PRISON EDUCATION AS A REHABILITATIVE TOOL FOR RECIDIVISM PREVENTION IN NIGERIA: LEGAL AND INSTITUTIONAL AVENUES FOR SUCCESS

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Abstract

The core prison function of punishment has not reduced recidivism as expected. Hence, greater focus on rehabilitation has been recommended as a means of equipping inmates to contribute as responsible members of society after release – thereby preventing recidivism. In line with the recent focus on the rehabilitation function of Nigerian prisons, the Nigeria Correctional Services Act 2019 (NCSA) was enacted – repealing the Prisons Act 1972 and, among other objectives, providing statutory backing for the fulfilment of the rehabilitation function. Highlighting the transformative potential of prison education for rehabilitation of inmates, this paper explores the problem of recidivism and some factors contributing to high recidivism rates. Socio-economic disadvantage is identified as a factor which predisposes Nigerian inmates to recidivism. As such, prison education is proposed as an effective tool with proven potential for rehabilitation, the empowerment of inmates and reduction of recidivism. The paper examines the NCSA's provisions on education as a tool for prison rehabilitation – identifying particular strengths and gaps which may impact the successful implementation of strategies for achieving the rehabilitation goals of prison education in Nigeria.

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1.0 INTRODUCTION

Recidivism is the relapse of an ex-offender into criminal behaviour, after undergoing punishment or sanction for a previous crime. A fundamental criminal justice problem, global recidivism rates indicate the inadequacy of prison confinement as a deterrent for crime or a tool for rehabilitation.
The focus of this paper is on the significance of the rehabilitation role of correctional institutions as a cure for the problem of recidivism and the possibility of employing correctional education as a rehabilitative tool for reducing recidivism in Nigeria.

In its exploration of the major roles of correctional centres, the paper pays particular attention to the realities of the Nigerian prison system – highlighting the susceptibility of Nigerian inmates to recidivism due to socio-economic disadvantage, which might have contributed to their confinement in the first place. The paper therefore proposes correctional education as a rehabilitation tool to prepare inmates for life outside confinement in order to prevent recidivism. The term 'correctional education', as used in this paper, refers to formal education (akin to what usually occurs in the classroom) for which relevant certification is provided upon completion. Also, in line with the recent change in nomenclature, following the repeal of the Prisons Act, the term 'correctional centre' as used in this paper is in the same context as the institution previously known as 'prison'. Where necessary, however, the term 'prison' is also retained.

This paper is organised thus: in section two, the history and role of correctional centres are explored. Thereafter, the problem of recidivism and its causative factors are discussed in section three. Section four explores the practical realities of Nigerian correctional centres and the impact on inmates. With the aid of secondary empirical data, the section also highlights the socio-economic characteristics that expose majority of inmates to the risk of recidivism. Section five discusses avenues for deploying correctional education as a possible rehabilitation tool preventing recidivism in Nigeria. The paper concludes with recommendations to achieve this proposition.

2.0 CORRECTIONAL CENTRES: DEFINITION AND HISTORY IN NIGERIA

As earlier stated, the term 'correctional centre' is a more recent term referring to the institution previously known as 'prison'. The Prisons Act 1972 defines prison as 'any lock-up house for the temporary detention or custody of prisoners newly apprehended or under remand, which is declared by the Minister by order in the Federal Gazette to be part of the prison'. In line with the change of nomenclature as aforementioned, the Nigerian Correctional Service Act[1] defines 'correctional centre' as 'a prison or any centre that serves as a place for detention, imprisonment or incarceration aimed at promoting a reformation, rehabilitation and reintegration of inmates'.[2] This definitional approach is laudable as it provides a proper foundation for the NCS' exercise of the rehabilitation function through its express reference to 'rehabilitation and reintegration'- especially since rehabilitation was not the initial focus of the Nigerian Prisons Service under the Prisons Act.

Correctional centres are known to have existed for various purposes from time immemorial. Aling notes that, though correctional centres were rare in the ancient world, Egypt was one of the a few nations which had correctional centres. He refers to Hayes' translation of an early Egyptian papyrus, which dealt with the confinement of Asiatic slaves in Egyptian correctional centres.[3] Hebrew biblical accounts on Joseph's sojourn in Egypt also point to a period of about two years spent in prison[4] sometime between 2000 and 1600 BC.[5]

[1] The Nigerian Correction Services Act was enacted in 2015. Among other things, it repealed the Prisons Act.

[2] Section 46

[3] Charles Aling 'Joseph in Egypt' <https://faculty.gordon.edu/hu/bi/ted_hildebrandt/otesources/01-genesis/text/articles-books/aling_josephpt3_bibsp.pdf> accessed 13 August 2021

[4] Genesis 40. See 'How Long Was Joseph in Potiphar's House? How Long in Prison' <https://amazingbibletimeline.com/blog/q27_joseph_how_long_in_prison/> accessed 13 August 2021

[5] Charles Aling PhD 'Joseph in Egypt: Part I' <http://www.biblearchaeology.org/post/2010/02/18/Joseph-in-Egypt-Part-I.aspx#Article> accessed 13 August 2021

Before the 19th century, early correctional centres served as places for confinement of offenders pending judgment and punishment.[6] The idea of imprisonment as a means of punishment in Europe was first suggested by Jeremy Bentham to prevent the death penalty, which he opposed. Correctional centres existed in Italy as far back as the 14th century. However, they were not widely used until the 19th century.[7] From the 19th Century, correctional centres served the dual purpose of confinement and punishment. Prisoners were housed under very harsh conditions and forced to take part in hard labour, with little or no concern for their personal welfare.[8] The earliest known operators of formal correctional centres were the British, with London being the first known place of construction of correctional centres for punishment. Subsequent calls for prison reformation as a means of reducing recidivism resulted in measures like basic education, mental health treatment and prison therapy being made available for prisoners.

Historical accounts suggest that the organised prison system originated in Nigeria in 1861 following the British capture of the colony of Lagos.[9] Prior to that time, different societies had different methods of dealing with deviant members of society. For instance, the Ewedo cult and the Ogboni cult were charged with this function in the Benin and Yoruba Kingdoms respectively.[10] Saleh-Hanna and Ume state that imprisonment as a form of punishing offenders is alien to Africa's core values in the administration of justice.[11] This is likely to be true for majority of the pre-colonial communities of Nigeria as customary trials were summary and measures such as shaming/shunning, fines, corporal punishment, banishment or death were meted on offenders, depending on the gravity of the offence committed. Though persons accused of grave offences were separated from

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[6] 'History of Imprisonment' (*Crime Museum*) <https://www.crimemuseum.org/crime-library/famous-prisons-incarceration/history-of-imprisonment/> accessed 13 August 2021

[7] Peter N. Nwankwo *Criminal Justice in the Pre-Colonial, Colonial and Post-Colonial Eras* (University Press of America, 2010) 6

[8] Crime Museum n.6

[9] A. R Rotimi 'Prison Administration in Modern Nigeria' (1982) 6(1) in International Journal of Comparative and Applied Criminal Justice 73 - 83

10 Daniel I. Nkwocha, CSS 774 – Prisons and Correctional Institutions in Nigeria' Course Material (National Open University of Nigeria, 2010)

[11] Viviane Saleh-Hanna and Chukwuma Ume 'An Evolution of the Penal System: Criminal Justice in Nigeria' in Viviane Saleh-Hanna (ed.) *Colonial Systems of Control: Criminal Justice in Nigeria* (University of Ottawa Press, 2008) 55

the larger community, confinement was for a limited period until a decision on banishment, ostracism or death was reached.[12] Also, unlike the western practice of confining prisoners-of-war in prison, inter-tribal conflicts were guided by established norms, which accepted warfare as part of inter-community diplomacy and hardly resulted in slavery or confinement.[13] In some communities, warfare captives were used as house or shrine slaves while others lived in their captive communities as lower-caste residents of same.[14] Radburn captures the pre-colonial criminal justice practice among the Igbos prior to the spread of the trans-Atlantic slave trade thus:

'The Igbo ... struggled with the problem of punishing criminals without being able to incarcerate them in jails. Given the smallness of Biafran polities, criminals could not be banished to a distant part of the state. Village elders-imposed death sentences on the most serious felonies and ordered lesser offenders to pay compensation to their victims.[15]

The rise of the trans-Atlantic slave trade necessitated the sourcing of able-bodied persons to be sold into slavery for economic reasons. This led to grave offenders and prisoners of war being sold as slaves. It is on record that, following the arrival of Aro (Igbo) slave dealers in the Igbo communities of South East Nigeria, sale into slavery became punishment for offences such as theft, arson and witchcraft. Troublemaking, unfaithfulness, and insolence though not offences per se, were sometimes punished by sale into slavery negotiated by the unscrupulous accusers of such deviants.[16] To prevent their escape, the slaves were confined in

[12] Saleh-Hanna and Ume, n.11, p.57

[13] Kenneth Onwuka Dike and Felicia Ifeoma Ekejiuba. *The Aro of South-Eastern Nigeria, 1650-1980: A Study of Socio Economic Formation and Transformation in Nigeria* (Nigeria: University Press Limited, 1990) 161 -195

[14] For instance, the Ibos of Ubulu-Ukwu community in present day Delta State identify the 'Onyi-Idu' quarters within Ubulu-Ukwu as one of such captive settlements. Onyi-Idu is believed to be a settlement of prisoners of war captured by Ubulu Ukwu during the Ubulu-Benin war which arose from an Ubulu prince's murder of a Benin princess –Adesuwa. See Joseph Obi Anene and CEA Ikemeafunah, History of Ubulu Ukwu (1982, Self-Published)

[15] Nicholas Radburn 'The Long Middle Passage: The Enslavement of Africans and The Trans-Atlantic Slave Trade, 1640-1808' (2016) PhD Dissertation, Johns Hopkins University, 45

[16] UNESCO 'Arochkwu Long Juju Slave Route (Cave Temple Complex)' <https//whc.undesco.org/en.tentativelists/5170/> accessed 13 August 2021. See also, Radburn n.15, 4

'prisons'[17] prior to sale to the European slave dealers and/or shipping out of Nigeria.

Following the colonial incursion in Nigerian governance, which began with the capture of Lagos by the British in 1861, correctional centres were established in line with the British criminal justice system. The first such prison was established in Broad Street, Lagos in 1872. By 1914 when the Northern and Southern protectorates were amalgamated there were eight correctional centres in existence in Nigeria.[18] As with British correctional centres, the establishment of correctional centres in colonial Nigeria was for confinement, suppression of dissent and punishment in furtherance of the colonial goal of subjugation and exploitation of resources. Hence, there was initially no policy for rehabilitation of prisoners.[19] Vocational training was first introduced in Nigerian correctional centres in 1917 but failed and was subsequently re-introduced together with moral and adult education classes in 1949.[20]

Upon Nigeria's attainment of independence, the Nigerian Prisons Service took over the management of correctional centres, with the singular focus still on confinement and punishment. With the promulgation of Decree No. 9 in 1972, the Nigeria Prisons Service (NPS) was given statutory backing to continue to function as confinement and punishment organs of the Nigerian criminal justice system. Decree No. 9 made no provision for rehabilitation of prison inmates.

[17] Also referred to as 'factories' or 'slave compounds'. See, for instance, US Library of Congress 'A journey in Chains' <https//loc.gov/classroom-materials/immigration/African/journey-in-chains/> 13 August 2021. See also BBC Bitesize 'The Transatlantic Slave Trade' < https//bbc.co.uk/bitesize/guides/zyfr82/revision/3> accessed 29/7/2021

[18] 'History of Nigeria Prisons Service' (Nigeria Prisons Service) <http://www.prisons.gov.ng/history_of_nps> accessed 3rd August 2021

[19] 'How Nigeria turned Her Majesty's prison into a place of pleasure' (BBC News, 14th August 2014) <https//bbc.com/news/world-africa-28418685> accessed 29th July 2021

[20] NPS, n. 18

2.1 Role of Correctional Centres

In the present day, correctional centres serve 4 major roles:

a. Retribution

In simple terms, retribution refers to punishment inflicted on someone as vengeance for a wrong or criminal act.[21] Beyond statutory prescriptions, retribution as a function of prisons mirrors a near-universal insistence for punishment as a retributive means of satisfying the innate moral desire for some form of 'sanitized revenge', which mere compensation or restitution cannot satisfy.[22] The retribution role of prisons has its roots in the doctrine of retributive justice on the basis of *lex talionis,*[23] such that severity of punishment is in proportion to the seriousness of a crime. Hence, whether or not a particular punishment benefits the community, moral balance will be achieved in society by paying a prisoner back for wrongs committed such that punishment becomes an end in itself.[24]

The retribution role is one of the most popular roles of correctional centres. It is believed that incarceration in prison is a way of depriving offenders of their freedom as punishment for crimes committed – both as a criminal justice tool and a means of social control. Depending on the gravity of an offence or the sentencing body's discretion, a sentence of imprisonment may be further compounded with 'hard labour' as further punishment. Section 4(1) of the Prisons Act 1972 recognises the sentence of imprisonment with hard labour under which a prisoner may be required to work at such labour as may be directed during the period of his confinement. In line with the rehabilitative focus of the Nigerian Correctional Service Act 2019 (2019),[25] the provision has been amended. Pursuant to section 15 of the NCSA, the word 'hard labour' is simply referred to as 'labour'. Despite this change of nomenclature, the retributive aim of the sentence of '(hard)

[21] Oxford Dictionary of English, 3rd Edition (Oxford University Press 2010)
[22] On nature and function of retribution, see generally Andrew Odenquist, 'An Explanation of Retribution' (1988) 85(9) Journal of Philosophy 464.
[23] The law of retaliation based on the doctrine of 'an eye for an eye'.
[24] Anzaku Sylvester Alex et al, 'Theoretical Exploration of Punishment and Incarceration in Nigeria?' (2015) 1(8) *Research Journal of Humanities and Cultural Studies* 1, 2
[25] The NCSA 2019 repealed the Prisons Act 1972.

labour' remains the same – the inmate will be subjected to such 'labour' 'as directed by the superintendent'.

The use of correctional centres as a place for punishment/retribution results in the treatment of offenders as a separate delinquent class labelled as 'criminal' and/or 'convict'.[26] These labels may result in post-conviction stigmatisation and further legal restrictions. For instance, section 254 of the Companies and Allied Matters Act precludes a person convicted for an offence in connection with the promotion, management or winding up of a company from acting as a Company Director for up to ten years. Similarly, under the 1999 Constitution no person convicted and sentenced for offence involving dishonesty in the preceding ten years is qualified to stand for election to public office in Nigeria.[27] In effect, though offenders would otherwise be deemed to have paid the price for their crimes during their term in prison, punishment may continue post-conviction. Herein also lies the deterrent role of correctional centres.

b. Deterrence

The deterrence function of correctional centres is closely connected with the retributive function. From a basic definitional perspective, deterrence refers to an act whose object is to discourage someone from doing something or prevent the occurrence of something by instilling doubt or fear of the consequences. This definition is on all fours with focus on punishment as a means of crime control. In this wise, the deterrence theory of punishment is directed at discouraging future criminal activity in society through punishment of offenders. According to Anzaku et al, the theory is anchored on fear as an influence on criminal choice. Hence, punishment should be severe enough as to discourage criminal activity, either by a potential repeat-offender or the society at large through fear of imposition of punishment.

The retributive/deterrent function of correctional centres is captured by Obioha who opines that deviants should be punished to make them pay back

[26] Anzaku et al (n.24) argue that the retributive response of society constitutes the bases for the label 'criminal'. Hence, if the retributive response is removed from societal reaction to a criminal, the label will lose its meaning.
[27] Sections 66(1)(d), 107(1)(d), 137(1) (e) and 182(1)(e)

for their actions and deter them and others from committing the crime in future.[28] Similarly, Adamu states that it is generally assumed that those who commit offences should be penalized so that law and order can be maintained.[29] In the past, beyond punishment/retribution, prisoners suffered ill-treatment in custody as a lesson to others – to deter crime. Though ill-treatment of prisoners is now discouraged and prisoners may enjoy some rights in custody, the restriction of freedom that attends imprisonment and some of the aforementioned post-conviction restrictions may still serve to deter crime. The above position notwithstanding, high recidivism rates indicate the contrary i.e. imprisonment alone cannot deter crime. Clearly, other more influential factors may constrain criminal behaviour. Hence the need to pursue rehabilitation of prisoners as a deterrent means of reducing recidivism.

c. Incapacitation

The incapacitation role of correctional centres involves the removal of a criminal from the society as a means of preventing harm to innocent persons in the society or confinement pending trial or sentencing. In recognition of this role, Rule 58 of the Standard Minimum Rules for the Treatment of Prisoners (The Mandela Rules) provides that 'the purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime...' Similarly, section 12(4) of the NCSA authorises the Prison Superintendent to detain persons duly committed to custody by a competent authority until such a person is discharged by due course of law.

Correctional centres' incapacitation role also includes their responsibility for the custody of accused persons remanded, pending trial, to prevent them absconding from justice. Though it is the practice in Nigeria for first-time accused persons to be remanded in custody for minor offences, this function of correctional centres is most applicable to persons considered to be flight risks such as those accused of grave offences or repeat offenders.

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[28] Obioha E.E. 'Challenges and Reforms of the Nigerian Prisons System' (2011) 27(2) JSS 95

[29] Adamu, A. (2004) 'Challenges of Crime Management' <http://www.abdullahiadamu.net/speeches/10705085945.html> accessed 13 August 2021

Their incapacitation notwithstanding, Section 36(5) of the 1999 Constitution guarantees every accused person the presumption of innocence pending proof of guilt. Accordingly, accused persons remanded in custody ought not to be classed as 'criminals' or 'convicts' or suffer the attendant stigmatisation attached to incarceration. Furthermore, they ought to be housed in separate facilities from convicts where practicable.[30]

d. Rehabilitation

The rehabilitation role of correctional centres has as its goal reforming and/or re-educating an inmate by equipping him/her with the necessary skills or training to enable him/her function as a law abiding citizen upon reintegration into the society. The English prison reformer, Elizabeth Fry, advocated for more focus on this role of correctional centres, noting that correctional centres may act as a means of preventing crime through the 'reformation of criminals'.To her, this was the true object of prison discipline.[31] In recent times, the rehabilitation role of correctional centres enjoys global emphasis. With increased recidivism, it has become clear that mere confinement and/or punishment without reformation may contribute to the revolving door phenomenon.[32] Hence, there have been more calls for rehabilitation of prisoners as a means of preparing them for life outside prison upon the completion of their term of imprisonment.

The rehabilitation role of correctional centres is recognised by statutes. In Nigeria, it constitutes a major objective for the enactment of the NCSA. Section 2(1)(c) of the NCSA provides as one of the objectives of the Act the need to 'enhance the focus on corrections and promotion of reformation, rehabilitation and reintegration of offenders'. Similarly Article 10(3) of the International Covenant on Civil and Political Rights provides that 'the

[30] See section 16 of the Prison Act 1972 for instance.

[31] Elizabeth Fry and Joseph Gurney 'Prisons in Scotland and the North of England' <https://community.dur.ac.uk/4schools.resources/Crime/Fry2.htm> accessed 13 August 2021

[32] On the 'revolving door' phenomenon see Francisca Anene, 'Reformation of Female Prison Inmates in Benin and Kirikiri Prisons: ODL to the Rescue' Paper Presented at the 7th Pan-Commonwealth Forum on Open Learning (PCF7) 2013 Lagos, Nigeria <http://oasis.col.org/handle/11599/2018> accessed 13 August 2021

[prison] system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Rule 65 of the Mandela Rules also provides:
'The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility'

3.0 RECIDIVISM AS A RECURRING CRIMINAL JUSTICE PROBLEM

Recidivism is a person's relapse into criminal behaviour, often after the person receives sanctions or undergoes intervention for a previous crime. It is usually identifiable through criminal acts, resulting in re-arrest, conviction or return to prison, with or without a new sentence during a 3-year period following release.[33] Recidivism is a global criminal justice problem though more so in some jurisdictions than others. On a general note, it would appear that the deterrent role of correctional centres has not been fulfilled as recidivism rates are on the increase. The study carried out by Langan and Levin suggests that about 67% of former prison inmates were rearrested for at least one serious new crime within 3 years after their release.[34] Similarly, The Prison Reform Trust Study suggests that seven out of ten young persons in the UK who leave correctional centres are likely to be reconvicted within two years of release.[35] Callan and Gardner estimated Australian recidivism rates at 58%.[36] In Norway, recidivism rates are estimated at 20%. Norway's rates are quite low compared to countries like

33 'Recidivism' (National Institute of Justice) <https://www.nij.gov/topics/corrections/recidivism/pages/welcome.aspx> accessed 13 August 2021

34 Langan and Levin in Joan Petersilia, *When Prisoners Come Home: Parole and Prison Re-entry* (OUP, 2003)

35 Enver Solomon 'Lost Generation, A: The Experiences of Young People in Prison' (Prison Reform Trust, 2004) <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Lost%20Generation.pdf> accessed 13 August 2021

36 Victor Callan and John Gardner 'Vocational Education and Training Provision and Recidivism in Queensland Correctional Institutions' (National Centre for Vocational Education Research, 2005)

the US with minimum recidivism rates of 47% and Italy with four in five (80%) ex-inmates reoffending after their release.[37] Nigerian correctional centres are classed as some of the worst correctional centres in the world.[38] However, this does not appear to deter crime or reoffending. Soyombo estimated Nigeria's recidivism rates at 37.3% in 2005.[39] This rose to 52.4% in 2010.[40] Considering the aforementioned statistics, it therefore stands to reason that without rehabilitative intervention, correctional centres' deterrent value or effect on recidivism is minimal at best.

3.1 Recidivism: Possible Causative Factors

Recidivism can be attributed to many factors. One of the most significant is post-release unemployment. Research suggests that prisoners who are employed soon after release are less likely to reoffend. Moak et al propose that by remaining employed, it is more likely that ex-offenders will avoid criminal activities and thus not reoffend.[41]

Age and gender also affect recidivism rates. Callan and Gardner's[42] study suggested that older people are less likely to re-offend. Research by Abrifor et al also showed that men are more likely to reoffend than women.[43] Tanimu notes that the typical Nigerian prisoner is a semi-literate male in the prime of his life, unemployed or self-employed in the lowest occupational ladder.[44] Even if they were employed before incarceration, prisoners

[37] Christopher Zoukis, 'Not the Worst, but not Norway: US Prisons v. Other Models' (*Huffington Post*, 9 June 2017) <https://www.huffingtonpost.com/entry/not-the-worst-but-not-norway-us-prisons-vs-other_us_59b0772ae4b0c50640cd646d> accessed 13 August 2021. Norway's low recidivism rate has been attributed to its focus of rehabilitation as against punishment.

[38] Benjamin Okorie-Ajah 'Criminal Justice Administration and Panic of Prison Correction in Nigeria' (2018) 1(2) JLJS 1

[39] Soyombo in Sorochi Otu 'Analysis of the Causes and Effects of Recidivism in the Nigerian Prison System' (2015) 10 INJODEMAR 136

[40] 2010 statistics. See C.A. Abrifor et al 'Gender Differences, Trend and Pattern Recidivism among Inmates in Selected Nigerian Prisons' (2012) 8(24) ESJ

[41] Moak et al 'A Study on the Causes of Recidivism in Massachusetts' BSc Research Project 2007

[42] n.36

[43] Abrifor n.40. Emphasis added.

[44] Bashir Tanimu 'Nigeria Convicts and Prison Rehabilitation Ideals' (2010) 12(3) *Journal of Sustainable Development in Africa* 140, 143

become unemployed by virtue of their confinement in prison. This is likely to continue post-release as there are unlikely to be ready jobs waiting for ex-prisoners. With national unemployment levels of 23.1%,[45] a typical Nigerian ex-convict competes from a position of disadvantage, having little or no education, lack of requisite skills, no external support and a criminal record.

The nature of correctional centres has also been identified as another cause of recidivism. Overcrowded correctional centres may become 'universities of crime'[46] where young offenders may be exposed to negative influence and radicalization from hardened criminals. During this process of prisonisation, new prison inmates may imbibe negative values, be introduced to prison drug culture and recruited into prison gangs.[47] Beyond the formal rules guiding prison confinement as enforced by prison authorities, prisoners live by internal rules mostly dependent on the survival of the fittest. In a 'community' where benefits are allocated in accordance with each prisoner's position in this internal hierarchy,[48] some prisoners undergo a process of dehumanising prisonisation such that they end up worse than when they were initially confined. Obioha notes that Nigerian correctional centres are overly regimented, with strict control of virtually all activities of inmates, resulting in prisoners who are mentally brutalized, with broken bodies and spirits, which leaves them destroyed and maladjusted upon release. Such maladjustment can contribute to recidivism.

Inactivity during prison confinement contributes to the problem of prisonisation.[49] A Correction Officer interviewed by Moak et al observed that prisoners only 'watch TV ... talk (and) fight' in prison.[50] In Nigeria

[45] NBS (2018). This is likely to be a conservative estimate, which does not take notice of other species of unemployment such as under-employment, cyclical unemployment, etc.

[46] Liz Stephens 'Overcrowded Prisons act as a University of Crime' (Politics.co.uk, 25 August 2009) <> accessed 13 August 2021

[47] John Dewar Gleissner 'Prison and Slavery – A Surprising Comparison' (Outskirts Press, 2010) 22

[48] For instance, Tanimu (n.44) observed that prisoners had to sleep in shifts or squat all night because of prison congestion. It is also a notorious fact that prisoners form gangs, which dominate their internal community and tend to terrorise those perceived to be weaker.

[49] Tanimu (n.44) opined that 65.2% of convicts were never assigned any work.

[50] Moak et al n.41, p. 29

where prisoners do not have access to such forms of entertainment as televisions, idleness is even more rampant. Tanimu's study indicated that 65.2% of convicts were never assigned any work while in prison. Such idleness creates a vacuum, which may then be filled through prisonisation.

Stigmatisation and stereotyping of ex-offenders makes adjustment to post-release life difficult for ex-inmates and may contribute to recidivism. As Gleissner opines, ex-offenders are perceived as poor marriage, employment and business prospects. Also, most of them lack support from family and friends, who may not wish to be associated with them for fear of stigmatisation. The culture-influenced perception of correctional centres as a place of punishment or confinement for grave offences has also contributed to the stigmatisation of ex-inmates. As highlighted above, correctional centres were not a known means of social control or punishment in traditional African communities. Hence, where offenders were confined for grave offences – usually as a precursor to banishment or death – such offenders and their families were severely stigmatised. Though formal modes of criminal justice administration/social control have changed, stigmatisation of prison inmates remains. Hence, persons who have been subjected to prison confinement (even while awaiting trial for which they may be subsequently acquitted) are severely stigmatised. The Nigerian shame culture is so potent that it effectively discourages association with ex-convicts or their relatives.

4.0 NIGERIAN CORRECTIONAL CENTRES AND INMATES: PRACTICAL REALITIES

As of December 2018, total prison population in Nigeria was 75,772. Table 1 provides a summary of Nigerian inmate populations per gender and class.

	Male	**Female**	**Total**	**Percentage**
Awaiting Trial	50,207	1,177	51,384	68%
Convicts	23,979	409	24,388	32%
Grand Total			**75,772**	**100%**

Table 1: Nigerian Prison Population (NPS, 2018)

Drawing from the earlier discourse on causative factors for recidivism, it would appear that Nigerian inmates are at a high risk of re-offending owing to significant conformity with causative factors. As shown in Table 1, majority of Nigerian inmates are male – a gender statistically correlated with recidivism. Available literature also indicate that majority of Nigerian prison inmates are socio-economically disadvantaged. Tanimu's assessment of the typical prison inmate as male, young and disadvantaged[51] has been corroborated by various other studies.[52] Eribo provides a clear picture of the lot of majority of Nigerian prison inmates. He notes that '…ninety-five percent of the prisoners who are behind bars are from poor homes and are illiterate. They are people who have been pushed to the edge of the cliff by life's frustrating factors… Most of the victims of this society got involved in crime as a result of their frustrations and the lack of opportunities to survive through legitimate means. Many felt dejected and hopeless-… pushing them to the other side of life people call 'criminal'.[53]

Little wonder Reiman opines that 'the rich get richer and the poor get prison'.[54] PRAWA's survey[55] on prison inmates in Enugu, Kano and Ikoyi Prisons also provides useful data on the educational and economic status of prison inmates. Table 2 replicates the findings from PRAWA's study on educational status of inmates in the aforementioned correctional centres

[51] Tanimu n. 44

[52] See for instance, Ogunleye, T. (2014) Perceived Contributions of Vocational Skills Acquisition to Prison Inmates. *American International Journal of Social Science* 3(2) 241 – 245; Emeka, J. O. et al (2018) Awaiting Trial Among Suspected Criminal Persons and Lack of Representation in Cross River State – Nigeria. 2(1) *International Journal of Sociology and Anthropology Research* 1 – 6; Orjiakor, C. T. et al (2017) Prolonged Incarceration and Prisoners Wellbeing: Lived Experiences of Awaiting Trial/Pre-Trial/Remand Prisoners in Nigeria. International Journal of Qualitative Studies on Health and Well-Being. 12(1) < https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5678456/> accessed 3rd August 2021;J.K Ukwayi and J.T Okpa 'Critical Assessment of Nigeria Criminal Justice System and the Perennial Problem of Awaiting Trial in Port Harcourt Maximum Prison, Rivers State (2017) 16 GJSS 17

[53] Osadolor Eribo 'Another Face of Slavery' in Viviane Saleh-Hanna, 'Colonial Systems of Control: Criminal Justice in Nigeria' (University of Ottawa Press, 2008) 122-123.

[54] Jeffery Reiman 'The Rich Get Richer and the Poor Get Prison' (New York Wiley, 1979)

[55] PRAWA 'Nigerian Prisons Survey' 2018

while the pre-incarceration economic status of the inmates is shown in Table 3.

Highest Level of Formal Education	Enugu	Kano	Ikoyi, Lagos
None	10.61%	18.13%	10.47%
Primary	26.14%	19.91%	21.42%
Junior Secondary	17.80%	13.11%	12.79%
Senior Secondary	35.23%	26.98%	38.19%
Tertiary	8.41%	7.23%	14.94%
Others	1.82%	14.64%	2.20%

Table 2: Education Levels of Enugu, Kano and Ikoyi prison inmates (PRAWA, 2018)

Employment Status	Enugu	Kano	Ikoyi
Wage/Salaried Worker	15.27%	13.39%	48.31%
Self Employed	63.75%	65.10%	42.54%
Student	11.74%	7.02%	3.15%
Out of Work	0.96%	0.28%	3.0%
Retired	0.16%	0.18%	0.23%
Unable to Work	1.05%	1.20%	0.85%
Others	7.07%	12.83%	1.92%

Table 3: Pre-incarceration employment status of Enugu, Kano and Ikoyi prison inmates (PRAWA, 2018)

Average Monthly Income (Naira)	
Less than 1,000.00	1.17%
1,000 – 5,000	5.51%
5,000 – 10,000	9.99%
10,000 – 50,000	59.69%
50,000 – 100,000	14.40%
100,000 – 500,000	7.57%
500,000 – 1,000,000	1.07%
More than 100,000	0.60%

Table 4: Pre-incarceration Average Monthly Income of Enugu, Kano and Ikoyi prison inmates. (PRAWA, 2018)

As the data indicate, majority of Nigerian prison inmates are significantly disadvantaged. Educationally, majority of inmates are below par. At least 1 in 10 prison inmates are completely uneducated. Of those who are educated, majority stopped at senior secondary school. Similarly, majority of Nigerian prison inmates are also economically disadvantaged (i.e. self-employed/unemployed/unable to work and earning N50,000.00 or less) This translates to 7 in 10 prison inmates just managing to get by prior to incarceration. From 2015, the World Bank international poverty line was $1.90 dollar a day. Prison inmates who earned N50,000.00 per month (about 136 dollars)[56] were actually living on $4.60 per day prior to incarceration. Of this number, prison inmates who earned less than 10,000.00 per month (about 28 dollars) were actually living under the poverty line prior to incarceration! and therefore living under the poverty line. Whatever little income such persons enjoyed prior to confinement is effectively wiped out whilst in prison as there are no opportunities for earning an income in the Nigerian prison system.[57]

Education and income constitute two out of three indices for assessing the human development index (quality of life) of a nation and the capabilities, wellbeing and life outcomes of persons in that nation.[58] Considering the levels of educational and economic disadvantage of prison inmates, they lack personal wellbeing and post-incarceration development is unlikely without deliberate steps taken to equip them with the skills to improve on their prior disadvantaged state.

The data presented above has grave implications for the nature of a typical inmate's prison experience, levels of awareness on avenues for pursuing freedom, economic ability to afford such options and ultimately, likelihood to adjust positively to post-incarceration life and contribute positively to society. An illiterate, poor, uneducated male who finds himself within the prison system is most likely to be further disadvantaged – having no means of income or educational development whilst in prison. The inmate

[56] based on 2018 average exchange rate of N362/$1

[57] Section 14(4) of the NCSA made provisions for prison inmates to earn one-third of the proceeds of their vocational training activities while in prison. However, this is yet to come into effect.

[58] Hayley Lashmar 'The Human Development Index – a better indicator for Success?' <sustainablegoals.org.uk/human-development-index-better-indicator-success> 13 August 2021

therefore comes out of the correctional system worse than they go in. This may be in line with the retributive object of confinement. However, for utilitarian purposes, it is more defeatist than advantageous in the long run because further disadvantage and a heightened predisposition to recidivism become more likely.

On the face of it, it may be argued that the prison population (as per the data on Table 1) constitutes an insignificant portion of the Nigerian population and may therefore lack negative wider implications. This argument does not take into account the entrenched system of the Nigerian family system. Majority of the inmates are male, in their prime and therefore possibly bread winners or significant contributors to the livelihood of their families prior to incarceration. The combined effect of their income being wiped out during incarceration and reduced earning ability post-incarceration is therefore likely to have a snowball effect on their family members/dependents, who are also likely to be poor. Labouring under similar disadvantages and therefore further predisposed to crime and/or recidivism by virtue of their sponsors' disadvantage.

4.1 Prison Education as a Rehabilitative Means of Reducing Recidivism Rates

By way of general comment, it would appear that recidivism risk factors are correlated to socio-economic characteristics of prisoners. Like high recidivism rates, prisoners' socio-economic characteristics are across jurisdictions.[59] Whilst a causative relationship has not been empirically established between these characteristics and recidivism, it may be useful to include policies to correct the inequalities posed by these characteristics as part of effective criminal justice administrations. This forms part of the motivation for this paper – direct prison rehabilitation activities (in this case, education) being aimed at correcting inequalities and reducing risk factors for recidivism.

