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Human Right Protection, Sovereignty and National Security in Nigeria Emerging Perspective and Contemporary International Law

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ABSTRACT

Observance of human rights is a cardinal principle for the survival of any democratic society just as ensuring national security is a vital interest for any nation. Nigeria has been under an unbroken democratic governance since 1999 and democracy can hardly exist in its real sense anywhere without the observance of human rights. The post war-on-terror era has witnessed several developments in international law, including the nature and function of national security. The paper established a link between national security and human rights by looking at some practical implications from a State policy perspective and practical situations, particularly in Nigeria. Doctrinal research method was used in this work. The paper found that Nigerian laws made enough provisions for both the respect for human rights and for ensuring national security which only need to be implemented fully and to allow the courts to decide the way forward when there is a conflict between human rights and national security. The paper concluded that the implementation of these laws cannot be said to be perfect, hence, the paper recommended that human rights should be respected in all situations except where the law allows for the derogation of those rights and the courts should be the ones to determine when there should be those derogations and not to be left in the hands of individual appointment holders. This is to avoid impunity and absolute power which corrupts absolutely.

Keywords: Rights, Human Rights, Sovereignty, National Security

INTRODUCTION

Nigeria is a recognized member of the comity of nations and a signatory to several international treaties including human rights treaties like the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights among others. Chapter four of the Constitution of the Federal Republic of Nigeria 1999 (as amended) is also devoted to fundamental rights.[1] There are two uncontested doctrines in international law concerning States – sovereignty as a form of right, and the right to the national security of the State. The former is a well-known doctrine in international law,[2] whilst the latter is a broad standard and usually contains, inter alia, the right to declare war, the right of a State to defend itself, and the right to public order.[3] For a State to exist, it must display these two characteristics as a genuine political entity 'in order to procure their mutual welfare and security,'[4] or promote its 'internal

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[1] Constitution of the Federal Republic of Nigeria 1999 (as amended) ss 33-46

[2] J Bartelson, *A Genealogy of Sovereignty* (CUP 1995) 5.

[3] B V A Rolling, 'The Concept of Security and the Function of National Armed Power' in A Cassese (ed), *The Current Legal Regulation of the Use of Force* (Nijhoff 1986) 283-322; J Robb, *Brave New War: The Next Stage of Terrorism and the End of Globalization* (John Wiley & Sons 2007) 30.

[4] J Crawford, *The Creation of States in International Law* (OUP 2007) 7

security and national defense',[5] and therefore claim its place among nations as a sovereign State. This means that security is at the heart of the very existence of a State and, as such, security, for modern purposes, includes the vague and broad concept of national security.[6] Under this broad concept, in which the *ordre public* of a sovereign State's internal affairs seeks shelter from the realms of evil (aggression and subversion), States are the supreme law-makers and power brokers on the international legal plane.

As there are competing aspects of security in legal and policy discourse, this paper deals with national security, as determined by a State, particularly at the domestic level. Hence, it is a sort of State security that focuses on the safety of the nation State, as opposed to collective security or human security. For instance, a government may deploy troops on home soil in order to tackle crime or illegal immigration for national security reasons.[7] In other instances, the where and when of national security being invoked can be on very vague and evasive grounds. The conception of national security in this paper plays on the Cold War realist conception, which encompasses the self-interest of the nation State.[8]

All sovereign States have different means at their disposal to safeguard their national security interests. Since the war on terror, a number of States have developed 'national security strategies' that set out the policy, legal and other methods to safeguard their national security. Furthermore, due to the vagueness of the concept of national security, States can justify any action within that paradigm.[9] In some States, the idea of national security will often escape the judicial community due to the integration of intelligence strategies, the *ordre public* or counter-terrorism. When judicial bodies do consider national security, the issues often remain sensitive and/or confidential. In some jurisdictions, questions of national security are also linked to criminal law and this creates a blur between traditional civilian courts and those that are designated as special tribunals for national security matters.

Moreover, due to the convergence of national security with criminal law in some States, it is increasingly difficult to separate the two when both are at play, if defendants have recourse to only one legal system. Take, for example, *A v Secretary of State for the Home Department*,[10] a case where foreign prisoners challenged the UK's Anti-Terrorism Act 2001 as unlawful, at least in relation to international law such as the European Convention on Human Rights (ECHR),[11] since they were being indefinitely held without trial. In that case, the then House of Lords agreed with the foreign defendants but the significance of the case relates to the fact that the Anti-Terrorism Act 2001 applied only to foreign defendants and UK defendants had recourse to domestic criminal law.

Under these scenarios, in jurisdictions such as the US, where alien terror suspects pose a threat to national security, it is the applicable domestic law, such as the Military Order of 2001, that is relevant.[12] The Military Order of 2001 circumvents the need to apply international law to alien terror suspects. As such, the US effectively and legally denies alien criminals and terror suspects human rights claims or the possibility of such claims deserving credence.[13] In the words of one commentator: 'American courts are giving short shrift by and large to human rights norms when they come into conflict with national security.'[14] Thus, for alien criminals or terror suspects facing the criminal justice system of the USA, raising human rights arguments as a defence is not straightforward.[15] However, it is important to note that

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[5] W T Worster, 'Law, Politics, and the Conception of the State in State Recognition Theory' [2009] (27) *Boston University International Law Journal*, 115

[6] A Cohen and S Cohen, *Israel's National Security Law: Political Dynamics and Historical Development* (Routledge 2012) 16.

