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NATIONALISM AND INTERNATIONALISM: CONTEXTUALIZING CLAMOUR FOR SELF-DETERMINATION IN NIGERIA

By

Dawood Adesola Hamzah*

Abstract

It was nationalism that led to the demise of colonialism. Ironically, it was the same nationalism that marked the beginning of Colonialism in the first instance. Nationalism is a conceptual movement for the advancement and preservation of sovereignty and territorial integrity of a nation. Internationalism on the other hand, is the belief in cooperation between sovereign states for the promotion of a greater political or economic cooperation among nations and people. Traditionally, nation-states are held to be autonomous to the extent of being free to enact laws and enter into international agreements that promote their interests according to how they themselves define them. This is essentially the reality of internationalism as individual sovereign states are the basic building blocks that give stamp of authority to the international system. However, modern international law has practically grown beyond that traditional conception. The set aspiration for self-determination of the Indigenous People of Biafra (IPOB) nationalism is in quagmire. It has been a victim of circumstance. This paper is an attempt to answer some pertinent questions such as: Are there communality or conflict between the concepts of nationalism and internationalism? To what extent the Igbo nationalist movements can be contextualized within the framework of these concepts? To address these questions, the methodology to be adopted is an interpretive methodology within the relevant theoretical framework.

Keywords: Nationalism, Internationalism, United Nations, Nigeria, and Biafra Agitations for Self-determination in Nigeria

1.0 Introduction

The modern nation-states are products of struggle. African nation-states for example, emerged from the epoch struggle against the imperial colonialism. The struggle had a global abnormal idiosyncrasy because war of independence was of global characteristics to win sovereignty by overthrowing imperialist regimes. The edifice of colonialism began to crumble right from the fall of Czariat Empire in 1917, during the First World War (1914-18). It was a time when Communist Revolution began in Russia resulting in the liberation of states that were annexed by Czar.[1] Consequently, after the World War II (193-45), the Great

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Britain had become incapacitated and thus succumbed to the wave of nationalism movement and by 1947it had no option except to abdicate power to the local natives. Immediately afterwards, nationalism emerged as an important and landmark international phenomenon spreading across the colonized territories.[2]

However, law is that element which binds the members of the community together in their adherence to recognized values and standards.[3] It consists of a series of rules regulating behavior, and reflecting, to some extent, the ideas and preoccupations of the society within which it functions.[4] This is exact description of the term 'international law' with important difference that the principal subjects of international law are nation-states, not individual citizens.[5] Thus, international law is the corpus of rules accepted as binding in relations between states and between nations. It stands as a legal framework for the practice of stable and organized international relations.[6]

The international law principle of non-interference in another country's domestic affairs is to the effect that each nation-state is qualified to have sovereignty over its territory and domestic affairs to the exclusion of any external authority or control. It is also to the effect that each state irrespective of geographical size is equal.[7] This principle gave impetus to the rise in 19th century thought of nationalism, under which legitimate states were assumed to correspond to nation-groups of people united by language and culture.[8]

The emerging realities of the relationship between nationalism and internationalism in the present time and whether there is communality or conflict between the two concepts and their impacts on clamour for self-determination forms the focus of analysis in this paper.

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[1] Joshi, A., 'Short Essay on Nationalism versus Internationalism' (2011), *http://www.preservearticles.com/201106037487/short-essay-on-nationalism-vs-internationalism.html* (accessed 28 Sept., 2017)

[2]Ibid.

[3]Shaw, M.N., *International Law*, (6th ed), (Cambridge University Press, 2008), p. 1. (The exception is when individuals are charged for crimes against humanity/human rights violation under the modern international criminal justice administered by the International Criminal Court in Hague). See Seira, Y., 'Breaking Imaginary Barriers: Obligations of Armed Non-State Actors Under General Human Rights Law – The Case of the Optional Protocol to the Convention on the Rights of the Child', *Journal of International Humanitarian Legal Studies*, (2014), 5 (1–2), pp. 213–257.

[4]Ibid.

[5]Ibid.

[6] Williams, S., *Fundamental Perspectives on International Law*, (Boston, USA: Wadsworth, 2011), pp. 4–5.

[7] See generally Kissinger, H., *World Order: Reflections on the Character of Nations and the Course of History,(Penguin Book Ltd., 2014), particularly introduction to Chapter 1.*

[8] See generally, Leurdijk, J. H.,*Intervention in International Politics*, (Eisma BV, Leeuwarden, Netherlands, 1986), p. vii.

1.1 Historical Perspective

Nationalism is a movement and a state of mind that harmonizes national identity, consciousness, and collectivities. It brought about the great transformation from the primitive order to modernity; it promoted imagination over and above production, distribution, and exchange; and it stimulated the nature of power over people and territories that fashions and controls the social and political world order.[9] It seeks to preserve the nation's culture and often involves a sense of pride in the nation's achievements. It is intricately linked to the concept of patriotism. In certain instances, it is used to refer to the belief that a nation should be able to control the government and all means of production.[10]

Nationalism emerged in a sixteenth-century Western Europe and England. Its emergence coincided with the advent of the Western Europe, and societies of Western European descent, to the position of economic, political, and to a certain extent cultural leadership of the entire world. [11] It emerged in a region, culturally unified by Western Christianity, which, independently of nationalism, and for the first time on such a broad scale in history, already began to bring other continents under its sway, thereby initiating the process of cultural, economic, and political globalization.[12]

On their arrival in African in the 1880s, the Europeans shared the continent among themselves as 'cake'. Under their colonial agenda, African nations and communities were subjugated and colonized with exception of Ethiopia and Liberia. The status quo remained until after the World War II when nationalist activism emerged. As the nationalist movement became strong and their campaign for independence gathered momentum in the 1950s and 1960s colonialism gave way and the colonized territories attained independence sometime on the platter of peaceful process and sometimes through several long bitter and bloody civil wars like in the cases of Algeria and Kenya.[13]

[9]Greenfeld, L., 'Five Road to Modernity', *Book Description by Harvard University Press, https://liahgreenfeld.com/books/nationalism-five-roads-to-modernity/* (accessed 4 Oct., 2017)
[10]Tom, N., and Paul, J., *Global Matrix: Nationalism, Globalism and State-Terrorism*, (London and New York: Pluto Press, 2005).
[11]Greenfeld, L., *Nationalism*, (Blackwell Publishing Ltd., 2012), p. 1.
[12]Ibid.
[13]See Horne, A., *A savage war of peace: Algeria 1954–1962* (New York Review Books, 2006); and Anderson, D., *Histories of the hanged: The dirty war in Kenya and the end of empire*, W&N; (New Ed edition, 2006).

As European departed Africa, the pioneers and leaders of nationalist movements assumed the leadership and control of political, educational, religious, and other social organization structure left behind by the colonialists.

1.2. Conceptual Analysis

Nationalism is theoretically a concept and a movement with collective tendencies. In practice, it is essentially for the promotion of the interests of a community, nation-state, or a country for the preservation of sovereignty, attainment and maintenance of territorial identity, integrity and self-determination.[14]It holds that a community or a nation is an ideal basis of an independent political and administrative framework to the extent of self-determination, and, freedom from external interference.[15]It consists of three basic paradigms.

1.3 The Three Paradigms of Nationalism

There are three paradigms namely, primordialism or perennialism, ethnosymbolism and modernism.[16]

1.3.1 *Primordialism*

Primordialism otherwise known as perenialism is the notion that nationalism derives from the early, 'primordial' roots and sentiments such as being born into a particular religious community, speaking a certain language or having or taking part in certain traditions, custom and conventions.[17] Primodialism has its origins in the evolutionary theories of Charles Darwin that were later substantially elaborated by John Tooby and Leda Cosmides.[18]

1.3.2 *Ethnosymbolism*

Ethnosymbolism is a theoretical attempt to explain nationalism by contextualizing it throughout history as a dynamic, evolutionary phenomenon and by further examining the strength of nationalism as result of the nation's subjective ties to national symbols imbued with historical meaning.

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[14]Anthony, S., *Nationalism: Theory, Ideology, History*, (Polity Publishers, 2010), pp. 9, 25-30.

[15]Alan, F., 'Nationalism', In Geoghegan, Vincent, Wilford, Rick (eds.), *Political Ideologies: An Introduction*, (Routledge, 2014), pp. 100-102.

[16] Paul,J., *Global Matrix: Nationalism, Globalism and State-Terrorism*, (London and New York: Pluto Press, 2005), pp. 73-103.

[17]Brass, P. R., *Nationalism* in Hutchinson & Smith (eds.), (Oxford University Press,1994), p. 83. See also Majevadia, J., *An Introduction to Nationalism Theory*, (2012) http://theriskyshift.com/2012/04/introduction-to-nationalism-theory-html/ (accessed 3 Oct., 2017) .

[18]Motyl, A., *Encyclopedia of Nationalism, (2 Vol. eds.) (San Diego: Academic Press,*2001), p. 268.

Ethnosymbolism is a 'middle-ground' between opposing views as the proponents of this theory including Smith maintain that nations themselves are modern ideas as they were consolidated in the modern industrial and post-industrial age. However, the pre-modern origins propounded by the primordialists are also relevant and vital to understanding people's connections and relationship to the nation.[19]

1.3.3 *Modernism*

Modernism theory holds that nationalism is a recent phenomenon that needs the structural conditions of modern society to exist. According to this theory, nationalism as an ideology began predominantly in Europe at the advent of industrialization.[20] To that extent, ethnic and cultural roots are not relevant factors in this regard because they were common denominators among all modern nations. Prominent modernists argue that nationalism and its cultural symbols used in the construction of the nation are created as a form of top-down control. Ernest Gellner is a leading proponent of this view. He argued that the industrial age ushered in a need for new forms of identity to reform and correct contradictions in society brought about by major shifts in social mobility.[21]

1.4 Internationalism

Internationalism is a political framework that promotes greater political or economic cooperation among independent sovereign states and people.[22] Beyond its link with other ideologies and movements, it has doctrinal basis through which its *modus operandi* is expressed. [23] It has been described as "the theory and practice of transnational or global cooperation.[24]This notion emphasizes that world unity is essential and this unity should cut across national, political, cultural, racial, or class boundaries so as to advance their common interests.[25] British liberal internationalist Richard Cobden was a leading pioneer of this notion.

It is interesting to note at this juncture that in recent times, internationalism has taken a new dimension under a doctrine of 'responsibility'. A practical expression of this new dimension can be seen in the United States of America assuming the burden of "policeman of the

[19] Ibid.
[20]Majevadia, J., *An Introduction to Nationalism Theory*, (2012) http://theriskyshift.com/2012/04/introduction-to-nationalism-theory-html/ (accessed 3 Oct., 2017) .
[21]Ibid.
[22]Arora, N. D., *Political Science*, (McGraw-Hill Education 2011), p. 2.
[23]Haliday, F., 'Three concepts of internationalism', *International Affairs*, (64) (2) (1988), pp. 187-198
[24] N. D., Arora, *Political Science*, (McGraw-Hill Education, 2011), p. 2.
[25]Kuehl, W. F., and Ostrower, G.B., *Internationalism*, (2002), http://www.encyclopedia.com/social-sciences-and-law/political-science-and-government/military-affairs-nonnaval/internationalism (accessed 05 Oct., 2017)

world," both unilaterally and multilaterally.[26] It should also be noted that the foundation of modern internationalism is strictly the existence of sovereign nations. It thus, envisions an international policy of multilateralism - i.e. world leadership not held by any single country by creating some formal and informal interdependence between countries. [27]

1.4.1 Norms of Internationalism

It can be seen from the above analysis that the emergence of nationalism as a tool of struggle against imperial colonialism, influenced, to certain extent, the 'shaping' and norms of internationalism which is aimed at attaining fraternity and cooperation among nation-states.[28] In certain terms however, 'the accepted norms of internationalism include recognition of the right of all the nations to self-determinations, national sovereignty and security, cultural peace, socio-economic progress and defense of the country's borders against external aggression. Noninterference into the internal affairs of one another is also included in these norms.'[29]

From their historical evolution and development, it can be argued that there is no room for antagonism between nationalism and internationalism. This informed the observation of the Russian Revolution V. I. Lenin when he stated that there is no internationalism without nationalism as the latter is a constituent of the former.[30]

The advent of international organizations such as the Russian Revolution and World Communist Movement, League of Nations, United Nations Organization (UNO), Non-aligned movement, (NAM), British Commonwealth of Nations and European Union had been impetus to the growth of internationalism. Through these organizations, legal and regulatory norms have developed tremendously.[31]

[26]Ibid.
[27]See generally I., Akira, *Global Community*, (London: University of California Press, 2002), pp. 9-10.
[28]Joshi, A., 'Short Essay on Nationalism versus Internationalism' (2011), *http://www.preservearticles.com/201106037487/short-essay-on-nationalism-vs-internationalism.html* (accessed 28 Sept., 2017)
[29]Ibid.
[30]Ibid.
[31] See generally Peters, A., *International Organizations and International Law, The Oxford Handbook of International Law,* (ed.), Katz, J. C., Hurd, I., Johnstone, I., (Oxford University Press, 2016).

1.3 Nationalism and International Law

The rules of the minimalists[32] concurs with the Westphalian conception of sovereignty while the solidarists[33] view which is characterized by an emphasis on substantive norms and values to govern international society, rather than mere coexistence is opposed to the Westphalian system and especially the primacy of the territorial integrity and sovereignty of states.[34]

Several instances appear to go in line with the solidarism position on rules of international law. For example, the United Nations intervention in the domestic affairs of sovereign states including Somalia, Bosnia, Rwanda, Haiti, Iraqi Kurdistan, Kosovo, East Timor, and others.[35] It is noted that though the UN intervention in these instances has not been based on general application and even not successful, but certainly were not solely motivated by the self-interest of the most powerful states, but in the least was partly launched with a view to preventing a humanitarian disaster or pervasion of justices and moreover, the humanitarian objective outweighed the norm of the sovereignty of the states in question.[36]Sometimes the intervention which is anti-Westphalia notions have been implemented by states acting together; at other times, they have been implemented through international institutions, such as the UN, North Atlantic Treaty Organization (NATO), European Union (EU) etc.[37]

The making of the law and norms of international law are to be viewed against the background of its sources and how it generally evolved. Basically, sources of International law include treaties, international customs, general principles of law widely recognized and acknowledged, the decisions of national and lower courts, and scholarly writings. Similarly, in the process of its development, it has been influenced by a range of political and legal theories. For example, the principle of *pacta sunt servanda* which was reflected in the 1920 Statute of the Permanent Court of International Justice, and later preserved in Article 38(1) of

[32] An ideology aimed at assisting in finding freedom. Freedom from fear. Freedom from worry. Freedom from overwhelm. Freedom from guilt. Freedom from depression. Freedom from the trappings of the consumer culture we've built our lives around. Real freedom. See https://www.theminimalists.com/minimalism/ (accessed 08, Oct., 2017).

[33] The term "solidarism" is applied to the sociopolitical thought advanced by Léon Bourgeois based on ideas by the sociologist Émile Durkheim which is loosely applied to a leading social philosophy operative during and within the French Third Republic prior to the First World War. See Hayward, J.E.S., "Solidarist Syndicalism: Durkheim and DuGuit", *Sociological Review* (1960) 8 and Thompson, Kenneth, *Émile Durkheim*, (Routledge, 2002)

[34]Moore,M., 'Sub-States Nationalism and International Law', *Michigan Journal of International Law*, 25 (4), (2004), p. 1322.

[35]Ibid.

[36]Ibid.

[37]Ibid at p. 1323.

the 1946 Statute of the International Court of Justice.[38] Thus, it is argued that the process by which international law is enacted and international norms recognized and institutionalized went through discussion and debate while the norms emerged in the atmosphere of competing visions and interests.

It is also observed that international law is puzzled by inconsistency due to the process of its metamorphosis which are partly the consequence of compromise between principles and political rule and sometimes between opposite concepts of the law itself. Observers argue that these contradictions are clearly manifested in the UN Charter which states its commitment to both human rights and to the sovereignty and independence of States.[39] Similarly, the concept of self-determination which is endorsed in the U.N. Charter[40]runs counter to recognition and observance of the sovereignty and territorial integrity of States.[41]

1.4 Nationalism and Self-Determination

Nationalism challenges the international norms in two respects. First, it was the important political factor that led to the creation of sovereign nation-states that constitute the political block of international system. It is the same nationalism that puts those nation-states at a risk of destruction.[42]

To check the threat of nationalism, international law formulated the doctrine of self-determination. The principle of self-determination was first enunciated in the 1860s and later gained popularity and wide acceptance.[43] It was propounded and promoted by Vladimir Lenin and particularly, US President Woodrow Wilson who articulated it in the deliberation that led to the emergence of the League of Nations.[44] The underlined philosophy of this principle was to introduce a mechanism that could enable a particular group of people to

[38] International Court of Justice, https://www.icj-cij.org/en (accessed 29 June, 2020)
[39]M., Heiberg, Subduing Sovereignty: Sovereignty and the Rights to Intervene 9 (1994)
[40]*See* U.N. Charter Art. 1, 2; *Id.* art. 55.
[41]*See*Emerson, R., 'Self-Determination',*American Journal of International Affairs*, (65), (1971). 459, 459-76; Heraclids, A., Self-Determination and Non-Intervention: In Quest of a Normative Symbiosis', *45 Journal of International Affairs*, (45), (1992), pp. 399-420; B., O'Leary, 'Determining Our Selves: On the Norm of National Self-Determination', Paper Presented to the International Political Science Association, (unpublished manuscript, on file with the *Michigan Journal of International Law/*author), (1994).
[42]Anghie, A., supra at p. 448.
[43]Fisch, J.,*A History of the Self-Determination of Peoples: The Domesticationof an Illusion*, (Cambridge University Press, 2015). p. 118.
[44]Ibid.

attain sovereignty and become recognized nation-states under the norms of the international system.[45]

During the World War II, the principle was incorporated into the Atlantic Charter which was signed by both Franklin D. Roosevelt, and Winston Churchill, US President and British Prime Minister respectively at that time. They both pledge Eight Principal points of the Charter.[46] Experts observe that there was lacuna in the Charter at it was not specific on a number of fundamental issues relating to self-determination and the necessary procedural rules to achieve it.[47]

In 1941 the Atlantic Charter was adopted by the Allies of World War II and the principle of self-determination therein was endorsed. In 1942, twenty-six states signed the UN Declaration which had accepted those principles. When in 1945 the UN Charter was ratified, the principle and right of self-determination was placed into the framework of international law and diplomacy.

Chapter 1, Article 1, part 2 of the UN Charter states: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."[48]
Article 1 in both the International Covenant on Civil and Political Rights (ICCPR)[49] and the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. "

The United Nations Universal Declaration of Human Rights article 15 states that everyone has the right to a nationality and that no one should be arbitrarily deprived of a nationality or denied the right to change nationality.

[45]Ibid.
[46]Ibid.
[47]Unterberger, B.M., "Self-Determination", *Encyclopedia of American Foreign Policy,* 2002.
[48] Charter of the United Nations: http://www.un.org/en/charter-united-nations/index.html (accessed 8 Oct., 2017).
[49]Office of the United Nations High Commissioner for Human Rights, 'International Covenant on Civil and Political Rights' https://web.archive.org/web/20120303001412/http://www2.ohchr.org/english/law/ccpr.htm (accessed 29 June 2020)

In 1960, the UN General Assembly Resolution 1514 (XV) adopted UN General Assembly Resolution 1514 (XV) subtitled: "Declaration on the Granting of Independence to Colonial Countries and Peoples", which supported the granting of independence to colonial countries and people by providing an inevitable legal linkage between self-determination and its goal of decolonization. It postulated a new international law-based right of freedom to exercise economic self-determination. Article 5 states: Immediate steps shall be taken in Trust and Non-Self-Governing Territories,[50] or all other territories which have not yet attained independence, to transfer all powers to the people of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or color, in order to enable them to enjoy complete independence and freedom.

In 1960 the United Nations General Assembly adopted United Nations General Assembly Resolution 1541 (XV), subtitled: "Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the United Nations Charter in Article 3", which provided that "[t]he inadequacy of political, economic, social and educational preparedness should never serve as a pretext for delaying the right to self-determination and independence." To monitor the implementation of Resolution 1514, in 1961 the General Assembly created the Special Committee popularly referred to as the Special Committee on Decolonization to ensure decolonization complete compliance with the principles of self-determination in General Assembly Resolution 1541 (XV).[51]

It should be noted that the charter and other resolutions was not insistent on full independence as the best way of obtaining self-government. It is also silent on enforcement mechanism. Moreover, new states were recognized by the legal doctrine of *utipossidetis juris*, i.e. that old administrative boundaries would become international boundaries upon independence if they had little relevance to linguistic, ethnic, and cultural boundaries. Nevertheless, justified by the language of self-determination, between 1946 and 1960, thirty-seven new nations in Asia, Africa, and the Middle East gained independence from colonial

[50] The United Nations and Decolonization: https://www.un.org/en/decolonization/nonselfgov.shtml (accessed 08 Oct.2017).
[51] General Assembly 15th Session - resolution 1541 (XV); United Nations General Assembly Resolution 1514 ; United Nations General Assembly 15th Session - The Trusteeship System and Non-Self-Governing Territories (pages: 509-510).

powers.[52] The territoriality issue inevitably would lead to more conflicts and independence movements within many states and challenges to the assumption that territorial integrityis as important as self-determination.[53]

1.4.1 Critique of Self-Determination

The clamour for self-determination by the nationalists has been criticized on several grounds including the challenges of territorial reconfiguration which is very costly and disruptive and may not even provide the much-desired solution. [54] It is also argued that not less than 8,000 groups in the world are potentially qualified to be nations. If right to national self-determination were to be granted to all these groups, territorial and boundaries reconfiguration would be required. When eventually they develop a national consciousness, there will be tendency for conflict that may likely lead to civil war and bloodshed.[55] It is also criticized for the challenges of redrawing of boundaries.[56]

1.5 Responses to Nationalist Aspirations

Nationalism has remained an inevitable enigma. Exploring appropriate modality to respond to nationalists' clamour for independent sovereignty and self-determination would continue. Thus, experts have continued to evolve principles to meet the aspirations of various minority nationalist groups according to their cultural backgrounds and belief. Some of those modalities include, non-territorial autonomy; territorial autonomy; and, devolution of power.[57]

1.5.1 Non-territorial Autonomy

Offering cultural rights or autonomy over certain functions that are important to the minority group with a view to respect their different cultures and identity is the most popular modality. This modality is known in the political science as "cultural autonomy," "segmental

[52]Resolution 1514 (XV) "Declaration on the Granting of Independence to Colonial Countries and Peoples"; Declaration on the Granting of Independence to Colonial Countries and Peoples; The General Assembly resolution 1514 (XV) of 14 December 1960.

[53]Gudeleviciute, V., 'Does the Principle of Self-determination Prevail over the Principle of Territorial Integrity'*International Journal of Baltic Law*,Vytautas Magnus University School of Law, 2 (2),(2005).

[54]Moore, M., ibid at p. 1327-8 quoting McGarry, J., *Orphans of Secession, in* National Self-determination and Secession (Margaret Moore ed., 1998), pp. 215-232.

[55] Moore, M., ibid quoting Gellner, E., *Nations and Nationalism*, (Cornell University Press, 1983), pp. 44-45

[56]Ibid at p. 1328.

[57] Ibid at p. 1329.

autonomy'" "functional autonomy," "corporate autonomy," and "corporate federalism.[58] The Ottoman Empire adopted this modality by which it was able to administer the religious diversity in its territory.[59]

1.5.2 Territorial Autonomy (Federalism)

Territorial autonomy or Federalism is a typical modality of giving territorial independence to a national group. It requires a territorial reconfiguration of the state concerned by drawing internal boundaries of the federation such that a national or ethnic group controls at least some of the states that make the federation.[60] It must be noted that federalism, by its very nature, implies a codified or written constitution, a supreme court, and a bicameral legislature as the federal government cannot unilaterally change the horizontal division of powers, and as the minority group enjoys some security in the exercise of collective self-government and self-determination.[61]

A typical example of this was Switzerland. It was founded, in its current form, in 1848. Others include Canada, which was established in 1867. There was also the Indian subcontinent, which was divided after decolonization into the two multiethnic federations of India and Pakistan. Federal system was also adopted for the Communist Soviet Union, Yugoslavia, and Czechoslovakia.[62] Nigeria was also founded on federal system at behest of its independence in 1960. Federal system has also been introduced in Belgium recently. Federalism has also been recommended for some states including Afghanistan, Cyprus, Iraq and Indonesia.[63]

1.5.3 Devolution of Power

Devolution of power is a second type of territorial autonomy modality which involves the granting or devolving power only to the region in which the minority is demographically strongest, without altering the constitutional structure of the State as a whole.[64] In this arrangement, granting autonomy does not affect the federalization of the State as an entity.

[58]Lijphart, A., *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries*, (Yale University Press,1984), pp. 183-85 as quoted by Moore, M., ibid.
[59]Coakley, J., 'Approaches to the Resolution of Ethnic Conflict: The Strategy of Non-Territorial Autonomy', *15 International Political Science Review*, (1994), pp. 297, 299.
[60]Moore, M., ibid at p. 1337.
[61]Ibid.
[62] Ibid.
[63]Ibid.
[64] Ibid.

However, there is typically less security for the minority in "federacy" or "partial federalization" arrangements.[65] A good example is United Kingdom where power was devolved to Scotland, Wales, and Northern Ireland.[66]

1.6 Rights of Secession under International Law

The combined effect of a statement credited to Woodrow Wilson, one of the architects of the concept of self-determination that: "*No people must be forced under sovereignty under which it does not wish to live*."[67] and the League of Nations declaration to the effect that: "*Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form [a] part by the simple expression of a wish...*"[68] are practical illustrations of the persistent tension in international law between the establishment of a right of secession of minority groups within sovereign states and the goal of maintaining international legal norms and the *status quo*.[69]

The inconsistency of the modern international law concerning the right of self-determination, and a permissive right to secession had been topical issues among scholars and jurists of international law. Thus, Allen Buchanan has thus proposed substantial forms of self-government within the state, which he calls "intrastate autonomy regimes." Indigenous peoples are his main example of the beneficiary of such a regime. However, his contention seems to be applicable to any national minority group that has been and is currently unjustly treated.[70]

Buchanan maintains that the international legal order should encourage alternatives to secession, particularly by working for greater compliance with existing international human

[65]McGarry, J., 'Autonomy' (unpublished manuscript, on file with the Michigan Journal of International Law/author) (2003) as quoted by Moore, M., ibid.
[66]*See generally*,McGarry, J., 'Must Pluri-National Federations Fail?', (unpublished manuscript, on file with the Michigan Journal of International Law/author), (2004) at p. 6; also, M., Hechter, *Containing Nationalism*, (2000);Moore, M., ibid.
[67] Message from President Wilson to Russia on the Occasion of the Visit of the American Mission (June 9, 1917), reprinted in Official Statement of War Aims and Peace Proposals, December 1916 to November 1918, at 105 (James B. Scott ed., 1921.
[68] League of Nations OJ. Spec. Supp 3, at 5 (1920)
[69] 'Secession: State Practice and International Law After the Dissolution of The Soviet Union and Yugoslavia', *Duke Journal of Comparative & International Law*, Vol. 3, p. 299.
[70]See generally A., Buchanan, Secession: The Morality of Political Divorce from Fort Sumter To Lithuania And Quebec, Westview Press, (1991).

rights norms prohibiting ethnic and religious discrimination and by supporting intrastate autonomy regimes (self-government arrangements short of full sovereignty).[71]

Therefore, if the position under international law on rights of secession remains unclear, for a right to secede to exist as a principle of customary international law several criteria related to state practice must be met. Firstly, a right of secession must be recognized by a number of states through continuous or repetitious, concordant practice over a considerable period of time.[72] Secondly, there must be general acquiescence or consent to this practice by other states.[73] Also, there is authority to prove the proposition that a new rule of customary international law can be established within a relatively short period of time so long as there is extensive and uniform state practice evincing general recognition of such a rule.[74] Consequently, the customary behavior of states can reveal the existence of an international legal principle such as a right of secession. It follows that if states have historically and consistently approved of the efforts of certain group to secede whether through prompt recognition of secessionists or through the supply of aid to them, such customary practice could serve as an evidence that an unarticulated right of secession exits. To determine whether such a customary right of secession exits, it is necessary to examine the international response to secession efforts, as well as the resolutions and documents of multinational organizations. [75]

2.0 Nigeria Biafra Secessionist Movements

The story of Biafra Secessionist movement began with the Nigerian Civil War which was fought by this nationalist group and the Federal Government of Nigeria. However, from 1999 to date, the Indigenous People of Biafra popularly referred to as (IPOB) have started a revival movement towards the realization of this secessionist aspiration. IPOB have formed and registered a human rights body known as Bilie Human Rights Initiative.[76] The body has

[71]Buchanan, A.,'Justice, Legitimacy, and Self-determination',*Moral Foundations for International Law* 417 (2004), pp. 401-55
[72]Hudson, M.O., 'Working Paper, Article 24 of Status of the International Law Commission', *Year BookInternational Law Commission*, (2) (1950),24, 26, U.N. Doc. A/CN. 416. See generally The Paquete Habana, 175 U.S. (1900), 677, 686-712 (Recognizing custom as a source of International Law).
[73]Ibid at p. 26.
[74]Ibid.
[75] Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia', *Duke Journal of Comparative & International Law*, Vol. 3, p. 302.
[76] Registered Charity Number 1172869; https://www.totalgiving.co.uk/charity-directory(accessed 29 June, 2020).

offices in both Nigeria and in the United Nations. The aim basically is to advocate for their right to self-determination and achieve independence by the rule of law.

Historically, the Biafran secessionist movement was the aftermath of the pogrom that was carried out against the Igbo and other Biafrans living in the northern part of Nigeria. The pogrom was launched as revenge against the assassination of northern leaders by a group of young soldiers led by Major Chukwuma Kaduna Nzeogwu, an Igbo military officer, in Nigeria's first military coup early on 15 January 1966. The Coup was followed by a counter-coup that led to the death of the then new head of state Major General Johnson Aguiyi-Ironsi, another Igbo military man, the same year.[77]

Over a million lives were lost during the war which ended after about two-and-a-half years.[78] The Biafran forces eventually surrendered to the Nigerian Federal Military Government under the motto: "No-victor, No-vanquished". The surrender team was led by the Biafran Vice President and Chief of General Staff, Major General Philip Effiong.[79]

Although, after the war, Biafra was reintegrated into Nigeria, the feeling of marginalization continued and thus, the Igbo Nationalist movements emerged. This time, the movements are in number.[80] Before the war, it was led by Chukwuemeka Odumegwu Ojukwu, a military officer, but now, most of the movements are being led by civilians who exhibit revolutionary and radical traits.

Notable Igbo nationalist movements that are campaigning vigorously for Igbo people self-determination include, the Movement for the Actualization of Sovereign State of Biafra (MASSOB) led by Ralph Uwazuruike; The Indigenous People of Biafra (IPOB) led by Nnamdi Kanu; and, the Biafra Nations Youth League (BNYL) led by Ebuta Ogar Takon. There is the Ohaneze Ndigbo is an apex Igbo socio-cultural group. The group represents all

[77]Siollun, M., *Oil, Politics and Violence: Nigeria's Military Coup Culture* (Algora 1966-1976), p. 110; Illoegbunam, C., 'July 29, 1966 countercoup: Africa's bloodiest coup d'état, Vanguard (29 July, 2016).
[78]Venter, A.J. *Biafra's War 1967-1970: A Tribal Conflict in Nigeria That Left a Million Dead,* (Helion & Company, 2016), p.139
[79]Philips, B., Biafra: Thirty Years On, (2000); http://news.bbc.co.uk/2/hi/africa/596712.stm (accessed 11 Oct.2017)
[80]*Godwin, O. O., 'Contemporary Igbo Nationalism and the Crisis of Self-Determination in Nigeria' African Studies, (2012), 71 (1): 29–51.*

Igbo communities within and outside Nigeria and could not be said to belong to the youthful firebrand secessionist campaigners.[81]

2.1 Ohaneze Ndigbo

As part of their efforts to bring together Igbo citizens under one umbrella following the Biafra civil war and its aftermath, an organizational assembly was created, referred to as the Igbo National Assembly (INA). This organization was later banned by the Federal Military Government at the time, probably due to the Government's suspicion of a grand agenda being cultivated by the Igbos via the organization; hence, the creation of Ohanaeze Ndigbo, in 1976. Although the group is not a political party, part of its objectives is to foster unity among its members to better allow them to be representative within the political scenario of Nigeria. Speaking on behalf of the movement, Chief Nnia Nwodo remarked that considering several impediments and challenges, restoration of the Biafra project was a difficult task, and might not even be in the overall interest of the Igbo in their aspiration for socio- economic and political relationships with other Nigerians. He added that: *"We should forget Biafra and insist on restructuring. There is no Igbo person that is happy with the situation of things in Nigeria.*"[82]

2.2 **Movement for the Actualization of the Sovereign State of Biafra**

Movement for the Actualization of the Sovereign State of Biafra (MASSOB) is an Igbo nationalist movement. It promotes and campaigns for the recreation of an independent state of Biafra. It is led by Ralph Uwazuruike an India-trained lawyer. The movement has its headquarters in Okwe in the Okigwe district of Imo State. MASSOB claims that it is a peaceful group. It has launched a 25-stage plan to achieve its goal through peaceful means.[83] It has two arms of government, namely, the Biafra Government in Exile and Biafra Shadow Government.[84]

[8181]Ené, M. O., 'Natural Nationalism: The Path to Igbo Cultural Renaissance.' Paper presented at the 7th Annual Igbo Studies Conference, *Howard University, Washington, D.C., USA,* April 3–4, 2009; Falola, T., [2001], *Nationalism and African Intellectuals, (*Rochester: University of Rochester Press, 2004); Frederick, F., *The Making of an African Legend. The Biafra Story, (*Harmondsworth: Penguin, 1977); Harneit-Sievers, A., *Constructions of Belonging. Igbo Communities and the Nigerian State in the Twentieth Century, (*Rochester: University of Rochester Press, 2006).

[82]Nwodo, J. O., President - Igbos Forget Biafra and Fight For Restructuring – Ohanaeze Ndigbo, (2017); https://www.ayola.tv/igbos-forget-biafra-restructuring-ohanaeze/ (accessed 12 Oct., 2017)

[83]Adeshokan, O., & Mahr, K.,"Dream of free Biafra revives in southeast Nigeria", *(2006) Los Angeles Times,* https://www.latimes.com/world/africa/la-fg-nigeria-war-legacy-20190430-story.html (accessed 29 June, 2020)

[84] Biafra News, https://www.today.ng/topic/biafra

2.3 MASSOB's Ideology and Policy

MASSOB ideology according to its leadership is fundamentally based on the principle of non-violence as enunciated by the Indian Mahatma Ghandhi.[85] To that extent, they intend to achieve their self-determination agenda by peaceful means through protest, demonstration, dialogue, and negotiation. They agitate for a Republic of Biafra comprising the South-East and South-South regions of Nigeria. Initially, it concentrated on organizing rallies and peaceful protests which culminated in hoisting Biafran flags at different locations in the South East. But later, this approach has been reserved mainly for period while celebrating key dates and events or in commemoration of dead members. In 2005, MASSOB revived the old Biafran currency into circulation. This step was welcome with enthusiasm by the Igbo citizens and their sympathizers at the border communities of Togo and the Republic of Benin.[86] In 2009 MASSOB launched the Biafran passport as part of the program to celebrate its 10th anniversary. MASSOB leader, Ralph Uwazuruike, said the introduction of the Biafran passport was in response to persistent demands from Biafrans in diaspora.[87] As part of the Nigeria Federal Government step to check MASSOB and its leadership, Ralph Uwazuruike was arrested in 2005 and was detained on treason charges. He has since been released.

2.4 Indigenous People of Biafra

The Indigenous People of Biafra (IPOB) is another Igbo Nationalist movement which emerged in 2012. It is led by Nnamdi Kanu whose agenda was to reinvigorate the quest for realization of Biafran Republic. Its ideological agenda was secession of Igbo nation including a number of states in south-east Nigeria made up mainly of people from the Igbo ethnic group and formation of an independent nation of Biafra.[88] Its modus operandi of achieving this nationalist aspiration is through Referendum. He insisted that its movement would continue agitation until the Nigerian government fixes a date for the referendum *"to settle the issue of Biafra in a civilized and democratic manner"*.[89] As part of propaganda mechanism to achieve its objective, IPOB established a pirate radio station - Radio Biafra. The Station has been broadcasting at various frequencies around the world. The Nigerian

[85]*Burton, S., A History of India, (John Wiley & Sons, 2010), p. 289*
[86] NewsWatch Magazine 3 March 2015.
[87]"MASSOB launches "Biafran Int'l Passport" to celebrate 10th anniversary - Vanguard News". *Vanguard News*. Retrieved 20 March 2015
[88]*Stephanie, H.,* "Biafran leader Nnamdi Kanu: The man behind Nigeria's separatists". BBC Online. *London, UK(5 May 2017).*
[89]*Chinedu, A.,*"Rearrest threat: Kanu not in hiding – IPOB", *Vanguard, (4 September 2017).*

Government, through its communication and broadcasting agencies has sought to clamp down on the UK-based station with limited success. On 17 November 2015, the Abia Sate police command seized an IPOB radio transmitter in Umuahia. Kanu was arrested and detained by the federal government and after protracted legal trials, he was released on 24 April 2017.

Meanwhile, the Nigeria Defense Headquarters has declared IPOB a militant terrorist organization. Director of Defense Information, Major-General John Enenche, in a statement on Friday 15 September 2017, said that the Armed Forces will confront "all security challenges facing the country.''[90]

Other Igbo Nationalist groups include Biafra Nations Youth League (BNYL) and Biafra Zionist Movement (BZM).

2.5 Schism and Nationalists' Clamour

Though, these Igbo nationalist movements usually exhibit determination to achieve their much-desired independence, however, they are always susceptible to extraneous influences resulting in unfortunate schism and internal conflict and power struggle. This explains why there is no central authority coordinating the Biafran self-determination campaign. They have often been beset with internal wrangling that had impeded its secessionist set objectives and efforts.

3.0 Conclusion

It can be concluded from the above analysis that nationalism is a manifestation of identical sentiments over loyalty and commitment to the cause of the state which had been an important instrument of liberation from colonialism and an effective tool in the attainment of independence and self-determination. Internationalism promotes a greater political or economic cooperation among nations and people. Its principles are based on the belief that nationalism should be transcended because the ties that bind people of different nations are stronger than those that separate them. Rights of secession under international law are ambiguous. The right of minority groups within states to secede and the norm of maintaining international order by preserving the territorial integrity of sovereign states are the main

[90] The Defense Headquarters has declared the Indigenous People of Biafra (IPOB) a militant terrorist organization; http://saharareporters.com/2017/09/15/breaking-nigerian-military-declares-ipob-terrorist-organization (accessed 12 Oct., 2017).

causes of tension between nationalism and internationalism. Ohaneze Ndigbo model of clamour for restructuring of the Nigeria state might be a better and manageable option for now than seeking to secede.

3.1 Recommendations

It is humbly recommended that nationalism should be seen, should be heard, and should be respected. Internationalism should do more to respond to the yearning and aspirations of all including the nationalist minorities. Internationalism and international institutions should eschew the tall ambition of achieving a structured international government. Similarly, international law and institutions should be rescued from unnecessary manipulation of some international interest groups. Nigeria should be restructured to attain a truly people-oriented government against its present over-centralized unitary system. The Igbo Nationalists should work towards national integration and inclusiveness within the scope of the Nigeria project as secessionist tendencies may not, after all, be the ultimate solution to their much-aspired self-determination. They should be conscious of the fact that the modern nation-states are becoming more interdependent than ever.