Prison rehabilitation is key to reforming prisoners, ensuring public safety and reducing recidivism. This point is captured brilliantly by Rubin

[59] UN/UIE provides data on characteristics of prison populations in USA, Malaysia, and Thailand. All are similar. See UN/UIE 'Basic Education for Prisoners' (1995) 18 -20.

'rehabilitation is the only approach to the treatment of criminals that is institutionally viable in our society… it is pointless to ask whether rehabilitation is more effective in stopping recidivism than torture, exile, servitude, or even shaming, because the choice among these approaches is not open to empirical assessment. We are not going to adopt them. There might be some point to asking whether rehabilitation is more effective than incapacitation, since incapacitation is clearly a morally acceptable strategy. But ... incapacitation does not address the question being asked; it is too limited an idea to tell us anything about the treatment of prisoners.'[60]

Unlike incapacitation and punishment, the goal of rehabilitation is forward looking. It recognises that though incapacitation may appear to solve the problem posed by criminals in the society, it is temporary and merely defers the problem till such criminals are released. Prisoners exposed to punishment and incapacitation alone are likely to be released into a society they will find difficult to adjust to. Whilst they passed their time in prison, their peers outside are likely to have advanced socially and economically whereas they have lost the opportunity to equip themselves to operate in the new society in which they will find themselves. Faced with the challenge posed by the aforementioned causes of recidivism, prisoners released in a worse state than when they were first imprisoned are likely to reoffend. Prison rehabilitation therefore attempts to prevent recidivism by reforming prisoners and equipping them with various skills to aid their post-release adjustment.

The premise that employed ex-offenders are less likely to re-offend constitutes the basis for the introduction of various interventions to prepare inmates for post-release employment and reduce recidivism. Batiuk et al opined that inmates that completed higher levels of education encountered greater employment success on parole and thereby reoffend less frequently than their less educated counterparts.[61] The Swedish National Council on Crime Prevention's study on occupational activities in Swedish prisons also suggested that education may have positive effects in terms of recidivism

[60] Edward Rubin 'The Inevitability of Rehabilitation' (2001) 19(2) Law and Inequality 343
[61] M. E. Batiuk 'Crime and Rehabilitation: Correctional Education as an Agent of Change; A Research Note' (1997) 14(1) Justice Quarterly 167

rates, albeit minimal.[62] Svensson described correctional education as 'one piece of the puzzle' in terms of its role for providing a platform for successful post-incarceration living due to its rehabilitative effect, which results in reduced recidivism.[63] Similar effects are suggested for Denmark,[64] and Finland.[65] Farley and Doyle also note the greatest reductions in recidivism for inmates of correctional institutions who engage with higher education for incarcerated students as provided in Australian correctional institutions.[66]

Similar results are suggested in the USA. Research findings from the Changing Minds study carried out in Bedford Prison, USA[67] indicated that college-in-prison programs reduced recidivism rates significantly. Compared to 29.9 % re-incarceration for prisoners who did not attend the college-in-prison programme, only 7.7% of those who participated were re-incarcerated. The study also established that the college-in-prison programme transformed the lives of student-inmates and promoted lasting transitions out of prison. With particular reference to the transformative power of education on recidivism, a 2013 analysis of Correctional Education programs indicated that obtaining higher education reduced recidivism by 43% and was four to five times less costly than re-incarceration.[68] As a living example, the life experience of Stanley Andrisse corroborates this finding. A former drug peddler with three felony convictions and a ten-year sentence for drug trafficking, he underwent post

[62] Johanna Kindgren and Linnea Littmann 'Work, education and Treatment in Swedish Prisons' (2015:20 Swedish National Council on Crime Prevention) 9

[63] Svenolov Svensson 'Sweden' in Torfinn Langelid et al (eds) 'Nordic Prison Education: A Lifelong Learning Perspective' (TemaNord 2009:536) 121, 178

[64] Kaj Raundrup 'Denmark' in Torfinn Langelid et al (eds) 'Nordic Prison Education: A Lifelong Learning Perspective' (TemaNord 2009:536) 27, 47-48

[65] Vuoko Karsikas et al 'Finland' in Torfinn Langelid et al (eds) 'Nordic Prison Education: A Lifelong Learning Perspective' (TemaNord 2009:536) 51,59

[66] Helen F. And Doyle J. 'Using Digital Technologies to Implement Distance Education for Incarcerated Students: A Case Study from an Australian Regional University (2014) 6(4) Open Praxis 357 – 363. See also Helen Farley et al 'Delivering Digital Higher En Prisons: The Cases of Four Universities in Australia, UK, Turkey and Nigeria (2016) 2(2) GLOKALde 147 - 166

[67] Michelle Fine et al, Changing Minds: The Impact of College in a Maximum-Security Prison <https//www.researchgate.net> accessed 13 August 2021

[68] Lois M. Davis et al 'Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs that Provide Education to Incarcerated Adults' <https://www.rand.org/pubs/research_reports/RR266.html> accessed 13 August 2021

graduate education while in prison and is now a professor at Johns Hopkins University.[69]

Coming home to the African continent, there appears to be a general paucity of research on the impact of correctional education on recidivism. However, similar results are indicated from few available studies. Quan-Baffour and Zawada established, on the basis of qualitative research, a positive relationship between correctional education and ex-inmates success in re-entering employment and reintegration into their communities in South Africa. They also noted that current inmates of correctional institutions perceived better chances of success in re-entering employment and reintegration into their communities post-incarceration.[70] Msoroka reported similar outcomes for prison educated ex-inmates in Tanzania.[71] With particular reference to Nigeria, studies on the impact of correctional education on recidivism, though few, also indicate a perceived positive correlation between correctional education and recidivism owing to the rehabilitative effect of the former.[72]

4.2 The Role of Nigerian Correctional Centres in the Rehabilitation of Inmates

Nigerian correctional centres are meant to serve all four functions stated above, though the reality may be different. With reference to the rehabilitative function, Orakwe opines that the Nigerian Prisons Service

[69] Read his full story: 'I went from Prison to Professor – here is why Criminal Records should not be Used to Keep People out of College' <http://theconversation.com/i-went-from-prison-to-professor-heres-why-criminal-records-should-not-be-used-to-keep-people-out-of-college-97038> accessed 13 August 2021

[70] Kofi Poku Quan-Baffour and Britta E Zawada, Education Programmes for Prison Inmates: Reward for Offences or Hope for a Better life? (2012) 3(2) Journal of Sociology and Social Anthropology 73-81

[71] Mohamed S. Msoroka 'Prisoner to Lawyer, Wayward to Welder: Tanzanian Prison Education through the Lens of 'Perspective Transformation' (2019) 11(2) JIPE 34 - 51

[72] For instance, 97% of participants in Ajah's study on educational training of prison inmates perceived prison education to be a helpful tool in the correction of inmates. See Benjamin Okorie Ajah 'Educational Training of Inmates in Awka and Abakaliki Prisons, Nigeria (2018) 13(2) IJCJS 299 – 306. See also Asokhia M.O. and Osumah Obaze Agbonjuae 'Assessment of rehabilitation Services in Nigerian Prisons in Edo State' (2013) 3(1) AIJCR 224 – 230 which advocated training programmes for inmates as a means of rehabilitating inmate and stopping recidivism.

(now Nigerian Correctional Service) is charged with taking custody of those legally detained, identifying causes of their behaviour and retraining them to become useful citizens in the society.[73] Obioha however notes that, by its establishment philosophy, the Nigerian Prison Service is an institution meant to administer penal treatment to adult offenders.[74] It is clear from the number of inmates awaiting trial in the Nigerian correctional centres that incapacitation has become the main role of Nigerian Correctional centres despite reform and rehabilitation being said to be its ultimate aim.[75] It is acknowledged that rehabilitation and reduction of the awaiting trial problem constitutes two of the objectives of the NCSA. The focus of this paper being on a means of achieving the former, its analyses are therefore germane.

The rehabilitative role of correctional centres is recognised by multilateral treaties to which Nigeria is state party. Article 10 (3) of the International Covenant on Civil and Political Rights (ICCPR) provides that 'the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.' This is re-echoed in Rule 65 of the Mandela Rules. For reformation to be a reality, prisoner welfare and rehabilitation must be prioritised. This is yet, an unrealised goal in Nigeria. Omoni and Ijeh opine that education of prisoners is necessary for rehabilitation but note that such provisions made for education of Nigerian prisoners are inadequate, especially as no connection appears to have been drawn between prisoners' formal education and their rehabilitation.[76] In their view, the situation in Nigerian correctional centres falls below standard and is not conducive to rehabilitation.[77] Similarly, Obioha notes that the Nigerian prison system is more punitive and dehumanising than the supposed corrective assignment it should be focused on. The same conclusion was reached by Tanimu who opined that its facilities and programs are out dated, unsuitable, and irrelevant to reformative and rehabilitation ideals.[78]

[73] NPS, n.18
[74] Obioha E. E. 'Challenges and Reforms in the Nigerian Prisons System' (2011) 27(2) Journal of Social Sciences 95
[75] NPS, n.18
[76] Omoni G. and Ijeh, S. (2009) 'Qualitative Education for Prisoners: A Panacea to Effective Rehabilitation and Integration into the Society' Edo Journal of Counselling 2 (1) 28
[77] Omoni and Ijeh, n.76, 35
[78] n.44, 149,

4.3 Correctional Education as a Tool for Rehabilitation in Nigerian Correctional Centres

Correctional education and vocational training constitute the most popular avenues for rehabilitation of inmates because they are easier to set up and similar to programmes available outside the correctional centres. Beyond its transformative power, correctional education enjoys the added advantage of being the most readily accepted basis for post-incarceration employment in Nigeria. The reality in Nigeria is that a certificate evidencing formal education is generally more readily accepted as proof of qualification than informal or vocational training.

The recently repealed Prisons Act 1972, which regulated the administration of correctional centres in Nigeria was completely silent on the rehabilitative function of the Nigerian Prisons Service. Perhaps, this gap was due to the Act having been enacted during the military era when the focus was on confinement and punishment. It is commendable that the then Nigerian Prisons Service went beyond the provisions of the 1972 Act – pursuing rehabilitative training programmes and establishing vocational training workshops in some correctional centres. However, the lack of an express statutory backing and proper policy/planning meant that correctional education was not an obligatory requirement and did not enjoy requisite funding.

Nigeria recently took a first step towards actually pursing the rehabilitative role with legal backing through the enactment of the NCSA. Unlike the 1972 Act, which is now repealed, the NCSA is heavy on rehabilitation – a clear indication of its focus beyond punishment. The NCS is saddled with rehabilitative obligations from the highest level and across all organs.[79] One of the objectives of the NCS is to enhance the focus on 'promotion of reformation, rehabilitation and reintegration of offenders'.[80] The Act

[79] Section 4(2) lists rehabilitation as one of the matters that the Controller-General should superintend on. Furthermore, Inmates Training and Productivity now constitutes one of the Directorates of the NCS. Whilst the NPS may have had a similar directorate in existence, the significance of this express inclusion in the law is that the directorate now has the locus to operate, not just as a mere administrative division created on the basis of an individual CG's idea, but as a a directorate backed by the law.

[80] Section 2(1) (c)

specifically includes the implementation of rehabilitation programs,[81] and the empowerment of inmates through the deployment of educational and vocational skills training programmes[82] as part of the functions of the NCS.[83] In recognition of the rehabilitative potential of Correctional Education, section 14(1) charges the NCS with the duty to provide opportunities for education, vocational training and training in agriculture.

Whilst the above are laudable, it will be needful for the NCS to expressly design and provide practical avenues for fulfilling the correctional education obligation. This is because, while section 14(1) expressly differentiates between education, vocational training and agricultural training as forms of rehabilitation training, the section 14(2) is silent on steps for providing the different forms of training. Instead, it focuses only on vocational training – charging the NCS to establish and run centres for vocational skills training. There is no similar provision for establishing and running of educational centres anywhere in the NCSA. It would therefore appear that the intended focus may still be only on vocational training.

Correctional education and vocational training have differences in mode of deployment and qualifications obtained. The failure to provide expressly for correctional education as has been done for vocational skills training may have been an oversight. However, it may also be interpreted as an indication of the low importance accorded to prison inmates' rights or capabilities to engage in correctional education. This appears to be a global problem indicative of a retribution theory –based on (subconscious) view of prison inmates as 'criminals' deserving of less investment than other members of society. Hence, even when educational opportunities are provided, they are sub-standard.[84] Such view is dangerous as it could impede the achievement of rehabilitation goals. Given the transformative impact of formal education on recidivism and post-incarceration adjustment as highlighted above, perhaps it is time to pay better attention to formal education in Nigerian correctional centres and provide avenues for accessing same. This does not

[81] Section 10 (f)
[82] Section 10 (h)
[83] One of the benefits of this inclusion is the potential for accountability. Hence, beyond custody of prisoners, measurement of the NCS' effectiveness will include an assessment of its attainment of its rehabilitative function.
[84] Ajah (n. 72) observed this at the Awka and Abakaliki Correctional Centres

preclude the pursuit of vocational education but could further strengthen the rehabilitation of inmates.

4.4. Access to Correctional Education for Awaiting Trial Inmates

Another point, which may require clarification, will be whether awaiting trial inmates are entitled to access correctional education while in custody. The practice has been for awaiting trial inmates to be excluded from vocational training due to practical issues like lack of funding, indeterminate confinement time, etc. The 2011 Prisons Bill proposed that inmates serving a minimum term of six months be afforded correctional education.[85] In effect, ATIs having neither been convicted nor serving a prison term would have been excluded had the Bill scaled through the legislative process. The NCSA places no such limits as proposed by the 2011 Bill. However, it also makes no express mention of ATIs' access. Furthermore, there appears to be an inconsistency of wording between section 2(1) (c) on the one hand, and sections 10(f) – (h) and 14 (1), on the other. Section 2(1) uses the word 'offender'. This word is not interpreted in the NCSA. However, by its legal meaning as someone who is guilty of an offence under the law,[86] an ATI would not be classed as an offender since he/she is presumed innocent until proven guilty.[87] This may be assumed to indicate that Correctional Education is inaccessible to ATIs. Nevertheless, the wording of sections 10(f) – (h) and 14(1) negates this assumption. The sections do not use the word 'offender'. Instead they make reference to 'opportunities for education … for inmates'.[88] The NCSA defines an inmate as 'any person lawfully committed to custody'.[89] ATIs being lawfully committed to custody, albeit pending trial,[90] it is submitted that they should be entitled to rehabilitative correctional education like convicted offenders since they suffer the same disadvantages and are also exposed to recidivism. They also constitute majority of the prison population.

[85] Section 17(3)
[86] lawdictionary.org citing Blacks Law Dictionary 2nd ed <www.lawdictionary.org/offender> accessed 13 August 2021
[87] Section 36 Constitution of the Federal Republic of Nigeria (CFRN) 1999
[88] Emphasis added
[89] Section 46
[90] Section 10(a)

The inclusion of ATIs in correctional Education programs will be a welcome development with the potential to contribute significantly to a reduction in offending or recidivism. ATIs constitute two-thirds of the Nigerian prison population. Furthermore, they spend an average of 4 years between being remanded in custody and conclusion of trial.[91] They are equally socio-economically disadvantaged and suffer the added disadvantage of being victims of a slow and ineffective criminal justice system under which they are presumed innocent but exposed to the horrors of the prison system with no hope or knowledge of a definite date of release, even if innocent. This further pre-disposes them to prisonisation. Failure to extend correctional education to ATIs therefore amounts to seeking to rehabilitate the minority, whilst the majority remain at risk of offending and/or recidivism.

It is also important not to deploy prison education with a tick-box objective without proper planning/policy as to quality and practical requirements for deployment. The UN/UIE[92] study on prison populations in Malaysia, USA and Thailand made a similar observation. The study observed that prison authorities viewed education not necessarily as a goal-based rehabilitation tool but a way of occupying prisoners. Hence, inmates may be denied access to educational facilities, transferred such that their education is abruptly interrupted or terminated or denied the necessary facilities to ensure availability of education in prisons. This appears to have been one of the reasons for the lack of success of vocational education in Nigerian correctional centres. Without proper foundation being laid, the same is likely for formal correctional education. To prevent such occurrence, it must be clear from the beginning (and at all times thereafter) that correctional education/vocational training is not an end in itself but a means to an end –

[91]UNODC research indicates that the average time spent by ATIs on remand without trial being concluded in Lagos state is 47 months while ATIs in Delta and Borno States spend 20-22 months awaiting final judgement after the conclusion of their trials. See 'Assessment of Justice System Integrity and Capacity in three Nigerian State Prisons (UNODC Technical Research Report, 2006). See also Francisca Anene and Laura Osayamwen, 'Remembering the Forgotten: Benefits of Prison Education for Awaiting Trial Inmates in Nigeria'. Paper presented at the 9th Pan-Commonwealth Forum on Open Learning (PCF9), Edinburgh, Scotland, September 2019 <http://oasis.col.org/handle/11599/3309> accessed 13 August 2021

[92] UN/UIE n.59

the goal being to rehabilitate inmates in preparation for productive post-incarceration life.

5.0 LEGAL AND INSTITUTIONAL AVENUES FOR PROVIDING CORRECTIONAL EDUCATION IN NIGERIA

The obligation on the Nigerian government to provide post-basic education is still not justiciable. However, the benefits of correctional education for rehabilitation constitute a compelling argument for extending post-basic education to prisoners as a special class pending universal actualisation in Nigeria. While lack of funding may be a credible excuse for not providing formal education in correctional centres, funding issues may be minimised by exploring alternative means of providing education to prisoners. Coyle suggests that educated prisoners may help in providing tuition to the uneducated.[93] Also, correctional centres authorities may consider developing partnerships with civil society and educational organisations to increase opportunities available to prisoners.[94]

5.1 Pursuing Correctional Education as a Human Right

Access to education is a human right guaranteed under various local and multilateral instruments. Article 17(1) of the African Charter on Human and Peoples' Rights guarantees every individual the right to education. Similarly, Article 26 of the Universal Declaration on Human Rights provides:

'Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.'

With reference to the education of prisoners, Rule 66 of the Mandela Rules provides 'All appropriate means shall be used, including religious care in the countries where this is possible, education, vocational guidance and

[93] Andrew Coyle 'A Human Rights Approach to Prison Management' 2nd ed. (International Centre for Prison Studies, 2009) 41
[94] Coyle, n.93, 88

training, social casework, employment counselling, physical development and strengthening of moral character, in accordance with the individual needs of each prisoner, taking account of his social and criminal history, his physical and mental capacities and aptitudes, his personal temperament, the length of his sentence and his prospects after release.'[95]

Nigeria is a state party to aforementioned treaties, which guarantee the right to education. It is duty bound to implement them domestically. [96] The obligation to provide education forms part of the 'fundamental objectives' of the Nigerian government under Section 18 of the 1999 Constitution. One of these objectives is the eradication of illiteracy and provision of free education. Section 18(3) provides:

'Government shall strive to eradicate illiteracy; and to this end Government shall as and when practicable provide

(a) free, compulsory and universal primary education;
(b) free secondary education;
(c) free university education; and
(d) free adult literacy programme'

As affirmed in *Okogie v. A.G Lagos State*[97] section 6(6)(c) of the same constitution renders the fundamental objectives non-justiciable but hinged on availability of resources. However, the position on basic education has been clarified by distinguishing judgments in subsequent cases. In *SERAP v. FGN & Anor*[98] insufficiency of funds was advanced as the Nigerian government's excuse for not implementing the basic education programme. This excuse was dismissed by the ECOWAS Community Court of Justice

[95] See also Article 56 - 60

[96] Note that the SMR is not binding on state parties. It is of persuasive value but globally accepted. See Meeting of the Expert Group of Standard Minimum Rules for the Treatment of Prisoners (UN Commission on Crime Prevention and Criminal Justice) <https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_21/E-CN15-2012-CRP2/E-CN15-2012-CRP2_E.pdf> accessed 13 August 2021

[97] (1981) NCLR 2187. On non-justiciability of the Fundamental Objectives, see generally Ogugua v. Ikpeze 'Non-Justiciability of Chapter II of the Nigerian Constitution as an Impediment to Economic Rights and Development' (2015) 5(18) Developing Country Studies 48

[98] Suit No. ECW/CCJ/APP/12/07

and the government ordered to take necessary steps to cover the shortfall to ensure a smooth implementation of the basic education programme, lest a section of the Nigerian populace be denied the right to education.[99] Similarly, in *Legal Defence and Assistance Project (LEDAP) GTE. v. Federal Ministry of Education & Anor*[100] it was held that by the enactment of the Compulsory Free Universal Basic Education Act 2004 (UBEC Act), the right to free, compulsory and universal education up to junior secondary school (basic education) is an enforceable constitutional right. The combine effect of these judgments is that, while the right to free basic education is always justiciable, the provision of free post-basic (senior secondary and tertiary) education is not.

By virtue of Section 18 of the 1999 constitution and the UBEC Act, it would be assumed that all illiterate and uneducated prisoners would be entitled to compulsory education up to junior secondary level. However, Section 2 of the UBEC Act only guarantees free, compulsory and universal education to every child of primary and junior secondary school age. The Act goes on to define 'child' as 'a person of primary and junior secondary school age who is between the age of 6 years and 16 years …'[101] By implication, illiterate/uneducated prisoners above 16 years of age, will be denied basic education. It is not clear why this limitation was included in the Act. Perhaps the age limitation was inserted in the UBEC Act for financial considerations to ease the burden of providing education for the significant mass of illiterate/uneducated Nigerians. Whatever the reason for the limitation, it constitutes a dangerous gap that takes no cognisance of the significance of education and the reality of high adult illiteracy rates in the Nigerian population. It is even more significant when considered from a criminal justice perspective. Illiterate/uneducated persons are believed to be at higher risk of offending or being imprisoned.[102] This negative impact of lack of education on human development constitutes another reason to consider extending universal basic education to all illiterate/uneducated prisoners. It therefore behoves on the NCS to collaborate with UBEC and ensure that all

[99] Paragraph 28
[100] Suit No. FHC/ABJ/CS/978/15
[101] Section 15
[102] The UN/UIE study (n 59, 19) notes that likelihood of imprisonment for this class of prisoners is three times that of drop-outs who have had some measure of formal education.

correctional centres have facilities for the compulsory provision of basic education for illiterate/uneducated inmates.[103]

5.2 ODeL as a Vehicle for Providing Correctional Education in Prison

One readily available means of extending education as part of the rehabilitative goal of correctional centres is through open, distance and e-Learning (ODeL). ODeL provides a viable means of reducing the problem of accessibility of correctional education due to lack of funding. Learning is done virtually or through course materials without the need for face-to-face instruction, which will necessitate added security in correctional centres. Learners are afforded the flexibility of studying at their pace and the opportunity to pass their time in meaningful study, regardless of their location. Through the ODeL mode, learners are also equipped with necessary skills to facilitate positive socialisation among prisoners through group study. ATIs can also be accommodated under the ODeL mode of study because of the possibility of seamless continuity of education whenever and wherever inmates are transferred across the country.

At present, there are no known institutions offering basic education through the ODeL mode. This is probably due to the fact that recipients of basic education are typically children and young persons to whom education is traditionally provided face-to-face. Prison premises are not open to the public. This would hamper face-to-face education for inmates since teachers will be precluded from accessing the premises without extensive security clearance. While the security considerations underlying closure of prison premises to the public are valid, illiterate inmates' right to basic education necessitates the exploration of other avenues to access basic education. ODeL represents one of such avenues.

[103] By virtue of Article 77(1) of the Mandela Rules, this obligation is compulsory

5.3 The NOUN Model: Special Centres in Correctional Centres[104]

The National Open University of Nigeria (NOUN), as Nigeria's only single-mode ODeL institution, has as one of its objectives the provision of higher and liberal education to all persons without distinction. In line with its social justice mandate, NOUN is empowered to provide tertiary education to specific categories of disadvantaged persons who are unable to access tertiary education through conventional means – correctional centre inmates fall within this class. Section 3(b) of the National Open University of Nigeria Act empowers the university to;'provide courses of instruction and other facilities for the pursuit of learning in all its branches and to make those facilities available on proper terms to such persons as are equipped to benefit from them, especially those who may not by the nature of their special circumstances enrol for residential full-time university education;[105]

In line with this mandate, NOUN has contributed significantly to the provision of tertiary education to prison inmates with the establishment of special study centres in various correctional centres. To date, study centres exist in ten correctional centres[106], and tuition is free to all prison inmates.[107] In view of the challenges associated with limited internet access and absence of face-to-face facilitation, the institution deploys learning through special learning tools such as external servers, customized tablets, CD-ROMs and flash drives.

NOUN's prison study programmes enjoy global recognition and have helped many prisoners in achieving long held dreams of accessing tertiary education.[108] Worthy of mention is the fact that the best graduating students

[104] See Tanglang's discourse on NOUN special centres in Helen Farley et al 'Delivering Digital Higher En Prisons: The Cases of Four Universities in Australia, UK, Turkey and Nigeria (2016) 2(2) GLOKALde 147 - 166

[105] Emphasis added

[106] Illaro, Umudike, Kaduna, Lafia, Kuje, Sauka, Keffi, Awka, Port Harcourt and Enugu, See NOUN 'List of Study Centres' <http://nouedu.net/index.php/study-centres-view> accessed 13 August 2021

[107] NOUN Approves Free Education for Nigerian Prisoners <https://www.nounportal.org/noun-approves-free-education-nigerian-prisoners/> accessed 6 March accessed 13 August 2021

[108] The NOUN-NPS partnership contributed significantly to NPS's receipt of the 2018 UNESCO Confucius Award for Literature and Skills Acquisition for Inmates. See Tina

in 2014 and 2018 were products of the Enugu Prison Special Centre.[109] It would be remiss for such excellent students to be stigmatised as 'ex-convicts' and denied access to employment or other avenues to contribute to society upon completion of their prison terms. These success stories should encourage further collaborative efforts to establish study centres in other correctional centres.

Owing to its ODeL mode of instruction, NOUN holds significant potential to succeed as the Nigerian vehicle for the provision of quality tertiary correctional education across Nigeria. As earlier mentioned, it has the legal backing to do so and has so far demonstrated sufficient capacity to do more.

6.0 CONCLUSION AND RECOMMENDATIONS

Like correctional centres around the world, Nigerian correctional centres' focus on confinement and punishment has proven an insufficient deterrent to crime. This makes the NCS' efforts at pursuing rehabilitation laudable and likely to be successful, having been given legal backing under the NCSA. Correctional Education has been proven to be an effective tool which rehabilitates, prepares and equips inmates with necessary skills to pursue gainful employment upon release. Though the NCSA did not specifically provide for the establishment of education centres in correctional centres, express reference to education as one of the recognised rehabilitative tools[110] is key as it constitutes a statutory foundation upon which steps can be taken to make Correctional Education available to all inmates. One of the most significant practical achievements of the NCSA will be the ability of ATIs to access Correctional Education. ATIs' constitute majority of the Nigerian prison community and are subject to similar socio-economic pressures as prisoners. Correctional Education has the potential to reform ATIs and prevent prisonisation, which can lead to offending and recidivism. A first step having been taken in the amendment

Abeku 'NPS receives UNESCO's $20,000 prize' (Guardian, 19 September 2018) <https://guardian.ng/news/nps-receives-unescos-20000-prize/> accessed 13 August 2021

[109] Bayo Wahab 'Prison Inmate Emerges Best Postgraduate Student of Open University' (Pulse.ng, 13 January 2018) <https://www.pulse.ng/communities/student/noun-prison-inmate-emerges-best-post-graduate-student-of-open-university/ckb5cws> accessed 13 August 2021

[110] Section 14(1)

of the legal framework for prison administration in Nigeria, the following are recommended:

a. In line with the NCSA, ATIs must be afforded access to rehabilitative education programmes available in prison. This will require careful planning and funding to ensure that the rehabilitative goals of Correctional Education become a reality for this class of inmates, the temporary nature of their stay in custody notwithstanding.

b. Illiterate and uneducated prisoners' right to basic education must be recognised and actively pursued as a first step on the rehabilitation journey. Cheap, but effective avenues for achieving this include the provision of basic education through the ODeL mode, engaging the more educated inmates to assist in providing basic education to the illiterate/uneducated and working with educational institutions/charities to provide basic education to inmates.

c. The NCS can pursue avenues and collaborations to provide flexible and affordable post-basic education through the ODeL mode. As Nigeria's single-mode ODeL institution, NOUN has both the expertise and experience to work with the NCS in achieving this goal. Beyond the prison study centres already in existence, the goal should be to have one study centre in each prison in Nigeria. This will facilitate access to tertiary education for inmates.

d. In recognition of the disadvantaged status of inmates with no source of income during confinement, Correctional Education should be free to all inmates. NOUN's waiver of tuition fees in its prison study centres is commendable and must be sustained in order to encourage off-takers among the prison community.

e. Having operated under a culture of confinement and punishment for over a century, statutory amendments without more may not be sufficient to change the mental attitude that may have been cultivated under the culture. Regular training of prison staff will therefore be imperative to displace old punishment-focused practices and institute a sustained culture of rehabilitation in the Nigerian correctional centres. Though not the focus of this paper,

there will also be need for an improvement in prisoner welfare and living conditions as these have psychological effects, both on how prisoners view themselves and how prison warders/staff view them.

CONTEXTUALISING THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS NORMS IN PROTECTING BELEAGUERED WOMEN IN SITUATIONS OF ARMED CONFLICT IN NORTH EASTERN NIGERIA

Paul Adole Ejembi*and Vitalis Akase Shima**

Abstract

This article has graphically shown that women in parts of north-eastern Nigeria have been violated, contrary to International Humanitarian Law (IHL) and human rights law. It espoused the need for the government to engage in continuous dialogue with Boko Haram in order to secure the release of women held in captivity and the imperative of engaging a neutral party such as International Committee of the Red Cross to enlighten combatants, especially, the Boko Haram members on the exigency of complying with rules of IHL. The article has canvassed for the recalibration of IHL treaties to engender the humane treatment of combatants hors de combat and persons held in captivity in respect of non-international armed conflicts in sync with the position of the law in international armed conflict. In addition, international human rights treaties should be calibrated to make belligerent, non-state actors accountable for human rights violations.

Key words: International Humanitarian Law, International Human Rights Law, Armed Conflict, Women, Boko Haram, Nigeria, State responsibility

1. INTRODUCTION

Nigeria's militant group, Boko Haram, who officially arrogated to themselves the name Jama'atu Ahlis Sunna Lidda' awatiwal-Jihad, which in Arabic language means 'People committed to the propagation of the Prophet's Teachings and Jihad',[1] have caused wide spread and systematic

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violations of human rights and laws of armed conflict through indiscriminate assassinations, bombings, abductions, forced marriages, rape, assault and battery, and wanton destruction of public and private property. Boko Haram propagates a version of Islam, which generally restrains Muslims from participating in educational, social or political activities associated with the Western society. The militant group was founded by Mohammed Yesuf in Maiduguri, north-eastern Nigeria, in 2002. The group initially focused on opposing and annihilating Western education. The name "Boko Haram" means "Western Education is forbidden," when translated from the Hausa language into the English language.[2]

In 2009, the belligerent group established a military agenda to create an Islamic state. As a result of the harrowing and gruesome activities which led to the destruction of the thousands of lives and property, including the killing of civilians, police, and the soldiers, the United States of America designated Boko Haram as a terrorist of group in 2013.[3]Boko Haram was also proscribed in Nigeria on the 24th May, 2013.[4]Since its establishment, Boko Haram has carried out massive attacks on both the military and civilians in Nigeria. The terror group unabashedly accepted responsibility for bombing the United Nations building in Abuja in which at least 18 persons were killed and 60 persons were wounded in 2011[5]. On 15th April 2014, it was reported that Boko Haram abducted about 200 female students from Government Secondary School, Chibok, Borno State, Nigeria. According to the Tanko Lawan, Borno State Police Commissioner (as he then was),[6], the girls were abducted after midnight from the school and piled

[1]British Broadcasting Corporation News, 'Who are Nigeria's Bokoharam Islamists?' Reported in BBC News on 4 May 2015.<www.bbc,com/news/world-africa-13809501> accessed 28 June 2016.

[2] ibid.

[3]Ibid.

[4] The Order has been Gazetted as Terrorism (Prevention) (Proscription Order) Notice 13,s.5 of the Terrorism (Prevention) (Amendment Act) 2013 provides

[5]Senan Murray and Adam Nossiter, 'Suicide Bomber Attacks U. N. Buildings in Nigeria'<www.mobile.nytimes.com/2011/08/27/world/Africa/27nigeriahtml> accessed28 May 2016.

[6] Associated Press, Maiduguri, 'School Girls Kidnapped by Suspected Islamists in Nigeria' The Guardian <https://www.theguardian.com/world/2014/apr/1/5/schoolgirls-kidnapped-suspected-islamists-nigeria> accessed 28 June 2021.

on the back of an open truck into a forest[7]. Over the years, thousands of women and girls have been held by Boko Haram against their will, subjected to rape, forced marriages, indoctrination, and used as sex slaves[8]. This article espouses the utility of international humanitarian Law and human rights law in protecting vulnerable groups such as women and girls during internal armed conflict and demonstrates the exigency of state responsibility and the correlative obligations of militant and belligerent groups such as Boko Haram.

2.0 THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW IN SITUATIONS OF NON-INTERNATIONAL ARMED CONFLICT IN CONTEXT

An armed conflict is said to occur 'whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.'[9] Nigeria is beleaguered by a plethora of political problems, including Boko Haram insurgency, which has lasted for several years. It has been reported that Boko Haram insurgency resulted in the death of over 20,000 persons and displaced about 2.6 million persons between 2002 and 2008.[10] Since 2009 onwards, Boko Haram has continued to attack civilians and civilian objects contrary to trite principles of IHL. The foregoing state of affairs is vividly captured as follows:

Nigeria's fight against Boko Haram remains one of the region's deadliest conflicts despite a major military offensive to contain the African Islamist military group and support from international partners. A new study of the

[7] ibid.

[8] Kelvin Sieff, 'They were Freed from Boko Haram's Rape Camps. But their Nightmare? Isn't Over' The Washington Post 3 April 2016 <https://www.washingtonpost.com/world/frica/they-were-freed-from-boko-harams-rape-camps-but-their-nightmare-isn't over/2016/04/03/df2aabo54f-11e5-99ce-681055c70o5fstory.html> accessed 28 June 2016.

[9] Prosecutor v Tadic Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR 72, 2 October 1999, para 70 cited in SandeshSilvakumaran, 'International Humanitarian Law' in Daniel Moeckli, Saneeta Shah, and SandeshSilvakumaran, (eds) International Human Rights Law (Oxford University Press, 2010) 526.

