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FACULTY OF BUSINESS AND LAW

Framing the Boko Haram Insurgency: An Assessment of Applicable Domestic and International Laws and Criminal Responsibility of Insurgents

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ANGLIA RUSKIN UNIVERSITY

ABSTRACT

FACULTY OF BUSINESS AND LAW

DOCTOR OF PHILOSOPHY

FRAMING THE BOKO HARAM INSURGENCY: AN ASSESSMENT OF APPLICABLE DOMESTIC AND INTERNATIONAL LAWS AND CRIMINAL RESPONSIBILITY OF INSURGENTS

CHINELO NNENNA AGOM-EZE

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This thesis analyses the situation of violence perpetrated by the armed group popularly known as Boko Haram in North East Nigeria. This violence has persisted since 2009 resulting in the loss of about 30,000 lives, displacement of over 2.5 million and destruction of property worth millions of dollars. The complex nature of the violence has raised questions as to its classification. It has been framed as terrorism by Nigerian government actors (the Army and the Justice sector); and by the international community, media and NGOs it has been framed as an armed conflict because of the intensity of the violence and level of organisation of the armed group. Such issues around how the violence is framed have an impact on applicable laws, legal responsibilities and determines the applicability of transitional justice mechanisms.

This PhD research will consider these conflicting categorisations and their implications. It will address the main research question of: To what extent may the Boko Haram violence be framed as an armed conflict? In order to address this main question, it will also shed some light on the following sub-questions of:

a. Who are the key stakeholders in the framing of the violence?
b. How has the Boko Haram violence been framed by different stakeholders?
c. How does their differing framing of the violence impact on the domestic and international laws applicable to the violence?

The research was conducted using two methodological approaches to address the research questions: (1) a doctrinal / positivist; and (2) constructivist approach. The doctrinal / positivist approach was used to analyse the black letter laws in the domestic criminal codes of Nigeria, and also in international treaties on International Humanitarian Law and terrorism; while the constructivist approach was used to analyse the perspectives of different actors and their contributions to framing of this conflict.

This thesis found that despite the framing by Nigerian authorities of the insurgency as a domestic issue, the facts illustrate the existence of an armed conflict and violations of international humanitarian law relating to a non-international armed conflict. Furthermore, it showed that the framing by domestic authorities of the violence as a terrorism / law and order issue influenced the charges brought against ‘terrorists’ tried in Nigerian courts as well as the possible remedies for victims. The thesis found that, at present, Nigeria only implements transitional justice remedies in a piecemeal fashion, inhibiting proper reconciliation to take root. This PhD research argues that the crimes committed by Boko Haram should be treated, at least in part, as an armed conflict and violations of International Humanitarian Law that trigger transitional justice processes in Nigeria aimed at promoting remedies for victims and reconciliation in society.

It applies a constructivist lens to the framing of the violence in Nigeria. This is an original approach that has previously not been used in analysing the violence. The use of this approach is important because it allows for the consideration of different framings of the violence, different applicable laws and provides insight into the reasoning of national

authorities. The ultimate impact of this approach is on the victims as this would increase protections for civilians and widen the scope of remedies available to address harm done. This research contributes to existing literature on the relationship between terrorism and international humanitarian law by categorising state responses to the issue in two categories i.e. restrictivist and expansionist. This is integral to the thesis as the argument made is that the existence of terrorist acts or the designation of certain parties to the conflict as 'terrorist' does not necessarily alter the application of IHL. Another important contribution to knowledge that this thesis makes is that it provides an analysis, for the first time, of terrorism related judgments from Nigerian courts that have previously been unavailable in academic discourse or international fora. These judgments are key in illustrating the frame of terrorism adopted by the Nigerian justice sector and how fair labelling concerns of victims are not fully addressed. Connected to the above contribution is the development of a model indictment sheet for cases emanating from the conflict in Nigeria. Such indictment sheet has not been presented before and is intended to facilitate the domestic prosecution, by the Nigerian authorities, of the full spectrum of crimes committed in the conflict including terrorism offences. This will ultimately benefit the victims/survivors, to ensure that perpetrators are held accountable for harm done. Lastly it proposes transitional justice measures that can be used in Nigeria. This is important as it widens the scope of responses available to national authorities to achieve justice and accountability ideals for victims/survivors.

Key words: *Armed Conflict; Boko Haram; Terrorism; International Humanitarian Law; War Crimes; Prosecutions; Fair Labelling; Transitional Justice*

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List of Abbreviations

AMISOM	African Union Mission in Somalia
AP II	Additional Protocol II
AQIM	Al-Qaeda in the Islamic Magreb
AU	African Union
AUPSC	African Union Peace and Security Council
CIL	Customary International Law
CRTR	Commission for Reception, Truth and Reconciliation (East Timor)
DDR	Disarmament, Disintegration and Reintegration
DNA	Deoxyribonucleic acid
DRR	Deradicalisation, Rehabilitation and Reintegration
EFCC	Economic and Financial Crimes Commission
GCs	Geneva Conventions 1949
IAC	International Armed Conflict
ICC	International Criminal Court
ICD	International Crimes Division (Uganda)
ICG	International Crisis Group (Crisis Group)
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICSFT	International Convention for the Suppression of the Financing of Terrorism
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
IDP	Internally Displaced Persons (People)
IHL	International Humanitarian Law
IHRL	International Human Rights Law
INGOs	International Non-Governmental Organisations
IOs	International Organisations
IRA	Irish Republican Army
ISIL	Islamic State of Iraq and the Levant
ISS	Institute for Security Studies
ISWAP	Islamic State in West African Province
LCBC	Lake Chad Basin Commission
MNJTF	Multinational Joint Task Force
MST	Material Support for Terrorism
NGOs	Non-Governmental Organisations
NIAC	Non-International Armed Conflict
NIMC	National Identity Management Commission
TRCs	Truth and Reconciliation Commissions
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor
US	United States

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Introduction

0.1 Background

This thesis explores the Boko Haram Insurgency and how it is framed by different actors, the applicable domestic and international law and consequences of different frames. The prevalent frame adopted by Nigerian authorities is that of terrorism and this thesis seeks to challenge this understanding. This research advocates for the adoption and acceptance of the frame of non-international armed conflict, either in parallel or as an alternate framing, as a means of providing increased protection for civilians and activating more encompassing accountability mechanisms for victims.

It is widely accepted that Boko Haram is one of the deadliest terrorist organisations globally.[1] The manifestations of the activities of Boko Haram gained international recognition with the bombing of the United Nations Country Office in the Federal Capital Territory Abuja in August 2011. Since then, Nigeria has seen a protracted reign of terror. The organisation has pushed past the religious divide to not only attack Christians but to do the same to fellow Muslims.[2]

It is pertinent to understand that the root of the growing extremism in North East Nigeria stems from economic decline and high levels of youth unemployment, poverty, ignorance, social inequality, social and economic exclusion[3] caused by the prevalence of corruption and the lack of proper implementation of government projects. The failure on behalf of the Government to resolve these issues has put an impediment on the efforts to effectively end the insurgency or in the very least alleviate the causative factors. In recent times, the above listed issues may be seen to have escalated as opposed to easing off.[4] With the economic downturn, the financial situation in the country has had an adverse effect on standard of living.[5] The Nigerian Government's strategy of treating the insurgency as merely religious and a law and order issue further enables it to avoid addressing the causative socio economic factors and hinders its response to the situation and efforts that could be taken to assist victims.

[1] Counter-Extremism Project, "Boko Haram". Available on: https://www.counterextremism.com/threat/boko-haram. Last accessed on 5 February 2021.
[2] Zenn J. et al, *Boko Haram Beyond the Headlines: Analysis of Africa's Enduring Insurgency* (Combatting Terrorism Centre at West Point, 2018), at 29.
[3] International Crisis Group, *Curbing Violence in Nigeria (II): The Boko Haram Insurgency,* Africa Report No. 216 (ICG, 2014), at 2-3.
[4] Onu E. et al, "Six People Fall into Extreme Poverty in This Nation Every Minute", *Bloomberg*, 22 February 2019. Available at: https://www.bloomberg.com/news/articles/2019-02-22/six-people-fall-into-extreme-poverty-in-this-nation-every-minute. Last accessed on 31 December 2021.
[5] *Ibid*.

Boko Haram through its activities has given way to a protracted violence in North East Nigeria. It has had an impact on the neighbouring States such as Chad, Cameroon and Niger and resulted in the establishment of a Multinational Joint Task Force. Their activities have decried a humanitarian crisis resulting in the loss of approximately 30,000 lives, displacement of 2.5 million people[6] and extirpated property worth $5.9 billion since 2009.[7] Furthermore, the violence has meted out unnecessary suffering on the civilian population not only in terms of death or injury but in loss of homes and livelihoods. As this PhD research will argue, some actions of the armed terrorist group have resulted in violations of International Humanitarian Law (IHL) and gross human rights violations. In reviewing the activities of the Boko Haram, it has been found that war crimes and crimes against humanity have been committed. This is however not reflected in responses by Nigerian governmental actors such as the justice sector and the military and is evident in the charges brought against insurgents.

International Humanitarian Law, especially the law applicable to non-international armed conflict, has been the source of vast academic inquiry. This thesis aims to contribute to this literature by looking at the complex situation of violence occurring in North East Nigeria through the lens of International Humanitarian Law, its implications for the pursuit of international criminal justice and accountability for harm caused. This approach diverges from the current framing of terrorism preferred by the Nigerian government.

To embark on this study, the key research question to be answered is: To what extent may the Boko Haram violence be framed as an armed conflict?

In considering this key question, sub-research questions are raised:

a. Who are the key stakeholders in the framing of the violence?
b. How has the Boko Haram violence been framed by different stakeholders?
c. How does their differing framing of the violence impact on the domestic and international laws applicable to the violence?

0.2 Author's Perspective and Relevance of the Research

This thesis builds on my Masters' dissertation titled "Neoliberalism, Boko Haram and Nigeria as a 'Failing State'" written in 2012. The dissertation investigated the reasons for the

[6] Counter-Extremism Project, "Nigeria: Extremism and Counter-Extremism" Available on: https://www.counterextremism.com/countries/nigeria. Last accessed on 5 February 2021.
[7] Zak B., "Boko Haram Insurgency and How To Curb Future Terrorism In Nigeria" *Sahara Reporters*, 3 March 2018. Available on: http://saharareporters.com/2018/03/03/boko-haram-insurgency-and-how-curb-future-terrorism-nigeria-bin-zak. Last accessed on 5 February 2021.

emergence of Boko Haram in Nigeria and concluded that the application of neoliberal policies in Nigeria resulted in non-beneficial socio-economic consequences that created an enabling environment for violence to thrive and contributed to the 'failing' of the Nigerian State. While my Masters' Dissertation focused on how past government actions contributed to the present situation of violence, this PhD research centres on the armed group itself, the framing of the crimes perpetuated under domestic legislation and international legal system and how harms done to victims can best be addressed.

The legal approach taken looks closely at the activities of Boko Haram, how different Nigerian actors have framed the violence, their motivations for doing so, how this has an impact on the applicable laws and the legal redress tools available for victims of their crimes. The choice of research focal area was predicated on the seeming disregard of the plight of victims of Nigerian government actors, limited conceptualisation of the insurgency and media reportage on the trial of persons affiliated with Boko Haram.

This research makes an original and important contribution to knowledge because it attempts to shed more light on the issues raised above. Beyond this, it explores how the application of black letter law is not a given but is shaped through actions and speech acts of certain actors. Furthermore, it delves into the relationship, using the specific case study of Boko Haram, between terrorism and International Humanitarian Law, which has been the subject of academic discourse, but remains a contested matter. This point is of importance because in recent times the nature of conflicts has increasingly shifted from international to non-international, and within the non-international space, the nature of the actors has expanded to include groups with terrorist and extremist ideology. The face of non-international armed conflict, previously characterised by groups seeking to overthrow governments or rebel movements agitating for autonomy or secession, now also includes non-state actors seeking to intimidate and instil fear without a clear agenda as to the desired results. A major turning point for this shift is said to be the September 11 bomb attacks in the United States.[8] Since then, terrorist armed groups have sprung up around the globe, undertaking activities that lead to situations of violence that, in some cases, have escalated to armed conflict.

[8] Schmitt M., "Counter-Terrorism and the Use of Force in International Law" (2003) 79 *International Law Studies Journal* 7, at 7. The shift referenced speaks to the shift in the nature of the actors, the non-state armed groups to encompass terrorist inclined groups. Furthermore, this is not to say there were no terrorist groups or attacks prior to 9/11 such as Fedayeen terrorists in Sinai nor the PLO in Lebanon. However, 9/11 was seen as a "defining event for global extremists and terrorists and it was widely considered the most egregious act of international terrorism." See: Gunaratna R., "The full circle of counterterrorism", *Council of Councils: Global Perspectives*, 1 September 2021. Available on: https://www.cfr.org/councilofcouncils/global-memos/911-effect-and-transformation-global-security. Last accessed on 9 November 2021.

Nigeria has become the locus of such situation of violence, with it being currently ranked as one of the most terrorism prone nations of the world and is classed in the same category as Afghanistan and Somalia,[9] nations with deep histories of conflict fuelled by designated terrorist groups.

0.3 Methodology

In this research, I have adopted two methodological approaches to address the research questions: (1) doctrinal/ positivism; and (2) constructivism. As will be discussed in more detail below, positivism allows for an analysis of the black letter law in the domestic criminal codes of Nigeria, but also in international treaties on International Humanitarian Law and international terrorism. A positivist analysis therefore facilitates an analysis of the strengths, weaknesses and lacunae of the laws in the area. I have used positivism to provide a detailed legal analysis of the following laws and rules: Nigerian Terrorism Prevention Act 2011, Nigerian Terrorism Prevention (Amendment) Act 2013, Article 3 common to the Geneva Conventions 1949 and Second Protocol Additional to the Geneva Conventions 1977 and International Criminal Court Statute 1998.

However, given that the conflict involving Boko Haram is a highly complex and politicised issue, focusing solely on the law, without having regard to other political, moral and social factors, would not have furnished a sufficient analysis. For this reason, I have decided to complement my positivist analysis of the law in question with a constructivist approach, to analyse the framing of this conflict from the perspective of the courts, Nigerian government (Justice sector, Executive, the military), NGOs, the media and the international community. This constructivist analysis will enable me to understand how different actors have attempted to frame the parties to the conflict, and the conflict itself, differently, for their own reasons. However, this divergent framing has significant implications for the applicable laws to the conflict and resultant attitudes towards justice and accountability for victims.

Below I set out to discuss some of the main features of the two methodological approaches I have adopted: (a) positivism; and (b) constructivism.

Positivism, as a theory is often applied when highlighting the current position of general legal principles and the application of the law. In other words, it can best be understood as a

[9] Okoli A. et al, "Terrorism and Humanitarian Crisis in Nigeria" (2014) XIV (1) *Global Journals of Human Social Science* 39, at 41.

"descriptive, morally neutral, theory about the nature of law."[10] This theory is often utilised for "analytical, doctrinal and legal research",[11] which this thesis partly is. The theory is thus "suited to research questions concerning the description and explanation of law as it is."[12]

As with most theories, there is no one size fits all description of positivism. However, several theorists have contributed to its formulation in various scholarly works, showing in what circumstances said theory applies and what it encompasses. One can say that there are central beliefs of positivists and these are that "what counts as law in any society is fundamentally a matter of social fact or convention and that there is no necessary connection between law and morality"[13]- and in this regard positive law has no connection to what is right or wrong. For instance, Kelsen sees laws as an "instrument of social control"[14] and argues that "a valid law is one that is systematically valid in the jurisdiction."[15] Whereas, Austin submits that "law is that which is posited i.e. made, enacted or laid down in a prescribed fashion",[16] and further states that "law is a matter of social facts". In addition, it is argued that "determining what the law is does not necessarily, or conceptually, depend on moral or other evaluative considerations about what the law ought to be in the relevant circumstances."[17] Furthermore, Raz is of the opinion that "it can never be a criterion of legal validity that a norm possesses moral value: the criterion of legality must simply be some determinate social fact."[18]

Central to the understanding of positivism is that the conceptualisation of law is exclusive of morality, this is often referred to the separation thesis. This is evident in the focus on the 'social' as espoused by numerous theorists. There are however differing understandings of the concept of social. On one hand theorists such as Austin and Bentham argue that 'social' is used to exclude the moral and other normative facts.[19] In this context, it is understood that "the relevant kinds of social facts that determine what law is are general social facts about political sovereignty."[20] On the other hand, others argue "what the law is basically depends on

[10] Marmor A., "Legal Positivism: Still Descriptive and Morally Neutral," (2006) 26 *Oxford Journal of Legal Studies* 683, at 683.
[11] Cryer R. et al, *Research Methodologies in EU and International Law* (Hart Publishing, 2011), at 38.
[12] *Ibid*.
[13] Coleman J. L. and Leiter B., "Legal Positivism" in Patterson D., *A Companion to Philosophy of Law and Legal Theory*, (2nd ed., Wiley-Blackwell, 2010), at 228.
[14] Marmor, *supra* n.10 at 685; Kelsen H., *General Theory of Law and State* (Wedberg trans., 1945), at 20-21.
[15] Stanford, "Legal Positivism", 17 December 2019. Available at: https://plato.stanford.edu/entries/legal-positivism/
[16] Muthushani D., "Theories of Law: Natural Law, Legal Positivism, the Morality of Law, Dworkin's Third Theory of Law, Legal Realism and Critical Legal Studies". Universita di Trento.
[17] Marmor, *supra* n.10, at 686.
[18] Coleman and Leiter, *supra* n.13, at 230; Raz J., *The Authority of Law* (Clarendon Press, 1979), at 37 – 52; Raz J., "Authority, Law and Morality" (1985) 68 *The Monist* 295, at 311 – 20.
[19] Marmor, *supra* n.10, at 686.
[20] *Ibid*.

the social rules that prevail in the relevant society".[21] This view is shared by Hart who states that "wherever there is law, there are primary rules that impose obligations and a rule of recognition that specifies the conditions that must be satisfied for a rule that imposes obligations to be a legal rule."[22]

There are however some schools of thought within the realm of positivism that suggest "moral and other evaluative considerations *may* determine, under certain circumstances, what the law is, but this is a contingent matter, depending on the particular social rules of recognition of particular legal systems."[23] This feeds into a critique of positivism as espoused by theorists such as Finnis who argue that "moral considerations form a *necessary condition* of legal validity"[24] and Dworkin whose argument is twofold- first, that morality is a sufficient condition for legal validity and second, legal morality is always partly a matter of moral judgment.[25]

Beyond this, Positivism often views law as "the observable phenomenon of legislation, custom, adjudication by courts and other legal institutions."[26] This could be said to be the reason why positivism is attractive and significantly influences the view of international lawyers. This position is buttressed by Brunnee and Toope, who posit that international lawyers are ever worried about the reality of their discipline that they look for qualities that will make it effective and bind the actors to the substantive outcomes of the processes of law creation.[27]

Based on this theory, the thesis adopts international humanitarian law [as formulated and accepted by the community of states under the auspices of the United Nations], specifically those relevant to non-international armed conflict, being Common Article 3, Additional Protocol II and relevant customary international humanitarian law, as its core area of study and reference point. International Humanitarian Law (IHL), simply put is the law that governs armed conflict. The thesis looks at how laws governing situations of violence of a terrorist nature could be viewed as non-international armed conflict governed by IHL and the offences arising where a breach occurs.

[21] *Ibid*.
[22] Coleman and Leiter, *supra* n.13, at 232.
[23] Marmor, *supra* n.10, at 686.
[24] *Ibid*, at 689.
[25] *Ibid*, at 689.
[26] Cryer, *supra* n.11, at 39.
[27] Brunnée J. and Toope S.J., "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 *Colum J Transnat'l L* 19, at 55.

However, because positivism requires a separation of law from morality, politics and similar forces, it would only furnish part of the answer to my research questions. This is because the Boko Haram insurgency I am focusing on is dominated by political, moral and social considerations that are not captured by a purely positivist perspective. Cryer argues, and I am inclined to agree, that once law is identified it is subjected to moral, social and political critique.[28] Therefore, although positivism is used to identify the law, as done in this case, this thesis uses other methods to highlight what it does not cover[29]- in this case the chosen method is constructivism.

Constructivism is used because it allows for the consideration of context and vested interests in the application of law. This view is supported by Lisinski, who argues that "constructivism's advantage is evident in that it focuses on social factors and stresses the importance of context."[30] In addition, Totaro posits that "constructo-positivism presents a far richer version of positivism that allows all sorts of moral theorising about what international law ought to be."[31] He buttressed his viewpoint by stating that the benefit of this approach is that it allows for a more accurate description of the actual state of international law.[32] The theory does not cover everything but what it does cover is important.[33] Constructivism helps explain how international law can exist and influence behaviour, and international law can help inform a richer understanding of the particular roles of different categories of norms in international society.[34] Beyond constructivism giving context, Wendt posits that constructivism brings renewed interest and sharpened analytical tools.[35]

Similar to positivism, there are different descriptions of what constructivism is, however, what is obtainable is several approaches that can be subsumed under the umbrella of constructivism. Constructivism is a theory of international politics that has become increasingly applied to the legal field. In its design, it incorporates elements of sociology and psychology, which makes it feasible to theorise about matters that seem to be unrelated because the

[28] Cryer, *supra* n.11, at 39.
[29] *Ibid*, at 38.
[30] Lisinski K., "Explaining War: A Comparison of Realism and Constructivism", *E-International Relations*, 3 May 2012.Available at: https://www.e-ir.info/2012/05/03/explaining-war-a-comparison-of-realism-and-constructivism/- Last accessed on 8 November 2021.
[31] Totaro M. V., "Legal Positivism, Constructivism, and International Human Rights Law: The Case of Participatory Development" (2008) 48 *Va J Int'l L* 719, at 721.
[32] *Ibid*, at 722.
[33] Ruggie J. G., "What makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge" (1998) 52(4) *International Organisation* 855, at 864.
[34] Brunnée J. and Toope S. J., "Constructivism and International Law" in Dunoff J. L. and Pollack M. A., *Interdisciplinary Perspectives on International Law and International Relations* (CUP, 2012), at 120.
[35] Wendt A., "Collective Identity Formation and the International State" (1994) 88(2) *The American Political Science Review* 384, at 394.

concepts and propositions normally used to talk about such matters are also unrelated.[36] At its broadest level, it holds that people make society and society makes people.[37]

Conventionally, constructivism posits that "formation of structure and institutions derive from the interaction of shared ideas."[38] Specifically, attention is focused on the role that culture, ideas, institutions, discourse, and social norms play in shaping identity and influencing behaviour.[39] Some core agreement between constructivists are summarised by Reus-Smit and Wendt in separate scholarly works. They stipulate that central to the understanding of constructivism are that:

1. Structures shape the behaviour of states;
2. Key structures in the states system are intersubjective; and
3. Identities and interests are conditioned and constructed by these structures.

While Wendt believes the "states are the principal units of analysis for international political theory"[40], Reus- Smit in his analysis expands the scope beyond states to the other actors. These actors include international organisations, NGOs, business entities and other norm entrepreneurs.[41] This focus on actors is also evidenced through the work of Keck and Sikkink.[42] Reus- Smit argues that "shared knowledge embedded in such structures determine how actors respond to their material environment and intersubjective beliefs, shape actors identities and their interests".[43] Cryer supports this view when he states that "actors derive views of their interests and identities from their relationship with law" and "for constructivists, law is a way of looking at and speaking about the world, and as such, impacts on the way the world is constructed by participants in the varied social processes".[44] Beyond this, Reus- Smit further posits that,

> there are reasons for actions, which have internal and external. Normative and ideational structures are constitutive of actors' reasons in both dimensions: through processes of socialisation they shape actors' definitions of who they are and what they want; and through processes of public justification they frame logics of argument.[45]

Constructivism differs from other political theories in the sense that realism is built on the understanding of power and power measured by material elements such as military strength,

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[36] Onuf N., *Making sense, making worlds: Constructivism in social theory and international relations* (Routledge, 2013), at 3
[37] *Ibid*, at 4.
[38] Reus- Smit C., *The Politics of International Law* (Cambridge University Press, 2004), at 104.
[39] Brunnée and Toope, *supra* n.34, at 121.
[40] *Ibid.*
[41] Ruggie, *supra* n.33.
[42] Keck M. E. and Sikkink K., *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998).
[43] Reus-Smit, *supra* n.38, at 21-22.
[44] Cryer, *supra* n.11, at 82.
[45] Reus-Smit, *supra* n.38, at 22.

economic prowess and a strong belief in sovereignty, which leads to the international space being anarchic, while liberalism refers, inter alia, to the building of a world order through institutions. Realists devalue "the role of norms in international societies and neoliberal institutions is a signalling device or a product of effective interest projection through explicit negotiation and formal adjudication."[46] For contemporary constructivists, social structures are built through interaction of states and other actors. Brunnee and Toope argue that "Constructivism helps explain how international law can exist and influence behaviour, and international law can help inform a richer understanding of the particular roles of different categories of norms in international society".[47]

In talking about structures, Arend argues that there are both material and non-material elements to the social structure. The material elements include resources and assets that comprise international power such as territory, population, effective government and sovereignty.[48] Its premise is on how these social structures constrain and enable actors in their choices and thus help to shape world politics.[49]

In its understanding of norms, positivists advance that norms are law only when they are made by an authority, although understanding of where the authority resides differs. O'Neill expresses this view when he states that "a norm is law, then, only if it is the command of a sovereign. Legality, on this account, is determined by its *source* – that is, the will or command of a sovereign – not its substantive merits."[50] They also argue that legal norms can only exist when they are produced through fixed hierarchies, noting that it is their formal nature that creates legal norms and these exist regardless of the link to social norms.[51] Austin domiciles the sovereign in a particular person whereas Hart argues that the sovereign is rather an office and not the person, as persons are transient.[52] Conversely, Constructivists expand this understanding by acknowledging the role of other actors referenced as norm entrepreneurs in the decision-making of the sovereign in norm creation, formalisation and institutionalisation. These actors expand beyond what is accepted under positivism to include international organisations and non-governmental organisations. This is the strongest bridging point between international law theorists and constructivists.[53]

[46] Brunnée and Toope, *supra* n.34, at 120.
[47] *Ibid*.
[48] Bederman D. J., "Constructivism, Positivism, and Empiricism in International Law" (2001) 89 *Geo LJ* 469, at 477.
[49] O'Neill M., *The Evolving EU Counter-Terrorism Legal Framework (*Routledge, 2011), at 7.
[50] Coleman and Leiter, *supra* n.13, at 231.
[51] Brunnée and Toope, *supra* n.34, at 119.
[52] Coleman and Leiter, *supra* n.13; Austin J., *The Province of Jurisprudence Determined* (Weidenfeld & Nicolson, 1955); Hart H. L. A. , *The Concept of Law* (Clarendon Press, 1961).
[53] Brunnée and Toope, *supra* n.34, at 119.

Constructivism focuses on structure and agency; it helps those who want to see or understand law's role in the construction of social reality. It dwells on how "individual states interpret and perceive the global system and the distribution of capabilities".[54] In addition, "constructivists do not disagree with the mere perception of the international system as anarchic, but hold the optimistic opinion that the effects of this system are dependent upon its actors' interpretations."[55] Specifically, on its relationship with International Law, Onuf and Kratchowil posit that there is "an important role for international law in helping to construct the identities of sovereign states and in shaping their behaviour."[56]

As earlier indicated, there are several concepts to be considered under the umbrella of Constructivism, but this thesis will focus on three, namely: Agency, Language and Framing, and Behavioural Relevance.

0.3.1.Agency

Central to constructivism is the notion of agency. Constructivists treat agents and structures as mutually constituted; agents create the system while systemic interactions help to recreate the agents.[57] According to Onuf, agency resides in individuals as they "can remake their social world [and this] has become the hallmark of constructivist analysis producing many upbeat accounts of how groups of individuals have managed to rearticulate social norms and out-manoeuvre more powerful opponents."[58] Onuf argues that "speech and its derivatives (rules, policies) are the media of social construction. People become agents by living in a world of language."[59] Onuf further contends that rules tell us who the active participants in a society are, these people are known as agents.[60]

Rules make agents out of individual human beings by giving them opportunities to act upon the world, these acts have material and social consequences. They use whatever means available to them to achieve their goals.[61] Rules give agents choices and agents act in society to achieve goals, these goals reflect people's needs and wishes considering their material

[54] *Ibid*, at 122.
[55] Milly A., *The Convenience of Norms and the ICC: A neorealist explanation for non- cooperation (*Masters Dissertation, Leiden University 2015), at 8.
[56] Brunnée and Toope, *supra* n.34, at 125.
[57] Brunnée and Toope, *supra* n.27, at 67.
[58] Sinclair A., *International Relation Theory and International Law: A critical approach* (Cambridge University Press, 2010); Onuf N., *World of Our Making: Rules and Rule in Social Theory and International Relations* (University of South Carolina Press, 1989), at 93.
[59] Onuf, *supra* n.36, at 29.
[60] *Ibid*, at 4.
[61] *Ibid*, at 9.

circumstances. Within the international society, states function as primary agents simply by conducting relations with each other.[62] In this vein, agents choose the rule to follow and as such agents that benefit from the rule follow it and those that it benefits less are less inclined to follow it, agents may use resources to change the rule.[63]

In looking at the issue of agency, Kratchowil advances that,

> From a constructivist perspective… agents are always autonomous, but their autonomy is always limited by the (limited) autonomy of other agents. The exercise of autonomy makes heteronomy a social condition, which agents accept as apparently unintended consequences of their individual, autonomous choices. International society is heteronomously ruled because states exercise their independence under the principle of sovereignty and a number of commitment-rules granting them rights and duties with respect to each other. One state's independence is a limit on every other's, and all states' agents accept the unintended consequences that result from their many individual choices.[64]

The works of Onuf and Kratchowil are however critiqued as having positivist leanings. Brunnee and Toope note that "in different ways, both Onuf and Kratochwil revert to the assumption that law can only be understood in hierarchical forms associated with domestic legal systems."[65] This is not necessarily seen as a disadvantage in view of the dual theoretical approach being taken in this thesis with the adoption of both the positivist and constructivist approaches. It is my view that this dual approach adds more depth to the analysis and is in line with the traditional understanding of law and its place in society in the Nigerian context.

0.3.2 Language and Framing

Theoretical submissions on the contributions of language to constructivism was also propounded by Onuf and Kratchowil. Onuf was strongly influenced by Habermas, who argued that identities of international actors are constructed in large part through communicative action. It has been suggested that constructivists have used this to test the "existence of genuine persuasion and moral decision-making in international politics".[66] Onuf noted that through speech acts articulated and accepted repeatedly that issues have become formalised and institutionalised into a law.[67] He uses speech act theory to argue that in speaking individuals are affecting the world. Onuf's version of the theory posits that "language is the key

[62] *Ibid*, at 17.
[63] *Ibid,* at 17-18.
[64] *Ibid*, at 20.
[65] Brunnée and Toope, *supra* n.34, at 126; Kratochwil F., *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, 1989), at 209 and 230; Onuf, *supra* n.58.
[66] Brunnée and Toope, *supra* n.34, at 123; Onuf, *supra* n.57; Habermas J., *The Theory of Communicative Action: Reason and the Rationalization of Society* (Beacon Press, 1984).
[67] Sinclair, *supra* n.58, at 13.

to understanding rules and the understanding of the social world".[68] Therefore, the social world and words are mutually constitutive and key to understanding how the world works and lies in unpicking the process of mutual constitution.[69] He argues that once a rule reaches a certain level of formalisation and institutionalisation, they are law.[70] This is linked to Finnemore and Sikkink's position on the life cycle of international norms- norm emergence, norm acceptance and norm internalisation.[71] Kratochwil contends that "the premise from which an argument starts and how the argument or debate is framed are crucial to arriving at a decision."[72] His focus is on language shaped by two factors, first, choice of narrative which contextualises the argument and the process and nature of the argumentation itself.[73] This is integral to this research as the framings and speech acts of different actors in Nigeria such as the wider Nigerian government (inclusive of the Executive and Legislature), Nigerian justice sector, Nigerian military, international organisations and non-governmental organisations operating in the region have shaped how the conflict is framed and consequential actions taken in terms of treatment of the insurgents and accountability measures explored.

0.3.3 Behavioural Relevance

Specifically, as it relates to the application of constructivism to international law, Dill advances a theory on behavioural relevance, making a strong case for it as a subset of broader constructivist theory. This possibly is the solution to the critique that constructivism's position on international law is not well articulated and is unclear "about how social and legal norms differ, the international legal system/order should be conceived, and how that institution conditions politics."[74] Dill's concept seeks to "explains how international law can make a counterfactual difference by prompting actors to behave differently than they would have done had they simply followed their interests or normative beliefs."[75] It advances that "State behaviour can best be accounted for with a view to internalised normative beliefs, sometimes States comply with it, because the legal rule aligns with a prior shared belief."[76] It shifts a researcher's focus from reasons for which States comply with international law to the effects

[68] *Ibid*, at 8.
[69] *Ibid*.
[70] *Ibid*, at 17.
[71] Finnemore M. and Sikkink K., "International Norm Dynamics and Political Change", (1998) 52(4) *International Organisation (International Organisation at Fifty: Exploration and Contestation in the Study of World Politics)* 887.
[72] Sinclair, *supra* n.58, at 20; Kratochwil, F. V., *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, 1989), at 37.
[73] Sinclair, *supra* n.58, at21; Kratochwil, *supra* n.72, at 12 and 213.
[74] Sinclair, *supra* n.58, at .24.
[75] Brunnée J., "A Constructivist Theory of International Law?" *EJIL Talk,* 23 September 2015.
[76] Dill J. and Rosenberg B., "Law, Legitimacy and Morality of Warfare: A conversation about legitimate targets?" *OXPOL*, July 19, 2015. Available on: https://blog.politics.ox.ac.uk/legitimate-targets-janina-dill/. Last accessed on 9 November 2021.

of compliance on behaviour.[77] Dill's position is supported by the view that "State preferences emerge from social construction and that State interests are evolving rather than fixed".[78] It is further suggested that constructivism treats international law as a dynamic process in which norm entrepreneurs interact with State actors to advance new norms with the objective of states adopting and ultimately internalising those norms.[79]

Earlier views on constructivism align with this argument. Cryer in his summation notes that "law actually constitutes, or at least helps to constitute actors and their interests, going deeper and doing more than constraining behaviour".[80] Wendt discusses the corporate identity of States which is shaped by the following interests: physical security, ontological security, recognition as an actor by others and development.[81] It further submits that "how a state satisfies its corporate interests depends on how it defines the self in relation to the other, which is a function of social identities at both domestic and systemic levels of analysis."[82] Reus- Smit also perceives that "not only do international politics and international law constitute and interpenetrate one another, actors move back and forth between legal and nonlegal action and justification to advance their projects."[83]

Linked to the discussion on identity and interests is the argument surrounding reasons for State compliance. Dill posits that state compliance can be viewed on a continuum between interest and norms, where a state chooses to position itself on a matter is depends on the intellectual or motivational effect.[84] The argument is that international law requires a compromise between utility and appropriateness. Simply put, it causes States to decide based on their national interest or an acceptable course of action based on shared normative beliefs. This varies slightly from Morrow's view that "constructivists believe that States comply with international obligations because they internalise the norms underlying such obligations".[85]

Fixating on the issue of norm internalisation, it is instructive to note that this internalisation of norms is not done by States in isolation but usually with transnational actors whose joint interests are not fully formed unless the interact with one another.[86] Therefore, constructivists

[77] *Ibid*.
[78] *Ibid*.
[79] Alford R. P., "The Nobel Effect: Nobel Peace Prize Laureates as International Norm Entrepreneurs" (2008) 49 *VA.J of Int'l L*. 61.
[80] Cryer, *supra* n.11, p.81.
[81] Wendt, *supra* n.35, at 384.
[82] *Ibid*, at 385.
[83] Brunnée and Toope, *supra* n.34, at 127.
[84] Dill and Rosenberg, *supra* n.76.
[85] Morrow J. D., "When do State Follow the Laws of War?" (2007) 101(3) *The American Political Science Review* 559, at 560.
[86] Totaro, *supra* n.31, at 728.

must play close attention to non-state actors as they are involved in the creation of shared understandings and the promotion of learning among States.[87]

As would be seen in chapter 3, this thesis specifically uses constructivism as an analytical tool to add more depth and nuance to the analysis of issues; this is with the understanding that the issue surrounding the violence is not purely legal but also political. This thesis would look at the possible frames that could be applied to the violence perpetuated by Boko Haram. These frames are that of simply terrorism, international armed conflict and non-international armed conflict. This thesis will argue that through communication action- speech acts, language and framing- a picture is projected by actors such as the Nigerian government (especially the Nigerian Army and the Justice sector- agents of the Nigerian State) and international non-governmental organisations. Furthermore, it will show that with each frame there is a different legal consequence and application of the law.

As earlier indicated, this thesis begins by examining what the law is. In doing so, the chapters are broken down to first analyse the historical perspective of the relationship between the key themes of international humanitarian law, terrorism and international criminal law. These are approached from the positivist lens. The second part of the thesis, which introduces the constructivist critique, considers the applicability of laid down principles and doctrines in relation to non-international armed conflict to the Boko Haram insurgency in Nigeria. In contemplating the applicability, it considered how different actors frame the conflict and the impact it has on its understanding. The thesis then proceeds to examine what the law ought to be. The third phase poses a more normative question of what the law ought to be, how the law ought to be approached as well as the judicial treatment it ought to receive and makes submissions as to opportunities available to better address criminal liability of combatants vis-à-vis obtainable laws and how such laws ought to be applied in the Nigerian setting.

In order to achieve this task, a qualitative research method is adopted, seeking to explore from a variety of sources the reasons behind non-application of international humanitarian law to terrorism related offences in domestic courts. The research is taken from both an empirical perspective and a reform-oriented approach. According to Vibhute and Aynalem, empirical research/ investigations seek to "assess the impact of law and reveals the gap between legal idealism and social reality, it perceives the idea of law as a social phenomenon and allows a researcher explore social, political, economic and cultural dimensions or implication of law."[88]

[87] Brunnée and Toope, *supra* n.27, at 70.
[88] Vibhute K. V. and Aynalem F., *Legal Research Methods* (Justice and Legal System Research Institute 2009), at 26.

Key empirical data analysed were hard to source trial court judgments from cases emanating from the insurgency. In Nigeria, only cases from the Court of Appeal or Supreme Court are published and seeing as these cases were mostly heard in the Federal High Court, they were not readily available for analysis and had to be individually sourced from the courts or Federal Ministry of Justice. Reform-oriented research is described as research based on empirical study and critical examination of the law to recommend changes in law and legal institutions.[89] Arguments and deductions made in this thesis draw from varying legal theories, namely positivism and constructivism, each presented to support a position, reasons for which are already above espoused.

In undertaking this research, data was primarily sourced from desk research to gather both primary and secondary sources. These sources comprise of domestic legislation, treaties, cases (foreign and local- Nigerian case law), United Nations Documents (Security Council and General Assembly), books, reports, newspaper articles and journal articles. Data gathered from these sources were analysed to make analytical deductions and recommendations. Specific emphasis is placed on the analysis of United Nations documents to ascertain the changing trends in the application of International Humanitarian Law to terrorism as well as Nigerian Case law. The summation of the analysis is directed at proving the thesis core hypothesis to wit: Common Article 3 and Additional Protocol II have not been allowed to govern the non-international armed conflict in Nigeria.

0.4 Structure and Outline

In addition to this Introduction, this PhD thesis consists in five chapters, followed by a Conclusion.

Chapter 1 explores existing literature on domestic law related to terrorism and sections of International Humanitarian Law relevant to non-international armed conflict. The review includes an analysis of books, journals, papers, opinion pieces and laws applicable to non-international armed conflict, Boko Haram and Terrorism. The purpose of this review is to ascertain what the existing literature is and identify gaps that this thesis aims to fill. More importantly, I aim to show the gap in literature relating to a legal analysis of the Boko Haram insurgency.

[89] *Ibid*.

Chapter 2 aims to respond to the question of how the gap between International Humanitarian Law and Terrorism can be bridged. This chapter looks at the relationship between these two focal areas and analyses how they overlap. I will use case studies to prove that International Humanitarian Law can apply in situations of violence that have been perpetuated by armed terrorist groups. It also undertakes an analysis of UN Security Council Resolutions as evidence of state practice on the application of IHL to terrorism related conflict.

Chapter 3 analyses the Boko Haram Insurgency and attempts a framing of the insurgency- Terrorism, International Armed Conflict or Non-International Armed Conflict. It does a deep dive into Boko Haram cataloguing its origins, religious ideology and purpose. It then undertakes an analysis of the different possible frames as presented by different actors and applicable laws in each instance and concludes that from the law the most applicable frame is that of Non-International Armed Conflict and it provides evidence to support this frame.

Having concluded that the most encompassing frame for the Boko Haram Insurgency is Non-International Armed Conflict, Chapter 4 analyses the role of International Criminal Law (ICL) in the enforcement of IHL and evaluates the effectiveness of the Nigerian judicial system. It further looks at the conflict through the lens of International Criminal Law and surmises that Boko Haram has committed war crimes and crimes against humanity. It then analyses court judgments emanating from the conflict to ascertain the scope of offences charged. It finds that the frame of Non-International Armed Conflict is not reflected in the charges and the conflict is treated simply as terrorism, a law and order issue.

Lastly, Chapter 5 evaluates how the application of the most encompassing frame- Non-International Armed Conflict- can trigger the use of transitional justice in order to best address harm done and provide accountability for victims. It provides an in-depth analysis of the current Deradicalisation, Rehabilitation and Reintegration (DRR) methods used and proposes alternate transitional justice measures that could be used in addition to prosecution. It proposes ways in which Nigerian justice sector can address fair labelling concerns through the development of a model indictment sheet.