[7] M Head and S Mann, *Domestic Deployment of the Armed Forces: Military Powers, Law and Human Rights* (Ashgate 2009) 8.

[8] N White, 'Security Agendas and International Law: The Case of New Technologies' in M Footer and Others (eds), *Security and International Law* (Oxford: Hart Publishing 2016) 6

[9] H Nasu, 'State Secrets and National Security' [2015] (64) *International and Comparative Law Quarterly*, 365.

[10] (2004) UKHL 56.

[11] European Convention on Human Rights, 1950

[12] Military Order of 13 November 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 CFR 919 (2002).

[13] P Ward, 'National Security versus Human Rights: An Even Playing Field' [2010] (104) *ASIL Proceedings*, 459

[14] *Ibid,* 461

[15] *Lawrence v Texas*, 539 US 588 (2003)

the line between national security and human rights has become such a dangerous zone of legal landmines that it is possible to use certain instruments in some domestic settings (such as the US Alien Tort Act)[16] to detect and raise human rights claims whilst, on the other hand, it is possible to directly encounter other instruments (such as the US War Crimes Act) that can strike human rights claims hard. The primary reason for this is because, under certain circumstances, human rights claims are in direct conflict with national security, meaning there is a dichotomy to balance between these two interests.[17]

Just as the contemporary conception and contents of human rights have developed and grown over the years at the global level, human rights in Nigeria have been energized and strengthened; and paradoxically, undermined and subverted, by certain historical developments. The most important human right is right to life. If human lives of the persons that make up a nation are taken without recourse to the law, the nation which is supposed to be made up of human beings, cannot exist. This paper will therefore look at the interaction between human rights and national security as provided for in Nigerian laws after which it will look at some practical situations wherein there has been smooth and rough interaction of these two important concepts and how the courts in Nigeria reacted to those situations.

CONCEPTUAL CLARIFICATION

1. Rights

Right have been used by different groups and thinkers for different purposes, with different and sometimes opposing definitions, and the precise definition of this principle beyond having something to do with normative rules of some sort or another is controversial. Feinberg[18] sees rights as claims, typically as valid claims. To have a right is to have a claim to something and against someone, the recognition of which is called for by legal rules or, in the case of moral rights, by the principles of an enlightened conscience. Rights, according to McCloskey,[19] are best "explained positively as entitlements to do, have, enjoy, or have done, and not negatively as something against others, or as something one ought to have". Unlike Feinberg, McCloskey holds that a full-fledged right need not specify who is obligated to provide what the right is to. The connection between rights and second-party duties becomes very loose. Rights as entitlements are 'intrinsic to their possessors' and are held 'independently of other people and …of what else ought to be'.[20]

A right can also be defined as a power, privilege or immunity guaranteed under a Constitution, statute or case law or claimed as a result of long usage.[21] In moral vocabulary, respect for rights is seen as a matter of justice. Rights can be asserted, demanded or stood upon. The obligations they impose are expected to be performed and their non-performance occasion feelings of indignation, resentment and disappointment. A right is something to which every individual in the community is morally entitled, and for which that community is entitled to disregard or forcibly remove anything that stands in the way of even a single individual getting it.[22]

Hohfeld's attempt to clarify the proposition "X has a 'right' to do Q", led to the categorization of four distinct incidents. The four basic components of rights are known as "the Hohfeldian incidents" after Wesley Hohfeld, the American legal theorist who discovered them. These four basic "elements" are the privilege, the claim, the power, and the immunity. Each of these Hohfeldian incidents has a distinctive logical form, and the incidents fit together in characteristic ways to create complex "molecular" rights. According to Hohfeld 'The term "rights" is used indiscriminately to cover what in a given case may be a

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[16] Alien Tort Act 28 US Code § 1350.

[17] J Petman, 'Security and Rights in the War on Terror: On the Constitutive Insecurity of Rules' in M Fichera and J Kremer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia 2013) 129–177.

[18] J Feinberg, 'The Rights of Animals and Unborn Generations' in W T Blackstone (ed.), *Philosophy of Environmental Crisis* (Athens, Ga.: University of Georgia Press 1974) 43-44.

[19] H J McCloskey, 'Rights – Some Conceptual Issues' [1976] (54) *Australasian Journal of Philosophy,* 99-115.

[20] McCloskey (n 32) 99.

[21] G Adikema-Ajaegbo, 'The Rights of Women in Nigeria' <www.thelawyerschronicle.com> accessed 17 January 2023.

[22] *Ibid.*

privilege, a power, or an immunity, rather than a right in the strictest sense; and this looseness of usage is occasionally recognized by the authorities.'[23] According to Hohfeld, in the strictest sense, all rights are claims.[24]

2. Human Rights

Definitions of human rights may differ according to the socio-economic conditions under which the defining scholars live. Moreover, there is controversy as to the status of human rights in the system of law. Many states regard human rights as a matter for the domestic jurisdiction, as opposed to the international jurisdiction, while others think otherwise.[25] Human rights are inalienable rights of human beings. "They are the freedoms, immunities and benefits, that according to modern values (especially at an international level) all human beings should be able to claim as a matter of right in the society in which they live."[26] Human rights have been defined as basic moral guarantees that people in all countries and cultures allegedly have simply because they are people. Calling these guarantees "rights" suggests that they attach to particular individuals who can invoke them, that they are of high priority, and that compliance with them is mandatory rather than discretionary. Human rights are frequently held to be universal in the sense that all people have and should enjoy them, and to be independent in the sense that they exist and are available as standards of justification and criticism whether or not they are recognized and implemented by the legal system or officials of a country.[27]

Dowrick[28] argues and submits that human rights are moral claims in essence, for they were built upon the ethical and political doctrine of the eighteenth century. He also submits that these ethical and political rights have been transformed into legal rights, as a result of their sanctioning by international treaties.