[10] Peace Insight, 'Nigeria: Conflict Profile'<http://www.peaceinsight.org/conflicts> accessed 12 July 20-19.

conflict offers fresh perspective on how lethal it has been, especially for civilians, and the pattern behind Boko Haram's attacks. Since 2009, the Boko Haram insurgency has killed tens of thousands and displaced millions, and violence by militants and security forces continues daily.[11]

Nigeria has indeed faced many challenges consisting of militancy, insurgency, among other conflicts, some of which degenerates into situations requiring military intervention (for example the Boko Haram insurgency); such situations constitute non-international armed conflict.[12] Despite the fact the military authorities announced in 2016 that Boko Haram armed group had been technically defeated, attacks from the belligerent group has continued unabated.[13]As of 2018, militants with ties to Boko Haram were in control of territories in Borno State, spanning 160 kilometres. Boko Haram rebranded itself as Islamic State in West Africa (ISWA) when it aligned with Islamic State in 2015. According to Ahmad Muhammad, 'Definitely, Boko Haram is very much a threat to our area. They even mount road blocks, conducting stop and search operations the way the military does.'[14]In recent times, it has been reported that Boko Haram's 'territorial control is now limited to small villages and areas in the country side, a shift in tactics has helped the group stage a threat to millions. It has turned to suicide bombings, which accounted for almost a third of all casualties in the first half of 2018; and has increasingly attacked Muslim places of worship and continues to challenge government authority in in Nigeria northeast and beyond.It reportedly collects taxes and provides some services in areas it controls.'[15]In the light of the fact that there exists armed conflict between Boko Haram and members of the Nigerian armed forces and in view of the effective control (siege) of some territories in the northeast by the belligerent group (Boko Haram), it is submitted that such situations are tantamount to non-international armed conflict and the principles of IHL are therefore applicable. Relevant principles of IHL

[11]John Campbell and Asch Harwood, 'Boko Haram's Deadly Impact' Council on Foreign Relations 20 August 2018 <https://www.cfr.org/article/bo> accessed 13 July 2019.
[12]Nnamdi Ikpeze, 'Civilians in Non-International Armed Conflicts: the Contemporary Nigerian Experience' [2015](6) Nnamdi Azikiwe University Journal of International Law and Jurisprudence;1
[13] Peace Insight (n5).
[14] Mohammed Al-Amin, 'Boko Haram Islamists Still in Control of Parts of North Eastern Nigeria'.<https://www.dw.com/en/boko-haram-islam> accessed 12 July 2019.
[15]Cambell and Harwood (n6).

applicable in non- international armed conflict include Common Article 3 of the Geneva Conventions 1949 and Protocol Additional to the Geneva Conventions of August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). The treaties are discussed hereunder.

3.0 PRINCIPLES OF NON-INTERNATIONAL ARMED CONFLICT AS ENVISAGED UNDER COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS OF 1949

The palpable human suffering and experience occasioned by the Second World War as well as the rising quest to protect the rights of individuals resulted in the formation of the Geneva Conventions of 1949.[16]The Geneva Conventions articulates standards of humane treatment and protection of combatants, prisoners of war, and civilians in armed conflict. The Geneva Conventions are applicable universally.[17] Common Article 3 of the Geneva Conventions of 1949 makes explicit provisions for the protection of civilians and members of armed forces who are no longer taking part in hostilities (hors de combat). Nigeria has ratified the four Geneva Conventions of 1949.[18]Common Article 3 of the Geneva Conventions 1949 specifically provides that:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the Following provisions:

1) *Persons taking no active part in hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts*

[16] U.O Umozurike, Introduction to International Law (3rd edn Spectrum Books Limited 2005) 215.

[17]Cornell Law School, "Geneva Conventions and their Additional Protocols' <https://www.lawcornell.edu/wex/geneva_conventions_and_theiradditional_protocols > accessed 2 June 2021.

[18] Nigeria duly ratified the Four Geneva Conventions of 1949 on 20 June 1961.

are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:

a) Violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture;
b) Taking hostages;
c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;
d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are recognized as indispensable by civilized peoples.

2) The wounded and sick shall be collected and cared for by impartial humanitarian body, such as the International Committee of the Red Cross may offer its services to the Parties to the conflict. The Parties to the Conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

The import of the provisions of Common Article 3 of the Geneva Conventions 1949, as indicated above, is that in the case of non-international armed conflict, all persons, including women and girls, are to be treated humanely by parties to the conflict. The Convention unequivocally prohibits unconscionable violence to life, including all kinds of murder, mutilation, cruel treatment, taking hostages, discrimination founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria, and arbitrary punishment without recourse to regularly constituted courts. Unfortunately, in practical terms, parties to non-international armed conflicts especially the Boko Haram group often flout these seminal provisions with impunity.

3.1 Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) Of 8 June 1977 in Context

The Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977[19] applies to all armed conflicts, which take place in the territory of high contracting party between its armed forces and dissident armed forces or other organized armed groups, which exercise such control over a part of its territory as to enable them carry out sustained and concerted military operations and to implement the Protocol.[20] The Protocol is, however, not applicable in situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, not being within the purview of armed conflict.[21]

The Protocol provides that all persons who do not take direct part or who have ceased to take part in hostilities are entitled to respect for their person, honour, convictions and religious practices. They are to be treated humanely in all circumstances without any adverse distinction.[22] The Protocol prohibits violence to life, health and physical or mental wellbeing of people, particularly, murder and cruel treatment such as torture, mutilation or any form of corporal punishment.[23]The Protocol also prohibits collective punishments, taking hostages, acts of terrorism, violation of personal dignity particularly humiliating and degrading treatment, rape, enforced prostitution and any other form of indecent assault, slavery and slave trade, pillage, and threats to commit any of the foregoing acts.[24]

International Humanitarian Law stipulates that persons engaged in armed conflict must always distinguish between civilians and combatants as well as persons hors de combat and between civilian objects and military objectives. By and large, IHL prohibits acts of terrorism or acts aimed at

[19](adopted 8 June 1977, entered into force 7 December 1978.) 1125 UNTS 609.
[20] The Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, s1.
[21]ibid Art 1 (2).
[22] ibid art 4(1).
[23] ibid art 4(2)(a).
[24] ibid art 4 (b)-(h).

spreading terror among civilian population. However, principles of IHL are applicable only in situations of armed conflict. Therefore, such principles are not applicable in respect of terrorist activities committed in peace time. Nonetheless, human rights principles are applicable at all times, that is, during armed conflict and peacetime.[25] The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949[26] expressly protects women in situations of armed conflict. It specifically provides for the protection of women against any attack on their honour, rape, enforced prostitution, or any form of indecent assault.[27]Sexual violence such as rape, acts of sexual slavery, or enforced prostitution are recognized as war crimes under the international criminal law.[28] Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977 also guarantees protection for children, including female children. It stipulates that appropriate steps must be taken to facilitate the reunion of families temporarily separated. It also prohibits the recruitment of children who have not attained the age of 15 years from being recruited in armed forces or groups. They are not allowed to take part in hostilities.[29] It can be gleaned, based on the cornucopia of principles highlighted above, that IHL is applicable in non-international armed conflict for the protection of women and children. IHL prohibits all forms of sexual violence, rape, hostage taking, murder, inhuman or degrading treatment or punishment. By and large, women and children are recognized as protected persons under IHL. It is therefore illegal for state actors or non-state actors to mistreat them, discriminate against them, or violate their honour and dignity through flagrant violation of their rights as experienced by a considerable number of women in the course of terrorist activities perpetrated mostly by Boko Haram members in Borno, Yobe, and Adamawa States of the Federal Republic of Nigeria.

[25] International Committee of the Red Cross, *International Humanitarian Law: Answers to Your Questions* (ICRC, 2004) 36.
[26](adopted in 1949, entered into force 21 October 1950) 75 UNTS 287.
[27] Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, art 27.
[28] Rome Statute of International Criminal Court 2187 UNTS 90, art 8 (2)(b) (xxii).
[29] Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, art 4(3)(b)(c).

4.0 AN OVERVIEW OF APPLICABLE HUMAN RIGHTS PRINCIPLES AND INSTRUMENTS FOR THE PROTECTION OF WOMEN IN SITUATIONS OF ARMED CONFLICT

Women and children are tellingly vulnerable, particularly, where there is break down of law and order. They often suffer all manner of violence, sexual harassment, rape, and violation of their human rights. The harrowing experience of women and the flagrant violation of their rights especially in situations of armed conflict have been graphically espoused as follows:

' ...women inevitably face the worst possible consequences in situations where law and order breaks down. Wars, armed conflicts and civil wars tend to associate themselves with horrific crimes against the honour and dignity of women. Women are confronted with acts of sexual violence, enforced pregnancies and rape.'[30]

International humanitarian law recognizes the applicability of international human rights law to situations of armed conflict. This stance is in sync with the provisions of the Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, which is to the effect that 'international instruments relating to human rights offer a basic protection to the human person, emphasizing the need to ensure a better protection for the victims of those armed conflicts.' [31] This point of view is further buttressed by the International Court of Justice, the International Law Commission, and the Human Rights Committee. They have unanimously affirmed that international human rights law is applicable in the time of armed conflict.[32]In the light of the foregoing, it may be inferred that human

[30]Christine Chinkin, 'Rape and Sexual Abuse of Women in International Law' [1994] (5) (3)European Journal of International Law; 326 cited in Javaid Rehman, *International Human Rights Law* (2nd edn Pearson Education Limited, 2010) 798.

[31]Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, the preamble.

[32] Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, para 25; Fragmentation of International Law; Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of International Law Commission, A/CN.4IL.682 (4 April 2006) para 104; General Comment 31, n27, para 11 cited in Sandesh Silvakumaran, 'International Humanitarian

rights principles are applicable at all times, including moments of peace and in situations of international or non-international armed conflict. Apposite human rights instruments, principles and norms applicable for the promotion and protection of the rights of women especially in situations of armed conflict are briefly considered as follows.

4.1 The Convention on the Elimination of All Forms of Discrimination against Women 1979

The Convention on the Elimination of All forms of Discrimination against Women (CEDAW) 1979[33] prohibits a wide range of discrimination against women.[34] States Parties to the Convention are mandated to take appropriate measures to ensure the advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights on equal basis with men.[35] The Convention also recognizes the following rights of women: right to participate in politics and governance; [36] right to change or retain their nationality,[37] right to education, [38] right to employment[39] right to health care,[40] right to family benefits and participation in recreational activities,[41] right to equality with men before the law, [42] right to marriage and same rights and responsibilities during marriage and its dissolution[43], among others.

States Parties are required to ensure that family education encompasses a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and

Law' in Daniel Moeckli, Saneeta Shah, and Sandesh Silvakumaran, (eds) *International Human Rights Law* (Oxford University Press, 2010) 531.

[33] (adopted and opened for Signature, ratification and accession on the 18 December 1979, entered into force 3 September 1979) 1249 UNTS 13 (CEDAW) Nigeria ratified CEDAW in 1985.

[34]Ibid art 2.

[35] ibid art 3.

[36] Ibid art 7-8.

[37] ibid art 9.

[38] ibid art 10.

[39] ibid art 11.

[40] ibid art 12.

[41] ibid art t 13.

[42] ibid art 15.

[43] ibid art 16.

development of their children taking into account the fact that the interest of the children is the priority in all cases[44]. State parties to CEDAW are expected to ensure, on the basis of equality of men and women, access to health care services, family planning, and guarantee to women appropriate services in connection with pregnancy and adequate nutrition during pregnancy and lactation.[45] State parties are mandated to take appropriate measures to suppress all forms of traffic in women and sexual exploitation of women. These rights, such as right to health care, right to adequate nutrition during pregnancy and freedom from sexual exploitation are germane for the protection of women, particularly, during armed conflict.

The CEDAW expressly requires State parties to modify or abolish existing laws, regulations, customs and practices, which constitute discrimination against women.[46] The Convention provides for the establishment of the Committee on Elimination of Discrimination against Women. The Committee is vested with the responsibility of considering the progress made in the implementation of the provisions of the convention.[47] It is, however, contended that the Committee on Elimination of Discrimination against Women, like many others established by the international treaties, is not a court with the power of binding decisions on the merits of cases.[48] Another major quandary in the implementation of the convention is manifest in African countries with a dualist approach to the relationship between international law and domestic or national law, such as Nigeria, which requires the domestication of international conventions in municipal law as a prerequisite for such an instrument to attain the force of law. Thus, in the case of *Abacha v Fawehinmi*,[49] the Supreme Court of Nigeria held, *inter alia*, that by virtue of the provisions of section 12 (1) of the 1979 Constitution of the Federal Republic of Nigeria (CFRN), which is coterminous with the provision of section 12 of the CFRN, 1999, as amended, an international treaty entered into by the government of Nigeria does not become binding until it is enacted into law by the National Assembly. The apex court further explained that before its enactment as

[44] ibid art 5(b).
[45] ibid art 12(1)(2)..
[46] ibid art 2.
[47] ibid art17
[48] Malcolm N. Shaw *International Law* (5thedn, The Press Syndicate of the University of Cambridge 2003) 298.
[49](2000) 4 SCNJ 400 at 446.

such, an international treaty has no such force of law as to make its provisions actionable in the Nigerian law courts.[50] Thus, in dualist countries, the mere act of ratification of international instruments is not enough; it is incumbent on the legislature to enact it into law in the domestic plane in order to give it the requisite force of law in the states concerned.

4.2 An Overview of the International Convention for the Protection of All Persons from Enforced Disappearance 2006

Enforced disappearances constitute an intricate and multifarious manifestation of human rights violation.[51] It is tantamount to the derogation of the 'right to life, the prohibition on torture and cruel, inhuman and degrading treatment, the right to liberty and security of the person, and the right to a fair trial.'[52] The International Convention for the Protection of All Persons from Enforced Disappearance[53] defines the concept of 'enforced disappearance' as follows:

'Enforced disappearance' is considered to be the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the state or by persons or groups of persons acting with the authorization, support or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person which place such a person outside the protection of the law.'[54]

It would appear that the above mentioned definition of enforced disappearance, in principle, gives the impression that the offence can only be perpetrated by state actors only. Nonetheless, Article 3 of the

[50] ibid

[51] Javaid Rehman, International Human Rights Law (2nd edn. Pearson Education Limited, 2010) 855.

[52] Anderson, 'How Effective is the International Convention for the Protection of All Persons from Enforced Disappearances Likely to be Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?' 7 Melb.J International Law (2006) 245; Velàsquez Rodriguez Case, Judgment of 29 July 1988, Inter-AM.Ct.H.R (Ser C) No.4 (1988) para 150 cited in Rehman (n45) 855.

[53] 20 Dec 2006 UN.Doc.A/61/488. Nigeria acceded to the International Convention for the Protection of All Persons from Enforced Disappearance 2006 on 27 July 2009.

[54] ibid Art 2.

Convention extends criminal responsibility for the offence of enforced disappearance to non-state actors. Thus Article 3 of the Convention specifically states that '*Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the state and to bring those responsible to justice.*' The rationale for the inclusion of acts committed by persons other than the state or its agents is to enlarge the scope of enforced disappearance to include acts perpetrated by non-state actors and to hold such persons criminally responsible under domestic criminal law.[55] The convention clearly prohibits enforced disappearance.[56] It categorically stipulates that there is no justification for enforced disappearance of persons under any circumstance whatsoever, whether a country is in a state of war or threat of war, internal political stability or any other public emergency.[57] The import of the preceding provision is that enforced disappearance is prohibited even in situations of armed conflict. Furthermore, the wide spread or systematic practice of enforced disappearance is regarded as a crime against humanity.[58] State parties are duty bound to take necessary measures to hold criminally responsible 'any person who commits, orders, solicits or induces the commission of, attempt to commit, is an accomplice to or participates in an enforced disappearance.'[59] Criminal responsibility is also attached to 'a superior who, knew or consciously disregarded information which clearly indicated that subordinates under his or effective authority and control were committing or about to commit a crime of enforced disappearance, exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance, and failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution.'[60] The International Convention for the Protection of All Persons from Enforced Disappearance in its outright prohibition of enforced disappearance also stipulates that *'no order or instruction from any public authority, civilian,*

[55]Javaid (n45) 864.
[56] International Convention for the Protection of All Persons from Enforced Disappearance 2006, art 1(1).
[57] ibid art 1 (2).
[58] ibid art 5.
[59] ibid art 6 (1).
[60] ibid art 6 (b)(i)(ii)(iii)(c).

military or other, may be invoked to justify an offence of enforced disappearance.'[61]

The endemic acts of enforced disappearances of women and girls through the terrorist activities of Boko Haram in Borno and Yobe states lends credence to the desirability of including non-state actors as perpetrators in offences of enforced disappearance. It is therefore incumbent on the Nigerian government to domesticate the International Convention for the Protection of All Persons from Enforced Disappearance in conformity with the extant provisions of Section 12, the Constitution of the Federal Republic of Nigeria 1999, as amended, and accordingly take robust legislative measures to specifically criminalize enforced disappearance in order to guarantee accountability of states and non-state entities where their activities are at cross purposes with the spirit and tenor of the law relating to enforced disappearance thereby undermining the human rights of the victims involved.

4.3 Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa 2000

The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa 2000[62] defines women as 'persons of female gender, including girls.'[63] The meaning of women as construed by the Protocol is used and duly adopted in the present article. The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa guarantees a number of rights for the protection of women, including right to life, integrity and security of the person, right to dignity, right to marriage, right to participation in the political and decision making process, right to peaceful existence, right to education and training, economic and social welfare rights, health and reproductive rights, right to food security, right to adequate housing, right to healthy and sustainable environment, widow's rights, right to inheritance, special protection for the elderly women, special protection of women with disabilities, special protection for

[61] ibid art 6 (2).
[62](adopted July 1 2003, entered into force 25 November, 2005) 2000 OAU DOC CAB/LEG/66.6 Nigeria ratified the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa 2000 on 16 December, 2004.
[63] ibid art 1.

women in distress, elimination of harmful practices, and elimination of discrimination against women.

The Protocol makes explicit provisions for the protection of women in situations of armed conflict. It mandates State parties to the Protocol to ensure respect for the rules of international humanitarian law applicable in armed conflict situations, which affects the population, particularly women. State parties are obligated to protect civilians, including women, regardless of the population to which they belong, in the event of armed conflict. States are also required to protect asylum seeking members of the female gender, refugees, returnees and internally displaced persons against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction. State parties are also duty bound to take all necessary measures to ensure that no child, especially girls under the age of 18 years, take direct part in hostilities and that no child is recruited as a soldier.[64]

The provision of Article 11 of the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa 2000 is instructive. This stance is predicated on the fact that although State parties are to be held primarily for the violation of the human rights of women in situations of armed conflict, individuals and groups such as members of the Boko Haram and other belligerent groups can be held criminally responsible in the event that they are adjudged liable as perpetrators of human rights violation and the asphyxiation of trite principles of IHL against women in situations of armed conflict before courts of competent jurisdiction, either at the national or international levels.

4.4 The Constitution of the Federal Republic of Nigeria, 1999

The principle of equality and non-discrimination is unequivocally enshrined in the Constitution of the Federal Republic of Nigeria 1999, as amended, (hereinafter referred to as the CFRN), as follows: '*…national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic*

[64]ibid Art 11.

association or ties shall be prohibited'.[65] Similarly, the CFRN, 1999, as amended, also provides that:[66]

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person –

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, place of origin, sex, religion or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizen of Nigeria of other communities, ethnic groups, places of origin, religious or political opinions.

The Constitution of Nigeria, 1999, as amended, in the light of the above mentioned provisions, clearly indicate that the prohibited grounds for discrimination include sex, religion, political opinion, ethnic group, among others. The following fundamental rights are enshrined in the Constitution of Nigeria, 1999, viz: right to life[67], right to dignity of the human person[68], right to personal liberty[69], right to fair hearing,[70] right to private and family life,[71] right to freedom of thought, conscience and religion[72], right to freedom of expression and the press[73], the right to peaceful assembly and association[74], the right to freedom of movement[75], the right to freedom from discrimination[76], and the right to acquire and own immovable property

65 Constitution of the Federal Republic of Nigeria 1999, as amended, s 15(2),Cap C23 LFN 2004.
66 *ibid* s 42(1) (a) (b).
67 s33, CFRN 1999, as amended.
68 *ibid*. s34.
69 *ibid*. s 35.
70 *ibid*. s 36.
71 *ibid*. s 37.
72 *ibid*. s38.
73 *ibid*. s39.
74 *ibid*. s 40.
75 *ibid*. s 41.
76 *ibid*. s 42.

anywhere in Nigeria.[77] The Constitution of Nigeria 1999, as amended, provides that any person who alleges that any of the fundamental human rights provisions stated in chapter four of the Constitution has been, is being or likely to be contravened in any state in relation to him may apply to the High Court in that state for redress.[78]

However, it has been asserted that law enforcement agencies, in many instances, violate these constitutional rights provisions with impunity.[79]Similarly, the Boko Haram have patently violated the human rights of women, particularly, in Borno and Yobe States through sexual violence, rape, abduction, hostage taking, enforced disappearance, murder, and other despicable acts. Boko Haram has also engaged in egregious acts of discrimination against women on religious grounds. A notable example is the appalling narrative of Leah Sharibu, a young girl of 15 years, who was abducted by Boko Haram on the 19th of February 2018 along with over a hundred other girls, while in a school known as the Government Girls Science and Technical College, Dapchi, which is located in Yobe State. Whilst all the other girls captured by Boko Haram had since been released, she remains in captivity based on the fact that she refused to deny Jesus Christ of the Christian faith and convert to Islam as demanded by the Boko Haram members.[80] To all intents and purposes, this constitutes a poignant violation of her human rights and a naked contravention of the sublime principles of IHL and international human rights law, which unequivocally prohibits discrimination on the basis of sex or religion, among other grounds.

4.5 Violence against Persons (Prohibition) Act, 2015

The Violence against Persons (Prohibition) Act, 2015 is essentially aimed at eliminating violence in private and public life, and prohibiting all forms of violence against persons and provide maximum protection and effective

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77 *ibid*. s 43.

78 the CFRN, 1999, as amended, Section 46(1).

79 E.E Alemika, 'Overview of Pattern of Human Rights Violations by Law Enforcement Agencies in Nigeria' In S. G Ehindero, and E.E Alemika, (eds) *Human Rights and Law Enforcement in Nigeria* (Nigeria Police Force, 2005) 5.

80 Lindy Lowry, 'One Year Later, Leah Sharibu Remains in Boko Haram Captivity' Open Doors NewsLetter 19 February 2019 <https://www.opendoorsusa,org/one-year-later-leah-sharibu-remains-in-boko-haram-captivity> accessed17 July 2019.

remedies for victims and punishment to offenders.[81]The Act attaches criminal responsibility to the following offences: rape, inflicting physical injury on a person, wilfully placing a person in fear of physical injury, coercion, deprivation of personal liberty, damage to property, economic abuse or forced financial dependence, forced isolation or separation from family and friends, emotional, verbal and psychological abuse, stalking, and intimidation. The Act takes cognizance of 'violence perpetrated in the public sphere' which it defines as '*any act or attempted act perpetrated by the State or non-State Actor before, during and after elections, in conflict, or war situations, which threatens peace, security and wellbeing of any person or the nation as a whole.'*[82]

The Violence against Persons (Prohibition) Act 2015, therefore, attaches penal sanctions on state actors or non-state actors who violate the provisions of the legislation. It is axiomatic that the offences stipulated under the Act such as rape, assault, inflicting physical injury on a person, coercion, deprivation of liberty, and damage to property, among others, palpably undermines and constitutes an antithesis to fundamental human rights. The applicability of the Act for the protection of human rights particularly in situations of armed conflict may be gleaned from its connotation of 'violence perpetrated in the public sphere', which is glaringly construed under section 46 of the Act to imply acts or attempted acts carried out by the state or non-state actors in situations of armed conflict. The High Court of the Federal Capital Territory is vested with the exclusive original jurisdiction to adjudicate over matters brought pursuant to the provisions of the Act. The main drawback of the Act is premised on its limited territorial jurisdiction. According to section 46 of the Act, its provision applies only to the Federal Capital Territory, Abuja. Thus other 36 states of the Nigerian federation are impliedly excluded from the legislation. Nonetheless, such states have the latitude to take a cue from the existing federal legislation and accordingly adopt or enact similar laws by the respective States' Houses of Assembly in the quest to protect human rights in all circumstances, including those characterized as armed conflict.

[81] Violence against Persons (Prohibition) Act, 2015, Long title.
[82]ibid s46.

4.6 Terrorism (Prevention) Act 2011

Sequel to the upsurge of terrorist activities in Nigeria, the government took some decisive measures. Boko Haram was proscribed and designated a terrorist organization. The legislature also enacted a statute called the Terrorism (Prevention) Act, 2011, which defines terrorism and prescribes different forms of punishment, depending on the severity of the offence committed. The Terrorism (Prevention) Act 2011, prohibits acts of terrorism and financing of terrorism.[83] The Act defines terrorism as:

[A]n act which is deliberately done with malice, afore thought and which:

(a) may seriously harm or damage a country or an international organization;

(b) is intended or can reasonably be regarded as having been intended to-

- *(i) unduly compel a government or international organization to perform or abstain from any act;*
- *(ii) seriously intimidate a population;*
- *(iii) seriously destabilize or destroy the fundamental political, constitutional or economic or social structures of a country or an international organization; or*
- *(iv) otherwise influence such government or international organization by intimidation or coercion and;*

(c) involves or causes as the case may be-

- *(i) an attack upon a person's life which may cause serious bodily harm or death;*
- *(ii) kidnapping of a person;*
- *(iii) destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;*
- *(iv) the seizure of an aircraft, ship or other means of public or goods transport and diversion or the use of such means of*

[83] Some sections of the Terrorism (Prevention) Act 2011, have been duly amended by the Terrorism (Prevention) (Amendment) Act 2013,s1(1).

transportation for any of the purposes in paragraph b(iv) of this subsection

(v) the manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological and chemical weapons without lawful authority;

(vi) the release of dangerous substance or causing of fire, explosions or floods, the effect of which is to endanger human life;

(vii) interference with or the disruption of water supply, power or any other fundamental natural resource, the effect of which is to endanger human life;

(d) an act or omission in or outside Nigeria which constitutes an offence within the scope of counter terrorism protocols and conventions duly ratified by Nigeria.

However, the Act stipulates that demonstration or stoppage of work is not a terrorist act.[84] It may be inferred that the massive killings, bombings, kidnap of persons including women, destruction of communities, and endemic intimidation of the population particularly in Borno, Yobe, and Adamawa States come within the purview of terrorism as construed by the extant provisions of the Terrorism (Prevention) Act, 2011. Furthermore, where two or more persons or organizations participate or collaborate in an act of terrorism or solicit others to commit the act of terrorism, the judge in chambers may upon application made by the Attorney General, National Security Adviser or Inspector General of Police, on the approval of the President, declare such an entity to be a proscribed organization and the notice is required by law to be published in an official gazette.[85] The Terrorism (Prevention) (Amendment) Act 2013 prescribes punishment for any person or body corporate that commits, attempts or threatens any act of terrorism. It states that such an individual or entity would be liable, on conviction, to varying degrees of punishment, depending on the magnitude, to a maximum of death penalty.[86] By and large, the Terrorism (Prevention) (Amendment) Act 2013, empowers law enforcement agencies to arrest and prosecute perpetrators of terrorist activities in Nigeria. The law has

[84] The Terrorism (Prevention) Act, 2011, s1(3).
[85] Ibid s2(1)(a)(b)(c).
[86] The Terrorism (Prevention) (Amendment) Act, 2013, s1(2).

engendered the arrest and prosecution of terrorist suspects. There are currently several cases of terrorism being tried at the Federal High Court of Nigeria.

5.0 BELEAGURED WOMEN IN NORTH-EASTERN NIGERIA: PILLAGED, PLUNDERED AND STRIPPED?

Women in north-eastern Nigeria have experienced a multiplicity of issues ranging from poverty, deprivation, marginalization, violence, and discrimination. The situation of women is exacerbated by the upsurge of armed conflict against the state, following the formation of Boko Haram. The plight of women in North-eastern Nigeria is picturesquely captured as follows:

'The prevalence of sexual violence within the Boko Haram crisis has been widely reported in humanitarian assessments, human rights reports and media coverage from the early days of the insurgency. Boko Haram's abuses against women and girls, including abduction, forced conversion to Islam, physical and psychological abuse, forced labour, forced participation in insurgency operations and forced marriage, rape, and other sexual abuse have inspired fear among local communities in the north-east Nigeria and contributed to the group's notoriety, both within the region and globally. However, while Boko Haram's violence against women and girls has been at the centre of public attention to the crisis, delivering protection and support for women and girls has been an ongoing challenge in the humanitarian response.'[87]

Since Nigeria's transition to democratic governance in 1999, Boko Haram's abuses against women have been prevalent. The belligerent group forcefully conscripts women as fighters in armed conflict. During captivity, virtually all women were raped and subjected to sexual slavery. Female captives were also denied food, forced to carry weapons of the terrorists, forced to cook, and deprived of sleep. Girls were used by Boko Haram to carry out majority of the suicide bombing attacks.[88] Thus the women were used as

[87] Humanitarian Practice Network (HPN), 'Sexual Violence and the Boko Haram Crisis in North-East Nigeria'<https://odihpn.org/magazine/sexual-violence> accessed 19 July 2019

[88]Mia Bloom and Hilary Mattess, 'Women as Symbols and Swords in Boko Haram's Terror' <http://cco.ndu.eduprism> accessed19 July 2019.

instruments of warfare and gruesomely denied their right to life. They were often killed after carrying out such attacks. The watershed in the spate of attacks against women and girls became exacerbated by the abduction of school girls in Chibok, a town located in Yobe State, Nigeria, where Boko Haram insurgents forcibly removed 276 girls from a public secondary school in Chibok town. Over the years, 107 girls have been found or released mainly through a deal between the Nigerian government and Boko Haram whilst the rest remain unaccounted for in the hands of the insurgents. Most of the abducted women and girls are being used as sex slaves and for conducting suicide bombings. The terrorist group has frequently attacked schools, mosques, churches, markets, police stations, and military facilities. Boko Haram mainly conducts its operation in a large area called Sambisa forest, which is situated in Borno State.[89] Similarly, in February 2018, a total of 110 girls were kidnapped from a boarding school situated in Dapchi, Yobe State. Over a hundred girls have been released but five other girls died in the process while one other girl known as Leah Sharibu, a Christian, is being held captive, for refusing to convert to Islam.[90]In June 2018, it was reported that 84 persons were killed in double suicide bomb attacks attributed to Boko Haram at a Mosque in Mubi, Adamawa State. About 12000 people have been killed and almost 200,000 persons were displaced in the north-east.[91] To a large extent, suicide bombings, abductions, sexual exploitation of women, and attacks on civilian targets by Boko Haram insurgents has negatively impacted the north-eastern region[92] in palpable contravention of international human rights principles and trite rules of IHL. Against this backdrop, it is evident that women have faced untold violation and monumental abuse of their fundamental human rights. They have been patently pillaged, plundered, and stripped, particularly, in north-eastern Nigeria. It is therefore expedient to review the obligations and responsibilities of state actors and non-state actors in order to engender respect for human rights and compliance with rules of IHL, especially as it

[89]Fidelis Mbah, 'Nigeria Chibok School Girls, Five Years on, 112 Still Missing' Aljazeera 14 April 2019<.https://www.aljazeera.com/news/2019/04/n> accessed 20 July 2019.

[90] British Broadcasting Corporation, 'Nigeria Dapchi Abductions: Schoolgirls Finally Home'<https://www.bbc.com/news/world-africa-4> accessed 20 July 2019.

[91] Human Rights Watch, 'Nigeria Events of 2018'<https://www.hrw.org/world-report/2019/c> accessed 20 July 2019.

[92] Ibid.

relates to the treatment of women in situations of non-international armed conflict in the Nigerian context.

6.0 RECONSTRUCTING AND RECALIBRATING THE OBLIGATIONS OF STATE ACTORS AND NON-STATE ACTORS IN SITUATIONS OF ARMED CONFLICT

This subhead is concerned with undertaking an overview of the primary obligations of states and non-state actors in situations of non-international armed conflict. It also focuses on basic responsibilities of states and non-state actors under international and domestic human rights law, particularly, in the Nigerian context with particular reference to the armed conflict in north-eastern region of Nigeria. It is pertinent to note that it is incumbent on all states, Nigeria inclusive, to prosecute non state actors who violate international humanitarian law. Both states and non- state actors are duty bound to adhere to principles of international humanitarian law in the course of armed conflict. Furthermore, this sub head explores strategies to be adopted towards ensuring that parties involved in armed conflict conform to the nuanced principles of both IHL and human rights law, particularly, within the purview of non-international armed conflict in the beleaguered north-eastern region of Nigeria.

6.1 The Obligations of States and Non-State Actors under International Humanitarian Law

Depending on the circumstances, international law stipulates that states are either obliged to punish non-state actors or cooperate with them.[93]Common Article 1 of the Geneva Conventions of 1949 obligates State parties to respect and ensure respect for the Conventions. State parties are bound to implement the provisions of the convention. It also stipulates that even if one of the parties may not be signatory to the convention, the state which is a high contracting party is obligated to remain bound by it in dealing with the belligerent group.[94] The same obligations apply in respect of the

[93] AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa 2009, Art 1 and Cotonou Agreement between the Members of the African, Caribbean and Pacific Group of States and the European Community and its Member States, 2000, Art 6 cited in Andrew Clapham, 'Non-State Actors' in Daniel Moeckli, Saneeta Shah, and Sandesh Silvakumaran (eds.) *International Human Rights Law* (Oxford University Press, 2010) 562.

[94]Geneva Conventions, 1949, Common Art 2.

