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Accountability For Human Rights Violations In Nigeria's Counterinsurgency Against Boko Haram: Problematising The Optional Protocol To The International Covenant On Civil And Political Rights

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ABSTRACT

The major objective of this Article is to examine the extent to which the accountability mechanism under international law is sensitive, and responsive to the challenges of accessing domestic remedies by victims of human rights violations in Nigeria's counterinsurgency against Boko Haram. It explores the extent to which the current framework has enabled and facilitated efforts of victims in this wise especially those of poor, weak and defenceless victims. In this article, we make a case that the inability of international law under the auspices of the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), to bring the perpetrators of heinous abuses in the counterinsurgency operations to book, is as a result of the deficiency in the complaint procedure, which is largely state-centred and a gap in the current framework. This article therefore proposes the view that remedies for victims in this conflict can be better realised, not just by viewing them as obligations that States are encouraged to fulfil within the confines of their sovereign status, but more importantly by crafting them within a framework of supranational legitimacy in which States can indeed be held accountable and compelled to meet their obligations.

Keywords: Accountability, Boko Haram, Counterinsurgency, Human Rights, Optional Protocol.

Pertanggungjawaban Pelanggaran HAM dalam Konflik Pemberontakan antara Nigeria dengan Boko Haram: Mempermasalahkan Protokol Pilihan dalam Kovenan Internasional untuk Hak Sipil dan Politik?

ABSTRAK

Tujuan utama dari artikel ini adalah untuk mengkaji sejauh mana mekanisme pertanggungjawaban dalam hukum pidana internasional dapat mengakomodasi tantangan dalam mengakses sistem kompensasi domestik bagi korban pelanggaran HAM dalam konflik pemberontakan Boko Haram di Nigeria. Tulisan ini menyelidiki bagaimana kerangka kerja yang ada saat ini memberikan ruang dan memfasilitasi korban dalam aspek tersebut, terutama mereka yang miskin dan rentan. Tulisan ini berargumen bahwa ketidakmampuan hukum internasional untuk membawa para pelaku kejahatan HAM berat dalam pemberontakan tersebut untuk bertanggung jawab atas kejahatan mereka terhadap korban adalah hasil dari kecacatan dalam prosedur pengaduan hukum pidana internasional, yang memang terfokus pada negara dan kurang mengakomodasi jenis-jenis konflik modern. Maka dari itu, tulisan ini mengusulkan perspektif dimana kompensasi kepada korban dari konflik pemberontakan ini dapat direalisasikan dengan

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lebih baik, dengan cara memasukkan pertanggungjawaban ini ke dalam legitimasi supranasional sehingga negara dapat dimintai pertanggungjawaban dan diwajibkan untuk memenuhi kewajiban mereka.

Kata Kunci: Boko Haram, Hak Asasi Manusia, Pemberontakan, Pertanggungjawaban, Protokol Pilihan

A. INTRODUCTION

The global appeal and the collective monitoring that human rights enjoys, positions it as perhaps the most prized asset of the international legal community. Despite the several centuries of being in conceptual wilderness, human rights emerged as a global force with the enactment of the Universal Declaration of Human Rights (UDHR) in 1948.¹ Since the UDHR, the growth of human rights has been astronomical with its dominance equally mercurial, such that the human right arena is now saturated with a vast body of legal instruments.² Yet even with its primacy and significant shift in its spatial reach, human rights has continued to wrestle with newer phenomena in the 21st century such as the upsurge in insurgencies and its frighteningly staying power. The slippery nature of this form of warfare demands constant vigilance mostly in terms of making perpetrators of human rights violations accountable. However, as the human rights community contends with insurgents on one side, its attention is also pulled on the other side, by the atrocities that have accompanied counterinsurgency operations. Such atrocities, for instance, have been rife in the Boko Haram insurgency, which has called to question Nigeria's obligation under International Human Rights Law (IHRL). In this respect, IHRL refers to the body of substantive as well as procedural laws, that guarantees the protection of human rights of persons against governments.³ It is made

up of international instruments guaranteeing respect for and the protection of human rights. For the purpose of this article, focus will be on the Universal Declaration on Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) as well as its Optional protocol,⁴ being key instruments that have come under the spotlight in Nigeria's counterinsurgency operations.

To deal with the problem of human rights abuses in counterinsurgencies, the field of International Human Rights Law (IHRL) has overtime developed certain procedures through ratified instruments, by which victims can submit communications as a way of kickstarting the accountability process. Within the context of this article, the relevant instrument is the Optional Protocol to the International Covenant on Civil and Political Rights (Hereinafter 'Optional Protocol'). However, the ubiquitous nature of the procedure under this protocol makes it such that not much has been achieved in terms of accountability. This has been described by Kim and Sikkink as nothing but theoretical accountability aimed at morally stigmatising would-be violators, as against indeed holding them accountable.⁵ This points to a problem in terms of the conceptualisation of the accountability process.

The focus of this article, therefore, is to examine the current accountability framework under the Optional protocol to the ICCPR. To achieve this, it would be divided into seven (7) parts – Part I of the

¹ Modibo Ocran, "Socioeconomic Rights in the African Context: Problems with Concept and Enforcement". *Loyola University Chicago International Law Review*, Vol. 5, No. 1, 2007, pp. 1 -13, at 1.

² These instruments cover a wide spectrum of specialised rights such as civil/political, social/economic, women, children, the disabled, etc.

³ M. Pinto, "Fragmentation or Unification Among International Institutions: Human Rights Tribunals", *New York University Journal of International Law & Politics*, Vol. 31, 1998, pp. 833 – 850, at 833.

⁴ Adopted alongside the ICCPR.

⁵ H. Kim and K. Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries", *International Studies Quarterly*, Vol. 54, No. 4 2010, pp. 939 – 963, at 941.

article which is the introduction, lays out the issues for consideration, while part II examines the Boko haram insurgency and its devastations. Part III examines Nigeria's counterinsurgency against the group and the allegations of human rights violations that have trailed these operations. Part IV engages the issue of legal basis for accountability under IHRL, while part V assesses the challenge of accountability under the Optional protocol to the ICCPR and the relevant issues therein. Part VI suggests a supranational framework of accountability, as complementary to the existing state-centred system, part VII deals with the conclusion.

B. THE BOKO HARAM INSURGENCY AND THE DEVASTATIONS

Nigeria is a multi-ethnic and multi-cultural State with deep ethno-religious divisions stratified along age-long complicated fault-lines.⁶ At the core of this tapestry is the issue of religion, which plays a dominant role in matters of national life.⁷ The result has been a fractured co-existence of disagreements. Often, the crisis stems from the ambition of certain sects of the Islam, one of the religions in the country seeking to impose extreme doctrines of the sharia law on the people of the Northern region of the country, an ambition that ends up clashing with the Constitution, as well as the democratic and human right ideals of the

country. It was following this pattern that the Boko haram insurgency evolved.