0.5 Research Challenges and Limitations

This introductory paper will not be complete without addressing the challenges prevalent in undertaking this research. I would agree with Comolli on a particular point which she poignantly put as “the decision to embark on this project stemmed from the realisation that even though some respected experts both from Nigeria and internationally, had produced

written analyses of Boko Haram, most of the available research tended to be fairly short and limited in scope."[90] In undertaking this research, the same challenge highlighted in the above sentence was faced in that there was limited cogent literature addressing the Boko Haram situation vis a vis International Law, particularly International Humanitarian law. To briefly enumerate the challenges, firstly, there was the challenge of paucity of academic material focusing specifically on the Boko Haram violence. Therefore, the analysis ensuing in this paper will emanate from existing discourse of International Humanitarian Law, Terrorism and Justice and Accountability in general. Secondly, there was also the challenge of focusing my research on academic and published findings as opposed to more empirical research involving victim interviews and perspectives. The consequence of this is that proposals made are based on reports of views of victims and not first-hand interactions with said victims.[91] Although this was a difficulty, in view of the ongoing conflict, it would not have been possible to travel to particular areas of Nigeria to conduct such interviews. I was able, however, to locate and rely on a number of reliable reports on victim interviews undertaken by non-governmental organisations in the field. The ability to access court judgments also proved to be an issue because of the bureaucratic nature of the Nigerian justice sector and the secrecy surrounding cases emanating from the insurgency. This had the effect of causing some delays in research, as I worked to gain access to such caselaw, and it also meant that I was only able to review a smaller sample size of judgments than initially anticipated. However, many of these judgments had not previously been easily accessible and this research makes them available to the academic community for the first time.

0.6 Scope of the thesis

This thesis is limited in scope to analysing the activities of Boko Haram as it relates to its classification, applicable domestic and international laws and its relationship to terrorism. It focuses on how different actors and their speech acts framed the activities of Boko Haram and the consequences of the classification occasioned by those speech acts. The thesis does not delve into activities of the Nigerian security forces and any resulting violations of domestic or international law. In this regard, it does not focus on the actions of Nigerian security forces nor remedies nor accountability mechanisms available to victims. Also, although this thesis acknowledges the activities in Boko Haram in a number of States, emphasis is on their activities in Nigeria.

[90] Comolli V., *Boko Haram: Nigeria's Islamist Insurgency* (Hurst 2015), at 27.

[91] This limitation does however create an avenue for further research as transitional justice proposals contained therein can be modified and further strengthened using these first-person accounts of victims.

1. Relevant Legal Framework

The armed group popularly referred to as Boko Haram has perpetuated violence primarily in North East Nigeria since 2009. This group has posed a full-fledged existential challenge to both individuals and government, as time after time, a new wave of violence is inflicted on citizens - destroying the lives and property of civilians and, in turn, piling pressure on the government to consider dire measures to curb this state of insecurity. The aim of the thesis is to undertake an in-depth analysis into the situation of violence to assess its different framings, applicable laws and consequential actions because of the applicable laws. It considers how different actors have contributed to its framing and advances what is considered by the author to be the most suitable frame- Non-International Armed Conflict. Beyond this, it proceeds to examine actions that ought to arise in view of this frame and suggesting possible behaviours that ought to be adopted by specific Nigerian government actors, especially the Nigerian justice sector. Thus, this research has been informed by the following questions: To what extent may the Boko Haram violence be framed as an armed conflict? In considering this key question, sub-research questions are raised:

a. Who are the key stakeholders in the framing of the violence?
b. How has the Boko Haram violence been framed by different stakeholders?
c. How does their differing framing of the violence impact on the domestic and international laws applicable to the violence?

However, before addressing these questions, certain preliminary points need to be considered to set the stage for the analysis. Firstly, this review will undertake an extensive definition of concepts and key words utilised in this thesis. Secondly, it would give an overview of laws potentially applicable to the situation of violence in Nigeria.

1.1 Definitions

Several key themes are utilised in this thesis or underpin analysis carried out and as such it is critical to understand what these terms mean and how they would be used in this thesis. The most important of these is International Humanitarian Law.

1.1.1 International Humanitarian Law

The meaning and scope of International Humanitarian Law has been covered extensively in the literature, so this section will confine itself to highlighting some of the main themes of this body of law. International Humanitarian Law also known as *jus in bello* refers to the body of laws governing conduct of combatants during war or an armed conflict. It is defined as the law that “regulates tensions between States, international organisations and other subjects of

international law… it consists of rules that, in times of armed conflict, seek for humanitarian reasons to protect persons who are no longer participating in the hostilities and restrict means and methods of warfare."[1] The body of law aptly referred to is made up of two branches: the Hague Conventions of 1899 and 1907 and the four Geneva Conventions of 1949 and Protocols additional to the Geneva Conventions of 1977.[2] The Hague Conventions have at their core, the principle of distinction and legality regarding the use of weapons that can lead to indiscriminate attacks and superfluous injury.[3] It is concerned with the means and methods of warfare to limit harm caused as well as expresses the rights and obligations of belligerents.[4] On the other hand, the Geneva Conventions moderate the conduct during hostilities and sets up a framework for the protection for civilians, prisoners of war, the shipwrecked and seamen.[5] The relationship between these two sets of laws is addressed in the *Nuclear Weapons* Case where the International Court of Justice (ICJ) found that:

> These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.[6]

Beyond this, it is argued that a number of other treaties have been adopted as being within the body of International Humanitarian Law. Notable treaties include the following: the Convention on the Rights of the Child 1989 (particularly as regards the conscription of child soldiers), Rome Statute of the International Criminal Court 1998, International Convention for

[1] ICRC, *International Humanitarian Law: Answers to your Questions* (ICRC 2015), at4.
[2] Hague Convention (II) with Respect to the Laws and Customs of War on Land, and its Annex: Regulations Concerning the Laws and Customs of War on Land, 29 July 1899; 1907 Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 8 June 1977, 1125 UNTS 3 ; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 8 June 1977, 1125 UNTS 609.
[3] Hague Convention (II) with Respect to the Laws and Customs of War on Land, and its Annex: Regulations Concerning the Laws and Customs of War on Land, 29 July 1899; 1907 Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land.
[4] *Ibid*.
[5] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287 [Geneva Conventions].
[6] *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep. 226, at 256; Dinstein Y., *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 2004), at 13.

the Protection of All persons from Enforced Disappearance 2006 and the Arms Trade Treaty 2013.[7]

Underpinning this body of law are the principles of humanity, distinction, principle against unnecessary suffering and the principle of necessity, at the core is the resolution to protect human dignity and to limit suffering in times of war.[8] According to Shaw, the underlying principles governing same are fundamentally that persons not actively engaged in conflict ought to be treated humanely, he argues that it is about striking a neat balance between military necessity and humanitarian concerns.[9] Maurer adds that it is based on universal norms of humanity, dignity and protection of the vulnerable.[10] It is important to note that majority of these principles and the provisions of the Hague Conventions and Geneva Conventions have attained customary status as per the *Wall Advisory Opinion*[11] and *the Eritrea Claims Commission*[12] case. International Humanitarian Law applies in instances of either an International Armed Conflict or Non-International Armed Conflict.

The nomenclature of International Humanitarian Law has however been subject to debate. Wilson advances that there is "no international agreement which defines International Humanitarian Law on its own terms, let alone sets down its provisions in a comprehensive way."[13] Wilson argues that there is a problem at the heart of IHL as the conventional narrative equates law of war or law of armed conflict with what today is referred to as International Humanitarian Law and this conventional account does not consider how and why IHL came to be used as the dominant name.[14] She argues that the promotion of the preferred nomenclature of IHL was a political tool used by international organisations such as the ICRC to expand their work into armed conflict scenarios.[15] She argues that the term IHL means more than Hague law or Geneva law which were the original laws of armed conflict and that includes "all the international legal provisions, whether written or customary, ensuring respect for the individual and his well-being', and was thus composed of two branches of law: Law of

[7] Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3; Rome Statute of the International Criminal Court 17 July 1998; International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, 2716 UNTS 3; Arms Trade Treaty, 2 April 2013 3013 UNTS 269.
[8] ICRC, *supra* n.1.
[9] Shaw M., *International law* (6th edition, CUP, 2008), at Chapter 21.
[10] *Ibid.*
[11] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ Rep 136.
[12] Ethiopia-Eritrea Claims Commission, *Partial Awards on the Claims relating to Prisoners of War* (2003) 42 ILM 1056, at 1083.
[13] Wilson P., "The myth of international humanitarian law" (2017) 3 *International Affairs* 563, at 578.
[14] *Ibid*, at 563-564.
[15] *Ibid*, at 565.

War (wide sense) and human rights."[16] At the core, she contends that International Humanitarian Law did not exist from inception but came about through the advocacy of ICRC and other INGOs like Human Rights Watch for the adoption of the nomenclature as the proper body of law regulating armed conflict and "as a tool for applying pressure on states—especially western ones—in relation to their military activities" without regard for "widely applied conventions of legal analysis, reasoning or methods of interpretation."[17] She concludes by stating that there is no body of law referred to as IHL. Although these points are important and lends credence to the value of interrogating accepted concepts, the core focus of the present research is not on the etymology of International Humanitarian Law. As such, while it is recognised that the body of law known as IHL may be defined differently, this thesis adopts the definition of IHL that Wilson describes as "the orthodox account [that is] dominant in public and academic discourse".[18]

1.1.2 Armed Conflict

As mentioned earlier, IHL governs armed conflict. Armed conflict is described to be "a state of fact and a question of law." Armed conflicts are oftentimes described in terms of the different types of conflict but the concept itself has evaded definition as it is not captured in the conventions or protocols. However, Pictet attempts a definition by stating that "any difference arising between States and leading to the intervention of members of the armed forces is an armed conflict."[19] The International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić* provided a definition which has hitherto become the standard definition[20] of an armed conflict. The Tribunal stated thus:

> An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State. International humanitarian law applies from the initiation of such conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party whether or not actual combat takes place there.[21]

The acceptance of the *Tadić* definition as the standard is highlighted in the updated ICRC commentary on the Geneva Convention where it is stated that "this definition has since been adopted by other international bodies and is generally considered as the contemporary

[16] *Ibid*, at 567.
[17] *Ibid*, at 574.
[18] *Ibid*, at 563.
[19] Pictet J., *Commentary on the Geneva Conventions of 12 August 1949: Vol.1* (ICRC, 1952); Shaw, *supra* n.9, at 1190.
[20] ICRC, *Commentary on the Third Geneva Convention,* 2020, at para.251. Available at: https://ihl-databases.icrc.org/ihl/full/GCIII-commentary. Last accessed on 14 December 2021.
[21] *Prosecutor v Dusko Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995), at para 70.

reference for any interpretation of the notion of armed conflict under humanitarian law."[22] By the Geneva Conventions there are two types of armed conflict: international and non-international. An International Armed Conflict (IAC) occurs in "all cases of declared war or of any other armed conflict which arises between two or more of the High Contracting Parties (States)."[23] Simply, it is defined as "when one or more States resort to the use of armed force against another State."[24] This includes wars of national liberation in exercise of a right to self-determination[25] or "military occupation of all or part of a High Contracting Party".[26] Furthermore, this is irrespective of the reasons for the intensity of the confrontation.[27] In instances where there is deemed to be an international armed conflict applicable laws are the Four Geneva Conventions 1949, Additional Protocol I and Customary International Humanitarian Law for International Armed Conflict. These laws protect civilians who are not directly participating in hostilities and combatants turned prisoners of war.

Conversely what is considered as non-international armed conflict (NIAC) (also known as internal armed conflict) has been subject to further debate. In the applicable law, it is said to apply to a "conflict not international in character occurring in the territory of one of the High Contracting Parties"[28] but this provision fails to give further elaboration. The ICRC updated commentary equally accepts this when it admits that "common article 3 does not provide a detailed definition of its scope of application, nor does it contain a list of criteria for identifying the situations in which it is meant to apply."[29] Moir argues that the definition in common article 3 is abstract and leaves the determination of the existence of an armed conflict to the concerned state.[30] Judicial interpretation concludes that the more specific and restrictive Common Article 3 is, the more it would lose its desired effect while the openness gives it strength.[31] Notwithstanding the foregoing, the Rome Statute specifically defines it as "armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups."[32] La Haye influenced by judicial interpretation of this article defines non-international armed

[22] ICRC Commentary, *supra* n. 20, at para. 251. This position is equally acknowledged in the Oxford Commentary on the 1949 Geneva Conventions.
[23] Article 2 Common to the Geneva Conventions of 1949.
[24] ICRC, *supra* n.1, at 18; *Tadić, supra* n. 21.
[25] Additional Protocol I, *supra* n.2, Art. 1.
[26] MSF, "The Practical Guide to Humanitarian Law". Available on: https://guide-humanitarian-law.org/content/article/3/international-armed-conflict-iac/. Last accessed on 31 October 2021.
[27] ICRC Commentary, *supra* n. 20, at para. 251.
[28] Article 3 Common to the Geneva Conventions of 1949.
[29] ICRC Commentary, *supra* n. 20, at para. 418.
[30] Moir L., *The Law of Internal Armed Conflict* (CUP, 2002), at 34.
[31] *Tadić, supra* n. 21 at paras. 561–568; and *Prosecutor v Rutuganda* (Judgment) ICTR-96-3-T (December 1999), at para. 91.
[32] Rome Statute, *supra* n.7, Art. 8(2)(f).

conflict as "the use of armed force within the boundary of one state between one or more armed groups and the acting government, or between such groups."[33]

This definition is further expanded in Additional Protocol II by capturing what it is not. It describes it as "armed conflict not covered by Additional Protocol I and takes place in the territory of a high contracting party between its armed forces and dissident armed forces or other organised armed groups under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and implement this protocol."[34] It further stipulates that it "shall not apply to situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature."[35]

According to Bothe et al, there are four categories or types of non-international armed conflict, namely: (1) internal disturbance; (2) ones which meet the threshold of common article 3 but not that of additional protocol 2; (3) conflict that meet the restrictive threshold of Additional Protocol 2, therefore both Common Article 3 and Additional Protocol 2 are applicable; and finally, (4) national liberation movements which apply to colonial struggle which means the whole body of international humanitarian law is applicable.[36] The implications of this distinction between the two sets of treaty provisions further leads to a discussion of when a non-international armed conflict does exist under the *Tadić* criteria. This will be addressed subsequently in this chapter. Nonetheless, it is evident from the definitions provided that the laws governing non-international armed conflict are Common Article 3, Additional Protocol II and customary humanitarian law applicable to non-international armed conflicts.

1.1.3 Terrorism

Another term that would be considered throughout this thesis and requires definition is terrorism. Terrorism has been described as anxiety inspiring violence employed by semi-clandestine individuals or groups towards the advance of political motivated ends.[37] As opposed to conventional warfare, it can be seen as unconventional. It has been argued that there is no universal definition of terrorism although efforts have been made. According to the 1937 Convention on Terrorism (which never entered into force), acts of terrorism were defined as "criminal acts directed against a State and *intended or calculated to create a state of terror*

[33] La Haye E., *War Crimes in Non-international armed conflicts* (CUP, 2015), at 5.
[34] Additional Protocol I, *supra* n.2, Art. 1.
[35] Additional Protocol II, *supra* n.2, Article 1(2).
[36] Bothe M. et al, *New Rules for Victims of Armed Conflict: Commentary on the two 1977 protocols additional to the Geneva Conventions of 1949* (Martinus Nijhoff Publishers, 1982), at 625.
[37] *Ibid.*

in the minds of particular persons, or a group of persons or the general public".[38] Some definitions existing include the draft Convention on International Terrorism, which states:

> Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:
> (a) Death or serious bodily injury to any person; or
> (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
> (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss; when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or to abstain from doing any act.[39]

According to the United States Code, "terrorism is a premeditated, politically influenced assault against non-combatant targets by subnational sects or covert agents…this act becomes international terrorism when it involves the geographical space or citizens of more than one country."[40] Others have also described it as "criminal acts intended or calculated to provoke a state of terror in the public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them."[41] It has been contended that the definition of terrorism at the international level would require the consideration of the following elements: "the *mens rea* aspect, the purpose of the act; the characteristic of the act itself, the target of the act, the perpetrators; the scope of the definition in time or place, and whether any exception or justification could be applicable."[42]

Other attempts to define terrorism focus on the type of terrorism. This is seen in the work of Saulawa and Karumi who states that there are different types of terrorism namely: political, non-political, quasi, limited political terrorism acts and civil disorder.[43] Shola provides a different set of categorisations: Religious terrorism linked to fanaticism, state sponsored terrorism, right wing terrorism aimed at liberal governments and separatist terrorism.[44] Furthermore, it can be argued that certain international conventions define terrorism in terms of specific acts. This position is buttressed by Krahenmann who states that,

> instead of a comprehensive convention on terrorism at the universal level, we have a framework

[38] Article 1 (2) 1937 Convention on the Prohibition of Terrorism (Emphasis added).
[39] Article 2 Draft Comprehensive Convention Against International Terrorism UN Doc. A/59/894 12 August 2005.
[40] US Title 22, Section 265f(d); Asiedu M., "Boko Haram and the African Union's Attitude towards Terrorism" (2019) *Global Political Trends* Center, at 3.
[41] UNGA Res 49/60 (17 February 1995) UN Doc A/Res/49/60.
[42] Ginkel B. V., "Combating Terrorism: Proposals for Improving the International Legal Framework" in Cassese A. (ed). *Realizing Utopia: The Future of International Law* (Oxford University Press, 2008), at 467.
[43] Saulawa M. A. and Karumi B., "Terrorism in Nigeria: An Overview of Terrorism (Prevention) Act 2013" (2015) 8(4) *International Journal of Business, Economics and Law* 8, at 10.
[44] Shola O. J., "Globalisation of Terrorism: A Case Study of Boko Haram in Nigeria" (2015) 6(1) *International Journal of Politics and Good Governance* 1, at 8-10.

> that is comprised of 19 universal legal instruments that deal with certain types of terrorism: a series treaties on acts on board aircraft, ships, and fixed platforms, and airports; one on hostage taking and one on internationally protected persons; three addressing specific materials, namely nuclear and explosive materials; and other treaties addressing terrorist bombings, the financing of terrorism, and acts of nuclear terrorism.[45]

Onuf takes a different approach by making propositions that fit into a different formulation of terrorism. He makes the initial claim that "terrorism is an observer's description of multiple acts of terror that members of a particular kind of social movement- a hypermovement- deliberately inflict, it is a more general description of social conditions in which acts of terror are a frequent occurrence and fear is generalised beyond immediate peril."[46] In order to give better insight he advances that social movements are built on 3 key dimensions- identity, opposition and totality. Specifically, on identity, he argues that "rules specifying acknowledgment of abstract principles confer agency on members, who thereby acquire the status of a member willing and able to act on principle."[47] On the issue of opposition, he states that "movements arise when individuals joining in a common activity expect at least some other individuals to oppose them consciously and actively with social conflict ensuing."[48] Regarding totality, he contends that "an organisation becomes a totality, a world unto itself, when it secures full obedience from officers and depends only on resources its officers make available."[49] He further adds that "social movements and anti-movements both require access to resources (skills, information and material) to enable agents to act on behalf of the movement."[50] He concludes that the rationale of terror is to disrupt and discredit other movements, institutions or society as a whole, on principles grounds, whether by targeting specific individuals or material artifacts, or by engaging in random acts of terror and terrorising large numbers of individuals not specifically targeted."[51]

From the literature what is clear is that although there has been an inability to come to an international consensus on the definition of terrorism, States have provided legal definitions as seen in several national legislations. What is more apparent is that the focus usually is on what is considered as 'acts of terrorism' and not terrorism itself. This is in relation to the focus on the elements that can be considered terrorism such as hijacking, financing of terrorism and

[45] Krähenmann S., "Legal Framework Addressing Terrorism and Counter-Terrorism" in Proceedings of the Bruges Colloquium on Terrorism, Counter-Terrorism and International Humanitarian Law, 17th Bruges Colloquium, 20-21 October 2016, at 19.
[46] Onuf N., "Making Terror/ism" (2009) 23(1) *International Relations* 53, at 53.
[47] *Ibid*, at 55.
[48] *Ibid*, at 56.
[49] *Ibid*, at 57.
[50] *Ibid*, at 54.
[51] *Ibid*, at 59.

use of explosive materials. In itself, these are crimes but rise to the level of terrorism when the intent is considered.

1.2 Applicable Laws

This section aims to analyse possible laws that could be applicable to the violence perpetuated by the armed group known as Boko Haram in North East Nigeria.

1.2.1 International Humanitarian Law

As stated above, there are two types of conflicts covered by international humanitarian law-international and non-international armed conflict. In taking these bodies of law into consideration, the applicable laws may be gleaned from the sources of laws as contained in article 38 of the International Court of Justice Statute 1946. These include international conventions, international custom, general principles of law and judicial decisions. I will now proceed to consider literature concerning both.

1.2.1.1 International Armed Conflict

The historical beginnings of International Humanitarian Law prior to codification is found in La Haye's work on *War Crimes in Non-international armed conflict* as well as Solis' *The Law of Armed Conflict: International Humanitarian Law in War.*[52] La Haye argues that the observance of International Humanitarian Law as we know it today commenced with the Chinese who adopted pragmatic views of means and methods of warfare. She also refers to the Middle Ages where International Humanitarian Law was based on the notion of allegiance.[53] She claims that the notion of allegiance helped distinguish between international and internal wars as "war between the sovereign and foreign armies, who owed no allegiance to this king, was 'international', and a conflict between sovereign and subjects, who owed allegiance to him, was a domestic conflict."[54] She alludes to the popularly known writings of de Vattel in the 18th century who argued that there ought to be applicability of the common laws of war with maxims of humanity, moderation and probity.[55] La Haye argues that in the 19th century it became necessary to distinguish conflicts on the basis of their scale and magnitude.[56] This could be seen through the Lieber Code of 1863 which provided for the treatment of prisoners of war,

[52] Solis G. D., *The Law of Armed Conflict: International Humanitarian Law in War* (CUP, 2010); ICRC, Fundamentals of IHL, Chapter C, 26 March 2012; Alexander A., "A short history of International Humanitarian Law" (2015) 26(1) *EJIL* 109; Grotius H. and Loomis L. R., *The Law of War and Peace (de Jure Belli Ac Pacis)* (Classics Club by Walter J. Black, 1949); De Vattel E., *The Law of Nations* (Newbery, Richardson, Crowder, Caslon, Longman, Law, Fuller, Coote and Kearsly, 1760).
[53] La Haye, *supra* n.33, at.34.
[54] *Ibid*.
[55] De Vattel E., *The Law of Nations* (Newbery, Richardson, Crowder, Caslon, Longman, Law, Fuller, Coote and Kearsly, 1760), at 109–11.
[56] La Haye, *supra* n.33, at 32.

principle of military necessity, protection of civilians, prohibition of rape and the prohibition of certain methods of modern warfare such as the use of poisons.[57] Following the American Civil War of 1860-1865, there arose a need to codify the rules of engagement. It can be argued that this was the first major step taken to moderate conduct of hostilities.

It can be argued that the Geneva Conventions governing international armed conflict were formulated in the aftermath of the Second World War and in a bid to minimise human suffering as witnessed during the war. Majority of the body of the Geneva Conventions are focused on international armed conflict with the exclusion of Common Article 3 and Additional Protocol II. The Conventions focus on the following:

1. Geneva Convention I: Wounded or sick soldiers on land members of the armed forces' medical services;
2. Geneva Convention II: Wounded, sick or shipwrecked military personnel at sea and members of the naval forces medical services;
3. Geneva Convention III: Prisoners of War;
4. Geneva Convention IV: Protection of Civilians including foreign civilians on the territory of parties to the conflict, civilians in occupied territories, civil detainees and internees and medical and religious personnel or civil defence units;
5. Additional Protocol I: expands these protections to cover wounded, sick and shipwrecked civilians and civilian medical personnel, obligation to search got missing persons and provision of humanitarian aid for the civilian population.

According to Shaw, there are key guiding principles that flow from these Conventions. In summary, prisoners of war and persons not directly participating in the conflict are entitled to respect for their lives, importantly, persons who have surrendered should not be killed; wounded and sick should be cared for the party to the conflict who is in power, everyone should have the benefit of judicial guarantees, parties are prohibited from using weapons that cause unnecessary losses or excessive suffering, and there should be distinction between civilians and combatants with attacks only aimed at military objectives.[58] It is important to note that for these provisions to apply there need not be a "formal declaration of war or recognition of the situation".[59] Dinstein buttresses this point by stating that in international armed conflict,

[57] Instructions for the Government of Armies of the United States in the Field prepared by Francis Lieber, promulgated as General Orders No.100 by President Lincoln, 24 April 1863. Reproduced in Schindler D. and Toman J. I. (eds.), *The Laws of Armed Conflicts. A Collection of Conventions, Resolutions and Other Documents* (3rd edn., Institute Henry-Dunant 1988), at 3.
[58] Shaw, *supra* n.9, at 1201-1202.
[59] Dinstein, *supra* n.6, at 15.

the operation of applicable law is not conditioned on any formal recognition of the enemy either as a State (as long as they meet the objective criteria of statehood) or as a Government (as long as there is de facto control of the state and their actions are treated as that of the State),[60] further elaboration would be given to this. ICRC argues that the application of these conventions is informed by factual conditions. Gasser practicalises this by arguing that "as soon as the armed forces of one State find themselves with wounded or surrendering members of the armed forces or civilians of another State on their hands, as soon as they detain prisoners or have actual control over a part of the territory of the enemy State, then they must comply with the relevant convention."[61] Another position advanced is that "in every international armed conflict, it is indispensable to determine whether a belligerent State whose conduct is at issue has expressed its consent to be bound by any germane treaty in force."[62] Furthermore, it is imperative to know if the States that are party to the conflict are signatories to the applicable treaties.

Classification of armed conflict

Dinstein provides instances when law governing international armed conflict are applicable. He states that these provisions can apply where there is a formal declaration of war between two sovereign states or the war is evident in the material sense through the "comprehensive use of armed forces."[63] Another clear instance is where one State "unilaterally uses armed force against another State even if the latter does not respond by military means."[64] Examples could include a blockade (naval or air) or an unconsented to invasion or deployment of State's armed forces on the territory of another State. This equally applies in instances where the use of armed force is "not directed against the enemy's armed forces but only the enemy's territory, its civilian population and/ or civilian objects including infrastructure".[65] He posits that it can even apply if it a mere incident that falls short of war. He argues that beyond the straightforward application of the law in the above instances, the International Humanitarian Law applicable to International Armed Conflict can be called to bear in two amorphous situations. First, where armed conflicts may be mixed horizontally in the sense that they incorporate elements of both international and non-international hostilities. In this instance, the rule in *Nicaragua* applies. The ICJ ruled that "the acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the

[60] *Ibid,* at 16.
[61] Gasser H.P., "International Humanitarian Law: An Introduction" in Haug H. (ed.), *Humanity for All: The International Red Cross and Red Crescent Movement* (Paul Haupt Publishers, 1992), at 510- 511.
[62] Dinstein, *supra* n.6, at 8.
[63] *Ibid*, at 5.
[64] ICRC Commentary, *supra* n. 20, at para. 256.
[65] *Ibid*, at para. 257.

legal rules relating to international conflicts."[66] This implies that it could bring about mixed conflicts. The second instance is where the conflicts are mixed vertically, that is, the conflict starting as non-international then morphing into an international.[67] This is seen in the case of *Rajić* where the ICTY held that the "significant and continuous intervention" of Croatian forces was able to transform an internal conflict to an international one.[68]

However, there are certain instances where there might be ambiguity as to the applicable classification to give where the involvement of another State in the control of a non-State Armed Group is in question. This has been the subject of a few judicial decisions, notable of which is the decision of the ICJ in the *Nicaragua* case and the ICTY in *Tadić*. In *Nicaragua*, the main issue in question was on state responsibility, central to which is the issue of attribution. It has been argued that control is at the centre of determining attribution. The measure to be applied in determining whether an intervening State had control over a non-State Armed Group has been subject to judicial interpretation. The question of adjudication was whether the United States could be held responsible for the actions of the contras. The ICJ found that in order to provide a response, the test to be applied is that of effective control. This requires that "the non-State armed group that is subjected to control be not only equipped and/or financed and its actions supervised by the intervening power, but also receives specific instructions from that power, or that occurs."[69] Conversely, the ICTY in *Tadić,* it was considered in the context of classification of the conflict; in this instance, it found the overall control test more applicable. This test provides that "in order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity."[70] This criteria was also utilised by the ICC in *Lubanga* where the pre-trial chamber stated that "where a State does not intervene directly on the territory of another state through its own troops, the overall control test will be used to determine whether armed forces are acting on behalf of the first State."[71] Thus it can be said that "the overall control test can be used to classify conflicts, whereas the effective control standard remains the test of attribution of conduct to a State." This summation was seen in the case on the *Application of the Convention on the Prevention and Punishment of the Crime*

[66] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14, at para. 219.
[67] Dinstein, *supra* n.6, at 14-16.
[68] *Prosecutor v Rajić* (Review of the indictment pursuant to Rule 61) IT-95-12-R61 (13 September 1996), at para. 21.
[69] ICRC Commentary, *supra* n. 20, at para. 302; Nicaragua, *supra* n.66, at para. 115.
[70] *Prosecutor v Tadić* (Judgment, Appeals Chamber) IT-94-1-A (15 July 1999).
[71] *Prosecutor v Thomas Lubanga Dyilo* (Decision on the confirmation of charges) ICC-01/04-01/06, (Pre-Trial Chamber I, 29 January 2007), at para 211; ICRC Commentary, *supra* n. 20, at para. 303.

of Genocide.[72] Although this position is understood, there is "lack of clarity as to how [both tests] could work together."[73] This is of some interest to this thesis as there have been question of whether the involvement of foreign States such as the United States, United Kingdom and States making up the Lake Chad Multinational Joint Task Force (MNJTF) have an impact on the classification of the violence.

Another scenario which bears mentioning is where there is an intervention of multinational forces in a non-international armed conflict. Vité argues that the presence of multinational forces does not necessarily make them parties to the conflict. However, he posits that where international troops clash with government forces the law governing IAC is applicable.[74] Whereas, if they clash with a non-State Armed Group (NSAG), the law governing NIAC applies. He also advances the possibility that when multinational groups are involved "the operation are decided, defined and carried out by international organisations" and the situation could be equated to an IAC.[75] He however concludes that "the legal regime applicable in the same conflict varies depending on the adversaries present in such situation."[76]

Emanating from this line of discourse is the thorny issue of the impact consent plays in the classification of an armed conflict, where there is armed intervention by another State in the territory of another. This may occur in instances where "interventions are directed against NSAGs and form part of the military support provided to the local government within the framework of a pre-existing NIAC."[77] This third State intervention may take the form of "supporting and exerting some form of control over the armed groups fighting the territorial government."[78] The ICRC stipulates that where consent is given by a State to a foreign State to use force on its territory it can be said that "the existence of consent would clearly rule out the classification of the intervention as an International armed conflict provided the intervention stays within limitations set by the consenting State and/or is withdrawn."[79] However, where consent is lacking the intervention of the foreign State could amount to an international armed conflict between the intervening State and territorial State. This was the position of the International Court of Justice in *Armed Activities on the territory of Congo* regarding the armed activities of Uganda in DRC, outside parts occupied by DRC. The ICJ found that "the conflict

[72] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, at paras. 400-407.
[73] ICRC Commentary, *supra* n. 20, at para. 305.
[74] Vité S., "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations" (2009) 91 (873) *IRCC* 69, at 88.
[75] *Ibid*, at 87.
[76] *Ibid*, at 77.
[77] ICRC Commentary, *supra* n. 20, at para. 290.
[78] *Ibid*.
[79] *Ibid*, at para. 292.

was international in nature even though Uganda claimed to have troops in the DRC primarily to fight non-state armed groups and not the DRC armed forces."[80] These scenarios above laid out show that the existence of a parallel conflicts could be possible especially a NIAC between the intervening States and the armed group.[81]

Having given a brief overview of applicable laws and jurisprudence on International Armed Conflict, this thesis will now consider that which applies to non-international armed conflict.

1.2.1.2 Non-International Armed Conflict

It can be said that "there is a substantial body of international humanitarian law, conventional and customary in nature that regulates non-international armed conflicts…these rules have largely been accepted by states and non-state armed groups alike."[82] It can be argued that the beginning of a law governing non-international armed conflict could be traced to recognition of belligerency. This is the "discretionary and purely subjective recognition by a state of the factual existence of a war providing certain condition are fulfilled."[83] La Haye claims that the advancement of this principle was the first attempt to apply laws of war and customs to civil conflicts by either the parent state or the insurgents. It encouraged the observance of humanitarian rules of warfare.[84] However, she argues that this was discretionary and political, as seen by adherence during the American Civil war and disregard during the Spanish Civil war of 1936 as it was perceived to have a minimal impact on the magnitude and bloodiness of the conflict.[85] In support of this view, Baty and Morgan argue that it brought about the greater recognition of non-international armed conflict.[86] Moir further argues that there were three ways of ranking civil conflict, namely: rebellion, insurgency and belligerency.[87] The recognition of belligerency was the signifier that rules of warfare apply to the conflict, it brought into effect *jus in bello* at the discretion of the government.[88] Recognition of same encouraged observance of humanitarian rules of warfare.

Moir and La Haye are in agreement on the conditions for recognition of belligerency. Moir states that it becomes applicable where the violence has escalated to one that is purely local

[80] *Armed Activities on the Territory of the Congo (Congo v Uganda) (*Judgment) [2005] ICJ Rep 168, at paras. 108, 146 and 208; *Ibid*, at para. 294.
[81] ICRC Commentary, *supra* n. 20, at para. 294.
[82] Sivakumaran S., *The Law of Non-International Armed Conflict* (Oxford University Press, 2012), at 152.
[83] La Haye, *supra* n.33, at 6.
[84] *Ibid*; Moir, *supra* n.30.
[85] Moir, *supra* n.30*,* at 19-20.
[86] Baty T. and Morgan J. H., *War: Its Conduct and Legal Results* (John Murray, 1915).
[87] Moir, *supra* n.30.
[88] Luard E.D.T., "Civil Conflicts in Modern International Relations" in Luard E.D.T. (ed.), *The International Regulation of Civil Wars* (New York University Press, 1972), at 21.

in warfare, resembling international war involving large proportion of the population and the insurgents occupy and administer a substantial portion of national territory.[89] He argues that in such circumstances insurgents conduct hostilities in accordance with laws of war through armed forces under a responsible authority and the hostilities reach magnitudes that foreign states find it necessary to define their attitude towards contesting factions.[90] The impact of a recognition of belligerency by third States meant that "the customary International law of neutrality became applicable between those States and the parties to the conflict."[91] In *United States of America v. Ramiz Zijad Hodzic et al.*, an opinion rendered citing the 1960 Commentary on the Geneva Conventions was that "if one party to a conflict is recognised by third parties as being a belligerent, that Party would then have to respect the Hague Rules."[92] Recognition of belligerency by third States had no legal consequence for relations between the State and the belligerent group, it did not bring international laws and customs of war into efforts and did not create a legal obligation to recognise its internal opponents as a belligerent.[93] Furthermore, it is also understood that where belligerency is recognised by the parent State the entirety jus in bello applies between it and the rebels.[94] Notwithstanding, this shows that it is not a matter of fact but is discretionary and it can be said that there are conditions precedent to its proper accordance and these are referenced above.[95] There are however varying views as to the applicable laws consequentially. One view is that where there is such recognition of belligerency from the Parent State "the conflict becomes subject to all four Geneva conventions in the entirety as well as the rest of humanitarian law and not simply common article 3".[96] On the other, it is claimed that it was the intention that "the civil conflicts in which rebels have been recognised as belligerents were intended to come within the scope of common article 3 and not the conventions as a whole."[97] Although recognition of belligerency was a precursor to the Geneva conventions, it can be said that it has fallen into disuse and holds no contemporary relevance. This view is buttressed by Gurmendi who agrees with this position.[98]

[89] Moir, *supra* n.30, at 13-14.
[90] Moir, *supra* n.30, at 5, La Haye, *supra* n.33, at 6, Lauterpacht H., *Recognition in international law* (Cambridge University Press, 1947).
[91] Moir, *supra* n.30, at7.
[92] United States District Court for the Eastern District of Missouri, Eastern Division, No.4:15CR49CDP/DDN, 9 May 2018, at para. 18.
[93] ICRC Commentary, *supra* n. 20, at para. 395.
[94] Moir, *supra* n.30, at 10.
[95] *Ibid*, at 13.
[96] *Ibid*, at 40.
[97] *Ibid*, at 41-42.
[98] Gurmendi A., "The Last Recognition of Belligerency (and Some Thoughts on Why You May Not Have Heard of It)", *Opinion Juris*, 10 December 2019. Available at: http://opiniojuris.org/2019/12/10/the-last-recognition-of-belligerency-and-some-thoughts-on-why-you-may-not-have-heard-of-it/. Last accessed on 31 October 2021.

Poignant then and applicable now is the reluctance of States to adhere to the prevailing rules and their strong opposition to any compulsory international regulation of non-international armed conflict. Furthermore, to bridge the gap regional agreements were used to govern non-international armed conflict such as the Conventions and Duties of Rights of States in the event of Civil Strife of 20 February 1928.[99]

The major signifier for International Humanitarian Law in the 20th Century were the 1949 Geneva Conventions which were necessitated by the outbreak of the two World Wars most especially the Second World War which featured untold brutality. The outcome of the war made it pertinent to adequately codify the treatment of persons not involved in hostilities to ward against blatant disregard for civilian life. Elder and Abi-Saab equally argue that in deliberations during the 1949 Diplomatic Conference where the draft conventions were debated, in discussions surrounding non-international armed conflict there was a clear tension between state sovereignty and humanitarian principles.[100] States such as Australia, Canada, United States, United Kingdom, France, Italy and Spain argued that the proposed provision to address non-international armed conflicts was too wide, and it failed to protect the rights of States.[101] Their arguments centred on the perceived leaning towards individual rights and they claimed it would hamper government efforts to repress insurgency because of protection accorded to belligerent forces. Elder argues that there was grave difficulty in applying the fourth convention to non-international armed conflict because it covered all forms of conflict be it rebellion or insurrection.[102] Conversely, the considerations of the USSR, Norway, Denmark and Mexico were centred on removing the category of self-determination from the equation.[103] Prior to 1949 Geneva Conventions, internal unrest was seen to be under the purview of the sovereign state in question. It is clear to see, that group of States in opposition were colonial masters seeking ways to stifle legal regulation of non-international conflicts that were on the rise in the face of the struggle for independence and decolonisation.

In deliberations, “majority of States agreed on the necessity of adopting some rules for non-international armed conflicts,”[104] it was agreed that a provision popularly referred to as Common Article 3 would read as follows:

[99] Convention on Duties and Rights of States in the Event of Civil Strife, Havana, 20 February 1928, 134 L.N.T.S. 45.
[100] Elder D. A., “The Historical Background of Common Article 3 of the Geneva Convention of 1949” (1979) 11 *Case W Res JIL* 37.
[101] *Final Record of the Diplomatic Conference of Geneva of 1949* (Berne, 1951), vol. II-B.
[102] Elder, *supra* n.100, at 43.
[103] Abi-Saab R., “Droit Humanitaire et conflicts internes: origines et évolution de International Law” Paris 1986; Final Record, *supra* n.101.
[104] *Ibid.*

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.[105]

This provision is slightly different from the Stockholm text, which reads as follows:

> In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no wise depend on the legal status of the parties to the conflict and shall have no effect on that status.[106]

Common Article 3 became the sole article governing non-international armed conflict. Non-observance of Common Article 3 and international humanitarian law in general has become a universal phenomenon. Its application has been disappointing despite the ever-growing number of conflicts,[107] as it has failed to alleviate suffering and prevent indiscriminate attacks on civilians. It is clear to see that the principle of reciprocity has not been observed in non-international armed conflict. The principle stipulates that the obligation to respect and ensure respect for IHL is not dependent on reciprocity. Furthermore, it connotes that the rules of common article 3 must also be observed in all circumstances.[108] Additionally, there is "the general opinion is that violations of international humanitarian law are not due to the inadequacy of its rules, but rather to a lack of willingness to respect them, to a lack of means

[105] Article 3 Common to the Geneva Conventions 1949.
[106] Pictet J., *Commentary on the Geneva Conventions of 12 August 1949: Vol. 2* (ICRC, 1960), at 31; Moir, *supra* n.30, at 23.
[107] Kilgore K. E., "Geneva Convention Signatories Clarify Applicability of Laws of War to Non-international armed conflict" (1978) *8 Ga JICL* 941, at 945.
[108] Henckaerts JM. and Doswald-Beck L., *Customary International Humanitarian Law, Volume I: Rules*, Ed. (Cambridge University Press, 2009), Rule 140.

to enforce them and to uncertainty as to their application in some circumstances, but also to ignorance of the rules on the part of political leaders, commanders, combatants and the general public."[109] Considering the limit of its application, it became clear that Common Article 3 needed clarification and amendments. The International Committee of the Red Cross (ICRC) expresses this view by stating that the provision has been "shown to require elaboration and completion… [and there is]….the urgent need to strengthen the protection of victims of non-international armed conflicts by developing International Humanitarian Law applicable in such situations."[110] Sivakumaran claims "in the post-1949 period, there was a concerted effort to move away from regulation of non-international armed conflict on an ad-hoc basis."[111] Some of such gaps include the absence of provisions on protection of the civilian population, implementation clauses for principles of assistance and protection of the sick and wounded, specification of judicial guarantees and conditions of detention of persons deprived of their liberty.[112]

In a bid to further strengthen, modify and supplement Common Article 3, Additional Protocol II was enacted. It strengthened "protection by including prohibitions against direct attacks on civilians, collective punishment, acts of terrorism, rape, forced prostitution, indecent assault, slavery and pillage… [and] rules of treatment of persons deprived of their liberty."[113] Although the Protocol incorporates important features, the sovereignty and humanitarian protection dichotomy came to the fore during negotiations. This was evident with the different groups: first, the realists who wanted a wide scope with simple rules, second, maximalists who wanted wide scope but detailed provisions and high threshold of application, which is self-explanatory.[114] Although, the content of this protocol far exceeds that which is contained in Common Article 3, it is seen as more restrictive, evidence of the latter group prevailing.