Protocols Additional to the Geneva Conventions 1949.[95] Thus, in practical terms, Nigeria, being a party to the four Geneva Conventions 1949 and Protocol Additional to the Conventions, is bound to respect and take deliberate measures to ensure respect for the provisions of the IHL treaties, although Boko Haram is not a party to the treaties. In furtherance of the objective to make sure other parties to an armed conflict respect the provisions of the conventions, innovative strategies need to be adopted. However, it is pertinent to point out that Boko Haram disregards western education and may, in principle, not be inclined to comply with treaties that are perceived to be products of western civilization or ideology. In retrospect, it had been reported that the Minister of Information, Mr Lai Mohammed, disclosed on the 25th March 2018, that the government had been negotiating with members of the Boko Haram in order to end hostilities.[96] Boko Haram is reportedly divided into two factions, one is led by Abubakar Shekau (it has been speculated that he was killed recently) and another by Abu Musab Al-Barnawi. The report further revealed that the Nigerian government had attempted to engage in negotiations with Boko Haram but the Shekau led faction has rejected negotiations while the Al-Barnawi led faction is open to negotiation.[97] Campbell opines that 'it is likely that any negotiations by the government would be with the Al-Barnawi faction.'[98]However, it would appear from all indications that the Nigerian government has changed its stance from negotiation to the use of force. This view is premised on the fact that the federal government of Nigeria recently asserted that it will not negotiate with Boko Haram Terrorists.[99] Accordingly, Mr. Babagana Monguono, the National Security Adviser, stated in a press conference that 'the Nigerian government does not see negotiations as a means to deal with the worsening security conditions in the country.'[100] Nonetheless, it is expedient to enlighten members of the Boko Haram, through an acceptable neutral party, on the need to abide by the principles of IHL, which in many respects, is in sync

[95]Protocols Additional to the Geneva Conventions 1949, Arts 1 and 2.

[96] John Campbell, 'Nigerian Government has been Negotiating with Boko Haram for Some Time' 28 March 2018 Council on Foreign Relations <https://www.cfr.org/blog/> accessed 29 June 2021.

[97] ibid.

[98] ibid.

[99] Adam Abu-bashal, 'Nigeria Says No Negotiations with Boko Haram Terrorists' 12 March 2021 <https://www.aa.com.tr/> accessed 29 June 2021.

[100]ibid.

with Islamic approach regarding the means and methods of armed conflict. For instance, it has been asserted that sharia recognizes the principle of distinction between combatants and non-combatants and the recognition of women and children, including persons with disabilities, as protected persons[101] who must be treated humanely. It is therefore incumbent on the Nigerian government to continuously engage in dialogue with Boko Haram in order to explore the possibility of bringing the protracted conflict to an end and to ensure that women and girls held in captivity are released safely. Government should also ramp up internal security to prevent reoccurrence of disappearance of women and the lacerating violation of their rights. There is also need for both parties to comply at all times with the rules of IHL, especially, taking cognizance of the desideration of protecting vulnerable groups such as women and children in situations of armed conflict. It is noteworthy that the Geneva Conventions of 1949 have attained ratification by virtually all states in the world.[102] It is trite law that many of the provisions enshrined in the Geneva Conventions constitutes customary international law and are therefore considered binding on all states.[103] Taking cognizance of the fact that the Geneva Conventions form part of customary international law, members of Boko Haram do not need to be parties to be bound by its provisions. The principles therein are, to a large extent, peremptory norms of international law which state actors and non-state actors such as Boko Haram and other belligerent groups are obligated to observe. Moreover, Nigeria is a party to the Geneva Conventions and the country has duly ratified and domesticated same.[104] The provisions are therefore binding on all authorities and persons within the country in accordance with the provisions of section 12 of the Constitution of Nigeria 1999, as amended. Institutional and regulatory bodies such as the National Human Rights Commission, Ministry of Women Affairs, Ministry of Justice, should collaborate with UN agencies, including UN women, in order to ensure the effective implementation of the provisions of the Geneva Conventions of 1949, Additional Protocols, and rules of customary IHL. Where there is a breach of the provisions of IHL, the state should take

[101] Javaid (n 45) 767.

[102] Steiner, Alston and Goodman (eds.), International Human Rights in Context: Law, Politics, Morals (Oxford University Press 2008) 1243-1345 cited in Javaid Rehman, International Human Rights Law (2nd edn. Pearson Education Limited 2010) 770.

[103] ibid.

[104] See the Geneva Conventions Act Cap G3 LFN 2004.

measures to effectively apprehend, prosecute and punish perpetrators, whether they are agents of the government or members of the Boko Haram. The International Committee of the Red Cross and other impartial bodies, such as UN agencies, should be engaged to assist in the education of parties to the conflict on the imperative of abiding by the rules of IHL and monitor due compliance.

Furthermore, it is trite law that 'all parties to an armed conflict – whether states or organized non-state armed groups are bound by treaties of IHL. The rules of customary IHL also apply at all times to all parties irrespective of their ratification of IHL treaties.'[105] It has been unequivocally restated that organized non-state armed groups are bound by the provisions of Common Article 3 of the Geneva Conventions 1949 and Additional Protocols II provided the state to which they belong is a party to the treaties.[106] It is therefore submitted that since Nigeria is a party to the Geneva Conventions 1949 and Additional Protocols to the Conventions, Boko Haram is inexorably bound to comply with the provisions of IHL. They are obligated to treat women humanely. They are specifically precluded from violating the life and person of women; they are to avoid taking women as hostages, refrain from sexual exploitation, rape, and denying women of their personal liberty. It is also pertinent that they release female captives, such as Leah Sharibu, whose deprivation of liberty is unmistakably founded on her faith contrary to the express provisions of Common Article 3 of the Geneva Conventions of 1949 and settled rules of customary IHL as well as principles of Islamic jurisprudence in situations of armed conflict, which clearly prohibits discrimination and maltreatment of women in such circumstances. Furthermore, it has been observed that the protection afforded persons deprived of their liberty is not elaborate and there is no prisoner of war status in non-international armed conflicts.[107] It is therefore imperative to review and recalibrate the Geneva Conventions and its Additional Protocols or formulate further Additional Protocols to provide comprehensive details on the treatment of persons deprived of their liberty, their material conditions, and the need to grant a special status of 'prisoner of war' to members of armed forces or belligerent groups such as Boko Haram members, who have been captured during armed conflicts. Between October 2017 and July 2018, the government in collaboration with

[105]International Committee of the Red Cross (n 19) 31.
[106] ibid.
[107] International Committee of the Red Cross (n19) 45.

relevant agencies conducted three rounds of criminal proceedings in which over 1500 Boko Haram suspects were tried in a military base situated in Kainji, Niger State. Some of the accused persons were in detention since 2009. Majority of them faced charges ranging from membership of Boko Haram to rendering support to the group. Some of the accused persons were made to undergo a period of rehabilitation, pursuant to the government policy of rehabilitating and reintegrating members of Boko Haram. The criminal trials were, however, reportedly 'fraught with irregularities, including lack of interpreters, inadequate legal defence, lack of prosecutable or admissible evidence or lack of credible witnesses.'[108] Some of the defendants were discharged and acquitted owing to lack of evidence against them.[109] States and non-state actors have enormous obligations to ensure the observance of under international law in any given situation.

6.2 The Responsibilities of States and Non-State Actors under International and Municipal Human Rights Law

States are regarded as the most significant legal persons and the epicenter of international relations and social activities under international law.[110] States are the main duty bearers of human rights obligations under customary international law. They are generally vested with responsibilities under human rights treaties.[111] Article 2(1) of the International Covenant on Civil and Political Rights 1966[112] obligates each state party to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights enshrined in the Covenant. Similarly, under the Convention on Elimination of All Forms of Discrimination against Women 1979, states are mandated to guarantee women the exercise and enjoyment of human rights and fundamental freedoms on equal basis with men.[113] In the same vein, the Protocol to the African Charter on Human and Peoples Rights on the Rights

[108] Human Rights Watch (n 69)

[109] Paul Adole Ejembi, 'The Crescendo of Terrorism Circumscribed by the Burgeoning Tapestry of Counter Terrorism and Human Rights Issues in Nigeria' [2019-2020] Nigerian Current Law Review 288-289.

[110]Malcom N. Shaw, *International Law* (6 edn. Cambridge University, 2008) 197.

[111] Sarah Joseph, 'Scope of Application' in Daniel Moecli et al (eds.) (n86) 151.

[112]International Covenant on Civil and Political Rights (Adopted by the General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 23rd March, 1976)999 UNTS 171 (ICCPR).

[113] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, art 3.

of Women in Africa, 2000, requires States Parties to combat all forms of discrimination against women through appropriate legislative, institutional and other regulatory measures.[114] Accordingly, it is incumbent on Nigeria, being a State party to the preceding treaties, to guarantee the promotion and protection of the human rights of women. At the domestic level, the state is under obligation to protect the fundamental human rights enshrined in Chapter IV of the Constitution of the Federal Republic of Nigeria 1999, as amended. The Constitution clearly gives citizens the latitude to seek redress in court where any of the human rights articulated under Chapter IV of the Constitution has been, is being, or likely to be contravened.[115] Therefore, the government has the onerous task of ensuring that the rights of women are adequately protected in all parts of Nigeria, including the north-eastern zone.

By and large, non-state actors are expected to promote and protect human rights.[116] They are viewed as having the potential of either violating or promoting human rights. Human rights were traditionally founded on the exclusive obligations of states rather than non-state actors. Although there are agitations to hold non-state actors accountable for human rights obligations, such views have been vehemently opposed on the ground that if non-state actors are granted human rights obligations, it would impliedly accord them state like status and tacitly bequeath them legitimacy under international law.[117] Clapham has, however, argued that to resolve this challenge, human rights violations perpetrated by armed opposition groups should be highlighted and brought to the fore as a means of delegitimizing them. This stance is further buttressed as follows:

'The problem of legitimizing armed groups evaporates if we decouple human rights from the idea that human rights supposedly emerge from an essential link between government and their citizens. When we see human rights as rights rather than self-imposed governmental duties, and when we envisage the rights project as founded on better protection for human

[114]Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, 2000, art 2.
[115] Constitution of the Federal Republic of Nigeria 1999, as amended, s46(1).
[116]Clapham (n86) 562.
[117] ibid.

dignity rather than privileges granted by states, we can start to see how we might imagine human rights obligations for non-state actors.' [118]

In the light of the foregoing, there is need for a paradigm shift from the traditional notion of holding states exclusively responsible for human rights violations whilst the actual perpetrators go scot-free, especially under the international law. It is posited that human rights jurisprudence and treaties should be reviewed to accord non-state actors the status of bearers of human rights obligations. By so doing, non-state actors such as Boko Haram, can be held directly accountable for violations of human rights.

7.0 CONCLUSION

Beleaguered women in north-eastern Nigeria, particularly in Borno and Yobe States, have suffered daunting challenges, including murder, sexual exploitation, rape, abduction and various forms of human rights violations, sequel to the establishment of the Boko Haram terrorist group and the ensuing armed conflict between them and agents of the state. This article has appraised a plethora of rights and privileges aimed at promoting and protecting women under IHL, particularly, in situations of non-international armed conflict and international as well as domestic human rights law. However, it has been indicated that although Nigeria is a party to apposite international treaties such as the four Geneva Conventions of 1949 and Additional Protocols to the Geneva Conventions as well as international human rights treaties, Boko Haram has flagrantly breached their obligations and have violated the rights of women in a most despicable manner. It has been recommended that Nigeria should domesticate relevant treaties to enable them have the force of law in the country as required by the Constitution. Furthermore, regulatory agencies should be established to monitor compliance with the treaties. The article has made a case for continuous negotiations with Boko Haram to release the women held in captivity and to enlighten them on the exigency of abiding by the rules of IHL, which is in sync with Islamic approach to armed conflict (an ideology ostensibly espoused by Boko Haram although this is debatable as other adherents of Islam have refuted their claims). The article further enjoined the Nigerian government to take adequate measures to arrest, prosecute and, where necessary, punish combatants, either within the ranks of the armed forces or Boko Haram group who are reasonably suspected of violating

[118] ibid

IHL. The article has espoused the imperative of recalibrating human rights jurisprudence and applicable treaties to hold belligerent non-state actors accountable for human rights violations. Furthermore, the article has advocated that IHL treaties in respect of non-international armed conflicts should be reviewed and further additional protocols should be established to explicitly grant combatants *hors de combat* as well as victims of armed conflict held in captivity the status of prisoner of war with comprehensive rules regarding their humane treatment, rights, and privileges as ordinarily applicable in international armed conflicts.

A REVIEW OF THE INTERNATIONAL CONVENTION ON OIL POLLUTION, PREPAREDNESS, RESPONSE AND COOPERATION

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Abstract

Oil pollution is a worldwide menace and several laws have been enacted to curb the effects it has on the seas and other water bodies. It was determined that it was not enough to have preventive laws; it was also essential to have preparedness and response measures put in place in case the preventive measures failed. This led to the adoption of the International Convention on Oil Pollution Preparedness, Response, and Cooperation, 1990. The Convention encourages partnership amongst State parties to curb oil pollution immediately it is discovered. It recognises the fact that States are bound by water boundaries and the oil pollution suffered by one State party may also be suffered by other neighbouring State parties. Thus, it is essential that there is a measure of preparedness, response and cooperation amongst States, in the event that oil pollution occurs. This paper reviews the provisions of the Convention as well as the position of some State parties to the Convention.

1. INTRODUCTION

The level of sea pollution traced to ships has been a huge concern and was in fact one of the highest priority issues discussed in the Mediterranean Action Plan of 1975.[1] It has been estimated that, on an annual basis, about

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[1]A. Carpenter, P. Donner and T. Johansson, 'The Role of REMPEC in Prevention of and Response to Pollution from Ships' in the Mediterranean Sea in Angela Carpenter and AG Kostianoy (eds), Oil Pollution in the Mediterranean sea: Part I: The International context (Springer International Publishing 2017)

220,000 vessels carrying over 100 tonnes of petroleum products (which makes up 20% of annual volume of petroleum traded worldwide) ply the Mediterranean Sea route, which is one of the major routes of sea trade transportations because of its strategic location between Asia, Africa and Europe.[2] This means that, at any given time, there are approximately 2,000 commercial ships and about 250 oil tankers travelling through the Mediterranean.[3] A research by Galil[4] says that there was a very high estimate of oil spill in the sea in the 1970s and that between 500,000 and 1 million tonnes of oil were spilled into the Mediterranean annually but that the figures reduced drastically after the adoption of oil pollution preventive conventions like the International Convention on Prevention of Pollution from Ships.[5] A survey of the past 20 years has revealed that some 150 accidents have resulted in a total of more than 70,000 tons of oil polluting the sea;[6] Transportation of goods through sea has increased since the beginning of the twenty-first century;[7] the resultant effect is that there is an increased risk of pollution, especially, through oil products. This is one of the reasons why stringent oil pollution strategies have to be taken seriously to protect the ecosystem, especially, in light of the promotion of sustainable development goals. Water has a universal way of connecting the world. So, what affects the water in one axis of the world is likely to affect the sources of water in other axis of the world, whether directly or indirectly. As a result, in the last half of a century, there have been several environmental treaties and agreements that have been entered into by States likely to be affected by oil pollution incidents. One of such treaties is the International

[2]Mediterranean Action Plan (MAP) Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea (REMPEC), Study on the Trends and Outlook on Marine Pollution, Maritime Traffic and Offshore Activities in the Mediterranean. REMPEC/WG.51/INF.3 (March 22, 2021)

[3] B.S Galil, 'Shipping Impacts on the Biota of the Mediterranean Sea' (2006) National Institute of Oceanography, Israel Oceanographic & Limnological Research 39

[4]ibid

[5]International Convention for the Prevention of Pollution from Ships 1973 (MARPOL 73/78)

[6]Israel Ministry of Environmental Protection, 'International Conventions' <www.sviva.gov.il/English/env_topics/InternationalCooperation/IntlConventions/Pages/OPRC.aspx> accessed 25 July 2021

[7]Mediterranean Action Plan (MAP) Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea (REMPEC), Study on the Trends and Outlook on Marine Pollution, Maritime Traffic and Offshore Activities in the Mediterranean. REMPEC/WG.51/INF.3 (March 22, 2021)

Convention on Oil Pollution Preparedness, Response, and Cooperation, 1990.

In October 1989, a resolution was adopted at the 16th Assembly of the International Maritime Organization 'to convene an international conference to consider the adoption of an international convention on oil pollution preparedness and response'.[8] The conference held in London at the International Maritime Organization headquarters from 19th to 30th November, 1990 and had participants representing 90 States, including Nigeria, and observers from three other States.[9] Nigeria's participation held greater importance as a Nigerian representative was elected as one of the six Vice-presidents of the conference.[10] At the end of the conference, the *International Convention on Oil Pollution Preparedness, Response and Co-Operation*, 1990; often referred to as the OPRC, was concluded and adopted on 30 November 1990 but it did not enter into force until 13 May 1995.[11]

Prior to the conference which brought about the OPRC, there was a convention that aimed to prevent further sea pollution - the *International Convention for the Prevention of Pollution from Ships 1973* as amended by its protocol of 1978 and commonly known as *MARPOL 73/78*. Its focus was on preventive measures that could help avoid oil pollution incidents on the sea. MARPOL aimed at preventing and minimizing, pollution from ships of any kind, whether accidental or operational.[12] However, a lapse in the provisions of the MARPOL was that it lacked preventive and response provisions. There is a common saying that prevention is better than cure;

[8]International Maritime Organisation, 'Safety Zones and Safety of Navigation Around Offshore Installations and Structures' 16th Assembly Resolution A.671(16) (October 19, 1989); United Nations, 'Treaty Series: International Convention on Oil Pollution Preparedness, Response and Co-Operation' (1995) Vol 1891

[9]International Maritime Organisation, 'OPRC Convention: International Convention on Oil Pollution Preparedness, Response and Co-Operation' (IMO Publication 1991)

[10]Ibid

[11]International Marine Organization, 'International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC)' (2019) <www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Oil-Pollution-Preparedness,-Response-and-Co-operation-(OPRC).aspx> accessed 25 July 2021

[12]Lloyd's Register, 'International Convention for the Prevention of Pollution from Ships' (2021) <www.lr.org/en/marpol-international-convention-for-the-prevention-of-pollution/> accessed 25 July 2021

while that is true, one cannot totally rule out the possibility of an accident that would eventually need to be cured. What happens when this accident that occurs on international waters is likely to affect more than one sovereign jurisdiction? Whose responsibility is it to respond to the accident with a cure? What happens when one or more of the affected jurisdictions are not financially and technically able to adequately respond to the accident? All of these are questions that MARPOL did not make provision for. Then, there arose a need to have a convention that addresses these lapses and aids States to make adequate preparation for oil pollution incidents as well as have response procedures and mechanisms in place to report pollution incidents. Hence, the need to have the OPRC as a multilateral agreement that would help parties partner together to tackle such incidents.[13]

The OPRC has been defined as 'an international convention that aims to establish a programme of exercises for oil pollution response organizations and training of relevant personnel'.[14] It is also a platform that forms a foundation for the IMO to develop a comprehensive training programme in cooperation with other interested governments and industries; the intended programme would ensure the participation of governments with pollution incidents.[15]

An overview of the OPRC shows the objectives, the intents and purposes of IMO and the parties, as well as the problem they sought to tackle and the solutions arrived at. The OPRC and its Protocol of 2000 sought to provide and indeed provides a framework for the development of States' capacity to prepare for and respond to pollution incidents caused by oil, hazardous and noxious substances.[16]

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[13]Government of Canada. 'International Convention on Oil Pollution Preparedness, Response, and Cooperation' (2020) <www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/convention-oil-pollution-preparedness-response-cooperation.html> accessed 25 July 2021

[14]International Maritime Organisation, 'International Convention on Oil Pollution Preparedness, Response and Cooperation' (2014) <www.biodiversitya-z.org/content/international-convention-on-oil-pollution-preparedness-response-and-co-operation-oprc> accessed 25 July 2021

[15]ibid

[16] P, Charlebois, 'The Role of International Instruments in Addressing Prevention, Preparedness and Response to Oil Pollution and the Extension of these to Address the

States that are parties to the OPRC are required to set up measures, either as a nation or in cooperation with other countries, which would help them deal with pollution incidents when they occur.[17]

2.0 CONCEPT OF POLLUTION

Pollution has been defined as 'the addition of any substance (solid, liquid, or gas) or any form of energy (such as heat, sound, or radioactivity) to the environment at a rate faster than it can be dispersed, diluted, decomposed, recycled, or stored in some harmless form'.[18] It has also been defined as 'the process of making air, water, soil, etc. dirty; substances that make air, water, soul, etc. dirty'.[19]

The major types of pollution regularly recorded are air pollution, water pollution and land pollution. The effect of pollution is almost always a damage to the ecosystem, whether in the air, on land or in water. The focus of the OPRC is to respond to water pollution. Water pollution occurs when bodies of water are contaminated by harmful chemicals, bacteria or other hazardous substances. Water pollution affects the world population the most because contamination of water means a reduction in access to clean water in the community affected. While affected communities are usually found in the undeveloped and developing countries, in contrast, water pollution is majorly caused by corporate entities of the developed countries. The main element of water pollution that is being discussed in the world today is oil and related substances. Attempts to introduce effective prevention procedures have been discussed for years and measures of prevention have been adopted but all such measures have not yielded a total and effective result. Water pollution is still a problem in the world today. In

Challenge of Hazardous and Noxious Substances (HNS)' (2008) International Oil Spill Conference Proceedings 73

[17]International Marine Organization, 'International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC)' (2019) <www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Oil-Pollution-Preparedness,-Response-and-Co-operation-(OPRC).aspx> accessed 25 July 2021

[18]Nathason J. A, 'Pollution' <www.britannica.com/science/pollution-environment> accessed 25 July 2021

[19]Oxford Advanced Learner's Dictionary. (6th ed.)

acknowledgement of this, and in recognition of the fact that even the strictest measures of prevention cannot totally phase out water pollution, the OPRC seems like an effective tool in reducing the damage suffered by the various communities affected.

3.0 AN OVERVIEW OF THE OPRC, 1990

The Convention consists of a total of 19 articles and an Annex of 4 paragraphs. In March 2000, there was an addition to the OPRC; since the OPRC was only created to tackle oil related pollution problems, state parties considered a protocol that would address pollution incidents caused by hazardous and noxious substances, which are also a threat to marine life and the ecosystem as a whole. The protocol to the Convention was formally adopted by State parties to the OPRC at the headquarters of the International Marine Organization in London. it is titled *Protocol on Preparedness, Response, and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, 2000 (OPRC-HNS Protocol)*. It entered into force on 14 June 2007. The OPRC-HNS Protocol was an expansion of the scope envisaged by the OPRC which had been in force since 13 May 1995; it was created to apply to pollution incidents caused by hazardous substances.[20]

The needs identified by states parties leading to the adoption of the OPRC contains salient points which are summarized below:

- Oil pollution incidents caused largely by ships and related facilities is a threat to marine life
- There is an urgent need to preserve the human environment and marine life
- Recognizing that even though there is a real importance of enforcing the precautionary measures already in place through conventions especially the International Convention for the Safety of Life at Sea, 1974, as amended, and the International Convention for the Prevention of Pollution from Ships, 1973, as modified by

[20]International Maritime Organization, Report of the Joint Wmo/Ioc Technical Commission for Oceanography and Marine Meteorology (Jcomm) Expert Team on Marine Accident Emergency Support (first session), Angra Dos Reis, Brazil (29 to 31 January 2007)

the Protocol of 1978; the relevance of precautionary measures, preparatory and response measures are even more relevant.

- The relevance of cooperation measures between states cannot be underrated as developing and technologically poor states with special needs can learn from the advanced states
- In accordance with the environmental principle of 'polluter pays', any company or facility that is responsible for polluting the water must be held liable for costs and compensation for damages caused in line with provisions of international instruments like the 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC)

As earlier noted, there is an annex to the convention and by virtue of article 1(2) of the OPRC, the Annex makes up an integral part of the Convention and any reference to the Convention also includes a reference to the Annex. The aim of the convention is targeted at controlling Ships and other water vehicles that carry oil bear a risk of polluting the water with the oil being carried on the vessels. However, by article 1(3) any Ship - warship, naval auxiliary or any other ship - operated, owned or used by a sovereign state is isolated from the control, provided that such ships are used for government non-commercial purposes for the time being and that the States that own the ships have adopted appropriate measures in ensuring that so far as is reasonable and practicable, those ships do not violate the provision and objectives of the convention.

As is common with every legal instrument, certain keywords connected and related to the use of the Convention area defined under article 2 of the OPRC. Amongst these keywords, the term 'Organization' was defined as far as the OPRC is concerned, to mean the International Maritime Organization (IMO), which is the founding body of the OPRC. Some other relevant words which were in constant use in the OPRC defined under this section are 'Oil', 'Oil Pollution Incident', 'Offshore unit', amongst others.

In accordance with the objectives and article 3 of the convention, oil pollution emergency plans are a necessary mechanism and every state party is to ensure that every ship bearing its flag should adopt and have on-board the oil pollution emergency plan made available by the International Maritime Organization. Furthermore, every such ship shall, while within the jurisdiction of another party, be subject to inspection by duly authorised

officers of that other party. To ensure that the authorized officers know the appropriate thing to do, every state party is expected to provide oil pollution emergency plans to operators of its offshore units and its Sea ports in accordance with the provision of article 6 of the Convention.

In the event that there is an oil pollution incident caused by either by a ship or an offshore unit, article 4 provides that such pollution should be reported in the soonest time possible. This article further stipulates the procedure required to be adopted while reporting oil pollutions. Every party is required to ensure that persons placed in charge of the ships bearing its flag and persons in charge of the offshore units, sea ports and oil handling facilities under its jurisdiction, report without delay, to the nearest coastal State or to the coastal State to whose jurisdiction the unit is subject, any discharge made by the ship or any event observed at sea involving a discharge of oil or the presence of oil. By the provision of article 4(1)(e), state parties should request that pilots of civil aircrafts who notice a discharge of oil or a presence of oil in the sea, should report without delay to the nearest coastal state. Pursuant to article 5, any State party that receives a report referred to in Article 4, is required to investigate such reports to determine if there is indeed an oil pollution incident and if it confirms that there is, it should determine the nature and possible consequences of such oil pollution incident. Upon ascertaining the nature and extent of the pollution, the State party is required to reach out to and notify all States likely to be affected by the incident with details of the oil pollution incident as well as details of the actions it has taken or intends to take to contain the pollution. Depending on the severity and nature of the incident, the party that got the report and other parties that are affected by the incident are required to make a report to IMO, stating details of the incident as well as appropriate measures that have been taken or intended to be taken to contain the pollution.

By article 6, each party is required to establish a national system of preparedness and response created to respond quickly to reports of oil incidents. The system must be in accordance with the minimum requirements laid out in article 6(1). Every party is also expected to make available details of its National Preparedness and Response System to the International Maritime Organization.

Another important objective of the OPRC is the need for international cooperation in response to pollution. Article 7 encourages parties to provide advisory services, technical support and equipment for the purpose of responding to an oil pollution incident, whenever another party affected by the incident so requests, however, any help rendered is totally subject to the capabilities of the party rendering the help. Also in line with the objectives of cooperation, article 8 provides that results of research and development programmes relating to the enhancement of the state-of-the-art oil pollution preparedness and response undertaken by any State party should be exchanged with other parties. The essence of this is that when one party gains a piece of knowledge through research that could be of help to others and shares it with others, it has saved the others the need to commence a research in that area. Resources for an intended research can then be diverted to other areas of research that would also be of worldwide benefit.

Also, in a bid to encourage international cooperation, article 9, which is similar to Article 7, provides for the technical cooperation of States that are well advanced and ahead of others with other states that have special needs. The advanced parties are encouraged to cooperate by providing technical assistance to the developing States who need help in training their personnel, accessing technical equipment and facilities as well as having other measures of preparedness and response to oil pollution incidents which they lack.[21]

International cooperation could be between two or more states; article 10 provides that bilateral and multilateral agreements showing cooperation in oil pollution preparedness and response could be made. Copies of such agreements are required to be transmitted to the IMO for record purposes. The rights and obligations of States parties under any other convention or international agreement are protected under article 11 of the OPRC.

As the regulatory organization, IMO has a part to play in managing and enforcing the OPRC; these functions in managing oil pollution preparedness and response are provided under article 12. While article 13 provides for an evaluation of the convention, article 14 states that an article or annex of the Convention can be amended and such amendments will enter into force by the acceptance of two thirds of the parties to the OPRC.

[21]OPRC

In the event that any party does not assent to the amendment, that party shall be treated as a non-party only for the purpose of the application of such amendment.

Under article 15, a period of one year from the date of the adoption was given to allow interested states sign the convention and afterwards states could deposit instruments of ratification, acceptance, approval or accession with the Secretary-General. By signature, ratification, acceptance, approval and accession, whether or not subject to a reservation, a party shall be considered a party of the convention.

According to Article 16, the convention was created to enter into force 12 months after at least 15 States had either signed the Convention without reservation as to ratification, acceptance or approval or had deposited the requisite instruments of ratification, acceptance, approval or accession. By article 17, states that have become parties by reason of signature, ratification, acceptance or accession can denounce their membership of the OPRC after the expiration of 5 years of their becoming parties, provided that a notification in writing is sent to the Secretary-General. Such denunciation can only become effective 12 months after the receipt of the notification by the Secretary-General or after the expiry of any longer period, which may be indicated in the notification.

The office of the depositary lies with the Secretary-General who shall ensure that Parties are informed of any new signature, ratification, denunciation and the date of entry into force of the convention. The Secretary-General of IMO is also expected to transmit to the Secretary-General of the United Nations a Certified True Copy of the convention for registration and publication in accordance with Article 102 of the Charter of the United Nations.[22]

Considering that there are multiple global languages and in order to accommodate every state, the OPRC was published in the major world languages, which are the Arabic, Chinese, English, French, Russian and Spanish languages.[23]

[22](OPRC, art. 18)
[23](OPRC, art. 19)

As earlier stated, capable states are enjoined to cooperate with and assist those with special needs. This would usually be of extra cost to them. In consideration of this, the Annex to the convention makes provisions for the reimbursement of costs of assistance expended by one party while assisting another.

As already discussed, the OPRC has a protocol. The Hazardous and Noxious Substances Protocol (HNS Protocol) was adopted to add to the objectives of the OPRC, pollution incidents caused by Hazardous and Noxious substances and its provisions are similar to the OPRC. What constitutes hazardous and noxious substances (HNS) is defined under art. 2(2) of the Protocol as 'any substance other than oil which, if introduced into the marine environment, is likely to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea'.

The HNS Protocol aims to provide a framework that will aid the co-operation of States in tackling incidents and issues that arise from the pollution of water caused by hazardous and noxious substances. Just as provided in the OPRC, in order to achieve the objectives for which the protocol was enacted, parties are required to ensure that appropriate measures for tackling pollution of the water bodies are put in place and to ensure that there is a conscious effort to achieve a state of purity in the water, either as a nation or in cooperation with other countries. Ships carrying hazardous and noxious substances are also required by the provisions of the HNS Protocol to abide by the preparedness and response regimes which are similar to those already in place for oil incidents.[24]

The HNS Protocol is very important especially to less developed countries because it was common for corporate entities in developed countries to dump their waste in developing countries. Most of the time, the waste is hazardous and toxic to the human health and is often transported via the international waterway. While the HNS protocol aims to prevent ships from accidentally or intentional dumping hazardous waste in the sea, there are some other international instruments that prevent the international movement of hazardous waste. It is better that it is not transported at all than

[24]E. Akabogu, 'Cleaner Waters: Legal Issues in Nigerian Marine Environmental Management' (2017) 1(1) The Nigerian Journal of Maritime Law 42

risk having it transported and dumped at sea. One such convention is the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes* 1989. The main aim of the Basel convention is to restrict transboundary movement of hazardous waste thereby protecting human health and the environment at large.[25] It was in recognition of the fact that companies in advanced countries were likely to dump hazardous waste in less developed countries, believing that there would be no outrage against it. The 1988 Koko incident in Delta State, Nigeria and the Khian Sea waste disposal incident were two of the very important incidents that led to the consideration of a convention to ban trans-boundary movements of hazardous wastes. The Koko incident was so dangerous to human health that it sparked international attention and made headlines worldwide. A ship from Italy dumped tonnes of hazardous waste disguised as raw materials in a community offering to pay $100 a month as storage fees. The decision to accept this offer led to the sickness, diseases and premature deaths of many in the following months. The indigene in whose compound the waste was stored eventually died of cancer.[26] A convention like the Basel convention makes it easier for the HNS protocol to be enforced because there would be fewer vessels transporting hazardous wastes unlike the thousands of oil vessels that can be found on the sea at any time of the day.

3.1 The Role of the International Maritime Organization under the Convention

The OPRC empowers the International Maritime Organization (IMO), as the founding body, to act as the coordinating authority.[27]IMO is a specialized agency of the United Nations. It is tasked with the responsibility of ensuring the safety of international waters from pollution and the security

[25]United Nations Environmental Programme, 'Basel Convention: Controlling Transboundary Movements of Hazardous Wastes and their Disposal' <www.basel.int/TheConvention/Overview/tabid/1271/Default.aspx> accessed 30 July 2021

[26]Liu, S. F, 'The Koko Incident: Developing International Norms for the Transboundary Movement of Hazardous Waste' (1992) 8(1) Journal of Natural Resources & Environmental Law 121

[27]International Marine Organization, 'International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC)' (2019) <www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Oil-Pollution-Preparedness,-Response-and-Co-operation-(OPRC).aspx> accessed 25 July 2021

of ships and port facilities. Igbogi[28] mentions that IMO's main role is 'to create a regulatory framework for the shipping industry that is fair and effective, universally adopted and universally implemented'. IMO, as the primary international organization responsible for maritime issues, has a critical role to play in ensuring that the international network for the response to incidents involving pollution from oil and hazardous and noxious substances, as well as fire and explosion incidents that may result in an accidental release, is always ready to kick off a timely and efficient response.[29]

The role of IMO as a regulatory body of the convention states under article 12 of the OPRC and article 10 of the HNS protocol as follows:

- receive, collate and disseminate information provided by parties
- provide assistance in identifying sources of provisional financing of costs
- promote training in the field of oil pollution preparedness and response
- promote the holding of international symposia
- facilitate the provision of technical assistance and cooperation in research and development in dealing with pollution among states
- provide advise to states establishing national or regional capabilities
- develop a response programme which would be adopted by states

It should, however, be noted that although the IMO has an important role to play in the oil pollution preparedness, response and cooperation procedures, it is not an operational organization and, therefore, has no direct responsibility for hands-on response to an incident.[30]

[28]Igbogi, E. G. 'IMO and ISPS Code Implementation in Nigeria' (2017) 5(3) The Voyage 10

[29]International Maritime Organization, Report of the Joint Wmo/Ioc Technical Commission for Oceanography and Marine Meteorology (Jcomm) Expert Team on Marine Accident Emergency Support (first session), Angra Dos Reis, Brazil (29 to 31 January 2007)

[30]ibid

4.0 COMPLIANCE OF STATES PARTIES TO THE CONVENTION

Going by the provisions of the OPRC,'ships are required to carry a shipboard oil pollution emergency plan. Operators of offshore units under the jurisdiction of parties are also required to have oil pollution emergency plans or similar arrangements, which must be co-ordinated with national systems for responding promptly and effectively to oil pollution incidents'.[31]It is also an important requirement for ships who notice incidents of pollution to report same to coastal authorities and further actions expected to be taken thereafter are detailed in the convention. Furthermore, parties to the convention are required to provide reasonable assistance to others in the event of a pollution emergency and the annex to the convention makes provision for the reimbursement of any assistance provided.[32] Many countries that have advanced technologies have ensured that they follow the provisions of the convention to the letter and so there has been a reduction in oil pollution and the adverse effects that arise therefrom since the beginning of the 21st century. There has been an impressive compliance to the provisions of the OPRC by its parties. Many of these parties partner, when the need arises, to combat oil pollution incidents.

