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PLEA BARGAINING IN UGANDA: IS THE CRIMINAL JUSTICE SYSTEM COGNIZANT OF WHAT IT IS UP AGAINST?

Emma Charlene Lubaale*

ABSTRACT

Criminal justice systems across the world are devising viable options to address the challenge of case backlog, and plea bargaining has emerged to be a dominant subject on their agendas. Over the years, plea bargaining has earned the support of many criminal justice systems to the extent that currently, emphasis is being placed on time and cost effectiveness, at the expense of the constitutional rights of the accused. Some of the arguments advanced for invoking it include the fact that developed economies in the West such as America have applied it for centuries. Uganda recently slotted the option of plea bargaining on its agenda. What remains largely unclear, however, is whether this procedure measures up to Uganda's Constitution. This article examines the constitutionality of plea bargaining. For justice systems like Uganda's, which have over the years managed to dispense justice without invoking it, the question is: Is plea bargaining inevitable? Should the fact that plea bargaining is applied in developed economies such as America's, automatically legitimise the procedure in Uganda's justice system? In the event that Uganda's criminal justice system is inclined towards this procedure, the article offers insight on how the procedure could be applied to ensure that the rights of the accused are limited as minimally as possible.

I. INTRODUCTION

Plea bargaining is a form of agreement between the prosecution and the defense where the accused admits guilt in return for a reduction in their charge or sentence.[1] The laws of Uganda define it as 'the process between an accused person and the prosecution, in which the accused person agrees to plead guilty in exchange for an agreement by the

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1. R.E Scott & W.J. Stuntz, *Plea bargaining as a contract*, 101 THE YALE L.J. 1909 (1992), at 1909; A.W. Alschuler, *An exchange of concessions,* 142 NEW LJ. 937 (1992), at 937.

prosecutor to drop one or more charges, reduce a charge to a less serious offense, or recommend a particular sentence subject to approval by court.'[2] The implication of this procedure is that the accused agrees to plead guilty in return for some concessions from the prosecutor. The accused can plead guilty to a less serious charge or to one of several charges in return for dismissal of other charges, or, plead guilty to the original criminal charge in return for a more lenient sentence. The major difference between plea bargaining and a guilty plea is that plea bargaining negotiations often involve the prosecutor and defence, they take place prior to trial and the accused waives his or her right to trial upon accepting the prosecutor's concessions.

In terms of historical origin, the notion of plea bargaining was 'essentially unknown during most of the history of common law.'[3] It only emerged under circumstances that, to this day, remain far from settled. It is not clear when exactly plea bargaining developed since not much is written about its exact origin. However, the little there is in terms of its historical development suggests that the need to save costs and deal with criminal case backlog was a huge impetus for the advent of plea bargaining.[4] There is still profound scholarly divergence on the historical development of plea bargaining. Commentaries on this issue have done nothing more than create uncertainty as they are far from consistent. Some commentators are of the opinion that plea bargaining was a major feature of criminal justice even prior to the 19th century.[5] Others contend that it was not until the end of the 19th century and the beginning of the 20th century that plea bargaining emerged, mostly in western states, including the United States of America (USA) and England.[6] Commentators who subscribe to the latter argument argue that prior to the 19th century, plea bargaining had no place in criminal justice and was in fact illegal.

Despite the controversy surrounding the origin and development of plea bargaining, several commentaries tend to suggest that at common law, criminal justice systems were generally not very receptive of plea bargaining. Studies suggest that even states such as USA whose courts have severally invoked this notion were initially hesitant to accommodate it. In fact, a number of earlier decisions by American courts implicitly suggest that the notion of plea bargaining was generally frowned upon. However, challenges such as the length and cost of criminal trials exacerbated the

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2. § 4 of the Judicature (Plea Bargain) Rules, 2016 (Under section 41(1) and 41(2) (e) of the Judicature Act, Cap.13) Herein after 'The 2016 Rules'.

3. A.W. Aschuler, *Plea bargaining and its history*, 79 COLOMBIA LAW REVIEW 1 (1979) at 4.

4. *Id.*

5. See for example, J. Langbein, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 70 (1974).

6. See for example, Aschuler, *supra* note 3.

pressure on American courts, leaving open the possibility of giving regard to plea bargaining. Not surprisingly, in the 1970 decision of *Brady v. United States*, the Supreme Court of America ruled that plea bargaining was 'inherent in the criminal law and its administration.'[7]

In recent times, plea bargaining has grown in its stature and impact that many criminal justice systems consider it indispensable. Presently, the USA has the most developed system of plea bargaining with reports indicating that over 90% of criminal cases are disposed of by plea bargain as opposed to a full trial.[8] Over the years, plea bargaining (as opposed to full trials) has been deemed indispensable in justice systems like USA's, for multiple reasons. The procedure has been vouched because of its potential to reduce case backlog, its role in reducing overcrowding in prisons, its ability to save the government's meagre financial resources that would otherwise be spent on full trials, and its time saving potential.[9] Arguments have equally been advanced to the effect that the accused stands to benefit from the plea bargaining procedure.

Notably, the procedure allows the accused to admit guilt and to assume responsibility for their conduct.[10] Further, in pleading guilty, arguably, the accused is spared 'the anxiety and uncertainties of a trial.'[11]

In Uganda, although plea bargaining is still in its early stages (having only gained momentum in 2013), arguments for the practice have earned the favour of a number of Ugandan legal professionals. Justice James Ogoola, the former Principal Judge of the High Court of Uganda, is on record for observing that plea bargaining not only ensures that people spend less time on remand, but also saves tax payers' money that would otherwise be spent on long investigations and facilitation of witnesses.[12] Justice Ogoola made note of a session in Lira District in which 200 cases were cleared in two weeks at a cost of only two million Uganda Shillings.[13] He contrasted the

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7. *Brady v. United States*, 397 U.S. 751 (1970).

8. U.S. Department Of Justice, Bureau Of Justice Statistics On State Court Sentencing Of Convicted Felons (2005).

9. M. Halberstam, *Towards neutral principles in the administration of criminal justice: A critique of supreme court decisions sanctioning the plea bargaining process*, 73 J. CRIM. L. & CRIMINOLOGY. 1 (1982), at 35; J. Mazzone, *The waiver paradox*, 97 NW. U. L. REV. 801 (2003), at 837-838; S.J. Schulhofer, *Is plea bargaining inevitable?* 97 HARV. L. REV. 1037 (1984), at 1039-1040; T.R. McCoy & M.J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887 (1980) at 905; *Santobello v. New York* 404 U.S. 257 (1971)*; Brady* case, *supra* note 7.

10. *Id*.

11. *Id.*

12. P. Amoru, *Jails overcrowded says Justice Ogoola,* DAILY MONITOR, October 13, 2008, at 2.

13. *Id.*

foregoing figures with the mere 30 cases that would have been cleared in a month, at a cost of 15 million Uganda Shillings had a full trial been conducted. While launching the plea bargaining procedure in Mbarara in 2014, Justice Yokoram Bamwine, Uganda's current Principle Judge, offered multiple reasons to justify plea bargaining in Uganda's criminal justice system.[14] Justice Bamwine observed that the situation in prisons is alarming and the judiciary had to look outside its normal operations to find a solution to the huge case backlog. Justice Bamwine added that plea bargaining was timely in terms of its potential to save time and Uganda's meagre resources.

Similar sentiments were shared by Mike Chibita, Uganda's Director of Public Prosecutions, who reiterated that the program is much cheaper compared to the normal process where suspects undergo a full trial.[15] In encouraging Ugandans to embrace the procedure, Chibita grounded his argument in the fact that USA, a well-developed economy and country with more judges, has embraced it.[16] The foregoing argument was also advanced by Johnson Byabashaija, the Commissioner General of Prisons in Uganda. In a 2015 paper presented by Byabashaija (on behalf of the Uganda Prisons Service), during an annual judges' conference, the Commissioner General recommended the increased use of plea bargaining in order to decongest prisons and to help reduce case backlog, arguing that most suspects spend years remanded in prison without being produced in court.[17]

Aside from the judiciary, some Ugandan scholars have equally added voice to the indispensability of plea bargaining in Uganda's criminal justice system. Kaweesa, in his study of case backlog in Uganda in 2012, vouched for plea bargaining as a viable option in addressing case backlog.[18] He argued that the effectiveness of plea bargaining in Uganda has a lot to do with a legal framework establishing the procedure of plea bargaining. To Kaweesa, a legislative framework would give plea bargaining legal force. He accordingly recommends that legislation be enacted as soon as possible to

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14. A. Wesaka, *Judiciary launches plea bargain program in Mbarara, 1000 cases to be heard*, DAILY MONITOR, October 6, 2014; H. Nsambu, *Judiciary introduces plea bargain sessions,* NEW VISION, September 1, 2014; E. Anyoli, *Plea bargain directions is to enhance efficiency of criminal justice system-Judge*, NEW VISION, April 15, 2015.

15. Wekesa, *id*.

16. *Id.*

17. J. Byabashaija, Views of Uganda prisons service on the performance of the judiciary (A paper presented during annual judges' conference at Imperial Golf View Hotel, Entebbe on February 24, 2015), at 1-5.

18. G. Kaweesa, Case backlog and the right to due process: The Uganda judiciary (L.L.M. Dissertation, Makerere University, 2012), at 102-105.

address this gap. Wekesa and Wamboga's[19] report similarly affirms the enthusiasm among legal practitioners towards the advent of plea bargaining. These authors note that there is close to a unanimous consensus among court users in Uganda on the fact that 'the trial procedure is long and tedious.' Most significantly, in April 2016, the rules governing the procedure of plea bargaining—that is, The Judicature (Plea Bargain) Rules 2016— officially became law in accordance with section 41(1) and 41(2) (e) of the Judicature Act, which confers upon the Rules Committee the discretion to make rules to govern the administration of justice. With the codification of plea bargaining rules, the procedure of plea bargaining has been legitimized. Precisely put, plea bargaining is now a major feature of Uganda's criminal justice system.

What remains largely unclear, however, is whether the implications of this procedure for constitutionally guaranteed rights have been carefully considered. The purpose of this article is to critically analyse the implication of plea bargaining for selected constitutional and doctrinal principles in the context of Uganda. The article is not intended to discredit the arguments advanced by adherents of plea bargaining in Uganda. Rather, it seeks to trigger critical thought on the part of criminal justice professionals, in particular, on the need for constitutionally guaranteed rights to be a major part of the reform agenda. Notably, the article does not offer clear cut solutions. In fact, it raises more questions than answers. However, the questions raised are geared towards putting to question the preparedness of Uganda's criminal justice system to strike a proper balance between invoking the plea bargaining procedure and guaranteeing the constitutional rights of the accused. In advancing the arguments in this article, the author draws on selected criminal justice systems which have over the years invoked plea bargaining. In terms of comparison, the systems in USA and Germany are placed at the heart of the discussion. USA is considered for the obvious reason that it has one of the most developed systems of plea bargaining. Germany on the other hand is considered because, just like Uganda's system, Germany was once described as a 'land without plea bargaining.'[20]

II. PLEA BARGAINING IN UGANDA: THE LAW APPLICABLE AND EMERGING JURISPRUDENCE

It would be inchoate to embark on a critical analysis of the implication of plea bargaining on constitutionally guaranteed rights in the context of Uganda without

19. A. Wekesa & S. Wamboga, Plea bargaining, unpublished.

20. *See*, J.H. Langbein, *Land without plea bargaining: How the Germans do it,* 78 MICHIGAN L. REV. 204 (1979), at 204-225.

providing a basis upon which that analysis gains credence. For this purpose, selected cases on plea bargaining in the context of Uganda are critically analysed. Additionally, the law applicable to plea bargaining in Uganda is briefly discussed to describe the parameters of this procedure in Uganda's Criminal justice system. Furthermore, since, as consistently noted, plea bargaining has featured prominently in the criminal justice system of USA, selected cases on the problematic outcomes of plea bargaining in USA are briefly discussed. The entire discussion in this section is intended to underscore the need to increasingly put to question Uganda's preparedness to invoke plea bargaining.

Plea bargaining in Uganda has since April 2016 been codified.[21] Codification plays several roles including the furtherance of certainty, accessibility and uniformity with regard to the application of a particular principle of law.[22] It is not feasible to analyse these rules in detail in this article. For this purpose, I confine myself here to a general exposition of these Rules. As a starting point, the Rules apply to all courts of judicature in Uganda.[23] In effect, both Ugandan magistrate courts and High Courts can invoke the procedure of plea bargaining in criminal matters. It follows logically that the procedure of plea bargaining can be invoked in both cases of minor offending and cases of serious offending since the procedure is applicable to all courts of judicature. The Rules, *inter alia*, underscore that the major objectives of the procedure of plea bargaining is to 'facilitate reduction in case backlog and prison congestion' and to 'provide quick relief from the anxiety of criminal prosecution.'[24] It can therefore be garnered that the foregoing objectives resonate with some of the objectives advanced by some of the adherents of plea bargaining in Uganda and beyond.

The rules make provision for disclosure, in which case the prosecution is under obligation to 'disclose to the accused all relevant information, documents or other matters obtained during investigations to enable the accused to make an informed decision with regard to plea bargain.'[25] Of course, this is a positive aspect. However, the extent to which an accused without legal representation can derive benefit from the said disclosure remains debatable and this issue will be discussed further in a section on the implication of the procedure for constitutionally guaranteed rights. Furthermore, although the procedure of plea bargaining involves the accused and the prosecution, the court has a role to play. For example, it has to be informed "of the ongoing plea

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21. *See*, the 2016 Rules, *supra* note 2.

22. M.A. Berger, *The Federal Rules of Evidence: Defining and refining the goals of codification*, 12 HOFSTRA L. REV. 255 (1984), at 255-277.

23. § 2, the 2016 Rules, *supra* note 2.

24. § 3, *id.*

25. § 7, *id.*

bargain negotiations".[26] Additionally, the court has to be consulted with regard to possible sentences.[27] Moreover, the court can reject the outcomes of a plea bargain if such outcome causes a miscarriage of justice.[28]

On a positive note still, the rules place emphasis on the interests of the victims, complainants and the community.[29] However, again, as will be subsequently discussed in the section on constitutional guarantees, the extent to which victims, complainants and communities can veto the decisions arrived at by the accused and the prosecution remains debatable.

In terms of jurisprudence, reporting has generally been poor. Thus far, there are hardly any reported cases in which the courts have comprehensively dealt with the issue of plea bargaining. This is not to suggest that plea bargaining is not being invoked. As noted, reports suggest that thousands of criminal matters have thus far benefited from the procedure of plea bargaining. Case reporting, however, is another issue altogether. The poor reporting of decisions in which this procedure has been invoked definitely impacts on the analysis in this section. Two random cases that involved plea bargaining featured are briefly analysed to demonstrate the reality of this practice in Uganda.

A. Uganda v. Kato (*Kato* case)[30]

The accused in the case of *Uganda v. Kato* was charged with the offence of rape contrary to section 123 of the Penal Code Act of Uganda. The facts of the *Kato* case were that on the night of 17 December 2015, the accused, dug a hole in the victim's house in Butisa, Kyengeza village in Wakiso District, and had sexual intercourse with her without her consent. Instead of opting for a full trial, the accused entered into a plea bargain with the prosecution. He admitted guilt and was consequently sentenced to 10 years imprisonment. In the ordinary course of events, the maximum penalty for the offence of rape is death. However, according to the presiding judge, Justice Wilson Musene, because the accused did not waste court's time by opting for a full trial, such a lenient punishment was warranted.

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26. § 8, *id*.
27. *Id.*
28. § 13, *id*.
29. § 11, the 2016 Rules, *supra* note 2.
30. This case is not reported. However, for further reading on facts of this case, see A. Wesaka, *Man sentenced to 10 years for raping 60-year-old woman*, DAILY MONITOR, August 23 2016, Retrieved from <http://www.monitor.co.ug/News/National/Man-sentenced-to-10-years-for-raping-60-year-old-woman/688334-3354172-dy658r/index.html> (accessed 6 February 2016).

It is hard to critically analyse this case because the circumstances under which the plea bargain took place are not clear. The facts available do not reveal as much detail. However, *prima facie*, there is an indication that the *Kato* case is one in which the procedure of plea bargaining can be considered a 'success'. What remains largely unclear, however, is whether, in arriving at this bargain, the accused received appropriate legal representation or whether his decision to admit guilt was properly informed. Indeed, prosecutors in Uganda are encouraging plea bargain procedures with a view to saving time, resources, reduce the number of trials and to ultimately decongest prisons.

According to the judiciary's technical advisor, Andrew Khaukha, more than 2,500 cases have successfully gone through the plea bargain programme that begun in 2014.[31] However, as consistently noted, it is hard to assess what threshold is used to measure success. With the scanty details on the cases in which plea bargaining has been invoked, it is hard to state with certainty that plea bargaining has been a success. What is clear though is that currently the 'success' of plea bargaining is being measured in terms of the extent to which it saves time, resources and the number of trials judges have to adjudicate. This raises the issue of whether constitutionally guaranteed rights constitute a major part of the success assessment. It is far from clear whether the procedure of plea bargaining, when documented in detail and measured against Uganda's Constitution, would still be described as a success without equivocation.

B. Uganda v. Kusemererwa (*Kusemererwa* case)[32]

In the *Kusemererwa* case, the accused was charged with the offence of rape contrary to section 123 of the Penal Code of Uganda. It was alleged that on 6 June 2013 at Hakibale Village in the Kabarole District, the accused (Kusemererwa) had unlawful carnal knowledge of the victim, who was aged 16 years of age at the time, without her consent. Having been approached by the prosecution with an option of a lighter sentence should the matter not proceed to trial, the accused was prepared to plead guilty to charges of rape and bargain for a sentence of 10 years imprisonment.

At first glimpse, this was a 'good' bargain especially when compared to the maximum sentence of death applicable in cases of rape. However, having secured legal representation, the accused's counsel raised a point of law objecting to the charges of

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31. Wekasa *supra* note 29.

32. *Uganda v. Kusemererwa,* Criminal Case No: HCT-01-CR-SC-0015-2014 (2015) UGHCCRD 12 (25 November 2015), retrieved from <http://www.ulii.org/ug/judgment/high-court-criminal-division/2015/15> (accessed 6 February 2017).

rape. Notably, both Counsel Businge Victor and Ruth Ongom on State Brief for the accused were of the opinion that the charges preferred against the accused were defective. In their view, the accused ought to have been charged with the offence of simple defilement, a charge applicable to carnal knowledge of girls below 18 years. They argued further that the offence of rape can only be committed against a woman capable of giving consent, that is, a woman above 18 years of age.

The prosecution, on its part, submitted that although section 129(1) of Uganda's Penal Code Act creates the offence of simple defilement, it would not be fatal to charge the accused with rape. Counsel for the accused, however, submitted in reply that the accused would be prejudiced if charged with rape in light of the fact that rape carries a maximum penalty of death while simple defilement carries a maximum penalty of life imprisonment. The difference in the nature of sentence therefore mattered, in defense counsel's view. The arguments advanced by both the prosecution and defense were quite elaborate and cannot be fully exhausted in this section. However, to summarise briefly, the Court ultimately ruled that the plea bargain agreement of 10 years based on the defective charges of rape should be rejected.

The *Kusemererwa* case is a telling one. The issue is not so much about the legal interpretations of sections 123 and 129 on the offences of rape and defilement under the Penal Code Act respectively, but rather, the effect that a plea bargaining procedure can have on the rights of the accused, in particular, an accused who does not have legal representation. The interpretation of section 123 and 129 is beyond the scope of this discussion. What is especially pertinent for the present discussion, rather, is the effect that legal representation can have on plea bargain proceedings, that is, tilting the pendulum, and consequently, ensuring that the rights of the accused are guaranteed.

It is hard to envisage a situation where the accused in the *Kusemererwa* case could have advanced legal arguments persuasive enough to convince the court to have the plea bargain agreement rejected. Clearly the arguments advanced by defense counsel were so technical that a lay person, not fully cognisant of the penal laws of Uganda, could not identify the difference in the nature of the charges, let alone appreciate the legal consequences of such a difference. Cases such as *Kusemererwa* by themselves, of course, cannot found a basis for discrediting the procedure of plea bargaining. A minimalist could, in fact, view it merely as an issue of implementation rather than a gap in doctrine. However, in these circumstances, implementation issues have major implications for the doctrine of plea bargaining and in the end, constitutionally guaranteed rights are undermined, in particular, where these bargains are not subject to sufficient legal scrutiny.

A glimpse into some of the cases in the USA in which the procedure of plea bargaining has been invoked do also amplify some of the problematic outcomes of plea bargaining.

III. A GLIMPSE INTO SOME OF THE PROBLEMATIC OUTCOMES OF PLEA BARGAINING IN USA

In 1989, Ada JoAnn Taylor[33] was faced with two choices. She had to either plead guilty and receive a lighter sentence or turn down a bargain. Turning down the bargain meant that she would exercise her right to trial, but with the option of a harsher sentence. The facts of the case were that in February, four years earlier, a 68-year-old woman was raped and killed in Beatrice, Nebraska. Police were now convinced that Taylor and five others were responsible for the woman's death. The options for Taylor were stark. If she pleaded guilty and cooperated with prosecutors, she would be rewarded. The choice for Taylor was difficult, but the incentives to admit guilt were enticing. The prosecutors' concession of a sentence of 10 to 40 years in prison meant that she would return home one day and salvage at least a portion of her life. The alternative (exercising her right to trial) was uncertain and could possibly lead to a lifetime behind bars or even a death penalty. The latter was unattractive by comparison.

After contemplating the options, Taylor pleaded guilty to aiding and abetting second-degree murder. Taylor had decided to control her destiny and accept the certainty of the lighter alternative as opposed to the uncertainty in the trial outcome had she exercised her right to trial. After serving 19 years in prison, Taylor was exonerated after DNA testing proved that neither she nor any of the other five accused in her case could have been involved in the murder.

On December 23 1990, a 21-year-old woman was robbed and sexually assaulted by an unknown assailant in New Jersey.[34] Three days after the attack, and again a month later, the victim identified John Dixon as the perpetrator from a photo array. Dixon was arrested on 18 January 1991 and as the case was for Ada JoAnn Taylor, he was threatened by prosecutors with a higher prison sentence if he failed to cooperate and confess to his alleged crimes. Dixon pleaded guilty to first degree kidnapping, first degree robbery, two counts of first degree aggravated sexual assault, and unlawful possession of a weapon in the third degree. He later asked the judge to

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33. *See,* Innocence project-Ada JoAnn Taylor, 19 Years in Prison: Innocent, retrieved from <http://www.innocenceproject.org/cases-false-imprisonment/ada-joann-taylor>, (accessed 1 June 2015).

34. *See,* Innocence Project-John Dixon, 10 Years in Prison: Innocent, retrieved from <http://www.innocenceproject.org/cases-false-imprisonment/john-dixon>,(accessed 1 June 2015).

withdraw his plea and perform DNA testing, claiming his plea was induced by fear of a harsher sentence if convicted by jury.[35] After the prosecution claimed that they doubted DNA testing would be relevant, the court denied Dixon's motion. He received a sentence of 45 years in prison. Ten years later, however, Dixon was released from prison after DNA evidence established that he could not have been the perpetrator of the crime.

In *North Carolina v. Alford*,[36] the accused was indicted for first-degree murder. After Alford's attorney questioned witnesses in the case and determined that there was a strong indication of guilt, he recommended Alford plead guilty to the prosecution's plea bargain offer of second-degree murder. Alford agreed but during the plea hearing continued to declare his innocence and stated that he was pleading guilty only to avoid the possibility of the death penalty. Despite Alford's insistence on his innocence, the trial judge accepted the plea and sentenced the accused to 30 years in prison. Alford appealed the decision in the Supreme Court of USA. Puzzlingly, in upholding the decision of the trial judge, the Supreme Court ruled that it was permissible for an accused to plead guilty even while maintaining his or her innocence.

In the popularly known 'West Memphis three' case,[37] three teenagers were convicted of killing three boys in West Memphis, Arkansas in 1993. As part of their investigation, police focused on a 17-year-old named Jessie Lloyd Misskelley Jr. (who was subjected to a 12-hour interrogation), along with two others teenagers, Damien Echols and Jason Baldwin. All the three teenagers were convicted at trial and became known as the 'West Memphis Three.' In terms of sentence, Misskelley and Baldwin received life sentences, while Echols received the death penalty. In 2007, DNA testing conducted on items from the crime scene failed to match any of the three. Significantly, however, the DNA testing did find a match; Terry Hobbs, one of the victims' stepfathers. Though Hobbs had claimed not to have seen the murdered boys at all on the day of their disappearance, several witnesses came forward after the DNA test results were released, stating that Hobbs was in the company of the three murdered boys at the relevant time. By 2011, the newly discovered evidence in the case was deemed sufficient to call a hearing to determine if there should be a new trial.

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35. It is to be noted that America applies a jury system of criminal justice which precisely entails the trial by the accused's peers (the jury).

36. *North Carolina v. Alford*, 400 U.S. 25 (1970).

37. *See*, Innocence project-West Memphis Three Go Free, retrieved from <http://www.innocenceproject.org/news-events-exonerations/west-memphis-three-go-free> (accessed 1 June 2015).

For the prosecution, however, the prospect of retrying the accused given the weak evidence offered at the original trial and the new evidence indicating the three might be innocent was unappealing. According to the lead prosecutor, there was no longer sufficient evidence to convict the three at trial. After serving 18 years in prison for a crime they may never have committed, they were subjected to a plea bargaining procedure. Upon the discovery of new evidence in the form of DNA, the prosecution offered concessions to the three males who were now men. They would plead guilty to the crime and be released or consider a fresh trial. The three preferred the former option and on 19 August 2011, the 'West Memphis Three' walked out of an Arkansas courtroom as free men but leaving behind a criminal record, in a case where guilt had not been proved beyond reasonable doubt. Echols, one of the 'Memphis three,' is on record for stating that "I am innocent, as are Jason and Jessie, but I made this decision because I did not want to spend another day of my life behind those bars." The question of whether the 'Memphis three' were innocent or guilty cannot be answered with certainty. What is clear, however, is the profound power of the plea bargaining machinery even amidst insufficient evidence to prove a case beyond reasonable doubt.

Having highlighted the problematic outcomes of plea bargaining, it is now imperative to delve deeper into the potential implications of plea bargaining on constitutional guarantees and some selected principles of criminal law.

IV. PLEA BARGAINING IN UGANDA AND SOME CONSTITUTIONAL AND DOCTRINAL QUESTIONS TO PONDER ABOUT

A. Plea bargaining and the right to a fair trial

Chapter four of the 1995 Constitution of the Republic of Uganda guarantees a relatively broad catalogue of rights, amongst which is the right to a fair hearing or fair trial. The right to a fair trial is given significant importance to the extent that under article 44, it falls within the ambit of non-derogable rights. This right has equally been accorded significant importance at the international level, with the International Covenant on Civil and Political Rights (ICCPR) expressly guaranteeing it under article 14. A similar guarantee is present in article 7 of the African Charter on Human and Peoples' Rights. Uganda is party to both the foregoing international instruments. The Human Rights Committee (HRC), the authoritative body with the mandate to offer interpretative guidance on the content of the ICCPR, has gone a step further to give meaningful

content to this right, through General Comment 32.[38] Amongst others, the HRC has emphasised that the right to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.[39] The HRC further underscores the critical need for States Parties to respect the rights guaranteed under the ICCPR regardless of the country's traditions or domestic laws. The HRC adds that 'it cannot be left to the discretion of domestic law to determine the essential content of the covenant guarantee.'[40] The right to a fair trial as guaranteed under article 28 of Uganda's Constitution encompasses multiple entitlements to accused persons, including the rights against self-incrimination, the right to be presumed innocent until proven guilty, examination of adverse witnesses, public trial before an impartial court, amongst others.

In terms of the right to be presumed innocent, article 28(3) (a) of the Constitution of Uganda provides that 'every person who is charged with a criminal offence shall be presumed to be innocent until proved guilty or until that person has pleaded guilty.' It appears that the import of the foregoing right is that until the prosecution proves the accused person guilty at trial, or, upon the accused voluntarily pleading guilty, the accused is to be presumed innocent for all intent and purpose. Emphasis is seemingly placed on the prosecution's obligation to prove accused person's guilt beyond reasonable doubt. Admission of guilt as per article 28(3) (a) is to be voluntary and not to be driven by incentives or concessions. With the advent of plea bargaining in Uganda's criminal justice system, the accused will now be offered concessions by the prosecutor to serve as incentives for guilty pleas. The accused's acceptance of these concessions also means that the accused gives up some constitutionally guaranteed rights such as the right to a trial.

However, in encouraging the accused to sacrifice trial rights at the altar of a lighter sentence upon pleading guilty, plea bargaining appears to be proceeding on the problematic presumption of the accused's guilt, with seemingly little or no obligation on the part of the prosecution to prove the accused's guilt beyond reasonable doubt. So ideally, having proceeded on the premise that the accused is guilty (before a trial), the prosecutor extends some form of lenience towards the accused. This way, the state benefits from the procedure by saving costs and time. The accused equally benefits in terms of the lighter sentence in comparison to the uncertain trial outcome and the harsher sentence should the case proceeds to trial.

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38. *See*, Human Rights Committee *General Comment no. 32: Right to equality before courts and tribunals and to a fair trial* (2007). (Herein after GC 32).

39. GC 32, ¶ 2.

40. GC 32, ¶ 4.

Proceeding on the premise of guilt conveniently ignores the possibility of some accused persons, in fact, being innocent. Of course, the assumption is that the factually innocent can never plead guilty to an offence they never committed.[41] Furthermore, adherents of plea bargaining assume that the accused person's option to waive their trial rights and to plead guilty is voluntary. In fact, the 2016 Rules on Plea Bargaining in Uganda require that a bargain on the part of the accused be voluntary.[42] Essentially, it does appear that the law applicable to plea bargaining proceeds on the premise that both the prosecution and the accused have equal bargaining power so much so that the accused person's decisions are voluntary. However, the cases briefly discussed above clearly demonstrate the inordinate power that the prosecutor may have over the accused during plea bargaining to the extent that even the factually innocent sometimes prefer the option of pleading guilty, to exercising their right to trial. Many accused persons are softly coerced into pleading guilty on account of the uncertainty of trial outcome as well as the harshness of the sentence that could be handed down, should they exercise their right to trial. As Cheesman aptly submits, in this agreement, the prosecutor holds all the cards to play the plea bargain game.[43]

It therefore becomes disingenuous to assume that the prosecution, with state resources at its disposal, as well as the power it wields over suspects, has equal bargaining power with an individual accused person. It is arguably based on this immense power imbalance that fair trial rights are to be strictly guarded because they constitute the most crucial form of leverage at the disposal of the accused person. With the advent of plea bargaining, it remains debatable whether the accused still possesses such leverage.

Uganda's criminal courts have religiously quoted the decision in *Woolmington v. Director of Public Prosecution*,[44] a defensibly celebrated dictum that has become a household name in all criminal law classes in Uganda's law schools. Amongst others, this dictum underscores that the notion of presumption of innocence is like a golden thread which runs through criminal law. In *Woolmington v. DPP*, it was unequivocally established that the burden of proving guilt was upon the prosecution. For this burden to be discharged, the prosecution has to furnish evidence that establishes guilt beyond reasonable doubt. The golden thread that the *Woolmington* Court speaks of is that the

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41. However, see discussion of J.S. Rakof, *Why the innocent plead guilty: An exchange,* The *NYR*. (2014); N. Gertner et al, Why the innocent plead guilty: An exchange, The NYR. (2015).

42. §§ 9 & 13, the 2016 Rules, *supra* note 2.

43. S.J. Cheesman, A Comparative Analysis of Plea Bargaining and the Subsequent Tensions with an Effective and Fair Legal Defense (PhD Dissertation, University of Szeged, 2014), at 136.

44. *Woolmington v. DPP* [1935] AC 462 HL (E).

burden of proof is upon the prosecution since the accused person is presumed innocent. Yet after religiously quoting this dictum for centuries, on account of its defensibility, Uganda's judicial officers are now very quick to transplant the 'fashionable' trend of plea bargaining in Uganda's system, with the procedure risking being at complete odds with the presumption of innocence in that the accused person is presumed guilty before the trial commences. Wan's argument resonates in these circumstances. This author submits that 'instead of establishing a defendant's guilt and sentence through an impartial process with a complete investigation and an opportunity for the defense to present its case, prosecutors take on the role of judge and jury, making all determinations based on the probability of whether they will win or lose at trial.'[45]

Of course Uganda's criminal justice system, particularly the judges who may be desirous of clearing their dockets and prosecutors who desire to secure convictions, will argue that the state does not take away the accused person's right to trial. Instead the accused is presented with the two options (one of a lighter and the other of a harsher sentence), leaving him or her with the option to decide whether or not he or she waives the right to trial. Indeed, one of the fundamental reasons why courts consistently consider plea bargaining constitutional is the assumption that the accused voluntarily waives their right to trial.[46]

However, such an argument is problematic and increasingly crumbles when measured against the various forms of coercion that plea bargaining take. With the unfettered discretion given to the prosecutor, logic would suggest that in most of the cases, indigent accused persons who do not understand legal terminologies will take up the concessions offered by the prosecutor and consequently plead guilty. It suffices to note that under article 28 (3) (e) of Uganda's Constitution, legal assistance is only offered by the state in cases where the maximum sentence is death or life imprisonment. The import of this is that accused persons, whose offences fall outside the ambit of the foregoing sentences, do not benefit from state legal counsel. It is hard to envisage a situation where an indigent accused person, with no professional legal advice, turns down a plea offer from the prosecutor even if they were factually innocent. It begs the question: would adherents of plea bargaining still maintain the argument that the state does not violate the accused person's right to fair trial, at least indirectly?

Kipnis[47] equates a prosecutor's plea bargain offer to being robbed by a gunman, with the power of the gun leaving a victim with no option but to surrender the property

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45. T. Wan, *The unnecessary evil of plea bargaining: An unconstitutional conditions problem and a not-so-least restrictive alternative*, 17 REV. OF LAW AND SOCIAL JUSTICE. 33 (2007), at 41.

46. See generally, the *ratio decidendi* in the *Brady* case, *supra* note 7.

47. K. Kipnis, *Criminal justice and the negotiated plea*, 86 ETHICS. 93 (1976), at 99.

to the robber. With plea bargaining, the state burdens the right to trial by posing an alternative that is so attractive that the accused person is left with no option but to waive his or her right to trial. So, in assuming that accused persons voluntarily waive their rights and accept the prosecutor's concessions, we fail to distinguish between what Kurlekar and Gokhale[48] have referred to as soft coercion and hard coercion. Kurlekar and Gokhale submit that not all compulsion can be classified into the categories of force and free consent. In putting to question the voluntariness of plea bargaining, the authors introduce the aspect of soft coercion, which leaves the accused making an informed decision on waiving their right to trial.

However, such a decision, would often not be arrived at by the accused, had the concessions not been made. This, in itself, negates the voluntariness of the consent. To Kurlekar and Gokhale, soft coercion may take the form of making known to the accused person, the risk of a harsher sentence, should he or she exercise his or her right to a full trial. It would, therefore, be misleading to unequivocally conclude that no coercion whatsoever, is present and that the accused person freely consented to waiving their right to trial. The possibility of a harsher sentence (should the accused insist on exercising his or her right to trial), makes voluntariness illusory and raises questions of the indirect role of the state in undermining the accused's right to a fair trial.

So admittedly, plea bargaining is cost effective, time saving and impacts positively on the effectiveness of judicial officers and prosecutors in terms of output. There are also benefits for the accused person since in accepting a bargain; there is normally a significant reduction in the sentence handed out as well as the speedy disposition of the case. Regrettably, however, the procedure could cause the innocent accused to plead guilty to a crime they did not commit. This begs the question: does justice now become too costly in Uganda for the accused to claim their inherent constitutional rights? Of course, it could be argued that the 2016 Rules leave room for the court to intervene with a view to ameliorating the challenges underlined in this section.[49] Notably, the Rules mandate the court to take part in plea bargain negotiations, with the court having the power to reject plea bargain agreements that cause a miscarriage of justice.[50]

Provisions such as the foregoing are a ray of hope for the accused. However, one does not need to lose sight of the fact that the very judicial officers who are expected to rule on the appropriateness of a plea bargain agreement may probably be

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48. A. Kurlekar & S. Gokhale, *The unconstitutionality of plea bargaining in the Indian framework: The vitiation of the voluntariness assumption*, INDIA L.J. (2014).

49. §§ 8 & 13, the 2016 Rules, *supra* note 2.

50. *Id.*

the same legal professionals desirous of clearing their dockets of cases. This argument is not intended to lead to an omnibus conclusion that the court is incapable of intervening where a miscarriage of justice arises. Rather, it is to accentuate that in a situation where judicial officers have consistently placed emphasis on the cost and time saving aspects of plea bargaining, bias may not be ruled out. It is, therefore, to be expected that the safeguards on paper may, in some cases, not have tangible impact on ground.

Furthermore, Bennum[51] has argued persuasively that it is not only the accused who has an interest in the right to a public trial before an independent court. It is Bennum's averment that public interest requires that criminal matters should not be dealt with behind closed doors and as such, the right to trial to be bargained away is to be questioned. This brings sharply into focus the question: in light of the fact that plea bargaining is not a public event, coupled with the fact that article 28 (1) of Uganda's Constitution underscores the right to a public trial, what happens to the right to a public trial, in particular, the public who desire to see justice done? Does the public have an interest and a right to know the manner in which justice is delivered, in particular, the extent to which the prosecution proved its case beyond reasonable doubt?[52]

Other questions that remain open are: What does a public trial mean? How much of the right to a public trial should be limited? Indeed, an argument could be advanced to the effect that the 2016 Rules have delineated the exacted role and place of the public in plea bargaining procedures.[53] However, the Rules do no more that state that the interest of the community shall be taken into consideration. It remains largely unclear how much influence the community has over plea bargain agreements. For instance, can the community veto plea bargain proceedings if it deems that justice would better be served through a full trial?

There is also much uncharted territory on plea bargaining and the right against self-incrimination, a procedural guarantee equally endorsed by Uganda's Constitution. Under Uganda's Constitution, the accused cannot be compelled to divulge or adduce evidence that incriminates him or her.[54] As already noted, the compulsion we are talking about in cases of plea bargaining is not the known torture as peculiar to Uganda.

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51. M.E. Bennun, *Negotiated pleas: Policy and purposes*, 1 SACJ. 17(2007), at 37-40.

52. Again, questions of *locus standi* arise in the sense that who has standing to bring an action with regard to the violation of the rights of the public to have justice seen to be done in criminal trials. Should the right to a public trial include recognition of the public interest to see justice done? Would an application such as the foregoing pass the admissibility test on public interest litigation?

53. § 11, the 2016 Rules, *supra* note 2. Notably, the interests of the community are to be taken into consideration.

54. *See*, §28(11) of the Constitution.

To be precise, the compulsion wielded by prosecutors will seemingly be clothed with an aura of 'leniency' and may not involve physical pain as popularly understood. If anything, it will be hard to argue the case of compulsion because it will be more professional and not carried out by the popularly known notorious police tactics.[55]

Yet an eye of detail in the idea of concessions and incentives could cause us to conveniently categorise it as soft coercion. In fact, Langbein[56] has gone a step further to equate plea bargaining to torture of the accused. Langbein defensibly equates the concessions offered by the prosecutor to torture (as understood in the medieval period) in the sense that in both procedures, the prosecutor is relieved of the burden of proving the accused person's guilt and the court is spared having to adjudicate it. The court condemns the accused based on his or her confession without independent adjudication. So then the other question is: in light of article 28(11) of Uganda's Constitution which is to the effect that an accused person is not to be compelled to give evidence against themselves, could we then argue that on account of the soft coercion that comes with plea bargaining, article 28(11) of Uganda's Constitution is implicitly violated through plea bargaining?

In the context of Uganda, we shall also recall the notorious military regimes of presidents such as Idi Amin and the current occasional disregard of accused persons' procedure guarantees, through acts such as torture to secure confessions from accused persons. The courts have consistently taken cognisance of our checkered history of political and constitutional instability, and the need for the recognition of the people's struggles against the forces of tyranny, oppression and exploitation.[57] We are then left to question, does the advent of plea bargaining appear to recapitulate much of the doctrinal folly of the arbitrariness of these dreaded regimes and practices, complete with the pathetic disregard of fundamental rights? Could it also represent the main institutional blunder of these dreaded regimes that we claim the new constitutional regime seeks to detract from? What equally happens to the right of the accused person to be tried by a competent court for a criminal offence in light of the fact that with plea bargaining, the prosecutor takes on the dual role of prosecutor and judge? And with commentators like Langbein justifiably equating plea bargaining to torture, as it were in the medieval period, can the debate on plea bargaining be carried further; that it violates the right to freedom from torture, in human and degrading treatment? Indeed,

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55. See generally, Annual Reports of the Uganda Human Rights Commission on torture of suspects, retrieved from <www.uhrc.ug> (accessed 2 June 2015).

56. J.H. Langbein, *Torture and plea bargaining,* 46 CHICAGO L.REV. 3 (1978), at 3-22.

57. *Uganda Law Society & Jackson Karugaba v. The Attorney General,* Constitutional Petition no 2 and 8 of 2002, at 48 (Herein after *Uganda Law Society* case).

as article 28(1) of Uganda's Constitution rightly underscores, the accused person should undergo a speedy trial and admittedly plea bargaining shows potential in advancing this guarantee. But should a speedy trial, as vouched for, take precedence over the many other rights guaranteed under article 28 of Uganda's Constitution?