At this juncture, it is important to dwell briefly on customary international humanitarian law applicable to NIAC. Customary International Humanitarian Law (CIHL) are "rules established by way of repetitive and uniform practice of States involved in armed conflict or of third Sates concerning armed conflicts, in the belief that the behaviour that is practiced is obligatory."[115] As such the key elements required are state practice and opinion juris. According to the ICJ,

[109] *Ibid*, at xxvii.
[110] Mrs Bujard (ICRC) in Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977) (Berne,1978) CDDH/I/SR.22; V2I, 201, at 201.
[111] Sivakumaran, *supra* n.82, at 55.
[112] Junod S., "Additional Protocol II: History and Scope" (1983) 33 *Am U L Rev* 29, at 31.
[113] ICRC, *supra* n.1, at 24.
[114] Junod, *supra* n.112, at 33.
[115] ICRC Casebook, "Customary International Humanitarian Law". Available at:https://casebook.icrc.org/glossary/customary-international-humanitarian-law. Last accessed on 31 October 2021.

practice should be virtually uniform (by this it should be sufficiently similar),[116] extensive and representative.[117] Practice could be seen in terms of "statements of third states on the behaviour of belligerents, abstract statement on alleged norm in diplomatic forums as well as military manuals."[118] Whereas, *opinio juris* requires said practice to be carried out in an obligatory manner. It is said that "customary rules remain important to protect victims on issues not covered by treaties."[119] According to the ICRC, who conducted a study to collate existing customary IHL rules, 148 rules of the 161 rules found apply to non-international armed conflicts.[120] Considering as noted that the treaty rules governing NIAC are limited, "the study shows, however, that there exist an important number of customary rules of international humanitarian law that define in much greater detail than treaty law the obligations of parties to a non-international armed conflict."[121] For instance, "treaty law does not expressly prohibit attacks on civilian objects in non-international armed conflicts, such a prohibition has developed under customary international law."[122] Other examples of CIHL relevant to NIAC include observance of the principles of distinction and proportionality. The importance of this study is buttressed by Sivakumaran who argues that "the Customary International Humanitarian Law study has been cited with approval by a number of courts and the jurisprudence of the ICTY has been followed in other arenas."[123] He however notes that "even leaving aside the important contributions of the ICTY and the Customary International Humanitarian Law study, there exists a substantial body of customary international humanitarian law that is applicable to non-international armed conflict, and which has been recognised by States."[124] It has been argued that CIHL is increasingly relevant in coalition warfare as "the rules can be relied upon as a minimum standard for drafting common rules of engagement or for adopting targeting policies."[125]

The relevance of CIHL in NIACs was addressed extensively in the *Tadić* decision. In this case the ICTY Appeals Chamber interpreted Article 3 of the Tribunal's Statute that is concerned with "violations of the laws or customs of war" and made pronouncements that make clear the position on customary international humanitarian law in NIACs. The ICTY in coming to its decision "undertook a survey of how the customary law of internal armed conflict has

[116] *Fisheries case (United Kingdom v. Norway)*, (Judgment), [1951] ICJ Rep 138.
[117] *North Sea Continental Shelf cases*, (Judgment), [1969] ICJ Rep 43, at para. 74.
[118] ICRC Casebook, *supra* n.115.
[119] ICRC, "Customary international humanitarian law: questions & answers", 15 August 2015 https://www.icrc.org/en/doc/resources/documents/misc/customary-law-q-and-a-150805.htm. Accessed on 31 October 2021.
[120] *Ibid.*
[121] *Ibid.*
[122] *Ibid.*
[123] Sivakumaran, *supra* n.82, at 104.
[124] *Ibid*, at 107.
[125] *Ibid.*

developed, with reference to those conflicts which had taken place (or indeed were still taking place) in Spain, the Congo, Biafra, Nicaragua, El Salvador, Liberia, Iraq, Georgia and Chechnya."[126] The Appeals Chamber determined that,

> Two bodies of rules have thus crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice (Nicaragua Case, at para. 218), but also applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and, as we shall show below (para. 117), to the core of Additional Protocol II of 1977.[127]

Moir argues that the ICTY "not only stated unequivocally that a body of customary international law has developed to regulate the conduct of internal armed conflicts, but went much further by asserting that there are rules applicable to those conflicts based neither upon common Article 3 nor upon Additional Protocol II."[128] It can be said that these rules could be those in relation to the Hague Rules. Moir states that the Tribunal "beyond a simple declaration that civilians were to be protected during non-international armed conflicts, however, and asserted that a body of customary international law has also developed regulating the means and methods of warfare in internal conflict."[129] In *Delalić*, the Tribunal clarified that "only certain rules and principles have been extended to regulate internal armed conflict, and that it is only the general essence of those rules, rather than their detailed regulation, which has become applicable."[130]

This position is further buttressed by the International Criminal Tribunal for Rwanda (ICTR) wherein the statute included violations of Additional Protocol II in its considerations of customary law.[131] Furthermore, the Rome Statute of the International Criminal Court crystallise norms accepted as customary international humanitarian law. Firstly, as it relates to Article 8 (2)(c), Sivakumaran argues that since "drafters of the Rome Statute intended that the Statute would contain only customary international law crimes…the war crimes contained therein necessarily have customary status."[132] Beyond this assertion, it can be said that the express acknowledgement of "serious violations of article 3 common to the four Geneva Conventions of 12 August 1949" was an acceptance of common article 3's customary

[126] Moir, *supra* n.30, at 138.
[127] *Tadić, supra* n.21, at para.98.
[128] Moir, *supra* n.30, at 188.
[129] *Ibid*, at 145.
[130] *Prosecutor v Zdravko Mucić aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalić* (Judgment) IT-96-21-T (16 November 1998), at para. 298; Moir, *supra* n.30, at 192.
[131] Statute of the International Criminal Tribunal for Rwanda 1994, Article 4.
[132] Sivakumaran, *supra* n.82, at 106.

status.[133] Sivakumaran further advances that "in order that the war crime is of customary status, the underlying prohibition must also have been of customary status, accordingly, any norms that did not have customary status before the Rome Conference can be considered to have crystallised during the Conference."[134] These include:

> Thus, the prohibitions on attacks against the civilian population, attacks on objects and personnel bearing the protected emblem, attacks on humanitarian assistance or peacekeeping personnel and objects, and attacks on religious, educational, and certain other objects, are all of customary status. So too are the prohibitions on pillage; sexual violence; mutilation; conscripting, enlisting, or using children to participate actively in hostilities; ordering displacement; killing or wounding treacherously; declaring that no quarter shall be given; and wanton destruction.[135]

More specifically, in article 8(2)(e) it clearly refers to "other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law."

Beyond the ICTY's declarations on customary international law, "the Tribunal, for the first time, authoritatively asserted that violations of the laws of internal armed conflict are criminal under international law".[136] Moir states that this has "subsequently been endorsed in the case law of both the ICTY and the ICTR, and by widespread *opinio juris* as expressed in the Rome Statute of the International Criminal Court."[137]

So far it has been shown that although the generality of International Humanitarian Law applies to international armed conflict, the applicable rules for non-international armed conflict (NIAC) are limited to Common Article 3, Additional Protocol II and customary International Humanitarian Law relevant to NIAC. It is important to ascertain the binding nature of these provisions and analyse the threshold for its applicability.

<u>Binding nature of the provisions</u>

There are a number of views on how international humanitarian law relating to NIACs binds non-state armed groups and insurgents (NSAGs). It goes without saying that States and their agents are bound by virtue of their adoption, assignation and accession to treaties. The more pressing question is to what extent it can be argued that NSAGs are bound, considering that "it is generally accepted that IHL is binding on… those armed groups that are sufficiently

[133] Klamberg M.(ed.), *Commentary on the Law of the International Criminal Court* (FICHL Publication Series No. 29, 2017), at 110.
[134] Sivakumaran, *supra* n.82, at 106.
[135] *Ibid*; Rome Statute, *supra* n.7, Article 8 (2)(c) and (e).
[136] Moir, *supra* n.30, at 188.
[137] *Ibid*, at 189.

organised to render them a party to an armed conflict."[138] Said issue is necessary to discuss because of its import to this thesis. Kleffner argues that there are possibly 5 opinions on how NSAGs can be bound by IHL, the most prevalent of which is binding force via the state through the doctrine of legislative jurisdiction. This doctrine is described as the "competence of the government to legislate for all its nationals… in relation to treaties, when a state ratifies a treaty, it does so not just on behalf of the State but also all individuals within its territory."[139] By this argument, "IHL applies to them because the parent state has accepted a given rule of IHL… as such the capacity of a state to legislate for all its nationals, entails the right of the State to impose upon them obligations that originate from international law, even if those individuals take up arms to fight that state or (an)other [Organised Armed Group] OAG."[140] This thinking is in tandem with the understanding that "the construct is fully compatible with other areas of international law through which States grant rights to, or impose obligations on, individuals and other legal persons."[141] In line with this view, Moir argues that Common Article 3 not only binds states which are signatory to the conventions but also the insurgents.[142] This argument stems from the phrase "each party to the conflict". Cassese posits a similar argument.[143] It can be said that a similar logic applies to Additional Protocol II and customary international humanitarian law.

With respect to Additional Protocol II, Cassese argues that it is in the interest of insurgents for the protocol to apply.[144] His argument is that it is beneficial to insurgents as they would gain from humanitarian protection as States have a duty to abide regardless of reciprocity. Notwithstanding the sound argument, Moir posits that it is unsustainable as it must be applied by both parties to be operational. Furthermore, the protocol will be a stillbirth if it is predicated solely on States compliance. Article 6(5) of Additional Protocol II explicitly refers to governments and insurgents as in the event of victory for the insurgents and they form a government, duties are imposed upon them. Junod argues without equivocation that "article 3 and Protocol II are binding not only on the established government, but also on the insurgent party."[145] It can be said that when applicable "neither the application of Common Article 3 nor that of Protocol II modifies the legal status of an insurgent party, and neither implies recognition of insurgents…recognises the quality of combatant [nor] confers any particular

[138] Kleffner J., "The applicability of international humanitarian law to organised armed groups" (2011) 93(882) *IRRC* 443, at 443-444.
[139] Sivakumaran S, "Binding armed opposition groups" (2006) 55(2) *ICLQ* 369, at 381.
[140] Kleffner, *supra* n.138, at 445.
[141] *Ibid*.
[142] Moir, *supra* n.30, at 52.
[143] Cassese A., "Status of rebels under 1977 Additional Protocols" (1981) 30 *ICLQ* 416.
[144] *Ibid*, at 425.
[145] Junod, *supra* n.112, at 34.

status on members of the armed forces or armed groups who have been captured."[146] Finally, it is key to note that it was not the intention of the delegation of some States to have insurgents be bound.[147]

Related to this is the question of what triggers the doctrine of legislative jurisdiction, one view advanced is that of active nationality triggered by the phrase 'all national'. This however raises the debate of what happens when the OAG is comprised of foreign nationals. Thus, a more certain point to rely on the description that lays emphasis on national territory- by so doing covering all persons within the State irrespective of nationality.[148]

Although the doctrine of legislative jurisdiction is the most plausible argument in favour of binding nature of IHL on NSAGs, it is not without criticisms. These include the absence of consent on the part of NSAGs and the failure to distinguish between "the binding force of IHL on NSAGs as a matter of international law and its binding force under domestic law",[149] going to the issue of the direct effect of treaties.[150] In response to the first, Kleffner states that "Common Article 3 categorically declares that 'each Party to the conflict shall be bound to apply, as a minimum'…the consent, or absence thereof, of an organised armed group is considered immaterial."[151] One could say that where a NSAG takes over the affairs of the State following an armed conflict, they are bound by treaties acceded. Regarding the latter, this brings up the argument of which system is applicable in a State- dualist or monist. It can be said in a monist system it is clearer as the treaty is automatically embedded in domestic law. However, in a dualist system, like in Nigeria, it does not become implementable without a corresponding domestic legislation. Thus, "the treaty will only be binding upon the individual if and when the state incorporates the treaty into its domestic legal framework."[152] Notwithstanding, Sivakumaran argues that the main question is what the status of OAGs under international law is. He uses the logic espoused that "international law may impose duties on individuals directly without any interposition of internal law"[153] and surmises that "the above statements can then also stand for the proposition that international humanitarian law binds individuals regardless of whether incorporation into domestic law has taken place. Armed opposition groups are thus bound by the rules governing internal armed conflict

[146] *Ibid*, at 34.
[147] Cassese, *supra* n.143, at 427, Moir, *supra* n.30, at 97.
[148] Kleffner, *supra* n.138, at 448-449.
[149] Kleffner, *supra* n.138, at 446.
[150] Sivakumuran, *supra* n.139, at 383.
[151] Kleffner, *supra* n.138, at 456
[152] Sivakumuran, *supra* n.139, at 384.
[153] Sivakumuran, *supra* n.139, at 385; Kleffner, *supra* n.138, at 447; *Jurisdiction of the Courts of Danzig*, (Advisory Opinion), [1928] PCIJ, Series B, No. 15, at 18.

regardless of whether such rules have been transformed into the domestic legal system of the state concerned."[154] Kleffner thus states that the capacity to legislate should be understood at the "the competence of states to accept rights and obligations under IHL for their nationals on the international plane."[155]

Besides the doctrine of legislative jurisdiction, other theories equally attempt to explain how NSAGs can be bound. One is by virtue of the binding force of IHL on individuals as evidenced by individual criminal responsibility that may accrue for violations of IHL as such the acts of the individual can also entail accountability for a NSAG.[156] Another is that by the exercise de facto governmental functions by such groups they are bound by their aspiration to represent the State or part of it. Kleffner notes in this circumstance that "it calls for the organised armed group to recognise its independent responsibilities as an entity that resembles a government and aspires to represent the state in the future."[157] An additional proposal is the binding force by virtue of consent by NSAGs, which is self-explanatory. With this reasoning, the willingness of insurgents must be ascertained in each individual conflict, by way of unilateral declaration or requesting aid of ICRC to ensure compliance.[158] Furthermore, there is the perspective that NSAGs can be bound under the general rules on the binding nature of treaties on third parties. Moir argues that with the aid of articles 34-36 of the Vienna Convention on the Law of Treaties that treaties can impose obligations on third parties provided there was intention to do so and the third party assents to the rights and obligations.[159] He claims that Common Article 3 is a clear expression of the first requirement of the provision intending to establish an obligation and the third parties being the insurgents may not feel an obligation to be bound.[160]

Lastly, there is the view that NSAGs are bound by virtue of the binding nature of customary IHL. In Sivakumaran's explanation, he notes that "the rules governing internal armed conflict bind armed opposition groups, for their binding character does not come from the signature or ratification of the instruments but from their customary international law status." He further states that this is premised on two views, first, "that the rules governing internal armed conflict have customary international law status" and second "armed opposition groups are bound by customary international law." Regarding the first, it can be said that Common Article 3 having attained the level of customary law and arguable *jus cogens*, insurgents are bound.[161] As per

[154] Sivakumuran, *supra* n.139, at 385.
[155] Kleffner, *supra* n.138, at 448
[156] *Ibid*, at 449-450.
[157] *Ibid*, at 453.
[158] Moir, *supra* n.30, at 99.
[159] *Ibid*, at 53.
[160] *Ibid.*
[161] *Ibid*, at 52-58.

the case of *Barcelona Traction*, it could even be accorded the status of *obligation erga omnes*.[162] On the second, Kleffner opines that it is because of their international legal personality. According to the Darfur Commission, "[a]ll insurgents that have reached a certain threshold of organisation, stability and effective control of territory, possess international legal personality and are therefore bound by the relevant rules of customary international law on internal armed conflicts."[163] Thus it is not only bound through the State against whom they fight but by the international committee of states at large.

An alternate understanding of the binding nature of these provisions is tied to the issue of compliance. Forster notes that "there is an apparent divide between the extensive IHL normative framework and the perceived lack of compliance with it in armed conflict."[164] Forster argues that "whether or not States abide by their legal commitments varies depending on the nature, duration and intensity of the armed conflicts they are involved in and is influenced by the nature of the States themselves."[165] He goes further to note that "IHL (influences) States' behaviour by clarifying what acts are violations, hereby inducing restraint in actors that would otherwise engage in such behaviour."[166] Dill further contends that "IHL has an effect that is reducible to calculations of interest and normative compliance that could take place in absence of legal guidelines."[167]

Although as noted about there are several theories on the binding nature of IHL relating to NIACs and it is highlighted that the most accepted of them is the doctrine of legislative jurisdiction, these theories are not without their weaknesses. Nevertheless, given that this thesis focuses on the role of State actors, and whether they are able to frame the Boko Haram violence in the context of IHL, a more in-depth discussion on the binding nature of IHL relating to NIACs would fall beyond the scope of the present research. In this respect, it is assumed herein that not only are State and their agents bound but also NSAGs. Another issue worth considering is the threshold for applicability of Common Article 3, Additional Protocol II and CIHL applicable to NIAC.

[162] *Barcelona Traction Light and Power Company Limited,* (Judgment), [1970] ICJ Rep 4.
[163] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, at para. 172, available at: https://www.un.org/ruleoflaw/files/com_inq_darfur.pdf (last visited 27 October 2021); Kleffner, *supra* n.138, at 454.
[164] Forster T., "International Humanitarian Law's Old Questions and New Perspectives: On What Law Has Got to do With Armed Conflicts" (2016) 98(3) *IRRC* 995, at 1002.
[165] *Ibid*, at 1000.
[166] *Ibid.*
[167] *Ibid*, at 1004.

Threshold for applicability of Common Article 3 and Additional Protocol II

Common Article 3 states clearly that it applies in the case of "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." However, this does not delineate the scope of application. Moir argues that there are two separate criteria which could help with giving the concept perspective. Firstly, there is the geographical location of the conflict as referenced by "in the territory of one of the High Contracting Parties." Secondly, there is the test of whether there exists an armed conflict. This is problematic as there is no universally acceptable definition barring that provided by the ICTY in *Tadić*. ICRC commentary claims that to arrive at what would fall under this article, they consulted the *travaux preparatoires* and came up with the following:

i) That the Party in revolt against the de jure Government possesses an organised military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
ii) That the legal Government is obliged to have recourse to the regular military forces against insurgents organised as military and in possession of a part of the national territory.
iii) (a) That the de jure Government has recognised the insurgents as belligerents; or
(b) that it has claimed for itself the rights of a belligerent; or
(c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
(d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression
iv) (a) That the insurgents have an organisation purporting to have the characteristics of a State.
(b) That the insurgent civil authority exercises de facto authority over persons within a determinate territory.
(c) That the armed forces act under the direction of the organised civil authority and are prepared to observe the ordinary laws of war.
v) That the insurgent civil authority agrees to be bound by the provisions of the Convention.[168]

In ascertaining whether there is an armed conflict, the ICTY determined that there is a two-step test: "whether (i) the armed violence is protracted and (ii) the parties to the conflict are organised."[169] It was further determined that the word protracted can be ascertained by looking at the intensity. As it relates to intensity, it has been argued that this can be gleaned through various indicative factors that may be present cumulatively or partly, these are:

> the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and whether any resolutions on the matter have been passed. Trial Chambers have also taken into account in this respect the number of civilians forced to flee from the combat zones; the type of weapons used, in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns; the extent of destruction and the number of casualties caused by shelling or fighting; the quantity of troops and units deployed; existence and change of front lines between the parties; the occupation of territory, and towns and villages; the deployment of government forces to the crisis area; the closure of roads; cease fire orders and agreements,

[168] Pictet, *supra* n.19.
[169] *Tadić,* supra n.21, at para.38.

> and the attempt of representatives from international organisations to broker and enforce cease fire agreements.[170]

Asides the use of intensity to determine the protracted nature of an armed violence, it has been suggested that a closely related criterion is that of duration. Furthermore, it is also an element in assessing the intensity of an armed confrontation. In the *Tablada* case, where an attack was undertaken by 42 persons on the military barracks of the National armed forces which persisted for 30 hours in 1989,[171] it was agreed that the threshold for intensity was met, although the duration was brief. Also, as Sivakumaran states "violence of a moderate intensity may amount to an armed conflict if it takes place over an extended duration."[172] The ICTY opined that "the duration of armed confrontations should not be overlooked when assessing whether hostilities have reached the level of intensity of a non-international armed conflict".[173] It has also been said to be more suited for determination of the existence of an armed conflict after the fact.[174]

Issues to be considered when determining organisation include the presence of enemy lines, responsible command and controlling authority are necessary. In the *Boškoski* case the following were highlighted: "command structure- that suggests the group can carry out organised military operations, logistical ability, … and demonstrate the ability to speak with a unified voice."[175] Also existence of headquarters and uniforms, communication modes used, availability of military training, recruitment of members, disciplinary measures and ability to negotiate with third parties.[176] It has been argued that organisation is important for three reasons: first, intensity may depend on how organised the group is, second, it suggests that the violence is of a collective character and lastly, the armed group needs to be organised for the violence to constitute an armed conflict.[177] Another point bears mentioning when organisation is considered, responsible command. This phrase has been subject to judicial interpretation. In *Hadžihasanović*, it was found that "there cannot be an organised military force save on the basis of responsible."[178] Whereas in *Akayesu*, ICTR held that it "entails a degree of organisation within the armed group or dissident armed forces."[179] Sivakumaran

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[170] *Prosecutor v. Ljube Boškoski and Johan Tarčulovski* (Judgment) IT-04-82-T (10 July 2008), at para. 177; La Haye, *supra* n.33, at 10; *Delalić, supra* n.130, at para. 188; *Prosecutor v Milosević* (Decision on Motion for Acquittal) IT-02-54-T (16 June 2004), at para. 31.

[171] Zegveld L., "The Inter-American Commission on Human Rights and international humanitarian law: A comment on the Tablada Case" (1998) 324 *IRRC* 505.

[172] Sivakumaran, *supra* n.82, at 168.

[173] ICRC Commentary, *supra* n.20, at para. 476.

[174] *Ibid,* at para. 473.

[175] Sivakumaran, *supra* n.82, at 170; *Boškoski*, *supra* n.170, at paras. 199–203.

[176] Sivakumaran, *supra* n.82, at 170-171.

[177] *Ibid,* at 177.

[178] *Ibid,* at 174; *Prosecutor v Hadžihasanović, Alagić, and Kubura* (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility) IT-01-47-AR72 (16 July 2003), at paras. 17 and 16.

[179] *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (2 September 1998), at para. 626.

argued aptly that when considering responsible command, it need not be a pyramid like structure but there must be some sort of "relationship of effective control by which one individual has the power to control the acts of another, in particular the power to prevent or punish particular acts of that other individual."[180] Although for Common Article 3 to come into force, the criteria of intensity and organisation ought to be present, this threshold is however said to be lower than that set by Additional Protocol II.

Comparatively, when looking at Additional Protocol II, it can be argued that there is a higher threshold applicable here. According to Junod, the purpose of Additional Protocol II is to develop existing International Humanitarian Law by shoring up prevalent gaps, clarifying the ambit by giving a definition of armed conflict and to safeguard what Common Article 3 has already created.[181] The issue of the threshold emanates from clarifying the ambit of the provision. As per the definition provided above, for Additional Protocol II to be operative firstly, armed forces of the High Contracting Party must be a party to the conflict, it cannot apply where the violence is between two non-State armed groups, as stipulates in the provision the conflict should be between the armed forces and dissident forces or organised armed group. As it pertains to the armed group, the provision requires a higher degree of organisation and this is evident in the detailed nature of the rules contained therein. Secondly, there ought to be territorial control and the nature of the hostilities, this is based on the inherent quality of the control as opposed to the duration. The size of said territory is however unclear from the law. Clarity is however provided in *Akayesu* where the ICTR found that "the armed group must be able to dominate a sufficient part of the territory to maintain sustained and concerted military operations and to apply Additional Protocol II."[182] According to Sivakumaran, this emphasises intensity of the violence and not the territorial control. The argument that insurgents ought to be able to mount a sustained and concerted military operation has been heavily criticised by Abi-Saab for being "too restrictive in view of the nature of modern, and particularly guerrilla warfare."[183] His argument stems from the view that "other forms of intense armed conflict, such as urban guerrilla armed conflict, would not fulfil the requirement of territorial control."[184]

Furthermore, another difference in application is in relation to the geographical scope. Ferraro notes that "the geographical scope of application of IHL covers the whole territory of the affected States", however, this "only applies to the belligerent relationship between the parties

[180] Sivakumaran, *supra* n.82, at 175.
[181] Junod, *supra* n.112, at 31–32.
[182] *Akayesu, supra* n.179, at para. 626.
[183] Herczeg G., "Protocol Additional to the Geneva Conventions on the Protection of Victims of Non-International Armed Conflicts" in Haraszti G.(ed.), *Questions of International Law* (Springer, 1981), at 77.
[184] *Ibid*, at 78.

to the NIAC."[185] There is the argument that common article 3 does not limit its application to the territory of a single country and thus applies so long as the NIAC originated in the territory of one of the High contracting parties to the Geneva Conventions.[186] This is because NIACs are "not characterised by their limited or unlimited territorial scope, but by the nature and quality of the parties involved, and by the actual occurrence of hostilities and other acts or operations having a belligerent nexus."[187] The wording of Common Article 3 indicates that once a NIAC comes into existence, the article applies in the whole territory of the state concerned.[188] Whereas Additional Protocol II "applies only to armed conflicts involving a contracting State as a party to the conflict and taking place in the territory of that State."[189] Although, a slightly contradictory argument is offered by Pejic, who posits that by the ICTR Statute acknowledging the spill over nature of the 1994 Rwandan conflict, it accepted that CA3 and APII can have extraterritorial effect.[190]

Another consideration is looking at the difference in scope of application of CA3 and APII is when there is outside involvement, that is, "a State fighting an armed group on its territory is joined by one or more States."[191] According to the ICRC updated commentary, "although such a conflict may occur within the territory of one State, other States use force extraterritorially", the nature remains a NIAC.[192]

Finally, there ought to be an ability to implement the protocol on the part of the insurgents. Forsyth argues that this introduced *de jure* reciprocity as States are required to observe the law only to the extent of the insurgents' adherence. This argument is highly controversial for two reasons, the first being that the principle of reciprocity is alien to International Humanitarian Law and secondly reciprocity was affirmed by the ICTY in *Prosecutor v Kupreškić* where it upheld the obligation to uphold key tenets of this body of law regardless of the conduct of enemy combatants."[193] From the foregoing, it is clear to see that the threshold of Additional Protocol II is significantly higher than that of Common Article 3 and far more limiting in respect of the internal conflicts that can come within its ambit. Thus, "while Common Article 3 applies to all non-international armed conflicts [that fulfil the basic requirements of

[185] Ferraro T., "The Geographic Reach of IHL: The Law and Current Challenges" in Proceedings of the Bruges Colloquium on Scope of Application of International Humanitarian Law, 13th Bruges Colloquium 18-19 October 2012, at 111.
[186] ICRC Commentary, *supra* n.20, at paras. 503-505. This is often known as a spillover NIAC.
[187] Melzer N., *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016), at 72.
[188] ICRC Commentary, *supra* n.20, at para. 491.
[189] Melzer, *supra* n.187, at 68; Pejic J., "The protective scope of Common Article 3: more than meets the eye" (2011) 93(881) *IRRC* 1, at 13.
[190] Pejic, *supra* n.189, at 13.
[191] ICRC Commentary, *supra* n.20, at para. 507.
[192] *Ibid*.
[193] (Judgment) IT-95-16-T (14 January 2000), at para 511.

intensity and organisation], Additional Protocol II applies only to those that fulfil the requirements set out in the Protocol."[194]

Interestingly, a non-international armed conflict need not remain in its original form as it may be transformed by the actions of third states. The role of foreign intervention in transforming non-international conflicts to an international and is of import to this paper. This is clearly shown by the Tribunal's decision in *Tadić* where it held that both types of conflict were present. The appeal judgment seems to "suggest that the direct intervention of another state in a non-international armed conflict through its troops internationalises the entire conflict."[195]

Beyond treaty law, it is important to note that there is customary international humanitarian law that applies to non-international armed conflict. There are arguments that suggest that since the Hague and Geneva Conventions have attained customary status, they are applicable to non-international armed conflict. Other arguments suggest that "the customary international humanitarian law of non-international armed conflict is by no means limited to norms relating to humane treatment."[196] These rules on humane treatment include: "care for the wounded and sick, and respect for cultural property, as well as the prohibitions of murder, torture, and cruel treatment, rape, humiliating and degrading treatment, the taking of hostages, summary execution, collective punishments, acts of terrorism, slavery, and pillage."[197] Beyond Common Article 3 and Additional Protocol II achieving customary status, other rules that can be considered as customary include "the principle of distinction, the prohibition on attacks against civilians and civilian objects, the requirement to take precautions, the prohibition on forcible transfer of civilians, and the provision of humanitarian relief."[198] Sivakumaran argues that the 1990 Declaration of the International Institute of Humanitarian Law on the Rules of International Humanitarian Law governing the Conduct of Hostilities in Non-International Armed Conflicts which has also been considered to reflect customary international law, and has been described as "the most authoritative expression of international legal opinion in this field."[199] ICRC also compiled a database of the rules that is viewed as the principal repository of customary international humanitarian law.[200]

[194] Pedrazzi M., "Additional Protocol II and threshold of application" in Pocar F. and Beruto G. L., The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives: 40th Roundtable on Current Issues of IHL (Sanremo 7 – 9 Sept 2017) (2018: International Institute of Humanitarian Law).

[195] La Haye, *supra* n.33, at 28, *Tadić, supra* n.70, at para. 84.

[196] Sivakumaran, *supra* n.82, at 105.

[197] *Ibid.*

[198] *Ibid.*

[199] *Ibid,* at 106.

[200] Pictet, *supra* n.19.

It has been advanced that there are other less traditional sources of non-international armed conflict. Sivakumaran argues that ad-hoc commitments of non-state armed groups constitute less traditional sources of international law considering their normative character and potential importance.[201] These ad-hoc commitments consist of "unilateral declarations; bilateral agreements between the parties or between one of the parties and a UN entity or non-governmental organisation, or trilateral agreements between the parties and an outside entity; codes of conduct, instructions, or regulations that are internal to the group; and legislation."[202] These alternative sources were utilised by the ICTY with the consideration of commitments of non-state armed groups in the *Tadić*.[203] Also, the 1992 Agreement between warring factions in the conflict in Bosnia used as the basis of criminal prosecution by the ICTY and the Memorandum of Understanding of 27 November 1991 relating to the conflict in Croatia are examples of said alternative sources.[204]

Having deliberated on International Humanitarian Law in relation to international and non-international armed conflicts, it is important to briefly examine the impact of other sub-bodies of international on the development of the law of armed conflict. In this regard, International Criminal Law and International Human Rights Law would be considered.

1.2.2 International Criminal Law

International Criminal Law (ICL) can be argued to be an area of Public International Law and is usually used for the enforcement of international law provisions. It has been said that it "is a body of international rules designed both to proscribe certain categories of conduct (war crimes, crimes against humanity, genocide, torture, aggression, international terrorism) and to make those persons who engage in such conduct criminally liable."[205] Cassese notes that "this is a set of rules indicating what acts are prohibit, with the consequence that their authors are criminally accountable for their commission… and conditions on which states must under international rules prosecute or bring persons liable to trial for those crimes."[206] Carlson adds that ICL "criminalises violations of internationally recognised human rights, situating itself between international law and criminal justice."[207] Furthermore, she notes that ICL "begins with one deceptively simple principle: punish the guilty who might otherwise, because of

[201] Sivakumaran, *supra* n.82, at 107.
[202] *Ibid.*
[203] *Ibid.*
[204] *Ibid,* at 107 and 125.
[205] Cassese A. and Gaeta P., *International Criminal Law*, (3rd edition, Oxford University Press, 2013), at 3.
[206] *Ibid.*
[207] Carlson K. B., "International Criminal Law and Its Paradoxes: Implications for Institutions and Practice" (2017) Spring *Journal of Law and Courts* 33, at 38.

circumstances partly connected to their own violence and criminality, go free."[208] Generally, international law pertains to States with the exception of ICL, which can apply to individuals. Prior to this occurrence, "international law was a merely a tool used by states to achieve stronger cooperation in judicial matters to oppose transnational criminality."[209] Langford contends that ICL "focuses on prosecuting fugitives from justice and holding individuals accountable for offences committed against the international community".[210] It can be argued that in the beginning that International Criminal Law "was concerned with offences committed during armed hostilities in time of war, violations of the rules of international law of warfare, which normally only generate state responsibility, gradually [it] came to be considered as breaches of law also entailing individual criminal liability."[211] It can therefore be said that *simpliciter* it is a means of criminalising violations of international law committed by individuals.

International Criminal Law is unique in the sense that it draws not only from international law norms but also domestic legislation and practice. As Hafetz puts it, "international criminal law… is evolving; it has been described as a hybrid— 'public international law impregnated with notions, principles, and legal constructs derived from national criminal law, [international humanitarian law], as well as human rights law'."[212] The emergent nature of this area can be seen in the patchwork nature of laws under the field.

The laws that make up ICL include the 1998 Rome Statute that establishes the International Criminal Court, the 1992 International Criminal Tribunal for the former Yugoslavia Statute, 1994 International Criminal Tribunal of Rwanda Statute, treaties that lay down substantive rules of IHL, Customary International Law, which is "necessary for the purpose of pinpointing general principles of criminal law, whenever the application of such principles becomes necessary."[213] To a large extent, international criminal tribunals have primarily implemented International Criminal Law. Sivakumaran notes that "the international criminal tribunals have had to interpret international humanitarian law provisions in order to pronounce on the guilt or innocence of individuals accused of war crimes."[214] The analysis of International Criminal Law will primarily focus on the Rome Statute as it contains what could be defined as "a set of widely accepted international crimes."[215] It can be said that there was a belief that "international

[208] *Ibid*, at 48.
[209] Cassese and Gaeta, *supra* n.205, at 18.
[210] McInerney-Langford S., "Book Review: Humanitarian Law in Action within Africa" (2015) 64(2) *I.C.L.Q.* 495, at 495.
[211] Cassese and Gaeta, *supra* n.205, at 495.
[212] Hafetz J., "Diminishing the value of war crimes prosecutions: a view of the Guantanamo military commissions from the perspective of International Criminal Law" (2013) 2(4) *C.J.I.C.L.* 800, at 807.
[213] Cassese and Gaeta, *supra* n.205, at 13.
[214] Sivakumaran S., "Re-envisaging the International Law of Internal Armed Conflict" (2011) 22(1) *E.J.I.L* 219, at 238.
[215] *Ibid,* n.134.

criminal justice urgently requires coherent and systematic development through codification"[216] and this is seen in the adoption of the Rome Statute.

International Criminal Law has however been criticised by scholars. One of such scholars, Mégret, in channelling Koskenniemi, posits that international criminal law is both apologetic in its pandering to power and utopian in its sustenance of a moral high ground. His primary critique of ICL is the view that ICL problems are caused by external forces such as the constraints of sovereignty and not in its formulation and structure. He contends that the challenge with ICL rests on its dependence on power structures; the creation of international criminal tribunals or even the international criminal court is not self-generated but created by a number of international actors (States, International organisations and civil society).[217] Specifically, on the International Criminal Court he argues that it depends on the "continued support of the Security Council to extend its jurisdictional reach and guarantee its authority."[218] Also in critique of ICL, Sagan advances that the practitioners of international criminal law take part in a cosmopolitan, liberal discourse that claims International Criminal Law has catalysed the decentring of the State and the inception of a potentially universalisable justice", and "African criminal and victim subjects are essential to the discourse", which is currently not the case.[219] Tallgren also critiques the "flaw in the positivist thinking of the presumed consent of all states to the use of the delegated exercise of their power by international institutions of criminal justice."[220] She further argued that the understanding of the rationale behind international criminal law goes beyond the rational and utilitarian purpose of prevention and suppression of criminality.[221]

The focus in relation to this thesis will be on war crimes and crimes against humanity. War crimes are defined by the Rome Statute as serious violations of article 3 common to the Geneva Conventions[222] and other serious violations of the laws and customs applicable in NIAC.[223] War Crimes in Non-International Armed conflict include violence to life and person, mutilation, torture, outrages against human dignity, taking of hostages, conscription of children. The Rome Statute further adds intentionally directing attacks against a civilian population, civilian objects, personnel or installations involved in humanitarian assistance,

[216] McCormack T.L.H., "The law of war crimes: national and international approaches" (2000) 4(1) *E. & P.* 73.
[217] Megret F., "The Anxieties of International Criminal Justice" (2016) 29 *LJIL* 197, at 201.
[218] *Ibid.*
[219] Sagan A., "African Criminals/African Victims: The Institutionalised Production of Cultural Narratives in International Criminal Law" (2010) 39(1) *Journal of International Studies* 3, at 4.
[220] Tallgren I., "The sensibility and sense of international criminal law" (2002) 13(3) *EJIL* 561.
[221] *Ibid*, at 565.
[222] Rome Statute, *supra* n.7, Article 8 (2)(c); This references paragraphs 1(a-d) of Common Article 3.
[223] Rome Statute, *supra* n.7, Article 8(2)(e).

killing a combatant who has surrendered.[224] According to Moir, "Article 8(2)(c) does essentially reproduce common Article 3, but subparagraph (e) goes much further than those contained in Additional Protocol II."[225] The scope of application for both instances is delineated in Article 8(2) (d) and (f) wherein it states that the war crimes provisions do not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."

It is important to note that it was not originally conceived that serious violations of common article 3 will be considered war crimes but the statutes of the ICTY and ICTR marked a crucial turning point. Prior to these statutes, "prosecutions of individuals for serious violations of common Article 3 were left to the discretion of States on the basis of their domestic criminal codes."[226] In *Tadić*, the "ICTY Appeals Chamber interpreted Article 3 of the ICTY Statute to be 'a general clause covering all violations of humanitarian law' and specifically to include serious violations of common Article 3 and other customary law rules applicable in non-international armed conflicts."[227] According the ICRC Updated Commentary, "today, the principle of individual criminal responsibility for war crimes in non-international armed conflicts is part of customary international law. A large number of national laws, including ICC implementing legislation and criminal codes, as well as military manuals, qualify serious violations of common Article 3 as war crimes."[228] As it relates to prosecution of war crimes beyond the international tribunals and international criminal court set up, "it is accepted in customary law that States have a right to vest universal jurisdiction over war crimes, including serious violations of common Article 3, in their domestic courts."[229] Additionally, "States are under an obligation to investigate war crimes allegedly committed by their nationals or armed forces or on their territory and, if appropriate, prosecute the suspects."[230]

Crimes against humanity are acts "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[231] It has been argued that "the notion of crimes against humanity seeks to preserve, through international criminal law, a nucleus of fundamental rights whose safeguarding constitutes a peremptory norm of international law."[232] Crimes against humanity are captured in Articles 7 of the Rome Statute.

[224] Rome Statute, *supra* n.7, Article 8(2).
[225] Moir, *supra* n.30, at 166.
[226] ICRC Commentary, *supra* n.20, at para. 911.
[227] *Ibid*, at para 912.
[228] *Ibid*, at para 914.
[229] *Ibid*, at para 917.
[230] *Ibid*, at para 918.
[231] Human Rights Watch, "International Criminal Court: The Mandate of the International Criminal Court", *HRW*, September 2004. Available at: https://www.hrw.org/legacy/backgrounder/africa/icc0904/2.htm. Last accessed on 19 January 2022; it is important to note that it need not be both widespread or systematic.
[232] *Barcelona Traction,* supra n.162; International Commission of Jurists, *International Law and the Fight Against Impunity: A Practitioners Guide No.7* (International Commission of Jurists, 2015).

Prior to the definition proffered in the Rome Statute, a broader definition was given by the ICTY in *Erdemović*, the Tribunal described it as,

> serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity.[233]

Furthermore, "the *Tadić* Case also reaffirmed the customary law status of crimes against humanity, and the fact that they can be committed during internal conflicts."[234] This case also made it clear that "the requirement of a nexus between crimes against humanity and any armed conflict has been abandoned completely in State practice;"[235] this is equally reflected in article 7.[236] In *Nikolic* the elements to the proved were clearly highlighted as:

> First, the crimes must be directed at a civilian population, specifically identified as a group by the perpetrators of those acts. Secondly, the crimes must, to a certain extent, be organised and systematic. Although they need not be related to a policy established at State level, in the conventional sense of the term, they cannot be the work of isolated individuals alone. Lastly, the crimes, considered as a whole, must be of a certain scale and gravity.[237]

Additionally, there is no general requirement that crimes against humanity be discriminatory in nature. Crimes that fall within this category include murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture, acts constitution sexual violence such as rape, sexual slavery or enforced prostitution, persecution, enforced disappearance and apartheid.[238] In essence, "International criminal law provides accountability for crimes of war and crimes against humanity."[239] This was affirmed in *Tadić* and confirmed in the Rome Statute, as shown above.