A number of countries have put in considerable efforts to not only ratify the convention but in addition put in place some of the provisions they agreed to be bound by. An example is Canada. Canada ratified the convention on March 7, 1994 and, as provided by the convention, it became operational in Canada on May 13, 1995, the same day it entered into force internationally. As a party to the OPRC, Canada has fulfilled its own obligation to give effect to the provisions of the convention in its domestic laws and has thus enacted *The Canada Shipping Act 2001*, which domesticates and gives effect to the OPRC. This Act provides a legislative framework Canada that meets all the requirements under the OPRC. Currently, Canada is working

[31]International Marine Organization, 'International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC)' (2019) <www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Oil-Pollution-Preparedness,-Response-and-Co-operation-(OPRC).aspx> accessed 25 July 2021

[32]ibid

on the development of a HNS Regime in order to ratify the OPRC-HNS Protocol.[33]

According to the Canadian Government website, Canada has actively been doing the following:

Information services: manage, collect and provide information on marine oil spill incidents that might impact Canada or any other international partners.

2. Technical services: analyse the information provided by the Parties and relevant information provided by other sources and provide advice or information to States;
3. Technical assistance: facilitate the provision of technical assistance and advice, upon request of States faced with major pollution incidents.[34]

This is a commendable effort by Canada to ensure that the State is compliant with the provisions of the Convention.

Another country that is putting in efforts to be compliant with the OPRC is Israel. Israel ratified the Convention in 1999 and it was not until after 9 years of the ratification in June 2008 that it approved a National Contingency Plan for Preparedness and Response to Combating Marine Oil Pollution.[35] With these active steps, the Israeli government has definitely showed interest in the operation of the OPRC.

[33]Environment and Climate Change Canada, 'Compendium of Canada's Engagement in International Environmental Agreements and Instruments: International Convention on Oil Pollution Preparedness, Response, and Cooperation (OPRC) (2020) <www.canada.ca/content/dam/eccc/documents/pdf/international-affairs/compedium/2020/batch-7/convention-oil-pollution-preparedness-response-cooperation.pdf> accessed 30 July 2021

[34]Government of Canada. 'International Convention on Oil Pollution Preparedness, Response, and Cooperation' (2020) <www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/convention-oil-pollution-preparedness-response-cooperation.html> accessed 25 July 2021

[35]Israel Ministry of Environmental Protection, 'International Conventions' <www.sviva.gov.il/English/env_topics/InternationalCooperation/IntlConventions/Pages/OPRC.aspx> accessed 25 July 2021

Under article 6(2) of the OPRC Article 6(2), parties are enjoined to establish oil spill combating exercises, a detailed plan for dealing with pollution incidents and minimum level of pre-positioned oil spill combating equipment. There could be mock exercises that would serve as rehearsals to train and equip response officials on what to do and steps to take when an actual spill occurs. So many countries have been involved in conducting real and mock oil spill combating exercises. Some countries that oil spill contingency plans have been at the forefront of this process are Indonesia, Japan, Norway, United States of America, Denmark, Estonia, Finland, Germany, Poland, Lithuania, Russia and Sweden.[36]

5.0 COMPLIANCE OF NIGERIA AS AN AFRICAN STATE

The OPRC was designed to capture and improve the ability of nations to cope with an oil spill. It specifically ensures that each State establishes a rapid response emergency system to handle oil spills and further establishes a mechanism for international cooperation to deal with these incidents. Specifically, it requires members to:

- put in place a National Contingency Plan (NCP) and a national authority that would be responsible for implementing the plan;
- maintain stockpiles of oil spill equipment and conduct preparedness exercises;
- send a report to neighbouring countries and be ready to respond to requests for assistance from other countries in emergency response situations.[37]

It would seem that the convention was made for Nigeria and indeed oil producing African nations because the rate at which oil pollution is ignored in Nigeria is alarming. Although the OPRC is directed towards oil spill in the large seas where ships ply, Nigeria, apart from being a coastal state, has quite a large number of streams, creeks and rivers that are regularly being polluted by oil mining activities. Nigeria is one African country that has

[36]Palsson, J, 'Oil Spill Preparedness in the Baltic Sea Countries' (2012) 3 Baltic Master II 1

[37]Israel Ministry of Environmental Protection, 'International Conventions' <www.sviva.gov.il/English/env_topics/InternationalCooperation/IntlConventions/Pages/OPRC.aspx> accessed 25 July 2021

suffered a series of oil pollution incidents, majority of which has been neglected and not dealt with. The discovery of oil in 1956 has led to an influx of multinational oil companies coming in to make as much profit as they can from the nation's wealth. Since the discovery of oil till date, there has been a dearth in the enforcement of the numerous oil regulations prohibiting and limiting oil pollution incidents to the barest minimum. Oil companies take advantage of the fact that there is little or no enforcement of environmental laws, and heed to little or no caution in ensuring that their activities do not continue to pollute the Nigerian waters. In 2011, it was reported that devastating oil spills in the Niger Delta over the past five decades will cost $1billion to rectify and probably take up to 30 years to clean up.[38]

In compliance with the obligation of state parties as stated by the OPRC, Nigeria has established a national system under the National Oil Spill Detection and Response Agency Act, 2006[39] targeted at responding promptly and efficiently to oil pollution incidents, known as the National Oil Spill Contingency Plan for Nigeria.[40] In further fulfilment of its preparedness and response obligation under the OPRC, the Nigerian government has established an agency to implement this plan known as the National Oil Spill Detection and Response Agency.[41] It is the responsibility of NOSDRA to detect incidents of oil spill and promptly respond to it. As a state that is known worldwide for its oil polluted land and the rough consequences it has had on the Niger Delta region, it is laudable that there is a plan and an agency in place to enforce the objectives of the OPRC.

The *National Oil Spill Detection and Response Agency Act,* 2006 *(*NOSDRA*)* is an effort by the Nigerian government to simulate the provisions of the OPRC Convention. The Act has two regulations - the *Oil Spill and Oily Waste Management Regulations, 2011* and the *Oil Spill*

[38] J, Vidal, 'Niger Delta Oil Spills Clean-up Will take 30 Years, says UN' *The Guardian* (4 August 2011) <www.theguardian.com/environment/2011/aug/04/niger-delta-oil-spill-clean-up-un> accessed July 25, 2021

[39]NOSDRA Act, s. 5

[40]Kola–Balogun, J, 'Nigeria: Legal Aspects of International Environmental Protection - The Nigerian Oil Spill' (1997) <www.mondaq.com/Nigeria/x/2375/Knowledge+Management/Legal+Aspects+Of+International+Environmental+Protection+The+Nigerian+Oil+Spill> accessed 25 July 2021

[41]NOSDRA Act, s.1(1)

Recovery, Clean-up Remediation and Damage Assessment Regulations, 2011. The *Oil Spill and Oily Waste Management Regulations, 2011* provides under its regulations 7, 8 and 9 similar provisions to articles 3, 4 and 5 of the *International Convention on Oil Pollution Preparedness Response and Cooperation* 1990. The provisions are as follows:

7. Owners or operators of Facilities shall make provisions to prepare for and prevent the occurrence of oil spills or oily wastes discharges and put in place appropriate measures to respond to oil spills or oily wastes discharges in their areas of operations.

8. (1) The discharge of oil or oily wastes upon land or navigable waters in Nigeria by the owner or operator of a facility shall be reported to the Agency within 24 hours by the spoiler or Facility owner.
   (2) The oil spill or oily wastes discharge report shall be furnished to the Agency in an 'Oil Spill Report Firm's in accordance with the specifications contained in Appendix II-2 to these Regulations.
   (3) The report shall include such details as the Agency may from time to time prescribe in guidelines issued pursuant to these Regulations.

9. (1) A Joint Investigation Team ("the JIT"), comprising the owner or the operator of spiller Facility, representatives of the affected community, the State Government and the Agency, shall be constituted within 24 hours of the spillage notification to visit the location where the oil spillage or oil discharge occurred to investigate the cause and extent of the spillage.
   (2) A report of the findings of the JIT shall be written in the JIT Report Form prescribed by the Agency in the form and specifications contained in Appendix II-3 to these Regulations.

Regulation 4 of the *Oil Spill Recovery, Clean-up Remediation and Damage Assessment Regulations, 2011* has similar provisions and states the modes of reporting an incident of oil spill as follows:

4. (1) Any person who observes a spill or an oil slick at sea shall report to the facility owner, the Agency or any other related regulatory or security organization.
   (2) The owner or operator of such facilities shall quickly take measures to verify and confirm the incident and if the incident is confirmed to have occurred, the operator shall respond in accordance with OSCP/SPCCP of the facility.
   (3) The owner of an onshore or offshore facility shall within 24 hours notify the Agency of any spill from such facility.
   (4) The format for reporting oil spills shall be as prescribed in the First, Second and Third Schedules, respectively, to these Regulations.

These enactments make provisions for penalties on entities that fail to comply with the regulations. The NOSDRA ACT provides that a daily penalty of ₦500,000 be meted out on any party that fails to report an incident of oil spillage to the Agency within 24 hours[42]and a further penalty of ₦1,000,000 to parties who fail to clean up the impacted site.[43] The *Oil in Navigable Waters Act, 1968* stipulates that it is a finable offence for any person to discharge oil from a ship.[44]

All of these, from the establishment of NOSDRA to the creation of the national contingency plan and the regulations that seek to implement the report and response provisions of the OPRC, indicate a sincere intention of the Nigerian government to enforce the objectives of the OPRC. However, despite all of these regulations, it is still common sight to find oil polluted waters with little or no effort to enforce the domestic laws against the companies that cause the spill. The multinational oil companies are still having a field day, earning their millions of oil money while the host communities battle with poverty, polluted water unfit for drinking or fishing, polluted land unfit for farming and polluted air that causes several respiratory diseases. With nothing being done to curb the menace of oil spill, it would seem that the regulations are just for decoration in the libraries and a mere show of compliance with the OPRC. This does not

[42]NOSDRA Act, s. 6(2)
[43]NODRA Act, s. 6(3)
[44]Udo Udoma & Belo-Osagie, 'Oil and gas environmental protection laws in Nigeria' (2019) <www.lexology.com/library/detail.aspx?g=12565d6d-b473-4335-be0d-1bd34aa0e4de> accessed 25 July 2021

really speak well of a country that not only participated in the conference and was present at its adoption in 1990 but also had an active presence with its representative serving as one of the conference vice presidents. There needs to be a better approach to the enforcement of not only the OPRC but also the domestic laws. The country cannot continue to be known for its laxity in the enforcement of environmental principles, especially at a time when talks of sustainable development goals is a part of almost every discourse in the various sectors globally. If the Niger Delta people who are the primary victims of oil spill cannot boast of a sustained environment to hand over to their children, it shows that the state of the region's environment is in a deplorable state.

6.0 CONCLUSION: HOW EFFECTIVE HAS THE OPRC CONVENTION BEEN?

It is safe to say that in curbing the high rate of oil pollution incidents on the waterways, the OPRC has achieved a great success. The International Maritime Organization has performed its duties as the coordinating body and many of the parties have been compliant to a large extent. On the global stage, the OPRC has been really effective. As stated in the earlier part of this work, the cases of oil spill incidents has drastically reduced from an annual figure of almost a million tonnes in the 1970s to less than 100,000 tonnes in the 21st century. The difference and the effect it has had are really clear. However, we cannot exactly say the same has happened in Nigeria. While the country has taken advantage of the provisions of the OPRC and has created its own contingency plan and agency, there have been no visible results to show that the contingency plan and the agency are serving their purpose. There are still laments from victims at the domestic level. It only means that there has been no effort to enforce the provisions of the OPRC on the international waters within Nigeria's jurisdiction. It is even possible that the officials manning the sea ports and oil facilities do not know what is expected of them in response to oil spill incidents. Ships flying the Nigerian flag may also not know what is expected of them according to the OPRC. The country would need to do a review of its preparedness and response plan and make series of adjustments in order to fall in line with the progress other advanced states are making.

It is thus recommended that Nigeria incorporates the oil pollution preparedness and response provisions contained in the convention into its

national laws. Although, a part of those provisions reflect in the national laws, some major parts have been left unattended to. If this can be done, it will go a long way in preparing Nigeria for oil pollution incidents that are likely to occur in the Niger Delta area.

It is also recommended that Nigeria works on a smooth cooperation with neighbouring countries like Benin Republic, Togo and Ghana that are likely to be affected by oil pollution of the international waters. This is one of the objectives that the OPRC sought to achieve. Cooperation will further help the State combat oil pollution incidents effectively.

Although the Convention has been of a huge benefit to Nigeria in helping us design our own oil pollution preparedness and response laws, there is still a lot that needs to be done. The enforcement of the laws is still a dream that should be accomplished in the nearest future.

A LEGAL ANALYSIS OF THE CONCEPTS OF GENUINE LINK AND NATIONALITY OF SHIPS UNDER THE DOCTRINE OF FREEDOM OF THE HIGH SEAS

AGAMA, FERDINAND ONWE*

Abstract

International law of the sea comprises of two important sets of principles: to wit, the concept of the freedom of the high seas, which grants all States unfettered access to exploration and use of the high seas and the issue of jurisdiction regarding the implementation of policies designed to secure the basic common goals of shared use of the sea. Accordingly, State vessels have unrestricted rights to navigate upon the waters beyond the national jurisdiction of any State. However, a structure of regulatory instruments created through the concepts of nationality of ships and genuine link to the flag State has been established in international law. This is to ensure effective jurisdiction, control and compliance with regulations in respect to the application of these freedom by national vessels and ultimately circumvent misuse the exercise of this freedom may generate. Against this backdrop, this paper examines the role of these instruments in the effective implementation of the doctrine of freedom of the high seas in the current regime of the sea. This is achieved through doctrinal method. The paper found that the concepts of genuine link and nationality of ships has created a balance between the freedom of navigation and the maintenance of law and order on the high seas. Howbeit, the exact meaning and legal consequence of the lack of genuine link between a ship and the flag State is still unclear. The paper therefore recommends the proper review of the relevant laws for a legal guide to the interpretation and application of these concepts for maximum utilization of the benefits inherent in the doctrine of the freedom of the High Seas.

Keywords: Genuine Link, Nationality of Ship, Freedom of the Sea, Jurisdiction

1.0 INTRODUCTION

The twin concepts of genuine link and nationality of ships are very crucial in the utilization of the doctrine of the freedom of the high seas. They are established to maintain law and order in shipping industry in relation to exploration and use of the high seas. Consequently, the law[45] requires that each State shall set out the conditions for the grant of its nationality to vessels, for the registration of vessels in its territory, and for the right of such vessels to fly its flag. Ships therefore have the nationality of the State whose flag they are entitled to fly. Howbeit, the law further demands that there must exist a real connection or what is called 'genuine link' between the State and the ships flying its flag and that the State must exercise effective jurisdictional control in ships' administrative, technical and social affairs. The concept of genuine link was first codified in the Convention on the High Seas of 1958 and since its codification, the existence of a genuine link between a flag State and the vessels flying its flag, as well as the legal consequences of the lack of genuine link on registration of ship have been the subject of great controversy among States and legal writers'[46]. Such confusion or lack of consensus has persisted as a result of uncertainty in international law regarding the exact definition and meaning of the concept and, particularly, due to the dramatic divide between national interests in the existence of open registries[47]. The concepts of genuine link and nationality of ships were primarily intended as an economic and social link or connection between the owner of the vessel and the State of registration. This link was required as a prerequisite to vessels' registration in order to ensure compliance with the State's regulations and guarantee its effective control and jurisdiction over the activities carried out by its vessels, for maintenance of peace and order on the high seas.

Generally, under the law of the sea and for the purpose of law and order on the high seas, ships bear the nationality of the State whose flag they are

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[45]Convention on the High Seas, 1958, Art. 5 and the United Nations Convention on the Law of the Sea (UNCLOS)1982,Art. 91.

[46]A Andrea "The Genuine Link Concept in Responsible Fisheries: Legal Aspects and Recent Development", (2006) available in www.fao.org › …

[47]*Ibid*

entitled to fly. The nationality of a ship is a means or mechanism to assign any ship or vessel to a certain national regulation or jurisdiction, under whose laws the vessel is registered or licensed. However, for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between States and the ships that fly their flag. Granting of nationality to a ship normally begins with the recording and registration of the ship in the ship´s registry of the granting State and once this is done, the vessel acquires the right and the obligation to fly the flag of the State. On this basis, flag States are a very important instrument in International Maritime as they take the administrative authority and are responsible for the effective regulation of the affairs in the vessels that fly their flag. Such regulation may relate to labour relationships between owner and crew members, technical inspection or survey, certification, classification and safety, as well as environmental pollution matters. Pursuant to the provisions of the Conventions on the Law of the Sea, there must exist an authentic and real connection or relationship between a vessel and the flag State. For instance, *Article 91(1)* of the United Nations Convention on the Law of the Sea, 1982 provides that "every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag…" The Article also requires that "there must exist a *genuine link* between the State and the ship". Unfortunately, neither this article nor Article 5(1) of High Seas Convention has attempted any precise definition of the term 'genuine link' or what should be the legal consequences where no genuine link exists between the vessel and the flag State.

It is the objective of this paper based on the above facts, to provide an analysis of the concepts of genuine link and nationality of ship under international law of the sea, address any lacuna and show how the concepts can contribute in ensuring an effective utilization of the principle of the freedom of the sea and foster international cooperation on the high seas.

2.0 FREEDOM OF THE HIGH SEAS AND NATIONALITY OF SHIPS

The doctrine of the freedom of the high seas stipulates that these zones beyond national jurisdiction[48] are, in time of peace, open to all nations and cannot be subjected to national appropriation. This doctrine essentially limits States' rights and jurisdiction over the Seas to a narrow belt of sea surrounding their coastlines. Freedom of the Seas in time of peace has acquired general and wide acceptance over the centuries that we hardly recall that it was not so in the beginning. It was once accepted that the ships of one nation might lawfully search the vessels of another nation on the high seas even in time of peace.

However, under the rule of international law today, the high seas are open to all States, whether coastal or land-locked. Nevertheless, such freedom to use the high seas by all States is exercised under certain conditions laid down by the United Nations Convention on the Law of the Sea (UNCLOS), 1982 and other rules of international law[49]. Every State therefore has the:

(i) freedom of navigation;
(ii) freedom of over flight;
(iii) freedom to lay submarine cables and pipelines, subject to Part VI;
(iv) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
(v) freedom of fishing, subject to the conditions laid down in section 2; and
(vi) freedom of scientific research, subject to Parts VI and XIII[50].

The UNCLOS further stipulates that "these freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area"[51],There is, therefore,

[48]These include the water column beyond the Exclusive Economic Zone (EEZ), or beyond the Territorial Sea where no EEZ has been declared, referred to as the High Seas under Article 86 of the UNCLOS.

[49]United Nations Convention on the Law of the Sea (UNCS), 1982. Art. 87(1)

[50]*Ibid*

[51]*Ibid*, Art. 87(2)

absolute freedom of navigation upon the seas, outside territorial waters, whether in peace or in war, except as the seas may be closed in whole or in part by international action to facilitate the enforcement of international covenants. This right to use the high seas freely by all States is to be breached only in a necessary international agreement. The freedom of navigation relies on the wider concept of the freedom of the sea meaning that ships which sail under the flag of a State have the nationality of that State and the right to sail in the high seas, without interference by another State.

The first move to grant nationality to ships occurred as early as 1826 when Sweden, Norway, and Denmark entered into a treaty to this effect.[52]During the codification of laws concerning the attribution of nationality to persons by the International Law Commission in 1930, the concept of nationality was extended to ships[53]. Parties to the Treaty on International Commercial Navigation Laws had recognized the discretionary authority of a flag States to set the conditions under which to grant nationality to ships prior to the inception of the 1958 Convention on the High Seas[54]. The 1958 Convention pursuant to the provision under *Article 5(1)* eventually converted this doctrine into a general principle of international law. Although the right to grant nationality is exclusive, the right to fly the flag of a State is determined upon the registration of the ship in the territory of the flag State. Registration is an administrative procedure through which a State grants its nationality to a ship. This procedure comprises the documentation of a ship to evidence nationality of the flag State[55]. The essence of registration is to identify the nationality of a vessel operating on the high seas and to enable it to assert that national character wherever found and exercise the right to freely use the high seas.

[52]D Martens, 'Treaty between Sweden, Norway and Denmark', (1826) *Nouveaurecueil Des Traites,*
No. 2.1075.

[53]Convention on Certain Questions Relating to Conflict of Nationality Laws, signed at The Hague in 1930, 179 U.N.T.S. 89 (1930).

[54]S W Tache, 'The Nationality of Ships: The Definitional Controversy and Enforcement of Genuine Link', (1982) *16 Int'l L*301.

[55]R. R. Churchill, The meaning of the "genuine link' requirement in relation to the nationality of the ships, (Cardif: University of Wales, 2000)

2.1 Exceptions to the Doctrine of the Freedom of the High Seas

The connection and/or relationship between the principles of the freedom of the high seas and nationality of ships usually comes into focus when a ship sailing the high seas bears no national character or is involved in certain criminal activities such as piracy and slave trade and other crimes of international concern. These are considered as crimes against all and too serious to tolerate jurisdictional arbitrage and so, in the event of such crimes, any State can exercise jurisdiction over the ship under the doctrine of universal jurisdiction.[56]While the concept of the freedom of the seas permits vessel flying the flag of any State to sail the high seas unmolested, engaging in activities contrary to the rule of international law will constitute a qualification or exception to this high seas rule. The concept of the nationality of ships is established for proper identification, control and regulation of the activities of the vessels on the high seas. Therefore, in order to mete out the right punishment to the right person or State, ships must be registered and bear the nationality of a country to show proof of ownership. In addition, the law also requires that there exist genuine link or relationship between such ship and the registering State.

Where a ship commits international crime and contravenes the rules of international law regarding the use of the high seas, it may lose the protection afforded by the doctrine of freedom of the high seas. Committing international crimes such as maritime piracy, maritime terrorism, slave trade, trading in humans/immigrants and drug dealing as well as weapons of mass destruction exposes a vessel to the jurisdiction of any State, not minding that such is not its flag State.[57]The doctrine of the freedom of the high seas does not imply that every action is feasible in the sea without repercussions[58]. It follows therefore that the basic concept of the freedom of the high seas is limited by the operation of a series of exceptions, under

[56]This doctrine allows States or international organizations to exercise criminal jurisdiction over an accused person, irrespective of where the alleged crime was committed, and regardless of the accused's nationality, country of residence, or any other relation with the prosecuting entity.

[57]P H Khoei and M Abdollahi, "Limitations of the Freedom of Navigation on the High Seas" (2016) *Specialty Journal of Politics*, Vol. 1 60-66.

[58]*Ibid*

the international law of the sea[59]. The United Nations Convention on the Law of the Sea stipulates that 'ships shall sail under the flag of one State only and, save in exceptional, cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas'[60]. The implication of the above provision is that, once a vessel has a nationality of any State, it is free to sail the high seas and can only be subject to the jurisdiction and control of the flag State whose nationality it bears. However, the following circumstances will constitute exceptions to the doctrine of the freedom of the high seas:

1. Right of Visit

Under customary international law, warships are granted the right of visit which permits them to approach and ascertain the nationality of ships in the high seas, although this does not automatically crystalize into the right to board the ship. Some of the circumstances that might give rise to the right of visit are: where a merchant ship is engaged in piracy or slave trade, or, though flying a foreign flag or no flag at all, it is indeed of the same nationality as the warship or of no nationality at all. Such visit may be undertaken only in the absence of hostilities between the flag States of the warship and a merchant vessel and in the absence of special treaty providing to the contrary. Furthermore, the warship must always exercise some caution in the exercise of this right, since it may be liable to pay compensation for any loss or damage resulting from the visit, if its suspicions are unfounded and the ship boarded has not committed any acts that warrant such suspicions[61]

i. Hot Pursuit

The right of hot pursuit is a principle of international law which extends the jurisdiction of a coastal State onto the high seas to enable it pursue and capture a foreign ship which is reasonably suspected of infringing its laws. The principle is a deliberate design to ensure that a vessel which has contravened the laws of a coastal State does not capitalize on the doctrine

[59]M N Shaw, *International Law* (5thedn Cambridge: Cambridge University Press, 2004) p. 549
[60]UNCOS, Art. 92 (1)
[61]*Ibid,* Art. 110

of the freedom of the high seas to evade punishment by fleeing to the high seas[62]. The law requires that hot pursuit of a foreign ship may only be undertaken when the competent authorities of the coastal State have reasonable grounds to believe that the foreign ship has infringed the laws and regulations of that State. Also, hot pursuit can commence only when the pursuing ship has satisfied itself that the ship being pursued or one of its boats is within the limits of internal waters, territorial sea, contiguous zone or economic zone or on the continental shelf of the coastal State, and may only continue in that pursuit outside the territorial sea or such other zones if it is uninterrupted[63]. Where the pursuit commences while the foreign ship is in the continuous zone, it may only be undertaken or justified if there has been any form of violation of the rights for the protection of which the zone was established. However, in accordance with Article 111, paragraph 3 of the United Nations Convention on the Law of the Sea, 1982, 'the right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State'.

ii. Treaty Rights

States may enter treaty allowing each other's warships to exercise certain powers of visit and search any vessels flying the flags of any State which are signatories to the treaty[64].

iii. Pollution

Pollution represents another instance that may operate to limit the free use of the high seas as espoused by international law. States are enjoined to assume corporate responsibility or jurisdiction for the purpose of preventing pollution. In so doing, international law requires that States shall take, individually and jointly as appropriate, all measures consistent with the Conventions on the Law of the Sea that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this

[62]The doctrine of hot pursuit developed from customary international law and has been codified under Article 111 of the United Nations Convention on the Laws of the Sea, 1982 and *Article 23* of the Convention on the High Seas, 1958. See *inter alia* "I'm Alone Case" and the case of *R V. Mills & Others (1995)* the International and Comparative Law Quarterly, Vol. 44, No. 4, pp. 949-958.

[63]UNCLOS. Art. 111 (4).

[64]M N Shaw, (n10) p.552.

purpose the best practicable means at their disposal and in accordance with their capabilities. The law also enjoins States to endeavour to harmonise their policies in this connection[65].

The basic principle of the freedom of the high seas is therefore not absolute but made subject to several qualifications. Where a vessel on the high seas is without nationality or any of the circumstances as recognized by the relevant law arises, it will operate against the exercise of the rights to freely use the high seas under customary international law.

3.0 THE CONCEPT OF GENUINE LINK

Genuine link is a legal principle formulated as constituting a legal bond connecting an individual or a vessel with the State vesting upon him/it its nationality[66].The concept of genuine link presupposes the existence of an authentic and real connection or relationship between vessels plying the high seas and the Sate of registration whose flag they fly. Since the first introduction and codification of the concept of genuine link in the 1958 Convention on the High Seas, the issue surrounding its existence between the vessels and flag Sates whose flags they fly as well as the consequence on ship registration in the absence of this link have been a matter of serious controversy, both in international disputes' settlement and among legal writers[67]. The situation is made worse as a result of silence on the part of the Conventions on the Law of the Sea regarding the definitional meaning of the term "genuine link" and due to divergent national interests in the existence of open registries[68].Open registry States are those nations where the fixed conditions for ship registration are generally mild, flexible and without any regard to nationality[69]. Most of the open registry States are developing economy which lack the ability and resources to exert the required jurisdictional control over all the ships flying their flag. A situation which is contrary to the spirit and intendment of the concept of genuine link

[65]UNCLOS, Art. 194; 1958 High Seas Convention, Art. 24.

[66]*Liechtenstein v. Guatemala* (Nottebohm), 1955 I.C.J. 4.

[67]A. Andrea (n[2])

[68]A. Odeke, 'An Examination of Bareboat Charter Registries and Flag of Convenience Registries in International Law', (2005) *Ocean Development and International Law*, Vol. 36, No. 4, p. 339-362. A useful analysis of ship registration is found in this work.

[69]A. Andrea (n[17])

as giving rise to an increased number of illegal, unreported, unregulated (IUU) fishing vessels and other illegal activities in the sea. Genuine link was primarily intended as an economic and social connection and relationship between the owner of the vessel and the State of registration. The existence of genuine link was required as a precondition for registration of ships to enable flag States exercise effective control and jurisdiction over the activities carried out by its commercial vessels, especially on the high seas, where ships without nationality are prone to be boarded by foreign warships.[70]

3.1 History and Development of Genuine Link Principle

The concept of genuine link between flag State and ship has generated intellectual and political controversy since its inception at the 1958 Convention on the High Seas.[71]As we noted above, the concept was first codified in the Geneva Convention on the High Seas, 1958. On the concept, *Article 5(1)* of the Convention stipulates that:

Each state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the state whose flag they are entitled to fly. There must exist a genuine link between the state and the ship; in particular, the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

Interestingly, the later Convection also embraced and adopted the concept. Hence, in like manner, the United Nations Convention on the Law of the Sea (UNCLOS), 1982, under its Article 91 provides that:

Every state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the state whose flag they are entitled to fly. There must exist a genuine link between the state and the ship.

In accordance with these provisions, States have the exclusive right to establish the conditions for the granting of nationality to ships. The relevant

[70]*Ibid*
[71]S W Tache (n[9])

Articles however provide further that there must be a genuine link between the State and the ship thereby imposing a limit to States' sovereignty in defining the conditions for the registration of ship. The reason for this requirement is to enable the flag State to exercise effective jurisdiction and control in administrative, technical and social matters over the ships flying its flag[72]. However, none of the Conventions provide the definition of the concept or its element or what would exactly constitute a genuine link, nor do they stipulate the consequences that would follow where a state registers and grant its nationality to a vessel without genuine link between the State and the vessel.

4.0 THE LEGAL BASIS OF THE CONCEPT OF GENUINE LINK

States' practice in granting nationality to ships through registry has been guided consistently by the general principle to individually establish the conditions for such conferral[73]. While granting nationality to ships, States have over the years, methodically adopted one of three systems or approaches including closed registry, hybrid registry and open registry. The brief examination of these systems is germane here for the purpose of establishing the legal rationale for the introduction of the concept of genuine link.

Closed Registry: This is the practice of a State to allowing the conferment of nationality only to ships wholly owned by its nationals and manned primarily with national crew. The United States is a good example of open registry policy. According to the U. S. law,[74] vessels engaged in the foreign trade of the United States must be:

a. built in the United States and belong wholly to citizens of the United States;
b. wholly owned by the citizens of the United States or a company organized under the laws of the United States, if foreign built; and
c. officers must be U.S. citizens.

[72]Convention on High Seas, Art. 5(1)
[73]*Lauritzen v. Larsen*, (1954)345 U.S. 571, 584, 73 S. Ct. 921, 97 L. Ed. 1254
[74]46 U.S.C. 11

Additionally, in accordance with 46 U.S.C. 367 'all steam vessels navigating any American waters and foreign private steam vessels carrying passengers from any port within the United States must be subject to annual inspections. Such inspections are conducted in order to ensure the protection of life and property[75].

Hybrid Registry: This is a modified version of closed registry with the provision for reciprocity to nationals of qualifying nations. Under this system, requirements for the ownership and manning of vessels are limited only to the majority of flag State's citizenry. The hybrid form was developed as a reconciliation of the extreme exigencies of both the closed and open registry. Canada represents a typical example of this form of registry. Under the Canadian law[76], Canadian nationality is conferred upon ships:

a. owned by Canadians or British subjects;
b. owned by companies incorporated under the laws of a commonwealth country;
c. whose majority of ownership is resident in Canada; and
d. whose officers are Canadians or landed immigrants.

Open Registry: This is the system or practice by which a State allows the conferment of nationality upon ships without regard to question of ownership, control or manning. Liberian practice is typical example of open registry system. Under the Liberian law,[77] nationality is granted upon ships:

a. that are seagoing, wherever built and regardless of tonnage;
b. owned by Liberians or nationals of any foreign state who maintain an operating office or qualified business agent in Liberia;
c. whose officers are citizens of any country, but duly licensed.
d. with Monrovia as home port.

Open registry policy, which permits the liberalization of nationality has been dubbed 'the flag of convenience' and had given rise to the concept of genuine link and its controversy. One of the reasons for the introduction of

[75]*Ace Waterways, Inc. v. Fleming (1951) 98 F. Supp., D.C.N.Y.*

[76]Canadian Shipping Act, 1934, Ch. 44, § I, 7 CAN. REV. STAT. 1 (1970)

[77]Maritime Code of Dec.12, 1948, as amended Dec. 22, 1949, 22 LIBERIAN CODE OF LAWS 51 (1973)

the concept of genuine link must be the fear and concern by organized labour over the economic and social security of seafarers. The International Labour Organization (ILO) was of the view that open registry vessels were attractive because they are manned and operated under substandard conditions[78]. The concern and controversy surrounding open registry system may have prompted the delegates to the Convention on the High Seas, 1958 to formalize and adopt the concept of genuine link as a test for flag States' effective jurisdictional control over ships flying their flags. In essence. *Article 5(1)*of the Convention stipulates that "there must exist a genuine link between the State and the vessel flying its flag; in particular, the State must effectively exercise its jurisdiction and control in the administrative, technical, and social matters over the vessel'.

The basis for the concept of genuine link as can be inferred from the provisions of *Article 5* of the 1958 High Seas Convention and *Article 91* of the United Nations Convention on the Law of the Sea, 1982 is to ensure flag States' effective jurisdiction, control and protection over flagships on the high seas. Therefore, the conferment of national character on ships was never meant to convert them into natural persons, but rather to provide a mechanism for the recognition of the flag State sovereignty over vessels that fly its flag[79]. However, such effective jurisdictional control would require a meticulous and continuous application of enforcement measures, which the relevant laws conspicuously failed to provide. Equally in *St. Vincent and the Grenadines v. Guinea case*,[80] it was established that "the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States" The decision stated further, that genuine link 'is not a precondition for registration of a ship but serves to guarantee the effective exercise of jurisdiction and control of the flag State over the ship'.

