

International and National Laws at Crossroads: Interrogating the Applicability of Selected Human Rights Instruments and the Quandary of Enforcement in Nigeria

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Abstract

This article analyses selected international instruments and the quandaries regarding their application and implementation in the international arena, especially at the African Court on Human and Peoples' Rights (Court) and Human Rights Committee as well as within the Nigerian regulatory environment. The article, adopting the doctrinal methodology of research, finds that individual citizens of Nigeria do not have the competence to file applications before the Court for purposes of seeking redress regarding the violation of the rights enshrined in the African Charter on Human and Peoples' Rights 1981 owing to the fact that Nigeria is yet to make the requisite declaration that would otherwise give individual Nigerian nationals the competence to file cases in the Court and grant it jurisdiction to entertain such cases in accordance with the provisions of articles 5(3) and 34 (6) of the Protocol on the Establishment of the African Court on Human and Peoples' Rights. Similarly, Nigeria has neither signed nor ratified the (First) Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) 1966 and the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of Death Penalty 1990. The prescriptive implication of this state of affairs is that individual Nigerians are precluded from filing complaints before the Human Rights Committee and it lacks jurisdiction to receive and consider communications from individuals claiming to be victims of violations of the rights enshrined in the ICCPR and the Optional Protocols. This article therefore makes a case for the ratification of relevant instruments and the expeditious recalibration of the Nigerian legal regime to foster a more effective, sustainable, accountable and transparent regulatory environment and to engender the realisation of the rights enshrined in regional and international human rights instruments for the benefit of Nigerian citizens.

Keywords: International human rights, national law, enforcement, African court

1. Introduction

As a Sequel to Nigeria's Independence from Colonial rule in 1960, the Country has made concerted efforts to promote and protect human rights. By and large, the post-independence Constitutions of 1960, 1963, 1979 and the Constitution of the Federal Republic of Nigeria (CFRN), 1999, as amended, which is the current constitution, made considerable provisions for the protection of human rights.¹ Beyond domestic legal and constitutional provisions, Nigeria played a significant role in the establishment of the African Charter on Human and Peoples' Rights 1981 under the auspices of the organization of African States (OAU), which is currently referred to as the African Union (AU).² In an effort to comply and demonstrate its commitment to the promotion and

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¹Jacob Abiodun Dada, 'Human Rights Protection in Nigeria: the Past, the Present and Goals for Role Actors for the Future' [2013] (14) Journal of Law, Policy and Globalization, 4.

²*Ibid.*

protection of human rights, Nigeria has ratified a number of international human rights treaties, they include International Covenant on Civil and Political Rights (ICCPR) 1966, International Covenant on Economic Social and Cultural Rights (ICESCR), 1966, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984, International Convention on Elimination of all forms of Racial Discrimination (CERD), 1965, Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) 1979, Convention on the Rights of the Child 1989³ among other treaties. However, Nigeria is yet to ratify a considerable number of human rights treaties such as The (First) Optional Protocol to the ICCPR, 1966, the Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty, 1990, Optional Protocol to Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), 1999, Optional Protocol to the Convention on the Rights of the Child (CRC) on the sale of Children, Child Prostitution and Child Pornography, 2000, Optional Protocol to the CRC, on the Involvement of Children in Armed Conflict, 2000, Optional Protocol to CAT Concerning Regular visit by National and International Institutions to Place of Detentions, 2002, and International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990.⁴

By and large, the Nigerian Legal System can be characterised as a dualist system which basically requires international treaties to be transformed and domesticated by the legislature before attaining the force of law. Thus, as a rule of thumb, even if the country ratifies a treaty, it remains unenforceable within the national milieu until it is duly domesticated by constituted authorities as required under the CFRN, 1999, as amended. The foregoing state of affairs poses fundamental challenges in terms of implementation and enforcement of human rights ordinarily guaranteed by international instruments otherwise ratified by Nigeria. Against this backdrop, the article seeks to analyze selected international instruments and the quandaries in respect of their application and implementation at the international arena especially at the African Court on Human and Peoples' Rights and the Human Rights Committee as well as within the Nigerian legal and regulatory environment.

2. Theoretical Framework

2.1. Monism

The monist theory is premised on the notion that both international law and national law form part of the same legal system.⁵ Exponents of monist theory hold the view that international law and municipal law are intricately connected with each other.⁶ Based on the monist theory, international law and domestic law are parts of a single legal system functioning harmoniously to meet the needs of the society.⁷ Proponents of monism hold the view that laws are mainly enacted for individuals. While domestic law is binding on such individuals directly, international law is legally binding on them through the state.⁸ Law is viewed by monists as a unified branch of knowledge.⁹ In monist states, treaties have the status of law in the domestic arena notwithstanding the absence of

³National Human Rights Commission, 'List Depicting Nigeria's Status of Ratification of U.N Human Rights Instruments' office of the UN High Commissioner for Human Rights NHRC NGA UPR S4 2009 a pdf> accessed 19 November 2024.

