

**NIGERIAN IMMIGRATION ACT 2015: AN EXAMINATION WITH THE 1999 CONSTITUTION AND INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW**

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**ABSTRACT**

*The Nigerian Agency responsible for the control of immigrants under the Immigration Act 2015, is the Nigerian Immigration Service with the responsibility of regulating and approving the immigration of expatriates. It is also charged with responsibilities to grant visas and entry permits into Nigeria. The functions of the Nigerian Immigration Service obviously involves meddling with human rights enshrined in the Constitution of the Federal Republic of Nigeria and under the articles of international human rights instruments. The Immigration Act provides the legal and regulatory framework for the entry and exist into or out of Nigeria. Therefore, in the course of its work in monitoring and controlling movement into and out of the country, the Nigerian Immigration Service interferes with the freedom of movement guaranteed under the Constitution and international human rights framework. It is in this context that this paper examines the provisions of the Nigerian Immigration Act 2015 with respect to protection of human rights, fundamental freedom and dignity of human person. This is compared with what obtains under international human rights documents. When movement is restricted unlawfully, the question of right interference arises, giving rise to contest, litigations and claims against the Immigration Service in court. The paper argues that the Immigration Act 2015 was passed with little provisions on human rights protection thereby creating room for officials of Immigration Service to thinker with and violate human rights. It concludes that while curtailing movement of illegal immigrants and emigrants, the officials should respect human rights of immigrants or emigrants.*

**Keywords:** Constitution, Human Rights Law, Humanitarian Law, Immigration, Migrant.

**1. Introduction**

Paramount to human being in his life is his security and welfare and every progressive government takes the responsibility to guarantee this. It is in this respect that the constitution of the Federal Republic of Nigeria provides that the security and welfare of the people shall be the primary purpose of government.<sup>1</sup> Equally important to every sensible government is the sanctity of its border, territorial integrity and security of the people. As a result, government impose measures to protect the sovereignty and integrity of the State. This is particularly important in the era of terrorist attack, refugee infiltration, and other security challenges.<sup>2</sup> The freedom of movement guaranteed under the constitution<sup>3</sup> is an

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<sup>1</sup> CRN 1999 (as amended) Section 14 (2) (b).

<sup>2</sup> O, Chinedu, *Nigerian Immigration Practice and Procedure* <<https://www.dcsli.com.ngo>> (Accessed July 10, 2019, 1.

<sup>3</sup> CFRN 1999 (as amended), Section 41.

important factor for consideration when promulgating legal framework for protection of borders and territorial integrity of the state. The Nigerian Immigration Act<sup>4</sup> which confers power to Nigerian Immigration Service does not contain sufficient provisions for protection of human rights enshrined in the constitution, particularly right to freedom of movement.<sup>5</sup> That is to say, that the power granted to the Nigerian Immigration Service (NIS) under the Act<sup>6</sup> to control the movement of persons entering or leaving the country, borders, and the enforcement of laws and regulations relating to immigration and emigration into and out of the country should be handled with regard to and respect for fundamental freedoms guaranteed under the Constitution of the Federal Republic of Nigeria 1999. It is in the context of this analysis that this paper examines the Nigerian Immigration Act 2015 with respect to human rights of people enshrined in the 1999 Constitution. That is, the paper seeks to examine the provisions of the Nigerian Immigration Act 2015 in comparison with the provisions of the Constitution and the Articles of international human rights law and international humanitarian law.

This is with a view to discover the extent to which the Nigerian Immigration law provide for human rights and respect the freedom of movement and association as guaranteed under the Constitution and international human rights instruments.<sup>7</sup> To examine the issues raised above, the paper is divided into five sections. Section one is the introduction. Section two is an overview of the Nigerian Immigration Act 2015. Section three is an examination of the provisions of Nigerian Immigration Act 2015 with the 1999 Constitution. Section four examines the Immigration Act 2015 with the international human rights frameworks with a view to seeing how both legal frameworks provide, protect and respect human rights. Section five is an overview of the Nigerian Immigration Act 2015 with International law. Section six concludes the paper. The paper adopts doctrinal and socio-legal research methodology in the conduction of the examinations. It looks at relevant literatures such as textbooks, journal articles, statutes, conventions, conference reports, and the Internet among other sources.

## **2. Nigerian Immigration Act 2015: An Overview**

The Nigerian Immigration Act 2015 (The Act) was established pursuant to the Act of the National Assembly 2015.<sup>8</sup> The Act provides the legal and regulatory framework for the entry and exit of persons into and out of Nigeria. It also seeks to ensure that entry on non-nationals into the country is monitored and controlled. The Nigerian Immigration Service (NIS), is an Agency under the Federal Ministry of Interior, and is charged with the responsibility of regulating and approving the immigration and emigration of expatriates as well as granting visas and entry permits into Nigeria.<sup>9</sup> According to Adeyemi:

the mandate of the NIS is hinged on the tripod necessity of advancing the security wellbeing of the citizenry, enhancing the in-flow of requisite skills and know-how required to drive the

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<sup>4</sup> Nigerian Immigration Act (Act No.8) 2015.