EXAMINATION OF THE CHALLENGES OF REPLACING THE ARM'S LENGTH PRINCIPLE WITH FORMULARY APPORTIONMENT AS STANDARD FOR ASSESSING TRANSFER PRICING

By

Isau Olatunji Ahmed*

Abstract

The Arm's Length Principle (ALP) is the cornerstone of the current transfer pricing regulation as recommended by both the Organisation for Economic Cooperation and Development (OECD) and the United Nations (UN).The application of ALP is predicated on treating members of a Multinational Corporation (MNC) Group (that is, the parent company and its subsidiaries)as separate legal entities and using the prices charged in a transaction between independent entitiesin an open marketto determine or benchmark the appropriate price to be charged in a transaction among the members of the MNC group. The application of the ALP looks straight forward in theory and it was considered as the best possible standard to assess and regulate transfer pricing. However, with the advent of globalization and with the introduction of sophisticated communication systems and advanced high speed information technologies, the practical application of the ALP became a difficult and herculean task. This has provoked a lively debate and arguments for the replacement of the ALP with the Formulary Apportionment which is held to be more suitable for the new globalized economy. The objective of this paper is to examine the application of the ALP and its challenges in the new globalized economy. The paper considers the application of the Formulary Apportionment as well as its prospect and challenges in replacing the ALP as the international standard for assessing transfer pricing.

Keywords: International Taxation, Transfer Pricing, Arms' Length Principle, Formulary Apportionment, Multinational Corporations (MNCs).

1.0 Introduction

Technological advancements in transportation and communication led to the emergence of Multinational Corporation (MNC) groups. The OECD defined a MNC group as a corporation comprising of two or more companies situated in more than one country but under the same ownership, management and control. [1] Thus, it can be said that a MNC group is a conglomerate of companies where the parent company is headquartered in one country while

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[1] Organisation for Economic Co-operation and Development (OECD), 'Concepts and Principles of Multinational Enterprise' (2000) <http://www.oecd.org/daf/investment/guidelines/mnetext.htm>accessed on 23 March, 2020.

it operates wholly or partly owned subsidiaries, branches or affiliates in other countries thereby creating a parent-subsidiary relationship within the MNC group.

The geographical boundaries between various companies within the MNC group mean that it is possible for international transfer of goods and services to occur in a transaction between various companies within the group. The process of setting or determining the prices of transaction between companies within a MNC group is what is commonly referred to as 'Transfer Pricing' while the negotiated price of the such transaction is referred to as the 'Transfer Price'.[2]MNC groups usually regard the process of determining and setting the transfer price of transactions within the group as an internal arrangement which is not subject to external influence or control and upon which they retain the discretion to determine or set the transfer price of the transactions in any way they deem fit.[3]

The implication of this is that a MNC can exploit its parent-subsidiary relationship within its group to set the transfer price of transactions in such a way to avoid tax payment which is commonly referred to as abuse of transfer pricing or transfer pricing manipulation.[4]This means that transfer pricing can easily be abused by MNCs in their quest to increase their profitability. Abuse of transfer pricing or transfer pricing manipulation is defined as an intentional over-invoicing/pricing or under-invoicing/pricing of the transfer prices of goods and services of an intra-company transaction for the purpose of reducing the global tax burden of a MNC group.[5]Abuse of transfer pricing is now generally considered as a major scheme of tax avoidance threat to the tax base of many countries impacting negatively on the tax base of many countries and on revenue generation.[6]

The susceptibility of transfer pricing to abuse and manipulation of MNC groups to avoid tax constitute a serious concern to governments around the world and that is the reason why governments are desirous of regulating transfer pricing to prevent tax avoidance. In this

[2]Organisation for Economic Co-operation and Development(OECD)'s Centre for Tax Policy and Administration 'Transfer pricing: A challenge for developing countries' (2013) <http://www.oecdobserver.org/news/archivestory.php/aid/3131/Transfer_pricing:_A_challenge_for_developing_countries.html> accessed on 24 April, 2020.

[3]Ibid

[4]Kalli Zannah 'An Empirical Investigation of Transfer Pricing Regulations for Nigeria with a Particular Emphasis on the Petroleum Sector' (Unpublished PhD Thesis, Aberdeen Business School, Robert Gordon University 2012) p. 1.

[5]Eden L., *Taxing Multinationals: Transfer Pricing and Corporate Income Taxation in North America*, (Toronto: University of Toronto Press, 1998) p. 12.

[6]Cooper J, Fox R., Loeprick J., and Mohindra K., 'Transfer Pricing and Developing Economies A Handbook for Policy Makers and Practitioners' <http://dx.doi.org/10.1596/978-1-4648-0969-9>accessed on 29 April, 2020.

regard, both the Organisation for Economic Co-operation and Development (OECD) and the United Nations (UN) recommended the arm's length principle (ALP) as the standard for assessing and regulating transfer pricing to prevent its abuse and manipulation.[7]The ALP is now regarded as the international standard for assessing and regulating transfer pricing having been adopted by almost all the countries in the world. This position is corroborated by a survey conducted by Price Water Coopers (PWC) in respect of transfer pricing rules of 97 countries including Nigeria which revealed that out of the 97 countries surveyed, it is only Brazil that is not using the ALP as the basis of its transfer pricing rule.[8]

According to the OECD, the application of the ALP is predicated on treating members of a Multinational Corporation (MNC) Group (that is, the parent company and its subsidiaries) as separate legal entities and using the prices charged in a transaction between independent entities in an open market to determine or benchmark the appropriate price to be charged in a transaction among the members of the MNC group.[9] While the application of the ALP looks straight forward in theory, the advent of globalization made the application of the ALP a difficult and a herculean task in practice. This has led to arguments for the replacement of the ALP with Formulary Apportionment which is said to be more suited for the new globalized economy. This article considers the application of the ALP and its challenges in the globalized economy. The article also considers the application of Formulary apportionment as well as its prospect and challenges in replacing the ALP as the international standard for assessing transfer pricing.

2.0 The Origin of Arm's Length Principle (ALP)

The term 'Arm's Length' is used to describe a transaction conducted between two unrelated, unaffiliated, unassociated or independent entities.[10] The development of the Arm's Length Principle (ALP) as the means for regulating transfer pricing can be traced back to the 1920s when the League of Nations set up a Fiscal Committee with a task of developing principles for the allocation of business profits among different tax jurisdictions.[11]This was partially

[7]Wittendorff J., *Transfer Pricing and the Arm's Length Principle in International Tax Law*, (Hague: Kluwer Law International, 2010) p. 48.

[8] Price Water House Coopers (PWC), 'International Transfer Pricing Survey2015/2016'<http://www.pwc.com/internationaltp>accessed on 14 April, 2020

[9] Organisation for Economic Co-operation and Development (OECD), 'Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration' (2010) <http://www.oecd.org/publishing> accessed on 12 January, 2020.

[10] Garner B. A., *Black's Law Dictionary*,9thedn., (New York: West Publishing Co., 2009) 1635

[11]Markham M., *The Transfer Pricing of Intangibles* (Hague: Kluwer Law International,2005) p. 15.

meant to counter the problem of double taxation which became prominent after the First World War.[12]

The Fiscal Committee of the League of Nations identified the Separate Accounting Method (SAM) as the preferred method of allocating business profits and income among different tax jurisdictions.[13]The fundamental requirement of the Separate Accounting Method is that the parent company and other subsidiary companies of a MNC group are required to keep separate financial accounts as if they were independent entities. This method treats the parent company and other subsidiary companies of a MNC group as separate and distinct entities that are required to keep separate accounts even though they are under the same control and management.[14]

With the collapse of the League of Nations in 1946, the OECD known back then as the Organisation for European Economic Co-operation (OEEC) mandated its Fiscal Committee in 1958 to continue the work of the League of Nations on allocation of profit and income.[15] This resulted in the adoption of the arm's length principle (ALP) in Article 9 of the OECD Model Tax Convention on Income and Capital of 1963 as the standard method of allocating income and profit between the parent company and other subsidiary companies of a MNC group in different jurisdictions. Following in the step of the OECD, the United Nations (UN) in 1980 also adopted the ALP in Article 9 of its Model Double Taxation Convention.

Thus, with its adoption by both the OECD and the UN member countries, the ALP became widely accepted as the international standard for assessing and regulating transfer pricing to prevent transfer pricing manipulation when allocating profit and income between two tax jurisdictions. According to Shaheen,[16] with its endorsements by both the OECD and the UN, the ALP became the basis upon which the transfer pricing rules were drafted to counter transfer pricing manipulation and to prevent double taxation.

Several arguments have been adduced for the international adoption of the ALP as the preferred method for assessing and regulating transfer pricing. It is argued that due to its use

[12]Chege Patrick Ngotho 'The Organisation of Economic Cooperation and Development (OECD) Transfer Pricing Guidelines: An Evaluation of their effectiveness in the Kenya's Tax Regime' (Unpublished LLM Dissertation, University of Nairobi, 2011) p. 81.

[13]Piciotto S., *International Business Taxation* (London: Weidenfeld and Nicolson, 1992) 28.

[14]Wittendorff J. *Transfer Pricing and the Arm's Length Principle in International Tax Law* (Hague: Kluwer Law International, 2010) p. 89.

[15]Markham M., *The Transfer Pricing of Intangibles* (Hague: Kluwer Law International, 2005) p. 17.

[16] ShaheenS., 'Why OECD's Arm's Length Principle (ALP) is under threat' (2010) <http://www.tpweek.com/Article/3048664/Why-OECDs-ALP-is-underthreat.html>accessed on 12 May, 2020.

of a market pricing system as the basis for determining acceptable transfer price, the ALP was widely accepted by various countries (both OECD member and non-member countries) as the international standard for assessing intra-company transactions.[17]Thus, it can be rightly postulated that the use of the market price system is responsible for the increased acceptability of ALP as the international standard for assessing and determining the price transactions between members of a MNC group.[18]

There is also an argument that the ALP became widely acceptable due to the fact that it has the ability to eliminate the risk of economic double taxation. According to Eden[19], the provision of Article 9(2) of the OECD Model Tax Convention is a provision meant to relieve or reduce the risk of economic double taxation that may arise where there is a transfer pricing adjustment. It is therefore argued that by removing the risk of economic double taxation, the ALP promotes the growth of international trade and investment.

2.1 Application of Arm's Length Principle (ALP)

The application of the ALP is predicated on treating members of a Multinational Corporation (MNC) Group (that is, the parent company and its subsidiaries) as separate legal entities and using the prices charged in a transaction between independent entities in an open marketto determine or benchmark the appropriate price to be charged in a transaction among the members of the MNC group. According to the United Nations, the open market place comprising of prices charged by independent entities in similar transactions is the measure to benchmark or verify the appropriate transfer price to be charged in transactions between members of a MNC Group and it is what determines whether or not the transfer price of the transaction has been manipulated or abused by members of a MNC group to avoid tax.[20]

This benchmarking system is commonly referred to as 'comparability analysis' which is regarded as the heart of the application of the ALP and it is the determinant factor as to whether a particular transfer price will be acceptable or not.[21]Comparability analysis involves

[17] Kobetsky M., *International Taxation of Permanent Establishments: Principles and Policy*(Cambridge: Cambridge University Press, 2011) p. 73.

[18]Eden L., 'Taxes, Transfer Pricing, and the Multinational Enterprise' in Rugman A. M. (ed.), *The Oxford Handbook of International Business,* 2nded. (Oxford: Oxford University Press, 2009) p. 594.

[19]Ibid 596.

[20] United Nations, 'Practical Manual on Transfer Pricing for Developing Countries' <http://www.un.org/esa/ffd/documents/UN_Mannual_TranferPricing.pdf> accessed on 15 May, 2020.

[21]Organisation for Economic Co-operation and Development (OECD),'OECD/G20 Base Erosion and Profit Shifting Project: Aligning Transfer Pricing Outcomes with Value Creation' <http://dx.doi.org/10.1787/9789264241244-en> accessed on 15 May, 2020.

comparing the conditions and circumstances of transactions between associated entities of a MNC group with that of the transactions between independent entities.[22]In making such comparisons, material differences between the controlled and uncontrolled transactions would have to be taken into account to establish whether the transactions are comparable to benchmark the appropriate arm's length transfer price. Factors to be considered in this regard include characteristics of the property or services transferred, the functions performed by the parties, the contractual terms, the economic circumstances of the parties, and the business strategies pursued by the parties. The extent to which these factors will determine the appropriate arm's length transfer price will depend upon the nature of the controlled transaction and the pricing method adopted.

The essence of comparability analysis according to the OECD is to ensure that prices of transaction between members of a MNC group are set to reflect market price that would have been charged in similar transactions if it were between independent entities.[23] This is because, in transactions between members of a MNC group, the parent-subsidiary relationship that exist within the group may prevent the transaction from being directly affected by external market forces in the same way that transaction between independent parties would be affected. This can result in transfer prices that do not reflect market prices thereby distorting the tax liabilities of the associated entities and the tax base of the country concerned.

In conducting a comparability analysis, the OECD recommended two general transfer pricing methods to determine the appropriate transfer price.[24] The first method is known as the 'Traditional Transaction Method' which has three sub-types methods namely: the Comparable Uncontrolled Price Method (CUP), the Resale Price Method (RPM) and the Cost Plus Method (C+). These methods provide the most direct way to establish the arm's length price of an intra-company transaction and are preferable to the other methods. The second method recommended by the OECD is known as the 'Transactional Profit Method'. This method is to be used when the traditional transaction methods are not applicable or as a

[22]Organisation for Economic Co-operation and Development (OECD), 'Transfer Pricing Comparability Data and Developing Countries' <http://www.oecd.org/.../transfer-pricing-comparability-data-and-developing-countries.html> accessed on 15 May, 2020.

[23]Ibid.

[24] Organisation for Economic Co-operation and Development (OECD), 'Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration July' (2010) <http://www.oecd.org/publishing> accessed on 15 May, 2020.

supplement. This method also has two types namely the Transactional Net Margin Method (TNMM) and the Profit Split Method (PSM).

2.2 The Challenges of the Application of Arm's Length Principle in the Globalized Economy

The application of the ALP as stated above looks straight forward in theory. Prior to globalization of the world economy, the ALP was seen as the best possible means to achieve an equitable allocation of income and profit between companies located in different tax jurisdictions.[25]The ALP was considered as the most appropriate means to approximate the appropriate transfer price in the open market in cases where property (such as goods, other types of tangible assets, or intangible assets) is transferred or services are rendered between associated entities. It was in this respect that the OECD built on the Separate Accounting Method earlier developed by the League of Nations as the basis of the ALP to allocate income and profits between different tax jurisdictions.

In corroborating the above assertion, a survey conducted by Ernst & Young revealed that as at the time the ALP was adopted, allocation of profits and income on geographical basis prevailed which allowed tax authorities to treat various companies of MNC groups located in different countries as autonomous legal and separate entities in respect of transactions between them. Accordingly, the companies within the MNC group are therefore required to account separately for income and expenses in the respective country where they operate.[26]

However, the advent of economic globalization made the application of the ALP to become a difficult and a herculean task in practice. Economic globalization refers to the widespread international movement of goods, capital, services, technology and information. It is the increasing economic integration and interdependence of national, regional, and local economies across the world through an intensification of cross-border movement of goods, services, technologies and capital.[27]Economic globalization has grown at an increased rate due to improvements in the efficiency of long distance transportation, advances in telecommunication, the importance of information rather than physical capital in the modern

[25]Organisation for Economic Co-operation and Development (OECD), 'Review of Comparability and of Profit methods: Revision of Chapters I-III of the Transfer Pricing Guidelines' (2012)<http://www.oecd.org/ctp/transfer-pricing/45763692.pdf> accessed on 15 May,2020

[26] Ernst & Young, 'Global Transfer Pricing Survey: Addressing the Challenges of Globalization' (2010) <http://www.ey.com/gl/en/services/tax/international-tax/2010-global-transfer-pricing-survey> accessed on 12 April, 2020.

[27]Joshi Rakesh Mohan, *International Business* (Oxford: Oxford University Press, 2009) p. 45

economy, and by developments in science and technology.[28] The rate of globalization has also increased under the framework of the General Agreement on Tariffs and Trade and the World Trade Organization, in which countries gradually cut down trade barriers and opened up their current accounts and capital accounts.[29] This has led to the integration of the developed economies with the developing countries through foreign direct investment, lowering costs of doing business, the reduction of trade barriers, and in many cases cross-border migration.

The surge in economic globalization significantly altered the nature of international trade and eroded the normative basis of treating companies within a MNC group as separate entities upon which the application of the ALP is rested.[30]With the introduction of sophisticated communication systems and advanced high speed information technologies in the new globalized economy, MNCs were able to achieve a highly-integrated system which makes it difficult, if not impossible, to separate the activities among the various companies within the MNC groups.[31] Accordingly, economic globalization rendered geographical boundaries irrelevant for business decision making as MNC groups were able to conduct their business activities in different geographical jurisdictions without necessarily establishing a physical presence in those jurisdictions.[32]The implication of this is that if a MNC group operate in a country without having a physical presence, it will be difficult for the tax authority to determine its income and profit for tax purposes. This means that such MNC will avoid paying tax on income and profit earned from a country where it does not have a physical presence which will impact negatively on revenue generation.

There is also a contention that the application of the ALP does not conform with business and economic realities of high integration level of businesses within the MNC group in the new globalized economy. The assumption of treating various companies within the MNC groups as separate entities has therefore been held to be a fallacy that does not exist in reality.[33]Thus, economic globalization rendered the arm's-length principle as an illusion which does not

[28] Shangquan, G., 'Economic Globalization: Trends, Risks and Risk Prevention' (2000) <http://www.un.org/esa/policy/devplan/index.html> assessed on 1July, 2020.

[29]Ibid

[30] Vann R. J, 'International Aspects of Income Tax' in Thuronyi V. (ed.) *Tax Law Design and Drafting*, vol. 2 (Washington: International Monetary Fund, 1998) p. 783

[31] Kobetsky M., *International Taxation of Permanent Establishments: Principles and Policy*(Cambridge: Cambridge University Press, 2011) p. 76

[32]Avi-Yonah R. S., Clausing K. A &Durst M. C, 'Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Split' (2009) 9 Florida Tax Review, pp. 497-500

[33]McCormack J., 'Getting What You Pay For: Transfer Pricing and Division' (Paper presented at the Workshop and Seminar of the Taxation Institute of Australia 1992) p. 29.

reflect business and economic realities given that members of MNC groups are in fact and in reality, under the same control and management with similar corporate goals and objectives.[34] In addition, reflecting on the assumption created under the ALP system, Hellerstein[35] compared the assumption under the ALP system with the famous fairytale cartoon '*Alice in Wonderland'* arguing that the ALP system 'turns reality into fancy and then pretends that it is the real world'. It is further argued further that the ALP system ignores the integrated nature of the MNC groups in a globalized economy but relies on comparative transactions between independent entities that have not integrated their operations to benchmark and determine the appropriate transfer prices to be charged within the integrated businesses of the MNC groups.[36]

It is therefore not surprising that the OECD Secretary-General, Angel Gurria in 2017 estimated that more than US$240 billion was lost annually between 2013 and 2015 to transfer pricing manipulation under the ALP system.[37] Even in the US, which is reputed to have the most sophisticated transfer pricing regime in the world, the application of the ALP has not helped enough to stop revenue loss.[38] Figures released by the country's Internal Revenue Service (IRS) showed that the country has been losing at least US$2 billion annually under the ALP system.[39]

3.0 Argument for the Replacement of the ALP

With the challenges presented by economic globalization to the application of the ALP, it has been argued that the current ALP system is no longer suited for the global nature of international business.[40]This is because application of ALP in treating members of the MNC group as separate entities and using prices charged in transactions between independent entities to benchmark the appropriate transfer price of transaction between associated entities

[34] Ibid

[35] Hellerstein J. R., Federal Income Taxation of Multinationals: Replacement of Separate Accounting with Formulary Apportionment' (1993) 60 Tax Notes, p. 1131.

[36] Mazerov M., 'Why Arm's Length Falls Short' (1994) International Tax Review, p. 28

[37] Angel Gurria, 'Opening Remarks by the OECD Secretary-General on 7 June, 2017 at the Signing Ceremony of the Multilateral Convention to implement tax treaty related measures to prevent BEPS' <http://www.oecd.org/tax/signing-ceremony-multilateral-convention-on-tax-treaty-related-measures-to-prevent-BEPS> accessed on 17 May, 2020

[38] Avi-Yonah R. S., 'The Rise and Fall of Arm's Length: A Study in the Evolution of U.S. International Taxation' (1995) 15 Virginia Tax Review, pp. 89-90

[39] Turro J., 'TNI Interviews Senator Byron L. Dorgan on Formulary Apportionment' (1994) Tax Notes International p. 22

[40] Avi-Yonah R. S. and Clausing K. A., 'Reforming Corporate Taxation in a Global Economy: A Proposal to Adopt FormularyApportionment' <https://www.brookings.edu/research/reforming-corporate-taxation-in-a-global-economy-a-proposal-to adopt-formulary-apportionment/> accessed on 15May, 2020

has been significantly weakened by the new globalized economy which allows people, good and services to interconnect beyond the physical barrier of geographical boundaries. In fact, the OECD admitted that there are challenges and problems confronting the application of the ALP in the new globalized economy which must be resolved to make its application of the ALP easier.[41]

The weaknesses, problems and the challenges confronting the application of the ALP in the globalized economy have therefore led to various academicians[42] and tax practitioners[43]to advocate for a replacement of the ALP. They are of the view that the challenges and problems presented by economic globalization have weakened the application of the ALP thereby prompting their calls for the replacement of the ALP. It is in this respect that these academicians and tax practitioners proposed a move away from the present ALP system to another system that will reflect the present international business and economic realities rather than the illusion created under the ALP system which has resulted in a continuous loss of tax revenue. They, therefore, advocated for a global adoption of Formulary Apportionment (FA) also known as Unitary Taxation as an alternative to the ALP in determining the proper level of profits across different national taxing jurisdictions.

This proposal is sequel to the successful implementation and application of the FA in some states in the United States which have been using the FA since the 19th century for the purpose of levying property and capital stock tax.[44] The success of the FA in this regard spurred scholars to consider the FA as a proper replacement for the current ALP system. For example, Weiner and McLure[45] recommended the use of FA within the European Union (EU)

[41]Organisation for Economic Co-operation and Development (OECD), 'Article 9(1) of the OECD Model Tax Convention' (2014) http://www.oecd.org/tax/treaties/2014-model-tax-convention-articles.pdf accessed on 15 May, 2020

[42] Weiner J. M., *Company Tax Reform in the European Union: Guidance from the United States on Implementing Formulary Apportionment in the EU*(New York: Springer, 2006) p. 48, Bird R. and Brean D., 'The Interjurisdictional Allocation of Income and the Unitary Taxation Debate' (1986) 34 Canadian. Tax Journal, p. 1412.

[43]Durst M., 'A Statutory Proposal for U.S. Transfer Pricing Reform' (2007) 115 Tax Notes, p. 1047, Avi-Yonah R. S., Clausing K. A &Durst M. C, 'Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Split' (2009) 9 Florida Tax Review, pp.497-500, Durst M.C., 'It's Not Just Academic: The OECD Should Re-evaluate Transfer Pricing Laws' (2010) <http://www.taxjustice.net/cms/upload/pdf/Durst_1001_OECD__not_just_academic.pdf> accessed on 15 May, 2020.

[44] Weiner Joann, 'Company Taxation for the European Community. How Sub-National Tax Variation Affects Business Investment in the United States and Canada' (Unpublished Ph.D. Thesis, Harvard University 1994) p. 40.

[45]Weiner J. M. and McLure C. E., 'Deciding whether the European Union Should adopt Formulary Apportionment ofCompany Income' in Sijbren C. (ed) *Taxing capital Income in the European Union: Issues and Options for Reform* (Oxford: Oxford University Press 2000) p. 260.

to allocate profit and income between two tax jurisdictions. This eventually made the European Union (2001) to issue a communiqué advocating for the use of FA within the EU under the proposed Common Consolidated Corporate Tax Base (CCCTB).[46]According to the United Nations, the FA is currently in use at sub-national levels in Switzerland, Germany, Japan and Canada[47]while some European countries including Denmark, France and Italy have experimented with the FA in the past.[48]

3.1 Application of the Formulary Apportionment (FA)

The application of the FA is predicated on treating the parent company and the various subsidiary companies of a MNC group as a single entity or a unitary business whereby the income, expenses, profits and losses of the corporate group are allocated on a pre-determined formula across the various taxing jurisdictions where the MNC group has business.[49] In this situation, unlike under the ALP system, the parent company and the various companies within a MNC group are treated as a single global taxpayer and its profit is calculated by subtracting its worldwide expenses from a global income without regard to legal distinctions between the members of the MNC group.[50] The resulting profit is thereafter allocated and apportioned among various taxing jurisdictions where it does business based on a formula that takes into account the economic realities, activities and contributions of each of the company to the global income and profit of the MNC group. Each taxing jurisdiction will then apply its tax rate to the profit apportioned to its jurisdiction.[51]

The proponent of the FA are of the view that the application of the FA ensures that the economic substance and realities of the integrated nature of the MNCs in the new globalized economy is reflected in its transactions because by treating a MNC group as a single worldwide taxpayer, the global income and profit of the MNC is distributed among members

[46]European Union, 'Towards an Internal Market without tax obstacles: A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities' (2001) <http://www.eur-les.europa.eu/LexUriServ/LexUrisServ.do?uri=COM:2001:0582.FIN:EN:PDF> accessed on 15 May, 2020

[47] United Nations, 'Practical Manual on Transfer Pricing for Developing Countries' (2017) <http://www.un.org/esa/ffd/publications/united-nations-practical-mannual-on-transfer-pricing-for-developing-countries-2017.html> accessed on 15 May, 2020

[48] Sheppard L. A., 'Dowdy Retailer Set to Destroy European Corporate Tax (2005) 38 Tax Notes International, p. 627

[49]Avi-Yonah R. S., Clausing K. A., and Durst M. C., 'Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Split' (2009) 9 Florida Tax Review, pp. 497-500

[50]Weiner J. M., 'Formulary Apportionment and Group Taxation in the European Union: Insights from the United States and Canada' <http://europa.eu.int/comm/taxation_customs/taxation/taxation.htm> accessed on 15 May, 2020

[51]Ibid

of the group to reflect their contributions to the global income.[52] The implication of this is that the application of the FA does away with the illusory assumption created under the ALP system that members of the MNC groups are separate and distinct entities.[53]Therefore, under the FA system, there is no need to conduct a comparability analysis to determine the appropriate transfer price which can be a very difficult task particularly in the globalized economy.

This gives the FA system an advantage over the ALP system because it eliminates the tax incentive to shift income from higher tax jurisdictions/countries to low/no tax jurisdictions/countries (tax haven countries). [54] Income-shifting from higher tax jurisdictions/countries to low/no tax jurisdictions/countries (tax haven countries) is a major strategy employed by MNCs to manipulate the transfer price of their intra-company transactions to gain a tax advantage. The FA system eliminate this incentive as a MNC group is regarded as a single worldwide taxpayer thereby prevent transfer pricing manipulation and its antecedent tax revenue loss. The application of the FA can therefore assist in reducing the tax incentive for MNCs to shift income by neutralizing the transfer pricing strategies in intra-group transactions.

It is further contended that the application of the FA aligns with the reality of the corporate tax system in the new globalized world economy.[55]Thus, it is held that the current system of the ALP which is based on the assumption of treating members of MNC groups as separate entities as well as requiring the conduct of comparability analysis to determine the appropriate transfer price is obsolete.[56] This argument stems from the fact as earlier stated that the basic assumption of the ALP system does not reflect the integrated nature of MNC group that has been achieved as a result of economic globalization.

3.2 Challenges of Replacing the Arm's Length Principle with Formulary Apportionment

Despite its advantages over the ALP as can be seen above, there are still doubts as to whether the FA can be a realistic international alternative to the ALP. The OECD, in particular, has

[52]Dennis T. J. H., 'Unitary Formulary Apportionment as a Solution to the Conundrum of Source' (2010) <http://www.jmls.edu/academics/.../Faherty_1.pdf> accessed on 15 May, 2020

[53] Ibid

[54]Avi-Yonah R. S. and Clausing K. A., 'Reforming Corporate Taxation in a Global Economy: A Proposal to Adopt Formulary Apportionment' (2007) <https://www.brookings.edu/research/reforming-corporate-taxation-in-a-global-economy-a-proposal-to adopt-formulary-apportionment/> accessed on 15 May,2020

[55] Ibid

[56] Ibid

criticized the idea of replacing the ALP system with the FA.[57] The OECD emphatically rejected the notion and the possibility of adopting the FA as the international standard for assessing transfer pricing. The OECD has continued to view the ALP as the only appropriate means of evaluating transfer prices among associated entities.

The major challenge to the international adoption of FA as replacement of the ALP as identified by the OECD is that it will be difficult to implement the FA internationally in a manner that will be acceptable to all countries. The OECD is of the view that an international application of the FA would require substantial international cooperation, coordination and consensus among countries with respect to formulas to be used for allocation of profits and income. The OECD argued in this regard that achieving such international cooperation, coordination and consensus may not only be practically impossible but may also be time-consuming and an extremely difficult task.[58]

The OECD further argued that even where countries accept a global implementation of FA, this may result in conflict of interest among the countries as to which formula should be included for allocation of profit and income. In this regard, each country may want to include formulas that are predominant in its jurisdiction with the incentive to maximize its own revenue thereby defeating the international cooperation and coordination needed for the global application of the FA.

Another contention of the OECD against the FA is that an international implementation and application of the FA will present enormous political and administrative complexity for countries. The international implementation and application of the FA require a level of international cooperation and an inclusion of all countries to ensure that there is only one standard to allocate profit between different taxing jurisdictions. It is contended that if a country where a MNC is headquartered has implemented the FA but the other country where its subsidiary company is located has not implemented the FA, the MNC group would be faced with the burden of complying with two different systems and standards. This, according to the OECD, has the implication of exposing the income and profits of the MNC group to double taxation thereby disrupting the basic principle of international taxation.

[57] Organisation for Economic Co-operation and Development (OECD), 'Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration' (2010)<http://www.oecd.org/publishing>accessed on 15 May, 2020.
[58] Ibid

The OECD further opined that the application of the FA on a global basis might present intolerable compliance costs to both the taxpayers and tax authorities particularly where not all countries agree on the formulas for allocation of profits and income. The OECD also disapproved with the argument that the FA can eliminate the tax incentive to shift income from higher tax jurisdictions/countries to low/no tax jurisdictions/countries (tax haven countries). It is the contention of the OECD that the that the application of the FA has not removed the motivation and incentive of MNCs to shift income to low/no tax jurisdictions as they can easily manipulate the formulas for allocation to shift profit to a particular jurisdiction where profit will not be taxed thereby leading to tax avoidance.

The above challenges as identified by the OECD constitute a serious barrier to the global adoption of the FA as the international standard of assessing transfer pricing. This made the OECD to continuously reject the notion that the FA can be a better alternative to the current ALP system. Thus, the OECD does not see the FA as a realistic alternative to the current ALP system. Despite the flaws associated with the practical application of the ALP, the OECD continued to consider the ALP as the best international principle through which an equitable allocation of profit and income of a MNC group can ensure fair transfer pricing among various taxing jurisdictions in respect of transactions between associated or related enterprises.

The OECD insistence on the ALP as the most appropriate means of assessing transfer pricing is due to the fact that the ALP has become widely accepted as the international standard for assessing transfer pricing over the years by almost all the countries in the world. Therefore, instead of jettisoning the ALP because of its flaws as suggested by the proponents of the FA, the OECD recommended that the ALP should rather be reformed to overcome its challenges posed by economic globalization instead of being thrown away. It is the contention of the OECD in this regard that since the ALP is widely recognized as the international standard for assessing transfer pricing, a sudden move away from the ALP will lead to a disproportionate allocation of income and profits in different tax jurisdictions and will also increase the risk of double taxation. It was, therefore, the recommendation of the OECD that experiences garnered from the application of the ALP should be drawn upon to refine and improve its application and implementation by providing clearer guidance to taxpayers and tax authorities. The reforms recommended by the OECD formed part of the 15-Action Plan developed by the OECD and the G20 to address the issue of Profit Shifting under a general package known as Base Erosion and Profit Shifting (BEPS) Project.

4.0 Reforms Proposed by the OECD to Strengthen the Application of Arm's Length Principle

One of the major reforms recommended by the OECD/G20 BEPS Project in the application of the ALP was for countries to prevent income and profit shifting through transactions involving transfer of intangibles within the MNC group. The BEPS Project advocated for adoption rules to measure the value of transfers of hard-to-value intangibles and rules to ensure that income and profits from transfer of intangibles are allocated in accordance with value creation.[59] This is to ensure that MNCs do not take advantage of unique properties such as intangible items including patents, brand name, license, franchise, trademark which are always hard to value due to lack of comparable price in the open market to shift income and profits from high tax jurisdictions to low or no tax jurisdictions.

The BEPS Project also advocated for the adoption of a three-tiered standardized transfer pricing documentation namely: (i) Master File; (ii) Local File; and (iii) a Country-by-Country Report. The standardized transfer pricing documentation is seen as a significant attempt to reduce compliance burdens on the MNCs by ensuring a consistent approach to documentation across various countries.[60] The Master File is expected to contain information relating to an overview of a MNC group business, including but not limited to the nature of its global business operations, its overall transfer pricing policies, its global allocation of income and profits and the level of economic activities of each of its permanent establishments in different countries in order to assist in tax collections. The essence of the Master File is to provide an overview of the MNC's global business operations, structure and transfer pricing policies. The Master File is expected to be filed in every tax jurisdiction where the MNC has permanent establishment. The information to be included in the master file is provided in

The local file on the other hand provides more detailed information relating to intra-company transactions in specific jurisdictions. The local file is meant to supplement the master file and to meet the objective of ensuring that taxpayers comply with the ALP in a specific jurisdiction. The information to be included in a local file includes information that are material in the context of a country's tax system and information on transactions taking place between associated entities in different countries. The local file just like the master file is also

[59]Organisation for Economic Co-operation and Development (OECD), 'Action Plan on Base Erosion and Profit Shifting (2013) <http://dx.doi.org/10.1787/9789264202719-en>accessed on 1 July, 2020

[60] Organisation for Economic Co-operation and Development (OECD), OECD, 'Explanatory Statement, 'OECD/G20 Base Erosion and Profit Shifting Project' (2015)<http://www.oecd.org/tax/beps-explanatory-statement-2015.pdf> accessed on 1 July, 2020

expected to be filed in every tax jurisdiction where the MNC has permanent establishments. Appendix III sets out the information to be included in the local file. The third document which is the Country-by-Country Report (CbC) is expected to be filed annually with the tax authority of the country where the MNC is headquartered. The CbC Report is expected to contain information regarding the amount of revenue, profits before income tax and income tax paid and other relevant economic activities. The CbC Report provides a clear overview of where profits, sales, employees and assets of MNCs are located and where taxes are paid.

The BEPS Project further recommended for countries to be flexible in the application of the ALP. The OECD advocated for the use of Safe Harbour in a transfer pricing legislation.[61] A safe harbour is a provision which relieves taxpayers from certain documentation obligations imposed by a country's general transfer pricing rules. According to the OECD, safe harbour can reduce the need to find data on comparables and to conduct comparability analysis in every case. This can reduce the compliance costs for taxpayers and provide certainty of treatment for controlled transactions. It can also reduce enforcement costs on the part of tax authorities.

The BEPS Project introduced an Advanced Pricing Agreement (APA) which is a form of arbitration.[62] APA is an arrangement or agreement between both the tax authorities and the taxpayers to determine the criteria to be used to determine the appropriate transfer price of a controlled transaction over a period of time. This involves an agreement between the taxpayer and the tax authority on criteria such as transfer pricing methods, comparable, appropriate adjustment and other relevant information necessary for the conclusion of controlled transactions. The APA has the ability to resolve disputes that may arise from transfer pricing disputes and it can prevent the profits from escaping tax or being doubly taxed. It is in this respect that the OECD TPG 2010 strongly endorsed the use of APAs particularly in complex situations where comparable information is not available. The OECD TPG further recommended that APA should be concluded on a bilateral or multilateral basis between competent authorities through a mutual agreement procedure.[63] It is argued that a bilateral and multilateral APA carries less risk of taxpayers feeling compelled to enter into an APA or to accept a non- arm's length agreement in order to avoid expensive and prolonged enquiries.

[61] Feinschreiber R. and Kent M., 'Updating the OECD's Safe Harbour Transfer Pricing Provisions' <https://www.oecd.org/.../transfer-pricing/.../safe-habour> accessed on 3 July, 2020

[62] Organisation for Economic Co-operation and Development (OECD), OECD, 'Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations' (2010) <http://www.oecd.org/ctp/transfer-pricing/45763692.pdf> accessed on 3 July, 2020

[63] Ibid

All the above recommendations have been adopted by OECD member countries and they have been included in 2017 OECD TPG released on 10 July 2017.[64] The OECD has stated that the effectiveness or otherwise of these recommendations will be adjudged in 2020 when most countries would have adopted these recommendations.[65]

4.1 The Best Approach for Nigeria and other Developing Countries

For Nigeria and other developing countries, it is the opinion of this writer that they should stick with the ALP system as there is no global consensus yet on the adoption of the FA as the international standard for assessing transfer pricing. It is equally important to note that majority of the trading partners of these developing countries are OECD member countries that regard the ALP as the international standard for assessing transfer pricing. For example, a 2019 foreign trade data released by the National Bureau of Statistics (NBS) showed that major trading partners with Nigeria are: India, Spain, The Netherlands, South Africa, France, Angola, Italy, Turkey, Ghana, Sweden Germany, Belgium, United Kingdom, United States, South Korea and China.[66] It is to be noted that out these countries Spain, The Netherlands, France, Italy, Turkey, Sweden, Germany, Belgium, United Kingdom, United States, South Korea and China are OECD member countries while India, South Africa, Angola and Ghana are countries that have also adopted the ALP as the standard for assessing transfer pricing as recommended by the OECD. The implication of this is that Nigeria and other developing countries cannot unilaterally adopt the FA as the standard for assessing transfer pricing as doing otherwise will have the potential of disrupting foreign direct investments which most developing countries relies on to provide amenities for their citizens.

In addition, the ALP is the backbone of the OECD Model Tax Convention on Income and Capital upon which most bilateral tax treaties are formulated. It is to be noted that Nigeria and other developing have adopted the OECD Model Tax Convention on Income and Capital as the basis of their bilateral tax treaties. This means that the developing countries have adopted the ALP as the standard for assessing transfer pricing. To replace the ALP with FA

[64]Organisation for Economic Co-operation and Development (OECD),'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017'<http://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm>accessed on 3 July, 2020

[65]Ibid

[66] National Bureau of Statistics (NBS), 'Foreign Trade in Good Statistics' <https://www.nigerianstat.gov.ng/download> (2019) assessed on 1 July, 2020

would mean a renegotiation of the double tax treaties which might be nearly impossible and time consuming and it can lead to disruption of international trade.

5.0 Conclusion / Recommendation

The article provided an in-depth analysis of the application of the arm's length principle (ALP) which is now regarded as the international standard for regulating and assessing transfer pricing. The finding of the article revealed that the application of the ALP is predicated on treating members of MNC groups as separate entities and using the prices charged in transactions between independent entities to benchmark or determine the appropriate transfer price to be charged between members of MNC groups.