⁴*Ibid.*

⁵Peter Malanczuk, Akehurst's Modern Introduction to International Law (7th edn Routledge 1997)

63. ⁶S.K Kapoor, International Law and Human Rights (17th edn Central Agency 2009)

101. ⁷H.O Argawal, International Law (18th edn Central Law Publications 2010) 44.

⁸*Ibid* 44-45.

⁹Kapoor (n6) 101

legislation to incorporate or domesticate such treaties. Generally, in monist states some treaties have the status of law which is enforceable within the domestic legal system.¹⁰ Switzerland is a typical example of a monist country. International law is considered as a part of national law. In that country, 'there is no need for the legislator to make a law or transform the treaty into law. As soon as the treaty enters into force, it automatically becomes applicable under Swiss law.'¹¹ By virtue of the monist theory, the application of international law in the domestic arena is premised on the doctrine of incorporation. The doctrine of incorporation holds that a rule or principle of international law automatically becomes part of domestic law without the requirement for adoption or transformation by the legislature or courts in the domestic milieu.¹² Thus monist theory is based on the ideology that international law and national law constitute the same legal order.

2.2. Dualist Theory

The dualist theory is based on the notion that international law and domestic law are two distinct legal systems which exist independently of each other.¹³ Unlike monism, dualism rejects the view that international law and domestic law operate as part of a single entity.¹⁴ Rather, proponents of dualism maintain that international law is separate and distinct from national law as each system operates in its area of competence. Under dualism, international law can only become part of national law if it is consciously and deliberately transformed into the national legal system through legislation or judicial process.¹⁵ Nigeria is typically a dualist nation taking into consideration the provisions of section 12 of the CFRN, 1999, as amended, which is to the effect that treaties do not have the force of law in Nigeria except such treaties, have been duly enacted into law by the National Assembly. Accordingly, the applicability of international law in the domestic arena would be viewed from a dualist or pluralist perspective.

3. Applicability of Selected Regional and Universal Human Rights Treaties in Nigeria and the Quandaries Undermining Their Enforcement

3.1 African (Banjul) Charter on Human and Peoples' Right (ACHPR), 1981 and other Regional Human Rights Instruments

The African (Banjul) Charter on Human and Peoples' Right (ACHPR)¹⁶ articulates specific rights and duties for individuals and groups.¹⁷ The ACHPR recognises a plethora of rights, such as right to equality before the law, right to life and integrity of every individual, right to human dignity, right to liberty and security, right to fair hearing, right to religion and freedom of conscience, right to freedom of expression, right to freedom of association, right to assemble freely, and right to freedom of movement.¹⁸ Other rights recognized under the ACHPR include the right to participate freely in the government of a citizen's country, the right to own property, the right to work, the right

¹⁰David Sloss, 'Domestic Application of Treaties' (2011) Santa Clara University <<https://digitalcommons.law.scu.edu/facpubs/635>> accessed 20 November 2024.

¹¹Robert Kolb, 'Relationship between International and Internal Law' Baripedia <https://baripedia.org/wiki/Relationship-between-international-and-internal-law> accessed 20 November 2024.

¹²Martin Dixon, Textbook on International Law (7th edn Oxford University Press 2013) 98.

¹³Peter Malanczuk, Akehurst's Modern Introduction to International Law (7th edn Routledge 1997) 63.

¹⁴Dixon (n12) 114.

¹⁵*Ibid* 95-99.

¹⁶OAU.DOC.CAB/LEG/67/3 REV. 5, 21 I.L.M. 58 (1982). The Charter was adopted on the 27th of June, 1981 by the Assembly of Heads of State and Government of the Organization of African Unity (now called African Union – AU). It entered into force on the 21 October, 1986. The Charter was enacted into Nigerian

¹⁷African (Banjul) Charter on Human and Peoples' Rights, Articles 1-29

¹⁸*Ibid* arts 1-13.

to enjoy the best attainable state of physical and mental health, the right to education, the right to family, the right to equality and freedom from discrimination of a people by another, and the right to existence and self-determination. The ACHPR also recognises the collective right of peoples to their economic, social and cultural development,¹⁹ the right to freely dispose of their wealth and natural resources;²⁰ the right to national and international peace and security,²¹ and the right of all peoples to a general satisfactory environment favourable for their development.²²

The ACHPR, 1981, has been transformed and domesticated in Nigeria.²³ Section 46 (1) of the CFRN, 1999, as amended provides that: 'A person who alleges that any of the provisions of this Chapter (Chapter IV) has been is being or likely to be contravened in any state in relation to him may apply to a High court in that state for redress.' The foregoing provision implies that individuals and groups whose rights have been breached can seek redress in court from the High Court and in case of appeal to the Court of Appeal and ultimately to the Supreme Court which is the apex court.