International Criminal Law through its expansion of focus from just states to include individuals solidifies the concept of individual criminal responsibility into international law. This is buttressed by the assertion by the International Military Tribunal that "crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced."[240] The Commonwealth Handbook defines international crimes as "acts which are prohibited by international law and which entail the personal criminal liability of the individual who has

[233] *Prosecutor v Erdemović* (Judgment) IT- 96-22-T (29 November 1996).
[234] Moir, *supra* n.30, at 147.
[235] *Ibid,* at 148.
[236] *Ibid,* at 162.
[237] *Prosecutor v Nikolic* (Rule 61) IT-94-2-R61, 108 ILR 21 (20 October 1995), at para. 26; Moir, *supra* n.30, at 150.
[238] Rome Statute, *supra* n.7, Article 7.
[239] McInerney-Langford, *supra* n.210, at 495.
[240] Graditzky T., "Individual Criminal Responsibility for violations of International Humanitarian Law committed in Non-International Armed Conflicts" (1998) 322 *IRRC*, at 32.

committed the act."[241] Thus, it can be averred that "international Criminal Law primarily addresses the conduct of individuals and aims at protecting society against the most harmful transgressions of legal standards perpetrated by such individuals."[242] It creates the personal criminal responsibility of the accused independently of the provisions of national law, although national law may (and will often) incorporate and reflect the prohibitions established under International Humanitarian Law and International Criminal Law.[243] This will include violations of the law of armed conflict or serious breaches of human rights norms whether committed during armed conflict or not (e.g. torture, genocide and crimes against humanity).[244] The issue of individual criminal responsibility was equally addressed in *Tadić*, where the ICTY found that,

> The accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.[245]

This is buttressed by article 25 of the Rome Statute; sub section (2) specifically states that "a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute." The International Commission of Jurists have pointed out that "the fact that the State does not define a behaviour constituting an international crime under international law as a crime in its national legislation does not exempt the person who committed it from liability, nor does it exonerate the State of its obligation to prosecute and punish this crime."[246] McCormack notes that "historically, the accretion of international legal norms on individual criminal responsibility lacked preconceived plan, logical interrelation or ordered design, especially as regards procedures of implementation."[247] This was sought to be rectified through the enactment of the Rome Statute, as "at the international level, the criminalisation of individual conduct is a recent phenomenon."[248]

Different legal scholars and political theorists have presented international criminal law in varying frames. International criminal law has been presented as a tool to address impunity and achieve universal justice. Persons who advance this view claim that the body of law has

[241] The Commonwealth, *International Humanitarian Law and International Criminal Justice: An Introductory Handbook*, (Commonwealth Secretariat 2014), at 54.
[242] Cassese and Gaeta, *supra* n.205, at 7.
[243] The Commonwealth, *supra* n.241, at 54.
[244] *Ibid.*
[245] *Tadić (Judgment), supra* n.70, at para. 692.
[246] International Commission of Jurists, *supra* n.147.
[247] McCormack, *supra* n.216 at 75.
[248] Cassese and Gaeta, *supra n.205,* at 18.

been informed by natural law and "holds that there is a universal justice that all human beings (should) share."[249] This position is supported by Okuta who posits that "the rapid development of international criminal law and the demand to put an end to the culture of impunity has led to an increase in the prosecution of international crimes."[250] By the view that "International criminal law, on the other hand, is constructed on "nonderogable" rights, so-called core rights that are immutable, inalienable, universal, and absolute, admitting no contingency or context,"[251] it could be seen to be linked to the natural law theory as it could be defined as laws that are in line with a moral code. Natural law theory contends that what law is "can only be adequately understood in light of certain moral standards and judgment laws"; it should contain principles that guide human conduct, telling us "how we ought to live, what things we should value we should seek and how we ought to order our lives."[252] Furthermore, the quest for justice as exemplified in the writings of Thomas Aquinas as it relates to human law vis-à-vis natural law posits that "the evildoer should be punished" and this is within the understanding of the "human law [being] framed for the common good of all,"[253] inherent in international criminal law.

Although some have advanced that the motive of international criminal law being altruistic and working for the greater good, others have argued that it is fuelled by political motivations and are a result of political contestations. Cryer, in support of this position, argues "the fact that international criminal law is not a body of law that has fallen from on high fully formed, but is the outcome of political contestation seems to have been recognised by a number of the works under consideration."[254] Furthermore, Samuel argues that "it would be naïve to assume that the actions of any court, with the inclusion of the ICC can be devoid of political influence in its pursuit to ensure lasting respect for the enforcement of justice," particularly as it relates to investigations and prosecutions.[255] Olugbuo contends that "the legal acceptance of international criminal justice is subject to political interests."[256] This paves way for contemplation of the behavioural relevance argument, where States are drawn between following utopian ideals versus national interest. A push for individual criminal responsibility could see "weaker" states acceding to the pressure of the 'acceptable' norm in favour of

[249] Carlson, *supra* n.207, at 40.
[250] Okuta A., "National Legislation for Prosecution of International Crimes in Kenya" (2009) 7 *J Int'l Crim Just* 1063, at 1063.
[251] Carlson, *supra* n.207, at 40.
[252] Muthushani D., "Theories of Law: Natural Law, Legal Positivism, the Morality of Law, Dworkin's Third Theory of Law, Legal Realism and Critical Legal Studies". Universita di Trento.
[253] Rice C. E., "Some Reasons for a Restoration of Natural Law Jurisprudence" (1989) 24 *Wake Forest L. Rev.* 539, at 563-564.
[254] Cryer R., "International Criminal Law vs State Sovereignty: Another Round?" (2005) 16(5) *E.J.I.L.* 979, at 989.
[255] Samuel O., "The International Criminal Court as a Political Tool" (2017) KEDISA Research Paper No. 9, at 4.
[256] Olugbuo B., "Acceptance of International Criminal Justice in Nigeria: Legal Compliance, Myth or Reality?" in Buckley-Zistel S. et al (eds.), *After Nuremberg. Exploring Multiple Dimensions of the Acceptance of International Criminal Justice* (International Nuremberg Principles Academy, 2016), at 2.

relevance on the international stage. In this line, it can be said that "a constructivist account of the development of international criminal law would take very seriously the role of ideas about international criminal responsibility and the effect those have on states, especially how they perceive their interests and what values they internalise and act upon."[257] Some critique surrounding the creation of the International Criminal Court posits that "the dialogue surrounding the ICC is indicative of the dynamic relationship between various 'assumptions about what the character of the present social world is and how it should be changed.'"[258] It can be said that "international criminal justice cannot be immune from strategic influences…it is plain that global and regional politics renders the commitment of some states to international justice more decisive than that of others."[259]

It has been argued that the political issue underpinning International Criminal Law could also be tied to the concept of sovereignty. Cryer argues this point when he says that "we must accept that international criminal law does affect state sovereignty (the law on crimes against humanity and genocide in particular) by prohibiting behaviour perhaps previously outside of the purview of international law."[260] He further argues that "international criminal law may have the effect of limiting sovereignty through its substantive norms". He continues by noting that "sovereignty has a lot to do with what is, or is not, considered to be part of international criminal law, as the distinction between international and non-international conflicts shows."[261] To buttress this point, Carlson argues that "international criminal law challenges traditional notions of sovereignty because it displaces state monopoly over the legitimate application of violence".[262] Cryer also notes that "the cooperation regime for the ICC is not strong, owing to an unwillingness of states to go too far in relation to their perceived sovereign prerogatives."[263] In addition to this issue, Blum argues that "it is also possible that, given the greater threat of enforcement of International Humanitarian Law through International Criminal Law and concerns about the politicisation of such enforcement, States would grow more reluctant to assume International Humanitarian Law obligations to begin with."[264] This is therefore evident of the contestation between the international space and the local space.[265]

[257] Cryer, *supra* n.254, at 995.
[258] Sagan, *supra* n.219, at 6.
[259] Cryer, *supra* n.254, at 988.
[260] *Ibid*, at 985.
[261] *Ibid*, at 989.
[262] Carlson, *supra* n.207, at 38.
[263] Cryer, *supra* n.254, at 986.
[264] Blum G., "Re-envisaging the international law of internal armed conflict: a reply to Sandesh Sivakumaran" (2011) 22(1) *E.J.I.L.* 265, at 269.
[265] Sagan, *supra* n.219, at 7.

On the opposite side of the spectrum it is posited that international criminal law does not necessarily have a negative impact on sovereignty as Cryer suggests but aids it. It is acknowledged that "the prevention of international crimes cannot occur without sovereignty."[266] Ocampo also lends his voice to this by saying that "the complementarity doctrine reinforces state sovereignty and establishes a clear boundary between the International Criminal Court and domestic courts. The International Criminal Court does not undermine states' rights, nor interfere with judicial matters that naturally fall within the jurisdiction of states."[267]

In addition to the foregoing, the relationship between international criminal law and international humanitarian law is also of interest and bears consideration. The role of International Criminal Law is inextricably linked to its relationship with International Humanitarian Law. It has been noted that "the humanisation and individualisation of international humanitarian law lie at the heart of the rise of international criminal law."[268] It can be argued that this link could be seen in the "notion that violations of international rules of warfare could also give rise to the criminal responsibility of the individual under international law gradually asserted itself."[269] Sivakumaran notes that "international criminal law and international human rights law have become linked inextricably with international humanitarian law in the regulation of internal armed conflict."[270] This is also supported by Cassese who states that "International Criminal Law simultaneously derives its origin from and continuously draws upon both international humanitarian law and human rights law as well as national criminal law."[271] He further added that international criminal law is a means through which International Humanitarian law may be enforced.[272] He stresses, "reliance on international criminal law has proven necessary to enforce international humanitarian law and sanction."[273] This position is further supported by Reka who argues that "international humanitarian law provides the rules, human rights law defining the frameworks of international and national accountability, and international criminal law, the 'newest' element, setting the conditions for international enforcement should national efforts fail."[274] Alubo and Piwuna state that "there is a clear, visible cross-pollination and cross referencing between international criminal law,

[266] Cryer, *supra* n.254, at 985.
[267] ICC Rome Statute, "International justice and the rule of law: strengthening the ICC through domestic prosecutions" (2009) 1(1) *H.J.R.L.* 79, at 81.
[268] Kapur A., "The rise of international criminal law: intended and unintended consequences: a reply to Ken Anderson" (2009) 20(4) *E.J.I.L* 1031, at 1031.
[269] Cassese and Gaeta, *supra* n.205, at 4.
[270] Sivakumaran, *supra* n.214, at 238.
[271] Cassese and Gaeta, *supra* n.205, at 5.
[272] Sivakumaran, *supra* n.214, at 220.
[273] *Ibid*, at 232.
[274] Reka V., "Challenges of domestic prosecution of war crimes with special attention to criminal justice guarantees ", (Doctoral Thesis, Pazamny Peter Catholic University 2012).

international humanitarian law and international human rights, the first and last of which are really different perspectives on the same problem".[275]

International Criminal Law has been defined as "the body of law that prohibits certain categories of conduct deemed to be serious crimes, regulates procedures governing investigation, prosecution and punishment of those categories of conduct, and holds perpetrators individually accountable for their commission."[276] International Criminal Law may address crimes that are multi-jurisdictional or national in nature such as terrorism. Both bodies of law have significant overlap as some of the sources of international criminal law form the bedrock of international humanitarian law such as the Geneva Conventions of 1949 and its Additional Protocols of 1977. International Criminal Law makes justiciable violations of the law on armed conflict/ the law on war. As Sivakumaran argues "it comprises the secondary rules to the primary rules of international humanitarian law."[277] It requires the interpretation of "international humanitarian law provisions in order to pronounce on the guilt and innocence of individual accused of crimes (such as) war crimes."[278] This can be seen in article 8(2)(c) of the Rome Statute of the International Criminal Court which states the war crimes can be committed in a non-international armed conflict. It is argued that "if violations of international humanitarian law occur, those violations will engage the legal responsibility of the person or entity that has committed the violations."[279] The importance of this relationship cannot be overstated. Blum expresses a similar sentiment, when she states that "the relationship between International Humanitarian Law and International Criminal Law, both with regard to States' assumption of obligations and more generally, is an important matter not only for internal armed conflicts but for international conflicts as well."[280]

Theoretically there is the question as to "whether the two fields of law develop in a way of fragmenting the legal framework that protects the individual; whether their requirements conflict with each other; or whether they develop towards forming the common legal ground for the protection of individuals in the context of an armed conflict."[281] As it relates to interpretation, Sivakumaran notes that "equally, it is not clear that the secondary rule – international criminal law – should be used to interpret the primary rule – international

[275] Alubo A. O. and Piwuna M., "Observance of Human Rights and International Humanitarian Law by Nigeria Armed Forces in Internal Security Operations" (2015) 5(9) *International Journal of Humanities and Social Science* 141, at 144.
[276] Advisory Service on International Humanitarian Law, "General Principles of International Criminal Law", *ICRC*, 2014.
[277] Sivakumaran, *supra* n.82, at 77.
[278] *Ibid.*
[279] Commonwealth, *supra* n.241, at 53.
[280] Blum, *supra* n.264, at 269.
[281] Orakhelashvili A., "The interaction between human rights and humanitarian law: fragmentation, conflict, parallelism, or convergence?" (2008) 19(1) *E.J.I.L.* 161, at 162

humanitarian law – given that there are important differences between them."[282] Although these are key considerations, they do not form the subject of this thesis. The major discourse is on the means of enforcing international humanitarian law and this is further discussed in chapter 4.

1.2.3 International Human Rights Law

While the main focus of this PhD research is to examine the applicability or otherwise of International Humanitarian Law to the situation of violence in North East Nigeria, it is also necessary to examine briefly the related field of international human rights law. International Human Rights Law (IHRL) is a body a law that stems from the Universal Declaration of Human Rights 1951, International Covenant on Civil and Political Rights 1966 and International Covenant on Economic and Social Rights 1966, to name a few. Also, regional human rights instruments have equally contributed to this body of law. This includes the African Charter on Human and People's Rights 1981, European Convention on Human Rights 1950 and American Convention on Human Rights 1969. The essence of these laws is to provide a basis for "individuals and groups can expect and/or claim certain rights that must be respected and protected by their States."[283] International Human Rights Law has gained increasing relevance and applicability to conduct of hostilities in recent times in view of the perceived inadequacies of the International Humanitarian Law.

It is widely accepted that the body of law known as IHRL has developed independent from interference from other sub-categories of International Law, but when considered in relation to situations of violence, its relationship with International Humanitarian Law is subject to discourse. The ICRC argues that the two bodies of international law are complementary as they share similar aims such as protection of lives, the health and dignity of individuals.[284] In embracing International Human Rights Law, Additional Protocol II makes provision for humane treatment, limits of violence to life and person, rights of a child and persons whose liberty is restricted which mirror extant international human rights law.[285] It is accepted that International Human Rights Law applies in armed conflict and this is buttressed the International Court of Justice in the *Wall Advisory Opinion* where it said "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and

[282] Sivakumaran, *supra* n.214, at 236.
[283] ICRC, *supra* n.1, at 35.
[284] *Ibid* p.36.
[285] Additional Protocol II, *supra* n.2.

Political Rights".[286] The necessity of International Human Rights Law is also acknowledged in the *Nuclear Weapons Opinion* where the International Court of Justice held that human rights continue to apply in armed conflict.[287] Meron argues that Additional Protocol II contains the basic core of human rights many of which have attained customary status.[288] Moir, in recognition of same, likens Common Article 3 to a blanket or umbrella provision, under which the specific elements provided by IHRL apply.[289] These include the principle of non-discrimination, violence to life and person, prohibition of taking of hostages and judicial guarantees of fair hearing. One may go so far as to say that due to the inadequacy of the provisions of Common Article 3 and Additional Protocol II, attention has turned to international human rights law to be a helpmate, most especially in the role of protection of civilians.[290]

Although these bodies of law are interrelated, they are distinct, as significant differences between International Humanitarian Law and International Human Rights Law exist. These include the difference of origin, binding nature in which International Humanitarian Law is binding on both state forces and insurgents whereas International Human Rights Law regulates the relationship between State and the individual, as there is an unequal relationship between the State and the governed. International Humanitarian Law protects a specific group of persons- persons no longer taking part in combat, civilians and combatant such as the wounded, sick or shipwrecked whilst IHRL applies to all persons in the jurisdiction of the state. The OHCHR notes that "these human rights obligations, whether positive or negative, apply to the State as a whole, independently from any internal institutional structure and division of responsibilities among different authorities".[291] International Humanitarian Law is operative during an armed conflict, but International Human Rights Law applies in both peacetime and armed violence. Finally, while International Humanitarian Law provisions are mandatory once deemed applicable while IHRL has derogable elements.

The issue of derogation is one which has been subject to academic discourse. According to Milanovic, "derogations allow States to depart from the full extent of their obligations in

[286] *Wall Opinion, supra* n.11, para. 106.
[287] *Nuclear Weapons Opinion, supra* n. 6.
[288] Meron T., *Human Rights and Humanitarian Norms as Customary law* (OUP, 1989), at 73.
[289] Sivakumaran, *supra* n.82, at 193-230.
[290] Article 2(1) International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[291] Office of the High Commissioner on Human Rights, *International Legal Protection of Human Rights in Armed Conflict* (United Nations, 2011), at22.

situations of emergency."[292] Article 4(1) of the International Convention on Civil and Political Rights, provides that,

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

As stated in *Nuclear Weapons* and *Wall* advisory opinions "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation."[293] However according to the ICRC the derogation must be necessary and proportional to the crisis, not introduced on a discriminatory basis.[294] Although, derogation is possible there are rules that are exempt such as right to life and prohibition against cruel and degrading treatment.[295]

As indicated above, in a NIAC both bodies of law (IHL and IHRL) apply concurrently. The ICJ in the *Wall Opinion* acknowledged this concurrent application when it opines that "some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."[296] The OHCHR notes that "in practice, due to the similar protections offered by both international human rights law and international humanitarian law, their concurrent application in armed conflicts does not, in general, raise substantive problems."[297] Human Rights apply in an armed conflict in a number of ways, these include acting as an interpretative device, to bring about "more detailed protection in many circumstances, should the affected State decide not to derogate from its obligations" and serving as an alternate enforcement mechanism.[298] As such where violations exist, not only can enforcement by brought for violation of IHL but for gross human rights violations.

On the issue of *lex specialis*, La Haye argues that there is a real convergence between International Humanitarian Law and International Human Rights Law with International Humanitarian Law being *jus specialis* and International Human Rights Law being *jus generalis*. She argued that human rights play a significant role in non-international armed conflict when

[292] Milanovic M., "Extraterritorial Derogations from Human Rights Treaties in Armed Conflict" in Bhuta N. (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges, Collected Courses of the Academy of European Law* (Oxford University Press, 2014).
[293] *Wall Opinion, supra* n.11, at para. 106; *Nuclear Weapons Opinion, supra* n. 6, at para. 25; *Ibid.*
[294] ICRC, *supra* n.1, at 37.
[295] *Ibid.*
[296] *Wall Opinion, supra* n.11, at para.106.
[297] OHCHR, *supra* n.291, at 57.
[298] Moir, *supra* n.30, at 197.

the government refuses to recognise applicability of Common Article 3.[299] Theoretically, assessing the relationship between IHL and IHRL, Koskenniemi argues that it is not a simple issue of convergence but that instead of reverting to extant legal regimes. The international community has created a different substratum of applicability and that there are two set of rules that are related to one another and there is difficulty in applying just one. He argues that in order to best assess the applicable law, the fact-condition (subject matter) is the determining factor, the assessment is "dependent on and makes constant reference to evaluative judgments of what is central and what is marginal to a case."[300]

Taking cognisance of the roles they play in conflict, the issue of hierarchy may come to the fore, most especially in the event of a conflict, the general leaning of this paper is to the effect that International Humanitarian Law is *lex specialis* to the *lex generalis* nature of International Human Rights Law. The above statement begs definition; l*ex specialis* in common language means special law as opposed to *lex generalis* which is general law. These terms in law refers to the principle "used to solve or prevent instead the simultaneous application of special and general rules, when they are compatible and hence would concur."[301] In this regard, "the specific rule modifies the general rule to the extent of the inconsistency between them. The general rule does not fall away; it remains in the background and is applicable to the extent that it does not conflict with the specific rule."[302] First discussed in this light in the *Nuclear Weapons* Case, the ICJ in its advisory opinion looked at the relationship between IHL and IHRL and stated thus,

> In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[303]

As Milanovic argued that this conclusion was premised on the United Kingdom submission where the key question addressed was "whether any of the rules of the law of human rights or the law on environmental protection can be construed, in accordance with the general principles stated above, as prohibiting the use or threat of use of nuclear weapons when

[299] La Haye, *supra* n.33, at 74.
[300] Koskenniemi M., "Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law", Report of the study group of the International Law Commission, UN General Assembly International Law Commission 58th session A/CN.4/L.682 13 April 2006, at para. 106.
[301] Zorzetto S., "The Lex Specialis Principle and its Uses in Legal Argumentation: An Analytical Inquire" (2012) 3 *Eunomia, Revisit en Cultura de la Legalidad* 61, at 84.
[302] Sivakumaran, *supra* n.82, at 89.
[303] *Nuclear Weapons Opinion, supra* n. 6, at para. 25.

carried out by way of legitimate self-defence"[304] Although the question appears as a given starting point, the nature of the relationship is not adequately addressed by the Opinion of the Court. This position was also held in the *Wall* Opinion where the ICJ held thus, "In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."[305]

Milanovic advances that "when it comes to describing the relationship between human rights and international humanitarian law, the *lex specialis* principle is frequently taken for granted, as if it has somehow always been there, carved in stone."[306] He presents a contrasting argument when he submits that a *lex specialis* attribution of International Human Rights Law to International Humanitarian Law serves to humanise major International Humanitarian Law treaties.[307] Simply put the essence of the allusion to *lex specialis* is that "human beings embroiled in armed conflict still retain those rights that are inherent in their human dignity, which are more, not less, important in wartime than in peacetime, and which apply regardless of considerations of reciprocity between the warring parties."[308]

Conversely, Sivakumaran advances that another interpretation of the rule "when the norms are consistent with one another, but one norm is of greater specificity than the other or is more tailored to the particular circumstances at hand…in this situation, the more specific rule is but an application of the general rule."[309] What is however clear from the literature is that classification of *lex specialis* or *lex generalis* may be dependent on the actual provisions.[310] For example, "should the relevant rule of international human rights law…contain the more specific rule, it would modify the general rule of international humanitarian law to the extent of the inconsistency between them."[311] Despite the above assertions, it is important to note that "the precise relationship between the law of armed conflict and international human rights law is subject to significant uncertainty."[312]

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[304] Milanovic M., "The Genesis of Lex Specialis" *EJIL: Talk,* 30 April 2014. Available at: https://www.ejiltalk.org/the-genesis-of-lex-specialis/. Last accessed on 31 October 2021; UK Submission on Nuclear Weapons case Letter dated 16 June 1995 from the Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland, at para 3.98.

[305] Milanovic, *supra* n.304; *Wall Opinion, supra* n.11, at para. 106.

[306] *Ibid.*

[307] Milanovic M., "Norm Conflict, International Humanitarian Law and Human Rights Law" in Ben-Naftali O.(ed.), *International Humanitarian Law and International Human Rights Law* (OUP, 2011).

[308] *Ibid*.

[309] Sivakumaran, *supra* n.82, at 89.

[310] Sivakumaran, *supra* n.82, at 92.

[311] *Ibid.*

[312] Hampson F. and Murray D., "ESIL- International Human Rights Law Symposium: Operationalising the relationship between the law of armed conflict and international human rights law", *EJIL: Talk!* 11 February 2016.

Milanovic in his article, “The Lost origins of Lex Specialis: Rethinking the relationship between Human rights and International Humanitarian law”, he places the two arguments prevalent on the application of International Human Rights Law to International Humanitarian Law. He states thus, “in the broadest of strokes, the debate is waged between two camps, comprised on both sides of academics, judges, government and military lawyers, various types of activists, etc. The first are the human rights enthusiasts, who generally believe that human rights law can and does substantively apply in situations of armed conflict, and that human rights enforcement mechanisms can have an important role to play in such situations. The second are the human rights sceptics, who for a variety of reasons resist the encroachment of human rights onto areas best left to International Humanitarian Law pure and simple.”[313] This argument can so clearly be seen in the insurgency in Nigeria and the reports arising therefrom.[314]

Briefly, it is worth considering emerging literature on the human rights law of non-international armed conflict as espoused by Abresch. This argues for a more direct regulation of International Humanitarian Law by International Human Rights Law rather than mere information. In so doing two schools of thought have emerges (1) the unification school which advances that there should be one body of law applicable to NIAC irrespective of the intensity of the conflict and (2) the threshold school that advances that “a non-international armed conflict of a low intensity would be regulated by international human rights law; a high-intensity non-international armed conflict would be governed by international humanitarian law; the separating threshold would be that of Additional Protocol II.”[315] Notwithstanding this view, it is clear that International Humanitarian Law and International Human Rights Law are two separate bodies of law that have interplay and concurrent application.

It is important to discuss who is bound by IHRL in the context of a NIAC. There is the traditional view that IHRL is only binding on States. Moir advances this view when he states that “human rights obligations are binding on governments only, and the law has not yet reached the stage whereby, during internal armed conflict, insurgents are bound to observe the human rights of government forces, let alone those of opposing insurgents.”[316] However, it can be argued that there is are considerations of the binding nature on non-state armed groups. Several views have been communicated on this issue. One view is that there is evolving practice showing

[313] Ohlin J. D. (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP, 2014), at 1.
[314] See Chapter 3.
[315] Sivakumaran, *supra* n.82, at 94.
[316] Moir, *supra* n.30.

that under certain circumstances, NSAGs can be bound "by international human rights law and can assume, voluntarily or not, obligations to respect, protect and fulfil human rights."[317] This is evidenced by resolutions of the security council, the General Assembly and in reports of special rapporteurs. For instance,

> the OHCHR Special Rapporteur on extrajudicial, summary or arbitrary executions indicated in the context of his mission to Sri Lanka that "[a]s a non-State actor, the LTTE does not have legal obligations under [the International Covenant on Civil and Political Rights], but it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights.[318]

As it relates the Security Council and General Assembly resolutions, a great number of these have called on States and NSAGs to abide by IHL and IHRL obligations.[319]

Another suggestion of when NSAGs can be bound is in situations where they exercise some degree of control over territory and population. This reasoning is based on the principle of effective control. It is argued that "where NSAGs exercise de facto control over territory, they must respect fundamental human rights of persons in that territory."[320] Furthermore,

> where a group exercises significant territorial and population control, and has an identifiable political structure… the [NSAGs] "must accept that insofar as they aspire to represent a people before the world [...] the international community does have human rights expectations" to which it will hold them.[321]

This view appears to be an accepted practice to a certain degree.[322] In situations such as the failure of it to apply could result in rightholders being deprived of their rights.[323]

It has also been advanced that NSAGs can be bound when they consent to the application of IHRL.[324] This could be through voluntary commitments recorded in "written memoranda of understanding, ground rules, or agreements and codes of conduct."[325] Examples of these are the 1998 Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines and the 1996 Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone. It is important to note that these instances are not without their challenges but discussion of which falls outside the ambit of this thesis.

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[317] OHCHR, *supra* n.291.
[318] OHCHR, *supra* n.291, at 24.
[319] UNSC Res 1894 (11 November 2009) UN Doc S/Res/1894; UNSC Res 1417 (14 June 2002) UN Doc S/Res/1417, at para. 4; UNSC Res 1193 (28 August 1998) UN Doc S/Res/1193, at para. 14.
[320] Rodenhauser T., "Human Rights Obligations of Non-State Armed Groups in Other Situations of Violence: The Syria Example" (2012) 3 *International Humanitarian Legal Studies* 263, at 264.
[321] Kamatali J., "The Application of International Human Rights Law in Non-International Armed Conflicts" (2013) 4 *J Int'l Human Legal Stud* 220, at 242.
[322] Rodenhauser, *supra* n.320, at 264, 280.
[323] OHCHR, *supra* n.291, at 25.
[324] See Bellal A. and Heffes E., "'Yes, I Do': Binding Armed Non-State Actors to IHL and Human Rights Norms Through Their Consent" (2018) 12 *HR & ILD* 1.
[325] Kamatali, *supra* n.321, at 244.

Lastly, a perspective advanced by the Human Rights Council Independent International Commission on the Syrian Arab Republic is that "at a minimum, human rights obligations constituting peremptory international law (jus cogens) bind States, individuals and non-State collective entities, including armed groups. Acts violating jus cogens – for instance, torture or enforced disappearances – can never be justified."[326] This is supposedly tied to the "legitimate expectations of the international community."[327] Rodenhauser argues that "many civil and political rights are rules of abstention which can be complied with even by NSAGs with a very low degree of organisation and no control over territory."[328] He adds as it relates to rules of customary international law consent is not required especially as the commission of enquiry found that "NSAGs have to respect the fundamental human rights of persons forming customary international humanitarian law."[329] This analysis is important as they could suggest that Boko Haram could be bound by human rights provisions.

1.2.4. Terrorism Laws

The issue of terrorism rose to prominence in the aftermath of the bombing of the World Trade Centre and the Pentagon in the United States in September 2011. It has become the biggest threat to international peace and security. Although, it is the case that terrorism matters are handled at the level of the domestic, efforts have been made at the international to address the issue. Guillaume argued that "whilst the combat of terrorism is still a matter for the police and domestic courts, numerous conventions have been adopted and ratified on a universal level with a view to ensuring the prosecution or extradition of the perpetrators of various crimes."[330] As mentioned above, a consensus is yet to be reached on the definition of terrorism. There have been numerous attempts to define terrorism from the 1937 Convention for the Prevention and Punishment of Terrorism[331] to the 1996 draft UN Comprehensive Convention on international terrorism, most of which are without universal acceptance. It has been argued that for there to be terrorism conditions have to be met: first, the perpetration of certain acts of violence capable of causing death, or severe physical injury; second, "an organised operation of concerted plan reflected in coordinated efforts to achieve a specific

[326] Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, A/HRC/19/69, 22 February 2012, at para. 106.
[327] Commission on Human Rights Special Rapporteur P. Alston, *Civil and Political Rights, Including The Question of Disappearances and Summary Executions*, *-Extrajudicial, Summary or Arbitrary Executions*, E/CN.4/2006/53/Add.5, 27 March 2006, at para. 25.
[328] Rodenhauser, *supra* n.320, at 278.
[329] Rodenhauser, *supra* n.320, at 276; Human Rights Council, A/HRC/21/50, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* 15 August 2012 Annex II, para 10.
[330] Guillaume G., "Terrorism and International Law" (2004) 53 (July) *ICLQ* 537, at 547.
[331] Convention for the Prevention and Punishment of Terrorism (16 November 1937). Geneva: League of Nations, 1937.

goal and third, the pursuit of objective to create terror."[332] While, there is yet to be a comprehensive international convention that delineates the scope of terrorism, there are a number of treaties that make up laws applicable to designated acts that could be considered amount to terrorism. This is illustrated by the International Convention on the Taking of Hostages 1979, Convention for the Suppression of Terrorist Bombing 1997, Convention for the Suppression of the Financing of Terrorism, 1999, Convention for the Suppression of unlawful seizure of Aircraft 1970, to name a few. Other acts prevented by these treaties include suppression of acts of violence against airports, ship and oil platforms as well as attacks on diplomats.[333]

Efforts to provide an ad-hoc regime for addressing terrorism can be seen in a combined reading or application of aforementioned treaties, where applicable as well as the legislating through UNSC Resolution as seen with Resolutions 1368 and 1373, which are critical binding documents that imposed obligations of States especially on the financing of terrorism and created a committee of oversee its implementation. It is also important to note the distinctions between state sponsored terrorism and acts attributable to individual actors.

Considering that terrorism is most times treated as a domestic issue, I would now consider the domestic legal framework to combat terrorism in Nigeria. Following the adoption of UNSCR 1373, Nigeria amended its Economic and Financial Crimes Commission Act 2004 to include two sections, section 15 on offences related to terrorism and section 46 that defined terrorism. Terrorism in the Nigerian context was thus described as:

> (a) any act which is a violation of the Criminal Code or the Penal Code and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or property, natural resources, environmental or cultural heritage and is calculated or intended to-
>
> (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act or to adopt a particular standpoint, or to act according to certain principles; or
>
> (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
>
> (iii) create general insurrection in a State;
>
> (b) any promotion, sponsorship of, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organisation or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i), (ii) and (iii).

[332] Guillaume, *supra* n.330, at 540.

[333] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 September 1971, 974 UNTS 177; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 March 1988, No. 29004; Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 14 October 2005 ; and Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, No. 15410.

However, in the wake on concerted terrorist attacks, the Nigeria legislature was compelled to enact the Terrorism Prevention Act 2011 following the United States' listing Nigeria as a country of interest on its Terror watch list.[334] This Act was later amended in 2013 to include a definition of acts of terrorism but not terrorism itself. This amendment was predicated on the need to strengthen the existing law and clarify offences. The Nigerian Terrorism Act 2011 (as amended)'s definition of terrorism, which is similar to that found in the UK Terrorism Act 2000, provides that an act of terrorism is:

> An act which is deliberately done with malice, aforethought and which:
> (a) may seriously harm or damage a country or an international organization;
> (b) is intended or can reasonably be regarded as having been intended to—
> (i) unduly compel a government or international organization to perform or abstain from performing any act;
> (ii) seriously intimidate a population;
> (iii) seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization; or
> (iv) otherwise influence such government or international organization by intimidation or coercion; and
> (c) involves or causes, as the case may be—
> (i) an attack upon a person's life which may cause serious bodily harm or death;
> (ii) kidnapping of a person;
> (iii) destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;
> (iv) the seizure of an aircraft, ship or other means of public or goods transport and diversion or the use of such means of transportation for any of the purposes in paragraph (b)(iv) of this subsection;
> (v) the manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of biological and chemical weapons without lawful authority;
> (vi) the release of dangerous substance or causing of fire, explosions or floods, the effect of which is to endanger human life;
> (vii) interference with or disruption of the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;
> (d) an act or omission in or outside Nigeria which constitutes an office within the scope of a counter terrorism protocols and conventions duly ratified by Nigeria.[335]

According to Ejeh, offences contained in the law include:

> murder, kidnapping and other attacks on a person or liberty of an internationally protected person, Terrorist meetings, soliciting and giving support to terrorist groups for the commission of a terrorist act, harbouring terrorists or hindering the arrest of a terrorist, provision of training and instruction to terrorist group or terrorist, concealment of information about acts of terrorism, provision of devices to a terrorist, recruitment of persons to be members of terrorist groups or to participate in terrorist acts. Incitement, promotion or solicitation of property for the commission of terrorists acts, provision of facilities in support of terrorist acts, financing of terrorism, dealing in terrorist property, hostage taking, membership of a terrorist group or proscribed organisation, conspiracy to commit terrorist acts, aiding and abetting terrorist acts, escape or aiding and abetting escape, attempt to commit an offence under the Act, preparation to commit terrorist acts, unlawful assumption of character of officers of any law enforcement or security, tampering with evidence and witness, obstruction of any officer of a law enforcement or security agency amongst others.[336]

[334] Ejeh E. U., "Nature of Terrorism and Anti-Terrorism Laws in Nigeria" (2019) 10(1) *NAUJILJ* 186, at 188- 189.
[335] Section 1 (3) of Nigerian Terrorism Act 2011 (As amended); section 1 UK Terrorism Act 2000.
[336] *Ibid*, at 191.

Oyewole contends that in Nigeria a three-step approach have been adopted as a counter-terrorism strategy. This approach is military based with the armed forces employing war-like strategies, a justice-policing model which "sees terrorism as a crime and one that needs a legal response", and a political approach that aims to address root causes through capacity building, economic development and deradicalisation.[337] These three strategies can be seen with the ongoing military offensive in the North East, the sole focus of the justice sector is based on dealing with terrorism as a crime and deradicalisation policy implemented through Operation Safe Corridor. These issues will be addressed in chapters 4 and 5.

1.2.4.1 International Humanitarian Law and Terrorism

Considering methods such as the indiscriminate weapons and human suffering occasion, it is important to examine terrorism through the lens of International Humanitarian Law.

Gasser in looking at the subject matter argues that the laws governing non-international armed conflict adequately provide for terrorist activity, as there is a prohibition against violence against persons and destruction of property as well as the use of deadly force against persons.[338] Furthermore, he argues that the Martens clause is quite apt in this circumstance as in the absence of a specific prohibition "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."[339] He equally argues that under Additional Protocol II, acts of terrorism are clearly prohibited.[340]

Comparatively, Saul in assessing the applicability of extant International Humanitarian Law norms seems to suggest that international counter terrorism norms post 9/11 have overlaid extant laws.[341] He claims that as a result of the fact that article 1(2) of AP II excludes riots, sporadic and isolated attacks, terrorist acts of this nature would not scale the threshold.[342] However, contrary to this argument the UK Ministry of Defence argues that Additional Protocol II is applicable where the terrorism related violence is sufficiently intense and the group is

[337] Oyewole S., "Boko Haram and the challenges of Nigeria's war on terror" (2013) 29(3) *Defense & Security Analysis* 253, at 254; Ike T. J., "Reconceptualising the Role of Law in Countering Terrorism: A Case Study of Boko Haram in Nigeria" (2018) 6(1) *Journal of Law and Criminal Justice* 107, at 109.
[338] Gasser H. P., "Acts of terror, terrorism, International Humanitarian Law" (2002) 84 (847) *IRRC* 547, at 548.
[339] Hague Convention respecting the Laws and Customs of War on Land 18 October 1907, Preamble.
[340] Article 4(2)(d) Second Protocol Additional to Geneva Conventions 1949, 1977.
[341] Saul B., "Terrorism and International Humanitarian Law" in Saul B. and Elgar E., *Research Handbook on International Law and Terrorism*, (2014) Sydney Law School Research Paper No. 14/16 208.
[342] *Ibid*. IRA Northern Ireland was used as an example.

organised.[343] Saul further argues that due to the added element of territorial control in Additional Protocol II, non-international armed conflict in which a terrorist group is a party may come under the ambit of Common Article 3 but not the Additional protocol II.[344]

Conversely it can be argued that these authors have not taken adequate cognisance of terrorist groups and the ever-changing nature of their campaigns. Increasingly, terrorist groups are holding significant territory as has been the case with Al Shabaab in Somalia as well as with Islamic State in Syria and Iraq and Boko Haram in North eastern Nigeria. Saul particularly places greater emphasis on terror related activities on the international level and the transnational non-international armed conflict as opposed to focusing on non-international armed conflict. His analysis isolates the ability of a terror campaign to be solely an international armed conflict. Furthermore, there is a failure to look at the threshold of the applicable provisions and critically assess how the activities of terrorist organisations can be rated. The debate on the relationship between IHL and terrorism is ongoing and is further explored in the next chapter.

1.3 Discourse on Boko Haram

Considering the impact Boko Haram has had on Nigeria and surrounding countries, it would behove scholars to comment on same. The discussion surrounding and emanating from the Boko Haram violence has definitely sparked international interest and discourse. Virginia Comolli in her book *Boko Haram: Nigeria's Islamist Insurgency* addresses the history of Boko Haram and the beginnings of the insurgency looking at the historical sources as well as the present socio-economic factors leading to the intensification of the insurgency. Further, she comments on the methods of the group, in so doing she catalogues the atrocities committed not only by the sect but also those undertaken by Government Forces. This is evidenced when she states thus, "this phenomenon that has produced over 3,000 deaths between January 2008 and 2013 … and it is not only deaths that were recorded as around 3.3 million people have been displaced by the violence since 2010 and over 400,000 civilians were forced to flee their homes in North East Nigeria in the first seven months of 2014 alone according to the National Emergency Management Agency."[345] Comolli in her synopsis addresses the internationalisation of the Sect into neighbouring countries and their ties to other terrorist networks such Al-Shaabab and Al-Qaeda in the Islamic Magreb. Finally, she looks at the

[343] *Ibid*, at 4; UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP, 2004), [1.33.4].
[344] *Ibid,* at 1-17.
[345] Comolli V., *Boko Haram: Nigeria's Islamist Insurgency (Hurst 2015)*, at 15; The number of persons displaced may vary depending on the report.

response of the Nigerian Government and the Western Response and proposes ways forward.

Although, Comolli's work is a detailed and well-researched piece, it does not directly cover the role of International Law in the violence. Comolli's closest reference is the allusion to the internationalisation of the conflict with the involvement of external actors and implications for the nation state. Additionally, with her reference to the failure of the State to meet the needs of the populace closely broaches the Lockean theory of the social contract. Further she refers to the just war theory. She states thus "indeed, a just war narrative justifying violence in response to Boko Haram's perceived persecution by the Government and Christians has been resonating among the militants since 2009 with no sign of losing its appeal."[346] In International Law parlance, Just War doctrine refers to the demand that "the commitment of a State's armed forces to war be based on whatever authority is necessary in that State to take such action." Propagated by the early philosopher Augustine, for him "war could only be undertaken to attain peace, and just cause in particular meant preventing harm to innocents."[347] This concept will be further explored in succeeding chapters. My thesis looks at the conflict from a legal perspective which does not detract from the socio economic and political factors arising therefrom.

David et al in *Boko Haram: the Socio- Economic Drivers* addresses an issue highlighted by Comolli which looked at the socio- economic factors. As the title of the book suggests critiques the phenomenon that is Boko Haram, addressing the evolution, ideological foundation and strategy of the sect. They look in depth at the changing context of terrorism vis a vis the political economy of Nigeria. Finally, their analysis posits recommendations on how to end the insurgency. Their central argument is that "the high level of socio- economic inequality in Nigeria can meaningfully explain the emergence and persistence of Boko Haram in Nigeria."[348] In making their analysis, the failed state, root cause and relative deprivation theoretical frameworks were utilised to buttress their argument and provide a foundation for the argument. Although, not driven by legal pursuits this book looks at the concept of terrorism taking into consideration existing philosophical considerations.

