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HUMAN RIGHTS INSTRUMENTS FOR THE PROTECTION OF THE RIGHT TO LIFE IN NIGERIA

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ABSTRACT

This work discusses various human rights Instruments fashioned out legally for the protection of the right to life in Nigeria. It takes off with the Constitution of the Federal Republic of Nigeria, 1999 as amended coupled inter alia with some fundamental provisions of the Nigeria Criminal Code, Penal Code, international instruments with some Protocols and supported with relevant decided cases where necessary. It also discusses extra – judicial killings and state murder in the guise of state security. It includes with the finding that most of the barbaric practices cited hereto, have been abolished in many global civilized democracies. It dwells extensively on section 34 of the Nigeria 1999 Constitution which makes provisions for the respect for the right of dignity of human person, both as a prisoner or free man. It holds that Nigeria security operatives and government have an important role to play in this regard. Further, it posits that law courts in all global jurisdictions have never failed to pronounce on, and vehemently condemns man's inhumanity to man under whatever guise. The implementation the paper draws the curtain, is a joint responsibility.

Keywords: Constitution, Right to life, Nigeria.

1. INTRODUCTION

It is common practice that in the discussion of human rights, one finds, in contemporary statutes, such as Acts, Constitutions, and other international instruments, numerous terms and concepts, namely, fundamental human rights, fundamental freedoms, civil liberties and civil rights, individual human rights as well as people's rights.[1] Among these various terms, the term 'human rights' seems to be the most encompassing, attributable to individuals, groups of individuals, peoples and the whole mankind. It is a fact that there is no consensus on the definition of 'human rights' among legal and political writers.[2] Legal instruments often cite lists of rights which they are supposed to promote, secure and protect. A good example of such legal instruments to mention one out of a long list of others is the

[1] Gasiokwu, M.O.U., Human Rights History, Ideology and Law, (Jos: Feb Anieh Nig. Ltd., 2003) p.1.
[2] Ibid, at p.2

constitution of the federal republic of Nigeria, 1999 (as amended).[3] The paper addresses Human Rights Instruments for the Protection of the Right to Life. It commenced with the Constitution of the Federal Republic of Nigeria, 1999 with specific focus on the right to life, limitations of the right to life, some statutory provisions of the Criminal Code, Penal Code and Sharia Penal Code attracting the death penalty in Nigeria, security of life by the state, right to dignity of human person, delay in the execution of condemned convicts in Nigeria, the fundamental rights (Enforcement procedure) rules, supported by case law. Thereafter, it discussed the international instruments for the Protection of the Right to Life in Nigeria which include: The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), Customary International Law, African Regional Instruments for the Protection of the Right to Life in Nigeria, Protocol to the African Charter on Human and People's Rights on the Rights of Women in African and the Cairo Declaration on Human Rights in Islam.

2. MUNICIPAL HUMAN RIGHTS INSTRUMENTS FOR THE PROTECTION OF THE RIGHTS TO LIFE

The major municipal human rights instrument for the protection of the right to life in Nigeria is the Constitution of the Federal Republic of Nigeria 1999 (as amended) which is the grundnorm. This is so, because of its supremacy.[4] Every other law takes its source from it and therefore, must not in any way be inconsistent with any of its provisions failing which such law becomes null and void to the extent of its inconsistency. [5]

2.1 The Constitution of the Federal Republic of Nigeria, 1999 (as amended)

Chapter IV of the Constitution provides for the fundamental rights of which the Right of Life is the Chief.[6] All the rights enumerated are very fundamental but the most notable and relevant to this paper are the right to life and the right to dignity of the human person for the main reason that all other rights are dependent on the right to life.

2.2 The Right to Life

The right to life is the most fundamental, and supreme right which human beings are entitled to have and without which the protection of all other human rights becomes either meaningless or less effective.[7] The right of each person to life, according to Omaka,[8] is something that is intrinsic to his status as a human being and which is a necessary concomitant to human existence. [8] the preservation of the right to life is one of the main responsibilities of any modern state hence numerous provisions of national legislation guarantee enjoyment of

[3] Chapter IV Sections 33 to 43 of the 1999 Constitution of Nigeria (as amended) contain a long list of protected rights though, the relevant ones to this paper are the right of life under S. 33 (1), (2) (a), (b), (c) and S. 34 (1) (a) respectively.

[4] S.1 (1), Constitution of Nigeria 1999 (as amended).

[5] S.1(3), ibid.

[6] S. 33 (1), other rights provided for in the constitution include: rights to dignity of human person, right to dignity of human person, right to personal liberty, right to fair hearing, right to private and family life, right to freedom of thought, conscience.

[7] Menghistus, F., "The Satisfaction of Survival Requirements'' in Ramcharan B.G. (ed), The Rights to Life in International Law (1985) p. 63; cited by Omaka, C.A. Rights to Life and Dignity of Human Person, in Okpara, O., Human Rights Law and Practice in Nigeria, vol. 1, (Enugu: Chengo Ltd, 2005) p. 112.

[8] Omaka, Ibid.

this right. It should however be noted that Nigeria still retains the death penalty in spite of the fact that a majority of countries worldwide have abolished it.[9] Section 33 of the 1999 constitution provides as follows:

- 33 (1) Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.
- 33 (2) A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the and religion, right to freedom of expression and the press, right to peaceful assembly and association, right to freedom of movement, right to freedom of discrimination, and right to acquire and own movable property anywhere in Nigeria use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary-
    - (a) for the defense of any person from unlawful violence or for the defense of property;
    - (b) in order to effect lawful arrest or to prevent the escape of a person lawfully detained; or
    - (c) for the purpose of suppressing a riot, insurrection or mutiny.

Hence, the exceptions or limitation clauses to section 33(2) (a), (b) and (c) of the Constitution means that any offender found guilty under the clauses shall be punished with death penalty, it becomes necessary to enumerate the offences that attract the death penalty under the Nigeria law. These offences include: murder or culpable homicide punishable with death, treason[10]; treachery[11]: giving false evidence leading to the conviction and execution of an innocent person;[12] armed robbery; trial by ordeal resulting in death;[13] abetment of suicide by a person below 18 years of age or by an insane or intoxicated person;[14] adultery by a Muslim and allied offences such as incest or rape; and aiding the enemy and cowardly behaviour by members of the armed forces. It is pertinent to note that though, section 33(1) guarantees the right to life, the said right is not absolute. Therefore, the right to life is not fully protected as long as the limitation or exception clauses are retained, However, the researcher agrees with the obvious fact, that no right is absolute, yet, it is submitted that the exceptions under section 33(2)(a)(b) and (c) of the constitution are clearly gaps that can be exploited by the government to perpetually retain the death penalty in the status books of Nigeria. This will continue to be a threat to the right of life in Nigeria.

Over-zealous government security operatives have been exploiting these limitation clauses with impunity in Nigeria through extra-judicial killings. A few examples will suffice. A policeman attached to the Bayelsa State Police Command recklessly killed a 20-year old man at a check-point, on Sani Abacha Express Way Abonnema, on the excuse that the deceased refused to stop when ordered to do so .[19] It is submitted that this is an obvious case of intentional deprivation of the deceased's right to life, contrary to section 33 (1) of the

[9] Joel, O.A., "Facts and Figures on Death Penalty", 2007 www.amnesty.org/en/death-penaltynumbers (accessed on 28 march, 2013); see also 'The Death Penalty in African' 4 African Human Rights Law Journal vol. 1, p. 14, (2004). Some of the countries that have abolished the death Penalty include: Cape Verde (1981), Mozambique (1990), Namibia (1990), Sao Tome and Principle (1990), Angola (1995), South African (1997), Cote D'ivoire (2000), Senegal (2004), Rwanda (2007) and Burundi (2009).

[10] Ss. 319 and 221 of the criminal code and penal code, cap. C38 and Cap. P3 LFN 2004 respectively.

[11] Ss. 132, 133 and 129 respectively of the Zamfara Sharia Panel Code Law, 2000.

[12] Odiegwu, M.,Policeman Mathew Egheghe to Die by Hanging, The Nations, Wednesday January 22, 2014, P.65.

[13] Adebisi,O.,Police Chief Arraigned for Murder. The Nations, Thursday March 24, 2014, p. 58.