Apart from the domestic court, the African Court on Human and Peoples' Rights has been established at the regional level to adjudicate disputes in respect of the interpretation and application of the ACHPR 1981 and other human rights instruments ratified by States Parties and render advisory opinions on any legal issue relating to the ACHPR or other relevant regional human rights instruments duly ratified by States Parties.²⁴ The following entities and persons have, in principle, the right of access to the African Court on Human and Peoples Rights (Court):²⁵

- (a) The African Commission on Human and Peoples' Rights;
- (b) The State Party which has lodged a complaint to the Commission;
- (c) The State Party against which complaint has been lodged at the Commission;
- (d) The State Party whose citizen is a victim of human rights violation;
- (e) African Intergovernmental organisations;
- (f) Non-governmental organisations (NGOs) with observer status before the African Commission on Human and Peoples' Rights;
- (g) Individuals.

However, it is pertinent to point out that individuals may only be allowed to institute cases directly before the Court if, at the time of ratification of the Protocol or any other time thereafter, the State Party concerned makes a declaration accepting the competence of the Court to receive cases. The Court has no jurisdiction or power to receive any individual petition as provided under article 5(3) of the Protocol involving a State Party that has not made such a declaration.²⁶ Thus in the case of *Femi Falana v African Union*,²⁷ the Applicant, a Nigerian national, who describes himself as a human rights lawyer based in Lagos, Nigeria, by an application dated 14 February 2011, instituted an action in the African Court on Human and Peoples' Rights against the African Union

¹⁹*Ibid* art 22

²⁰*Ibid* art 21

²¹*Ibid* art 23

²²*Ibid* art 24

²³African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap A9 Laws of the ²⁴Federation of Nigeria (LFN) 2004.

²⁴African Court on Human and Peoples' Rights, Rules of Court, 25 September, 2020, Rule 29(1).

²⁵Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights(adopted 10 June 1998, entered into force 25 January 2004)The Protocol was ratified by Nigeria on 20 May 2004.

²⁶*Ibid* art 34(6).

²⁷APP No. 001/2011.

(Respondent). In the proceeding, the Applicant alleged that he had made several efforts to get Nigeria to deposit a written declaration accepting the competence of the Court as required under article 34 (6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol) without success. He contended that he had been denied access to the Court because of the failure or refusal of Nigeria to make a declaration to accept the competence of the Court in respect of individual complaints in line with the provisions of article 34 (6) of the Protocol. The Applicant averred that since his efforts to make Nigeria make a declaration failed, he decided to file an application against the Respondent (African Union) as a representative of its Member States, requesting the Court to find the provisions of article 34 (6) of the Protocol inconsistent with articles 1, 2, 7, 13, 26, and 66 of the ACHPR 1981. According to the Applicant, the requirement for a state to make a declaration to allow access to the court by individuals and non-governmental organisations (NGOs) is a violation of his right to freedom from discrimination, fair hearing and equal treatment. In his prayer, the Applicant sought for the following orders:

- (a) A declaration that article 34 (6) of the Protocol on the Establishment of the African Court on Human and Peoples' Rights is illegal, null and void as it is inconsistent with articles 1, 2, 7, 13, 26 and 66 of the ACHPR, 1981.
- (b) A declaration that the Applicant is entitled to file human rights complaints before the African Court on Human and Peoples' Rights by virtue of article 7 of the ACHPR.
- (c) An annulment of the provisions of article 34 (6) of the Protocol on the Establishment of the African Court on Human and Peoples' Rights.

In opposition, the Respondent urged the Court to dismiss the application in its entirety for lack of jurisdiction. The Court, by a majority of seven votes to three, held that the provisions of articles 5(3) and 34 (6) of the Protocol, read together, it has no jurisdiction to hear the case instituted by Femi Falana, Esq (Applicant), against the African Union (Respondent).²⁸ The Court in its judgment stated, *inter alia*, that:²⁹

At this juncture, it is appropriate to emphasize that the Court is a creature of the Protocol and that its jurisdiction is clearly prescribed by the Protocol. When an application is filed before the Court by an individual, the jurisdiction of the Court *rationae personae* (by reason of the nature or position of the person or entity) is determined by Articles 5(3) and 34 (6) of the Protocol, read together, which requires that such an application will not be received unless it is filed against a state which has ratified the protocol and made a declaration. The present case, in which the application has been filed against an entity other than a state having ratified the Protocol and made the declaration, falls outside the jurisdiction of the Court.³⁰ Therefore the Court has no jurisdiction to entertain the application.

Similarly in the case of *Michelot Yogogombaye v The Republic of Senegal*³¹ the African Court on Human and Peoples' Rights held, *inter alia*, that the effect of the provisions of articles 5(3) and 34

(6) of the Protocol on the Establishment of the African Court on Human and Peoples' Rights is that '...direct access to the Court by an individual is subject to the deposit by the Respondent State of a declaration authorizing such a case to be brought before the Court'.³²

²⁸*Ibid* para 75.