3. Sovereignty

Sovereignty is the exclusive right to exercise supreme political authority (legislative, judicial, executive) over a geographical region, over a group of people, or over themselves. The concept of sovereignty is at the confluence of several branches of law: constitutional law, public international law, community law, but it has a strong meaning and utility for areas that we will exemplify not at all exhaustive: civil law when it regulates people, general theory of law when defining concepts and principles, administrative law when presenting institutions or tax law when regulating the legal relations in which taxpayers participate.

Pușcaș[29] concludes that the concept of sovereignty has been defined in countless ways, framed in different contexts by philosophers, lawyers, and the basic idea always remains the same, namely that the sovereignty of a state combines two elements. Inseparable: the supremacy of power within the state and the independence of the state from other powers. Sovereignty is "the supreme authority with which the state is endowed by the people through constitutional democratic forms and, as the supreme power of the state, implies its exclusive competence over the national territory and its independence from any other external power.

At the same time, Krasner[30] identifies four meanings of the notion of sovereignty: internal sovereignty, which refers to the organization of public authority within a state and the level of effective control exercised by those in power; the sovereignty of interdependence, which aims at organizing the public authority to control cross-border movements (regulating the circulation of information, ideas, goods,

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[23] W N Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Legal Reasoning' [1913] (23) *Yale Law Journal,* 30.
[24] *Ibid,* 36.
[25] R M M Wallace, *International Law: A Student Introduction* (London: Sweet & Maxwell 1986) 175.
[26] B A Garner (ed.), *Black's Law Dictionary* (9th edn, Thomas Reuters 2004) 809.
[27] J Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (Berkeley: University of California Press 1987) 561.
[28] F E Dowrick (ed.), *Human Rights: Problems, Perspectives and Texts* (Kettering Northamptonshire: University of Durham 1979) 12.
[29] I Pușcaș, *People, Sovereignty and the State: Politicizing Refugee Issues During the Cold War and Beyond* (VDM Verlag Dr. Müller 2010) 31.
[30] D Krasner, *St. Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press 1999)

population, pollution or capital beyond its borders); international legal sovereignty, which presupposes the mutual recognition of states or other entities; Westphalian sovereignty, which admits the exclusion of external actors from the configurations of internal authority.

4. National Security

Security in this context can simply be said to be the state of being secure, especially from danger or attack.[31] National security can therefore be said to be the state of a nation being secure, especially from danger or attack. National security is a vital interest of any nation which invariable means that without national security, there can hardly be the nation itself. Berkowitz and Bookes[32] defined national security as a "nation's ability to preserve its internal values from external dangers is still inadequate. It implies that dangers to a country's security originate from the outside, but it ignores the threat from within." Political unrest and widening economic inequities regional development disparities, as well as cultural, linguistic, and ethnic animosity, are the bane of modern politics. To a larger or lesser extent, every nation must protect itself from them. When a nation is economically and technologically developed, politically secure, and socio-culturally unified, it can be said to have a sword for its own protection.

CONFLICTS AND THE ESSENCE OF NATIONAL SECURITY

It is safe to argue that conflicts highlight the importance of national security. The form that such conflict may take is another matter.[33] Furthermore, the rise in armed conflicts can also be attributed to new actors which, some scholars have argued, have their sole motive as the erosion of the State.[34] Interestingly, the modern trend in armed conflicts seems to either rise or remain unsettled through attempts at peaceful negotiation. Regional skirmishes involving the internal security of minor or failed States may not pose a security threat to powerful States, unless the minor State has weapons of mass destruction and there is a possibility of such weapons falling into the wrong hands. On the other hand, a civil war or other internal conflict in a powerful State such as Nigeria may have consequences beyond the Nigerian border and may even affect the national security of other countries such as Ghana, or the *ordre public* of the African Union.

During the various uprisings in the Middle East, conveniently named the Arab Spring, such civil unrests in principle only exacerbated some of the underlying conflicts that posed a threat to the sovereignty of those States. Some of the underlying problems were drawn along ethnic lines, or concerned political opposition, and manifested in various revolutions starting in 2011. This is most notable in Syria, where a civil war threatened the unity of the State and included external States as proxies. That civil war has drawn in the lone superpower, the United States, partly for national security reasons and partly due to the involvement of the erstwhile superpower, the Russian Federation, for reasons of pride and to reassert its power.

The issue of national security and human rights is also a further concern regarding the new type of conflict that occurs in cyberspace because of internet communication technologies. Cyber conflicts,[35] whether initiated through distributed denial of service (DDoS) attacks such as on Estonia in 2007, or through more modern and sophisticated methods, generally constitute a form of 'attack' for the purposes of the law of armed conflict.[36] Therefore, under such circumstances, human rights implications also

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[31] Garner (n 26) 1476.

[32] M Berkowitz and P G Booke, 'National Security' in D L Sills (ed.) *International Encyclopedia of Social Sciences* (vol 11, New York: Macmillan Free Press 1968) 4.

