTABILITY FOR ELECTORAL CRIMES: A CASE FOR STRENGTHENING EXISTING INSTITUTIONS

By

Stanley Ibe[1]

Abstract

During the 2011 voters' registration process, the Independent National Electoral Commission (INEC) allegedly detected 870,000 cases of multiple registration – clearly a crime under the Electoral Act. There is no evidence to suggest that a sizeable number of these multiple registrants were prosecuted. This is not peculiar. Perpetrators of electoral crimes in Nigeria often get away with their crimes. Take the recommendation by the National Human Rights Commission to the Attorney General of the Federation to prosecute 41 persons who brazenly violated the Electoral Act in the build-up to the 2011 general elections. Not one of these individuals has been brought to justice. Unfortunately, this seeming reluctance or incapacity to prosecute electoral offenders fuels more violence, creates a culture of impunity and encourages complete disregard for laws. In a bid to address this challenge in a concerted fashion, The Justice Muhammadu Uwais Committee on Electoral Reforms[2] recommended the establishment of an Electoral Offences Commission to prosecute electoral offenders. As excellent as this recommendation might be, it appears to assume that this new institution – if created – will rise above the challenges that bedevil existing institutions. It is not clear what drives that optimism. The writer argues for strengthening existing institutions to deliver on their mandates.

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1. LL.B (Lagos State); LL.M (Maastricht); PGD (Abo/Turku). Ibe is a human rights lawyer, researcher and democracy enthusiast.
2. Report of the Electoral Reform Committee. Vol. 1, Main Report, December 2008 available at http://ele.ng/wp-content/uploads/2014/03/JusticeMohammedUwaisReport.pdf (accessed on 12September 2015).

BACKGROUND & CONTEXT

Nigeria has an unpleasant history with elections[3] and violence.[4] As Justice Muhammadu Uwais' Committee[5] put it in 2008, "the 85 year old history of Nigeria's elections shows a progressive degeneration of outcomes. Thus the 2007 elections are believed to be the worst since 1922."[6] The Committee lays the blame for this state of affairs on a "prevailing atmosphere of impunity with regard to election offences." Characterizing the main beneficiary of the process, the Committee observes that politicians "have become more desperate and daring in taking and retaining political power, more reckless and greedy in their use and abuse of power, and more intolerant of opposition, criticism and efforts at replacing them."[7] These words ring true today as they did more than 8 years before.

To get a better handle on the subject of engagement, it is necessary to clarify what electoral violence means. Jeff Fischer helpfully describes electoral violence as "any random or organized act that seeks to determine, delay, or otherwise influence an electoral

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3 The history of elections begins in 1922 with the Clifford Constitution that allowed three unofficial representatives from Lagos and one from Calabar to be elected by residents of those towns with a minimum income of 100 pounds sterling. For more on a short but reverting history of elections and coups in Nigeria, See A. Jinadu, "Nigeria" in I.M. Fall, M. Hounkpe& Others, *Election Management Bodies in West Africa - A Comparative Study of the Contribution of Electoral Commissions to the Strengthening of Democracy* (Johannesburg: Open Society Foundations, 2011), chapter 5, pp.110-115.

4 Ironically, the first federal elections to which the principle of universal adult suffrage applied – that of 1959 - was marred by violence and allegations of electoral malpractices. This was only the beginning in a long history with electoral violence. The 1964 federal elections suffered a similar fate, as did 1961 regional elections in Tiv Division. Unfortunately, violence has become a common feature in successive elections since 1959. For more on this, see A. Jinadu (n. 3 above), p. 111.

5 Presidential Committee on Electoral Reform, 2007.

6 Report of the Electoral Reform Committee (n. 2), page 19, paragraph 2.1 (a)

7 *Ibid*, paragraph 2.1 (b)

process through threat, verbal intimidation, hate speech, disinformation, physical assault, forced protection, blackmail, destruction of property or assassination."[8] Described in this way, it is easy to see why several acts perpetrated by political actors, their agents and cronies amount to electoral violence and therefore qualify as crimes for which accountability is required.