The article also found that economic globalization made the application of the ALP to be a difficult one which has led to clamors for its replacement with the Formulary Apportionment (FA) which is considered more suitable for the new globalized economy. The application of the FA is premised on treating a MNC group as a single entity where income and profit are allocated between the subsidiaries of the MNC according to predetermined formulas. However, the application of the FA is not without its challenges which made the OECD to reject the FA as a possible replacement for the ALP.

It can therefore be posited under this article that the challenges confronting the application of the ALP in the globalized economy and the criticisms that have been levied against the application of the FA by the OECD are pointer to the fact that there is yet to be a perfect system to regulate and assess transfer pricing in the world. It is the recommendation of this article that countries should strengthen the application of the ALP in their respective jurisdiction by implementing the reforms recommended by the OECD and the G20Base Erosion and Profit Shifting (BEPS) Project 15-Action Plan. It is also recommended that countries should consider the use of the FA in the future instead of relying on the ALP at all times. The European Union, for example as stated in the body of the article has indicated its intention to make use of the FA to allocate income and profit of MNCs under the Common Consolidated Corporate Tax Base. It is further recommended that Nigeria and other developing countries should continue to use the ALP system and they should introduce all the reforms recommended by the BEPS Project to strengthen the application of the ALP in their respective jurisdictions.

PROCEDURAL CHALLENGES TO EAST AFRICAN COMMUNITY COMMON MARKET PROTOCOL ON FREE MOVEMENT OF LABOUR IN BURUNDI

By

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Nirera Didier**

Abstract

The five EAC countries as a way of moving forward with integration process, jointly established a Common Market which would provide for free movement of factors of production like people, goods, services, money, labour, right of establishment and right to residence of the EAC citizens within EAC member states. This is additional to free movement of goods under the Custom Union. The Protocol on the Establishment of EAC Common Market entered into force on 1st July 2010 having been ratified by all the five partner states and this Protocol was signed by Heads of States on 20th November 2009, coinciding with 10th anniversary celebrations of the revived Community. The paper traced the evolution of East African Community Common Market Protocol, examined the provision on free movement of labour in East African Community, legal provisions on Common Market Protocol and procedural challenges to Common Market Protocol on the free movement of labour in Burundi. The writers relied on published and unpublished materials like Treaty for the Establishment of East African Community 1999, Protocol on the Establishment of the East African Community Common Market 2009, Protocol on the Establishment of East African Community Custom Union 1999, text books and articles in journals. Others are Newspapers and internet materials. The paper revealed that the major challenges facing free movement of labour in Burundi are there is no clear procedures to obtain necessary documents need for residence and high cost of accommodation. The writers recommended that for effective free movement of labour in Burundi, there is need for elimination/adjustment of domestic laws to fit in EAC-CMP, there is need for increase on infrastructure investment in order to reduce the cost of doing business and facilitate efficiency in production, transportation and delivery of goods and services to the people of East Africa, need for promotion of joint border regular meetings and sensitisation of Burundians about Common Market Protocol.

Keywords: East African Community, Free Movement of Labour, Common Market Protocol, Regional Integration Strategy

1.1 Introduction

The East African Community has a long history which can be traced to during and after the colonial periods in East Africa.[1] The regional integration in East Africa is not a new issue

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because it dated back to the end of the 19th century by the construction of the Ugandan Railway from the coastal town of Mombasa to Fort Florence on the shores of Lake Victoria.[2] It was in 1917 when a Custom Union was formed by Uganda and Kenya which Tanganyika (now Tanzania) joined later in 1919. The cooperation preparations transformed to the establishment of the East African High Commission in 1948 which lasted until the independence of Tanzania in 1961. Henceforth, the High Commission was outmoded by the East African Common Services Organisation and later, the East African Community in 1967.The former East African Community however collapsed just after ten years of its existence in 1977 on account of inequitable spreading of expenses and reimbursements among the partner states because there was skewed beneficiation in favour of a particular country to the detriment of other countries. This however led to interstate imbalances of trade.[3] Secondly, there emerged ideological differences which led to the three countries adopted different politico-economic models whereby Kenya preferred a socialist model.[4] Furthermore, following Idi Amin's military coup in Uganda in 1971, personality clashes ensued and as such, the East African Authority constituted by the three Heads of States could not meet to discuss and resolve emerging issues. Despite the historical hindrance, the essence of collaboration among the three East African States namely: Kenya, Uganda and Tanzania was renewed in the middle of 1990s through a Cooperation Agreement which was later advanced into a Treaty for the Establishment of East African Community in 1999 and came into force in 2000, following endorsement by the partner states.[5] However, EAC membership expanded to five partner states when Rwanda and Burundi united in 2008 after signing the Treaty of accession by both countries to the Community[6] and was later expanded

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[1] Jennifer G., *Free Movement and Equal Rights for Low-Wage Workers?What the United States can Learn from the New EU Migration to Britain*, (Fordham University-School of Law, UC Berkeley Law School, Chief Justice EARL Warren Institute on Law and Social Policy Issue Brief,2011), p. 67. <https:www.lexisnexis.com/legal/newsroom/immigration/b/insidenews/free-movement-equal-rights-for-low-wage-workrs?what-the-united-states-can-learn—from-the-new—eu-migration-to-britain> accessed on 12 June, 2018.

[2] United Nations Economic Commission for Africa (UNECA) Sub-Regional Office for Eastern Africa, Domestication and Mainstreaming of Regional Integration Processes Instruments and Decisions into National 'Policies, Legal and Regulatory Frameworks: Issues, Challenges and Opportunities, the Case of Uganda' (2013).

[3] Jaime D,*et al*, *Getting the Best out of Regional Integration: Some Thoughts for Rwanda*,(Kigali 2011), p. 100.

[4] Ibid.

[5] East African Community Common Market Implementation Plan, (November, 2011).

[6] Ibid.

to six when South Sudan joined in 2016.[7]Under the revived EAC of 1999, the Custom Union was launched in 2005 and was supposed to take full operation by 2010.[8]

This has however not happened due to several challenges encountered but the member states agreed to go ahead in fulfilling their obligations deriving from Custom Union Protocol concurrently with the ones of Common Market.[9] The Custom Union was expected to be achieved in 2010 and the next stride in the integration process envisioned by EAC was the formation of a Common Market in order to produce single internal market among the partner states. On the same regard, the five EAC countries, as a way of moving forward with integration process, jointly established a Common Market which would provide for free movement of factors of production, that is, people, goods, services, money, labour, right of establishment and right to residence of the EAC citizens within EAC member states among other things; apart from the free movement of goods under the Custom Union.[10] The Protocol on the establishment of EAC Common Market came into being on 1st July 2010, following ratification by all the five partner States[11] and this Protocol was signed by Heads of States on 20th November 2009, concurring with 10th anniversary festivities of the revived Community.[12] Even though, the Treaty does not exhaustively define the term Common Market but it refers to situation where impediments to the free movement of the most important segments of the economy have been removed.[13]

Essentially, Common Market or internal market which includes the common policies in certain areas, such as competition in agriculture as currently referred to in European Union, is about the absence of internal barriers but not absence of control and management. It is therefore an arrangement that integrates the markets of factors of production from individual Partner State into one single market.[14] This means that, the Common Market involves the integration or amalgamation of all three markets which are goods markets, labour markets and capital markets.[15] This paper therefore traced the evolution of EAC Common Market

[7] Comparative Study on the Free Movement of Workers in Select East African Community Countries: Burundi, Kenya, Rwanda and United Republic of Tanzania (International Organisation for Immigration, 2019), p. 1.<https://tanzania.iom.int>, accessed 5 July, 2020.
[8]East African Community Common Market Implementation Plan, (November, 2011).
[9] Ibid.
[10] Walter O., 'East African Integration, Dynamics of Equity in Trade, Education, Media and Labour' (*Society* for International Development: Regional Office for East Africa, 2011).
[11] Burundi, Kenya, Rwanda, Tanzania and Uganda.
[12] Juma M., 'Statement by the EAC Secretary General'(Arusha, 1 July 2010).
[13] Kanyangoga J. B.,'Integrating Migration with Development in EAC: Policy Challenges and Recommendations'(Kigali: Research Paper/Cuts International Geneva Resource Center, 2010), p. 65.
[14] Kennedy G, et al, *Regional Integration in East African Community, (*Dares Salaam: Dares Salaam University Press, 2011), p. 67.
[15]Arts 76 and 104, EAC Treaty, 1999.

Protocol, examined the provisions on free movement of labour within EAC countries, legal provisions on Common Market Protocol and procedural challenges to Common Market Protocol on the free movement of labour in Burundi.

2.0 Understanding Provisions on Free Movement of Labour in EAC

The East African Common Market Protocol provides for the movement of persons, travel documents and the free movement of worker in particular. It focuses on three migration issues: national policy frameworks, data management and migrant worker practices.[16]Cross-border labour mobility peaked at the late of 19thcentury but started descending at the beginning of the great melancholy and Second World War as result of economic restrictions. Contrary to the recent international migration, the cross border movement of people at the mercantile period (between 1500 and 1800) and industrial period in 1800 and 1910 was not related to economic backwardness and underdevelopment of the sending countries. As an illustration, Britain, which was the first country to industrialise and the most advanced nation at the beginning of the 20th century was the largest sending nation.[17]

When the autarky and economic nationalism began in 1910, various barricades were erected against trade, investment and migration. As a result, the cross-border movement of labour and capital was frustrated. Majority of the migrants at this time were mainly refugees and displaced persons who made no positive contributions to the growth of economic and development. On the other hand, after the industrialisation which began in the 1960s, a new pattern of migration emerged. Workers from underdeveloped countries began migrating to developed countries. Majority of them were from Latin American, African and Asian continents.[18] More so, the oil-rich countries of the Persian Gulf, East Asia like Japan, Hong Kong, China, the Republic of Korea, Malaysia, Singapore, Taiwan and Thailand witnessed influx of immigrants[19]

Presently, the enormousness and shape of labour migration has little bearing with population burdens. Unlike in the 1960s and 1970s, when migration was mostly a one-way traffic from low-income and poor countries to well-to-do nations, presently, most of the migrants are

[16]International Organisation for Migration, 'Study Highlights Need for Free Movements of Labour in East Africa,' (IOM Manila Administrative Centre, 2020) <https://www.iom.int> accessed on 5 July, 2020.

[17] World Bank, 'Doing Business in East African Community: Smarter Regulations for Smaller and Medium Size Enterprise International Bank for Reconstruction and Development' (World Bank, Washington DC, 2013).

[18]Simonetta L, et al, 'Meta-Analyses of Labour-Market Impacts of Immigration: Key Conclusions and Policy Implications' (2010) 28 (5) Environment and Planning C, pp.819-833,

[19]World Bank, 'Shaping the Future: A Long-Term Perspective of People and Job Mobility for the Middle East and North Africa, Washington,' 2009.

from countries with inspiring economic growth rates and declining fertility rates. The World Bank's World Development Report stated that the emigration today is due to less distraction and more of integration.[20]

Article 10 (1) provides that the Partner States should guarantee free movement of workers to citizens of the other Partner States within their territories.[21] This provision entitle s workers to apply for employment and accept offers of employment in other partner states. Such workers can move freely within the territories of partner states for employment, they can conclude contracts and take up employment based on the contracts, national laws and administrative actions.[22] It also enables worker to enjoy the freedom of association and collective bargaining for better working conditions in pursuance to the national laws of the host partner state and to enjoy the rights and benefits of social security as accorded to the workers of the host partner state. The provision further enjoins the partner states to ensure that workers do not face discrimination in employment, remuneration and other conditions of work based on their nationality.[23] Workers should actually use their educational and specialized experiences obtained in their home country to seek for employment in other partner states without having to undergo other examinations or proficiency tests in the host country. In this regard, partner states undertook in Article 11 to recognise such qualifications acquired in other partner states.[24] In this context, the partner states were to gradually blend their curricula, examinations standards, certification and accreditation of educational and training institutions to simplify acknowledgement of the qualifications.[25]

In addition, in order to facilitate labour mobility within the Community, Partner states undertook the harmonisation of their labour rules, state regulations and programmers of each of the partner states as well as a review and harmonisation of state social security policies, laws and systems so as to offer social security to self-employed persons who are citizens of other partner states.[26]The application of this Article shall be based on the advices and rules issued by the Council.[27]Article 39 of CMP enjoins the partner states to synchronise their social policies so as to promote and protect decent work and improve ethics of living of the citizens.[28]

[20] Ibid.
[21] Protocol on the Establishment of the East African Community Common Market, 2009.
[22] Ibid.
[23] Art 10 (1) ibid.
[24]Art 11, ibid.
[25] Ibid.
[26] Art 12, ibid.
[27] ibid.
[28]Art 39, ibid.

Burundi had committed to allow different categories of workers with immediate effect in 2010.[29] However, one would expect that two years into that commitment, the country has eliminated any prohibitive legislations that existed prior to CMP and complementary policies instituted. That is why the commitment in Article 12 extends to review and harmonisation of domestic social security policies, laws and systems in the region.[30]

As part of the framework for cooperation, the partner states committed in Article 5 of CMP to ease cross-border movement of persons and eventually approve an integrated border administration structure.[31] They also committed to remove limitations on the movement of labour, harmonise labour policies, programmes, legislations, social services, provide for social security benefits and establish uniform standards of measurements for association of workers and employers.[32] The partner states are also anticipated to start employment promotion centers and eventually approve a joint employment policy. Lastly, the member states are enjoined to facilitate the right of residence of the citizens of EAC.[33]

3.0. Legal Provisions on the Common Market Protocol

The Protocol on the Establishment of EAC Common Market came into existence on July 1st 2010 after ratified by the partner states.[34]The formation of EAC Common Market was in accord with the provisions of the EAC Treaty. It makes provisions for free movement of goods; labour; services; and capital which will meaningfully improve trades and investments and make the region more industrious and prosperous.[35]The Common Market epitomises the second step of the provincial integration procedure as defined by the Treaty for the formation of EAC following the Custom Union which come into being in January 2010. The Common Market Protocol is a moment to achieve the next step in the integration procedures, that is, Monetary Union and the EAC Political Federation.[36]The Provisions are as follows:

3.1. Legal Objectives of the Common Market Protocol

[29]Burundi Diagnostic Trade Integration Study, (Vol. 1, 2012).
[30]Art 12,Protocol on the Establishment of the East African Community Common Market, 2009.
[31]Art 5, EAC-CMP2009.
[32] Uganda Legal Information Institute, Labour Unions (Registration) Registrations, Statutory Instrument Supplement, 2012.)<https://www.slideshare.net/sonukmr583/labour-legislation>.Accessed on 22 April, 2018.
[33] Ibid.
[34] Burundi, Kenya, Rwanda, Tanzania and Uganda.
[35] A Quick Guide to the EAC Common Market Protocol (May 22, 2018, 12.09 PM)<https://www.eassi.org/wp-content/uploads/2018/08/A-QUICK-GUIDE-TO-THE-EAC-COMMON-MARKET-PROTOCOL-BY-EASSI.pdf> accessed on 12 June, 2019.
[36] Ibid.

The objective of the Common Market is to expand and deepen cooperation in the economic and social fields for the benefit of the partner states.[37] The specific objectives of EAC Common Market are:[38]

i) Acceleration of growth in the economic development of partner states through the accomplishment of the movement of goods, persons and labour;

ii) Guaranteeing the rights to establish, reside and free movement of capital and services;

iii) Strengthening the coordination and regulation of trade relation and economic of the partner states to promote accelerated, harmonious and balanced development within the community;

iv. Sustaining the expansion and integration of economic activities within the Community which will be evenly distributed and benefit the partner states equitably;

iv) Promotion of mutual understanding and collaboration among citizens of the partner states for their social and economic advancement; and

v) Enhancing investigation and technological advancement in order to fast-track social and economic growth.[39]

Therefore, the free market forces within the community is expected to increase economic efficiency, widen the consumers' choice and enhance the community's competitiveness in the world market.[40] For the purpose of realising the objectives of EAC Common Market, the partner states undertake to cooperate to participate and synchronise their rules in areas as provided in the Protocol and in such other areas that the Council may determine fit.[41]It is expected that transformation to a common market should be comparatively simple because most of the required foundations are previously in place, but the trial has always been how to strengthening these institutions to guarantee support for effective Common Market.

3.2 Legal Principles of the Protocol

The Common Market shall be directed by the ultimate and effective values of the Community based on the provisions of Articles 6 and 7 of the Treaty.[42]Article 6 of EAC also deals with

[37] Art. 4 (1) of the Treaty for the Establishment of EAC, 1999.
[38] Art. 4 (2) ibid.
[39] Ibid.
[40] Art. 4 (1) ibid.
[41]Art. 4 (3), ibid.
[42]Art. 3 (1) of EAC Common Market Protocol 2009.

free movement of goods among the partner states, governed by the Customs Law of the Community as provided in Article 39 of the Protocol on the formation of EAC Customs Union.[43] Similarly, Article 7 of EAC guarantees free movement of labour and persons who are citizens of the other partner states within their territories.[44] Also, in accordance with paragraph 1, each partner state shall not discriminate against citizens of the other partner states based on their nationalities.[45]

Further on the Principles of the common market, Article 3 (2) provides that, without prejudice to paragraph 1, the partner states undertake to: observe the principle of non-discrimination of nationals of other partner states based on state of origin; avail treatment to citizens of other members states equal to the treatment given to third parties; ensure transparency in issues affecting other partner states; and share information for the operation of this Protocol.[46] Therefore, if these principles are honoured by the member states, then, free movement of the labour and other factors of productions within the EAC would be experienced at a greater extent.

3.3. Free Movement of Goods

Free movement of goods implies elimination of internal tariffs, application of common external tariffs, application of uniform rules of origin, elimination of non-tariffs barriers and the application of common external trade policy.[47] This means that, goods produced within the region shall be completely free from tariffs among the member states and those states shall apply common tariffs for goods imported outside ECA region. In terms of implementing the free movement of products among partner states, EAC Common Market Protocol states that, it shall be governed by the customs law of the Community with the EAC Protocol on standardisation, quality assurance, metrology and testing[48] which came to being on 15th, January 2001, the same date it was signed in Arusha, Tanzania.[49]

3.4. Free Movement of Persons and Labour

Free movement of persons is a major factor of economic integration and development. It guarantees availability of skills and labour where they are required to offshoot economic

[43] Art. 6 (1), ibid.
[44]Art. 7 (1), ibid.
[45]Art. 7 (2), ibid.
[46] Art. 3 (2), ibid.
[47] Art. 6, ibid.
[48]Art. 39 of the Protocol on the Establishment of East African Community Custom Union, 1999.
[49] Ibid.

development and investment.[50] Free movement of persons confers right to nationals of EAC member states to enter the territory of other partner states without a visa, to stay in the territory and exit without constraints.[51] Each member state, pursuant to the provisions of international law shall protect the citizens of other member states while in their territories.[52] Free movement of persons shall not immune the nationals of member states who committed crime in another partner states from extradition or prosecution.[53]In 2010, the International Labour Organisation (ILO) estimated that there were about 19.3 migrants workers in Africa of which 8.4 were classified as migrant workers. 1n 2015, the estimated population of East Africa was over 145.5 billion people with a gross domestic product of about USD 147.5 billion. As the region intensifies efforts to achieve its integration milestones, specifically within the context of EAC Common Market Protocol, cross-border labour movements have made labour migration a pertinent issue for the partner state like Burundi.[54]

3.5. Free Movement of Capital

Free movement of capital occurs when the member states agreed among themselves to remove restrictions of movement of capital belonging to the partner resident in the community and discrimination based on nationality or on place of residence of the persons or the capital is invested. They also agreed not to introduce any new constraint on the movement of capital, payments and transfers or apply more restrictions or regulations, remove restrictions relating to current payments connected with the movement of goods, persons and services or capital among partner states based on the provisions of Common Market Protocol.[55] In other words, free movement of capital requires the absence of restriction hindering free movement of finances from one country to another or to all members of the community. It is important to mention here that free movement of capital depends on one way or another to the application of other rights like right to establish and reside and free movement of services as contained in the Protocol.[56]

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[50] African Union Commission, United Nations Economic Commission for Africa, Labour Migration Governance for Development and Integration in Africa (A Bold New Initiative Programme Brief, 2015), p. 4.<www.ilo.org/wcms5/groups/public...africa/documents/meetingdocument/wcms_345393.pdf> accessed 12 June 2018.

[51]Art. 7 (2) of EAC Common Market Protocol 2009.

[52]Art. 7 (3), ibid.

[53]Art. 7 (4), ibid.

[54]International Organisation for Migration, (note 16 above).

[55]Art. 24, ibid.

[56] Nsengiyumva J. C., 'EAC Integration Process: Achievements and Challenges in the Implementation of East African Community Common Market' (Presentation on Lake Tanganyika Basin Conference, 2011), p. 8.

3.6. Free Movement of Workers

There is free movement of workers in situation where the citizens of EAC have the right to apply for employment and accepting employment. This actually enables them to move freely within the territories of member states. The member states guarantee free movement of workers who are citizens of the other member states in their territories. [57] There should be no discrimination of workers of other member states based on their nationalities in relation to employment, remuneration and other conditions of work and employment.[58] For the purpose of Article 10 of EAC Common Market Protocol, free movement of workers should qualifies a worker to: (a) seek for offers and accept offers of employment actually made; (b) have freedom of movement in the territories of the member states to seek for employment; (c) enter into contracts and get employed pursuant with the contracts, domestic legislations and administrative activities devoid of any discrimination; (d) live in the terrain of a member state to be gainfully employed in pursuance with the state legislations and administrative procedures governing the employment of workers of that member state; (e) enjoy free association and joint negotiating for healthier working environments based on the provision of domestic legislations of host member state; and (f) enjoy rights of social security as provided to the workers of the host member state.[59] All these are aimed at ensuring that workers enjoy freedom of association and collective bargaining for better working conditions in accordance with national laws of the host partner state and the right to be accompanied by a spouse, children and dependents.[60]

This means that, a person from one partner state, for the purpose of employment, shall stay in another member state, together with his/her family and other persons depending on him/her freely as long as he/she respects the domestic legislations of the host country.[61] In terms of the scope, apart from the power conferred to the Council which may, if deems necessary, issue directives and make regulations on social security benefits in regard of exception to the general provision. The provisions of EAC Common Market Protocol do not apply to the employment in the public services unless the state laws and rules of the host partner state so permit.[62] In limiting the abuse of this discretionary power bestowed on states, it is provided

[57]Art. 10 ofEAC Common Market Protocol, 2009.
[58]Ibid.
[59] Art. 10 (3) (a) –(f), ibid.
[60] Comparative Study on the Free Movement of Workers in Select East African Community Countries, (note 7 above), p. 10.
[61] Kennedy G., 'The Legal Analysis of the Common Market of the East African Community as Market Freedoms in the Open Market Economy,'(2011) l (1), Law in Africa, pp. 143-154.
[62]Art. 10 (4) of EAC.

that the national regulations and procedures shall not apply unless they are not in contrary to the major objective of the Protocol.[63]

In order to avoid legal differences, the domestic legislations and managerial processes of a member state should not be adopted where the main purpose or consequence is to disallow citizens of other member states, the employment that has been offered.[64] Also, the provisions of Article 10 may not apply to employment in the public service unless the state legislations and regulations of a host member state so permit.[65] However, free movement of workers shall be subject to restrictions enforced by the host member state on conditions of public policy, public security or public health.[66]

3.7. Free Movement of Services

Partner states hereby guarantee free movement of services supplied by citizens of other member states and the free movement of services suppliers who are citizens of member states within the community.[67] Through free movement of services, the provider from one of the member states will be given the opportunity to supply services to other member freely. Free movement of services involves the supply of services from the jurisdiction of a member state into the territory of another member stat by a service supplier of a member State through commercial presence of the service supplier in the territory of another state.[68] For the implementation of the free movement of services, partner states are compelled to take necessary measures which include non-limitation to legal and administrative actions by removing and not introducing new confines on the delivery of services within the member states.[69]

3.8. Right of Establishment

There is right of establishment whereby member states give right of establishment to citizen of other member states within their territories and the member states will make sure that discrimination against citizens of the other member states based on their state of origin do not exist.[70] The right of establishment implies that a citizen of a member state enjoys right and freedom to take up and pursue an economic undertaking in the jurisdiction of another

[63] Art. 10 (9), ibid.
[64] Ibid.
[65] Art. 10 (10), ibid.
[66] Art. 10 (110, ibid.
[67] Art. 16 of EAC Common Market Protocol, 2009.
[68]Art. 16 (2) (a), (b), (c) and (d), ibid.
[69] Ibid.
[70]Ndegwa P., *The Common Market and Development in East Africa*,' (Kampala: SKampala Eastern Africa Publishing House, 1965), p. 136.

member state. The companies and business ventures established in pursuance to the domestic legislations of one of the member states with a registered office, central administration or principal place of business and commence significant commercial activities in the member state shall, for the purpose of establishment, not be discriminately treated in other member state.[71] On the same bedrocks, for the purposes of undertaking commercial activity, member states shall collectively identify the germane skill acquired, pre- requisites met, warrants and documentations granted to a company or a business venture in territory of the other member states.[72] In other words, a company with a certificate and registered with reference to the domestic legislations of one of the member states will be allowed to carry on business in jurisdiction of other member states.[73]

3.9. Right of Residence

By right of residence, partner states shall give right of residence to the nationals of other partner states who have been allowed in their jurisdiction based on the provision of the Protocol.[74] Just like in the circumstance on right on the free movement of workers, the right of residence also applies to spouse, children and dependents of the worker or self-employed persons who is eligible to the right of residence as contained in Articles 10 and 13 of EAC-CMP.[75] After signing the Protocol and initiation of operations, the EAC member states had to put the EAC Common Market in the progression mode. The Common Market Protocol shows obviously rights, freedoms, duties and obligations of people propagate the common market forward and reap its benefits. The Common Market Protocol makes provisions for legal frameworks for its operation. Foremost as provided in the schedules, is the domestication of Protocol's provisions by member states within their domestic legislations by December 2010.[76]

4.0. Procedural Challenges to Free Movement of Labour

It should be stated that economic diversification remains limited and agriculture is likely to remain the main source of income and employment for years to come. Agriculture provides

[71]Art. 13 (5) of EAC Common Market Protocol 2009.
[72] Art. 13 (6), ibid.
[73] Ibid.
[74]Art. 14 (1), ibid.
[75]Art. 14 (2) of EAC Treaty, 1999.
[76] Ndegwa,*The Common Market and Development in East Africa*, (note 70 above).

income for about 85 percent of the country's population.[77]Burundi therefore favours skilled migrants who have skills that are not possessed locally by Burundians. This is a condition that must be satisfied before migrants can get employment in Burundi. Other perquisites are nationality of one of the EAC Partner states, a business proposal and proof of finances in the country.[78]Labour migration in Burundi is managed by a number of stakeholders which include COSYBU, ISTEBU, the Ministry of Public Service, Labour and Employment and Police for Air, Borders and Foreign (Police *de l'Air, des Frontieres et des Ettrangers).* Migrant workers are bound to abide by the rules and regulations of Burundi. Upon entry into the country, they are enjoined to have a visa, work permit or residence permit. EAC Common Market Protocol provides that citizens of member states are not required to pay any work permit fees, however, EAC migrants to Burundi are still expected to apply for permit and the employer pays three percent of the salary as permit fees, and the required documents are application letter, passport, residence permit, curriculum vitae, diplomas and passport size picture.[79] The migrants interviewed revealed the challenges faced in the processing of these permits. Save for in the law, there were no clearly published guidelines for the procedure used to acquire work permits, neither was the duration indicated.[80]

4.1. Poor Perception of Educational Qualifications

Although it is not written, there is a widespread perception by many would-be employers in countries like Kenya, Uganda and Tanzania that Burundi did not have the higher tertiary level training institutions to provide the level of education and certification that is considered as satisfactory.[81] This perception alone makes any professional trained in Burundi to be considered as not well qualified and are therefore less competitive in a regional labour market. Its professionals are therefore likely to face skills and remuneration discrimination when looking for jobs in other partner states. This is likely to be the case in the short to medium term before the culture and practice of qualification recognition and harmonisation

[77] Document of the World Bank,' Republic of Burundi Addressing Fragility and Demographic Challenges to Reduce Poverty and Boost Sustainable Growth Systematic Diagnostic,'(2018) International Development Association Country Department AFCW3 African Region, p. 37.
[78]Comparative Study on the Free Movement of Workers in Select East African Community Countries, (note 7 above), p. 60.
[79]Art. 12 of EAC Treaty, 1999.
[80]Comparative Study on the Free Movement of Workers in Select East African Community Countries,(note 7 above), p. xi.
[81]Art. 12 ofEAC Treaty.

of curriculum is fully embraced in the region. It is reassuring, though to note that the process has commenced, with Burundi and Kenya having had MoU in this regard.[82]

4.2. Low Public Awareness

There is insufficient public education and awareness in the country, which means that many residents of Burundi are not fully aware of the opportunities and the preparations they need to make to operate optimally within the EAC Common Market. Although, this is a challenge that applicable to all partner states.[83]There is also no comprehensive regional integration strategy to steer implementation of CMP in Burundi. Burundi also lacks institutional mechanisms to coordinate and monitor implementation of CMP.[84]

4.3. Impact of Differentiated Commitments in CMP

It is clear from CMP commitment schedules that nearly each partner state has made different commitments in terms of the categories of labour they would welcome in their labour markets. Some of the member states with relatively higher wage levels that would provide incentive for Burundians to move require relatively highly skilled labour, especially in categories where they deem they have a domestic shortage.[85] Burundi has been experiencing low level of skills development and has an acute shortage of the eligible professionals required by other partner states. Therefore, Burundi is not likely to benefit from the opening of EAC labour markets because of these restrictions. Ideally, all categories of labour and professionals ought to have been able to move freely without discrimination between categories. In any case, a region needs a combination of skilled and unskilled labour to develop and unite. Thus, restricting the movement of certain categories of labour is creating imbalances and disunity rather than promoting integration of labour markets in the region.[86]

Nonetheless, there are those who belong to the school of thought that EAC member states need more skilled people so that the onus should be on the unskilled member states to get skills for them to be able to move freely and thereby contribute more to the development of EAC bloc. In fact, those who have tolerated this thought might argue further that if unskilled persons moved freely, they may end up unemployed and anti-social behaviour (such as

[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] R Mukandala R., 'Political Cooperation in Perspectives on Regional Integration and Cooperation in East Africa,' (Arusha: EAC Secretariat, 2000), p. 102.
[86] Ibid.

crime), may set in as well as expansion of slum dwellings, results which may adversely affect the development and growth potential of a country.[87]

4.4. There is no Comprehensive Regional Integration Strategy in Burundi

A regional strategy is critical to ensure consistency of the various commitments made in different regional negotiations. Integration, notably in the blueprint of EAC is fully underway and substantive results have already been achieved. However, Burundi still lacks a coherent and concrete strategy with a prioritized roadmap for action.[88] The comprehensive operation of CMP by Burundi has taken several years. There is still a strong rationale for Burundi to develop such a strategy. Moreover, the establishment of an efficient institutional mechanism to coordinate and monitor implementation of regional integration efforts is a prerequisite. Without such a strategy, some of the expected benefits to accrue for Burundi might not be achieved. Elaboration of such strategy should help Burundi in the prioritisation of its numerous regional commitments in the future.[89]

4.5. Other Challenges

Implementation of free movement of labour to the citizens of EAC might be hampered by other challenges. The privileges of free movement of labour are accompanied by the right of residence whereby the migrating workers and their family members are supposed to be provided with accommodation. To get accommodation can be a challenge particularly in countries like Burundi that are facing with shortage of accommodation.[90]

Another notable challenge facing EAC member states on mutual recognition of educational certificates, qualifications, skills and experience acquired in a particular profession. A member states may have unique education programmes which are distinct from those of other member states, also country's academic programme and standards may seem superior to those of other member states. Synchronizing academic trainings, skills and experience requirements before gaining entry into the labour market can therefore be a challenge for member states trying to apply free movement of labour. A good example is whether a Bachelor degree of Medicine obtained at Makerere University can be compared with the one obtained at University of Nairobi or any universities in Tanzania, Rwanda and Burundi?

[87] Ibid.
[88] *East African Community Secretariat*. Arusha Trade Report, 2008.
[89] Ibid.
[90] Tsikata Y and Jaime D, 'Regional Integration in Africa: Challenges and Prospects,' (A Contribution to the Handbook of Africa and Economics, 2018), p. 18.

Therefore, disparity in education curricula, qualifications and skills may compel employers in the receiving country to conduct training programmes for citizens of other member states wishing to work in the country which will amount to incurring extra costs to the employers and to production cost.[91]

Language barrier is another challenge.[92] In most cases, there are different official and national languages among countries of a Regional Economic Community. In EAC, English is the official language in Kenya and Uganda, Kiswahili is the official language in Tanzania and based on the colonial heritage of the member states, French is the official language of Rwanda and Burundi.[93]In order to fully implement Common Market in EAC bloc, there is need for a unique language among the member states for effective interaction and conducting business. Language and culture of a people are inseparable. It is therefore difficult for a national of a particular member state to adopt a new language for the purpose of communication. It is imperative for people seeking to carry on commercial business in the region to struggle to learn the dominant language for transaction in those member states.[94]

It is also momentous to observe that free movement of workers is only applicable to private enterprises in the member states because Article 10 (10) stated that its provision are not applicable to employment in public sector.[95] However, where a member state lacks some specific professionals and skills in the public sector and its domestic labour policy frowns at employment of foreigners, this provision has denied the government the benefit of those professionals and skills.

There is also the challenge of brain drain and brain-gain in labour mobility. Countries may be reluctant to regional labour mobility due to fear of brain drain. Brain drain or brain gain means skilled labour and is highly related to reciprocated acknowledgement of academic credentials and specialized experiences.[96] With this communal recognition, migrant workers are assured of higher standing on the professional ladder as well as higher remuneration. Mutual appreciation make available to migrant workers, the incentives mandatory to work in the formal instead of informal sectors of employment.[97]EAC member states may take the

[91]Kennedy,The Legal Analysis of the Common Market of the East African Community as Market Freedoms in the Open Market Economy,' (note 61 above), p. 14.
[92] Francisco V., 'Labour Mobility within the European Union: Findings, Stakes and Prospects*' (2000) 139 (4)* International Labour Review, p. 437.
[93] Ibid.
[94] Ibid.
[95]Art. 10 (10) of EAC Treaty.
[96] Mugisa E, et al, 'An Evaluation of the Implementation and Impact of the East African Community Customs Union' (*Final* Report for the EAC Secretariat, 2009).
[97] Ibid.

benefit of the skills differentiation that exists in the region by training more professionals with the intent to send them to those member states with shortage of skilled labour. Good example is Kenya that sent English teachers to Tanzania and accountants, lawyers and engineers to Rwanda and Burundi.[98]

Social security also constitutes great challenge to guarantee free movement of persons / labour within the EAC. In any case, the EAC member states have different social security schemes not only in the design but also in the number of the schemes. As a result, harmonising these schemes could become a challenge to the member states. Moreover, an issue such as the transferability or otherwise of the benefits from the schemes makes the free movement of labour more intricate. For instance, does a Rwandan who is working in Burundi and enjoying social security benefits while in the country have the right to transfer the hard-earned benefits to his/her home country if he/she desires to go back home? Other issues include the difference in currency, for instance, should the benefits enjoyed by the Rwandan who works in Burundi be in Burundian Franc or in Rwandan Franc? This is sticky, given the lack of a common currency in the region. In recognition of the hindrances to free movement of labour arising from non-transferability of social security benefits, some RECs such as the EU and the CARICOM have allowed the transfer of social security benefits among the member states.[99] The EAC Council of Ministers had issued a directive for the region to conduct an actuarial study portraying the economic and financial impact of the portability of social security benefits if the system was to be implemented.[100]

Promoting free movement of persons and workers requires relaxation of border controls. Porosity of borders affects the security of the citizens of the host country.[101]Porous borders leads to increase in fire arms, drugs and human trafficking. Some of the EU and RECs member states envisaged that accommodating new member states to the Union and opening up their labour markets to them would cause influx of illegal immigrants thereby leads to high decimal crime in their jurisdictions. Human trafficking is lush in the EAC region because two of the five member states (Kenya and Uganda) are the most countries in the EAC region which suffered from high poverty levels, terrorism, conflict, political stability,

[98]Jumuiya News, *A Newsletter of the Ministry of East African Community*, 2009.
[99]Noel W., 'Pilot Study to Assess the Likely Impact of the Free Movement of Labour in the CSME on the OECS Labour Market' (Caribbean Regional Negotiating Machinery, 2007), P. 16.
[100] Ibid.
[101]Newman P., *The Economics Integration in East Africa (*New York: Oxford University Press, 1965), p. 58.

severe droughts and famine and general desperation. These therefore make Kenya and Tanzania important destination as well as transit point for human trafficking.[102]

The condition is further intricate by the influx of refugees from countries like Ethiopia, South Sudan and Somalia.[103] EAC countries like Kenya and Uganda hosted more than four hundred and fifty two thousand refugees from Somali in September, 2011 at Dadaab camp, the largest refugee camp in the region.[104]Also, many Burundians migrated to different EAC countries. This is a colossal challenge to the free movement of persons and labour in the EAC region because it increases the susceptibility of the nationals of EAC member states to trafficking, smuggling and other forms of abuses.[105]

Challenges of trafficking always accompany with human rights abuses of migrant workers. Obviously, porosity of borders increases abuses of women and children who are frequently enticed into involuntary labour and commercial sex. Slavery, forced labour, cruelty, degrading and inhumane treatment by employers as well as severe and unwarranted punishment are the majority of abuses of fundamental human rights of migrant labourers.[106] Most of the migrant labourers in this predicament are those who have been trafficked. Women are genetically vulnerable to these nature of abuses because of the gender-specific industries and nature of work.[107]

Finally, a citizen of a member state who want to commence business in another member state needs a citizen shareholder. The migrant is given a temporary work permit which is renewable as long as the migrant wants. However, he has limited if any, chances of getting a permanent residency irrespective of the length of time he/she has established or worked in the host country.[108] The sponsorship system is also existent in the EAC member states where citizens of other EAC member states wishing to establish in the country to member with locals. This is done mainly due to fear of embezzlement of funds from the receiving country to the country of origin of the migrants.

5.0. Recommendations

[102]Ibid.
[103]Ongaga B. J., 'Factors Influencing the Implementation of East Africa Community Customs Union'*(*MBA Project Paper. University of Nairobi 2007), p. 33.
[104] Ibid.
[105]Society for International Development *Greater Horn of Eastern Africa (GHEA) Outlook No. 25: Human Trafficking in the GHEA*, 2012.
[106] Ibid.
[107]Ku Masih, 'International Organization for Migration, Intra-Regional Labour Mobility in the Arab World'(Cairo: International Organization for Migration 2010), p. 69.
[108]Ibid.

This section contains various suggestions on how to enhance free movement of labour in Burundi and in East African Community in general. To ensure free movement of labour in Burundi and in East African Community, the following have to be done:

Elimination/Adjustment of Domestic Laws to Fit in EAC-CMP: The restrictions which are still found within domestic laws of partner states including Burundi have to be removed. The use of the direct effect and applicability of community law as both principles are used within European Union. Though the study is not suggesting that we do exactly what European Union does but it is obvious that the system needs some adjustments. The member states have to be reminded about commitments made with regard of other rights and freedoms of the Common Market Protocol and be encouraged to fulfill them because their non-fulfillment affect free movement of labour negatively.