<sup>5</sup> CFRN 1999 (as amended), Section 41.

<sup>6</sup> Nigerian Immigration Act (Act No,8) 2015, Section

<sup>7</sup> CFRN 1999 Section 40; Section 41.

<sup>8</sup> Nigerian Immigration Act (Act No.8) 2015 Section 1.

<sup>9</sup> Bisi Adeyemi, *Control of Migrants under the Immigration Act 2015*<<https://www.irglobal.com/article/control-of-immigrants-under-the...>> (Accessed July 10, 2017), 6.

Nigerian economy as well as preventing indiscriminate employment of under-qualified immigrants with its attendant negative consequences.<sup>10</sup>

The Act provides that persons entering into Nigeria, or leaving Nigeria are required to be examined by the Immigration Officer.<sup>11</sup> On this basis, the officer may, on the information provided, refuse admission to any non-Nigerian citizen in any proper case. Thus, in *Awolowo v. Minister of Internal Affairs*<sup>12</sup> the defendant argued that the Constitution of the Federal Republic of Nigeria entitles him to the defence counsel of his choice.<sup>13</sup> After reviewing section 13 of the Immigration Ordinance, the court held that the right to enter Nigeria must be accorded to counsel who is called to Nigerian Bar and has the right to enter and leave the country. The Act also requires every passenger who arrives or departs Nigeria from any recognized port to produce to an immigration officer “anding or embarkation” cards in such form as the Minister or the Comptroller-General of Immigration may specify and to satisfy the immigration officer that he is the holder of a valid travel document.<sup>14</sup>

The Act authorizes the Minister of Interior to prescribe the conditions for entry into Nigeria and the fees payable in respect of such authorized entry.<sup>15</sup> Thus, where such conditions are not met, the Minister is at liberty to deny such visitor entry, irrespective of the nature or purpose of that visit.<sup>16</sup> Flowing from this, the Act further prescribes that a foreigner, intending to come into the country either for business meetings, specialized projects or long-term employment may only enter the country after obtaining the appropriate entry visa.<sup>17</sup> It also specifies that any person in Nigeria, who wants to employ a migrant shall, unless exemption is granted, apply to the Comptroller - General of Immigration for the migrant to enter Nigeria. Among other conditions, the Comptroller-General of Immigration has the discretion to grant an expatriate permission as he deems fit. Following this is the condition that an employer of migrant worker must obtain an Expatriate Quota and Business Permit before employing the migrant worker. However, the Act provides that nationals of member States of the Economic Community of West African States (ECOWAS) are exempted from obtaining entry visas and can reside, work, travel freely to Nigeria and undertake commercial and industrial activities without resident permits, visa or special permission.<sup>18</sup> They are only required to apply for and obtain what is known as an ECOWAS Resident Card. In the context of these and other provisions of the Immigration Act 2015, the next section of the paper examines the Act with the constitution.

### **3. Immigration Act and the 1999 Constitution**

Nigeria as a sovereign authority with responsibility for security of its citizens, it needs to protect the socio-economic interests of its populace. Recognizing this objective and in a bid to ensure strict

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<sup>10</sup> Ibid.

<sup>11</sup> Nigerian Immigration Act (Act No.8) 2015 Section 15.

<sup>12</sup> (1963) LCN/1050(SC)

<sup>13</sup> CFRN 1960 Section 21 (5) ©.

<sup>14</sup> Nigerian Immigration Act (Act No.8) 2015 Section 17.

<sup>15</sup> Ibid, Section 19.

<sup>16</sup> Bisi Adeyemi (n 9) 3.

<sup>17</sup> Nigerian Immigration Act (Act No. 8) 2015 Section 18.

<sup>18</sup> Ibid, Section 37 (13).

compliance to lay down laws, the immigration Act empowers the Minister of Interior, the Nigerian Immigration Service and the Nigerian Courts, where necessary, to detain persons suspected to have violated the provisions of the Act for the purpose of establishing their guilt and enforcing specific provisions of the Act.<sup>19</sup> The Act empowers an Immigration Officer to detain, after due examination, any person who appears to him to be a prohibited immigrant who enters Nigeria by inland waters or overland.<sup>20</sup> Furthermore, the Act empowers the Minister of Interior or the Comptroller General of Immigration to prohibit the departure of any person who is yet to satisfy an order of a court of competent jurisdiction or against whom a warrant of arrest had been issued.<sup>21</sup>