²⁹*Ibid*.

³⁰*Ibid* para 73.

³¹Application No. 001/2006, para 34.

³²*Ibid*.

In the light of the cases of *Falana v African Union* (supra) and *Michelot Yogogombaye v The Republic of Senegal* (supra), it may be inferred that individual citizens of Nigeria and NGOs do not have the competence to file applications before the African Court on Human and Peoples' Right for purposes of seeking redress regarding the violation of the rights enshrined in the ACHPR 1981, African Charter on the Rights and welfare of the Child 1990,³³ Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa 2003,³⁴ and relevant regional human rights instruments in force and duly ratified by the country. This stand point is based on the fact that although Nigeria has duly ratified the Protocol, it is yet to make the requisite declaration that would otherwise empower the court to entertain such cases.

3.2 International Covenant on Civil and Political Rights, 1966

The International Covenant on Civil and Political Rights (ICCPR) 1966³⁵ generally provides a comprehensive universal framework for the promotion and protection of civil and political rights.³⁶ The fundamental premise underlying the treaty is enshrined in Article 10 of the ICCPR, which is to the effect that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.³⁷ The Convention mandates States Parties to ensure the equal right of men and women to the enjoyment of all civil and political rights enshrined therein.³⁸ In a nutshell, the ICCPR recognises a plethora of human rights. These rights include the right to life,³⁹ the right to freedom from torture and other cruel, inhuman or degrading treatment and punishment,⁴⁰ the right to be recognised as a person before the law,⁴¹ the right to liberty and security of person,⁴² the right to access to justice,⁴³ freedom from retroactive punishment,⁴⁴ right to freedom of thought, conscience and religion,⁴⁵ right to hold opinions and freedom of expression,⁴⁶ and right to peaceful assembly.⁴⁷ Other rights articulated in the ICCPR include the right to freedom of association with others,⁴⁸ right of men and women of marriageable age to marry and found a family,⁴⁹ right to protection of children,⁵⁰ and right of ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practice their own religion, or use their own language.⁵¹ It is

³³(adopted 1 July 1990, entered into force 29 November 1999). The Charter was signed by Nigeria on 13 July 1999, entered into force 23 July 2001.

³⁴(adopted 1 July 2003, entered into force 25 November 2005) The Protocol was signed by Nigeria 16 December 2003 and ratified on 16 December 2004.

³⁵(adopted 16 December 1966, entered into force on the 23 March 1976) in accordance with Article 49; New York; 999

UNTS 171; 61 L.M. (1967) 368. Nigeria acceded the ICCPR 1966 on 29 July 1963.

³⁶See the Preamble and Articles 1 to 58 of the ICCPR 1966.

³⁷Zehra F. Kabasakal Arat, *Human Rights World Wide: A Reference Handbook* (ABC-CLIO, Inc, 2006) 176.

³⁸ICCPR 1966, art 3.

³⁹ICCPR 1966, Article 6

⁴⁰*Ibid* article 7.

⁴¹*Ibid* art 16.

⁴²*Ibid* art 9.

⁴³*Ibid* arts 14 and 15.

⁴⁴*Ibid* art 15.

⁴⁵*Ibid* art 18.

⁴⁶*Ibid* art 19.

⁴⁷*Ibid* art 21.

⁴⁸*Ibid* art 22.

⁴⁹*Ibid* art 23.

⁵⁰*Ibid* art 24.

⁵¹*Ibid* art 27.

⁵²*Ibid* art 6(2).

pertinent to note that the foregoing rights are not absolute. For instance, the right to life may be restricted or limited in execution of the sentence of a court in countries which have not abolished death penalty.⁵² States Parties to the Convention are permitted to derogate from their obligations in time of public emergency which threatens the life of the nation.⁵³ However no derogation is permissible in respect of the right to life, freedom from torture, inhuman or degrading treatment or punishment, freedom from slavery and servitude, freedom from imprisonment on the ground of inability to fulfill a contractual obligation, freedom from retroactive punishment, right to recognition of as a person before the law, and right to freedom of thought, conscience and religion.⁵⁴ The ICCPR 1981 provides for the establishment of a Human Rights Committee (hereafter referred to as the Committee).⁵⁵ The Committee is empowered to receive and consider communications by a State Party to the effect that another State Party is not complying or fulfilling its obligations as required under the ICCPR. The Committee can only deal with a matter after all available domestic remedies have been exhausted or where the application and provision of remedies is unreasonably prolonged.⁵⁶ The Committee is also empowered to make general comments as it may consider appropriate to the States Parties. It may also transmit such comments to the Economic and Social Council along with copies of reports received from States Parties on measures they have adopted to give effect to the rights enshrined in the ICCPR and the progress made towards the enjoyment of those rights.⁵⁷