Introduction of Penalties on the Partner States: Heavy penalties should be introduced against partner states or any institutions which infringe on community laws and fails to perform its obligations because it has been seen that there are no such penalties in place and that their absence affects the effectiveness of the community laws. It is suggested that any deviant states should be required to pay a specified amount of money or to deny it to hold any post in EAC.

Strengthening of the East African Court, Access of private litigants to East African Court of Justice has to be encouraged because the practice indicates that the domestic courts of partner states do not effectively use the East African Court of Justice in handling disputes submitted before them pertaining to the interpretation and application of East African Community law.

Improvement in Clearance from the Boarder Points: There is need to solve the challenge of long clearance time of people moving into Burundi due to duplication of customs declarations at Burundi-Tanzania border. There is need to ensure that the Kabanga/Kobero are converted to one stop border post (OSBP), necessary infrastructure established so as to realise a remarkable reduction in clearance time.

Technical Capacity Building in EAC: Recruitment of skilled personnel to work in different ministries and border posts of the EAC to reduce or solve the problem of lack of technical capacity in the various areas of policy reforms and legislative challenges. Hence, Burundi should undertake such reforms. Increased in capacity building is also required to strengthen regulatory and supervisory capacity and to improve collection of the necessary statistics on movement of people and workers. Regular training and formation of knowledge platforms

and establishment of agencies or bureaus of employment that tracks and disseminates information on available employment opportunities within EAC need to be established.

Increase on Infrastructure Investment: EAC partner states particularly, Burundi should invest in infrastructure (ports, railways, electricity, and telecommunications), particularly, along the central and northern corridors of Burundi in order to reduce the cost of doing business and facilitate efficiency in production, transportation and delivery of goods and services to the people of East Africa.

Setting up a Single Authority in EAC: That EAC partner states should set up a single authority to oversee the management of border posts with the necessary enabling legislations, clearly defining scope and giving it the necessary power to execute its mandate. Such authority must have the support of all regional governments.

Promotion of Joint Regular Border Meetings: That EAC partner states should promote joint regular border meetings to address issues affecting trans-boundary communities; such meetings should involve security and local leaders within the borders. Also, there is need to harmonise travel documents, including students' passes to East African partner states on gratis basis.

Sensitisation of Burundians about Common Market Protocol: To date, Burundi public relations strategy has been less than desirable. Public awareness about opportunities provided by the Common market is very low. The public relations strategy has to take all-inclusive methodology to meet the required objective of sensitising Burundians of their rights under the Common Market Protocol. Wider and deeper sensitisation should be undertaken to enable Burundian community to appreciate and have sufficient knowledge on their rights and responsibilities along with benefits entailed in the operationalisation of the Common Market Protocol and other integration stages.

6.0. Conclusion

The common market commenced in July 2010 and ultimate allow free movement all factors of production within the region. The Treaty of EAC provides that there shall be free movement of goods, services, persons, labour and capital as well as for the rights of residence and of establishment. All the six partner states have made commitments to open up and create regional markets in several sectors and have covenanted to eliminate limitations on the free movement of workers, right of establishment and residence as well as to pursue reciprocated acknowledgement of educational and specialised experiences. On that note, Article 5(2) of

the Treaty for the Establishment of EAC enjoins partner states to establish among themselves, a Customs Union, a Common Market, a Monetary Union and ultimately, a Political Federation. The Common Market is the second stage of integration after the Customs Union which was achieved through the EAC Protocol on the Customs Union in 2004.[109] Burundi has indeed undertaken a myriad of policy and legislative reforms in view of her commitment to CMP.

Burundi could benefit potentially from the established EAC common labour market. A major impediment to free movement has been the lack of a political commitment to implement the decisions to remove the legislative and administrative barriers to the free movement of persons. In some cases, government has made the legislative commitments but the administrative hurdles continue to be problematic.

[109]Art. 75 of the Treaty for the Establishment of the East African Community 1999.

HEALTHCARE INFRASTRUCTURE FRAGILITY IN CONFLICTS: A COMPARATIVE STUDY OF THE PUBLIC HEALTH IMPLICATIONS OF INSURGENCY IN NIGERIA AND YEMEN

By

Uzoma Prince-Oparaku*

Abstract

Healthcare infrastructure in a world constantly at war with itself has come under a sustained threat of destruction, disruption, and discontinuation everywhere conflict is found. These disruptions, destructions and carnages often lead to mass relocation of health care personnel unavailability and inaccessibility of health care services and facilities in violence prone areas. Countries like the Republics of Nigeria and Yemen with otherwise fledgling and fragile health care delivery systems crumble quickly under the weight of any form of sustained conflict directed at its fabric. This paper examines the impact of internal conflict on health care infrastructure in Nigeria and Yemen. Utilising a desk-based methodology, it argues that an adherence even at the barest minimum to the principles of the International Humanitarian Law by parties to internal conflicts will substantially mitigate the fragility and improve sustainability of health care infrastructure and systems in times of conflict. The paper concludes that engaging International Humanitarian Law(IHL) in continued communications and negotiations with armed groups would ensure the possibility of its observance, increase the chances of sustaining access to, and reduce the fragility of public health care infrastructure in conflict situations. The paper recommends engaging the IHL in internal conflicts and sustaining communications and negotiations between parties to a conflict and demonstrated commitment to humane war practices advocacy, will improve the availability, sustainability and accessibility of healthcare infrastructure and services in the ongoing conflicts in Nigeria and Yemen.

Keywords: Nigeria, Yemen, Healthcare Infrastructure, fragility.

1.0 Introduction

Conflict is often characterised by health systems collapse leading to low maternal and child health indices in regions experiencing conflict[1]. A study in Yemen exploring the association between ongoing conflict and the health system's failure to respond appropriately to an outbreak of diphtheria found, that an outbreak of diphtheria was 11-fold more likely in a conflict torn area and three times more like in an area with a history of conflict.[2]Sustained

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[1]Dureab F.*et al*, 'Diphtheria Outbreak in Yemen: The Impact of Conflict on a Fragile Health System'(2019) *Confl Health* 13**,** 19 <https://doi.org/10.1186/s13031-019-0204-2 > accessed on 3 July, 2020.

[2] Ibid p. 4.

conflicts often lead to disruption to public health infrastructure such as water supply, transportation of medical supplies, power source/electricity grid destruction, disruption of immunization programs, and damaged sewage systems[3]. Spikes in crowded living conditions as refugees squeeze in with relatives or in poorly coordinated and sparsely funded Internally Displaced Persons (IDP) centers leading to outbreaks of diseases such as cholera and other contagious diseases[4].

Assaults and disruption to healthcare infrastructure are in many forms. The SafeGuarding Health Care in Conflict Coalition[5] groups these attacks into four major forms: bombing, shelling, burning, looting, and other violence inflicted on health facilities and transport, violence inflicted on health workers independent of attack on a facility or transport, military takeover of health facilities, fighting around hospitals, and obstruction of access to health care, medicine and essential supplies[6]. The Coalition enumerates in detail, activities by different parties to conflicts in the period under review in their report. These acts that in many ways affect public health infrastructure and access thereto remain rife in conflicts today. Furthermore, attacks on public transportation, public water and sewage systems, communication systems and private residences severely annihilate availability of health care services, health care workers' safety and their ability to provide care. The Yemeni and Nigerian health systems rely heavily on foreign aid and have less than 10percent of their annual budget allocated to health care. Yemen spent about 6.5%[7] of its annual budget per capita of its Gross Domestic Product (GDP) on health care in 2014 while Nigeria in the same year budgeted 3.7% per capita of its GDP for health care[8]. It is important to note that some African Countries like Sierra Leone and surprisingly Liberia spent11.1%[9] and 10%[10] respectively on healthcare in the same year. This two countries (Sierra Leone and Liberia) may not have implemented the 15% recommended by the Abuja Protocol, however their

[3]United Nations Development Programme, 'Assessing the Impact of War on Development in Yemen'<ImpactOfWarOnDevelopmentInYemen.pdf> accessed on 3 July, 2020.p.8
[4]Alliance for International Medical Action, 'Cholera in Nigeria: An Outbreak hits IDP Camps' <https://alima-ngo.exposure.co/cholera-in-nigeria> accessed on 3 July, 2020.
[5]Safeguarding Health in Conflict Coalition, 'No Protection No Respect: Health Workers and Health Facilities Under Attack in 2015 and Early 2016'p8.
<https://www.safeguardinghealth.org/sites/shcc/files/SHCC2016final.pdf>accessed on 29 November,2019.
[6] Ibid
[7]World Health Organisation, 'Country Profiles'<https://www.who.int/countries/yem/en/> accessed on 22 September, 2019.
[8]Ibid
[9]World Health Organisation, 'Country Profiles: Sierra Leone'<https://www.who.int/countries/sle/en/> accessed on 6 July, 2020.
[10]World Health Organisation, 'Country Profiles: Liberia' <https://www.who.int/countries/lbr/en/> accessed on 6 July, 2020.

commitment to spending a little more on health care will increase their chances of moving closer to achieving their commitments under goal 3 the Sustainable Development Goals (SDGs) on health. Regrettably, a system run on these meager provisions such as demonstrated by the Nigerian and Yemeni health budgets, will not provide sustainable services in times of peace let alone in times of conflict.

1.1 Conceptual Framework

1.1.1 Health Systems

The World Health Organisation (WHO) defines health systems as all the activities whose primary purpose is to promote, restore and/or maintain health, the people, institutions and resources, organised as one entity under expressed policies and laws, to improve the health of the population, while responding to people's legitimate expectations and insulating them against the cost of diseases through a variety of activities aiming to improve health".[11]

1.1.2 Healthcare Infrastructure

Health care infrastructure includes facilities like buildings, and other support services such as power and electricity, water, sanitation and communication systems that constitute the basic operating system required for provision of health care services.[12] In times of conflict or disaster, the capacity for health care systems to deliver health care services without interruptions is always a critical issue. Therefore, the WHO recommends that national health authorities craft health policies and regulations that enhance the safety of health facilities from conflicts and disasters, protect lives of occupants of health facilities at all times, preserve the economic investment including the operation of health facilities, collate, harmonise and assess the implementation of policies as well as national and international regulations on safe health facilities and most importantly make health facilities safe, energy efficient and resilient to future risks including conflicts.[13] Therefore national health systems must aspire to have health care systems that possess these attributes or at best have a plan to

[11]World Health Organisation, 'Health Systems StrengtheningGlossary' <https://www.who.int/healthsystems/hss_glossary/en/index5.html> accessed on 3 July, 2020.
[12]World Health Organisation, 'Hospitals: Infrastructures and Technologies' <https://www.who.int/hospitals/infrastructure-and-technologies/en/> accessed on 6 July, 2020.
[13]World Health Organisation, 'Making Health facilities Safe in Emergencies'<https://www.who.int/activities/making-health-facilities-safe-in-emergencies> accessed on 6 July, 2020.

have one in peace time such that in times of conflict the system will not grind to a halt completely.

1.1.3 International Humanitarian Law (IHL)

International Humanitarian Law is a set of rules highlighting humanitarian reasons for the mitigation and limitation of the effects of war and armed conflict. IHL protects non and former combatants while restricting means and methods of warfare. IHL is also known as the law of armed conflict.[14] IHL emanated from rules of ancient civilisations and religion requiring that warfare be subject to certain principles and customs.[15] The bitter experience of modern warfare ensured the universal codification of IHL, striking a delicate balance between humanitarian considerations such as protection of civilians and care for the wounded at war and military requirement of warring parties.[16] A major portion of IHL is contained in the Geneva Conventions of 1949 and its additional Protocols with almost all countries as signatories.[17] However, there are other instruments that seek to proscribe the use of a class of weapons and military tactics and protect a certain selection of people and commodities. They include the 1954 Convention for the Protection of Cultural Property in the event of Armed Conflict, and it's two protocols; the 1972 Biological Weapons Convention; the 1980 Conventional Weapons Convention and it's five protocols; the 1993 Chemical Weapons Convention; the 1997 Ottawa Convention on anti-personnel mines; the 2000 Optional Protocol to the Convention on the Rights of the Child and the involvement of children in Armed Conflict[18].This discourse will however further discuss only the IHL as represented in the Geneva Conventions and its additional Protocols largely because of the overarching application of Article 3 common to all four Geneva Conventions as well as the Additional Protocols to internal or non-international armed conflicts.[19]

[14]The American Red Cross, 'Summary of the Geneva Conventions of 1949 and their Additional Protocols'. <https://www.redcross.org/images/MEDIA_CustomProductCatalog/m3640104_IHL_SummaryGenevaConv.pdf > accessed on 15 May, 2019.p.1

[15]International Community of the Red Cross, 'Advisory Serviceon International Humanitarian Law: What is International Humanitarian Law' <https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf>accessed on 5 July, 2020.

[16] Ibid

[17] Ibid

[18] Ibid

[19]Ibid

1.2 IHL in Relation to Internal Armed Conflicts

Historical concepts of justice codified in IHL can be traced to the Babylonia's Hammurabi code, Justinian code and Lieber Code applied during the United States civil war[20]. IHL is firmly rooted in the principles of humanity, neutrality and impartiality.[21]

International humanitarian law as we know it today is generally traced to Sir Henry Dunant who witnessed the horror of the Battle of Solferino[22] and suggested principles that will ameliorate the inhumanity and suffering occasioned by war.[23] In his work "*A Memory of Solferino*", he proposed special protections for volunteer groups and personnel and the wounded in situations of war and violence.[24]What became the International Committee of the Red Cross was formed as a group of five in 1853 to implement Sir Dunant's suggestions including the Formal Agreement for the Relief of the Wounded. In the same year representatives from 16 nations assisted by the committee of five negotiated a 10 Article treaty codifying Henry Dunant's suggestions; the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Field 1864.[25] Under this Convention, medical infrastructure and personnel; civilian and military are to be recognised as neutral and protected.[26]This instrument marked the beginning of humanitarian instruments negotiated to mitigate the suffering caused by war and conflict. Since then, other instruments such as, The Hague Convention of 1907[27], the 1949 Geneva Conventions and its 1977 and 2005 Additional Protocols has joined the ranks of important IHL instruments.

[20]The American Red Cross, 'Summary of the Geneva Conventions of 1949 and their Additional Protocols'. (note 14 above) p.1.
[21]Ibid
[22] 24th June 1859 the medical services of the French and Sardinian army was overwhelmed, no transportation available and supplies left behind, the wounded poured into neighboring villages. Henry Dunant aided by local women cared for the wounded for three days and three nights in a church.
[23]Alexander A., 'A Short History of International Humanitarian Law' The European Journal of International Law Vol. 26 no. 1. <https://academic.oup.com/ejil/article-pdf/26/1/109/5121583/chv002.pdf> accessed on 30 May, 2019.p.111.
[24]The American Red Cross, 'Summary of the Geneva Conventions of 1949 and their Additional Protocols'. (note 14 above).
[25]Alexander A., 'A Short History of International Humanitarian Law'(note 21 above).
[26]The American Red Cross, 'Summary of the Geneva Conventions of 1949 and their Additional Protocols'(note 14 above).
[27]Alexander A., 'A Short History of International Humanitarian Law' (note 21 above). There seem to be a consensus among international scholars that the Hague Convention represent the customary law on the way and means of waging war while the Geneva Conventions remain the authority on international law governing

An important part of IHL is the four Geneva Conventions of 1949 adopted by all member countries of the United Nations at the time. These Conventions are now supplemented by two other instruments namely the Additional Protocols of 1977 relating to the protection of victims of armed conflicts and the 2005 Additional Protocol III relating to the adoption of an additional distinctive emblem. These provide specific rules for the safeguarding of combatants and members of armed services who are wounded, sick, or shipwrecked, prisoners of war, and civilians as well as medical personnel, military chaplains, and civilian support workers of the military.

1.3 The Geneva Conventions and Additional Protocols

An international conference of diplomats in 1949 building on treaties on protection of war victims revised and updated the Conventions into the four Geneva Conventions of 1949. The four Conventions apply in all situations of armed conflict between nations and where nations are partially occupied by a foreign military even in situations of unopposed military occupation [28] . State parties must practice specific humanitarian principles and punish dissidents within their jurisdiction[29]. Parties must also take legislative and procedural steps to domesticate enforceable consequences for the commission or procurement of the violation of the provisions of the conventions. [30] Protection of medical personnel and medical establishments including mobile medical units are clearly marked transportation for health care in times of war. Convention I in Article 19 specifically provide

> "Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked but shall at all times be respected and protected by the Parties to the conflict. Should they fall into the hands of the adverse Party, their personnel shall be free to pursue their duties, as long as the capturing Power has not itself ensured the necessary care of the wounded and sick found in such establishments and units[31]."

The Boko Haram insurgents from data already cited above did not spare medical facilities and personnel in their bid to draw attention or spark enough outrage to bring the Nigerian government to its knees. The rest of chapter of the first convention details protection for

humanitarian action and actors. This seems to flow from the very provisions of these instruments as The Hague Convention specifically refers to the Geneva Convention in its Article 21 as the law regarding the treatment of the sick and wounded. However, the Hague Convention does mention in Article 15 that the belligerents shall make available to relief societies necessary facilities for the effective discharge of their humanitarian efforts.

[28] Article 3 of all four Geneva Conventions 1949.

[29]Ibid

[30]The American Red Cross,'Summary of the Geneva Conventions of 1949 and their Additional Protocols'(note 14 above)

[31] Article 19 Convention 1

hospital ships[32], situations where hospital, personnel and establishment may lose protection[33] and chapter 4 details protections for permanent and auxiliary personnel both those of medical units of warring parties[34] and that of aid societies[35]

The second Convention[36] in chapter three again outlines protection for all things medical on the sea akin to the manner in the first convention and further provides for the protection of hospital ships, Providing care for the wounded, sick and shipwrecked regardless of whether they are friends or enemies coastal, rescue crafts, and sick bays.

In the same vein the Third Convention[37] humane treatment of prisoners provides for the protection of prisoners of war, provision of medical attention and treatment for medical personnel who are prisoners of war.[38] The fourth Convention provides for the protection of civilian persons and property. In Article 56 it provides;

> "To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties. If new hospitals are set up in occupied territory and if the competent organs of the occupied State are not operating there, the occupying authorities shall, if necessary, grant them the recognition provided for in Article 18[39]. In similar circumstances, the occupying authorities shall also grant recognition to hospital personnel and transport vehicles under the provisions of Articles 20 and 21"[40].

In adopting measures of health and hygiene and in their implementation, the Occupying Power shall take into consideration the moral and ethical susceptibilities of the population of the occupied territory. In the 1958 commentary on this provision the ICRC noted and rightly

[32] Article 20
[33] Article 21 and 22.
[34] Article 24. The 2016 commentary on Article 24 clarifies that notwithstanding that this article ordinarily refers to medical personnel of the either warring parties in an international conflict, personnel of societies such as Doctors Without borders will be brought under the protection afforded under this article as long as they remain impartial.
[35] Article 26.
[36] Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949.
[37] Convention Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
[38] Article 30 - 31.
[39]Article 18 provides for steps to be taken to ensure that civilian hospitals engaged in assisting the sick and wounded in times of conflict are adequately protected from the surrounding hostilities.
[40]Article 20 and 21 provide for the required conditions to ensure the protection of civilian medical personnel in times of hostilities.

so that conditions in war times are often not health conducing, public health infrastructure collapses and basic hygiene become an ambitious aspiration for civilians caught in the hostilities. Therefore, actors in conflict must take steps as conditions permit to ensure that the fragility of public health infrastructure is given a modicum of attention to ensure that civilians, the wounded that are *hors de combat* and particularly medical and religious personnel live a life of dignified existence even in war times. This must also be done taking into consideration the cultural and religious inclinations of the communities where the hostilities are raging.[41]

1.4 The Additional Protocols I & II

The Additional Protocols to the Geneva Conventions were adopted to supplement the 1949 Conventions, particularly with reference to internal conflicts and civil wars as this strain of violence was not covered by the conventions except under Article 3 which is of a general nature makes the Conventions applicable to all armed conflict common to all four Convention.[42] However since these Conventions were crafted the field of armed conflict has evolved and is still evolving thereby necessitating a protocol to properly and specifically provide for internal armed conflicts which since after the world Wars has become the prevalent kind of conflict around the world. It has also been noted that internal conflicts are fought more ruthlessly and have far more access to civilians than international conflicts and therefore requires again specific provisions to combat the damage caused in the process and thereafter. [43] Moreover, these Conventions predates more than half its current number subscribing States including Nigeria and this treaty making presented a good opportunity for countries to contribute to international law formation.

The First Additional Protocol[44] provides protections for civilians, women, children medical and religious personnel in international conflicts. The protocol expands protections for most categories with protections under the Fourth Geneva Convention[45]. Special provisions for

[41] ICRC Commentary on Article 56 of the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949.
[42] International Committee of the Red Cross, 'Protocols I and II Additional to the Geneva Conventions' (International Committee of the Red Cross, 1 January 2019) <https://www.icrc.org/eng/resources/documents/misc/additional-protocols-1977.htm> accessed on 1 December, 2019.
[43] Ibid
[44] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
[45] Geneva Convention relative to the Protection of Civilian Persons in Time of War August 1949.

medical personnel[46] and medical units[47] are expanded under this protocol for international conflict scenarios. Medical units are not to be objects of attack and medical personnel are to be respected and protected and given assistance and protection in carrying out their work under the dictates of the body of IHL. Additional Protocol II specifically targets internal conflicts like the Boko Haram insurgency extending the provisions under the Fourth Convention and an equivalent of the protections under the First Additional Protocol for international conflicts to internal conflicts. Medical personnel and religious medical units are to be respected and protected.[48] Again medical units and transportation[49] in internal armed conflicts are not to be subject of attack unless they cease to retain protection under the guidelines of the conduct of hostilities under the Protocol[50].

2.0 The Boko Haram Insurgency in Nigeria

For about two decades the northeast region of Nigeria has been under the siege of violence, insecurity and carnage and unnecessary loss of human life in the hands of the *Jammatul Ahlis Sunnah lid Daawa wal Jihad* otherwise known as *Boko Haram* sect [western education is forbidden]. *Boko Haram* has unleashed violence on the Nigerian police and the military, politicians, hospitals, schools, primary health care centers, religious buildings, public institutions: national and multinational and on ordinary citizens.[51]

This needless carnage has left most of the health care infrastructure devastated, destroyed or shuttered, health care workers killed, abducted or radicalized, and those who were lucky relocated either out of the country or to safer regions of the country.[52] This state of affairs has occasioned a deep humanitarian crisis with over 6 million Individuals needing urgent medical care, food and clean drinking water. *Boko Haram*, a group that started in 2002 with an agenda root out corruption and injustice and to Islamise Nigeria, gradually morphed into a full-blown terrorist organisation seeking to overthrow government[53]. By 2009 the group had started

[46] Article 15.
[47] Article 12.
[48] Article 9
[49] Article 11
[50] Article 11 (2)
[51]Claire Felter, 'Nigeria's Battle with *Boko Haram*' (Council on Foreign Relations, 8 August 2018) <https://www.cfr.org/backgrounder/boko-haram> accessed on 17 June, 2019.
[52] Duku Joel, '*Boko Haram*: 3.5 million in Dire Need of Health Care in the Northeast'. The Nation, (Nigeria2 October, 2016)<https://thenationonlineng.net/boko-haram-3-5-million-dire-need-healthcare-northeast/> accessed on 30 June, 2019.
[53] Encyclopaedia Britanica, Boko Haram: Nigerian Islamic Group'<https://www.britannica.com/topic/Boko-Haram> accessed 6 July 2020. ; Adamu H.and Baba I.,'Resolving Nigeria's Boko Haram Insurgence: What Role for the Media?'(2014)155 Procedia- Social and Behavioral sciences,pp.14 – 20.

challenging State laws in areas they were believed were under their control such as Bornu State Nigeria by refusing to wear helmets while operating motorcycles[54]. The group became emboldened by their encounters with the Nigerian military and their grievance over the publicized execution of their then leader Mohamed Yusuf.[55] The death of their leader was expected to destabilise or end the violence and destruction unleashed by the sect. However, a new organisation emerged under the leadership of Shekau Abubakar who was allegedly killed several times by the Nigerian military. This new group claimed responsibility for Abuja bombings, staged prison break in Bauchi freeing its detained members and other inmates.[56]

3.0 Implications of Terroristic attacks on Public Healthcare Infrastructure

Nigeria is among the countries of the world with a health care workforce shortage problem[57] and this was deepened by the conflict in the country since 2010[58]. Health care professionals fled not just the country but specifically the conflict torn States. Nurses, physicians and pharmacists, laboratory scientists, hospital administrative staff fled for their lives as Boko Haram besieged the region.[59]

Health care services in the region grinded to a halt, vaccination programs already scheduled and on course before the insurgency began became crippled and the skeletal staff left to continue what is left of the program became totally overwhelmed.[60] Health care facilities were either completely destroyed in the conflict or not functional because it was too dangerous for health workers or patients to get to the facilities. According to WHO, Borno State has 743 health facilities. 35% of these health facilities are destroyed, 29% sustained

[54] Uri Friedman, 'The Bike-helmet Law that Helped Trigger an Insurgency in Nigeria: On Unintended Consequences and Boko Haram's Murky Origins' The Atlantic (Nigeria22 May,2014)<https://www.theatlantic.com/international/archive/2014/05/the-bike-helmet-law-that-triggered-an-insurgency-in-nigeria/371301/>accessed on 2 July, 2019.

[55] Alobo E. and Inaku J.and Ipuole R, 'The Asymmetric Nature of Boko Haram Insurgency and its Implications on Human Rights and International Humanitarian Law' (2018)Vol-3, Issue-5, Sept - Oct, International Journal of Eng. Lit. and Social Sciences (IJELS), pp.882 – 892.

[56]Claire Felter, 'Nigeria's Battle with *Boko Haram*' (note 51 above)

[57] Adedini S. *et al,*'Barriers to Accessing Health Care in Nigeria: Implications for Child Survival'.(2014)Global Health action Vol 7 Issue 1 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3957799/pdf/GHA-7-23499.pdf> accessedon 13 June,2019.

[58]Ibid

[59] Bigna J. ,'Polio Eradication Efforts in Regions of Geopolitical Strife: the Boko Haram Threat to Efforts in Sub-Saharan Africa'(2016) Afri Health Sci16(2) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4994566/pdf/AFHS1602-0584.pdf> accessed on 18 September, 2019.

[60]Felix Obi and Ejemai Eboraime, 'How Boko Haram is Devastating Health Services in Northeast Nigeria'<http://theconversation.com/how-boko-haram-is-devastating-health-services-in-north-east-nigeria-65751 >accessed on 2July, 2019.

differing levels of damage while another 34% remain unaffected.[61]The 481 health facilities in Borno State making up the unaffected 34% have only 4%functional; that is a health care system that has grinded to an unfortunate halt. The unaffected facilities that are not operational according to WHO is largely due to insecurity caused by the activities of *Boko Haram* in the region.[62]

Hospitals and clinics are often raided by the insurgent groups in search of medication for their wounded members or to draw government, media attention and public outrage to their cause. Pharmacies and medication dispensaries are not left out of the carnage as they are looted and emptied of all medication and supplies.[63]

4.0 Nigeria's Policy and Legislative Framework for Terrorism and Response

Since *Boko Haram* began unleashing violence on northern Nigeria and its environs Nigeria has responded both by way of policy update and legislative reform to combat the mayhem. The national law on terrorism passed in 2011[64] was amended in 2013[65] to reflect improved inter agency collaboration in the response to the growth of terroristic threat in the country and region and the financing of terrorism. The Act and its amendment detailed the definition[66]and penalties[67] for terrorism and other offences under the Act. The Act in section 32 grants jurisdiction to try offences to the Federal High Courts regardless of where the offence was committed, and whether or not the offender is a Nigerian citizen.

The Act[68] further strengthens Nigeria's commitment to its international obligations regarding terrorism by extending the definition of terrorist act to mean any act described as such under the following instruments;

(i) Convention for the Suppression of Unlawful Seizure of Aircraft, 1970,

(ii) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971,

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[61] World Health Organisation, 'News Release 2017: Full Impact of Devastated Health Services in Northeastern Nigeria Revealed by WHO Report'<http://www.who.int/mediacentre/news/releases/2016/north-east-nigeria/en/> accessedon 2 July, 2019.
[62] World Health Organization,'Country Profiles' (note 7 above).
[63]Felix Obi and Ejemai Eboraime, 'How Boko Haram is Devastating Health Services in Northeast Nigeria' (note 60 above)
[64]Terrorism Prevention act 2011 (Nigeria) The Principal Act.
[65]Terrorism Prevention (Amendment) Act 2013
[66]ibid s 1 (2) (a) – (3).
[67]Terrorism Prevention Act (note 65 above) s 33.
[68]Ibid s 40

(iii) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons; including Diplomatic Agents, 1973,

(iv) International Convention against the Taking of Hostages, 1979,

(v) Convention on the Physical Protection of Nuclear Material, 1980,

(vi) Protocol for the Suppression of Unlawful Acts of violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988,

(vii) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 (ix) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, 1988,

(ix) The International Convention for the Suppression of Terrorist Bombing, 1997,

(x) The Convention against Terrorist Financing 1999

(xi) Convention on Offences and certain other Acts committed on Board Aircraft 1969

(xii)Convention on the Making of Plastic Explosives for the purpose of Detection 1998.

Interestingly the Act does not mention nor anticipate the provision for the safety of health care infrastructure during terrorist attacks or sustained terrorist attacks. The Act does not also mention the possibility of engaging terrorist to ensure the continued availability and access to health services.

5.0 Internal Conflict and Insurgency in Yemen

Demonstrations calling for the end of a more than three-decade rule of Alli Abdullah Saleh began in 2011.[69] In response to these protests president Saleh made concessions including increase in government employee emoluments, promised not to seek reelection at the end of his tenure in 2013 and a reduction of income taxes.[70]These protests bolstered by the success of protests in other Arab countries by pro-democracy groups continued to call for immediate

[69] Human Rights Watch, 'No Safe Places: Yemen's Crack down on Protests in Taizz'(2012) Human Rights Watch. <https://www.hrw.org/sites/default/files/reports/yemen0212webwcover.pdf> accessed on 27 November,2019.

[70] Adam Augustyn, and Patricia Bauer *et al*, 'Encyclopedia Britannica, Yemen Uprising 2011 – 2012' Encyclopedia Britannica,(20 January, 2019)<https://www.britannica.com/event/Yemen-Uprising-of-2011-2012> accessed on 27 November, 2019.

vacation of office by President Saleh, inspite of these concessions.[71] Following an agreement between the Gulf Cooperation Council and the Saleh-led government and intervention from the international community former Vice President Abd Rabbuh Mansur Hadi was made the transitional President.[72]This did not however, result in a violence-free Yemen as violence broke out soon again in 2014. The Houthis, in concert with pro-Saleh groups, took over Sana'a in what has been known as the Houthi rebellion, Sa'dah War or Sa'dah conflict.[73] Later in 2014, a botched agreement was reached leading to the resignation of the Hadi-led Government. Saudi Arabia, with consolidated support of the United States, United Kingdom and France launched a military intervention to prevent a possible entrenchment of Iraqi/Al-Qaeda Influence in Yemen.[74]

The Saudi-led coalition military campaign against the Houthis and pro-Saleh rebel forces overtime has resulted in untold hardship to the civilian population in Yemen particularly[75]. The United Nations and aid organizations report widespread human rights violations by different parties to the conflict.[76] These human rights abuses range from mass child soldier recruitments, abductions and forced disappearances, destruction of essential public infrastructure such as public transportation systems, access to water supply systems and scores of civilian deaths.[77] According to the United Nations Report on Yemen, as of 2016 the time the report was compiled 4,125 Yemenis have died and another 7,207 injured.[78] The Coalition reports a much higher number of casualties; 6,400 deaths and thirty thousand persons injured.[79]The health care in Yemen as is the case in most underdeveloped cash-strapped economies, was fledgling and underfunded before the fracas ensued. This therefore ensured that any form of disruption in the form of attacks, absence of health workers due to

[71] The Arab Spring a series of protests that began in Tunisia in the early 2010s decrying corrupt, incompetent and oppressive Islamic regimes. These protests saw the ouster of the Egyptian and Tunisian leaders.
[72] Safeguarding Health in Conflict Coalition,No Protection No Respect: Health Workers and Health Facilities Under Attack in 2015 and Early(note 5above).
[73]Andrew McGregor, 'Shi'ite Insurgency in Yemen: Iranian Intervention or Mountain Revolt?' (2004) Vol II Issue 16 Terrorism Monitor, The James Town Foundation. <https://web.archive.org/web/20061016201749/http://jamestown.org/terrorism/news/uploads/ter_002_016.pdf> accessed on 29 November, 2019.
[74] Popp Roland, 'War In Yemen: Revolution and Saudi Intervention' (2015) No 175 CSS Analyses In Security Policy <https://doi.org/10.3929/ethz-a-010681857> accessed on 29 November, 2019.
[75]Ibid
[76]The Romeo Dallaire Child Soldiers Initiative, 'Yemen Country Report Children and Security' (2017) <https://www.childsoldiers.org/wp-content/uploads/2017/06/Yemen-January-2017-Report-1.pdf> accessed on 30 November, 2019.
[77]Ibid
[78]Ibid
[79]Safeguarding Health in Conflict Coalition,No Protection No Respect: Health Workers and Health Facilities Under Attack in 2015 and Early2016'(note 7 above)

violence situations or an abrupt blockade of medical supply chains completely cripples the system.

Just like the case of Northeast Nigeria, many hospitals were shelled in different parts of Yemen. In the early days of the conflict, eight hospitals were bombed in Sana'a, Saada, Dhale and Aden by the Saudi-led Coalition forces and more than 100 other hospitals were in some way affected by the violence.[80] Both parties to the conflict treated civilians like combatants thereby increasing suffering and the need for intensive health care interventions such as surgeries resulting from traumatic injuries[81]. Assault on health care facilities such as the Science and Technology Hospital, humanitarian supply warehouse for international medical corps and health centers across the conflict areas resulted in death and injury to aid and health care workers.[82]

6.0 International Response to Conflict in Nigeria

The United States government designated *Boko Haram* a terrorist organization in 2013[83] thereby allowing it to step in and send noncombatant troop to assist Nigeria and its neighbors; Chad, Cameroon and Niger in combating Boko Haram. Nigerian government also designated Boko Haram a terrorist organization and this led to a complete elimination of all other methods of resolution except violence. This complete resort to violence did nothing but lead to more bizarre attacks by the group like the killing of 65 girls in 2014 and the abduction of the famous 217 girls of Chibok.[84]

Nigeria launched a national task force to mitigate criminal operations and facilitate better movements on its northern border in 1994[85] which was later expanded to include Chad and Niger in 1998 aiming to combat common border problems in the Lake Chad Basin

[80]Ibid
[81]Ibid
[82]Ibid p. 43.
[83]The White House, Office of the Press Secretary, 'Statements and Releases:Statement by Assistant to the President for Homeland Security and Counterterrorism Lisa Monaco on the Designation of Boko Haram and Ansaru as Foreign Terrorist Organisations' (United States November 13, 2013) <https://obamawhitehouse.archives.gov/the-press-office/2013/11/13/statement-assistant-president-homeland-security-and-counterterrorism-lis> accessed on 2 July, 2020.
[84]Chika Oduah,'Chibok: The Village that Lost its Daughters to Boko Haram'The Guardian (Nigeria 15 May, 2014)<https://www.theguardian.com/world/2014/may/15/chibok-nigeria-200-kidnapped-schoolgirls-boko-haram> accessed on 2 July, 2020
[85] Olawale, I. A., 'Rethinking the Functionality of the Multinational Joint Task Force in Managing the Boko Haram Crisis in the Lake Chad Basin' (2017) Vol XLII, No. 3AJOL <https://www.ajol.info/index.php/ad/article/view/167098/156535> accessed on 30 November, 2019.

headquartered in Baga, Borno State, Nigeria.[86] In 2012, after the mandate of the Multinational Joint Task Force (MNJTF) was enlarged to include terrorism the headquarters was moved to N'Djadema, Chad and run by Lake Chad Basin Commission under the auspices of the African Union Peace and Security Council (AUPSC)[87]. The MNJTF was later in 2015 further expanded to include Benin Republic[88].

The MNJTF benefits from the support of United States, France and the European Union through the African Union's African Peace Facility in differing forms. The European Union support enables the MNJTF to remunerate personnel and offset some its operational and logistical costs.[89] France and the United States provide materials to Troop Contributing Countries (TCCs).

7.0 International Response to Conflict in Yemen

The Yemeni police and military right from 2011 have led heavy handed military assaults against terrorism both under President Saleh and President Hadi. The Saudi-led coalition a regional effort also was in response to the growth of terroristic in Yemen. The United States government since the twin tower attacks has occupied a forefront position in taking the war against terrorism to wherever it may rise from. Just as is the case with Nigeria's Boko Haram the Yemeni unrest had the United States intervening in several ways. However, in Yemen the United states conducted air strikes over the Yemeni airspace targeting terrorist.

8.0 Challenges to Implementing IHL in Insurgencies

Parties to a conflict are bound by international humanitarian law to ensure the safety of civilians including medical personnel who are non-combatants in areas under their control. In the same vein humanitarian organizations have a right to offer impartial assistance where the need so exists. However, the emergence, growth and proliferation of non-state armed groups and terrorist groups has continued to complicate the humanitarian space occasioning hardship in the practice of International Humanitarian Law and conflict relief.[90]

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[86]Ibid
[87]Ibid
[88]Ibid
[89]The European Union, 'Multinational Joint Task Force against *Boko Haram'*<https://ec.europa.eu/knowledge4policy/projects-activities/multinational-joint-task-force-mnjtf-against-boko-haram_en> accessed on 30 November, 2019.
[90] Hugo Slim, 'Practicing Humanity in Changing Conflict'<https://www.icrc.org/en/document/practicing-humanity-changing-conflict>p.9 accessed on 1 December, 2019.

The humanitarian space is continuously complicated and rendered more treacherous by actors unleashing violence and those actors providing relief. This is particularly so because conflict, its perpetrators and aid providers has evolved. The era of wars between militaries of different countries with well-defined battle lines and flags or colonies seeking independence through conflict has all but passed. This has given way to an era where groups rise against their governments seeking to overthrow it or are controlling relatively large areas including the civilians who reside in them.

Again, parties to internal conflicts since the end of the second world wars have not paid any responsible attention to the provisions of international humanitarian law and this particularly detrimental to civilians and medical and other aid workers who often find themselves in these situations of helplessness. These attitudes in contemporary combat actors suggest that in fact parties to contemporary conflicts do not conduct warfare as if the IHL exists at all[91]. It seems the world has forgotten the horrors of the second war or the parties to contemporary conflicts did not experience the world wars and therefore cannot process what needed to be done to ensure they do not repeat again in history.

Furthermore, non-state armed groups present and even deeper challenge in the respect that there is no clear communication channel between any other actor in a conflict they participate. For instance, in a group like Boko Haram has had a different leader at different times in the conflict and the leader has been reported killed a dozen times. This makes it almost impossible to pass across any form of intelligence to the group whether in the form of negotiations or medical aid by impartial aid organizations.

8.1 Analysing State Responses to Terrorism in Nigeria and Yemen.

In these instances, as enumerated above none of the State parties made any effort to plan or implement any modicum of safeguard for health care infrastructure. Health care centers, hospitals, humanitarian supply warehouses were shelled, bombed or otherwise affected by the carnage in the two different conflicts under review. State parties to these conflicts who have commitments under international human rights law and international humanitarian law fail to take steps to safeguard health workers and public health infrastructure, that is of critical response in any kind or level of terrorist attack. Engaging parties to a conflict especially regarding creating a safe zone for humanitarian relief and health services provision will

drastically reduce the suffering of both combatants and civilians in the event of a terrorist threat or actual attack.