Other authors such as Guibbard address similar issues as raised by David et al and Comolli, providing in-depth analysis of Boko Haram and their history, religious fundamentalist beliefs

[346] *Ibid*, at 39.
[347] Mednicoff D. M-, "Humane Wars? International Law, Just war Theory and contemporary armed humanitarian intervention" (2006) 2 *Law, Culture and Humanities* 373, at 379.
[348] David O.et al, *Boko Haram: The Socio-Economic Drivers* (Springer, 2015).

and the portraying the effects of their insurgency and going further to posit, political solutions to the insurgency.

Other sources of note include reports from the UN Office for the Coordination of Humanitarian Affairs[349], Human Rights Watch[350], Amnesty International[351] all detailing the humanitarian fallout of the insurgency. They detail the Human Rights violations and breach of International Humanitarian Law of the armed group. Although reference is made to the legal foundations for their conclusions, they do not provide an in-depth legal analysis on the applicable laws, those which are operative and how conclusions of the existence of a non-international armed conflict were arrived at.

1.4 Contribution to the scholarship

Having provided a synopsis of the themes this PhD thesis will cover; this section will explain how this research will make a contribution to the existing literature. This research undertakes a detailed and systematic legal analysis of the Boko Haram violence through the prism of applicable domestic and international laws. There is limited to no literature that provides such an extensive analysis of this case study. In addition, through its analysis in the following chapters, this research aims to address a number of knowledge gaps in literature on the following issues:

a. A review of the Boko Haram Insurgency from a legal and constructivist lens;
b. The role of different actors in Nigeria in shaping the perception of the insurgency;
c. An analysis of Nigerian domestic case law emanating from the insurgency that have been made available to a domestic and international audience;
d. The relationship between international humanitarian law and terrorism especially in terms of non-international armed conflict and its changing nature, with particular reference to the Nigerian context; and
e. The desired response on the part of Nigerian government actors in respect of the conflict.

This thesis thus contributes the following the existing literature:

a. A legal and constructivist analysis of the violence perpetrated by Boko Haram.

[349] OCHA, *Nigeria: Situation Report*, 4 Feb 2021. Available at: https://reports.unocha.org/en/country/nigeria/. Last accessed on 14 December 2021.
[350] Human Rights Watch, *Spiralling Violence: Boko Haram Attacks and Security Force Abuses in Nigeria*, (HRW, 2012).
[351] Amnesty International, *Nigeria: 'Our Job is to Shoot, Slaughter and Kill': Boko Harm's Reign of Terror in North East Nigeria*, (Amnesty International, 2015).

b. It applies a constructivist lens to the framing of the violence and this approach has previously not been used. The use of this approach is important because it allows for the consideration of different perspectives of the violence, different applicable laws and provides insight into the reasoning of national authorities. The ultimate impact of this approach is on the victims as this would increase protections for civilians and widen the scope of remedies of available to address harm done.
c. This research enhances existing literature on the relationship between terrorism and international humanitarian law by categorising state responses to the issue in two categories i.e. restrictivist and expansionist. This is integral to the thesis as the argument made is that the existence of terrorist acts or party to the conflict being designated as terrorist does not alter the application of IHL. Furthermore, it contributes by arguing that an inclusive reading of laws relating to both concepts would be beneficial to the adjudication of domestic terrorism cases, acknowledging that violations of international humanitarian law occurred and appropriately framing the issues.
d. Likewise, it analyses terrorism related judgments from Nigerian courts that have previously been unavailable in academic discourse or international fora. These judgments are key in illustrating the frame of terrorism adopted by the Nigerian justice sector and how fair labelling concerns of victims are not fully addressed.
e. Connected to the above contribution is the development of a model indictment sheet for cases emanating from the conflict in Nigeria. Such indictment sheet has not been presented before and would make it easier for government prosecutors to prosecute the full spectrum of crimes committed in the conflict including terrorism offences. The end goal is for victims and survivors to see an acknowledgement on harm experienced and likely accountability for said harm.
f. Lastly, it makes a case for the use of transitional justice mechanisms as a means of addressing accountability concerns of victims and provides suggestions of how these theoretical solutions can be practicalised. This is important as it widens the scope of responses available to national authorities to achieve justice and accountability ideals for victims.

1.5 Conclusion

This literature review has sought to present a positivist understanding of likely applicable laws that will be considered in this thesis. It sets a foundation for further analysis and critique of the law and its application. It highlights the gaps in existing literature as it relates to the Boko Haram Insurgency and expresses how it would fill the identified gaps. It also aims to introduce

themes that will be subject of further discourse such as the relationship between International Humanitarian Law and Terrorism, framing of the insurgency, the laws applicable dependent on the frame adopted, the relationship between International Humanitarian Law and International Criminal Law and Criminal Responsibility of insurgents and enforcement of violations of International Humanitarian Law and International Human Rights Law. The next chapter will further examine the relationship between IHL and Terrorism.

2. International Humanitarian Law and Prohibition of Terrorism- How the Gap can be Bridged?

International Humanitarian Law is the law that governs armed conflict. In recent times, the nature of conflicts has changed from international in nature to increasingly non-international in nature.[1] Even the nature of non-international armed conflicts has changed from struggles for self-determination, to civil wars and now conflict fuelled by radicalisation, climate change, socio-economic factors and political exclusion including terrorism related violence.[2] Conflicts in present times have become asymmetrical and with limited adherence to international humanitarian law or customary international humanitarian law.[3]

Terrorism is the term used to describe actions by extremist or politically motivated groups, which seek to cause significant damage without regard for life or property.[4] Prominent examples of such attacks include the September 11, 2001 bombings of the World Trade Centre and the Pentagon in the United States, the July 7 bombings in the United Kingdom, the November 2015 Concert attack in France and the Nice Bastille Day killings in July 2016 as well as the United Nations building bombing in Nigeria in 2010, to name a few. It has been argued that to designate individuals involved in the activity and the groups they belong to as terrorist is seen as a political decision and not a legal one.[5] Notwithstanding the acknowledgment of the changing nature of conflict and the similarities between actions captured under the umbrella term Terrorism and actions governed by International Humanitarian Law, there has been a divergence of opinion on whether conflicts fuelled by terrorist activities can be governed by International Humanitarian Law.

More so in Nigeria, since 2009, there has been persistent and consistent attacks of a terrorist nature fuelled by violent extremism and attributable to the terrorist group, Boko Haram. In their subsisting campaign, Boko Haram attacks have resulted in loss of territorial control by the Nigerian government in the North East region of Nigeria, countless loss of life and destruction

[1] Venturini G., "From International to Non-International Armed Conflicts: IHL and the changing realities in the nature of armed conflicts", 42nd Roundtable on Current Issues of International Humanitarian Law on the 70th Anniversary of the Geneva Conventions, 4-6 September 2019, at 1.
[2] ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to protection in armed conflict on the 70th Anniversary of the Geneva Conventions* (ICRC, October 2019).
[3] Geib R., "Asymmetric conflict structures" (2006) 88(864) *IRRC* 757, at 757.
[4] Saul B., "Definition of 'Terrorism' in the UN Security Council: 1985-2004" (2005) 4(1) *Chinese Journal of International Law* 141, at 165.
[5] Debarre A. S., "Countering Terrorism and Violent Extremism: The Risks for Humanitarian Action" in Tschudin A. et al, *Extremisms in Africa Volume 2* (Tracy McDonald Publishers, 2019), at 203.

of property. Most especially their campaign has claimed approximately 30,000 lives, millions displaced[6] and extirpated property worth $5.9 billion since 2009.[7]

An analysis of the correlation between terrorism and international humanitarian law was carried out by Ben Saul who argued that traditionally terrorist attacks were treated as a crime as opposed to conflict. He posited that there is a difference between sporadic attacks and terrorism of sufficient intensity to amount to an armed conflict; in the first instance he stated that IHL would not be applicable and in the second instance an argument can be made for the application of IHL should the necessary thresholds be crossed.[8] He argues that "there is no need for any special status of 'terrorist' in IHL, which would only serve to diminish existing humanitarian protections".[9] Sassoli equally argued that "in armed conflicts, any act which could reasonably be labelled as 'terrorist' is prohibited by IHL if it is linked with the armed conflict and committed on the territory of one of the states affected by the conflict."[10] Also, Gasser in his article highlighted portions of international instruments that reference terrorism and implied that certain IHL provisions are applicable to terrorism. His analysis however focused primarily the application on terrorism in relation to international armed conflict and does not factor in non-international armed conflict.[11] Other opinions particularly gleaned from the *travaux preparatoires* for the draft International Convention on Terrorism showed a reluctance of States to apply International Humanitarian Law provisions to terrorism related violence that could also be considered as a conflict.[12] This assertion is supported by Debarre who argues "however, States are increasingly applying a counterterrorism framework to acts of violence committed during situations of armed conflict, instead of IHL."[13]

Although there is existing literature on this relationship, it appears the debate is far from settled as case law emerges with rising situations of violence of this nature. Furthermore, it is noteworthy that existing literature on this subject often commences on the premise of terrorism with conversation on application of IHL appearing as an afterthought. The approach taken in

[6] Counter-Extremism Project, "Nigeria: Extremism and Counter-Extremism". Available on: https://www.counterextremism.com/countries/nigeria. Last accessed on 28 December 2021.
[7] Zak B., "Boko Haram Insurgency and How to Curb Future Terrorism in Nigeria" *Sahara Reporters*, 3 March 2018. Available on: http://saharareporters.com/2018/03/03/boko-haram-insurgency-and-how-curb-future-terrorism-nigeria-bin-zak. Last accessed on 28 December 2021. This figure is most likely higher than what is quoted as violence has persisted in the North East.
[8] Saul B., "Terrorism and International Humanitarian Law" in Saul B. and Elgar E., *Research Handbook on International Law and Terrorism*, (2014) Sydney Law School Research Paper No. 14/16, at 4-5.
[9] *Ibid*, at 16.
[10] Sassoli M., "Terrorism and War" (2006) 4 *J Int'l Crim Just* 959 at 967.
[11] Gasser H. P., "International Humanitarian Law, the Prohibition of Terrorist Acts and the Fight against Terrorism" (2001) 4 *Yearbook of International Humanitarian Law* 329.
[12] UNGA Sixth Committee (59th Session), "Report of the coordinator on the results of the informal consultations on a draft comprehensive convention on international terrorism, held from 25 to 29 July 2005" (12 August 2005) UN Doc A/59/894.
[13] Debarre, *supra* n.5, at 202.

this chapter begins on the premise of the analysis of the existence of a conflict with the political colouration of the term 'terrorist'. This thesis asserts that International Humanitarian Law applies to protracted violence fuelled by terrorism and more so in the Nigerian context. To arrive at this conclusion, this chapter will draw a direct correlation between terrorism and the acts that would cross the threshold of Non-International Armed Conflict (NIAC); to buttress this point case studies of the situations of violence in Afghanistan and Somalia, where IHL can be said to be applicable (which will form the basis of further analysis and juxtaposition against the Nigeria situation, will be used. The focus on NIAC is simply because the subject of this thesis is the violence perpetuated by Boko Haram, which primarily occurs in North East Nigeria and thus leads to the assumption of the greater probability of the existence of a NIAC in Nigeria.

This thesis will attempt to contribute to the debate on the relationship between IHL and counter-terrorism legal framework and conclude that it need not be an either/or relationship but that the two frameworks can co-exist. This thesis expresses the opinion that IHL is applicable where terrorism related violence rises to the intensity required for it to apply contrary to the stance of some States which favours the use of the sectoral legal framework on counter-terrorism.

2. 1 Definition

Defining the key terms in this chapter is integral to the analysis of the subject and the relationship between the two namely: International Humanitarian Law and Terrorism. As stated in chapter 1, IHL is the law governing armed conflict be it international or non-international. Terrorism on the other hand is trickier as there has been difficulty in getting a universal consensus on its definition. Stuurman states that "the definition of terrorism is a difficult concept to map and has been the source of contention in academia and policy for several years now."[14] Thus, there are a variety of definitions provided in several literature and international instruments as to what could amount to terrorism. This is already captured in Chapter 1.

Literature shows the difficulty in defining the term terrorism, as what is however available is an array of what may constitute "an act of terrorism". This may or may not be a deliberate act by States to ensure that terror attacks are treated as isolated events and not constituting part of an armed conflict. This can be seen in the *travaux preparatoires* of the committee in charge

[14] Stuurman Z., "Terrorism as Controversy: The Shifting Definition of Terrorism in State Politics", *E-International Relations*, 24 September 2019. Available at: https://www.e-ir.info/2019/09/24/terrorism-as-controversy-the-shifting-definition-of-terrorism-in-state-politics/. Last accessed on 28 December 2021.

of drafting the international convention. From these documents there is an understanding that States are unwilling to have the Terrorism Convention overlap with International Humanitarian Law. For instance, the Hashemite Kingdom of Jordan suggested a version of a draft Article 18 that would "create a clear delimitation between acts governed by international humanitarian law and acts covered by the comprehensive convention."[15] It is this reasoning that brings up the question as to the relationship between terrorism and International Humanitarian Law.

2.2 Prior Application of International Humanitarian Law to Terrorism Related Conflict

To aid the analysis of the relationship between these two terms, it may be helpful to review some case studies showing the correlation between the two concepts. It is important to note that there have been a number of armed conflicts with terrorism links wherein international humanitarian law was applicable such as in Iraq, Afghanistan, Yemen, Sri Lanka or Somalia. However, the case studies have been narrowed down to Afghanistan and Somalia to buttress my argument. Central to this choice is the understanding that "not all armed groups are terrorist and not all terrorist groups are armed groups in the IHL sense of the term."[16] These conflicts have been chosen because they have the key elements required to prove my thesis being that actions that can be adjudged to fall under the umbrella of terrorism, perpetuated by group designated as terrorist can rise to the level of being governed by international humanitarian law. In addition, these groups operative in both States are guided by radical extremist ideology, similar to Boko Haram. These situations of violence are also of importance as parts of violence have been described as a non-international armed conflict perpetuated by non-state actors who have been adjudged to be terrorist.

2.2.1 Afghanistan

Following the 9/11 attacks in the United States, the United States led coalition waged a fight against terrorism, specifically targeting Al-Qaeda and the Taliban. ICRC states that "specific aspects of the fight against terrorism launched after the attacks against the United States on 11 September 2001 amount to an armed conflict as defined under IHL…The war waged by the US-led coalition in Afghanistan that started in October 2001 is an example."[17] It is however argued that the involvement of the US makes the conflict international in nature.

[15] UNGA Doc A/59/894, *supra* n.12, at 5.
[16] Sassoli M., "Legal Qualification of the Fight against Terrorism" in Proceedings of the Bruges Colloquium on Terrorism, Counter-Terrorism and International Humanitarian Law, 17th Bruges Colloquium, 20-21 October 2016, at 48.
[17] ICRC blog, "What does humanitarian law say about terrorism?" 14 August 2017. Available at: http://blogs.icrc.org/ilot/2017/08/14/humanitarian-law-say-terrorism/. Last accessed on 28 December 2021.

Afghanistan is a country that has been besieged with conflict for decades. The conflict in Afghanistan is best understood in stages with varying actors. The Afghan government has been supported by the United States in responding to threats posed by the Taliban, Al-Qaeda and other armed groups such as Islamic State-Khorasan. In addition to the conflicts directly impacting and involving the Afghan State, there is an ongoing armed conflict between the two non-state actors- Taliban and Islamic State-Khorasan.[18] Each of these conflicts can be said to have some element of International Humanitarian Law applicable, however, this is more apparent in the international setting with the involvement of external states such as the United States. However, for the purpose of analysis, emphasis will be on the conflict between the Afghan State and the Taliban.

Firstly, it is important to determine whether the Taliban can be considered as a terrorist organisation. It can be argued that the Taliban as a group has not been globally accepted as a terrorist organisation especially with the United States failing to designate it as such. This position is however not in consonance with the designation by Japan[19], Canada[20], Russia[21]. Although not classified by the United Nations as such, the Security Council included the Taliban in the groups subject to the sanctions regime pursuant to Security Council Resolution 1267 (1999) and Resolution 1373 (2001), wherein the Taliban is listed alongside Al-Qaeda, a popularly known terrorist organisation. Notwithstanding the foregoing, although not formally designated as a terrorist organisation by the United States, the Taliban is represented on the sanctions list by key individuals in its network such as Abdul Samad Sani, Abdul Qadeer Basir Abdul Baseer, Hafiz Mohammed Popalzai and Maulawi Inayatullah.[22] This thesis therefore proceeds on the presumption that the Afghan Taliban are a terrorist organisation and aligns itself with the views of Canada and Japan as well as views inferred from Security Council Resolutions.

As said in the previous chapter, in order to determine whether a conflict can be categorised

[18] Geneva Academy, Rule of Law in Armed Conflicts (RULAC), "Non-International Armed Conflict in Afghanistan". Available at: http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-afghanistan#collapse3accord. Last accessed on September 26, 2018.
[19] Japanese Public Security Intelligence Agency, "International terrorist organizations overview and trends of terrorist organisations in the world". Available at: http://www.moj.go.jp/psia/ITH/organizations/index.html. Last accessed on September 26, 2018.
[20] Public Safety Canada, "Currently listed entities". Available at: https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx. Last accessed on September 26, 2018.
[21] Federal Security Service of the Russian Federation, "A single federal list of organizations, including foreign and international organizations recognized as terrorist in accordance with the legislation of the Russian Federation (as of June 2, 2017). Available at: http://www.fsb.ru/fsb/npd/terror.htm. Last accessed on September 26, 2018.
[22] U.S. Department of the Treasury, "Treasury Sanctions Taliban and Haqqani Network Financiers and Facilitators". Available at: https://home.treasury.gov/news/press-releases/sm0265. Last accessed on September 26, 2018; US Executive Order 13284 of January 23, 2003.

or a determination made as to if the threshold for application of IHL has reached the threshold of a non-international armed conflict, two test will need to be passed, firstly that the level of armed violence is at a certain degree of intensity that goes beyond internal tensions; and secondly that the non-state actor has a degree of organisation.[23]

It is obvious that the intensity of the conflict in Afghanistan is evidenced by the persistent nature of the conflict. This intensity is documented by the United Nations Assistance Mission in Afghanistan (UNAMA). In their report they state that there is "protracted ground fighting, the battlefield permeated civilian sanctuaries that should be spared from harm, with suicide attacks in mosques; targeted attacks against district centres, bazaars and residential homes; and the use of schools and hospitals for military purposes."[24] To buttress this point the Geneva Academy also documenting the conflict in Afghanistan states that "during 2016, the Taliban have launched major attacks on important cities, such as the regional capitals of Helmand and Kunduz. In 2017, smaller attacks are carried out almost daily, including in the capital Kabul."[25] Furthermore, the UNAMA report shows that in 2016, there were 11,418 civilian casualties and as of 2009 there were 70 civilian casualties.[26] The argument that the intensity of attacks in Afghanistan meets the threshold of NIAC is supported by RULAC, who surmise that "in light of the frequency of armed confrontations, the number of casualties, and the number of people displaced by the fighting, the required threshold of intensity of violence is met."[27]

Another evidence of the intensity of the conflict in Afghanistan is the use of sophisticated weaponry and the nature of the attacks. Investigations carried out revealed that the Taliban have in their possession RPG7 launchers, semi-automatic weapons as well as variations of the PK machine guns.[28] ICRC reports that in Afghanistan there are "night raids, air strikes, suicide bombs and improvised explosive devices" detonated.[29] This position is also supported by UNAMA reports which state that "the use of improvised explosive device tactics (including suicide and non-suicide attacks) caused 2,290 civilian casualties [as well as] aerial strikes by pro-government forces, recording 353 civilian casualties".[30]

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[23] *Prosecutor v Tadić* (Opinion and Judgment, Trial Chamber) IT-94-1-T (7 May 1997); Geneva Academy, Rule of Law in Armed Conflicts (RULAC), *supra* n. 18.
[24] UNAMA and OHCHR, *Afghanistan: Protection of Civilians in Armed Conflict*, Annual Report (UN, 2016) at 3.
[25] Geneva Academy, Rule of Law in Armed Conflicts (RULAC), *supra* n. 18.
[26] UNAMA and OHCHR, *supra* n.24, at 3.
[27] Geneva Academy, Rule of Law in Armed Conflicts (RULAC), *supra* n. 18.
[28] Chivers C. "What's Inside a Taliban Gun Locker?", NY Times At War Blog, 15 September 2010. Available at: https://atwar.blogs.nytimes.com/2010/09/15/whats-inside-a-taliban-gun-locker/. Last accessed on 26 Sep. 2018.
[29] International Committee of the Red Cross, "The ICRC in Afghanistan – Overview", *ICRC*, 2 September 2016. Available at: https://www.icrc.org/en/document/icrc-afghanistan-overview. Last accessed on 26 Sep. 2018.
[30] Report of the Secretary General, "The situation in Afghanistan and its implications for international peace and security" (10 September 2018) UN DOC A/73/374- S/2018/824. The information is in respect to information for the reporting period.

Equally, on the issue of organisation, it can be said that the Taliban is one of the most organised non-state actors in the world. Case law shows that in order to prove organisation, the key criteria is the ability to control territory, other indicators include the "existence of a command structure and disciplinary rules and mechanisms, the ability to procure, transport, and distribute arms, the ability to plan, coordinate and carry out military operations, the ability to negotiate and conclude agreements"[31]. An analysis chronicling Afghanistan history of violence posits that in 1997 the Taliban controlled two thirds of the country; by November 2016, 14 provinces were under their control and others were disputed with the government.[32] Furthermore, an analysis done by RULAC shows that despite skirmishes within the group which resulted in a splintering of the wider Taliban group, the main Taliban group has retained a structure with a leadership figure- Haibatullah Akhunzada- as well as appointed governors for Afghanistan and developed a military command structure."[33] The Taliban have also shown the ability to launch to large scale attacks on big cities.[34] The organisational capacity of the Taliban is illustrated by their ability to speak with one voice and wield negotiating power as seem with the peace talks which held between the Taliban and the Afghan government in 2015 in Qatar.[35]

Although there appears to be consensus as to the application of International Humanitarian Law, there has been controversy as to the classification of the conflict in Afghanistan. As mentioned in chapter 1, the presence of foreign states or multinational forces could have an impact on the classification of a conflict. It was surmised that where there is overall control over an armed group by a foreign state, it can be said that there is an international armed conflict. It was further noted that where a foreign state clashes with government forces of the home state, the law relating to IAC is applicable and if the clash is with a non-armed group, that relating to NIAC applies. In addition, it was argued that where consent is given by the home state to the intervening state against a non- state armed group, the rules relating to NIAC applies. On one hand, there is the argument that the conflict is international in nature with the involvement of NATO and the persistent presence of United States forces in Afghanistan. On the other hand, there is the view that since these forces are or were present (in the case of NATO forces) in Afghanistan with the permission of the Afghan government, it thus cannot be classified as an international conflict. This second view is supported by the United Nations Assistance Mission in Afghanistan (UNAMA), who posit that "the armed conflict

[31] UNAMA and OHCHR, *supra* n.24,
[32] BBC, "Afghanistan profile- Timeline", 9 September 2019. Available at: https://www.bbc.com/news/world-south-asia-12024253. Last accessed on 28 December 2021.
[33] Geneva Academy, Rule of Law in Armed Conflicts (RULAC), *supra* n. 18.
[34] *Ibid*.
[35] *Ibid*.

in Afghanistan is a non-international armed conflict between the Government of Afghanistan and its armed forces (i.e. Afghan national security forces supported by international military force) and non-State armed opposition groups"[36] such as the Taliban. The same resolution was also reached by other key international organisations and institutions such as the office of the Prosecutors of the International Criminal Court[37] and International Committee of the Red Cross. This is reinforced by the view that there is an existing NIAC between the Taliban and Afghan Government with the support of multinational forces (NATO) is still considered a NIAC. On the effect of the presence of United States troops, it has been argued that this does not change the nature of the conflict to international, as the United States troops were acting in support of the Afghan forces against the Taliban. According to RULAC, "over the past 20 years, the US had been party to a NIAC against the Taliban."[38] More clearly, the NIAC was between "the…governments of Afghanistan led by Ashraf Ghani – supported by US troops – and the Taliban – an organised armed group."[39] From the foregoing, it can be said that the conflict in Afghanistan is primarily borne out of violence between the Afghan government and Taliban. Also, this brief analysis makes clear that the indicators of duration, number of casualties, intensity to name a few, are present.

As to the laws that are applicable in the non- international armed conflict in Afghanistan, it is arguable that both Common Article 3 and Additional Protocol II are applicable. On the applicability of Common Article 3, the ICTY in *Tadić* found that there must be a state of protracted armed violence and the non-state party must have a certain level of organisation.[40] Bellal et all stresses this point in an article which argues that "by 2010, the Taliban were said to be holding sway in the south and east of the country, as well as in pockets of the west and north, and 'in 2009 started launching increasingly brazen attacks in urban areas."[41] On the issue of organisation, it is found that "the four main groups – the Taliban, the Haqqani network, Hezb-e-Islami, and Al Qaeda (in Afghanistan)–have each demonstrated sufficient organisation to be bound directly by international humanitarian law."[42] Particularly as it relates to the Taliban "the issuance of what is in effect a military code of conduct is evidence of the existence of command structure and disciplinary rules and mechanisms within the group."[43]

[36] BBC, *supra* n.32.
[37] International Criminal Court, *Report on Preliminary Examination Activities* (2017)
[38] Geneva Academy, Rule of Law in Armed Conflicts (RULAC), "Non-International Armed Conflict in Afghanistan. Available on: https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-afghanistan. Last accessed on 16 December 2021.
[39] Geneva Academy, Rule of Law in Armed Conflicts (RULAC), "Revised Classification of the Armed Conflicts in Afghanistan following US Withdrawal", 21 September 2021. Available on: https://www.rulac.org/news/revised-classification-of-the-armed-conflicts-in-afghanistan-following-us-w. Last accessed 16 December 2021.
[40] *Prosecutor v Tadić* (Judgment, Appeals Chamber) IT-94-1-A (15 July 1999).
[41] Bellal A. et al. "International law and armed non-state actors in Afghanistan" (2011) 93 (881) *IRRC* 47, at 79.
[42] *Ibid*.
[43] *Ibid*.

Although there are arguments that posit that Common Article 3 does not apply to armed non-state actors, this view is debunked by the case of *Nicaragua*, where the ICJ confirmed the applicability of Common Article 3 to the Contras.[44] Furthermore, "state practice, international case law, and scholarship, have, however, confirmed that Common Article 3 applies to such Armed Non-State Actors directly."[45]

It is further debatable whether Additional Protocol II is applicable in Afghanistan considering it was only acceded to in December 2009. The Protocol requires that the non-state party have responsible command, exercise control to enable them carry out sustained and concerted military operation and to implement the protocol.[46] The evidence of their issuance of code of conducts fulfils the requirement of responsible command. As shown above the evidence documenting the intensity and sustain level of casualties suffered, it is safe enough to posit that the second criterion has been met. Lastly on the implementation of the protocol, it is argued that it is sufficient to show that there is capacity to realistically apply the protocol and thus it is sensible "to conclude that Additional Protocol II is indeed applicable to the conflict in Afghanistan, at the very least to the hostilities between the armed forces of the Government of Afghanistan and the Taliban, given that all the requisite criteria appeared to be met as of early 2011."[47] This view is equally buttressed by the War Report, which found that "this conflict meets the threshold for the application of the 1977 Additional Protocol II."[48] Similar views are captured in the United Nations Assistance Mission in Afghanistan report on protection of civilians in armed conflict[49] and by Bellal et al who state thus, "Additional Protocol II is indeed applicable to the conflict in Afghanistan."[50]

2.2.2 Somalia

Another prime example of the application of International Humanitarian Law to terrorism fuelled conflict is Somalia. Somalia as a nation has been affected by the lack of effective government since the overthrow of President Siad Berre in 1991. Since then, there have been clashes between warlords and clans.[51] Despite several attempts at establishing a transitional government, none have been able to take effective control of the entire State. Prominent of

[44] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14.
[45] *Ibid*.
[46] Second Protocol Additional to the Geneva Conventions of 1949, 1977, Art.1(1).
[47] Bellal et al, *supra* n.41, at 58.
[48] Bellal A.(ed), *The War Report. Armed Conflicts in 2016*, (Oxford University Press, 2017), at 51.
[49] UNAMA and OHCHR, *Afghanistan: Protection of Civilians in Armed Conflict*, Annual Report (UN, 2014), at xii.
[50] Bellal A.(ed), *The War Report. Armed Conflicts in 2014* (Oxford University Press, 2015), at 58.
[51] Dersso S. A., "The Somalia Conflict Implications for peacemaking and peacekeeping efforts" (2009) *ISS Paper* 198; BBC News, "Somalia profile- Timeline" 4 January 2018. Available at: https://www.bbc.com/news/world-africa-14094632. Last accessed on 28 December 2021.

these clashes is the conflict between the Somali government and Harakat al-Shabaab al-Mujaahidiin popularly known as Al-Shabaab. In respect of this conflict one could say there is a consensus that there is a non-international armed conflict in Somalia.

The main phase of the conflict in Somalia happened in 2007 with the emergence of Al-Shabaab. Crisis Group describes the group as "the only organisation with the capability, motive and experience to pull off anything on this scale."[52] According to the Group, "conclusive "defeat" against Al-Shabaab remains elusive."[53] Notwithstanding the fact that "AMISOM has made significant inroads in reversing Al-Shabaab's territorial control, but it is overstretched and struggles to fight a non-conventional war against a resilient insurgency that feeds off local conflicts and, frequently, the heavy-handed tactics of its enemies, whether African, Somali or U.S. forces."[54]

Furthermore, Al-Shabaab is not merely considered an armed group but is also classified as a terrorist organisation. This status is recognised by the United Nations Security Council where it describes the group as a "transnational terror threat"[55]. This view is supported by AMISOM that describes it as an "Al Qaeda-affiliated terror group"[56]. Al-Shabaab has been designated as a terrorist entity by a number of western nations, notably, United States in 2008, Australia in 2009, Canada, New Zealand, the United Kingdom as well as the United Nations Security Council in 2010.[57] The United States in section 219 of the Immigration and Nationality Act defines a Foreign Terrorist Organisation or a Specially Designated Global Terrorist as one

[52] Crisis Group, "Managing the Disruptive Aftermath of Somalia's Worst Terror Attack", 20 October 2017. Available at: https://www.crisisgroup.org/africa/horn-africa/somalia/b131-managing-disruptive-aftermath-somalias-worst-terror-attack. Last accessed on 3 October 2018.
[53] Crisis Group, *Somalia: Al-Shabaab it will be a long war*, 26 June 2014, at 1. Available at: https://www.crisisgroup.org/africa/horn-africa/somalia/somalia-al-shabaab-it-will-be-long-war. Last accessed on 3 October 2018.
[54] Crisis Group, *supra* n.52.
[55] UNSC, "Report of Monitoring Group on Somalia and Eritrea pursuant to Security Council Resolution 2244 (2015)" (2016) UN Doc S/2016/919.
[56] African Union Mission in Somalia. Available at: http://amisom-au.org/mission-profile/military-component/. Last accessed on 3 October 2018.
[57] US Department of State, "Bureau of Counterterrorism: Foreign Terrorist Organisation". Available at: https://www.state.gov/foreign-terrorist-organizations/. Last accessed on 28 December 2021; Australian National Security, "Listed terrorist organisations". Available at: https://www.nationalsecurity.gov.au/what-australia-is-doing/terrorist-organisations/listed-terrorist-organisations. Last accessed on 28 December 2021; New Zealand Police, "Designated terrorist entities". Available at: https://www.police.govt.nz/advice/personal-community/counterterrorism/designated-entities?nondesktop. Last accessed on 28 December 2021; Public Safety Canada, "Currently listed entities". Available at: https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx. Last accessed on September 26, 2018; UK Home Office, "Policy Paper: Proscribed terrorist groups or organisations", 26 November 2021. Available at: https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2/proscribed-terrorist-groups-or-organisations-accessible-version. Last accessed on 28 December 2021; United Nations Security Council, "Al-Shabaab". Available at: https://www.un.org/securitycouncil/sanctions/751/materials/summaries/entity/al-shabaab. Last accessed on 28 December 2021.

which "poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States."[58]

As said above to determine whether there is a non-international armed conflict, the intensity of violence and the organisation of the armed group needs to be reviewed. According to several reports especially from International Crisis Group (ICG) shows that there are still continued attacks against the military and government officials in Mogadishu and other rural area. In April 2017, ICG documented a suicide bombing that killed at least 29 people.[59] Furthermore there were reports in October 14, 2017 of twin truck bombings in Mogadishu killed towards of 300 people which ICG attributes to Al-Shabaab. They also argue that "Al-Shabaab remains a resilient force that undertakes suicide bombings, targeted assassinations, ambushes and sweeps across south-central Somalia."[60] Reports cataloguing the incidents of violence in Somalia show that of all the countries in Africa, Somalia remains one of the most active. Specifically it is documented that Somalia has almost three times the violence than in other States, there were reportedly approximately 740 armed, organised events in 2016 with the highest total number of casualties.[61] According to AMISOM reports, "Al-Shabaab has retained the operational capacity to launch large-scale attacks against African Union Mission in Somalia (AMISOM) contingents… [and have] continued to launch complex attacks in Mogadishu."[62] Other examples of these attacks include a car bombing in Mogadishu that killed at least 81 people[63] and wounded about 125 people[64] in December 2019; a mortar attack around the Mogadishu airport that killed about 7 people in October 2019;[65] attacks on the UN

[58] Section 1(b) of Executive Order 13224 of July 2, 2002, and Executive Order 13284 of January 23, 2003. https://www.gpo.gov/fdsys/pkg/FR-2008-03-18/pdf/E8-5444.pdf. Last accessed 3 October 2018.
[59] Crisis Group, "Somalia", April 2017. Available at: https://www.crisisgroup.org/crisiswatch/april-2017#somalia. Last accessed: 3 October 2018.
[60] Crisis Group, "Somalia: Transforming Hope Into Stability", 30 April 2017. Available at: https://www.crisisgroup.org/africa/horn-africa/somalia/somalia-transforming-hope-stability. Last accessed on 3 October 2018.
[61] Armed Conflict Location & Event Data Project, "Real-Time Analysis of African Political Violence" (2017) 55 *Conflict Trends* http://www.acleddata.com/wp-content/uploads/2017/02/ACLED_Conflict-Trends-Report-No.55-February-2017_pdf..pdf Last accessed on 3 October 2018.
[62] UNSC, *supra* n.55.
[63] Al Jazeera, "Al-Shabab claims deadly attack in Somalia's Mogadishu", *Al Jazeera*, 31 December 2019. Available at: https://www.aljazeera.com/news/2019/12/31/al-shabab-claims-deadly-attack-in-somalias-mogadishu. Last accessed on 26 December 2021.
[64] Guled A., "Somalia bombing kills dozens; airstrikes target militants", *AP News*, 30 December 2019. Available at: https://apnews.com/article/somalia-ap-top-news-mogadishu-mohamed-abdullahi-mohamed-international-news-6f7839c0cff441bee9beef6ac2264519. Last accessed on 26 December 2021.
[65] Maruf H., "Al-Shabab Mortar Attacks Hits Area Around Mogadishu Airport", *VOA News*, 13 October 2019. Available at: https://www.voanews.com/a/africa_al-shabab-mortar-attacks-hits-area-around-mogadishu-airport/6177533.html. Last accessed on 26 December 2021.

compound in March 2020;[66] attacks on hotels in 2020;[67] and suicide bombings in 2021[68]. The above are only a few instances that show that the violence is still intense in Somalia, most of which is attributable to the terrorist islamist organisation- Al-Shabaab.

Also, in looking at the issue of organisation of Al- Shabaab, one can argue that one of the key indicators of organisation of a group is their level of control of territory. This can be seen in Somalia's case as it controlled significant parts of central and southern Somalia in 2009-2010. Although they lost control of some major towns and cities, Al-Shabaab continues to control many rural areas. Crisis Group reports that Al-Shabaab "controls tracts of rural south central Somalia and supply routes between towns, pursues a steady campaign of car bombings, assassinations and other attacks in Mogadishu and has targeted and in some cases overrun isolated AMISOM and Somali army bases."[69] There have also been reports that "Al-Shabaab recently recaptured several areas in the Shabelle Valley, including the town of Bariire, only 45km outside Mogadishu and on a major route to the capital."[70] It can also be argued that they also fulfil the requirement of a command structure. Al-Shabaab, is currently led by Ahmad Umar under whose leadership, enforcement mechanisms have been put in place to address persons who contravene the law, one of such mechanisms is the use of investigations.[71] Furthermore, one can argue that Al-Shabaab has the ability to negotiate and conclude agreements. This can be seen with its convening of local peace talks in 2016.

There appears to be a consensus from the international community that there is a non-international armed conflict in Somalia. This is evidenced by the United Nations Security Council resolution authorising AMISOM to intervene which references international humanitarian law.[72] Also, it is illustrated by the call by ICRC "to all forces involved to respect international humanitarian law and to ensure respect for its rules by all of their members."[73]

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[66] Dhaysane M., "Somalia: Al-Shabaab attacks UN compound in capital", *Anadolu Agency*, 19 March 2020. Available at: https://www.aa.com.tr/en/africa/somalia-al-shabaab-attacks-un-compound-in-capital/1771163. Last accessed on 26 December 2021.

[67] Al Jazeera, "Somalia: Over a dozen killed in hours-long Mogadishu hotel siege", *Al Jazeera*, 17 August 2020. Available at: https://www.aljazeera.com/news/2020/8/17/somalia-over-a-dozen-killed-in-hours-long-mogadishu-hotel-siege. Last accessed on 26 December 2021; BBC News, "Somalia al-Shabab militants attack Afrik hotel in Mogadishu", *BBC News*, 1 February 2021. Available at: https://www.bbc.com/news/world-africa-55879679. Last accessed on 26 December 2021.

[68] Barise H., "At least 7 killed in suicide bombing in Somalia's capital", *AP News*, 28 April 2021. Available at: https://apnews.com/article/suicide-bombings-bombings-mogadishu-africa-somalia-95843fafcdebe67c15b380db548bf88a; Al Jazeera, "Suicide bomber kills at least eight in Somali capital", *Al Jazeera*, 25 September 2021. Available at: https://www.aljazeera.com/news/2021/9/25/suicide-bomber-kills-at-least-eight-in-somali-capital. Last accessed on 26 December 2021.

[69] Hogendoorn E. J., "Somalia's Current Security and Stability Status", *Crisis Group*, 14 March 2018.

[70] Crisis Group, *supra* n.52.

[71] *Ibid*.

[72] UNSC Res 1772 (20 August 2007) S/Res/1772.

[73] Henckaerts JM. and Doswald-Beck L. (ed.), *Customary International Humanitarian Law, Volume II: Practice Part 1* (Cambridge University Press, 2009), at 3178, para. 139; ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

This view is equally supported by reports by Human Rights Watch and the War Report 2016.[74] The application of international humanitarian law in Somalia is equally evidenced by the acknowledgment of "violations of international humanitarian law affecting civilians involving targeting of civilians" by AMISOM. By their report

> trends in violations of international humanitarian law [can be seen] in terms of the intensity and scope of Al-Shabaab attacks, violence against civilians by international forces (including as a result of the use of aerial weaponry) and the impact of armed conflict associated with political and inter-clan disputes frequently involving federal and regional forces and local militias. Targeted killings of civilians by Al-Shabaab included government officials, civil servants, parliamentarians, international agency staff, civil society activists and journalists.[75]

Like in Afghanistan there has been foreign intervention in Somalia with the presence of 22,000 African Union Mission in Somalia troops with backing from the United Nations Security Council. There has also been intervention by the Ethiopian and Kenyan armed forces as well as airstrikes by the United States government. These actions raise the question of whether the involvement of these parties changes the nature of the conflict from a non-international armed conflict to an international armed conflict. The argument is buttressed by evidence of US airstrikes as well as the spillage of the insurgency into Kenyan territory and the engagement of Kenya troops. This can be seen with the bombing in the Westgate Mall bombing in Nairobi in 2013 and the massive attack on a Kenyan military base in Somalia's el-Ade town in January 2016, killing about 180 soldiers.[76] However, there is consensus that with regards to Somalia valid consent appears to be present with nothing to suggest fraud or coercion.[77] In addition, it can be said that these forces joined in the fight against the insurgency at the behest of the Somali government. Thus, stemming from the analysis in Chapter 1, it can be said that the presence of the foreign states does not alter nature of the conflict between the Somali government and Al- Shabaab. Furthermore, there is no evidence of a foreign state controlling the actions of Al- Shabaab to also alter the classification of the conflict as a NIAC.

There appears to be a consensus from the international community that there is a non-international armed conflict in Somalia. This is evidenced by the United Nations Security Council resolution authorising AMISOM to intervene which references international humanitarian law.[78] Also, it is illustrated by the call by ICRC "to all forces involved to respect international humanitarian law and to ensure respect for its rules by all of their members."[79]

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[74] Human Rights Watch, *Shell Shocked: Civilians under siege in Mogadishu* (HRW, 2007), at 97; Bellal, *supra* n. 50, at 233.
[75] Human Rights Watch, *Ibid*, at 97.
[76] BBC News, "Who are Somalia's al-Shabaab?", 22 December 2017. Available at: https://www.bbc.com/news/world-africa-15336689. Last accessed on 3 October 2018.
[77] Bryne M, "Consent and the use of force: an examination of 'intervention by invitation' as a basis for US drone strikes in Pakistan, Somalia and Yemen" (2016) 3(1) *Journal on the use of force and international law* 97, at 108**;** Human Rights Watch, *supra* n.74, at 97.
[78] UNSC, *supra* n.72.
[79] Henckaerts and Doswald-Beck, *supra* n.73.