[14] Precious, D. N100 Bribe: Policeman to Die by Hanging, The Nations, Tuesday, February 25, 2014, p.61.

Constitution more so as he was not arrested, tired and sentenced to death by a court of competent jurisdiction in Nigeria.

Similarly, in 2013, a police officer attached to one of the Police Stations, Agege Lagos arbitrarily shot dead, a man during the January 9 fuel subsidy removal peaceful mass protest. His killing was not in defence of any person from unlawful violence or for the defence of property. It was equally not done in order to execute a lawful arrest or to prevent an escape of a person lawfully detained. The deceased was intentionally deprived of his right life, contrary to section 33(2) (b) of the 1999 Constitution. On another occasion, a police corporal willfully shot and killed one man in Port Harcourt, on a very trivial excuse that the deceased resisted arrest whereas, the actual cause of his killing was his refusal to offer N100 bribe allegedly, forcefully demanded by the policeman. Definitely, his killing was not for the purpose of suppressing a riot, insurrection or mutiny, but a flagrant violation of section 33(2) (c) of the 1999 constitution.

It is, therefore, opined that the exceptions or limitation clauses (the provisions) to section 33(2), (a) (b), (c) of the constitution and the death penalty provisions under the various statute books of Nigeria like the Criminal Code. Penal Code and the Sharia Penal Code to be critically examined or amended by the National Assembly and the concerned State Assemblies respectively in order to enhance unqualified right to life under section 33(1) of the 1999 constitution. The paper shall now examine some judicial pronouncements to buttress the argument.

It is pertinent to point out that pursuant to the provision of section 33(1) of the 1999 constitution, a person who has been found guilty of an offence punishable with death by a court of competent jurisdiction in Nigeria can be executed but not when such a person has appealed against the judgment.[15] In *Bello's Case*, he was executed on the directive of the Oyo State Government in spite of his pending appeal at the Court of Appeal. The Supreme Court awarded damages against the Oyo State Government for ordering Bello's execution while his appeal was yet to be heard. It is submitted that whatever amount of damages awarded against the Oyo State Government cannot resurrect the deceased, Bello. The awarded damages were like medicine after death. The execution of the convict while his appeal was pending amounted to a violation of right to life and an abuse of the rule of law, more so as it is trite, that an appeal in such circumstance ought to have operated as a stay of execution. More importantly, it is opined that if death penalty was not constitutional in Nigeria and the provision of the right to life was not qualified under Section 33(1) of 1999 constitution, the Oyo State Government could not have exploited the gap to order the execution of Bello especially during the pendency of his appeal.

In the case of Okoro v. The State,[16] The supreme court held that death penalty pronounced on Okoro was in line with the provisions of section 30(1) of the 1979 Constitution (now section 33(1) of the 1999 Constitution (as amended). It is agreed that the interpretation of the provision under examination by the supreme Court is unassailable, yet, it is argued that the constitutionality of death penalty in Nigeria and the qualification of the right to life under section 33(1) and the limitation clauses under section 33(2), (a), (b) and (c) of the 1999 Constitution have made the right to life not to be fully efficacious. In order to make it meaningful, the death penalty should be abolished to enable the right to life provision to be fully meaningful, more so as the death penalty has not proved to be more effective in reducing the high rate of crimes in Nigeria than life imprisonment. A good example of this fact is that despite that armed robbery attracts penalty in Nigeria, the spate of the commission of the offence has not reduced. This shows that the punishment is not effective as envisaged.

[15] Bello v. The State (1986)12 SC I.
[16] (1998) 12 SCNJ 84.

It is agreed that the use of force may sometimes be necessary in order to achieve the objective of the limitation clauses of section 33(2) of the 1999 constitution, yet, it is believed that only proportionate force could be justified. Thus, in the case of Okonkwo v**.** The State,[17] the appellant and the 1st accused lived in the same compound. The deceased on arriving very late in the night, forced himself into the premises of the 1st accused and when he was challenged by the latter as to whom he was, he pulled out his dagger at the 1st accused. The 1st accused took the deceased for a member of an armed robbery gang who came to attack him. He then raised an alarm and grabbed the deceased in an attempt to disarm him. During the struggle, other members of the compound came out and joined in beating the deceased and later overpowered him, tied him, and kept him within the compound, while the 1st accused went to lodge a complaint of armed robbery with the police. The police came and dumped the body of the deceased in the boot of their car. They then drove back to the station and deposited the body in a mortuary. At the end of the trial, the trial court found the appellant and the 1st accused guilty of murder and sentenced them to death by hanging. On appeal, in unanimously allowing the appeal, the court held inter alia that section 30 of the 1979 constitution (now section 33(2)(a) of the 1999 Constitution, (as amended) allowed a person to use such force as is reasonably necessary for the defense of his property. The court considered the force used in the case as reasonably necessary in the circumstances.

The facts of the case, having unarguably disclosed that the deceased was already over-powered and duly arrested before he was beaten to death, the decision of the court appears faulty, the reason being that the consequent force used after he had been subdued, cannot by any imagination be said to be justified. It is submitted that the deceased ought to have been handed over to the police, in tandem with the requirement of due process of law. The deceased was denied his constitutional right to life as he was disallowed the right to be heard by a court of law before he was killed.

In the case of Ahmed v. The State,[18] the Court of Appeal rejected a similar defence relied upon by the appellant that he acted in self-defence of his property. The court agreed that though, he acted in defence of his property, the force used and the weapon employed was out of proportion more so as the attackers were unarmed. This research aligns with the well-considered decision of the court of Appeal, because it is in line with the established criminal law principle of proportionality and also opines that the deceased persons were denied their right to life as provided for under section 33(1) of the 1999 constitution (as amended).

2.3 Security of Life by the State

It is necessary to consider whether section 33(1) of the 1999 Constitution of Nigeria merely imposes a negative obligation on the state not to take life or, whether it imposes any positive obligation on state agencies to act to save life. The European Commission on Human Rights (ECHIR) has indicated that similar provision in the European Convention on Human Rights imposes obligations on state to take appropriate steps to safeguard life. This will for instance, entail taking appropriate steps to promote security and to prevent murder and other crimes threatening life. The Commission held that states are not duty bound to provide bodyguards, indefinitely, to protect the lives of people who fear that they are likely to be attacked.[19] Of course, the doctrine of the rule of law requires that there must be effective government capable of maintaining law and order. It is opined that the right to life requires states, not only to abstain from taking life, but also to take positive steps to protect life. The

[17] (1998) 4 NWLR 143 CA.
18 (1998) 5 NWLR 493 C.A
[19] Xv, Ireland (6040/73) CD 44, 121 European Commission on Human Rights.

United Nations Human Rights Commission has noted that the expression "inherent right to life" cannot properly be understood in a restrictive manner and the protection of this right requires that measures be undertaken to reduce infant mortality, to increase life expectancy and to eliminate malnutrition and epidemics. The commission also considers that the right to life includes a duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of lives.[20] The right to life has been so respected in many jurisdictions that any thin that threatens a person's means of livelihood, is considered a violation of this right. *In Olga Tellis V. Bombay Municipality*,[31] the Supreme Court of India held that an important facet of the right to life is the right to livelihood because; no person can live without the means of living if you deprive a person from livelihood, you have deprived him of his life.[21] The research aligns with the above mentioned assertion of the Supreme Court of India and expects African countries particularly Nigeria to emulate same.

3. RIGHT TO THE DIGNITY OF HUMAN PERSON

Section 34(1) of the 1999 constitution provides inter alia: Every individual is entitled to respect for the debility of his person and accordingly: (a) No person shall be subjected to torture or to inhuman or degrading treatment. According to Omaka,[22] the above provisions now cover the former provisions on inhuman treatment, slavery and forced labour, which existed before the Nigerian constitution of 1960.[23] Supporting the provision of section 34(1) of the 1999 Constitution of Nigeria, the Indian Supreme Court has held that the right to life includes the right to live with human dignity and all that goes with it, including the bare necessities of life such as adequate nutrition, clothing, shelter, facilities for reading, writing and expressing oneself.[24] In *Rajasthan Kishan Sangthan v. State of Rajasthan,*[25] the Indian Supreme Court equally held that a person, even during lawful detention is entitled to be treated with dignity. It added that the right to be treated with human dignity is provided for under Articles 21 of the Indian Constitution which guarantees the right to life. Though, these cases are foreign, it is submitted that, they are very relevant to the right to life and the right to the dignity of human person enshrined in sections 33(1) and 34(1) of the 1999 constitution, more so, as they enrich the literature on the topic of this dissertation. On whether death penalty amounts on inhuman or degrading treatment, Ogbu and Nwabueze[26] has pungently argued that the death penalty, viewed as retribution for murder, may not be cruel from the constitutional point of view, but it is inhuman to terminate human existence by killing, and the fact that it is inflicted as a punishment for crime does not make it less so.