However, Yemen interestingly through the World Health Organization had an agreement between rebel forces and the government of Yemen to create a safe zone for the provision of medical care in the enduring conflict in Yemen[92],

Under that agreement the WHO representative to the country Ghulam Popal advocated for "the continuous delivery of health services to all [the] affected population without discrimination". A situation where all patients/casualties who need medical treatment can be treated without to what side they are fighting on. In a meeting held April 2011, negotiations between The Yemeni ministry of health officials and opposition representatives produced a memorandum of understanding(MOU)for the provision of "impartial and neutral health services" to all those in need. WHO assists in monitoring the implementation and adherence to the MOU and also in capacity to assist Yemen in actually providing the safe zone as contemplated under the MOU.

8.2 Properly Defining Terror and Creating Communication Channels

Humanitarian organizations are the most disadvantaged when armed groups are labeled terrorists as this completely changes the humanitarian space in which they work. This is particularly so as different national legislations define terror differently as there is no universally accepted definition of terrorism[93]. There were no enabling laws on terrorism in Nigeria until June 2011 when the Terrorism (Prevention) Act 2011, Act No. 10 was passed into Law by the Goodluck Jonathan Administration.[94] The law interestingly failed to define terrorism but however detailed acts that qualify as terrorist acts. In its section 1(2) and (3), the Act lists a few offences or acts that when committed with "malice aforethought" qualify as terrorists acts.[95]

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[92]World Health Organisation, 'Keeping Health Workers and Facilities Safe in War' (Bulletin WHO, 1 January 2012) <https://www.who.int/bulletin/volumes/90/1/12-030112/en/> accessed on 1 September, 2019.

[93]Ejeh E. U and Bappah A.I andDankofa Y., 'Nature of Terrorism and Anti-Terrorism Laws in Nigeria' Nnamdi AzikiweUniversity Journal of International Law and JurisprudenceVol. 10 No. 2 (2019)<https://www.ajol.info/index.php/naujilj/article/view/183699> accessed on July 6, 2020.

[94]Ibid

[95]Acts of Terrorism under the Act Include an act which may seriously harm a country or an international organisation, intended or can be reasonable be regarded as having been intended tocompel a government or international organisation to perform or abstain from performing an act, seriously intimidate a population, destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation or otherwise influence such government or international organisation by intimidation

The United Kingdom Terrorism Act 2000 (as amended) defines terrorism as "actions or threats of action designed to influence the government or an international governmental organization or to intimidate the public or a section thereof, for the purpose of advancing a political, religious, racial or ideological cause".[96]The judgment of the United States Supreme Court in *Holder v. Humanitarian Law Project*[97] is a classic example where the petitioning Civil Society Organisation (CSO) was found to have violated the US 2001 Patriot Act in providing training and support for peace building activities. In that case a civil society organisation; the humanitarian Law Project alongside five other CSOs and two American citizens petitioned the district court challenging the constitutionality of the provisions of the Antiterrorism and Effective Death Penalty Act in its paragraph 2339B(a)(1)which makes providing "material support or resources to a foreign organisation" a federal crime[98]. In the opinion of Humanitarian Law project, the provision and attendant criminalisation of the expressed activity prevents them from doing their work in support of the political and humanitarian activities of the Kurdistan Workers Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE).[99]The district and the appeals court found for the applicants, thereby prompting the United States congress to amend the law in the Patriot Act to read "expert advice or assistance. "The plaintiffs appealed in 2003 challenging the amendment and the district and appeals court again agreed with the plaintiffs, holding that the terms used in the legislation were too vague[100]. On submitting the case to the Supreme Court these activities were held to have met the definition of "providing material" support to terrorism[101]. National legislations on what constitutes terroristic acts have yet to be tried in the courts but continue to prejudice opportunities and render even more dangerous already treacherous conditions in which humanitarian organisations have to navigate just to provide aid where it is acutely needed.[102]

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or coercion or an attack on a person lifewhich may cause serious bodily harm or death and kidnapping., destruction of government or public facility, transport system. etc

[96] Andrew Macleod, 'Engaging Non-State Armed Groups for Humanitarian Purposes: Experience, Constraints And Ways Forward', In Chatham House Royal Institute Of Humanitarian Affairs, Humanitarian Engagement With Non -State Armed Groups, Research Papers April 2016. <https://www.chathamhouse.org/sites/default/files/publications/research/2016-04-29-NSAG-macleod-hofmann-saul-webb-hogg.pdf> accessed on 30 November, 2019. p. 13

[97] 561 US. 1(2010), 130S. Ct 2705

[98]International Committee of the Red Cross, 'How Does Law Protect in War' *United States of America, Eric Holder v Humanitarian Law Project*. <https://casebook.icrc.org/case-study/united-states-america-holder-v-humanitarian-law-project> accessed on 5 July, 2020.

[99]Ibid

[100] Ibid

[101] Ibid

[102]Ibid

9.0 Recommendations and Conclusion

Often the availability of aid is not the question; the question remains that of accessibility. The difficulty in providing aid where it is painfully needed remains a big issue in the triangular relationship between aid workers, governments, and insurgent groups. Many times, humanitarian organisations are unable to access conflict torn areas and this hampers or completely disrupts humanitarian programmes.[103] Humanitarian challenges and opportunities abound in many places in the world making individual, group, national and international action and actors an imperative.

Volunteerism will always have a place in humanitarianism as important aid activities and medical care require human hands. Therefore, the need for professional humanitarian workers with the requisite training to navigate the ever-changing and constantly evolving humanitarian climate cannot be over emphasised.

Most importantly what we have been told in times of peace may very well be what we will remember in times of war and as such, there must be a sustained, vigorous, and informed push for advocacy through every channel of human socialisation such as schools, churches, mosques on the all-important task of preserving health care, its personnel and infrastructure in times of peace and war.

State parties to the four Conventions and its Additional Protocols must take policy and legislative initiatives to sensitise military personnel and the general population on the dictates and demands of IHL. Affirmative action must also be taken to ensure the recognition and protection of the red cross and red crescent symbols within the rank and file of military, paramilitary and the citizenry before the onset of hostilities thereby ensuring a modicum of regard for these signage when they are put up in conflict areas.

Concerted efforts must be made to create and sustain as much as practicable, communication channels between parties to a conflict especially non-international conflicts as this will ensure the possibility of a continuing engagement on the importance and commitment of parties to the ideals of the IHL.

[103]Aleksandra Matijevic Mosimann and Wolde-Gabriel Saugeron, 'Nigeria: Struggle to Survive for Victims of Conflict and Violence'(International Committee of the Red Cross, 30 June 2014)<https://www.icrc.org/eng/resources/documents/update/2014/06-30-nigeria-displaced.htm>accessed on 1 December,2019.

Health infrastructure in conflict zones must display the red cross and or the red crescent to properly identify facilities as protected from hostilities. Medical personnel including military medical personnel must also display the signage on their uniforms designating them as non-combatants. Medical personnel also must be allowed to be impartial in the discharge of their duties ensuring that the wounded regardless of what side they fight on receives medical attention when in need of one.

Finally, advocacy and awareness on humane means of war as much as possible must gain steam especially in peace time when these parties can still be reached. The media must lend itself to the propagation of a better humanitarian space as it has become an immensely powerful influence on every aspect of life.

RE-THINKING AND OPTIMIZING NIGERIA'S ANTI-CORRUPTION LEGAL FRAMEWORK: UPSTREAM PETROLEUM SECTOR CORRUPTION EVALUATION

By

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Abstract

Corruption is a recurrent decimal in Nigeria's upstream petroleum sector. This research investigates why national anti-corruption laws are not effective in Nigeria's upstream petroleum sector. Rent-seeking, public choice and extractive theories of corruption are evaluated due to their impacts in combating corruption. The study is a doctrinal legal research that adopts a point-by-point comparative approach with library research method. The study reveals that corruption strives on the weak enforcement of anti-corruption laws and lack of political will in providing effective regulatory intervention. In conclusion, the study finds that anti-corruption agencies in Nigeria are not effective because of absence of the Federal Government's political will to combat corruption, inadequate budgets and absence of strict enforcement of anti-corruption laws in Nigeria. The study recommends among other reforms, soft law approach and strict enforcement of anti-corruption laws.The study recommendsincrease in budget allocation to Nigeria's anti-corruption agencies in the light of the finding that inadequate budget is a challenge.

Key words: Corruption, Soft Law Approach, Upstream Petroleum Sector, Transparency.

1.0 Introduction

The petroleum sector being the main source of Nigeria's economy is bedevilled with systemic and endemic problem of corruption. This has impeded the economic growth of the country. Notwithstanding the current global trend in relation to the use of alternative energy and the de-emphasis on oil, the Federal Government of Nigeria is exploring various options to effectively resolve this problem through anti-corruption legal framework. It is expected that the Federal Government makes the best use of her oil revenues while it lasts, for a meaningful development of the country by uprooting corruption from the sector.

Corruption is not only peculiar to Nigeria but it is a global phenomenon. Corruption has substantially reduced the earnings of the Federal Government of Nigeria from oil revenues. Consequently, most Nigerians are living in abject poverty, with the lowest human

development indicators.[1] Nigeria is the eighth largest producer of crude oil worldwide and is the fifth largest in the Organization of Petroleum Exporting Member States.[2] Corruption and the mismanagement of oil revenues have been compounded by the global decline in oil prices. The decreasing influence of the demand for Nigeria's crude oil on the international market is generating intensive operational costs due to old and dilapidated crude oil infrastructure or assets in the sector.

In addition to corruption, Nigeria's upstream petroleum sector is bedevilled with a number of other issues: pipeline vandalism and crude oil theft by militants in the Niger Delta Region, this causing the oil outputs to plunge from 2.3million barrels per day to one million barrels per day (bpd) in early 2016[3]

This decline in crude oil production has resulted in the insertion of a *force majeure*[4]clause in petroleum agreements by petroleum companies in Nigeria. Corruption is prevalent in Nigeria despite the plethora of anti-corruption laws and policies in the country. However, these are general anti-corruption laws not specifically designed for the upstream petroleum sector. Corruption remains the most critical problem in the upstream petroleum sector in Nigeria.

As a result, most renowned scholars from the various disciplines have published several academic works on corruption, its manifestations, and how to combat it[5].However, it appears none of these publications have provided long-term solutions to the challenges posed by corruption in Nigeria's upstream petroleum sector. This present study sets out to offer options for combating corruption effectively in the sector through the use of soft law approach. This approach adopts among others issues such as: anti-corruption self-reporting mechanism, stringent enforcement and incentivisation of compliance with anti-corruption laws.

Combating corruption in the upstream petroleum sector is imperative for Nigeria's socio-economic development and poverty eradication. To be successful, the enforcement of these

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[1] World Bank, 'World Development Report 2017: Governance and the Law' (2017), <www.worldbank.org/en/publication/wdr2017> accessed 22 April, 2020, p.5.

[2]Omorogbe, Y., 'Law and Investor Protection in the Nigerian Natural Gas Industry' (1996),14(2), Journal of Energy and Natural Resources Law, p.179.

[3]Olujobi, O. J., and Olujobi, O.M., 'Theories of Corruption 'Public Choice-Extractive Theory' As Alternative for Combating Corruption', (2020),11(2), International Journal of Environmental Sustainability and Green Technologies, p.8.

[4]*Black's Law Dictionary Eighth Edition 2004 definesForce majeure*as a legal clause that allows companies to stop operations or shipments without breaching contracts.

[5]Abdullahi, U. M.I, *et al.,* 'Evidence of Petroleum Resources on Nigerian Economic Development 2000–2009' (2015),6(2),Business and Economics Journal, p.1.

anti-corruption laws must be executed with sincere commitment backed up by strong political will. The Federal Government in providing effective regulatory intervention should render the much needed assistance to the law officers. It will also entail the enlightenment of Nigerians in terms of the negative consequences of corruption in the sector.

Corruption in the petroleum sector of Nigeria is not a new concept. Several of such cases have been documented. One of such is the alleged $12.2 billion missing oil windfalls in 1991 uncovered by the Pius Okigbo Committee during the General Ibrahim Babangida's era. The amount of money is yet to be recovered.[6] The money could have been used for infrastructural development in the country.

Similarly, between 1998 and 1999, Chevron Nigeria Limited was accused of tax evasion and fraud.[7] The company was alleged to have evaded about US$2.7 billion tax in addition to the accumulated penalties of $8,100,000[8] in connivance with the Nigerian tax officials. The aim was to recycle the amount of tax payable to the Federal Government by $76million,[9] thereby depriving the Federal Government of its statutory revenues for developmental projects in Nigeria. This fraud was attributed to the weak enforcement of its anti-corruption and transparency laws in the sector.

Figure 1: Benefits of Transparent Upstream Petroleum Sector

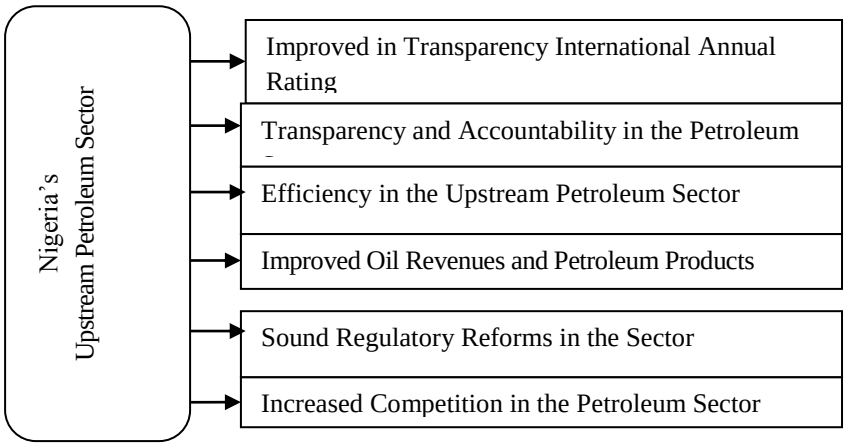
Transparency in the upstream petroleum sector will improved Transparency International Corruption Perception Index annual rating of Nigeria, promotes growth, efficiency, accountability and sound regulatory framework and health competition in the sector.

[6]Okojie,P., and Momoh,A., 'Corruption and the Crisis of Development in Nigeria' (Paper Presented at the Conference on 'Redesigning the State? Political Corruption in Development Policy and Practice' held at Manchester Metropolitan University, November 25, 2005), p.3.

[7]Otusanya,O.J., 'The Role of Multinational Companies in Tax Evasion and Tax Avoidance: The Case of Nigeria' (2011), 22(3), Journal of Critical Perspectives on Accounting, p.317.

[8] Anele,K., 'Multinationals Are Notorious For Tax Evasion. Do You Agree?' (2015), http://documentslide.com/documents/multinationals-are-notorious-for-tax-evasion2.html, accessed 1 March, 2020,p.1.

[9]O.J, Otusanya, 'The Role of Professionals in Anti-Social Financial Practices: The Case of Nigeria' (2011), *Journal* Accountancy Business and the Public Interest, <http://visar.csustan.edu/aaba/otusanya2011.pdf> accessed 6 January, 2020, p.80.



Source: This was prepared by the Authors

2.0 Methodology

This study is a library-based doctrinal legal research. It is supported by a contextual analysis, including reference to internet sources, an extensive review of academic literature, examination of case studies and the analysis of relevant judicial and statutory provisions. The analysis x-rays the flaws in Nigeria's national anti-corruption laws. The aim is to remodel Nigeria's upstream petroleum sector anti-corruption laws.

The study makes use of journals, textbooks and the internet sources as secondary sources. Primary sources include case laws, statutes, relevant international anti-corruption conventions for gaining useful insight to reform Nigeria's anti-corruption laws for transparency and accountability in the sector.

3.0 Statement of Research Problem

The attention of legal scholars has been drawn to the weak regulatory governance in Nigeria's upstream petroleum sector. The weak legal framework has had a detrimental consequence of corruption on the economic growth of the country.[10] Corruption increases transaction costs in the sector, thereby undermining the judicious and proper management of petroleum resources for the development of the country.

In 2011, the Royal Dutch Shell Petroleum Company and ENI were alleged to have short-changed the Federal Government by $1.1 billion. The two companies did this by granting oil block OPL 245 to Malabu Oil and Gas Ltd.[11] The Company was allegedly owned by the former Nigerian Oil Minister, Dan Etete. Mr. Etete who awarded the oil block to the company while in office in contravention of Corporate Governance's Code and Code of Conduct Bureau and Tribunal Act[12] as contained in the Fifth Schedule of the 1999 Constitution of the Federal Republic of Nigeria (As amended). An interesting twist to the Malabu corruption saga is the fact that those who were indicted for bribery abroad in respect of the transaction have been convicted, whereas those indicted in Nigeria have not been arraigned nor convicted due to the weak enforcement mechanisms in the anti-corruption

[10]Takon, N., 'The State-Backed Oil Company in Nigeria's Petroleum Economy: Evolution, Dilemmas and Paradoxes' (2014), 3(3), International Journal of Development and Sustainability, In Global Witness, 'The Scramble for Africa Oil, Gas and Minerals',<: https://www.globalwitness.org/.../rigged%20the%20scramble%20for%20africa's%...> accessed 26 May, 2020, 2, also In E.,Okpanachi, and A., Nathan, 'Preventing the Oil "Resource Curse In Ghana: Lessons from Nigeria' (2012), 68(6), the Journal of New Paradigm Research, p. 430.

[11]Carvalho, R., 'SPTEC Advisory - 2016 Country Review' (2017),<www.sptec-advisory.com/sptec_advisory-nigeria_2016_news_review.pdf> accessed 29 January, 2020, p.60.

[12]Cap. C15 Laws of the Federation of Nigeria, 2004.

laws.[13] But recently, the United Kingdom's court dismissed $1.1billion Nigerian corruption lawsuit against Shell, Eni for lack of jurisdiction in respect of a dispute over the OPL 245 oil field payment made as bribe to secure the oil license but the companies are undergoing trial in an Italian court.[14]

The 2012 report of the Petroleum Revenue Special Task Force also revealed another form of corruption to the extent that oil block bids from 2005–2007 were characterised by corruption and obligatory mergers. It was discovered in the report that preferential treatment was given to certain petroleum companies without considering their technical know-how or financial capability before the grant.[15] This task force was set up by the former Minister for Petroleum, Diezani Allison Madueke, on behalf of the Federal Government and was headed by Mallam Nuhu Ribadu. The report further revealed that seven discretionary licences worth over $183 million in signature bonuses were not paid to the Federation Account from 2005-2011. These lapses were due to the poor enforcement of the Petroleum Profit Tax Act by the Federal Inland Revenue Service which has caused loss of revenues to the Government.

There seems to be a serious challenge in the administration of signature bonus in Nigeria. For instance, there was over US$566 million in outstanding signature bonuses and statutory fees that some petroleum companies ought to have paid in advance to the Federation Account. Non-transparent methods of managing signature bonuses and poor record-keeping systems in the Department of Petroleum Resources were also exposed. The Petroleum Profit Tax payment made by the petroleum companies was based on unsupervised self-assessments. This was accepted without further confirmation by the Federal Inland Revenue Service which also occasioned loss of revenues to the Government due to weak enforcement of its anti-corruption laws.[16]The recommendations of the report for the entrenchment of transparency in the operations have not been enforced.

Similarly, there is the Halliburton bribery scandal, where the sum of One Hundred and Eighty ($180,000,000.00) million US dollars was allegedly offered as bribe to secure the contract for the construction of the Bonny Island Liquefied Natural Gas Project between 1995 and 2004.[17] Halliburton's subsidiary Kellogg, Brown and Root (KBR) was indicted for the violations of Foreign Corrupt Practices Act. The United States' Government fined Halliburton $579 million and its Chief Executive Officer was sentenced to seven years imprisonment.[18]

Corruption has always been a challenge in the upstream petroleum sector, particularly in the NNPC. The Federal Government has made several institutional and legal efforts to promote transparency in the sector by establishing the Nigeria Extractive Industry Transparency Initiative[19] and the Sovereign Wealth Funds to manage the excess earnings from crude oil.[20]

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[13]Global Witness, 'Landmark Prosecution as Nigerian Authorities Charge Shell and Eni Over Shady $1.1 Billion OPL 245 Deal' (2017), <https://www.globalwitness.org/en/press-releases/landmark-prosecution-nigerian-authorities-charge-shell-and-eni-over-shady-11-billion-opl-245-deal/ > accessed 8 June, 2020.

[14]Olisah C., 'United Kigdom Court Dismisses $1.1billion Nigerian Corruption Lawsuit against Shell, Eni' (2020), <https://nairametrics.com/2020/05/23/uk-court-dismisses-1-1billion-nigerian-corruption-lawsuit-against-shell-eni/> accessed 1 July, 2020.

[15]Ribadu, M.N., 'Report of the Petroleum Revenue Special Task Force' (2012), <www.premiumtimesng.com/docs_download/report_of_the_ribadu_led_petroleum%20revenue%20special%20task%20force%202012.pdf>accessed 3 June, 2020, p.107.

[16]*Ibid.*

[17]Barbara, C.G., and Kathleen, A.L., 'Investigation of Halliburton Co./TSKJ's Nigerian Business Practices: Model for Analysis of The Current Anti-Corruption Environment on Foreign Corrupt Practices Act Enforcement' (2006),96(2)Journal of Criminal Law and Criminology, p.505.

[18]Ajuzie, G.C., 'Bureaucratic Corruption in Public Administration: Its Effects on the Nigerian Economy' (2010),<http://globalacademicgroup.com/journals/academic%20scholarship/bureaucratic%20corruption%20in%20public.pdf>accessed 5 June, 2020, p,130.

[19]Nigeria Extractive Industries Transparency Initiative (NEITI) Act, 2007.

The Niger Delta Development Commission (NDDC)[21] was also established to promote a swift and sustainable development of the Niger Delta oil producing areas. The Federal Government also instituted the Amnesty Programme to sustain harmony and development in the Niger Delta region through the provision of vocational skills and training of reformed militants. The Federal Government similarly instituted the Presidential Advisory Committee Against Corruption (PACAC) in August 2015.[22] The Presidential Committee on Assets Recovery to retrieve stolen assets on November 18, 2016, and the National Prosecution Coordination Committee to advise on corruption cases May 27, 2016.[23]But the Committee was later disbanded. The Federal Government also revoked the Infrastructure Protection Contracts with the former militants due to prevalence of crude oil theft and corruption in the sector. The current forensic audit of the NDDC by the National Assembly on the allegation of N40billion[24] illegally expended by its Interim Management Committee is a constitutional mandate of the legislatures to promote transparency, accountability, rapid and sustainable development of the region.

However, as global attention is shifting from fossil fuels to renewable energy, there is renewed clamour among Nigerians for the diversification of the economy. This has been largely due to the global oil price slump, low demand for Nigeria's crude oil on the international market, and the endemic corruption in the oil sector. Oil prices have dropped significantly from $110 a barrel in 2010 to $48 per barrel in 2014 and $31 per barrel in 2016[25] but increased to $54.15 per barrel in 2017, $72.8 in 2018 and $65.06 in 2019[26]. This has decreased the revenues of the Federal Government from oil.

These developments prompted various anti-corruption probes, such as the reports of the Nigeria Extractive Industries Transparency Initiative (NEITI) 1999–2004, 2005, 2006–2008. The reports of the audit of the importation of fuel commission by the NNPC in 2008, and in 2009–2011 with the report of the audit of the NNPC by KPMG Professional Services submitted to the Presidency on November 22, 2010, which exposed corruption in the sector. The 2012 Report of the Mallam Nuhu Ribadu Petroleum Revenue Special Task Force set up by the Federal Government too uncovered different corrupt practices in the sector.

The above anti-corruption audit reports brought to the fore lack of transparency, which promotes corruption and retards development in the sector. These occurred due to the absence of political will on the part of the Federal Government to combat corruption. These corruption cases have been perennial features of the sector. Therefore, there is the need for a proactive approach to combat corruption in the oil sector. Transparency in the sector is critical to national development, since the sector accounts for over 95% of Nigeria's foreign exchange earnings.

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[20]Nigeria Sovereign Investment Authority (Establishment) Act 2011, Cap N.166, Laws of the Federation of Nigeria 2004.

[21]Niger-Delta Development Commission (Establishment) Act, 2000 Act, No. 6, Laws of the Federation of Nigeria.

[22]The Presidency, 'Presidential Advisory Committee Against Corruption Report August 2015-July 2016' (2016), <http://pacac.gov.ng/pac/wp-content/uploads/august_2015-july_2016.pdf> accessed 28 March, 2020, p,9.

[23]Recovery of Public Property (Special Provisions), Act Cap R.4, Laws of the Federation of Nigeria, 2004.

[24]Ayado, Solomon, 'Again, Senate Insists on Probe of N40bn in NDDC',Business Day Newspaper (Nigeria,9 June 2020), <https://businessday.ng/news/article/again-senate-insists-on-probe-of-n40bn-in-nddc/>accessed 1 July , 2020.

[25]Bello,A.T., 'Oil and Gas Problems in Nigeria: The Impending Problems and the Preferable Solutions' (2017), <SSRN: https://ssrn.com/abstract=3072236 or http://dx.doi.org/10.2139/ssrn.3072236>accessed 11April, 2020, p.2.

[26]Nigerian National Petroleum Corporation (NNPC), 'Crude Oil Price' <https://www.nnpcgroup.com/pages/oil-prices.aspx >accessed 6 April, 2020.

As a result of large scale corruption in the sector, many international oil companies are now divesting their interests and this has also resulted in extensive poverty and infrastructural deficit in Nigeria, despite being endowed with abundant petroleum resources. Nigeria is said to have lost up to 40% of its oil revenues to corruption,[27] even though international anti-corruption conventions and national anti-corruption laws have been passed.

4.0 Literature Review

One of the challenges that give room for corruption in the oil sector is the absence of a political will to combat corruption by the Federal Government. This deficit has led to failure in transparency and good governance despite the various anti-corruption audit reports that have uncovered corruption in the sector. The lack of commitment to combat corrupt practices has led to the reluctance of some international anti-corruption institutions from providing their full supports on the repatriation of proceeds of corruption to Nigeria. These anti-corruption audit reports have not been used to gain useful insights to reform the sector. Meanwhile, some government officials are allegedly benefiting from the corrupt practices thereby resisting all transparency measures. This has led to loss of oil revenues to the government from the sector.

The fundamental problems with the anti-corruption legal framework are weak enforcement and the ambiguity of laws. Ambiguous laws make it difficult to understand its objectives, leading to loss of corruption cases in courts.[28] This is evident in section 404(1)(a) of the Criminal Code that criminalises the demand of property. Similarly, many anti-corruption laws fail to concurrently combat corruption in both the private and public sectors. Majority of the upstream petroleum operators are private companies thereby weakening the enforcement of anti-corruption laws and encouraging corrupt practices in the sector.

Meanwhile, the law pertaining to bribing public officials entails the offering, promising, giving and receipt of bribes. However, the enforcement of the law is weak. Weak enforcement of anti-corruption laws by anti-corruption agencies due to corruption and bribery have occasioned loss of revenues to the Federal Government. Such revenues could have been used for infrastructural development in Nigeria, if there was compliance with the anti-corruption laws. There would also be consistent monitoring and evaluation of compliance by the anti-corruption agencies, upstream petroleum regulators and other stakeholders in the sector.

Consequently, in 2004, Nigeria set up an Investigation Committee to investigate the allegation of corruption in the sector but the then Attorney General of the Federation (AGF) and Minister of Justice Mr. Michael Aondoaaka applied mere administrative reprieve instead of the criminal prosecution of Halliburton suspects.[29] This was a violation of the *rationale* for sections 174(1)(c) and 211of the 1999 Constitution (as amended) that empowered the AGF to institute, discontinue and undertake criminal proceedings against any person before any court in Nigeria with provisos of taking into cognizance public interest, justice and due process before the exercise of such powers. This abuse of power of *nolle prosequi* by the former AGF prompted loss of revenues to the Federal Government through frequent unprosecuted incidence of corruption in the sector.

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[27]Thomson Reuters, 'Corruption Costs Nigeria 40 Percent of Oil Wealth, Official Says 100, 000 Barrels Said to be Stolen Each Day' (2004), <http://www.boston.com/new/world/africa/articles/2004/12/17corruption>accessed 7 June , 2020.

[28]BelloAkeem Olajide, 'Redefining the Mental Element of Bribery in Nigeria' (UnpublishedPhD Thesis, Faculty of Law, Department of Public Law, University of Lagos, Nigeria), p. 3.

[29]Igbinedion Solomon, 'Culpability of Attorney General of the Federation in Multinational Companies' Corporate Liability' The Guardian (Nigeria 23 August, 2011), <http://www.guardiannewsngr.com/index.php?option=com_content&view=article&id=58689:culpability-of-agf-in-multinational-companies-corporate-liability&catid=42:law&itemid=600>accessed 20 March , 2020.

The shoddy prosecution of corruption cases shows that the Federal Government lacks the political will to combat corruption in the sector. Since no one has been successfully prosecuted for the Halliburton bribery case in Nigeria, while other culprits have been convicted in the United States and Germany, this has brought ridicule upon the nation on the international scene. The decline in oil revenues and investments in the sector seems that the Federal Government has resolved not to prosecute the beneficiaries of Halliburton bribery.[30] A strong political will is *sine qua non* for effective enforcement of anti-corruption laws to guarantee transparency and accountability in the sector.

Undoubtedly, Nigeria's mono economic status and overdependence on crude oil for national income[31] have made the sector vulnerable to corrupt practices and other oil-related crimes, thereby leading to oil price volatilities and declined in oil revenues. This appears to be a threat to the world energy resources market due to problem of growth and development caused by prevalence of corruption in the sector. The Nigerian economy has been unstable due to the rising tension in the sector. The abandonment of other non-oil sectors, such as agriculture and solid minerals among others that would have generated more incomes for the Federal Government is a minus to the nation.

Also, the lack of transparent metering equipment for measuring crude oil sales or produce which has given room for corruption, malpractices and loss of oil revenues by the Federal Government for socio-economic development in Nigeria is a disadvantage. NNPC reports on crude oil produced and sold are full of contradictions due to secrecy in their operations. Also, the absence of stringent legal framework on record keeping and lack of legal provisions in the Act for timely publication of its detailed financial statements to the public. This has hampered transparency and encouraged prevalence of corruption in oil revenues from the sector.

Moreover, the Nigeria Extractive Industries Transparency Initiative's (NEITI) audit report indicated that the new Port Harcourt refinery lacked the metering equipment for measuring crude oil transfer through pipelines to depots during 1999–2004 due to absence of legislation on compulsory and transparent usage of metering equipment for measuring crude oil sales or produce. This gave room for corruption, lack of accountability and loss of oil revenues by the Federal Government from the sector.[32] The alleged missing 20 billion US dollars oil revenues from the NNPC as alleged by the former Governor of the Central Bank of Nigeria, Lamido Sanusi, through domestic crude oil sales still remains unresolved[33] due to poor enforcement of transparency laws. The weakness of the enforcement agencies occasioned shortage in national oil revenues for developmental projects in Nigeria.

Further, the 2009 and 2011 NEITI's reports revealed that some oil and gas companies colluded with some tax officials to evade tax payments of about $8.3billion, the amount which they ought to have deposited in the Federal Government's treasury[34]due to weak enforcement of the provisions of the Petroleum Profit Tax Act. All of these have given room for corruption and low oil revenues credited to the Federal Government.

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[30]Ogbonna-Nwaogu, I., 'Contradictory Positions of Government and Its Anti-Graft Agencies: An Analysis of the Halliburton Case from Media Reports' (2010), 2(2), Journal of Alternative Perspectives in the Social Sciences, p.663.

[31]Nwanolue, B.O.G., and Osegbue, C., 'The Nigerian State and Crude Oil Bunkering in Niger Delta: Examining the Environmental Vulnerability' (2013), 3(1), African Journal of Social Sciences, p. 41.

[32]Nwokeji, G.U., 'The Nigerian National Petroleum Corporation and the Development of the Nigerian Oil and Gas Industry: History, Strategies and Current Directions' (2007), <https://www.bakerinstitute.org/media/files/page/9b067dc6/noc_nnpc_ugo.pdf>accessed 27March, 2020, p.49.

[33]Akinola, Adeoye Ologuntoye, 'Globalization, Sustainable Democracy and Deregulation in Nigeria: A Case Study of the Downstream Oil Sector' (Unpublished PhD Thesis, University of KwaZulu-Natal 2015), p.143.

[34]Nigeria Extractive Industry Transparency Initiative, 'Nigeria: Recovering Missing Payments'(NEITI Progress Report 2014), <http://progrep.eiti.org/2014/country-focus/nigeria> accessed10 January, 2020.

Likewise, the challenge of restructuring in Nigerian National Petroleum Corporation (NNPC) due to corruption and persistent shortage of oil revenues as the current structure of the corporation contradicts international standard and practice for viable, transparent commercial legal entity that is independent with self-accounting mechanism on profits. This will guarantee transparency like Statoil in Norway which operates like other commercial oil companies without any special status of statutory corporation where the governments only act as regulators and charge corporate taxes, this has enhanced transparency in their petroleum sector. Amendment of NNPC Act[35] to expunge the petroleum minister as the chairman of the NNPC's board will enhance transparency through check and balance and thorough scrutinization of NNPC's commercial transactions in the sector.Section 7 of the Act provides that the Corporation shall keep proper accounts and proper records in relation thereto in a form which shall conform to the best commercial standards. The corporation has not been maintaining proper records and accounts that can promote transparency and accountability in all its transactions in the sector. All its operations are characterized with opaqueness and confidentiality. Section 7(4)(a)(b) of the Act contravenes section 162 of the 1999 Constitution by allowing the corporation to maintain fund to finance its operations. The corporation has relied on the confusion created by section 7 of the Act to retain certain amount outside the regular public financial management controls. The author opined that, there is the need to create an explicit rule on how the Nigerian National Petroleum Corporation (NNPC) should finance its operations and keep proper records of its transactions. Allowing NNPC's transactions to be done in secrecy will promote corruption and ineffectiveness and it would cost Nigeria huge loss particularly at this period of global decline in oil prices. Amendment to the Act is needed to spell out how NNPC'S internal cost control mechanisms should be strengthened through regular audit and proper keeping of accounting records of all transactions in the sector. The Act if implemented efficiently should combat corruption and embedded transparency in the sector after the gaps identified have been corrected

In addition, there were over 566 million US dollars in outstanding signature bonuses and statutory fees that some upstream petroleum companies ought to have paid in advance to the Federation Account. This amount occasioned deficit in oil revenues to the Federal Government. Non-transparent methods of managing signature bonuses and poor record keeping systems in the Department of Petroleum Resources were also uncovered by Nuhu Ribadu's report in 2012. The Petroleum Profit Tax payments made by some petroleum companies were based on unsupervised self-assessments. These payments were accepted without further confirmation by the Federal Internal Revenue Service to promote transparency in the sector. The recommendations ofNuhu Ribadu's report for the entrenchment of transparency in the upstream petroleum operations have also not been enforced to curb corruption in the sector.

Also, in 2013, the audit report of the Nigeria Extractive Industries Transparency Initiative (NEITI) alleged that the NNPC has not transferred dividends amounting to $14.34 billion of the Nigeria Liquefied Natural Gas (NLNG) Project with an interest and loan repayment to the sum of $12.92 billion to the Federation Account.[36] This is due to the absence of laws compelling it to transfer the money immediately to the Federation Account. Moreover, this has given room for corruption and deficit in oil revenues accruing to the Federal Government for the development of the nation.

[35]Nigerian National Petroleum Corporation (NNPC) Act, Cap N123, LFN, 2004.

[36]Nigeria Extractive Industries Transparency Initiative (NEITI), 'Financial, Physical and Process Audit: An Independent Report Assessing and Reconciling Physical and Financial Flows within Nigeria's Oil and Gas Industry' (2013), <https://www.proshareng.com/admin/upload/reports/2013oilgasreport.pdf>accessed13 March, 2020, p.86.

The non-remittance of oil revenues by Nigerian National Petroleum Corporation and some of its subsidiaries to the Federation Account that could have been used for infrastructural development in Nigeria, but due to the flaws in sections 80, 162(1) of the 1999 Constitution (as amended) that failed to stipulate expressly the time frame for the remittance of oil revenues to the Federation Account and failure to curb discretionary spending by NNPC has given room for corruption in the sector.

The absence of financing model law and the conflict between the country's Constitution and section 7 of the NNPC Act on oil revenues spending thus initiating opportunity for corruption in the corporation by withholding oil revenues accruing to the Federal Government as operational costs in the sector.

For instance, in 2014, the report of the NEITI audit on oil and gas industries revealed non-remittance of oil revenues of over ₦2.23 trillion by the NNPC to the Federation Account.[37] This was a flagrant contravention of the Constitution and Fiscal Responsibility Act, 2007. NEITI's 2015 audits and reports exposed the failure of Nigerian National Petroleum Corporation (NNPC), Nigerian Petroleum Development Company (NPDC) and other oil companies to remit the sum total of ₦3.78 billion to the Federation Account.[38]NEITI'S Annual Progress Report, 2016, also revealed that unremitted dividends of the NLNG project worth $15.823 billion on loans and interests from year 2000 to year 2014 were paid to NNPC but were not remitted to the Federation Account,[39] thereby giving room for corruption and shortfall in oil revenues accruing to the Federal Government from the sector.

Further, in 2014, the audit report of the Nigeria Extractive Industries Transparency Initiatives on oil and gas industries revealed there remains a non-remittance of oil revenues amounting to ₦2.23trillion by the NNPC to the Federation Account.[40] In addition, the legal framework regulating Nigeria's upstream petroleum sector are archaic. They do not represent the current legal developments and anticipated legal challenges in the sector. Nigerian Extractive Industries Transparency Initiative (NEITI) revealed that Federal Government lost the sum of ₦1.74 trillion in oil revenues in 2013 owing to non-passage of Petroleum Industry and Governance Bill (PIGB) and other vital petroleum laws to reform the sector.[41] There is therefore the need for a total overhaul of the laws to combat corruption and to promote transparency in the sector.

Also, the forensic audit report conducted by Price water house Coopers on behalf of the Federal Government on the operations of the Nigerian National Petroleum Corporation (NNPC) on the non-remittance of crude oil revenues in 2012 and 2013 have not been put to use. This would have taken initiative to bridge the gaps identified in our anti-corruption laws.

The report recommended, among others, the restructuring of the NNPC as the current structure of the corporation contradicts sustainable commercial legal entities in the sector. However, in the United Kingdom and the United States, the governments only act as

[37]Nigeria Extractive Industries Transparency Initiative, 'Nigeria Extractive Industries Transparency Initiative Oil and Gas Report 2014' (2014), <http://cislacnigeria.net/wp-content/uploads/2017/01/neiti-oilgas-report-2014-exec-summary-301216pdf> accessed10 May, 2020.

[38]Nigeria Extractive Industries Transparency Initiative Policy Brief, 'Unremitted Funds, Economic Recovery, and Oil Sector Reform' (2017), 3, <http://www.neiti.gov.ng/phocadownload/neiti-pb3-280317.pdf >accessed28 June, 2020.

[39]Nigeria Extractive Industries Transparency Initiative (NEITI), 'NEITI 2016 Annual Progress Report' <http://www.neiti.gov.ng/index.php/resources/internal-resources/workplans-reports/annual-neiti-eiti-reports> accessed 28 June, 2020, p.37.