We should not be so quick to forget the highly controversial dictum by the Field Court Martial in Karamoja in 2002 wherein, in an attempt to purportedly further a speedy trial of the two alleged 'murderers' of Michael Declan O'Toole (an Irish parish priest in Moroto) and two other victims, the accused persons underwent a trial that lasted only two hours and 36 minutes.[58] The judgement was passed without allowing for full investigations, with the two soldiers being executed by firing squad on the day of the judgment, leaving them with no option of appeal. The fact that the other rights of the foregoing accused persons were compromised cannot be emphasised enough. It is notable that the problem in this case is not so much about the two hours and 36 minutes that the trial lasted, but rather, the fact that emphasis on speed caused the Field Court Martial to disregard the other fundamental rights of the accused person. This stance was firmly condemned by the Constitutional Court of Uganda as evident in the case of *Uganda Law Society & Jackson Karugaba v. The Attorney General*.[59] The Constitutional Court, in the foregoing case, underscored the supremacy of the Constitution in accordance with article 2 of the Constitution, consequently holding, amongst others, that the fair trial rights of the deceased convicts were violated. Justice Twinomujuni, delivering the judgment, with the unanimous court concurring, categorically observed as follows:

> They argue that these are special institutions that were never intended to be bound by stringent rules and procedures laid down in the Constitution. I have always held that this argument is fallacious. The majority of Justices of this Court have always maintained that the Constitution applies to all authorities and persons throughout Uganda. I was, therefore, shocked to hear the same arguments being advanced in this petition by counsel for the respondent. Yet article 2 of the Constitution states simply and unambiguously as follows …[60]

The Constitutional Court underscored further that 'in order to understand the meaning of this mandatory requirement [of a fair and speedy trial], we have to look at relevant

58. *Id.*
59. *Id.*
60. *Id.*, at 11.

provisions in the whole Constitution, but also the entire provisions of articles 22, 28 and 44(c) of the Constitution,' with the court consequently concluding that 'speed must be reasonable speed measured against the overall objective of achieving a fair trial.'[61] The Court added that courts have 'no powers to bend the Constitution in order to accommodate special needs, whether legitimate or not.'[62] Reminding Ugandans of an unpalatable past, where fundamental rights were not accorded due regard, the Court observed that 'in this case, the soldiers were tried and executed without according them virtually all basic human rights guaranteed by articles 28 and 44(c) of the Constitution.'[63] According to the Court, the entire process 'was a denial of natural justice precedented only by military trials of President Idi Amin's era.'[64] Indeed, the circumstances of the foregoing case arose within the context of a full trial, whereas plea bargaining often occurs prior to trial. However, by analogy, the prejudicial consequences of the trend set by the *Uganda Law Society* case resonates with some of the risks that could potentially arise where the need to save financial costs and time (through plea bargaining) takes precedence over the other fundamental rights of accused persons.

B. Plea bargaining and the right to equality

Article 21 of the Constitution of Uganda guarantees the right to equality, underscoring that 'all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.' The potential implications of plea bargaining on the right to equality of all before the law can be viewed through different lenses.

It is notable that presently, Uganda's criminal justice system is making concerted efforts to ensure that sentences handed down are consistent. This is evident in the recently enacted sentencing guidelines.[65] However, the lenient sentences given to those accused persons who accept plea bargains, and the harsh sentences handed

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61. *Id*., at 23. On the need for the entire Constitution to be read together as an integrated whole and no one particular provision destroying the other but each sustaining the other, see also *Paul Kawanga Ssemogerere and two others v. Attorney General*, Constitutional Appeal No.1 of 2002.

62. *Uganda Law Society* case, *supra* note 57, at 19.

63. *Id*., 28.

64. *Id.*

65. See Sentencing Guidelines for the Courts of (Practice) of 26 April 2013, retrieved from <http://www.loc.gov/law/help/sentencing-guidelines/uganda.php#Guidelines>, which amongst others, seek to address the challenge of the wide disparities in sentences in which charges under the same offense involving similar circumstances often result in greatly varying punishments.

down to similarly situated accused persons who reject plea bargains by insisting on exercising their right to trial, could lead to large sentencing disparities. This not only undermines the entire criminal justice system but raises issues of equality before the law. It would be expected that offences falling within the same category should attract similar sentences unless there are compelling circumstances justifying a departure from such a norm. This, it is argued, would effectively further the right to equality for all accused persons before the law.

Yet the sentencing disparities directly resulting from sentencing differentials through plea bargaining appear to suggest that accused persons who accept plea bargains are accorded more favourable treatment while those who reject plea bargains are treated more harshly notwithstanding that the facts of the cases against them may be similar. Unless, of course, waiving constitutional rights has now turned out to be a mitigating factor that justifies treating accused persons differently. But if not, it appears equality issues are brought to the fore. The constitutional question that then remains debatable is whether, indirectly, plea bargaining undermines the right to equality before the law in terms of its potential to further an approach that deals with similar offenders differently.

Further, it is an axiomatic truth that a fair trial on the part of the accused is often as good as the quality of the legal representation they martial. It follows then that in many cases, in ensuring that the law is appropriately interpreted and applied to afford justice to the accused, the role of a competent legal defense (which of course comes with a price) is indispensable. Competent legal defense becomes even more pronounced and in fact indispensable in plea bargaining negotiations in light of the fact that at this stage, the prosecutor not only asserts profound power, but there are relevant legal questions that the defense needs to put to the prosecutor to justify the prosecutor's decision to opt for a bargain. Some of these questions may pertain to the sufficiency, relevance and admissibility of the evidence against the accused, all of which may be complex subjects beyond the ordinary intellect of an accused. A competent defense at the plea bargaining stage is equally critical in light of the fact that some prosecutors opt for plea bargains because they know full well that the evidence against the accused is too weak to sustain a conviction should the matter proceeds to trial (whereupon it will be subjected to a standard of 'beyond reasonable doubt'). Only a competent defense attorney can pick up on gaps in the prosecution's case.

It is in this regard that the line between the poor (or indigent accused persons) and the rich (or more financially stable accused persons) becomes clear cut. In this regard, although the 2016 Rules make provision for disclosure 'to the accused all relevant information, documents or other matters obtained during investigations to

enable the accused to make an informed decision with regard to plea bargain',[66] such disclosure is of limited relevance where the accused lacks the expertise to critically analyse the information disclosed.

Sandefur[67] makes an interesting and simple observation, yet so critical enough to put to question the implication of plea bargaining on the right to equality from a financial status front. He observes as follows:

> Defendants, often too poor to afford their own attorney, unfamiliar with court proceedings, and threatened by the full force of the prosecutor's office, are likely to be very intimidated. They find themselves confronted by experienced and confident officers of the state, in suits and robes, speaking the jargon of the law and possessing wide discretion to engage in hardball tactics before trial. Prosecutors know how to exploit limits on habeas corpus rights, mandatory sentencing rules, and loopholes that allow evidence collected under questionable circumstances to be admitted.[68]

In light of the above dramatic, yet defensible observations, it can be said that a fair bargain on the part of the accused is largely dependent on the quality of legal representation they are able to martial. With the outcomes of the *Kusemererwa* case, briefly discussed in one of the preceding sections, the role of competent legal representation in plea bargaining proceedings cannot be over emphasised. Implicitly, it appears that a price has been put on justice. If an accused cannot afford a good lawyer to bargain or evaluate the prosecutor's concessions, they are more likely than not to accept poor bargains. Conversely, their financially stable counterparts, who are armed with the requisite financial resources to instruct a competent defense attorney, are better placed to bargain more effectively. Consequently, it is highly probable that the bargains struck by poor accused persons will tend to be comparatively worse than those struck by similarly situated rich accused persons. Arguably, poor accused persons would rather settle for a lenient sentence than proceed to full trial (without a competent defense attorney), only to be 'slapped' with a harsher sentence. Considered together, the foregoing circumstances illustrate how the procedure of plea bargaining, though not discriminatory in intent, could result in the discrimination of the poor in terms of its

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66. § 7 the 2016 Rules *supra* note 2.

67. T. Sandefur, *In defense of plea bargaining: The practice is flawed, but not unconstitutional,* REGULATION FALL.28 (2003), at 28.

68. *Id.*

practical application. Therefore, a question that falls to be answered is: in terms of article 21 of Uganda's Constitution, can an argument be sustained to the effect that plea bargaining undermines the right to equality on account of its implicit (or indirect) preferential treatment of the rich over the poor?

One may argue that indigent accused persons can have leverage during plea bargain sessions through legal aid professionals. However, studies conducted by some Non-Government Organisations (NGOs) on the status of legal aid in Uganda and East Africa generally, indicate that the legal aid framework falls short of established international standards relevant for the provision of legal aid, with most poor and vulnerable accused persons still not being able to access quality legal aid.[69] It is reported that legal aid providers are not present in all parts of the country.[70] Moreover, presently, the only enabling legislation on legal aid is the Poor Persons Defence Act.[71] This Act is not only outdated, but it is also limiting in terms of its criteria of determining or defining indigence and connecting the need for aid to the constitutional provision on legal representation. As such, legal aid cannot, without equivocation, be relied on as a safety net in aiding accused persons to martial informed bargains against the more powerful prosecutor (who has state resources at his or her disposal).

Moreover, in accordance with the Advocates Act of Uganda, the time and skill spent in preparing and accomplishing a case to conclusion directly impacts on the amount of legal fees that legal practitioners charge.[72] Good pay, would, arguably, be a good incentive for a defense attorney to consider proceeding with the matter to trial despite the time constraints. Conversely, for poor accused persons, with little or no incentive to pay for their case to be worth the long trial option, it is likely that the most that such accused persons will get is a plea bargain. The defense attorney will probably look to saving the enormous amount of time spent preparing for trial, and participating in a trial and accordingly prefer a more time and cost effective plea bargaining option. As Rauxloh aptly submits, in these circumstances, the accused is only entitled to as much legal defense as they can afford.[73]

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69. DANISH INSTITUTE FOR HUMAN RIGHTS & EAST AFRICA LAW SOCIETY, ACCESS TO JUSTICE AND LEGAL AID IN EAST AFRICA 5 (2011).

70. *Id.*

71. *See*, Poor Persons Defense Act Chapter 20 of the Laws of Uganda. The Law is so abstract that it leaves subjects such as competent defense unanswered.

72. *See generally*, The Advocates Act (Remuneration and Taxation of Costs) Rules, Statutory Instrument 267-4.

73. R.E. Rauxloh, *Formalization of plea bargaining in Germany: Will the new legislation be able to square the circle?*, 34 FORDHAM INT'L L.J. 295 (2011), at 329.

C. Plea bargaining and the principle of legality

In criminal law, the principle of legality guarantees the primacy of the law in criminal procedure so that the accused is not exposed to arbitrary bias.[74] The principle of legality assures that the accused person is not punished arbitrarily.[75] As such, the accused can't, amongst other things, be prosecuted or convicted subject to a law that is unclear and unascertainable. Decision making must equally not alter the legal situation retrospectively by discretionary departures from ordinary laws and norms. Uganda's Constitution expressly guarantees this principle, albeit using different terminology.[76] Against this backdrop, questions arise as to the potential of plea bargaining to undermine this requirement. It is to be emphasized that the legislature, in defining the ingredients (or elements) of crime and prescribing sentences or penalties for those crimes, does so, to amongst others, ensure predictability and consistence.

With plea bargaining, prosecutors can extend concessions falling outside the ambit of sentences prescribed by the legislature. This has major implications for predictability and certainty on the part of the accused since the prosecutor reserves the power to detract from the prescribed sentence with a view of making concessions that are appealing to the accused. Prosecutors are equally free not to prefer the highest sentence despite the severity of the crime. Essentially, the prosecutor, in making concessions, can act outside the legislative prescriptions. Thus in this regard, a deeper challenge that a plea bargain poses is going squarely against the legislature's need for predictability through prescribed sentences and offences. Essentially, the legislature's intent and the law's effect on crime become either minimal or non-existent.

It could follow then that most criminal prosecutions and the sentences handed down would most likely be in stark departure from what is prescribed by the penal laws, rendering penal laws almost illusory. As Standen decorously puts it, 'plea bargaining … takes place in the shadow of other forces, but not in the law's shadow… because it so often fails to internalise the laws that purportedly govern it … as the law is nearly opaque.'[77] Under these circumstances, it remains largely unclear whether this uncertainty can still be considered to be in accord with legality, a principle that Uganda's criminal justice system is mandated to adhere to.

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74. J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 4 (2005).

75. *Id*.

76. *See generally*, §§ 28 (7) and 28(8) of the Constitution of Uganda on the legality principle generally.

77. W.J. Stuntz, *Plea bargaining and criminal law's disappearing shadow*, 117 HARV. L. REV. 2548 (2004), at 2552.

Currently, it is hard to understand, in precise terms, what agenda the judiciary of Uganda is furthering. Not so long ago, there was an indication the judiciary needed to further greater predictability in the sentencing of criminals. This cause was aptly furthered by guidelines, namely, The Constitution (Sentencing Guidelines for the Courts of (Practice) of 26 April 2013.[78] The former Chief Justice, Benjamin Odoki, issued these guidelines in accordance with article 133(1) (b) of the Constitution of Uganda, which is to the effect that the Chief Justice 'may issue orders and directions to the courts necessary for the proper and efficient administration of justice.' The Guidelines find basis in the fact that there are wide disparities in sentences in which charges under the same offense involving similar circumstances often result in greatly varying punishments, in part because of unfettered judicial discretion, corruption, favoritism, and influence peddling. Thus, the Sentencing Guidelines sought to ameliorate these challenges by introducing uniformity and transparency to the sentencing process through sentencing ranges for specific offenses and other tools designed to standardize the process.[79]

The Sentencing Guidelines provide specific sentencing recommendations for the offences of murder, rape, aggravated defilement, robbery, kidnapping with intent to murder, terrorism, treason, manslaughter, robbery, defilement, trespass, corruption and related offenses; and theft and related offenses. For these offenses, the Sentencing Guidelines provide a range of sentences including a minimum sentence for each offense and a list of aggravating and mitigating circumstances. With the emphasis on predictable sentences and the need to avoid sentence disparities, one would have expected that procedures that detract from this agenda are to be avoided. But with such a commendable trend, one is left speculating how exactly plea bargaining fits within the ambit of the consistence and predictability agenda, in light of the potential of plea bargaining to further sentencing disparities for accused persons charged with the same offence.[80]

Notably, the current Sentencing Guidelines do not contain provisions that reward the acceptance of responsibility or empower the process of plea bargaining. Some commentators are of the opinion that this stance suggests that plea bargaining is not an option in furthering the predictability and consistence agenda.[81] Yet after

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78. Sentencing Guidelines, *supra* note 65.

79. *Id.*

80. In this regard, accused persons who accept prosecutors' concessions receive lighter sentences while those who opt for trial are likely to receive more severe sentences i.e. those that are in accordance with the established legislative framework on sentencing.

81. D.B. DENNISON, UGANDA'S NEW SENTENCING GUIDELINES: INTRODUCTION, INITIAL ASSESSMENT AND EARLY RECOMMENDATIONS, 1 (2014), at 9.

enacting the Sentencing Guidelines, the judiciary now invokes plea bargaining, seemingly handing over to the prosecutors the power to further sentence disparities. Taken together, the constitutional question that will fall to be answered is whether an approach that bestows unfettered discretion upon the prosecutor to detract from a prescribed legislative framework constitutes a wholesale abandonment of the basic principle of legality upon which law enforcement in a democratic community must rest.

D. Plea bargaining and the inherent nature of rights

Article 20(1) of the Constitution of Uganda entrenches one of the well-known tenets of human rights, which is that 'fundamental rights and freedoms of the individual are inherent and not granted by the state.' This provision could also suggest that since rights are not granted by the state, the state cannot condition the enjoyment of a benefit to a waiver of constitutionally guaranteed rights. Viewed through the foregoing lens, article 20(1) seems to be akin to the well-known doctrine of 'unconstitutional conditions' which underscores that the government cannot condition a benefit on the recipient giving up a constitutional right, even if the government is not under obligation to provide that benefit.[82]

In terms of the 'unconstitutional conditions' doctrine, it matters not whether the benefit is a right or a privilege.[83] The benefit or privilege in this regard is the reduction of a charge or sentence. Viewed differently, the doctrine means 'that whatever an express constitutional provision forbids government to do directly it equally forbids government to do indirectly.'[84] Precisely put, and with specific regard to plea bargaining, if the state cannot directly take away the accused person's right to trial, then it cannot do so indirectly through plea bargaining. So the unconstitutional conditions doctrine proceeds on the premise that a benefit conditioned on surrendering a constitutional right (such as a concessions from plea bargaining), creates an impermissible burden on that right even though the burden may be characterized as being only indirect. Commentators argue that during the plea bargaining process, prosecutors generally offer charging or sentencing concessions to induce accused persons to plead guilty and waive their right to trial or threaten the accused with a

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82. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 510 (1978); A.W. Alschuler, *The unconstitutionality of plea bargaining,* 83 HARV. L. REV. 1387 (1970), at 1399.

83. *Id.*

84. V. Alstyne, *The Demise of the right-privilege distinction in constitutional law,* 81 HARV. L. REV. 1439 (1968), at 1445-46.

harsher sentence should they chose to exercise their right to trial.[85] They are of the opinion that in those circumstances, the state is essentially penalizing the accused who chooses to exercise their constitutional right, thereby burdening the right to a trial.[86]

Some courts in the USA have criticised the tendency of conditioning benefits on waiving constitutional rights. It is, however, puzzling why despite the strong stance on this subject, the Supreme Court of USA still fails to hand out similar pronouncements with respect to plea bargaining. In *Frost & Frost Trucking Co. v. Railroad Commission*,[87] the court found that a voluntary waiver of rights by the individual in exchange for government benefits conditioned on such a waiver was really not much of a choice, 'except a choice between the rock and the whirlpool-an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.'[88]

The Court further declared that if the state may compel the surrender of one constitutional right as a condition of its favour, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.[89] Similarly, in *Sherbert v. Verner*,[90] the Court again reaffirmed the principle that conditioning benefits on not exercising a constitutional right effectively penalized the exercise of that right. The Court held that a benefit conditioned on surrendering a constitutional right created an impermissible burden on that right, 'even though the burden may be characterized as being only indirect.'

The above discussion raises the issue whether or not, plea bargaining should be considered an unconstitutional procedure in the sense that it conditions the benefits of plea bargaining concessions on the accused surrendering their right to be presumed innocent, thereby impermissibly burdening the right to be presumed innocent and more generally, the right to a fair trial. Could it be argued that plea bargaining undermines article 20(1) of the Constitution in that the procedure is calculated solely to deter the accused from exercising their right to trial in the name of saving costs and time? Adherents of plea bargaining may argue that rights can be limited in accordance with

85. Wan, *supra* note 45, at 34.
86. *Id.*
87. *Frost & Frost Trucking Co. v. Railroad Commission* 271 U.S. 583 (1926).
88. *Id*., at 593.
89. *Id.*
90. *Sherbert v. Verner* 364 U.S. 479, 490 (1960).

article 43 of Uganda's Constitution.[91] It bears mentioning, however, that under article 44 of Uganda's Constitution, the right to a fair trial is non-derogable.

Moreover, even if article 44 is to be left out of the debate, and arguments based on article 43, the inevitable issue that falls to be resolved is whether the indirect limitation of the right to a trial through plea bargaining 'is acceptable and demonstrably justifiable in a free and democratic society.' This brings sharply into focus the principle of proportionality. This principle provides that 'if you pursue an end, you must use a means that is helpful, necessary, and appropriate.' It is, therefore, unacceptable to use means, which even though necessary, do more harm than the end is worth. Thus, although the popular argument has been that plea bargaining will have the effect of saving costs and time, the rights trumped upon tend to make the intended goals worthless. The notion that Uganda's criminal justice system needs to critically engage with is one of proportionality, in particular, to weigh the time and cost benefits of plea bargaining on the one hand, and the price that accused persons (including some innocent ones) have to pay in waiving a fundamental right to a trial, on the other.

E. Plea bargaining and victims' rights

Traditionally, under criminal law, the victim to the crime was viewed merely as a witness to the crime, only serving the purpose of testifying in furtherance of the state's case. This is in view of the notion that offending is against the state. This traditional notion has, and continues to be challenged, with international instruments such as the United Nations Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985, underscoring that victims of crime should have a voice and fully participate in decisions pertaining to those offending against them. It would, for instance, be puzzling, to acquit a rapist, merely on account of a plea of guilt, without engaging the victim on their interests and needs. To do so would be to defeat the ends of justice, consequently causing the public to lose faith in the criminal justice system.

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91. § 43 of Uganda's Constitution is on limitation of rights, reading as follows:
43. General limitation on fundamental and other human rights and freedoms.
(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.
(2) Public interest under this article shall not permit—
(a) political persecution;
(b) detention without trial;
(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.

In light of the foregoing, plea bargaining may leave many questions unanswered, especially on the exact place of victims' rights to access to justice. This is because plea negotiation ideally involves the defense and the prosecution. Worthy to note, the 2016 Rules underscore that the interests of victim, complainant and community are to be taken into consideration.[92] However, it remains largely unclear to what extent the voice of the victim, complainant and the community can influence the plea bargaining decision. A question that needs to be answered is: can a victim to crime challenge the bargain between the prosecutor and the accused, as endorsed by the presiding judge, arguing that the process did not fully serve the deterrent and retributive role of criminal law? Should prosecutors be mandated to seek the input of victims to the crime in terms of the appropriate sentence? What then happens when victims insist on the matter proceeding to trial, arguing, for instance, that justice would be better served through a full trial? These, and many questions remain unanswered, leaving open the question: to what extent will victims' interests be accommodated in the plea bargaining procedure?

V. THE DEVELOPMENT OF PLEA BARGAINING IN THE USA AND GERMANY: A CONSTITUTIONALLY GROUNDED MOVE OR A COMPROMISE?

While USA is generally described as 'the world's plea bargaining capital' with over 90% of its cases disposed of through plea bargaining, there was a period in the history of USA's criminal justice system when plea bargaining did not form part of the justice process. In this regard, Alschuler draws from the subject of confession law (which shares a few common features with plea bargaining), to demonstrate that emphasis has always been placed on voluntariness and procedural guarantees in securing guilty pleas.[93] The author points out that in the history of confession law, securing guilty pleas through incentives made the entire guilty plea unenforceable at common law.[94]

Recourse in this regard can be made to the 1783 case of *Rex v. Warickshall*,[95] where an English Court held that 'a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it.' Dervan has asserted that while plea bargaining as it exists today relies upon the use of incentives, common law prohibitions on such inducements persisted

92. § 11, the 2016 Rules, *supra* note 2.
93. A.W. Alschuler, *Plea bargaining and its history*, 79 COLUM. L. REV. 1 (1979) at 12.
94. *Id.*
95. *Rex v. Warickshall* (1783) 1 Leach 263; (1783) 168 ER 234 1783.

until well into the 20th century, on account of the effect that these incentives had on the actual voluntariness of the accused.[96] Dervan and Edkins, however, submit that there was a turn of events in 1919, with the advent of the prohibition era. This era brought with it the over-criminalization problem, which opened for consideration alternative procedures to deal with the case backlog.[97]

Even with the increasing accommodation of plea bargaining, it continued to rest uncomfortably alongside constitutional principles established by the precedents of the USA Supreme Court. In the 1936 case of *Walker v. Johnston*,[98] for instance, Jack Walker was charged with armed robbery. In a procedure akin to what Uganda has started invoking in its present criminal justice system, prosecutors threatened to seek a harsh sentence if Walker failed to cooperate, but offered a lenient alternative in return for a guilty plea. Facing a sentence twice as long if he lost at trial, Walker pleaded guilty. The Supreme Court found the bargain constitutionally impermissible, noting that the threats and inducements had made Walker's plea involuntary. The Supreme Court categorically observed as follows:

> [Walker] was deceived and coerced into pleading guilty when his real desire was to plead not guilty or at least to be advised by counsel as to his course. If he did not voluntarily waive his right to counsel, or if he was deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of a constitutional right.[99]

Again in the 1968 case of *United States v. Jackson* (*Jackson* case),[100] the Supreme Court did not hesitate to strike down a statute that allowed for the death penalty only when the accused failed to plead guilty and insisted on exercising his right to trial. The Court reasoned that such a provision '[imposed] an impermissible burden upon the exercise of a constitutional right.'[101] The court made memorable observations that would have made one assume that a pace was being set for incentives arising from plea bargaining sessions to, perhaps, fall within the ambit of 'impressible burden of constitutional rights.' The *Jackson* Court specifically found that the statutory provision discouraged

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96. L.E. Dervan, *Bargained justice: Plea-bargaining's innocence problem and the Brady Safety-Valve*, UTAH L. REV. 51 (2012), at 65-66.

97. L.E. Dervan & V.A Edkins, *The innocent defendant's dilemma: An innovative empirical study of plea bargaining's innocence problem*, 103 J. CRIM. L. & CRIMINOLOGY, 1 (2013), at 10.

98. *Walker v. Johnston*, 312 U.S. 275, 279–80 (1941).

99. *Id*., at 286.

100. *United States v. Jackson*, 390 U.S. 570, 571-72 (1968).

101. *Id*.

accused persons from exercising their right not to plead guilty and their right to a trial. The Court declared further that if a provision's purpose or effect was 'to chill the assertion of constitutional rights by penalizing those who choose to exercise them,' then such a provision was 'patently unconstitutional.'[102] The Court went on to hold that the 'evil' of the provision was not that it coerced guilty pleas and trial waivers, but that 'it needlessly encourage[d] them.'[103] The Court consequently found that in reserving the death penalty for only those who insisted on exercising their right to a trial, the statute impermissively burdened the accused's right to a trial and the right to the presumption of innocence.

It can be garnered that despite the increasing recourse to plea bargaining, up until 1968, in accordance with the *ratio decidendi* in the *Jackson* case, emphasis was placed on the principle of 'impermissible burden upon the exercise of a constitutional right.' It would therefore appear that by 1968, the Supreme Court was still prepared to hold plea bargaining unconstitutional based on the impermissible burden it imposed on the exercise of constitutional rights. Dervan and Edkins, however, assert that, despite a continued rejection of plea bargaining by appellate courts, by 1967, even the American Bar Association (ABA) was beginning to see the benefits of the practice.[104] It appears that the cost and time effectiveness of plea bargaining, opened for consideration the possibility of explicitly making pronouncements on its constitutionality.

Not surprisingly, in the celebrated decision of *United States v. Brady* (*Brady* case),[105] the Supreme Court puzzlingly detracted from the *ratio decidendi* of the *Jackson* Court, consequently making an explicit pronouncement on the constitutionality of plea bargaining. The facts of the *Brady* case were that the accused was charged with kidnapping in violation of federal law. The charged statute permitted the death penalty, but only where recommended by a jury. The import of this was that the accused could avoid capital punishment by pleading guilty prior to a jury trial. Realizing his chances of success at trial were minimal in light of the fact that his co-accused had agreed to testify against him, Brady pleaded guilty and was sentenced to 50 years in prison. Brady later changed his mind, however, and sought to have his plea withdrawn, arguing that his act was induced by his fear of the death penalty. It shall be recalled that prior precedents on plea bargaining (such as the *Jackson* Dictum) suggested that the Supreme Court would frown upon the decision of the accused person to plead guilty and waive

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102. *Id.,* at 581.
103. *Id.,* at 583.
104. Dervan & Edkins, *supra* note 97, at 11.
105. *Brady* case, *supra* note 7.

their constitutional right to trial, for fear of harsher punishment.

The *Brady* case would be and is still a landmark decision in determining the future of plea bargaining in USA in terms of its constitutionality. Puzzlingly, the Supreme Court took a very disturbing approach in the *Brady* case - one that appears to detract from the pace set by the *Jackson* Court. In this regard, the Supreme Court categorically ruled as follows:

> Of course, the agents of the state may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant. But nothing of the sort is claimed in this case; nor is there evidence that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty.[106]

The Court added,

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).[107]

The *Brady* court, therefore, conveniently detracted from the principle established in the *Jackson* case (on 'impressible burden of constitutional rights'), preferring a principle of voluntariness by the accused. Essentially, the Supreme Court found plea bargaining to be constitutional provided it was voluntary. As consistently underscored in this article, the voluntariness stance is seemingly illusory in light of the practicality of voluntariness in plea bargaining negotiations. Wan has observed that the *Brady* Court's approach misses the defensible point made in the *Jackson* case.[108] Wan contends that the *Jackson* court focused on state action burdening constitutional rights, not on

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106. *Id.*, at 750-51.
107. *Id.,* at 755.
108. Wan, *supra* note 45, at 42.

whether the accused's choice was voluntary or intelligent.[109] To Wan, 'whether a defendant's choice was voluntary or intelligent does not cure the fact that there is still an unconstitutional burden.'[110]

The problematic departure of the Supreme Court from the precedent it set in the *Jackson* case on plea bargaining raises the issue whether, by 1970, the Supreme Court of USA was now more concerned about saving time and costs, than guaranteeing the constitutional rights of the accused. It begs the question whether justice had now become too costly in USA for accused persons to claim their inherent constitutional rights. Indeed, in the decisions subsequent to the *Brady* decision, the courts were seemingly less concerned about the argument of plea bargaining imposing an impermissible burden on the constitutional rights that the accused was entitled to. Emphasis was now placed on time and cost effectiveness. In the 1971 decision of *Santobello v. New York*,[111] for instance, the Court fully accommodated the practice of plea bargaining, ruling that:

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component to the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

In *Corbitt v. New Jersey*,[112] the Court dealt with a state sentencing scheme that provided a possibility for a more lenient sentence upon a plea of *non vult*,[113] a possibility that did not exist if the accused were instead convicted by the jury after a trial. The Court dismissed the accused's argument that the statute imposed an unconstitutional burden on his rights, finding that 'it is not forbidden to extend a proper degree of leniency in return for guilty pleas.'[114]

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109. *Id.*

110. *Id.*

111. *Santobello* case, *supra* note 9, at 260.

112. *Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978).

113. A plea of *non vult* is when an accused pleads no contest, or where the accused does not admit or deny the charge. While a plea of *non vult* is an alternative to a guilty plea, it has the same effect as the guilty plea in that the defendant will be punished as if he or she pleaded guilty.

114. *Corbitt* case, *supra* note 112, at 223.

Similarly, in *United States v Goodwin*,[115] the Court held that a prosecutor could bring additional charges against an accused who requested a jury trial after failing to reach a plea bargain with the prosecutor. Puzzlingly again, the Court found that the idea of a prosecutor bringing additional charges against the accused who requested a trial solely to punish the accused was 'so unlikely.'[116]

The reason why the Supreme Court of USA in the *Brady* case preferred to depart from the pace set in cases such as the *Jackson* case; cannot be established with certainty. An observable trend could, however be established in terms of how the courts subtly and progressively 'sneaked' plea bargaining in the criminal justice system. The benefits of plea bargaining in terms of time and cost effectiveness, it appears, seemed too appealing. By 1970, in the *Brady* decision, it appears the Supreme Court inevitably had to pronounce itself on the constitutionality of plea bargaining, and since a good *ratio decidendi* can easily justify a flawed judgment, the need to further time and cost effectiveness, and the purported voluntariness of the accused; seemed a safe *raison d'etre* for the constitutionality of plea bargaining.

One is inclined to conclude that plea bargaining continues to be widely applied in USA, not because it is constitutional, but because the dilemma of time and cost of trials, inevitably leaves the criminal justice system preferring the option of sacrificing constitutional rights at the altar of cost and time effectiveness. Indeed, for USA, which is one of the largest countries in the western world, some have argued that 'it's easy to say "no plea bargaining" when your entire population is less than half of five of America's largest cities combined.'[117] Despite the foregoing argument, the fact that it is inevitable does not necessarily make it constitutional. From a constitutional point of view, plea bargaining should be called what it is, as opposed to 'deceptively' using ungrounded arguments to justify its constitutionality. The reality is that plea bargaining sits uncomfortably in the company of established principles of criminal law and may equally not withstand logical constitutional scrutiny.

It will be interesting to see how Uganda's constitutional court approaches the question of the constitutionality of plea bargaining, in the event that the procedure is challenged. I hope to perhaps see a more 'grounded' decision, the constitutional court acknowledging that the procedure is unconstitutional but the time and financial costs

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115. *United States v. Goodwin* 457 U.S. 368 (1982).

116. *Id.*

117. See for example, Why is plea bargaining legal in the US, when it's not in other western countries?, retrieved from <http://www.reddit.com/r/askreddit/comments/33dkix/serious_why_plea_bargaining_legal_in_the_us/> (accessed 20 May 2015).

are making the guarantee of constitutional rights impossible. This stance, may, however, be rhetorical, in that apart from USA, other countries, having transplanted plea bargaining from USA, have consistently found plea bargaining to be constitutional, despite the recurring question of the procedure's impermissible burden on guaranteed constitutional rights.

Germany is one of the countries that has equally embraced plea bargaining, going a step further to pronounce on its legality.[118] The position taken by Germany is daunting in light of the fact that it is predominantly inquisitorial justice systems, with some criminal procedural principles in Germany being at odds with the practice of plea bargaining.[119]

Traditionally, inquisitorial justice systems do not consider guilty pleas to be sufficient, on their own, to found a conviction. Ideally, inquisitorial systems conceive criminal procedure as an official investigation, to the extent that even with a guilty plea, the trial court still has to investigate the case, find the objective truth and equally figure out the credibility of the confession.[120] In inquisitorial justice systems, it is possible for an accused person to be acquitted after pleading guilty, because the focus is on inquiring into the truth. However, despite the position of Germany on guilty pleas, in

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118. See for example, the landmark decision of *BGHStNStZ* 1987, 419 in which the Federal Constitutional Court (FCC) of Germany considered the legality of discussions that had been made between the parties where they discuss the case. It was stipulated by the court that they are not forbidden so, 'long as the law was respected.' There was held to be no violation in this particular case as the final sentence which was received was commensurate with the offender's guilt. As such the free choice of the accused had not been violated. Similar to the Court of Appeal's decision in the case of *Turner* the German FCC established a set of rules which were to be followed in the case of informal negotiations. By setting out these limitations upon the process the FCC seemed to be indirectly accepting their validity. This decision was then followed in 1998 in *BGHSt NJW* 1998, 86, where the Fourth Senate of the Federal High Court of Justice stated that informal settlements are not prohibited so long as they remain within certain specified parameters. This case established that discussions held in the preparation stage are allowed so long as they can be revealed in the main trial. The trial court still had to investigate and find the objective truth and had to figure out the credibility of the confession. Since this case, it has been recognised by the courts that informal negotiations are part of the German criminal justice system.

119. Plea bargaining may be in conflict with § 103(2) of the German Constitution as well as §261 of the Code of Criminal Procedure of Germany, which are to the effect that the accused may not be convicted by a court where there is doubt about their guilt. See also § 152(11) of the Code of Criminal Procedure of Germany, which entrenches the celebrated rule of compulsory prosecution (*Legalitatsprinzip*), having the effect of mandating the German prosecutor to prosecute all prosecutable offenses, to the extent that there is a sufficient factual basis.

120. § 244(2) of the German Code of Criminal Procedure reads: 'In order to establish the truth, the court shall, *proprio motu*, extend the taking of evidence to all facts and means of proof relevant to the decision.' Finding the truth is an objective goal and not subject to the interests of the defense or prosecution. Hence, an admission of guilt is not sufficient to convict the accused.

2009,[121] the country made express provisions on the regulation of plea bargaining. German bargains are known as *Absprachen*.[122] They concern confessions and do not replace the trial but generally shorten them. It is also notable that even prior to the formalization of plea bargaining in 2009, plea bargaining was conducted informally.[123]

There are also some provisions of the Germany Criminal Procedure Code which implicitly endorsed plea bargaining.[124] Perhaps the biggest challenge that Uganda's judiciary will face in arriving at an objective decision on the constitutionality of plea bargaining pertains to the pace set by other developed criminal justice systems on the constitutionality of the procedure (Such as Germany, USA, amongst others).

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121. § 257c was introduced into the German Code of Criminal Procedure which allows for as well as regulates agreements without infringing the German Criminal Procedure. This new provision means that an agreement becomes valid when, 'the court announces the possible context of the agreement and both prosecution and defense consent.' Importantly, § 160b allows for the communication between both the prosecution and the defense before the trial so long as the communication, 'is suitable to further the proceedings.' These provisions both seek to reconcile the practice of informal settlements with the German procedure of searching for the substantive truth.

122. Rauxloh, *supra* note 73, at 296-331.

123. *Id.*

124. For example, § 153(a) of the German Code of Criminal Procedure which provides as follows:

[Provisional Dispensing with Court Action; Provisional Termination of Proceedings]

(1) In a case involving a misdemeanour, the public prosecution office may, with the consent of the accused and of the court competent to order the opening of the main proceedings, dispense with preferment of public charges and concurrently impose conditions and instructions upon the accused if these are of such a nature as to eliminate the public interest in criminal prosecution and if the degree of guilt does not present an obstacle. In particular, the following conditions and instructions may be applied:

1. to perform a specified service in order to make reparations for damage caused by the offence,
2. to pay a sum of money to a non-profit-making institution or to the Treasury,
3. to perform some other service of a non-profit-making nature,
4. to comply with duties to pay a specified amount in maintenance,
5. to make a serious attempt to reach a mediated agreement with the aggrieved person (perpetrator-victim mediation) thereby trying to make reparation for his offence, in full or to a predominant extent, or to strive therefore, or
6. to participate in a course ….

Essentially, § 153a permits the prosecution to divert (i.e. conditionally suspend). § 153a covers several quite serious crimes that may be considered felonies. These include crimes against the person (such as battery), most drug offenses, environmental crimes, and property crimes (such as larceny and virtually all business crimes, regardless of the financial harm caused).

VI. CONCLUSION AND RECOMMENDATIONS

The fact that even inquisitorial criminal justice systems such as Germany, a country that was once described as a 'land without plea bargaining',[125] are prepared to compromise fundamental principles upon which their criminal justice systems rest, to consider speedier and cost effective options, could mean that adversarial justice systems such as Uganda's, will not hesitate to fully embrace the procedure.

Moreover, it will be recalled that it is the judiciary that will finally have the mandate to make a pronouncement on the constitutionality of plea bargaining in Uganda. If the constitutionality of plea bargaining is challenged, I see a situation where a biased judiciary will be adjudicating its own cause in light of the fact that declaring plea bargaining unconstitutional is tantamount to imposing a burden on judicial officers, who view plea bargaining as an option on cutting down on their work load. Thus, it appears that the debate going forward with regards to plea bargaining, in light of the problematic pace set by foreign criminal justice systems is: How can this unconstitutional procedure be applied in a manner that restricts the rights of the accused person as minimally as possible. In light of the fore going, the following recommendations are made:

(i) As earlier alluded to, a competent defense is indispensable if the accused is to secure a relatively fair bargain. If the criminal justice system is prepared to undermine fundamental rights of accused persons, it should equally be prepared to make some concessions. By concessions, I mean, the criminal justice system should ensure that indigent accused persons can be availed with legal assistance so that they can meaningfully participate in plea bargaining negotiations. Under no circumstance should an accused person arrive at a decision in plea bargaining negotiations without the assistance of a defense attorney. By a defense attorney, I don't mean legal practitioners with no skill or experience in criminal prosecution whatsoever. The defense attorney should be competent enough to advance the accused person's case in a manner that will guarantee the rights of the accused to the highest extent possible. In fact, provision should be made for indigent accused persons to appeal a decision where the bargain was arrived at based on the advice of an incompetent defense attorney.

(ii) The police and prosecutors should equally be prepared to disclose the evidence on the investigation record to the accused person's attorney so as to ensure fair play at plea bargaining sessions. Additionally, prosecutors should desist from preferring charges and considering plea bargains before gathering sufficient evidence.

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125. Langbein, *supra* note 20, at 204-225.

By the time prosecutors consider plea bargains, the evidence on record at the time of the bargain, must be sufficient to found a conviction. As such, prosecutors should desist from the unpalatable habit of invoking plea bargains based on weak cases, not supported by evidence. Precisely put, plea bargaining should not turn out to be a strategy to conceal or to repair the weaknesses in the prosecution's case.

(iii) For now, the constitutionality of plea bargaining remains in balance and ought to be challenged. The argument should not be that it directly violates constitutional rights, but that it indirectly does so, in terms of the impermissible burden it imposes on the accused person to enjoy constitutionally guaranteed rights. Perhaps most importantly, it is not enough for adherents to merely argue that USA, a developed economy applies plea bargaining. Rather, it is important for the procedure to be measured against the values of our very own constitution, a law considered to be supreme.

(iv) Even if challenging plea bargaining in the constitutional court may be unsuccessful, at the very least, the issues raised by the petitioners will trigger debate on the subject and draw the attention of the legislature to the need to enact a more stringent law on plea bargaining. This is because currently, adherents of plea bargaining in Uganda, in advocating for the procedure, seem too excited and appear to be viewing the procedure as some sort of 'magic bullet'. Their 'omnibus' arguments have hardly been challenged as focus has thus far been on the merits of plea bargaining.

(v) Overall, a major lesson that the practice of plea bargaining in USA and Germany offers Uganda's criminal justice systems is – plea bargaining has a number of benefits, in particular saving time and resources. However, there are deeper constitutional issues at stake. The courts in the USA and Germany have chosen to declare plea bargaining constitutional. However, Uganda's judiciary does not have to follow in these footsteps. It can still depart from this popular trend. Most importantly, if this procedure is to be constitutionally challenged, Uganda's judiciary should be keen not to repeat the mistakes made by the judiciary of the USA and Germany. It is important for the courts not sacrifice constitutional rights at the altar of time and cost effectiveness.