[78]Argiroffo, 'Flags of Convenience and Standard Vessels', (1974) 110 *INT'L LAB. REV*. 437

[79]S W Tache, (n[25])

[80]The M/V 'Saiga' (No.2) case (St. Vincent and the Grenadines v. Guinea), judgment of 1 July 1999, International Tribunal for the Law of the Sea

5.0 ANALYSIS OF THE NATURE AND MEANING OF GENUINE LINK

In a bid to bring home the nature and meaning of the term genuine link, this paper examines and analyses the wordings of the relevant laws, particularly *Article 5 (1)* of the 1958 Convention on High Seas. It is observed that the insertion of the phrase *in particular* in the article automatically injected a dichotomy into the meaning of the concept of genuine link[81]. The concept therefore possesses both legal and functional meanings. In the first place, Tache argued that, 'all that is required of a flag State to establish genuine link is the conferment of national character upon a ship'[82]. It is however, not settled whether this is the intendment of the law. The question is whether the law requires the existence of genuine link before a State can validly grant its nationality to a ship or, as Tache opined, genuine link automatically materializes once a State confers its national character on a vessel. The language of the Conventions seems to favour the first question.

The second part of the meaning resulting from the phrase is functional in nature. Here, the flag State has a functional duty to effectively exercise jurisdiction and control over the internal activities of the ship. Jurisdictional control as required here must not be physical, but would be enough that the State is recognized to have the authority and exert control over the activities of the vessel[83]. This only implies that matters regarding the affairs of the ships are conducted in accordance with the laws of the flag State and in consistency with the applicable international rule. The actual running of the day to day activities of the ship is the sole responsibility of the crew and management[84]. Unlike the legal component, the functional component is not a precondition for the recognition of national character, but failure by flag State to perform this function might raise doubt as to the authenticity of the nationality of the ship. Genuine link therefore entails the legal and functional responsibilities the flag State assumed when it confers its nationality upon a ship[85]. In practice, there is apparently, no consensus

[81] *Ibid*
[82] S W Tache, (n[35])
[83] *Elefteriou v. The Archontissa*, 443 F.2d 185 (4thCir. 1971).
[84] S W Tache, (n[33])
[85] This is the position of *Simon Tache*. But, this seems not to be the position of the law which requires the existence of genuine link as a basis for the conferment of nationality on ships.

among States as to what constitutes a genuine link or the consequences that follow from its absence[86].

5.1 Relation between the Concepts of Nationality and Genuine Link

International law requires that the link between a ship and its flag State must be a real and not just an artificial one, and that a State must be able to exercise effective jurisdictional control over ships to which it has granted its nationality[87]. What should be made clear is whether the existence of genuine link is the precondition for a flag State to confer its national character on a ship or if it is such conferment that gives rise to a genuine link. Some authors have advocated that nationality of the owners of vessels should be recognized as the basis for exercise of genuine link[88]. A proposal by the United Nations Conference on Trade and Development (UNCTAD)[89] defines genuine link as comprising of the following:

a. registration,
b. substantial share of the beneficial ownership in the vessel by nationals of the flag State,
c. principal place of business and effective management of the legal entity which has beneficial ownership of vessel in the flag State, and
d. principal officers of the legal entity beneficially owning the vessel be nationals of the flag State.[90]

The above proposal seems to suggest that conferment of nationality to ships should precede and in fact establishes genuine link as required by law. However, the opinion and understanding espoused in this work is that, from the wordings of the relevant articles of the sea Conventions, genuine link is made the requirement for the conferment of nationality to ships. States are at liberty to confer their national character to ships provided there exists genuine link between such State and the ship. In any case, the grand purpose

[86]Churchill and R Robin, The meaning of the "genuine link' requirement in relation to the nationality of the ships, (Cardiff: University of Wales, 2000).
[87]UNCLOS, Art. 91(1)
[88]Watts, 'The Protection of Merchant Ships' (1957), *33 BRIT. Y.B. INT'L L*. 52.
[89]UNCTAD, TD/B/C.4/177, 42, (1978).
[90]The analysis of each of the paragraphs of this proposal is contained in S W Tache, (n[36]) pp. 307-309.

of genuine link has been asserted to be a reflection of national policies aimed at protecting national merchant vessels on the high seas.[91]

The conferment of nationality to a ship is an expression of the flag State's willingness to assert jurisdictional control over the affairs of that ship, which has been recognized as the functional component of genuine link[92]. However, the ability of the flag State to enforce the functional component becomes the function of some internal and external factors, which in many cases are beyond the control of the flag States. The internal factors such as the stability of the political climate, robust financial standing, adequate economic resources, and disciplined trained manpower of the flag State are important in this regard. The external factors or conditions that would facilitate the jurisdictional control of the affairs of ships on the high seas by the flag States include uniform international standard or regulations, defined shipping trade routes, stable economic as well as political relations.

In the case of *IMCO*[93], Judge Moreno Quintana in his dissenting decision observed that 'the ownership of a merchant fleet … reflects an international economic reality which can be satisfactorily established only by the existence of a genuine link between the owner of a ship and the flag it flies'. Also, in the *Barcelona Traction case*[94], Judge Jessup in his separate opinion contended that the concept of genuine link was common to the nationality of people, ships and companies, and that 'if a State purports to confer its nationality on ships by allowing them to fly its flag, without assuring that they meet such tests as management, ownership, jurisdiction and control, other States are not bound to recognize the asserted nationality of the ship'. In essence, the concepts of nationality and genuine link are meant to ensure monitoring and control of the operations and activities of vessels on the high seas by the flag States for maximum, effective utilization of the doctrine of the freedom of the high seas under the customary international law.[95]

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[91]R. Pinto, 'Flags of Convenience', (1960) *Journal Du Droit Int'l* 354.
[92]S W Tache, (n[36])
[93]Advisory Opinion on the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation, [1960] ICJ Rep. 150.
[94]*Barcelona Traction, Light, and Power Company, Ltd* [1970] ICJ Rep. 1.
[95]*In a bid to strengthen Flag States' jurisdiction and control in this regard, the IMO has adopted and implemented a number of measures such as IMO Member State Audit Scheme, IMO Ship Identification Number Scheme, IMO Unique Company and Registered Owner Identification Number Scheme etc.*

5.2 Legal Significance of the Concepts of Nationality and Genuine Link under the Doctrine of the Freedom of the High Seas

It is trite that under the present international law of the sea, the high seas are open and accessible by all States, whether coastal or landlocked. For instance, the 1958 Convention on High Seas provides that the high seas are open to all nations and no State may validly appropriate any part of the high seas to its sovereignty. The freedom to access the high seas is exercised under the conditions laid down by the rules of international law'[96]. The doctrine of the freedom of the high seas is a generally recognized principle of international law, and is available to all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

However, the freedom to access and use the high seas must not be treated as a leeway to anarchy or abuse, hence, the introduction of the concepts of genuine link and nationality of ships. A ship can only legally access the high seas if it possesses national character. A ship without nationality (a stateless ship) or a ship sailing under flags of two or more States enjoys no protection in international law. The concept of nationality, therefore, imposes serious duty on individual flag States to assert jurisdiction over vessels flying their flags and ensure compliance with the rules it lays down for the exercise of the freedom of the high seas.[97] Although, international law accords States the full rights to confer their nationality to ships and to prescribe the rules governing such grants, the concept of genuine link was introduced to set restriction on such prerogative.[98] This is done to prevent the issue of reflagging of ships from the traditional maritime States and the attendant violation of the international obligations.

The legal basis for the concepts of nationality of ships and genuine link can be found in the court decision in the case of *Nottebohm*[99] where the Court described nationality as '… a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties,' and stressed that

[96]The 1958 Convention on High Seas, Art. 2
[97]N P Ready, *Ship Registration*, Third Edition, (London: Hong Kong, 1998).
[98]H G Harry, *On the Foundations and Sources of International Law*, (Hague: TMC Asser Press, 2003).
[99]*Liechtenstein v. Guatemala* [1955] ICJ 1 [1955] ICJ Rep. 4.

a substantive connection should exist between the individual and the State of his nationality. This judgment influenced in no small way, the development of the concept of genuine link in relation to the nationality of ships. However, the factors stated in the case in relation to an individual are not applicable to a ship, as the connection between a flag State and ships flying its flag should be of such a nature as to allow it to maintain order on the high seas[100]. Nationality of ships and the question of genuine link are crucial in the international law of the sea as they facilitate orderliness in the use of the high seas. It must be recognized however that, unlike nationality of ship, failure by the relevant Conventions to define genuine link or what constitute the concept, has engendered protracted controversy which tends to whittle down its expected effect under the law of the sea.

6.0 CONCLUSION

As established in this work, the concept of genuine link refers to the real and authentic connection, relationship or link that exists between a ship and the flag State through which the Ship acquires nationality. There is therefore a correlation between the concepts of genuine link and nationality of ship, in that the law has made the existence of genuine link a necessary condition that States must consider before granting its national character to ships. However, to the contrary, the Court admitted in the case of *St. Vincent and the Grenadines v. Guinea*[101] that genuine link is not a precondition for registration of a ship but serves to guarantee the effective exercise of jurisdiction and control of the flag State over the ship. More intriguing is the lack of consensus among States on a definition of the concept of genuine link. The situation has engendered divergent views as to the parameters of the concept with many questions which remained unanswered. The vagueness of the concept as introduced in legislation has given rise to uncertainty regarding the means necessary to confirm the existence of genuine link and the possible outcome or consequences of the absence of genuine link in relation to ships and their flag States. However, going further, and in conclusion, this work has toed the line of the reasoning of Judge Jessup in *IMCO* case above. The concept of genuine link is common to and inseparable from the nationality of people, ships and companies. These relationships are to enable flag States to exercise effective

[100]Churchill andR Robin,(n[39])
[101]Judgment of 1 July 1999, International Tribunal for the Law of the Sea

jurisdictional control over the vessels flying their flag and give such vessels a national character. Therefore, in line with Judge Jessup's argument, where a state purports to confer its nationality on ships by allowing them to fly its flag, without assuring that they meet such tests as management, ownership, jurisdiction and control over the ships, other States may not be under any obligation to recognize the asserted nationality of the ship.

In response to the vagueness of the concept of genuine link and the controversy it generates, this paper recommends an immediate review of the relevant articles of the Conventions providing for the concept. This is to enable genuine link as a concept to acquire a definite and generally acceptable definition, secure established criteria for determining its existence and define the legal outcome of conferment of nationality in its absence. Prior to the recommended review however, it is suggested that flag States should, in the meantime, strengthen their jurisdiction and improve on the enforcement of their international legal obligations for the purpose of establishing genuine link, in line with the initiatives adopted by the International Maritime Organization (IMO).The paper also recommends that the tests enunciated in the IMCO case should be applied in establishing the existence of genuine link and recognition of ships' nationality for the purpose of enjoying the free use of the high seas.

A THEORETICAL AND LEGAL PERSPECTIVE OF NIGERIA'S CORPORATE GOVERNANCE FRAMEWORK

By

Anthonia Omosefe Ugowe*

Abstract

Nations primary company law steers the corporate governance approach in the country. To ascertain the effectiveness of regulations, regulations should be evaluated from time to time. This paper study of the effect of Nigeria's primary and ancillary companies laws, including the main theories that give effect to the ancillary regulation, found that the custodians of the Companies and Allied Matters Act 2020, the Code of Corporate Governance for Public Companies 2011and the Regulation on the Adoption and Compliance with Nigerian Code of Corporate Governance 2018 do not provide sufficient information to enable an assessment of the effect of the laws in Nigeria. The paper also questions the adaptability of transplanted corporate governance theories to Nigeria's business environment. Nevertheless, the paper finds no dispute in the corporate governance approach in Nigeria's companies. Yet, in a bid to avoid disputes, it recommends that companies' memorandum and articles of association contain provisions that clearly state and describe companies' corporate governance approach. Another recommendation is for policymakers to produce a regulation that, in clear terms, supports company directors' management approach so long as the directors pay attention to regulatory prescribed care and skill; and the same can be proved using the reasonable man standard. The final recommendation is for policymakers to produce similar regulations for different governance approaches.

Keywords: Nigeria, Corporate Governance, Corporate Governance Regulation, Public Companies and Corporate Governance Theories

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1.0 INTRODUCTION

Companies are possibly the world's dominant institution, as some large companies have more income, logistical competencies, and global presence than some national governments.[1]Walmart, for instance, is the largest retailer in the world and has its presence in 24 countries. Walmart has approximately 10,500 stores in the countries it operates and eCommerce websites. The company employs more than 2.3 million associates worldwide, with the fiscal year 2021 revenue of $559 United States Billion Dollars.[2]

Using Nigeria as its case study, this paper determines if the approach of company law should be to provide no more than a framework for the efficient functioning of a capitalist system, to maximize returns for financial investors mainly, or a broader spectrum of company's investors. For many years, there has been a debate regarding what the corporate governance of companies should be. Should a company be understood as purely private, or as a social institution in which there is a legitimate public interest? The growth of this debate can be attributed to the scandals and sometimes, collapses of "successful" indubitable companies and the 2007-09 global financial crisis. The scandals, collapses and crises had crippling effects on economies and the whole business world. Hence, the demand for a better legal framework through strong democratic institutions to sustain businesses and any economy in the wake of risky events.

Some scholars argue that for a company to function optimally, maximising its shareholders' wealth, should be the principal goal of company directors. Other scholars argue that for a company to function optimally, the interest of its various stakeholders, (financial and non-financial investors), are to be taken into consideration by the directors of the company. These competing claims for preference in the allocation of the company's overall interest while rendering social services has given rise to different points of view of what a company's governing overall interest should be.

[1]David Ciepley, 'Beyond Public and Private: Toward a Political Theory of the Corporation' (2013) 107 American Political Science Review 139, 141; Jin Jing, 'Constructing the corporate governance system within the regime of corporate law from the perspective of a revised mechanism design theory: the shareholder primacy model versus the stakeholder theory model' (PhD thesis, University of Hong Kong 2014).
[2]Walmart 'About Us' <https://corporate.walmart.com/our-story> accessed 19 October 2021.

Regulatory institutions in every economy play a vital role in mapping out and coordinating the legal framework that guides the governance of every aspect within an economy. Nigeria's company law - Companies and Allied Matters Act 2020 provides for a fiduciary relationship between the directors and the companies the directors manage. It also provides that the directors at all times are to act in the best interest of the company by promoting its success.[3]It is instructive to highlight that on the 7th of August, 2020, the President of Nigeria, Muhammadu Buhari, signed into law the Companies and Allied Matters Act 2020. The Act in operation before the new law is the Companies and Allied Matters Act 1990.

The Regulation on the Adoption and Compliance with Nigerian Code of Corporate Governance 2018 supplements the Companies and Allied Matters Act 2020. It applies as a flexible set of rules [4] Before the commencement of this regulation, the Code of Corporate Governance for Public Companies 2011 applied to all public companies, whether listed or not. This Code, like the Regulation on the Adoption and Compliance with Nigerian Code of Corporate Governance 2018, applies flexibly but on a comply or explain basis.[5] The reason the Adoption and Compliance with Nigerian Code of Corporate Governance 2018 is not being examined is that it commenced in 2019; hence the effect of the regulation is yet to be evaluated. The examination of the provisions of the Companies and Allied Matters Act 2020 and the Code of Corporate Governance for Public Companies 2011, excludes other sectoral corporate governance regulations implemented in Nigeria. However, there are references to other sectoral governance regulations where necessary.

Despite the instruction given to directors to promote the success of the company at all times, shareholders, being the financial investors in a company expect returns on their investment, so too do other people who invest, albeit, non-financially, to the sustainability of a company expect returns on their contribution to the company. The non-financial investors in a company typically manage their relationship with the company through contracts and existing regulation(s). In contrast, shareholders' relationship with a company is usually regulated by the company's articles of association and existing regulation(s).

[3] Companies and Allied Matters Act 2020, s 305 (1) (2) (a) (b) (3) and (8).
[4]The Regulation on the Adoption and Compliance with Nigerian Code of Corporate Governance 2018, s C.
[5] Code of Corporate Governance for Public Companies in Nigeria 2011, s 1.3. (a).

In analysing the effect of Nigeria's company law and her complementary corporate governance regulation in contributing to Nigeria's economy, this paper seeks to specifically assess both regulations as they guide public companies in Nigeria and the outcome so far. To understand the regulations, this paper evaluates two leading theories of corporate governance as both theories give credence to the two diverse opinions, on what the legal framework should be in regulating companies. The paper also evaluates national and international reports, including decisions from the judiciary and the expectations of society. The two theories of corporate governance discussed in this paper are the shareholder and the stakeholder theories.

The remainder of this paper is structured as follows: Part 2 analyses the shareholder theory. This theory argues that the corporate governance aim of a company should mainly be to maximise profits for its financial investors. In this part, the shareholder theory is analysed through the provisions of Nigeria Code of Corporate Governance, alongside its primary company law that gives authority to the advancement of the shareholder theory recommendations. Courts' judgments in corporate governance disputes are also examined.

Part 3 of this paper looks at the stakeholder theory. Here too, the paper analyses the provisions of Nigeria's Companies and Allied Matters Act 2020 that argues for the corporate governance of a company to be broader in its approach. The provisions of the nation's Code of Corporate Governance is also studied. In a bid to give effect to the reality of these provisions, some companies' statements are discussed.

Part 4 underscores lessons from Parts 2 and 3 literature and makes suggestions that are helpful to regulatory institutions in maintaining regulations and in building a strong economy for Nigeria. This part also concludes the paper.

2.0. THE SHAREHOLDER THEORY

The shareholder theory centres on the agency relationship, the agency problem, and the agency costs - the recommended solutions to the problem.[6] An agency relationship arises when one party or more, also known as the principal(s) under a contract, delegate to another party or more, also known as the agent(s), the power to make decisions and create value on the job given to the agent(s).[7] Following the contract, the agent is accountable to the principal on the management of the job for which the agent is under a contract to carry out. Agency problem occurs when the principal and the agent interests diverge or when the principal does not have complete information on the agent's actions.[8] The principal bears the price to pay to solve the agency problem through effective control methods known as agency costs, to influence the agent's interests to align with the principal's and for the principal to have complete information on the agent's actions.[9]

The argument for the better governance approach of companies began in the United States of America (USA) in the debate between Professors Adolf Berle and E Merrick Dodd in the 1930s.[10] Berle argued that a company should be run in the interest of its shareholders, because, the shareholders advance the funds used in managing the company. Accordingly, directors of a company should create value on behalf of shareholders by maximising the capital of shareholders ahead of any other interested party's interest in the company. To further bolster the theory, its supporters argue that there is empirical evidence to show that increasing shareholder value does not conflict with the long-term interest of other stakeholders in a company. Instead, it is only in growing shareholders value that the needs of other

[6]Douglas A Bosse and Robert A Phillips, 'Agency Theory and Bounded Self-Interest' (2016) 41 Academy of Management Review 276; Brahmadev Panda and N M Leepsa, 'Agency theory: Review of Theory and Evidence on Problems and Perspectives' (2017) 10 Indian Journal of Corporate Governance 74.

[7]Michael C Jensen and William Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics 305, 308; Bosse and Phillips (n 6) 278; Michael Duffy, 'Two's Company, Three's a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in the Tripartite Contract, And the Lens of Theory' (2016) 39 University of New South Wales Law Journal 165, 168.

[8]Eugene F Fama and Michael C Jensen, 'Separation of Ownership and Control' (1983) 26 Journal of Law and Economics 301, 304; Bosse and Phillips (n 6) 278.

[9]Eugene F Fama and Michael C Jensen, 'Separation of Ownership and Control' (1983) 26 Journal of Law and Economics 301, 304; Bosse and Phillips (n 6) 278.

[10]Jennifer G Hill, 'Then and Now: Professor Berle and the Unpredictable Shareholder' (2010) 33 Seattle University Law Review 1005-006; Kevin V Tu, 'Socially Conscious Corporations and Shareholder Profit' (2016) 84 The George Washington Law Review 121, 128.

stakeholders, and even the need of the company to remain a going concern, can be met.[11]

The primary argument put forward in support of the shareholder theory is that the shareholders own the company because they provide the capital needed to start and manage it. Thus, the responsibility of company managers is to increase shareholders' wealth.[12] In the USA case of *eBay Domestic Holdings Inc. v Newmark*,[13] eBay Domestic Holdings Inc., a minority shareholder, kicked against the desire of the founding and majority shareholders in Craigslist to continue operating their online classified site as a free service to the community. In trying to protect the desires of its founding and majority shareholders, the board of directors of Craigslist adopted structures within the company which were detrimental to eBay. The board reduced eBay's ownership percentage; clogged eBay's right to sell its shares freely and hindered eBay from unilaterally electing a director to the board. eBay sued the board of directors for breach of fiduciary duties. The Delaware Court of Chancery held that a company incorporated for profit, pursuit of non-shareholders interest, must at some point align with the interest of its shareholders. The board of directors' duty under such an incorporated company was to increase the value of its shareholders. Company shareholders are the subscribers to the memorandum of the company and any person who in writing agrees to become a member of the company and whose name is in the company's register of members.[14]

Another argument in favour of operating a company principally for its shareholders is that the shareholders have the greatest stake in the outcome of the company. Shareholders benefit if the company's wealth increases, and bear a higher risk than fixed claimants such as creditors and employees when the company is liquidated. This is so because shareholders are the sole residual claimants in a company.[15] The framework of this argument is in

[11]Steven Wallman, 'The Proper Interpretation of Corporate Constituency Statues and Formulation of Director Duties' (1991) 21 163, 177-78; Sajid Gul et al., 'The Relationship between Dividend Policy and Shareholder's Wealth' (2012) 552 Economics and Finance Review 55..

[12]Sajid Gul et al., (n 11); Jeehye You, *Legal Perspectives on Corporate Social Responsibility: Lessons from the United States and Korea* (Springer 2015) 37.

[13]16 A.3d 1 (2010).

[14] Companies and Allied Matters Act 2020, s 105 (1)(2).

[15]Jonathan Macey, 'Corporate Social Responsibility: A Law & Economics Perspective' (2014) 17 Chapman Law Review 331, 333; Tu (n 10) 130.

Companies and Allied Matters Act 2020, ss117; 426 - 28; 431 - 32; 565 - 67; 588; 609 and 657. Also, supporters of the shareholder theory emphasise shareholders' return by company directors because shareholders appoint the directors. The agency relationship between directors and shareholders is a fiduciary type. The directors (also known as agents) are appointed by shareholders (also known as principals) to manage the company on behalf of the shareholders. Hence, without shareholders to monitor and discipline the directors, the directors may pursue selfish interests which may incur costs for the shareholders.[16] The appointment argument is found in Nigeria Companies Act. The law states that at incorporation, the subscribers to the memorandum and articles of association of the company are to name the first directors and thereafter have a say in the appointment or rejection of subsequent directors in the company.[17]The monitoring role of shareholders is found in the Companies and Allied Matters Act 2020, ss 107; 242 – 43; 267 - 68; 272 - 73; 278; 308 and 342.

By monitoring, the shareholders will be better informed in making decisions on their investments. The United Kingdom (UK) Times newspaper in 1866 blamed shareholders for their investment loss when the companies in which they had invested collapsed. The shareholders were blamed for being ignorant and knowingly paying no attention to their investments.[18]Shareholders activism is one of the means to align shareholders and directors' interests thereby solving the challenges of the agency relationship between shareholders and directors. The accountability principle of corporate governance developed from agency theory.[19]

In Nigeria, however, the majority shareholders in companies are usually also the company's Chief Executive Officer (CEO) or his or her descendant or protégé.[20] Thus, ownership is concentrated and the interest of the

[16]Francois Brochet and Suraj Srinivasan, 'Accountability of Independent Directors: Evidence from Firms Subject to Securities Litigation' (2014) 111 Journal of Financial Economics 430, 433; Pattarin Adithipyangkul and Tak Yan Leung, 'Large Shareholders and Independent Director Equity Compensation' (2016) 26 Australian Accounting Review 208, 209.

[17] Companies and Allied Matters Act 2020, ss 36(4) (c); s 272 - 73.

[18]Alice Belcher, *Directors' Decisions and the Law* (Routledge 2014) 6.

[19]Chinyere Uche, Emmanuel Adegbite, and Michael John Jones, 'Institutional shareholder activism in Nigeria' (2016) 16 Corporate Governance 680, 681; Amira Hawas and Chin-Bun Tse, 'How Corporate Governance Affects Investment Decisions of Major Shareholders in UK Listed Companies: Has the Recent Credit Crunch Changed the Game?' (2016) 31 Journal of Accounting, Auditing & Finance 100; Siala Bouaziz Souha and Jarboui Anis, 'Corporate governance and firm characteristics as explanatory factors of shareholder activism: Validation through the French context' (2016) 4 Cogent Economics & Finance 1, 2.

[20]Emmanuel Adegbite, 'Good corporate governance in Nigeria: Antecedents, propositions and peculiarities' (2015) 24 International Business Review 319, 320.

majority shareholder and CEO are aligned. It is instructive to state that in the concentrated ownership structure, the corporate governance conflict is usually between the inside majority shareholder/CEO and outside minority shareholders on the mode of the governance or company's strategies or other reasons.[21] To attend to the interest of all shareholders in Nigeria, Nigeria's company law contain provisions that aim at providing equal treatment among all shareholders. For instance, Companies and Allied Matters Act 2020, s 387 (1) (a) ensures that every member of a company regardless of whether he is entitled to receive notice of general meetings shall not less than 21 days before the date of the meeting be sent a copy of the company's financial statements for the year. S 392 (1) further provides that any member who demands a copy of the company's financial statements shall be provided with the company's last financial statements at no charge even if he is not entitled to the company's financial statements.[22]

It is also argued that where maximising shareholders' wealth is the main focus of directors, the least cost will be spent, and the directors are more purposeful. The logic here is having additional interests may be tiring or impossible for the directors to balance all the divergent interests which may be conflicting.[23] Besides, non-financial investors are protected by regulation(s) and by the terms of the contracts entered into with the company.[24]

In conclusion, supporters of the shareholder theory argue that investors' profit maximization should be considered above other company stakeholders' interests because shareholders are the only stakeholders in a company who are not able to exit companies without a significant sacrifice

[21]Ylber Bezo, Fran Brahimi and Rezart Dibra, 'Corporate Governance in Transition Countries' (2015) 6 Research Journal of Finance and Accounting 104, 105; Stephen R. Goldberg, Dori Danko and Lara L Kessler, 'Ownership Structure, Fraud, and Corporate Governance' (2016) 27 The Journal of Corporate Accounting & Finance 39, 40.
[22] See further Companies and Allied Matters Act 2020, ss 341 and 343; Code of Corporate Governance for Public Companies 2011, ss 21-22;Goldberg et al. (n 21) 42; Ruth V Aguilera and Rafel Crespi-Cladera, 'Global corporate governance: On the relevance of firms' ownership structure' (2016) 51 Journal of World Business 50, 53.
[23]See generally the conclusion in the empirical study of Martin Gelter, 'The Pension System and the Rise of Shareholder Primacy' (2013) 43 Seton Hall Law Review 968-70; N Craig Smith and David Rönnegard, 'Shareholder Primacy, Corporate Social Responsibility, and the Role of Business Schools' (2016) 134 Journal of Business Ethics 464.
[24]Lynn A Stout, 'The Toxic Side Effects of Shareholder Primacy' (2013) 161 University of Pennsylvania Law Review 2013; Diane Denis, 'Corporate Governance and the Goal of the Firm: In Defense of Shareholder Wealth Maximization' (2016) 51 The Financial Review 470.

on their part.[25] Even when shareholders sell their shares, the price paid for the shares takes into consideration any shareholders' exploitation. For instance, following Skye Bank solvency problem, the Central Bank of Nigeria (CBN) sacked the board and took over the management of the bank in 2016 to stabilise the bank.[26] By 2018, the CBN revoked the license of Syke Bank while the Nigerian Stock Exchange first suspended Skye Bank shares before delisting the bank some months after the suspension.[27] The shareholders recorded a cumulative loss of about N449 Billion shares or 13.64 percent of their investment.[28]

Also in the UK's case of *Prudential Assurance Co. Ltd v Newman Industries Ltd*,[29] Newman, the first defendant shareholders in an extraordinary general meeting, approved the purchase of assets and certain liabilities in another company, relying on an issued company explanatory circular signed by its chairman (second defendant), who also sat as chairman in the company of interest. The plaintiff, a minority shareholder in Newman Industries, commenced an action against Newman's directors, claiming that the circular was misleading and tricky. The plaintiff action was at first brought as a derivative action wherein he also contended for personal damages against the second and third defendants (chairman and vice-chairman for conspiracy). Afterwards, the plaintiff claim for conspiracy was converted to a representative action seeking relief for all Newman's shareholders who had suffered a loss like the plaintiff. The court held, a plaintiff shareholder cannot recover personal loss against his investment company where the company has suffered damage, for his loss is through the company. A shareholder cannot receive relief on a sum equal to the diminution in the market value of his shares, or equivalent to the probable diminution in the

[25]Smith and Rönnegard (n 23)472-73; Tu (n10) 179.
[26]Proshare Markets, 'Tracking Skye Bank Share Price: 5 days After' (*Proshare*, 14 July 2016) <https://www.proshareng.com/news/Investors%20NewsBeat/Tracking-Skye-bank-s-Share-Price--5days-After/31664> accessed 9 October 2021; Yinka Ogunnubi, 'Skye Bank – The Rise, the fall and the bridge' (*Proshare*, 25 September 2018) <https://www.proshareng.com/news/REGULATORS/SkyeBank---The-Rise--The-Fall-And-The-Bridge/41946> accessed 9 October 2021.
[27]Vanguard 'NSE suspends trading on Skye Bank shares' *Vanguard* (Lagos, 22 September 2018) <https://www.vanguardngr.com/2018/09/nse-suspends-trading-on-skye-bank-shares/> accessed 9 October 2021; Oladeinde Olawoyin, 'NSE Delists Skye Bank, Fortis' *Premium Times* (Abuja, 22 August 2019) <https://www.premiumtimesng.com/business/business-news/347945-nse-delists-skye-bank-fortis.html> accessed 9 October 2021.
[28]Bamidele Ogunwusi, 'Banks Shareholders still Mourn Loss of Investment in Skye Bank' *Independent* (Lagos, 7 January 2019) <https://www.independent.ng/banks-shareholders-still-mourn-loss-of-investment-in-skye-bank/> accessed 9 October 2021.
[29][1982] 1 Ch 204. The principle in Prudential's case was used in the Australian case of David Ballard v Multiplex Limited [2008] NSWSC 1019 wherein the court rejected and dismissed the plaintiff's claim.

dividend. The acceptable procedure is to commence a derivative action on the company's behalf. Any recovery to the shareholders will be through the company.

Accordingly, shareholders bear the costs of wrongs or self-dealing by other stakeholders, even if they exit. An exception will be where the shareholder loss is personal and separate from the loss suffered by the company. Even though Nigeria publicly listed companies (like their counterparts in the UK) use the unitary board structure and implement the comply or explain approach in the adherence of their corporate governance codes, they differ in share ownership structure. As stated earlier in this paper, in Nigeria, ownership is usually substantially concentrated in a few shareholders.[30] The controlling shareholder is usually the company's founder and its CEO. Still, if the regulatory body of the company stipulates how long the founder is to occupy the post of CEO, he/she leaves the position at the expiration of the stipulated term to become the company's chairman. An example is CBN's directive, instructing CEOs of banks to serve a maximum tenure of ten years, notwithstanding the provisions of the memorandum and articles of association or any terms of any contract of engagement.[31] The subsequent CEOs are usually members of his family or protégé. This structure is different from the UK, and other developed Anglo-Saxon environments where ownership is often dispersed and the shareholders are not traditionally involved in the management of the company.[32]

The difference in share ownership structure between Nigeria and other developed Anglo-Saxon environments where the dominant corporate governance theories developed is the reason why the typical agency problems found in the Anglo-Saxon environments are not faced in Nigeria. Indeed, this paper finds no case in Nigeria where the shareholders have taken directors to court for losses caused by the separation of shareholders and directors. Even when discussions on the principle of reflective losses are discussed in Nigeria, no Nigerian case is cited.[33] This is not to posit that

[30]Adegbite (n 20) 320.
[31]Central Bank of Nigeria, 'Brief on Guidelines for Tenure of Managing Directors of Deposit Money Banks and related matters' <www.cbn.gov.ng/out/2010/publications/pressrelease/gov/tenure_guideline19012010.pdf> accessed 21 June 2020.
[32]Janet Dine and Marios Koutsias, *The Nature of Corporate Governance: The Significance of National Cultural Identity* (Edward Elgar Publishing Ltd 2013) 189; Adegbite (n 20) 320.
[33]Wunmi Bewaji, Insider Trading in Developing Jurisdictions: *Achieving an effective Regulatory regime* (Abingdon and New York: Routledge, 2012), 223-24; Olaniwun Ajayi, 'Analysing the 'No-Reflective Loss'

there are no disputes when share ownership and management are substantially fused. What is usually found are disputes between controlling shareholders and minority shareholders as found in the case of *Agip (Nigeria) Limited v Agip Petroli International and others.*[34] Agip Petroleum International, an Amsterdam registered company, in a sale and purchase agreement sold off all its 60 percent shares in Agip Nigeria Ltd to Unipetrol Nigeria Plc. Nigerian shareholders held the remaining 40 per cent. Some minority shareholders alleged that their right of first refusal of shares was not sought before the sale to Unipetrol Nigeria Plc. Thus, by a Writ of Summons, the minority shareholders filed a suit against the respondents seeking a declaration that the said sale of shares is a fraud on the shareholders and other persons having an interest thereon, hence unlawful and illegal.

The minority shareholders also filed 2 Ex-parte motions seeking an injunction against the sale between Agip Petroleum International and Unipetrol Nigeria Plc, and a derivative action further to section 303 of the Companies and Allied Matters Act 1990. The trial judge granted the two Ex-parte applications. Some of the respondents appealed to the Court of Appeal against the orders of the trial judge. The Court of Appeal declared the issuance and service of the Writ of Summons null and void. The shareholders dissatisfied, appealed to the Supreme Court. The Supreme Court held that by the community reading of section 303 of the Companies and Allied Matters Act 1990 and Rules 2(1) and (2) of the Companies Proceedings Rules 1992, an application for leave to prosecute a derivative action is to be commenced by an Originating Summons with notice to the company.

A similarity between Nigeria's Code of Corporate Governance for Public Companies 2011 and the Code of Corporate Governance for Finance Companies in Nigeria 2018 is that both regulations are silent on what conditions should be met before a CEO can take up the position of chairmanship in the same company. The Regulation on the Adoption and Compliance with Nigerian Code of Corporate Governance 2018however provide that where the board decides that the CEO or an Executive Director

Principle in the context of an SSPA' (9 February 2018) <http://www.olaniwunajayi.net/blog/analysing-no-reflective-loss-principle-context-sspa/> accessed 19 October 2021.