The counsel for the appellant in the case of Onuoha Kalu v. The State[27] toed similar line of argument. In March, 1981, Kalu was charged with the offence of murder punishable under section 319(1)[28] and arraigned before High Court of Lagos State. He was found guilty as charged at the close of hearing. Now, as the appellant, he appealed to the Court of Appeal and his appeal was unsuccessful. He further appealed to the Supreme Court and the Court upheld the conviction. Iguh J.S.C noted:

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[20] Ibid.
[21] (1968) A.I.R. (Sup. Ct) 186.
[22] A.I.R.I 86 Ct (App. 7).
[23] Omaka, C.A., op. cit., in Human Rights Law and Practice in Nigeria, Vol. 1, fn. 7, p. 126.
[24] Akande, J.O. Introduction to the Constitution of Nigeria, (Ibadan: Sunshine Publishers, 2000) p. 30.
[25] AIR 1989 Rajasthan I.O. Reported also in (1989) CLB, 1177.
[26] B.O. The Presidential Constitution of Nigeria (London: C. Hurst and Co., 1981) p. 411
[27] (1998) 13 NWLR (Pt. 509-659) p. 531.
[28] Criminal Code Cap 31 Laws of Lagos State of Nigeria, 1973.

> Upon a careful perusal of the various feign authorities to which our attention was drawn by the appellant, the opinion that the death penalty per se amounts to torture, inhuman and degrading treatment and, therefore, intrinsically unconstitutional seems to me a minority view…. If qualified, the death penalty was, in the main, held to be constitutional. If unqualified, however, the death penalty was rightly in my view, declared to be unconstitutional.

His lordship Iguh, JSC thereafter, reviewed some decisions from foreign jurisdictions on the same subject matter. Thus, in *Mbushu and Anor v. The Republic,*[29] the Tanzania Court of Appeal held that although, the death penalty is a form of cruel, inhuman and degrading treatment, it was nevertheless constitutionally permissible, having regard to the qualified nature of the right to life as entrenched in the Tanzanian Constitution. In contradiction to the Tanzanian decision, the Constitutional Court of South African in The State v. Makwanyane and Anor,[30] held that the death penalty violated the constitutional protection of freedom from cruel, inhuman and degrading treatment under section 11(2) of the South African Constitution and was in consequence invalid and unconstitutional.[31] It is submitted that in comparative analysis. The Tanzanian Constitution on the subject matter, is on all fours with the provision of section 33(1) of the 1999 Constitution of Nigeria, which qualified the right to life and thereby permitting death penalty in Nigeria. This study prefers the decision of the South African Constitutional Court in Makwanyane and proposes that National Assembly of Nigeria amend section 33(1) and (2)(a)(b) and (c) of the 1999 Constitution, respectively to be in tandem with section 11(2) of the South African Constitution, where death penalty is unconstitutional.

3.1 Delay in Execution of Condemned Convicts

Relying on one of the cases in Nigeria, *Kalu v. The State,*[32] earlier cited where the Nigeria Supreme Court held that the death sentence is constitutional pursuant to the provision of section 30(1) of the 1979 Constitution (now section 33(1) of the 1999 Constitution), Osita[33] maintains that it is almost universally accepted that inordinate delay in the execution of condemned convicts amount to inhuman and degrading treatment.[34] The searcher totally agrees with the author more so as it is in line with some judicial authorities. Nigeria Prisons are brimming with convicts awaiting the hangman's noose.[35] According to the Daily Sun Newspaper, investigations revealed that as at December. If it is settled that undue delay in execution of condemned convicts amounts to inhuman and degrading treatment, it is submitted that condemned convicts should not be kept in custody for too long. Recently, the Commissioner for Justice, Oyo State said eight prisoners on death row who had spent not less than 9 years in prison, without being executed had their sentences commuted to life

[29] Criminal Appeal No. 142 of 1994: 30/1/95.
[30] (1999) (6) BCLR 666 (CC), (1995) SACLR LEXIS 218.
[31] Ibid. see also Mavunduse, D.A. 'A New Millennium Free from Death Penalty in South Africa' http://www.sardc.net/editorial/sanf/1999/09/30--09-1999-nf2.htm (accessed on 4 June, 2014).
[32] (1998) 13 NWLR (Pt.509-659) p. 531.
[33] Ogbu, O.N., op. cit, at p.21
[34] Catholic Commission for Justice in Zimbabwe v. A.G 91993) I ZLR 242 and Soering v U.K. (1989) 11 EHRR, 439.
[35] Sunday, A., "Why Governors Do Not Ratify Death Sentence" Daily Sun, Tuesday June 10, 2014, p.53 in 2013, a total of 1,094 inmates were on death row. Nineteen of them are females while 1,075 are males.

imprisonment.[36] They are Musiliu Suleiman, Paul Faforiji, Mathew Johnson, Founsho Olanipekun, Asimiyu babatunde, Olabode Emmanuel, Olusina Ajayi and Obasi Onyeye. Though, life imprisonment is preferred to the death penalty, in the opinion of the researcher, it would have been better if the Governor had granted the prisoners outright pardon considering the time they had spent in the prison custody, aside the time of their trial before sentence more so as the 1999 Constitution of Nigeria (as amended) permits him to do so. Section 212 of the 1999 Constitution provides that the Governor may:

(a) grant any person concerned with or convicted of any offence created by any law of a state a pardon, either free or subject to lawful conditions;
(b) grant, to any person a respite, either for an indefinite or for a specified period, of the execution of any punishment imposed on that person for such an offence;
(c) substitute a less severe form of punishment for any punishment imposed on that person for such an offence; or
(d) remit the whole or any part of any punishment imposed on that person for such an offence or of any penalty or forfeiture otherwise due to the state on account of such an offence. S.212 (2) The Powers of the governor under subsection (1) of this section shall be exercised by him after consultation with such advisory council of the state on prerogative of mercy as may be established by the law of the state.

The President of the Federal Republic of Nigerian can also exercise similar powers.[37] It is important to state that the delay of accelerated hearing of cases, particularly, capital offences punishable with death, is more often than not, caused by defense counsel in order to buy time by availing their clients of appeal remedies. In Re applications by Thomas and Paul,[38] the High Court of Trinidad and Tobago, held that the delays which had occurred, were the result of invocations by the appellants of the appeal procedures followed by bringing of the motion for committal, and as such, no delay could be attributed to the state which was so protracted as to amount to unreasonable incarceration. The United Nations Human Rights Commission adopted similar approach in the case of Barret and Sutcliff v. Jamaica,[39] where the Commission ruled that even prolonged periods of detention under a severe custodial regime on death row, cannot generally be considered to constitute cruel, inhuman and degrading treatment if the convicted person was merely availing himself of appellate remedies. The paper aligns with the better view that states should ensure that their appellate procedure and the period allowed for consideration of reprieve, is not unduly long and protracted, or will not allow a condemned prisoner to cause unnecessary delay.[40]

[36] Durojaiye, B. "Eight Prisoners Escape the Hangman's Noose", the Nation Tuesday, February 26, 2013 p.9.

[37] S. 175 (1), (a), (b), (c), (d), (2) and (3) of the 1999 Constitution, op. cit.

[38] (1986) LRC (Const) 285. See also major Al-Mustafa of the Nigerian army case that lasted for over 12 years due to series frivolous applications.