The Nigerian State is today locked in an insurgency with its opponent being the Salafist group called Boko Haram,⁸ a group whose capability has cost the country irreparable loss in terms of senseless killings and other forms of horrific violence.⁹ In terms of fatalities from the insurgency, Human Rights Watch (HRW) puts the figure at 10,000 persons killed.¹⁰ The group's savagery has also been extended to acts such as targeted killings, suicide attacks, widespread abduction, burning and looting, etc.¹¹ Corroborating the HRW report, another account claims that the group may have indeed killed up to 100, 000 persons, destroyed over 1,400 Schools, displaced more than 2.6 million people, and caused about \$9Billion worth of damage.¹² Given the horrific nature of its activities, scholars have come to the conclusion that the aims and ambitions of the group are unlimited, compared to that of earlier groups in the country such as the Maitatsine and Shiites.¹³ The increase in the spread of its nefarious activities in Nigeria's north-east region has created adverse humanitarian conditions for the people of the region.¹⁴

The group appeared to have reached the highest point of its war of attrition when around January 2015, it was reported to have under its occupation and control, close to 14 local government councils in the northeast region.¹⁵ These councils were later recovered through the efforts of the

⁶ P. A. Ganyi, "Religious Diversity in Post-Colonial Multicultural Nigerian Society", *Master of Arts Thesis, University of Pretoria*, 2015, at 2.

⁷ *Ibid.*

⁸ Osita Ebiem, *Nigeria, Biafra and Boko Haram: Ending the Genocides Through Multistate Solution*, United States: Page Publishing Inc., 2014, at 1.

⁹ T.U. Akpoghome, "Other Situations of Violence: Classification Issues and Concerns: The Nigerian Situation", *Journal of Law and Criminal Justice*, Vol. 3, No. 1, 2015, pp. 70 – 88, at 78.

¹⁰ B. Sheppard, "They Set the Classrooms on Fire: Attacks on Education in North-East Nigeria", 2016, <https://www.hrw.org/report/2016/04/11/they-set-classrooms-fire/attacks-education-northeast-nigeria>, accessed on 5th of February 2019.

¹¹ *Ibid.*

¹² F.C. Onuoha and S. Oyewole, "Anatomy of Boko Haram: The Rise and Decline of a Violent Group in Nigeria", *Reports- Aljazeera Centre for Studies*, 22 April 2018 <http://studies.aljazeera.net/en/reports/2018/04/anatomy-boko-haram-rise-decline-violent-group-nigeria-180422110920231.html>, accessed on 5th February 2019.

¹³ O.O. Ajibola, "Terrorism and Insurgency in Northern Nigeria: A Study of the Origins and Nature of Boko Haram", *Journal of Law, Policy and Globalisation*, Vol. 5 No. 12, 2015, pp. 6 – 16, at 6.

¹⁴ E. Imasuen, "Insurgency and Humanitarian Crises in Northern Nigeria: The Case of Boko Haram", *African Journal of Political Science and International Relations*, Vol. 9, No. 7, 2015, pp. 284 – 296, at 285.

¹⁵ H.Y. Bappah, "Nigeria's Military Failure against the Boko Haram Insurgency", *African Security Review*, Vol. 25, No.2, 2016, pp. 146 – 158, at 146.

Nigerian Military. However, the recent upsurge in brazen attacks particularly on military formations and other reports of mass displacements, abductions, and horrific killings, clearly points to the fact that the last, may not have been heard of the group and its capacity to unleash terror.

C. NIGERIA'S COUNTERINSURGENCY AGAINST BOKO HARAM AND HUMAN RIGHTS VIOLATIONS

In a bid to curtail the group and its locust methods, a major approach adopted by the Nigerian government has been military action, a counterinsurgency operation involving collaborations amongst the nation's Army, Airforce, the Police, and other Security forces. More particularly, since the coming to power of the current administration on May 29, 2015 when the President declared that the operational base of the Military High Command will be fully moved to the theatre of war in the City of Maiduguri.¹⁶ These operations have been heavily stepped up, leading to the re-claiming of the group's former base i.e. the Sambisa forest.¹⁷

However, the military approach has been trailed by allegations of human rights violations, which has brought it under both domestic and international spotlight.¹⁸ It has been observed that in times of war State actors having the authority to protect human rights, not only fail to do so but are often, the first to violate these rights¹⁹. This may be to achieve set military objectives or simply due to a lack of respect for the protection of such rights. This characterisation has featured prominently in the government's counterinsurgency, which has attracted criticism and stinging attacks, for its very poor human rights credentials.²⁰ A series of disturbing reports have catalogued the shortcomings of the Military, not only in failing to safeguard the rights of the civilian population such as women and children, but also that of captured insurgents, foreign ad-hoc personnel and the press. Amnesty International, in some of its reports, has accused the soldiers of raping and molesting females displaced by the insurgency, even in addition to other human rights abuses.²¹ Further allegations include

¹⁶ BBC News, "Boko Haram: Nigeria Military moves HQ to Maiduguri", <https://www.bbc.com/news/world-africa-33048511>, accessed on 5th of February 2019.

¹⁷ UK Guardian Newspaper, "Nigeria Army Captures Last Boko Haram Camp in Former Stronghold", <https://www.theguardian.com/world/2016/dec/24/nigerian-army-captures-last-boko-haram-camp-in-sambisa-forest>, accessed on 5th of February 2019.

¹⁸ Amnesty International, "Amnesty International Report 2017/18: State of the World's Human Rights", 2018, p.282. Available at: <https://www.amnesty.org/en/documents/pol10/6700/2018/en/>.

¹⁹ P. Malek-Ahmadi, "Human Rights in Non-International Armed Conflicts", *Master of Arts Thesis, Columbia University*, 2018, at 6.

²⁰ Amnesty International, *supra* note 18.

²¹ Amnesty International, "Nigeria: Starving Women raped by Soldiers and Militia who claim to be rescuing them", *Amnesty International Report* 2018, <https://www.amnesty.org/en/latest/news/2018/05/nigeria-starving-women-raped-by-soldiers-and-militia-who-claim-to-be-rescuing-them>, accessed on 5th of February, 2019; A.C. Godwin, "Amnesty International finally releases report, reveals how Nigerian Army rapes, molests Female IDPs", *Daily Post Newspaper*, (24 May, 2018), <http://dailypost.ng/2018/05/24/breaking-amnesty-international-finally-releases-report-reveals-nigerian-army-rapes-molests-female-idps>, accessed on