[40]Nigeria Extractive Industries Transparency Initiative, 'Nigeria Extractive Industries Transparency Initiative Oil and Gas Report 2014' (2014), <http://cislacnigeria.net/wp-content/uploads/2017/01/neiti-oilgas-report-2014-exec-summary-301216.pdf > accessed10 March, 2020.

[41] Moghalu, K., 'Obsolete Legislation and the Challenges of National Development: Nigeria's Petroleum Industry Experience' (2018), <http://www.financialnigeria.com/obsolete-legislation-and-the-challenges-of-national-development-nigeria-s-petroleum-industry-experience-interview-98.html> accessed12 March, 2020.

regulators and charge corporate taxes without any national oil companies.[42] This approach enhances transparency in their oil sectors unlike in Nigeria where the NNPC performs both the regulatory and commercial roles. Such functions gave room for corruption and abuse of discretionary powers due to the absence of law that separate its regulatory and commercial roles in the sector.

In the same way, the 2016 Nigeria Extractive Industry Transparency International's Annual Progress Report revealed that unremitted dividends[43] of the NLNG project worth $15.823 billion US dollars on loan and interests from 2000 to 2014 were paid to NNPC. The amounts were also not remitted to the Federation Account[44]. This contravenes sections 80, 162(1) of the 1999 Constitution (as amended) that states that all funds that are paid to the Federal Government must be remitted to the Federation Account thereby aided corruption in the sector.

Corruption and the mismanagement of petroleum revenues are believed to be perpetrated by public officials. These officials collaborate with multinational upstream petroleum companies, who are said to have offered substantial payments to government officials in the sector to secure illicit oil contracts. This occasioned loss of revenues to the government due to lack of comprehensive due diligence mechanisms in the sector to scrutinise oil contracts.

The Shell Petroleum Development Company (SPDC), ChevronTexaco, ExxonMobil Corporation, Agip Oil Company, and Total Oil Company are the major petroleum operators in Nigeria. Some petroleum companies are alleged to be beneficiaries of corruption to the detriment of the Nigerian State and its citizens. If this is not combated, it may consistently hamper economic growth and transparency in Nigeria's upstream petroleum sector.[45]

It is undebatable that, had the Federal Government combated corruption in the upstream petroleum sector and used the earned revenues judiciously during the oil boom, Nigeria would have recorded unprecedented infrastructural development in all sectors. However currently, oil prices have dropped significantly from $110 a barrel in 2010 to $48 per a barrel in 2014 and as low as $31 per barrel in 2016.[46] In 2017 it was $44.5 per barrel while in 2018 it was $57 per barrel and in the first quarter of 2019 it was $63.17 per barrel.[47] However, it is anticipated that Nigeria will diversify its economy to other non-oil sector such as agriculture and solid minerals to end its mono-economy status and to promote economic stability and development in the country.

The NNPC, as the main statutory body regulating the sector, may be deemed as opaque national oil corporation since its activities have been allegedly characterised by corruption and concealment. The practice of awarding oil pioneer status to petroleum companies that have been well established for years deprives the Federal Government of its statutory oil

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[42] Carlyle, R., 'Why Does the United States Do not have a National Oil Company?'<https://www.quora.com/why-does-the-us-does-not-have-a-national-oil-company> accessed23 March, 2020.

[43]Onya, R.M., and Elemanya, A.V., 'Analysis of President Buhari's Anti-Corruption Policy: A Reality or an Illusion?' (2016), 2(11), International Journal of Advanced Academic Research Social and Management Sciences, p.82.

[44] Nigeria Extractive Industries Transparency Initiative (NEITI), 'NEITI 2016 Annual Progress Report'<http://www.neiti.gov.ng/index.php/resources/internal-resources/workplans-reports/annual-neiti-eiti-reports>accessed28 April, 2020, p.37.

[45]US Energy Information Administration, 'Nigeria Overview' (2015), <https://www.connaissancedesenergies.org/sites/default/files/pdf-pt-vue/nigeria.pdf>accessed28 March, 2020, p.7.

[46]Bello A.T., 'Oil and Gas Problems in Nigeria: The Impending Problems and the Preferable Solutions' (2017), < https://ssrn.com/abstract=3072236 or http://dx.doi.org/10.2139/ssrn.3072236 >accessed April 11, 2020, p.2.

[47] Central Bank of Nigeria, 'Daily Crude Oil Price' (2019),<https://www.cbn.gov.ng/rates/dailycrude.asp> accessed March 13, 2020.

revenues in the sector due to archaic legal framework regulating Nigeria's upstream petroleum sector which give room for corruption.

Transparency in the revenues of the upstream petroleum sector is *sine qua non* to exterminate corruption. Ayoade, in his article "Nigerian National Petroleum Corporation and Prospects for Transparency in the Petroleum Industry Bill",[48] advocated the need for transparency in the petroleum sector, as it has proven nearly impossible to obtain accurate data on oil production in Nigeria over the years, with the Central Bank of Nigeria, Ministry of Finance, Department of Petroleum Resources, and International oil companies providing contradictory figures. Poor data availability and non-record-keeping culture are hallmarks of the pervasive corruption in the sector. It is the writer's view that the paper failed to emphasise on the enforcement of the prescribed punishments, and now, the Bill has been outdone by the proposed Petroleum Industry Governance and Institutional Framework Bill, 2017.

Moreover, in buttressing the absence of transparency in the sector, Oyewunmi and Olujobi in their article "Transparency in Nigeria's Oil and Gas Industry: Is Policy Re-Engineering the Way Out?",[49]argue that secrecy in the mode of awards of petroleum contracts, licences, leases, and other transactions by the NNPC is due to the absence of provisions in the NNPC Act[50] pertaining to transparency and record keeping. It is the writers' view that public disclosure of financial reports and of transactions made by the NNPC and National Petroleum Investment Management Services should not negate commercial agreements' confidentiality clauses in the sector. It is recommended that transparency laws should include voluntary reporting procedures to deter corruption, but the paper being discussed also failed to mention the enforcement challenges of anti-corruption laws.

Moreover, Eigen, in his work "Fighting Corruption in a Global Economy: Transparency Initiative in the Oil and Gas Industry",[51] outlined that the EITI's aim is to promote transparency by requesting companies to disclose all incomes paid to the government as well as the disclosure of revenues received by government from extractive industries, with an independent auditor confirming the accuracy of the figures disclosed for public scrutiny of how oil revenues are spent. He failed to acknowledge how lack of sanctions for non-compliance with its provisions affects the functioning of the agency.

Moreover, the gaps in the literature that this paper intends to fill are the absence of some distinct anti-corruption laws in Nigeria's anti-corruption legal framework. For instance, incentivised Whistle-blowers Protection Act and Civil Forfeiture of Proceeds of Corruption Act, absence of legal templates or frameworks for the domestication of international anti-corruption conventions in the sector and the refusal to integrate and adopt stringent enforcement of both the hard and soft law approaches in combating corruption in the sector in conjunction with international cooperation hampered the effectiveness of the existing national anti-corruption legal framework in Nigeria's upstream petroleum sector as proposed by this work. However, Section 5 of the Act placed the responsibility of appointing National Stakeholders Working Group members on the President without any legislative confirmation by the National Assembly. This is a basic flaw of the Act. This requires an amendment for adding the element of transparency. In addition, in his article "A Critique of the Enforcement of Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007 in Nigerian Oil

[48]Ayoade, M.A., 'Nigerian National Petroleum Corporation and Prospects for Transparency in the Petroleum Industry Bill' (2011),5, Knust Law Journal, p.89.

[49] Oyewunmi, O.A., and Olujobi, O.J., 'Transparency in Nigeria's Oil and Gas Industry: Is Policy Re-Engineering the Way Out?' (2016),7(3), International Journal of Energy Economics and Policy, p.630.

[50]1969 (as amended).

[51]Eigen, P., 'Fighting Corruption in a Global Economy: Transparency Initiative in the Oil and Gas Industry' (2007), 29(2), Houston Journal of International Law, p.327.

and Gas Sector",[52]Okeke argues that Section 16 of the Act prescribed the sanction of ₦5–30 million or imprisonment for a term of two years as the tentative penalty for oil companies, their directors and government officials who present false information or fail to provide any information when required. The penalties appear to be insufficient, considering the billions of dollars that are generated from the sector. Two years of imprisonment does not have a severe deterrence value, considering the endemic corruption in the sector.

5.0 Theoretical Framework on Corruption

Several theories have been expounded by scholars underlining the cause of corruption and how it can be combated. An understanding of these theories can give an insight into these problems and, in the context of this study, can assist in combating the corruption prevalent in Nigeria's upstream petroleum sector.

This study seeks the enforcement of the existing anti-corruption legal framework in conjunction with the reform of various pitfalls identified in the process and the enactment of basic anti-corruption laws that are absent in the Nigeria's anti-corruption legal framework. Three theories are essential to this study: Rent-Seeking Theory of Corruption, Extractive Theory of Corruption and Public Choice Theory of Corruption. They are considered helpful in the analysis of the research.

5.1 Rent-Seeking Theory of Corruption

The tenets of this theory were detailed by Gordon Tullock in 1967. The theory however, has been traced to the work of Anne Kruger in 1974.[53] The theory helps the study by defining rent seeking theory of corruption as the processes of disbursing resources that create no social benefits with the aim of influencing public policies outcomes and consequently public resources spent are socially wasted. According to this theory, rent-seeking is the disbursement of resources and efforts in creating or transferring rents.[54]

The justification for the theory is that it reduces administrative rent-seeking activities and bottlenecks in Nigeria's upstream petroleum sector, and it promotes transparency and due processes in the sector. According to this theory, corruption occurs in cases where artificial barriers to entry are created as a means for bribes or other undesirable behaviour, such as lobbying. The theory focuses on the collaboration between the State and other stakeholders

[52] Okeke,V.O.S., 'A Critique of the Enforcement of Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007 in Nigerian Oil and Gas Sector' (2013),14(II), British Journal of Arts and Social Sciences,p.107.

[53]Henderson,D.R., 'Rent Seeking' https://www.econlib.org/library/enc/rentseeking.html accessed4 May, 2020, p.1.

[54]Mushtaq,H.K.,Rent-Seeking as Process (NewYork: Cambridge University Press, 2000),p.5 <https://core.ac.uk/download/files/103/2792081pdf>accessed20 March, 2020,

in the sector. The State has the power to assign proprietary rights of oil trade through licensing, regulations, taxes, and by awarding oil contracts.

However, the theory supports the study by arguing that artificial barriers are created by government officials in the sector through bureaucracy and administrative bottlenecks. Government officials as well as other stakeholders in the sector influence the State to create these to serve their self-interest and then exploit petroleum operators in the sector. Corruption does not only occur in cases where companies give bribes, so that artificial barriers to entry are removed and they operate, it triggers disputes over rent and causes upstream petroleum companies to compete for preferential treatment, which is against due process.

In this case, there is the need to differentiate between corruption and lobbying. Lobbying differs from corruption, in that it is legal while corruption is not. Corruption is the pecuniary gain or other benefits transferred between a bribe-giver and a bribe-taker, whereas lobbying is an attempt to sway another person without the involvement of any payments. In the same vein, corruption differs from other rent-seeking activities due to the varying levels of transparency.

The theory suggests a reduction of artificial barriers by the State. The researcher of this paper (hereafter, the researcher) argues that certain barriers to entry may be socially effective; for instance, barriers to enter Nigeria's upstream petroleum industries by imposing the requirement of licence. This perceived barrier may prevent persons with fraudulent intentions from gaining access to the sector. The challenge the theory faces lies with describing rules that give rise to artificial barriers and those that do not.

The theory also has shortcomings in terms of designing incentives and managing incorruptible behaviour. To combat corruption in the sector, finding solutions to these problems are fundamental. The researcher argues that corruption is an obstacle to economic development; thus, competitive lobbying is preferable to corruption.

5.2 Extractive Theory of Corruption

Extractive theory of corruption means the relationships between state, its agent and the society. Here the states' agent uses the resources of the state for the benefits of their leaders. The fact that the state is a stronger party in the relationship who benefits most from corruption they are the major shareholders in the upstream petroleum companies the state is

seen as a passive player. As cited by Iyanda 1999,[55] Amundsen opines,[56] in his work "Corruption: Definitions, Theories and Concepts", that the concept of the extractive theory is based on the idea of authoritarianism – the use of force and exploitation of a State's resources by rulers or their agents. Adebisi[57] further revealed that the theory is based on the principles of authoritarian government and neo-patrimonial States. Balancing the concerns regarding corruption, Amundsen,[58] in his article "Political Corruption: An Introduction to the Issues", argues that a few government officials profit from corruption by utilising the State's apparatus to extort resources for the benefit of the ruling government.

The theory supports this work by resisting autocratic regimes and the government's officials who uses powers and resources of the State (oil revenues) to protect their personal interests at the detriment of the nation's economy and development. The theory accentuates a renowned postulation that power has the propensity to corrupt, and unlimited power leads to absolute corruption. In other words, where excessive power is concentrated absolutely in the hands of a few persons such as the minister of petroleum's discretionary power in the oil sector, there is more potential for corruption, abuse of power, wealth seeking and extraction of resources for personal gain.

5.3 Public Choice Theory

The theory was propounded between 1950and1960. The major proponents of the theory are James Buchanan, Gordon Tullock and Mancur Olson, Public Choice theory centres on individuals' interests and preferences which model ones' behaviour in taking rational decision. This often churns out pre-determined goals for such individuals through optimal maximization of every utility. The theory is useful for a better understanding of corruption. It allows one to predict consequences of corruption, since most anti-corruption laws are enacted with sanctions for non-compliance.

The theory supports this study by emphasising that individual is responsible for both his actions and the consequences of his actions. In the upstream petroleum context, the theory is concerned with corrupt government officials who attempt to make the most of their utility in the sector through malpractices. Graaf, in his work "Causes of Corruption: Towards a

[55]Amundsen, L., 'Political Corruption: An Introduction to the Issues' (1999), <https://www.cmi.no/publications/file/1040-political-corruption.pdf > accessed1 April, 2020, p.5.

[56]Iyanda, D.O., 'Corruption: Definitions, Theories and Concepts' (2012),2(4),Arabian Journal of Business and Management Review,p.40.

[57]Adebisi,M.A., 'The Political Economy of Oil Price Deregulation and the Subsidy Fraud Crisis: A Study of Systematic Bureaucratic Corruption in Nigeria' (2015), 5(9), Journal of Energy Technologies and Policy,p.36.

[58]Amundsen, I., 'Political Corruption: An Introduction to the Issues' Chr. Michelsen Institute Development Studies and Human Rights, < https://www.cmi.no/publications/file/1040-political-corruption.pdf> (accessed 2 March, 2020), p.7.

Contextual Theory of Corruption" argues that government officials are rational scheming individuals who resolve to become corrupt when the advantages outweigh the disadvantages, which refers to the combination of expected penalties and the likelihood of being indicted for corruption.

The theory explains the cost of corruption in the sector as follows: when one is corrupt, one is impairing developments and growth in the sector. Langseth, in his work "Prevention: An Effective Tool to Reduce Corruption" believes that to make penalties effective in preventing corruption, it is crucial to link the payments of anti-corruption agencies with the amount of corruption proceeds retrieved from the sector. Anechiarico and Jacobs, 1996 in their work "The Pursuit of Absolute Integrity", argue that imposing stiffer penalties with severe preventive measures may improve the chances of being caught for corruption and may increase the cost of corruption through detailed preventive anti-corruption mechanisms, which is based on the uncompromised enforcement of anti-corruption laws and sanctions in the sector.

6.0 **International Anti-Corruption Conventions**

The United Nations Convention Against Corruption[59] is meant to thwart corrupt practices, illegal funds transfer, called money laundering, and private sector corruption, and establish a detailed monitoring regime for financial institutions to eliminate financial crimes. The researcher argues that the provisions of the convention can be utilised to recover proceeds of corruption for infrastructural development in Nigeria. Smith and Pieth, in their work "The Recovery of Stolen Assets: A Fundamental Principle of the United Nations Convention Against Corruption",[60] underscored the importance of the convention by stating that it offers legal assistance and technical support to return the proceeds of corruption.

Nliam, in his article "Assessing the Adequacy of International and Regional Legal Framework Against Corruption in the Public Sector",[61] argues that the United Nations Convention Against Corruption and the African Union Convention offers the legal basis for preventing and tackling corruption through national anti-corruption laws but fails to address asset confiscation and accentuate the enactment of laws regulating sentence and non-sentence-based confiscation. The provisions of the convention on cross-border money

[59]United Nations Convention Against Corruption General Assembly Resolution 58/4 of 31 October 2003.

[60]Smith, J., and Pieth, M., 'The Recovery of Stolen Assets: A Fundamental Principle of the United Nation Convention Against Corruption' (2007), 2 U4 Brief 1, <http://www.u4.no/publications/the-recovery-of-stolen-assets-a-fundamental-principle-of-the-un-convention-against-corruption/ > (accessed5 March, 2019), p.4.

[61]Nliam, O., 'Assessing the Adequacy of International and Regional Legal Framework AgainstCorruption in the Public Sector' In M.A., Ayoade, S.A., Igbinedion *(*eds.)*Legal Perspectives to Corruption, Money Laundering and Assets Recovery in Nigeria* (Lagos:Department of Jurisprudence and International Law, Faculty of Law, University of Lagos, 2015), p. 29.

transfer of corruption proceeds especially from upstream petroleum sector have not been replicated in Nigeria's anti-corruption laws.

Also, member States are under the obligation to create agencies to manage asset confiscation and enact laws regulating sentence and non-sentence-based confiscation. Nigeria has not created any agency to manage asset seizure and the proceeds from corruption.[62]

Further, it has not enacted laws regulating non-sentence-based confiscation as required under the convention; Member States are obliged to incorporate measures into their national laws to protect whistle blowers in conformity with their legal systems.[63] This also has not been implemented in Nigeria. The Whistle Blowers Protection Policy is in place; however, it is not law and not sufficient to protect the vulnerabilities of whistle blowers and witnesses who testify in court against corrupt government officials. In the case of the *Federal Military Government v. Sani* [1990]7 SC (Pt. II) 89 3909the Court held that a policy of any government which has not been enacted into law cannot stand as a basis for disciplinary measure. This gap has been identified as a serious impediment to anti-corruption efforts in the sector.

Guzman,[64] writing on "Compliance Based Theory of International Law", observes that the major flaw in the convention is the lack of legal instrumentation to penalise erring members for failure to comply with the provisions of the convention. Lucinda argues that failure to critique the use of discretionary terms in the convention's provisions without the use of any mandatory language appears to make the convention "a toothless legal instrument".[65]

It is the view of the researcher that flaws in the convention, such as the failure to criminalise non-cash forms of bribery, such as shares, hospitality, and failure to prohibit financing of foreign political parties, in the convention should be amended. Affirming the contributions of the convention, Davis,[66] in his article "Does the Globalization of Anti-Corruption Law Help Developing Countries?" said that despite these flaws, the convention has made substantial

[62]Article 51, United Nations Convention Against Corruption, 2003.

[63]Organization for Economic Cooperation and Development (OECD), 'G20 Anti-Corruption Action Plan – Protection of Whistleblowers' (2011), Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation, <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>accessed 18 March, 2020.

[64]Guzman, A.T., 'A Compliance Based Theory of International Law, <https://www.law.berkeley.edu/files/guzmanComplianceandIL.doc > accessed16 March, 2020).

[65]Lucinda, A.L., 'The United Nations Convention Against Corruption: The Globalization of Anti-corruption Standards' Conference of the International Bar Association International Chamber of Commerce Organization for Economic Cooperation and Development, <Steptoe, http://www.steptoe.com/assets/attachments/2599.pdf>(accessed 16 March, 2020).

[66] Davis, K.E., 'Does the Globalization of Anti-Corruption Law Help Developing Countries?'(2009), <https://nyudri.files.wordpress.com/2011/10/driwp61.pdf> accessed16 February, 2020.

contributions in the international anti-corruption crusade. The researcher opines that enforcement has been a major flaw of the convention in combating corruption.

Confirming the achievements of the convention, Padideh considered the case of Mabey and Johnson who were penalised for offering bribes to government officials in Ghana, Angola, Madagascar, and Jamaica to secure business advantages as laudable in "Controlling Corruption in International Business: The International Legal Framework".[67] The researcher believes that implementation has been the main drawback of the convention, which the article did not discuss exhaustively.

Even though Nigeria's government consented to a few of these conventions, they are yet binding due to section 12 of the 1999 Constitution (as amended), which obliges the National Assembly to domesticate treaties by enacting it as national laws. The researcher suggests that the various loopholes in the conventions should be amended for effectively tackling the issue of corruption in the upstream petroleum sector.

7.0 The Nature of Corruption in Nigeria's Upstream Petroleum Sector

Transparency in the revenues of the upstream petroleum sector is *sine qua non* to exterminate corruption. Ayoade, in his article "Nigerian National Petroleum Corporation and Prospects for Transparency in the Petroleum Industry Bill",[68] advocated the need for transparency in the petroleum sector, as it has proven nearly impossible to obtain accurate data on oil production in Nigeria over the years, with the Central Bank of Nigeria, Ministry of Finance, Department of Petroleum Resources, and International oil companies providing contradictory figures. Poor data availability and non-recordkeeping culture are hallmarks of the pervasive corruption in the sector. It is the researcher's view that the paper failed to emphasise on the enforcement of the prescribed punishments, and now, the Bill has been outdone by the proposed Petroleum Industry Governance and Institutional Framework Bill, 2017.

As part of the analysis on transparency, Nweke, in his work "Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets: Is Soft Law the Answer?"[69] said that the approach of the Federal Government towards transparency has been the consideration of hard laws and suggested the use of soft laws and a voluntary reporting mechanism as alternative regulatory measures to encourage oil

[67] Padideh, A., 'Controlling Corruption in International Business: The International Legal Framework', <http://www.eolss.net/sample-chapters/c13/e6-67-03-07.pdf > accessed16 March, 2020. UNODC Organisation, https://www.unodc.org/documents/treaties/organized_crime/cop6/ctoc_cop_2012_crp/ctoc_cop_2012_crp4.pdf. (accessed 10 February, 2020.

[68] Ayoade, M.A., 'Nigerian National Petroleum Corporation and Prospects for Transparency in the Petroleum Industry Bill' (2011), (5), Knust Law Journal, p.89.

[69] Nweke, B., 'Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets: Is Soft Law the Answer' (2007), 8(04), *German Law Journal*, p.315.

companies to provide information regarding their operations. However, the flaw in this approach is the absence of penalty for non-compliance, which may defeat the *rationale* for this approach.

Moreover, in buttressing the absence of transparency in the sector, Oyewunmi, in the article "Transparency in Nigeria's Oil and Gas Industry: Is Policy Re-Engineering the Way Out?",[70] argued that secrecy in the mode of awards of petroleum contracts, licences, leases, and other transactions by the NNPC is due to the absence of stringent provisions in the NNPC Act[71] pertaining to transparency and record keeping. It is the researcher's view that public disclosure of financial reports and of transactions made by the NNPC and National Petroleum Investment Management Services should not negate commercial agreements' confidentiality clauses in the sector. It is recommended that transparency laws should include voluntary reporting procedures to deter corruption, but the paper being discussed also failed to mention the enforcement challenges of anti-corruption laws.

Moreover, Eigen, in his work "Fighting Corruption in a Global Economy: Transparency Initiative in the Oil and Gas Industry",[72] outlined that the Extractive Industry Transparent Initiative's aim is to promote transparency by requesting companies to disclose all incomes paid to the government as well as the disclosure of revenues received by government from extractive industries, with an independent auditor confirming the accuracy of the figures disclosed for public scrutiny of how oil revenues are spent. He failed to acknowledge how lack of sanctions for non-compliance with its provisions affects the functioning of the agency. However, section 5 of the Act placed the responsibility of appointing National Stakeholders Working Group members on the President without any legislative confirmation by the National Assembly. This is a basic flaw of the Act. This requires an amendment for adding the element of transparency. In addition, in his article "A Critique of the Enforcement of Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007 in Nigerian Oil and Gas Sector",[73]Okeke argued that section 16 of the Act prescribed the sanction of ₦5-30 million or imprisonment for a term of two years as the tentative penalty for oil companies, their directors and government officials who present false information or fail to provide any information when required. The penalties appear to be insufficient, considering the billions of

[70]Oyewunmi,O.A., and Olujobi, O.J., 'Transparency in Nigeria's Oil and Gas Industry: Is Policy Re-engineering the Way Out?' (2016),7(3), International Journal of Energy Economics and Policy, p.630.
[71]1969 (as amended).
[72]Eigen, P., 'Fighting Corruption in a Global Economy: Transparency Initiative in the Oil and Gas Industry' (2007),29(2), Houston Journal of International Law, p.327.
[73]Okeke,V.O.S., 'A Critique of the Enforcement of Nigeria Extractive Industries Transparency Initiative Act 2007 in Nigerian Oil and Gas Sector' (2013), 14(II), British Journal of Arts and Social Sciences, p.107.

dollars that are generated from the sector. Two years of imprisonment does not have a severe deterrence value, considering the endemic corruption in the sector.

Furthermore, no petroleum company has been reported to be penalised for non-compliance with the NEITI Act, despite serious infringements of the Act. The researcher admits that insufficiency of sanctions under the Act may promote non-compliance. In the same vein, there is a need for the Act to be amended to empower the NEITI to prosecute offenders and a need for mutual cooperation between investigators and prosecutors for the successful prosecution of corruption cases and for incorporating transparency in the sector. Also, there is need for stringent implementation of anti-corruption sanctions against corruption offenders.

The major challenge of the agency is that identified corruption in the various audit reports were not prosecuted timely by the police, and this was not properly stressed by the article. There is the need for a stringent legal regime that demands accountability of upstream petroleum sector revenue flows of the NNPC in order to remit oil revenues to the federation account with mandatory reporting procedures. The penalty of two or more years of imprisonment and/or a fine of up to US$151,000 do not hold sufficient deterrence values to combat corruption. Thus, there is the need to review the Act.

With regard to the Nigerian Extractive Industries Transparency Initiative Act, the major problem of the initiative is legislative; it has no power to compel the NNPC to remit unpaid revenues to the federation account.[74] The Act should be amended to bestow it with the power to prosecute erring oil companies and to compel the remittance of outstanding payments from the NNPC to the federation account. There is therefore the need to extend the scope of its transparency to the Petroleum Technology Development Fund, Niger Delta Development Commission as well as oil producing communities in order to integrate transparency in the sector as well as to aid in discharge of its mandate in the sector.

Furthermore, the Public Procurement Act[75] was enacted to eliminate corruption in Nigeria's procurement system and to entrench transparency in the sector. It precludes conflicts of interest and comprises sanctions, such as suspension and debarment of companies found guilty of fraud and breach of contract.[76] The Act does not apply to procurement by national defence or national security, except in case the President expressly permits it.[77] There is a need to exercise caution with regard to these exemptions, because that too can give rise to

[74]Nigerian Extractive Industries Transparency Initiative 2014 Annual Activity Report.
[75]Laws of the Federation of Nigeria (LFN), 2004.
[76] GANBusiness Anti-corruption Portal, 'USA Corruption Report' (2015), <http://www.business-anti-corruption.com/country-profiles/usa> accessed10 February, 2020.
[77]*Ibid*, s.15(2).

corruption. The Act fails to provide clear distinctions on types of procurement; it accommodates only two methods of tendering special and restricted methods of procurement and favours only open competitive tendering. Additionally, it fails to provide the mechanisms for disputes resolution.

Further, with respect to the Code of Conduct Bureau and Tribunal Act,[78] Chene and Transparency International's article on "Foreign Exchange Controls and Assets Declarations for Politicians and Public Officials"[79] expressed concern that the bureau has not functioned as anticipated due to the lack of funds, manpower and resources to monitor the entire public service in Nigeria. It was required to confirm the accuracy of the declarations made by government officials in the sector.[80]Idowu,[81] in his article "An Appraisal of the Code of Conduct for Public Officers in Nigeria", highlighted the need for probity to override the privacy of any government officials in the sector. The Code does not apply to the informal sector where many upstream petroleum operators are situated.

The penalties for breaching the Act are vacation of office regardless of being elected or nominated, debarment from holding any public office whether elective or not for a period not exceeding 10 years, and forfeiture of any property acquired through abuse of office to the State.[82] It is vital to state that the punishments prescribed by the Act are grossly inadequate. A term of imprisonment will have more deterrence value than forfeiture or other non-custodial methods of punishment.

The Proposed Petroleum Industry Governance Bill (PIGB)[83] is anticipated to divide the NNPC into viable commercial petroleum entities, but no detailed provisions on fiscal arrangements, such as taxes, royalties and host communities, are available yet. The reform may fall short of privatisation, as the ownership of these commercial legal entities are vested with the government, which contravenes section 18 of the Companies and Allied Matters Act,[84] which prohibits the formation of a company with less than two persons. This illegality should be amended with stringent anti-corruption clauses before the Bill becomes a law.

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[78]Laws of the Federation of Nigeria (LFN), Cap.C.15, 2004.

[79]Chene and Transparency International, 'Foreign Exchange Controls and Assets Declarations for Politicians and Public Officials' (2011), <www.u4.no/publications/foreign-exchange-controls-and-assets-declarations-for-politic>(accessed 18 March, 2020).

[80]*Ibid*, Schedule 5, s.11(1–3).

[81]Idowu, A.A., 'An Appraisal of the Code of Conduct for Public Officers in Nigeria' (2000), XLIV (1–2), Philippine Journal of Public Administration, p.100.

[82]*Ibid, ss.*20–22 (1) (2), Cap. C. 15 Laws of the Federation of Nigeria, 2004.

[83]2015.

[84]2004.

The Bill[85] has great potential in terms of tackling corruption in the sector. If enacted and enforced, it is expected to offer a clear separation between policy, regulatory and commercial roles of the NNPC, incorporate transparency and good governance as well as provide an institutional framework for Nigeria's petroleum industry.

Also, sections 2(1), (2) and 3 of the Bill provide for the Minister's right to pre-emption; this is an amendment in conformity with the current economic realities and anticipated future challenges in the sector. Under the proposed Bill, the penalty for non-compliance with its provisions has been increased to ten million Naira (₦10,000,000.00) and/or imprisonment for six months.[86] For obstruction, there is a fine of five million Naira (₦5,000,000.00) and/or imprisonment for six months.[87] The Minister of Petroleum is also empowered to make regulations to increase the pecuniary penalties under the Bill, and the unfettered power to grant licenses and leases[88] can only be exercised now with approval from the Nigerian Petroleum Regulatory Commission unlike the previous legal regime.[89]

It is the view of the researcher that the Bill is an improvement on the extant legislations in the petroleum sector and on the old Petroleum Industry Bill, whereby the Chief Executive Officer of the Petroleum Inspectorate was selected by the Petroleum Minister with approval from the National Council of Ministers, the Department of Petroleum Resources, as well as its Director General.

The power to formulate regulations vested in the Minister, under section 9 of the Petroleum Act and retained by the Petroleum Industry Bill has been expunged. It has been conferred on the proposed Nigerian Petroleum Regulatory Commission, which is to be the regulatory body for the industry as stated in section 8(1) (2) of the Bill. The proposed equity in the new company should be awarded to Niger Delta communities and their State Governments in order to expand the ownership of oil, tackle the problem of discontentment among the host communities and present a clearer separation between the regulators and the regulated in the sector. This will end corruption and the long prevailing practice of non-remittance of funds to the federation account.

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[85] Ighodalo, W., 'Review of the Petroleum Industry Governance and Institutional Framework Bill', <http://www.banwo-ighodalo.com/assets/resources/16f9efca630ad479ab019af7b736e809.pdf>accessed13 April, 2020.

[86] S.3(3) Petroleum Industry Governance and Institutional Framework Bill, 2017.

[87] *Ibid*, s.3(4).

[88] The Petroleum (Drilling and Production) Regulations No: 9, 2006 and applications are to be made to the Minister for licence and lease applications would now be required to be made to Nigerian Petroleum Regulatory Commission.

[89] Odujinrin, A., 'Discretionary Powers of Minister of Petroleum: An Analysis of the Petroleum Industry Governance Bill 2016 – Powers of the Minister' <http://www.petroleumindustrybill.com/tag/discretionary-powers-minister-of-petroleum/#.wfubdy9sxdg> accessed 2 March, 2020.

8.0 The Petroleum Industry Governance Bill 2017

The Petroleum Industry Governance Bill 2017 is to regulate the oil industry and to repeal all the extant legislations in the sector. The Bill creates new and confirms some existing agencies to promote good governance and accountability in the sector. Under Bill, the Minister of Petroleum Resources is responsible for the general governance, policy and strategy in the Sector. He has pre-emptive rights to all petroleum products in the event of National emergency but does not have the authority to award, revitalize, modify, lengthen or annul any lease or licence granted under the Act and he cannot establishes any new entities. The National Petroleum Regulatory Commission (NPRC) is to substitutes the present Department of Petroleum Resources. The agency is to regulate the sector. It is expected to be autonomous from the Minister of Petroleum but to be managed by a Governing Board appointed by the President with the approval of the Senate.There are some pertinent issues that need to be addressed before the enactment of the Bill into law there are: Bill offers the institution of Boards for the commercial institutions. The structure of these boards may not indicate the suitable equilibrium of powers to ensure efficient Board control to decrease the risk of executive-led decision-making; and to promote adequate independence of the board to curtail excessive government meddling so, there is the need for increase the number of non-executive directors to executive directors with detailed conditions to ensure autonomy of the directors. While the Bill provides for detailed tenures of Non-executive directors but failed to make provision for stable tenures for the Executive Directors to protect them from partisan politics. The execution of well-defined contracts to the Executive Directors may tackle this issue.

The recently proposed commercial entities are to be regulated by the provisions of the Code of Corporate Governance issued by the Securities and Exchange Commission but the Bill does not include stringent sanctions to address possible conflicts that may arise between its provisions and those of the Security and Exchange Commission (SEC) Code to avert potential ambiguity by emphasizing on the supremacy of the Bill over those of the SEC Code, where arguments arise.

The extensive powers given to National Petroleum Company (NPRC) may be abused therefore; there is the need for proper restructuring of the board for efficient execution of its mandate. Fixing of petroleum products via legal framework for a fair market value of petroleum products and tariffs for gas processing and transportation is an indication that the Federal Government is not willing to fully deregulate the downstream sector of the industry.

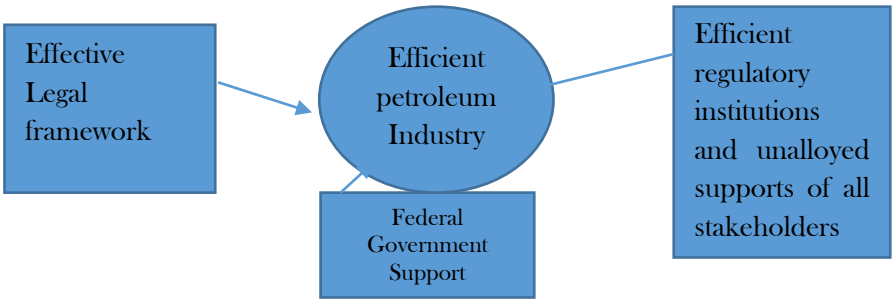
The Bill provides for the divestment of at least 40% of the shares in the NPC within 10 years of incorporation but investors may be unwilling to invest in a company which will be majorly owned and run by government. Also, this sole ownership by government contravenes the provisions of section 18 of the Companies Allied Matters Act 2004.

Similarly, the formation of a single regulator for the industry may offer enormous power to the NPRC which may be abused and occasioned inefficiency and unnecessary bureaucracy. The bill has potential to significantly improve the petroleum industry but its success depends on the political will of the Federal Government to ensure it is passed and to ensure that its provisions are properly enforced to promote transparency and accountability in the sector. However, since the Bill is a work in progress there is the need to harmonies all concerns such as incorporation of anti-corruption clauses before it is assented to by the President to achieve its aim of reforming the sector for the common good of all Nigerians.

9.0 Discussion of Findings

- The study observes that there is a need for thorough reform in Nigeria's anti-corruption laws with a combination of legal and non-legal solutions to combat corruption. The solution lies in the stringent enforcement of existing anti-corruption and transparency laws and the reform of various flaws identified in the laws in order to institutionalise transparency in the sector. For an efficient soft law approach, there is the need for the current anti-corruption legal framework to complement the Whistle Blowers Protection Bill, Civil Forfeiture of Proceeds of Corruption Bill and Witness Protection Bill. Absence of these distinct anti-corruption laws implies that Nigeria's national anti-corruption legal framework is incomplete.
- There is a need not to rely solely on legislations for transparency in the sector.
- A sophisticated anti-corruption method may be necessary, such as adopting an integration of soft and hard laws, to combat corruption in the sector. The approach depends largely on civil law rather than the conventional criminal justice system for combating corruption, which is very slow. The *rationale* for this approach is supported by the option for damages, assets confiscation, fines, and other monetary reliefs. Furthermore, when anti-corruption agencies fail to sue for corruption, private citizens can initiate civil actions. The standard of proof is a balance of probabilities, which is simpler than proof beyond reasonable doubt as per the criminal law.
- There exist flaws in Nigeria's national anti-corruption legal regime. This impedes the effective performance of anti-corruption laws and there is non-application of soft law approach to combat corruption in the sector.

Figure 2: Benefits of Stringent Anti-Corruption Legal framework



Source: This was prepared by the Authors

10.0 Recommendations

New measures that can be implemented to eradicate corruption include the enactment and incentivisation of the Whistle Blowers Protection Act and Civil Forfeiture of Proceeds of Corruption Act as well as the implementation of citizenry education strategies on the negative consequences of corruption in the sector. The Whistle Blowers Protection Act, which offers protection to any secret informant and encourages citizens to expose corruption without the fear of backlash,[90] has not been passed into law by the National Assembly. The Civil Forfeiture of Proceeds of Corruption Act, if enacted, will deny corrupt government officials the right to assets accumulated through corruption, as practiced in Norway, the United States and the United Kingdom where anti-corruption laws are stringently enforced.

There is the need to amend the NNPC Act, 1977, to spell out explicitly what funds the Corporation can retain and how they can be used instead of the current provision, which is not explicit enough. The amendment of section 7 of the Act must reflect how the Corporation should retain and fund its operations, its tax structure and payments of dividends to promote transparency, rather than the current position that contravenes section 80, 162 of the 1999 Constitution, which requires payments of all revenues into the federation account.[91] The regulatory roles of the NNPC should be separated from its commercial roles, like in Norway, where the National Oil Company (Statoil) operates like other commercial oil companies without any special status.

Anti-corruption laws, however well drafted, will be interpreted by the court, and this has often led to the emergence of problems where laws are not properly interpreted. Therefore, the judiciary needs to be strengthened to eradicate the prolonged trials of corruption cases and the perceived corruption at the bench.

[90] Article 9, Council of Europe Convention Against Corruption.

[91] Sayne, A., and Gillies, A., 'Inside NNPC Oil Sales: A Case for Reform in Nigeria' (2015),<https://resourcegovernance.org/sites/default/files/nrgi_insidennpcoilsales_completereport.pdf> accessed 2 July, 2020.

The Nigerian Government has lost not less than 150,000 barrels of crude oil valued at $6 billion annually to crude oil theft,[92] and this has reduced the national income, which ought to have accrued to the federation account. This is a result of the alleged connivance of the Federal Government's officials in the sector. The lack of specific legal framework for oil and gas that criminalises crude oil theft is responsible for this crime. Section 3(e), (f), (iv) of the Nigeria Security and Civil Defence Corps Act[93] only provides for pipeline protection as one of the functions of the Corps, without outlining clearly the penalties to be meted out to the culprits. There is the need for specific provisions in the Petroleum Industries Governance Bill, criminalising crude oil theft and other corruption-related activities in the sector.