[39] Communication 271/1988. This approach was recently affirmed by the committee in Loxely Griffitns v. Jamaica (Communication No. 217/1988, where the applicant had spent 11 years on death row). The court of appeal in Lagos on 26th June freed two juveniles on death row for 10years. Obong Edet and Obed were sentenced to death for armed robbery at the age of 17 years by the Lagos State High Court, Lagos on September 30th 2004. See Article by Jibueze, J. "Juveniles on Death Row Regain Freedom". The Nation, Friday 27, 2014, p. 58; See also Mugonye, D & Njeru, M., "President Kibaki Pardons 28 Death Row Convicts" http://www.santegidio.org/pdm/news2003/26-02-03-6.htm(accessed on 18th August, 2014).

[40] Hatchard, J. "A question of Humanity: Delay and Death Penalty Law" (1999) Vol. 6, No. 28 Jan/Feb. p.3 see also, Hatchard, J, "Capital Punishment in South African": some Recent Development, International and Comparative Law Quarterly Vol. 43 91994) 923 & D. p. 62.

3.2 Fundamental Rights (Enforcement Procedure) Rules

It is pertinent to note that in order to enhance the protection of Human Rights in Nigeria, a set of rules known as "The Fundamental Rights (Enforcement Procedure) rules" were made in December, 1979 by the Honorable Justice Atanda Fatai-Williams, the then Chief Justice of Nigeria in exercise of the powers conferred on him by section 42 93) of the 1979 Constitution. These rules came into force on 1st of January, 1980.[41] The Rules (hereinafter referred to as "FREP Rules") 1979 have since been repealed and recently replaced with FREP Rules, 2009 by the then Chief Justice of Nigeria Honorable Justice Idris Legbo Jutigi, in exercise of the powers conferred on him by section 46 (3).[42] The preamble to the Rules provides as follows: "The Courts shall constantly and conscientiously seek to give effect to the overriding objectives of these rules at every stage of human rights action especially whenever it exercises any power given by the Rules or any other law and whenever it applies or interprets any rule." Rule 3 provides *inter alia* that:

(a) The Constitution, especially Chapter IV, as well as the African Charter, shall be expansively and purposely interpreted and applied, with a view to advancing and releasing the rights and freedoms contained in them and affording the protections intended by them.

(b) For the purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms, the court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the court is aware, whether these bills constitute instruments in themselves or form parts of larger documents like constitutions.

Perusing the provisions of these Rules, it is submitted that they are unambiguous and geared towards the protection of human rights, either municipal, African Regional or International in so far as they touch on the protection of human rights in Nigeria. Numerous cases have been decided under the FREP rules in Nigeria, since their Inception. However, a few examples will suffice. In Mohammed Garuba and ors v. A.G. of Lagos State,[43] the applicants who had been convicted and sentenced to death by an armed robbery tribunal, sought to quash the proceedings at the High Court. The suit was thrown out on the ground that the jurisdiction of the court had been ousted by the Robbery and Firearms (Special Provisions) Act.[44] Thereafter, an application to secure the right of the convicts of life was brought pursuant to the FREP Rules on their behalf by the Committee for Defence of Human Rights (CDHR) and the application was allowed. Having regard to the simple and speedy nature of applications relating to the enforcement of fundamental human rights, it is opined that applicants who wish to ventilate any claim under the African Charter which has been domesticated in Nigeria,[45] should file their complaints under the FREP Rules, 2009.

In the case of *Nemi* v. A.G of Lagos State and 1 Or,[46] one of the issues for determination was whether the Federal High Court has jurisdiction to entertain a condemned prisoner's suit seeking a review of the death sentence passed by another court or tribunal. The

[41] Statutory instrument No. 1 of 1979 in the Official Gazette No. 84 of vol. 66 of 20th December, 1979-part B.

[42] 1999 Constitution of the Federal Republic of Nigeria (as amended).

[43] 1 NPILR 1.

[44] Cap 398 LFN, 1990, (now Robbery and Firearms Act Cap R11 LFN, 2004).

[45] Pursuant to S. 12 91) of the 1999 Constitution (as amended).

[46] FHCL/L/CP/63/95 of Tuesday 5th January, 1999, reported in Cases on Human Rights (2001) 1 CHR

applicant was tried and convicted of the offence of armed robbery and sentenced to death. He remained on death row for an unduly prolonged period. He filed an application, praying the court for a declaration that his unduly prolonged stay on death row, under agony of suspense of death amounted to torture, inhuman and degrading treatment and sought an order quashing the death sentence or commuting it to a term of imprisonment. The respondent argued that the Federal High Court, Lagos lacked jurisdiction to grant applicant's claims, contending that the applicant's fundamental rights, as alleged, cannot be enforced without first of all inquiring into how and why the applicant was tried and convicted for robbery. In the respondent's view, the competent court to do that was the State High Court. The Court head that the Federal High Court has a post-trial jurisdiction to order variation of a sentence of death passed on a condemned prisoner by a court or tribunal under section 42 of the 1979 Constitution (now section 46 (1) of the 1999 Constitution) more so as the words "High Court" under that section embrace both the Federal and State High Courts. The researcher agrees with the interpretation of the provision of the section under examination as it accords due respect to the rule of law and recognizes the inalienable right of a condemned prisoner to explore all legal avenues open to him to save his life. Having closely examined the relevant provisions of the 1999 Constitution (as amended) that provide for the protection of the right to life, the work has revealed that constitutional guarantees of the right of life are subject to certain limitations which derive from the following:

(a) The manner in which the relevant provisions have been couched. For example, the provision of section 33 (1) of the 1999 Constitution is couched in such a way that it permits death penalty so far it is pronounced by a court of competent jurisdiction in Nigeria in respect of a criminal offence of which he has been found guilty.
(b) The couching of the provisions of section 33 (2), (a), (b) and (c) contain exception or limitation clauses which permit the death penalty.
(c) Possibility of violent changes leading to amendment, partial or total suspension of human rights provisions. For example, the Nigeria military exploited the limitations on various instances when they dabbled into governance in Nigeria 1966-1979, 1983-1999.

More importantly, under the 1999 Constitution, the President has power to proclaim a state of Emergency under specified circumstances, subject however to the approval of such proclamation by the National Assembly. A good example is the on-going State of Emergency in Borno, Yobe and Adamawa State in Nigeria. Section 45(1) and (2) of the 1999 Constitution provide restriction on and derogation from fundamental human rights in Nigeria. Section 45 (2) particularly provides as follows: "An act of the National Assembly shall not be invalidated by reason only that it provides for the taking, during periods of emergency, of measures that derogate from section 33 or 35 of the Constitution but no such measures shall be taken in pursuance of any such Act during any period of emergency save to the extent that those measures are reasonably justified for the purpose of dealing with the situation that exists during the period of emergency."[47] It is submitted that going by the provision of section 45 (2) of the Constitution, the right of life provided for, under section 33 (1) of the Constitution is open to undue exploitation by the Federal Government under the guise of reasonable justiciability during any period of proclamation of a State of Emergency in the country or any part thereof, and this will undoubtedly give room to the legality of the death penalty. The identified limitations need to be addressed promptly to enhance unqualified right to life in Nigeria.

[47] Durner, B. and Geurtsen H., 'The Death Penalty and War' *International Journal of Human Rights*, Vol., 6, pp 17-19, (2002).

3.3 International Human Rights Instruments for The Protection Of The Right Of Life In Nigeria

In international human rights law, there are three key documents which are together known as the International Bill of Rights.[48] These consist of the Universal Declaration of Human Rights (UDHR); the International Covenant on Economic, Social and Cultural Rights (ICESCR). Jointly, they form the backbone and life wire of the international human rights system.[49] The UDHR instrument was adopted and proclaimed by the United Nations General Assembly at Paris in 1948.[50] Nigeria, being a bonafide member of the United Nations, (UN) makes the Bills to be relevant to this dissertation and are therefore discussed below.

(a) The Universal Declaration of Human Rights (UDHR)

The final draft of this instrument was presented to the General Assembly in late 1948. On 10 December, 1948, the Assembly adopted it by a vote of forty-eight to zero with eight abstentions the Soviet Union, South Africa, the Ukraine, Belorussia, Czechoslovakia, Poland, Yugoslavia and Saudi Arabia[51] in the preamble of the instrument, it is stated as follows: "Whereas member states have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms." The rights mentioned and protected in the instrument were elaborated in articles 1 to 30 respectively. This dissertation mainly focuses on some of the rights, particularly the right to life and freedom from torture, cruel, inhuman or degrading treatment because of their relevance.