The Act provides that where a recommendation for deportation is in force in respect of an offender he shall be detained unless the Minister otherwise directs.<sup>22</sup> And the Act also provides that where a deportation order is in force in respect of an offender, he may be detained under the authority of the Minister until he is removed from Nigeria pursuant to the Act.<sup>23</sup> It is important to note that whilst Section 52 of the Act empowers an Immigration Officer to detain, within a reasonable time, prohibited immigrants who are due for deportation from Nigeria, Section 53 of the Act empowers the Minister to direct the detention of any person against whom a detention order has been made where the deportation is impracticable or prejudicial to national interest. The Act in particular empowers the Division of Irregular Migration (established under Section 62 of the Act) to arrest, detain and prosecute offenders under the Act or any other law relating to smuggling of migrants and similar offenders.<sup>24</sup>

As Ozor argues, the most controversial provision of the immigration Act as regards the detention of persons for alleged immigration offence is Section 48 (1).<sup>25</sup> It is pertinent at this stage to reproduce the section. It states:

“where a person is charged with an offence upon conviction of which the offender may be recommended under this Act or any other Act for deportation...; and notwithstanding the provision of any other Act or enactment, the offender at the hearing may be remanded in custody for a period not exceeding 21 days at the first instance, and thereafter as occasion may require, the offender may be so remanded from time to time, but in no case shall the total period of remand exceed 90 days.”

As Ozor posits, the above Section clearly confers the power to detain an immigrant whose possible punishment may climax in his deportation for a period not exceeding three months.<sup>26</sup> Again, it must be noted that this power is conferred on the court and not the Immigration Service or the Minister. The Section purports that, during trial, the offender may be detained whilst a deportation order is being awaited by the Minister. With respect, this section is contradiction with human rights and fundamental

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<sup>19</sup> Ibid, Section 53.

<sup>20</sup> Nigerian Immigration Act (Act No. 8) 2015 Section 26.

<sup>21</sup> Ibid, Section 31.

<sup>22</sup> Ibid, Section 50 (1).

<sup>23</sup> Ibid, Section 51(2).

<sup>24</sup> Ibid, Section 63.

<sup>25</sup> Ozor Chinedu, *Nigerian Immigration: Practice and Procedure*, DCSL Corporate Services Ltd, [www.dcs.com.ng](http://www.dcs.com.ng) 2019.

<sup>26</sup> Ibid.

freedoms under the constitution and international human rights.<sup>27</sup> Thus, in *Lucien Habib v Principal Immigration Officer*<sup>28</sup> the court held that an immigrant's fundamental right to freedom of movement, association or assembly must be respected while awaiting his removal from the country. The Constitution of the Federal Republic of Nigeria 1999 (as amended) provides for Fundamental Objectives and Directive Principles of State Policy and states that the state social order shall be founded on Freedom, Equity and Justice.<sup>29</sup> It is against this fundamental principle that the Immigration Act 2015 provisions on detention of foreigners or immigrants is contrary to the Constitution. Detention of person up to three months or more is illegal, and moreover, detention of immigrants most often is carried on mere allegation and on proof on guilt by a court of law.

The Constitution of the Federal Republic of Nigeria<sup>30</sup> provides that:

“very person shall be entitled to his personal liberty and no person shall be deprived of such liberty save...in accordance with procedure permitted by law –for the purpose of preventing the unlawful entry of any into Nigeria or of effecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of proceedings relating thereto: Provided that a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence.”

Also, in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.<sup>31</sup> In view of these provisions of the constitution, it is argued that detention of a person for a period of twenty-one days as provided in the Nigerian Immigration Act 2015<sup>32</sup> is unconstitutional, illegal and null and void. The Constitution equally provides that every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereby or exit therefrom.<sup>33</sup> In this respect, delaying or denying a citizen of Nigeria from travelling out of the country without cogent reasons under the Immigration Act will be unlawful.<sup>34</sup> Thus, in *Nigeria v Secretary of State for the Home Department*<sup>35</sup> the court held that delaying or total refusal by Immigration Service to allow a citizen travel in and outside his country is manifestly illegal under the Immigration law and this must apply to every civilized country.

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<sup>27</sup> CFRN 1999 Sections 33, 40, and 41; ACHPR Article 2, 12.

<sup>28</sup> (3PLR/1959/37 (FSC) 15.

<sup>29</sup> CFRN 1999 Section 17, ACHPR Article 2, 12.

<sup>30</sup> CFRN Chapter IV Section 35 (1) (f).

<sup>31</sup> CFRN 1999 Section 36 (1).

<sup>32</sup> Nigerian Immigration Act 2015 Section 48 (1).

<sup>33</sup> CFRN 1999 Section 41 (1).

<sup>34</sup> Ibid.

<sup>35</sup> (2009) ECtHR 15.