The use of crude oil tracking system to monitor production and movements of crude oil in Nigeria through modern technologies with DNA fingerprint on crude oil barrels to ascribe a status of legitimacy to crude oil obtained and sold by the NNPC may be required to combat oil theft and promote transparency in the sector. If these technologies are properly standardised, it can be a veritable anti-corruption tool to identify stolen crude oil from Nigeria. Due diligence in the operations of the refinery is also one anti-corruption mechanism for combating oil theft and corruption in the selected case study countries.

Nigeria should replicate this in our laws. Companies operating in the sector should perform a thorough evaluation of their operations[94] and corruption risks[95] through comprehensive due diligence as Norway does, whereby petroleum companies are required to establish whistle blower hotlines for employees who wish to notify the company or anti-corruption agencies of corrupt practices through mobile services, anonymous e-mail addresses, or by using external whistle blowing hotlines managed by independent service providers to report corrupt activities. Disqualification of companies' directors, debarment of companies culpable of corruption from public procurement/bids and non-prosecution and deferred prosecution agreements are also part of the lessons Nigeria can learn from the selected case study countries.

[92]Anyio, S.F., 'Illegal Oil Bunkering and Oil Theft in Nigeria: Impact on the National Economy and the Way Forward' (2015),1(1), Ilimi Journal of Arts and Social Sciences, p.53.
[93]No.6, 2007, (Amendment Act).
[94] TheUnited Nation Global Compact, 'A Guide for Anti-Corruption Risk Assessment'(2013),<http://www.spainsif.es/sites/default/files/upload/publicaciones/riskassessmentguide.pdf >accessed11 March, 2020.
[95]Navigant Consulting Inc., 'The United Kingdom Bribery Act 2010: What Does it Mean for Multinationals' (2010), <www.navigantconsulting.com> accessed1 February, 2020.

11.0 Conclusions

The study lays emphasis on the need to optimise the existing anti-corruption legal regime to entrench transparency, accountability and efficiency in the sector and concludes that anti-corruption agencies in Nigeria are not effective because of absence of the political will of the Federal Governments to combat corruption with sufficient or adequate budgets and the strict enforcement of anti-corruption laws. The Federal Government has made efforts to mitigate the consequences of corruption and promote a durable infrastructure in Nigeria by enacting a plethora of anti-corruption laws criminalising corruption, but these appear deficient due to weak enforcement.

The study suggests the use procurement debarment system as a tool to deter corruption and to promote integrity in public procurement. It precludes companies and individuals from participating in government contracts for a stipulated period if found culpable of corruption or breach of contract. It was revealed that a similar provision under section 58(1)(6)(a) of the Nigerian Public Procurement Act provides for debarment or blacklisting; however, this provision is poorly enforced to combat corruption in the sector unlike in other clime where they are implemented strictly.

The study revealed that the participation of oil producing communities in the award or licensing process will give them a sense of ownership. The impact of petroleum activities on oil producing communities should be a major requirement for consideration before the award of petroleum licences or contracts in the sector while participatory ownership is still absent under the Nigerian legal regime. This participation of oil producing communities in the award process of oil blocks or licences in the sector by regulatory authorities will give them a sense of belonging and may reduce the unending agitations for resource control by the oil producing communities, pipeline vandalization to the barest minimum and reduce corruption also. The also suggested regulatory institutions that can promote transparency in the sector with new measures to eradicate corruption such as the enactment and incentivisation of compliance with the Whistle-blowers Protection Act and the Civil Forfeiture of Proceeds of Corruption Act in addition to citizenry education on the negative consequences of corruption in the sector and the need to promote transparency and accountability in the sector.

IMPLEMENTATION OF THE CONVENTION ON THE PROTECTION OF THE WORLD CULTURAL AND NATURAL HERITAGE: ANALYSIS OF CHINA AND UGANDA

By

Charlotte Kabaseke*

Abstract

World heritage is fast being depleted especially in the face of urbanization and climate change and there is urgent need to preserve and protect it. International law provides for the preservation and protection of the different forms of heritage. States are therefore obligated to protect the different forms of heritage within their territories. The World Heritage Convention was enacted for the preservation and protection of world heritage but it has had some challenges, among them, implementation at domestic level. Whereas both China and Uganda have ratified the convention, they are both still facing implementation challenges. Employing the doctrinal and comparative legal methods, the paper seeks to examine the efficacy of the World Heritage Convention in preserving world heritage. The paper further seeks to comparatively examine the extent to which China and Uganda have domesticated and implemented the convention. A conclusion is drawn that China has performed much better than Uganda in domesticating as well as the preservation of the world heritage within its jurisdiction. Uganda as well as other countries facing similar challenges as Uganda has great lessons to learn from China. Recommendations are made on how Uganda can improve her own situation.

Keywords: World Heritage, Law, Preservation, China, Uganda

1.0 Introduction

The concept of heritage is wide with varied meaning based on the geographic location and different people appreciate heritage differently. [1] Heritage has historical, cultural, archaeological and scientific value.[2] In the face of rapid development, urbanization, armed conflict and climate change, the preservation of heritage is under serious threat.[3] There is

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[1] Boer B. & Gruber S., 'Heritage Discourses' in Jessup & Rubenstein (eds), *Environmental Discourses in Public and International Law* (Cambridge: CUP, 2012), pp. 375, 399.

[2] Taylor K., 'Cultural Heritage and Urbanisation in China', 2013 The China Story online Journal <https://www.thechinastory.org/2013/08/cultural-heritage-and-urbanisation-in-china/> accessed on 09 June, 2019.

[3] Ibid.

therefore a need to legally preserve and protect it.[4] International law provides for the preservation and protection of the different forms of heritage. Meanwhile, individual states are obligated to protect the different forms of heritage within their territories.[5] The 1972 Convention concerning the protection of the world cultural and natural heritage (World Heritage Convention) serves as the foremost international law treaty relating to the protection and preservation of cultural and natural heritage.[6] Although the Convention has been touted as being progressive in offering protection to cultural and natural heritage, it lacks an effective enforcement mechanism and consequently faces implementation challenges at the domestic level.[7]

At the domestic level, both China and Uganda have ratified the World Heritage Convention and have enacted enabling legislation to incorporate the provisions of the convention in their domestic law. However, these countries are facing challenges in enforcing the Convention in their jurisdictions. For instance, in China, the legislation has been criticised for being 'backward and low levelled.'[8] It has also been observed that the local governments mandated by the domestic legislation to enforce the law in their various provinces have not been cooperative in enforcing the law.[9] In Uganda, the only law on heritage is dated and does not recognise intangible heritage.[10] The heritage law also has a weak and non-deterrent penal provision which requires a person found guilty of destroying a heritage monument or site to pay a fine of 2000 Uganda Shillings (less than a dollar).[11] This paper therefore seeks to examine efforts by both the Chinese and Ugandan governments in domesticating and

[4] Ibid.

[5] Boer B. and Gruber S., 'Heritage Discourses' (note 1 above), pp. 375- 376.

[6] Gruber S., 'Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law', (2007), 10 (3) & (4) Asia Pacific Journal of Environmental Law, p. 253.

[7] Ibid p. 263.

[8] Yujun G., Zhihua D. & Xiobing Q., 'China and International Law on Cultural Heritage, Consumer Protection and Food Security' in Lingliang & Jiehan (eds), *Annual Report on China's Practice in promoting the International Rule of Law* (Beijing: Social Sciences Academic Press, 2015), pp. 338-346 at 346.

[9] Articles 6, 7 and 8 of the Law of the People's Republic of China on Intangible Cultural Heritage 2011; Zhengxin H., 'Legal protection of cultural heritage in China: a challenge to keep history alive' 2015 International Journal of Cultural Policy, pp. 1-19 at 15.

[10] Historical Monuments Act (1967) Cap. 46 Laws of Uganda 2000.

[11] S. 19 of the Historical Monuments Act (note 10 above).

implementing the World Heritage Convention in their jurisdictions. It examines the legislation, policies and state practices in the protection and preservation of cultural heritage in these countries. This paper uses the doctrinal and comparative legal methods to examine the World Heritage Convention and the national legal frameworks on the protection and preservation of cultural heritage in China and Uganda, and identify the normative and application weaknesses and gaps in order to offer recommendations. After the introduction follows a descriptive overview of the international and regional laws that govern the protection and preservation of cultural heritage. Section three comparatively examines the legal mechanisms for protecting cultural heritage in China and Uganda. Section four draws the sections together and concludes that although China has better legislation and implementation mechanisms than Uganda, the existing national legislation provides insufficient protection for cultural heritage in both countries. The paper therefore ends by making recommendations on how this situation can be improved.

2.0 The World Heritage Convention and the promotion, protection and preservation of cultural and natural heritage

The World Heritage Convention has been applauded for having contributed a great deal to the protection of world heritage.[12] The World Heritage Convention,'[13] in its preamble, provides for the protection and preservation of cultural and natural heritage.[14] It states that, '… a convention establishing an effective system of collective protection of the cultural and natural heritage of outstanding universal value, organized on a permanent basis and in accordance with modern scientific method...[15] The preamble to the Convention further recognizes that 'the deterioration or disappearance of cultural and natural heritage is harmful impoverishment of the heritage of the whole world'[16] and further that protection of heritage at national level is

[12] Gruber S., 'Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law' (note 6 above), p. 260.

[13] World Heritage Convention, adopted on 16 November, 1972, by the General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 17 October to 21 November 1972, at its seventeenth session (entered into force 17 December 1975).

[14] Articles 1 and 2 of the World Heritage Convention (note 13 above).

[15] Preamble to the World Heritage Convention (note 13 above).

[16] Ibid.

insufficient because of limited recourses.[17] The Convention puts in place mechanisms like international cooperation and assistance to enable states to conserve heritage.[18] The Convention, in article 1 defines cultural heritage as 'monuments, groups of buildings and sites of outstanding universal value from the point of view of history, art or science.'[19] Unlike other Conventions, the World Heritage Convention has been hailed for applying a different approach in using the term 'cultural heritage'. Other Conventions use the term 'cultural property.'[20] The definition of 'cultural heritage' has however been critiqued for only including immovable items, hence excluding the protection of movable cultural property from the ambit of the Convention's protection.[21] It has however further been argued the lack of the use of the term 'immovable' in the definition implies that movable items are included within the ambit of the Convention's protection.[22] Article 4 of the Convention provides that it is the duty of states parties to 'ensure the identification, protection, conservation, presentation and transmission to future generations' of world heritage, to the utmost of the state's resources and where appropriate with some financial assistance…[23] This article by implication requires states parties to use the most of their resources to protect world heritage yet the convention in its preamble recognizes that heritage is being depleted as a result of lack of resources.[24] States parties could use this provision to avoid protection of cultural heritage by alleging that they lack resources.

Article 8 of the Convention establishes the World Heritage Committee through which the Convention operates. The committee evaluates the efforts of states to conserve heritage through state reporting, provision of financial support to states upon request and has put in place operational guidelines for the conservation of heritage.[25] The World Heritage

[17] Ibid.

[18] Article 7 of the World Heritage Convention (note 13 above)

[19] Article 1 of the World Heritage Convention (note 13 above)

[20] Gruber S., 'Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law'(note 6 above), p. 261.

[21] Ibid.

[22] Ibid.

[23] Article 4 of the World Heritage Convention (note 13 above).

[24] Preamble to the World Heritage Convention (note 13 above).

[25] Articles 8-26 of the World Heritage Convention (note 13 above).

Committee has however suffered political pressure from state parties concerning having items placed on the world heritage list which has led the body to bow to state pressure sometimes.[26] Gruber[27] gives an example of 'the 34th session of the World Heritage Committee in Brasília in 2010 where 21 properties were inscribed on the world heritage list, although International Union for Conservation of Nature (IUCN) and International Council on Monuments and Sites (ICOMOS) recommended the inscription of less than half of them in their reports to the World Heritage Committee following their evaluations of the properties.'[28] The Committee continues to face growing financial pressure especially with the growing increase of world sites which makes monitoring difficult.[29]

Article 3 and 4 of the Convention provide that states parties have a duty to 'identify, conserve and protect' different property of outstanding universal value to be included on the world heritage list.[30] The Operational Guidelines for the Implementation of the World Heritage Convention[31] as established by the World Heritage Committee, define the term 'outstanding cultural value' as, 'cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity.' For cultural or natural heritage to be of outstanding cultural value, it has to qualify as being of integrity and has to have authenticity[32] as regards its 'design, material, workmanship and setting.' This however gives room for the heritage item to be modified for purposes of preservation. For example, the buildings made of wood or which have had to be

[26] Gruber S., 'Convention Concerning the Protection of the World Cultural and Natural Heritage 1972' in: Fitzmaurice and Tanzi & Papantoniou (eds), *Elgar Encyclopedia of Environmental Law: Multilateral Environmental Treaties* (Cheltenham: Edward Elgar Publishing, 2017), pp. 60-66 at 66.

[27] Gruber (note 26 above), pp. 64-66; World Heritage Committee, *Nominations to the World Heritage List*, UNESCO Doc WHC-10/34.COM/8B (Paris, 31 May, 2010).

[28] Gruber S., 'Convention Concerning the Protection of the World Cultural and Natural Heritage 1972' (note 26 above), pp. 64-66.

[29] Ibid p. 65.

[30] Articles 3 and 4 of the World Heritage Convention (note 13 above).

[31] Operational Guidelines for the Implementation of the World Heritage Convention 12 July, 2017, WHC.17/01 < http://whc.unesco.org/en/guidelines/> accessed on 11 June, 2018.

[32] Operational Guidelines (note 31 above), Para. 78.

completely replaced after being gutted by fire.[33] A case in point is the Forbidden City and Summer Palace in China.[34] Another case in point is tombs of Buganda Kings at Kasubi in Uganda which were gutted by fire[35] but are still on the world heritage list. States parties are at liberty to nominate heritage which meet the criteria to be added to the world heritage list. This, as explained by Gruber[36] is an indicator that the World Heritage Convention respects state sovereignty in accordance with article 6 of the Convention which provides that, 'Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated..' It is important to note that even if article 6 further provides that, '…without prejudice to property right provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate…,' Gruber[37] points out that the lack of an express obligation on state parties to nominate items for the world heritage list in the interest of state sovereignty could be interpreted as defeating the aims of the Convention.

The World Heritage Committee has a list of world heritage which is under threat of potential danger.[38] The Committee does not need the permission of states parties before including an item on that list but state parties which have items included on this list are obligated to ensure that the specific item that has been listed is protected from the looming danger.[39] Gruber however emphasizes that without the willingness of the respective state parties to cooperate, the purpose of this provision will be defeated.[40] Currently, China has no item of the list world

[33] Gruber S., 'Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law' (note 6 above above), p. 262.

[34] Ibid.

[35] BBS news, 'Uganda's Kasubi royal tombs gutted by fire' Wednesday, 17 March, 2010 <http://news.bbc.co.uk/2/hi/africa/8571719.stm> accessed on 11 June, 2018.

[36] Gruber S., 'Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law' (note 6 above), p. 262.

[37] Ibid.

[38] World Heritage Convention (note 13 above), article 11 (4); UNESCO, 'List of world heritage in danger' <http://whc.unesco.org/en/danger/ > accessed on 11 June, 2018.

[39] Gruber S., 'Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law'(note 6 above), p. 264.

[40] Ibid.

heritage in danger but Uganda has one item, the tombs of Buganda Kings at Kasubi in Uganda currently under study.[41] The tombs which were gutted by fire on 16th March 2010 are still under threat of fire, road construction and have a poor management and tourism plan.[42] The Heritage Committee, having considered Uganda's State of Conservation report (2018) concluded that the tombs were still under threat. The Committee decided to retain them on the list of world heritage in danger. This is because there is no fire fighting equipment in place and no sufficient security to quickly act in case there is another fire outbreak.[43] Article 5 (b) of the Convention requires states 'to set up services for the protection of world heritage with appropriate staff possessing the means to discharge their functions.' This provision is good and in the interest of heritage protection and conservation but it does not define what amounts to appropriate staff. Countries would require a lot of funds in order to be able to hire staff with knowledge on world heritage. In some countries like Uganda, so much cultural value is attached to cultural heritage and staffs are traditionally selected.[44] Despite the mechanisms put in place by the World Heritage Convention to safeguard heritage around the world, the Convention has been criticised for not having a robust enforcement mechanism and leaving matters of enforcement to the state parties in a bid to respect state sovereignty.[45]

At Regional level, Uganda is a party to the 1981 African Charter on Human and People's Rights (African Charter).[46] Article 17 (2) and (3) of the African Charter provides that 'every individual has a right to take part in the cultural life of his community' and that the state is under duty to protect traditional values recognised by the community. Further, article 22 provides that all people have the right to '…cultural development with due regard to their

[41] UNESCO, 'List of world heritage in danger' (note 38 above).

[42] UNESCO, 'State of Conservation, Tombs of Buganda Kings at Kasubi (Uganda)' <http://whc.unesco.org/en/soc/3781> accessed on 11 June, 2018.

[43] Ibid.

[44] UNESCO, 'Tombs of Buganda Kings at Kasubi' 'WHC Nomination Documentation' p. 26 <http://whc.unesco.org/en/list/1022> accessed on 11 June, 2018.

[45] Gruber S., 'Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law' (note 6 above), p. 263.

[46] African Charter of Human and People's Rights, adopted in Nairobi on 27 June, 1981 and entered into force on 21 October, 1986. <https://au.int/sites/default/files/treaties/7770-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf> accessed on 18 June, 2018.

freedom and identity and in the equal enjoyment of the common heritage of mankind.' In addition, article 29 (7) provides that every individual preserve and strengthen positive African cultural values in his relations with other members of the society.' These provisions imply that states parties are under duty to ensure that their citizens enjoy their culture and their cultural heritage. Conversely, individuals should make effort to take part in cultural life and preserve culture, making public participation crucial in the preservation of cultural heritage. China on the other hand has entered into various bi-lateral agreements in the interest of the protection of cultural heritage. These include; 'Agreement between the State Administration of Cultural Heritage of the People's Republic of China and the Ministry of Culture of the Federal Republic of Burma on Promoting exchange and cooperation in the field of Cultural Heritage.'[47] By this agreement, Burma and China agreed to collaborate in the protection of Cultural property. China also signed an agreement with France. The Administrative Agreement between the Director General of State Administration of Cultural Heritage of the People's Republic of China and the Minister of the Ministry of Culture and Public Information of France on the Exchange and Training Program in the Field of Cultural Heritage.' [48] This agreement facilitates collaboration between France and China in the protection of cultural property. Through this partnership, some gold artefacts that had been illegally smuggled out of China over 20 years ago were brought back to China.[49] This implies that China, unlike Uganda has a wider base at regional level through which to ensure the fulfilment of its obligations under the World Heritage Convention. Clearly, China has put more effort in the protection of heritage by entering into several bi-lateral agreements. Uganda on the other has not entered into any bi lateral agreements. It can therefore be concluded at this stage that China has taken more steps and is doing better than Uganda in its efforts to legally protect the world heritage in its jurisdiction. This section having analysed efforts to protect heritage at the international and regional levels, the next section

[47] Cultural Heritage Agreement between China and Burma, Signed on 27 June, 2014 in China.

[48] Cultural Heritage Agreement between China and France, Signed on 21 October, 2014.

[49] Yujun G., Zhihua D. and Qiao Xiobing Q., 'China and International Law on Cultural Heritage, Consumer Protection and Food Security' (note 8 above), p. 344.

comparatively analyses the extent to which the international and regional provisions have been implemented at national level by China and Uganda.

3.0 Implementation of the World Heritage Convention at National Level: A Comparative analysis of China and Uganda's Legal Framework on Cultural Heritage

3.1 Introduction

Despite the fact that it is the fourth largest country in the world in size and has the largest population in the world, China is a unitary state that is governed by one central government.[50] China's local governments at the provinces are still under the central government's control.[51] China has had temporary Constitutions since 1949[52] when the People's Republic of China came into being.[53] It was not until 1982 that China got a formal Constitution[54] which is hinged on the principles of 'socialism and people's democratic dictatorship,[55] leadership of the communist party and Marxism.'[56] China is a monist state and although no express provision exists under the Constitution, in practice, international law takes precedence over domestic law.[57] Provisions of the international treaties that China has acceded to, take precedence over the civil provisions of China's law, if the two provisions are different.[58] China ratified the World Heritage Convention on 12th December 1985. Similar to China,

[50] Preamble to the Constitution of China, 1982 (as amended); Chung J. H., 'China's Local Governance in Perspective: Instruments of Central Government Control', (2015), 4 (1), The China Journal, <https://www.journals.uchicago.edu/doi/full/10.1086/683210> accessed on 16 June, 2018.

[51] Ibid p. 5.

[52] Ding Z., 'A Historical Look at China's Constitutional Framework', (1987), 12 In The Times Journal, p. 1 <http://www.cpp.edu/~zding/publication/Chinese%20Constitution.doc.> accessed on 16 June, 2018.

[53] Farooq U., 'Brief History of Constitution of China - Constitutional Law Notes', 2014 <http://www.studylecturenotes.com/constitutional-laws/brief-history-of-constitution-of-china-constitutional-law-notes> accessed on 16 June, 2018.

[54] Ding Z., 'A Historical Look at China's Constitutional Framework' (note 52 above), p.1.

[55] Article 1 of the Constitution of China 1982 (as amended).

[56] Farooq U., 'Brief History of Constitution of China - Constitutional Law Notes' (note 53 above), p.45.

[57] Keyuan Z., 'International Law in the Chinese Domestic Context', (2010) 44 (3), Valparaiso University Law Review, pp. 935-956 at 936.

[58] General Principles of the Civil Law of the People's Republic of China, adopted at the Fourth Session of the Sixth National People's Congress on April 12, 1986 and promulgated by Order No. 37 of the President of the People's Republic of China on April 12, 1986) Article 142.

Uganda is a unitary state governed by a president who is elected every five years.[59] The Constitution of the Republic of Uganda was promulgated by the Constituent Assembly in 1995 after a history of political and constitutional instability.[60] Uganda is currently governed by the multiparty system with the National Resistance Movement Party (NRM) as the incumbent party in power.[61] Uganda is a dualist state and in order for an international or regional instrument to be applicable in Uganda, it has to be enabled by an Act of Parliament.[62] Uganda ratified the World Heritage Convention on 20th November 1987. China and Uganda are rich in natural and cultural, tangible and intangible as well as movable and immovable heritage.[63] China and Uganda have properties on the world heritage list.[64] China and Uganda have laws and policies for the protection, promotion and preservation of heritage.[65] For purposes of this section the main focus will be on the 'The Law of the Peoples Republic of China on the Protection of Cultural Relics' and the 'Historical Monuments Act' of Uganda. This is because they are directly enacted under the World Heritage Convention for purposes of tangible cultural heritage protection. The other Laws, Regulations and

[59] Commonwealth Secretariat, 'Uganda: Constitution and Politics', 2018 <http://www.commonwealthofnations.org/sectors-uganda/government/>accessed on 16 June, 2018.

[60] Preamble para. 1 to the Constitution of the Republic of Uganda, 1995.

[61] S. 3 of the Political Parties and Organisations Act, 2005; Makara S., Rakner L. and Svåsand L., 'Turnaround: The National Resistance Movement and the Reintroduction of a Multiparty System in Uganda', (2009) 30 (2), International Political Science Review, pp.185 – 2004 at 190 and 198.

[62] Article 123 (2) of the Constitution of the Republic of Uganda, 1995; Sections 2 and 4 of the Ratification of Treaties Act Cap. 204, Laws of Uganda 2000.

[63] Bell J. S., 'Introduction to the cultural heritage issue', (2016) 48 (3), Chinese Law and Government, pp. 179 – 183 at 179; Gruber S., 'Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law', (2007) 10 (3) & (4), Asia Pacific Journal of Environmental Law, p. 253; Nsibambi F. S., 'Reviewing Uganda's Heritage Legislation to Suit Contemporary Dynamics', (2011), Legal Issues in Conservation, P.1.

[64] China properties inscribed on the world heritage list (53) <http://whc.unesco.org/en/statesparties/cn>; Uganda properties inscribed on the world heritage list (3) <http://whc.unesco.org/en/statesparties/ug> accessed on 06 June, 2018.

[65] Law of the People's Republic of China on the Protection of Cultural Relics 1982 (revised in 2002); Law of the People's Republic of China on Intangible Cultural Heritage 2011; Constitution of the Republic of Uganda 1995; Historic Monuments Act 1967 (Uganda), Traditional Rulers (Restitution of Assets and Properties) Act 1993 (Uganda), Local Government Act 1997 (amended 2002) (Uganda), National Environment Management Act 1998 (Uganda), National Cultural Policy 2006 (Uganda).

policies that protect heritage in China and Uganda may just be mentioned for purposes of clarification.

3.2 China

China has very rich cultural heritage.[66] China's cultural heritage includes architectural designs, paintings, tombs, cultural practices, temples and palaces among others. Some of China's world heritage was destroyed during the Cultural Revolution and what was left is being threatened by destruction on top of the ordinary wear and tear.[67] In the era of rapid development, industrialization and urbanization, some of the cultural heritage is being razed in favour of modern buildings.[68] Article 22 (2) of China's Constitution provides that, 'the state protects places of scenic and historical interest, valuable cultural monuments, and treasures and other important items of China's historical and cultural heritage.' [69] A constitutional provision on cultural heritage protection implies that China is committed to cultural heritage protection. China enacted the Law of the People's Republic of China on the Protection of Cultural Relics (Cultural Relics Law).[70] Article 1 of this law provides that,'this law is formulated in accordance with the Constitution in order to strengthen the protection of cultural relics, to inherit the outstanding historical and cultural heritage of the Chinese nation, to promote scientific research, to conduct education in patriotism and revolutionary traditions, and to build socialist spiritual civilization and material civilization.' This provision further strengthens China's commitment to cultural heritage protection. This Law provides for the management and protection of cultural heritage. Article 8 of the Cultural Relics Law places the responsibility of the protection of cultural relics with the administrative department of state council.[71] A body, State Administration of Cultural Heritage (SACH) oversees the protection of cultural

[66] Huo Z., 'Legal protection of cultural heritage in China: a challenge to keep history alive', (2015) International Journal of Cultural Policy, pp. 1-19 at 15.

[67] Huo Z., (note 66 above), p. 1; Gruber S. 'Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law' (note 6 above) pp. 254 & 260.

[68] Huo Z., 'Legal protection of cultural heritage in China: a challenge to keep history alive' (note 66 above) p. 1.

[69] Article 22 of the Constitution of the Peoples' Republic of China1982 as amended.

[70] Law of the People's Republic of China on the Protection of Cultural Relics (Cultural Relics Law) (1982) (as revised in 2015).

[71] Article 8 of the Cultural Relics Law (China) (note 70 above).

heritage.[72] This arrangement is vital for accountability purposes. Article 5 vests ownership of cultural heritage in the state. This arrangement is good because it enables the government oversee the protection of cultural heritage. The arrangement of state ownership of heritage might however restrict public participation in management of cultural heritage. Whereas article 6 recognises private ownership of heritage items, private owners are expected to abide by the 'state laws and regulations' on protection of cultural relics. There is therefore need for these two legal provisions to be reconciled to ensure that the government does not suppress or override public participation while ensuring that there is no misuse of the cultural heritage site by private stake holders. The protection and management of cultural heritage[73] is also provided for, as well as mechanisms for the establishment of protected areas at national and provincial levels. Regional and Local Governments (LG's) are mandated to establish their own organizations for heritage management overseen by SACH.[74] This arrangement has been said to be problematic because even when overseen by the national body, LG's might have ideas that clash with those of the central government and there will be no uniformity across LG's.[75] It has also been pointed out that the heads of the LG's are not democratically elected, but are appointed by the Communist Party and whose evaluation since the economic reform is based on the GDP of their areas.[76] The LG leaders have been more interested in the economic growth of their regions, rather than conservation of world heritage in their LG's. A case in point is when the Beijing Municipal Government acted in favour of a state developer and demolished the home of a revered architect, Sicheng Liang, which had been listed by the SACH as a cultural heritage of state importance.[77] Article 12 provides for incentives to be given to whoever makes efforts to protect the cultural relics of China. This encourages the communities to value and protect cultural heritage. This practice may not be good because

[72] Government of China, 'State Administration of Culture Heritage' 2014 State Council of the People's Republic of China' <http://english.gov.cn/state_council/2014/10/06/content_281474992893400.htm> accessed on 18 June, 2018.

[73] Articles 2, 5, 6, 7 and 8 of the Cultural Relics Law (China) (note 65).

[74] Article 8 of the Cultural Relics Law (China); Articles 6, 7 and 8 of the Law of the People's Republic of China on Intangible Cultural Heritage 2011.

[75] Huo Z., 'Legal protection of cultural heritage in China: a challenge to keep history alive'(note 66 above) p. 1.

[76] Ibid p. 14.

[77] Ibid.

people might not protect cultural heritage for its value but rather for the incentive. Whereas it is acknowledged that incentives may encourage more sensitization about heritage, people instead need to be objectively sensitized about the value of heritage and the value of protecting it. This is because placing emphasis on incentives may encourage a situation where the safety and quality of heritage is compromised in favour of the highest bidder in terms of monetary incentives. Part VII of the Act provides for the legal liabilities for the violation of any provision of the Act. Article 64 provides that any person that violates the provision of the Act is liable to criminal action and section 65 provides that whoever causes loss or damage to cultural relics is liable to civil action. Section 66 provides that whoever unlawfully causes removal or damage to cultural relics through construction is liable to pay a fine of 50,000 to 500,000 Renminbi (7765,25 dollars to 77647,50, US dollars) depending on the extent of damage caused. These provisions deter potential crimes against cultural relics. The Cultural Relics Law has been criticized for being a strategy to 're-establish the China Communist Party after the trauma caused by the cultural depression'[78] This is because by re-establishing cultural heritage through the law after a depression, the communist party hoped to gain an edge over other political parties, hence a political strategy. It can therefore be argued that heritage might not necessarily have been on the key agenda of the communist party but for purposes of gaining political ground, cultural heritage was given attention. Due the growing demand for art products, there is growth in illicit trade of cultural products, despite China's laws and harsh penalties against such acts.[79] This is an indicator that the law alone might not be enough to protect cultural heritage, but people need to be sensitized about the value of cultural heritage. One would also wonder how the products get sold if they are within secured places. It is possible that the people supposed to protect them are the ones who sell them off. This could be argued to be one of the obstacles to the poor enforcement and implementation of the heritage laws. China also enacted the Law of the People's Republic of China on Intangible Cultural Heritage 2011 which recognises intangible heritage in China and seeks to provide for 'identification, recording filing…and putting in place measures to save and

[78] Bell J. S., 'Introduction to the Cultural Heritage Issue', (note 63 above) 2016, p. 179.

[79] Huo Z., 'Legal protection of cultural heritage in China: a challenge to keep history alive' (note 66), pp. 1-2.

protect intangible heritage which reflect the traditional culture of China.'[80] The intangible heritage should have authenticity, integrity and continuity.'[81] Chapter 5[82] is on legal liability for misuse and non-protection of intangible cultural heritage and provides for punishment in case anyone breaches the provisions of the Act. This act is a deterrence for potential offenders. China has a Ministry of Culture and Tourism which is in charge of cultural matters, including cultural heritage.[83] China has many other laws regulations and ordinances to protect and preserve cultural heritage and they include; Regulations of the People's Republic of China on the Protection of Cultural Relics Act (2017 second revision). Despite China's rich cultural and natural heritage, the government of China has been criticized for not according the cultural and natural heritage the value due to them.[84] This has been attributed to the poor implementation of the legal provisions in respect of cultural and natural heritage protection. This has partly been attributed to financial challenges faced by China. In addition, China lacks cooperation from the different provinces as well as lack of experts required for purposes of restoration of the sites.[85]

3.3 Uganda

Similar to China, Uganda has rich 'historic, natural and cultural heritage.'[86] As discussed in the Chinese context, Uganda is facing challenges in the protection of its heritage due to development and the threat of globalization.[87] Uganda's Constitution of 1995, in its national objective and principle of state policy XXV provides for the preservation and promotion of the country's heritage. However unlike China, this provision remains an objective, making it

[80] Article 3 of the Law of the People's Republic of China on Intangible Cultural Heritage 2011 (note 65 above).

[81] Article 4 of the Law of the People's Republic of China on Intangible Cultural Heritage 2011(note 65 above).

[82] Article 64 and 65 of the Cultural Relics Law (China) (note 65 above).

[83] People's Republic of China, 'Ministry of culture and tourism of the People's Republic of China' <http://en.cnta.gov.cn/> accessed on 11 June, 2018.

[84] Gruber S., 'Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law' (note 6 above), p. 254.

[85] Ibid p. 254.

[86] Nsibambi F. S., 'Reviewing Uganda's Heritage Legislation to suit contemporary dynamics' (note 63 above), p.1.

[87] Ibid.

non-binding. Article 37 of the Constitution of Uganda recognizes the right to culture and provides that, 'Every person has a right as applicable to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others,[88] This provision places an obligation on the government to protect the right to culture just as it would protect any other right. Protection of this right comes with the protection of cultural heritage, both tangible and intangible especially since it does not make any reference to any specific element of culture. The Historic Monuments Act of 1967 (The Act) is the only legislation in Uganda. The long title to the Act provides that, '…. directly provides for the protection and preservation of heritage. It recognizes 'historical monuments and objects of archeological, paleontological, ethnographic and traditional interest.'[89] In providing for the protection and maintaining of sites, Section 1(1) states that, "the Minister may, by statutory instrument, declare any object of archaeological, paleontological, ethnographic, traditional or historical interest to be a preserved object for the purposes of this Act. The Act has been criticized for only recognizing immovable heritage and not movable heritage.[90] Further, the Act does not recognize intangible heritage, yet unlike China, Uganda does not have any other law specific to heritage or intangible heritage. The Baganda tombs have been recognized for their intangible heritage which is linked to spiritual beliefs,[91] yet this is not recognized under the law and it is not clear how this is handled even at the site itself.[92] Uganda however has a Culture Policy[93] which, in its article 2.2 provides that,

[88] Article 37 of the Constitution of Uganda.

[89] Long title to the Historical Monuments Act, 1967 Chapter 46 Laws of Uganda 2000.

[90] Nsibambi F. S., 'Reviewing Uganda's Heritage Legislation to suit contemporary dynamics' (note 63 above), p.3.

[91] UNESCO, 'Tombs of Buganda Kings at Kasubi' (note 44), P. 21 & 26; World Heritage Committee, 'Imperial Tombs of the Ming and Qing Dynasties, state of administration of the Peoples Republic of China' WHC Nomination Documentation, 2 December, 2000 p. 9 <https://whc.unesco.org/uploads/nominations/1004ter.pdf> accessed on 10 June, 2018.

[92] UNESCO Regional Office (East Africa), 'Evaluation Mission 3 on the reconstruction of Muzibu – Azaala – Mpanga tombs of Buganda Kings at Kasubi, a world heritage site of Uganda' p. 18 <https://whc.unesco.org/document/141625> accessed on 10 June, 2018.

> 'the cultural heritage of Uganda includes artistic and cultural expressions. These are; language and literary arts, performing arts, visual arts and handicrafts, indigenous knowledge, cultural beliefs, traditions and values, cultural sites monuments and antiquities.'

Whereas this provision is progressive in its recognition of both tangible and intangible heritage, Uganda needs to take the step of transforming this policy into a legally binding law. Section 8 of the Act provides for the maintenance and inspection by the inspector of monuments but the Act is not being enforced even in the face of destruction of heritage sites. For example, when the Fort Luguard was destroyed and replaced with a mosque, the provisions were not invoked.[94] Section 19 of the Act provides that any one who destroys a cultural heritage or contravenes any provision of the Act is liable to pay a fine of 2000 Uganda shillings (less than 1 US dollar) or imprisonment not exceeding 6 months or both.[95] This provision is very weak compared to China's penalties which are severe and hefty with offenders facing criminal charges and paid fines not less than 50,000 Renminbi (About 7,075.74 US dollars.[96] This can easily deter offenders. The Ugandan penal provision is an indicator that the law is very dated and needs amendment to fit the times and era, in which cultural heritage are in danger due to the already outlined factors.

Beside the weak law governing world heritage in Uganda, there are other challenges like ignorance about world heritage and its value as well as lack of political will.[97] Culture is viewed as backward by some people who prefer modernization.[98] There is also lack of funds to implement the few relevant and weak legal provisions that Uganda has.[99] The government of Uganda has also been blamed for neglecting its cultural heritage.[100] For example the fire

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[93] Government of Uganda, *Uganda National Culture Policy 2006* (Uganda: Ministry of Gender, Labour and Social Development, 2006), <http://ocpa.irmo.hr/resources/policy/Uganda_Culture_Policy-en.pdf> accessed on 09 June, 2018.

[94] Nsibambi F. S., 'Reviewing Uganda's Heritage Legislation to suit contemporary dynamics' (note 63 above) p.3.

[95] S. 19 of the Historical Monuments Act (Uganda) (note 65 above).

[96] Articles 64 and 65 of the Cultural Relics Law (China) (note 65 above).

[97] Nsibambi F. S., 'Reviewing Uganda's Heritage Legislation to suit contemporary dynamics'(note 63) p. 1.

[98] Ibid.

[99] Ibid.

[100] Ibid.

that gutted the tombs of the Baganda kings was blamed on neglect by the government.[101] Unlike, China, Uganda lacks a specific ministry to promote cultural heritage. Cultural heritage is handled by the Ministry of Tourism, Wild Life and Antiquities, which has a department in charge of Museums and monuments.[102] This only takes care of specific tangible cultural heritage whereas matters concerning intangible cultural heritage are handled by the Ministry of Gender, Labour and Social Development.[103] This is an indicator that issues concerning cultural heritage are scattered and mixed up under different ministries which are in charge of many other things and cultural heritage may not be given the due attention it needs. Cultural heritage has a negligible budgetary allocation of only 0.003 percent per year.[104] Similar to China, cultural matters are decentralized at local government level.[105] This could be subject to abuse especially since Uganda lacks a specific government body in place to oversee the activities at local government level, and there are hardly any experts at local government level to properly handle cultural heritage affairs. There is a risk of cultural heritage not being given the due attention it deserves. Having analyzed the extent to which China and Uganda have incorporated international and regional legal provisions within their national laws, it is concluded that China has performed better than Uganda in the domestication of the international and regional legal provisions. The next section will review the extent to which these provisions have been enforced in China and Uganda.

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[101] Ibid.

[102] Government of Uganda, 'Ministry of Tourism, Wildlife and Antiquities' <http://www.gou.go.ug/ministry/ministry-tourism-wildlife-and-antiquities> Accessed on 09 June, 2018.

[103] Nyiracyiza J., 'Archeology Collections of the Uganda National Museum: Preservation and Commemoration of Our Cultural Heritage' (2009) 12 (1), Africa Diaspora Archaeology Newsletter, p. 6; Government of Uganda, 'Ministry of Gender, Labour and Social Development' <http://www.gou.go.ug/ministry/ministry-gender-labour-and-social-development> accessed on 09 June, 2018.

[104] Uganda Coalition on Economic, Social and Cultural Rights (UCESCR), 'The state of economic, social and cultural rights in Uganda and emerging issues' Joint Submission to the United Nations Universal Periodic Review (UPR) of Uganda Second Cycle Twenty Sixth Session of the UPR Human Rights Council 31 October - 11 November 2016, p. 11.