Additionally, a Human Rights Watch report posits that Common Article 3 is applicable in the Somalia case.[80] It argues that since Somalia is not a party to the Additional Protocols, Additional Protocol II it is not directly applicable. Nevertheless, it is the position that provisions of the protocols "have been recognised by states to be reflective of customary international law."[81] From state practice, it can be said that the rules as contained in Additional Protocol II are applied in Somalia. This averment is supported by Somalia's submission to the Human Right Council in 2011 wherein it states, "the Government is aware that many provisions of AP II represent customary IHL rules and therefore apply to the situation in Somalia."[82] Thus it can be said that its application is because of attainment of customary status and not as a treaty obligation.[83]

Having reviewed instances where International humanitarian law has applied to the conduct of terrorist groups and terrorism fuelled violence. It is now important to look at the literature on the relationship between the two concepts- International Humanitarian Law and Terrorism.

2.3 The Relationship between International Humanitarian Law and Terrorism

There are debates on the ability of these two legal frameworks to co-exist and this leads to differing views on the fundamental question of whether International Humanitarian Law applies to Terrorism and terrorism related violence. For the purpose of this research the varying approaches would be referred to as the restrictivist and expansionist approach. Simply put the restrictivist approach argues that acts of terrorism cannot be contemplated under International Humanitarian Law while the expansionist view posits that if the terrorist acts meet the threshold of laws applicable to conduct of hostilities, then IHL ought to apply. In order to figure out how to bridge the gap between these concepts, a detailed look at these approaches is required.

The restrictivist approach posits that the laws applicable to armed conflict ought not to apply to terrorism and ought to be dealt with under the purview of international covenants related to terrorism and domestic terrorism legislation. It contends that States have an obligation and right to defend citizens against terrorist attacks and this arrest and detention of persons may be done in accordance with national laws.[84] This view is shown by the increasing "tendency among States to consider any act of violence carried out by a non-State armed group in armed

[80] Human Rights Watch, *supra* n.74.
[81] *Ibid*, at 97; ICRC Blog, *supra* n.17.
[82] Henckaerts and Doswald-Beck, *supra* n.73, Rule 87; UN Human Rights Council, "National Report: Somalia", UN Doc. A/HRC/WG.6/11/SOM/1, 11 April 2011, § 75.
[83] Human Rights Watch, *supra* n.74, at 97.
[84] *Ibid*.

conflict as being "terrorist" by definition, even when such acts are in fact lawful under IHL."[85] In advancing this viewpoint States argue that **"**IHL itself does not contain terrorism as an autonomous crime, but (only) prohibits terrorist acts"[86] and as such cannot be used to suppress terrorism. Ferraro expresses similar thoughts when he states "it is important to remember that even if IHL applies to acts carried out by non-State armed groups designated as terrorists, States retain at the domestic level the leeway for criminalising actions undertaken by the former during non-international armed conflict- be they lawful or unlawful under IHL - in the absence of combatant privilege and immunity in such situations."[87]

Underlying this restrictivist thinking is the fear of conferring legitimacy to 'terrorist' acts- committed either in the context of an armed conflict or otherwise. The fear being that the application of IHL, "would affect the status of the fighters and offer them additional protection."[88] However, Hampson argues this reasoning is based in perception not reality as "it is absolutely clear that the applicability of CA 3 and Additional Protocol II does not affect the status of the fighters. Nor does it affect the legitimacy of the conflict."[89] To reiterate Common Article 3 says "the application of the preceding provisions shall not affect the legal status of the Parties to the conflict." Another driving point for this view is that both bodies of laws have different objectives. Ferraro makes a similar comment when he states that they (the laws guiding armed conflict and counter-terrorism efforts) are not the same. It is said that the legal framework guiding armed conflict and counter terrorism have the similar core objective of protecting civilians but different rationales and assumptions. Debarre makes a similar assertion by stating that "in theory, counterterrorism and IHL are not contradictory frameworks. In fact, at their core they both have the protection of civilian populations. They also, however, have fundamentally different underlying rationales and assumptions, and each has evolved in a different manner."[90] The ICRC contributes to this line of thought by arguing that "they have distinct rationales, objectives and structures."[91] Illustrating this is the view that IHL regulates both lawful and unlawful acts of violence, whereas under terrorism all is unlawful. Also, under

[85] ICRC, "Applicability of IHL to Terrorism and Counter-Terrorism", 1 October 2015. Available at: https://www.icrc.org/fr/node/14180. Last accessed 28 December 2021.
[86] Ambos K. et al, "Some Reflections on the Legal Treatment of Terrorism: Marking the 11th Seminar of the Latin American Study Group on International Criminal Law", *EJIL Talk,* 2 Dec 2014.
[87] Ferraro T., "Interaction and Overlap between counter-terrorism legislation and International Humanitarian Law" in Proceedings of the Bruges Colloquium on Terrorism, Counter-Terrorism and International Humanitarian Law, 17th Bruges Colloquium, 20-21 October 2016, at 29.
[88] Hampson F., "The Conduct of Hostilities versus the Law Enforcement Paradigm" in Proceedings of the Bruges Colloquium on Terrorism, Counter-Terrorism and International Humanitarian Law, 17th Bruges Colloquium, 20-21 October 2016, at 89.
[89] *Ibid*.
[90] Debarre, *supra* n.5, at 202.
[91] ICRC, *supra* n.85.

IHL, there appears to be an equality of parties but under terrorism laws these do not have such equality.[92]

It can be argued that this approach can be explained through the prism of the constructivist school of thought. Constructivists are of the view that "interests are not simply given and then rationally pursued but that social construction of actors identities is a major factor in determining interest."[93] Furthermore, they argue that "through interaction and communication, actors generate shared knowledge and shared understandings that become the background for subsequent interactions".[94] This view is evident in the restrictivist school of thought as although States are seen to be focused on national interest, there is a shared understanding that makes them reluctant to accept the application of international humanitarian law in situations of violence in their respective countries as it gives the perception of weakness as it seen as a threat to their sovereignty.

The drafting of conventions relating to the prohibition of terrorism have towed the line of the restrictivist school of thought by keeping the application of International Humanitarian Law separate from laws relating to terrorism. O'Donnell argues that although some of the anti-terrorism treaties such as the 1979 Convention against Hostage Taking and the 1997 Convention against Terrorist Bombings "contain provisions referring to international humanitarian law or concepts derived from it, most of them are exclusionary clauses designed to ensure that acts that in principle come within the scope of both international law and international law against terrorism are governed by one or the other."[95] This position is emphasised by the International Law Commission (ILC) in their commentary on the Draft Convention on the Prohibition of International Terrorisms.[96] O'Donnell emphasises this position when he argues that "many acts are classified as terrorist crimes only if they take place during an armed conflict but are not covered by humanitarian law."[97] Fundamentally the provisions are designed in such a way that "excludes acts that violate IHL as well as those that comply with it."[98] In addition, the working definition of acts of terrorism excludes "activities

[92] *Ibid*.
[93] Forster T., "International humanitarian law's old questions and new perspectives: On what law has to do with armed conflicts" (2016) 98(3) *IRRC* 995 at 1003; Brunnée J and Toope S., *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, Cambridge 2010), at 12.
[94] Brunnée and Toope, *Ibid*, at 12.
[95] O'Donnell D., "International Treaties Against Terrorism and the Use of Terrorism during armed conflict and by armed forces" (2006) 88 (864) *IRRC* 853, at 863.
[96] UNGA A/59/894, *supra* n.12.
[97] O'Donnell, *supra* n.95, at 872.
[98] *Ibid*, at 876.

of armed forces during an armed conflict, as those terms are understood under international humanitarian law."[99]

The limitation with this school of thought is that it lacks consistency. Most of the principles contained in Conventions which comprise International Humanitarian law, have been accepted as Customary International Humanitarian law. In one instance, Customary International Humanitarian law is exempted and in another its application is permissible.[100] This can be seen with the Convention on the Prohibition of Hostage Taking which provides that "in so far as States Parties to this Convention are bound under those conventions [the Geneva Conventions and Protocols I and II] to prosecute or hand over the hostage taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts."[101] According to O'Donnell, this exclusionary clause does not prevent the application of Customary International Humanitarian Law.[102] Conversely, Article 19(2) of the Convention on the Prohibition of Terrorist Bombings referenced international humanitarian law in general and thus is included in the exemption.[103] Furthermore, conferment of legitimacy fears are debunked by the fact that common article 3 does not confer legitimacy on belligerents.[104] Ferraro argues that "denial that non-State organised armed groups designated as terrorist could be party to a NIAC within IHL; this means putting into question not only IHL applicability but also, when applicability is accepted, shaking the foundations on which this body of law is built."[105] In my view although arguments canvassed by the restrictivist school of thought have some merit, inconsistencies leave room for the consideration of other schools of thought.

Conversely the expansionist view posits firstly that "where violence reaches the threshold of armed conflict, whether international or non-international, IHL is applicable."[106] It further argues that IHL does not provide a definition of 'terrorism', but prohibits most acts committed in armed conflict that would commonly be considered 'terrorist'.[107] It buttresses its point by advancing that "IHL specifically prohibits "measures" of terrorism and "acts of terrorism". Specifically, "Article 33 of the Fourth Geneva Convention states that "collective penalties and likewise all measures of intimidation or of terrorism are prohibited." Also, Article 4 of Additional

[99] *Ibid*.
[100] *Ibid*.
[101] Article 12 Convention against the Taking of Hostages 1979.
[102] O'Donnell, *supra* n.95, at 864.
[103] *Ibid*, at 865.
[104] Ferraro, *supra* n. 87.
[105] *Ibid*.
[106] ICRC, *International Humanitarian Law: Answers to your Questions* (ICRC, 2015), at 82.
[107] ICRC, *supra* n.17.

Protocol II prohibits "acts of terrorism" against persons not or no longer taking part in hostilities."[108] It has been advanced that they emphasise that "neither individuals, nor the civilian population may be subject to collective punishments, which, among other things, obviously induce a state of terror."[109] It is further argued that these provisions are a key element of IHL rules relating to the principle of military necessity.[110] Particularly, the above referenced provisions prohibit "attacks that specifically aim to terrorise civilians, for example campaigns of shelling or sniping of civilians in urban areas."[111] It can thus be said that "once an armed conflict exists, not only is the conduct of the parties to that conflict governed by IHL, but also any act (terrorist or otherwise) with a nexus to that conflict."[112] Furthermore, Policinski contends that "the upholding of humanitarian law during counter terrorism operation is key to the elimination of terrorism."[113] Ferraro buttressed this view by arguing that,

> in situations of armed conflict, it prohibits most acts that are criminalised as 'terrorist' in domestic legislation and international conventions specifically addressing terrorism. For instance, in armed conflict, IHL prohibits direct and deliberate attacks against civilians, based on the principle of distinction, which is a cornerstone of this body of law. It also prohibits indiscriminate attacks (such as bombing in civilian settings) and hostage taking, to name but a few examples. These prohibitions apply in both international armed conflict (IAC) and non-international armed conflict and are of a customary law nature as well.[114]

Debarre concurring with this view argues that,

> IHL provides a strong legal framework to deal with non-state actors that may also be designated as 'terrorists'. Indeed, it proscribes most acts that domestic legislation and international terrorism conventions criminalise as terrorist if committed in peacetime, such as attacks on places of worship, the taking of hostages, or direct attacks on civilians. These acts can be prosecuted as national or international crimes in domestic courts. IHL also includes specific rules on terrorism, including prohibiting acts or threats of violence of which the primary purpose is to spread terror among civilian populations.[115]

This position is also supported by case law as seen in *Boškoski and Tarčulovski*, where the ICTY found that "terrorist acts may be constitutive of protracted violence and that while isolated acts of terrorism may not reach the threshold of armed conflict, when there is protracted violence of this type, especially where they require the engagement of the armed forces in hostilities, such acts are relevant to assessing the level of intensity with regard to the existence of an armed conflict."[116] McKeever adds that when assessing the reason for the application of IHL to conflict with terrorist elements, it should be considered that "IHL has well-established

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[108] *Ibid*.
[109] ICRC, "International humanitarian law and terrorism: questions and answers", 1 January 2011. Available at: https://www.icrc.org/en/doc/resources/documents/faq/terrorism-faq-050504.htm. Last accessed on 27 December 2021.
[110] *Ibid*.
[111] *Ibid*.
[112] Sassoli, *supra* n.10, at 976.
[113] Policinski E., "Terrorism, Counter-Terrorism and International Humanitarian Law: Primer on a recurring conversation" *ICRC Humanitarian and Policy Blog*, 2 November 2016; Baghen S., "IHL and Counter-Terrorism: Turkey and the PKK", *Foreign Policy Association*, 11 March 2016.
[114] Ferraro, *supra* n.87, at 27.
[115] Debarre, *supra* n.5, at 104.
[116] *Prosecutor v. Ljube Boškoski and Johan Tarčulovski* (Judgment) IT-04-82-T (10 July 2008).

rules concerning the definitions of crimes, modes of liability, jurisdiction, and on international legal cooperation."[117]

Secondly, there is the view that both IHL and Counter-Terrorism Framework can apply at the same time. This strand of the expansionist view is supported by case law. In *Liberation Tigers of Tamil Eelam (LTTE) v Council* before the European Court of Justice, the relationship between these two legal frameworks were subject of deliberation. The Court founds that, "the applicability of international humanitarian law to a situation of armed conflict and to acts committed in that context does not imply that legislation on terrorism does not apply to those acts."[118] Furthermore that "the LTTE … wrong to claim that, in international law, the notions of armed conflict and of terrorism are incompatible."[119] Similar expansionist view were also expressed in the *Ukraine v Russia (Provisional Measures)* case where the ICJ held that "as far as Article 2(1)(b) ICSFT is concerned, every act which amounts to terrorist conduct will *also* be unlawful under Common Article 3 of the GCs when committed in the context of an AC."[120] This principle is also practicalised in *Hamdan v Rumsfeld* where the court held that the common article 3 applied in the fight with Al-Qaeda and so the protections guaranteed need to be met.[121] An argument has also be made that terrorist acts could be indicative of the existence of an armed conflict.

This expansionist approach is supported by the theory of inclusive legal positivism, which argues that "while there is no necessary moral content to a legal rule, a legal rule may by conventional rule, make moral criteria necessary or sufficient for validity in that system."[122] Simply put, "morality seems to be sufficient grounds for the legal status of a norm."[123] Furthermore, that the application of morality is contingent and derived from the choices and actions of particular legal officials. Thus, applying this to the expansionist view and taking cognisance of the role of States in international law, this understanding is read by the choices States make. Therefore, the expansionist school of thought informed by inclusive legal positivism suggests that States can make a choice to apply international humanitarian law alongside international conventions on terrorism to ensure that the persons accused of such crimes are sufficiently covered and prosecuted under all applicable law.

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[117] McKeever D., "International humanitarian law and counter-terrorism: fundamental values, conflicting obligations" (2020) 69(1) *I.C.L.Q.* 43, at 51.
[118] [Case T-208/11] LTTE v Council (General Court, Judgment. 16 October 2014).
[119] *Ibid,* para. 67.
[120] Trapp K. "Ukraine v Russia (Provisional Measures): State 'Terrorism' and IHL", *EJIL Talk,* 2 May 2017.
[121] 548 U.S. 557 (2006) at 627-633. Ip J., "The Supreme Court and House of Lords in the War on Terror: *Inter Arma Silent Leges?"* (2010) 19(1) Michigan *State Journal of International Law* 1, at 30-31.
[122] Bix B. H., "Legal Positivism" in Golding, M.P. and Edmundson, W. A., *The Blackwell Guide to the Philosophy of Law and Legal Theory* (John Wiley, 2008), at 37.
[123] *Ibid*.

This thesis aligns with the expansionist approach with proposes that where the terrorist acts are committed within the scope of an armed conflict, IHL is applicable. Sassoli avers that "most frequently, fights against terrorist groups, if at all covered by IHL, are covered by the IHL provisions on non-international armed conflicts, provided that the two traditional conditions for that law to apply are fulfilled."[124] Furthermore Rona maintains that,

> in short, humanitarian law is quite at home with the War on Terror when it amounts to armed conflict. When the War on Terror does not meet the criteria for armed conflict, it is not that humanitarian law is inadequate, but rather that its application is inappropriate. A terrorist group can conceivably be a party to an armed conflict and a subject of humanitarian law.[125]

The tension between these two approaches is expressed by Policinski who contends that the issue of the "applicability of IHL to acts considered [as] terrorism is consistently listed as challenge in current conflicts."[126] Therefore, a critical look at the actions of states in the United Nations through the Security Council and General Assembly will show the global trend towards the application of International Humanitarian Law to prohibition of acts of terrorism.

2.4 An Analysis of United Nations documents

The discussion as to whether the International Humanitarian Law is applicable to cases where conflicts are borne out of terrorist activities is one which has been subject to further debate with the growing number of conflicts. An in-depth analysis of United Nations documents being Security Council resolutions, General Assembly resolutions as well as reports from the Secretary General, will aid in building and supporting the argument in favour of the application of International Humanitarian Law to Terrorism. McKeever argues that "depending on the circumstances, much of the conduct that is criminalised in treaties and Security Council resolutions on terrorism might already be criminal under IHL."[127] It can be said that these documents are indicative of speech acts of States that are enshrined in texts adopted.

In a few Security Council Resolutions, the correlation between terrorism and adherence to international humanitarian law has been made. This can be seen with Resolution 2249 (2015) which "called for member states to take all necessary measures on the territory under the control of ISIS to prevent terrorist acts committed by ISIS and other Al-Qaida affiliates".[128] Specifically it states that

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[124] Sassoli, *supra* n. 16, at 52.
[125] Rona G., "Interesting Times for International Humanitarian Law: Challenges from the 'War on Terror'" (2003) 27(2) *The Fletcher Forum of World Affairs* 55, at 60.
[126] Policinski, *supra* n.113.
[127] McKeever, *supra* n.117, at 48.
[128] Securitycouncilreport.org, *Security Council Report*, 2018. Available at: https://www.securitycouncilreport.org/. Last accessed on 27 Sep. 2018.

> its violent extremist ideology, its terrorist acts, its continued gross systematic and widespread attacks directed against civilians, abuses of human rights and violations of international humanitarian law, including those driven on religious or ethnic ground constitutes a global and unprecedented threat to international peace and security.[129]

It goes further to condemn "in the strongest terms the continued gross, systematic and widespread abuses of human rights and violations of humanitarian law… carried out by ISIL" and reaffirmed that "those responsible for committing or otherwise responsible for terrorist acts, violations of international humanitarian law or violations or abuses of human rights must be held accountable."[130]

This position is also reflected in relation to the Non-International Armed Conflict in Afghanistan. Particularly, Security Council Resolution 2160 (2014) expressed concern about the security situation in Afghanistan, in particular the "on-going violent an terrorist activities by the Taliban, Al-Qaida" and reaffirmed "the need to combat this threat by all means, in accordance with the Charter of the United Nations and international law, including applicable human rights, refugee and humanitarian law."[131] This position is equally re-echoed in Security Council Resolution 2082 (2012),[132] and Security Council Resolution 1904 (2009) wherein the Security Council stated that,

> Terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed, and reiterated its unequivocal condemnation of Al-Qaida, Usama bin Laden, the Taliban and other individuals, groups, undertakings and entities associated with them, for ongoing and multiple criminal terrorist acts aimed at causing the deaths of innocent civilians and other victims, destruction of property and greatly undermining stability and Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations and international law, including applicable international human rights, refugee and humanitarian law, threats to international peace and security caused by terrorist acts.[133]

This view is supported by Reports of the Secretary General in which violations of international humanitarian law in respect of non-international armed conflicts are documented. One of such reports in 2009 states that "in Afghanistan, according to UNAMA, over 1,100 civilians were killed during 2008 in attacks by anti-Government elements, including suicide attacks and

[129] UNSC Res 2248 (20 November 2015) UN Doc S/Res/2248.
[130] *Ibid*.
[131] UNSC Res 2160 (17 June 2014) UN Doc S/Res/2160.
[132] UNSC Res 2082 (17 December 2012) UN Doc S/Res/2082. There are a number of UN Security Council Resolutions that support this position such as UNSC Res 1805 (20 March 2008) UN Doc S/Res/1805; UNSC Res 1894 (11 November 2009) UN Doc S/Res/1894; UNSC Res 1963 (20 December 2010) UN Doc S/Res/1963; UNSC Res 1989 (17 June 2011) UN Doc S/Res/1989; UNSC Res 2129 (17 December 2013); UNSC Res 2170 (15 August 2014) UN Doc S/Res/ 2170; UNSC Res 2354 (24 May 2017) UN Doc S/Res/2354; UNSC Res 2379 (21 September 2017) UN Doc S/Res/2379; UNSC Res 2395 (21 December 2017) UN Doc S/Res/2395.
[133] UNSC Res 1904 (17 December 2009) UN Doc S/Res/1904.

attacks on educational facilities, teaching staff and students, in particular females."[134] Another in 2015 paints a grim picture where it states that

> shocking levels of brutality and casual disregard for human life and dignity have come to characterise most of today's armed conflicts. Civilians are killed and maimed in targeted or indiscriminate attacks. They are tortured, taken hostage and disappeared, forcibly recruited into armed groups, displaced from their homes, separated from their families and denied access to the most basic necessities.[135]

In Afghanistan, this is seen with the "sharp rise in civilian casualties and displacement in 2014"[136] and in Somalia where "Al-Shabaab has continued to use asymmetric combat techniques, including attacks targeting government institutions, politicians and journalists using improvised explosive devices."[137]

To buttress this point, the UN General Assembly has aligned with this position. In UN GA Res 180 (2018), the Assembly deeply deplored "the occurrence of violations of human rights and fundamental freedoms in the context of the fight against terrorism, as well as violations of international refugee law and international humanitarian law."[138]

Security Council Resolutions are generally seen to have the potential to have binding effect especially if they are made pursuant to Article 4 and 25 of the United Nations Charter as the Security Council "possess decisional powers in the 'operational' realm of international peace and security."[139] Simply put, resolutions in general "may therefore have the legal effect of (i) creating obligations, rights and/or powers (which we shall call 'substantive effects') and/or (ii) making determination of facts (e.g. that an alleged fact is true) or legal situations (e.g. that an obligation was violated), which trigger the substantive effects ('causative effect'). To this should be added (iii) how and when the substantive effects operate ('modal effects')."[140] On the binding nature of Security Council resolutions the International Court of Justice "has not definitively decided whether Security Council decisions possess an overriding binding effect, but it has specified that the binding effect includes, *ratione materiae*, operational matters and covers, *ratione personae*, all Member States."[141] This position in supported by the cases of

[134] UNSC, "Report of the Secretary-General on the protection of civilians in armed conflict" (2009) UN Doc S/2009/277, para. 32.
[135] UNSC, "Identical letters dated 19 June 2012 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council" (2012) UN Doc S/2012/453, at para. 4.
[136] *Ibid*, at para. 10.
[137] *Ibid*, at para. 21.
[138] UNGA Res 60/158 (20 February 2006) UN Doc A/Res/60/158.
[139] Öberg M. D., "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ" (2006) 16(5) *EJIL* 879, at 883.
[140] *Ibid*, at 881-882.
[141] Ibid, at 884.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory[142] and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*.[143] It can be said that "the binding effect of SC resolutions belongs to the realm of international peace and security and includes enforcement under Chapter VII of the UN Charter."[144]

Furthermore, it can be argued that irrespective of the binding effect, Security Council Resolutions could be declarative of custom and could play a role in norm emergence. Custom is said to result "from the general and consistent practice of States followed by them out of a sense of obligation."[145] As explained in the *Asylum* case, it is "constant and uniform usage accepted as law."[146] It is said to consist of state practice and *opinio juris*. According to the ICJ in the *North Sea Continental Shelf cases*, in assessing state practice, it was noted that:

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.[147]

Whereas for *opinio juris*, it "relates to the need for the practice to be carried out as of right." The ICJ in the *North Sea Continental Shelf cases* explained in relation to how custom materialises that:

> Not only must the facts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.[148]

Furthermore, Judge Tanaka in his dissenting opinion observes that:

> There is no other way than to ascertain the existence of *opinio juris* from the fact of the external existence of a certain custom and its necessity felt in the international community rather than to seek evidence as to the subjective motives for each example of State practice, which is something impossible of achievement.[149]

Arguments have been canvassed as to the role of security council resolution in the development of custom. Fox stated that the US described International Organisations (IO)

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[142] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, at para. 26.
[143] [1971] ICJ Rep 16, at 50.
[144] Öberg, *supra* n.139, at 885.
[145] Fox G., "Security Council Resolutions as Evidence of Customary International Law", *EJIL Talk*, 1 March 2018.
[146] *Colombia v Peru (Asylum case)* [1950] ICJ Rep 266.
[147] [1969] ICJ Rep 3, at 43.
[148] *Ibid,* at 44.
[149] *Ibid*, at 176.

resolutions as embodying the *opinio juris* of states and potentially their practice."[150] This is supported by Henckaerts and Doswald-Beck when they aver that state practice can be gleaned from "the negotiation and adoption of resolutions by international organisations or conferences [and the] the value accorded to any particular resolution depends on its content, its degree of acceptance and the consistency of State practice outside it."[151] In particular, they state that "state practice at the international level is reflected in a variety of sources, including in resolutions adopted in the framework of the United Nations, in particular by the Security Council."[152] Furthermore, Öberg argues that, "if it [i.e. resolutions] restates existing international norms, it may have an evidentiary value for establishing these,

> the role of UN resolutions is indeed to participate in the creation of customary law and is neither confined to restatement or interpretation ('reiteration or elucidation') of the Charter, nor to mere evidence of the content of international customary law (since the 'effect of consent to the text of such resolutions' is 'an acceptance of the validity of the rule or set of rules declared by the resolution').[153]

This view is also buttressed by the ILC draft conclusions on identification of customary international law which argues that practice can be gleaned from resolutions of an international organisation (of which it can be advanced that the security council is a subset of an international organisation, the United Nations). It also states *opinio juris* can ascertained from "conduct in connection to resolutions adopted by an international organisation.[154]

This perspective is one which aligns with this thesis. Another angle that contributes to this submission is that States by way of agency give powers to the Security Council to make decisions and thus these decisions in the form resolutions, imposed obligations on them. It could be said that "IOs may also act on their own behalf when member states "have conferred powers upon the international organisation that are functionally equivalent to the powers exercised by States."[155] According to Fox et al "when the Council imposes such obligations it acts as an agent for all UN member states. Article 24(1) of the Charter provides that member states confer on the Security Council primary responsibility for the maintenance of international peace and security and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."[156] This agency theory is illustrated in

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[150] Fox, *supra* n.145.
[151] Henckaerts JM. and Doswald-Beck L. (ed.), *Customary International Humanitarian Law, Volume I: Rules* (Cambridge University Press, 2009), at xli.
[152] *Ibid*, at liii.
[153] Öberg, *supra* n.139, at 897.
[154] International Law Commission, "Draft Conclusions on identification of customary international law", 2018. Adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10, para. 65).
[155] *Ibid*.
[156] Fox G.H et al, "The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law" (2018) 67 (649) American *University Law Review* 649 at 707.

the *Prosecutor v Taylor* where the Special Court of Sierra Leone held that "an agreement between Sierra Leone and the UN was, as a result of Council approval, "an agreement between *all* members of the United Nations and Sierra Leone."[157] Furthermore, their effect as it relates to norm emergence can be seen in research carried out to Fox et al, where from their findings they conclude that Security Council Resolutions on NIACs "are evidence of CIL with regard to whether non-state parties are bound by human rights obligations and whether peace agreements ending NIACs are legally binding."[158]

Resolutions in the form of decisions have the power to "create rights implying reciprocal obligations to fulfil those rights or at least not to interfere with them."[159] This can be seen with Security Council Resolutions 2082 (2012) and 1904 (2009) earlier cited, wherein the Security Council stated in express terms that they are acting under Chapter 7 of the United Nations Charter, which deals with the notion of international peace and security. Thus, it can be said that through these Security Council resolutions adopted pursuant to Chapter VII of the UN Charter and their position of the application of IHL to terrorism related conflict, a norm on this point could have emerged.

2.5 Conclusion

This chapter has made a number of arguments all driving towards the principal argument that international humanitarian law ought to be applicable to terrorism fuelled violence. Furthermore, that acts of terrorism ought not to be treated in isolation where they form a critical part of an armed conflict as to some extent both legal frameworks can co-exist. This position was supported by an analysis of the non-international armed conflicts in Afghanistan and Somalia, where it was found that International Humanitarian Law has been applicable in these conflicts that are fuelled by terrorist entities of the Taliban and Al-Shabaab respectively. In addition, this paper argued that there are two contrasting views of the application of International Humanitarian Law to Terrorism, the restrictivist approach and the expansionist view, each of them are backed up by differing theoretical schools of thought, the constructivist and positivist schools of thought respectively. This paper aligns with the expansionist school of thought and buttresses its position by drawing the correlation between International Humanitarian Law and Terrorism from United Nations documents specifically Security Council Resolutions. These UNSCRs evidence a trend towards the application of International Humanitarian Law to terrorism related violence, although not expressly codified in the law

[157] Fox, *supra* n.145; *Prosecutor v. Taylor* (Decision on Immunity from Jurisdiction) SCSL-2003-01-I (May 31, 2004).
[158] Fox, *supra* n.145; Fox et al, *supra* n.156.
[159] Öberg, *supra* n.139, at 886.

Having discussed extensively the relationship between IHL and Terrorism, this thesis will now proceed to analyse the violence perpetuated by the armed group- Boko Haram and undertake an analysis of applicable frames and attendant applicable laws.

3. Boko Haram Insurgency: Terrorism, International Armed Conflict or Non-International Armed Conflict- An Analysis of Possible Frames

Nigeria's fight against Boko Haram remains one of the region's deadliest situations of violence despite a major military offensive.[1] The armed group, Boko Haram, has persistently carried out its campaign of violence in Nigeria through bombings and targeted attacks on civilian communities. This violence has resulted in a high number of civilian casualties and property damage. Through their actions, Boko Haram has developed a reputation as one of the most lethal jihadi groups in the world and their actions are set to be at par, if not surpass the actions of its counterparts- Al-Qaeda in the Islamic Maghreb (AQIM) and Al-Shabaab.[2] Boko Haram attacks have undermined public safety across the region, scarred Nigeria's economy and development, further "deepened religious and regional fault lines thereby reversing some of the country's hard won gains in building national unity and stability."[3] The scale of violence perpetuated by this group has raised questions about its origin, motivations, leadership and organisation. Particularly on the conflict, there are the issues arising about how the conflict is framed, the nature of the conflict, the role of international humanitarian law and its application in the extant case. Furthermore, it raises queries about the applicable law under which the Boko Haram insurgency is adjudged to be an armed conflict, by taking into consideration the activities of the group. In addressing the foregoing questions, this chapter seeks to analyse the surrounding complexities and proffer appropriate answers.

3.1 Who is Boko Haram?

The armed insurgent group Boko Haram has been defined as an Islamic separatist movement comprising of a "potent blend of religious fanaticism, social media savvy and cold-blooded violence."[4] Although popularly known as 'Boko Haram', which translates to 'western education is forbidden, sin, sinful or anathema', the interpretation of the group's full name *Jama'atu Ahlis Sunnah Ladda'awatih wal Jihad* is 'people committed to the propagations of the Prophet's teaching'.[5] It is important to note the understanding of 'education' transcends the literal meaning to also cover influence. Stroehlein succinctly states that the group "lament the

[1] Campbell J. and Harwod A., "Boko Haram's Deadly Impact", *Council on Foreign Relations*, 20 August 2018. Available at: https://www.cfr.org/article/boko-harams-deadly-impact. Last accessed on 29 December 2021.
[2] Zenn J. et al, *Boko Haram Beyond the Headlines: Analysis of Africa's Enduring Insurgency* (Combatting Terrorism Centre at West Point 2018), at iii.
[3] International Crisis Group, *Curbing Violence in Nigeria (II): The Boko Haram Insurgency,* Africa Report No. 216 (ICG, 2014), at 40.
[4] Campbell J., *US Policy to Counter Nigeria's Boko Haram*, Special Report No. 70 (Council on Foreign Relations, Centre for Preventive Action, 2014), at vii.
[5] Amnesty International, *Nigeria: Trapped in the cycle of violence* (Amnesty International, 2012), at 7.

perceived deterioration of morals unleashed by western influence."[6] The goal of Boko Haram is to govern territory under Sharia law, fully eliminate secular, democratic and un-Islamic governments and targeting western education.[7] Boko Haram's rhetoric emphasises justice for the poor through the rigid application of sharia or Islamic law.[8]

It is argued that the emergence of the group was borne out of the dire political and socio-economic situation in Nigeria. Campbell in supporting this view states that "the Boko Haram Insurgency is a direct result of chronic poor governance by Nigeria's federal and state governments, political marginalisation of the North East and the region's accelerating impoverishment."[9] This argument is further buttressed by the International Crisis Group who argue that "most Nigerians are poorer today than they were at independence at 1960 and as such frustration and alienation drive many to join self-help ethnic, religious, community or civic groups, some of which are hostile to the State."[10] This is still the situation till date with 40% of Nigerians (approximately 83 million people) living below the country's poverty line of $381.75 per year,[11] diminishing GDP growth rate of 6.77% in January 2014 to 2.2% in 2019,[12] the occurrence of two recessions in 2016 and 2020 and concerns about the surge in inflation, which is at a 33 month high of 16.47%.[13]

There are corroborated and concurrent reports as to the group's origin. The most popular account of the armed group's beginnings is traced back to the early 2000s. Amnesty International advances this view by finding that Boko Haram was established in 2003 under the leadership of an Islamic cleric- Mohammed Yusuf.[14] This is further corroborated by the BBC who charted the beginnings of the group and submit that the group began its operations in 2002. Reports show that the group was initially made up of about 200 people, many of whom were students who migrated to a remote area of Yobe State (in North East Nigeria),

[6] Stroehlein A., "On the trail of Boko Haram", *The Independent*, 12 March 2012. Available at: https://www.independent.co.uk/news/world/africa/on-the-trail-of-boko-haram-7562636.html. Last accessed on 29 December 2021.
[7] Zenn, *supra* n.2, at v.
[8] Campbell, *supra* n.4.
[9] *Ibid*, at 5.
[10] International Crisis Group, *supra* n.3.
[11] World Bank, "Nigeria releases new report on poverty and inequality in country", 28 May 2020. Available at: https://www.worldbank.org/en/programs/lsms/brief/nigeria-releases-new-report-on-poverty-and-inequality-in-country. Last accessed on 29 December 2021.
[12] *Ibid*.
[13] Omilana T., "Nigeria inflation surges to 33-month high", *The Guardian*, 16 February 2021. Available at: https://guardian.ng/news/nigeria-inflation-surges-to-33-month-high/. Last accessed on 29 December 2021.
[14] Amnesty International, *supra* n. 5, at 7.

reportedly given to them by Bukar Abba Ibrahim, the then Governor of the State.[15] This initial group was referred to as Yusufiyya or Nigerian Taliban.[16]

Alternatively, there is the argument that the group emerged much earlier than early 2000s. International Crisis Group (ICG) in support of this position argues that "Boko Haram grew out of a group of radical Islamist youth who worshipped at the Al-Haji Muhammad Ndimi Mosque in Maiduguri in the 1990s,"[17] led initially by Abu Yusuf Mohammed Yusuf (popularly known as Mohammed Yusuf) who was a preacher and leader in its youth wing- Shababul Islam (Islamic Youth Vanguard)- a salafist group. ICG further argues that Mohammed Yusuf's "literal interpretation of the Qu'ran led him to advocate that aspects of Western education he considered in contradiction to that holy book, such as evolution, the big bang theory of the universe's development and elements of chemistry and geography, should be forbidden."[18] Boko Haram reportedly drew parallels with the rhetoric of Usman dan Fodio's Sokoto Caliphate "as a reference point for all who wanted a new righteous leadership through Sharia;" the rise of Boko Haram could also be traced to rise of Islamic reform groups such as the Islamic movement of Nigeria led by Zakzaky.[19] Yusuf is also reported to be a student of Zakzaky, the leader of the Islamic Movement of Nigeria, who advocated for the creation of an Islamic State.[20]

In tracing the beginnings of the Boko Haram, it has also been argued that the group has ties to Yan Tatsine, followers of Maitatsine (as known as Mohammed Marwa).[21] Both groups (i.e. Maitatsine and Boko Haram) are seen as fanatical islamist sects whose beliefs are not held by majority of Muslim Nigerians. Maitatsine was prominent for taking an aggressive stance against western influence, refusing to accept the legitimacy of secular authorities.[22]

Primarily, Boko Haram was linked to the Salafi line of Islam. This link was established through the early founder of the armed group, Mohammed Yusuf who was a student of Shaykh Abubakar Mahmud Gumi and Ja'far Adam who were known Salafi/ Wahhabi scholars in Nigeria[23] and thus a proponent of such beliefs. The Salafi doctrine follows the practices of the

[15] International Crisis Group, *supra* n.3, at 9.
[16] *Ibid*.
[17] *Ibid*, at 7.
[18] *Ibid*.
[19] *Ibid*, at 8.
[20] Amnesty International, *supra* n. 5, at 63.
[21] Pham J.P., "Boko Haram's Evolving Threat", *Africa Security Brief No. 20*, April 2012, at 1; International Crisis Group, *supra* n.3, at 8.
[22] International Crisis Group, *supra* n.3, at 8-9.
[23] Brill, "Popular discourses on Salafi Radicalism and Salafi Counter-Radicalism in Nigeria: A Case Study of Boko Haram" (2012) 42 (2) *Journal of Religion in Africa* 118, at 120-122.

early Muslims, especially the Hadith and as such they are concerned with the observations of the edicts of the faith, particularly what is licit and forbidden.[24] The doctrine is concerned with sanitising Islam from western influence. This is supported by Olidort, who noted that "salafism sought to purify Islam from western influence and digression from true Islam."[25] A central tenet of salafism is that western education and participating in western government is forbidden and efforts should be made to establish an Islamic government.

Generally, there are contentions as to the true intent and approach of Salafists. On one hand there is the view that Salafists do not get involved in political issues and take on a quiet approach to their beliefs focusing on preaching and religious education.[26] This perspective is supported by Olidort who argues that salafists view secular political ideologies, nation-states, political parties as un-islamic and reject modern institutions.[27] Some scholars argue that Salafists believe that Muslims should devote their energy to solving more urgent problems like poverty, illiteracy, marginalisation of Muslims in government, unemployment and provision of services.[28] More importantly, they do not advocate for the use of force. On the other hand, although Mohammed Yusuf claims to be influenced by Salafi doctrine, he moves beyond preaching to active engagement and challenge of the Nigerian government. Olidort further advances that "salafism serves as a vehicle whose claim to authentic Islam is hermeneutic and its political adaptability allows groups like ISIS and Boko Haram to market their vision."[29] In line with the general precepts of the Salafi doctrine, Mohammed Yusuf believed that every non-islamic government should be replaced with an Islamic one. Specifically, he rejected the authority of the Nigerian government since it was ruled by a government based on unbelief,[30] that is, the Nigerian government is not ruled in accordance with Sharia law.

However, contrary to the views that Mohammed Yusuf chose to abide by, one of the scholars affiliated to Yusuf, Ja'Afar Adam, disagreed with his interpretation and application of Salafist doctrine. He states that Yusuf's argument lacks authoritative Islamic support, lack of knowledge and moral integrity.[31] His fundamental grouse with Yusuf's reasoning was based on the doctrine of necessity.[32] Adam argues that it is necessary for Muslims to go to secular

[24] International Crisis Group, *supra* n.3, at 9.
[25] Olidort J., "What is Salafism? How a Non-political Ideology became a political force", *Foreign Affairs,* 24 November 2015. Available at: https://www.foreignaffairs.com/articles/syria/2015-11-24/what-salafism. Last accessed on 5 November 2019.
[26] Hamid S. and Dar R., "Islamism, salafism and Jihadism: A primer", *Brookings Institute*, 15 July 2016.
[27] Olidort, *supra* n.25.
[28] *Ibid*.
[29] Olidort J., "Does ISIS really follow salafi version of Islamic law and theology?" *The Washington Institute*, 21 September 2016. Available at: https://www.washingtoninstitute.org/policy-analysis/does-isis-really-follow-salafi-version-islamic-law-and-theology. Last accessed on 5 November 2019.
[30] Brill, *supra* n.23, at 127.
[31] *Ibid*, at 132.
[32] *Ibid*.

schools in order to have sufficient knowledge to counter secular beliefs. Nonetheless, Adam buttresses the need for an Islamic government and warns that Muslims cannot effectively counter the Nigerian Government without the "mastery of modern secular knowledge."[33] Notwithstanding the foregoing, although Salafi ideas are necessary to the understanding of the ideology of the group, they are insufficient for fully understanding what drives Salafi jihadist groups-[34] of which you can describe Boko Haram as one of such.