Nigeria acceded the ICCPR on the 29th day of July, 1993.⁵⁸ It is contended that having ratified the ICCPR, the treaty creates binding obligations on the part of Nigeria and other state parties.⁵⁹ However, the ICCPR 1966 does not have the force of law in Nigeria. This is premised on the provision of the CFRN, 1999, as amended, which stipulates 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'.⁶⁰ Thus, in the case of *Abacha v Fawehinmi*,⁶¹ the Supreme Court held that no treaty entered into by the government of Nigeria shall have the force of law except to the extent to which the treaty has been enacted into law by the National Assembly.⁶² Nonetheless, it is critical to point out that the national constitutions of some countries including the CFRN, 1999, as amended, draws inspiration from the ICCPR as a result of the fact that the fundamental human rights provisions in chapter 4 of the CFRN may be gleaned as a recognition and 'part fulfillment of the International obligation of the states to take joint and separate action in cooperation with the UN for the achievement of universal respect for, and observance of human rights and fundamental freedoms'.⁶³

⁵²*Ibid* art 4.

⁵³*Ibid* art 4 (1) (2).

⁵⁴*Ibid* art 4 (1) (2).

⁵⁵*Ibid* art 28.

⁵⁶*Ibid* art 41 (1) (a) (c).

⁵⁷*Ibid* art 40 (4).

⁵⁸University of Minnesota, 'Ratification of International Treaties Nigeria'. Available at <<http://www.umn-eduhumants/research/ratification-nigeria.html>> accessed 2 July 2014.

⁵⁹CJD Dakas, 'Nigeria's obligation under the International Convention on the Rights of Persons with Disabilities' In Epiphany Azinge and Chinyere Ani (eds) *The Rights of Persons with Disabilities* (Nigerian Institute of Advanced Legal Studies press, 2011) 211.

⁶⁰CFRN, 1999, as amended, s12(1).

⁶¹(2000) FWLR 533 at 585.

⁶²*Ibid*.

⁶³J. A. Dada, 'Human Rights under Nigerian Constitution: Issues and Problems' In International Journal of Humanities and Social Science'. Available at > accessed 29 July 2014.

(First) Optional Protocol to the International Covenant on Civil and Political Rights 1966 The (First) Optional Protocol to the International Covenant on Civil and Political Rights 1966⁶⁴ provides that in order to achieve the purposes of the ICCPR 1966 and enhance the implementation of its provisions, it would be necessary to enable the Human Rights Committee (Committee) to receive and consider communications from individuals claiming to be victims of violations of the rights enshrined in the ICCPR.⁶⁵ The establishment of the (First) Optional Protocol to the ICCPR (First Optional Protocol) is necessitated by the fact that the ICCPR 1966, which is the principal treaty, only makes provisions for States Parties to maintain complaints before the Committee in the event that their rights are violated by other States Parties or Party as the case may be. It did not make provision for individuals to maintain such claims. Accordingly, article 1 of the (First) Optional Protocol stipulates that:

A State Party to the Covenant (ICCPR) that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the present Protocol.

Thus, the (First) Optional Protocol permits individuals who claim that any of their rights enshrined in the ICCPR have been violated and have exhausted all available domestic remedies to submit a written communication to the Committee for consideration.⁶⁶ Where an individual submits a written communication to the Committee, the Committee will bring it to the attention of the State Party to the Protocol alleged to have violated any provision of the ICCPR 1966.⁶⁷ Upon receipt of the communication, the receiving state is obligated to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been provided or put in place by the State concerned.⁶⁸ Thereafter, the Committee is required to consider communications received in the light of all written information available to it by the individual and by the State Party involved.⁶⁹ The Committee will then examine the communications and forward its views to the State Party and the individual concerned.⁷⁰ Afterwards, the Committee is required to include it in its annual report which must be submitted to the General Assembly of the United Nations, through the Economic and Social Council in line with the provisions of article 45 of the ICCPR 1966.⁷¹

However, the Committee, like many others established by the international treaties, is not a court with the power of binding decisions on the merits of cases.⁷² The foregoing presupposes that there is no elaborate mechanism for the enforcement of recommendations or suggestions or decisions made by the Committee within the purview of the extant provisions of the ICCPR and its (First) Optional Protocol. Furthermore, it is pertinent to note that Nigeria has neither signed nor ratified

⁶⁴(adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁶⁵Preamble of the (First) Optional Protocol to the ICCPR 1966.

⁶⁶(First) Optional Protocol to the ICCPR 1966, art 2.

⁶⁷*Ibid* art 4 (1).

⁶⁸*Ibid* art 4 (2).

⁶⁹*Ibid* art 5 (1).

⁷⁰*Ibid* art 5 (3) (4).

⁷¹*Ibid* art 6.