EXPANDING UN REFUGEE PROTECTION: THE CASE FOR ECONOMIC MIGRANTS

J. Matthew Orr*

Abstract

This article provides a historical analysis of the United Nations' statutory refugee protection regime. It analyses two seminal and regional refugee protection instruments—the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees—which expanded the UN protection afforded to certain externally displaced persons. It notes the deficiencies in these instruments in protecting economic migrants and the failure of the United Nations (UN) has not updated its refugee protection regime. While the African and Latin American governments developed the Convention Governing the Specific Aspects of Refugee Problems in Africa in 1969 and the Cartagena Declaration on Refugees, respectively, to respond pragmatically to refugee problems unique to their respective regions, neither treaty explicitly included in its refugee definition extremely destitute persons who have no access to economic mobility in their home countries. This article argues that the UN should develop a new refugee protection instrument that includes such persons in its refugee definition.

I. INTRODUCTION

> *The refugee is both a product of, and remains closely embedded in, a complex interplay between state prerogatives and human rights, and politics and law.*[1]

Chiamaka Obasanjo is a 26-year-old, single mother of two. She has lived her entire life in a tiny, rural village near Ak'haldem, Ethiopia. She heavily depended on her husband, Baako, for financial and emotional support until last year when he was executed by the Ethiopian government. Baako, who was wrongfully accused by local

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1. THOMAS GAMMELTOFT-HANSEN, ACCESS TO ASYLUM: INTERNATIONAL REFUGEE LAW AND THE GLOBALISATION OF MIGRATION CONTROL 11 (eds. James Crawford, et al) (2011).

government officials of stealing a lamb from a fellow villager, was sentenced to death without any form of due process or judicial review. Daily life in the Obasanjo family was sufficiently arduous before Baako died. When Baako was killed, Chiamaka's prospects of facilitating healthy and peaceful lives for her children, Tadaaki and Gilda, 9 and 11 respectively, became exponentially grimmer.

Clean water is virtually non-existent in Ak'haldem; the village's only nearby water source is a stagnant pond. Dead fish, which suffocated as a result of the water's low oxygen level, are readily visible floating atop the brown-tinted liquid of the pond. A recent, persistent drought has affected widespread famine throughout the entire Horn of Africa. Even in Ethiopia's capital city of Addis Ababa, the average Ethiopian, whose average yearly income is around $500, finds it cripplingly expensive to purchase even a scarce loaf of bread. Locating a nutritious source of calories—or enough calories to survive, for that matter—is a daily struggle for Chiamaka. When she is lucky enough to acquire provisions, Chiamaka distributes the majority to her children.

Ak'haldem's main source of food is shipped in from Addis Ababa and sold at the local market. However, shipments have been increasingly infrequent in the last few months because of the pervasive food shortage. There are no doctors within 50 miles of Ak'haldem. When a villager becomes ill, which is essentially a weekly event as a result of the prevalence of disease perpetuated by the village's unsanitary conditions, only one remedy is available: hope for the best. Tadaaki became infected with dysentery, presumably from the town's rancid water, in late 2014. After suffering for nearly three months, Tadaaki inexplicably began to recover to full health and was eventually rid of the disease. Chiamaka realised that the chances of living a healthy, fulfilling life in Ak'haldem, Addis Ababa, Ethiopia, or anywhere else in the Horn of Africa were slim. She opted to flee to Europe.

Chiamaka gathered the essentials for the dangerous journey—which consisted of the remainder of the money Baako's parents gave after he was executed (approximately $200), a few loaves of bread, some dried fish, and a jug of dirty pond water—and departed at dawn for Asmara. It took the family five days to walk the 80 mile distance to Addis Ababa. For much of the trip, Chiamaka alternated carrying each child on her back to protect their feet from being blistered by their rope-soled sandals. When the withered family finally arrived in the Ethiopian capital city—having long since exhausted the supplies with which they began—they walked directly into the city center in search of the human smuggler that Baako's father described to her.

The smuggler agreed to transport Chiamaka and her children for $200 total; she initially interpreted the gesture as an act of compassion. The smuggler typically charged $300 per head for this particular trip, but claimed there were exactly three vacant spots remaining on the ship and that he would take them at a discounted rate.

The first leg of the smuggling route would precipitate the Obasanjo family up the Red Sea to Egypt via boat. If everything went as planned, the migrants would be stuffed into the back of a lorry and driven to the Mediterranean where they would board a Sicily-bound vessel. The voyage up the Red Sea, though lengthy, was uneventful. Inside the lorry, however, the cargo compartment was virtually unventilated; the Obasanjo family, along with 22 other Ethiopians and Eritreans, spent the next nine hours struggling to breathe in the oxygen-ridden, gas-fumed, soiled-body-odor tainted air. Throughout the entire ordeal, however, Chiamaka was simply relieved to be breathing non-Ethiopian oxygen. When the lorry finally reached the Mediterranean, the young mother of two felt an emotion burgeoning within her that she had not felt since Baako died—she felt hopeful.

The small, makeshift vessel was unsteady in the sea due to overloading. It was doubly exacerbated by the fact that the boat's "captain" had never piloted a boat across the Mediterranean—not to mention a boat filled to the brim with Ethiopians and Eritreans. Though the boat ran out of gasoline merely a mile from the Sicilian shore, the water was still over 100 meters deep. In an attempt to save space and weight, the boat had not been outfitted with oars, life jackets, or any other safety equipment. While the incoming waves pushed the boat a couple hundred yards closer to shore, the boat soon drifted broadside of the waves and capsized under the unequally distributed weight of its passengers.

Although an Italian coastguard vessel spotted the wreck soon after it occurred, it did not reach the scene in time to save the lives of the four people who drowned. Gilda, Chiamaka's 11-year-old-daughter, was among the dead. The coastguard ship transported the living to the shoreline, where they were promptly herded, via bus, to a nearby refugee processing station.

Although she was undoubtedly mournful over the loss for her daughter, Chiamaka could not help but feel relieved that her journey had come to an end. She could now rest easy with the expectation of finally living in a country in which citizens had access to clean, running water. She wanted to take a bath. She wanted to try a new, foreign cuisine. She wanted to learn Italian or Spanish or German and to put her son through school. Above all, Chiamaka wanted her late husband to somehow know that she, via the difficult journey, had endured across two countries and two seas, had improved the lives of herself and her family—albeit at the sacrifice of Gilda.

Although the above narrative is hypothetical in nature, it is representative of the struggles undergone by millions of Africans, Middle Easterners, and Southeast Asians during the last few years in their attempt to obtain legal acceptance into the European Union (EU). It is further representative of the struggles of countless persons worldwide since the UN instituted the 1951 Convention relating to the Status of Refugees (the

1951 Convention)[2] and the 1967 Protocol relating to the Status of Refugees (the 1967 Protocol).[3] Many would consider Chiamaka's journey from her village of Ak'haldem to the island of Sicily to be successful, sans the loss of Gilda. Regrettably, it simply does not work that way. Under the current UN refugee protection regime, Chiamaka would very likely be handed a refusal-of-entry document soon after requesting asylum. This is not only plausible—it is the most likely outcome in such a scenario.

The UN's 1951 Convention relating to the Status of Refugees requires the provision of extraterritorial protection to externally displaced persons only when such persons are able to demonstrate fear of persecution in their country of origin.[4] Chiamaka, who fled Ethiopia for economic reasons—no matter how horrible the conditions in Ak'haldem were—would be denied entry into Europe and forcibly returned to Eritrea (or instructed to find her own way home, which would be impossible for a penniless migrant like her). Regardless, under the current UN regime, Chiamaka's grueling trip to Sicily, as well as Gilda's death, was ultimately futile. Such is the current state of the UN refugee protection regime.

The UN refugee protection system is comprised of two seminal treaties: the 1951 Convention relating to the Status of Refugees[5] and the 1967 Protocol relating to the Status of Refugees.[6] The 1951 Convention included geographical and temporal limitations in its refugee definition—i.e., refugees consisted only of persons who were displaced as a result of crises on the European continent that occurred prior to January 1, 1951. However, the UN eventually recognized that the 1951 Convention's limiters precluded scores of externally displaced persons, who faced dangers on the same level as those *included* in the treaty's refugee definition, from extraterritorial protection. Accordingly, the UN removed the geographical and temporal limitations of the 1951 Convention by implementing the 1967 Protocol.

The 1951 Convention and its 1967 Protocol are groundbreaking in the sense that they, for the first time in UN history, provided sweeping, codified, multilateral protection to persons displaced from their home countries due to state-sponsored or state-allowed persecution. Unfortunately, the two seminal UN treaties are grossly

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2. United Nations, 1951 Convention relating to the Status of Refugees, opened for signature July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954).

3. United Nations, 1967 Protocol relating to the Status of Refugees, opened for signature January 13, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

4. 1951 Convention relating to the Status of Refugees, *supra* note 2, § II(A). This is a gross generalization of the method through which an externally displaced person accedes to the UN refugee protection.

5. *Id.*, § III(A).

6. 1967 Protocol relating to the Status of Refugees, *supra* note 3, § III(B).

under-inclusive to whom they offer refugee protection. States parties[7] to these treaties are only required to harbor externally displaced persons who meet its strict refugee definition. This policy was undoubtedly intended—and indeed, has been successful in its endeavor—to prevent large numbers of indigent persons from migrating to more prosperous UN States.[8] Such practice is disconnected from the UN's express aim of providing humanitarian protection and assistance to those clearly in need.[9]

Eventually, the regions of Africa and Latin America realized that in order to provide legal protection to externally displaced persons, new, multilateral, expansive refugee instruments would have to be developed. In response to mass influx situations unique to the continent of post-colonial Africa, the Organization of African Unity (OAU) developed a broader refugee protection treaty—the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 OAU Convention).[10] In a similar response to refugee problems distinctive to Latin America, governments within the region implemented an even *broader* refugee instrument—the 1984 Cartagena Declaration on Refugees (the 1984 Cartagena Declaration).[11] While both regional instruments pragmatically expanded the protection offered by the UN treaties, neither specifically granted refugee status to extremely destitute persons whose governments are unable or unwilling to provide economic mobility to their indigent citizens. Such persons face the same bleak realities as conventional refugees. Moreover, severely impoverished people whose governments do not facilitate access to basic human rights, such as food, clean water, and shelter, harm their citizens on the same or greater level as conventional refugees.

II. INTERNATIONAL AND REGIONAL REFUGEE PROTECTION REGIME

A. 1951 Convention relating to the Status of Refugees

1. Historical Context—"Refugees have existed as long as history," but it became apparent during the Twentieth Century that the international community was

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7. *See infra* note 72.
8. *See infra* note 217.
9. *See infra* note 215.
10. Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1001 U.N.T.S. 45 (entered into force Sept. 10, 1969). *See infra* Section IV.
11. Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 1984 Cartagena Declaration on Refugees, OAS/Ser.L/V/II.66, doc. 10, rev. 1 (entered into force Nov. 22, 1984). *See infra* Section V.

obligated—at least from a humanitarian perspective—to provide certain "protections and solutions" to refugees.[12] The earliest mechanism that provided for the international protection of refugees dates back only as far as the formation of the League of Nations in 1920.[13] Dr. Fridjtof Nansen, a preeminent Norwegian athlete and explorer-turned-President of the Norwegian Union for the League of Nations, was elected as the first High Commissioner for Refugees in 1921.[14] The League of Nations placed refugees into categories, which were determined principally by the nationality or country of origin of the person in question.[15]

Commissioner protections, which were offered initially only to Russian prisoners taken during World War I, were subsequently extended to Assyrian, Assyro-Chaldean, and Turkish refugees by 1928.[16] Up until 1950, the League of Nations, and later the United Nations,[17] created (largely on an *ad hoc* basis)[18] and "dismantled" numerous international institutions devoted to the protection of European refugees.[19] Interestingly, the League of Nations refused to grant refugee status to Spaniards fleeing Franco's Fascist regime or to Italians fleeing the Fascist government established by Mussolini.[20] During this period, "human rights refugees"—including the Spanish and Italian refugees who fled Fascism—were considered to be facing domestic issues rather

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12. Erika Feller, *The Evolution of the International Refugee Protection Regime*, 5 WASH. UNIV. J. OF L. AND POLICY 129, 130 (2001).

13. *Id*.

14. *Id*.

15. Under all treaties and arrangements created under the existence of the League of Nations, the fact that a person was "outside [his or her] country of origin" and "without the protection of the government of that state" were "sufficient and necessary conditions" for a person to be granted refugee status. *See,* GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW (3d ed.) at 16.

16. Feller, *supra* note 12, at 130. A Russian refugee was defined in 1926 to include "any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality." *See,* Goodwin-Gill, *supra* note 15, at 16.

17. Feller *id*. The UN, which was formed in 1945, dealt with refugee issues that arose after the failed League of Nations was abandoned at the conclusion of World War II. *See*, Francis O. Wilcox, *United Nations in the Mainstream of History*, 50 AM. SOC'Y INT'L L. PROC. 187 (1956).

18. In addition to the Assyrians who fled to France and the Assyro-Chaldeans and Turks who fled to the Caucasus and Greece, conventions set up by the League of Nations also extended refugee protections to Germans who could not "enjoy…the protection of the German Government"; Ruthenes in Austria and Czechoslovakia; Jews in Romania; and Hungarians in Austria, France, and Romania. Goodwin-Gill, *supra* note 16, at 17.

19. Feller, *supra* note 12, at 130.

20. Goodwin-Gill, *supra* note 15, at 18.

than international problems.[21] Accordingly, the League of Nations was unwilling to grant refugee status to such human rights refugees, believing that doing so would be "inconsistent with the [League's] principle of non-intervention in the internal affairs of sovereign states."[22]

The UN established the International Refugee Organization (IRO) in 1947 to manage the massive refugee crisis stemming from the World War II-era Nazi occupation of Europe.[23] The IRO was "competent to assist" displaced Europeans, including those who had fled the Nazi, Quisling, and Fascist regimes; certain Jews; and "people who were considered refugees [before World War II] for reasons of race, religion, nationality, or political opinion."[24] Although the UN intended to dissolve the IRO on or before June 30, 1950, it became rapidly apparent that the "comprehensive nature" of the IRO's task[25] made disbanding the organization so soon a practical and procedural impossibility.[26] Moreover, UN member states understood the necessity of composing a multilateral agreement to address future refugee crises.[27] Six months before the IRO was scheduled to wind up, the UN General Assembly voted to replace the IRO with the United Nations High Commissioner for Refugees (UNHCR) as the "principal"[28] UN refugee protection agency.[29]

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21. GÖRAN MELANDER, REFUGEE POLICY OPTIONS—PROTECTION OR ASSISTANCE, THE UPROOTED: FORCE MIGRATION AS AN INTERNATIONAL PROBLEM IN THE POST-WAR ERA 151 (Göran Rystad ed., 1990).

22. Goodwin-Gill, *supra* note 15, at 18.

23. Feller, *supra* note 12, at 129. European refugees who were displaced as a result of World War II were mostly welcomed and greeted warmly by host countries. This was likely due to the fact that the refugees originated largely from neighboring countries, often shared ethnic similarities with citizens of their destination countries, and—most importantly—helped to fill labor shortages.

24. Goodwin-Gill, *supra* note 15, at 19. The IRO also offered protection to people who had been "deported or expelled" or forced into labor outside their nation of origin.

25. Feller, *supra* note 12, at 130. The IRO was charged with "address[ing] every aspect of the refugee problem from registration and determination of status, to repatriation, resettlement, and legal and political protection." (Internal quotation marks omitted).

26. *Id*.

27. *Id*.

28. Goodwin-Gill, *supra* note 15, at 20.

29. Feller, *supra* note 12, at 130. The UNHCR adopted its Statute in December of 1950. United Nations, *1950 Statute of the Office of the United Nations High Commissioner for Refugees*, U.N.G.A. Res. 428 (V) (entered into force Dec. 14, 1950). The UNHCR's proposed purpose is to "provide international protection for refugees and to seek permanent solutions to their problems by assisting governments to facilitate their voluntary repatriation or their assimilation within new international communities." See Feller *id.,* at 130-31. The UNHCR was initially established for a three-year life span. However, like the IRO, the UN's intention for such a short existence grossly underestimated the future necessity of a multilateral international organization meant to provide refugees with protection under international law.

The UNHCR became effective in 1951 and was allotted an initial annual budget of $30,000 and a 33 person staff.[30] At the inception of the UNHCR, the chief refugee issue facing Europe was the displacement of approximately one million Europeans who had fled Nazism and communism.[31] The same year, the UN drafted the 1951 Convention,[32] which stands as the seminal legal instrument defining *who* constitutes a refugee, the *legal rights* to which people deemed refugees are entitled, and *how* member states are statutorily obligated to treat refugees.[33] The 1951 Convention was the first—and, indeed, coupled with the 1967 Protocol, remains the only—binding legal "refugee protection instrument" with universal application.[34]

The intent of the 1951 Convention, which is "[g]rounded in Article 14 of the Universal Declaration of Human Rights (the Universal Declaration),"[35] was initially rather limited; it was created to be effective for only three years and was meant to address solely the "question of the status of refugees" rather than solutions to refugee issues, root causes of refugee crises, or policies relating to granting asylum to recognized refugees.[36] However, the 1951 Convention also "defines a refugee's obligations to host countries and specifies certain categories of people, such as war

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The UNHCR was created as a "subsidiary organ" of the UN General Assembly under Article 22 of the UN Charter. United Nations, *U.N. Charter*, *opened for signature* June 26, 1945 (entered into force Oct. 24, 1945). Feller *id.,* at 131.

30. Feller *id.,* at 131.

31. *Id*.

32. *Id*. *1951 Convention relating to the Status of Refugees.*

33. *Id*.

34. *Id*.

35. United Nations, *1948 Universal Declaration of Human Rights*, Art. 14, *opened for signature* Dec. 10, 1948, U.N.G.A. Res. 217 (A)(III) (entered into force Dec. 16, 1948). Article 14 of the Universal Declaration states that: (1) all persons have a right to "seek and enjoy" asylum in other countries from persecution; and (2) this right may not be invoked by persons fleeing prosecution for "non-political crimes" or from other acts that are contrary to the "purposes and principles" of the UN.

36. Feller, *supra* note 12, at 131. "While [the 1951 Convention] traced its origins broadly to human rights principles, it was more about states' responsibilities than individuals' rights." The 1951 Convention initially applied only to persons fleeing events that occurred in Europe before 1951. *1951 Convention relating to the Status of Refugees*, art. 1(A)(2). However, the 1967 Protocol expanded the instrument, removing temporal and geographical limitations of the 1951 Convention. *1967 Protocol relating to the Status of Refugees*, art. I(2), (3). The 1951 Convention has also been "supplemented by refugee and subsidiary protection regimes," including the 1969 OAU Convention and the 1984 Cartagena Declaration on Refugees (the 1984 Cartagena Declaration). Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1001 U.N.T.S. 45, enacted Sept. 10, 1969. Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, *1984 Cartagena Declaration on Refugees*, OAS/Ser.L/V/II.66, doc. 10, rev. 1 (entered into force Nov. 22, 1984).

criminals, who do not qualify for refugee status."[37] The 1951 Convention became effective in the spring of 1954 and has only been subject to one amendment—the document's 1967 Protocol.[38] The 1951 Convention essentially consolidated prior international refugee treaties and stands as the most "comprehensive codification" of international refugee rights.[39] Currently, 145 nations are parties to the 1951 Convention.[40]

The 1951 Convention is a status and rights-based instrument which is supported by several fundamental principles.[41] The three most important of these principles are non-penalization, non-discrimination, and *non-refoulement*. The principle of non-discrimination dictates that parties to the 1951 Convention are prohibited from applying its provisions in a discriminatory manner against refugees on account of country of origin, race, or religion.[42] The non-penalization principle demands that parties to the 1951 Convention are prohibited from penalizing refugees for illegally entering or remaining within a destination country.[43] The 1951 Convention's Article 33 *non-refoulement* principle—arguably the most fundamental and vital provision of the instrument, given that "no reservations or derogations may be made to it"— prohibits states from returning refugees to "the frontiers" of territories in which the refugees would fear "threats to life or freedom" on account of "race, religion, nationality, membership of a particular social group or political opinion."[44]

2. Scope—In addition to codifying a specific, exclusive definition of exactly who constitutes a refugee, the 1951 Convention "sets out the principal obligations of

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37. 1951 Convention relating to the Status of Refugees.

38. *Id*; 1967 Protocol relating to the Status of Refugees.

39. Feller, *supra* note 12, at 131. 1951 Convention relating to the Status of Refugees.

40. United Nations High Commissioner for Refugees, *State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol* 1, available at <http://www.unhcr.org/3b73b0d63.html>. There are 148 states that are party to either the 1967 Protocol or the 1951 Convention. The United States, Venezuela, and Cabo Verde are parties only to the 1967 Protocol. Madagascar and Saint Kitts and Nevis are parties only to the 1951 Convention.

41. 1951 Convention relating to the Status of Refugees.

42. *Id*., Art. 3. International human rights law has expanded the 1951 Convention's non-discrimination policy to include prohibition against discrimination based on sex, age, disability, sexual orientation, or "other prohibited grounds of discrimination." See also, Goodwin-Gill, *supra* note 15, at 36.

43. 1951 Convention relating to the Status of Refugees, Art. 31. Refugees may not be arbitrarily detained solely for seeking asylum, nor may they be charged with immigration or criminal offences relating to the seeking of asylum. Feller expands upon this point, arguing that "[refugees] cannot be expected to leave their country and enter another country in a regular manner, and accordingly should not be penalized for having entered into, or for being illegally in, the country where they seek asylum." *See* Feller, *supra* note 12, at 132.

44. Feller *id.,* at 132. 1951 Convention relating to the Status of Refugees, Art. 33.

States" towards those deemed refugees.[45] Technically, members to the 1951 Convention are not legally required to provide asylum to refugees or to "admit refugees for permanent settlement."[46] Indeed, the only obligation states parties to the Convention owe to refugees is the duty of *non-refoulement*, which entails that they are not to forcibly return (or *refouler*)[47] refugees to any country where they are "likely to face persecution, other illegal treatment, or torture."[48]

The 1951 Convention applied only to persons fleeing World War II-related events that occurred before 1951—especially people fleeing the rise and rule of the Nazi regime.[49] Further, the 1951 Convention offered protection to only persons fleeing events that occurred on the European continent.[50] In 1967, the UN General Assembly drafted and finalized the Protocol relating to the Status of Refugees, which removed the temporal and geographical scope of the 1951 Convention.[51] Recognizing that the 1951 Convention's refugee definition was under-inclusive in application,[52] the 1967 Protocol's purported purpose was to modernize the refugee definition to include persons who clearly constitute refugees and need international protection, yet are unable to access such protection as a result of the under-inclusive refugee definition of the 1951 Convention.[53]

Article 1 of the 1951 Convention defines a refugee as any person who, as a result of events occurring before 1 January 1951[54] and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable

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45. S. Martin, *Forced Migration, the Refugee Regime and the Responsibility to Protect*, PROTECTING THE DISPLACED: DEEPENING THE RESPONSIBILITY TO PROTECT 13, 22 (eds. Sara E. Davies & Luke Glanville).

46. *Id*.

47. Goodwin-Gill, *supra* note 15, at 201. 1951 Convention relating to the Status of Refugees, Art. 33. The term stems from the French root "*refouler*," which means "to drive back or repel, as of an enemy who fails to breach one's defenses." The principle of *refoulement* is distinguishable from expulsion or deportation, in which a "lawfully resident alien" is required to leave a state, lest he or she be forcefully removed.

48. 1951 Convention relating to the Status of Refugees, Art. 33.

49. *Id*., Art. 1(A)(2).

50. *Id*.

51. 1967 Protocol relating to the Status of Refugees, Art. I(2), (3).

52. *Id.,* preamble.

53. 1951 Convention relating to the Status of Refugees, Art. 1(A)(2).

54. *Id*. The 1967 Protocol expanded the 1951 Convention by "lift[ing]" the temporal scope of the refugee definition, citing the fact that "new refugee situations have arisen since the [1951] Convention was adopted and that the refugees concerned may therefore not fall within the scope of the [1951] Convention." Martin, *supra* note 45, at 21; *1967 Protocol relating to the Status of Refugees*, preamble.

or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[55]

More concisely, a refugee is "a person who has crossed an international frontier because of a well-founded fear of persecution."[56] While the 1951 Convention "included geographical (events that occurred in Europe) and temporal (persons displaced before 1951)"[57] limitations. Indeed, only people who explicitly fit this category were entitled to UNHCR protection[58] and such limitations were essentially removed by the 1967 Protocol, which applied the 1951 Convention to refugees worldwide.[59] The 1951 Convention essentially substitutes the governments of host nations as avenues for protection in the place of "unable or unwilling sovereigns."[60] The 1951 Convention's refugee definition is designed to protect the "international system of states," which is "threatened when states fail to fulfill their proper roles."[61]

"Lack of protection by the government of the country of origin"—including the failure or unwillingness to provide "effective [governmental] guarantees in matters such as life, liberty, and security of the person"—stands as an important driving force behind the 1951 Convention's refugee definition.[62] Considering the impracticability inherent in making individualized, ad hoc determination of refugee status on a large scale, "mixed flow"[63] migrations, this element of protection is especially important in efficiently processing asylum seekers at the borders of destination countries.[64] The "field of UNHCR competence, and thus the field of [the Commissioner's]

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55. *1951 Convention Relating to the Status of Refugees*, Art. 1(A)(2).

56. A.E. Shacknove, *Who Is a Refugee?*, 95 ETHICS 274 (Jan. 1985).

57. Martin, *supra* note 45, at 21 (information in parentheses mine). *1951 Convention relating to the Status of Refugees*, Art. 1(A)(2).

58. E.O. Awuku, *Refugee Movements in Africa and the OAU Convention on Refugees*, 39 J. AFR. L. 79, 80 (1995).

59. Martin, *supra* note 45, at 21. *See* notes 69-92, *infra*.

60. Martin, *supra* note, at 21-22.

61. C. Keely, *How Nation-States Create and Respond to Refugee Flows*, 30 INT'L MIGRATION REV. 1046 (vol. 4) (1996). Such "proper roles" include, namely, the state responsibility to refrain from persecuting citizens based upon political opinion, race, religion, and nationality.

62. Goodwin-Gill, *supra* note 15, at 29.

63. Emma Haddad, *EU Migration Policy: Evolving Ideas of Responsibility and Protection*, PROTECTING THE DISPLACED: DEEPENING THE RESPONSIBILITY TO PROTECT 85, 98 (eds. Sara E. Davies & Luke Glanville). Parties to the 1951 Convention, including all members of the EU, "must grapple on a daily basis with today's phenomenon of mixed flows that encompass refugees, economic migrants, and lots of categories in between."

64. Goodwin-Gill, *supra* note 15, at 30.

responsibilities" has expanded significantly since the UNHCR became effective in 1951.[65]

In the UN General Assembly's 1986 Report (the 1986 Report), the UN focused on "coerced movements" in which migration impetuses were understood to have been caused by "a variety of natural, political and *socio-economic* factors which directly or indirectly force people to flee . . . in fear for life, liberty and security."[66] The 1986 Report cited wars and internal conflict as "major cause[s] of refugee flows," as "flight [is] often the only way to escape danger to life or extensive restrictions of human rights."[67] In many severely impoverished nations, however, the intense, pervasive poverty stemming from economic underdevelopment and inadequate economic infrastructures, endanger basic human rights to the same degree as war or persecution.

3. Non-refoulement—Arguably the most important provision of the 1951 Convention—which preeminent refugee law scholar, Guy S. Goodwin-Gill, refers to as "the foundation stone of international protection"[68]—is the principle of *non-refoulement*.[69] Article 33 of the 1951 Convention, which codified the *non-refoulement* principle, states that:

> No [State party to the 1951 Convention] shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[70]

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65. *Id*., at 29.

66. *Id.,* at 30 (emphasis added). The fact that the UN focused on coerced movement not explicitly covered by the 1951 Convention's definition of refugee (ex. socio-economic coercion) illustrates its understanding that the international statutory refugee definition is no longer comprehensive enough to effectively cope with the problems faced by citizens involved in modern migratory movements. Relevant socio-economic factors include those that "threaten the physical integrity and survival of individuals and groups . . . underdevelopment . . . [and] the absence of adequate economic infrastructures." Despite the inadequacy of the statutory refugee definition, which does not offer protection to indigent persons, the UN has neither updated the 1951 Convention (excluding the 1967 Protocol), nor otherwise allowed severely impoverished economic migrants access to asylum in more prosperous nations, such as many EU member states.

67. *Id*.

68. *Id*., at 50.

69. *1951 Convention Relating to the Status of Refugees*, Art. 33(1).

70. *Id*.

However, this provision may not be claimed by a refugee for "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is" or by a refugee who has been convicted of a "particularly serious crime" in his home country and is merely fleeing judgment.[71]

The principle of *non-refoulement* "applies across a broad class" of externally displaced persons.[72] However, in some situations, certain factual elements must be present in order for the *non-refoulement* principle to be triggered. For example, the existence of "mass movement to or across an international frontier and some evidence of relevant and valid reasons for flight, such as human rights violations in the country of origin" forces destination countries to make "formal determination[s]" of whether or not asylum-seeking individuals meet the 1951 Convention's criteria for accession to refugee protection.[73] Indeed, states may not shirk their legal obligations by "ignoring," avoiding, or disregarding their *non-refoulement* responsibilities.[74] Unfortunately, many States have attempted to circumvent their *non-refoulement* obligations by hiring private, third-party companies to patrol the seas beyond the borders of their countries in an attempt to seize and *refouler* refugees before they reach their shores and borders.[75]

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71. *Id*., Art. 33(2).

72. Goodwin-Gill, *supra* note 15, at 50.

73. *Id*.

74. Gammeltoft-Hansen, *supra* note 1, at 1. Some EU states today—most notoriously Hungary—have explicitly violated this provision of the 1951 Convention in their treatment of asylum seekers along EU borders. Hungary has taken a particularly "hard line" against the mass influx (composed largely of Syrians), going to great lengths to construct a 110-mile long segment of "razor-wire fence" along its border with Serbia. Katya Adler, Europe stumbles toward a migrant plan, BBC NEWS (Sept. 23, 2015), available at <http://www.bbc.com/ news/world-europe-34332984; *Why is EU struggling with migrants and asylum?*>, BBC NEWS (Sept. 8, 2015), available at <http://www.bbc.com/news/world-europe-24583286>. Ironically, in the Cold War era in 1956, "some 200,000 Hungarian refugees" fled Soviet "suppression" and were received with "open arms" by neighboring Austria. Tim Lister, Today's refugees follow path of Hungarians who fled Soviets in 1956, CNN (Sept. 7, 2015), available at <http://www.cnn.com/2015/09/07/europe/hungary-refugees-1956/>. Italy, too, has turned away scores of asylum seekers without affording them their "international right to request asylum." Kavitha Surana, Italy quietly rejects asylum seekers by nationality, advocates say, Al Jazeera America (Oct. 19, 2015), available at <http://america.aljazeera.com/articles/2015/10/19/italy-quietly-rejects-asylum-seekers-based-on-nationality-advocates-say.html>. Italian authorities are accused of arbitrarily and summarily rejecting certain asylum seekers based solely on their country of origin. For example, "local activists and lawyers" claim police and border control authorities in Sicily "have begun to summarily classify some new arrivals as economic migrants on the basis of their country of origin, issuing them refusal-of-entry documents almost as soon as they arrive." Most persons rejected based upon arrival came from Africa, especially Eritrea.

75. Gammeltoft-Hansen, *supra* note 1, at 99. The *non-refoulement* principle does not apply extraterritorially.

B. 1967 Protocol Relating to the Status of Refugees

The 1967 Protocol is a widely accepted,[76] multilateral legal document that expanded the geographic and temporal scope[77] of the refugee law regime beyond that of its predecessor. Like the document it sought to expand, the 1967 Protocol was aimed at defining who constitutes a refugee and determining the "appropriate convention standards of treatment" applicable to persons seeking asylum—whether or not they are lawfully present in their destination State.[78] Also, like the 1951 Convention, the 1967 Protocol codifies merely the *minimum* rights owed to asylum seekers and refugees by States Parties to the instrument.[79] This author shares the opinion of Goodwin-Gill: The measures of the 1951 Convention and its 1967 Protocol have proven to be "inadequate to deal with certain aspects of today's refugee problems."[80]

1. Historical Context—On December 14, 1950, the United Nations General Assembly voted to convene a 26-State[81] Conference of Plenipotentiaries in Geneva to draft and finalize a Convention relating to the Status of Refugees (the Conference).[82] The Conference—which aimed to assuage the suffering of post-World War II, externally displaced persons, yet included geographical and temporal limitations in its

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76. Goodwin-Gill, *supra* note 15, at 739. Currently there are 144 States Parties to the 1967 Protocol. In comparison, 144 States are parties to the 1951 Convention, 141 States are parties to both instruments, and 147 States are parties to one or both of those instruments.

77. *See supra* FN 40.

78. Goodwin-Gill, *supra* note 15, at 506. *1951 Convention Relating to the Status of Refugees*. *Protocol Relating to the Status of Refugees*.

79. *Id*.

80. *Id*. However, Goodwin-Gill, states that the "principle objective" of the two instruments has always been "the regulation of issues of legal status and treatment" of refugees and asylum seekers, as opposed to the "grand design of universally acceptable solutions." He believes that such nearsightedness is a fatal flaw in the refugee law regime. The international system of protection for refugees and asylum seekers *should unequivocally* seek to apply universally to persons in need of extraterritorial protection. Even if this is an unfeasible goal—i.e., it is likely impossible for any legal document to solve, with 100% effectiveness, every issue in which a displaced person seeks assistance from beyond the borders of his or her own State—such documents should still aim to do so. Approaching a dire crisis with a defeatist mentality leads inevitably to failure.

81. The governments of 26 nations were "represented by delegates who all submitted satisfactory credentials or other communications of appointment authorizing them to participate in the Conference." *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, Art. I, 189 UNTS 150 (entered into force on Apr. 22, 1954).

82. *Id*.

refugee definition[83]—met from July 2 to July 25, 1951.[84] The Conference formally and unanimously adopted the 1951 Convention on July 25, 1951; the instrument was "opened for signature at the European Office of the United Nations" from July 28 to August 31, 1951.[85]

In the decade following the adoption and implementation of the 1951 Convention, the instrument's shortcomings became strikingly evident.[86] At this point, "UNHCR protection activities" were inevitably forced "well beyond" Europe, especially into Africa.[87] Thus, the 1951 Convention's "individualized" and "persecution-based" methodology was inapplicable to the "new refugee situations"[88] that arose post-implementation of the instrument. By the late 1960s, the United Nations finally acknowledged that there existed a significant gap in the international refugee protection regime. After all, the 1951 Convention provided protection only to persons who had fled events occurring in the European continent[89] *before* January 1, 1951. Accordingly, the U.N. General Assembly "felt it necessary" to expand the scope of UNHCR refugee protection, thus prompting the drafting and finalization process of the 1967 Protocol relating to the Status of Refugees.[90] The 1967 Protocol was entered into force on October 4, 1967.[91]

2. Scope & Application—The 1967 Protocol—"considering that new refugee situations [had] arisen since the [1951] Convention was adopted and that the refugees concerned may therefore not fall within the scope of the [1951] Convention" and that "equal status" should be afforded to *all* refugees, regardless of the timing or location

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83. The 1951 Convention defined refugees as only someone who, "[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." *1951 Convention relating to the Status of Refugees*, Art. 1(B)(1)(a).

84. United Nations, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, Art. I.

85. *Id*.

86. Feller, *supra* note 12, at 132.

87. *Id*. During this period, the African continent experienced the "painful process of decolonization."

88. *1967 Protocol relating to the Status of Refugees*, preamble.

89. The geographical limitation was optional in terms of implementation by States parties to the 1951 Convention. *1951 Convention relating to the Status of Refugees*, Art. I(B)(1)(a).

90. Feller, *supra* note 12, at 132.

91. *1967 Protocol relating to the Status of Refugees.*

of their plight[92]—essentially removed the geographical and temporal limitations posed by the 1951 Convention.[93] Indeed, the 1967 Protocol's refugee definition broadened its predecessor's, stating:

> [T]he term 'refugee' shall, except as regards the application of paragraph 3 of this Article, mean any person within the definition of Article I of the [1951] Convention as if the words 'As a result of events occurring before 1 January 1951 and . . .' and the words '. . . a result of such events,' in Article 1(A)(2) were omitted.[94]

Paragraph 3 of this article states that the 1967 Protocol "shall be applied by the States Parties hereto without any geographic limitation"; however, States with pre-existing "declarations" of geographical limitations had the option to maintain those limitations.[95] Thus, although the 1967 Protocol removed the 1951 Convention's "stipulative date," the geographical option technically remains in effect.[96]

The 1967 Protocol adopted and applied Articles 2 through 34 of the 1951 Convention (including the axiomatic bedrock of refugee protection: the principle of *non-refoulement*) as if expressly set forth therein.[97] In other words, the 1967 Protocol essentially applied the "meat" of the 1951 Convention, sans limitations on time and location. The only portions of the 1951 Convention that were *not* expressly included in the 1967 Protocol are non-substantive in nature (i.e., "executory and transitory provisions") and do not regard formal refugee protections.[98]

C. 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

Although the 1951 Convention and its 1967 Protocol remain the seminal international legal instruments governing international refugee law, their concepts of who constitutes a refugee have proven "inadequate" to handle the issues faced by "millions of externally

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92. *Id*., Preamble.
93. Feller, *supra* note 12, at 132.
94. *1967 Protocol relating to the Status of Refugees*, Art. I(2).
95. *Id*., at Art. I(3).
96 Goodwin-Gill, *supra* note 15, at 507. Currently, only four States maintain their geographical limitation (Congo, Madagascar, Monaco, and Turkey). Thus, the 1967 Protocol's geographic option is not *truly* operative in the grand scheme of international refugee protection. *Id*. at footnote 7.
97 *1967 Protocol relating to the Status of Refugees*, art. I(1).
98. *Id.*, Ch. VI.

displaced" citizens of third-world nations.[99] Fortunately, the 1951 Convention does not prohibit contracting states from granting "more far-reaching" rights to displaced persons—including expanding the refugee definition.[100] Indeed, Article 5 of the 1951 Convention provides that none of its provisions "impair any rights and benefits granted by a Contracting State to refugees apart from this Convention."[101] Thus, parties to the 1951 Convention are at liberty to supplement refugee rights; they may not, however, abbreviate rights granted by the 1951 Convention.

In 1969, the OAU exercised this right by enacting the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 OAU Convention),[102] which was the first binding regional refugee law instrument to broaden the refugee definition in the 1951 Convention.[103] In fact, the 1969 OAU Convention remains today the most expansive, binding refugee protection instrument in existence.

1. Historical Context—The first refugee crisis on the African soil arose in the 1960s: a decade of massive decolonization[104] and the intensification of struggles for independence by African nations.[105] The conflicts[106] that resulted from the colonized African states' struggles for independence spurred a series of "massive refugee movements."[107] The *reasons* behind refugee movements from independent countries

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99. E. Arboleda, *Refugee Definition in Africa and Latin America: The Lessons of Pragmatism*, 3 INT'L J. REFUGEE L. 185, 186 (1991).

100. Awuku, *supra* note 58, at 80.

101. *1951 Convention relating to the Status of Refugees*, Art. 5.

102. *Convention Governing the Specific Aspects of Refugee Problems in Africa*. From the inception of the OAU Convention's drafting process, "most African States agreed that the meaning of refugee had to be expanded." *See,* Arboleda, *supra* note 99, at 194 (internal quotations omitted).

103. Arboleda *id.,* at 189.

104 . *Id.*, at 190. Over half of the African refugees who fled their home countries during the 1960s originated from "colonial and dependent states"—namely, Portuguese colonies on the continent (e.g., Mozambique and Angola). The remainder stemmed from the other 38 African nations, which were independent sovereigns.

105. *Id.*, at 190.

106. The "enormous refugee problem in colonial and dependent [African nations] stemmed primarily from oppression and racism." See *id.*

107. Awuku, *supra* note 58, at 80. For example, the struggles for independence in the Portuguese colonies of Angola, Mozambique, and Portuguese Guinea produced "stringent and brutal" repressive measures from the Portuguese government. Arboleda, *supra* note 99, at 190. Comparable independence movements in Rhodesia (now Zimbabwe) and South Africa "precipitated" a stricter interpretation and application of racist policies, to wit, apartheid. Colonial governments implemented "even harsher measures of racial discrimination" that served to "erode the black majority's" freedoms of education, speech, and movement.

in the 1960s in Africa were multifaceted and exceedingly complex. When former colonies actually *did* obtain independence from their colonizers, the sudden shift in economic systems and social regimes fostered political controversies that facilitated additional refugee displacements.[108] These economic "birth pangs" are always present when a country can no longer depend upon its former colonizer for financial support.[109]

Furthermore, the "arbitrary manner" in which the territory of the African continent was divided among "colonial powers" incited numerous conflicts between varying ethnic, tribal, and cultural groups when the colonizers were removed from the picture.[110] Another factor that created widespread African refugee movements during this period was the "continued interference" by *former* colonial powers in the "internal affairs" of newly independent states.[111] Finally, the refugee crises that originated in the newly independent countries were further "exacerbated by the impatience and possible over-enthusiasm" of infant governments that attempted to suppress any political ideologies that conflicted with their own.[112]

In May 1963, the "rising tide of refugees prompted"[113] the African nations to spawn the OAU, which "focus[ed] its attention" on refugee issues.[114] Between 1964 and 1967, the volume of externally displaced Africans nearly doubled from approximately 400,000 to 700,000.[115] At this point, it was widely acknowledged among African governments and the OAU that, despite the fact that the UNHCR had been granting "material assistance"[116] to displaced African persons who were not explicitly covered by the 1951 Convention's refugee definition, the 1951 Convention was simply inadequate to effectively manage the widespread refugee crises occurring in neo- and post-colonial Africa. Accordingly, the African parties to the 1951 Convention[117] and

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108. Awuku, *supra* note 58, at 80.