[33] U Dolgopol and J Gardam (eds), *The Challenge of Conflict: International Law Responds* (Martinus Nijhoff Publishers 2006).

[34] A Blin, 'Armed Groups and Intra-State Conflicts: The Dawn of a New Era?' [2011] (93) *International Review of the Red Cross*, 296.

[35] R Clarke, 'Threats to U.S. National Security: Proposed Partnership Initiatives Towards Preventing Terrorist Attacks' [2000] (12) *DePaul Business Law Journal*, 33.

[36] Y Dinstein, 'The Principle of Distinction and Cyber War in International Armed Conflicts' [2012] (17) *Journal of Conflict and Security Law*, 261

emerge even if such 'attacks' occur in cyberspace.[37] For instance, the right to privacy as enunciated under article 17 of the International Covenant on Civil and Political Rights (ICCPR) forms a direct correlation to cyber conflicts, as the activities of a belligerent cyber entity or individual can harm the targeted person and therefore breach his rights under international law. In the Delfi Case, the ECtHR found that the equivalent of article 17 ICCPR was breached when an Estonian information internet site caused harm to a ferry operator.[38] These examples show that cyber conflict is a form of silent conflict, as I posited elsewhere,[39] that outdistanced Cold War era conflicts, and reasserted espionage and destruction in a contemporary sense with devastating effects. The international initiatives to respond to cyber conflict, such as the Tallinn Manual, are admirable, although such efforts to some extent are in vain when they develop principally as adversarial tools in organisations such as NATO.[40]

Regardless of where a conflict occurs, whether in cyberspace or on the territory of sovereign States, States are prepared to take actions to defend their territory or territorial information infrastructures. States are required to observe international human rights law when facing such conflicts. However, given that national security concerns often drive States to 'protect' themselves in event of an 'attack', it is still unclear where human rights laws are applicable in the event of an 'attack' and national security justifications are often invoked to suspend human rights laws. Thus, armed conflicts still require peaceful settlement, and the settlement of these conflicts would be of mutual benefit to the international community, in particular if the States where the conflicts are taking place are considered as sources of a national security threat to other States.

From a theoretical point of view, van Kempen identifies four concepts of security that are inextricably linked to human rights. According to van Kempen, 'international security through human rights protection by States',[41] 'negative individual security against the State', 'security as justification to limit human rights' and 'positive State obligation to offer security to individuals' are all part of a complex system that links human rights to security. Yet, despite this positive relation between human and security norms, van Kempen concludes that 'international human rights law offers neither an unequivocal nor a clear perspective on security.'[42] This finding is important because the international legal system, including international human rights law, has long championed human rights as the most privileged and safe concept for the vulnerable and stateless in international law.

Yet, at the same time, international norms reveal that the international human rights system of rules depends on how they interact with the national rules of States, and whether those human rights rules contravene or interfere with the administration of justice and national security.[43] Another argument that van Kempen develops is the idea of peace as a result of conflict, which involves human rights peace theory, whereby on some occasions 'security between States has increasingly come to depend on security within those States.'[44] For the purposes of this section of this paper, this observation is actually part of the essence of conflict and national security. In other words, and as van Kempen also posits, due to the complexity of internal conflict, human rights breaches (at the national level) are often the root cause of, or can directly trigger, conflict.[45] Thus, if the human rights (or constitutional or political rights at the national level) of citizens are not upheld by the State, such States can plunge into internal conflict as a result of those breaches.

[37] H Lin, 'Cyber Conflict and International Humanitarian Law' [2012] (94) *International Review of the Red Cross*, 515.
[38] *Delfi As v Estonia* App No 64569/09 (ECtHR, 16 June 2015).
[39] P Sean Morris, 'iSpy: International Silent Conflicts, Cyber Warfare and Developments in International Diplomatic Law' (Working Paper, 2012)
[40] L J M Boer, 'Restating the Las as it Is: On the Tallinn Manual and the Use of Force in Cyberspace' [2013] (5) *Amsterdam Law Forum*, 4.
[41] P H van Kempen, 'Four Concepts of Security – A Human Rights Perspective' [2013] (13) *Human Rights Review,* 3.
[42] *Ibid.*
[43] *Ibid,* 22
[44] *Ibid,* 5
[45] *Ibid.*

In a number of States where internal conflicts have taken place, or are still ongoing, it is easily deducible that such conflicts occur because of repression by a regime or other systematic deprivation of human rights. The response at the international level is a call for the respect of international human rights law and similar obligations in the international legal system.

INTERACTION BETWEEN HUMAN RIGHTS AND NATIONAL SECURITY THROUGH NIGERIAN LAWS

Several Nigerian laws made provisions to ensure the protection of both human rights of citizens and national security. Some of the laws that will be examined in this work include the grundnorm, the Constitution of the Federal Republic of Nigeria 1999 (as amended), Terrorism (Prevention) Amendment Act 2013, Administration of Criminal Justice Act 2015, Armed Forces Act, CAP A20, LFN 2004 (as amended) and the Fundamental Rights Enforcement Procedure Rules 2009.