⁷²Malcom N. Shaw, *International Law* (7th edn Cambridge University Press, 2014) 231.

the (First) Optional Protocol to the ICCPR 1966.⁷³ It is trite law that a state cannot be bound by a treaty in which it has not given its consent. This potent principle of law resonates with the Latin maxim *pacta tertiis nec nocent nec prosunt* (a treaty binds the parties strictly, it does not create legal obligations for a third state). The maxim unequivocally reflects the tenets of customary international law.⁷⁴ In the case of *Free Zones Upper Savoy and the District of Gex Case (France v Switzerland)*⁷⁵ the Permanent Court of International Justice (PCIJ), held, inter alia, that the provision of article 435 of the Treaty of Versailles is not binding on Switzerland as the country is not a party to that specific treaty provision, except to the extent to which the country has consented to it or agreed with it. This principle is in accordance with the provision of article 34 of the Vienna Convention on the Law of Treaties 1969⁷⁶ which states that 'a treaty does not create either obligations or rights for a third state without its consent.' This is also congruent with the provision of article 34 of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations 1986,⁷⁷ which provides that 'a treaty does not create either obligations or rights for a third State or third organization without the consent of that State or that organization'.

Against this backdrop, Nigeria is not bound by the provisions of the (First) Optional Protocol to the International Covenant on Civil and Political Rights 1966 having neither signed nor ratified the treaty. The prescriptive implication of this is that individual citizens of Nigeria are precluded from filing complaints before the Human Rights Committee and it is bereft of jurisdiction to receive and consider communications from individuals claiming to be victims of violations of the rights enshrined in the ICCPR.

3.3 Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of Death Penalty 1990

The Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of Death Penalty (Second Optional Protocol to the ICCPR) 1990⁷⁸ declares that the abolition of death penalty contributes to the enhancement of human dignity and progressive development of human rights and that all measures of abolition of death penalty should be considered as progress in the enjoyment of the right to life.⁷⁹ Accordingly, article 1(1) of the Second Optional Protocol to the ICCPR states that: 'No one within the jurisdiction of a State Party to the present Optional Protocol shall be executed.' Each State Party is obligated to take all necessary measures to abolish death penalty within its jurisdiction.⁸⁰ States Parties are mandated to include in the reports they submit to the Human Rights Committee information on the measures that they have taken to give effect to the Second Optional Protocol to the ICCPR.⁸¹ Individual citizens of States Parties to the (First) Optional Protocol to the International Covenant on Civil and Political Rights 1966 are at liberty to file petitions or complaints regarding the violation of the rights

⁷³ See Generally the United Nations Treaty Collections <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=4&> accessed 9 December 2020. As of the time of writing this article Nigeria is conspicuously excluded as a party to the Protocol.

⁷⁴ David Harris, Cases and Materials on International Law (7th edn Thomson Reuters (Legal) Limited, 2010) 686.

⁷⁵ (1932) PCIJ Reports, Series A/B No. 46 cited in David Harris, Cases and Materials on International Law (7th edn Thomson Reuters (Legal) Limited, 2010) 684-685.

⁷⁶ (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁷⁷ (adopted 21 March 1986, yet to enter into force as of 9 December 2020) A/CONF.129/15.

⁷⁸ (adopted 15 December 1989, entered into force 11 July 1991) UNGA/RES/44/128.

⁷⁹ See Preamble of the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of Death Penalty 1990.

⁸⁰ *Ibid* art 1(2).

⁸¹ *Ibid* art 3.

enshrined in the Second Optional Protocol to the ICCPR before the Human Rights Committee and it has the competence to receive and consider communications from individuals unless the State Party to the Second Optional Protocol to the ICCPR has made a statement to the contrary at the moment of ratification or accession.⁸²

A meticulous perusal of the status of States under the auspices of the United Nations Treaty Collection Series manifestly indicates that Nigeria has neither signed nor ratified the Second Optional Protocol to the ICCPR.⁸³ Death penalty is currently enshrined in Nigerian statutes. The CFRN, 1999, as amended recognizes death penalty.⁸⁴ The mode of executing death sentence in Nigeria is contained in some statutory provisions including the Criminal Procedure Act,⁸⁵ the Criminal Procedure Code,⁸⁶ and the Administration of Criminal Justice Act (ACJA) 2015.⁸⁷ Section 367 (2) of the Criminal Procedure Act provides as follows:

The sentence of the Court upon you is that you be hanged by the neck until you be dead and may the Lord have mercy on your soul.

This is in tandem with section 273 of the Criminal Procedure Code which states that:

When a person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

Similarly, section 402 of ACJA, 2015, stipulates thus:

(1) Punishment of death is inflicted by hanging the convict by the neck till he is dead or by lethal injection.

(2) Sentence of death shall be pronounced by the court in the following form: 'the sentence of the Court upon you is that you be hanged by the neck until you are dead or by lethal injection.