109. Arboleda, *supra* note 99, at 190. Newly independent African nations' attempts to "ensure external and internal security, internal stability, and economic and social reconstruction" often left citizens feeling as if they were once again being oppressed—though in this instance by their own government rather than their former colonizer. See Arboleda *id*., at 190-91.

110. *Id*., at 190.

111. *Id*.

112. *Id*., at 191.

113. Awuku, *supra* note 58, at 80.

114. Arboleda, *supra* note 99, at 191.

115. *Id*.

116. Awuku, *supra* note 58, at 80.

117. African state parties to the 1951 Convention include: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Congo, Djibouti, Egypt, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Ivory Coast, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Rwanda,

the OAU called for a "regional convention" aimed at addressing and remedying refugee problems unique to Africa.[118]

In 1964, OAU's Council of Ministers adopted a resolution that created a "special commission" to explore the African refugee problem, postulate recommended solutions to the problem, and to "ensure the welfare" of refugees in countries of asylum.[119] The special commission originally intended to adopt its own, comprehensive refugee plan that would supersede all other asylum-related, multilateral treaties (including the 1951 Convention). The commission adopted the first draft of the 1969 OAU Convention in late 1964.[120] Unfortunately, the "serious shortcomings" of this "Kampala Draft" prodded the OAU to form a committee of "legal experts" to revise the instrument.[121] Attendees were "requested to adhere" to the provisions of the 1951 Convention, sans the date limitation.[122] These experts' revision—the so-called "Leo Draft"—was immediately and heavily criticized for being even *more* stringent and under-inclusive than the 1951 Convention it sought to replace.[123] Thus, the OAU Council of Ministers and Heads of State and Government rejected the Leo Draft in late 1965.

The OAU completed two additional drafts of the 1969 OAU Convention in 1966 and 1967, respectively.[124] The Council of Ministers concluded that Africa needed a purely "African instrument" to serve as a "regional complement" to the 1951 Convention rather than simply overriding and superseding its provisions.[125] The OAU further instructed the special committee that its mission was to develop a new legal instrument, complementary to the 1951 Convention, "specifically geared" towards the regional needs of Africa.[126] In February 1969, at the twelfth session of the OAU

Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, Sudan, Swaziland, Togo, Tunisia, Uganda, United Republic of Tanzania, Zaire (formerly Kinshasa), Zambia, and Zimbabwe. *1951 Convention relating to the Status of Refugees.*

118. Awuku, *supra* note 58, at 80.

119. Arboleda, *supra* note 99, at 192. The meeting was held in Lagos, Nigeria and was composed of representatives from Burundi, Cameroon, Congo, Kinshasa (now known as Zaire), Ghana, Nigeria, Rwanda, Senegal, Sudan, Tanzania, and Uganda.

120. *Id*. The first draft of the 1969 OAU Convention came to be known as the Kampala Draft.

121. *Id*.

122. *Id*. This request served also as a departure from the OAU's original intention to adopt a new legal instrument, "independent of the international system," to supplant the refugee policies of the 1951 Convention.

123. *Id*.

124. *Id*.

125. *Id*.

126. *Id*.

Council of Ministers, the final draft of the 1969 OAU Convention was approved.[127] The same instrument was subsequently formally adopted by the OAU Assembly of Heads of State and Government in Addis Ababa, Ethiopia, later that year.[128] The 1969 OAU Convention became effective on June 20, 1974 after ratification by 14 states.[129]

2. Scope—The 1969 OAU Convention is a binding, multilateral legal instrument that has been ratified by 45 of the 53 states in Africa.[130] From the inception of the 1969 OAU Convention's drafting process, there existed a "broad consensus" among African nations that the 1951 Convention's refugee was under-inclusive and required expansion to apply adequately to the "situations of [all] African refugees."[131] In fact, at the beginning of the drafting process, the OAU Council of Ministers' mission was to compose a document that would wholly supplant the 1951 Convention.[132] However, in the final draft of the 1969 OAU Convention, the broader definition adopted by the OAU did not supersede the 1951 Convention—rather, it supplemented it.

The refugee definition adopted by the 1969 OAU Convention was "unprecedented" and groundbreaking in a number of ways.[133] Firstly, the 1969 OAU Convention constituted the first international legal instrument to expand the 1951 Convention and its 1967 Protocol's conceptions of refugees. Secondly, the 1969 OAU Convention constituted the first time in international refugee law that a legal instrument included in its refugee definition:

> [E]very person who, owing to *external aggression*, *occupation*, *foreign domination* or *events seriously disturbing public order* in either part or the whole of his country of origin or nationality, is compelled to leave

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127. Arboleda, *supra* note 99, at 193. *Convention Governing the Specific Aspects of Refugee Problems in Africa*.

128. Arboleda, *supra* note 99, at 193. A total of 41 representatives of the independent African states and governments signed the final draft of the OAU Convention on Sept. 10, 1969.

129. *Id*. *Convention Governing the Specific Aspects of Refugee Problems in Africa*.

130. African Union, List of Countries Which Have Signed, Ratified/Acceded to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, available at <http://www.au.int/en/sites/default/files/treaties/7765-sl-refugee_problems_in_africa_0.pdf>.

131. Arboleda at 194. Indeed, most African governments felt it was inherently "difficult to apply the [refugee] definition in the UN Convention as it was not broad enough to cover all refugee situations in Africa." Awuku at 80.

132. Arboleda, *supra* note 99, at 194. Indeed, some delegates requested that the OAU form a refugee definition "totally independent of the 1951 Convention." *Id*.

133. Arboleda, *supra* note 99, at 194.

> his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[134]

This constitutes a significant departure from the 1951 Convention's refugee definition, which entitles externally displaced persons to asylum only if they meet four conditions: 1) he or she is outside his or her country of origin; 2) he or she has a "well-founded fear" of persecution; 3) such fear is based on either religion, race, nationality, or membership of a particular social group or political opinion; and 4) he or she is unwilling or unable to avail himself or herself of the protection of that country, or to return there, for fear of persecution.[135] Thirdly, unlike the refugee concept established by the 1951 Convention, the 1969 OAU Convention does not require asylum seekers to subjectively "justify" their fear of persecution in order to obtain the status and protection afforded a refugee.[136]

Undoubtedly, the OAU's Council of Ministers and its Assembly of Heads of State and Government fully intended to significantly expand the scope of the 1951 Convention and its 1967 Protocol in their application to refugee situations on the African continent. The drafters of the 1969 OAU Convention explicitly recognized in the preamble that a significant "need" had arisen for an "essentially humanitarian approach towards solving the problems of refugees."[137] Moreover, the preamble "not[ed] with concern" the "constantly increasing numbers of refugees in Africa" and that such refugees should be afforded adequate protections that would "alleviat[e] their misery and suffering and provid[e] them with a better life and future."[138] The 1969 OAU Convention sought to achieve—indeed, *achieved*—its mission of non-arbitrarily, humanitarianly expanding the 1951 Convention's and 1967 Protocol's concepts of what it means to be a refugee. The scope of the OAU Convention broadly expanded refugee protections in Africa on a pragmatic and non-ad hoc basis. This is starkly contrary to the 1951 Convention, which merely responded to the large-scale, external displacement of WWII-era refugees.

3. Application—The 1969 OAU Convention is broadly and flexibly applicable to refugee situations in Africa due to its refugee definition, which is qualitatively

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134. *Convention Governing the Specific Aspects of Refugee Problems in Africa*, Art. 1(2) (emphasis added).

135. Awuku, *supra* note 58, at 80. *1951 Convention on the Status of Refugees*, Art. 1(A)(2)).

136. Arboleda, *supra* note 99, at 194. *Convention Governing the Specific Aspects of Refugee Problems in Africa*.

137. *Convention Governing the Specific Aspects of Refugee Problems in Africa*, preamble § 3.

138. *Id.*, preamble § 1.

different from the classical refugee definitions that require an asylum seeker to prove he or she faces deliberate discrimination in his or her country of origin.[139] Such broad and flexible application reflects the rationale behind the formation of the 1969 OAU Convention in the first place, which was created as a response to the "pervasive" armed conflicts and "associated random lawlessness" in the region.[140] Such conflict and lawlessness are often precipitated and facilitated as a result of the extreme poverty in failed states. Indeed, the 1969 OAU Convention—unlike the 1951 Convention—applies in situations in which asylum seekers' fears are predicated upon the "accidental but nonetheless dangerous consequences" that occur in impoverished states in which "intensive fighting" and lawlessness are pervasive.[141]

The 1969 OAU Convention is also broadly applicable due to its drafters' intentional inclusion of terminology that "lacked a firm definition" under international law.[142] Indeed, the terms "external aggression," "foreign domination," and "occupation" had no widely accepted, black-and-white meaning in international law when the treaty became effective in 1974.[143] This terminology "reflected the urgency" of pragmatically responding to the African refugee crises that existed when the 1969 OAU Convention was formed. This pragmatic response to actual, real-life conditions "established an important precedent in international law."[144]

Most importantly, the drafters' employment of flexible terms in its refugee definition allows the 1969 OAU Convention to be efficiently applied in mass influx situations[145] in which it becomes thoroughly impracticable to make "individual

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139. Arboleda, *supra* note 99, at 195.

140. *Id*.

141. *Id*.

142. *Id*.

143. *Convention Governing the Specific Aspects of Refugee Problems in Africa*, Art. 1(2). "Aggression" was formally defined by a UNHCR Special Committee in in 1974 as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations as set out in this definition." United Nations General Assembly, res. 3314 (XXIX), 29 GAOR, Supp. 31 (A/9631) at 142.

144. Arboleda, *supra* note 99, at 195.

145. The UNHCR stated in a set of 2001 guidance materials that situations of "mass displacement pose particular challenges for receiving States, for other States affected in the region and, increasingly, for the international community" as a whole. *See,* United Nations High Commissioner for Refugees, *Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, Art. 1(1) (2001), available at <http://www.unrol.org/files/Protection%20of%20Refugees%20in%20Mass%20Influx%20Situations%20Overall%20Protection%20Framework.pdf>.

determinations."[146] The 1969 OAU Convention's pragmatic applicability to mass influx situations contrasts strongly with the 1951 Convention and its 1967 Protocol. These seminal asylum treaties have proven inefficient, ineffective, and inadequate to manage determinations of refugee status along European borders during the ongoing refugee crises affecting the EU, which has led to massive backlogs and has left thousands of asylum seekers in proverbial limbo, out in the literal cold.[147]

Aligning itself with the 1951 Convention, the 1969 OAU Convention includes the asylum principles of cessation and exclusion. The 1969 OAU Convention's cessation clause "spells out situations in which a refugee ceases to be a refugee," thus, losing his or her rights to the protections to which refugees are entitled as a matter of law.[148] The 1969 OAU Convention ceases to apply to any refugee who has: 1) voluntarily re-availed himself of the protection of his country of origin; 2) voluntarily reacquired his nationality after losing it; 3) acquired a new nationality and enjoys the protection of his new nationality; 4) voluntarily re-established himself in his country of origin; 5) become unable to continue to refuse to avail himself of the protection of his country of origin because of the circumstances in connection with which he was recognized as a refugee; 6) committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee; *or* 7) seriously infringed upon the purposes and objectives of the OAU Convention.[149]

The 1969 OAU Convention's exclusion clause "specifies the circumstances in which refugee status does not apply."[150] The 1969 OAU Convention is inapplicable to asylum seekers "with respect to whom the country of asylum has serious reasons" to believe has: 1) committed a crime against peace, a war crime, or a crime against humanity; 2) committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; 3) been guilty of acts contrary to the

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146. Arboleda, *supra* note 99, at 195. The "massive migrations" to which the OAU Convention responded "made individual determinations [of refugee status] quite impracticable."

147. *See, e.g.,* Alex Barker, *Serbia gears up for struggle to see migrants through winter*, FINANCIAL TIMES, available at <http://www.ft.com/cms/s/2/46eda4aa-8ec0-11e5-8be4-3506bf20cc2b.html#axzz3sSHDOZf7>, (Nov. 24, 2015); *The Latest: Finland to house asylum-seekers in tents and containers to meet arrival surge*, U.S. NEWS & WORLD REPORT, available at <http://www.usnews.com/news/world/articles/2015/11/10/the-latest-27-police-hurt-in-clashes-at-calais-migrant-camp> (Nov. 10, 2015); and Stephanie Nebehay, *Balkan border controls leave migrants in limbo: aid agencies*, REUTERS, available at <http://www.reuters.com/article/2015/11/20/us-europe-migrants-un-idUSKCN0T912720151120#g9M5AdddVf5lH7h7.97> (Nov. 20, 2015).

148. Awuku, *supra* note 99, at 82.

149. Convention Governing the Specific Aspects of Refugee Problems in Africa, Art. 1(4)(a)-(g).

150. Awuku, *supra* note 99, at 82.

purposes and principles of the OAU; *or* 4) been guilty of acts contrary to the purposes and principles of the UN.[151]

D. 1984 Cartagena Declaration on Refugees

The internationally accepted definition of a refugee, as advanced by the 1951 Convention[152] and its 1967 Protocol,[153] have "proven inadequate" in dealing with the "massive influxes" of refugees fleeing war, political issues, "internal civil strife," inadequate economic conditions, and natural disasters in Latin American countries in the latter half of the 20th century and early part of the 21st century.[154] Although the 1984 Cartagena Declaration on Refugees (the 1984 Cartagena Declaration) is a non-binding legal instrument, it "created customary legal rules for defining refugees."[155] However, while many of the displaced Latin Americans may be considered "refugees" under the broad, layman dictionary definition of the term,[156] such persons typically do not constitute refugees under the 1951 Convention's definition.

1. Historical Context—Latin America—especially Central America—is a "prime example" of a region in which the conventional international refugee definition has proven inadequate.[157] The legal concept of asylum has existed in Latin America since 1889 in the form of the Montevideo Treaty on International Penal Law (the 1889 Montevideo Treaty).[158] The 1889 Montevideo Treaty "affirmed" asylum as "an inviolable right of those persecuted [by their home countries] for their political beliefs."[159] The 1889 Montevideo Treaty is viewed as the first multilateral treaty to

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151. Convention Governing the Specific Aspects of Refugee Problems in Africa, Art. 1(5)(a)-(d).

152. 1951 Convention relating to the Status of Refugees, art. 1(A)(2).

153. 1967 Protocol relating to the Status of Refugees, Art. I(2), (3).

154. Arboleda, *supra* note 99, at 185.

155. *Id. Cartagena Declaration on Refugees*

156. The Cambridge English Dictionary defines a refugee as a person "who leaves his or her home or country to find safety." Oxford University Press, *The Cambridge English Dictionary*.

157. Arboleda, *supra* note 99, at 188.

158. The Montevideo Treaty on International Penal Law was enacted in 1889 by the First South American Congress on Private International Law. ISIDORO ZANOTTI, EXTRADITION IN MULTILATERAL TREATIES AND CONVENTIONS 7 (Lydia B. Zanotti ed., 2006). The treaty, which was signed by representatives from the governments of Peru, Uruguay, Bolivia, Argentina, and Paraguay, focused primarily on criminal law. Articles 15 through 18 of the 1889 Montevideo Treaty concern the legal regime of asylum.

159. Arboleda, *supra* note 99, at 197.

respond to the "political instability" in Latin America and to a growing understanding in the region that "inevitable victims of persecution"[160] must be protected under international law; indeed, states must hold one another accountable for how they treat their citizens.

A number of regional conventions that dealt specifically with asylum as a means of international protection for those facing domestic political persecution followed the 1889 Montevideo Treaty.[161] Such international conventions of Latin American powers included the 1928 Havana Convention on Asylum, the Montevideo Conventions on the Rights and Duties of States of 1933 and 1940, the 1954 Caracas Conventions on Territorial Asylum and Diplomatic Asylum, and the 1969 Pact of San José.[162] These legal instruments defined persons seeking asylum (or "asylees") as "persons seeking refuge due to persecution by virtue of their imputed or real political delinquency."[163]

The early Latin American multilateral legal instruments' approaches to the treatment of refugees were very similar to the 1951 Convention's refugee codification. Moreover, the refugee definitions of the 1951 Convention and the 1967 Protocol quickly "gained acceptance" throughout Latin American countries—most of which are parties to those UNHCR instruments.[164] It eventually became apparent to Latin American states, though, that the 1951 Convention's refugee definition was outdated

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160. *Id*., at 198.

161. *Id.*

162. *Id*. These international conventions focused on both diplomatic and territorial asylum. Diplomatic asylum typically entails persons "seeking refuge at a foreign embassy or other property while still in their own country." Territorial asylum, on the other hand, often concerns "those seeking refuge when physically in the potential asylum-granting country." see *id*. Territorial asylum is the type most frequently associated with modern refugee crises, such as the 2015 EU refugee crisis, in which most refugees presented themselves at the borders of potential asylum-granting countries in the hopes of receiving international protection from events occurring in their home country. Swaths of Syrians refugees, for example, fled to the EU to escape the ongoing civil war in their home country.

163. Arboleda, *supra* note 99, at 198 (internal quotations omitted).

164. *Id*., at 200. Latin American countries that are signatories to the 1951 Convention and/or its 1967 Protocol include Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Jamaica, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. Of the 20 Latin American members states to these two UNHCR legal instruments, Brazil and Paraguay maintain the original geographical limitation of the 1951 Convention that dictates that displaced persons shall only be considered "refugees" under the meaning of that term in the Convention if the events forcing them to flee their home countries occurred on the European continent. However, Brazil and Paraguay accepted the 1967 Protocol's extinguishment of the 1951 Convention's temporal limitation, which stated that refugees are persons fleeing events that occurred prior to Jan. 1, 1951. See *id*.

and under-inclusive. The 1951 Convention's refugee definition failed to offer sufficient protection to many of the people fleeing domestic hardships[165] in the region. Indeed, many Central American countries, including Mexico, "had to revitalize their longstanding asylum traditions to deal humanely" with those seeking refuge from severe poverty, internal violent conflict (including gang and cartel violence), and natural disasters.[166] Accordingly, nations that had an interest in migration crises met in Mexico in 1981 in an event that became known as the 1981 Colloquium on Asylum and the International Protection of Refugees in Latin America (the 1981 Colloquium).[167]

The 1981 Colloquium endeavored to "discuss the most immediate and delicate problems presented by" the refugee crises in Central America and to "examine the inadequacies of international refugee law" as applied to displaced Latin American persons.[168] The most important determination made by representatives at the 1981 Colloquium was that the current framework for the treatment of refugees in Central America offered inadequate protection for the modern realities faced by displaced persons in the region.[169] The 1981 Colloquium's response to this scenario marked the "first time in a regional forum" in which a broader definition of "refugee" was proposed for Latin America.[170] Conclusion No. 4 of the 1981 Colloquium's Conclusions and Recommendations essentially "reiterated" the language of the 1969 OAU Convention's

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165. *Id*., at 187. In addition to the widespread poverty that has characterized Latin America over much of its modern existence, such hardships included, most notably, an "outbreak of violence" during the 1980s throughout Central America that forced "hundreds of thousands of people" to flee their home countries in an attempt to protect their families. See *id*., at 200. Arboleda adeptly coined this phenomenon as "the massive Central American exodus." Such extensive conflict within Central American countries, including infamous Panamanian gang violence and the political instability in the Caribbean nations during the 1960s, created a "massive regional displacement" of people that the "established rules of asylum" were unable to adequately address. See *id*.

166. *Id*., at 200. Unlike previous Latin American refugees, many of whom were "high profile" or "well known individuals" fleeing oppressive political regimes, the waves of displaced Latin American persons in the 1970s and 80s were often people from "rural" communities near the borders of the states in which they sought asylum. *Id*. In many cases, "particularly among Salvadoran and Guatemalan asylum-seekers," entire villages simultaneously fled their homes.

167. *Id*., at 201. The 1981 Colloquium on Asylum, which met in May 1981, was hosted by the Mexican Secretariat on Foreign Affairs along with the Institute for Legal Research of the National University of Mexico. The Colloquium was conducted "under the auspices" of the UNHCR, which had set up "regional offices" in Latin America in the latter part of the 1960s in order to create a "highly visible" role in the region in order to facilitate ethical treatment of asylum seekers. See *id*., at 199-201.

168. Arboleda, *supra* note 99, at 201.

169. *Id*.

170. *Id*., at 200-01. Notably, the refugee definition offered at the 1981 Colloquium encompassed not only Central America, but all of Latin America. See *id*., at 201.

refugee definition[171] and proceeded to expand it even further, including as refugee persons fleeing "massive violations of human rights."[172]

In the three years following the 1981 Colloquium, Latin American refugee issues—especially those relating to persons displaced from the impoverished Central American countries of Guatemala and El Salvador and the indigent Caribbean nations of Cuba and Haiti—became even more expansive and "acute."[173] In the 1981-82 Annual Report of the Inter-American Commission on Human Rights (the Commission), the Commission reported that "a shift in the old tradition of granting political asylum" had occurred as a result of a number of factors; namely, the number of political asylum seekers was "several times" more than at any other time in the history of Latin America.[174]

In order to address the intensifying refugee crisis, Central American governments[175] convened yet again.[176] This time, in November 1984, "an *ad hoc* group of experts and representatives from governments in Central America"[177] convened in Cartagena, Colombia.[178] The Colloquium enacted[179] the 1984 Cartagena Declaration

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171. The 1969 OAU Convention's definition of refugee basically restates the 1967 Protocol's refugee definition and then expands it in a subparagraph of Article 1, postulating that refugees also include "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality." *Convention Governing the Specific Aspects of Refugee Problems in Africa*, Art. 1(2).

172. Arboleda, *supra* note 99, at 202 (internal quotations omitted).

173. *Id*. While there are no hard figures quantifying the exact volume of refugees displaced between 1981 and 1984, estimates range from as few as 100,000 refugees to as many as 1 million. See *id*.

174. *Id*., at 203-04.

175. *Id*. Representatives from the governments of Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela were present at the meeting, which was known as the *Coloquio Sobre la Protección Internacional de los Refugiados en America Central, México y Panamá: Problemas Jurídicos y Humanitarios* (or, the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama: Legal and Humanitarian Problems).

176. *Id*., at 202-03. The Colloquium was sponsored by the University of Cartagena, the Regional Centre for Third World Studies, and the United Nations High Commissioner for Refugees, and was conducted "under the auspices of the Colombian government." See *id*.

177. Goodwin-Gill, *supra* note 15, at 38.

178. Arboleda, *supra* note 99, at 203.

179. It is important to note, at this point, that the parties to the 1984 Cartagena Declaration were given express power under the 1951 Convention to grant "more far-reaching" rights to refugees (including expanding the definition of who constitutes a refugee). Awuku, *supra* note 58, at 80. Indeed, Article 5 of the 1951 Convention relating to the Status of Refugees explicitly establishes that its provisions do not "impair any rights and benefits granted by a Contracting State to refugees." In other words, international refugee instruments may supplement the 1951 Convention.

on November 22 in order to adequately address the intensifying social, political, and economic problems facing Latin Americans.

2. Scope—The 1984 Cartagena Declaration provided the "most encompassing"[180] international legal definition of refugee to date,[181] which is much broader than those of either the 1951 Convention or the 1967 Protocol.[182] Indeed, Article III of the 1984 Cartagena Declaration espoused the Colloquium's belief that it had become "necessary to consider enlarging the concept of a refugee, bearing in mind . . . the precedent of the 1969 OAU Convention (article 1, paragraph 2)."[183] The 1984 Cartagena Declaration also listed several other rationales behind its formation, the most noteworthy being the importance of "reiterat[ing]" the principle of *non-refoulement* "as a rule of *jus cogens*,"[184] "confirm[ing] the . . . exclusively humanitarian nature" of granting asylum and recognizing people's statuses as refugees,[185] understanding that nothing about granting asylum to a refugee should be interpreted as an "unfriendly act" towards the refugee's country of origin,[186] and calling on refugees' destination countries to "establish a minimum standard of treatment for refugees" based upon the provisions contained in the 1951 Convention and its 1967 Protocol.[187]

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180. *Id*.

181. The 1984 Cartagena Declaration's conception of refugee remains the most expansive refugee definition of any international legal instrument.

182. Arboleda, *supra* note 99, at 203.

183. Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, *Cartagena Declaration on Refugees*, Art. III(3), Cartagena, Colombia, Nov. 19-22, 1984. The 1984 Cartagena Declaration was also principled upon "fostering the necessary process of systematic harmonization of national legislation on refugees." See *id*., Art. III(1). Moreover, the 1984 Cartagena Declaration purported to promote the "ratification of or accession to" the 1951 Convention and its Protocol by states which had yet do so, and to convince those states to accept those multilateral legal instruments without "reservations" that "limit[ed] the scope of those instruments." See Art. III(2). Further, the Declaration urged states which had ratified the 1951 Convention and/or its 1967 Protocol but had "formulated such reservations" to expediently withdraw their limitations. Arboleda, *supra* note 99, at 203.

184. Cartagena Declaration on Refugees, Art. III(5). The instrument refers to the principle of *non-refoulement* (including *refoulement* at the "frontier" of destination states) as a "cornerstone of the international protection of refugees." A rule of *jus cogens* is a fundamental facet of international law from which no derogation shall ever be permitted. *See,* Legal Information Institute, *Jus cogens*, CORNELL UNIVERSITY LAW SCHOOL, available at <https://www.law.cornell.edu/wex/jus_cogens>. Other examples of rules of *jus cogens* include the law against genocide, the principle against racial discrimination, and laws prohibiting human trafficking and slave trade. *Id*.

185. Cartagena Declaration on Refugees, Art. III(4).

186. *Id*.

187. *Id*., Art. III(8).

In determining who constitutes a refugee, the 1984 Cartagena Declaration first considers the "objective situation" within the displaced person's country of origin as well as the displaced person's "particular," individual situation.[188] After reaffirming the refugee definitions set forth under both the 1951 Convention and the 1967 Protocol, the 1984 Cartagena Declaration's refugee definition further includes as refugees persons who demonstrate that they meet two distinct conditions.[189] First, the asylum seekers must have fled their home country because of a threat to their "lives, safety, or freedom."[190] Secondly, that threat must have been produced by at least one of five factors: 1) generalized violence; 2) foreign aggression; 3) internal conflicts; 4) massive violations of human rights; or 5) "other circumstances which have seriously disturbed the public order."[191] This greatly broadened the refugee definitions of the 1951 Convention and its 1967 Protocol—instruments under which one may accede to international refugee protection only if one is fleeing state-sponsored persecution within one's home country.

The 1984 Cartagena Declaration is composed of terminology unique in international refugee law instruments.[192] Such terminology is located in neither the 1951 Convention, the 1967 Protocol, nor even the extensive 1969 OAU Convention—all three upon which the 1984 Cartagena Declaration is expressly based.[193] Indeed, the 1984 Cartagena Declaration employs "far-reaching,"[194] broad phrases such as "generalized violence," "foreign aggression,"[195] "internal conflict," "massive violations of human rights," as well as the catchall phrase "other circumstances which have seriously disturbed public order" refugee definition.[196] These

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188. Arboleda, *supra* note 99, at 203. See also, Cartagena Declaration on Refugees.

189. Cartagena Declaration on Refugees, Art. III(3). See also, 1951 Convention relating to the Status of Refugees; 1967 Protocol relating to the Status of Refugees.

190. Cartagena Declaration on Refugee, Art. III(3).

191. *Id*.

192. Arboleda, *supra* note 99, at 203.

193. *Id*.

194. *Id*.

195. In 1967, the UN General Assembly set up a Special Committee tasked with forming a comprehensive definition of the term "aggression," as applied in multiple international treaties. The 1971, the Committee finally defined aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations as set out in this definition." United Nations General Assembly, res. 3314(XXIX), 29 GAOR, Supp. 31 (A/9631) at 142 (1971).

196. Cartagena Declaration on Refugees, Art. III(3). Such wide-ranging phrases are not surprising given Latin America's "deep-rooted and generous tradition of asylum." See also, Arboleda, *supra* note 99, at 203.

phrases expand upon those of the 1969 OAU Convention, which constituted the most expansive international refugee law instrument before the composition of the 1984 Cartagena Declaration.[197] Michel Moussali, who was the UNHCR Director of International Protection when the 1984 Cartagena Declaration was ratified, regarded the document as an instrument that "reaffirms and expands the established principles of the inter-American [refugee protection] system."[198]

3. Application—The 1984 Cartagena Declaration—considered by international legal scholars as "soft law"[199]—is a nonbinding, multilateral, international legal instrument. While, unfortunately, no single, widely accepted, tried-and-true legal definition of soft law exists, Francis Snyder provides one of the most cited definitions in international law. Soft law entails "rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects."[200] Although soft law instruments contain "normative content," they are not technically legally binding upon their signatories.[201]

While the 1984 Cartagena Declaration is "not a formally binding treaty," it still achieved practical effects in the region of Latin America.[202] The Declaration's 10 participants—Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Venezuela—"endorse[d]" the proposition that displaced Central Americans should have access to "appropriate and applicable standards of protection and assistance" when the governments of their home countries either refuse or are unable to provide the necessary protection and care to which they are entitled as a matter of humanitarian law.[203] This non-binding treaty's "endorsement"[204] essentially functions by codifying "pragmatic principles"[205] that "fit the Central American reality."[206] At its core, the 1984 Cartagena Declaration provides its signatories with "customary legal rules"[207] dictating how to humanitarianly apply the

197. Arboleda, *supra* note 99, at 203.
198. *Id*. (internal quotations omitted).
199. David M. Trubek, *"Soft Law," "Hard Law," and European Integration: Toward a Theory of Hybridity*, U. WISC. L. STUDIES RESEARCH PAPER 1002 (2005), *citing* Francis Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools, and Techniques*.
200. *Id*.
201. Trubek *id.*, at 1.
202. Goodwin-Gill, *supra* note 15, at 38.
203. *Id*.
204. *Id*.
205. Arboleda, *supra* note 99, at 203.
206. *Id*.
207. *Id*., at 185.

1951 Convention and 1967 Protocol to displaced Latin Americans in a manner that does not exclude displaced persons from protection, who clearly require the assistance of foreign governments (yet are unable to access it under the 1951 Convention's strict refugee definition). Fortunately, the 1984 Cartagena Declaration's more expansive refugee definition has "become the established norm throughout Central America."[208]

III. THE NEED TO REFORM THE LEGAL FRAMEWORK AND ENHANCE PROTECTION FOR ECONOMIC MIGRANTS

The 1951 Convention offered refugee protection only to displaced Europeans who had fled their countries of origin "owing to a well-founded fear" of persecution based upon an impetus of "race, religion, nationality, membership of a particular social group, or political opinion."[209] To acquire refugee status (and potentially access asylum protection), the displaced person in question must have been externally displaced prior to January 1, 1951 and must explicitly meet one of these conditions.[210] Within the following decade-and-a-half, the UN eventually came to understand the shortcomings inherent its multilateral, international refugee protection instrument.[211] Indeed, the 1951 Convention was grossly under inclusive to afford protections to any refugee issues that developed after 1950.

In response, the UN drafted and implemented the 1967 Protocol, which incorporated most of the substantive provisions of its predecessor and removed the 1951 Convention's temporal and geographical limitations. However, in the years following the implementation of the 1967 Protocol, nations in Africa and Central America came to realize that this instrument, too, was too narrow to afford adequate protection to externally displaced persons within the regions.[212] Fortunately, the UN refugee protection regime does not preclude States parties to the instruments from expanding the protections provided to refugees by the 1951 Convention and its 1967 Protocol; it merely prohibits States from redacting or curtailing its provisions.[213]

Only 16 years expired between the finalization of the 1951 Convention and the 1967 Protocol that expanded its protections. On the other hand, it has been *forty years* since the UN adopted and implemented the 1967 Protocol; the UN has not statutorily

208. *Id*., at 189.
209. 1951 Convention relating to the Status of Refugees, Art. 1(A)(2).
210. *Id*.
211. *See supra* FN 73-79.
212. *See supra* FN 86, 144.
213. *See supra* FN 87-88.

expanded or modified its refugee protection regime a single time during this nearly-half-a-century period. However—just as the UN General Assembly recognized in 1967 that it was high time to substantially enhance the international refugee protection scheme in the name of humanitarianism—another expansion is long past due.

The 1951 Convention explicitly identifies the "social and *humanitarian*[214] nature of the problem of refugees" as one of the fundamental rationales behind its composition.[215] Its preamble further evinces the UN's lucid understanding of the fact that one of the most basic principles behind *why* refugees should be afforded extraterritorial protection is that "human beings shall enjoy *fundamental rights* and freedoms without discrimination."[216] The UNHCR Statute (the Statute) echoes this human rights sentiment, stating that the High Commissioner for Refugees' "work . . . shall be of an entirely non-political nature; it shall be *humanitarian* and social."[217] Finally, the Statute states that, in order to "provide for the protection of refugees," the High Commissioner shall engage in "[p]romoting the admission of refugees, not excluding those in the most *destitute* categories, to the territories of States."[218]

Despite the Statute's and the 1951 Convention's supposed objectives to affect the welfare of displaced persons in a humanitarian manner, the UN's international refugee protection regime has thus far refused to offer extraterritorial relief to destitute, indigent, and impoverished persons who migrate to States parties to the UN's refugee protection system.[219] But people externally displaced due to extreme poverty and

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214. *The Merriam-Webster dictionary defines "humanitarian" as an adjective meaning "relating to or characteristic of people who work to improve the lives and living conditions of other people." The* MERRIAM-WEBSTER DICTIONARY *(NEW ED.), Merriam-Webster* (Jan. 1, 2016). The Oxford English Dictionary defines "humanitarian" as an adjective meaning "concerned with or seeking to promote human welfare." OXFORD ENGLISH DICTIONARY (7TH ED.), *Oxford Univ. Press* (Nov. 1, 2013). Goodwin-Gill interprets "humanitarian considerations"—a component of the UN's theory behind why certain displaced persons are entitled to protection—to mean "a general sense that something must be done, even if those in need of protection or assistance do not fall squarely within the letter of legal regimes of competence or obligation." *See*, Goodwin-Gill, *supra* note 15, at 29.

215. 1951 Convention relating to the Status of Refugees, preamble.

216. *Id*. (emphasis added).

217. 1950 Statute of the Office of the United Nations High Commissioner for Refugees, Ch. I(5) (emphasis added).

218. *Id*., Ch. II(8)(d) (emphasis added). Interestingly, the Statute specifically dictates that States are not to *refouler* "destitute" refugees, even though the UN refugee definition fails to mention an asylum seeker's economic condition as a consideration or component of accession to refugee status.

219. The policy behind this approach is obvious—the UN fears "opening the floodgates to vast numbers of people in the developing world living in poverty, or suffering from unemployment or poor medical care, and the associated costs of caring for such persons." *See*, Goodwin-Gill, *supra* note 15, at 315.

economic hardship within their countries of origin—in Europe, economic migrants tend to stem from Africa (e.g., Eritrea),[220] the Middle East (e.g., Pakistan),[221] or Asia (e.g., Bangladesh)[222]—often face dangers on the same level of persons fleeing persecution.[223] Moreover, governments that are inadequate to allow their citizens access to basic human needs, such as food, clean water, and shelter, effectively deny their citizens the basic human rights to which we are all entitled. Indeed, while it may be difficult to argue that such persons are victims of persecution, it is "quite reasonable to contend their inability to [legally] migrate" renders them unable to access their most basic human rights.[224]

Due to the documented negative effects of extreme poverty[225] and States' inability or disinterest in providing citizens access to basic human needs, persons often find they have no choice but to flee their homes in search of States and economies in which they can provide for themselves and, often, their families. Furthermore, the UN's "obsession" with compartmentalizing people into either refugees or economic migrants is made more difficult by the "fundamental ways in which these two groups are related."[226]

But there is one major difference. This difference has a direct, tangible impact on the lives of the severely impoverished. Those who flee their homes in search of extraterritorial protection due to persecution are statutorily entitled to UN refugee protection. Those who flee their homes in search of exterritorial safety due to the fact that their government has failed to maintain a society in which such persons have upward economic mobility from the mires of extreme poverty are entitled to nothing.

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220. G. Cole, *It makes no sense to separate refugees from economic migrants*, THE INDEPENDENT (Oct. 8, 2015), available at <http://www.independent.co.uk/voices/it-makes-no-sense-to-separate-refugees-from-economic-migrants-a6685911.html>.

221. Dusan Stojanovic, *European nations shut their borders to economic migrants*, YAHOO! NEWS (Nov. 19, 2015), available at <http://news.yahoo.com/4-european-nations-shut-borders-economic-migrants-131326441.html>.

222. *Id*.

223. The author in no way intends to diminish the hardships faced by conventional refugees. My assertion is simply intended to illuminate the reader to the fact that economic migrants face dangerous realities due to severe poverty.

224. L. Ferracioli, *The Appeal and Danger of a New Refugee Convention*, 40 SOC. THEORY AND PRAC. 127, Jan. 2014.

225. Poverty is inseparably interconnected with poor housing and living conditions (which classically lead to the spread of disease), water- and food-related diseases, unsafe stress levels, alcohol and substance abuse, and a lack of education. *Causes & Effects of Poverty on Society, Children, and Violence*, POVERTIES.ORG (May 2013), available at <http://www.poverties.org/effects-of-poverty.html>.

226. Cole, *supra* note 220.

In fact, it is perfectly legal—an accepted practice, even—for destination countries to ship economic migrants back to their home countries as if they are exporting cargo.[227]

For example, in October 2015, amidst the ongoing refugee/migrant diaspora into Europe, Italy began issuing refusal-of-entry documents almost instantaneously to certain asylum seekers.[228] According to refugee advocates, the refusals were predicated purely and arbitrarily upon the asylum seekers' countries of origin.[229] For instance, more than 70 percent of Nigerians and Malians were rejected on their first claim; persons from Senegal, Gambia, and Bangladesh were met with similarly high rates of expulsion from the country.[230] Even if such broad, sweeping refusals did not violate the 1951 Convention, which they clearly do,[231] such actions by a State party to the UN protection regime offend the fundamental principles of humanitarianism upon which the regime is based.

The time has come for the UN to align its *actions* with its explicitly accepted *obligation* to provide humanitarian protection to externally displaced persons. The 1951 Convention was found to be inadequate in that it did not apply to huge amounts of externally displaced persons in search of humanitarian aid, hence the UN's passage and implementation of the 1967 Protocol. In the same vein, the 1967 Protocol is inadequate in scope, misaligned with the UN's purported humanitarian aim of offering extraterritorial protection to refugees,[232] and downright disjointed from morality. After all, refugees and economic migrants "are so interlinked that they should be treated in the same way" and offered the same protections as a matter of law.[233] Although most who flee impoverished Eritrea are labeled economic migrants, the important consideration is that "they do so precisely to protect their families and friends from

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227. Those who do not meet the conventional UN refugee definition are not entitled to protection from *non-refoulement.* Under the current UN refugee protection regime, States parties to the 1951 Convention and/or the 1967 Protocol may forcibly return economic migrants to their countries of origin—even though they face hardships just as pervasive and dangerous as persons fleeing persecution and even though they have no access to governmental protection from their indigent plight. *See,* 1951 Convention relating to the Status of Refugees, Art. 33; 1967 Protocol relating to the Status of Refugees.

228. *See,* Surana, *Italy quietly rejects asylum seekers by nationality, advocates say*.

229. *Id*.

230. *Id*.

231. Incontrovertibly, "anyone from any country has a right to apply for asylum and receive asylum reception benefits, regardless of their country of origin." See *id*; 1951 Convention relating to the Status of Refugees.

232. Rather than the conventional UN definition, the word "refugees" here should be interpreted according to my idea of who constitute refugees.

233. Cole, *supra* note 220.

becoming refugees themselves."[234]

The UN General Assembly should task a committee with the duty of forming a new refugee convention to be proposed for adoption. This new instrument—which, for simplicity's sake, I will refer to as the New Refugee Compact—should incorporate as its refugee definition a hybrid of the definitions proposed by refugee theoreticians Andrew E. Shacknove, Matthew J. Gibnay, and David Miller. Unlike the 1951 Convention, which is "inapt to tackle the different vulnerabilities" faced by international migrants,[235] the New Refugee Compact's refugee definition should "vividly" capture the "vital human interests and ethical concerns" that permeate contemporary issues surrounding forced[236] people movements.[237]

Shacknove argues that persecution is not an "essential criterion of refugeehood."[238] Rather, he contends that refugees are "persons whose basic needs are unprotected by their country of origin, who have no remaining recourse other than to seek international restitution of their needs, and who are so situated that international assistance is possible."[239] Shacknove's theory of the refugee is predicated upon a belief that the 1951 Convention and its 1967 Protocol should account for "the broader ways"—in comparison with persecution—that the bond between citizen and State can be severed.[240]

Gibnay takes a similar position, contending that refugees are persons who flee States characterized by "inadequacy or brutality," which either refuse or are unable to "provide protection" to their citizens.[241] When destination States *refouler* persons fleeing domestic poverty to their countries of origin, they "seriously jeopardize [the displaced persons'] . . . vital subsistence needs."[242]

Miller, in comparison, advocates that "persons who cannot meet their basic needs in their countries of origin" should be afforded refugee status and protection as

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234. *Id*.

235. Ferracioli, *supra* note 224, at 125.

236. I use the term "forced" rather loosely here. The reasons behind people movements—whether refugee-or economic migrant-based—are "always a mixture of voluntary and involuntary factors." *See,* Cole, *supra* note 220. No migrant or refugee who chooses to flee his or her home country in search of protection is truly "forced" to flee in the purest sense of the word.