One could argue that Boko Haram did not commence as a radical islamist organisation that utilises violence to communicate their message but a political one with some reports drawing connections with politicians. It is submitted that in the early beginnings of the armed group, "they were allowed to operate as a legitimate organisation."[35] This view is also supported by an International Crisis Group Report that suggests that Mohammed Yusuf formed an alliance with Ali Modu Sheriff, a prominent politician in Borno State.[36] Furthermore, it was alleged that the Borno State government provided funds to Mohammed Yusuf through Buji Foi, a known Yusuf disciple.[37] It has also been argued that members of Boko Haram started as political thugs to further the objectives of politicians in Borno State. This claim is substantiated by Zenn *et al* who argue that funding came through political elites like Sheriff and through political patronage.[38] Ahmed and Eckel buttress this point by stating that "politicians saw Yusuf and his adherents as a useful base for rallying political support" and advance that Ali Modu Sheriff became Governor of Borno State because of this alliance and the group was repaid with the appointment of a top Boko Haram official as the State Commissioner for Religious Affairs.[39] This apparently gave them access to state funds to build mosques and finance other projects.

Beyond this, an opinion that has been proffered is that Boko Haram started as an "Islamic anti-corruption group."[40] ICG argues that the aim of Boko Haram was to create a "strict Islamic state in the north to address the ills of society, including corruption and bad governance."[41] As per the spokesman of the group, Abu Qaqa, "our objective is to place Nigeria in a difficult

[33] *Ibid*, at 132-137.
[34] Olidort, *supra* n.29.
[35] Omolaye-Ajileye A., "Legal Framework for the Prevention of Terrorism in Nigeria" [2015] 11 *National Judicial Institute Law Journal* 19, at 28.
[36] International Crisis Group, *supra* n.3, at 12.
[37] *Ibid*.
[38] Zenn, *supra* n.2, at 92.
[39] Ahmed I. and Eckel M., "In the home of peace, a siege of fear- Boko Haram: A VOA Special Report", *Voice of America*, 2014. Available at: https://www.voanews.com/MediaAssets2/projects/boko-haram/index_en.html. Last accessed on 1 June 2020.
[40] Channels TV, "Boko Haram: From Islamic sect to Armed Threat", 9 February 2019. Available at: https://www.channelstv.com/2019/02/09/boko-haram-from-islamist-sect-to-armed-threat/. Last accessed on 5 November 2019.
[41] International Crisis Group, *supra* n.3, at 9.

position and even destabilise it and replace it with Sharia…[and to]… take Nigeria back to the pre-colonial period when the Sharia law was practised."[42]

Beyond the origins and motivations of the group, it is pertinent to discuss the membership of the armed group. Asides Mohammed Yusuf, other prominent persons in the armed group are Muhammad Ali who was a student who met with Bin Laden and was requested to organise a cell in Nigeria with N300m.[43] He arrived in Nigeria preaching a newfound ideology but did not gain much support until he met Mohammed Yusuf.[44] This lends credence to the view of the international nature of the conflict, with the possible connection to an international terrorism network. Similarly, Abubakar Shekau is another notable figure who took over from Mohammed Yusuf as the leader of the armed group. He was the Boko Haram leader from 2009- March 2015 and he equally served as Islamic State in West Africa Province (ISWAP) leader between March 2015 and August 2016[45] and has been described as a "bloodthirsty lunatic, who is temperamental, dreaded and feared."[46]

Furthermore, there is also the issue of their messaging and strategy. It has been argued that between the leadership of Yusuf and Shekau, there was a transition in messaging and strategy. Under the leadership of Yusuf, messaging was focused on sermons and record for sale in Nigeria and neighbouring countries; he was interviewed by local radio and television stations and they broadcast his preaching, which was focused on jihadi movements, implying a degree of influence and emulation.[47] His main strategy was to create an exclusive society of his followers with institutions to cater for welfare and finance through micro finance entities.[48] Yusuf was known to the Nigerian government and had dialogued with the government in 2003. He was driven by domestic concerns, the goal of accumulating followers and the preparation for a clash with the Nigerian State, which led him to store arms in members' homes and in mosques.[49]

Following Yusuf's death in 2009, the messaging of Boko Haram transformed to video messaging, fliers and press statements, it also "increasingly mirrored messaging from international jihadi groups."[50] In terms of strategy, by late 2010 Boko Haram attacks occurred

[42] International Crisis Group, *supra* n.3, at 9.
[43] Zenn, *supra* n.2, at 9.
[44] *Ibid*.
[45] *Ibid*, at 19-20.
[46] *Ibid,* at 54.
[47] *Ibid*, at 89-90.
[48] *Ibid*, at 90.
[49] *Ibid*.
[50] *Ibid*, at 101.

almost daily in North East Nigeria and by 2012 Boko Haram had expanded its high profile attacks to Kano and Sokoto States. Their membership also evolved as the rank and file became more diverse, with members coming from different regions in Nigeria not just the North East.[51] This segued into Phase 3 from 2013 to 2016. There was a shift towards increasingly targeting civilians as punishment for collaborating with government forces and the Civilian Joint Task Force[52] while attempting to consolidate territorial control. The strategy also changed to respond to the establishment of the Civilian Joint Task Force and State of Emergencies enforced in the North East region.[53] At present (2016- present), the core strategy has primarily been to target military installations and personnel.

It appears that they remained mainly political between their inception in 2002/2003 till 2009 when their actions took on a violent nature. The Nigerian government was aware of the beginnings of this armed group, even though they did not start by propagating violent attacks. This view is supported by Human Rights Watch who stated that "the threat was recognised as the Nigerian government deployed military and police to crush the uprising"[54] on several occasions. This can be seen with "a police and military assault [July 2009], which left hundreds dead and the sect's headquarters and mosque left in ruins."[55] Although the Nigerian government recognised this threat, its response to the escalating nature of the conflict raised questions about how the activities of the Boko Haram was framed.

3.2 Framing the Insurgency

As early as 2011, it could be argued that a number of actors had an impact in framing the violence in Nigeria. The actors include the Nigerian government especially the Nigerian Army and Nigerian Justice sector, and the international non-governmental organisations (INGOs); their use of language to frame the activities of Boko Haram has led to those activities being portrayed through different lenses, each with different legal consequences related to the application of different legal regimes. In understanding why there are different frames, it is important to realise that the violence perpetrated by Boko Haram is a highly complex and politicised issue and cannot be viewed from one angle; the situation of violence is affected by both political and legal issues and cannot be discussed without taking cognisance of the complexities. The framing of the violence will thus be discussed taking into consideration, the

[51] *Ibid*, at 97.
[52] *Ibid*, at 102.
[53] *Ibid*.
[54] Human Rights Watch, *Spiralling Violence: Boko Haram Attacks and Security Forces Abuses in Nigeria* (HRW, 2012), at 22.
[55] The Guardian, "Boko Haram attacks – timeline", 25 September 2012. Available at: https://www.theguardian.com/world/2012/sep/25/boko-haram-timeline-nigeria. Last accessed on 29 December 2021.

issues of agency, language framing and behavioural relevance under the following frames which is summarised in the table below:

A. Boko Haram Violence as simply terrorism
B. Boko Haram Violence as an International Armed Conflict
C. Boko Haram Violence as a Non-International Armed Conflict

Table 1: Framing the Boko Haram Insurgency

S/No.	Frame	Agent	Language	Applicable laws
A	Terrorism	Nigeria (e.g. the Federal Ministry of Justice and the Courts)	Terrorism, Counter-Terrorism (Strategy), militant, domestic, struggles, menace.	Terrorism Prevention Act 2011 (as amended by Terrorism Prevention Amendment Act 2013)
B	International Armed Conflict	United Nations Security Council	War, between States, use of force	Chapter VII UN Charter, Geneva Conventions 1949 (especially Common Article 2), Customary IHL relevant to IAC
C	Non-International Armed Conflict	Nigeria (e.g. the Armed Forces) Advocacy Networks (INGOs, Media, International/ Diplomatic community)	Movement, Intensity, Organisation, Ceasefire, Control, Conflict, War, application of International Humanitarian Law	Common Article 3 of the Geneva Conventions 1949; Additional Protocol II to the Geneva Conventions 1977, Customary IHL relevant to NIAC

A. Boko Haram Violence as Simply Terrorism

The frame of the Boko Haram violence as simply terrorism is put forward primarily by Nigeria. Nigeria being the principal agent has advanced this frame for a number of reasons. One of which is that viewing the violence as a mere domestic/ criminal issue gives the impression that the Nigerian government is strong and able to withstand internal threats. This perception is shared by Stroehlein who argues that framing the violence as anything other than domestic brings about “fear and misinformation that reaffirms everyone’s core understanding of their

deeply dysfunctional state: Nigeria is broken and headed towards the brink."[56] Furthermore, there is the argument that an acknowledgment of the depth of the insurgency could also have an impact on the perception of foreign investors of Nigeria, which could have a negative impact on the economy.

Nigeria in propagating this frame has utilised language such as "domestic", "criminal", "terrorist", "counter-terrorist" and "militant". Evidence of this is seen in statements made by key figures in government. For instance it has been claimed that the then President Goodluck Jonathan "was restrained in fighting Boko Haram because he considers it a domestic crisis, needing subtle management."[57] Jonathan equally referred to them as "the new front in the global war on terror."[58] Other comments attributed to him include that he "framed Boko Haram as a terrorist organisation with ties to international jihadist networks, thereby laying the groundwork for a narrow terrorism response."[59] Other government personalities have also weighed in on the issue. The former Governor of Lagos State, Raji Fashola "called on Muslims and other Nigerians not to accept any reason given by the criminals to explain their action."[60] Whilst the then Chief of Army Staff noted that "in recent years, the atrocious activities of terrorists and sundry criminals in various parts of the nation have sounded a clarion call to duty."[61] This view of criminality is equally supported by a comment by a Chadian Brigadier General, Zakaria Ngobongue, who stated that they are "bandits and criminals who have nothing to do with religion."[62] Furthermore, the once Nigerian Ambassador to the United States, Adebowale Adefuye referred to Boko Haram as the "motley band of criminals."[63] The former President of Nigeria, Olusegun Obasanjo when discussing the threat of Boko Haram described "the widespread ramification of the menace of Boko Haram within and outside the

[56] Stroehlein, *supra* n.6.
[57] Obasi N., "Nigeria's faltering response emboldens Boko Haram", *International Crisis Group*, 31 January 2015. Available at: https://www.crisisgroup.org/africa/west-africa/nigeria/nigeria-s-faltering-response-emboldens-boko-haram. Last accessed on 5 November 2019.
[58] Campbell, *supra* n.4, at 9.
[59] Brechenmacher S., "Stabilising Northeast Nigeria after Boko Haram", *Carnegie Endowment for International Peace Working Paper,* May 2019.
[60] Ogunlami Y., "Boko Haram is sheer propaganda, Islam is a religion of peace", *Pulse.ng*, 10 January 2015. Available at: https://www.pulse.ng/communities/religion/babatunde-fashola-boko-haram-is-sheer-propaganda-islam-is-a-religion-of-peace/0evg0s5. Last accessed on 29 December 2021.
[61] Odunsi W., "We have developed new strategies to tackle Boko Haram- Army Chief", *Daily Post*, 6 July 2014. Available at: https://dailypost.ng/2014/07/06/developed-new-strategies-tackle-book-haram-army-chief/. Last accessed on 29 December 2021.
[62] Sieff K., "Nigeria war expands as Chad, Niger send troops to fight Boko Haram", *Washington Post*, 9 March 2015. Available at: https://www.washingtonpost.com/world/africa/nigeria-war-expands-as-chad-niger-send-troops-to-fight-boko-haram/2015/03/09/c8f004f8-c674-11e4-aa1a-86135599fb0f_story.html. Last accessed on 29 December 2021.
[63] Kessler G., "Boko Haram: Inside the State Department debate over the 'terrorist' label", *Washington Post*, 19 May 2014. Available at: https://www.washingtonpost.com/news/fact-checker/wp/2014/05/19/boko-haram-inside-the-state-department-debate-over-the-terrorist-label/. Last accessed on 29 December 2021.

Nigerian border."[64] The word "menace" is also echoed by the President Jonathan who "promised that his government will surely bring the Boko haram menace to an end."[65] The most obvious alignment of the violence with the frame terrorism is the proscription notice issued by the Federal government further to an application at the Federal High Court.[66] This notice clearly proscribes and declares the activities of Boko Haram and Ansaru as terrorism.

The emphasis on the "domestic" and "criminality" lends further credence to the argument on the terrorism frame. This view is substantiated by use of internal security forces such as the Police and Department of State Security (DSS) to arrest suspects. One of such reports is that DSS paraded five suspects arrested in relation to bombing of the Nyanya motorpark, these suspects were found to be members of Boko Haram.[67] Another report is that Kabiru Sokoto (a known leader of the Boko Haram sect in Sokoto State) was hunted down by the Police and later arrested by the DSS following his escape from Police custody.[68] This account simply shows that Nigeria in the early days of the violence was determined to treat the armed actors as mere criminals utilising tactics for common criminals. This issue will however be further discussed in the next chapter. Beyond actors of the Nigerian State, this frame is also reinforced by commentary on the violence. For example, there is the view that Boko Haram is a cover for criminal activity and political thuggery.[69] A Reuters article reports that "the Nigerian authorities say the five year insurgency has become mixed up with broader criminality."[70] Also, Stroehlein argues strongly that Boko Haram needs to be handled as criminal cases.[71] Additionally the focus on the frame of terrorism is succinctly put by Campbell who states, "the government's response to Boko Haram is to see it as a terrorist movement in isolation from any environment that may have fostered it."[72]

[64] Obasanjo O., "Letter of Appeal to President Goodluck Jonathan titled Before it is too late", 2 Dec 2013. Available at: https://www.thecable.ng/wp-content/uploads/2014/12/Olusegun-Obasanjos-letter.pdf. Last accessed on 29 December 2021.
[65] Osuagwu P. et al, "Why I sacked Azazi- Jonathan", *Vanguard Newspaper*, 25 June 2012. Available at: https://www.vanguardngr.com/2012/06/why-i-sacked-azazi-jonathan/. Last accessed on 29 December 2021.
[66] Terrorism (Prevention) (Proscription Order) Notice, 2013 pursuant to Terrorism Prevention Act (No.10, 20110 (as amended) and FHC/ABJ/CS/368/2013
[67] Oluokun A., "5 Suspects arrested over Abuja bombings", *PM News*, 12 May 2014. Available at: https://pmnewsnigeria.com/2014/05/12/5-suspects-arrested-over-abuja-bombings/. Last accessed on 29 December 2021.
[68] Oluokun A., "Boko Haram: How Kabiru Sokoto was re-arrested", *PM News*, 10 February 2012. Available at: https://pmnewsnigeria.com/2012/02/10/boko-haram-how-kabiru-sokoto-was-re-arrested/. Last accessed o 29 December 2021.
[69] Stroehlein, *supra* n.6.
[70] Reuters, "Nigeria says violence does not threaten Boko Haram talks to free girls", *Newsweek*, 27 October 2014. https://www.newsweek.com/nigeria-says-violence-does-not-threaten-boko-haram-talks-free-girls-280014. Last accessed on 29 December 2021.
[71] Stroehlein, *supra* n.6.
[72] Campbell J., "Boko Haram: Origins, Challenges and Responses", *NOREF, Norwegian Peacebuilding Resource Centre Police Brief,* October 2014.

In addition to the foregoing, the general disposition of the Nigerian government has been to enact Anti-Terrorism laws and to charge captured insurgents/ terrorists for offences under the Terrorism Prevention Act 2011 (as amended) and the Economic and Financial Crimes Commission Act 2004. This is similar to the situation between the United Kingdom and the IRA wherein the struggles saw a police clampdown done under the auspices of UK Prevention of Terrorism (Temporary Provisions) Act 1989.[73] It was handled as a solely domestic issue and prosecutions were handled by the Crown Prosecution Service.

This response by Nigerian government actors of not seeing a situation of violence for what it truly is, is also evident in their response to previous incidents of violence in the State. For instance, the indigene-settler clashes in Plateau and Kaduna States were portrayed as one of various violent incidents fuelled by ethno-religious sentiments and the then President Obasanjo described it as sectarian violence that has raised "ethnic and religious tension across the country."[74] Whereas its root causes could be traced to socio-economic crisis caused by falling oil prices and the persisting negative impact of Structural Adjustment policies adopted in the 1980s on Nigeria's economy.[75] The tensions were also traced to colonial policies that separated indigenes from non-indigenes and created suspicion and intense competition through the unequal and differential treatment of ethnic groups.[76] Also, the response to the Niger Delta militancy saw the use of police and military to quell insurrection that had underlying economic, environmental, social and political reasons.[77]

Beyond the actions of the Nigerian State, other factors have also fed into this frame of terrorism. Firstly, Boko Haram has a history of religious jihadism, preaching a violent strain of Islam that has not found much support in Nigeria. As earlier indicated, members of Boko Haram were greatly influenced by a salafist ideology. Asides that, the group can be said to have been influenced by stronger terrorist groups. This view is supported by the Council on

[73] Hillyard P., "Irish People and the British Criminal Justice System" (1994) 21(1) *Journal of Law and Society, The Royal Commission on Criminal Justice* 39, at 39.
[74] The New Humanitarian, "Obasanjo declares state of emergency in Plateau State", 18 May 2004. Available at: https://www.thenewhumanitarian.org/news/2004/05/18/obasanjo-declares-state-emergency-plateau-state. Last accessed on 29 December 2021.
[75] See: Ogbimi F.E , "Structural Adjustment is the Wrong Policy" (2001) 8(1) *African Technology Forum, Massachusetts Institute of Technology*; Ukah M., "Structural Adjustment Programme and its Negative Effect on Education in Nigeria: A philosophical reconceptualization" (2014) 2(2) *International Journal of Public Administration and Management Research* 170.
[76] See: Osaghae EE. and Suberu R.T., "A History of Identities, Violence and Stability in Nigeria" (2005) *CRISE Working Paper* No.6; Falola T., *Colonialism and Violence in Nigeria* (Indiana University Press, 2009); Ochonu M., "The roots of Nigeria's religious and ethnic conflict" *Global Post* March 10, 2014. Accessed on: http://www.pri.org/stories/2014-03-10/roots-nigerias-religious-and-ethnic-conflict; David O. et al, *Boko Haram: The Socio-Economic Drivers* (Springer, 2015).
[77] Idemudia U. and Ite U., "Demystifying the Niger Delta Conflict: Towards an Integrated explanation" (2006) 33(109) Review *of African Political Economy* 391; Eke S.J., "No pay, no peace: Political settlement and post-amnesty violence in the Niger Delta (2015) 50 (6) *Journal of Asian and African Studies* 750.

Foreign Relations who state that "contacts and links between Boko Haram and al-Qaeda in the Islamic Maghreb, al-Shabaab in Somalia, or the Movement for Unity and Jihad in West Africa in Mali"[78] are significant.

The group reportedly has links with Al-Qaeda. Crisis Group reports that between 2000 and 2002, Osama bin Laden issued two audio messages calling on Nigerian Muslims to wage jihad and establish an Islamic State.[79] It is further reported that Boko Haram was boosted by Al-Qaeda in the Islamic Magreb (AQIM). This is evident from an interview conducted of an emir of AQIM- the head of Al-Qaeda North African Franchise in 2010 wherein he volunteered that his group will be providing Boko Haram with weapons and training.[80] Mallam Mohammed Ashafa, a prominent member of the Boko Haram was accused of facilitating terrorist exchange programme between the sect in Nigeria and the Al-Qaeda network.[81] Although it has been noted that the central al-Qaeda leadership does not control Boko Haram.[82]

In addition to Boko Haram's ties to Al-Qaeda, they had links to Al-Shabaab, a known and acclaimed terrorist organisation. This is supported by Zenn et al, who argued that Boko Haram's emergence in 2009 caused scholars to re-evaluate, cultivated networks to AQIM and Al-Shabaab. The two groups assisted Boko Haram in rapidly increasing its tactical sophistication.[83] In June 2012, the commander of US forces for Africa noted that there are indications that Boko Haram was likely "sharing funds and training in the use of explosive materials with Al-Shabaab and AQIM."[84]

Its terrorism ties are also evident in the factionalised segments of Boko Haram. One faction led by Abubakar Shekau reportedly has ties to Al-Qaeda and the second faction better known as Islamic State in the West Africa Province led by Al-Barnawi has links to Islamic State, with them having withdrawn their support from Shekau and giving it to Al-Barnawi in 2016.[85] Some reports suggest that Boko Haram also pledged their support to Islamic State in March 2015.

Secondly, the assertion that Boko Haram is a terrorist organisation was substantiated by the United Nations Security Council, as they were listed under the Entities associated with al-

[78] Campbell, *supra* n. 4, at 11.
[79] International Crisis Group, *supra* n.3, at 23.
[80] Pham, *supra* n.21; International Crisis Group, *supra* n.3, at 8.
[81] All Africa, "Nigeria: Trial of Moh's Ashafa- the making of another Mohammed Yusuf, Boko Haram Leader", [No date]
[82] International Crisis Group, *supra* n.3, at 23.
[83] Zenn, *supra* n.2, at 132.
[84] Human Rights Watch, *supra* n.54, at 89.
[85] Campbell J., "Suspected Leadership changes to is- Backed Boko Haram faction continue", *Council on Foreign Relations,* 12 March 2019. Available at: https://www.cfr.org/blog/suspected-leadership-changes-backed-boko-haram-faction-continue. Last accessed on 29 December 2021.

Qaeda essentially categorising them as a foreign terrorist organisation[86] by the Security Council's Al-Qaeda Sanctions Committee on 22 May 2014. As such, by United Nations Security Council Resolution 2083 (2012), the group was designated for "participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of" Al Qaeda and AQIM.[87]

Thirdly, the acknowledgment of the terrorist nature of the group was affirmed by the United States Department of State designation of Boko Haram and Ansaru as terrorist groups on 14 November 2013 in line with section 219 of the Immigration and Nationality Act. This is also supported by the designation of Boko Haram/Ansaru leaders as specially designated global terrorists[88] in the same league as Al- Qaeda and Islamic State. In designating members of Boko Haram as such, the US State Department reasoned that it was assisting in cutting off financial support to terrorist activity and helping law enforcement efforts against said individuals.[89]

As indicated above each frame comes with its own implications and applicable laws. In the case of the Boko Haram Insurgency and the terrorism frame, the applicable laws are the domestic criminal laws on terrorism prevention. In Nigeria, the applicable laws as earlier mentioned are the Terrorism Prevention Act 2011 (as amended by the Terrorism Prevention Amendment Act 2013) and the Economic and Financial Crimes Commission Act 2004, which has provisions on financing terrorist activities. It could be said that the impetus to enact these laws was based off a Security Council resolution 1373, which required member states to make terrorism and terrorist funding a serious crime in domestic legislation.[90] It can therefore be said that the general disposition of States is to view matters such as this as purely a domestic issue.

Although this may be the case and this frame may be apt, it can be argued that the Boko Haram violence can be described as more than just terrorism, thus the other possible frames will be discussed below.

[86] Campbell, *supra* n.4, at 10.
[87] UNSC Res 2083 (17 December 2012) UN Doc S/Res/2083.
[88] United States Executive Order No.13224 (July 2, 2002).
[89] *Ibid*.
[90] Omolaye- Ajileye, *supra* n.35, at 21.

B. Boko Haram Violence as an International Armed Conflict

Arguments have been made that the reach of the group into neighbouring countries has altered the nature of the violence, bringing the question of whether the conflict is indeed non-international, international or internationalised in nature, in view. Boko Haram's reign of terror has not only left an indelible mark in Nigeria but also on its neighbouring countries such as Cameroon, Chad and Niger. It has been argued that the violence "may be evolving into a transnational threat with links to terrorist groups and violent extremists in the North West and East Africa."[91] This question/ argument helps introduce another possible frame being "Boko Haram Violence as an International Armed Conflict".

International Armed Conflict as conceptualised by Common Article 2 is defined as "declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."[92] The institution with the agency to propagate this frame would be the United Nations Security Council by virtue of their powers and duties pursuant to Chapter VI and VII of the UN Charter as well as the States themselves. Specifically, by Article 39 of the UN Charter, the Security Council can act where there is a finding of a "threat to the peace, breach of peace, or act of aggression" particularly between two States.[93] Such action can include the use of force to maintain or restore international peace and security. Fry argues that sometimes breach of the peace by a State or States under the UN Charter could constitute an armed conflict under Common Article 2.[94] Action to be taken by the Security Council could possibly be seen with the mobilisation of UN forces, or engagement in hostilities by States with the backing of the UN or the use of peaceful means to seek a resolution, pursuant to a security council resolution[95] as seen with the United Nations Military Observer Group in India and Pakistan to observe the ceasefire entered into between the two states following renewed hostilities in 1971 over Kashmir.[96] Another such instance is the fact that the Security Council has conducted over 40 meetings

[91] Pham, *supra* n.21.
[92] Article 2 common to the Geneva Conventions 1949.
[93] This is not to say that there cannot be a finding of breach of peace where it is an internal issue as seen in Somalia. This can be seen with the establishment of United Nations Operation in Somalia pursuant to resolution 751 (1992). The UN Charter is referenced because it contains conditions under which States may resort to war or to use of armed force in general. See Article 1 and Chapter VII of the UN Charter and ICRC, "What are jus ad bellum and jus in bello? 22 January 2015. Available at: https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0. Last accessed on 29 December 2021.
[94] Fry J. D., "The UN Security Council and the law of Armed Conflict: Amity or Enmity" (2006) 38 *Geo Wash Int'l L Rev* 327 at 329.
[95] Chapter VI and VII UN Charter 1945.
[96] UN Peacekeeping, "UNMOGIP Factsheet", United Nations. Available at: https://peacekeeping.un.org/en/mission/unmogip. Last accessed on 29 December 2021.

on the issue of the Russian aggression in Ukraine.[97] This chapter will now proceed to assess actions taken by this institution to further this frame.

The Security Council under the UN Charter has the responsibility of maintaining the international peace and security and by inference preventing armed conflict. These are roles esteemed by the Security Council and are structures that are consistently held up and advanced. However, in the context of the Boko Haram Violence, very few actions of the Security Council could point to the maintenance of this frame. One of such actions is the push for a more regional response headed by the African Union as a whole, Economic Community of West African States (ECOWAS) and the Lake Chad Basin Commission. This is seen in Security Council Resolution 2349 wherein the Security Council welcomed "the commitment expressed by the Governments in the Region to combat Boko Haram…facilitate stabilisation, and enable access for humanitarian organisations, in accordance with the African Union Peace and Security Council's (AUPSC)'s mandate" and encouraged ECOWAS and the Lake Chad Basin Commission "to develop a comprehensive and common strategy that effectively addresses the drivers that contributed to the emergence of Boko Haram and ISIL, with a particular focus on longer term development needs."[98] In furtherance of this, the Security Council gave its support to the Multinational Joint Task Force (MNJTF) in the fight against the insurgency. In their resolution on the Boko Haram Insurgency in the Lake Chad Basin wherein they commend the "important territorial advances by the Governments in the Region against Boko Haram …[by]… the MNJTF", recognise the "continued support of the AU to the MNJTF" and call on "Member States of the Lake Chad Basin Commission (LCBC) and Benin to continue their efforts in the fight against Boko Haram."[99] This support was also communicated by Presidential Statements issued by the UN Security Council endorsing the AU Peace and Security Council authorisation of force against Boko Haram.[100]

Prior to continuing my analysis on the development of the frame of International Armed Conflict, this chapter will dwell for a few moments on the MNJTF. One of the factors that has fed into this narrative is the multilateral security arrangement, which saw the establishment of the Multinational Joint Task Force to combat the insurgency and fight Boko Haram. This Task Force was established in 2015 and comprised of military personnel from Benin, Cameroon,

[97] Geneva Academy (RULAC), "International armed conflict in Ukraine". Available at: https://www.rulac.org/browse/conflicts/international-armed-conflict-in-ukraine#collapse4accord. Last accessed 29 December 2021.
[98] UNSC Res 2349 (31 March 2017) UN Doc S/Res/2349,
[99] *Ibid*.
[100] Brubacher, M. et al, "The AU Task Forces: an African response to transnational armed groups" (2017) 55(2) *J. of Modern African Studies* 275, at 284.

Chad, Niger and Nigeria.[101] Its range of operations is spread across Nigeria, Chad, Cameroon and Niger, as the cross-border nature of the insurgency transformed it to a regional threat. For instance, in 2017 Boko Haram killed civilians in at least 10 attacks in the Diffa region in Niger.[102] In 2018, 18 girls were kidnapped from two villages- Blaharde and Bague, in Niger.[103] The group is allegedly responsible for the deaths of 158 civilians in Cameroon. The deadliest attack happened in Waza on 12 July 2017 wherein a young girl was forced to carry and detonate a bomb in a crowded video game centre and resulted in 16 civilians killed and at least 34 injured.[104] There were also reports of Boko Haram having killed nearly 400 civilians in Northern Cameroon.[105] Other attacks in Amchide on 15 Oct 2014 killing 30 civilians, in Bamare on 22 July 2015 where 13 civilians were killed and more than 30 wounded and also on 25 July 2015 where 20 people were killed and more than 80 were wounded when a suicide bomber detonated in Port Vert.[106] According to the UN Human Rights Council, the conflict between the armed group Boko Haram and government security forces of Nigeria, Cameroon, Niger and Chad has devastated the lives of hundreds of thousands of civilians[107] in those States. With the involvement of other sovereign states, it can be argued that the conflict has become international in nature.

As mentioned above, although there is no direct UN Security Council engagement nor Chapter VII sanctioned actions nor actions of the security forces of the concerned States against the Nigerian armed forces, the actions of the MNJTF are backed by the Peace and Security Council (PSC) of the African Union (AU).[108] This then begs the question of whether the backing of a regional body is capable to transforming the nature of the conflict. The response to this question is highly unclear as the use of a Task Force is a novel construct straddling the "intersection between regime interests, institutional self-interest and delegated authority."[109] The Task Force could be defined as a hybrid construct of addressing "the growing threat of

[101] Geneva Academy, Rule of Law in Armed Conflicts (RULAC), "Non-International Armed Conflict in Nigeria". Available at: https://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-nigeria. Last accessed on 29 December 2021.
[102] Amnesty International, "Lake Chad region: Boko Haram renewed campaign sparks sharp rise in civilian deaths", 5 September 2017. Available at: https://www.amnesty.org/en/latest/news/2017/09/lake-chad-region-boko-harams-renewed-campaign-sparks-sharp-rise-in-civilian-deaths/. Last accessed on 29 December 2021.
[103] Campbell J., "Recent Boko Haram attacks along Nigeria-Niger Border", *Council on Foreign Relations*, 30 Nov 2018. Available at: https://www.cfr.org/blog/recent-boko-haram-attacks-along-nigeria-niger-border. Last accessed on 29 December 2021.
[104] Amnesty International, *supra* n.102.
[105] Amnesty International, "Cameroon: Hundreds slaughtered by Boko Haram and abused by security forces", 16 September 2015. Available at: https://www.amnesty.org/en/latest/news/2015/09/cameroon-hundreds-slaughtered-by-boko-haram-and-abused-by-security-forces/. Last accessed on 29 December 2021.
[106] Amnesty International, "Boko Haram, Bombing Campaign sees civilian deaths spiral", 24 September 2015. Available at: https://www.amnesty.org/en/documents/afr44/2498/2015/en/. Last accessed on 29 December 2021.
[107] Amnesty International, "UN Human Rights Council, 30th Session 14 Sept- 2 Oct 2015", 30 September 2015.
[108] African Union, Communique of the Peace and Security Council 489th Meeting 3 March 2015 (PSC/PR/COMM.CDLXXXIX)
[109] Brubacher, *supra* n.100, at 277; Barnett, M. & Finnemore, M., *Rules for the World: international organizations in global politics* (Cornell University Press, 2014).

insurgencies" and "western concerns for good governance" while remaining true to "the principles of sovereignty and non-interference in national affairs."[110] Brubacher et al argues that Task Force's look for outright military victory while seeking to maintain a high degree of state control over command and strategy choices.[111] Furthermore, Task Forces are created at the request of the State. It can be argued that the AU's intervention was based off its right to forceful intervention (and authorised use of force) in the domestic affairs of member states under grave circumstances[112] and serious threat to legitimate order. Although, the nature of the Task Force and external influence of the PSC could be said to change the nature of the conflict at some level, there is the view that it does not become international in nature because the Task Forces are created at the behest of States, "operated largely from their own country, under their own tactical command and with their own funding", that is to say with their consent[113] while AU's operational control is tenuous.[114] Therefore instead of buttressing the argument in favour of the existence of an International Armed Conflict, it works contrary.

Another point that may contribute to the furtherance of this frame is linked to the Security Council's awareness of the "importance of its early considerations of situations which might deteriorate into armed conflicts". This is evidenced by its monitoring of events in the Lake Chad region as seen in its reports of the Secretary- General on the protection of civilians in armed conflict[115] and on the activities of the United Nations Office for West Africa,[116] which catalogue issues concerning the insurgency and efforts taken by the State to resolve said issues as well as recommending possible courses of action for the Security Council and Member States. Noteworthy is the fact that none of the recommendations in these reports lean towards military action sanctioned by the UN. The absence of key phrases such as "all measures necessary", "by the use of force if necessary", "the necessary measures" or "the necessary action" in Security Council documents referencing the insurgency suggest that the Security Council is not inclined to exercise its agency to advance the concept of Boko Haram Insurgency as an International Armed Conflict. One could extend this argument to state that the Security Council by its actions does not believe that there exists an International Armed Conflict. This point is also buttressed by the fact that the one major resolution on Boko Haram and the violence perpetrated was not adopted pursuant to Chapter VII of the UN Charter.

[110] Brubacher, *supra* n.100, at 278.
[111] *Ibid*, at 280.
[112] Constitutive Act of the African Union 2000 Article 4 (h) and 4(j); Protocol on Amendments to the Constitutive Act of the African Union 2003 Article 4 (h).
[113] See Chapter 1- Classification of armed conflict for discussion on the impact of consent on the classification of an armed conflict.
[114] Brubacher, *supra* n.100, at 284.
[115] UN SC S/2012/453 (18 June 2015).
[116] UN SC S/2015/1012 (22 December 2015); UN SC S/2013/732 (11 December 2013).

Upon review of actions by the Security Council, it is found that the Security Council has not through its use of language and mobilisation of structures advanced the frame. It could also be advanced that even if action was taken with a resolution adopted under Chapter VII, it may still not infer the existence of an International Armed Conflict as the violence is not between two States.

It thus raises the question of the reasons why the Security Council may have taken this stance. An obvious reason could be that the acknowledgment of an insurgency by the Security Council shows that the Security Council has failed in its core responsibility of maintaining international peace and security and thus it is not in their interest to acknowledge it as such.[117] Notwithstanding the foregoing, it could be argued that other occurrences such as the involvement of western countries and Boko's Haram affiliation to terrorist networks have contributed to the contemplation of this frame.

Beyond the involvement of other sub-regional States and the operation of Boko Haram in those States, other Western countries have also been involved in some form. The United Kingdom offered to work with Nigeria to fight the scourge of terrorism. For instance, the UK Special Forces and Nigeria military participated in a raid in Sokoto State on 8 March 2012 to free a British citizen and an Italian citizen kidnapped in May 2011.[118] Furthermore, the United States offered to assist the Nigeria Security Forces in setting up an intelligence fusion cell to better share information among agencies and to assist in forensics and post-bomb investigation.[119] An example of the help they provided was seen in the deployment of US drones and surveillance aircrafts to assist in the search for the missing Chibok schoolgirls. Also, the US Department of Defense deployed 12 active duty US soldiers to train a 650 man Nigerian ranger battalion.[120] The US also sponsored a Trans-Sahara Counter Terrorism Partnership.[121] However, it is noteworthy that this was at the request of the Nigerian government.[122] It is reported that since 2012, at least 20 countries have provided military assistance to the Nigerian government in the form of weapons, equipment, training and financial support, earmarked for military needs.[123]

[117] Turk D., "The Role of the UN Security Council in Preventing Internal Conflicts" (2001) 8(1) *International Journal on Minority and Group Rights* 71, at 72.
[118] Human Rights Watch, *supra* n.54, at 90.
[119] *Ibid*.
[120] Campbell, *supra* n.4, at 17.
[121] Pham, *supra* n.21.
[122] Campbell, *supra* n.4, at 17.
[123] Amnesty International, *Stars on their shoulders. Blood on their hands: War crimes committed by Nigerian Military* (Amnesty International, 2005), at 12.

Asides the involvement of other States, there is also the argument that could be made for the affiliation of Boko Haram to known terrorist networks, as argued above. The cross-border nature of some of these networks may contribute to the argument that the nature of the conflict has morphed. These networks include Al-Qaeda in the Islamic Magreb and Islamic State (with Boko Haram pledging their allegiance to Islamic State in 2015). In an interview the Emir of AQIM (Head of the North African franchise) stated that his group will be providing Boko Haram with weapons and training.[124] Notwithstanding this link, there is the finding that the central al-Qaeda leadership does not control Boko Haram and has openly criticised its brutality.[125]

This argument about the possible international nature of the conflict arises because the definition of an international conflict connotes the involvement of one or more sovereign states. Although this argument is plausible, this may not be the case in this instance. This is because the key factor of consent was present. In this instance, the consent referred to is the consent of the Nigerian government. In furtherance of the argument that although there are links to international terror networks and involvement of other sovereign States, the conflict could be said to remain non-international in nature as "Boko haram's attention has been on Nigeria, not the furtherance of an international jihad beyond the Sahel."[126]

Notwithstanding the above there is no indication of the elements that lend credence to the international nature of the conflict, being the involvement of one or more sovereign states. In addition, there is limited evidence to sustain the frame of an International Armed Conflict or an acknowledgment of such by the United Nations Security Council. Thus, the laws applicable to International Armed Conflict, being the Chapter VII of the UN Charter and the four Geneva Conventions 1949, would not apply in this case. In this instance what is obtainable is a multitude of non-state armed terror groups, but the only conflict is between the Nigerian State and Boko Haram. A more sustainable frame is that the Boko Haram Violence is a Non-International Armed Conflict, and this will be discussed below.

C. Boko Haram Violence as a Non-International Armed Conflict

From the above analysis, what has been shown so far is that Boko Haram is a terrorist organisation that is not involved in an international armed conflict although there is the involvement of foreign States but with the consent of the Nigerian State. The next frame, which is more sustainable and best fits the conflict in question, is that of a Non-International Armed Conflict.

[124] Pham, *supra* n.21.
[125] Campbell, *supra* n.4, at 19.
[126] *Ibid*.

As earlier stated in this thesis, social structures are built through interactions of States, these interactions result in rules and rules make agents out of individual human beings by giving them opportunities to act upon the world, which have material and social consequences. These rules give agents choices and within the international society, States act as primary agents. It can therefore be said that the structure in this sense is International Humanitarian Law as a whole and rules in this particular instance are the obligations on State parties contained in Common Article 3, Additional Protocol II and Customary International Humanitarian Law, which are the laws governing non-international armed conflict. The rules are made by States as a whole but also enforced by them through agents (individual human beings) who represent the interest of the State in specific international institutions such as the International Criminal Court (ICC). Other institutions, which are given agency by virtue of the rules, are International Red Cross Committee (ICRC) and International Non-Governmental Organisations (INGOs). Kratchowil had argued that agents are independent, and their independence is limited by the limited independence of other agents.[127] This argument where applied would mean that the ICC, ICRC and INGOs are autonomous in their actions but they can only act so far as the State gives them access to, or in the case of the ICC where procedure permit them to act. They can however through the application and restating of the rules cause a State to rethink an earlier taken stance.

The frame of Non-International Armed Conflict would often be put forward by the State concerned being the principal agent. It can be argued firstly that Nigeria is an agent of the rules of International Humanitarian Law relating to non-international armed conflict. As a result of which, they are charged with the responsibility of abiding by the obligations under these rules. However, in Nigeria, we have a situation where the government was willing to accept that there was a domestic terrorism issue but unwilling to accept that it has risen to the level of a Non-International Armed Conflict and reluctant to exercise this agency vis-à-vis International Humanitarian Law by their initial failure to acknowledge the application of the Common Article 3 and arguably Additional Protocol II to the conflict. This is explained by Obasi who states that the then “President [Jonathan] was often poorly informed, never grasped the gravity of the threat and failed to provide consistent and coherent policy guidance to drive an effective counterinsurgency.”[128] This failure thus activated the agency of other actors, in this case the INGOs, media and general international community to not only ensure that the obligations contained in the Geneva Conventions are adhered to but to make a case for the acknowledgment of their application in this instance.

[127] Onuf, N., *Making sense, making worlds: Constructivism in social theory and international relations* (Routledge, 2012), at 3.
[128] Obasi, *supra* n.57.

It can be said that International Humanitarian Law came about through the three-stage process of the norm life cycle being norm emergence, norm acceptance and norm internalisation. The actions of individuals and organisations or 'norm entrepreneurs' post Second World War could be argued to have had an impact on this process. Finnemore and Sikkink submit that norm entrepreneurs are critical for norm emergence because they call attention to issues or even "create" issues by using language that name, interpret, and dramatise them. This process is otherwise referred to as framing."[129] Finnemore and Sikkink add that the "construction of cognitive frames is an essential component of norm entrepreneurs' political strategies, since, when they are successful, the new frames resonate with broader public understandings and are adopted as new ways of talking about and understanding issues. In constructing their frames, norm entrepreneurs face firmly embedded alternative norms and frames that create alternative perceptions of both appropriateness and interest."[130] Therefore, one can say that through speech acts articulated and repeated on the norms contained in International Humanitarian law, groups such as ICRC "dramatically expanded protections under international humanitarian law including the treatment of wounded soldiers, prisoners of war, civilians under enemy control".[131]

The focus on this analysis is on the last stage of the life cycle- norm internalisation- which I argue it is a continuous process. Norm internalisation can be defined as "the process by which states and other major international actors internalise norms and act in accordance with them because they understand them to be correct or appropriate."[132] It is generally agreed that constructivists believe that States comply with international obligations because they internalise the norms underlying such obligation.[133] In Nigeria, it can be said that the Geneva Conventions and their Additional protocols have been accepted as norms as evidenced by their ratification/adoption/ accession in 1961 and 1988 respectively but are still going through the process of norm internalisation.