Article 3 provides that "Everyone has the right to life, liberty and security of person", while Article 5 provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment". These provisions are in tandem with the provision of section 33 (1) and 34 (1) (a) of the 1999 Constitution of Nigeria. If members of the UN have pledged themselves to achieve, in co-operation with this international body, the promotion of universal respect for the observance of human rights and fundamental freedoms, the research therefore disagrees with the decision of Nigeria, being a member of the UN to still retain the death penalty in its statute books, for example, the Criminal Penal and the Sharia Penal Codes respectively.

The UDHR provides an authoritative definition of human rights, setting out the principles and norms of securing respect for the rights of man everywhere in the world. It has been described as the great charter of liberties and a common standard of achievement of all people. Article 1 of the UDHR provides: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in spirit of brotherhood. Since the adoption of the UDHR in 1948, there has been proliferation of international and regional human rights instruments. It is noteworthy that, nearly all modern Constitutions of many countries all over the world including Nigeria contain bills of rights. Thus, the learned jurist T.O. Elias was right when he observed: "It seems that the Universal Declaration of Human Rights of 1948 may come to be judged as perhaps the most important document to have emerged from the United Nations Organization... This document has set in

[48] Uko, E.J *Human Rights Law: Right to Health Care in Africa; and Aspect of Tortuous Liability and Medical Negligence,* (Uyo: Livingo Company Nig. 2007), p.2
[49] Ibid.
[50] In Resolution 217 A (III) of 10 December, 1948
[51] Robertson, A.H. et al. *Human Rights in Eruope: a Study of the European Convention on Human Rights,* (Manchester: Manchester University Press, 1993) p.25

motion the unprecedented process of decolonization and the inevitable principles of the right of self-determination of peoples..."[52]

The UDHR instrument is blessed with two Covenants: one dealing with Civil and Political Rights (ICCPR), while the other one deals with Economic, Social and Cultural Rights. States Parties have the option to ratify either or both of them.[53] It is submitted that this is one of the loopholes in the instruments which many states parties can exploit as they can argue that the provisions therein are not binding on them more so as it is not mandatory of them to ratify the instrument.

(b) International Covenant on Civil and Political Rights (ICCPR)

The most relevant segment of this instrument is found in Part III, particularly articles 6 and 7 respectively. Article 6 (1) provides that "Every Human being has inherent right to life. No one shall be arbitrarily deprived of his life". This provision is in *pari-material* with the first leg of section 33 91) of the 1999 Constitution of Nigeria. The word "arbitrary" therein can be equated with the provisions of section 33 (2), (a), (b) and (c) of the said Constitution which are commonly referred to as limitation clauses to the right of life under section 33 (1). Article 6 (2) provides:

> In countries which have not abolished the death penalty, sentence may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

The most serious offences in Nigeria include: Murder or culpable homicide punishable with death,[54] treason,[55] treason,[56] giving false evidence leading to the conviction and execution of an innocent person,[57] robbery with firearms or offensive weapons, [58] trial by ordeal resulting in death,[59] abetment of suicide by a person below 18 years of age or by an insane or intoxicated person,[60] aiding the enemy and Article 6(3) provides:

> When de privation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any state party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

[52] Elias, T.O, *New Horizon in International Law, (Amsterdam: Suthof & Noordhoof International Publishers*, 1979) p. 162.

[53] ibid, at p. 163; Article 48 (2) ICCPR and Art 26, ICESCR respectively provide that the instruments are subject to ratification, Jonathan, G.O "who Disregarded International Law, and Why Every Nation (Outside China) should be *concerned", Michigan State Journal of International Law*, issue 18, vol. 3, p. 527, (2010).

[54] Ss. 319 and 211 of the Criminal and Penal Code respectively.

[55] Ss. 37, 38 and 411

[56] Ss. 49A, Criminal Code

[57] S. 159, Penal Code

[58] S. 1 Robbery and Firearms Act, Cap R11 LFN, 2014

[59] Ss. 208 and 214 of the Criminal and Penal Code respectively.

[60] S. 227 of the Penal Code

Article 6(4) provides: "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases." This provision is in tandem with section 175 (1), (a), (b), (c), (d), (2), (3) and 212(1), (a), (b), (c), (d) and (2) of the 1999 Constitution of Nigeria, where the President and Governors can exercise their powers under the Prerogative of Mercy respectively. Article 6(5) provides that: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years and shall not be carried out on pregnant women". The provision is similar to the provision of section 270 and 272 of the Nigeria Criminal Procedure Code which prohibit passing of death sentence on a pregnant woman and a person under the age of 17 years respectively. Section 272 of the Criminal Procedure Code (CPC) provide *inter alia:* "Where a person convicted of an offence punishable with death and it appears to the court where he is convicted that he is under the age of 17 years, when he committed the offence, the court shall order that he, be detained under the governor's pleasure."

The above provision makes the age of the offender at the time the offence was committed, the determining factor and not the age at the time of the conviction of the offender, thus overturning the old law handed down in R v. Bangasza.[61] Articles 6(6) provides that: "Nothing in this Article shall be invoked to delay or to prevent the abolition of capital punishment by any state party of the present Covenant". It is submitted that a close study of the provisions of Article 6(1) to (6) show that the ICCPR instrument does not expressly abolish the death penalty. The language of sub-section 6 of Article 6 suggests that abolition of capital punishment in any of the state parties is not mandatory but desirable. These loopholes deserve urgent regularization. Despite the lapses identified in the Article, it is further submitted that all measures geared towards the abolition of the death penalty are commendable as progress in the enjoyment of the right to life, pursuant to Article 1, (1) and (2) of the Second Optional Protocol to the ICCPR. Article 1 (1) provides: "No one within the jurisdiction of a state party shall be executed, while article 1 (2) provides that "Each State Party shall take necessary measures to abolish the death penalty within its jurisdiction." Article 7 of the ICCPR provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

The first leg of Article 7 of the instrument is similar to the provision of section 34 (1) (a) of the 1999 Constitution in Nigeria. In *Nemi* v. A.G Lagos State,[62] the Court of Appeal held inter alia that the applicant's undue incarceration for a very long time in prison under the death sentence amounted to inhuman and degrading treatment, contrary to section 31 (a) of the 1997 constitution (now section 34(1)(a) of the 1999 constitution). It submitted that the judgment in Nemi's case would serve as deterrent to courts in Nigeria that may delay accelerated hearing and determination of criminal cases punishable with death under the guise of trivial reason or the other. There are two optional Protocols to the ICCPR. The First Optimal Protocol was adopted by the UN General Assembly in 1966 at New York.[63] It was opened for signature, ratification and accession on 19 December, 1966[77]. It entered into force on 23 March, 1976.[64] It was ratified by 152 countries as per 15 July, 2004.[65] Article 4(1) of the instrument provides:

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[61] (1960) FSC 1

[62] (1996) 6 NWLR (Pt. 452)

[63] In Resolution 2200 A (XXI) of 16 December, 1966.

[64] ibid

[65] Banning, T.V. et al, *Human Rights Instrument,* 6th (edn.), (Costa Rica: University for peace press, 2004) p.7

> In time of public emergency which threatens the life of the nation and its existence of which is officially proclaimed, the state parties to the present covenant may take measures derogating from their obligation under the present covenant to the extent strictly required by the existence of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language or social origin.

Agreed that the security of lives and property is one of the top priorities of any country, the couching of the provision of Article 4(1) of this instrument can be exploited by any state party under the guise of a state of emergency which threatens the life of the nation and its existence in its territory or any part thereof. Such party can derogate from the right to life and carry out capital punishment in its territory arbitrarily to the detriment of its perceived enemies. This, it is submitted is unfair to an ideal democracy.

Nigeria has ratified the ICCPR instrument but at the time of writing this dissertation, it has failed and or neglected to be a signatory to the first Protocol. It is submitted that Nigeria, not being a signatory to this Protocol is to enable her to retain the death penalty in its statute books and this is tantamount to violation of the right to life of its citizens and its obligation under the UN charter to promote universal respect for, and observation of human rights and freedoms. The Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty was adopted by the UN General Assembly in December, 1989 at New York.[66] It was opened for signature, ratification on 15 December, 1989 and came into force on 11 July, 1991. As at July, 15, 2004, 53 countries have ratified it. Article 1(1) of the instrument provides as follows: "No one within the jurisdiction of a state party to the present Protocol shall be executed: while Article 1(2) provides: "Each state part shall take necessary measures to abolish the death penalty within its jurisdiction".