Therefore, the provision of the Nigerian Immigration Act which empowers the Minister of Interior or the Comptroller General to prohibit the departure of any person who is yet to satisfy an order of a court or against whom a warrant of arrest had been issued (but not yet arrested or detained lawfully) is against fundamental human rights principles provided under the constitution and as reflected in the above case law. This paper argues that much as the provisions of the Immigration Act 2015 is laudable, its provisions and its enforcement must be in tandem with and respect the provisions of the 1999 Constitution. The Act was couched in such way that may suggest that the country has scant regard for human rights. For instance, in the case of an immigrant or emigrant, subjecting him or her to long period of detention that deprive him of his liberty pending the issuance of an administrative order is reprehensible. Against this background, it is necessary for the Act to specify a time frame for issuing relevant detention and deportation order in conformity and consistent with the provisions of the constitution.

Therefore, allowing the Minister of Interior or the immigration officer to detain persons whether immigrant or emigrant at will or for a reasonable time, again is unconstitutional. Moreover, the term “reasonable” is subjective, not defined in the Act and can easily be abused by immigration officer. The Immigration Act provides for categorization of migrants into regular and irregular migrants.<sup>37</sup> The Act also authorizes the Minister of Interior to prescribe the conditions for entry into Nigeria and the fees payable in respect of such authorized entry. Thus, where such conditions are not met, the Minister is at liberty to deny such visitor or irregular migrant entry, irrespective of the nature or purpose of the visit.<sup>38</sup> With respect to the power of division of irregular migration, this paper argues that irregular migrant worker or non-documented migrant worker which is defined as a person who enters a country without authorization for the purpose of obtaining employment,<sup>39</sup> has the same right as other migrant workers under the International Convention on the Right of Migrant Workers and their Families (ICRMW).<sup>40</sup> Therefore, as with other migrant workers, States may not, on the basis of the irregular status, deprive an irregular migrant worker the rights afforded to him under the ICRMW.<sup>41</sup>

The Act still uses the term illegal or irregular migrants<sup>42</sup> which has been outlawed by the United Nations General Assembly<sup>43</sup> in 1975. Since that time, the term non-documented migrant is used to avoid the stigma attached to term irregular or illegal migrant. The use of the term illegal or irregular migrant amounts to discrimination against migrants who entered the country illegally. This in contravention of the Constitution and international human right instruments.<sup>44</sup>

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<sup>36</sup> Nigerian Immigration Act 2015 Section 31.

<sup>37</sup> Nigerian Immigration Act 2015, Section 63.

<sup>38</sup> Ibid.

<sup>39</sup> ICRMW Article 5.

<sup>40</sup> A/Res. /45/158, 18 December, 1990, Article 7.

<sup>41</sup> ICRMW Article 25 (3).

<sup>42</sup> Nigerian Immigration Act 2015 Article 62.

<sup>43</sup> UN General Assembly Resolution 3449 (XXX), *Measures to Ensure the Human rights and Dignity of Migrant Workers*, UN Doc, A/Res/32/120, 9 December 1975, para, 2.

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#### **4. Immigration Act 2015 and International Human Right Law and International Humanitarian Law**

In the examination of Immigration law and migrants' rights under international human right law and international humanitarian law, it is necessary to define the term migrant under international law. There is no clear, universally agreed upon definition of the term a migrant, sometimes referred to as international migrant.<sup>45</sup> Whatever definition generally accepted by human rights bodies and whatever the category of migrants, what is mostly important is their right under the law. In other words, what is necessary is to determine the rights of migrants. According to international human right norms, which are based upon the inherent dignity of every person, migrants enjoy the fundamental rights afforded to all persons regardless of their legal status in a State.<sup>46</sup> On this note, the paper examines the rights of migrants under international law with a view to determine how the Nigerian Immigration Act 2015 complies with the law protecting the rights. The basic rights of migrants under international law are therefore outlined as follows.

##### **Right to Life**

Just as enshrined in national constitutions, migrants have all the rights proved for under international law. First, all migrants have a right to life, and States have an obligation to ensure that no migrant is arbitrarily deprived of this right.<sup>47</sup> To maintain international standard, States are enjoined to prosecute right to life violations, including extrajudicial killings that take place during a migrant's journey from the country of origin to the country of destination and vice versa.<sup>48</sup>

As stated in International Justice Resource Center:

“States also have a duty to mitigate loss of life during land and sea border crossings<sup>49</sup> and generally, under international human rights law and international law of the sea, the State has a duty to protect and ensure the right to life of individuals at sea within the State's territory or that a ship under the State's jurisdiction comes across. The international law of the sea in particular has developed provisions concerning the rescue and protection of individuals, including migrants, lost at sea.<sup>50</sup> For example, Article 98 of the United Nations (UN) on the Law of the Sea (UNCLOS) places an obligation on ship masters to assist any person found at sea who is in danger of being lost and rescue persons in danger if informed of their for assistance, so long as such actions do not seriously endanger the ship, crew or passengers.”<sup>51</sup>

##### **Equality and Non-Discrimination**

International human rights law guarantees freedom from discrimination in the enjoyment of human rights for all people, including migrants. For instance, International Covenant on Economic, Social and

<sup>45</sup> OHCHR, *Migration and Human Rights: Improving Human Rights-Based Governance of International Migration* (2013), 7.