237. M.J. Gibnay, *Liberal Democratic States and Responsibilities to Refugees*, 93 AM. POL. SCI. REV. 169, 171 (1999).

238. Shacknove, *supra* note 56, at 276.

239. *Id*., at 277.

240. Ferracioli, *supra* note 224, at 125, *citing* Shacknove, *supra* note 56.

241. Gibnay, *supra* note 237, at 170-71.

242. *Id*., at 171.

a matter of law.[243] Indeed, Miller argues that when these people reach the shores and borders of better-situated UN member states in search of a humanitarian safe haven from the mires of poverty, the destination states "have a duty of assistance to open their borders" and offer them the protection unavailable in their countries of origin.[244]

To properly align UN refugee protection with the organization's purported goals and principles relating to externally displaced persons, the New Refugee Compact's refugee definition should be informed by and based upon the theories of Shacknove, Miller, and Gibnay. Accordingly, severely impoverished persons whose mere existence is characterized by the harsh realities and dangers of living in poor, underdeveloped societies[245] would finally have access to the humanitarian protection the UN should have granted them long ago.

Although some will inevitably argue that my proposition is unrealistic, likely basing their argument upon the proposition that granting economic migrants access to the same protection afforded to conventional refugees would open the proverbial "floodgates"[246] into the EU and the United States, which would not have the money and resources to adequately protect them, the reality of the matter is somewhat counterintuitive.[247] Moreover, my proposition would not open the "floodgates.[248]

Migrants have been proven time and again to be good for the economies of recipient states—especially the United States, which serves as a great case study for the positive effects immigration[249] can have on the economy. The U.S., a country for which "[i]mmigration is the oldest and newest story," has undergone "three peak periods" of mass immigration into the country; the fourth began in the 1980s and is arguably ongoing.[250] The period from 2000-2010 ranks as the highest immigration period in U.S. history, with an estimated 14 million new immigrants; this new wave brought the total

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243. Ferracioli, *supra* note 224, at 125, *citing* David Miller, *Immigration: The Case for Limits*, CONTEMPORARY DEBATES IN APPLIED ETHICS, 202 (A.I. Coleman & C.H. Wellman, eds.) (2002).

244. *Id*.

245. *See supra* note 215.

246. Goodwin-Gill, *supra* note 15, at 315.

247. *See infra* notes 249-55.

248. *See infra* notes 256-61.

249. While immigration obviously differs from conventional refugeehood in the sense that traditional immigrants are seeking employment opportunities rather than fleeing persecution, my aim is to examine the effects of new labor on an economy, irrespective of the source.

250. S. Abraham, et al, IMMIGRATION AND AMERICA'S FUTURE: A NEW CHAPTER—REPORT OF THE INDEPENDENT TASK FORCE ON IMMIGRATION AND AMERICA'S FUTURE 1, (Doris Meissner, et al, eds.) (2006).

foreign-born population to approximately 40 million.[251] The New Refugee Compact would likely spur a fifth peak period.

Yet, in spite of "popular misgivings," foreign-born workers continue to be a "critical resource" for the American economy in the 21st century.[252] Due to "declining working-age populations," countries such as Japan and many European countries have become less competitive in the global economy.[253] Contrarily, America's large-scale immigration reality has facilitated workforce growth at a "healthy and steady rate."[254] Further, the lack of education that characterizes most immigrants—and would undoubtedly characterize virtually everyone admitted as refugees under my proposal—actually provides tangible benefits to economies.[255] In America, especially, whose labor pool becomes increasingly more educated every year,[256] undereducated and uneducated foreign-born workers fill low-skilled jobs—most of which are vital to economy and society—which are increasingly "beneath" the education level of many in the workforce.

My proposal would not open the "floodgates"[257] that opponents of my argument may presume. A new, expanded refugee definition that affords UN protection to "persons who *cannot* meet their basic needs in their countries of origin"[258] allows statutory protection *only* to externally displaced persons who have literally zero opportunity for upward economic mobility in their countries of origin. People who merely demonstrate extreme poverty do not meet this definition. Under my proposed scheme, accession to UN-sanctioned protection requires a showing of extreme, crippling impoverishment, coupled with living in a State that affords no protections, welfare programs, or assistance to those in need of humanitarian aid.

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251. Steven A. Camarota, *A Record-Setting Decade of Immigration: 2000-2010*, THE CENTER FOR IMMIGRATION STUDIES (Oct. 2011), available at <http://cis.org/2000-2010-record-setting-decade-of-immigration>.

252. Abraham, *supra* note 250, at 3.

253. *Id*.

254. *Id*.

255. *Id*., at 5.

256. *Id*. Experts estimate that by 2020, roughly 62% of Americans in the workforce will hold "more than a high school degree"; roughly 33% will hold a college degree..

257. *See supra* notes 236, 238.

258. Ferracioli, *supra* note 224, at 125. (emphasis added).

For example, an indigent person who resides in Mexico,[259] no matter how destitute, would not be considered a refugee under the New Refugee Compact. Many externally displaced Eritreans,[260] on the other hand, *would*. As opposed to what some may argue, a "bright line" test, though favored in certain areas of law, is not necessary in determining whether someone should be granted UN refugee protection. Indeed, the OAU Convention intentionally forewent such a bright line test in favor of a flexible, generalized test, applicable to the perpetually changing demands of refugee issues on the African continent.[261] Refugee law experts—the review panels of the "treaty-monitoring Committees" that hear appeals from refugee admission/rejection decisions made by UN states parties to the 1951 Convention—are presumably sufficiently knowledgeable to properly determine whether an asylum seeker would be entitled to protection under the New Refugee Compact.[262]

People who have fled their home countries as a result of their government's inability or refusal to facilitate a society in which they have access to basic human needs, such as clean water, nutritious and sufficient food, adequate healthcare, and satisfactory shelter, have fled dangers and hardships that are in many cases equal to those of conventional refugees. In contrast with its purported humanitarian principles, the UN regrettably does not provide protection to the latter group. Given the dangers and sufferings to which they are ceaselessly exposed, externally displaced persons who have no access to upward social mobility or basic human needs in their countries of origin should receive the same legal treatment and status as refugees under the 1951 Convention and the 1967 Protocol.

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259. While likely no one would consider Mexico to be a "rich" country, it does not meet the lofty level of impoverishment coupled with a veritable lack of economic mobility and governmental assistance requisite for refugee status. *See, e.g., The World Factbook: North America: Mexico*, CENTRAL INTELLIGENCE AGENCY, available at <https://www.cia.gov/ library/ publications/the-world-factbook/geos/mx.html>.

260. Eritrea's "lack of resources" and "chronic drought" coupled with the "restrictive economic policies" it imposes on its citizens are crippling. The country's government completely inhibits its citizens' economic mobility. Further, its food harvests are generally unable to meet the demand, leaving to widespread starvation. *See, The World Factbook, supra* note 259.

261. *See supra* notes 128-30.

262. Goodwin-Gill, *supra* note 15, at 297. The European Court of Human Rights (ECHR), for example, serves as a treaty-monitoring Committee.

IV. CONCLUSION

The UN has long been obsessed with compartmentalizing externally displaced persons into two mutually exclusive groups: economic migrants and refugees.[263] The UN international refugee protection regime, composed statutorily of the 1951 Convention[264] and the 1967 Protocol[265] which expanded its reach, requires externally displaced persons to have a "well-founded fear" of being subjected to persecution based on race, nationality, religion, political opinion, or membership of a certain social group.[266] However, as a result of the "fundamental ways" in which economic migrants and refugees are "intimately related," distinctions between the two are often arbitrary and obscure.[267] In fact, in some situations, externally displaced persons flee their countries of origin to *avoid* becoming refugees in the future.[268]

Throngs of people around the world are mired in debilitating poverty. In many countries, these indigent persons have no domestic recourse. Their governments either cannot or will not provide them with adequate protection. These governments have failed to maintain societies in which their citizens have even the slightest *opportunity* to escape the crippling economic hardships that impact and inform every aspect of their lives. They have no access to acceptable, modernized healthcare. Their access to clean water and nutritious food is severely constrained. Yet, when they travel great distances to better-developed nations within the UN, frequently leaving behind their families, they are all-too-often shunned and turned away. Human beings who chose neither their place of birth nor the "governments" that would rule them are treated as pariahs. This sort of treatment is perfectly legal and acceptable under the current UN international refugee law regime.

The UNHCR Statute, the 1951 Convention, and the 1967 Protocol are each founded upon humanitarian principles. These instruments all purportedly aim to provide ethical and humanitarian treatment to those who meet their narrow definition of refugee; but it is this very definition that is inherently non-humanitarian. Indeed, it is against the principles upon which the UN refugee regime is centered to exclude people from UN refugee protection—people who face realities equally as dangerous, pervasive, and bleak as many who meet the conventional refugee definition—simply

263. Cole, *supra* note 220.
264. 1951 Convention relating to the Status of Refugees.
265. 1967 Protocol relating to the Status of Refugees.
266. 1951 Convention relating to the Status of Refugees, Art. 1(A)(2).
267. Cole, *supra* note 220.
268. *See supra* note 224.

because they were not "persecuted" in their home country. The UN should seek to provide the same refugee protections afforded conventional refugees (including asylum and the *non-refoulement* principle) to externally displaced persons who lack access to basic human rights and needs within their countries of origin.

It has been 40 years since the 1951 Convention has been statutorily amended or expanded in any way. It is high time for the UN to draft and implement a new international refugee instrument to align its actions with its principles. Many economic migrants face realities just as dangerous as conventional refugees; UN refugee law should treat certain destitute economic migrants accordingly.

ADJUDICATING WOMEN'S CUSTOMARY LAW RIGHTS IN NIGERIA: HAS THE TIDE FINALLY TURNED?

O. Aigbovo* &A.O. Ewere**

Abstract

After decades of hope and expectation, the April 2014 decisions of the Supreme Court in Ukeje and Anekwe came as pleasant relief to the female-folk, and a milestone in the annals of judicial development in Nigeria. The decisions finally terminated the prevarication and conservative policy of the apex court and firmly turned the tide against discriminatory customary law rules of succession in favour of female children and widows, respectively. This article examines the possible factors responsible for the change in policy by the apex court and prognosticates that this new vista opened by the court against discriminatory native law and custom, will be difficult, if not impossible for the Supreme Court to reverse in future. As a result of the principle of stare decisis upon which the Nigerian legal system is built, the decisions will no doubt command tremendous influence on the future development of intestate succession rules in Nigeria. By virtue of these decisions, the succession rights of female children and Nigerian widows on intestacy have finally become a reality in line with prevailing global trends and constitutional standards against gender-based discrimination.

I. INTRODUCTION

In the course of the last two and half decades, the fortunes of gender-based discriminatory customary law rules in Nigerian Courts have been mixed. The tide against the rules has witnessed its ebb and flood. For example, in 2004, the Supreme Court of Nigeria disagreed with the activist zeal of the lower courts in the application of the constitutional provisions against gender-based discriminatory customary law rules in the case of *Mojekwu v. Iwuchukwu*.[1] In that case, the Supreme Court had the opportunity to lend its authority to the judicial onslaught against gender-based discriminatory customary law rules, especially customary law rules on inheritance

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1. (2004) 11 NWLR (Pt 882) 196.

championed by the Court of Appeal in this case and a number of others.[2] However, that hope was dashed by the apex court when in its decision, it chose to maintain its usual conservative policy in favour of discriminatory customary law rules of inheritance.

Nearly a decade after its decision in *Mojekwu*, the Supreme Court was presented with the opportunity to re-examine its policy on gender-based discriminatory customary law rules of inheritance in two cases in which the Court of Appeal, as usual, had struck down the offending rules. In view of the tremendous influence of these decisions on the future development of intestate succession rules in Nigeria, this article appraises the Supreme Court decisions in the case of *Ukeje & Anor v. Ukeje*[3] and *Anekwe & Anor v. Nweke*,[4] both of which were given on the same day.

In those decisions, the Supreme Court relied on section 42 of the Constitution of the Federal Republic of Nigeria 1999, and the repugnancy clause, to strike down gender-based discriminatory customary law rules. It is argued that an important reason for the change in policy of the court is its gender composition, although the promotion to the Supreme Court of some of the Court of Appeal justices who have favoured the striking down of gender-based discriminatory customary law rules of inheritance, cannot be discounted. It is also argued that it will be difficult to convince the Supreme Court to reverse itself in any subsequent challenge to its new policy. It is further argued that in light of Nigeria's obligations under several international human rights conventions and developments in other commonwealth jurisdictions in Africa with similar discriminatory native laws and customs, it would be difficult, if not impossible, for the Supreme Court to reverse its decisions in the two cases under consideration.

This article is divided into six parts. The second part discusses the previous policy of the Supreme Court regarding gender-based customary law rules on inheritance. The third part discusses the Supreme Court decisions in the two cases under appraisal. The fourth part advances possible reasons for the change in policy; the fifth part examines prognostications as to the future of gender-based discriminatory customary law rules in the Supreme Court of Nigeria in light of its decisions in the two cases under reference, while the sixth and final part concludes the paper.

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2. See for example *Mojekwu v. Mojekwu* (1997) 7 NWLR (Pt.512) 283, *Ukeje v. Ukeje* (2001) 27 NWLR (Pt. 723) 196 and *Anekwe & Anor v. Nweke* [Unreported decision of Enugu Division of the Court of Appeal in Appeal No: CA/E/311/2009; delivered on Thursday 14th February, 2013.

3. (2014) 3-4 MJSC 149, (2014) 234 LRCN 1.

4. (2014) 3-4 MJSC 183, (2014) 234 LRCN 34, [2014] 9 NWLR (Pt.1412) 393.

II. PREVIOUS POLICY OF THE SUPREME COURT

Section 42 of the Constitution provides as follows:

> (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:
> (a) be subject either expressly by, or in the practical application of any law in force in Nigeria or any executive or administrative action of government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject; or
> (b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions.
> (1)No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

One of the tests of validity of customary law is the repugnancy clause under which native law and customs which are repugnant to natural justice, equity and good conscience are not enforced by the court. The previous policy of the Supreme Court was to apply this constitutional non-discrimination clause and the repugnancy clause selectively to non-contentious customary law rules, while refusing to extend it to even justifying discriminatory customary law inheritance rules.[5] The court has had the opportunity to consider two customary law rules of inheritance which discriminate against the female child and the widow without a male child. These two rules are epitomized in the *oli-ekpe* custom of the Ibos of South Eastern Nigeria, although discrimination against women is also prevalent under many customary law systems in Nigeria. Under the *oli-ekpe* custom, the female children of a man who dies without a male child cannot inherit his property. Instead, the nearest male paternal relation is entitled to inherit such property. Of course, the widow of such a man cannot inherit his

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5. *See,* O. Aigbovo, *Supreme Court Policy in Relation to Customary Law Cases*, in THE UWAIS COURT: THE SUPREME COURT AND THE CHALLENGES OF LEGAL DEVELOPMENT (1995-2006), revised ed. (D.A. Guobadia, & A.O. Adekunle eds., 2007), at 297.

property.[6] In *Mojekwu's case,* the Court of Appeal struck down the discriminatory custom against female children on three grounds, namely:

> (a) The custom is incompatible with the kola tenancy custom of Onitsha (the lexsitus) under which custom a female child can inherit her father's property,
> (b) The custom is unconstitutional, as it discriminates against the female child on the ground of sex,
> (c) The custom is repugnant to natural justice, equity and good conscience.

The Court of Appeal followed its decision in this case in *Ukeje v. Ukeje,*[7] where it specifically referred to Wali JSC's statement at the Supreme Court in *Agbai v. Okagbue* that:

> … any customary law that sanctions the breach of an aspect of the rule of law as contained in the fundamental rights provisions guaranteed to a Nigerian in the Constitution is barbarous and should not be enforced by our court.[8]

However, the problem with reliance on *Okagbue* is that the custom considered in that case was not related to inheritance, but the right to private property and freedom of association. So, considering the Supreme Court policy of willingness to strike down culturally insignificant customs but unwillingness to strike down culturally significant ones like the discriminatory rules on inheritance, there was the need for the Supreme Court to pronounce on the issue of discriminatory customary law rules on its merits. In *Uke v. Iro*,[9] although the issue was not about women inheritance rights, the Court of Appeal also struck down a customary law rule which prohibited a woman from giving evidence in land matters on the ground that the custom is incompatible with section 42 of the Constitution. In the case of *Anekwe & Anor v. Nweke,*[10] the Court of Appeal, following its policy of intolerance of discriminatory customary law practices, refused

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6. *See, Mojekwu v. Mojekwu* (1997) 7 NWLR (Pt.512) 245.
7. (2001) 27 WRN 142.
8. [1991] 7 NWLR (Pt. 204) 391.
9. [2001] 11 NWLR (Pt. 723) 196.
10. *Unreported decision of Enugu Division of the Court of Appeal in Appeal No: CA/E/311/2009; delivered on Thursday 14th February, 2013.*

to apply an Awka Ibo custom which bars a widow without a male child of her deceased husband from inheriting the deceased's property. The two earlier Supreme Court decisions on the inheritance rights of widows without male children only went as far as giving the widow the right to occupation and possession in their life time.[11] However, in this case, the Court of Appeal granted the widow's claim to title to the property in dispute, in spite of the existing Supreme Court decisions on the point at the time of the judgment.

Mojekwu, Ukeje and Anekwe went on to appeal to the Supreme Court. Therefore, these appeals presented an opportunity for the Supreme Court to pronounce directly and authoritatively, for the first time, on the inheritance rights of a female child and widow under customary law in light of the non-discrimination clause in section 42 of the Constitution and the repugnancy test for the validity of customary law.[12]

It was expected that the Supreme Court would uphold the turning tide against discriminatory customary law rules of inheritance by striking them down under section 42 of the Constitution.[13] However, this hope was dashed by the Supreme Court decision in *Mojekwu*, the first of the cases which came up on appeal before it. At the Court of Appeal, Niki Tobi JCA was unsparing of the *oli-ekpe* custom when he struck it down with the following words:

> Is such a custom consistent with equity and fair play in an egalitarian society such as ours where the civilized sociology does not discriminate against women? Day after day, month after month, and year after year, we hear of and read about customs which discriminate against the women folk in this country. They are regarded as inferior to the men folk. Why should it be so? All human beings – male and female – are born into a free world and are expected to participate freely without any inhibition on grounds of sex and that is constitutional. Any form of societal discrimination on grounds of sex, apart from being unconstitutional, is antithesis to a society built on the tenets of democracy which we have freely chosen as a people. We

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11. See *Nezianya v. Okagbue* [1963] 3 NSCC 277, and *Nzekwu v. Nzekwu* [1988] 1 NSCC 581, [1989] 2 NWLR (Pt. 104) 373.

12. In *Ogiamien v. Ogiamien* [1967] NMLR 245. The Supreme Court stated obiter that a rule of Benin customary law which discriminates against the other children in favour of the eldest son in the inheritance of the estate of hereditary title holder was not repugnant to natural justice equity and good conscience.

13. *See,* O. Aigbovo, *Turning the Tide: Adjudicating Women's Customary Law Rights in Nigeria*, 31 JOURNAL OF CONSTITUTIONAL AND PARLIAMENTARY STUDIES (2003), at 101.

> need not travel all the way to Beijing to know that some of our customs including the Nnewi "Oli-ekpe" custom relied upon by the appellant are not consistent with our civilized world….. On my part, I have no difficulty in holding that the "Oli-ekpe" custom of Nnewi is repugnant to natural justice, equity and good conscience.[14]

At the Supreme Court, this passage, especially, was too much for Uwaifo JSC. He decisively overruled the repugnancy ground (and the embedded ground of unconstitutionality) of the Court of Appeal judgment, while leaving only the ground of the incompatibility of the *oli-ekpe* custom of Nnewi with the custom of Onitsha Kola tenancy. He gave four reasons for overruling the repugnancy ground as follows: (i) the issue of repugnancy was not joined by the parties; (ii) the Court of Appeal failed to draw the parties' attention to the issue of repugnancy; (iii) it was unnecessary to base the judgment partly on repugnancy since there was another ground – that the applicable custom was that of the kola tenancy of the *lexsitus* – which was sufficient to support the judgment; and (iv) the language used by Niki Tobi, JCA in declaring the custom repugnant made the pronouncement too general and far reaching that it seems to cavil at, and is capable of causing strong feelings against all customs which fail to recognize the role of women.

These reasons for overruling the repugnancy ground of the Court of Appeal judgment are mostly procedural, although the last one is based on the then prevailing conservative Supreme Court policy which favoured the protection of discriminatory customary laws. Uwaifo JSC abandoned all pretences and made it clear that the repugnancy ground would have been struck down still, even if there was no procedural reason for doing so, when he said:

> It would appear, for these reasons that the underlying crusade in that pronouncement went too far to stir up a real hornet's nest, even if it had been made upon an issue joined by the parties or properly raised and argued. I find myself unable to allow the pronouncement to stand in the circumstances, and accordingly I disprove of it as unwarranted.[15]

The Supreme Court decision in *Mojekwu* is therefore no authority for a challenge of customary law rules of inheritance which discriminate against female children on the grounds of repugnancy and incompatibility with the non-discrimination clause in

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14. [1997] 7 NWLR (Pt.512) 283 at 304-305.
15. [2004] 11 NWLR (Pt.883) 196 at 217.

section 42 of the Constitution[16] The only issue settled in that case is that the *oli-ekpe* custom of Nnewi is incompatible with the Onitsha Kola Tenancy which allows a female child to inherit her father's property.

In the case of the widow without a male child, the Supreme Court policy has been less conservative. In *Nezianya v. Okagbue,*[17] the rights of a widow without a male child over her deceased husband's property under the *oli-ekpe* custom of Onitsha was considered. The Supreme Court held that the widow was entitled to possession and occupation of the deceased husband's property as a member of the family, so long as the family does not object to her occupation, but that she cannot assume ownership of the property or alienate it. In the subsequent case of *Nzekwu v. Nzekwu,*[18] the Supreme Court, when confronted with the same *oli-ekpe* custom, followed its decision in *Nezianya* and held that no member of the deceased husband's family has the right to dispose of his property, at least in the lifetime of the widow without a male child. Nwokedi J. at the High Court was of the view that any Onitsha custom which allows the family members to alienate the property of the deceased in the lifetime of the widow is barbarous, uncivilized and repugnant to equity and good conscience.

It is noteworthy that Nnaemaka-Agu and Craig JJ.SC dissented from the majority judgment, on the ground, among others, that since the widow who was the plaintiff was dead; her life interest in the property was at an end. Even the majority opinion of Nnamani JSC, who read the lead judgment, was that the plaintiff did not establish any title of ownership to the land in dispute but a right to possession at least for life. The result from the majority and dissenting opinions is the same. The property of a deceased man who has no male child goes back to his paternal family after the death of his widow. *Nezianya* and *Nzekwu* did not therefore establish that a widow without a male child has a right to ownership over her deceased husband's property. The gender-based discrimination against females upheld in these cases is in the fact that the ownership right over the property of the deceased man does not go to his female children, or his widow because of their sex, but instead they go to his paternal male relations.

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16. *See,* O. Aigbovo, *The Tide Returns: Adjudicating Women's Customary Law Rights in Nigeria*, 11 NIGERIA BAR JOURNAL (2001), at 162.

17. (1963)1 All NLR 352).

18. (1988)1 NSCC 581.

III. *UKEJE v. UKEJE AND ANEKWE & ANOR v. NWEKE:* HAS THE TIDE FINALLY TURNED?

Twenty-six years and ten years after its landmark decisions in *Nzekwu* and *Mojekwu*, cases respectively, the Supreme Court was presented with another opportunity to pronounce on the two limbs of the *oli-ekpe* custom, namely, the disinheritance of the widow without a male child and the female child.

In *Ukeje*, the Court had the choice to follow its decision in *Mojekwu* and refuse to endorse one of the grounds of the Court of Appeal judgment in that case by virtue of which the Ibo native law and custom which precludes a female child from inheriting her father's property was struck down (this ground is that the Ibo native law and custom is incompatible with the non-discrimination clause of the Constitution)[19] or endorse the decision of the Court of Appeal and thereby lend its considerable authority to the judicial liquidation of customary law rules which disinherit females in Nigeria.

The effect of the route taken by the Court in *Anekwe* would be no less profound. If it endorsed the Court of Appeal decision in that case, it would give the widow of a deceased man the right to inherit title and not merely usufructuary rights over his property. It is fortuitous that both cases were decided by the Supreme Court on the same day.[20] The court in a unanimous decision upheld the judgment of the Court of Appeal in the two cases.

In *Ukeje*, Rhodes – Viviour, JSC who delivered the lead judgment, said:

> No matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from her late father's estate. Consequently, the Igbo customary law which disentitled a female child from partaking in the sharing of her deceased father's estate is in breach of section 42(1) and (2) of the Constitution, a fundamental rights provision guaranteed to every Nigerian. The said discriminatory customary law is void as it conflicts with section 42(1) and (2) of the Constitution.[21]

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19. The second ground of the Court of Appeal judgment is the incompatibility of the Ibo custom with that of Lagos, the *lexsitus*. Under the custom of the Yoruba of Lagos, a female child can inherit from her father.

20. 11th April, 2014.

21. [2014] 3-4 MJSC 149 at 175.

The ground breaking nature of this decision is in the fact that in one fell swoop, the Supreme Court struck down two discriminatory native law and customs. The first is the native law and custom which disentitles a female child from sharing in the inheritance of her father's property. The second native law and custom was alluded to by Rhodes-Vivour, JSC, in the opening sentence of the passage above but is more explicitly stated by Ogunbiyi, JSC in her concurring opinion as follows:

> It follows therefore that the Igbo native law and custom which deprives children born out of wedlock from sharing the benefit of their father's estate is conflicting with section 42(2) of the constitution of the Federal Republic of Nigeria, 1999.[22]

This decision has therefore struck down any native law and custom or general law which discriminates against not only female children, but any individual on the basis of being born out of wedlock.

Rhodes-Vivour, JSC in his lead judgment, and Onnoghen, Ogunbiyi, Aka'ahs and Okoro, JJ.SC, in their concurring judgments, were taciturn in their opinions. However, a different panel of justices in *Anekwe* was not so restrained in unanimously declaring the Ibo native law and custom which disentitles a widow without a male child from inheriting the property of her husband, as repugnant to natural justice, equity and good conscience. In her lead judgment, Ogunbiyi JSC delivered a stern homily when she said:

> I hasten to add at this point that the custom and practices of Awka people upon which the appellants have relied for their counter claim is hereby out rightly condemned in very strong terms. In other words, a custom of this nature in the 21st century societal settling will only tend to depict the absence of the realities of human civilization. It is punitive, uncivilized and only intended to protect the selfish perpetration of male dominance which is aimed at suppressing the right of the womenfolk in the given society. One would expect that the days of such obvious differential discrimination are over. Any culture that disinherits a daughter from her father's estate or wife from her husband's property by reason of God instituted gender differential should be punitively and decisively dealt with. The punishment should

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22. *Id.*, at 177.

> serve as a deterrent measure and ought to be meted out against the perpetrators of the culture and custom. For a widow of a man to be thrown out of her matrimonial home, where she had lived all her life with her late husband and children, by her late husband's brothers on the ground that she had no male child, is indeed very barbaric, worrying and flesh skinning.[23]

The Supreme Court justice went *ad hominen* and descended on the Appellants' counsel:

> It is indeed much more disturbing especially where the counsel representing such perpetrating clients, though learned, appear comfortable in identifying, endorsing and also approving such a demeaning custom.[24]

In his short concurring judgment, Muhammad, JSC said:

> It baffles one to still find in a civilized society which cherishes equality between the sexes, a practice that disentitles a woman (wife in this matter) to inherit from her late husband's estate, simply because she had no male child from her husband. This practice, I dare say, is a direct challenge to God the creator who bestows male children only; female children only [as in this matter], or an amalgam of both males and females to whom he likes... To perpetuate such a practice as is claimed in this matter will appear anachronistic, discriminatory and unprogressive. It offends the rule of natural justice, equity and good conscience. The practice must fade out and allow equity, justice and fair play to reign in the society.[25]

Muntaka-Coomassie, JSC noted that:

> The said custom is clearly repugnant to natural justice even the community had stayed away from it, it should be declared void at all time. Same be condemned by all.[26]

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23. (2014) 3-4 MJSC 183 at 219.
24. *Id.*, at 219.
25. *Id.*, at 220-221.
26. *Id.*, at 223.

Ngwuta, JSC said:

> My noble lords, the custom pleaded herein, and is a similar custom in some communities wherein a widow is reduced to chattel and part of the husband's estate, constitutes, in my humble view, the height of man's inhumanity to woman, his own mother, the mother of nations, the hand that rocks the cradle… The custom of Awka people of Anambra State pleaded and relied on by the appellant is barbaric and take the Awka community to the era of cave man. It is repugnant to natural justice, equity and good conscience and ought to be abolished.[27]

Finally, Ariwoola, JSC completed this circle of severe strictures against the offending native law and custom when he said:

> In the oral testimony, the appellants had stated that the reason why their custom forbid[s] the respondent from entitlement to inheritance of any land or landed property in her matrimonial family was the fact that she "has six female children without a single male child." By this, it meant that the said six female children of the respondent were denied their entitlement to inherit their father's property simply because of their sex. There is no doubt, this custom pleaded and canvassed by the appellants against the respondent is, to say the least repugnant to natural justice, equity and good conscience. It is even barbaric.[28]

The relevant pronouncements of the justices of the Supreme Court who sat on the appeal expose the strong passion which was collectively brought to bear against the native law and custom in question by the panel of Justices of the Supreme Court. The language of the court in this case is stronger than that of Niki Tobi JCA (as he then was) at the Court of Appeal in *Mojekwu's case*, yet in that case the Supreme Court unanimously struck down Niki Tobi's language as *"…it went too far to stir up a real hornet's nest…"*[29] What was responsible for this major shift in the Supreme Court policy regarding native law and custom which discriminates against females in inheritance matters?

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27. *Id.*, at 224.
28. *Id.*, at 226.
29. *Mojekwu v. Iwuchukwu* (2004) 11 NWLR (Pt. 882) 196 at 217.

IV. REASONS FOR THE CHANGE IN SUPREME COURT POLICY

Several factors could be responsible for the drastic change in the Supreme Court policy. Firstly, it could be due to the promotion of Court of Appeal Justices who were activists in reforming the discriminatory customary law rules. Secondly, it could be due to the influence of international conventions against gender-based discrimination. Thirdly, it could be as a result of the increasing number of women in the Supreme Court and the elevation for the first time of a female to the position of the Chief Justice of Nigeria in July 2012. Each of these factors is worthy of interrogation individually in order to confirm or eliminate it as the prime factor responsible for the shift in policy.

A. Activist Justices

The justices who gave or concurred to judgments striking down customary law rules of inheritance which discriminate against females while at the Court of Appeal are regarded as activist justices. The relevant question here is: did they continue their activism at the Supreme Court?

The first of the celebrated cases at the Court of Appeal is *Mojekwu*.[30] The panel of justices consisted of Niki Tobi, JCA who read the lead judgment, Ejiwunmi and Ubaezonu, JJ.CA. The second case is *Ukeje*.[31] The panel of justices in that case consisted of Oguntade, JCA, Galadima, JCA, who read the lead Judgment, and Aderemi, JCA. The third case is *Uke v. Iro*.[32] The panel of justices in that case consisted of Pats-Acholonu, JCA, who read the lead judgment, Akpiroroh, JCA and Ikongbeh, JCA.[33] All the Justices who sat in *Mojekwu, Ukeje* and *Uke* except Ubaezonu, Akpiroroh and Ikongbe JJ.CA were eventually elevated to the Supreme Court. Inyang Okoro JCA, one of the Justices who sat in *Anekwe* has been elevated to the Supreme Court. Pats-Acholonu was in the panel of Supreme Court justices which struck down the far reaching pronouncement of Niki Tobi in *Mojekwu v. Iwuchukwu.* He concurred with Justice Uwaifo's scathing criticism of Niki Tobi's pronouncement without any protest. Tobi JSC and other activist justices who demonstrated clear resistance against discriminatory customary law rules at the Court of Appeal did not maintain the same stand when they were elevated to the Supreme Court, either because

30. (1997) 7 NWLR 283.
31. (2001) 27 WRN 142.
32. (2001) 11 NWLR (Pt. 723) 196.
33. In *Anekwe,* the panel of Justices consisted of John Inyang Okoro, JCA, Ayobode Olujimi Lokulo-Sodipe, JCA, and Isaiah Olufemi, JCA who read the lead Judgment.

they were equally caught by the web of conservatism or because they were not given the opportunity to do so.[34] It can therefore be concluded safely that the elevation of activist justices to the Supreme Court did not play any significant role in the change in Supreme Court Policy.

B. The impact of International Conventions in informing court decisions

In some of the cases where discriminatory native law and custom was struck down, the Court of Appeal referred to some international Conventions and Declarations which prohibit gender-based discrimination or discrimination of any kind. In *Mojekwu,* Niki Tobi's pronouncement at the Court of Appeal which irritated Uwaifo JSC to the extent of dismissing it as a crusade is based on declarations made at the fourth world conference on women held in Beijing China, in 1995. Also, in *Mojekwu v. Ejikeme,*[35] Niki Tobi, JCA while condemning oppressive native laws and customs of widowhood, stated obiter that they are discriminatory and therefore against the provisions of the Constitution and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) of 1981.

However, as noted above, in *Mojekwu,* the Supreme Court rejected Niki Tobi JCA's pronouncement at the Court of Appeal, including his reliance on the Beijing Conference. The pronouncement in the former case was made obiter, and therefore not a strong authority on the point. Apart from the Beijing Declaration and CEDAW which have been expressly cited by the Court of Appeal, there are other human rights declarations and conventions which could have aided the Supreme Court in fashioning or changing its conservative policy regarding gender-based discriminatory native law and custom even before the two cases of *Ukeje* and *Anekwe* got to the Supreme Court. For example, the preamble to the United Nations (UN) Charter of 1945 enjoins all states to ensure the protection of the fundamental human rights, the dignity of, and worth of the human person, and the equal rights of men and women. The Universal Declaration of Human Rights (UDHR) 1948,[36] the International Covenant on Civil and Political Rights (ICCPR) of 1966[37] and the African Charter on Human and Peoples' Rights (ACHPR) 1981, prohibit all kinds of discrimination, including gender-based discrimination. Nigeria domesticated the ACHPR by enacting the African Charter on

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34. Unlike Pats-Acholonu, Tobi and other justices were not part of the Supreme Court panel that decided the cases under the discourse.

35. (2000) 5 NWLR (Pt. 657) 402.

36. GA Resolution 217A (III).

37. 199 UNTS 171.

Human and Peoples Rights (Ratification and Enforcement) Act of 1983.[38] It is therefore binding on Nigeria. Apart from the ACHPR, the provisions of the other declarations and conventions are not enforceable in Nigerian courts because they have not been domesticated as required by section 12(1) of the Constitution of Nigeria. These declarations and conventions are therefore only persuasive. However, the Supreme Court is yet to rely on the ACHPR which is binding in Nigerian courts or on any of the other declarations and conventions which only have persuasive force. Not even in the two cases reviewed in this paper did the Supreme Court rely on any international declaration or Convention. The result therefore is that international declarations and conventions are not significant factors in the change in policy of the Supreme Court.

C. Women in the Supreme Court Bench and Appointment of Female Chief Justice

In June 2005, Justice Mariam Aloma Mukhtar was elevated to the Supreme Court from the Court of Appeal. Her elevation received positive and hopeful reactions. A newspaper report of her swearing in on 8th June, 2005 is as follows:

> The women cheered. They could not contain their joy. They gave a standing ovation. They applauded and applauded until they were almost begged to adjourn; but when she blew them a kiss it became obvious to all that she understood… She knew why nearly all the female lawyers and judges in the country thronged the Supreme Court's ceremonial hall that cool Wednesday morning. They were there to show their support and solidarity. At last and for the first time in history, a woman joined their lordships on that hallowed row.[39]

Again she became the first woman to be appointed as the Chief Justice of Nigeria in July 2012. She has been described as independent minded, liberal, highly principled and a stickler to due process.[40] It is reported that Justice Mariam Aloma Mukhtar has been

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38. Cap A.9 Laws of the Federation of Nigeria, 2004.

39. Justice Aloma Mariam Mukhatar, 1st Female Supreme Court Judge, retrieved from <http://www.thisdayonline.nview.php?id=19770.www.nairaland.com/458/justice-aloma>, (accessed on October 17 2014).

40. *See*, Behold, Nigeria's First Female Chief Justice THIS DAY NEWSPAPER, July 17, 2012, retrieved from <www.thisdaylive.<om>HOME>NEWS>, (accessed on 17th Oct. 2014). See also, Justice Mariam Alomamukhator, The Star of Many Firsts, WEEKEND PEOPLES, retrieved from <daily.ng.com/index.ph>, (accessed on October 10, 2014).

subjected to discrimination herself in the course of her career as a judge. For example, she was reportedly denied the Chief judgeship of her native Muslim - dominated Kano State in 1987, although she was the most qualified judge for that position.[41]

Again, some months to the retirement of Chief Justice Dahiru Musdapher, her predecessor, Mukhtar, was nominated by the Nigerian government acting on the advice of the National Judicial Council, to be seconded to the Gambia as the Chief Justice of that country. On realizing that this was a ploy to prevent her from becoming the first female Chief Justice upon the retirement of Justice Musdapher, she declined the nomination.[42]

As the Chief Justice of Nigeria, Justice Mukhtar is the administrative Justice who empanels Justices to hear cases before the Supreme Court. She is therefore in a powerful position to determine the Justices to hear a given case. It is therefore understandable why Justice Ogunbiyi was one of the two female Supreme Court Justices on the two different panels which heard the appeals in *Ukeje* and *Anekwe*. She concurred with the lead judgment of Rhodes-Vivour, JSC, in *Ukeje* and wrote the lead Judgment in *Anekwe*. One can therefore safely conclude that the single most important factor which has resulted to the change in the policy of the Supreme Court regarding gender-based discriminatory native law and custom rules of inheritance is the elevation of female justices to the Supreme Court and the appointment of a female as the Chief Justice of Nigeria.

V. THE FUTURE OF GENDER-BASED DISCRIMINATORY INHERITANCE RULES UNDER NATIVE LAW AND CUSTOM

As noted above, some factors likely to have led to the major shift in Supreme Court policy were adumbrated. Two of the factors, namely, the role of activist justices and the influence of international conventions were discounted, and the gender composition of the Supreme Court panels which heard the appeals, including the headship of the Court by a female was identified as the critical factor. However, in offering prognostications as to the future of gender-based discriminatory rules of inheritance in the Supreme Court, all three factors are critical in sustaining the turning tide against these rules.

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41. *See*, Femi Falana, Why I Salute Chief Justice AlomaMukhtar, THE SCOOP, June 14, 2014, retrieved from <www.thescoopng.com/femifalana-why>, (accessed on October 10, 2014).

42. *See*, *supra* note 39, and Falana *id*. After Justice Mukhtar, two other female justices, that is, Justices Olufunlola OyelolaAdekoye and Clara Bata Ogunbiyi were appointed to the Supreme Court.

Although some of the justices who earned activist credentials in the Court of Appeal became conservative or had no opportunity to display their activism after being elevated to the Supreme Court, and failure to cite international conventions by the Supreme Court in *Ukeje* and *Anekwe*, however, the two discounted factors and the unanimous decisions of the court in the two cases are together powerful obstacles to any gender-based discriminatory customary law rule in Nigeria. These two cases are now the final authorities on gender-based discriminatory rules of inheritance in Nigeria and a challenge to the policy in these cases is liable to be met by the following obstacles:

> (a) Any challenger would have to convince the Supreme Court to reverse itself. Although the Supreme Court can reverse itself, it does not do so lightly. This would require convincing the full court of the Supreme Court of the following:
> i. That the previous decision is inconsistent with the Constitution or that it is erroneous in law; or
> ii. That the previous decision was given *per incuriam*; or
> iii. Establish before the Court that the previous decision is occasioning miscarriage of justice or that it is perpetuating injustice.[43]
>
> (b) Secondly, one would be met by a slew of international Conventions and Declarations which are applicable, but were not considered by the Supreme Court in the two cases.

Although the provisions of some of the above-mentioned international conventions are yet to be domesticated and therefore not binding on courts in Nigeria, some courts in the country have continued to rely on the general principles entrenched in the international conventions to strike down or condemn discrimination against females under customary law. For instance, in *Mojekwu,* Niki Tobi, JCA relied on the Beijing declaration, among others, against discriminatory and other harmful practices against females in striking down the *oli-ekpe* custom of the Ibowhich disinherits daughters. Again in *Mojekwu v. Ejikeme,*[44] Niki Tobi JCA relied, amongst others, on the CEDAW in condemning the *nrachi* custom of the Ibos which denies a daughter the right to succeed the estate of her father except when she undergoes the *nrachi* custom under which she becomes a man symbolically, and so cannot marry or leave her father's house.

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43. *Odi v. Osafile* [1985] 1 NWLR (Pt. 1) 17 at 35; *Rossek v. ACB* [1993] 8 NWLR (Pt. 312) 382 at 431, 443; *Oladele v. Aromolaran II* (1996) 39 LRCN 937.

44. [2000] 5 NWLR (Pt. 657) 402.

In the case of *Asika v. Atuanya*,[45] Denton-West JCA relied, amongst others, on CEDAW and Article 16 of the Universal Declaration of Human Rights to strike down a rule of Onitsha native law and custom which disinherits female children. These undomesticated conventions are therefore highly persuasive in Nigerian courts. On the other hand, the ACHPR has been domesticated in Nigeria as the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act of 1983.[46] Therefore, it enjoys the full legal force associated with any other domestic law in Nigeria.