[34](2010) LPELR-SC 351/2002.

should become the company's chairman, the cool-off period should be three years.[35] The provision works to put a stop to a CEO having unbridled authority in a company if he becomes chairman immediately after functioning as company CEO.

Nevertheless, in the business world, the same individual sometimes holds the post of both CEO and chairman of the company if the board decides it is in the best business strategy for the company. An example is UK's Stuart Rose who held the position of CEO at Marks and Spencer from 2004 then, combined the role with chairman from 2008, exiting both posts in 2010 and 2011 respectively.[36] In the USA, Jamie Dimon occupies the position of chairman and CEO of JPMorgan Chase & Co, one of the four leading banks.[37] Be that as it may, existing studies are not in agreement on if combining the roles of CEO and chairman aids the company's performance or act as a clog to the prosperity of the company.[38] However, it is not news that, depending on several factors, some best practices of corporate governance may be harmful in certain circumstances but relevant to a company's survival in other circumstances. Thus companies and policymakers should consider the culture of the people, circumstances of the company, and other contexts before applying best practices of corporate governance. JPMorgan Chase & Co, for instance, outperform banks like Citigroup and Bank of America where the office of CEO and chairman are separate.[39]

Nonetheless, the arguments presented above are not a conclusion that companies incorporated for profit do not consider the interest of their non-

[35] S 3.3.

[36]Independent, 'He saved M&S. But Sir Stuart Rose will be a tough act to follow' *Independent* (London, 18 May 2008) <https://www.independent.co.uk/news/business/analysis-and-features/he-saved-ms-but-sir-stuart-rose-will-be-a-tough-act-to-follow-830139.html> accessed 2 October 2021; Julia Finch, 'Stuart Rose to leave M&S slowly after Bolland joins' *The Guardian* (London, 3 March 2010) <https://www.theguardian.com/business/2010/mar/03/marks-spencer-executives-rose-bolland> accessed 2 October 2021; Evening Standard, 'Sir Stuart Rose bows out at Marks & Spencer' *Evening Standard* (London, 4 January 2011) <https://www.standard.co.uk/business/sir-stuart-rose-bows-out-at-marks-spencer-6551490.html> accessed 2 October 2021.

[37]JPMorgan Chase & Co, 'Who we are: Our Leadership' (2020) <https://impact.jpmorganchase.com/about/our-leadership/jamie-dimon> accessed 2 October 2021.

[38]Anthony Goodman, 'Should banks keep combined the role of CEO and chairman?' *Financial Times* (London, 1May 2013) <https://www.ft.com/content/fb849930-b251-11e2-8540-00144feabdc0> accessed 21 October 2021; Elisabeth Dedman, 'CEO succession in the UK: An analysis of the effect of censuring the CEO-to-chair move in the Combined Code on Corporate Governance 2003' (2016) 48 The British Accounting Review 376; Krista B Lewellyn and Stav Fainshmidt, 'Effectiveness of CEO Power Bundles and Discretion Context: Unpacking the 'Fuzziness' of the CEO Duality Puzzle' (2017) 38 Organization Studies1604.

[39]Goodman (n 38).

shareholders. Be Onsite, a London based, registered not-for-profit company, founded by Lend Lease, a multinational construction company, provides training, on-site experience and job opportunities to disadvantaged individuals seeking to earn a decent living in the property sector.[40] Disadvantaged persons include individuals with criminal records or not having academic qualifications or experience or disability.[41] The job skill training provided by Be On site is combined with practical and emotional support until employees build sustainable careers.[42] Another example is TOMS Shoes. The company gives shoes, water, safer births and sight to improve the lives of people and communities in need.[43] Beyond this, Toms funds start-up companies with a social mission and its coffee is resourced sustainably.[44]

In Nigeria, United Bank for Africa Foundation is charged with the corporate social responsibility of the United Bank for Africa group. It contributes to the socio-economic improvement of the communities in which it operates.[45] For example, the Foundation sustains five leisure gardens across Nigeria; it sponsors empowerment and skills acquisition conferences, including entrepreneurship programmes. Across Africa, the Foundation provides recommended English literature to secondary schools to minimise the declining reading culture among secondary school students distracted by electronic social media and other vices.[46] Indeed, all public listed companies in Nigeria demonstrate their commitment to their stakeholders as the Companies and Allied Matters Act 2020[47] and the Code of Corporate Governance for Public Companies 2011[48] recommend that they do.

[40]Be Onsite, 'Who we are' (2012) <https://www.beonsite.org.uk/who-we-are> accessed 19 October 2021.
[41]Be Onsite, 'What we do' (2012) <https://www.beonsite.org.uk/what-we-do> accessed 19 October 2021.
[42]Be Onsite, 'What we do: how we do it' (2012) <https://www.beonsite.org.uk/how-we-do-it> accessed 19 October 2021.
[43]Toms, 'How we give: Improving lives' (2018) <http://www.toms.co.uk/improving-lives> accessed 19 October 2021.
[44]Toms, 'Beyond One for One' (2018) <https://www.toms.co.uk/beyond-one-for-one> accessed 19 October 2021.
[45]United Bank for Africa, 'Shared Values: UBA Foundation' (2018) <https://ubagroup.com/uba-foundation> accessed 19 October 2021.
[46]ibid.
[47] S 305 (3) and (4).
[48] S 28.

Despite the arguments; regulations, and judgments in favour of directors managing a company to maximise shareholder's interest, the shareholders value governance system is not without its gaps. These gaps undergird the theory's criticism and outright rejection in some spheres.

In relation to the ownership and management structure in Nigeria, shareholder theory is rejected as a foundation for governing Nigeria's companies because the theory's premise does not capture governance where ownership and management are fused. The theory cannot regulate the ownership-management structure in Nigeria. Its supporters' argument, based on the separation of management and shareholder ownership structure does not translate successfully to Nigeria's ownership concentration model.

Nevertheless, minority shareholders can benefit from the monitoring recommendation of the theory. Where all the non-management shareholders monitor the majority shareholder/CEO, the action would help the majority shareholder/CEO, and other shareholders understand the usefulness of making decisions after all the relevant facts are known and deliberated. The Financial Reporting Council of Nigeria can help in this regard by promoting awareness about corporate governance principles through workshops, seminars, and training. Already, the Financial Reporting Council of Nigeria Act 2011, directs the Council to ensure good corporate governance practices in Nigeria's private sector.[49]

3.0 THE JUSTIFICATION WHY CORPORATE GOVERNANCE ENCOMPASSES MORE THAN SHAREHOLDERS MAXIMISATION

Scholars like Bebchuk[50] and Mansell[51] argue that shareholder profit maximisation produces a short-term focus and that short-term earnings performance overshadows all else to the detriment of long-term earnings, and this fails to maximise social wealth. Some scholars have submitted that

[49]Financial Reporting Council of Nigeria Act 2011, s 11 (c), s 50 (c) and 51 (b).
[50]Lucian A Bebchuk, 'The Myth that Insulating Boards Serves Long-term Value' (2013) 113 Columbia Law Review 1637, 1638.
[51]Samuel Mansell, 'Shareholder Theory and Kant's 'Duty of Beneficence' (2013) 117 Journal of Business Ethics 583, 584.

short-term earnings contributed to the global financial crisis of 2008-09.[52] This is because by focusing on shareholders' profit maximisation mainly, directors tend to invest in businesses with short term profit, without taking into consideration the effect of such decisions in the long run on the company and the economy. Still, it is good to note that a single objective of the company can have many interrelated variables that should be considered in managing a company. For instance, the role of government, creditors, employees, time frame and the climate in achieving the company's objective.

Also, depending on the circumstances of the company, the company may need to be sustained through the pressure of short term ventures/price competition. In Huawei early years of operation in Shenzhen; it operated as a private company in major competition with state-owned companies that dominated the market. Aware that Huawei's products were substandard than its competitors, Ren Zhengfei, Huawei's founder, attracted customers by providing outstanding customer service. Huawei products regularly broke down, but every time a breakdown was reported, its engineers went to the customer to fix the broken-down product at a time convenient for the customer.

Also, in rural and desert regions of China, rats affected telecom connections. Huawei, unlike the multinational companies, treated the rats' plague as a responsibility to solve. Its unlimited customer service was different from other companies even though Huawei's competition had standard products. Huawei's customer services delivery made the brand popular and reputable as its customers were assured that the company cared about their needs. With time, Huawei gained a competitive advantage.[53] Presently, Huawei is a notable international, infrastructure provider of information and communications technology, including smart devices. It operates in over 170 countries. The company remains a private company, fully owned by its China-based employees.[54]

[52]Jeffrey L Callen and Xiaohua Fang 'Institutional investor stability and crash risk: Monitoring versus short-termism?' (2013) 37 Journal of Banking & Finance 3047.
[53]David De Cremer and Tian Tao, 'Leading Huawei: Seven Leadership Lessons of Ren Zhengfei' *The European Business Review* (Online, 17 September 2015) <www.europeanbusinessreview.com/leading-huawei-seven-leadership-lessons-of-ren-zhengfei/> accessed 15 October 2021.
[54]Huawei, 'Home: About Huawei – Corporate Information' <www.huawei.com/uk/about-huawei/corporate-information> accessed 15 October 2021; Juha Saarinen, 'Analysis: Who really owns Huawei' (*IT News*, 28 May 2010) <www.itnews.com.au/news/analysis-who-really-owns-huawei-175946> accessed 15 October 2021; Dan

The proponents against the shareholder theory argue that the emphasis on shareholders being the only residual claimants in a company is misplaced.[55] Shareholders are not the only individuals to make company-specific investments. Employees also may embark on specific skill training that is useful only in the company in which they are employed. In the event of long service in this company, the employee's employment prospects maybe limited as they may be uninspired to move to another employer. When they do, they may not find useful the training undertaken in the previous employment in the new company. This may result in a stunted career progression or redundancy. In comparison, shareholders can diversify their risk more quickly than other stakeholders.

Finally, the idea that the shareholders own the company does not sit well with the concept of the company being a separate legal entity. Upon incorporation, cadxddd qompanies operate as legal entities separate from their shareholders. Shares are the shareholders' property, but the company is not.[56]Shareholders are unable to lay claim to any property held by the company and assert ownership rights over it, except in cases of insolvency where company property can be distributed to shareholders.[57] *Salomon v Salomon*[58]is best-known for the effect of incorporation. Mr. Salomon boot manufacture business was firstly managed as a sole proprietorship before the business registration as a limited liability company. After the company's registration, the assets of the business were transferred to the company. The price of the transfer was paid to Salomon by way of debentures having a floating charge on the assets of the company and by shares.

When the company collapsed and went into liquidation, its primary debenture holder sued because Salomon's secured floating charge came first in time against the unsecured creditors of the company. The court held that the company is legally registered; thus, the company was separate in law from the person or persons directing the company. From the time of

Moskowitz, 'How to Invest in Huawei' (*Investopedia*) <www.investopedia.com/articles/investing/051215/how-invest-huawei.asp> accessed 15 October 2021.

[55]Gelter (n 23) 919..

[56]*Salomon v Salomon* [1896] UKHL 1, [1897] AC 22; Companies and Allied Matters Act 2020, s 42 and s 43.

[57]Jean-Philippe Robé, 'The Legal Structure of the Firm' (2011) 1 Accounting, Economics and Law 1, 3.

[58] [1896] UKHL 1, [1897] AC 22. See also Companies and Allied Matters Act 2020, s 42 and s 43; Robé (n 57) 3.

registration, the company became an independent person in law, with its duties and rights different from those of its shareholders.

Because of the shortcomings of the shareholder theory, some scholars like Dodd and Gooyert et al. advocate for an alternative purpose in governing a company. They argue that the role of any system of company law should principally be to provide a framework for the efficient functioning of a capitalist system to protect or balance the interest of various stakeholders, including shareholders. They believe this governance approach is a better means of building strong democratic institutions.[59]

4.0 STAKEHOLDER THEORY

The early advocate for the stakeholder theory is Professor E Merrick Dodd.[60] The theory gained more prominence in the wake of corporate scandals in the business world.[61] The stakeholder theory asserts that the managers of a company owe a duty to shareholders, as well as, other parties that contribute either voluntarily or not, to the creation of a company's wealth.[62] For instance, employees of a company commit time and other resources in exchange for salaries and other benefits that come with performing excellently. Employees are beneficiaries and not risk bearers in the company.[63] Therefore, managers are to consider employees' interests and the interests of the shareholders when making decisions on behalf of the company. The stakeholders of a company have been identified to include creditors, employees, suppliers, customers and the communities in which the company operates.[64]These types of stakeholders are the non-financial investors.

[59]Tu (n 10) 129; Vincent de Gooyert, Etiënne Rouwette, Hans van Kranenburg and Edward Freeman, 'Reviewing the role of stakeholders in Operational Research: A stakeholder theory perspective' (2017) 262 European Journal of Operational Research 402, 408-09.
[60]Hill (n 10) 1005 – 006; Tu (n 10) 128.
[61]Jill Solomon, *Corporate Governance and Accountability,* (3rd edn, John Wiley & Sons Ltd 2010) 21; Callen and Fang (n 52) 3047.
[62]Leo E Strine, 'The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law' (2015) 50 Wake Forest Law Review 761, 763.
[63]ibid.
[64]Solomon (n61) 15.

The arguments for the stakeholder theory are contained in the Companies and Allied Matters Act 2020, s 305 (3) and (4). The law direct directors to consider the impact of the company's operation on the environment in which it carries on business and also have regards to the interests of its members and employees in general in the performance of their duties.

The supporters of the stakeholder regime argue that balancing various stakeholders' interests will provide the company the long-term ability to remain a going concern. Thus, sustaining an institution beneficial to the wellbeing of individuals, society and a nation. Deng et al. studies focused on the years 1992 to 2007 to determine whether managers participate incorporate social responsibility (CSR) to meet non-shareholder stakeholders' interests to the disadvantage of shareholders' interest. The research examined 1,556 USA completed mergers by 801 companies to measure such companies rating, by their social performance in CSR. It made use of KLD Research & Analytics, Inc. (KLD) database in scoring the companies. In testing the robustness of its result, an out-of-sample analysis of USA companies in the FTSE4Good index, for the period 2001 to 2011, were analysed. Companies that had undergone mergers were chosen for this study because the process and outcome of mergers are unsure. Mergers not only threaten shareholders' wealth but also endanger the continued relationship between the company and its stakeholders. The result of the study reveals that mergers by acquiring companies with high CSR are unlikely to fail; the merger stake a shorter time to complete in comparison with acquiring companies with low CSR. After the mergers, high CSR participation companies announced higher stock returns for the acquiring companies and value-weighted portfolios of the acquiring and the target companies.[65] Furthermore, Deng et al. research found that during merger announcements, acquiring company's social performance significantly influences the wealth of other stakeholders, for example, acquirer's bondholders and target suppliers and customers.

Also, the job of the employees after the merger by high CSR acquiring companies, are less likely to be terminated compared with employees after a merger by low CSR acquirers[66] Again, the result of the research finds that

[65]Xin Deng, Jun-koo Kang and Buen Sin Low, 'Corporate Social Responsibility and Stakeholder Value Maximization: Evidence from Mergers' (2013) 110 Journal of Financial Economics 87, 88-91 and 108 – KLD database is used because it is a renowned authority on companies CSR activities and performance ratings.
[66]ibid 89.

the companies that take into consideration the interest of its non-shareholder stakeholders enhance the company's efficiency and its long-term profitability, which eventually maximizes shareholders' wealth and company's value.[67] On the whole, a better approach in governing a company is to seek to balance various stakeholders' interests in the pursuit of the company's objectives.

Stakeholder theory seeks to focus on the fact that those involved in, and dealing with, companies are humans; thus, corporate law should not be de-personalised.[68] With the stakeholder theory, the usefulness of a company is measured by evaluating how it assists society gain a richer understanding of community by respecting human dignity and overall welfare.[69] Cases in point will be, 9mobile (previously trading as Etisalat Nigeria, a telecoms company that started trading in Nigeria in 2008). 9mobile gives merit awards scheme to undergraduate students of computer science, electrical electronics engineering and business management since 2009; the company also has in place a teacher training programme in English Language for teachers in primary and secondary schools in Rivers, Oyo and Kaduna States. It runs this programme in collaboration with the British Council.[70] Total Nigeria also is involved in various community schemes such as Malaria initiative, HIV/AIDS initiative.[71] The company from 2016 has been incorporating the United Nations Sustainable Development Goals in its strategy to fulfil socio-economic and environmental development in Nigeria.[72]

The stakeholder theory embraces a normative world view that emphasises the fact that people are part of a shared community who inherit the benefits, values and goals of the community.[73] Thus, the cultural environment in which people find themselves cannot be ignored, and the company is regarded as a community of interdependence, mutual trust and reciprocal

[67]ibid 108; see also Thomas M Jones and Will Felps, 'Shareholder Wealth Maximization and Social Welfare: A Utilitarian Critique' (2013) 23 Business Ethics Quarterly 207, 218.
[68]Andrew Keay, 'Tackling the Issue of the Corporate Objective: An analysis of the United Kingdom's Enlightened Shareholder Value Approach' (2007) 29 Sydney Law Review 577, 586.
[69]ibid.
[70]9 mobile, <http://9mobile.com.ng/corporate-social-responsibility/> accessed 29 September 2021.
[71]Total Nigeria, <www.total.com.ng/pro/about-us/sustainable-development-amo.html> accessed 5 September 2021.
[72]Total Nigeria, <http://nigeria.total.com/en/commit-us/toward-responsible-energy> accessed 5 September 2021.
[73] Solomon (n61)15.

benefit.'[74] A consequence of this approach is that shareholders maximisation is not necessarily the main business driving force in carrying out company activities. Instead, company directors in managing a company, are to consciously consider other important interests for the benefit of the company in the long run.[75] Invoking a pure shareholder value approach in the governance of a company, according to stakeholders' apologists, will possibly damage the interest of non-shareholders in a company, as these groups of stakeholders will be aware that their interests are subordinate to shareholders' maximisation always.[76]

Furthermore, even though investors are now more aware of their expectations, rights, powers and options, it does not seem wise for anyone in today's business world to invest in a company where a group of stakeholders' interests triumph over other stakeholders' interests. This is because the business world is embracing different interests to ascertain the sustainability of businesses, economies and the climate.

In addition, the scandals and sometimes, collapses of companies have highlighted the dangers of companies having an individual or a group of individuals wielding too much power within a company,[77] some of which failures were because the companies were directed for the benefit of its shareholders only.[78] Of popular knowledge are the scandals and collapses in Enron, Worldcom and Royal Bank of Scotland.

Opponents of the stakeholder theory raise questions such as if the company's managers are fiduciaries of the company and not its shareholders, which natural persons legitimately have the authority, and where is the authority to hold managers accountable derived? Who determines the interest of the company? From where is the right to determine the interest of the independent company gotten? Blair and Stout's team production model submits that because companies are fictional

[74]ibid.
[75] Companies and Allied Matters Act 2020, s 305(3) and (4).
[76]Keay (n 68) 586.
[77]See generally, Roger Barker and Iris H-Y Chiu, 'Protecting minority shareholders in block holder controlled companies: evaluating the UK's enhanced listing regime in comparison with investor protection regimes in New York and Hong Kong' (2014) 10 Capital Markets Law Journal 98 – 132.
[78]ibid.

persons that function only through human agents,[79] a company consists of its team members who contribute distinct investments in the company's provision of goods and services as a team. The company board's role is to mediate on the hierarchy within the company, by balancing team members' interests (which may be conflicting) in a manner that keeps every team member satisfied enough to remain a member of the team.[80]

Having analysed the reasons proffered by the shareholder and stakeholder theories governance approach, both theories' recommendations contained in regulations, some empirical studies on regulation provisions and case laws, it is good to evaluate Nigeria's corporate governance acceptability rate. Including the adherence and the consequences of non-adherence of companies regulations from the reports of the institutions in place to produce and maintain the regulations.

Nigeria's Corporate Affairs Commission monitors the compliance of the Companies and Allied Matters Act 2020.[81] The website has no report on compliance or otherwise of companies carrying out business in Nigeria.[82] The public, however, can search for company names, addresses and dates of registration on the website.[83] The Department of Legal Division (Investment Management) under the office of the Operations Directorate of Nigeria's Securities and Exchange Commission, is responsible for compliance with the Code of Corporate Governance.[84] The Commission has no information or record on the rate of acceptance and compliance of this Code in Nigeria. The website, however, has information on companies that are facing disciplinary actions, including the names of companies that have faced disciplinary actions and have had the enforcement action taken against the companies lifted.[85] The website also has a list of the litigations in which the Commission is a party.[86]

[79]Margaret M Blair and Lynn A Stout, 'Team Production Theory of Corporate Law' (1999) 85 Virginia Law Review 247, 249.
[80]ibid 282; Jan Kultys, 'Controversies about Agency Theory as Theoretical Basis for Corporate Governance' (2016) 7 Journal OeconomiA copernicana 613, 627.
[81] Companies and Allied Matters Act 2020, s 8.
[82]Corporate Affairs Commission, 'Home' <http://new.cac.gov.ng/home/> accessed 17 October 2021.
[83]Corporate Affairs Commission, 'Home: Public Search' <https://search.cac.gov.ng/home> accessed 17 October 2021.
[84]'Operations' <http://sec.gov.ng/directorates/operations/> accessed 24 October 2021.
[85]Securities and Exchange Commission Nigeria, 'Enforcement: Suspensions and Penalties: Companies facing enforcement action, 2016' <http://sec.gov.ng/suspensions-and-penalties/> accessed 24 October 2021.
[86]Securities and Exchange Commission Nigeria, 'Enforcement: Litigation' <http://sec.gov.ng/litigation/> accessed 24 October 2021.

In the UK, the Department for Business, Energy and Industrial Strategy is responsible for companies. The department is supported by 42 agencies and public bodies,[87] among which is, Companies House (The equivalent of Nigeria's Corporate Affairs Commission), whose duties include incorporating and dissolving companies as well as inspecting and storing company's information. The detailed information displayed on the register of companies is accessible by everyone online free of charge. Thus the public can access comprehensive information of every company registered in the UK.[88] The UK Financial Reporting Council monitors the implementation and maintains the UK Corporate Governance Code.[89] It also reports yearly on the development of corporate governance in companies.[90] Through the reports, companies, institutions, and the public can monitor the governance approach of companies and make informed decisions on the companies. Indeed, accountability and transparency are at the heart of building a strong democratic institution and corporate governance. Where institutions and companies are not accountable and transparent, the result of regulations cannot adequately be evaluated.

In the pursuit of companies' long-term success through viable regulations and institutions, this paper, makes recommendations in the next section.

[87]Department for Business, Energy and Industrial Strategy, 'What we do' <https://www.gov.uk/government/organisations/department-for-business-energy-and-industrial-strategy> accessed 24 October 2021.

[88]Companies House, 'About us' <https://www.gov.uk/government/organisations/companies-house/about#our-responsibilities> accessed 24 October 2021.

[89]Financial Reporting Council, 'FRC Roles and Responsibilities: Schedule of Functions and Powers' (June 2017) <www.frc.org.uk/getattachment/67835f0e-e4c2-4d2a-9aeb-e57feed885be/FRC-Roles-Responsibilities-Schedule-of-Functions-Powers-June-2017.pdf>5-6 accessed 25 October 2021 and Financial Reporting Council, The FRC and its Regulatory Approach(Financial Reporting Council Limited 2014).

[90]Financial Reporting Council, 'Developments in Corporate Governance and Stewardship 2011-20'<https://www.frc.org.uk/directors/corporate-governance-and-stewardship/developments-in-corporate-governance-and-stewardsh>accessed 25 October 2021.

5.0 RECOMMENDATIONS AND CONCLUSION: GOVERNANCE FRAMEWORK TO AID STRONG DEMOCRATIC INSTITUTIONS

The question that arises is, which of the two models of governance should the company law and the corporate governance of a company protect? Professor Berle, after about twenty years of the debate between himself and Professor Dodd, admitted that the debate is settled in favour of Professor Dodd following the arguments that endured after their debate.[91]

Lawmakers and companies must acknowledge and do right by non-financial investors and, define the objectives of regulations, by embracing standards wider than investors profit maximisation. As evidenced in the preceding paragraphs in this paper, Nigeria's primary and ancillary company laws, have already made provisions for this broader governance - by directing the directors of a company to consider the interest of the environment, shareholders as well as the company's employees.

Yet, because the argument still abounds, especially in Nigeria where ownership and management usually rest on the same people, on the governance approach a company should imbibe, this paper makes the following recommendations to directors – as they are the ones who decide on the governance approach in companies. The approach the directors take may put them in risky situations where the shareholders may challenge directors' decisions as failing to maximize shareholders' profit. Company directors may be sued for violating the "fiduciary duties" owed shareholders should directors' decisions seem to take into consideration other aims, other than shareholders' profit maximisation. Be that as it may, directors are usually insured to cover claims or compensation.

Even though this paper finds no case and literature where shareholders in Nigeria have taken directors to court, for losses caused by the separation of shareholders and directors in corporate governance, it is recommended that in Nigeria, where all incorporated companies are required to have a Memorandum and Articles of Association before incorporation,[92] prospective companies' Memorandum of Association should clearly state

[91] Tu (n 10) 129.
[92] Companies and Allied Matters Act 2020, s 27, 36 (1), (4)(e).

that the company will create benefits for the public. At the same time, the Articles of Association should contain a detailed description of this provision.[93] The Memorandum and Articles of Association are the rules by which companies are governed. These documents can be altered, subject to the provisions of the Companies and Allied Matters Act 2020, ss49 - 54. This means that already incorporated companies can make necessary changes in accordance with the Act.

Another recommendation is for Nigeria policymakers to produce a regulation that, in clear terms, support company directors making profits for its shareholders, yet direct that non-financial investors' resources are not depleted. This will protect directors from frivolous litigations for putting into consideration the interests of non-financial investors. The regulation to be produced should protect directors, so long as the directors believe that their actions or inactions are in the best interest of the company and same can be proved, using a reasonable standard of care and skill.

Furthermore, Nigeria policymakers should consider producing parallel regulations that support the different governance regimes. In this way, all stakeholders have a good knowledge of the governance approach adopted in any company. In the UK, some companies are classified as B corporations. These companies are incorporated for-profit, yet the companies' mission includes standards in environmental and social outcome, accountability and transparency.[94] The USA has the Benefit Corporations Legislation. Companies passed under this state to state legislation, must have the following features: the company must consider non-shareholders' interests; have a corporate objective of creating benefits for the public; its annual report, which must be made public, must contain information on the company's efforts to pursue a public interest. The company must also make public the evaluation of the company's overall environmental and social performance as judged by a third-party standard.[95] The legislation is operational in states that have passed the legislation.[96]

[93] Companies and Allied Matters Act 2020, s 32(1), 46(1).
[94]B lab, 'Home: What are B Corps?' <http://bcorporation.uk/what-are-b-corps-uk> accessed 15 October 2021.
[95]Felicia R Resor, 'Benefit Corporation Legislation' (2012) 12 Wyoming Law Review 91– 92 and 101; Tu (n 10)142.
[96]Benefit Corporation, 'How to become a Benefit Corporation' <http://benefitcorp.net/businesses/how-become-benefit-corporation> accessed 15 October 2021.

In response to the question of the governance approach that ensures a company flourishes, develops and supports any economy to grow and develop, this paper is not taking a position with any of the competing camps. Instead, it sought to provide information and recommendations, which may aid all stakeholders and prospective stakeholders' decisions in relating to a company. For institutions, the tools needed to build a strong democratic government. Furthermore, the paper brings to the fore Nigeria's court inexperience in the no-reflective loss aspect of company law.

All the same, the reality is that whatever type of governance approach a company leans towards, without functional institutions to uphold regulations, be they hard or soft law, the objective of the company, the development of a nation and the sustenance of the environment may be unattainable. Hence the call for Nigeria's institutions to effectively carry out institutions purpose and be accountable and transparent to the public on their responsibilities. Accountability and transparency are some of the ways to build strong democratic nations.

GENERAL AVERAGE CONTRIBUTION IN THE CARRIAGE OF GOODS BY SEA: SHOULD IT BE RETAINED OR ABOLISHED

Ishaya Martins*

Abstract

The concept of general average is of great antiquity. It has fruitfully served the maritime community for the last two millennia, but the justification for its continued existence in the 21st century is questionable. This article examines the proposition the general average contribution and should be abolished because it has outlived its usefulness and no longer relevant in a technological age because insurers have taken over the role of paying for maritime adventures for ships, cargoes and crew in case of any accidents or the throwing of goods overboard in the course of voyage. Consequently, that general average contribution should be abolished. Moreover, with the current technological development in the use of meteorologist to forecast the weather for sailing ships in order to avoid the hazardous weather of the sea or to wait at a safe port for a week or more for the weather to a clear off before proceeding or continuing with sailing. The will prevent or avoid the throwing of goods overboard for general average contribution. The article also discusses arguments for retaining general average contribution. In conclusion, the resilience of general average as an age-old equitable maritime principle in noted. But the author points to the sophistication in the modern regime of marine insurance in support of discarding general average and allowing maritime losses to lie where they fall, particularly with the insurers to indemnified independently by the insurer of each interest in a maritime adventure without contributions from co-adventurers since the insurance policy will cover all losses.

Key words: General Average, marine insurance, average adjustment, abolish and retain

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1.0 INTRODUCTION

The ocean varies in depths, plains, trenches, mountains, ridges and volcanoes rocks that line the ocean surface and floors. The risk of accidents is common, coupled with the hazardous weather of the seas and ocean. With its variety of geological features, the sea bed resembles the continental landscape[1]. In case of unforeseen circumstances or in the event of an accident, a ship may be grounded after it hits an obstacle. If it sinks, there may be no means to salvage or rescue the ship, and its entire cargo may perish. As ships sail, they may also encounter violent storms, such as hurricane or typhoon, or collide with an incoming ship. The weather on the high sea may force a ship to become vulnerable to destruction, thereby becoming distressed. Consequently, part of the cargo has to be jettisoned or thrown overboard to lighten the ship to enable her continue and complete the voyage.[2]

One of the primary duties of the master of a ship is to be diligent to bring the adventure to a successful conclusion by protecting the ship and cargo from undue risks as the agent for the ship owner. Consequently, considerable latitude is given to the master in the matter of goods overboard in order to lighten the ship[3]. If the ship sustains damage such that repairs are necessary, he must dock in the nearest port of call at which such repairs can be effected. The same applies in the case of any other grave peril threatening the ship or her cargo such as storms, hurricane, icebergs, heavy fog and other perils of the sea. Some of these perils may necessitate that part of the cargo be jettisoned overboard to lighten the ship for the safety of the ship, its passengers and remaining cargo. [4]

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[1] *Gardner et al, Geology of the United States seafloor- the view from Gloria Cambridge University, 1996 p.346. Schlee et al, Imaging the seafloor, US Geological Survey bulleting, 1995 p.24*

[2] Duhaime's Timetable of World Legal History". *Duhaime's Law Dictionary*. Retrieved April 9, 2016.

[3] Hardy Ivamy (1976) Payne and Ivamy's Carriage of Goods by Sea, 10th Ed. Butterworths, London, P. 178

[4] *Cornah, Richard; Reeder, John (2013). Cooke, Julian ed. Lowndes & Rudolf: The Law of General Average and the York-Antwerp Rules 14th ed. Sweet & Maxwel. Pp20-21*

2.0 ORIGIN AND DEVELOPMENT OF GENERAL AVERAGE

For a better understanding of the origin and development of modern practice of general average, the book of Jonah, one of the books of the Old Testament of the Holy Bible, serves a better reference and may probably be the earliest, and simplest example that gives a clearer illustration of what may be said to have given birth to the evolution and development of the modern practice of general average today. In the book of Jonah,[5] Jonah was sent by God on a mission to go to Nineveh and preach against the wickedness of the people of that great city. Jonah ran away from God. In an attempt to run to Tar-shish, he went down to Joppa where he found a ship about to sail to Tar-shish. There he boarded the ship and sailed to Tar-shish. In his foolishness, he thought he had fled away from the Lord. No sooner the ship got to the high sea, the Lord sent a great wind on the sea and such a violent storm arose that the ship, the passenger and goods were about to sink in the sea. All the sailors, mariners and passengers on board were afraid and each cried to his gods and in order to lighten the weight of the ship for safety, they also threw cargo/wares into the sea. Meanwhile, while all these incidents were going on, Jonah was right under the deck of the ship fast asleep. The ship master went under the deck and woke Jonah up and said, "Wake up" how can you sleep? Get up and call on your God! May be he will take notice of us and we will not perish. The sailors decided among themselves to cast lots to find out who was responsible for the calamity. They cast the lost and it fell on Jonah. Jonah then confessed and told them how God had sent him to Nineveh but he was running away from God. They asked what they should do to him to make the sea calm down for them. Jonah's reply was that, they should pick him throw him into the sea, and the sea will become calm. He said it was his fault that the great storm was upon them. The sailors decided to throw Jonah overboard like other cargo and the raging sea grew calm. Jonah was swallowed thereafter by a great Shark. Then all members on board feared the Lord, and they offered a sacrifice to the Lord and make vows to serve him.[6]

[5] Jonah Chapter 1: 1-7, the Holy Bible
[6] Jonah Chapter 1: 1-17 (supra)

Similar to the above but not identical versions of the tribulations and victory of Yunus are to be found in the Holy Quran.[7] In the light of the above story the lessons that can be drawn are:

Perils do occur at sea during voyage in the carriage of goods by sea, which may necessitate preservation or safety of interests. At sea, sacrifices and expenditure can intentionally be incurred for the common safety of vessel, cargo and persons. Salvos may be involved in the preservation from peril property connected with a maritime and adventure. The casting of the lot and the anxieties of the sailors before throwing Jonah over board was submitted as being the nucleus of risk distribution in general average in the carriage of goods by sea.