The challenge really is not with identifying what violent acts translate to crimes for which prosecution ought to occur. That is fairly easy. What is somewhat difficult is – having identified crimes for which the law ought to take its course, how do we ensure perpetrators account for them? Some people – including the Electoral Reform Committee – argue that INEC should be divested of the powers to prosecute so they can concentrate on their core mandate of election management.[9] For this category, we need another institution to take on this responsibility. This writer disagrees.

While there are compelling reasons to establish a commission to prosecute electoral offences, including the lack of capacity within

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8 J. Fischer, "Electoral Conflict and Violence: A Strategy for Study and Prevention." IFES White Paper 2002-1 of February 5, 2002, p.8 available at http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan019255.pdf (accessed on October 15, 2015).

9 INEC has broad powers including those of organizing and supervising elections to the offices of President and Vice President, Governors and Deputy Governors, Senators, Members of the House of Representatives and Houses of Assembly of the States; registering political parties; monitoring organization and operations of political parties; monitoring political campaigns and providing rules and regulations which govern political parties. For more on the powers of INEC, see Section 15, Part 1, 3rd Schedule to the 1999 Constitution available at http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm#IndependentNationalElectoralCommission (accessed on October 19, 2015). In its report, the Electoral Reform Committee recommended the amendment of the 1999 Constitution with a view to unbundling INEC and assigning some of its current responsibilities to (a) Political Parties Registration and Regulatory Commission; (b) Electoral Offences Commission; (c) Constituency Delimitation Commission and (d) Centre for Democratic Studies.

INEC and the need to keep the institution focused on performing its core functions, we argue that creating another institution simply bureaucratizes the problem without necessarily solving it. Besides the obvious question of resources for this new institution, there is the broader question of what value it would add in a context where there are at least three institutions – the Attorney General's Office, the police and INEC – already charged with this responsibility. Besides, the argument could be extended further to suggest that specialized courts should be established to ensure speedy dispensation of justice. Again, this idea attempts to isolate justice for electoral offences (crimes) from the broader concept of justice which ought to apply in all cases.

Our central thesis therefore is that new institutions do not necessarily solve problems. In some cases, they actually exacerbate the problem. Take the challenge of fighting corruption in Nigeria. The primary institution designed to lead this effort is the Nigeria Police Force. Granted the institution has not been as effective as it could be in addressing this challenge.[10] However, the proliferation of "corruption fighting institutions" hasn't either. Sometimes, people are confused about the related responsibilities of these institutions – so much so that the "Stephen Oronsaye Committee"[11] recommended the scrapping of two of the more popular anti-corruption institutions – the Economic and Financial

10 Those interested in understanding how the police operates in Nigeria may wish to read *Criminal Force: Torture, Abuse and Extrajudicial Killings by the Nigeria Police Force* (New York: Open Society Foundations, 2010).

11 Presidential Committee on the Rationalization and Restructuring of Federal Government Parastatals. The Committee was inaugurated by President Goodluck Jonathan on August 18, 2011 with a four point mandate, including to "examine critically the mandates of the existing federal agencies...and determine areas of overlap or duplication of functions and make appropriate recommendations." See Mr. Stephen Oronsaye's remarks at the submission of Committee Report on April 16, 2012 reproduced in full at http://ireports-ng.com/2012/04/16/fg-moves-to-scrap-efcc-icpc-frsc-others-as-oronsaye-committee-submits-reports-on-rationalisation-of-mdas/ (accessed on 12 October 2015).