It is submitted that the language of Article 1(2) suggests that the instrument aims at abolishing the death penalty and therefore has not expressly abolished it. Nigeria has also not signed this Optional Protocol. It is further submitted that the word "Optional" semantically makes the Protocol not mandatory[67] but desirable. It is strongly believed that the lapses inherent in the couching of the instrument are what some states parties to the ICCPR, including Nigeria. Have exploited to enable them retain the death penalty in their jurisdictions. Under the states' obligation clause in the preamble of the ICCPR which all the states parties have voluntarily agreed under the Charter of the UN to promote universal respect for observance of human rights and freedoms, the states' parties that are still retaining the death penalty are not morally justified to do so as this translate to a flagrant violation of their obligation.

(c) The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The third key document in international human rights law known as the international Bill of Rights is the International Covenant on Economic, Social and Cultural Rights (ICESCR). In the preamble of ICESCR, all the states parties agreed they shall promote universal respect for, and observance of, human rights and freedoms. The instrument provides

[66] ibid

for various rights Article 1 to 15. The ones that are relevant and desirable to this dissertation are Article 6, 11, 12 and 13 respectively. Article 6(1) provides *inter alia* that:

> The states parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

Though, this Article does specifically mention the right to life provided for under section 33(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), the researcher submits that the right to work directly affects the right to life business anybody who is denied the right to work will have no meaningful source of livelihood. This will result to abject poverty and penury. It is therefore, unarguable that the Article contemplates the right to life. Article 11 provides that: "The states parties to the present Covenant recognize the right of everyone to adequate standard of living for himself and his family, including adequate food, clothing and housing …" Article 12(1) provides that; "the states parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health". Article 13(1) provides inter alia that: "everyone has the right to education". This paper has shown that in spite of the provision for the rights enumerated above in the instrument, Article 4 provides for limitations of the rights. Article 4 provides inter alia that:

> The states parties recognize that in the enjoyment of the rights provided … in the present Covenant, the state may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Having closely examined the couching of Article 4 above, it is submitted that this limitation constitutes a lacuna that can be exploited by a state party to derogate from the fundamental rights, particularly the right of life of its citizens and this needs to be critically re–examined and promptly regularized, more so, as the limitation is in conflict with states parties obligation under the Charter of the United Nations referred to in the preamble of the instrument that states parties shall promote universal respect for, and observance of human rights and freedoms. At this juncture, the paper takes a look at some judicial authorities both domestic and foreign, in order to put to rest the age –long argument whether Economic, Social and Cultural rights which fall under Charter II of the Constitution of the Federal Republic of Nigeria 1999 (as amended) whose heading is couched "Fundamental Objectives and Directive Principles of State Policy" are justiciable or not. In Adamu V. A.G. Borno State,[68] it was held that where a local authority as in that case, in the implementation of the fundamental objectives and directive principles of state policy adopted a system which infringes on a citizen's fundamental right of religion and freedom, from discrimination, that breach of the citizen's fundamental human rights is justiciable. Though, that case is distinguishable from the right to life, it is submitted that it is relevant here because the right to life is a fundamental right. Pursuant to the decision in Adamu's case, it is further submitted that where there is a conflict between fundamental objectives and fundamental human rights, it must be resolved in favour of the latter.

[68] (1996) 8 NWLR 203.

In the South African case of government of the *Republic* of South Africa and *Ors V.* Grootbooon & Ors.[69] The right to housing, was enforced by the Constitutional Court. In South Africa, some justiciable Bill of Rights have been jurisprudentially confirmed by court.[70] In the Indian case of Olga Tellis v. Bombay Municipal Corporation,[71] the Supreme of India ruled that slum and pavement dwellers could be evicted from their shelters without the provision of alternative accommodations for them. The Supreme Court held inter alia:

> The sweep of the right to the life conferred by Article 21 is wide and far reaching … An equally important facet of the right to life is the right to livelihood because no person can live without the means of living. If the right of livelihood is not treated as part of the constitutional right to life, the easiest way of depriving a person of his right to life would be point of abrogation …

Though the Indian and South African cases cited above are foreign, it is submitted that they are relevant to the issue for determination whether Economic, Social and Cultural rights are justiciable or not as regards the right to life. Having evaluated the cases cited on the subject matter above, it is submitted that failure to enforce the rights protected particularly the right to life under the ICESCR instrument by any state party would be tantamount to violation of the right to life. In fact, the question was asked in the case of Olubunmi Okojie & Ors v. A.G. Lagos State,[72] how the right to life could be justified when a person is living in abject poverty and undignified condition. The court held that issues relating to fundamental objectives and directive principles of state policy must conform to and run as subsidiary to the fundamental rights provisions.

It must be emphasized that in spite of the lapses identified in the international Bill of Rights, it is submitted that the adoption of the international Covenant on Human Rights and of the Optional Protocol in December, 1966 which entered into force on 23rd March, 1976, the establishment of Human Rights Committee represented the successful the lofty aims and principles of the UDHR into binding instruments of international law. There is no doubt that the two Covenants have legal force as treaties for the parties to them and make a detailed codification of human rights.[73] According to Kapoor,[74] by their nature, the two international Covenants on Human Rights cannot be said to be universal because they differ from region to region and from state to state in view of the economic, social and political conditions of the people. It is submitted that there is much force in the criticism, yet it cannot but be noted that there is nothing which prevents the states of different regions from adopting Regional Conventions on Human Rights such as American Convention on Human Rights, European Convention on Human Rights and African Charter on Human and People's Rights which have proved to be successful.

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[69] 2001 (1) SA 46 (CC).

[70] Ss. 22 -29 of the South Africa Constitution, 1996.

[71] (1968) a.i.r. (Sup. Ct) 180, and the Nigeria Case of SERAP v. *Federal Republic of Nigeria* & 1 Or: ECW/CCJ/APP/08/2008 where the ECOWAS Court held that the right to quality education can be enforced under Chapter II of the 1999 Constitution of Nigeria which deals with Fundamental Objectives and Directive principles of State Policy. See also Inyang, R., *The Non -justiciability of Chapter II of the 1999 Constitution of Nigeria and promise of Dividends Democracy, cited* in the *Journal of Public Law* & Constitution Practice Vol. 5, March 2013, p. and 266 Chaji, S.M., Nigerians and Dividends of Democracy @www.gamji.com.article8000/new8199.htm (accessed 29/1/2014).

[72] (1981) 1 NCLR p. 218

[73] Brownlie, I., *Principles of International Law,* 2nd (edn), (Oxford: Clarendon Press, 1993) p. 1

[74] Kapoor, S.K. *International Law and Human Rights*, 18th (edn), (Allalhabad: Arjun printers, 2011) p. 835

Since the International Conventions on Human Rights are generally based on the Universal Declaration, a case can be made for their provisions being authoritative interpretation of the Charter even for non –parties to the Covenants in so far as they incorporate (and do not deviate from the Universal Declaration) the rights proclaimed in the Universal Declaration. It is submitted that there is no doubt that the International Covenants on Human Rights have greatly influenced the development of human rights jurisprudence generally and particularly in Nigeria.