<sup>46</sup> UDHR 1948 Article 2 (UNGA Res 217 A (111)).

<sup>47</sup> ICCPR, 1966 Article 6, ICRMW, Article 9.

<sup>48</sup> UNGA Res. 23/20, *Human Rights of Migrants*, UN Doc. A/HRC/RES/23/20, 26 June 2013. Para. 4 (c).

<sup>49</sup> *Ibid*, para.4 (d).

<sup>50</sup> UNCLOS 1982 Article 98.

<sup>51</sup> *Ibid*, Article 98 (2), International Justice Resource Center, *Migration and Migrants' Rights*

<<https://ijcenter.org/thematic-research-guides/immigration-emira...>> (Accessed June 21, 2021), 7.

Cultural Rights states “The States Parties to the present Covenant undertakes to guarantee the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>52</sup> When migrants belong to any group within the contemplation of the Convention, right freedom from discrimination on any ground applies. Regional human rights instruments such as Inter- American Convention on Human Rights,<sup>53</sup> Arab Charter on Human Rights,<sup>54</sup> African (Banjul Charter on Human and Peoples’ Right),<sup>55</sup> and European Convention on the protection of Human Rights and Fundamental Freedoms.<sup>56</sup> Also, a migrant’ right to non-discrimination in the workplace is protected.<sup>57</sup> In accordance with the above principles of international law, the Inter-American Court of Human Rights held in its *Advisory Opinion On the juridical Conditions and Rights of Undocumented Migrants*<sup>58</sup> that the principle of equality and non-discrimination has reached the status of jus cogens or a preemptory norm of general international law. Therefore, all states are bound to these rules regardless of whether they have ratified specific international treaties. The Court emphasized:

A person who enters a State and assumes an employment relationship, acquires his labour human rights in the State of employment, irrespective of migratory status, because respect and guarantees of the enjoyment and exercise of those rights must be made without any discrimination. In this way, the migratory status of a person can never be a justification for depriving him or her of the enjoyment and exercise of his human rights, including those related to employment.

### **Right to Protection against Arbitrary Arrest and Detention**

It is against the provisions of international law to subject individuals, including migrants, to arbitrary arrest and detention.<sup>59</sup> Specifically, under Article 9 of International Covenant on Civil and Political Rights (ICCPR), a State must not arbitrarily arrest and detain an individual, and the State must show that other less intrusive measures besides detention have been considered and found to be insufficient to prove detention is not arbitrary. Therefore, the prolong detention of a migrant is not justified simply by the need to wait for an entry permit or until the end of removal proceedings when reporting obligations or other requirements would be less intrusive measures to ensure that the migrant's situation complies with domestic law. This was the decision of Human Rights Committee in *A v Australia*.<sup>60</sup>

In line with the above decision, the European Court of Human Rights has held that holding a migrant for an unreasonable long period of time without informing him of the reason for detention violates the European Convention of Human Rights. In *Saadi v the United Kingdom*,<sup>61</sup> Saadi fled Iraq and arrived in

<sup>52</sup> ICSCR 1966 Article 2 (2), ICCPR 1966 Article 2 (1).

<sup>53</sup> IACHR 1969 Article 1.

<sup>54</sup> ACHR 2004 Article 3.

<sup>55</sup> ACHPR 1981 Article 2.

<sup>56</sup> ECHR 1950 Article 14.

<sup>57</sup> Vincent Chetal, “Sources of International Law”, in (Brian Opeskin et al, eds.), *The ILO Declaration on Fundamental Principles and Rights at Work*, 2012, 79.

<sup>58</sup> (2003) I/A Court H.R., *Advisory Opinion OC-18/03*, para. 173 (4).

<sup>59</sup> AFCHPR Article 6; IACHR Article 7; ArCHR Article 14; ECHR Article 5; ICCPR Article 9.

<sup>60</sup> (1997) Communication No. 560/1993, *Views of 30 April 1997*, para. 8.2.

<sup>61</sup> (2008) ECtHR paras. 67-74.



London where he claimed asylum and was granted temporary admission. However, immigration officials detained him in January 2001 for 76 hours before his representative was informed of the reason why he was being detained. The European Court of Human Rights found that the United Kingdom violated Article 5 (2) which states that (everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest, and of any charge against him).