By Article 1 of the ACHPR, parties to the Charter undertake to, among other things, guarantee freedom from any form of discrimination and safeguard the human right of all individuals within their jurisdictions without exceptions. Article 3 of the Charter provides for freedom from all kinds of discrimination, including discrimination based on sex. Article 18(3) of the Charter specifically provides:

> The State shall ensure the elimination of every form of discrimination against women and shall also ensure the protection of rights of the women and the child as stipulated in international declarations and conventions.[47]

By reason of the fact that it has been domesticated in Nigeria, the Supreme Court has applied the ACHPR as a binding law in some cases.[48]

Lastly, due to the authority of the decisions in *Ukeje* and *Anekwe* and the difficulties in challenging them pointed out above, it is envisaged that it would be by far easier for Supreme Court Justices to sustain the anti-discrimination policy of those cases in future, than for them to reverse the cases and adopt the previous conservative policy of the court.

Also, the trend in other African countries favours reliance on international declarations and conventions in striking down discriminatory customary law rules. For example, in *Ephraim v. Pastory*,[49] the Tanzania High Court relied on the Tanzania Constitution and international human right Conventions to strike down a Haya

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45. (2008) 17 NWLR (Pt. 1117) 484.

46. Cap. A9 Laws of the Federation of Nigeria, 2004.

47. It is contended that this Article is wide enough to accommodate even relevant international declarations and Conventions, even if they have not been domesticated in Nigeria.

48. See [1994] 9 NWLR (Pt.366) 1 and *Abacha v. Fawehinmi* [2000]6 NWLR (Pt. 660) 228.

49. (2001) AHRLR 236 (TZHC 1990).

customary law rule which prevented females from selling inherited clan land.[50] Similarly, in the Botswana case of *Ramantele v. Mmusi,*[51] the changing global trends in customary rules of succession were clearly reflected. In that case, four sisters appealed to the Court of Appeal from the Customary Court of Appeal on the ground that the customary law rule which disinherits women violated their right to equality under section 3(a) of the Botswana Constitution and taking into consideration international, regional and comparative laws. The daughters, Edith Mmusi, Bakhani Moima, Jane Lekoko, and Mercy Ntsehkisang, argued that they were entitled to the family home having contributed to the development of the property and had taken care of their mother prior to her death. Their claim was challenged by their half-brother's son, Molefi Ramantele, who argued that under Ngwaketse customary law, the family home was inherited by the youngest son and thus he was entitled to inherit as his father received the property from the youngest son of the deceased property owner.

The Court of Appeal held that the customary law rule which denies women the right to inherit the family home infringed on the right to equality, noting the supremacy of the Constitution over all other laws including customary law. The court therefore stated that the daughters were entitled to inherit the homestead. According to the court, customary law "develops and modernizes with the times. Harsh and inhumane aspects of custom are discarded as time goes on; with more liberal and flexible aspects consistent with society's changing ethos being retained." The court argued that the customary rule calling for the inheritance of the family home by the youngest son was akin to the primogeniture rule and that it was based on the view that the son never leaves the parents' home except when he marries or is banished. In this case, the court observed that the son had long left his parents' home. Lesetedi J further noted that in the intervening thirty years, a lot had changed, including the constitutional values of equality before the law, and the increased leveling of the power structures with more and more women heading households and participating with men as equals in the public sphere and increasingly in the private sphere. He added that customary laws should be declared unconstitutional if they are not in line with the Constitution.

Based on the foregoing, the court concluded that there is no rational and justifiable basis for sticking to the narrow norms of bygone days when such norms go

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50. The court relied on Article 26 of the International Covenant on Civil and Political Rights (ICCPR) which prohibits discrimination based on sex, CEDAW, and Article 7 of the Universal Declaration of Human Rights which prohibits discrimination based on sex.

51. *Unreported judgment of the Botswana Court of Appeal, delivered in Gaborone, on September 3, 2013. See,* Lisa Anderson, Botswana Women Win Landmark Right to Inherit under Customary Law (accessed September 16, 2013), retrieved from <http://www.trust.org/item/20130904043025-btl5h/>.

against current value systems. Any customary law or rule which discriminates in any case against a woman unfairly solely on the basis of her gender would not be in accordance with humanity, morality or natural justice. Nor would it be in accordance with the principles of justice, equity and good conscience.

VI. CONCLUSION

The two cases of *Ukeje* and *Anekwe* have changed the tide firmly and finally against gender-based discriminatory customary law rules in Nigeria, especially discriminatory rules of succession or inheritance. For the first time, the Supreme Court relied on the non-discrimination clause in the Constitution to strike down a gender-based discriminatory customary law rule. This new vista which the Supreme Court has been reluctant to open against such native laws and customs will be difficult, if not impossible to close in the future. Also, although the Supreme Court did not consider the jurisprudential bases offered by international conventions and declarations which could have provided additional grounds for the two decisions, those instruments are available to resist any attempt to challenge the new policy of the Supreme Court in future.

QUEST FOR EFFECTIVE LEGAL PROTECTION AND AFFIRMATIVE ACTION FOR MINORITIES IN NIGERIA

Paul Adole Ejembi*

Abstract

Minorities exist in various states and territories in the international community. In retrospect, minority rights in Nigeria had been patently neglected and relegated to the margins of society. The article demonstrates that the numerous spate of ethnic, religious and socio-political quagmire has led to an unbridled agitation for the protection of minority rights in contemporary Nigeria. The article asserts that in the absence of a well-articulated legal framework, the clamour for the protection of minority rights in the country would be restricted to the province of rhetoric. The article further undertakes an analysis of relevant international regimes for the protection of minority rights and their correlation with Nigerian domestic law. The article concludes by alluding that the recognition, standardisation, and protection of minority rights would enhance peaceful co-existence and promote national integration. The article argues that it is incumbent on the government to take proactive steps by enacting laws and establishing institutions to address issues affecting beleaguered minorities in Nigeria. The article finally posits that the legislature should domesticate relevant international instruments in Nigeria to engender a paradigm shift from the trajectory of burgeoning rhetoric to a palpable threshold of effective protection of minority rights in the country.

I. INTRODUCTION

Minorities exist in multifarious collectivities and identities in human society. There are cultural, ethnic, linguistic, racial, religious, and political minorities all over the world[1] including Nigeria. Some countries have adopted policies to recognise and protect the cultural and linguistic identities of minorities. Some states have, however, refused or failed to recognize the existence of minorities. Genocide and physical annihilation of

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1. See, R. JAVAID, INTERNATIONAL HUMAN RIGHTS LAW (Essex: Pearson Education Limited, 2010), at 433.

minority groups have taken place in some other territorial jurisdictions.[2]

In retrospect, minority rights in Nigeria have been neglected and abused since 1914 and throughout the period prior to independence of the country.[3] Sequel to Nigeria's independence from colonial authorities in 1960, there was minor recognition of its ethnic and linguistic minorities.

The past constitutions of 1963 and 1979 as well as the present 1999 Constitution of Nigeria, did not make provisions for the protection of minorities in the country. The numerous spate of ethnic, religious, and socio-political quagmire in the country[4] has led to an unbridled agitation for the protection of rights of minorities. While demands for the protection of minority rights in Nigeria are important, the absence of ossified robust legal framework makes such agitations mere rhetoric.

In light of the foregoing, this article analyses relevant international regimes for the protection of minority rights and their correlation with Nigeria's domestic laws. The impediments to the realisation of minority rights will be articulated and recommendations made for reforms and policy consideration.

II. THE MEANING OF THE CONCEPT OF MINORITY

The concept of 'minority' presents difficulties in respect of precise definition. Its meaning varies significantly depending on the cultural, political, sociological, and legal persuasion of the proponents.[5] The term 'minority' has been defined as:

> a group of persons who reside on the territory of a state and are citizens thereof, display distinctive ethnic, cultural, religious or linguistic characteristics, are smaller in number than the rest of the population of that state or of a region of that state and are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.[6]

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2. *Id.*

3. *See*, S. Onimisi, *Prospects for Equal Rights in Nigeria*, in *Linguistic Minorities and Inequality in Nigeria* (N. Bagudu ed., 2003), at 44.

4. *See,* N. Bagudu (ed), *Introduction and Background,* in Bagudu *id*., at 7.

5. *Id.*, at 4.

6. F. CAPOTORTI, STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES (NEW YORK: UNITED NATIONS, 1991), Para 568; see also, J. DESCHENES, PROPOSAL CONCERNING THE DEFINITION OF THE TERM MINORITY" 4/Sub-2/1985/31, 14th May, 1985, *cited* in O.D. SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW (CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS,

The above definition has been criticized. For instance, it has been argued that the principle which requires that a group must be 'numerically inferior' than the rest of the population of a state, places an enormous burden of proof on the group and may be difficult to ascertain. For example, the ethnic conflict in Rwanda and Burundi where numerically smaller groups exert political control and dominance over larger groups, defies the connotation of minority as being numerically inferior.[7]

It has also been asserted that minorities are "undermined not so much by their weaknesses in number, but by their exclusion from power."[8] The consideration of political power in the determination of minority versus majority is succinctly put as follows:

> The distinction… between nations and minorities is one of power. The element of power or powerlessness is the distinguishing characteristic of national and minority discourses.[9]

Thus, Palley posits that a minority is "any racial, tribal, linguistic, religious, caste or nationality group within a national state which is not in control of the political machinery of the state".[10]

The definition of minority presented by Francesco Capotorti has also been questioned in respect of its restrictions of minorities to citizens of a state, thereby excluding non-citizens within the state. Article 27 of the International Convention on Civil and Political Rights (ICCPR) provides that:

> In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group to enjoy their own culture, to profess and practice their own religion or to use their own language.[11]

2010), at 6-7.

7. Rehman, *supra* note 1, at 435.

8. *Id*.

9. H. Cullen, *Nations and its Shadow: Quebec's Non-French Speakers and the Courts,* 3 LAW AND CRITIQUE (1992), at 219, *cited in* Javaid, *supra* note 1, at 435.

10. C. Palley, Constitutional Law and Minorities (Minority Rights Group, 1978), at 3; see also, *Javaid id*., at 435.

11. New York, 16th December, 1966, United Nations 999 U. N.T. S171; 6.ILM (1967) 368.

It may be gleaned from the provisions of Article 27 of the ICCPR that the concept of minorities refers to persons in general as opposed to only citizens of a country.[12] The Human Rights Committee, in its exposition of the terms used in Article 27 of the ICCPR, stated that individuals designed to be protected need not be citizens of a state party. The Committee therefore pointed out that a state party may not restrict the rights under Article 27 of the Convention to only its citizens. Just as persons belonging to minorities need not be nationals or citizens, they need not be permanent residents. Thus migrant workers or even visitors in a state constituting such minorities are entitled to the exercise of those rights stated therein.[13]

Alemika posits that the statutes of minority and majority have quantitative, economic, social and cultural dimensions. For instance, the quantitative dimension is exemplified by the fact that the concept of minority refers to a group with small numerical population as compared to other groups within a particular state or region. Minority also refers to power relations between powerless groups vis-a-vis more powerful groups in society.[14] Although the concept of minority is complex and difficult to define with precision, Bagudu remarked that:

> An inability to define a concept with precision does not necessarily question its legal existence, in fact many international legal institutions have survived in the absence of specifications and meticulousness…[15]

In the context of the present discourse, the term minority connotes a group of persons who reside in a territory of a state and portray distinctive ethnic, cultural, religious, or linguistic characteristics and are either not in control of the political machinery of a state or smaller in number than the rest of the population of that state or region and show a sense of collective will directed towards preserving their culture, traditions, religion, language, and to assert their rights to existence, equality, and non-discrimination.

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12. Javaid, *supra* note 1, at 436.

13. *See*, The Human Rights Committee, General Comment No. 23 (Fiftieth Session. 1994) Report of the Human Rights Committee IGBOR 49th Session Supp. No. (A/49/40) Paras 5.1 and 5.2, at 107-110.

14. E. Alemika, *Protection of Minority Rights in a Democratic Nigeria Society,* in Bagudu, *supra* note 3, at 27-28.

15. Bagudu, *supra* note 4, at 4.

III. INTERNATIONAL PROTECTION OF MINORITIES UNDER THE AUSPICES OF THE UNITED NATIONS

The problem of protecting minorities in Europe was a source of concern after the First World War.[16] Thus, at the Paris Peace Conference in 1919, a number of treaties were drafted to protect minorities.[17]

In 1947, the Commission on Human Rights under the auspices of the United Nations (UN), established a sub-commission on the Prevention of Discrimination and the Protection of Minorities. The UN adopted a Declaration on Minorities in 1992. In 1995, the UN established the Working Group on Minorities in order to oversee the implementation of the Declaration. Sequel to the recommendations of the Working Group on Minorities (WGM) and efforts of Non-governmental Organizations, the Commission on Human Rights established an Independent Expert on Minority Issues (IEMI) in 2005 so as to enhance the protection of minorities. The IEMI and the Working Group on Minorities (WGM) complement each other. While the WGM provides an avenue where minorities can state their situation and discuss directly with government representatives, the IEMI is mandated to undertake country visits to meet with government representatives and minorities.[18] The rights of minorities are interrelated and stems from the substantive rights of the individual. The right to equality, non- discrimination, the right to existence, culture, freedom of religion and expression are fundamental aspects of individual and minority rights. The right of minorities also has a collective dimension. For instance, the right to life is not restricted to the physical existence of members of a particular minority but includes cultural, linguistic, and religious, existence, otherwise the group would be deprived of its distinctiveness.[19]

Over the years, the UN has initiated Declarations, International Treaties and Conventions which are aimed at protecting minorities. Relevant provisions of some international instruments would be considered briefly hereunder.

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16. P. MALANEZUCK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW (1977), at 105.

17. R. Mc Corquodale, *Right of Peoples and Minorities*, in INTERNATIONAL HUMAN RIGHTS LAW (D. Moeckli, S. Shah, S. Sivakumaran, & D. Harris eds., 2010), at 383.

18. Minority Rights Group International, A Short History of Minority Issues at the U.N, retrieved from <http://www.minorityrights.org/1333/campaign-to-keep-miniority-voices-at-the-un/a-short-history-of-minority-issues-at-the-un-html>, (accessed on the 14th January, 2012).

19. Javaid, *supra* note 1, at 438.

A. Universal Declaration of Human Rights

Article 2 of the Universal Declaration of Human Rights (UDHR) provides that everyone is entitled to all the rights stated in the Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status. Article 27 is to the effect that everyone has the right to participate in the cultural life of the community. Article 7 provides that all are equal before the law and are entitled without any form of discrimination to equal protection of the law. Although the UDHR is not necessarily a binding legal instrument, the General Assembly of the United Nations unequivocally proclaims that the Declaration is a common standard of achievement for all peoples and nations and they shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures to secure their universal and effective recognition observance.[20]

B. Declaration on the Elimination of all Forms of Racial Discrimination 1964

The General Assembly of the United Nations on the 20 November 1963, in its resolution 1904 (XVIII), enunciated the Declaration on the Elimination of All Forms of Racial Discrimination.[21] The Declaration clearly expresses the intention of states to eliminate racial discrimination in all forms and manifestations, throughout the world.[22] However, the Declaration, being a General Assembly resolution, is not a binding document per se.[23]

C. International Covenant on Economic, Social and Cultural Rights 1966

The International Covenant on Economic, Social and Cultural Rights (ICESCR)[24] identifies significant social, economic, and cultural rights.[25] It also obligates state parties to strive for the promotion and observance of the rights recognized in the

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20. *See*, Preamble of the Universal Declaration of Human Rights (1948).

21. G.A. Res 1964 (XVIII) 20th November, 1963.

22. *See*, Human Rights Education Association, The Rights of Ethnic and Racial Minorities, retrieved from <http:///www.hrea.org/index.php?docld=360>, (accessed on the 24th January, 2012).

23. Javaid, s*upra* note 1, at 408.

24. Adopted and opened for signature, ratification and accession by General Assembly resolution 220AA (XXI) of 16th December, 1966 which entered into force on the 3rd January, 1976 and acceded to by Nigeria on the 29th of July, 1993.

25. Z.F. ARAT, HUMAN RIGHTS WORLD WIDE: A REFERENCE HAND BOOK (2006), at 178.

Convention.[26] Article 1 paragraph 1 of the 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". Article 2 of the Convention expressly provides that state parties undertake that the rights articulated in the treaty shall be exercised without discrimination of any kind including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other social status. Furthermore, Article 15 of the Convention recognises the right of everyone to cultural life. In light of the above mentioned provisions, discrimination against the rights of persons including minorities is prohibited. Minorities are also entitled to participate in all aspects of their cultural life.

D. International Covenant on Civil and Political Rights 1966

The International Convention on Civil and Political Rights (ICCPR)[27] recognizes that the ideal of free human beings enjoying civil and political freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights; as well as his economic, social and cultural rights. Article 1 of the ICCPR provides that all persons have the right to self-determination and to freely determine their political status and pursue their economic, social and cultural development.

Article 2 of the Convention, is to the effect that each state party shall respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Convention without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

Furthermore, Article 6 of the Convention stipulates that every human being has an inherent right to life. Article 20 of the ICCPR requires state parties to prohibit by law "any advocacy of national racial or religious hatred that constitutes incitement to discrimination, hostility or violence".

Equality of all persons before the law is guaranteed under Article 26 of the ICCPR. It provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. It further stipulates that "the law shall prohibit any discrimination and guarantee to all persons equal and effective

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26. *See,* Preamble of the Convention on Economic, Social and Cultural Rights.

27. Adopted and opened for signature, ratification and accession by General Assembly resolution 220A (XXI) of 16th December, 1966 and entered into force on the 23rd March, 1976 and acceded by Nigeria on the 29th of July, 1993.

protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Article 27 of the Convention expressly states thus: "In those states in which ethnic, religious or linguistic minorities exists, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language".

The combined provisions of the above-mentioned Articles, in effect, guarantee the protection of the rights of minorities within the jurisdictions of state parties to the ICCPR.

E. International Convention On The Elimination Of All Forms Of Racial Discrimination 1965

The International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)[28] states that any doctrine of superiority based on racial differentiation (including minorities) is scientifically false, morally condemnable, socially unjust and dangerous, and there is no justification for racial discrimination in theory or practice anywhere in the world.[29]

Article 1 of the Convention defines the term "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

Article 1 sub article 4 of the Convention gives state parties the latitude to undertake affirmative action in respect of groups or individuals (such as minorities) for the sole purpose of ensuring that such persons attain equal enjoyment or exercise of human rights and fundamental freedoms. The said Article further states that such special measures (affirmative action) shall not be deemed racial discrimination, provided, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

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28. Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21st December, 1965 and entered into force on the 4th January, 1969 and ratified by Nigeria in 1965.

29. *See,* ICERD, Preamble.

Article 4 of the ICERD is to the effect that state parties to the Convention shall condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination. To this end, state parties shall declare an offence punishable by law all dissemination of ideas on racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racial activities, including financing thereof.

Article 5 of the ICERD stipulates that parties to the Convention shall undertake to prohibit and to eliminate racial discrimination in all its forms and guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

> (a) The right to equal treatment before tribunals and all other organs administering justice;
> (b) The right to security of person and protection by the state against violence or bodily harm, whether inflicted by government officials or by any individual, group or institutions;
> (c) Political rights, in particular the right to participate in elections to vote and to stand for election on the basis of universal and equal suffrage, to take part in the government as well as in the conduct of public affairs at any level and to have equal access to public service;
> (d) Other civil rights, in particular: (i) the right to freedom of movement and residence within the border of the state; (ii) the right to leave any country, including one's own, and return to one's country; (iii) the right to nationality; (iv) the right to marriage and choice of spouse; (v) the right to own property alone as well as in association with others; (vi) the right to inherit; (vii) the right to freedom of thought, conscience and religion; (viii) the right to freedom of opinion and expression; (ix) the right to freedom of peaceful assembly and association; (e) economic, social and cultural rights, in particular: (i) the right to form and join trade unions; (ii) the right to housing; (iii) the right to public health, medical care, social security and social services; (iv) the right to education and training (v) the right to equal participation in cultural activities; and (f) the right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks.

Judicial and institutional protection of the right of individuals and groups including minorities is guaranteed by Article 6 of the Convention. The Article provides that state parties shall assure to everyone within their jurisdiction effective protection and remedies, through competent national tribunals and other state institutions, against any acts of racial discrimination which violates his human rights and fundamental freedoms.

Article 8 of the Convention provides for the establishment of a Committee on the Elimination of Racial Discrimination consisting of 18 experts of high moral standing and acknowledged impartiality elected by state parties from among their nationals, who shall serve in their personal capacity, with due consideration being given to equitable geographical distribution and to the representation of different forms of civilization as well as of the principal legal systems. The Committee is charged with the responsibility of resolution of matters brought before it and to make suggestions and general recommendations based on the examination of reports and information received by state parties. Such suggestions and general recommendations shall be reported to the General Assembly, together with comments, if any, from state parties.[30]

F. Convention on the Prevention and Punishment of the Crime Of Genocide

Article 11 of the Convention on Prevention and Punishment of the Crime of Genocide[31] defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Article III of the Convention makes genocide, conspiracy to commit genocide and complicity in genocide, punishable. Article V of the Convention enjoins contracting parties to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the Convention and to provide effective penalties for persons guilty of genocide or any of the other acts of genocide. Thus the provisions of the Convention can be utilized to protect minorities against the crime of genocide.

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30. *Id.*, Articles 8 and 9.

31. Approved and proposed for signature and ratification or accession by General resolution 260 A (III) of 9th December, 1948 and entered into force on the 12th January, 1951 in accordance with Article XIII. Nigeria acceded to the Convention on the 27th July, 2009.

G. Rome Statute of the International Criminal Court

The Rome statute of International Criminal Court[32] provides for the establishment of an International Criminal Court.[33] Nigeria signed the Rome Statute on 1st June 2000, and ratified it on the 27th September 2001.[34] The court has jurisdiction to adjudicate in respect of the following crimes: (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; and (d) the crime of aggression by virtue of the provisions of Article 5 of the Statute. The Statute gives the International Criminal Court jurisdiction over acts of genocide of specific national, ethnic, racial or religious groups.[35]

H. Convention Relating to the Status of Refugees 1951

The Convention Relating to the Status of Refugees[36] gives a person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, who is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, the right to seek asylum. State parties are required to apply the provisions of the Convention to refugees without discrimination to race, religion or country of origin.[37]

It may be gleaned from the provisions of the Convention Relating to the Status of Refugees 1951 that the right of minorities is protected by the Convention. The Convention specifically protects persons who have well-founded fear of being persecuted for reasons of "membership of a particular social group", which include minorities.

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32. Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on the 17th July 1998 and entered into force on the 1st July 2002 in accordance with Article 126. Nigeria ratified the Statute on the 27th September, 2001.

33. Rome Statute of International Criminal Court 1998, Article 1.

34. Human Rights Education Association, The Rights of Racial Minorities, retrieved from <http://www.hrea.org/index.php?docld360>, (accessed on 24th January, 2012). See also, Rome Statute of International Criminal Court 1998, Article 6.

35. Human Rights Education Association "The Rights of Racial Minorities". Available at http://www.hrea.org/index.php?docld360 (accessed on 24th January, 2012). See also, Article 6 of the Rome Statute of International Criminal Court 1998.

36. Adopted on the 28th July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of the 14th December, 1950 and entered into force on the 22nd of April, 1954 in accordance with Article 43. Nigeria acceded to the Convention on the 23rd October, 1967.

37. *See*, Convention Relating to the Status of Refugees 1951, Articles 1 and 3.

I. Convention Against Discrimination in Education 1960

The Convention Against Discrimination in Education[38] proclaims that every individual or group has a right to education. It protects individuals or groups against discrimination on the basis of race, colour, sex, language, religion, political, national, or social origin, in the provision of access to education of any type at any level.[39] By and large, minorities are entitled to the rights enunciated in the Convention.

J. Employment Policy Convention 1964

The Employment Policy Convention[40] guarantees the right of all human beings, irrespective of race, colour, sex, religion, political opinion, national extraction or social origin, to freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use his skills and endowments in a job for which he is well suited.[41] By virtue of the foregoing provisions, all persons including minorities have the right to freedom of choice of employment.

K. Customary International Law and the Protection of Minorities

Customary International Law is binding on all states with limited exceptions.[42] The emerging consensus is that virtually all rights enumerated in the UDHR have acquired the status of Customary International Law.[43] Some human rights principles are now regarded as Customary International Law in light of state practice. These include genocide, slavery, and the principle of non-discrimination. It is therefore contended that where a crime of genocide or discriminatory action is taken against minorities in a given state, the rules of Customary International Law may be invoked to protect them.

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38. Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization on the 14th December 1960 and entered into force on the 22nd May 1962 in accordance with Article 14. Nigeria acceded to the Convention on the 18th November, 1969.

39. *See,* Convention Against Discrimination in Education 1960, Articles 1, 2 and 3.

40. Adopted on the 19th July 1964 by the General Conference on the International Labour Organization at its forty-eight Session and entered into force on the 15th July 1966 in accordance with Article 5. See International Labour Organization, 'Ratifications of C122-Countries that Have not Ratified this Convention. <'www.ilo.org/dyn/normlex/en/f?p=normlexpub:1130>, (accessed on the 4th February, 2017). At the time of writing this article, Nigeria was yet to ratify the Convention.

41. Employment Policy Convention 1964, Article 1.

42. C. Chinkin, *Sources,* in Moekli et al., *supra* note 17, at 110.

43. M.N. SHAW, INTERNATIONAL LAW 5TH ED (2003), at 256.

IV. SOME DECISIONS OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE IN RESPECT OF MINORITY RIGHTS ISSUES

In the Lubicon Lake Band Case,[44] the Government of Canada permitted the Provincial Government of Alberta to expropriate the Band's minorities' territory for purposes of private corporate use. The United Nations Human Rights Committee held that the rights protected under Article 27 of the ICCPR included the rights of persons in community with others to engage in economic and social activities which were part of the culture of the community to which they belonged. The Committee also held that the Canadian Government had violated Article 27 of the ICCPR.

In the case of *Sandra Love Lace v. Canada,*[45] a Maliseet Indian woman who had married a non-Maliseet Indian man got divorced. Upon the demise of the marriage, she lost her rights by the provisions of Canadian Municipal Law to reside on the Tobique reserve, which she desired sequel to the breakdown of her marriage. The Human Rights Committee held that her access to culture and language was interfered with and the loss of her rights violated Article 27 of the ICCPR.

In *Kitok v. Sweden,*[46] a member of the Sami community in Sweden filed a petition to the Human Rights Committee in respect of the regulation of economic activity in the community. The Human Rights Committee decided that the restriction placed upon an individual member of a minority group with the reasonable and objective aim of continued viability and welfare of the minority as a whole was not a violation of Article 27 of the ICCPR.

V. THE APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS NORMS AND INSTRUMENTS FOR THE PROTECTION OF MINORITIES IN NIGERIA

Pacta Sunt Servanda, the principle that treaties are binding and must be performed in good faith is a cardinal aspect of the law of treaties.[47] Article 26 of the Vienna Convention on the law of Treaties 1969[48] provides that "every treaty in force is binding upon the parties to it and must be performed in good faith".

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44. A/45/40, Vol. II, at 1; 96 ILR, at 667.

45. Communication No. 24/1977 (30th July, 1981) UNDOC.CCPR/C/OP/1 at 83 (1984).

46. Communication No. 197/1985 UNDOC.CCPR/C33/197/1985.

47. D. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 7TH ED. (2010), at 670.

48. (1980) U.K.T.S 58 CMnd 7964; 115 U.N.T.S 231; (1969) 81 I.L.M 679 (1969) 63 AJIL 873 entered into force in 1980; Official Records, U.N. Docs. A/Conf.39/11.

However, it is a well-known principle of International Law that a state cannot be bound by any agreement to which it has not given its consent either by signing, ratification, accession or any other means of expressing intention to be bound.[49] It is pertinent to note that international instruments can only attain the force of law within Nigerian legal system to the extent to which any such treaty has been enacted by the National Assembly.[50] This is congruent with the dualist approach to the relationship between International Law and Municipal Law.[51] Thus, in the case of *Abacha v. Fawehinmi*,[52] the Supreme Court of Nigeria held that by virtue of Section 12(1) of the 1979 Constitution (which is coterminous with the provisions of Section 12 of the CRFN, 1999, as amended), an international treaty entered into by the government of Nigeria does not become binding until it is enacted into law by the National Assembly.

The apex court further explained that before its enactment as such, an international treaty has no such force of law as to make its provisions actionable in Nigerian law courts. Although Nigeria has ratified relevant instruments for the protection of minorities such as the ICESCR, the ICCPR, the ICERD, among others, these instruments are yet to be domesticated and enforced in the country's municipal law. Section 12 of the 1999 Constitution of the Federal Republic of Nigeria, as amended, provides that:

> No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

Parties to treaties are often instructed to institute measures that will engender the application of such treaties within their domestic legal framework.[53] By and large, state parties to treaties are bound to observe the provisions of treaties already ratified or signed by them.[54] Article 27 of the Vienna Convention on the Law of Treaties, 1969 (hereafter: 'Vienna Convention 1969), stipulated that "a party may not invoke provisions of its internal law as justification for its failure to perform a treaty". This is without prejudice to Article 46 of the Vienna Convention which provides as follows:

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49. M.O. GASIOKU, INTERNATIONAL LAW AND DIPLOMACY (SELECTED ESSAYS) (2004), at 332.

50. Section 12, 1999 Constitution of the Federal Republic of Nigeria.

51. *See*, Gasiokwu, *supra* note 49.

52. (2000) 4 SCNJ 400 at 446; see also *Abacha v. Fawehinmi* (2000) 13 NWLR (pt. 660) 228; see also, S.H. Tar, CONSTITUTIONAL LAW AND JURISPRUDENCE IN NIGERIA (PORT-HARCOURT: PEARL PUBLISHERS, 2004) at 57-59.

53. *See*, Gasiokwu, *supra* note 49, at 332.

54. *See*, Articles 26 and 27 of the Vienna Convention on the Law of Treaties 1969.

> (1) A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
> (2) A violation is manifest if it would be objectively evident to any state conducting itself in a matter in accordance with normal practice and in good faith.

In the Land and Maritime Boundary between Cameroon and Nigeria case,[55] Nigeria invoked the provisions of Article 46 of the Vienna Convention 1969 in an attempt to renege an agreement entered into between the country and Cameroon. The International Court of Justice (ICJ) rejected an argument by Nigeria that an agreement with Cameroon that was signed by the Nigerian Head of State was invalid because it had not been ratified by its Supreme Military Council, as the Nigerian Constitution required. Applying the provisions of Article 46 of the Vienna Convention 1969, the court stated that albeit "the rules concerning the authority to sign treaties for a state are constitutional rules of fundamental importance… a limitation of a Head of State's capacity in this respect is not manifest… unless it is properly publicized", especially having regards to the fact that Heads of State are recognized as representing their states for the purpose of concluding a treaty in Article 7 of the Vienna Convention 1969.[56]

Furthermore, unless a different intention appears from the provisions of treaty, it is binding upon such party in respect of its entire territory.[57] From the foregoing, it is worth noting that international instruments for the protection of minorities can only attain the force of law within Nigerian legal system "to the extent to which any such treaty has been enacted by the National Assembly".[58] This is congruent with the dualist approach to the relationship between International Law and Municipal Law.[59]

Nevertheless, *jus cogens* is a peremptory norm of general international law, accepted and recognized by the international community of states as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[60] They bind all states

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55. ICJ Rep. 2002, at. 303 at 430.
56. *See,* Harri, *supra* note 47, at 688.
57. Article 29 of the Vienna Convention on the Law of Treaties 1969.
58. *See*, Section 12, the 1999 Constitution of the Federal Republic of Nigeria.
59. *See,* Gasiokwu, *supra* note 49, at 337.
60. *See*, Article 53 of the Vienna Convention on the Law of Treaties, 1969; see also, Chinkin, *supra* note 42, at 113.

regardless of whether they have ratified the treaties that contain them.[61] The norms commonly asserted to have the status of *jus cogens* include genocide, murder/disappearance and systematic racial discrimination.[62] *Jus cogens* may be accepted as the law of the hand without the act of incorporation.[63]

It is thus submitted that *jus cogens* norms may be invoked for the protection of minorities in Nigeria, especially where crimes of genocide or murder is committed against them, notwithstanding the ossified provisions of Section 12 of the 1999 Constitution of Nigeria, as amended.

VI. AN OVERVIEW OF MINORITIES IN THE NIGERIAN CONTEXT

Nigeria is a multi-cultural country with a large population of about 150 million people. There are over three hundred ethnic groups in the country. The majority ethnic linguistic groups, which constitute over 40 percent of the population, are the Hausa, Igbo, and Yoruba. Other ethnic linguistic groups such as the Ijaw, Kanuri, Tiv, Ibibio, Gwari, Nupe, Jukun, Igala, Idoma, Igede, Ijaw, Edo, Urhobo, among others, are regarded as minorities.[64] Since the country's independence from colonial rule in 1960, minority groups have been agitating for equality and fairness in the distribution of resources and political power. The main agitation of beleaguered minority groups in Nigeria is succinctly articulated as follows:

> At the vortex of the ethnic minority question is the disenchantment with the structure of the Nigerian federation perceived by ethnic minorities to be skewed in favour of three dominant groups by the three ethno regional blocs: Hausa in the North, Yoruba in the West and Igbo in the East. For the ethnic minorities, the federation is not inclusive and this results in political, economic and cultural marginalization.[65]

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61. Chinki *id.*, at 113.

62. The American Law Institute Restatement (Third) of the Foreign Relations Law of the United Nations (1989) Para 702, *cited* in Chinkin *id.*, at 113.

63. Chinkin *id.*

64. M.R. Rindap and M.I. Auwal, *Ethnic Minorities and the Nigerian State*, 3 INTERNATIONAL JOURNAL OF ARTS AND HUMANITIES (2014), at 90-91; see also, the Embassy of the Republic of Nigeria in the United States 'About Nigeria', retrieved from www.nigeriaembassyusa.org/indexphp?page=about-nigeria, (accessed on the 5th February, 2017).

65. Rindap & Auwal, *id.,* at 90.

Minority groups in Nigeria have often averred that since the country's independence in 1960, 'the rulership of the country has been monopolized by the Northern Majority (mainly Hausa and Fulani) in partnership with the Igbo and Yoruba to the exclusion of the minorities.'[66] It is, however, imperative to point out that the hegemony of 'majority rule' experienced a brief hiatus when Dr. Goodluck Jonathan, who comes from Ijaw ethnic minority group in Bayelsa State, situated in Southern Nigeria, became the President of the country from 5 May 2010 to 29 May 2015. Thereafter, Mohammed Buhari assumed office as the incumbent President of Nigeria with effect from 29th May 2015. He comes from the Fulani ethnic group in Katsina State, Northern Nigeria.

Minority groups in Nigeria also encounter challenges such as unequal treatment in terms of employment, they are denied political appointment in favour of majority groups, and they also receive less government attention in the provision of infrastructure and other social amenities.[67] Furthermore, the Movement for the Survival of the Ogoni People, a pressure group, pungently contends that 'the fundamental problem of Nigeria is the centralization of state and economic powers, which has led to abject marginalization of minority groups.'[68]

VII. LEGAL FRAMEWORK FOR THE PROTECTION OF MINORITIES IN NIGERIA

By and large, there is no comprehensive domestic legal regime that deals with the multifaceted issues affecting minorities in Nigeria. The absence of a robust legal framework for the protection of minorities in the Nigerian legal system has gravely attenuated the prospects of enforcing their rights in Courts. This probably accounts for the dearth of case law on the subject. Nonetheless, some legal provisions relating to the protection of minorities in the country are considered hereunder.

A. The Constitution of the Federal Republic of Nigeria 1999, as Amended

The Constitution of Nigeria expressly prohibits discrimination on the grounds of ethnic or linguistic association or ties as well as religion.[69] This fundamental provision

66. *Id*., at 97.

67. Bagubu, *supra* note 4, at 82-83.

68. R.T. SUBERU, ETHNIC MINORITY PROBLEMS AND GOVERNANCE IN NIGERIA: RETROSPECT AND PROSPECT (Institut francais de recherché en Afrique, 1996), available at books.openedition.org/infra/7622?lang=en (accessed on 5th February, 2017).

69. Section 15(2) of the Constitution of the Federal Republic of Nigeria, 1999.

enshrined in Section 15 subsection 2 of the Constitution of Nigeria 1999, as amended, may be relied on as a basis for policies and social advocacy aimed at preventing discrimination against minorities.

It has, however, been observed that Section 15 subsection 2 of the Nigerian Constitution, which is provided under Chapter 2 of the Constitution is not justiciable.[70] The apparent non-justiciability of the above mentioned provisions lends credence to the necessity for reforms in order to engender an enabling legal and regulating environment for the protection of minorities in Nigeria.

B. The Federal Character Commission (Establishment) Act 2004

The principal objective of the Federal Character Commission (Establishment) Act 2004 is to establish the Federal Character Commission which has the responsibility to promote, monitor and enforce proportional sharing of all bureaucratic, economic, media and political posts at all levels of government.[71] The functions of Federal Character Commission include the following:[72]

(1) To work out an equitable formula, subject to the approval of the President, for the distribution of all cadres of posts in the civil and public services of the Federation and of the States, the Armed Forces, the Nigerian Police Force and other security agencies, bodies corporate owned by the Federal or a State Government and Extra-Ministerial Departments and Parastatals of the Federation and States;
(2) To promote, monitor and enforce compliance with the principles of proportional sharing of all bureaucratic, economic, media and political posts at all levels of government;
(3) To take such legal measures including the prosecution of the heads or staff of any ministry, extra-ministerial department or agency which fails to comply with any federal character principle or formula prescribed or adopted by the Commission;
(4) To work out (a) an equitable formula, subject to the approval of the President, for distribution of socio-economic services, amenities and infrastructural facilities; (b) modalities and schemes, subject to the approval of the President, for redressing the problems of imbalances and reducing the fear of relative deprivation and

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70. *See*, H. Alisigwe, *Towards the Justiciability of Chapter Two of the 1999 Constitution,* 3 JOURNAL OF PUBLIC LAW AND PRACTICE (2010). See also, section 6(6) (c) of the Constitution of the Federal Republic of Nigeria 1999.

71. *See*, Title of the Federal Character Commission (Establishment, etc) Act Cap F7 LFN 2004.

72. *See*, Federal Character Commission (Establishment, etc) Act Cap F7 LFN 2004, section 4.

marginalization in the Nigerian system of federalism as it obtains in the public and private sectors;

(5) To ensure that all ministries and extra-ministerial departments, agencies and other bodies affected by the Act have a clear criteria indicating conditions to be fulfilled and comprehensive guidelines on the procedure for (a) determining eligibility and the procedure for employment in the public and private sectors of the economy (b) the provision of social services, goods and socio-economic amenities in Nigeria.

As may be deduced from the above mentioned functions, the Federal Character Commission is charged with the responsibility of promoting, monitoring and enforcing compliance with the principles of proportional distribution of bureaucratic, economic, and political positions at all levels of government. Thus the Commission is vested with powers to enhance equitable appointments of all citizens of the country including minorities.[73] The Commission is basically empowered to enforce compliance with its guidelines and formulae in the areas of the provision of employment opportunities, distribution of infrastructural facilities, socio-economic amenities and other indices.[74] Any person who refuses or neglects to apply the principle of Federal Character in any area or activity within the time frame set by the Commission is guilty of an offence under the Act.[75] Such a person is liable on conviction to a sentence of imprisonment or fine.[76]

It would appear that the scope of the Federal Character Commission (Establishment) Act 2004 is largely concerned with proportional or equitable sharing of political posts, employment and socio-economic services, across Nigeria's geo-political zones. However, the Federal Character Commission fails to address fundamental concerns of minorities such as the preservation of their culture, traditions, language, religion, and ethnic identity. More so, the efficacy of the Federal Character Commission in ensuring equitable sharing of bureaucratic, economic, and political positions in all geo-political zones and states may be questioned in light of the hue and cry about marginalisation and suppression by some Nigerians, particularly minorities, in various parts of the country.

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73. *See, id.*, section 4; and sections 1 to 9 of the Guiding Principles and Formulae for distribution of all cadres of posts. These Guidelines were commenced on the 2nd October, 1997 and was enacted pursuant to Section 4(1) (a) of the Federal Character Commission (Establishment etc) Act LFN 2004.

74. Federal Character Commission (Establishment) Act 2004, section 5(c).

75. *See,* section 14(2) *id*

76. Section 15, *id*.

VIII. IMPEDIMENTS TO THE REALIZATION OF THE RIGHTS OF MINORITIES IN NIGERIA

Many states express reservations about according minorities special rights owing to the fear of creating divisions within the populace and the fear of enhancing secessionist movements. On the contrary, it has been argued that recognition and protection of minorities enhances internal peace and national integration.[77] The impediments to the realization of the rights of minorities in Nigeria may be adumbrated as follows: (1) political and economic suppression; (2) inadequate domestic legal regime for the protection of minorities; (3) non-domestication of relevant international instruments for the protection of minorities; (4) marginalization and deprivation; (5) discrimination and inequality; and (6) non-justiciability of Chapter Two of the Constitution of Nigeria, 1999, which ordinarily prohibits discrimination against persons or groups including minorities and enhancement of social and economic rights.