4. CUSTOMARY INTERNATIONAL LAW

International customs have been regarded as one of the prominent sources of international law for a long time. It is the oldest and original source of international as well as of law in general.[75] It is only in the modern period that the importance of customs has suffered a setback. However, even today it is regarded as one of the important sources of international law. Torsten Gihi[76] said: "In certain cases, usage gives rise to customary international law, in other cases, it does not. But there is no rule of international law, or indeed any rule at all, which determines when usage shall give rise to custom." Custom in international law is a practice followed by those concerned because they feel legally obliged to have in such a way.[77] A rule of customary international law derives its law hallmark through the possession of two elements, namely – a material and a psychological element. The material element refers to the behaviour and practice of states, whereas the psychological element is the subjective conviction held by state that the bevaviour in question in compulsory and not discretionary.[78] It was unanimously agreed at the time of the adoption of the Universal Declaration of Human Rights that is shall not impose any legal obligations on States.[79] The Chairman of the U.N. Commission on Human Rights –Eleanor Roosevelt, had stated before the General Assembly at the time of the adoption of the Declaration that:

> In giving our approval to the Declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law of legal obligation. It is a Declaration of basic principles of human rights and freedoms to be stamped with the approval of the General Assembly by formal note of its members, and to serve as common standard of achievement for all people of all nations.[80]

It has been argued that the entire UDHR embodies customary international law.[81] While it may not bind states as a treaty obligation, it certainly may reflect ideals held by the

[75] Oppenhiem's International Law, Vol. 1, Edited by Jennings, R. and Watts, A., 9th (edn). (Longman GP UK Ltd & Hudson, T. 1992)
[76] Gilhi, T., *Legal Character and Sources of International Law (*1957) pp. 82-83.
[77] Rebecca, M.M., *International Law,* 5th (edn), (London: Sweet & Maxwell, 2005), p. 9.
[78] Rebecca, M.M., *International Law,* 5th (edn), (London: Sweet & Maxwell, 2005), p. 9.
[79] Agarwal, H.O., *International Law and Human Rights,* 7th (edn.) (Allahabad: Central Law Publications, 2010) p. 765.
[80] Ibid, at p. 766 Neumayer, E., "Do Human Rights Treaties Improve Respect for Human Rights?" *Journal of Conflict Resolution,* vo. 6 pp. 217, (2007).
[81] Ladan, M.T., *The Resources of International Law Human Rights Teaching in School,* Edited by Obilade, A.O., (Lagos: Constitution Rights Project, 1999) p. 70.

international community.[82] Any consideration of it as customary international law can only be made after an article by article examination as was done in the case of *Filartiga* v. Pena – Irala.[83] In that case, the issue for determination was whether torture was a breach of international law. The United States Court of Appeal for the second circuit found that:

> There is at present no dissent from the view that guarantees include, at a bare minimum, the right to be free from torture. The prohibition has become part of customary international law, as evidenced and defined by the UDHR … which states in the plainest language that no one shall be subjected to torture.[84]

It is evident that all states, and cultures and societies agree that most human rights should be protected. These states, cultures and societies do have different approaches about the extent to which the exceptions and limitations on human rights exist and there is an obligation to protect them. Many human rights – for example, right to life, freedom from torture, freedom from racial discrimination, prohibition on genocide, right to education can be considered to be customary international law and so binding on states which have not ratified treaties to protect those rights. Indeed, some of these rights may be *jus cogens*, as was accepted by the International Court of justice (ICJ) in Barcelonia Traction Case.[85] It submitted that the right to life being accepted as one of the rights that may be *jus cogens* by the ICJ makes customary international law to be relevant to this dissertation.

In *Socio –Economic Rights Accountability Project* (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission (UBEC)[86]. The plaintiffs alleged the violation of the rights to quality education, right to dignity, right of peoples to their wealth and natural resources and rights of peoples to economic and social development guaranteed by Article 1, 2, 17, 21, and 22 of the African charter on Human and Peoples' Rights. The defendants alleged that the Economic Community of West Africa States (ECOWAS), Court of Justice of the ECOWAS lacked jurisdiction to judge this issue because the compulsory and Basic Education Act and the Child's 2004 are municipal laws of Nigeria and therefore, not a treaty, Convention or Protocol of ECOWAS, that the education objective of the Federal Replica of Nigeria is provided for under section 81(1), 2(2) and (3) of Chapter II of the 1999 Constitution. The Defendants further argued that it is non –justiciabl3e or enforceable and cannot be determined by the court, more so as the plaintiffs have no locus standi, because they have not suffered any damage, loss or personal injury. The court held that the right to education can be enforced the court and dismissed all the objections advanced by the defendants.

It is submitted that this is the first time that an international court has recognized citizens legal right to education and sends a clear message to ECOWAS member states. The right to education and by extension, the right to life can, therefore, be inferred to fall under the customary international law and binding on states which have not ratified treaties to protect them more so as custom in international law is a practice followed by those concerned because they feel legally obliged to behave in such a way.[87]

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[82] Ibid, at p. 71
[83] (1980) 630 F. 2nd 876
[84] Ibid, at p. 876. See also, Hathaway, O., "Do Human Rights Treaties Make a Difference?", Yale Law Journal , Vol. 111, pp. 26-28 (2002).
[85] Belgium v. Spain (1970) I C.J. Rep. 3.
[86] ECW/CCJ/APP/08/2008
[87] Rebecca, M.M., *op. cit.,* p. 10

Presently, it cannot be said with firmness that the rights cited under customary international law have acquired the status of customary rule of wide research is required to be done through the comprehensive survey of state practice of each and every right stated in the Universal Declaration to draw a conclusion as to which of them have acquired the status of customary rule of international law.

5. REGIONAL HUMAN RIGHTS INSTRUMENTS FOR THE PROTECTION OF THE RIGHT TO LIFE IN NIGERIA

Generally, there are various regional human rights instruments for the protection of human rights.[88] These include *inter alia:* the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, the Inter – American Convention on Human Rights, 1969, American Declaration of the Rights and Duties of man, Convention on the Protection of Human Rights and Fundamental Freedoms (European Convention), European Convention for the Prevention Torture and inhuman or Degrading Treatment or Punishment, African Charter on Human and People's Rights (African Charter), African Charter on the Rights and Welfare of the Child and Protocol to the African Charter on the Rights of women in Africa. The ones that are discussed in this dissertation are the African Charter and Protocol to the African Charter on the Rights of Women in Africa respectively because of their relevance to the work.

5.1 The African Charter on Human and People's Rights (ACHPR)

The idea of an African Charter on Human and People's Rights was First proposed at the African conference on the rule of law in 1961.[89] The Conference was organized by the International Commission of Jurists in Lagos. It declared, inter alia, that: "In order to give full effect to the Universal Declaration of Human Rights (UDHR), this Conference invites the African Governments to study the possibility of adopting an African Convention on Human Rights."[90] This was the maiden step and the process subsequently led to the adoption of the African Charter on Human and People's Rights (ACHPR) in 1981. The Charter establishes a system geared towards the protection and promotion of human rights.

It is expressed in its preamble that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights as the latter is guarantee for the enjoyment of civil and political rights.

Pursuant to the couching of this expression in its preamble, it is submitted that there is no doubt about justiciability of some rights like education provided for under Chapter II, section 18 of the 1999 Constitution of Nigeria[91] more so as the ACHPR instrument has been domesticated under the municipal law of Nigeria by the provision of section 12(1) of the 1999 Constitution. Though, section 18(3) of the Constitution provided that Government shall strive to eradicate illiteracy; and to this end. Government shall as when practicable provide –

- Free, compulsory and universal primary education;
- Free secondary education;
- Free universal education and
- Free adults' literacy programme.

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[88] Uko, E.J., *op. cit.* p. 2.

[89] Udombana, N.J., *Regional Human Rights Regime, in Human Right Teaching in School, Edited* by Obilade, A.O., (Lagos: CRP, (1999) p. 196.

[90] ibid

[91] SERAP v. FRN I Or: ECW/CCJ/APP/08/2008.

It is submitted that the phrase "as and when practicable" in section 18(3) makes its enforcement indefinite and uncertain. Government can always exploit it is a defense to deny citizens the right to free education during economic depression. Education, in the opinion of the researcher is so fundamental to the wellbeing of any human being and denial of its rights is tantamount to denial of the right to life. The ACHPR Charter provides for both individual and Peoples' rights and duties. It places obligations on the states parties in Chapter I, Article 1 as follows:

> The member states shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

Article 4 of Charter provides:

> Human Rights are inviolable. Every human being shall be entitled to respect for his life and integrity of his person. No one may be arbitrarily deprived of his life.