Constitution of the Federal Republic of Nigeria 1999 (as amended)

The Constitution of the Federal Republic of Nigeria 1999 (as amended) (CFRN) made several provisions. The entire Chapter four of the Constitution is devoted to fundamental rights. It began with right to life wherein it provided that "every person has a right to life and no one shall be deprived of his life, save in the execution of sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria".[46] The CFRN brings in the issue of national security even at this stage already by providing that 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 use to such extent in such circumstances as permitted by law, of such force as is reasonably necessary for the following reasons; for the defence of any person from unlawful violence or for defence of property, in order to effect lawful arrest or to prevent the escape of a person lawfully detained or for the purpose of suppressing a riot, insurrection or mutiny.[47]

The drafters of the Constitution clearly distinguished when the right to life can be said not to be derogated from. Any deprivation of life outside the exceptions becomes a criminal offence that is punishable by law. The Constitution recognizes the fact that in a situation of insurrection or mutiny, that suppression of such acts is necessary and that it may involve life, depending on the method used to suppress it and which should be in line with the rules of engagement of the military or paramilitary organization that is used for the suppression of the act in question. Even here, the constitution recognizes the importance of the lives of citizens and equally recognizes the importance of having a nation that is secured. In the case of *Eze v State*,[48] the Supreme Court of Nigeria restated the fact that life is sacred and that the court will convict anyone who deprives another of his life in ways that are not permitted by law.

The Constitution also guarantees the right to the dignity of human person.[49] The Constitution herein outlaws torture or inhuman or degrading treatment, slavery or forced labour.[50] It however gives exception in the case of forced labour if it is required in consequence of an order of court, if it is required in the duties of the members of the Armed forces or the police, in an emergency or calamity threatening the life or well-being of the community. It is also an exception if the labour forms part of compulsory national service in the Armed Forces of the federation or as a part of education and training of citizens as may be prescribed by the Act of the National Assembly. In this instance, the Constitution recognizes that in certain situations, in order to save a community during an emergency, there could be forced labour, but still to the benefit of the people themselves and for their security. Any such labour that does not come within the ambit of the constitutional provision is unlawful.

[46] Constitution of the Federal Republic of Nigeria 1999 (as amended), s 33(1)
[47] *Ibid,* s 33(2).
[48] (2018) LPELR-44967 (SC)
[49] CFRN 1999, s 34
[50] *Ibid.*

There are also other human rights guaranteed by the Constitution like the right to personal liberty[51] and the right to fair hearing[52] with their own exceptions. The right to fair hearing is an outstanding human right especially as it relates to trials. It provides that "every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty"[53] It equally provides that every person charged with a criminal offence shall be entitled to be informed properly in the language that he understands and in detail of the nature of the offence. In addition, it provides that such an accused person shall be given adequate time and facilities for the preparation of his defence and that he has a right to defend himself in person or by legal practitioners of his own choice. He equally has a right to examine in person or by his legal practitioners the witnesses called by the prosecution and to equally have without payment, the assistance of an interpreter if he cannot understand the language used at the trial of the offence.[54] The Supreme Court of Nigeria in reiterating the importance of fair hearing in the case of *Chitra Knitting & Weaving Manufacturing Co Ltd v Akingbade*[55] held that "it follows therefore that once an appellate court finds, as in this case, that there is a breach of the right of fair hearing in the proceeding in issue, it must allow the appeal, having no other alternative in the matter". Once the right to fair hearing is breached, the trial becomes a nullity. The CFRN 1999 and Nigerian courts are clear about the need to observe the right to fair hearing. The Constitution equally made a bold statement in relation to national security when it provided for restriction and derogation from fundamental rights.

The Constitution also gives citizens an opportunity for redress when their rights are breached. In a special way, it provides that "any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress."56 It is also in line with this Section of the Constitution that the Chief Justice of Nigeria promulgated Fundamental Right Enforcement Procedure Rules 2009 which is purely meant for redress on human rights breaches. The Constitution did not just provide for when the rights are breached but also when it is being or likely to be contravened.

Terrorism (Prevention) Amendment Act 2013

Terrorism is generally new in Nigeria, compared to some other parts of the world and as a new disease, needed a new solution which gave birth to the Terrorism Prevention Act 2011 and its subsequent amendment in 2013. The amendment makes provisions for extra-territorial application of the Act and strengthens terrorist financing offences.[57] One can hardly talk about national security in Nigeria without mentioning the menace of terrorism. Some of the accusations of breach of human rights in some quarters against Nigeria sprang up due to the fight against terrorism especially with regard to Boko Haram terrorist members. However, the Act provides for protection of human rights even in the counter terrorism fight. One example of such provisions is that:

> The court may, pursuant to an *ex-parte* application, grant an order for the detention of a suspect under this Act for a period not exceeding 90 days subject to the renewal for a similar period until the conclusion of the investigation and prosecution of the matter that led to the arrest and detention is dispensed with.[58]

The provision is made to ensure that there is no arbitrary and prolonged detention of suspects of terrorism offences in the country. Every lawyer representing a suspect that is detained longer than the period provided without the approval of a court has a right to sue the authority that detained the suspect. There is therefore a close interaction as far as this Act is concerned, between human rights and national security. It will be like a jungle if there are no checks and balances to regulate methods of arrest and detention even

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[51] *Ibid*, s 35

[52] *Ibid,* s 36.

[53] *Ibid,* s 36(5).

[54] *Ibid,* s 36(6).

[55] (2016) LPELR- 40437.

[56] CFRN 1999, s 46.

[57] Terrorism (Prevention)(Amendment) Act 2013, Explanatory Memorandum.