The ECtHR noted that in order for States to comply with the European Convention detention must be carried out in good faith, it must be closely connected to the purpose of preventing unauthorized entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but also aliens who, often fearing for their lives, have fled from their own country. International Covenant on the Rights of Migrant Worker and their Families (ICRMW) specially protects migrant workers and their families from individual or collective arbitrary arrest or detention.<sup>62</sup> And the Committee on Migrant Workers notes that in order for arrest or detention to not be arbitrary, it must be prescribed by law, pursue a legitimate aim under the law.<sup>63</sup> Additionally, the Convention on Migrant Workers stresses that the criminalization of irregular migration does not constitute a legitimate interest in regulating irregular migration.<sup>64</sup> Furthermore, the Convention on Migrant Workers emphasize that lawful administrative detention may transform into an arbitrary detention if it exceeds the time period for which a State can properly justify the detention.<sup>65</sup>

### **Right to Protection against Torture or Inhuman Treatment**

The prohibition against torture is a jus cogen or pre-emptory norm of international law, which means that States have an obligation to enforce the prohibition of torture even if the State has not ratified a relevant treaty. Additionally, Article 2 (2) of the Convention against Torture states that a State may never cite exceptional circumstances, including war or a public emergency, to justify torture.<sup>66</sup>

### **Non-Refoulment**

Non-refoulment, a basic principle of refugee law, refers to the obligation of States not to refoule, or return, a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of in a particular social group or political opinion.<sup>67</sup> Non-refoulment is universally acknowledged as a human right. It is expressly stated in human rights treaties such as Article 3 of the Convention against Torture<sup>68</sup> and Article 22 (8) American Convention on Human Rights. The right of non-refoulment is also applicable to individuals who do not have refugee status and may be interpreted more broadly than under the 1951 Refugee Convention. Non-refoulment include the obligation to not return a migrant to a State where he or she would face a risk of persecution or other

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<sup>62</sup> ICRMW Article 16 (4).

<sup>63</sup> General Comment No. 2, 28 August 2013, para. 23.

<sup>64</sup> Ibid, para. 24.

<sup>65</sup> Ibid, para. 27.

<sup>66</sup> ICCPR 1966 Article 7; ECHR Article 3; IACHR Article 5 (2); ArCHPR Article 8.

<sup>67</sup> Convention Relating to the Status Refugees 1951, Article 33 (1).

<sup>68</sup> Convention against Torture 1948.

serious human rights violation, including torture and cruel, inhuman or degrading treatment or punishment, lack necessary medical treatment, or be threatened with the risk of onward refoulement.<sup>69</sup> State' obligation with regard to non-refoulement also apply extraterritorially whenever they operate and hold individuals abroad, including to the extent of armed conflict or offshore detention or refugee processing facilities. Unlike under the 1951 Refugee Convention, which bases the principal of non-refoulement on the individual' refugee status, non-refoulement in the context of Convention against Torture applies regardless of refugee status.<sup>70</sup>

### **Prohibition against Collective Expulsion**

The prohibition of collective expulsion of aliens is part of customary international law, and therefore, every State, regardless of the international treaty it has ratified, or not ratified, is still bound by the obligation to uphold the prohibition.<sup>71</sup> Additionally, many of the major human rights instruments prohibit the collective expulsion of aliens.<sup>72</sup>

### **Family Rights**

International human rights norms require States to consider migrants' family life and their family members in decision regarding their admission, detention, or expulsion. For example, the Integration Convention on the Right of Migrant Workers (ICRMW) obligates States parties to “pay attention to the problems that may be posed for members of his or her family, in particular for spouses and minor children” when a migrant worker is detained and to “take appropriate measures to ensure the protection of the unity of the family of the migrant workers.”<sup>73</sup> The Inter-American Commission on Human Rights has similarly concluded that States subject to its jurisdiction must take into account a migrant' family ties, and the impact on the family members, in the host country in determining whether to deport him or her.<sup>74</sup>

### **4(a) Jurisprudence of Rights of Migrants under International Law**

Having analyzed the rights of migrants under international law, it is necessary to see some selected case laws on the rights of migrants. In *A v Australia*<sup>75</sup> the Human Rights Committee found Australia had violated the right to liberty under Article 9 of the ICCPR by arbitrarily detaining the applicant, a migrant and Cambodian national who arrived to Australia by boat. He alleged that he was arbitrarily detained in Australia while his application for refugee status was pending. His detention was arbitrary, he argued, because there was no legitimate reason to detain him, at the time of filing his application, his detention had lasted for over three and half years, and there was no available judicial review of his detention. The Human Rights Committee found that the State' justification for detention –that the applicant was a flight risk and entered the country illegally –were insufficient to keep the applicant in detention for a total of

<sup>69</sup> CMW, General Comment No. 2 2013, para.50.

<sup>70</sup> Interim Report of the Second Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/70/303, 7 August 2015, para. 38.

<sup>71</sup> Third Report on the Expulsion of Aliens by the Maurice Kondo Special Rapporteur, UN Doc A/CN.4/581, 19 April 2007, para. 115.