The instrument has been domesticated under the municipal law of Nigeria. Having closely examined the couching of Chapter 1, Article 1 of the Charter, which places obligations on the states parties to recognize the rights, duties and freedoms enshrined in the Charter and undertake to adopt legislative or other measure to give effect to them, one wonders why Nigeria still retains the death penalty of its statute books. For these reason, it is submitted that the death penalty still being retained in Nigeria's statute books is a violation of the right to life of its citizens and a repudiation of its voluntary obligation under Chapter 1, Article 1 of the ACHPR. This is not ideal in a civilized democracy and should be disallowed. Article 5 of the Chapter provides as follows:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, salve trade, torture, cruel, inhuman or degradation punishment and treatment shall be prohibited.

The provision of Chapter 1, Article 5 of the Charter is similar to that of section 34(1), (a), (b) and of the 1999 Constitution of Nigeria. The couching of the Article, clearly, reveals the good intention of the ACHPR instrument as regards the enjoyment of the rights protected therein. In actual practice, these rights are more often than not violated with impunity in African countries including Nigeria particularly the right to life by respective governments at the helm of affairs. Even though section 33(1) of the 1999 Constitution of Nigeria authorizes killing in execution of a sentence of a court, it is important to emphasize that such killing could only be justified under the provision where there is no appeal. Thus, the Supreme Court in *Bello* v. A.G. Oyo State.[92] awarded damages against the Oyo State Government for executing a convict whose appeal was yet to be determined by the Court of appeal. It is

[92] (1986) 12 SC 1. See also the case of *Gbemere v. Shell Petroleum company and N.N.P.*C (2005) A.H.R.L.R (Nigeria) p. 46, FHC where the court declared that the actions of the respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicants community was a violation of their fundamental right to life (including healthy environment) and dignity of human person guaranteed by Constitution and the African Charter and were therefore restrained from further flaring of gas in the applicants community. See Iboloku, P.C., "The Constitution Right to Life and Exercise of Police Power:" *A Development,* Vol. 14, No. 1 p. 22, (2014).

submitted that the execution of Bello was arbitrary; a violation of his right to the respect to the dignity inherent in a human being and to the recognition of his legal status. The various individual rights provided for are listed in Article 2 -18 of the Charter respectively. Undoubtedly, the list is quite extensive. But a good number of them are couched in a language that appears to deny them of their meaning and thus calls serious implications for their enforcement. For example, Article 8 proclaims "freedom of conscience, the profession and free practice of religion". It also declares that: "No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms". After closely examining the provisions of the Charter, it is observed that it does not have provisions dealing with suspension of rights in times of war or state of emergency. It is submitted that a state of emergency provides an avenue particularly for government to encroach on human rights especially the right to life under the guise of state security.

More importantly, there are many articles in the Charter which provide that rights guaranteed therein can be limited by law, [93] or in the interest of national security, or in the interest of safety, ethics public need or general interest,[94] or right of others, morality or common interest.[95] It is also observed that there is no provision in the Charter stipulating that particular limitations imposed by a state must be necessary for the purpose for which the rights are limited.[96] It is submitted that all the gaps identified above need prompt regularization in order to checkmate undue exploitation by governments of member's states to the detriment of their citizens.

5.2 Protocol To The African Charter On Human And People's Rights On The Rights Of Women In African (2003)

Another instrument, relevant to this dissertation is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, better known as the Maputo Protocol.[97] It was adopted by the Africa Union on the 11th of July, 2003 at its summit in Maputo, Mozambique. On 25th November, 2005, after ratification by the requisite 15 member nations of the African Union, the Protocol entered into force. The Protocol which focuses on the enforcement and protection on women's rights provides that it is the duty of the state to ensure that women are afforded equal opportunities as men. The Maputo Protocol guarantees women's rights on the continent. The emergency of this Protocol was as a result of concerns for the plight of women in Africa with particular focus on human rights. This is expressly documented in the Draft Protocol to the African Charter on Human and People's Rights on the Rights of Women in African: To date, no Africa instrument relating to human rights proclaimed or stated in a precise way what the fundamental rights of women in Africa are. There is thus a vacuum in the (sic) coregent preoccupation in Africa. Provisions of the Maputo Protocol that are of significant importance to this dissertation are Article 3 and 4 respectively. Article 3 –Right to Dignity provides:

(1) Every woman shall have the right to dignity inherent in a human being and to have recognition and protection of her human and legal rights.
(2) Every woman shall have the right to respect as a person and to the free development of her personality;

[93] Articles 6, 8, 9, 10(1), 11, 12, 13 and 14 respectively.
[94] Articles 11, 12 and 14
[95] ibid
[96] [112] Daniel, T.A., *Principles of Human Rights Review, An International Human Rights Journal,* ABU, Zaria, Vol. 2, No 2, at p. 83 (2011).
[97] Olomojobi, Y., *Human Rights on Gender, Sex and the Law in Nigeria, (*Lagos: Princeton Publishing Co., 2013) p. 26

(3) States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women.
(4) States Parties shall adopt and implement appropriate measures to ensure the protection of women's right to respect for her dignity and protection f women from all forms of violence, particularly, sexual and verbal violence.

There is no gainsaying the fact that the provision of Article 3 of the Protocol seeks in good faith to protect the right to the dignity of women yet, in practice, it is a notorious fact that women and even young girls have been raped or gang –raped to death in Nigeria.[98] Though, Article 26 of the Protocol provides for implementation and monitoring of States Parties, it is not provided in the instrument, the process by which effective monitoring and implementation of the provisions of the Article by the appropriate organ of the African Union (AU), will be carried out in order to achieve its desired objective. It is submitted that the absence of this important provision in the instrument has rendered the Article ineffective thereby denying women who have fallen victims of gang –rape leading to their death right to life and right to respect for their dignity. This defect needs urgent rectification. "Every woman shall be entitled to respect for her life and integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited." The provision of the first leg of Article 4(1) is similar to the provision of the first leg of section 33(1) of the 1999 Constitution of Nigeria while the provision of the second leg of the same Article is similar to the provision of section 34(1) (a) of the 1999 Constitution of Nigeria respectively.

A perusal of the Maputo Protocol shows that there is no express provision therein prohibiting the death penalty. It is submitted that any member state can exploit the lacuna to retain the death penalty in its territory and it is strongly believed that this may have been one of reason why Nigeria still retains the punishment in its status books which does not serve the primary purpose of the Protocol.

There is equally no provision for sanction in the instrument against any state party that may violate the provision of Article 4(1) of the instrument and this exposes it to flagrant abuse of the right to life women. It is submitted that all the defects identified in the instrument need to be promptly regularized by the appropriate organ of the African Union to enhance the desired effect of the instrument.

6. CONCLUSION

This paper has attempted to examine Human Rights instrument relevant to the protection of the Right to Life in Nigeria. It considered: the right to life and dignity of human person under section 33(1) of the Constitution of the Federal Republic 1999 (as amended), Fundamental Rights (Enforcement Procedure) Rules, International Bill of Rights, Customary International Law, and African Regional Instruments for the Protection of Rights to Life in Nigeria. There is no doubt that it is constitutional duty of the state to protect the fundamental human rights guaranteed by Chapter IV of the Nigerian Constitution of 1999, and other relevant International Bills of Rights and Protocol, especially the right to life, and the dignity of human person. It is equally the duty of individual citizens of Nigeria to respect and assist in preserving the rights of their fellows at all times and in all circumstances.

[98] Isiguzo, J., "Seven held for allegedly raping girl, nine", The Nation Tuesday, July 8, 2014, p. 10. See also, Adeyemi, E, "Heartless Robbers Snatch Man's Car, Throw away 3 –month baby gang rape wife to death", *Sunday Sun,* August 17, 2014, p. 15. This paper reported that for more than two hours, eight robbers one after the other engaged a poor woman in a marathon sex while the husband watched helplessly and the helpless innocent baby cried profusely. See Otabor, "Seven supports arrested for defiling minors aged between six and thirteen", *The Nation* Tuesday, September, 2, 2014, p. 57.

Extra –judicial killings, state murder in the guise of state security, death penalty and the like epitomizes violent rape of the inalienable fundamental right to life. Most of these practices have been abolished in many civilized countries. Most importantly, section 34 of the Nigerian Constitution of 1999, makes provision for the respect for the right of dignity of human person, both as a prisoner or a free man. The security operatives and the government have an important role to play in this regard. The law courts in all jurisdictions have never failed to pronounce on, and condemn man's inhumanity to man under whatever guise. The implementation is a joint responsibility.