The lessons drawn from foregoing: one may say that the history of general average was first recorded in the holy bible. It might have started from time immemorial until the story of Jonah was in the Bible. General average is an ancient practice that was first put in writing by the Greek Rhodians in the Digest of Justinian. Their basis for this primitive law was common benefit: "that which has been given for all should be replaced by the contribution of all." 1Vessel transport was the primary mode of cargo transportation, and certain obstacles such as storms frequently arose potentially causing shipwrecks, forcing shippers to lighten their load through jettison. All who had benefited from the loss of the disposed cargo would then pay their share of the loss. The Romans adopted general average similarly but expanded it to include other instances of sacrifice made, such as cutting of the mast. Thus, general average became more of a general principle. After the fall of the Roman Empire, Europeans in the Middle Ages included general average in their sea laws. All maritime countries adopted different rules and processes. The first attempt toward unification began in 1860 through the National Association for Promotion of Social Science, resulting in various international conferences.[8] It was the Glasgow Conference in the September of 1860 where they first agreed on various resolutions to establish a uniform law of general average. In York in 1864 at the Third International General

[7] Surat al-Saffat Chapter 37 verse 139-148, Surat al-Qalam Chapter 68 verses 48-50, Surat Yunus Chapter 10 verse 98-100

[8]The initial conference 1 charles l.black &gilmore grant, the law of admiralty 1 2nd Ed. 1975 (citing Digest of Justinian).at 1-3.2

Average Congress, they agreed on eleven rules known as "The York Rules" or the "Rules" and suggested them as legislation in the maritime countries along with charter parties and bills of lading. These Rules were amended at the 1877 conference at Antwerp, where a twelfth rule was added, and became known as "The York and Antwerp Rules," which were further amended at a conference of the Association for the Reform and Codification of the Law of Nations in Liverpool in 1890, becoming "The York-Antwerp Rules 1890." This version of the Rules proved to be too specific and addressed only points significant at the time of each conference rather than establishing general principles. Thus, in 1924, after World War I, the Conference on the International Law Association revised the 1890 Rules and adopted a general declaration of principles lettered A-G to be applied in addition to the 12 numbered Rules. This created some confusion, however. At the 1950 Committee Maritime International conference, a "Rule of Interpretation" was added: In the adjustment of general average the following lettered and numbered rules shall apply to the exclusion of any law and practice inconsistent herewith. Except as provided by the numbered Rules, general average shall be adjusted according to the lettered Rules." Another CMI conference in 1974 amended the Rules once again in Hamburg. Then, in June 1990 in Paris, the CMI amended Rule IV. In 1994 in Sydney, the Rule Paramount was added, which states:

In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred. Lastly, the Rules were updated in 2004, which introduced amendments that included: the exclusion of Salvage from General Average, thus amending the present Rule VI, although credit will be given for any salvage paid by one party, usually ship on behalf of others; an amendment to Rule XI so that crew wages will no longer be allowed while at a Port of Refuge; an amendment to Rule XIV so that savings to ship interests achieved by effecting temporary repairs to accidental damage at a port of refuge are accounted for first, before any allowance in General Average is considered; the removal of any allowance for commission; the adoption of a procedure whereby the rate of interest (currently 7%) will be reviewed annually by Committee Maritime International and the introduction of a time bar provision, where national jurisdictions permit. It is reported that a considerable number of ship-owners have avoided incorporation of the 2004 amendments. The York-Antwerp Rules therefore came to contain: (1) one Rule of Interpretation, (2) seven lettered Rules of Principle (A - G), and (3) 22 numbered Rules (I - XXII). They are

commonly incorporated into bills of lading, charter parties and policies of marine insurance. In general, they must be incorporated into a contract to hold legal power. A timeline of these conferences is below:

Note that the first known statement of the law of general average is a small fragment of ancient Greek legislation, which forms a text in the digest of Justinian. The Rhodian law decrees, that if in order to lighten a ship, goods has been thrown overboard, that which has been given for all should be replaced by the contribution of all. It is submitted that the above sentence contained both the principle and a perfect example of the peculiar communism to which seafaring men are brought in extremities. That is what is given, or sacrificed. In time of danger for the sake of all, is to be replaced by a general contribution on the part of all who have been brought to safety. It is a rule, which from the oldest recorded times, has been universal among seafaring men, no matter to what country they belong, founded on the necessities of their position.[9]

However, the origin of the word average in English laws is not known. This is because England was almost the only maritime country which did not possess a code of sea law at that early time. England early commercial law appears to have been regulated by the merchant themselves. For instance, the name of Lombard Street on the English policies of insurance, which is set out in the first schedule to the marine insurance act, 1906 provides as follows, "and it is agreed by us, the insurers, that this writing or policy of insurance shall be of as much force and effect as the surest writing or policy of assurance here to force made street."[10] The provisions of the marine insurance act attests to the traditional way which attributes to settlers in Lombard cities during the time of the introduction of the practice of general average to England from Europe. A statue of Elizabeth I, recorded the question of insurance and trade been dealt with by certain older merchants in England which states that: grave and discreet persons appointed by the lord mayor of London as men by reason of their experience fittest to understand such matters.

[9]General Average Declared After Engine Explosion" *Western Overseas Corporation Dispatch, **2** (2), p. 1, March 2012, retrieved 2012-06-1*

[10] Nagendra & Raoul Colin Vaux: British Shipping Laws, Vol. 13, Ship-owners, Stevens and Sons London, 1967, p. 16

The above statement attests to the traditional way of appointing persons with vast experience in setting problems and conflicts pertaining to general average. It was in the year 1799 that trace can be found of the actual term general average in the English courts of law where Lord Stowell in the court of admiralty stated of the word average as follow:

"Is for a loss incurred towards which the whole concern is bound to contribute pro rata because it was undergone for general benefits and preservation of the whole..."[11]

3.0. DEFINITION OF GENERAL AVERAGE

The word general average traces its origins in ancient maritime law, it remains part of the law of most countries. The actual use of the word "average" has some traces of the growth of a technical term out of the Italian word ''avere'', which means the saving of property. The word avere is used throughout the code of Italy to denote the basis of contribution or contributory value. Thus, the jettison and damage through jettison, it says, shall be equalized over ''totun avere'' that is all the property remaining in the ship. General Average literally means, a general loss. When General Average is declared, not only are ocean carriers not liable for loss or damage to cargo, but every cargo owner is actually responsible, in part, for the cargo of others, as well as the ship itself.

A classic example of a General Average sacrifice is jettison to lighten a stranded vessel. Jettison is the throwing overboard of cargo or ship's material, equipment or stores. Other examples include stranding, fires, and collisions. **All participants' vessel and cargo owners contribute to offset the losses incurred.** Sacrifice is to give up something that is important or valuable to you in order to get or do something that seems more important. A number of definitions of general average have been laid down by the courts of law, and subsequently by formal legal and contractual codes as to what is general average, which shall be considered below. The word 'General Average' has been defined by Lawrence J. in the case of *Birkely v. Presgave*[12] as follows:

[11] Martin Dock ray and Katherine Thomas (1998) Cases and Materials on the Carriage of Goods by Sea, 2nd Ed. Cavendish Pub. Ltd., London, P. 433

[12] 91801) 1 East 220

That General average is all losses arising in consequence of extra ordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, and most be borne proportionately by all who are interested.

Secondly, the Marine Insurance Act[13] defined general average as where any extra ordinary sacrifices or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common advantage.

Thirdly, the York-Antwerp Rules[14] provided a more comprehensive definition of general average thus: 'That which has been sacrificed for the benefit of all shall be made good by the contribution of all." This is the latest revision made in 2004, which also made rules that are recognized internationally and provide guidelines for the handling of maritime losses. Financial definition of general average is said to mean the amount a company pays the shipping company or the losing company in a general average. A general average is a form of insurance in maritime law stating that if one company's cargo must be thrown overboard in order to save the ship from sinking, all other companies with cargo on the ship must pay restitution. Normally, each company's general average contribution is in proportion to the amount of cargo each had on the ship. This is done to reduce risk to all companies using a ship to transport their goods.

However, the writer attempts to define general average to be a risk distribution system rateably of sacrifices or expenditures intentionally and reasonably made for the common safety and for the purpose of preserving from peril the cargo involved in a common maritime adventure, which are borne by different contributing interests, only up to the amount of general average avoided. From the various definitions of general average provided above, the cardinal point to note is that, there is risk distribution by all interest in the maritime adventure consequent of intentional or reasonable act of unforeseen peril of the sea based on agreement between the parties. What this means is that:

[13] Section 66 (2) Marine Insurance Act, 1906

[14] Rules A, B & F York Antwerp Rules, 1974

a. All cargo on board is seized.
b. All cargo owners are held responsible to share in the loss.
c. Such cargo is generally delivered free of lien when the cargo owner puts up a security deposit or bond.
d. Typically, the security deposit must be cash.
e. General Average computations are so complex normally a General Average adjuster is retained to determine the total General Average loss amount. The additional expenses for the General Average adjuster are billed on a shared basis to those with cargo on the vessel.
f. General Average claims can take years to be resolved.[15]

Note that nothing is paid in respect of lives that may have been saved. Contribution is only in respect of the ship, goods carried, and the freight, which depend upon its safety. General average contribution is a contribution by all the parties in a sea adventure to make good the loss sustained by one of their number on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril. The law of general average is a principle of maritime law whereby all stakeholders in a sea venture proportionally share any losses resulting from a voluntary sacrifice of part of the ship or cargo to save the whole in an emergency. For instance, should the crew jettison some cargo overboard to lighten the ship in a storm, the loss would be shared *pro rata* by both the carrier[16] and the cargo-owners. In the exigencies of hazards faced at sea, crew members may have little time in which to determine precisely whose cargo they are jettisoning. Thus, to avoid quarrelling that could waste valuable time, there arose the equitable practice whereby all the merchants whose cargo landed safely would be called on to contribute a portion, based upon a share or percentage, to the merchant or merchants whose goods had been tossed overboard to avert imminent peril. General average traces its origins in ancient maritime law, and the principle remains within the admiralty law of most countries[17].

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[15]*Richard Cornah (April–May 2004).* "The road to Vancouver – the development of the York-Antwerp Rules" *Journal of International Maritime Law. Retrieved April 9, 2016.*
17 ibid
[17]Oxford Advanced Learner's Dictionary, 7th Ed., Oxford University Press, p. 108
John Donaldson et al., Op Cit P. 7

4.0 TYPES, CONDITIONS AND PRINCIPLES OF GENERAL AVERAGE

Types of general Average

There are two principal types of general average costs: general average sacrifice and general average expenditure. The jettison of cargo to prevent a ship from sinking is an example of general sacrifice. In the event of a fire, fire extinguishing costs are classified as general average expenditures. The general average sacrifices are made for common safety. For example, 'jettison' which means throwing away of the cargo in order to lighten the ship. Similarly, the use of cargo as fuel, cutting away of a spare and sails. The general average loss is rateable, contributed by the parties interested. In the contribution of general average loss, the contributory interest, amount to be made good and contributory values are considered.

Conditions that gave rise to General Average in shipping

There is a General Average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.[18]

a. Sacrifice or expenditure must be extraordinary

Normal costs or damages sustained by a marine transport company in meeting its contractual obligations do not constitute General Average. For instance, marine equipment affected by a ship foundering is considered differently to equipment breakage or deterioration at sea. Running a ship's turbines when not at sea is deemed abusive and unacceptable. Running the turbines at sea, however, is deemed regular and acceptable, regardless of the risk to vessel and freight, and what was done to resolve the problem. Any loss resulting from the latter is not covered by 'General Average'. In order to be covered by the term, there must be commitment and resolve; it could not be avoidable. It is not possible to 'sacrifice' something if losing it was preordained and unalterable.

[18]Rule A of the "York-Antwerp Rules 1974"

b. There must exist real and substantial peril

In order to be covered by the term 'General Average', it is imperative there be risk and danger to vessel and cargo. It does not have to be immediate, but it must be genuine and considerable. There is a fine line between things done to protect all in the face of impending danger and those done in order to stave off potential risk. We do not detail those differences now, but provide two examples as clarification. A ship at sea and drifting with no engine power is considered to be in immediate danger. This applies even if the weather and seas are mild and there seems to be no further danger. If, however, a captain reasonably decides to seek safe harbour to avoid bad weather, this is not generally considered as General Average.

c. Need for common safety

Overall, anything done must be for the sake of overall wellbeing, not just a percentage thereof. Consider, for example, a ship freighting goods required to be kept under refrigeration. The cooling system malfunctions while the ship is in a hot climate. The master would have to make for the nearest port so the machinery could be fixed. Under these circumstances, the risk is solely to the freight in the cool rooms. The vessel and any other materials being carried are unaffected and could finish their journey. In such an instance, the premise of 'General Average' does not apply. Another illustration would be a vessel transporting costly freight being sent to various traders getting beached on a shoal. The captain has some of the freight offloaded, thus lightening the ship so it moves off the shoal and is once more afloat. Once any damage has been made good, the ship is able to sail on, carrying the remaining freight to its destination.

Clearly there might have been alternatives available to the captain. He could, for example, have called for assistance to get the ship hauled from the shoal. This, however, could have done more harm than good. It might cause a breach to the ship's hull, thus potentially putting the freight in danger of water damage. He could also have attempted to get the ship off the shoal by using his own machinery on board. This too, however, could risk breaching the hull, and would likely also harm the engines and other machinery. All these options may well cause damages or discrimination to

the venture stakeholders.[19]In practice, the principles of General Average are the same, whether the ship is a bulk carrier with one consignment of cargo or a container vessel carrying 20,000 TEU of containerised goods. The practical issues do, however, increase in scope depending on the scale and complexity of the casualty and number of interests involved.

d. Another condition that give rise to general average contribution that there must be an intentional act of man that gives rise to it. It must arise from damage purposely and directly affected by the agency and will of man, not accidentally caused by the agency of wind and waves of the sea[20]. For instance, what occurred to Jonah's ship above is an act of general average, because the ship, crew, cargo and passengers were in imminent danger of being lost.

Principles of General Average

There is no general average where the sacrifice is made for the interest of one person only. For one to be entitled to a general average contribution, it must be shown or there must be evidence that the loss was sustained with a view to the general safety of the vessel, freight and cargo[21]. In other words, the loss which will entitle one of the co-adventures to a contribution from all, must be suffered for the sake of all. To determine general average contribution, the question to be asked is, was the sacrifice for the benefit or safety of the adventure? If the answer is in the affirmative, that is, for the safety of the adventure, the general safety must also be the motive for the sacrifice/but, if it is made for other motive it will give rise to any claim for general average[22]. For instance, if a vessel from Italy were to berth at Tin Can Island Port, Lagos, Nigeria and there occurred a fire outbreak in one of the holds of the ship, and in consequences of the fire outbreak, the Nigerian Ports Authorities took over possession of the ship from the master. And if the measures taken by the Port Authorities is to save other vessels and property within Tin Can Island Port as opposed to the saving of the Italian Vessel and her cargo, there is no general average contribution. But if, the

[19]*Baughan, Simon (2015). Shipping Law 6th ed. Routledge.pp50-67*
[20] Rule A, York Antwerp 1994
[21] Ibid rule ii, xv and xviii
[22] Ibid rule viii

motive of the port authorities is to save the Italian vessel and her cargo, then there would be a general average contribution by all interests.

Also, general average loss must have been incurred under the pressure of real and imminent danger common to the whole adventure. It is not enough that a jettison has been made. The measure must have been forced upon those resorting to it by the fear of perishing.

A panic terror will not excuse the captain who had recourse to jettison without being forced to it by real danger. For instance, in the case of *Vlassopoulos v. British and Foreign Marine Inc. Comp*.[23] It was held that the peril must be real, it is not necessary that the ship should be actually in the grip, or even nearly in the grip, of the disaster that may arise from a danger. Someone has to take the initiative, as the saying, goes that doing nothing is worse than making the wrong decision. A good example of lack of initiative was the vessel "The AMOCO CADIZ[24]' which was stranded on the West Coast of France in March, 1978. The master ought to have acted timeously and promptly to save the vessel, cargo and crew but refused to make a decision. It is submitted that an error of judgment is not a crime.

The amount to be made good and the contributing interests are valued at the time and place of the termination of the voyage[25]. The values are subject to any loss or damage which have occurred; and in order to put all on an equal footing, an estimate has to be made of the accidental loss or damage, which would probably have occurred to the property sacrificed.

General average sacrifice includes the jettison of cargo to enable a vessel to refloat after being grounded and water damage caused by attempts to put out a fire. But nothing is paid in respect of lives that may have been saved. Contribution is only in respect of the property, ship and the freight which depend on its safety. The question is how can one enforce his rights under general average?

[23] Carver on the law of Carriage of Goods, paragraph 864, p. 735
[24] March, 1978
[25] Rule G York Antwerp 1994

A party to a contract of carriage by sea or maritime adventure usually makes special provision in the contract regarding general average to protect his right to enforce in case of intentional jettison of goods. The most common is to insert a clause to the effect that general average is to be adjusted in accordance with the York-Antwerp rules, 1994. This stipulation may be inserted in a charter party, or in a bill of lading.[26] There has to be security giving of general average, in the customary terms, that a promise to pay any general average contribution that is found to be properly due.

Rights of recovery for general average contribution for goods may exist even though, owing to a mistake or oversight. However, considerable difficulties are likely to be encountered in enforcing those rights, more especially if the goods change ownership during voyage or immediately after discharge. Under English law, for instance, a duty is imposed upon the ship owner to obtain general average security, not only for his own benefit but also for the benefit of the owners of goods.

Parties claiming in general average must give notice in writing to the general adjuster of the loss or expenses within twelve months of the date of the termination of the common maritime adventure. Failing to give notification or within twelve months of request for the same, the average shall be at liberty to estimate the extent of the allowance or the contributory value on the basis of information available to him, and can only be challenged on the ground that it is manifestly incorrect[27].

4.1 Arguments to abolish general average

Today, especially in the case of container ships, general average is by all accounts extremely time-consuming and expensive. Container ship voyages that become subject to general average due to an incident can involve thousands of cargo interests, all having different cargo insurers. The more cargo interests, the longer the case will take as general average involves numerous insurance settlements. Often, delays occur just calculating liability, regardless of whether any disputes arise. Time must be taken to arrange for general average security, to obtain documentation, and to settle claims, once statements have finally been produced. All of this requires

[26]The full text of the 1994 Rules

[27] Rule E York Antwerp Rule 1994

immense work on all sides, which includes experts, adjusters, surveyors, brokers and agents: "The cost of the work carried out by these people appears in the adjustment and includes average adjuster's fees, ship valuer's fees, average disbursements, insurance premiums and brokerage, additional survey fees, expenses of collecting general average security, collecting or settling commission and the ship-owners own expenses for declaring and handling the general average. Increased overhead costs are often not taken into consideration, such as the extensive clerical work involving settlement. Professor William Tetley explains in his article, general average claims must be submitted by the ship-owner's underwriters in writing to the average adjuster within 12 months of the date of termination of the venture. A professional average adjuster then apportions the adjustment[28].

The general average is apportioned by multiplying the value of each contributory interest by a fraction, composed of the value of all the general average expenses, divided by the sum of the contributory values. These calculations can become very complex, with the result that it can take years, in some cases, for the adjustment to be completed and a final 'general average statement' to be issued by the average adjuster.[29] Moreover, even the issuance of the general average statement does not necessarily result in resolution. The contributions must then still sometimes be quantified by a court judgment or arbitral award. This process easily can take years and, while some may argue that general average guarantees timely action since specific rules are provided, this argument often fails in practice as a result of the complex adjustment and/or litigation processes

Arguments to Retain General Average

The largest conflicts regarding the present usefulness of general average are those between ship-owners and cargo insurers. Ship-owners worry that if expenses such as cargo handling are not subject to general average, many of these expenses will fall on the ship-owner along with repair costs. Ship-owner also argue that general average acts as protection over sacrificing

[28] The place of General average in Marine Insurance Today, 123 UN Doc.94-50984, Mar. 8, 1994.

[29]ibid. Conference Report, Int'l Marine Claims Conference, Anything But Average-How the Average Adjuster's Role Differs Depending on Jurisdiction. (Oct. 1, 2009), available at http://www.marineclaimsconference.com/2009/docs/AveragePanel.pdf.

cargo so as to permit incurring expenses to save the voyage. However, others argue that sacrifice as a reason to decree general average is so rare today that all expenses should simply be allowed to lie where they fall. As explained in General Average,[30] in their view general average acts as a casualty management system understood by all parties and is therefore a steadfast system in a time of crisis. To them, narrowing the scope of general average or abolishing it would be a disadvantage to ship owners by reducing the amounts recoverable. As they argue: General Average is a very practical solution for sorting out distribution of losses following major maritime casualties. It is a system that is understood internationally and there is no point doing away with all or part of it. The recent lack of English case law on abandonment of the voyage is in no small part due to the way general average works in practice.

In a position paper by International Chamber of Shipping, they maintain that the master of a ship can concentrate on the safe navigation and safety of the vessel, taking whatever decisions are necessary in the interest of all engaged in the maritime adventure; and the Master's independence of action does not prejudice the interests of any one party since all contribute pro rata to their degree of loss. The system therefore represents an equitable means of rateable sharing therefore general average contribution should be retained.

Similarly, in 1996 a worldwide group known as the Association of Average Adjusters issued the following detailed argument predicting certain negative effects, which would result if general average were abolished: If General Average were abolished, i.e. either by change of law or by agreement, and those losses and expenses which are at present divided between ship and cargo were not so divided, some other method of dealing with those losses or expenses would have to be devised. The end of a well-known system would inevitably lead to uncertainty and to litigation if any new system were not seen to be fair and workable. The most frequently suggested method would be for the losses and expenses to 'lie where they fall.' Therefore, ship-owners would recover for their sacrifice from their

[30] .A position paper by International chambers of shipping May 2004, available athttp://www.jssusa.com/assets/Uploads/GA-papers/ICS0504. 13

insurers, and cargo owners from theirs.[31] They gave an example, that general average protects against the unnecessary jettisoning of cargo. This, of course, pre-supposes that a ship-owner or his master will always make the right sacrifice and raises the question as to what the 'right' sacrifice is. An example, a fully loaded ship strands: to refloat, the master can either jettison a quantity of cargo or damage the vessel's engines in forcing her off the ground if salvage assistance is not available. Now, it has been suggested to always do the right thing, whichever is most efficient and involves least loss or expense. So, if the right thing is to strain his engines, he will do it. But the choice is not so simple. The cost of jettisoning cargo is more easily quantifiable and the ship may have been so little damaged by the stranding that she can carry the balance of cargo to destination. The amount of damage to be done to the engines is almost wholly unquantifiable and, even after refloating, the damage so done may involve resort to a port of refuge, probably under tow for repairs.

Furthermore, the master has a duty to his employers, and they have a duty to both their shareholders and their Insurers, under the Maritime Insurance Act1906 section (78(4)), to avert or minimise a loss. If the Master damages his engines, he will lose his employers' earnings while repairing them and the Hull underwriters will have to pay for the repairs. Indeed the Underwriters could argue that they are not liable for the claim as the Master could have jettisoned the goods. The Master will probably be sacked anyway for running the vessel aground in the first place, so he might as well jettison the cargo. In the absence of General Average, the loss of cargo lies where it falls, with the cargo owner and his insurer. When a vessel breaks down at sea, it and its cargo can be rescued by a tug employed, either on a contractual basis at a daily rate or on a no-cure-no-pay salvage basis.[32]

[31]ibid Charles Hebditch, John Macdonald & Phillip Stacey, General Average Briefing Notes, Ass'n of Average Adjusters Apr. 3, 1996, at 11, available at http://www.jssusa.com/asset.

[32]The Association of Average Adjusters of the United States and Canada: YARArchived September 23, 2009, at the Wayback Machine

The ship owner is the one who contracts on the daily basis and if losses lie where they fall, he and his insurers will have to pay the full amount of the hire: his insurers might not be too happy about this if the cargo is worth four or five times the value of the ship. If the ship and cargo are rescued on a salvage basis, then the salvor will obtain an award against the ship and cargo separately. Under these circumstances, it seems probable, in the absence of the General Average system, that the number of no-cure-no-pay salvages will increase as salvage awards tend to be considerably more expensive than towage on a daily hire basis; this will be to the disadvantage of both hull and cargo underwriters. The solution to that would be also to abolish the law of salvage. They also highlight problems, which could arise with respect to port of refuge expenses.

In the absence of the General Average system, there will be problem of how to allocate expenses, especially port of refuge expenses. If the vessel is towed into a port of refuge, under a no-cure-no-pay salvage, the ship owner, basing himself on the arguments successfully put forward in the "Trolius" and "Glaucus[33] cases, may try to argue that the vessel is not in safety until repaired and insist that all the port of refuge expenses are paid for by the salvors. The expenses, plus the salvors' mark-up, will be considered by the salvage arbitrator in his separate awards against ship and cargo, which will lie where they fall. Even where the vessel reaches a port of refuge under her own power, there will probably be doubts about who is liable for the various expenses incurred there. Presumably, the inward and outward port charges might be claimed from Hull Insurers as part of the reasonable cost of the repairs, subject to the terms and conditions of the policy. But what of the costs of discharging, storing and reloading cargo, if discharge is necessary to effect repairs?

Again, the ship owner, basing his argument on the Medina Princess,[34] may try to claim these costs also from his Hull Underwriters as part of the reasonable cost of repairs. But what if the cargo is damaged by water used to extinguish a fire and has to be discharged, stored, sorted and reconditioned before reloading? Under the General Average system, as these are General Average expenses, the ship-owner traditionally arranges

[33] *1962]2 Lloyds Report 17 Rose, Francis (2005). General Average: Law and Practice. Maritime and Transport Law Library (2nd ed.). Informa Law (Routledge)*

[34]

and pays for these operations. Nevertheless, if losses lie where they fall, he may be reluctant to do so and may insist on receiving cash in advance from the relevant cargo interests before he does so or; alternatively, he may try to collect some kind of security to guarantee payment of these special charges.

Nowadays, the majority of cases where a ship is likely to be detained at a port of refuge for a substantial time to effect repairs and discharge of cargo is necessary for these repairs, the ship-owner arranges and pays for the cargo or part of it to be forwarded to destination by other means, confident that a substantial proportion at least, if not all, the cost will be allowable in General Average. If the loss lies where it falls, he will be reluctant to do so and the cargo interests, if they require their cargo urgently, will have to arrange and pay for this by themselves and many cargo policies do not cover such forwarding costs. The ship-owner cannot, at least under English Hull policies, recover the wages and maintenance of his crew during repairs, as part of the reasonable cost of those repairs. He may therefore, when his ship is at a port of refuge, choose to repatriate them and hire people at the port of refuge to act as watchmen, to shift the vessel to and from a repair berth, etc. The cost of hiring these riggers is normally allowable as part of the reasonable cost of repairs.

If it is correct that the majority of the expenses at a port of refuge, which are now allowed to general average will, in the absence of general average, fall on the ship owner and his Hull insurer; this will have further consequences. A ship owner may consider a voyage frustrated if the cost of completing it exceeds the sound market value of the ship. For example, if a ship has a value of US$ 2,000,000 and the cost of repairing damage is US$ 1,600,000 and the cost of the port of refuge expenses, previously on General Average, now lying where they fall, on the ship-owner, amount to US$ 450,000. The total cost of completing the voyage exceeds the value and the voyage is frustrated. The cargo interests have to pay themselves to discharge and forward cargo to destination. Under the General Average system, they would only pay their contributions to the port of refuge and extra forwarding costs. Furthermore, using the same figures, the ship-owner, assuming the vessel was insured for its sound value, could prove a claim for constructive total loss from his Hull and Machinery Insurers, whereas, under the general

average system, he could only use the ship's proportion of the expenses to prove the constructive total loss and could not do so[35]

5.0 CHALLENGES OF GENERAL AVERAGE CONTRIBUTION

The first problem of general average is how to distinguish between particular average and general average before making a claim. This has been a problem to cargo owners. Particular average is a partial loss or damage of the subject matter insured, caused by peril insured against, and which is not a general average loss[36]. This implies that the loss or damage is accidental and not deliberately caused, while general average is a loss caused by or directly consequential on the general sacrifice. There is general average where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving property in periled in the common venture. In the earliest days of general average, the problem was that cargo owners hardly distinguished between the two and often find their cases falling under particular average, which can only be settled by insurance companies. This problem still persists today.

Settlement of disputes relating to general average has never been smooth and easy. For instance, cargo owners always query ship owners for lack of due diligence to make the vessel seaworthy before embarking on the voyage. This is one of the main cargo-owners' objections to general average contribution. This objection may be true and the issue of seaworthiness cannot be over emphasized because many engines breakdown is as a result of poor maintenance. Cargo owners often raise objections relating to breaches of contract on the part of ship owners for failure to disclose the dangerous nature of the goods. Poor navigational aids sometimes lead to accidents. A case in point, though not a general average case, is the case of Grand Champion Jankers Ltd v. Norpipe A/S[37] where the House of Lords held that the owner was liable. The vessel "Marion" while dropping anchor at Hartle Pool, damaged a submerged oil pipe line. A claim for the resulting damage of exceeded $25,000,000. The accident was caused because the

[35] *Cornah, Richard; Sarll, Richard (2018). Shead, Joshua (ed.). Lowndes & Rudolf: The Law of General Average and the York-Antwerp Rules (15th ed.). Sweet & Maxwel.p.236*

[36] Section 64 and 66 Marine Insurance Act, 1906

[37] (1984) NWLR p. 942

captain used an outdated nautical chart, which did not mark the pipe line. The ship owner sought to involve the Merchant Shipping Act to limit their liability to $982,292.06. The court came to the conclusion that the ship owners could not limit their liability because they failed to maintain effective supervision. The Managing Director also failed to take note of a marine inspectorate report that referred to the unsatisfactory condition of the ships charts.

Moreover, settlement of general average contribution may well be difficult when developing nations or countries are involved. They are equally difficult when the United State of America is involved because of frustration and high cost of legal fees charged by lawyers in America. Hoefiner, the chairman of the Association of Average Adjusters of the USA[38] in his address stated:

David Angus commented on the frequent refusal of cargo interest to pay their contributions to general average. He told us that a London P & I Club Managing Partner had said to him: "general average has become a disaster. Can't we for God's sake abolish it? While the sentiment expressed is not new, it reflects the frustration that exists because cargo underwriters, particularly in the United States of America, have made a general average a happy hunting ground for the legal profession rather than the practical solution for commercial problem it was intended to be. Nowadays, general average leads to under writers passing money around amongst themselves and nothing more. The primary problem of General Average is the settlement of general average which has become the weak point of the distribution system.

The practical challenge of general average contribution is that it is tedious, expensive and time consuming because of protracted and costly arguments as to their correct allocation. The period between the act of general average and formal request to adjuster to draw up a general average statement to final settlement is long. For instance, particular difficulties in collection are experienced in North African countries, Central American countries, Venezuela and in the United States of America. Occasionally, difficulties

[38]Address of Hoefiner at the Annual General Meeting of General Average Adjuster, 1983s

are experienced in the United Kingdom and in the Socialist States of Eastern Europe, the Soviet Union and Western Europe

To most cargo owners, events leading to general average is always put at the door steps of the ship owners. They claim that the vessels are not properly managed and maintained. It is submitted that this may not likely be true sometimes because the vagaries of the sea may necessitate the jettison of goods not necessarily for lack of maintenance of ships.

The problem of who takes the initiatives in general average has not been fully resolved. Is it the master or whoever is in charge who will have the benefit of advice from those ashore. The case of AMOCO CADIC (supra) stranded in the West Coast of France was an example of lack of initiative with unfortunate consequences that led to the loss of ship and cargo.

Irrespective of how fair the adjuster is, there will always be objection either on the ground that he has too little or too much in the general average column or that the contribution value for the vessel or cargo interest are not as they should be General average exists independently of marine insurance. But in modern commercial policies, insurers on ships and cargo almost invariably pay proportion of general average losses and contribution under the policies. The problem is that their interest in general average cannot be properly be understood

There is also the problem of lack of uniformity in the application of the rule; and the manner of calculation is not simple. Experts in that field must be called in to calculate. If the expert is to travel from London to Nigeria, for instance, or from Britain to Germany or vice-versa that also entails a lot of professional fees to be bored by the ship owners and the cargo owners that also lead to loss of business, money and time. Difficulties may arise where there are different ports of destination, which is often the case in contemporary trading conditions.[39]

In a situation of perils following maritime casualties, a conflict of interest will often arise naturally from the need to choose the means for saving the situation. The owner of the goods jettisoned might well have preferred the master to choose another alternative or that some goods other than his own

[39]*Mandaraka-Shephard, Aleka (2015). Maritime Law (3d ed.). Routledge p149*

had been selected for sacrifice. It is submitted that general average owes its origin to that conflict of interest and is a device whereby, so far as possible, the conflict is eliminated through general average. The owner of the property sacrificed is placed as nearly as possible in the same financial position as the owners of the property saved by that sacrifice.[40]

The question now is, is general average outdated? If outdated, should it be abolished or be retained in the contemporary world. It is a well-known fact our discussion above on the origin of the principle of General Average that General Average had existed from time immemorial. Also, on whether it is obsolete, there are two schools of thoughts on this issue. The first school of thought is of the view that general average is an obsolete institute and it should be abolished. This is particularly so on the ground that now, ship, freight and cargo are all insured. As far as they are concerned, general average merely affords underwriters the opportunity to pass money around amongst themselves and nothing more.

The second school of thought, that is, the general consensus of maritime law practitioners is that general average should be retained as it is now until a final blue print of new insurance policy is formulated or provided for. That if general average is discarded something must be put in place to replace it and must be superior to general average. However, it is the view of this writer that something had been put in place over the years since 1906, that is, the Insurance Companies Act.

The first school of thought is of the view that general average should be abolished has more merit for the following reasons:

1. General average adjustment is in many cases, no doubt, a very expensive and a complicated process that often leads to delay in the settlement of accounts between stakeholders in a maritime adventure right from its inception
2. The benefits and burden of general average contribution are, in most cases, ultimately enjoyed or borne by the insurers of contributing interests. They could make appropriate alteration to premium rate, up or down, if general average is abolished today

[40]*Todd, Stuart (March 15, 2018).* "General average declared for stricken Maersk Honam vessel". *Lloyd's Loading List*. P.18

3. Today, purchasers of ships must, as a matter of law, insure their vessels against any loss. Likewise, cargo owners must insure goods against damage or loss at the point of loading or during voyage and at port of discharge. All these are borne by the insurance company concerned. If general average contribution is retained, it will amount to double payment. The owner of goods saved during voyage and payment by insurers of the owners of the goods jettison at sea. Consequently, the reality now is that general average is obsolete and therefore needs to be abolished.
4. In modern commercial policies, insurers on ships and cargo almost invariably pay a proportion of general average losses and contribution under their policies, but their interests in general average cannot properly be understood unless consideration of insurance are, in the instance, left out of account.

6.0 CONCLUSION

The law of general average is the oldest maritime concept, with its roots traceable to the text in the Bible. Similar incidence in its origin is also traceable to the earliest maritime codes of various countries. It is humbly submitted that general average be abolished since ships, cargoes, freight and crew on board must be insured, and this is borne by the insurers. If general average contributions continue to be retained, all losses will at the end of the day be referred to the insurance companies for settlement and that will amount to double receiving of payment by owners whose goods are thrown overboard in the course of voyage.