<sup>72</sup> Protocol 4 to the ECHR, Article 4' ACHR Article 2 (5); AMCH, Article 22 (9) ArCHR, Article 26 (2); ICRMW, Article 22 (1).

<sup>73</sup> ICRMW Articles 17 (6), 44.

<sup>74</sup> *US v Woyne Smith, Hugo Armendariz* (2010), IACHR, Report No. 81, 10, Case 12.562,

<sup>75</sup> Human Rights Committee, Communication No. 560/1993.

four years. In violation of the rights to liberty and security of Article 9 (1) of the ICCPR. Additionally, the Committee found that the State's restricted ability under recently passed legislation to review the lawfulness of detention of migrants was in violation of Article 9 (4). In *Hirsi Jamaa & Ors v Italy*<sup>76</sup> the European Court of Human Rights held that Article 3 of the European Convention on Human Rights,<sup>77</sup> which prohibits torture and cruel, inhuman, or degrading treatment, places an obligation on State parties not to expel migrants to a country where the State party is aware that the migrants face risk of the treatment prohibited under Article 3.

The 24 applicants, who are nationals of Somalia and Eritrea and were sent by Italian police to Libya, alleged that the Italian authorities returned them to a country where they were likely to face torture or cruel, inhuman, or degrading treatment within the country and likely to be repatriated back to their countries of origin where they would also likely face similar treatment. Because the Italian authorities knew the applicants were likely to be exposed to treatment as described under Article 3 both within Libya and in their home countries, which they were likely to be sent back to once in Libya, the European Court of Human Rights held that Italy violated Article 3 of the Convention.<sup>78</sup> In *Good v Botswana*, the African Commission on Human and Peoples' Rights held that the inability to challenge an order of removal in the judicial system is a violation of the right to fair trial and right of non-nationals to be expelled according to the law. The complainant is a national of Australia who was working in Botswana when the President ordered him removed from the country after he wrote and published an article critical of the government. National legislation prohibited the domestic courts from hearing an appeal of an executive order of removal. The African Commission found violation of Articles 7 (1) and 12 (4) of the African Charter on Human and Peoples' Rights, which guarantees the right to have one's case heard by a competent tribunal and the right of non-nationals to only be expelled in accordance with the law. Furthermore, because the deportation orders, which were carried out the same day as the court's ruling that it could not hear the complainant's case, did not take into account the complainant's family and mutual support they derive from one another, the removal of the complainant violated his right to family life under Article 18

In *Ramon Martinez v United States*,<sup>79</sup> the Inter-American Commission on Human Rights found that the United States violated the rights to due process and a fair trial under the American Declaration on the Rights and Duties of Man because the State failed to inform the applicant, who was convicted of a crime in the United States, of his right to consular relations. The Inter-American Commission referenced the obligation under Article 36 of the Vienna Convention on Consular Relations<sup>80</sup> to inform the rights under the American Declaration. Article 36 of the Vienna Convention requires a State party to inform a non-national who has been arrested or detained that they have a right to communication with the consular office of their home State. A lack of communication with the consular office could result, the Commission noted, in due process

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<sup>76</sup> (2012) ECHR 2776/09

<sup>77</sup> ECHR 1950 Article 3.

<sup>78</sup> (2010) ACommHPR, Communication No. 313/05.

<sup>79</sup> (2002) IACHR, Merits Report No. 52/02.

<sup>80</sup> Vienna Convention on Consular Relations 1969

violations due to factors including a lack of familiarity with the State' judicial system or a language barriers.

In *Simone Ehivet Gbagbo and Micel Gbagbo v Republic of Cote d'voire*,<sup>81</sup> the court held that the State did not act in accordance with the derogation principle under Article 4 of the ICCPR and Article 48 of the Ivorian Constitution. In addition, under the African Charter, the prohibition on arbitrary arrest and detention is absolute, and derogation is not permitted. Thus, the State also violated Michel' Article 6 right to be free from arbitrary arrest and detention. In relation to the compulsory residence order, the Court found that Michel' right to movement and choice of residence under Article 12 of the ICCPR and Article 12 of the African Charter, had been violated, as the authorities did not respond to his request to be moved to a safer and more comfortable' location. The State also violated Michel' right to moral health of the family under Article 18 (1) of the African Charter, because it denied Michel any communication with his family and didn't inform him when he would be able to leave Bouna. Lastly, the Court held that Michel was not able to access any available domestic remedies because he was held under house arrest during a political crisis, and rejected the State' argument that Michel was actually able to enter a complaint through the appropriate channels before a competent judge. He was therefore denied his right to an effective remedy under Article 7 (1) of the African Charter.