Nigeria has a diversity of over 300 ethnic groups[78] and it is one of the world's largest democracies. The nation has a heterogeneous population with ethnic groups whose membership vary significantly in size, natural resources, political power and wealth. Minority groups in Nigeria often experience marginalisation and exclusion.[79] The structure, powers and constitution of the government, particularly the local government system, does not provide an elaborate legal and regulatory framework that "enables each constituent minority ethnic-nationalities to maintain their identity without being politically colonized, economically impoverished and culturally assimilated by larger ethnic groups."[80] Furthermore, it has been observed that while the Nigerian constitution provides for individual rights, it neglects specific provisions for minority group rights.[81]

Against the foregoing, the desideratum for affirmative action to enhance the socio-economic cum political status of minorities has become expedient. This view is in tandem with the suggestion that affirmative policy and action is required although a maximum time frame for implementation must be stated after which any group that has benefited will be subjected to a criteria of strict merit.[82] Thus the Federal Character

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77. *See,* Bagudu, *supra* note 4, at 6.

78. Human Rights Council, Draft Report of the Working Group on the Universal Periodic Review in the 4th Session of the Working Group on the Universal Periodic Review held in Geneva from the 2nd to 13th February 2009, at 3.

79. Alemika, *supra* note 14, at 35.

80. *Id.,* at 36.

81. *Id.,* at 36.

82. *Id.,* at 41.

Commission is enjoined to establish affirmative action policies aimed at addressing the inequalities that exist in the polity an expand opportunities for minorities in the country. Similar regulatory agencies should be established at the state and local government levels so as to enhance a more effective administration at the grassroots.

Furthermore, it is suggested that state and federal legislators should enact relevant laws for the protection of minorities in the country. The National Assembly should take deliberate steps to domesticate relevant international instruments in Nigerian law. This would enable minorities explore international mechanisms for the protection of their rights especially when domestic remedies are exhausted. It is also suggested that bold and proactive steps be taken to review the constitution of the Federal Republic of Nigeria, 1999, in order to include specific provisions for the protection of the rights of minorities. Finally, the provisions of Chapter Two of the Constitution should be made justiciable so as to enable minorities seek legal remedies in the event of discrimination or denial of their rights.

IX. CONCLUSION

Equality and non-discrimination are quintessential features of human rights law. It has been shown that the past Constitutions of Nigeria, including the present 1999 Constitution, did not enshrine adequate provisions for the protection of minorities. It has also been shown that minorities in the country experience discrimination, marginalisation, and exclusion. The spate of ethnic, religious, and socio-political quagmire in the nation has led to an unprecedented agitation for the protection of minority rights. However, the agitation for the rights of minorities would remain mere rhetoric in the absence of apposite legal regimes or mechanisms for the protection of minorities.

It has been indicated that the recognition and protection of minorities would enhance peaceful coexistence and national integration. Therefore, it is incumbent upon the government to take proactive and deliberate steps to enact laws and establish institutions to address the multifarious issues affecting minorities in the country. It is also expedient for the National Assembly to domesticate relevant international instruments and norms in Nigerian law.

It is posited that a combined effect of the above recommendations would engender a paradigm shift from the parlance of mere rhetoric to the threshold of effective legal and affirmative action for the protection of minorities in Nigeria.

CHALLENGES OF JUDICIAL REVIEW AS A MECHANISM TO IMPLEMENT THE FREEDOM OF INFORMATION ACT OF NIGERIA

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ABSTRACT

The real value of a right may be determined only when it is tested in court. This is because courts have the primary and perhaps sacred duty of ensuring justice in the enforcement of law and enjoyment of rights. Judicial review is a key mechanism in the Nigerian Freedom of Information Act (FOIA) to secure the right of access to information enshrined in the Act. The centrality of judicial review to the FOIA is underscored by the fact that nearly every right or duty prescribed in the Act is subject to judicial review. This article examines the effectiveness of the judicial review clause in the FOIA. It argues that due to some 'missing links' in the judicial system, the promise of judicial review in the Act may not be available to some applicants who have been denied their right of access to information.

I. INTRODUCTION

Freedom of information is the cornerstone of democratic governance. It is to democracy what food is to the body.[1] Just like a malnourished body cannot function optimally, democracy cannot flourish in a closed society.[2] When citizens are not informed or inadequately informed, they are not able to influence public policies or access public resources.[3] Without access to information, citizens may not be able to make informed decisions or voice informed opinions about allocation and distribution of public resources. Freedom of information therefore is the oxygen of democracy and

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1. M. Mwananyada, Fumbling under the Veil; Access to Information and Democracy: The Zambian Case (LLM Thesis, University of Pretoria, 2006) at 1, retrieved from <http://repository.up.ac.za/handle/2263/927> visited 2/27/2016.

2. C. Boix, *The roots of democracy*, 135 POLICY REVIEW (2006), at 5.

3. F.D. Shado, The torn Veil: Access to Information as a Tool for Combating Corruption with Reference to Uganda (LLM Thesis, University of Pretoria, 2004), at 2, retrieved from <http://repository.up.ac.za/handle/2263/927 visited 3/22/2015>.

the backbone of open and democratic government.[4] The right to freedom of information is of antiquated origin. The earliest elaboration of such right in a legal document is the Swedish Freedom of Information Law of 1766.[5] From that time up till around 1990, there were only about thirteen countries with FOI legislations.[6] However, in recent years, the number of countries with freedom of information legislation has increased significantly.[7]

Freedom of information is critical to governance because it makes government more transparent and accountable. It engages public participation in decision making and enhances understanding of the decision making processes by the public, thereby improving the quality of decision made and also endearing trust in those decisions and the general working of government. In addition, FOI provides a sure guard against abuses, mismanagement, corruption and especially conspiracy theories and rumor mongering about government activities. Malfeasance thrives in secrecy and obscurity. The more government transactions and operations are transparent, visible and open to scrutiny, the more feasible it is to expose, deter, and contain corruption. Openness allows citizens to scrutinize the actions and inactions of government, facilitate proper and informed debate which in turn promotes healthy competition.

Access to information is key to the realization, promotion and protection of basic human rights especially socio-economic rights. Freedom will be bereft of all effectiveness if citizens have no access to information. Access to information is basic to a democratic way of life. For this reason, citizens must have the legal right to request and receive information on all functions and decisions of government that do not

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4. C.A. Lindstorm, *A Citizen's Perspective: Introduction to Open Government and the Freedom of Information Act*, THE 1(3) COMMUNITY PLANNER (Spring 2011), at 20.

5. W. Keim, List of Countries with Access to Information, retrieved from <www.home.broadpark.no/~wkein/foi-list.htm> (visited July 27, 2013). In a letter to W.T. Barry as far back as 4 August 1822, former United State President, James Madison wrote: "A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both." Letter reprinted in K. Saul, The Complete Madison: His basic writings, *quoted by* C. Note boom, *Addressing the External Effects of Internal Environmental Decisions: Public Access to Environmental Information in the International Law Commissioner's draft Article on Prevention of Trans-boundary Harm,* 12 NEW YORK UNIVERSITY ENVIRONMENTAL LAW JOURNAL (2003), at 245-246.

6. UNESCO, Freedom of Information, retrieved from <www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information> (visited July 27 2015).

7. Freedominfo.org, 93 Countries have FOI Regimes, Most Tallies Agree, retrieved from <www.freedominfo.org/2012/10/93-countries-have-foi-regimes-most-tallies-agree> (visited July 27 2015).

undermine national security or that do not infringe the individual right to privacy.[8]

Freedom of information was recognised at international level as early as 1946 when the United Nations General Assembly at its very first session adopted Resolution 59(1), on 'Calling of an International Conference on Freedom of Information'. The Resolution states as follows: "Freedom of Information is a fundamental human right and… the touchstone to all freedoms to which the United Nations is consecrated."[9] Article 19 of the Universal Declaration of Human Rights (1948) further states that the fundamental right to freedom of expression encompasses the freedom to "seek, receive and impart information and ideas through any media and regardless of frontiers." Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) prescribes that the right to freedom of expression shall include "the freedom to seek receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

Adumbrating on the meaning and scope of Article 19(2) of the ICCPR, the United Nations Special Rapporteur on Freedom of Opinion and Expression explained that: "The right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by government in all types of storage and retrieval systems."[10]

The right to freedom of information has also been enshrined in regional human rights treaties such as the African Charter on Human and Peoples' Rights (African Charter), the European Convention on Human Rights and the Inter-American Convention on Human Rights. For instance, Article 9 of the African Charter of which Nigeria is a party, provides that "every individual shall have the right to receive information". In line with this provision, the African Commission on Human and Peoples' Right adopted a Declaration of the Principles on Freedom of Expression in Africa which further elaborated on the freedom of information obligations imposed on member states by Article 9 of the African Charter. The Commission has stated that public bodies hold public information not for themselves but as custodians of the public good and everyone has the right to access this information.

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8. L. Diamond, Building a System of Comprehensive Accountability to Control Corruption, (Paper presented to the Seminar on Democratic Consolidation: The International Context and the Mexican Experience, Mexico City, 18-20 February 2003).

9. United Nations General Assembly Resolution 59(1), 1946. See also, T. Mendel, Freedom of Information as an Internationally Protected Right (2004), retrieved from <www.article19.org> (July 22 2015).

10. UN Document E/CN.4/1998/40 "Promotion and Protection of the Right to Freedom of Opinion and Expression" Report of the Special Rapporteur, 28 January 1998, para 14.

II. SYNOPSIS OF THE FOI ACT

The Nigerian Freedom of Information (FOI) Act which came into force on 28 May 2011 has been hailed as a landmark piece of legislation.[11] The primary objective of the Act is to make public records and information more freely available, provide for public access to public records and information, protect public records and information to the extent consistent with public interest and the protection of personal privacy, protect serving public officers from adverse consequences for disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes and for related matters.[12] The Act comprises 32 sections covering right of access to information and proactive disclosure,[13] processing of requests,[14] maintenance of public records,[15] exemptions,[16] judicial review,[17] monitoring,[18] and miscellaneous provisions.[19]

The Act provides for the right of 'any person' to access or request any public record or information which is in custody of any public agency or institution.[20] This right is guaranteed by employing two mechanisms. First, the Act obliges public institutions to ensure that they keep records of their activities and ensure proper organization and maintenance of all information in their custody in a manner that facilitates easy public access.[21] In this case, public institutions shall regularly publish and make available to the public, without prior request, basic information relating to such organisation. These pieces of information are required to be widely disseminated, updated and reviewed periodically and whenever changes occur. Secondly, the Act guarantees the right of access to information by empowering any person who is interested in any public record or information, to apply for it from the public institution which the information in its custody.[22]

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11. The FOI Act was passed into law by the National Assembly on May 26th, 2011 and assented to by the President of the Federal Republic of Nigeria on May 28th, 2011.
12. Explanatory Memorandum to the Freedom of Information Act, 2011.
13. FOI Act, sections 1-2.
14. *Id.*, sections 3-8.
15. *Id.*, sections 9-10.
16. *Id.*, sections 11-19.
17. *Id.*, sections 20-25.
18. *Id.*, section 29.
19. *Id.*, sections 26-28 & 30-32.
20. *Id.*, section 1.
21. *Id.*, sections 2(2), 8 & 9.
22. *Id.*, section 1.

As a general rule, all FOI requests are required to be processed, granted or refused within seven days.[23] However, where a public institution which receives an FOI request is of the view that another public institution is more suitable to disclose the information, the institution to which the application is made shall, within seven days of receipt of the application, transfer the same to the other public institution.[24] The receiving institution shall within seven days make the information available to the applicant. However, where large number of records is requested and producing such volume of records would unreasonably interfere with the institution's operations, or consultations are necessary before the document can be produced, the original time limit of seven days may be extended by another seven days. In total, a public institution may have up to 21 days within which to grant or refuse FOI request, if transfer and consultations are involved.[25]

Not every official information is liable to disclosure under the FOI Act. The Act provides for two general exemptions: absolute and qualified exemptions. Qualified exemptions are those exemptions that may be circumvented on the basis of overriding public interest. For instance, where the public interest in the disclosure outweighs the importance of the qualified exemption, a public institution is duty bound to direct that the information should be disclosed.[26]

Absolute exemptions, on the other hand, are those which ought to be applied in all circumstances, regardless of whether the public interest in the disclosure outweighs the importance of the exemption. Even in cases where the public interest in the information is very strong and supports disclosure, an absolute exemption will still apply.

Section 29 of the FOI Act obliges all public institutions to submit to the Attorney General of the Federation, not later than 1st of February every year, a report covering the preceding calendar year which shall state: the number of determinations made by the public institution to refuse FOI request and the reasons for the refusal, the number of applications for judicial review, a description of the court's decision with respect to those applications, the number and description of FOI requests pending before the public institution, the number of days taken by the public institution to process different types of FOI requests, the total amount of fees collected on each application, the number of full time staff devoted to processing FOI requests, and the

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23. *Id.*, section 4.

24. Notice of the Transfer must be given to the Applicant.

25. First 7 days is the original time limit; another 7 days in case of transfer; yet another 7 days in case the records requested are large and consultation necessary before the records can be generated.

26. *Okazie v. Attorney General of the Federation & Anor* Suit No FHC/L/CS/514/2012.

total amount of money expended by each public institution in processing these requests in the preceding year.[27]

The Attorney General is mandated to make these reports available to the public through print and electronic media. Further, the Attorney General is required to submit to the National Assembly yearly an omnibus report containing "a list of cases arising under the Act, the exemption involved in each case, disposition of such cases and the cost fees and penalties assessed.[28] The Attorney General's report shall also contain a detailed description of the steps taken by the Federal Ministry of Justice to encourage all governments and public institutions to comply with the FOI Act.[29] The first Annual National Compliance Report prepared by the Office of the Attorney General of the Federation (AGF) showed that only 25 Ministries, Departments and Agencies (MDAs) submitted Compliance Report to the AGF in the year 2011.[30] In 2012, the number increased to 28.[31]

III. JUDICIAL REVIEW UNDER THE FOIA

The real value of a right may be determined only when it is tested in court. This is because courts have the primary and perhaps sacred duty of ensuring justice in the enforcement of law and enjoyment of rights.[32] The importance of ensuring justice, evenhandedness, fair play and due process in processing FOI requests cannot be overemphasized. It is best illustrated by considering the grimy feelings aroused in FOI applicants and the public at large, when these very important values are absent in the administration of the Act. Ultimately, the attitude of the general public to the FOI Act will depend if not mainly but largely on the way the Act is interpreted and applied by the courts. A liberal and purposive interpretation coupled with courageous and dynamic application will import vigour and vitality to the provisions of the Act. Such

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27. FOI Act, section 29(1)(a)-(h). Between 2011 and 2012, only 23 MDAs submitted their Annual Compliance Report to the Attorney General of the Federation. Of these, only 11 have staff specifically designated to handle FOI requests. In total, 8 requests were made, with many taking as much as 20 days to be responded to. *See*, Right to Know, Implementing Nigeria's Freedom of Information Act 2011: The journey so far, retrieved from <www.r2knigeria.org>, (viewed July 27, 2013).

28. FOI Act, section 29(7).

29. *Id.*, section 29(8).

30. Communiqué Issued at the End of a Two-Day National Conference on the Freedom Of Information Act 2011 organized by Right To Know Initiative (R2k), Nigeria on the 30th and 31st of July, 2013 at the New Chelsea Hotel, Abuja.

31. *Id*.

32. *See*, B.O. NWABUEZE, THE SECOND MENORIAL LECTURE SERIES (2007).

courageous application would no doubt infuse in public institutions a sense of the peremptoriness of the provisions of the Act.

Within the context of the FOI Act, judicial review implies a proceeding whereby a court assesses or evaluates decisions of public institutions with respect to FOI requests or other matters under the Act with a view to ascertaining whether such decisions or actions have been taken or done as prescribed by the Act.[33] Nearly every decision taken by a public institution under the FOI Act is subject to judicial review.[34] Importantly, an applicant who has been denied access to any public information may apply to court within 30 days after the denial or within such further time as the court may allow.[35]

The court has stated in *Incorporated Trustee of the Citizen Assistance Centre v. Ikuforiji*[36] that non-compliance with the 30-day time frame is not fatal to the applicant's right to seek judicial review. The court during a judicial review under the FOI Act shall hear the applicant summarily,[37] and the onus of proof during the trial shall lie not on the applicant but on the public institution.[38] The court may compel a public institution to disclose any information sought by the applicant if the court finds: (a) that the public institution is not authorized by the FOI Act to conceal the information, or (b) that the institution is so authorized but the court nonetheless finds that the institution does not have a reasonable ground to deny the application, or (c) that the public interest in the disclosure of the information is greater and more vital than the interest being served if access to the information is refused.[39]

As expected, it is in the court and not in the legislature or decrees of a legislature that the public feels the cutting edge of the law.[40] If citizens are well acquainted with the work of the courts, this knowledge and respect for the work of the court will 'survive the shortcomings of every other branch of government. But if they

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33. *See*, *A.G. Federation v. Abule* (2005) 11 NWLR (part 936) 369.

34. The right of access, proactive disclosure duty, decision of a public institution to transfer an FOI request to another institution, and the decision by a public institution to unilaterally extend the time for processing FOI request beyond seven days are all enforceable in court. Further, all notices of denial of access, notices of transfer of requests and notices of extension of time for processing FOI request shall contain a clause informing the applicant his right to seek judicial review of such notices. *See*, FOI Act, sections 1(3), 2(6) & 5(1).

35. FOI Act, section 20.

36. *Incorporated Trustees of the Citizens Assistance Centre v. Ikuforiji,* Suit No ID/211/2009.

37. FOI Act, section 21.

38. *Id.*, section 24.

39. *Id.*, section 25.

40. A. VANDERBILT, THE CHALLENGE OF LAW REFORMS (1955), at 4-5, cited *in* H.J ABRAHAMA, THE JUDICIAL PROCESS (1975), at 3.

lose their respect for the work of the courts, their respect for law and order will vanish with it to the great detriment of the society.'[41]

A. Some of the decided court cases in regard to right to freedom of Information

It is thus important to know not only the provisions of the FOI Act but more importantly, the interpretations which the courts have vested on such provisions in four notable decided cases.[42]

1. Okazie v Attorney General of the Federation & Anor[43]—On 26 January 2012 Mr. Okazie wrote a letter to the Attorney General of the Federation and the Economic and Financial Crimes Commission (EFCC) requesting information on some matters. In respect of the Attorney General, the applicant requested the following information: the list of criminal prosecutions being carried out by the Ministry of Justice through private lawyers, the total amount paid for the said prosecutions, the source of funds, and the total number of lawyers retained by the Ministry including the details of fees paid to them on case-by-case basis. The applicant also requested for the total amount paid by the Ministry to its own legal officers and the amount expended for training and equipping them in the preceding year, and also the reason for abandoning its own legal officers in favor of private lawyers in the prosecution of offenders.

On the part of the EFCC, the applicant requested for the following information: list of criminal prosecutions being carried out by EFCC through private lawyers with the total amount paid for such prosecutions and the source of the funds; the total amount paid by EFCC to its own legal officers and the amount expended for training and equipping them in the preceding year. The applicant also requested for: the reason for abandoning its own legal officers in favor of private lawyers to prosecute offenders; the total amount paid to the firm of Olaniwun Ajayi LP in respect of the prosecution of Cecelia Ibru, the former Managing Director of Oceanic Bank Plc, and the total value of properties recovered from her, the whereabouts of the money and property recovered; as well as the amount of money and properties that have been returned to Oceanic Bank and its shareholders.

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41. *Id.*

42. *See*, Freedom of Information Law Report available online at: http://mediarightsagenda.net/freedom-of-information-law-report.

43. *Boniface Okazie v. Attorney General of the Federation & Anor* Suit No FHC/L/CS/514/2012.

Both the Attorney General and EFCC failed to reply the applicant's letter; thus this action for a court order compelling EFCC and the Attorney General to disclose the information. The Attorney General filed a counter affidavit with a written address seeking an extension of time within which to supply the applicant with the information requested. After listening to both parties, the court, per M.B. Idris, held that the respondents (that is EFCC and the Attorney General) failed to show that any of the information requested falls within the ambit of the two general exemptions under the FOI Act, namely, the absolute exemptions which are those where there is no duty to consider public interest; and the qualified exemptions which are those where duty to consider public interest exists.

The court further held that section 15(1)(b) of the FOI Act imposes an obligation on all public institutions to deny an application for information whose disclosure could reasonably be expected to interfere with the contractual or other negotiation of the third party. 'A third party' includes a legal practitioner in the context of his professional relationship with his client. Accordingly, the court granted all the reliefs sought by the applicant as prayed except the information relating to the total sum paid to the firm of Olaniwun Ajayi LP in respect of the prosecution of Cecelia Ibru. The judge directed the respondents to provide the said information to the applicant within 72 hours of the court order. By this judgment, the court has reinforced the principle that no public institution has power under the law to keep mute when an FOI request has been made to it.

2. LEPAD v Clerk of the National Assembly[44]—The court in this case laid down the principle that public institutions during judicial review proceedings cannot validly rely on grounds other than those stated in the Notice of Denial/Refusal. The court also stated in this case that public records in custody of a public institution are to be issued by way of certification by the officer who has custody of them. Public records are for the public and therefore cannot be issued in their original form, in compliance with provisions of the Evidence Act regarding issuance of Public document upon application.

The facts of this case were that the applicant on 6 June 2011 applied to the Clerk of the National Assembly requesting, amongst others, information on the details of the salaries, emoluments and allowances paid to federal legislators—that is, Honorable Members and Distinguished Senators of the 6th Assembly, from June 2007 to May 2011. This request was denied by a Notice of Denial written to the applicant

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44. *Legal Defence and Assistance Project (Gte) Ltd v. Clerk of the National Assembly* Suit No FHC/ABJ/CS/805/2011.

by the Clerk of the National Assembly. According to the Notice, the request was denied on two grounds, namely; (i) that the requested information was subject to litigation in court; and (ii) that the information formed part of the information exempted by section 14 of the FOI Act. The applicant, by an originating motion dated 20 September 2011, sought a declaration that the refusal of the requested information by the Clerk of the National Assembly was an infraction of the applicant's right to the information under section 1(1) of the FOI Act. The applicant also prayed for an order of court directing the Clerk to disclose to the applicant the information requested within 14 days. The respondent (Clerk of the National Assembly) filed a counter affidavit and attached a document marked exhibit A which he said is the reply of the respondent to the applicant's letter.

The main issue for determination was whether the grounds relied upon by the respondent was justifiable under the FOI Act. The court, per Balkisu Bello Aliyu held on the first ground that although two cases were pending in respect of the records requested by the applicant, the respondent could nonetheless disclose the information since the interest of the respondent would not be prejudiced by such disclosure. On the second ground, the court held that the applicant's request does not relate to personal information exempted under section 14 of the FOI Act but was information relating to what was paid out from public fund while the legislators were in service. The respondent was thus ordered to disclose to the applicant within 14 days from the date of the order, detailed information on the salaries and emoluments of the legislators.

3. PPDC v. Power Holding Company of Nigeria[45]—The 1st respondent, Power Holding Company of Nigeria (PHCN), awarded a contract for the supply and installation of 300 units of 11KV, 500A On-Load Sectionalizers for installation at the High Voltage Distribution System (HVDS) networks at Karu (in Abuja); the Lagos University Teaching Hospital (LUTH), Ogba and Agege (all in Lagos); and Challenge (Ibadan). By a letter dated 30 August 2012, the applicant requested for the following information or documents in respect of Bid No. NGP-D2 for the contract: the Procurement Plan, Needs Assessment Document, documentation on design and specification requirement which are not contained in the standard bidding documents, documents on the scope of the procurement, bidding documents issued to all bidders in respect of the procurement, a list of all contractors that submitted bids in respect of the procurement, copy of the bid evaluation report of the technical sub-committee of the Tenders' Board for the procurement, Minutes of the Tenders' Board approving the

45. *Public and Private Development Centre (PPDC) Ltd & Nigeria Contract monitoring Coalition v. Power Holding Company of Nigeria* Suit No FHC/ABJ/582/2012.

winning bid, copies of the letters of award of contract and final contract award documents for the award of the contract for the procurement, documentation on the current status of the procurement project, document showing the procurement contract sum, conditions of the procurement contract and payment terms and schedule, and names and addresses of all Distribution Companies on whose behalf the procurement was undertaken and which will subsequently be responsible for the utilization and management of the goods and works procured. The respondent Company refused to furnish the applicant with the documents requested.

The applicant in this suit brought pursuant to sections 1, 2(6) & 20 of the FOI Act prayed the court for a declaration that the failure of the respondent to furnish the documents requested violated the right of the applicant under the FOI Act. The applicant also prayed for an order of Mandamus compelling the respondent Company to disclose the documents requested. Several interlocutory applications were made which severely delayed the accelerated hearing of the case. The respondent company anchored its refusal to disclose the information on section 15(1)(b) of the FOI Act. The section provides as follows: "A public institution shall deny an application for information that contains…information the disclosure of which could reasonably be expected to interfere with the contractual or other negotiations of the third party."[46] The respondent's counsel submitted that the information and document requested is a copy of the Bid Evaluation Report of the Technical Sub-Committee of the Tenders' Board for the procurement and it involved a third party, the winner of the bid, namely, Crown Resources Development Co Ltd. The respondent's counsel also argued that section 15(1)(b) has its origin in the doctrine of Privity of Contract, and that the disclosure of the requested information would certainly affect the contractual relationship between parties to the contract.

The court, per Ademola J, held that before a public institution can hide under the exemption clause of section 15(1)(b) to withhold information, the following conditions must exist concurrently: the transaction alleged must still be at the negotiation stage; a third party must be involved; and the disclosure of the information should reasonably be expected to interfere with the contractual or other negotiations of a third party. In the present case, negotiations had been concluded before the FOI request was made and the disclosure of the information sought by the applicant cannot by any stretch of the imagination reasonably be expected to interfere with any contractual or other negotiations of Crown resources Development Co. Ltd which is the third party in the case. The court also noted that the pleadings and written argument of

46. FOI Act, section 15(1)(b).

the respondent lacked substance, were frivolous, time-wasting and an abuse of court process. Accordingly, the court awarded costs of ₦20, 000 jointly and severally against the Respondents.

4. Citizens Assistance Centre v Ikuforiji[47]—In this case, the applicant by a letter dated 14 July 2011 wrote to the Speaker of the Lagos State House of Assembly requesting for information on overhead costs of the legislative house from 1999 to September 2011. This request was denied on the ground that the information requested is exempted under the FOI Act, such being personal information maintained with respect to the respondent's employees, appointees and support staff. The applicant thus brought this suit asking the court for *mandamus* compelling the respondent to release to the applicant the information requested.

The respondent filed a notice of preliminary objection wherein the respondent challenged the propriety of the suit on so many grounds amongst which are: that the applicant lacked *locus standi*; that the applicant is not a jurist person; that the applicant has no reasonable cause of action; that the FOI Act is not retrospective in application; and that by section 14(1)(6) of the FOI Act, the information requested is exempted since the overhead costs sought to be published cannot be published without creating crisis in the state. The court, per Idowu J. held that since the commencement date of the FOI Act is 28 May 2011 the Act cannot apply retrospectively. The court also bemoaned the practice whereby applicants make straight up applications for mandamus, compelling the public institution to disclose the requested information instead of first making application for judicial review of the decision denying access to information.

With respect to the main thrust of the case, the court held that the overhead expenses of the Lagos State House of Assembly falls under the category of information precluded from public knowledge by virtue of section 14(1)(b) of the FOI Act. This decision is questionable on many grounds. First, the court has made it clear in the earlier case of *LEPAD v. Clerk of the National Assembly* (supra) that emoluments of legislators were liable to disclosure under the FOI Act. Secondly, the author believes the FOI Act is inherently retrospective in nature. There is no way members of the public will see the Act in good light if they are restricted from accessing governments' records prior to 2011.

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47. *Incorporated Trustees of the Citizens Assistance Centre v. Hon. Adeyemi Ikuforiji* Suit No ID/211/2009.

B. Challenges of judicial review under the FOIA

The power of the courts to review decisions of public institutions in respect of FOI requests is precious, yet fragile. While the trend in most of the cases reviewed above evokes public confidence in the capacity of the court as the bastion of justice –with reference to the quick dispensation of cases, and especially the prescription of time-limit for compliance with decisions—it is nonetheless necessary to state that due to some factors unconnected with the FOI Act, courts may be out of the reach of some applicants who have been denied wrongfully their right of access to information. It is well known that the problems bedeviling adjudicatory process in Nigeria are multifarious and multi-dimensional.[48] They range from too many cases in court to trial delays, denial of justice, inadequacy of judicial personnel, archaic system of court adjudication, corruption, lack of modern management technology and the absence of case management techniques.[49]

One major problem with the administration of justice generally is undue delay.[50] This problem is as old as the Magna Carta, if not even older.[51] This age-long problem has been addressed by the Constitution of the Federal Republic of Nigeria 1999 when it provides: "In the determination of his civil rights and obligations, including any question or determination against or by any government or authority, *a person shall be entitled to a fair hearing within a reasonable time* by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality".[52]

Despite the clear constitutional provision in support of expeditious trial, delayed trial and trial beyond what can be regarded as reasonable time is the norm rather than the exception. This is because the judicial process by its very nature is slow.[53] A study conducted by the Lagos State Ministry of Justice in 2001 showed that it takes an average of five to ten years for a contested case to move from filing to

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48. P.A. Anyebe, Towards Fast Tracking Justice Delivery in Civil Proceedings in Nigeria, retrieved <www.nials-nigeria.org> (visited July 24, 2015).

49. D. Peters, *Alternatives to Litigation: The Multi-Door Court House Concept in Issue,* in JUSTICE ADMINSTRATION IN NIGERIA (F. Yusuf., 2008), at 435.

50. N. TOBI, THE NIGERIAN LAWYER (2002) at 412.

51. N. Tobi, *Delay in Administration of Justice,* in JUSTICE IN THE JUDICIAL PROCESS: ESSAYS IN HONOUR OF JUSTICE EUGENE UBAEZONA JCA (C. C.NWEZE ed., 2002) *at* 138. It would be recalled that as far back as 1215, section 40 of the *Magna Carta* provides: 'To no one will we sell, to no one will we deny nor delay right to justice.'

52. Nigeria Constitution, section 36.

53. Tobi, *supra* note 50, at 413.

judgment.[54] A very high ranking officer recently lamented that a suit before one of his courts suffered well over (80) eighty adjournments.[55] The appellate courts are not any better. During the 2010-2011 Legal Year, for instance, the Supreme Court disposed of 163 cases, consisting of 78 judgments and 85 motions.[56] However, 1,149 civil appeals, 58 criminal appeals and 177 motions were still pending before the Supreme Court. Commenting on this backlog, Justice Dahiru Musdapfer, C.J.N (as he then was) opined that even if there were a full constitutional complement of 21 justices of the Supreme Court, it would certainly take several years before the logjam would be cleared.[57]

Due to the prevalence of this problem, the Supreme Court in *Ariori v. Elemo*[58] laid down the criteria for determining the reasonableness of the length of a civil trial. The court held that:

> Reasonable time for the consideration and delivery of court of the judgment depends only on the time an active, healthy and mentally alert judge takes to read and consider the evidence and write his judgment with full and complete consciousness of all the impressions of witnesses at the trial. A period of time which dims or loses the memory of impressions of the witnesses is certainly too long and is unreasonable. Where a period of time dims or loses the memory of impressions or witnesses, it occasions a miscarriage of justice, contravenes the fair trial provisions of our Constitution and vitiates the whole proceedings.[59]

The court also noted that what amounts to reasonable or sufficient time in each case depends on the court's discretion. Thus, in the case of *Lawal v. Erinle*,[60] where the trial judge delayed the delivery of a judgment for a period of nine months after final address, the Supreme Court described the delay as inordinate. However, in *Nnajiofor v.*

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54. Anyebe, *supra* note 48. See also, Y. Osinbanjo, The Retreat of the Legal Process, Nigerian Institute of Advanced Legal Studies, Lagos (2011), at 3.

55. A.H. Yadudu, The Nigerian Legal Profession: Towards 2010, NIALS Annual Lecture Series, Lagos, Nigerian Institute of Advanced Legal Studies (1997), at 6.

56. D. Musdapher, The Nigerian Judiciary: Toward Reform of the Bastion of Constitutional Democracy, Fellows Lectures Series, Lagos, Nigerian Institute of Advanced Legal Studies (2011).

57. *Id.* See also, Anyebe, *supra note,* 48.

58. *Ariori v. Elemo* (1983) 1 SCNLR 1.

59. *Id.*

60. *Lawal v. Erinle* SC 109/70 decided on 1st September 1972 (unreported), cited in Tobi, *supra* note 50, at 143.

Ukonu,[61] the Supreme Court found that a trial which lasted three years did not violate the constitutional right of fair hearing within reasonable time.

The causes of delay in the adjudicatory process are numerous. These may include the fact that judges write down court proceedings in long hand, inordinate applications for adjournment,[62] lack of legal representation or absence of counsel in court, poor health of the parties or the judge, congested Cause List, lengthy court processes,[63] lengthy advocacy, filing of many motions and raising countless objections. Another frequent cause of delay is the right of appeal even in the slightest interlocutory matters.[64] Although some measure of delay is indispensable if the judicial process must triumph for the mutual benefits of parties, yet undue delay of FOI cases may constitute a formidable disincentive to judicial review under the FOI Act.

While the judiciary must be saluted so far for the accelerated hearing of FOI cases and the prescriptions of time-limit for compliance with their decisions, it is nevertheless noteworthy that semblance of undue delay is beginning to rear its ugly head in the adjudication of FOI cases. One of the cases which has been credited as the most daring and far-reaching, *LEPAD v. Clerk of the National Assembly* (where the court ordered the Clerk of the National Assembly to release to LEPAD details of the pay package of legislators between 2007 and 2011) is currently on appeal. In fact, majority of the cases reviewed in this article are currently on appeal, and the first thing public institutions do is to secure an order of the appellate court staying execution of the laudable judgment of the lower court. It is needless to state that the practice of dragging FOI cases through the odious appeal process from the High Court all the way to the Supreme Court may impact not only the public's desirability to access the court but also on the usefulness of the information obtained at the end of that long-drawn-out process.

One clear missing link in the FOI Act which has posed quite a challenge to persons seeking judicial review of actions of state governments with respect to the FOI Act is the lack of clarity and specificity about the application of the Act to the 36 states of the Federation. It is also not very clear which provisions of the Constitution the Act was passed pursuant to. Could it be section 38 of the Constitution,[65] paragraph 3(c) of

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61. *Nnajiofor v. Ukonu* (1985) 2 NWLR (part 9) 686.

62. A civil case is hardly completed without adjournments unless the defendant, the public institution in this case accepts liability.

63. Although the originating motions for judicial review of FOI requests are usually of concise length, the affidavit and written address are not.

64. Tobi, *supra* note 50, at 413.

65. This section provides for Freedom of Expression and the Press. Most commentators believe FOI is an appendage of the freedom of expression.

the Third Schedule to the Constitution,[66] Item 60(a) of the Exclusive Legislative List[67] or Item 4 of the Concurrent Legislative List?[68] This ambiguity is seriously affecting the willingness of members of the public to institute judicial review proceedings in states which claim the Act does not apply to them. Another major challenge to judicial review under the FOI Act is the seeming inconsistency in the decisions of the various courts.

While the court in *LEPAD v. Clerk of the National Assembly* for instance, directed that the salaries, emoluments and allowances of Federal legislators from 2007 to 2011 should be disclosed, the court in *Incorporated Trustees of Citizens Assistance Center v. Ikuforiji* refused to allow the same information to be disclosed in respect of Lagos State legislators, arguing that salaries are personal information exempted from disclosure under the Act.[69] Such inconsistency can be resolved only by the appellate court but it is certainly not in the interest of the public or FOI applicants that FOI matter should be dragged up to the Supreme Court as most times information requested is only useful if obtained within a specific time-frame.

Yet another challenge often overlooked is the cost implication of pursuing a judicial review under the Act. Although the FOI Act in its wisdom contains provisions which are meant to trim down the cost of requesting and obtaining information from public institutions,[70] the Act nevertheless failed to mitigate the financial burden of FOI applicants in their effort to seek judicial review. In a paper presented at the 6th international Appellate judges' conference in September 1992, Honourable Justice Niki Tobi, JCA (as he then was) described the impact of the global economic meltdown and inflationary trend on costs of litigation as follows:

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66. This provision establishes the Code of Conduct Bureau and empowers the National Assembly exclusively to make laws prescribing the terms and conditions for access to information about assets declaration by public officers.

67. *See*, Part I of the Second Schedule of the Constitution. This Part contains the Exclusive Legislative power of the National Assembly to make laws for the establishment and regulations of authorities for the federation or any other part thereof for the promotion and enforcement of the fundamental objective and directive principles of state policy (FODPSP). It would be recalled that section 14(2)(c) of the FODPSP (of the Constitution) requires government to ensure participation of all and sundry in affairs of government.

68. *See*, Part II of the Second Schedule of the Constitution. This Part contains the Concurrent Legislative power of both the National Assembly and State Assemblies to make law with respect to archives and public record.

69. The grounds for the refusal by the court in *Incorporated Trustees of Citizen Assistance Centre* were that the FOI Act cannot apply retrospectively and that the emolument of legislators is not disclosable under the Act.

70. See FOI Act, section 8.

> The world is in a state of flux. And I really mean the entire world. It is in a state of economic depression. Prices of goods jump every day. So also are costs of services. They jump by leaps and bounds. The economy does not only fluctuate like the tidal waters in Nigeria or like the weathercock in climatology, it is also frail and flabby. One is not sure of the price index the next day…Because of competing economies and the dynamics of changing economic society in particular the economic world order in general, the resultant inflationary trend is inching every day, and for the worse and disadvantage of mankind. This hurrying inflationary trend affects everybody everywhere… since the judicial process being enforced by judges is part of the world legal system and legal order, it must feel the pains and pangs of the global recession.[71]

The picture above is even truer today. Court fees are increasing daily in order to generate more revenue for government and meet the overhead costs of the court. It is a truism that justice in court, to a large extent, depends on the caliber of lawyers employed by the litigant. Thus, apart from statutory court fees, litigants have to pay their counsel and the services of good lawyers are no doubt very costly.[72] The applicant also has to transport himself to court and in some cases, he has to foot the bills of some well wishers who may offer to accompany him to court. This state of affairs usually goes on for a long time. While justice delayed may not in all cases be synonymous with a denial of justice, it nevertheless means added expenses for the applicant. The costs and expenses of litigation again grow bigger and bigger as the public institution climbs the ladder of appeal up to the apex court.

Altogether, an FOI applicant who wishes to pursue the option of judicial review to completion may have to cough out huge amount of money. Many a time, the costs and expenses associated with litigation far exceed the value of the subject matter of the case. This is especially so in FOI proceedings where all an applicant requires for instance is a few pages of a public document. Under this type of arrangement, only rich applicants will succeed in pursuing their requests to the point of judicial review or on appeal if need be. Public institutions, on the other hand, squander tax payers' money

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71. N. Tobi, Poverty and the Judicial Process (A paper presented by Honourable Justice Niki Tobi JCA (as he then was) at the Sixth International Appellate Judges Conference in September 1992), *cited in* Tobi, *supra* note 50, at 146.

72. Of course, high cost of professional services is not limited to the legal profession. It cuts across other profession.

to engage the services of the best lawyer and spend even more to drag the case through appeal. If the applicants cannot match up, the case may go in favour of the public institution. While the FOI Act could not have prescribed separate, subsidized filling fees for cases of judicial review under the FOI Act nor preclude lawyers from demanding high professional fees, the Act ought to contain some practical legal aid provisions. The absence of such provisions is a fundamental omission, which in no doubt will affect the willingness of members of the public to seek judicial review under the Act.

IV. CONCLUSION

Judicial review is not a free-standing component of the FOI Act. The phase of judicial review can be reached only after some preliminary stages have been exhausted. Thus, the number of judicial reviews under the FOI Act will depend first on the number of FOI requests made generally. If there are fewer requests, it follows there will be few judicial review cases. Similarly, judicial review depends on whether every piece of information requested is disclosed by the relevant authority. If that is the case, there will certainly be no need for judicial review. Further, if there are cases of refusal, judicial review will still depend on whether the reasons given for the refusal are satisfactory to the FOI applicants. If they are, no judicial review application will be made. Even if the reasons given are not satisfactory to the applicant, judicial review also depends on whether the applicant is not incapacitated or discouraged from seeking review by other reasons or factors such as excruciating poverty, protracted delay often associated with judicial proceedings, and the costs of seeking judicial review, among others. The implication of the analysis above is that case reports on FOI cannot be used as sole determinant of citizens' engagement with the FOI Act.

One point that came out clearly from the FOI cases reviewed is the fact that most public institutions refuse FOI requests on any ground, lawful or otherwise, thereby leaning in favour of the option of being dragged to court, where they would further advance ridiculous defenses.[73] These defenses are usually slammed by the courts and the public institutions are usually compelled to disclose the information which they had no legitimate reason to conceal in the first place. Such attitude is costly for citizens and for the public institutions themselves. It amounts to an unconscionable waste of public

73. Media Rights Agenda, Press Release: Media Rights Agenda commends judiciary for upholding right to information for citizens' Lagos, Tuesday, 28 May 2013, retrieved from <http://mediarightsagenda.net/press-release-media-rights-agenda-commends-judiciary-for-upholding-right-to-information-for-citizen/> (visited July 2, 2016).

funds. In fact, majority of the cases which have so far come before the court on the FOI Act should ordinarily not have come near the court's doorstep in the first place. In the spirit of proactive disclosure, such matters as salaries and allowances of staff of public institutions ought to be published and made available to the public by the public institutions in hard copy or on the institutions' web pages. Proactive disclosure is the cornerstone of the freedom of information regime. Without efficient record keeping and a culture of self-disclosure, public institutions may act in sabotage of the Act. If public institutions are not obligated to keep records, the public's right to request such records cannot be said to be guaranteed.