By and large, there are diametrically opposing polemics of abolitionists of death penalty and anti-abolitionists of death sentence. On the one hand, the standpoint of abolitionists is that capital punishment is a barbarous mode of punishment in an otherwise humane penal system. Apologists of this viewpoint have asserted that it is unnecessary as a deterrent to the commission of crime and it is, in many respects, dangerous and harmful taking into account the possibility of injustice or miscarriage of justice during criminal proceedings.⁸⁸ On the other hand, the anti-abolitionists have averred that it is less inhuman than the proposed alternative of life imprisonment. They contend that death penalty is indispensable as a deterrent and the danger of miscarriage of justice is minimal in an efficient administration of criminal justice system.⁸⁹ Conversely, there have been vehement arguments against the imposition of death sentence on the ground that it undermines fundamental human rights norms. In the case of *Furman v Georgia*⁹⁰ the United States Supreme Court held that capital punishment, as administered then, violated the eighth amendment's prohibition of cruel and

⁸² *Ibid* art5.

⁸³ See United Nations Treaty Collections , 'Second Optional Protocol to the ICCPR, Aiming at the Abolition of Death Penalty' <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-12&chapter=4> accessed 10 December 2020.

⁸⁴ CFRN, 1999, as amended, s 33 (1)(2).

⁸⁵ Cap 43 Laws of the Federation of Nigerian 1958, 367(2).

⁸⁶ Cap 20 Laws of Northern Nigeria 1960, s273.

⁸⁷ ACJA, s402.

⁸⁸ M. A Owode, *The Law of Homicide in Nigeria* (Obafemi Awolowo University Press Limited, 1990)291.

⁸⁹ *Ibid*.

⁹⁰ (1972) 408 US 238.

unusual punishments. Justice Stewart accordingly stated that:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual...if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it on one side. I simply conclude that the eighth and fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed.⁹¹

In the Nigerian context, the CFRN, 1999, as amended, provides that every individual is entitled to respect for the dignity of his person.⁹² However, it would appear that there is a patent contradiction between the provisions of right to life guaranteed under section 33 of the CFRN, 1999, as amended, and the right to human dignity ordinarily guaranteed by section 34 of the CFRN, 1999, as amended, taking into account, the death sentence recognized under the provisions of sections 367 (2) of the Criminal Procedure Act, 273 of the Criminal Procedure Code, and section 402 of ACJA, 2015. Section 34(1) (a) of the CFRN, 1999, as amended, states that: 'no person shall be subjected to torture or to inhuman or degrading treatment.' The Court of Appeal in the case of *Uzoukwu v. Ezonu II*⁹³ defined the term 'inhuman treatment' as used in section 31 of the CFRN, 1979, (now section 34 of the CFRN, 1999, as amended) as a 'barbarous, uncouth and cruel treatment; a treatment which no human feeling on the part of the person inflicting the barbarity or cruelty'.⁹⁴ Statutory provisions such as sections 367 (2) of the Criminal Procedure Act, 273 of the Criminal Procedure Code, and section 402 of ACJA, 2015, which prescribes death penalty glaringly depicts the cruelty and inhumanity of death penalty.⁹⁵ To all intents and purposes, it is respectfully contended that death penalty is portentously antithetical to human rights. The hackneyed contention to the effect that the rate of capital offences would have increased but for the use of death sentence has been categorically refuted.⁹⁶ After an in depth analysis of the administration of death penalty as a method of punishment in Nigeria in relation to capital offences, it has been tellingly indicated that there is no evidence in support of the efficacy of death penalty in Nigeria.⁹⁷

The international trend towards the abolition of death sentence is evident. Since September 2018, 121 States around the world have voted in favour of General Assembly resolution 73/175 to place a moratorium on the utility of death penalty in the administration of criminal justice.⁹⁸ In its resolution 36/17, the Human Rights Council requested the Secretary –General of the United Nations (UN) to dedicate the 2019 supplement to his *quinquennial* (five yearly) report on capital punishment to the consequences of the imposition and use of death sentence on the enjoyment of human rights. Accordingly the Secretary General of the UN recommended that all measures should

⁹¹*Ibid* 309-310.

⁹²CFRN, 1999, as amended, s 34 (1).

⁹³[1997] 6 NWLR (pt 200) 708.

⁹⁴*Ibid*.

⁹⁵See Inam Wilson 'Is Death Penalty Unconstitutional?' [1998] (1)(4) Huri-Laws News Letter.

⁹⁶A. A. Adeyemi, 'Administration in Nigeria: Sentencing' in Yemi Osinbajo (ed), Law Development and Administration in Nigeria (Federal Ministry of Justice, 1990) 116-117.

⁹⁷*Ibid*.

⁹⁸Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary General on Capital Punishment and the Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing Death Penalty at the Human Rights Council, Forty-Second Session, 9-27 September 2019, Agenda Items 2 and 3.A/HRC/42/28, 28 August 2019;1-15.

be taken towards abolishing death penalty as such 'measures constitute progress in the protection of the right to life and are important steps towards the universal abolition of the death penalty.'⁹⁹

Given the fact that Nigeria has neither signed nor ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, it is not bound by its provisions. The implication of this is that individuals cannot file complaints regarding the imposition of death penalty and the Committee on Human Rights inexorably lacks the competence to receive and consider communications from beleaguered Nigerian nationals as envisaged by the provisions of The (First) Optional Protocol to the International Covenant on Civil and Political Rights 1966 and the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of Death Penalty 1990.