5th of February 2019; A.C. Godwin, "Nigeria Army Raped Us – IDPs Confirm Amnesty International Report", *Daily Post Newspaper*, 5 June 2018, <http://dailypost.ng/2018/06/05/nigerian-soldiers-raped-us-idps-confirm-amnesty-international-report>, accessed on 5th of February 2019; S. O'Grady, "Nigerian soldiers 'rescued' women, then starved and raped them, Amnesty International says", *The Washington Post*, 24 May 2018, https://www.washingtonpost.com/news/worldviews/wp/2018/05/24/nigerian-soldiers-rescued-women-then-starved-and-raped-them-amnesty-international-says/?noredirect=on&utm_term=.a4bbe41a9028, accessed on 5th of February 2019; S. Ogwuanyi, "Amnesty Outlines how Nigerians' Rights were violated by Military, Boko Haram, Others", *Daily Post Newspaper*, 22 February, 2018, <http://dailypost.ng/2018/02/22/amnesty-outlines-nigerians-rights-violated-military-boko-haram-others>, accessed on 5th of February 2019; Amnesty International, "Threats from Nigerian Military won't deter us from defending Human Rights", *The Vanguard Newspaper*, 7 June, 2018, <https://www.vanguardngr.com/2018/06/threats-from-nigerian-military-wont-deter-us-from-defending-human-rights-ai>, accessed on 5th of February 2019; J. Erunke, "DHQ Counters Amnesty International over Alleged Rights Violation, Extra-judicial Killings by Military", *The Vanguard Newspaper*, 24 February,

cases of arbitrary arrest of persons without charge, torture and mass incarceration.²² In its 2015 Report, HRW for instance, states that in 2013, 1,400 persons were detained without trial by the Joint Investigation Team of the Military.²³ Amnesty International also re-echoed these allegations in its 2017/18 Report, where it stated that:

*The military detained hundreds of women unlawfully, without charge, some because they were believed to be related to Boko Haram members. Among them were women and girls who said they had been victims of Boko Haram. Women reported inhuman detention conditions, including a lack of health care for women giving birth in cells.*²⁴

Yet these cases of human rights violations fall within provisions of IHRL treaties, which Nigeria has an obligation to uphold. For instance, under Article 7 of the ICCPR, the Nigerian government has an obligation to ensure the prohibition of acts of torture, degrading and inhuman treatment or punishment to its citizens.²⁵ Acts such as rape, torture and mass incarceration are all examples of degrading and inhuman treatment and punishment, meaning that they represent a violation of Nigeria's obligation under the ICCPR. In extension, they are also a violation of Article 9 and 10 of the ICCPR²⁶ which deals with the right to personal liberty and security of a person. In the same wise, Article 5 of the UDHR states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment", while Article 9 provides that, "no one shall

be subjected to arbitrary arrest, detention or exile".²⁷ The human rights allegations reported by both HRW and Amnesty International are equally violations of these provisions. Other cases of human rights violations include collateral damages in which people are either killed, or high civilian casualty is recorded in indiscriminate attacks through military operation. A major example is the bombing of an Internally Displaced Persons' (IDP) Camp in Rann, headquarters of Kala Balge Local government area of Borno state.²⁸ Regarding the Rann incident, HRW in its 2018 Report noted that:

*On January 17, the Nigerian air force carried out an airstrike on a settlement for displaced people in Rann, Borno State, killing approximately 234 people according to a local official, including nine aid workers, and injuring 100 more. The military initially claimed the attack was meant to hit Boko Haram fighters they believed were in the area, blaming faulty intelligence. After six months of investigations, authorities said they had mistaken the settlement of displaced people for insurgent forces. At the time, the settlement was run by the military.*²⁹

In addition, there are allegations that Nigerian soldiers upon capturing Sambisa forest, drove on top speed thereby crushing several Boko haram hostages including

2019), <https://www.vanguardngr.com/2018/02/dhq-counters-amnesty-international-alleged-rights-violation-extra-judicial-killings-military>, accessed on 5th of February 2019.

²² Human Rights Watch, "HRW World Report", 2015, https://www.hrw.org/sites/default/files/wr2015_web.pdf, at 404, accessed on 5th February 2020.

²³ *Ibid.*

²⁴ Amnesty International Report 2017/18, *supra* note 18.

²⁵ ICCPR 1966.

²⁶ ICCPR 1966.

²⁷ UDHR 1948.

²⁸ J. Erunke, "Accidental Bombing of IDP's Camp: Nigeria Airforce Apologise", *The Vanguard Newspaper*, 18 January 2017, <https://www.vanguardngr.com/2017/01/accidental-bombing-of-idps-campnigerian-airforce-apologizes-over-action>, accessed on 5th of February 2020.

²⁹ Human Rights Watch, "HRW World Report", 2018, Available at: https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf. at 392, accessed in 5th February 2020.

women and children.³⁰ Incidents of this nature are a direct violation of Article 6 of the ICCPR which provides that, “every human being has the inherent right to life. This right shall be protected by law”.³¹ This provision in particular reiterates that, “no one shall be arbitrarily deprived of his life”.³² This same right is covered by Article 3 of the UDHR which states that “everyone has a right to life, liberty and security of person”.³³ The implication is that these avoidable deaths are a violation of Nigeria’s obligation in this instance.

Though these allegations have been refuted by the Military, who continue to label the above human rights organisations as mischief makers, evidence of these violations remain a well-known incubus which the government has not been able to extirpate. Disturbingly, accountability for these violations is rarely spoken of, much less pursued. This has left the victims more helpless than before. This has been made possible by the weak complaint/accountability mechanism under IHRL, where the State who is supposed to be held accountable, is also the same party expected to activate a programme of remedy. The question therefore ensues, how will a party who has been accused of being in the wrong, at the same time be willing to commence remedy proceedings for victims? Will that not be viewed as an admittance of wrongdoing and liability on its part? This issue is at the core of the accountability crisis under IHRL, which has encouraged a less productive remedy regime. This article looks at putting these issues on the front burner, but first what is the legal basis for accountability?

D. THE INTERNATIONAL LEGAL BASIS OF ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS IN COUNTERINSURGENCY OPERATIONS

At the centre of IHRL is the concept of ‘Human rights’, which basically refers to universally recognised values, freedoms, and legal guarantees that safeguard persons and groups from the actions and inactions of the State, its agents, and other individuals that may want to interfere with such natural entitlements.³⁴ As universally recognised values, the protection of human rights is deemed as essential provision of international law, as evident in Article I of the United Nations (UN) Charter which states that:

“International cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”³⁵

Despite its expansive reach over the years, human rights are today under great threat given the proliferations of different forms of violence, in which the first casualty is often the rights of civilians. IHRL is expected to promote accountability in governments’ response to acts of terror, such as in a counterterrorism or counterinsurgency operation. In contextualising these ideals, the Office of the United Nations High Commissioner for Human Rights (UNHCHR) notes that;

The promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognizing that effective

³⁰ Human Rights Watch, “HRW World Report”, 2016 Available at: https://www.hrw.org/sites/default/files/report_pdf/wr2016.pdf, at. 422-423., accessed on 5th February 2020.

³¹ ICCPR 1966.

³² ICCPR 1966.

³³ UDHR 1948.