Crimes Commission (EFCC)[12] and the Independent Corrupt Practices and Other Related Offences Commission (ICPC).[13] Although the recommendation has not been implemented, the challenge of proliferation and the seeming regression in the anti-corruption war may have swayed the Committee to reach this decision.[14]

Against this backdrop, we are minded to think that strengthening existing institutions is a viable alternative to creating new institutions. This strengthening process might include establishing appropriate structures and practices by which acceptable conduct is rewarded and vice versa. This is particularly critical in the context of Nigeria where a few consider themselves above the law.

The culture of impunity which develops as people disregard the law without consequences creates different categories of individuals – some who get punished for violating the law and others who do the same thing but seem to get away with it. Changing this culture is not as easy as writing a piece about it but it can be done.

The well-intentioned argument for establishing an Electoral Offences Commission by the Muhammed Uwais Committee may not change things if the fundamentals remain the same. It seems to

12 Established by the Economic and Financial Crimes Commission (Establishment) Act of 2004. The Act assigns 17 functions to the Commission, including investigation of all financial crimes (section 6(b), adoption of measures to eradicate the commission of economic and financial crimes (section 6(e)), and coordination of all existing economic and financial crimes investigating units in Nigeria (section 6 (n)).

13 Established by the Corrupt Practices and Other Related Offences Act of 2000. The Act assigns 6 duties to the Commission, including examination of practices, systems and procedures of public bodies (section 6 (b)), educating the public on and against bribery, corruption and related offences (section 6 (e)), and enlisting and fostering public support in combating corruption (section 6 (f)).

14 In his remarks at the submission of the report, Chairman Oronsaye observed that "it is a fundamental breach of acceptable practice of good public sector governance to create a new agency or institution as a response to the seeming failure or poor performance of an existing agency in order to suit political or individual interests." See Oronsaye's Remarks referenced at note 3 above.

me that there are sufficient prosecuting institutions in Nigeria to prosecute electoral and other crimes. The big question is whether we will let them do their jobs.

I. LEGAL FRAMEWORK FOR ELECTORAL CRIMES

The conduct of elections is regulated primarily by the *Constitution of the Federal Republic of Nigeria, 1999*[15] and the *Electoral Act* 2010. However, there are othersupplementary legal instruments, including - in the context of electoral crimes, the *Criminal Code*, *Penal Codes Criminal Procedure Act, Criminal Procedure Code*, the *Police Act* and *Guidelines for the Conduct of Police Officers on Electoral Duty*.

The Electoral Act, 2010 (as amended) creates a number of election-related crimes and prescribes penalties. To mention a few, it is a crimeto "directly or indirectly threaten any person with the use of force or violence during any political campaign."[16] It is also a crime to "threaten to make use of any force, violence or restrain" or to inflict or threaten to inflict either directly or through another person "any minor or serious injury, damage, harm or loss on or against a person in order to induce or compel that person to vote or refrain from voting, or on account of such person having voted or refrained from voting."[17] This crime extends to post-election violence to the extent that it protects people from violence, intimidation or threats for "having voted or refrained from voting" for someone.

15 1999 (as amended). It is instructive to note that a fresh amendment to the Constitution - which sought, among other things, to provide for the right of independent candidates to stand for political offices, establish time -limits for pre-election suits and extend to 21 days, the time limit for INEC to conduct presidential or governorship run-off - was submitted in February 2015 to President Goodluck Jonathan but was unfortunately not signed before his term expired on May 29, 2015.

16 Section 96(1).

17 Section 131 (1). Upon conviction, this crime is punishable with up to three years imprisonment

Perhaps more instructive in the context of the 2015 elections[18] is the prohibition of hate speech.[19] Although not a crime in itself, hate speech often precedes violence and is therefore prohibited.Section 93(3) of the Electoral Act prohibits the use of places "designated for religious worship, police station and public places" for "political campaigns, rallies and processions" or in order to "promote, propagate or attack political parties, candidates or their programmes and ideologies." Section 95 provides that: "No political campaign or slogan shall be tainted with abusive language directly or indirectly likely to injure religious, ethnic, tribal or sectional feelings." It also prohibits "abusive, intemperate, slanderous or base language or insinuations or innuendos designed or likely to provoke violent reaction or emotions."
Section 102 provides for sanctions against "any candidate, person or association who engages in campaigning or broadcasting based on religious, tribal or sectional reason for the purpose of promoting or opposing a particular political party or the election of a particular candidate." The sanction is a maximum fine of N1,000,000 or imprisonment for twelve months or both. These provisions are reinforced by paragraph 10 (c) of the *Guidelines for Political*