[58] *Ibid,* s 27(1).

in extreme cases of terrorism. If there is a situation where someone or some persons do not strictly follow the law in arrest and detention, there are judicial remedies when such a situation is brought before the law courts. This is to ensure that the Government and security agencies respect human rights while conducting counter terrorism operations.

Administration of Criminal Justice Act 2015

The need to reduce the number of awaiting trial inmates in Nigeria and the need to speed up the process of obtaining justice in the country brought the need for the promulgation of the Administration of Criminal Justice Act (ACJA) 2015. Many countries of the world have the challenge of having too many awaiting trial inmates and in many cases outnumbering the number of those that have passed through trial, convicted and sentenced. In order to ensure quick dispensation of justice, which is at the heart of the protection of human rights, the Act established the Administration of Criminal Justice Monitoring Committee made up of the Chief Judge of the Federal Capital Territory who is the Chairman, the Attorney General of the Federation, a Judge of the Federal High Court, the Inspector General of Police, the Comptroller General of the Nigerian Prisons Service and the Executive Secretary of the National Human Rights Commission. Others are Chairman of any of the local branch of the Nigerian Bar Association in the Federal Capital territory, the Director General of the Legal Aid Council of Nigeria and a representative of the Civil Society working on human rights and access to justice or women rights.[59]

It is obvious that while protecting national security, issues of arrest and detention of suspects will arise, hence the need to ensure that the human rights of those arrested, detained or tried are adequately protected. This shows the interaction between national security and human rights in the Administration of Criminal Justice Act. It is important to add that the provisions of this Act are practically implemented and the Act has actually enhanced speedy trials in Nigeria to some extent.

Armed Forces Act, CAP A20, LFN 2004

The Armed Forces Act (AFA) is a special law that guides members of the Armed Forces in their day-to-day activities, both in and outside uniform. The members of the Nigerian Armed Forces are the ones that are deployed in counter terrorism operations. They are bound to be professional, strictly follow their rules of engagement and ensure that they respect human rights in their operations. There have been situations where members of the Armed Forces were court martialled for breaching the human rights of suspects even in counter terrorism operations. Currently, two soldiers are standing trial before 7 Division General Court Martial of the Nigerian Army in Maiduguri, Nigeria for allegedly extra judicially killing one arrested Boko Haram member on 16 January 2021 out of eight of them that were arrested, while trying to avenge the death of one officer and six soldiers killed by the arrested terrorists. Boko Haram members are known to be terrorizing Nigeria especially in North Eastern part of the country and they are currently the most potent threat the national security of Nigeria. Even then, the law does not allow troops in the counter terrorism operation to extra-judicially execute arrested members of the Sect no matter the atrocities they committed before being arrested. Nigeria is also a signatory to the Geneva Convention that prohibits the extra judicial killing of an arrested suspect. It would have been a different thing if they were killed while exchanging fire with the troops in battle.

The rights of the troops themselves are adequately protected during their own trials.[60] Even those that extra-judicially killed arrested terrorists will also have their rights protected while being tried at the court martial, just like how the rights of civilians are protected while being tried in civil courts. They have the right to be informed of the crime they committed. A copy of the charge sheet and summary or abstract of evidence shall be given to the accused at least 24 hours before the trial.[61] They equally have the following rights in a court martial; the right to defend themselves in person or by a counsel of their choice.[62] Where they cannot afford a counsel, the military will provide them one.[63] Right to object to any member of the court martial or a waiting member before they are sworn in.[64] Right to the presumption of innocence.[65] Right to examine in person or by their legal practitioners, the witnesses called by the prosecution.[66] Right to an interpreter if they cannot understand the language used at the trial of the offence.[67]

They also have the right to the record of proceedings of the trial at the conclusion of the trial[68] and right to be tried for an offence once,[69] right not to be tried for an offence that has been condoned[70] and right not to be tried for an offence not defined and the penalty not prescribed in a written law.[71] The rules of evidence observed in civil courts are the same rules observed in a court martial. AFA provides that "…the rules as to evidence to be observed in proceedings before a court-martial shall be the same as those observed in criminal courts in Nigeria…" The same Evidence Act 2011, used in civil courts is used in courts martial.

HUMAN RIGHTS AND NATIONAL SECURITY LINK IN NIGERIA: PRACTICAL SITUATIONS

The essence of the laws as enunciated above is to guide human activities and in this context, to ensure a balanced interaction between human rights which is a part of rule of law and national security which ensures that even the lawyers are secured. It will not be right to claim that Nigeria has been perfect in executing the provisions of the law especially with regard to human rights while working to ensure national security. The Nigerian Government has been accused of disobedience to court orders in some instances, like the cases of the former national security adviser, Col Sambo Dasuki (Rtd) and Sheik Ibrahim El Zakzaky granted bail while in detention in some occasions but were not released. Col Dasuki was standing trial for an allegation of diverting $2.1 billion arms funds while serving as National Security Adviser while Elzakzaky was tried for alleged culpable homicide, unlawful assembly and disruption of public peace among others. Two of them have however been released. While Col Dasuki was released on 24 December 2019 in obedience to one of the many court orders after about four years in detention, Elzakzaky was discharged and acquitted by the Kaduna State High Court in Nigeria on 28 July 2021 after about four years in detention as well. The two cases bordered on the interaction between human rights and national security.