[105] Article 178 of the Constitution of Uganda 1995; Sections 8 (1)(1); 9 (f) (g) (h) and Schedule 5 of the Local Governments Act 1997 Cap 243, Laws of Uganda 2000 as amended.

4.0 Management of China's Ming Tombs and Uganda's Tombs of the Buganda Kings (Buganda Tombs)

China is home to the imperial tombs of the Ming and Qing Dynasties and Uganda is home to the tombs of Buganda Kings at Kasubi which are both cultural sites listed on the World Heritage List.[106] The Ming tombs belong to the state according to section 5 of the Cultural Relics Law of China[107] which provides for state ownership of all ancient tombs. This makes the tombs more protected within the ambit of the laws of China on cultural heritage as already outlined in Section 2 of this paper. Unlike China, the government of Uganda does not take over ownership of the cultural heritage which is privately owned but rather enters into maintenance and custody agreements with the owners of the property, if any.[108] The Buganda tombs are privately owned by the Buganda kingdom.[109] The central government only retains a supervisory and at times a partnership role.[110] For example, the Buganda Kingdom, in partnership with the Uganda government launched the 'Kabaka (King) heritage trail' which is aimed at encouraging the civil society who live around the tombs to get involved in maintenance of the site and in turn they can make products which they can sell to the tourists or do performances for the guests at a fee, part of which can be used to further maintain the heritage site.[111] This is an indicator that Uganda has encouraged public participation in the management of cultural heritage. This has not been without challenges, because civil society ideas sometimes clash with those of the government. State ownership is advantageous because it comes with an annual state budget allocation of 1 million Renminbi (about

[106] UNESCO, 'World Heritage List' <https://whc.unesco.org/en/list/> accessed on 18th of June, 2018.

[107] Cultural Relics Law (China) (note 65 above).

[108] S. 1 (3) of the Historical Monuments Act' 1967 Laws of Uganda, 2000.

[109] S. 2 and Schedule to the Traditional Rulers (Restitution of Assets and Properties) Act 1993 Chapter 257, Laws of Uganda, 2000; Statute no. 7 Constitutional (Amendment) Statute 1993; Statute no.8 Traditional Rulers (Restitution of Assets and Properties) Statute 1993; Kamuhangire E., 'Formal legislation and traditional heritage management systems: A case of interdependence in Uganda' in Ndoro & Pwiti, *Legal Frameworks for the protection of immovable cultural heritage in Africa* (Italy: ICCROM, 2009), pp. 27 – 31 at 31; UNESCO, 'Tombs of Buganda Kings at Kasubi' p. 21 & 26.

[110] Kamuhangire E., (note 109 above).

[111] Kamuhangire E., (note 109 above); Government of Uganda, 'Report on the state of conservation of the tombs of Buganda Kings at Kasubi' 28 February, 2018 <http://whc.unesco.org/en/list/1022/documents/> accessed on 10 June, 2018, p. 4-5.

141,514.80 US dollars) for maintenance of the tombs.[112] The budget allocation for all cultural heritages in Uganda is 0.003 % of the annual budget, which is too little to carry out all the required affairs of all the cultural heritage nation-wide and later on maintenance work.[113] Funds for maintaining the site largely come from the visitors to the site and this is very little because staff salaries have to be paid and the funds left for maintenance are minimal.[114]

The Ming tombs are managed at provincial level and overseen by SACH,[115] and the staff in charge of the tombs includes professional staff who continue to be sent for professional training.[116] This is in accordance with Article 5 (b)of the World Heritage Convention which requires states parties to employ 'appropriate staff and possessing the means to discharge their functions.' The Buganda tombs on the other hand are managed by a newly appointed Buganda Heritage and Tourist Board which works together with the traditional managers of the tombs and the National Technical Committee which was mainly set up to oversee the reconstruction process since the tombs were gutted by fire, but whose advisory role will continue even after reconstruction.[117] The staff of the Buganda kingdom is generally local people that have wide knowledge and history about Buganda Kingdom and the tombs. They have no expertise on cultural heritage affairs and according to tradition, cannot take advice from anybody including expert or technical advice.[118] This is detrimental to the management of the heritage site because in order to maintain the site in this day and age of economic development and climate change, there is need for more than traditional knowledge in the maintenance of the tombs.

In China, the Ming tombs have a buffer zone surrounding it for purposes of its protection as

[112] World Heritage Committee, 'Imperial Tombs of the Ming and Qing Dynasties, state of administration of the Peoples Republic of China' WHC Nomination Documentation, 2 December, 2000 p. 18 & 22 <https://whc.unesco.org/uploads/nominations/1004ter.pdf> accessed on 10 June, 2018.

[113] UCESCR, 'The State of Economic, Social and Cultural Rights in Uganda (note 104 above), p. 11.

[114] UNESCO, 'Tombs of Buganda Kings at Kasubi', (note 44 above), p. 26.

[115] Cultural Relics Law (China) (notes 65).

[116] World Heritage Committee, 'Imperial Tombs of the Ming and Qing Dynasties', (note 112 above), pp. 22, 23, 28.

[117] Government of Uganda, 'Report on the state of conservation of the tombs of Buganda Kings at Kasubi' 28th February 2018 <http://whc.unesco.org/en/list/1022/documents/> accessed on 10 June, 2018, pp. 4-5.

[118] UNESCO, 'Tombs of Buganda Kings at Kasubi', (note 44 above), p. 21 & 26.

well as the cultural items there in.[119] The buffer zone also protects the tombs from encroachment and construction around the heritage site especially in the face of rapid economic development in China.[120] The Buganda tombs lack a buffer zone, which makes it susceptible to intruders and yet the outer fence around it is weak and made out of reeds which usually get eaten by termites. The inner fence of the tombs is in an even worse state because the parts of the reeds are usually taken by the women around the tombs for use as firewood.[121] The lack of a buffer zone makes the tombs vulnerable in the face of urban development especially with several constructions going on around the tombs and with the possibility of road construction and widening.[122] At the time of the nomination of this site, a buffer zone was being considered but it still was not going to prevent construction but would instead limit the height of buildings as well as specific activities. This is because the tombs are located in Kasubi, a busy city suburb in Kampala and is largely a residential area.[123] It should be noted that both heritage sites face some similar protection and maintenance challenges such as 'development pressures' especially with the ongoing rapid economic and urban development in both China and Uganda. People and corporations are inclined to use every available space to construct modern structures, either for business or residential purposes leading to some reported encroachments on the heritage sites' land.[124] Environmental pressures are another challenge for these sites. In the face of climate change, there are a lot of weather changes like heavy rains (floods) causing mould and weakening of buildings. Specifically for the Buganda tombs made up of only traditional materials like wood and elephant grass, there is a lot of decay and termite infestation.[125] Both sites suffer natural disasters like fires, encroachers on buffer zones and too many tourist visitors who

[119] World Heritage Committee, 'Imperial Tombs of the Ming and Qing Dynasties', (note 112), p. 22.

[120] Ibid p. 21.

[121] UNESCO Regional Office (East Africa), 'Evaluation Mission 3 on the reconstruction of Muzibu – Azaala – Mpanga tombs of Buganda Kings at Kasubi', (note 92 above), p. 18.

[122] Ibid.

[123] UNESCO, 'Tombs of Buganda Kings at Kasubi, (note 44), p. 21.

[124] UNESCO (note 123 above), p. 29; World Heritage Committee, 'Imperial Tombs of the Ming and Qing Dynasties', (note 112 above), p. 24.

[125] Ibid.

might sometimes destroy the environment around the sites requiring more maintenance.[126] Although both China and Uganda have taken steps in the preservation and protection of the heritage items in their jurisdictions, China has taken more significant steps than Uganda, as outlined in this section.

5.0 Conclusion and Recommendations

This essay set out to analyse the efficacy of the World Heritage Convention and how it cascades into effectively offering protection of cultural and natural cultural heritage at national level in China and Uganda. International law can only be said to have achieved its purpose if it is effectively enforced at national level. The World Heritage Convention has good provisions which guarantee the protection and preservation of cultural heritage. The Convention however lacks an enforcement mechanism and it operates through World Heritage Committee and the operational guidelines for the implementation of the World Heritage Convention. The convention has faced implementation challenges at domestic level. The essay confirmed that in the face of rapid economic development, urbanisation and climate change, preservation and protection of world heritage becomes increasingly difficult and striking a balance between issues like human rights and sustainable development, even worse.[127] Uganda and China are both facing challenges with implementation of the World Heritage Convention. China has enforced the Heritage Convention better than Uganda at domestic level. It should however be noted that although on the face of it, China seems to have better heritage laws and institutions than Uganda, Uganda's constitutional recognition of culture as a stand alone right with state obligation to protect it places Uganda at a better edge than China which only offers ordinary legal protection of cultural heritage. China's laws, are numerous and comprehensive (including the Cultural Relics Law currently under study), unlike Uganda which has only one law that caters for tangible cultural heritage and has an extremely weak penal provision that is not able to deter crime against heritage sites. This is an indicator that Uganda 's law is very dated as it was enacted 50 years ago and hence needs

[126] Ibid.

[127] Gruber S., 'Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law' (note 6) p. 66.

to be urgently repealed and replaced or at least amended. China is also doing much better than Uganda in the maintenance of their tombs. China's state ownership of the tombs is a best practice that Uganda needs to consider because funds are availed from government for the smooth running and maintenance of the tombs.

Buganda kingdom which relies on levies from tourist who are not very many and the allocated budgetary allocation from the government cannot be relied upon because it is too little. Ming tombs are inevitably in much better shape than the Buganda tombs which were worsened by the fire that gutted them in 2010. Uganda needs to put in place better laws that put in place proper measures for the maintenance of the tombs or take over the ownership of the tombs again rather than have them privately owned by the kingdom. What China needs to learn from Uganda however, is the community involvement in conservation of cultural heritage and specifically cultural heritage and particularly Ming tombs. China also needs to learn from Uganda and consider incorporating the right to culture into its Constitution because this makes the duty to protect cultural heritage more binding on the government. China's legislation has also been criticised as being low levelled.[128] Even if China's legal provisions are numerous and progressive, the enforcement is very weak and the provisions have not been enforced or acted upon.[129] There is also the need for continued monitoring for both sites by the responsible government bodies to ensure continued compliance with the world heritage law.

[128] Yujun G., Zhihua D. and Qiao Xiobing Q., 'China and International Law on Cultural Heritage, Consumer Protection and Food Security' (note 8), p. 346.

CHARITABLE TRUST AS MEANS OF POVERTY ALLEVIATION IN NIGERIA: PROBLEMS AND PROSPECTS

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Abstract

Nigeria is currently undergoing recovery from economic recession which affects the spending-power of government on delivery of social economic rights to its ever increasing population. The level of poverty is very high, Prices of goods and services are high while government finds it difficult to meet the basic needs of citizens such as water, electricity, road, housing, education, health. In a developing country like Nigeria, the functions of government go beyond maintaining law and order but also include provision of essential socio-economic needs. In line with the projection of the current administration of President Muhamadu Buhari to take Nigerians out of poverty by year 2030 and in realization of the fact that government alone cannot cater for all the needs of Nigerians, there is need for Government both at the Federal and state levels to put in place policies that will encourage private sector participation in social-economic intervention programme through institution of Charitable of trust which will assist in equitable wealth distribution. However, it is observed that despite its immense benefits, Charitable Trust is not popular practiced among Nigerians thereby denying many people of getting out of abject poverty. This paper examines the problems and prospects of Charitable Trust as a means of alleviating poverty in Nigerian. Relying on doctrinal research method, the study recommends a general change in attitude and culture of wealthy Nigerians from being self-centered to philanthropic disposition which will assist in equitable wealth distribution in Nigeria.

Keywords: Charitable Trust, Poverty Alleviation, Problems and Prospect.

1.0 Introduction

Nigeria as a leading economy in Africa is currently recovering from economic recession and the government has been complaining of inadequate fund to provide social services and amenities for the wellbeing of its citizenry. Within the period of almost sixty years of independence, Nigeria has witnessed various governments with usual unfulfilled promise of revamping the economy of the country and creating a better life for all the citizenry through provision of jobs, water, good roads and infrastructure. Currently, the rate of unemployment has increased in Nigeria with a corresponding increase in the level of poverty. In 2016, it is observed that the population of Nigeria stands at 168 million with 60 % rate of poverty.[1] As at 2017, Nigerian population is 182 million with over 50% rate of poverty.[2] In 2019, many workers complained of nonpayment of salary for up to ten months in their respective states which leads to lack of income to meet their daily basic needs like food, cloth and shelter. Other people complained of lack of access to good road, water, housing, health care and education. The worst hit among the under privileged Nigerians are the sick but poor Nigerians and in particular, thousands of Internally Displaced Nigerians who are affected by internal conflicts and kept in the IDP Camps in many states like Benue, Nasarawa, Adamawa, Bornu, Cross Rivers and others.[3] Since it has been realized that all the needs of citizens cannot be singularly met by the governments in Nigeria due to paucity of fund, governments have since recognized the important role of private participation in poverty alleviation assistance and donations from public spirited individuals and organizations In line with the promise of the current administration of President Muhamadu Buhari to carry over 200million Nigerians out of poverty by the year 2023[4] the Federal Government of Nigeria has recognized the need for inclusiveness of the private sector as an option for achieving success in poverty alleviation drive and this involves institution of charitable trust by private individuals and private organizations. Charitable Trust when instituted by well-meaning Nigerians shall compliment effort of the Government in providing free health care,

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[1] National Bureau of Statistics, Abuja, (unemployed population data, Nigeria 2018). <http//wwwq42017_q3 2018unemployment_report-pdf-adobe-acrobatreaderDc> accessed May 23, 2020.
[2] Nigerian Vision 2020, Economic Transformation Blue Print National Planning Commission, (Nigeria May2019), p8.
[3] Ibid
[4] President Muhammadu Buhari's Administration's 7Point Agenda under Action People's Congress APC (2019-2023), Nigeria as reported on Channels News Report, May 15,2019.

scholarship, free education entrepreneurs, good roads, cheap housing and other related services to the people. For example, the efforts of Rochas Okorochas Foundation on provision of free education to less privileged children, the Tony Elumelu Foundation for providing youth all over Africa and the rest of the world with entrepreneurial skills, training and fund are a few of the testimonies to the significance of instituting Charitable Trust as a veritable means of poverty alleviation among the people.[5]

However, it is observed that despite the importance of Charitable Trust as a means for alleviation of poverty, Charitable Trust remains very unpopular among Nigerians. Buttressing the above position, Chief Afe Babalola SAN submitted in his interview granted to the Nigerian Tribune that people are no longer philanthropic as they are supposed to be. He said that Nigerians are no longer giving out donations and charity as much as it is expected of them.[6]

This same view was expressed by the Ewi of Ado-Ekiti Oba Aromolaran during the celebration of his 50th anniversary. The Ewi referred to traditional rulers, as the replica of God on earth and lamented that the subjects who are supposed to give them things they live on, no longer do so. He also complained that people no longer give social supports to the less privileged. He said that while the white men and the missionaries have continued to give donations for establishment and improvement of great universities all over Europe, he could not understand the reason why Nigerians do not. He however attributed the reason to the fact that Nigerians are too self-centered and suggested that people's selfish attitude must change. He noted that he has started to give charity and his donation of a building to the University Teaching Hospital (UCH) Ibadan during the 50th anniversary celebration in 2007 was a good example for other people to follow.[7]

This paper therefore, examines the problems and prospects of Charitable Trust as a tool for achieving poverty alleviation in Nigeria. The significance of this study is based on the fact that philanthropism or the act of giving out charity is a catalyst to rapid socioeconomic development of the society. Therefore, a study of this respect will assist to educate the people on the need for creating charitable trust and this will further boost socioeconomic development of Nigeria. Further, this study will help to change the minds of Nigerians to be less self-control and learn to give out charity. It will also serve to enlighten Nigerians that one can entrust his property after death, for charitable purpose which will be beneficial to

[5] How to Establish Charitable Trust in Nigeria,< https://www.wikki.how.com.establish> accessed on Jan. 23, 2020.
[6] Nigerian Tribune, Monday 31 December, 2007, p.8.
[7] Ibid

mankind and other charitable objects. Above all, it will serve as a means of economic empowerment to the less privileged Nigerians thereby relieving them of poverty.

2.0 Meaning of Charitable Trust

The word Trust has been defined in various ways by several authors, but because of the utility of the concept, it has become difficult to give an accurate and sufficient meaning. Charitable Trust is defined as a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of another person (the beneficiary).[8] Sir Arthur Underhill, defined trust as an equitable obligation binding the trustee to deal or control a property for the benefit of the beneficiaries.[9] In essence, Trust is explained as a relationship existing between two or more parties whereby a party known as trustee based on the obligation imposed by equity keeps a property and the title to it in trust for the benefit of another party known as the beneficiary. A trust can be majorly divided into private and public trust. Private trusts are those instituted for exclusive benefit of some private individuals, while Public trusts are those instituted for the benefit of the public. It is in the category of public trust that we have Charitable Trust. The word Charitable Trust includes those trusts which are made for charitable purpose or for the benefit of the public. Such include trust for the advancement of religion, trust for advancement of education, trust for relief of poverty and trust for other purposes beneficial to the public at large.

A charitable trust is a trust whose object is the promotion of public welfare even if it confers benefit on individual or class. As already stated, the purpose of charitable trust is to benefit the general society or at least, a significant proportion of it. Because of this, charitable trusts are treated very favourably and they attract rules not found in other categories of trust.[10]

2.1 Classification of Charitable Trust

It is difficult to give a general definition of charitable trust which connotes a gift for public benefit as people always confuse charitable trust to alms giving. Therefore, for a trust to be

[8] Bryan A. Garner, *Black Law Dictionary, 7th edition*, (Western Group, St. Paul ,1989) p. 204.
[9] Arthur Underhill, *Law of Trust and Trustees,12 Edition* (London Buttermint,1970) p.39
[9] Muiz Banire, *The Nigerian Law of Trust* (Excel publications, Lagos, 2002), p.189.

charitable, its purpose must fall within the spirit and intendment of the preamble to the statute of Elizabeth 43 Elizabeth 1 C4, 1601 commonly called the Charitable Uses Acts 1601.[11] Charitable Trust, includes provision for the relief of the aged, impotent and poor people, the maintenance of sick and maimed soldiers, and mariners, school of learning, free schools and scholars in universities, the repair of bridges, ports, havens, causeway, churches, sea banks, highways, the education and preferment of orphans, the marriage of poor maids, aid and help of young tradesman, handicraftsmen, relief of poor infants, concerning payment for setting out of soldiers and taxes, etc. The trust, which fall within the above Preambles in the Statutes of Charitable uses 1601 are charitable. However, it has been held that this list is outdated and was not even intended to be a complete list of charities. It has been held that a more legal and general definition of charitable trust is that of Lord Machanghten in *Commissioner of Income Tax v. Permisel:*[12] trust for relief of poverty; trust for advancement of education; trust for advancement of religion; and trust for other purposes beneficiary to the society. The question whether a trust is charitable or not is a question of law to be decided by the judge in the light of circumstances in which the institution of trust came into existence. In the case of *Incorporated Council of Law Reporting for England and Wales* v. *Attorney General* (1972)[13] it was held in reaching a decision whether a trust is charitable or not, the judge is not affected by:

a. testator's opinion as to whether the purpose he has indicated is charitable or not;
b. testator's motive, as this will not prevent a gift from being charitable if the purpose is one that is charitable in the eye of law.

In order words opinion and motive cannot be the yardstick for determining whether a trust is charitable or not. What is essential is the intention and purpose more so, when such is charitable in the eyes of the Law.

2.2 Trust for Advancement of Religion

For a gift to be charitable under the above, it must be for the advancement of religion. Thus, in the case of *Iyanda and Others v. Ajike & Ors*[14], the court was to determine whether the bequest of a room to be used as a private family mosque in a private house was for charitable

[11] Statute of Charitable uses Act 1601
[12] [1891] AC (531) 583
[13] (1972) Ch. 73
[14] [1894] 19 NLR 11

purpose. Baker, S.P.J held that as the room was intended by the testator to be used as a private family

mosque in a private house, there was no charitable purpose in the devise and the trust relating to it being void, the room fell into the residue. "Religious purposes are charitable only when religious services tend directly or indirectly towards the instruction or edification of the public."[15] A gift for advancement of religion in general term is charitable as well as a gift for specific religious purposes. Accordingly, a gift for the stipend of the clergy, a gift for maintenance of a church yard, including tombs, and a gift for the improvement or upkeep of the fabric of the church has been held charitable.

2.3 Trust for Advancement of Education

Trust for the establishment and support of professorship and lectureship are obviously educational in character. Trust for purposes such as increasing the stipends of university teachers and fellows of colleges have been held to be charitable. The same principles applied to learned societies and institutions, colleges and universities. In *Incorporated Council of Law reporting for England and Wales v. A.G.*[16] the court held that the council was a charitable organization since the preparation of law reports was for the advancement of education. However, while it must be known that the element of public benefit must be reflected in a gift of charitable trust and the gift must be for the advancement or furtherance of some educational purpose, a gift for the advancement of political education in association with a political party and in furtherance of its aims is not charitable[17].

2.4 Trust for Relief of Poverty

The following trusts have been held charitable for relief of poverty; a gift for relief of poor relations of the donor; gifts for benefit of the widows and children of deceased ex-employees of a firm; a gift for encouragement of poor emigrants; a gift for poor employees of a firm; and a gift for ladies of limited means[18].From the above, what is required is for an individual to be in difficult circumstances as to be unable to maintain a modest standard of living. Therefore, for a trust for relief of poverty to be valid, it is essential that all the objects should fall within designation "poor". Thus, in *Re-San's Will Trusts*[19], a gift for the working classes is held not

[15] Edward Stockwell., *Trust and Equity* (Person Education Ltd, England, 1992), 13.,
[16] Up cit. See also Royal College of Surgeons v. National Provincial Bank Ltd. [1952] A.C 631
[17] Mofat G., *Trust Law, Text and Material 4th Edition* (Cambridge University Press, 2008), 7.
[17] Fabunmi J.O., *Equity and Trust in Nigeria,* (Ile-Ife University Press 1986) p.166
[19] (1954) Ch. 265.

to be a gift for the relief of poverty because the phrase "working class" does not necessarily mean poor persons but if the gift had been made to members of the working class who are aged or widows, trust for relief of poverty might be implied.

2.5 Trust for other Charitable Purposes Beneficial to the Community

This type of trust covers all other instances in which a trust is charitable and an element of public trust is evolved. In *Incorporated Council of Law Reporting for England and Wales v. A.G.*, Jessel L.J. said that the courts generally accept that if a purpose is shown to be beneficial to the community, it is prima facie charitable in law.[20]

In *Re Jones* deceased, the testator directed his trustee to build a hall which shall remain absolutely for use of his countrymen of Lagos community forever. The testator further directed that the first floor of the building was to be used for public meetings and the top floor to be used for a library. The Privy Council held that notwithstanding that the will contained no express devise to the trustees, the property has by the terms the will to be affected with a permanent trust is beneficial to the community of Lagos weighed very much with the court in arriving at its decision. However, it is not every purpose of public benefit which is charitable but such purposes that come within the preamble to the statute of Uses 1601 are charitable, most of the trusts under this heading are not based on logic, but upon precedent. Such include a gift for the welfare of cats and kittens, a trust for protection and benefit of animals, a trust for establishment of a hospital in which animals which are useful to mankind should be properly treated and cured with a view to public advantage and similarly, a trust for promotion of sports as an end in itself.

3.0 Requirement of Public Benefit

It is a general assumption that for a trust to be charitable it must benefit the commune as a whole and public benefit means one that can be established by the evidence in a law court. Therefore, a trust is not charitable if it benefits only the inhabitants of a particular area. In *Iyanda and Others v. Ajike & Ors*[21], a bequest of a room to be used as a private family mosque in a private house was held not charitable as it did not benefit the public. Further, a bequest that benefits only a section of the whole community is not charitable, nor is a bequest to persons who are defined by a test of relationship or a particular individual or body. A

[20] Supra, p.578
[21] [1894] 19 NLR 11

bequest for education of children and grandchildren of testator was held not charitable. Similarly, a bequest to a member of a particular company is not charitable.[22]

However, there are exceptional instances where element of public benefit is either relaxed or not required. Such instances include trust for relief of poverty, even though the beneficiaries are defined by a test of relationship to an individual or body, or a trust for a company's employee. All these have been held to be charitable. Similarly, a gift in which a charitable purpose is implied has been held charitable, provided the terms of such gifts do not negate charitable purpose.[23]

Also, a gift is charitable if it is made to a person whose office is charitable. Thus, a gift to a vicar or other religious body without indicating the purpose to which the gift is to be applied creates a charitable trust because it will be implied that the property must be applied to public and not for religious purpose. The person is irrelevant if the purpose is indicated and the purpose must be exclusively charitable. From the above, it must be noted that a trust is not charitable unless the objects are exclusively charitable.

3.1 The Concept of Taking People out of Poverty (Poverty Alleviation)

Poverty can be explained as depravation of access to opportunities or from obtaining other essential elements of life such as food, water, electricity, health care, education, good roads, jobs, financial assistance necessary for having a decent and comfortable life. Poverty affects men and women in the society in different ways but generally the power to grow and enjoy a good life. The policy of taking the people out of poverty in Nigeria is therefore predicated upon the need to combat poverty among Nigerians by embarking on various poverty reduction programmes which Charitable Trust is considered as one of such anti-poverty programmes being operated by non-governmental bodies.

3.2 Charitable Trust and Poverty Reduction in Nigeria

Charitable Trust is a means of poverty reduction and empowerment of people by nongovernmental individuals, associations and foundations with the ultimate goal of enhancing socio-economic growth of the people. It overcomes poverty through provision of social supports and services like scholarship, health-care, financial support, jobs and entrepreneur promotion, portable water, access roads, education training centers, religious centres and other needs which many people are deprived of, thereby making life decent and

[22] In Re Obabumi Pedro [1961] LLR 127

[23] Jegede M.I, *Law of Trust, Bankruptcy and Administration of Estate*, (MIJ Professional Publishers Ltd, Lagos) p.7.

more meaningful to people in Nigeria. Several studies have shown that implementation of Charitable trust in Nigeria has reduced sufferings of many lives and facilitated their access to enjoyment of essential social amenities.

4.0 Charitable Trust Creation under Nigerian Law

Charitable Trust can be created during the lifetime of the settlor or from part of the settlor's will after his death. Charitable Trust foundations are registered as incorporated trustees or association limited by guarantee under the Companies and Allied Matters Act (CAMA) Nigeria. However, the unincorporated Charitable Trust organizations previously registered under the common law in Nigeria are also recognized but may not be eligible for tax reliefs as VAT like those under CAMA. According to section 25(2) of CAMA,[24] "Charitable organization shall not register with share capital or allot shares to its members that create it or create ownership right on any member, although it stands as an artificial body which can sue and be sued by the fact of its registration". Relevant facts that are required to be stated in the form for registration of charitable trust organization according to section 674 of CAMA include: name of the Charitable trust body, the aims and objectives of the organization, the names and particulars of board of trustees as well as the rules that prohibit any trustee or member of the organization from diverting the fund.[25]

5.0 Assessment of Implementation of Charitable Trust in Nigeria

Charitable Trust organizations are organized in Nigeria for various purposes. Such include foundation for relief of poverty advancement of education, advancement of good healthcare, advancement of religion and for other purposes. Assessment of the existing Charitable Trust Organizations and their specific objectives are hereby made. Among the Charitable Trust Organizations for relief of poverty in Nigeria is Akinola Foundation. Established in 2009 and it caters for the needs of the widows of journalist on official duty. It presented its first set of beneficiaries with cheques for various sum of money on 27/10/2010 as financial assistance at Ladi Lawal centre, Lagos state Chapter of Nigerian Union of Journalist. The Tony Elumelu Foundation for skill acquisition and Poverty alleviation among youth in the world is another strong charitable organization. This foundation has so far empowered thousands of youths on skills and enterpreneural development across the globe. Others include Ndubizu Charitable

[24] S.25(2) Company and Allied Matters Act of Nigeria LFN 2004
[25] Ibid

Foundation, Honey Foudation, Erelu Adebayo foundation and a host of others have assisted Nigerians in the areas of financial assistance and community development services.[26]

Some Charitable organizations established for advancement of education in Nigeria include: Rochas Okorocha Foundation which has gone a great length in establishing many primary and secondary schools for orphans in Nigeria, trained and accommodated them free of charge. New Creation Education Foundation(NCEF), established in 2001. There is also Afe Babalola Foundation which has donated buildings and facilities to tertiary institutions in Nigeria. Edu Watch Foundation is another charitable organization in Nigeria. The above foundations have contributed immensely to sponsoring free education for many students in Nigeria.

The Charitable Organization for the advancement of religion in Nigeria include the World Bible College (WBC) Abuja, Edumoga Inland Mission of Benue State which specializes in providing education and financial supports to foreign based indigenes of Edumoga in the United Kingdom. Organizations established for advancement of good health include: Kanu Nwako Heart Foundation, registered 2005 in Lagos, it caters for various Nigerians who suffer from various heart defects.[27] Over 810 Nigerians have benefited from the foundation in 2008.There is Family Care Association established in Lagos and it embarked on Anti malaria Programme in 7 states of Nigeria. Also, there is Ladi Lawal Foundation established in Lagos to enlighten the public in knowing about their genotype. The Charitable Trust Organizations established for other purposes beneficial to the community or class of people in Nigeria include: The British-American Tobacco Nigeria Foundation (BATN) established 2002 to improve quality of life of people in the rural area. There is the Nigerian Conservation Foundation, (NCF) 1982. This foundation developed unique nature conservation strategies that are helpful to the people in Akwa Ibom State, Cross River, Edo, Lagos, Ogun, Plateau, Taraba and Jigawa States of Nigeria. The African Artist Foundation, established in Lagos and it caters for ageing and young artists. Abia State Association Incorporation is another foundation that caters for the need of Abia State people in diaspora. Adisa Bakare Foundation established in Ilorin and caters for the needs of indigent students and indigent people in Kwara State. There is also, Mustapha Akanbi Foundation also established in Ilorin, Kwara State and it caters a lot for indigent people and students in Kwara State. Others include Save a Child Foundation established by Tolulope Agboola, The Labadidi Foundation for leadership

[26] How to Establish Charitable Trust in Nigeria< https://www.wikki.how.com.establish> accessed on Jan. 23,2020

[27] Ibid

development of Nigerian youth was established by Daniel Ogechi Akujobi Memorial Foundation established for poverty alleviation among Nigerians and the host of others.[28]

However, it is observed that despite the laudable contributions of the above Charitable Trust Organizations to poverty alleviation in Nigeria, the level of implementation of charitable trust is still low. Also in term of number and popularity, the existing prominent charitable institutions which include; Afe Babalola Foundation, Rochas Okorocha Educational Foundation, Tony Emulemu foundation, Mustapha Akanbi Foundation, Adisa Bakare Foundation and the host of others are known to be very few compared to the over 180 million population of Nigerians. Therefore, activities of the existing charitable foundations in Nigeria are extremely inadequate and relatively incommensurate with the demands of Nigerians for massive poverty alleviation. In order to improve on the low level of popularity of Charitable trust among Nigerians, the following identified problems need to be addressed.

6.0 Problems of Charitable Trust in Nigeria

The fact that Charitable trust and other related nonprofit organizations are mandated to pay Value Added Tax (VAT) as provided under the Value Added Tax Act 1993 and the VAT Amendment Act 2007 as well as Federal Revenue Service Establishment Act 2007 is capable of discouraging people from creating Charitable trust as such interested people will find it difficult to understand the rationale behind payment of VAT since tax exemption had already been granted to creators of Charitable Trust under Nigerian Law.[29]

It is observed that prevalence of extended family system with a well developed social welfare system which duplicates many of the beneficial effects of charities is responsible for lack of popularity of charitable trusts. This is because in Nigerian society, the social needs such as relief for poverty and advancement of education are in most cases taken care of by wealthy members of the family and not by operation of a welfare state or by charity system as would be found in very advanced western countries, but by all embracing extended family system. Under this system, any individual who has become averagely wealthy in the society is required to maintain and support many of the less privileged members of his extended family. This practice is done directly e.g. by paying school fees of his relatives or by erecting at his expense, a building to house his relatives, giving monthly stipend for food or indirectly by making a cash donation to some local community project such as donation for

[28] Ibid.

[29] Afolabi Elebi, et al "Charitable Objects and Regulatory Issues in Nigeria's Not For Profit Sector" <http/lelawlegal.com2020/04/3/charitable trust/utml_source> accessed May 25, 2020.

construction of roads or a maternity hospital which will be to the benefit of all members of his family living in that community. Consequently, there is a little room left for charities, because many of the functions of charities are performed by extended family system[30]. Another factor is that the current level of economic depression and poor salary remuneration to workers in Nigeria have made it difficult for individuals to accumulate surplus funds which can be used to establish charities after all the demands of their family have been met. Further, it is observed that prevalence of poverty in Nigeria whereby many people do not have access to basic essentials of life like employment, good food, housing and financial empowerment has made it difficult for those who have interest in charity to be buoyant enough to institute charitable trust.

Absence of philanthropic culture is another hindrance to popular practice of charitable trust in Nigeria. This is because people are no longer philanthropic as they are supposed to be, people no longer give out much or donate for a course as expected of them. This view was attested to by Chief Afe Babalola, lamented about the lukeworm attitude of Nigerians to giving donations and embarking on all forms of charity. They attributed materialistic tendency of Nigerians as the cause of their poor culture for philanthropism.

Selfish tendency is another factor against popularity of Charitable Trust. This is based on the on the reason that giving alms in the mosques and churches to the less privileged people is not fashionable to a great extent in Nigeria because many people prefer to spend their money on social parties and other self-aggrandizing programmes that will fetch them personal popularity and recognition than social service like charitable trusts.[31]

Another problem of popular implementation of Charitable Trust is Ignorance. This is because a lot of people still do not know that you can leave behind your property after death for the benefit of nonhuman objects such as cats or for saying prayers for the dead people in the mosque or saying mass for the dead in the church for the repose of the testator's soul. Capitalism is another factor militating against popularity of Charitable Trust. This is based on the fact that that the capitalist system of economy being practiced in Nigeria has made people to develop the tendency to accumulate money and pile up public wealth for personal use rather than for public use with resultant effect that few privileged people are rich while so many people languish in poverty. Therefore, the need to ensure the accumulated wealth is

[30] Kodilinye, G. *An Introduction to Equity in Nigeria,* (Evans Publications Ltd. Lagos,1986), 97
[31] Chief Afe Babalola, Interview with Nigerian Tribune, 30/12/2007

also inherited and perpetrated in the family assets made it difficult for some wealthy people to give out charities.[32]

7.0 Prospects of Charitable Trusts in Nigeria

Notwithstanding the above problems of Charitable Trust, it is observed that Charitable Trusts stand to bring about many benefits and thereby facilitates rapid socio-economic recovery for Nigeria if popularly practiced. It is also observed that popular practice of Charitable Trust will continue to serve as an important tool for complementing government efforts particularly in the area of provision of education, health services, provision of roads, portable water, religious advancement, relief of poverty and other public empowerment needs. Since the poor financial position of governments in Nigeria has constrained their capabilities to effectively finance public institutions, a number of public educational institutions therefore have to rely on endowment fund provided by private individuals and corporate bodies for meeting some of their official obligations. Some private individuals and organizations in the forefront of providing endowment support include the Lambo Foundation which tremendously financed community health and community health educational projects at the University of Ilorin. Also, Mallam Yusuf Olaolu Ali SAN, a prominent legal practitioner, SAN privately financed provision of computer equipment at the Faculty of Law Computer Centre and at Obafemi Awolowo University, Ile Ife, Faculty of Law Computer Centre.[33] Also, the same Yusuf Ali SAN built and donated 80 bed hostel accommodation each to University of Ilorin and Osun State University, Faculty of Law, Ifetedo Osun State, in 2011and 2012 respectively.[34] Another prospect is that popular Charitable Trust will continue to serve as a vehicle for social and religious upliftment. This is because proliferation of churches and mosques and religious groups in Nigeria has made it necessary for such religious organizations to appeal for fund as charitable donation from members of the public. An important prospect of Charitable Trust is that it will continue to serve as a means for redistributing wealth between the rich and the poor in Nigeria. This idea is already reflected in one of the cardinal divisions of Charitable Trust as trust for relief of poverty. This is because the aspect of Charitable Trust which provides financial gifts for the relief of poor people including the widows, the orphans, the aged, poor emigrants and others will go a long way to achieve redistribution of wealth from

[32] Kodlinye, G., *An Introduction to Equity in Nigeria,* (Daybis Ltd.Ibadan, Nigeria 2001), p.97
[33] Bakibinga D.J.,*Law of Trust in Nigeria* (Univeristy of Ilorin Press 1989) p.29.
[34] Citation of Yusuf Ali SAN in (the Jurist,LawStudents Journal,Faculty of Law,University of Ilorin Nigeria,2012).

the rich to the poor.[35] Charitable trust will also continue to serve as a reliable means of remembrance for the testator who donated it. It has been observed that as at today, one of the most reliable means of remembering testators after death is through the implementation of charitable trust which he instituted while alive. Such foundations like Adisa Bakare Educational Foundation in Ilorin, Kwara State, Moshood Abiola Foundation in Accountancy, Dideolu Specialist Hospital/ Health Foundation in Ogun State, Oyawoye Foundation in science studies, the Lambo Foundation in Health Education[36] as well as Mustapha Akanbi Foundation Ilorin Kwara State among others, will serve as a reliable means of remembering the testators during and after they have died. It has been observed that Charitable Trust shall continue to serve as a means of getting spiritual accomplishment. The fact that that many rich and aged people in Nigeria believe and cherish the idea that doing good for the benefit of people brings about a more fulfilling spiritual reward than financial benefit will make more people to engage on creation of Charitable Trust like building churches, mosques, maintenance of church yard, mosques or giving stipend to the clergy because they believe this will bring them more spiritual rewards.[37] Another factor is that Charitable Trust has the prospect of certainty. Once established as an exclusive charitable trust, no matter the extent of the generality of its objectives, Charitable Trust will not be operated in a way that will make it run afoul of its objectives. It is this certainty factor that makes Charitable Trust appealing to testators. Special tax exemption privileges are perhaps one of the reasons why charitable Trust still has a good prospect in Nigerian society today. Ordinarily, charitable trust is exempted from income taxation. Also, there are tax inducements offered to testators to cover some benefits in charitable organizations. This is because under section 21 (5) (c) of the Companies Income Tax Act, donation made by a company for charitable purpose are deductible from the company's income, whereas, this special concession does not apply to other aspects of trust.[38]

8.0 Conclusion

It is found from the study above that the level of implementation of Charitable Trust is generally low in Nigeria and the problems militating against its popular implementation include the prevalence of extended family system, the high level of economic depression, prevalence of poverty, lack of philanthropic culture, general custom in Nigeria, selfish

[35] Ibid
[36] Mofat, G,.*Trust Law in Nigeria*, Text and Materials 4th edition, p. 7.
[37] How to Establish Charitable Trust in Nigeria, https://www.wikki.how.com accessed on 21/03/2020
[38]S. 21(5) Companies and Allied Matters Act 1990.

tendency and ignorance. However, considering the immense benefits of Charitable Trust in taking Nigerians out of poverty, it is hereby recommended that more work should be done by the government in Nigeria to ensure that a lot of public enlightenment and mass mobilization of people are made for overcoming the problems of ignorance, lack of philanthropic culture, selfish tendency is such a way that will enable more people to embrace the culture of public charity thereby promoting institution of Charitable Trust that will assist in alleviating poverty in Nigeria.