4. Towards a Paradigm Shift to Effective Application and Implementation of International Human Rights Norms in Nigeria and Beyond

The ACHPR 1981 and other regional human rights instruments as well as the ICCPR 1966 and its optional protocols provide a robust international framework for the promotion and protection of human rights. However, in the light of the glitches and quandaries regarding the implementation and enforcement of these instruments especially before judicial and quasi-judicial bodies such as the African Court on Human and Peoples' Rights and the Human Rights Committee, it has become expedient to recalibrate the Nigerian legal regime in order to foster a more effective, sustainable, accountable and transparent regulatory environment for the realisation of the rights ordinarily guaranteed by international human rights instruments such as the ACHPR and allied regional human rights instruments and the ICCPR 1966. Accordingly, the following recommendations are hereby presented for reforms and policy consideration.

- i. Nigeria should make the requisite declaration that would otherwise give individual Nigerian citizens the latitude to file cases in the African Court on Human and Peoples' Rights, after exhausting domestic remedies, and empower the court to entertain such cases in accordance with the provisions of articles 5(3) and 36 (4) of the Protocol on the Establishment of the African Court on Human and Peoples' Rights.
- ii. The Federal Republic of Nigeria is essentially a dualist nation. Although Nigeria has duly ratified the ICCPR 1966, it is implored to take a step further by domesticating the treaty in accordance with the provisions of section 12 (1) of the CFRN, 1999, as amended, to enable it attain the force of law in the country.
- iii. The Committee on Human Rights should be empowered and authorized by States Parties to the ICCPR, through a further amendment of the ICCPR or the establishment of an additional Protocol, to make legally binding decisions on the merit in respect of matters presented and calibrated to function as an international court on human rights.
- iv. Nigerian government is entreated to sign and ratify the (First) Optional Protocol to the International Covenant on Civil and Political Rights 1966. The prescriptive implication of doing so is that individual citizens of Nigeria would be allowed to file complaints before the Human Rights Committee and it would be able to assume jurisdiction to receive and consider communications from individual Nigerians claiming to be victims of violations of the rights enshrined in the ICCPR.
- ii. This article espouses the view that death penalty is antithetical to human rights norms and
- iii. _____

⁹⁹ *Ibid.*

values. It has been shown that there is no evidence in support of death penalty as a method of punishment in the administration of criminal justice in Nigeria. It is therefore recommended that death penalty should be expunged from the entire Nigerian statutes.

iv. As a corollary to the suggestion in paragraph (5) above, Nigeria is implored to sign and ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of Death Penalty so as to enable Nigerian citizens whose rights to life and human dignity have been violated to seek remedies at domestic courts and file complaints before the Human Rights Commission after exhausting domestic remedies.

5. Conclusion

The ACHPR 1981 and other regional human rights instruments as well as the ICCPR 1966 and its optional protocols provide a robust international framework for the promotion and protection of human rights. However, in the light of the fact that Nigeria mainly operates a dualist legal system, such instruments are not applicable as a matter of course. Due process must be followed by way of ratification and transformation to the domestic milieu. For instance, individual citizens of Nigeria and NGOs do not have the competence to file applications before the African Court on Human and Peoples' Rights for purposes of seeking redress regarding the violation of the rights enshrined in the ACHPR 1981 owing to the fact that Nigeria is yet to make the requisite declaration that would otherwise give individual Nigerian citizens the latitude to file cases in the African Court on Human and Peoples' Rights and empower the court to entertain such cases in accordance with the provisions of articles 5(3) and 36 (4) of the Protocol on the Establishment of the African Court on Human and Peoples' Rights. Similarly, Nigeria has neither signed nor ratified the (First) Optional Protocol to the International Covenant on Civil and Political Rights 1966 and the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of Death Penalty 1990. The prescriptive implication of this state of affairs is that individual Nigerian nationals are precluded from filing complaints before the Human Rights Committee and the Committee lacks jurisdiction to receive and consider communications from individual Nigerians claiming to be victims of violations of the rights enshrined in the ICCPR and the Optional Protocols. In view of the foregoing glitches and quandaries associated with the implementation and enforcement of these instruments especially before judicial and quasi-judicial bodies such as the African Court on Human and Peoples' Rights and the Human Rights Committee, this article makes a case for the ratification of such instruments by Nigeria and canvasses for the recalibration of the Nigerian legal regime in order to foster a more effective, sustainable, accountable and transparent regulatory environment to engender the realisation of the rights ordinarily guaranteed by international human rights instruments for the benefit of Nigerian nationals.