On 26 August 2018, the Nigerian President while declaring open the 2018 Annual General Conference of the Nigerian Bar Association in Abuja, Nigeria, the Nigerian President made a statement that bordered on this topic. He said that: "Rule of Law must be subject to the supremacy of the nation's security and national interest. Our apex court has had cause to adopt a position on this issue in this regard and it is now a matter of judicial recognition that; where national security and public interest are threatened or there is a likelihood of their being threatened, the individual rights of those allegedly responsible must take second place, in favour of the greater good of society".[72] This statement brought about so many comments in the country, from those for and against the position of the President.

The statement of the President was culled from the case of *Dokubo-Asari v Federal Republic of Nigeria*[73] decided by the Supreme Court on 8 June 2007. Dokubo-Asari, the appellant was tried on five-count charges of conspiracy to commit treasonable felony, forming, managing and assisting in the management

[63] Rules of Procedure Army 1972, rule 25 (b).
[64] AFA, s 137.
[65] CFRN 1999, s 36 (5).
[66] CFRN 1999, s 36 (6) (d).
[67] *Ibid*, s 36 (6) (e).
[68] *Ibid*, s 36 (7).
[69] AFA, s 171 (1) (a) and (b)
[70] *Ibid,* s 171 (c); *Aminun Kano v The Nigerian Army* (2010) 1 MJSC (Pt 1) 151.
[71] CFRN 1999, s 36 (12).
[72] The Punch, 'President Buhari's Speech at 2018 NBA Annual General Conference' <punchng.com/president-buharis-speech-at-2018-nba-annual-general-conference> assessed 18 January 2023.
[73] (2007) LPELR – 958 (SC)

of unlawful societies, publishing a statement, rumour or report likely to cause fear and false alarm to the public and membership of unlawful societies.[74] The trial court refused him bail based on the weight of the charges. He appealed to the Court of Appeal which equally dismissed his appeal which made him to appeal to the Supreme Court. In its judgment, the Supreme Court held as follows;

> The pronouncement by the court below (Court of Appeal) is that where National Security is threatened or there is the likelihood of it being threatened, human rights or the individual rights of those responsible take second place. Human rights or individual rights must be suspended until the national security can be protected. This is not anything new. The corporate existence of Nigeria as a united, harmonious, indivisible and indissoluble sovereign nation, is clearly greater than any citizen's liberty or right. Once the security of the nation is in jeopardy and it survives in pieces rather than in peace, the individual's liberty or right may not even exist.[75]

The President rightly quoted the law as stipulated by the Supreme Court of Nigeria in that particular case. The Supreme Court acted in line with the CFRN wherein it provided for derogation of some rights based on the interest of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedoms of other persons.[76] It is the court that made this decision and it is the courts that should make decisions as to whether a suspect or an accused should be granted bail or not. That is the difference. It is not the President as a person or the Attorney General of the Federation as an individual that should assess a situation and come up with the idea that such a suspect or an accused person should not be granted bail. That will not be within the ambit of rule of law which is supreme. Even the same court may decide differently in another case if the facts are not in all fours. It is the duty of Nigerian courts which remain the custodians of Nigerian laws and which must always be obeyed. Though the CFRN 1999 authorises the Attorney General of the Federation or those of States (in states) to institute and undertake criminal proceedings against any person before any court of law in Nigeria other than a court martial in respect of any offence created by law, to take over and continue at any stage before judgment or to discontinue at any stage before judgment,[77] he still performs those functions through the instrumentality of the court and when the court decides that a detainee or an accused person should be granted bail, the only way to continue detaining such a person is if the decision not to grant bail is appealed and if the appellate court refuses to grant bail. The reason for strictly following the rule of law is to avoid impunity wherein an individual determines how long a person should remain in detention without recourse to the courts.

INTERNATIONAL HUMAN RIGHTS OBLIGATIONS: LINK TO NATIONAL SECURITY

The international human rights system is a legal minefield, dotted with various legal instruments and regulations which, in one sense, provide the possibility to incorporate a vast array of concepts into the human rights narrative.[78] Thus, linking international human rights to national security is not far-fetched. Van Kempen found that there is no real linkage between international human rights and security,[79] but one can question whether this is really the case and what the exact nature of international human rights obligations is in relation to national security. There are no answers to these questions, and this section merely attempts to extrapolate upon some of these intricacies.

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[74] *Ibid.*
[75] *Ibid,* p.38 para B-E.
[76] CFRN 1999, s 45.
[77] CFRN 1999, ss 174 and 211
[78] D Joyce, 'Human Rights and the Mediatization of International Law' [2010] (23) *Leiden Journal of International Law*, 507.
[79] van Kempen (n 41).

The current international legal regime on human rights is a consequence of the Second World War. Thus, the Charter of the United Nations (UN Charter),[80] the Universal Declaration of Human Rights (UDHR),[81] the International Covenant on Civil and Political Rights (ICCPR)[82] and the International Covenant on Economic, Social, and Cultural Rights (ICESR)[83] were designed to provide the necessary legal avenues for the protection of individuals who endured much suffering during the conflict.[84] The 1945 UN Charter was the first international legal instrument to promote modern international human rights. From the perspective of the UN Charter, fundamental rights and freedoms were designed as part of the grand bargain that resulted in the establishment of the UN and brought in the 'new international law of human rights.'[85] However, it is the UDHR that is the actual blueprint of the modern international human rights legal system and some argue that even the UDHR has a long and complicated history, going as far back as the American and French Revolutions.[86]