18 Nigeria's National Human Rights Conclusion recognized a "notable growth in hate speech" in the run-up to the 2015 general elections. See *A Pre-Election Report and Advisory on Violence in Nigeria's 2015 General Elections* (Abuja: National Human Rights Commission, 2015), pp. 31-33.

19 Hate speech include (a) all dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means; (b) incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin; (c) threats or incitement to violence against persons or groups on the grounds of (b) above; (d) expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination on the grounds in (b) above, when it clearly amounts to incitement to hatred or discrimination; (e) participation in organizations and activities which promote and incite racial discrimination." United Nations Committee on the Elimination of Racial Discrimination, General Recommendation No. 35 on "Combating Racist Hate Speech," CERD/C/GC/35, para 13, p. 4 (2013) available at http://www.refworld.org/docid/53f457db4.html (accessed on October 28, 2015).

Rallies, which also prohibits the use of hate speech and discriminatory rhetoric during campaigns. Regrettably, neither the fairly elaborate provisions nor the sanctions regime could deter people from resorting to hate speech during the 2015 general elections. One reason for this, is probably lack of accountability for similar offences committed in the past.

There are of course other crimes recognized by the Electoral Act. These include possession of more than one valid voters card, applying for ballot paper in the name of some other person, voting more than once in an election, offering money to voters to vote or refrain from voting for a particular candidate, acting or inciting orders to act in a disorderly manner on election day, and snatching or destroying election materials.[20]

II. WHAT MAKES ELECTORAL CRIMES PROFITABLE?

There are several factors that make commission of electoral crimes profitable in Nigeria. In this section, we will briefly examine four – the lucrative character of political offices; lack of accountability for these crimes; the politics of "winner takes all" and the related question of absence of virile opposition; as well as poverty/youth unemployment.

The political office is perceived as one of the most sought-after offices anywhere in Nigeria.[21] The reasons are not far-fetched. It is extremely rewarding in terms of access to resources and political

20 The Independent National Electoral Commission (INEC) has produced a concise chat of the offences and corresponding punishment upon conviction. This is available at http://www.inecnigeria.org/wp-content/uploads/2013/09/ELECTION-OFFENCES-AND-PENALTIES.pdf (accessed on 16 October 2015).

21 In an interview with one of Nigeria's leading television stations, former Senator Ayo Arise described politics as "the most lucrative job in this country today." See "Politics is Nigeria's Most Lucrative Business – Senator Arise," Channels Television, September 25, 2013 available at http://www.channelstv.com/2013/09/25/politics-is-nigerias-most-lucrative-business-senator-arise/ (accessed on October20, 2015).

leverage.[22] Indeed, the mere invitation to political office elicits a different kind of deference from citizens. Regrettably, the political office does not necessarily belong to the qualified. Anyone with the means can grab, use and abuse power – often with impunity. This partly explains why successive elections have been fraught with violence, each seemingly more intense than the previous.