³⁴ A.S. Adomovo, “Insurgency, Counter-Insurgency, and Human Rights Violations in Nigeria”, *The Age of Human Rights Journal*, Vol. 3, 2014, pp.46 – 62., at 48.

³⁵ Article 1 (3) of The UN Charter 1945.

*counter-terrorism measures and the promotion of human rights are not conflicting goals, but complementary and mutually reinforcing.*³⁶

Also, in his report submitted in accordance with UN General Assembly resolution 65/221 and Human Rights Council resolution 15/15, the former UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while fighting terrorism, Ben Emmerson noted that:

*It is essential that the protection of human rights of victims of terrorism is seen as a genuine legal duty resting primarily on States, and that it is not misused as a pretext for violating the human rights of those suspected of terrorism, for taking emergency measures which provides for excessive and disproportionate executive powers, or for other essentially political objectives.*³⁷

IHRL has its sources in key human rights treaties, with the frontline being the three normative instruments i.e. UDHR,³⁸ the ICCPR,³⁹ and the International Covenant of

Social, Economic, and Cultural Rights (ICESCR).⁴⁰ The three are referred to as the 'International Bill of Rights'. Flowing from these three instruments, the path of IHRL has been shaped by a growing body of other instruments such as the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment (CAT),⁴¹ and its Optional Protocol;⁴² the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁴³ and its Optional Protocol;⁴⁴ and the Convention on the Rights of the Child (CRC),⁴⁵ the Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflicts.⁴⁶

IHRL also has its source in extant rules of Customary International Law (CIL), which have become binding principles of law on all States, including those not party to relevant treaties, to the end that such CIL can be enforced against them.⁴⁷ Reflecting the ideals of CIL, some rights are also deemed of a 'special class', such as crimes against humanity, genocide, freedom from torture, racial discrimination, right to self-determination, and slavery are generally recognised as peremptory norms of CIL i.e. 'ius cogens',⁴⁸ to the end that no derogation no matter the circumstances, are permitted

³⁶ UNHCHR "Fact Sheet No. 32: Human Rights, Terrorism, and Counter-Terrorism" [https://www.ohchr.org/Documents/Publications/Fact sheet32EN.pdf](https://www.ohchr.org/Documents/Publications/Fact%20sheet32EN.pdf), accessed on 6th of February 2019.

³⁷ United Nations, "Index to Proceedings of the General Assembly", 66th Session – Part 1", 2013, p. 127, https://library.un.org/sites/library.un.org/files/itp/a66-part1_0.pdf, accessed on 6th of February 2019.

³⁸ UDHR 1948.

³⁹ ICCPR 1966.

⁴⁰ UN General Assembly Resolution 2200 A (XXI) of 16 December 1966 and entered into force on 3 January 1976.

⁴¹ UN General Assembly Resolution A/RES/39/46 on 10 December 1984 and entered into force on 26 June 1987.

⁴² UN General Assembly Resolution A/RES/57/199 on 18 December 2002 and entered into force on 22 June 2006.

⁴³ UN General Assembly Resolution A/RES/34/180 on 18 December 1979, and became effective 3 September 1981.

⁴⁴ UN General Assembly Resolution A/RES/53/243 on 6 October 1999, and entered into force on 22 December 2000.

⁴⁵ UN General Assembly Resolution A/RES/44/25 on 20 November 1989 and became effective on 2 September 1990. For instance, Article 4 of the Optional Protocol to the Convention on the Rights of the Child prohibits the involvement of Children in armed conflict and imposes obligations on all parties to ensure this is so.

⁴⁶ This document was adopted and opened for signature by the UN Gen. Ass. on 25 May 2000 entered into force on 12 February 2002.

⁴⁷ As a rule, CIL is applicable to all parties in an armed conflict, including non-state actors, irrespective of their recognition of the law governing armed conflicts. See T. Meron, "The Continuing Role of Custom in the Formation of International Humanitarian Law", *American Journal of International Law*, Vol. 90, 1996, pp. 238 – 246.

⁴⁸ The term 'ius cogens' refers to peremptory norms or fundamental principles of International law that has come to be accepted as binding on States and to which no derogation is permitted. It is important to state that the idea of peremptory norms is central to issues of accountability under International Human Rights Law. See United Nations, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", *Yearbook of the International Law*

against such rights.⁴⁹ In today's world, due to the increase in asymmetric warfare and the consistently changing balance of power which causes parties to the conflict to resort to all manner of illegitimate means to gain leverage⁵⁰, the need to protect the human rights of innocent persons and non-actors trapped in such warfare and the demand for accountability when such violations have been established, is now a matter of urgent international concern.⁵¹ It is within this context that accountability for allegations of human rights violations in the Boko Haram insurgency must be viewed as a burden to be discharged by the international community and not just an obligation that the Nigerian government should be encouraged to fulfil.

Nigeria is a state operating a democratic constitution and like many other countries is a signatory to the major IHRL treaties. Nigeria became a state party to the CAT on 28th July 1988 and the ICCPR on 29th July 1993, which makes their provisions binding on the government. Under Article 2 (3) of the ICCPR, the obligation of a State for human rights violations comes with an additional obligation to ensure that reparation for losses suffered is made to the victims. Also, the Human Rights Committee stated in its General Comment 31 that, *"Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy,*

which is central to the efficacy of article 2, paragraph 3 is not discharged." Such victims have a right to reparation to address the injury caused by them, such as compensation, rehabilitation, restitution, satisfaction, and an assurance of non-repetition of the violation.⁵²

Reports of widespread allegations of human rights violations in the counterinsurgency is in the public domain, the challenge however is that holding Nigeria accountable to its obligations in this regard remains largely problematic. Engaging this issue, Hassan posits that there is no doubt that there is a need for accountability from the Nigerian State for alleged human rights violations in the Boko Haram insurgency, the difficulty however relates to what kind of accountability?⁵³ This definitely leaves a gap in the chain of accountability. While the challenges of accountability are manifestly numerous, one aspect that appears to serve as an 'escape pod' for States is the shortcomings in Optional protocol to the ICCPR dealing with accountability. That section will form the next discussion in this Article.

Commission 2001, Vol.2, No.2, 2001, pp. 31 – 143, at 110.

⁴⁹ The UN Human Rights Committee has noted that certain rights of a similar standing are provided for in the International Covenant on Civil and Political Rights (ICCPR), with the consequence that they can't be subject to derogation. Examples are - Article 6 (providing for 'right to life'); Article 7 (providing for 'prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent'); Article 8 (dealing with 'prohibition of slavery, slave trade and servitude'); Article 11 (providing for 'prohibition of imprisonment because of inability to fulfil a contractual obligation'); Article 15 (dealing with 'the principle of legality in the field of criminal law'); Article 18 (providing for 'freedom of thought, conscience and religion').

⁵⁰ T. Pfanner, "Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian

Action", *International Review of the Red Cross*, Vol. 87 No. 857, 2005, pp. 149- 168, at 149

⁵¹ P. Malek Ahmadi, *Supra note* 19, at 21, 37.