Of course, one could interpret references in the preamble of the UDHR as references to security, such as 'recourse, as a last resort, to rebellion against tyranny and oppression.'[87] However, these can also be viewed as a description of the internal chaos of States, whereby State administrators (dictators/leaders) opposed their own people, and hence not a national security issue in the traditional sense. The UDHR was adopted in 1948 when the state of affairs was not exactly rosy. The war was still fresh in the memory of many people and the victors were concerned with how human rights violations in States could destabilise those States' national security and the effect of such destabilisation on the wider international community.[88]

The UDHR itself has other examples that can be seen as references to national security. For instance, in article 3, a clear link to national security is established. Article 3 provides that 'everyone has the right to life, liberty and security of person.'[89] The latter part of article 3 confirms that 'security of person' refers to 'the right of being protected against certain intensive interferences from the State.'[90] In other words, article 3 of the UDHR is concerned with protecting the rights of individuals from State sponsored national security objectives that affect the human rights of the individual. Taken literally, what this means is that States ought to ensure that, as a part of their internal national security policy, the security of their citizens is well protected when the broad and vague policy objectives of national security are implemented. The alternative would be that internal chaos would prevail and therefore destabilise national security. Article 3 should also be seen in relation to article 5 and article 9 of the UDHR, which cover, in article 5, torture and inhuman and degrading treatment or punishment and, in article 9, arbitrary arrest or detention. Together, these provisions of the UDHR create a triad of links between national security and human rights which are, in a sense, the very same aspects in contemporary human rights discourse that provoke questions on national security. Perhaps the strongest linkage the UDHR creates between human rights and national

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[80] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI

[81] UNGA Res 217A (III) (10 December 1948) UN Doc A/810.

[82] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[83] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3

[84] P Ballinger, 'Entangled or "Excluded" Histories, Displacement, National Refugees, and Repatriation after the Second World War' [2012] (25) *Journal of Refugee Studies*, 366

[85] Charter of the United Nations 1945, preamble.

[86] P Slotte and M M Halme-Tuomisaari, *Revisiting the Origins of Human Rights* (CUP 2015)

[87] UDHR 1948, 3rd preamble.

[88] J von Bernstorff, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law' [2008] (19) *European Journal of International Law,* 903.

[89] UDHR 1948, art. 3

[90] L Rehof, 'Article 3' in A Eide and Others (eds), *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press 1992) 73.

security is that, as the grand dame of the international human rights system, most other regional and national human rights rules adopted or used the model of the UDHR.[91]

The ICCPR is one of the major binding international legal instruments on human rights which is, in one sense, a direct descendant of the UDHR. Echoing article 12 of the UDHR, the ICCPR provides, in article 17, for the protection of privacy, family, home and correspondence.[92] However, article 12 of the ICCPR explicitly mentions national security as a subject matter of human rights. According to this provision, individual freedoms should not be curtailed unless a national security measure to protect them is required: '[human] rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public)...'[93] Similarly, articles 13, 14, 19, 21, and 22 reinforce exceptions to human rights on the ground of national security.

The wording used in article 12 regarding the permissible purposes for interference in human rights protection connotes two levels of exception: a low-level exception based on public order and a high-level exception based on national security. Thus, the low-level exception in the ICCPR conceivably involves internal threats to the State, and/or threats posed by individuals. In such instances, the freedoms of individuals may be suspended or denied on certain grounds. An example of a low-level exception could the posting of an army in the internal borders of a State to help mitigate threats such as illegal immigration. However, one can argue that it is up to the domestic criminal justice system to properly respond to the low-level exception that article 12 of the ICCPR advocates.

The above perspectives are some singular insights into the direction of international human rights rhetoric in the global sphere and how that rhetoric can easily be adapted to suit other norms such as national security.

CONCLUSION

One thing that does seem to have emerged is that international human rights law does not offer protection to domestic situations regarding the violation of human rights. In other words, where national security intersects with human rights violations at the domestic level, international human rights law is weak because there are so many firewalls against what is considered national security at the domestic level, which States can invoke based on their domestic laws. Within the realm of international relations and international law operations, it is up to States to determine the reach and scope of international law and, as such, 'the nation State still prevails globally, international law is not normally legally binding domestically unless it is incorporated into national legislation.' Furthermore, where international law is incorporated into domestic legislation, the risk of incompatibility with other constitutional norms may render international human rights norms incompatible with national security legislation.

The paper brought out the interaction between human rights and national security in Nigeria, using the provisions of the CFRN 1999 (as amended), the Terrorism Prevention Amendment Act 2013 and the Armed Forces Act CAP A20 Laws of the Federation of Nigeria 2004 among others. All the Acts made provisions for the respect of human rights and equally for the protection of National Security. Like the tongue and the teeth, human rights are meant to co-exist with national security. It is the law that created the nation that equally created human rights. The paper found that the legal provision for the protection of human rights in Nigeria and for ensuring National Security is adequate. However, the implementation cannot be said to be perfect hence the paper recommends that human rights should be respected in all situations except where the law allows for the derogation of those rights and the courts should be the ones to determine when there should be those derogations and not to be left in the hands of individual appointment holders. This is to avoid impunity and absolute power which corrupts absolutely.

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[91] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR); American Convention on Human Rights (ACHR) (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

[92] *Celepli v Sweden*, Communication No.456/1991, UN Doc CCPR/C/51/D/456/1991 (1994); *Karker v France*, Communication No.833/1998, UN Doc CCPR/C/70/D/833/1998 (2000).

[93] ICCPR 1966, art. 12(3)