One of the more significant contributors to escalating electoral crimes is the apparent lack of accountability for the crimes. Like we indicated in the introductory section of this article, some electoral offenders from the 2011 elections have yet to face justice. While there may be several good reasons why this is the case, it is perhaps the biggest incentive for potential offenders but also political office holders. Expressing his frustration with this state of affairs, former Chairman of INEC, Professor Attahiru Jega lamented that:

The issue of electoral offences and the impunity with which they are committed is also something that we have to deal with. We have done our best since we came in as a new commission to prosecute electoral offenders, both during the registration exercise and the elections. And we recorded quite a number of successful prosecutions, even though these are relatively few compared with the large number of offenders. One of the major challenges we have, obviously, has to do with institutional weaknesses, such as inadequacy of legal capacity to prosecute such large number successfully within a short period.[23]

22 Professor Claude Ake explains this phenomenon as follows: "In Nigeria the struggle for political power is so intense that political competition escalates to a form of warfare. What causes this is the simple fact of political power being so highly valued. The more political power is valued, the more intense the struggle for it." See "Time to Stop Winner Takes All Syndrome." *The Tide Newspaper*, October 20, 2015 available at http://www.thetidenewsonline.com/2015/05/25/time-to-stop-winner-takes-all-syndrome/ (accessed on October 20, 2015).

23 A. Jega, "Elections, Democratic Transition and Conflict Management in Africa." Keynote Address at Symposium on "Managing Conflicts in Africa" organized by the Centre for Conflict Management, Kennesaw State University, Georgia, USA, May 13, 2011, pp 13-14

The politics of "winner takes all" and concurrent absence of a virile opposition make losing an election unpalatable to the average political office aspirant. The biggest indicator of the "winner takes all" syndrome is the tendency for the "ruling party" in succeeding elections to monopolize state power and resources for the purpose of perpetuating party members in power. Little wonder former President Olusegun Obasanjo famously described the 2007 general elections as a "do or die" affair.[24] On the other hand, politicians donot like to be in opposition apparently because most are in politics for what they can get rather than what they can give. Consequently, opposition party members are wont to crossover to the other side as soon as they lose elections or fall out of favour with party leadership. This trend took a ridiculous dimension before and shortly after the 2015 general elections. In a thoughtful response to what has been described as "political normadism,"[25]Alhaji Balarabe Musa, former governor of Kaduna State opined:

The defection by members of political parties is mindless. This is because there is a lot of loose money in the country and anybody

24 In its February 12, 2007 edition, *Daily Trust Newspaper* quoted President Olusegun Obasanjo's statement in a political campaign rally in Abeokuta, Ogun State as follows: "...this election is a do or die affair for me and the PDP. This election is a matter of life and death for the PDP and Nigeria." For more on Obasanjo's rhetoric and its impact on the 2007 elections, see M. Tenuche, "Rhetoric of President Olusegun Obasanjo & the 2007 General Elections in Nigeria." *Journal of Sustainable Development in Africa*, Vol. 12, No. 1, 2010 available at http://www.jsd-africa.com/Jsda/V12NO1_Spring2010_A/PDF/Rhetoric%20of%20President%20Olusegun%20Obasanjo%20(Tenuche).pdf (accessed on October 20, 2015.

25 Dr. Udeuhelelkechukwu describes *political nomadism* in the words of Malthora as "party defection, cross carpeting, party-swltching, floor-crossing, party-hopping, canoe-jumping, decamping, party- jumping etc." See U. Ikechukwu, "Political Nomadism and its Implications on Political Development in Nigeria: A Critical Analysis." *International Journal of African and Asian Studies*, Vol. 9, 2015 available at file:///C:/Users/lpt/Downloads/22756-24838-1-PB.pdf (accessed on October 20, 2015).

with sufficient money can go to any other party to achieve his ambition....The root of defection is money politics...another reason why politicians decamp is due to lack of internal democracy within political parties. This lack of internal democracy is what results to this threatening level of defection in the country.... Normally there is nothing wrong with defection, it is democratic, and it is the utilization of the constitutional provision for freedom of association and choice. The phenomenon happens in all countries of the world... in advanced countries defection happened rarely and if it happened, there must be honourable reasons for it.[26]

Poverty is pervasive in Nigeria.[27] As a result, political office seekers can exploit the vulnerability of poor people to perpetuate violence and therefore commit electoral crimes. Concomitant with rising poverty is massive youth unemployment[28] which provides the human resource required to commit these crimes.