⁵² See for instance Principle 3 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines) which states that, *"The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to...(d) provide effective remedies to victims, including reparation..."*.

⁵³ Idayat Hassan, "What is Justice? Exploring the Need for Accountability in the Boko Haram Insurgency", *Harvard Human Rights Journal*, 2017, <http://harvardhrj.com/what-is-justice-exploring-the-need-for-accountability-in-the-boko-haram-insurgency>, accessed on 9th of February 2019.

E. ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS UNDER INTERNATIONAL LAW: PROBLEMATISING THE OPTIONAL PROTOCOL TO THE ICCPR

1. General Framework of Accountability

The need to hold state parties accountable for the rights of persons within their domestic jurisdiction is a fundamental shift in IHRL.⁵⁴ Human rights' deep moral and legal associations with situations of non-international armed conflicts like the Boko haram insurgency means that issues of accountability have become dominant in today's discourse. The framework of accountability has its root in the doctrine of '*pacta sunt servanda*' which stipulates that every treaty in force, has binding authority on all parties to it and to which they are bound to perform their obligation in good faith.

The primary duty to uphold IHRL under binding treaties falls on states. Under the UN Charter and regional conventions such as the European Convention on Human Rights (ECHR), states pledge to promote respect for human rights, without discrimination, in their jurisdictions.⁵⁵ States assume

duties to respect, protect and fulfil human rights and to pass measures and legislation compatible with treaty obligations. Obligations, however, can be limited in certain respects. At the time of ratification states may lodge reservations against certain provisions. States may also be permitted restrictions (derogations) on certain rights during conflicts, or an official declaration of '*public emergency*' which threatens the state. Alongside sovereign states, non-state actors for instance insurgents' groups such as Boko Haram are today considered as having obligations under international law, to which they can be held accountable.⁵⁶

It is instructive to state that human rights violations, can either be by a state party or a non-state party, and can also occur through the activities of the Armed Forces of the State, any group or militia acting on behalf of the state,⁵⁷ or even persons or institutions exercising governmental power. Under international law, both the state as an entity, its agencies, as well as individuals making up its authority structure can be held accountable. This

⁵⁴ S. Narula, "The Right to Food: Holding Global Actors Accountable under International Law", *Columbia Journal of Transnational Law*, Vol. 44, 2006, pp. 691 – 715, at 693.

⁵⁵ Articles 1, 55, and 56 of the Charter of the United Nations, 24 October 1945, 1 UNTS XVI; See further Article 1, European Convention on Human Rights (ECHR).

⁵⁶ Andrew Clapham, "Human Rights Obligations of Non-state Actors in Conflict Situations", *International Review of the Red Cross*, Vol. 88, No. 863, 2006, pp. 491 – 510, at 498.

⁵⁷ The Law of Armed Conflict for instance recognises anyone fighting on behalf of the state as a 'Combatant' with the consequence that such can be brought to trial, or otherwise held accountable.

See R. Arneson, "Just Warfare Theory and Non-combatant Immunity", *Cornell Journal of International Law*, Vol. 39, 2006, pp. 663 – 669.

There must however be a *de facto* relationship between the two, that must reflect a tacit agreement, in which such militia may be seen as 'belonging' to the state party.

See Article 4B (1), Third Geneva Convention, which provides that, "*persons belonging, or having belonged,*

to the armed forces of the occupied country (emphasis mine), if the occupying power considers it necessary by reason of such allegiance to intern them". This tacit agreement may just simply evidence the fact that the militia supports the state, without the former being under the latter's control. It may also be that the former not only supports the latter, but that the latter exercises 'overall control' over all of the activities of the former.

See the decision of the Court in *Prosecutor v. Zejnil Delalic, Zdravko Mucic (aka 'Pavo'), Hazim Delic and Esad Landzo (aka 'Zenga') (Celebici case)* (Judgment of 20 February 2001), ICTY AC, IT-96-21-A, at para. 15; S. Sivakumaran, "Binding Armed Opposition Groups", *International and Comparative Law Quarterly*, Vol. 55, 2006, pp. 369 – 394, at 380.

It should however be noted that the 'overall control' requirement is not without deep challenges, particularly as regards establishing the extent of control. For an analysis on the difficulty in demonstrating the 'overall control' requirement.

See Jensen, "Combatant Status: Is It Time for Intermediate Levels of Recognition for Partial Compliance", *Virginia Journal of International Law*, Vol. 46, 2005, pp. 209 - 213.

is in line with the law of state responsibility. The international legal accountability regime which was initially a circumscribed framework, limited to just harm caused by a State to Aliens and their property, has over time developed into a general framework for determining a State's responsibility for breaches of international law.⁵⁸ Enacted as a specific framework to address issues in this regard, is the International Law Commission ('ILC') Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, which provides a set of rules for determining state responsibility.

In establishing responsibility, Article 1 of the Draft Articles state that, "*every internationally wrongful act of a State entails the international responsibility of that State*".⁵⁹ For there to be state responsibility, the act(s) in question must firstly be attributable to the State concerned, and secondly, it must be an international obligation.⁶⁰ In the context of this article, it has been established that the human rights violations levelled against the Military, are acts that Nigeria has an obligation to protect under IHRL. More so, these acts were carried out by the Military, acting as an agency of the State. This is covered by Article 6 of the Draft Articles which state that:

"The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the of the State to exercise elements of governmental authority shall

be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance".⁶¹

Within this provision, acts of human rights violations by the Military committed by its soldiers, are deemed internationally wrongful acts of the Nigerian government. Additionally, remedies for these acts rest squarely on the State and not the individuals whose conduct generated state responsibility.⁶² Such individuals are only subject to necessary punishment, as may be provided under domestic law of the country.⁶³

Given that the UDHR is a non-binding declaration, the ICCPR is perhaps the relevant human rights instrument in this case. It principally binds states to negative obligations to desist from interfering in the safeguarded sphere of personal liberty.⁶⁴ Some of the key rights under the document includes life, privacy, and freedom from discrimination as well as equality of all persons.⁶⁵ The enforcement mechanism of the ICCPR is through the Human Rights Committee (HRC) provided for in Article 28 of the covenant.⁶⁶ The HRC oversees the implementation of the treaty.⁶⁷ It provides standards for interpreting the covenant as well as pointing out human rights issues.⁶⁸ It drives the implementation of the covenant by state parties, through a reporting system and also receives and considers individual complaint procedures of

⁵⁸ J. Brunnee, "International Legal Accountability Through the Lens of the Law of State Responsibility", *Netherlands Yearbook of International Law*, Vol. 36, 2005, pp. 3 – 38, at 5.

⁵⁹ ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001.

⁶⁰ Article 2, *Ibid.*

⁶¹ Article 6, *Ibid.*

⁶² A. Nollkaemper, "Concurrence Between Individual Responsibility and State Responsibility under International Law", *International and Comparative Law Quarterly*, Vol. 52, No. 3, 2003, pp. 615 -640, at 617.