## **5. The Nigerian Immigration Act 2015 and International Law**

This section of the paper examines the Nigerian Immigration Act 2015 in the context of international human rights law and international humanitarian law. This is with a view to determine the extent to which the Nigerian Immigration Act 2015 complies with the international human rights law and international humanitarian law. This is in the context of the fact that since human rights has entered the realm of international law, it has acquired jus cogen status and is now a peremptory norm of general international law. In this respect, States are not allowed to use their national constitutions or other legislation to limit or prevent the enjoyment of human rights protected under international conventions whether they have ratified, acceded to, or domesticated the treaty or not.

To this extent, States are not permitted to derogate from the rights or insert "law back" provisions (subject to, in accordance with, with respect to or with regard to the provisions of the constitution or law), in their legislation or the constitution as these have the effect of denying or limiting the enjoyment of human rights. While the existence of the Nigerian Immigration Act 2015 is commendable, there are limitations of the Act because of some loose Articles pertaining to human rights. One of the sections is section 18 of the Act, which stipulated in paragraph (b) of "prohibited immigrants" that any person suffering from any form of mental disorder is barred from entering Nigeria and shall be deported.<sup>82</sup> As International Alliance for Peace and Development<sup>83</sup> stated, this section is in apparent contravention of

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<sup>81</sup> (2013) ECW/CCJ/APP/18/11; ECW/CC/JUD/03/13.

<sup>82</sup> Nigerian Immigration Act 2015 Article 18.

<sup>83</sup> International Alliance for Peace and Development, *Briefing on Nigeria for Committee on the Protection of all Migrants Workers, List of Issues Prior to Reporting*, 32<sup>nd</sup> Session, (30 March to 9 April 2020).

Article 7 of the Convention on non-discrimination in rights.

Therefore, it is necessary to amend section 18 of the Immigration Act 2015, more so when Nigeria has ratified the Conventions. Another limitation of the Nigerian Immigration Act, 2015 in the application of due process guarantee for migrant workers and members of their families, is that the Immigration Act 2015 did not include any procedural guarantees on detention and expulsion, despite the fact that Section 6 of the Nigerian Constitution 1999 guaranteed to all persons civil and political rights, including the right to litigation, protection procedures.<sup>84</sup> This is contrary to Article 16 of the Convention on freedom for migrant workers and personal safety and also paragraph 7 of the Article regarding the arrest or the remand of a migrant worker or his family members. Also, the Nigerian Immigration Act 2015 is silent of right to compensation to migrant worker's work-related injury in contravention of Article 83 of the International Convention on the Rights of Migrant Workers, which affirmed that the State party to the Convention must ensure effective remedies for any person whose rights are violated. Since 2015, the Northeast Nigeria has witnessed an increase in violence and killings by armed groups called Boko Haram militias.<sup>85</sup> According to Alliance for Peace and Development,<sup>86</sup> the killings by the terrorists in the Northeast Nigeria has resulted in a major humanitarian crisis. The killings include aid workers and infrastructure workers, most of whom are foreigners. According to Article 2 of the Convention, the term migrant worker refers to a person engaging in a remunerated activity in a state of which he is not a national. In view of this therefore, it is Nigeria's responsibility, perhaps through the Immigration Act to provide protection for migrant workers who are forced to flee persecution and violence taking place in the Northeast Nigeria and elsewhere. This is a lacuna in the Nigerian Immigration Act 2015, at least with respect to protection of human rights of migrant workers and their families.

## 6. Conclusion

The paper has synthesized the Nigerian Immigration Act 2015 with the 1999 Constitution and international human rights instruments with respect to immigration and rights of migrants. Contrary to assumptions and the practices of some legislatures, migrants whether regular or irregular are holders of fundamental rights under the national and international law. For this reason, international and regional human right frameworks enshrine and enforce rights, which unless expressly stated otherwise, are applicable to everyone independent of a person's status. Therefore, the fact of not complying with conditions for entry, stay or residence in a Member State should not deprive an individual from certain basic rights which are shared by all human beings.

In view of the above, the international human right instruments established within the United Nations and the International Labour Organization frameworks provide a set of international norms and

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<sup>84</sup> CFRN 1999 Section 6.

<sup>85</sup> United Nations Secretary-General: Statement attributed to the Spokesman for the Secretary-General on Nigeria, December 24, 2019 <<https://www.un.org/sg/en/content/sg/statement/2019-12-24/statement-attributable-the-spokesman-for-the-secretary-general-nigeria>> (Accessed August 9, 2020), 6.

<sup>86</sup> (n 74).

standards for the protection of human rights, including labour rights that are applicable to irregular migrants. Therefore, the Nigerian Immigration Act 2015 requires a comprehensive review to provide and recognize the human rights of migrants whether they are irregular or regular or whatever status they possess. That is, the Act supposed to undergo holist review so as to remove obstacles it pose to realization of basic rights of migrants to which they are entitled. The amendment will make the Act conform to international human rights instruments and best practices.