These challenges can be addressed by a combination of good governance, effective oversight and accountability mechanisms and

26 "Defection Undermines The Quality of Politics in Nigeria – Balarabe Musa."*Leadership Newspaper*, February 12, 2014 quoting *News Agency of Nigeria* available at http://leadership.ng/news/344910/defection-undermines-quality-politics-nigeria-balarabe-musa (accessed on October 20, 2015).

27 The World Bank ranks Nigeria as the 3rd highest contributor to the "world poor" population in terms of sheer numbers (with 7% of nearly 760 million poor people around the world). The top two are India (33%) and China (13%). See "Ending Poverty Requires More than Growth, Says WBG." Press Release, April 10, 2014 available at http://www.worldbank.org/en/news/press-release/2014/04/10/ending-poverty-requires-more-than-growth-says-wbg (accessed on October 20, 2015).

28 Dr. Aisha Mahmood, Special Assistant on Sustainable Banking at the Central Bank of Nigeria indicated that 70% of 80 million youths in Nigeria are either unemployed or underemployed. See A. Mahmood, "Nigerian Sustainable Banking Principle." Paper presented at the World Environment Day Programme organized by the Federal Ministry of Environment, Abuja on June 5, 2015 and quoted in http://www.informationng.com/2014/06/80-of-nigerian-youths-are-unemployed-cbn-official.html (accessed on October 31, 2015).

the entrenchment of sound political culture. The response must however begin with a result-oriented leadership committed to changing the present narrative.

III. HOW WE CAN TURN THE TIDE?

In October 2015, the courts nullified elections in Rivers State[29] and 18 of 31 local governments in Akwa Ibom State.[30] It was not the first time that elections have been nullified in Nigeria. In these cases – as in many before them – the courts identify the commission of electoral crimes, and sometimes even go as far as listing alleged offenders. Unfortunately, they often refrain from ordering prosecution of these people and prosecuting institutions are reluctant to take up the challenge. This is one reason why impunity in the context of elections persists.[31] The other is that our justice system unfortunately sometimes condones impunity. Confirming this point, the National Human Rights Commission in a report issued in February 2014 made the following observation:

> The Nigerian judiciary has created the impression that there is one law for poor people and another for the big men and women who put themselves forward for elections...The courts not only facilitate the violation of citizens' rights to effective participation in

29 S. Iroegbu, "Tribunal Nullifies Wike's Elections, Orders Fresh Polls." ThisDay Newspapers, 24 October 2015 available at http://www.thisdaylive.com/articles/tribunal-nullifies-rivers-election/223633/ (accessed on 28 October, 2015).

30 I. Isine, "Confusion as Tribunal Nullifies Elections in 18 Akwa Ibom LGAs but leaves Governor in Office." Premium Times, October 22, 2015 available at http://www.premiumtimesng.com/news/headlines/191892-confusion-as-tribunal-nullifies-election-in-18-akwa-ibom-lgas-but-leaves-governor-in-office.html (accessed on 28October, 2015).

31 In 2013, the Presidential Committee on Dialogue and Peaceful Resolution of Security Challenges in the North (also known as "Turaki Committee") identified "impunity with which crimes of violence are carried out, possibly because of prolonged absence of deterrent measures taken to punish perpetrators" as partly responsible for the "ease with which citizens take up arms to protect themselves because of the apparent feeling of government's inability to guarantee their security."

their government, they also aid the culture of impunity that has become the hallmark of elections in Nigeria.[32]

It is fairly clear from the referenced report that we are dealing with systemic problems here. Turning the tide on this culture of impunity therefore requires some adjustments in the way thatwe hold people to account for electoral crimes. Perhaps we need to take another look at our institutions. The institutions desperately require a revival. This revival has got to be holistic to last. There is no point in having a superb police force if the judiciary is going to frustrate cases brought before it and vice versa. Prosecutions have to be taken more seriously and in this wise, the judiciary has got to be more proactive than it is at the moment. In all cases where electoral crimes are established, the judiciary should make consequential orders for prosecution of all offenders. We do not require any legal reform to make this possible – just the will to do the right thing.