⁶³ *Ibid.*

⁶⁴ D. Sloss, "The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties", *Yale Journal of International Law*, Vol. 24, 1999, pp. 129 – 185, at 138.

⁶⁵ *Ibid.*

⁶⁶ ICCPR 1966.

⁶⁷ C.A. Cohn, "The Early Harvest: Domestic Legal Changes Related to the Human Rights Committee and the Covenant on Civil and Political Rights", *Human Rights Quarterly*, Vol. 13, 1991, pp. 295 – 321, at 295.

⁶⁸ *Ibid.*

human rights violations.⁶⁹ In its oversight functions, the HRC works with three levels of enforcement in implementing the covenant.⁷⁰ Firstly, in line with Article 40 state parties are expected to submit a report on measures they have taken to give effect to their obligations under the covenant.⁷¹ This report is to be submitted to the UN Secretary-General who thereafter would transfer the same to the HRC.⁷² The HRC then studies the report, makes its appropriate comments, and transmits its own report as well as these comments to back to state parties.⁷³ Secondly, in line with Article 41, a state party may submit communication to the HRC stating that another state party is not fulfilling its obligations under the covenant, so long as both state parties have declared that the HRC can hear such communication.⁷⁴ Thirdly, where a state party has ratified the Optional protocol to the ICCPR, individuals claiming violation of their rights can submit communication to the HRC.⁷⁵

However, in terms of holding governments accountable, this mechanism represents more of a paper tiger, as state parties are hardly brought under any severe penalty for non-compliance with their obligations.⁷⁶ In fact, it has been pointed out that, most times the consequence of a communication going to the HRC, is bad publicity for the state party concerned.⁷⁷ This necessarily renders this framework weak and ineffective. This is in addition to the problematic nature of the third level of

enforcement, which the framework of written communication to the HRC provided for under the Optional protocol. This deserves deep examination to unravel the inherent issues.

2. Legal Uncertainty about Aspects of Accountability under the Optional Protocol

A fundamental challenge to accountability for the Human rights violations already discussed in this article, is rooted in the inefficacy of the procedure provided for complaint/accountability under the ICCPR. This procedure exists within the framework of the Optional protocol to the ICCPR,⁷⁸ designed as a procedural mechanism for implementing the ICCPR.⁷⁹ It provides an avenue through which citizens of state parties to the ICCPR as well as the protocol, who assert that their rights have been violated, can seek redress by submitting written communications to the HRC. The HRC receives communications from alleged victims of human rights violations, in accordance with laid down provisions of the protocols. In this respect, Article 1 states that:

A State party to the Covenant that becomes a party to the present protocol recognises the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State party of any of the rights

⁶⁹ *Ibid.*

⁷⁰ S. Joseph, "A Rights Analysis of the Covenant on Civil and Political Rights", *Journal of International Legal Studies*, Vol. 5, 1999, pp. 63 – 80, at 65.

⁷¹ *Ibid.*

⁷² Article 40 (2) of ICCPR 1966; *Ibid.*

⁷³ Article 40 (4) of ICCPR 1966; *Ibid.*

⁷⁴ ICCPR 1966; *Ibid.*

⁷⁵ S. Joseph, *Supra* note 70, at 66.

⁷⁶ *Ibid.*, at 65.

⁷⁷ *Ibid.*

⁷⁸ The Protocol was adopted December 16, 1966, alongside the International Covenant on Civil and Political Rights (ICCPR), G.A. Res 2200 A, 21 UN GAOR Supp. (No. 16), 49, 49-60, UN Doc. A/6316 (1966). It entered into force March 23, 1976.

⁷⁹ E. Mose and T. Opsahl, "The Optional Protocol to the International Covenant on Civil and Political Rights", *Santa Clara Law Review*, Vol. 21, 1981, pp. 271 – 290, at 272.

*set forth in the covenant. No communication shall be received by the Committee if it concerns a State party to the covenant which is not a party to the present protocol.*⁸⁰

Similar provisions to the above can be found in Article 14 of the International Convention on Elimination of All Forms of Racial Discrimination (CERD) 1965,⁸¹ and Article 22 of the CAT, 1984.⁸² So far, this rhetoric has not been matched with the rigour of practical realisation, making the entire regime inconsistent with the aspirations of the international human rights system. For instance, a worrying part of the above provision is the aspect which states that, “*no communication shall be received by the Committee if it concerns a State party to the covenant which is not a party to the present protocol*”.⁸³ This means that even where a country, who is a party to the ICCPR is actively violating the rights of its people, as long as it is not signed up to the protocol, it may be difficult to hold such a State accountable under this procedure. The protocol also stipulate in Article 2 that any individual making a submission must have exhausted available domestic remedies,⁸⁴ while Article 3 adds that the identity of such an individual must be ascertainable, else the communication would be deemed invalid.⁸⁵ Article 4 further state that the State concerned would be allowed a period of six months within which to respond to the allegations,⁸⁶ while Article 5 (1) provides that after this period, the HRC, taking all the materials before it (both the individual’s communication and the state’s response), would arrive at a decision.⁸⁷

Till date, Nigeria has not agreed with the individual complaint procedure under the Optional protocol. This scenario presents a sort of *fait accompli* on potential victims who may want to seek remedies. It however does not shut the door on examining the problematic nature of this framework, particularly as this would be important in making prospective contributions to accountability under international law. Also, though the problematic framework cannot bound Nigeria, the proposal that would be proposed in this article are of such nature that, the international community can bypass the protocol, to still hold Nigeria accountable.

In problematising the Optional protocol, it is important to start by saying that its provisions relating to remedying, both completed human rights violations, and ongoing violations poses difficult questions. To start with, the protocol does not define what ‘*remedies*’ exactly mean in the context of human rights violations. It thus suffers from legal clarity. Legal clarity demands precision in the crafting of legislations such that it can cure the mischief it was enacted to deal with. If remedies are not defined, then it becomes problematic determining with precision the kind of remedy that the IHRL envisages. For instance, where a teenage girl in the course of the Boko haram insurgency has been subjected to years of sexual violence in the hands of predatory soldiers resulting in several unwanted pregnancies, what remedy would suffice? Also, how does one determine the fate of the family of a man who has been innocently tortured to death on the allegation of being a Boko haram sympathizer? This lack of

⁸⁰ Optional Protocol to the ICCPR.

⁸¹ UN General Assembly Resolution 2106 A (XX), 21 December 1965, entered into force 4 January 1969.

⁸² Resolution UN GA A/RES/39/46, 10 December 1984, entered into force on 26 June 1987.

⁸³ Optional Protocol to the ICCPR.

⁸⁴ *Ibid*

⁸⁵ *Ibid*.

⁸⁶ Article 4 (1) and (2) of Optional Protocol to the ICCPR.