Another vital observation of the author is the fact that, with the exception of section 6 of the Act which allows for additional seven days in case the information requested is voluminous or consultation is required in order to produce the information, the Act is not sufficiently flexible in terms of time-frame for response by public institutions. For instance, in the cases of *Okazie v. Attorney General of the Federation & Anor*[74] and *PPDC v. Power Holding Company of Nigeria*,[75] there is no way a government institution working at its normal pace would produce all the documents requested within the first seven days or even within the additional seven days. In such exceptional cases, the FOI applicant ought to have been empowered by the Act to demand that the request be processed within a longer time-frame.[76] The advantage of this arrangement is that it is the FOI applicant who recognizes the need for more time, not the government agency making excuses for additional time outside the statutory maximum. Another reason for this flexibility is because those records might not have been kept. Even where they are kept, the figures or information requested may not have been disaggregated in the way and manner the applicant wants them.

It is also useful if lawyers representing clients in FOI matters state in their originating processes the specific time-frame within which they want the public institution concerned to comply with the order of the court. A review of the cases earlier highlighted shows that in all cases where the time-frame for compliance is specifically stated in the applicant's pleadings, the courts usually enforce the same. In the case of *Okazie v. Central Bank of Nigeria*[77] for instance, where the applicant

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74. *Boniface Okazie v. Attorney General of the Federation & Anor* Suit No. FHC/L/CS/514/2012.

75. *Public and Private development Centre (PPDC) Ltd & Nigerian Contract Monitoring Coalition v. Power Holding Company of Nigeria* Suit No FHC/ABJ/582/2012.

76. The applicant could for instance, state in his/her application: 'Although I know the organization is bound by law to process my request within 7 days or at most 14 days, I am willing to give your organization one month to respond because of the volume of information I am requesting.'

77. *Boniface Okazie v. Central Bank of Nigeria* Suit No. FHC/L/CS/494/2012.

negligently omitted to ask for one, no time-frame for compliance was ordered by the court.

It is often said that the role of the judge in any society is the attainment of justice.[78] In the context of the FOI Act, the task of ensuring justice through the process of judicial review is a very odious one. This is because judges, like other human beings, are mere mortals who are prone to sympathy, fears, prejudices and all manners of frailties.[79] Infallibility is certainly not their virtue. The judiciary as the Third Estate of the Realm is well known for its bad record keeping culture. Yet, whether the FOI Act will achieve its objectives as set out in its Explanatory Memorandum depends largely on the attitude of judges to the Act. Already, majority of FOI requests under the Act are resulting in lawsuits. Even simple matters such as salaries of staff which ought to be disclosed proactively by the relevant public institutions had to end up in court as in the case of *Uzoegwu v. Central Bank of Nigeria & Anor*.[80]

However, it remains to be seen how these court cases will impact on the attitude of public institutions to comply with the Act. The Act, for instance, mandates public institutions while denying a request for information to state whether or not the information exists.[81] What if a document exists but the institution lies that it doesn't. Of course, the public institution is still in violation of its obligations, having failed to comply with section 2 of the Act which compels keeping of record of all activities, operations and businesses. But what good would it do the applicant if the court finds a public institution in violation of its record keeping obligation? While court cases are good for proper understanding of the import of the Act and for the purpose of setting precedence, public institutions should be encouraged and sensitized to comply voluntarily with the Act especially with reference to record keeping. It is elementary to state that even when an FOI applicant is successful in court, a court order cannot produce a record that does not exist.

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78. P.O. Aderemi, *The Role of a Judge in the Administration of Justice in Nigeria*, in ADMINSTRATION OF JUSTICE IN NIGERIA: ESSAYS IN HONOUR OF JUSTICE MOHAMMED LAWAL UWAIS (J.A. Yakubu, ed., 2000), at 79.

79. *Id.*

80. *Uzuoegwu FOC Esq. v. Central Bank of Nigeria & attorney General of the Federation* Suit No. FHC/ABJ/CS/1016/2011.

81. FOI Act, section 7(3).

THE INTERNATIONAL CRIMINAL COURT (ICC) AND THE ENFORCEMENT OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS

Eric Ayemere Okojie* & Peace Folorunsho**

Abstract

For a court or tribunal to exercise power over persons or territories, and for its decisions or judgments to be binding on such persons or territories, the court must have the jurisdiction to do so. This article is centred on an examination of the jurisdiction of the International Criminal Court (ICC) with regard to the enforcement of international humanitarian law and the protection and promotion of human rights in times of armed conflict. This article will also highlight the enforcement challenges being faced by the ICC in carrying out its mandate. This article reveals that the absence of superpower nations like the United States from the ICC has undermined the jurisdiction of the court in the enforcement of international humanitarian law and protection of human rights. The article therefore advocates a review of the ICC's jurisdiction to make it more proactive in dealing with its challenges.

I. INTRODUCTION

The idea of establishing an agency with an international mandate for addressing human rights violations particularly genocide, war crimes and crimes against humanity dates back to the 15th century. However, it was not until the late 19th century that what we currently know as international criminal law began to emerge in the form of rules governing military conflict.[1]

In 1872, Gustav Moynier who was one of the founders of the International Committee of the Red Cross (ICRC) proposed the establishment of a permanent international criminal court in response to the crimes of the Franco-Prussia war.[2] The

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1. L. Barnett, International Criminal Court: History and Role, Library of Parliament Research Publication, 4 November, 2008, available at <http://ww.parl.gc.cacontent/[op/researchpublications/prb0211-e.htm>, (accessed on December 13, 2015).

2. The International Criminal Court and Sudan: Access to Justice and Victim's Rights, Roundtable, Khartoum, 2-3 October, 2005, 5.

aftermath of World War II also played a significant role in drumming up calls for the establishment of an international criminal court.[3] Military tribunals were then put in place by the Allied Powers in Nuremberg and Tokyo to try those alleged to have committed startling atrocities; and later the establishment of international criminal tribunals in Rwanda after the genocide of 1994, the former Yugoslavia as well as the Special Court for Sierra Leone after the conflict. It is worth noting that prior to the Nuremberg and Tokyo tribunals, there was the Peace Treaty of Versailles which established a special tribunal to try Emperor William II of Hohenzollern, former Emperor of Germany after World War I for the violation of human rights and humanitarian law. The Peace Treaty of Versailles provided thus:

a) The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctities of treaties.
b) A special tribunal will be constituted to try the accused thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following powers: namely, the United States of American, Great Britain, France, Italy and Japan.
c) In its decision, the tribunal will be guided by the highest motives of the international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.
d) The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the former Emperor in order that he may be put on trial.[4]

Robert M. Jackson, in his opening address to the Nuremberg Tribunal, said:

> That four great nations, flush with victory and stung with injury stay the hand of vengeance and voluntarily submit their captives' enemies

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3. Harvard Political Review, The ICC- at 10, last modified September 3, 2012. *See,* Barnett, *supra* note 1.

4. Article 227, Treaty of Versailles, 1919. Laudable as the article 227 is, the composition of the members of the tribunal begs the question with regard to the possibility of the suspect ever getting a fair trial when the accusers are also the judges? Perhaps the reason why the government of the Netherlands under Queen Wilhelmina rejected the Allies demands to turn him over to them for trial. However, it would have been a different thing entirely had the Allies had jurisdiction over him. See generally, <http://histclo.com/royal/ger/w2/w2pw.htm>.

> to the judgment of the law is one of the most significant tribute that power has ever paid to reason…. We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it in our own lips as well. We must summon such detachment and intellectual integrity to our task that this Tribunal will commend itself to posterity as fulfilling humanity's aspirations to do justice…[5]

The establishment of the various military tribunals and special courts to try those suspected of genocide, war crimes and crimes against humanity as in the cases of former Yugoslavia, Rwanda, and Sierra Leone was geared towards the creation of a permanent international criminal court to try these offences. However, even with the creation of the ICC as a permanent court, problems still linger especially in regard to the jurisdiction of the court. As former United States of American President Bill Clinton said in an address to the 54th session of the United Nations General Assembly, in September, 1999, "it is easier to say 'Never again' "but much harder to make it so."[6]

II. HISTORICAL BACKGROUND

On 17 July 1998, 120 States at a Diplomatic Conference held at the headquarters of the Food and Agriculture Organization of the United Nations voted overwhelmingly to adopt the Rome Statute of the ICC.[7] The ICC was established in July 1998 by virtue of the Rome Statute which came into being in that year.

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5. Henry T. King, Robert Jackson's Place in History: Nuremberg Revisited, <http://www.robertjackson.org/the-man/speeches-articles/speeches/speeches-related-to-robert-h-jackson/robert-jacksons-place-in-history-nuremberg-revisited/>, (accessed on December 13, 2015).

6. Address by former President Bill Clinton of the United States to the United Nations General Assembly 54 Session, available at <http://m.state.gov/m207554.htm>, (accessed on December 15, 2015). The phrase "Never again" was first used after World War II. This was a particular reference to the holocaust carried out by the Nazis on the Jewish people. This phrase resurfaced 49 years after as a result of the Rwanda genocide perpetrated by the Hutus against the Tutsis minority. It should be noted that the United States turned a blind eye to the Rwanda genocide due to the humiliation they suffered during the Somalia crises after the overthrew of the dictator Siad Barre who fled to Lagos, Nigeria. To the Americans, the Rwanda crisis was an "African affair."

7. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (2004), at ix.

As the Conference to establish the ICC was underway in Rome in July 1998, three groups emerged.[8] The first group was led by Canada and Norway. It was arguably the most influential and advocated a potent and robust ICC. In its ranks were countries of middle powers and developing countries that generally supported a *proprio motu.*[9] The second group was made up of the Permanent Members of the United Nations Security Council or P-5 with the exception of Britain which had joined the 'like-minded states' just before the Conference began. This group advocated for a more important role for the Security Council in the establishment and operation of the Court. The United States in particular, was strongly against the *proprio motu* advocated by the former and therefore argued that ICC jurisdiction be limited to the U.N. Security Council referrals.[10] The third group, comprised of the non-aligned group, was formed in opposition to the P-5's insistence on the exclusion of nuclear weapons from the statute. This group included states like India, Mexico and Egypt. However, their position with regard to the independence and power of the ICC was similar to that of the P-5.

The jurisdiction of the court was the most complex and most sensitive issue. However, the *proprio motu* did receive significant, though not general, support. At the end of the Conference, 120 countries voted in favour of the Rome Statute of the ICC, 21 abstaining and seven against. The United States was one of the countries that voted against the Statute of Rome putting them in the company of China, Israel, Iraq, Libya, Qatar and Yemen.[11]

III. THE JURISDICTION OF THE ICC

On 11 April 2002, Bosnia-Herzegovina, Bulgaria, Cambodia, Democratic Republic of Congo (DRC), Ireland, Jordan, Mongolia, Niger, Romania and Slovakia submitted their instruments of ratification to the UN bringing the total number of countries to ratify the Rome Statute to 66, well beyond the 60 countries needed to make it a binding treaty.

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8. *See*, Barnett, *supra* note 1.

9. This is the power of the Prosecutor to act independently in commencing investigation into any of the crimes under the ICC jurisdiction by his own motion or initiative. See generally, the provisions of Articles 13 (1), 15 and 53 (1) of the Rome Statute of the ICC where the issues of those negotiations are now enshrined.

10. *See,* Barnett, *supra* note 1.

11. History of the ICC, available at <http://www.iccnow.org/?mod=rome>, (accessed September 13, 2015). The United States later signed the Rome Statute on December 31, 2000 but withdrew on May 6, 2002. Also, Israel later signed the Rome Statute on December 31, 2000 but withdrew its signature as well on August 28, 2002.

This triggered the entry into force of the Rome Statute on 1 July 2002. On 18 July 1998, at the birth of the Rome Statute establishing the ICC, then UN Secretary General, Kofi Annan, said thus:

> It is an achievement which, only a few years ago, nobody would have thought possible…. It is my fervent hope that by then a large majority of United Nations Members States will have signed and ratified it, so that the Court will have unquestioned authority and the widest possible jurisdiction.[12]

As the euphoric celebration of the world's first permanent international criminal court was underway in Rome in 1998, United States government officials were in strong terms denouncing the Statute. The then U.S Secretary of Defence, Donald Rumsfeld, said "… The United States will regard as illegitimate any attempt by the court or state parties to the treaty to assert the ICC's jurisdiction over American citizens."[13] According to Collin Powell, former Secretary of State, the ICC undermines U.S judicial sovereignty and the U.S cannot be held accountable to a higher authority that might try:

> to second-guess the United States after we have tried somebody…. We are the leader in the world with respect to bringing people to justice…. We have supported a tribunal for Yugoslavia, the tribunal for Rwanda, we are trying to get the tribunal for Sierra Leone[14] set up…. We have the highest standards of accountability of any nation on the face of the earth.[15]

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12. Press Release L2890, Secretary General says the establishment of International Court of Justice is a major step in the march towards universal human rights and rule of law,, <http://www.un.org/News/Press/docs/1998/19980720.12890.html>, (accessed on December 15, 2015).

13. Secretary Rumsfeld Statement on the ICC treaty, available at <http://www.defense.gov/releases/release.aspx?releaseid=3337>.

14. The Special Court for Sierra Leone (SCSL) was set up jointly by the Government of Sierra Leone and the United Nations pursuant to Security Council Resolution 1315 of 2000. The Court was established in 2002 in Freetown but due to security concerns, it was moved to The Hague. On 26 April, 2012, the Special Court for Sierra Leone found Charles Taylor guilty of 11 counts of war crimes and crimes against humanity including terrorism, murder, rape and the using of child-soldiers. Consequently, he was sentenced to 50 years imprisonment. This sentence was affirmed on appeal on 26 September, 2013. See generally, Liberia's Charles Taylor loses appeal against war crimes, <http://mobile .reuters.com/article/idUSBE98P0DP20130926?irpc=932>.

15. US renounces world court treaty, available at <http://news.bbc.co.uk/1/hi/1970312.stm>;

Former Senator and Attorney General of the United States, John Ashcroft, said the ICC was "a clear and continuing threat to the national interest of the US."[16] This attitude of the US officials to the ICC made Judge Richard Goldstone, the first Chief Prosecutor at the war crimes trials surrounding the former Yugoslavia, to add: "The US have really isolated themselves and are putting themselves into bed with the likes of China, Yemen and other undemocratic countries."[17] In his response to the continuous stance of the U.S that ICC is a threat, a violation of the sovereignty of states and other principles, Hans-Peter Kaul, in an address at the International Conference held in Arbil, Iraq on 26 November 2001 said:

> As demonstrated through the 10 years of existence of the Court, through 10 years of work closely followed by the international community, this argument is simply without any basis. Otherwise, why would already as many as 199 states from all region of the world, including four members of the League of Arab States: Jordan, Djibouti, the Comoros and Tunisia, be members of ICC?[18]

This attitude of the U.S to the ICC to date is a great impediment to the workings of the Court as it touches on the jurisdiction of the Court which to date has continued to make the enforcement of humanitarian law an uphill task.

The Rome Statute in paragraph 10 and Article 1 explicitly provides that the jurisdiction of the ICC "shall be complementary to national criminal jurisdictions". The rationale behind this complementary jurisdiction of the ICC to the national jurisdiction of State Parties is to the effect that states' sovereignty must be maintained.[19] This therefore entails that it is the responsibilities of states to exercise its criminal jurisdiction over those responsible for international crimes.

The crimes within the jurisdiction of ICC are genocide, crimes against humanity and war crimes. These also include offences committed in international as

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16. Elsa Kania, ICC at 10, available at <http://harvardpolitics.com/literary-supplement-1/the-icc-at-10/>, (accessed on December 15, 2015).

17. See *supra* note 14.

18. Address by Dr. jur. h. c. Hans-Peter Kaul at the International Conference "Max Planck Conference on Unity and Diversity of the Judiciary and Law in Iraq, held on 26 November, 2011 in Arbil, Iraq, 8."

19. Rome Statute, 1998, para. 8.

well as non-international armed conflicts.[20] The fourth crime in which the ICC could also exercise jurisdiction is the crime of "aggression". At the Rome Conference of 1998, states could not agree on the definition of this crime. However, a compromise was reached whereby the crime was included in the list of the crimes the ICC could exercise jurisdiction. The jurisdiction of the ICC over this crime and the role and the question as to the role of the UN Security Council was deferred for consideration by the Review Committee since no agreed definition of the crime could be adopted by the delegates at the Conference.[21] The Review Conference of the ICC held in Kampala in 2010 finally adopted a definition for the crime of aggression in order for the ICC to exercise jurisdiction over it. By the provisions of Article 13 of the Rome Statute, the ICC in the exercise of its jurisdiction may commence investigations in the following ways: (1). by State Party referral to the Prosecutor; (2) by the United Nations Security Council referral to the Prosecutor; and (3). By the Prosecutor *proprio motu.*

The crime of genocide is specifically provided for in Article 6 of the statute. For the purpose of this statute, 'genocide' means any of the following acts committed with intents to destroy, in whole or in part a national, ethnical, racial or religious group:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

This definition is *in pari materia* with the definition in the Convention on the Prevention and Punishment of the Crime of Genocide (the Convention on Genocide), 1948. The ICC, however, elaborates this definition further by broadening the scope of its jurisdiction. The crime of genocide is generally considered as one of the worst moral crimes a government or any ruling authority including that of a guerrilla group, terrorist organization, an occupation authority can commit against its citizens or those

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20. International armed conflicts are those conflicts between sovereign states. Non-international armed conflict, on the other hand, are conflicts within a state- a state fighting a rebellious group within as in the case of Taliban in Afghanistan or a group exercising the right to self-determination as in the case of Basque in Spain. See generally, The Geneva Conventions, 1949, common articles 2 and 3, Additional Protocol 1, 1977, article 4 and Additional Protocol 11.

21. *See*, Barnett, *supra* note 1.

it exercises control over.[22] The Convention on Genocide came about after the Holocaust—a systematic attempt by the Nazi authorities during World War II to kill every Jew regardless of wherever they were found, in total annihilation. This pogrom resulted in the killings of about 6 million Jews[23] by the Nazis—a clear attempt to wipe out a racial and religious group from the face of the earth.

On the other hand, the Rwanda genocide of 1994 carried out by the Hutu majority on Tutsi minority, was a systematic attempt to wipe out an ethnic group. In March 2009, Sudanese President Omar Al-Bashir was indicted with two counts of war crimes and five counts of crimes against humanity and became the first sitting head of state to be indicted by the ICC.[24] The ICC Pre-Trial Chamber rejected the Prosecutor, Luis Moreno-Ocampo's application to charge Al-Bashir with genocide, ruling that there was insufficient evidence. That ruling was overturned by the Appeal Chamber on 12 July 2010.[25]

In July 2010, Al-Bashir was, for a second time, indicted by the ICC for genocide. He was charged with three counts of genocide in Darfur and a second arrest warrant was issued against him.[26] Al-Bashir is accused for the conflict in Darfur where some 300,000 people are said to have died since 2003 when the conflict started. The Janjaweed, a pro-government Arab militia, are accused of ethnic cleansing against civilians from Fur, Masalit and Zaghawa communities after rebels took up arms in Darfur 2003.

Crimes against humanity and war crimes are covered by Articles 7 and 8 respectively of the Rome Statute. Crimes against humanity encompass acts committed as part of a deliberate widespread or systematic attack directed at a civilian population, including murder, rape, sexual slavery and enforced prostitution.[27] War crimes are defined as serious crimes in war-international and non-international such as grave breaches of the Geneva Conventions, and breaches of international customary law such

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22. Genocide, accessed at <http://www.hawaii.edu/powerkills/GENOCIDE.ENCY.HTM>, (retrieved on December 20, 2015).

23. *Id*.

24. See *supra* note 27.

25. Al-Bashir indicted for Genocide, accessed at <http://www.un.org/upps/news/story.asp/htm/story.asp?NewsiD=35293&Cr=international+criminal+court&Cr1=#UvNNXsmPKBU>, (retrieved on December 20, 2015).

26. Darfur warrant for Sudanese Bashir, "ICC adds Genocide," accessed at <http://m.bbc.co.uk/news.10603559>, (retrieved on December 20, 2015).

27. Professor Vitit Murtarbhorn, Faculty of Law, Chulalongkorn University, Bangkok, retrieved from <http://www.humanrights.asia/resources/journals-magazines/article2/0201/international-humanitarian-law-and-the-international-criminal-court>, (accessed on February 20, 2014).

as international attacks on civilians and the recruiting of children under 15 years of age into armed conflict.[28]

The ICC on 7 February, 2014, said it was opening a preliminary examination into violence in Central African Republic (CAR) to determine whether atrocities committed in the country constitute possible war crimes.[29] The ICC Prosecutor Fatou Bensouda, said: "The allegations include hundreds of killings, acts of rape and sexual slavery, destruction of property, pillaging, torture, displacement and recruitment and use of children in hostilities."[30] The CAR is a signatory to the Rome Statute and as a result the ICC has jurisdiction to handle accusations for the offence of genocide, crimes against humanity and war crimes committed on the territory and on its nationals.

At the Review Conference (Assembly of States Parties) held in Kampala, Uganda, in May-June 2010, the States Parties amended the Rome Statute to include a definition of the crime of aggression and provisions for the activation of the jurisdiction of the ICC (but not before 1 January 2017) in respect of that crime.[31] The Review Conference, having reached a consensus on the definition of the "crime of aggression," adopted a resolution amending the Statute of Rome with the insertion of new Articles 8 *bis*, 15 *bis* and 15 *ter*. The Conference also adopted in the resolution that the amendments shall enter into force in accordance with the provisions of Article 121(5). Article 121(5) states that:

> Any amendment to Articles 5, 6, 7, and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification and acceptance. In respect of State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

It can be gleaned from Article 121(5) above that the jurisdiction of the ICC on the crime of aggression even after the amendment of the Rome Statute is still a problem. This is so in that any State Party to the Rome Statute that has not ratified or accepted the

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28. V. Muntarbhorn, International Humanitarian Law and the International Criminal Court (2004), retrieved from <https://www.scribd.com/document/204474100/International-Humanitarian-Law>.

29. ICC to open war crimes in CAR, last modified December 22, 2015, retrieved from <http://m.aljazeera.com/story/2014285164926916>.

30. ICC to open war crimes in CAR *id.*

31. Rome Statute amended, (accessed on December 22, 2015).

amendments to the Rome Statute adopted in Kampala is not within the jurisdiction of the ICC. Thus, where a crime of aggression is committed by the nationals of a State Party or in its territory that has not ratified or accepted the amendments to the Rome Statute, the ICC cannot exercise jurisdiction even where it has so determined that a crime of aggression has been committed. The new Article 8 *bis* provides thus:

> The Crime of Aggression
> 1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
> 2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
> (c) The blockade of the ports or coasts of a State by the armed forces of another State;
> d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
> (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
> (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of

such gravity as to amount to the acts listed above, or its substantial involvement therein.

The new Article 15 *bis* states thus:

> Exercise of jurisdiction over crimes of aggression (State referral, *proprio motu*)
> 1. The Court may exercise jurisdiction over the crime of aggression in accordance with Article 13, paragraphs (a) and (c), subject to the provision of this article.
> 2. The Court may exercise jurisdiction only with respect to the crimes of aggression committed only one year after the ratification or acceptance of the amendments by thirty States Parties.
> 3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption for an amendment to the Statute.
> 4. The Court, may in accordance with Article 12, exercise jurisdiction over crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared it does not accept such jurisdiction by lodging such declaration with the Registrar. The withdrawal of such declaration may be effected at any time and shall be considered by the State Party within three years.
> 5. In respect of a State that is not a Party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or in its territory.
> 6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, and any relevant information and documents.
> 7. Where the Security Council has made such determination, the Prosecutor may proceed with investigation in respect of a crime of aggression.
> 8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in Article 15, and the Security

> Council has not decided otherwise in accordance with Article 16.
> 9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
> 10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in Article 5.

Article 15 *ter* states:

> Exercise of jurisdiction over the crime of aggression (Security Council Referral)
> 1. The Court may exercise jurisdiction over the crime of aggression in accordance with Article 13, paragraph (b), subject to the provisions of this article.
> 2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
> 3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January, 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
> 4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

This new Article 8 *bis* contains the definition of the crimes of aggression whilst Articles 15 bis and 15 ter contained complex provisions upon which the ICC is to exercise its jurisdiction. By these provisions, thirty State Parties must submit their instruments of ratification to the amendments to the Rome Statute before the ICC can exercise its jurisdiction over the crime of aggression. Even if that is achieved, the ICC will still not be able to exercise its jurisdiction over the crime of aggression because its jurisdiction over the crime of aggression will only commence after 1 January, 2017 by the State Parties.[32] Therefore, the ICC jurisdiction over the crime of aggression is not immediate. It does mean that where a crime of aggression has been determined, the perpetrators will for now go unpunished. This jurisdictional problem brought about by the amendments to the Rome Statute with regard to the new regime of the crime of aggression has made Kevin Jon Heller to argue as follows:

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32. Amendments to the Rome Statute of the International Criminal Court on the Crime of aggression, 2010, common Article 15 (3).

> …ICC will only have jurisdiction over an act of aggression committed by a State Party who has accepted (by omission) that jurisdiction and only when that act is committed against a State Party. There are a number of problems with this jurisdiction regime, which deviates substantially from the regime that governs other crimes within the ICC's jurisdiction. First, the Court will have no jurisdiction over a State Party's act of aggression against a non-State Party, even though it would have jurisdiction over the war crimes and crimes against humanity as a result of that same act. That is an unfortunate asymmetry. Secondly, it permits State Parties to take an a la carte approach to ICC's jurisdiction. I could be wrong, but I find it unlikely that any state that routinely uses force against other states (or against non-state actors located in other states) will not opt out of aggression. Why wouldn't they? There may be some reputation cost for a state not to be a part of ICC, but it is difficult to believe that there will be any such cost for a state that joins the ICC but limits the Court's jurisdiction over it to war crimes, crimes against humanity and genocide. The ICC jurisdiction will thus almost certainly be limited to states that do not have either the motive or the wherewithal to commit the crime in the first place (to be fair, the ICC provision does eliminate a possible disincentive for a state to join the ICC, which is a good thing). Thirdly, it permits State Parties to take a completely hypocritical approach to aggression…. A State Party that opts out of aggression cannot be prosecuted if it commits an act of aggression against a State Party that has not opted out. But the converse is not true: States Parties that have not opted out could be prosecuted for acts of aggression against an opting-out State Party. An opting-out State Party is thus protected against other States Parties but is permitted to commit acts of aggression itself, even against States Parties that have not opted out…. Fourth and finally, the ICC will not have jurisdiction over non-State Party that commits an act of aggression against a State Party, even though the Rome Statute specifically provides such territorial jurisdiction for war crimes, crimes against humanity and genocide. Perhaps that concession was necessary to gain the support

of some States Parties…[33]

The new regime of the crime of aggression in the Rome Statute is indeed a welcome development as it has been long overdue. However, the crime not being at par with war crimes, crimes against humanity and genocide is a considerable concern as the efficacy of ICC is being hampered. The questions therefore are: what is the viability of ICC with respect to its jurisdiction and prosecution of the crime of aggression considering the opt-out clause which States Parties can readily and easily exercise? With ICC not having jurisdiction over the crime of aggression committed by nationals or in the territories of non-State Parties, is the whole amendment to the Rome statute that brought about the crimes of aggression within the jurisdiction of ICC not a futility?

Again, considering the Vienna Convention on the Law of Treaties which provides that: "A Treaty does not create either obligations or rights for a third State without its consent," and that a Treaty cannot establish an obligation on a Non-State Party unless it "expressly accepts that obligation in writing;"[34] will it not be correct to say that Non-State Parties who have neither ratified nor accepted the amendments to the Rome Statute with regard to the crime of aggression within the gamut of international law?

IV. ICC AND UNIVERSAL JURISDICTION

Crimes of universal jurisdiction under international law can be established by Treaty, as well as by Custom.[35] Universal jurisdiction is a principle in international law by which states claim criminal jurisdiction over persons whose alleged crimes were committed outside the boundaries of the prosecuting state, regardless of nationality, country of residence, or any other relation with the prosecuting state.[36] The rationale behind this principle is based on the notion that certain crimes are so harmful to international interests and thus states are entitled and even obliged to bring proceedings against perpetrators irrespective of the territory the crime was committed and the

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33. Opinio Juris, The Sadly Neutered Crime of Aggression, <http://opiniojuris.org/2010/06/13/icc-review-conference-early-reports-0f-an-ingeniously-confusing-deal-on-aggression>, (accessed December 23, 2015).

34. Vienna Convention on the Law of Treaties 1969, Arts. 34 and 35.

35. Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35(2) NEW ENGLAND LAW REVIEW (2001), at 363.

36. Sylvia Nicolaou Garcia, *European Efforts to Apply the Principle of Universal Jurisdiction Against Israeli Officials*, MIDDLE EAST MONITOR (2009), retrieved from <www.mmemonitor.org.uk>, (accessed on December 23, 2015).

nationality of the perpetrators or the victims.[37]

Historically, the principle of universal jurisdiction can be traced to the writings of Grotius, and to the prosecution and punishment for the crime of piracy.[38] However, the jurisprudence behind the principle of universal jurisdiction can be traced to the *Lotus* case.[39] It was based on this principle that Israel tried and sentenced to death Adolf Eichmann in 1961.[40] There have been recent cases of Late Chilean dictator Augusto Pinochet (1998), Rwanda's Sisters Maria Kisito and Gertrude (2000), Israel's Tzipi Livini, (2009), etc.

It has been argued that the ICC does not have universal jurisdiction as its jurisdiction is carefully spelt out in Article 5 of the Rome Statute.[41] This is because universal jurisdiction is unilaterally exercised by a state whereas that of the ICC is exercised by an international organization to which states have delegated the authority to enforce international law.[42] But considering paragraph 6 of the Preamble to the Rome Statute, how tenable is that argument?

A. United States and the ICC

The United States (US) is not a party to the Rome Statute. On 6 May 2002, it broke off all ties with the ICC when it unsigned the Rome Statute.[43] The US took this decision

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37. Mary Robinson, *Foreword*, in THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, PRINCETON UNIVERSITY PRESS, PRINCETON (2001) 16, *cited in* Xavier Philippe, *The Principles of Universal Jurisdiction and Complementarity: How the Two Principles Intermesh*, 88(862) INTERNATIONAL REVIEW OF THE RED CROSS (2006) 377.

38. Philippe *id.*, at 378.

39. *France v. Turk*, 1927 P.C.I.J (ser. A) No. 10 at 18. In that case, a French vessel had run into a Turkish vessel killing some Turkish citizens. When the French vessel anchored at a Turkish Port, Turkey took custody over and prosecuted the French watch officer for criminal manslaughter. France argued that Turkey could not legitimately try a French citizen under international law as only France had jurisdiction since Turkey could not "point to some title of jurisdiction recognized international law." This argument was rejected by the P.C.I.J.

40. *Attorney General of Israel v. Eichmann*, 36, I.L.R 277, 299, a(Isr. S. Ct 1962).

41. Questions & Answers on the ICC Universal jurisdiction, <www.amicc.org>, (accessed on December 23, 2015).

42. *Id.*

43. Aurelie Coppin, Status of the US signature of the Rome Statute of the International Criminal Court (2008), available at <www.amicc.org>. It should be noted that the unsigning of the Rome Statute by the US is "technical." Their earlier signature is still intact as it was not erased. The unsigning was done through a letter to the then UN Secretary-General, Kofi Annan. The letter states thus: "the US does not intend to become a party to the treaty. Accordingly, the US has no legal obligations arising from its signature on December 31, 2000."

because it fears the ICC is not sufficiently equipped to safeguard the individual liberty of states. Thus, in August 2002 the Bush administration signed into law the American Service members' Protection Act (ASPA)[44] and immediately after, the US started negotiating bilateral immunity with states in accordance with Article 98.[45] Countries that signed the agreement promise never to surrender US soldiers indicted of war crimes, crimes against humanity and genocide in their territory to the ICC.[46]

On 21 June 2004 Kofi Annan, then UN Secretary-General, called on the UN Security Council to vote against a resolution that would exempt US soldiers serving in the UN approved operations from prosecution from the ICC. He said; "For the past two years, I have spoken quite strongly against the exemption, and I think it would be unfortunate for one to press for such an exemption, given the prisoner abuse in Iraq."[47] In December, 2004, the US government added the Nethercutt Amendment to the arrangement.[48] However, in 2008, ASPA was amended thereby softening the US stance on those who had not signed the agreement and lifting restrictions on foreign military aid and a number of waivers were issued.[49] To date, the US is still not a party to the Rome Statute.

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44. Anti-ICC Legislation Generally, available at <http://www.amicc.org/usicclegislation>, (accessed on August 17, 2015). This prohibits the US from providing military aid to any state that is a party to the Rome Statute of the ICC. The only countries that are exempted are those that receive special waiver from the US President or that signed the agreement. Also, exemption was extended to selected countries (Taiwan, NATO members, and major non-NATO allies such as Israel, Egypt, Republic of South Korea, etc.). See generally article 98 of ASPA.

45. *Id.*

46. The effect of this agreement is that US nationals who commit war crimes, crimes against humanity and genocide will not be surrendered to ICC for investigation and possibly for prosecution where the Prosecutor has established a case against them.

47. Bush Faces Major Test at UN on Exemption from war Crimes Court, <http://truth-out.org/archivecomponent/k2/item48460:bush-faces-major-test-at-un-on-exemption-from-war-crimes-court>, (accessed on August 17, 2015).

48. Anti-ICC Legislation, *supra* note 47. This amendment went beyond military aid to include denial of economic aid. However, this amendment expired on September 30, 2008. The implication is that this law no longer exists.

49. *Id.*

B. Africa and the ICC

Many observers and critics of the ICC have argued that the court targets Africa and its leaders.[50] These questions are being asked because most of the ICC investigations and prosecutions are in Africa. Some of the cases include that of Sudanese President Omar al-Bashir, Kenyan Deputy President William Ruto, former President of Cote d'Ivoire Laurent Gbagbo, and others in Uganda, DRC, CAR, and Libya. However, except with cases of Sudan and Libya which were referrals from the UN Security Council to the ICC, the rest were invitations by the various states to ICC.

From all indications, the ICC is focusing on Africa than the rest of the other parts of the world. Africa is not the only continent facing crises. Thus, the ICC must spread its focus beyond Africa if it is to achieve its purpose. Hence, Professor William Schabas asked: "Why prosecute post-elections violence in Kenya or recruitment of child-soldiers in DRC, but not the murder and torture of prisoners in Iraq and illegal settlement in the West Bank?"[51]

The African Union (AU) shares the same sentiment. At the AU summit held on 26-27 May 2013, the AU Assembly adopted a decision requesting the ICC to refer back to Kenya its case against President Uhuru Kenyatta and his deputy Ruto.[52] It noted that there is "the need for international justice to be conducted in a transparent and fair manner, in order to avoid any perception of double standard, in conformity with international law."[53] During the Press Conference at the conclusion of the summit, the Chairperson of the Assembly, Ethiopian Prime Minister Harlemariam Desalegn, said: "African leaders came to a consensus that ICC's process conducted in Africa has a flaw. The intention was to avoid any kind of impunity but now the process has degenerated to some kind of race-hunting rather than the fight against impunity."[54]

C. Syria and the ICC

The Syria uprising began in March 2011. Syria is not a party to the Rome Statute and thus the ICC has no jurisdiction over the country. Even with clear and compelling

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50. Stephen A. Lamony, Is the International Criminal Court really picking on Africa, <http://africanarguments.org/2013/04/16/is=the-international-criminal-court-really~picking-on-africa-by-stepk\hen-a-lamony>, (accessed on February 17, 2014).

51. The ICC Africa Problem, <http://m.aljazeera.com/story/201369851918549>, (accessed on December 24, 2015).

52. *Id*.

53. *Id*.

54. *Id*.

evidence of the use of chemical weapons against the opposition as well as civilians, including children, in relatively large scale in the Ghouta area of Damascus on 11 August 2013, none has been held responsible.[55]

The fight for supremacy amongst the P5s is largely responsible for the inability of the international community to bring to justice the perpetrators of these heinous crimes. The ongoing stalemate between Russia and to a lesser degree China and the rest of the UN Security Council, is the most obvious and widely reported reasons as to why no "breakthrough" on the Syrian question has been achieved. For the ICC to intervene, there must be a UN Security Council referral to it. And for this to be possible, Russia and China must either abstain or vote in favour of a referral. But the Assad administration is a Russian ally.[56] If Sudan and Libya could be referred to the ICC by the UN Security Council, thereby granting the court jurisdiction over them, why not in this case which moreover has glaring evidence of the use of chemical weapons by a sitting government against its own people? Situations like this and many others have made the enforcement of humanitarian law under the regime of the ICC very difficult.

On 22 February, 2014, the UN Security Council unanimously approved a resolution to boost humanitarian aid to Syria.[57] Through Resolution 2139 (2014), the Council demanded "that all parties to the conflict, in particular the Syrian authorities, promptly allow rapid, safe and unhindered humanitarian access for UN humanitarian agencies and their implementing partners, including across conflict lines and across borders."[58]

In the resolution, the Council strongly condemned "the widespread violations of human rights and international humanitarian law by the Syrian authorities." It urged all parties involved in the conflict to lift sieges of populated areas, including in Aleppo, Damascus and Rural Damascus, and Homs.[59] But will the Syrian authorities or the free Syrian Army recognize this resolution?

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55. UN confirms chemical weapons used in Syria, <http://edition.cnn.com/2013/12/12/world/meast/syria-civil-war/>, (accessed on August 17, 2015).

56. Why Syria Still Won't be Referred to the ICC, <http://justiceinconflict.org/2013/08/22/why-syria-still-womt-be-referred-to-the-icc/>, (accessed on December, 24 2015).

57. Unanimously approved, Security Council resolution demands aid access to Syria, <http://www.un.org/apps/news/story.asp?NewsID=47204&Cr=Syria&Cr1=#.UwjvldWSo>, (accessed December 24, 2015).

58. *Id*.

59. *Id*.

D. Human Rights and the ICC

The offences of genocide, crimes against humanity, war crimes and crime of aggression as enshrined in Articles 6, 7, 8 and new Articles 8, 15 *bis* and 15 *ter* of the ICC are for the protection and promotion of human rights. But the question is: has the ICC been able to exercise jurisdiction over these crimes by bringing to justice those who have violated and keep violating these rights? The human rights abuses of prisoners in the Abu Ghraib Prison is a graphic example of how the ICC has failed in this regard. In 2004, the world was outraged when photographs detailing the systematic physical and sexual abuse of the Iraqi prisoners at the American military prison in Abu Ghraib were released.[60] The photographs show horrible and demeaning treatment of the prisoners. This was a clear violation of human rights which falls within the jurisdiction of the ICC. The soldiers involved were subsequently court-martialled and sentenced to various terms of imprisonment.

In a report released in March, the UN Assistance Mission in Iraq and the UN High Commissioner for Human Rights concluded that actions by ISIS[61] "may amount to war crimes, crimes against humanity, and possibly genocide."[62] ISIS deliberately targets specific ethnic and religious groups such as Christian, Yazidis and Shiites. Addressing this issue of human rights violations by ISIS, in April, the ICC Prosecutor Fatou Bensouda said that ISIS has committed "crimes of unspeakable cruelty"[63] but she admitted that her jurisdiction is too narrow to launch a prosecution.[64]

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60. Ifeoma Ajunwa, *Bad Barrels: An Organisational-Base Analysis of the Human Rights Abuses at Abu Ghraib Prison*, 17(2) UNIVERSITY OF PENNSYLVANIA JOURNAL OF LAW AND SOCIAL CHANGE, (2014), at 1.

61. The acronym "ISIS" means Islamic State of Iraq and Syria.

62. Joshua Keating, Why It's So Hard to Prosecute ISIS for War Crimes, available at <http://www.slate.com/blogs/the_slatest/2015/04/08/isis_and_the_icc_why_it_s_will_be_tough_to_prosecute_the_islamic_state_for.html>, (accessed on December 24, 2015).

63. *Id*.

64. *Id*. The reason behind this statement is simply that neither Iraq nor Syria is a party to the Rome Statute which established the ICC. And the only way investigation into the alleged crimes can be conducted is by a referral from UN Security Council. Due to the polarization of the Council, such referral, if tabled before the Council, is not likely to see the light of the day.

V. CONCLUSION

For the ICC to be relevant, the issue of its jurisdiction must be taken seriously and paramount in the eye of every member of the international community. To date, only three persons have been convicted by the ICC: Thomas Lubanga in 2012, Germain Katanga in 2014, and Jean-Pierre Bemba Gombo in 2016. The workings of the ICC are still fraught with problems. These jurisdictional problems have made the enforcement of humanitarian law and prosecution of persons indicted for human rights violations ineffective.

The broadening of the crime of genocide as well as the amendments of the Rome Statute that brought in the crime of aggression within the ICC jurisdiction, is indeed a good development in enforcing humanitarian law. However, much still needs to be done for the ICC to be able to enforce humanitarian law and to protect the human rights of persons. These jurisdictional issues need urgent attention and every nation, including the "big powers" especially the "P5", must get on board in order to achieve a more viable and stronger ICC in the enforcement of humanitarian law and the prosecution of persons indicted for human rights abuses. To this end, machinery for arresting those indicted by the ICC should be put in place and states, whether parties or not to the Rome Statute, should cooperate with the court in arresting the indicted persons within their territories.