Given the federal system in operation, the justice ministries at the centre and in the states must take seriously allegations of electoral crimes committed under their jurisdictions. The departments of public prosecutions – as the prosecuting arm of justice ministries responsible for crimes must take up as many known cases of electoral crimes as possible or at least select a few to make a public statement about their commitment to justice and accountability.

INEC has demonstrated a commitment to cleaning its house by sanctioning some of its staff involved in electoral crimes.[33] They

32 *An Independent Review of Evidence of the Rights to Participate in Government, to Public Service, and to Fair Trial through the Election Petition Process in Nigeria 2007-2011: Initial Report* (Abuja: National Human Rights Commission, 2014), pp. 11-12, para. 1.13

33 In July 2014, online newspaper, Premium Times reported that INEC had sacked 30 of its staff allegedly involved in electoral malpractices during the 2011 general elections. As commendable as this is, it took about 4 years to happen. See F. Owete, "Exclusive: INEC Sacks 30 Staff over Election-Related Offences." Premium Times, July 26, 2014 available at http://www.premiumtimesng.com/news/165587-exclusive-inec-sacks-30-staff-over-election-related-offences.html (accessed on October 30, 2015).

have to do more. In many cases, electoral crimes cannot be committed without the connivance of INEC staff and security personnel. Besides suspending or disengaging such staff, INEC needs to hand those over to law enforcement agencies for further investigation and prosecution. We cannot allow people to benefit from their crimes. The same admonition must go to the security agencies, some of whose staff actually provide cover for electoral crimes. It is instructive that the Nigeria Army is currently investigating the complicity of its personnel in alleged electoral fraud perpetrated during the governorship elections in Ekiti and Ondo States.[34] They have to do more than just dismissing officers if found guilty, they need to pass such officers to the relevant law enforcement institutions for further processing.

At the heart of turning the tide in this or any endemic problem is the people. Nigerians must take responsibility for making their institutions work. We must make demands on these institutions to deliver on their mandate or pay the penalty for failing to do so. The price for liberty is eternal vigilance therefore citizens must be on the lookout for electoral offenders – they must prevent whatever offences they can and where not possible, collect evidence with which to lodge complaints with the appropriate institutions. This is good for arresting escalating electoral crimes but also for creating a framework for accountability by those elected into public offices.

As good as these proposals sound, they may not achieve the desired outcomes unless government takes more interest in building strong institutions and refrains from using these institutions for personal purposes. In this sense, they have to properly fund and equip our institutions; guarantee security of tenure for leaders of these institutions; create an effective reward and sanctions regime;

34 The army set up a Board of Inquiry on 20 October to investigate alleged malpractices and involvement of its personnel in Ekiti and Osun States governorship elections. See "Ekiti, Osun Election Rigging Tape: Army Sets up Board to Investigate," Vanguard Newspaper, October 21, 2015 available at http://www.vanguardngr.com/2015/10/ekiti-osun-election-rigging-tape-army-sets-up-board-to-investigate/ (accessed on October 30, 2015).

strengthen existing oversight mechanisms to keep an eye over these institutions and show leadership by respecting the institutions.

IV. CONCLUDING REMARKS

Periodic and credible election is one of the sign-posts of democracy. Nigeria may have done well in terms of conducting periodic elections but it has failed to live up to consistently credible polls. Aspirants to political offices have often exploited weak or complicit law enforcement and absence of accountability to rig themselves into power and once in perpetuate themselves there. To preserve our current democratic experience, this has to be checked by the right mix of interventions. We have proposed a few and hope that the policy makers will take them seriously.

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