⁸⁷ Article 5 (1) of Optional Protocol to the ICCPR.

clarity in terms of definition creates a gap that can be exploited by states violating human rights, as they hide behind the ambiguity to evade accountability.

In addition, the general framing of accountability under the protocol leaves the duty of providing remedies at the doorstep of state parties, with a proviso that the international community through the HRC would step in, when the state has glaringly refused, or failed to act. This mechanism is founded on the conventional norm, which is that human rights enforcement is majorly as a matter of domestic jurisdiction, with the additional notion that the sovereignty of states in this regard must be respected.⁸⁸ Overtime, the use to which states have put their authority in this area has become a matter of concern, as human rights violations on the part of states have become dilemmatic.⁸⁹ For instance, how can a state alleged to be the principal perpetrator of human rights violations, be expected to be willing and able, to submit itself to the process which will provide remedies to victims? Certainly, states will view any attempt on their part to provide such remedy as an admittance of culpability, with the fear that it may lead to further scrutiny and investigations by the international community. The behaviour of governments over the last five decades has shown that states alleged of human rights violations, would rather hold on to their version of the story, than yield any inch to remedies.

Also, a proper dissection of provisions of the Optional protocol will show that it does not really empower victims in practical terms concerning the measures so outlined. For instance, Article 3 which refers to any communication by an anonymous victim as 'inadmissible', appears to cut

victims off access to justice. It creates a problem for victims who may not want to provide their information and may want to protect their identity. While it is arguable that this is to provide for accuracy in terms of the making of an allegation, yet it does not take into consideration instances where the case of violations may be so wanton that victims may just want the violation stopped and not really after being remedied. It is therefore difficult to see how the structure under the Optional protocol hopes to achieve the goals of IHRL, when the process of accountability is tied to putting a face to the request for help.

Furthermore, the accountability structure does not take into consideration the abject state of human rights infrastructure in most developing countries such as Nigeria. Though a signatory to the ICCPR, the country has continued to pay lip service to its full application, as well as to other subsidiary matters such as the development of an efficient criminal justice system, which will enhance victim's access to justice. Certain issues are key in this regard, which demands a bit of analysis. To start with is the question of disproportionate levers of power as well as capacity between the state and victims. This is reflected mostly in the burden of financing the Optional protocol's requirement under Article 2 and 5 (2) (b), which states that prospective complainants must have exhausted the '*available domestic remedies*.' Of course, such domestic remedies can only be accessed through the domestic courts. In a country such as Nigeria where the judiciary's independence is suspect, where the courts are hamstrung by issues of underfunding, and where they remain perennially hobbled by a political class known for its pervasive culture of

⁸⁸ H. Kim and K. Sikkink, *Supra note* 5, at 942.

⁸⁹ *Ibid*, at 939.

interference, accessing the so-called remedies may just be a tall order.

The necessary inference to be drawn is that leaving the duty of access to remedies within the domain of state-created courts, provides an environment of helplessness, which may expose victims to further abuses from the state and its proxies. For instance, given the indigent state of most victims, an option to get legal representation to access '*available domestic remedies*' may be through the 'Legal Aid Unit' of the State's justice ministries, or the Human Rights Commission. It is debatable whether the lawyers in such government establishments would be willing to act as formidable defenders of victims in getting proper legal representation. Even where a victim supposedly succeeds in terms of his/her complaint being accepted by the HRC, in the event that the victim's legal representation is coming from a State agency, such agency may become a target of attack by agents of the state for daring to expose the government to ridicule. More so, the danger in a regime of remedy based on state discretion is to unwittingly make the state both a defendant and a judge in its own cause. This can be dispiriting as the reality most times is that the government ends up determining the course and outcome of such proceedings, with victims having faint hopes of the remedy sought.

Even where the Optional protocol tries to qualify the requirement for exhausting domestic remedies, by providing that "*this shall not be the rule where the application of the remedies is unreasonably prolonged*".⁹⁰ The issue of

what duration qualifies as being '*unreasonably prolonged*' remains subjective. This has serious implications for legal accountability of state parties, as the prescribed measures are too vague and lacks confidence. For instance, when can it be said that a victim in the Boko haram insurgency has indeed exhausted the '*available domestic medium of redress*'?

The inescapable truth is that the potential for accountability remains largely unrealised, given the inherent weakness of the Optional protocol. Victims of human rights violations in the Boko haram insurgency are therefore left to wonder where to turn to. This sort of situation empowers violators above the victims, hence the need for better thinking. In the next section of this article, an attempt would be made to canvass an alternative regime of accountability, particularly one outside the direction and control of state parties.

F. TOWARDS A FRAMEWORK OF SUPRANATIONAL LEGITIMATION OF ACCOUNTABILITY

The cloudy atmosphere of compliance with human rights obligations by countries is one of the most pressing challenges of IHRL.⁹¹ Even though the body of international human rights has developed significantly since the UN Charter, the effect on the actual human right attitude of countries remains a challenge.⁹² Notwithstanding the frenetic pace of human rights norms since the end of the second world war, African countries have continued to display a sort of luke-warmness towards these noble ideas. Whereas the adoption of IHRL treaties is to grant citizens of state parties the legal right

⁹⁰ Article 5 (2) (b) of Optional Protocol to the ICCPR.

⁹¹ For an overview on literature on what motivates or demotivates nation to act in compliance, see generally Abram Chayes and Antonia Handler Chayes, "On Compliance", *International Organisation*, Vol. 47, No. 2, 1993, pp. 175 – 205; G.W. Downs, (et.al.) , "Is the Good News About Compliance Good News about

Cooperation", *International Organisation*, Vol. 50, No. 3, 1996, pp. 379 – 406.

⁹² L.C. Keith, "The United Nations Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behaviour?", *Journal of Peace Research*, Vol. 36, No. 1, 1999, pp. 95 – 118, at 95.

to protection and remedy.⁹³ This has not been the case in Nigeria where the ICCPR has not translated into meaningful implementation whether in peacetime, or within the context of its ongoing counterinsurgency against Boko haram. The rules of the Optional protocol have also not been complied with as expected.

Added to this is the fact that the current complaint regime has not brought the needed succour to victims of human rights abuses as proclaimed in the preamble to the optional protocol. Aside from its periodic reports of compliance with human rights treaties,⁹⁴ and instances of alternative reporting from organised civil society,⁹⁵ not much has been seen within the accountability space. Yet law should be able to respond to developing values, as well as problems.⁹⁶ The important question to therefore ask is - what further way can the UN human rights system deploy, in assisting disempowered victims of armed conflicts such as the Boko haram insurgency, to access the remedies they deserve? The answer lies in re-thinking the current procedure of accountability under IHL.

This article canvases the position that even where a state may have constitutionalised the process of human rights accountability, there is the need for a system of legitimisation of remedies at a supranational level, which will not only be accessible to victims, but also impose the needed pressure on states to respect their human rights obligations. Such legitimisation regime would not put the power of remedies in the hands of states, but rather, it would institutionalise a system of

'complementarity' in which both the state and the international legal system, can assume jurisdiction over determining questions of human rights violations, as well as the provision of remedies. For instance, while Nigeria has a constitutional framework for human rights protection,⁹⁷ as well as the enforcement of rights,⁹⁸ both have proved ineffective in providing remedies for victims in the government's counterinsurgency against Boko haram. This is symptomatic of the prevailing environment of disdain for the rule of law; an environment in which these structures have not been able to redress the violation of human rights, even in peacetime.

Such supranational legitimisation regime is both legally and ethically desirable. Firstly, when a state is alleged to be involved in gross human rights violations, another state may violate the territorial sovereignty of the perpetrator, on the ground of humanitarian intervention.⁹⁹ Secondly, under the UN human rights system, the pursuit of human rights protection and accountability, can no longer be seen as an obligation of states, but importantly the responsibility of all.¹⁰⁰ There are several benefits to such supranational legitimisation framework. Such a framework being a potent accountability mechanism, has the power of galvanising enthusiasm on the part of victims to file complaints. Also, it will strengthen legal relations between states and their citizens, as the possibilities of heavy international retribution, will continually create consciousness on the part of the state as regards its human rights obligations.¹⁰¹ More so, it will privilege

⁹³ A.M. Manirabona and F. Crepeau, "Enhancing the Implementation of Human Rights Treaties in Canadian Law: The Need for a National Monitoring Body", *Canadian Journal of Human Rights*, Vol. 1, No. 1, 2012, pp. 31 – 50, at 31.

⁹⁴ Article 40 of ICCPR 1966.

⁹⁵ A. Afsharipour, "Empowering Ourselves: The Role of Women's NGOs in the Enforcement of the Women's Convention", *Columbia Law Review*, Vol. 99, 1999, pp. 129 – 140, at 129.

⁹⁶ D. Shelton, "Challenges to the Future of Civil and Political Rights", *Washington & Lee Law Review*, Vol. 19, 1998, p. 669.

⁹⁷ Section 33 – 44 of Constitution of the Federal Republic of Nigeria 1999.

⁹⁸ Section 45 of Constitution of the Federal Republic of Nigeria. See also the Fundamental Rights (Enforcement Procedure) Rule 2009.

⁹⁹ B.M. Benjamin, "Unilateral Humanitarian Intervention: Legalising the Use of Force to Prevent Human Rights Atrocities", *Fordham International Law Journal*, Vol. 16, No. 1, 1992, pp. 120 – 142, at 120.

¹⁰⁰ Article 55 and 56 of the UN Charter 1948.

¹⁰¹ G. Neuman, "Human Rights and Constitutional Rights: Harmony and Dissonance", *Stanford Law Review*, Vol. 55, 2003, pp. 1863 – 1901, at 1863

victims of human rights violations in situations such as the Boko haram insurgency with a faster route to accessing justice, while at the same time providing a legal basis for the HRC to objectively examine the commitments of a state party under the covenant, to determine where it has erred. As a former Chief Justice of Zimbabwe, Anthony Gubbay has observed, the enjoyment of rights cannot be separated from the remedies provided for their enforcement.¹⁰² Where the supposed remedies are out of the reach of victims, the provision of such rights is meaningless.¹⁰³

Though international criminal law can be an avenue for securing accountability for human rights violations that have assumed the level of international crimes, when such violations even though of a widespread nature cannot be designated as international crimes, IHRL becomes duty bound to ensure that justice is still served for victims.¹⁰⁴ As pointed out by Fleck, the fundamental nature of some humanitarian standards means that all states, no matter the extent of their obligation can be made to ensure protection for them.¹⁰⁵ Thus, the striking conceptual convergence between a practicable accountability mechanism, and easy access to justice, makes this the more compelling.

A faster way of getting this done, is to engage Civil Society Organisations (CSOs) in this area. CSOs have been recognised as effective partners in shaming government's alleged of committing human rights violations.¹⁰⁶ In this respect, CSOs can be a major force in making a case for the current accountability framework to be moved wholly to the supranational level. Trying to

answer the question of whether international human rights treaties improve respect for human rights, Neumayer submits that there are no easy answers in this regard.¹⁰⁷ Importantly, he states that the absence of civil society makes human rights not to achieve much.¹⁰⁸ He therefore concludes that human rights ratification is often of more benefit to a country, when there is a strong CSO space.¹⁰⁹ This article submits that in view of the devastating impact of the Boko haram insurgency and the associated human rights violations from the government's counterinsurgency, CSOs can indeed be useful in engaging the international community effectively.

G. CONCLUSION

This Article has examined the Boko haram insurgency in Nigeria and how the governments' counterinsurgency has become steeped in human rights violations. It has also analysed the international legal basis for determining accountability in the counterinsurgency, as well as how the current framework under the ICCPR's Optional Protocol has been largely unsuccessful in achieving much. Suggestions have also been offered as to how the current system can be recalibrated for better results. The challenges examined in this article show that the accountability mechanism of the Optional protocol generally negates the whole aspiration of the international human rights system, which is to ensure not just the protection of rights, but the provision of adequate remedies where violations have been successfully established.

¹⁰² A.R. Gubbay, "The Protection and Enforcement of Fundamental Human Rights: The Zimbabwean Experience", *Human Rights Quarterly*, Vol. 19, 1997, pp.227 – 254, at 228.

¹⁰³ *Ibid.*

¹⁰⁴ A. McBeth, "Crushed by an Anvil: A Case Study for Responsibility for Human Rights in the Extractive Sector", *Yale Human Rights and Development Law Journal*, Vol. 11, 2008, pp. 127 -142, at 129.

¹⁰⁵ D. Fleck, "International Accountability for Violations of the ius in bello: The Impact of the ICRC Study on Customary International Humanitarian Law", *Journal*

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¹⁰⁶ J.C. Franklin, "Shame on You: The Impact of Human Rights Criticisms on Political Repression in Latin America", *Human Rights Quarterly*, Vol. 52, 2008, pp. 187 – 211, at 187.

¹⁰⁷ E. Neumayer, "Do International Human Rights Treaties Improve Respect for Human Rights?", *Journal of Conflict Resolution*, Vol. 49, No. 6, 2005, pp. 925 -953, at 950.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

The overarching objective of IHRL is to safeguard, either through protection or restitution, the humanity in every human being across the globe, as an expression of the position that human rights occupies at the top of the international political agenda. However, it appears justifiable at this point to draw the conclusion that for the victims of human rights violations in the Boko haram counterinsurgency, the reverse appears to be the case. It is clear that most governments would not readily subject themselves to domestic courts, so as to be held accountable, unless a superior force either compels them to do so, or delivers a verdict against them. For this dilemmatic situation to be removed, the international community must urgently consider a supranational framework of accountability, to retrieve human rights from the grip of States.

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