On one hand, it can be argued that this process has been completed, i.e. internalised through the domestication of the Geneva Conventions in Nigeria's laws in 1960. On the other hand, the existence of a law on the domestic plane does not mean that it is practicalised and used.

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[129] Finnemore M. and Sikkink K., "International Norm Dynamics and Political Change" (1998) 52(4) *International Organisation (International Organisation at Fifty: Exploration and Contestation in the Study of World Politics)* 887 at 897.

[130] *Ibid*.

[131] Alford R. P., "The Nobel Effect": Nobel Peace Prize Laureates as International Norm Entrepreneurs" (2008) 49 *VA.J of Int'l L*. 61.

[132] Totaro M. V., "Legal Positivism, Constructivism, and International Human Rights Law: The Case of Participatory Development" (2008) 48 *Va J Int'l L* 719, at 728.

[133] Morrow J. D., "When do States follow the Laws of War?" (2007) 101(3) *The American Political Science Review* 559 at 560.

Morrow argues that States do not always comply with these norms because they may lack the capability to carry out their obligations, the norms may not be fully internalised yet, or multiple norms could conflict.[134] In the case of Nigeria, it is my argument that the norms are not fully internalised yet and this is where the norm entrepreneurs play their role.

Most norm internalisation processes highlight the importance of non-state actors. In this instance, these non-state actors or norm entrepreneurs could be the INGOs that are operating in Nigeria. This loose group of institutions could be described as a transnational advocacy network, as conceptualised by Keck and Sikkink. They define a transnational advocacy network to include "those relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services; this network attempts to both build and sustain structures to implement their issues, because its agents not only participate in new areas of politics but also shape them."[135]

Thus, in order to uphold the structure of International Humanitarian Law, external actors (agents) have sought to bring about the acknowledgment and application by the Nigerian government. The chosen mode has been through raising awareness and drawing needed attention to violations of the rules. Through the actions of INGOs such as Amnesty International, Human Rights Watch and Crisis Group; policy institutes such as Council on Foreign relations; Media houses such as the BBC and CNN; and the International Community, the narrative advancing the cause of adherence to the rules have resulted in a change of perspective on the part of the Nigerian government (through their sub-agent, the Nigeria Army) and their treatment of the insurgency.

Some commentary and actions which may have contributed to change in narrative include a statement by the former US Ambassador to Nigeria, Robin Sanders, who at a congressional hearing stated that “Nigeria is at the beginning of a long war or long conflict, they have to realise this is no longer a localised insurgency.”[136] INGOs in their reportage painted a certain picture of the Boko Haram Insurgency and advanced their thoughts on how it should be considered and treated. Such INGOs like Amnesty International have condemned the human rights violations being perpetrated by the Nigeria Security Forces in Borno State in response to abuses by Boko Haram[137] by attempting to highlight a growing issue of concern. These

[134] *Ibid*.
[135] Totaro, *supra* n.132, at 728-729.
[136] Ahmed and Eckel, *supra* n.39.
[137] Amnesty International, “Joint Public Statement- Nigeria: Unlawful Killings by the Joint Military Task Force in Maiduguri must stop”, 14 July 2011. Available at: https://www.amnesty.org/en/documents/afr44/013/2011/en/. Last accessed on 29 December 2021.

included unlawful killings, brutal assaults and unlawful detentions by the Nigerian security forces and to call attention to the humanitarian crisis occurring in the North East. It can be argued that impunity is impermissible and as such, guiding rules for the conflict should be prescribed. A telling phrase in a joint statement released by Amnesty International was that "national security must not be pursued at the expense of human rights."[138] Their argument also stretches the application of the law to apply to Boko Haram by calling on them to respect the principle of humanity in International Humanitarian Law.[139]

In addition, the groups have gone so far as to define and frame the insurgency in Nigeria. Amnesty International wrote that the situation in Nigeria had escalated to the point of being a Non-International Armed Conflict and the called on the international community to ensure prompt, independent investigations into acts which may constitute war crimes and crimes against humanity.[140] Thus, Boko Haram should be accountable for killing civilians, imprisonment, abduction, forced marriage, rape and sexual slavery, recruitment and use of child soldiers, pillage and targeting civilian objects.[141] The recurring reference of INGOs to international crimes indicates that some international law should apply and should govern their actions.

Some INGOs have questioned the actions taken by the Nigerian government. Specifically critiquing them for taking a soft approach in the beginning of the insurgency. One of such critiques has been the use of committees and negotiation to address the conflict such as the preparation of a White Paper on the conflict which is yet to be implemented, the establishment of a Dialogue and Reconciliation Committee set up and negotiation talks held in Maiduguri by former President Obasanjo, even though this has been denied by the government of the day. In taking the soft approach, some of the tools used has been the de-radicalisation of convicted terrorists and those awaiting trial as well as building capacity to communicate our national values better through the military, law enforcement and civilian institutions.[142] The soft approach being taken was buttressed by the then National Security Adviser Dasuki announcing a soft approach to addressing the root causes of terrorism.[143] Another critique of the Nigerian government has been that it has not yet taken adequate steps to thoroughly and

[138] *Ibid*.
[139] Amnesty International, *supra* n.5, at 4 and 10.
[140] Amnesty International, "Nigeria: War Crimes and crimes against humanity as violence escalates in North East", 31 March 2014. Available at: https://www.amnesty.org/en/latest/news/2014/03/nigeria-war-crimes-and-crimes-against-humanity-violence-escalates-north-east/. Last accessed on 29 December 2021.
[141] Amnesty International Comment, "In light of the terrorist attacks and Human rights abuses and violations committed by the terrorist group- Boko Haram", 1 April 2015. Available at: https://www.amnesty.org/en/documents/afr44/1362/2015/en/. Last accessed on 29 December 2021.
[142] International Crisis Group, *supra* n. 3, at 44.
[143] *Ibid*.

independently investigate crimes under international law and other serious human rights violations by its forces.[144] Taking cognisance of the foregoing, it is evident that, generally, in their framing of the conflict in Nigeria, INGOs have painted a picture of a weak Nigerian state.

It bears mentioning that the Nigerian Army saw the threat of the influential reporting by these norm entrepreneurs, particularly Amnesty International and Action Against Hunger, and has launched several campaigns in a bid to discredit and to change the narrative in their favour. Such attempts have included shutting down operations of humanitarian agencies in Borno under the guise of collusion with Boko Haram and funding of the group,[145] invading media houses[146] and threatening to pull Amnesty International license to operate in Nigeria.[147] These actions have had the opposite effect of lending credit to their accounts.

Regardless of the above, the persistence of such reportage can therefore be said to have altered the framing of the situation by the Nigerian government, who went from referring to the conflict as internal disturbance and mere terrorism to admitting the application of International Humanitarian Law and constantly restating that the Nigerian Army operating in the theatre are bound by rules of engagement in line with these obligations. In view of the foregoing, it can be said that these norm entrepreneurs have effectively engaged the process of norm internalisation and the norms encapsulated in the Geneva Conventions have begun to be internalised.

This is evidenced by the transition in the rhetoric of the Nigeria Army. The general propensity of the Nigeria Government especially the Army had been to view the attacks as an internal disturbance and to deviate from human rights obligations in their efforts to suppress it. Ahmed and Eckel argue that "for the Nigerian military, the military way may seem like the best way to counter the threat and fear being inflicted with increasing intensity by Boko Haram."[148] In the early days of the insurgency, the Nigeria Army referred to the insurgents as "miscreants"[149]

[144] Amnesty International, "Boko Haram: Civilians continue to be at risk of human rights violations by state security forces", 24 September 2015. Available at: https://www.amnesty.org/en/documents/afr44/2428/2015/en/. Last accessed on 29 December 2021.
[145] See: Fairbairn, A., "Mercy Corps is extremely concerned about on-going closures in North East Nigeria", *Mercy Corps* Press Release, 25 October 2019; The New Humanitarian, "NGO closure in Nigeria, climate action at the UN, and a $500m cheque for Yemen: The Cheat Sheet", 27 September 2019.
[146] See: BBC Africa, "Nigeria's Daily Trust undermined security, army says", *BBC*, 9 January 2019. Available at: https://www.bbc.com/news/world-africa-46780701. Last accessed on 29 December 2021.
[147] Amnesty International, "Nigeria: Threats from the military won't deter us from defending human rights", 7 June 2018. Available at : https://www.amnesty.org/en/latest/news/2018/06/nigeria-threats-from-the-military-wont-deter-us-from-defending-human-rights/. Last accessed on 29 December 2021.
[148] Ahmed and Eckel, *supra* n.39.
[149] Akinyemi, D. and Akinrefon, D., "Boko Haram has killed 3000- Chief of Army Staff", *Vanguard Newspaper*, 5 November 2012. Available at: https://www.vanguardngr.com/2012/11/boko-haram-has-killed-3000-chief-of-army-staff/. Last accessed on 29 December 2021.

and the President referred to the insurgency as a "rebellion".[150] This sentiment was equally expressed at the Nigerian Bar Association Annual Law Conference in 2015, wherein a military officer when responding to a question on human rights violations argued that since the terrorists were killing with impunity and not respecting human rights, the Nigerian Army was under no obligation to accord them the observance of human rights.[151] This argument is substantiated by reports collated by Amnesty International who detail instances of enforced disappearances, extra-judicial killings, torture, cruel and degrading treatment. Experiences recounted confirm that detainees were tortured using various methods including beatings, being shot in the leg, foot, hand, nail or tooth extractions, suspending detainees by the feet or from a pipe or rod, starvation, choking and other forms of heinous acts by Nigerian Security Forces, particularly the Nigeria Army.[152] One detainee stated that

> after the early morning prayers on 12 February 2013, as we were coming out of the mosques, soldiers came and told all of us to lie down on the ground in the street. Some people were trying to arrange their kaftans, the soldiers shot and killed some of them on the spot, some were shot on the legs, and the soldiers began to beat some of us on the head with iron rods, others were beaten with wood.[153]

Another stated that,

> many of my colleagues did not make it [died in detention]. The beating, the torture was just too much for us. They do all types of things to you, the soldiers. They will tie your hands behind your back, with the elbows touching and then one of them will walk on your tied hands with their boots. Your hands will remain tied and then they'll pour salt water on your wounds.[154]

These are just a few of the reports.

With INGOs and other actors earlier mentioned constantly shedding light on the conflict, the Nigerian Army and the Nigerian government as a whole came to the realisation that International Humanitarian Law applies and by extension the existence of a Non-International Armed Conflict. This is seen with the former President, Obasanjo stating that "conventional military actions based on standard phases of military operations alone will not permanently and effectively deal with issue of Boko Haram.[155] President Obasanjo also makes reference to the insurgency as a "war".[156] This was also acknowledged by President Jonathan who stated that the actions of the group "amount to a declaration of war and a deliberate attempt to undermine the authority of the Nigerian State and threaten her territorial integrity".[157] This

[150] Botelho, G., "Nigerian Presidency declares emergency in 3 states during rebellion", *CNN*, 14 May 2013. Available at: https://www.cnn.com/2013/05/14/world/africa/nigeria-violence/index.html. Last accessed on 29 December 2021.
[151] Interactions following a presentation by Amnesty International on "Counter-Insurgency: Is human rights a distraction or sine qua non?" at the 55th Session of the Nigeria Bar Association 2015.
[152] Amnesty International, *Welcome to Hell Fire: Torture and other ill- treatment in Nigeria* (Amnesty International, 2014), at 9-12.
[153] *Ibid,* at 15.
[154] *Ibid,* at 16.
[155] Obasanjo, *supra* n.64.
[156] *Ibid*.
[157] Botelho, *supra* n.150.

is also seen in a report of the status of Operation Lafiya Dole (the operative name for Nigeria's offensive against Boko Haram) by the theatre Commander, Major General Leo Irabor, wherein he stated that a Boko Haram fighter who surrenders "would be humanely treated in line with international best practices and in accordance with the international humanitarian law."[158] Furthermore, there was also the existence of a ceasefire agreed to by both parties to the conflict, which speaks to the adherence of international humanitarian law.[159] Beyond this, the more telling statement of the drastic shift in the conceptualisation of the conflict was provided by president Jonathan who stated that "since 2009, we have had to contend with many attacks and killings which has now developed into a full scale war targeting the stability and integrity of our nation."[160] It can therefore be said that by these other actors exercising their agency and compelling Nigeria to begin to exercise theirs, the structure of international humanitarian law is built and sustained.

It is important to note before moving on that there are differing treatments of the conflict between two sectors of the Nigerian government- one being the Nigerian Army, who have now admitted that the Geneva Conventions apply, and two, the Nigerian Justice sector who have failed to translate this realisation into the adjudication on matters and continue to treat combatants as common criminals, charging captured combatants under regular criminal law, which does a disservice to the nature and gravity of the conflict. The treatment by the Nigerian Judicial Sector is more aligned with the first frame of the conflict as mere terrorism. This will however be discussed in greater depth in the next chapter, where the spotlight would be on the treatment of the conflict by the Nigerian Justice system.

Behavioural Relevance brings an extra nuance to understanding the development and dominance of the frame of Non-International Armed Conflict. It brings into play the continuum between interests and norms, along which a State positions itself. It causes States to make a decision based on their national interest or an acceptable course of action based on shared normative beliefs and calls for a compromise to be made. Dill argues that, International Law tends to specify in detail which behaviour is required in order to attain an acceptable outcome that reflects what a society considers to be an acceptable compromise between interests and norms.

[158] Abdulkareem, H., "Nigerian soldiers repel 10 Boko Haram attacks in 2 weeks – Theatre Commander", *Premium Times*, 7 December 2016. Available at: https://www.premiumtimesng.com/news/headlines/217323-nigerian-soldiers-repel-10-boko-haram-attacks-2-weeks-theatre-commander.html. Last accessed on 29 December 2021.
[159] Soyombo, F., "Nigeria's 'fake' ceasefire with Boko Haram", *Al-Jazeera*, 11 November 2014. Available at: https://www.aljazeera.com/opinions/2014/11/11/nigerias-fake-ceasefire-with-boko-haram. Last accessed on 29 December 2021.
[160] Omolaye- Ajileye, *supra* n.35, at 28.

In looking at Nigeria's interests, the principal interest that is obvious is that of sovereignty. There is a view generally amongst states that admitting the application of International Humanitarian Law and the existence of the conflict is a sign of weakness and evidence of a compromised sovereignty. Thus, for its interests, States are more inclined to simply categorise the conflict as a mere internal disturbance. It is noteworthy to identify that how a State satisfies its corporate interests depends on how it defines the self in relation to the other. In this regard, Nigeria on the international scene prefers to be viewed as a regional power who is significantly empowered in terms of its security and economy, likening itself as the protector and defender, particularly in the West Africa Region and thus rejects any accounts that reflects otherwise.

Nigeria, in the international field, prefers to be viewed as participatory in the development of norms and is usually quick to sign and ratify international instruments without considering its effects on its national interest. Hence, when its actions are called into question by norm entrepreneurs (as detailed above) and other States for their non-compliance with obligations and human rights standards, it is eager to take steps to be seen in compliance especially when it relates to aid, loans and other forms of assistance. This was evident when the United States refused to sell weapons to Nigeria for human rights violations in line with the 2012 Leahy Amendment Act, which bars US aid to foreign military found to have committed abuses.[161] This prompted actions by the Nigeria to be seen as compliant. This has effectively moved Nigeria's position on the spectrum away from interests closer to norms. Nigeria has therefore strived to abide by the behaviour prescribed by the Geneva Conventions, their Additional Protocols and Customary International Humanitarian Law.

Having looked at how the violence has been framed, the role in which INGOs and how they have positioned themselves, this chapter will then proceed to analyse the insurgency itself, highlighting the point of escalation and looking at elements that show how the insurgency has risen to the level of a non-international armed conflict.

3.3 Boko Haram Insurgency: The Non-International Armed Conflict

Although the radical Islamic group, Boko Haram did not commence as a violent terrorist organisation, in 2009 the group evolved and became the perpetrator of mass violence in the North East region of Nigeria. Reports gathered by Amnesty International and Human Rights Watch indicate that Boko Haram commenced its reign of terror in earnest in July 2009.[162]

[161] Ahmed and Eckel, *supra* n.39.
[162] Amnesty International, "Nigeria: Killing by Security Forces in Northern Nigeria- Public Statement", 31 July 2009. Available at: https://www.amnesty.org/en/wp-content/uploads/2021/07/afr440282009en.pdf. Last accessed on 29 December 2021.

Specifically they state that since 2009 Boko Haram attacks are carried out with increasing sophistication and deadliness,[163] wreaking havoc and suffering on the lives of millions of people in the North East.[164]

This evolution in the group was tied to the extrajudicial killing of its foremost leader, Mohammed Yusuf. This evolution was preceded by a series of co-ordinated attacks in several towns in North East Nigeria between 26 and 30 July 2009, where there were skirmishes between members of the Boko Haram sect and the Nigerian security forces.[165] The first was an attack on a police station in Bauchi by members of Boko Haram and the second was the setting on fire of a police station in Potiskum, Yobe State on 27 July 2009. In response to these attacks, the Nigerian Police killed 30 people and on 30 July 2009, the Nigerian Police killed 200 alleged members of Boko Haram who were attempting to flee Maiduguri, the capital city of Borno state.[166] An expanded report indicates that by the end of the week 800 people had been killed, 30 being police officers. It is reported that Mohammed Yusuf was arrested by Nigerian Security Forces following the attacks and "was allegedly …extra-judicially killed by said security forces. An account of the death of Mohammed Yusuf by Human Rights Watch states that the extrajudicial killing was carried out in a brazen and execution style."[167] In view of the foregoing, it can be said that July 2009 was the tipping point in the conflict between Yusuf/ Boko Haram and the Nigerian security authorities.

A contributory and linked evolutionary factor was the emergence of Ibrahim Shekau, as the leader of the radical Islamic group in June 2010. This change in leadership is widely acknowledged with Amnesty International reporting "in 2010 Boko Haram regrouped and Shekau emerged as the leader of the largest faction of Yusuf's more radical followers,"[168] and Pham who stated that in June 2010, Shekau emerged as a new leader although thought to have been killed during the 2009 uprising.[169] The killing of the foremost leader of the group, who in hindsight was more moderate than his successor, gave room for Shekau's rise and radically transformed the modus operandi of the group. This reasoning was supported by media reports which noted that Boko Haram was broadly peaceful before Mohammed Yusuf's

[163] Amnesty International, *supra* n.5, at 3.
[164] Amnesty International, *Nigeria: 'Our Job is to Shoot, Slaughter and Kill': Boko Harm's Reign of Terror in North East Nigeria*, (Amnesty International, 2015), at 3.
[165] Amnesty International, "Nigeria: Unlawful killings by the Joint Military Taskforce in Maiduguri must stop", 14 July 2011. Available at: https://www.amnesty.org/en/documents/afr44/013/2011/en/. Last available on 29 December 2021.
[166] Amnesty International, *supra* n.162.
[167] Human Rights Watch, *supra* n.54, at 36.
[168] Amnesty International, *supra* n.164.
[169] Pham, *supra* n.21.

death and with Shekau, Boko Haram has undertaken a violent campaign of deadly attacks on schools, churches, mosques, state critics and security forces.[170]

This view may be contradicted in the first instance by the decrease in activity in the immediate aftermath of the death of Mohammed Yusuf. This was evidenced by little to no reports of incidents instigated by Boko Haram with only 171 incidents resulting in 951 fatalities recorded between 2009 and 2011.[171] Specifically, between July and December 2010 at least 85 people were killed in 35 separate attacks in 4 States; these figures are significantly lower than those reported in subsequent years. Furthermore, in 2011, 550 people were killed in at least 115 incidents.[172] Notwithstanding the foregoing, there was an uptick in attacks from 2011. It may be argued that there was a period of limited activity because Shekau was attempting to consolidate his power.

There are differing views on when the insurgency escalated to the point of being referred to as a Non-International Armed Conflict. Some reports place this escalation in 2012 while others argue that this turn of events occurred in 2013 and some in 2014. The Nigeria Security Tracker in its tracking of the evolution of Nigeria's running conflict with Boko Haram documents a significant spike in monthly incidents in 2012.[173] In addition, in the first 9 months of 2012, more than 815 people died in some 275 separate incidents.[174] The escalation in conflict could be additionally marked by the declaration of state of emergency by the then President Goodluck Jonathan on 31 December 2011[175] in 15 local government areas across 4 States (Borno, Plateau, Yobe and Niger),[176] and another State of Emergency in May 2013. One could say that this changed the nature of the conflict as the State of Emergency resulted in the military implementing counter terrorism and insurgency efforts.

Some other groups place the point of escalation in 2013. For instance, RULAC expressly states that from 2013, Nigeria became involved in Non-International Armed Conflict on its territory against Boko Haram, a non-state armed group.[177] It was argued that "human rights have been systematically violated and abused and International Humanitarian Law has been

[170] Channels TV, *supra* n.40.
[171] Raleigh C., Linke A., Hegre H. and Karlsen J. (2010). "Introducing ACLED-Armed Conflict Location and Event Data." 2017 47(5) *Journal of Peace Research* 651; ACLED. (2017). "Armed Conflict Location & Event Data Project (ACLED) Codebook, 2017.
[172] Human Rights Watch, *supra* n.54, at 40.
[173] Nigeria Security Tracker by Council on Foreign Relations. Available at: https://www.cfr.org/nigeria/nigeria-security-tracker/p29483. Last accessed on 29 December 2021.
[174] Human Rights Watch, *supra* n.54, at 40.
[175] *Ibid*, at 49.
[176] Amnesty International, *supra* n.5, at 8 and 64.
[177] Geneva Academy (RULAC), *supra* n.101.

consistently disregarded", with Boko Haram having killed at least 6,800 people, mostly civilians in 2013.[178] This view was also expressed by the International Criminal Court in its report on Preliminary Activities in Nigeria released in 2013, where it was found that the required level of intensity and organisation of parties to the conflict necessary for the violence to be qualified as a NIAC.[179] Others such as Amnesty International place the point of escalation in 2014 as they argue that "the escalation of violence in north-eastern Nigeria in 2014 has developed into a situation of non-international armed conflict in which all parties are violating international humanitarian law."[180] What is apparent however, is that there was a surge in frequency and intensity of incidents..

This chapter operates from the basis of 2012 being the point of escalation, taking into cognisance the change in principal actor on the part of Nigeria from the Police to the Army. As highlighted in the previous chapter, what determines the classification of a situation of a Non-International Armed Conflict is the intensity and organisation. I will now address each of them in turn.

3.3.1 Intensity

It can be argued that the conflict in Nigeria meets the intensity threshold for a Non-International Armed Conflict. Intensity in an armed conflict is characterised by the number, intensity and duration of the incidents, weapons, extent of material destruction, casualties and involvement of the Security Council.[181] In the *Tadić* Appeal Chamber case, it was suggested that the duration of violence was a principal determining factor for the classification of a conflict, specifically the existence of a protracted large scale armed violence would be a major indicator of intensity. One can say that the protracted nature is evidenced by the fact that the conflict in Nigeria has persisted since 2012 and has greatly impacted on the North East region of Nigeria, leading to a humanitarian crisis. Although the issue of duration is integral to the determination of intensity, other factors also play a part in the evaluation of intensity.

One measure of gauging whether the threshold for intensity has been met is through the number of incidents. It can be said that between 2012 and 2015 the number of attacks increased significantly and there was an uptick in incidents between 2018 and 2020. This is buttressed by the Nigeria Security Tracker whose tracking shows that between June 2011 and

[178] Amnesty International, *supra* n.164, at 9.
[179] ICC, *Report on Preliminary Activities- Nigeria*, 2013, at para. 218; ICC, *Report on Preliminary Activities- Nigeria, 2018.*
[180] Amnesty International, *supra* n.140.
[181] Geneva Academy, Rule of Law in Armed Conflicts (RULAC), "Non-International Armed Conflict in Afghanistan. Available on: https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-afghanistan. Last accessed on 16 December 2021.

June 2018 2,021 incidents and 37,530 killed were documented. Whereas ACLED identified 3,346 incidents with 34, 261 persons killed.[182] It is argued that civilians have borne 45% of deaths with ACLED having attributed 15, 107 to civilians in the worst hit years of 2014 and 2015.[183] One can argue that these figures are also indicative of the duration of the conflict.

Another defining marker are the "deaths, injuries and damage caused by the violence."[184] Since 2009, Boko Haram killed more than 30,000 people, abducted thousands of women and girls, 2.4 million people are internally displaced and almost 7 million people in need of humanitarian assistance in Borno, Adamawa and Yobe States.[185] Different data sets provided contrasting data on the actions of Boko Haram, in terms of occurrence of incidents. Notwithstanding, it can still be said that the scale and depravity of Boko Haram's attacks is appalling.[186] For instance, in 2012, there were a series of bombings such as a bombing in Kano Municipal that killed about 160 civilians, a suicide bombing in a church in Kaduna that killed 71 civilians.[187] In addition, in 2013, 228 people were killed in the crossfire between security forces and Boko Haram in Baga, Borno State; 156 civilians were killed in an ambush by Boko Haram fighters disguised in military wear.[188] In 2014 Boko Haram had killed more than 4,000 people and in the first quarter of 2015, 1,500 people.[189] Boko Haram has claimed responsibility for attacks in 12 States and Federal Capital Territory.[190] Some of the incidents recorded include 14 bomb attacks which killed at least 222 people in start of June 2015. Additionally, at Abattoir in Maiduguri on 2 June 2015, 12 people were killed, on 3rd and 22nd June 2015 at Baga road motor park, there were 16 civilian fatalities and on 20 September 2015 at a mosque and viewing centre, 75 people killed, also at Onion market on the same day

[182] Campbell and Harwod, *supra* n.1.
[183] *Ibid*.
[184] Sivakumaran S., *The Law of Non-International Armed Conflict* (Oxford University Press, 2012), at 168; *Prosecutor v Delalić, Mucić, Delić and Landžo* (Judgment) IT-96-21-T (16 November 1998), at para. 188; *Prosecutor v Milosević* (Decision on Motion for Acquittal) IT-02-54-T (16 June 2004), at para. 30; *Prosecutor v Limaj* (Judgment) IT-03-66-T (30 November 2005), at paras. 135–67
[185] Geneva Academy (RULAC), *supra* n.101; *Ibid n.79*; Campbell and Harwod, *supra* n.1.
[186] Amnesty International, *supra* n.105.
[187] Nigeria Security Tracker, *supra* n.173; Shuaibu I., "Nigeria: Horror, Anger in Kano as Death Toll Reaches 200", *Thisday*, 22 January 2012. Available at: https://allafrica.com/stories/201201230259.html. Last accessed on 29 December 2021; BBC, "Nigerian Easter bomb kills many in Kaduna", 9 April 2012. Available at: https://www.bbc.com/news/world-17650542. Last accessed on 29 December 2021.
[188] Nigeria Security Tracker, *supra* n.173; Premium Times, "Red Cross says 187, not 185, died in Borno village, Baga, during JTF, Boko Haram fight", 22 April 2013. Available at: https://www.premiumtimesng.com/news/130809-red-cross-says-187-not-185-died-in-borno-village-baga-during-jtf-boko-haram-fight.html. Last accessed on 29 December 2021; Audu O., "Boko Haram insurgents in military khaki kill 23, burn scores of houses, vehicles in Borno village", *Premium Times,* 18 September 2013. Available at: https://www.premiumtimesng.com/news/144864-boko-haram-insurgents-in-military-khaki-kill-23-burn-scores-of-houses-vehicles-in-borno-village.html. Last accessed on 29 December 2021.
[189] Amnesty International, *supra* n.164, at 32.
[190] Amnesty International, *supra* n.5, at 9.

19 people were killed.[191] These instances although severe, do not fully capture the gravity of the deaths and damage caused.

As earlier stated, Boko Haram has perpetuated widespread attacks on the civilian population of Nigeria, particularly those in the North East. The widespread nature of the attacks on civilian population can also be seen in their actions against the United Nations, bars, schools, Muslim clerics, government collaborators and Christians. The group bombed the United Nations on 26 August 2011 utilising a car bomb killing 25 people and injuring over 100.[192] In addition to the foregoing, the group has also attacked banks, prison facilities and telecommunication infrastructure.

Generally, there are numerous reports of said attacks on civilians. On 4 November 2011, at least 100 people were killed in gun and bomb attacks in Damaturu, Yobe State, also on 19 April 2012, 5 workers were killed in Kasmi Bakery in Maiduguri. Furthermore, on 20 January 2012 at least 186 people were killed in Kano when Boko Haram attacked across 8 locations.[193] Between May and December 2013, Boko Haram is reported to have killed 1,200 people.[194] The deadliest single attack by the Boko Haram led to at least 60 fatalities in Rann, Borno State on 28 January 2017, in addition to the destruction of hundreds of structures. This attack also showed that Boko Haram has consistently and deliberately targeted civilians.[195]

In addition to the foregoing, there have been numerous attacks on Christians by the group. In the five days of violence in July 2009 Boko Haram members killed 37 Christians and destroyed 29 churches as well as attacked more than 127 churches and also killed 142 Christians between 7 June 2011 and 12 Jan 2012. These attacks on churches consisted of torching and blowing up of church buildings, abductions and forced conversions. One of such attacks was the Christmas day bombing in 2011 at St. Theresa's Church, Madalla, in Niger State where 43 people were killed[196] as well as the killing of 96 civilians in Gubio Local Government of Borno State in June 2020.[197] Some of these attacks were perpetuated during religious services utilising guns, IEDs and suicide bombers.

[191] Amnesty International, *supra* n.144.
[192] Human Rights Watch, *supra* n.54, at 55. Other reports place the deaths at 23 (of which 11 were UN staff) and the number of injured at 116 *(*Amnesty International, *supra* n.5).
[193]Amnesty International, *supra* n.5, at 12.
[194] Persson, H., *Nigeria- An overview of challenges to peace and security* (Sweden Ministry of Defence (FOI), 2014), at 23.
[195] Amnesty International, "Nigeria: Deadliest Boko Haram attack on Rann leaves at least 60 people murdered", 1 Feb 2019
[196] Human Rights Watch, *supra* n.54, at 94.
[197] Motion of urgency public importance raised at the Nigerian House of Representatives on 10 June 2020 by Hon. Usman Zannah on the "Attacks on 2 villages in Gubio Local Government Area of Borno State by Boko Haram Insurgents". See: Nigerian House of Representatives, "Votes and Proceedings", 10 June 2020, at 2.

The group also struck Muslims that publicly opposed Boko Haram tactics, ideology or cooperated with government authorities. For instance, twelve islamic (Wahabi) clerics were killed in Borno State, one of which was Ibrahim Birkuh who was killed outside his home in Biu, Borno State on 6 June 2011 and another was Sheikh Ali Jana'a who was killed outside his home in Maiduguri on 29 October 2011.[198] Their attacks also focused on civil servants and more than a dozen politicians in Borno and Yobe States,[199]which included the killing of the then Borno State Attorney General.

In line with Boko Haram's objective of banning foreign education, schools were also a focal point of their attacks. It was documented that between 21 February and 1 March 2012, 10 primary schools were attacked.[200] As a result of these attacks, thousands of pupils were forced out of schools in Yobe, Adamawa, Kaduna and Borno States.[201] It is reported that the precise number of teachers and students killed as well as schools burnt and destroyed are unknown.[202] As of June 2013, 48 students and 7 teachers were killed and between July and September of the same year, 80 students were killed.[203] Their most notorious act was the kidnapping of 250 female students from Federal Government Girls Secondary School in Chibok in April 2014. This number is however disputed as other reports claim that 276 schoolgirls were kidnapped with 57 having fled immediately.[204] Another prominent attack by the group was the kidnapping of 110 secondary school students in Dapchi, Yobe State on 19 February 2018. It is reported that students are yet to fully return to school either as a result of fear or because the school premises' have been destroyed.

It is also noteworthy that aid/ health workers have not been spared by the onslaught. Amnesty International in their tracking of the conflict has noted that Boko Haram deliberately targets specific individuals or categories of civilians, which include health officials.[205] One of such incidents was the killing of Hauwa Liman, an aid worker, in 2018 who had earlier been kidnapped and held for ransom.[206]

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[198] Amnesty International, *supra* n.5, at 13.
[199] Human Rights Watch, *supra* n.54, at 54; Mohammed, A., "Gunmen Kill Borno Attorney-General, Ex-Prison Boss," *Daily Trust*, 19 September 2012. Available at: https://allafrica.com/stories/201209190395.html. Last accessed on 29 December 2021.
[200] Amnesty International, *supra* n.5, at 17.
[201] Amnesty International, *Keep Away from schools or we'll kill you: Right to education under attack in Nigeri*a (Amnesty International, 2013), at 4.
[202] *Ibid*, at 6.
[203] *Ibid*, at 8.
[204] Channels TV, *supra* n.40.
[205] Amnesty International, *supra* n.164, at 5.
[206] Amnesty International, "Nigeria: Boko Haram killing of aid worker Hauwa Liman is a war crime", 16 October 2018. Available at: https://www.amnesty.org/en/latest/news/2018/10/nigeria-boko-haram-killing-of-aid-worker-hauwa-liman-is-a-war-crime/. Last accessed 29 December 2021.

Beyond the attacks on schools, places of worship, health facilities, Boko Haram targeted structures that they considered imports from the western world and which had a propensity for attracting a high number of civilians. Boko Haram in its campaign attacked at least a dozen bars and entertainment centres.[207] In addition to this, media facilities were also attacked such as the Thisday building in Abuja on 26 April 2012 and other news media outlets in Kaduna State.[208]

According to the ICTY in *Boškoski*, another identifier of intensity is the involvement of third parties, be it the United Nations Security Council (UNSC) or other foreign entities. It can be said that there has been an involvement of the UNSC in the conflict through the Resolution 2349 (2017) which wholly addressed the conflict in Nigeria and Boko Haram. The Resolution expressly condemned,

> all terrorist attacks, violations of international humanitarian law and abuses of human rights by Boko Haram and ISIL in the Region, including those involving killings and other violence against civilians, notably women and children, abductions, pillaging, child, early and forced marriage, rape, sexual slavery and other sexual and gender-based violence, and recruitment and use of children, including increasingly the use of girls as suicide bombers, and destruction of civilian property, and calls for those responsible for these acts to be held accountable, and brought to justice.[209]

By this measure, the Security Council called upon "Member States to ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular, international human rights law, international refugee law and international humanitarian law."[210] The Security Council's involvement also included the designation of Boko Haram as a terrorist group by the Council sanctions committees and also through the regular tracking of protection of civilians in Armed Conflict, wherein the conflict in Nigeria has often featured.[211] It can also be said that intensity is also proved through the involvement of other sovereign states (as will be discussed later in this chapter) and INGOs such as ICRC, MSF, Plan International, Mercy Corps and other humanitarian groups.

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[207] Sahara Reporters, "Boko Haram Militants Attack Football Viewing Center in Damaturu", 17 June 2014. Available at: http://saharareporters.com/news-page/boko-haram-militants-attack-football-viewing-center-damaturu. Last accessed on 29 December 2021; Vanguard, " How suicide bombers killed 30 football fans at Borno viewing centre", 17 June 2019. Available at: https://www.vanguardngr.com/2019/06/how-suicide-bombers-killed-30-football-fans-at-borno-viewing-centre/. Last accessed on 29 December 2021.

[208] Human Rights Watch, *supra* n.54, at 56.

[209] UNSC Res 2349, *supra* n.98, at 2 para. 1.

[210] *Ibid*, at 4 para. 9.

[211] UNSC Report of the Secretary-General on the protection of civilians in armed conflict 13 May 2018 (S/2016/447); UNSC Report of the Secretary-General on children and armed conflict in Nigeria 10 April 2017 (S/2017/304); UNSC, Report of the Secretary-General on the activities of the United Nations Office for West Africa, 22 December 2015 (S/2015/1012); UNSC Report of the Secretary-General on the activities of the United Nations Office for West Africa and the Sahel 26 December 2017 (S/2017/1104).

Lastly it can be argued the involvement of the Nigerian Armed Forces as opposed to the Nigeria Police Force is a clear indication of intensity. This is supported by Sivakumaran who citing the *Boškoski* case states that "of particular significance is the use of armed forces on the part of the state rather than the use of its police force."[212] This has been the case as since 2012, the Nigerian Army has been increasingly involved in the conflict, to the extent of commissioning a full scale operation and offensive under the code name "Lafiya Dole" now "Hadin Kai".

From the foregoing, it can therefore be argued that the threshold of intensity has been crossed in Nigeria as not only one factor has been present but a multitude of factors pointing towards the gravity of the conflict in Nigeria.

3.3.2 Organisation

The organisation of a group is determined on a case by case basis as there is no one size fits all policy on the determination of organisation. To aid in this determination, the following features may help: responsible command and established hierarchy, means to carry out widespread or systematic attack against a civilian population; exercises over part of a territory if a State; criminal activities against the civilian population as a primary purpose; group articulated intention to attack a civilian population; and group fulfils some or all the criteria.[213] It can be argued that Boko Haram meets the criteria of organisation.

One key marker of organisation is the presence of responsible command and established hierarchy. This view is expressed in a number decided cases such as *Hadžihasanović*,[214] *Akayesu*[215] and *Bemba Gombo*,[216] however for the purpose of this analysis the position of the ICTR in *Akayesu* and of the ICC in *Bemba Gombo* would be operative. In *Akayesu*, it was noted that "'[t]he armed forces opposing the government must be under responsible command, which entails a degree of organisation within the armed group or dissident armed forces."[217] The ICC in *Bemba Gombo* added that there should be an "operative internal disciplinary system."[218] These elements are seen with Boko Haram.

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[212] Sivakumaran, *supra* n.184, at 169; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski* (Judgment) IT-04-82-T (10 July 2008), at paras. 243, 245–6; *Prosecutor v Boškoski and Tarčulovski* (Appeal Judgment) IT-04-82-A (19 May 2010), para. 22.
[213] Geneva Academy (RULAC), *supra* n.101.
[214] *Prosecutor v Hadžihasanović, Alagić, and Kubura* (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility) IT-01-47-AR72 (16 July 2003); Sivakumaran, *supra* n.185, at 174-175.
[215] *Prosecutor v Akayesu,* (Judgment) ICTR-96-4-T (2 September 1998), at para. 626.
[216] *Prosecutor v Bemba Gombo,* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges) ICC-01/05-01/08 (15 June 2009), at para. 234.
[217] *Akayesu, supra* n.215, at para. 626.
[218] *Bemba Gombo, supra* n.216, at para. 234.

There have been arguments made that the leadership of the group is opaque. This view is supported by Campbell who reiterates this argument, "with few clear answers about its leadership, connections to other jihadist groups,"[219] and noted that command and control among Boko Haram factions operating in Borno state and adjacent territories remains obscure.[220] Human Rights Watch also advances that "as of 2012 little was known of the group's leadership". There was also the argument that the clandestine nature of the group has led to much speculation about the composition of its leadership, membership, "possible factions, sponsors and links to foreign groups."[221] It is my argument that the leadership of the group has been certain. The leadership of Boko Haram moved from Mohammed Yusuf to Ibrahim Shekau. Shekau as leader is reported to lead the Shura (the council of elders), which consists of seven members.[222] This is further buttressed by Human Rights Watch who state that "Boko Haram is a cell based organisation that remains unified under the control of Shekau and Shura Council."[223] Each member of the Shura heads up a ministry, there are also provisions for commanders and sub-commanders.[224] The group's number is estimated to be around 15,000[225] even though the Army stated that as of 2009 Yusuf had only 4,000 followers.[226] Their operating system is fluid as members operate in cells with relative autonomy.[227] It is also reported that the armed group also provided its own justice system through these mechanisms.[228]

It can be argued that there are two major factions, Boko Haram led by Shekau and Jama'atu Ansarul Musilimia Fi Biladis (Vanguards for the Protection of Muslims in Black Africa)- Ansaru, led by Al- Barnawi.[229] Human Rights Watch from its findings has found that there are two major branches: the first is a larger organisation that aims to discredit the Nigerian government and a smaller more dangerous group that is increasingly sophisticated and lethal. Crisis Group however submits that there are six factions. It is my contention although the group is factionalised there is still a degree of co-ordination and organisational control.

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[219] Campbell, *supra* n.4, at vii.
[220] Campbell J., "Boko Haram evolves and persists in North East Nigeria", *Council on Foreign Relations*, 17 April 2019. Available at: https://www.cfr.org/blog/boko-haram-evolves-and-persists-northeast-nigeria. Last accessed on 29 December 2021.
[221] Human Rights Watch, *supra* n.54, at 11.
[222] Amnesty International, *supra* n.164, at 15.
[223] Human Rights Watch, *supra* n.54, at 38.
[224] Amnesty International, *supra* n.164, at 15.
[225] *Ibid*.
[226] Nnochiri, I., "Boko Haram: Yusuf had only 4,000 followers in 2009, Army tells court", *Vanguard Newspaper*, 8 December 2011. Available at: https://www.vanguardngr.com/2011/12/boko-haram-yusuf-had-only-4000-followers-in-2009-army-tells-court/. Last accessed on 29 December 2021.
[227] Amnesty International, *supra* n.164, at 15.
[228] *Ibid*. at 15-17.
[229] Reuters, *supra* n.70.

The ICTY in reiterating the understanding of "Responsible Command" as expressed by the ICRC in *Hadžihasanovic* states that,

> The existence of a responsible command implies some degree of organisation of the insurgent armed group or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organisation similar to that of regular armed forces. It means an organisation capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a de facto authority.[230]

Therefore, it can be argued that the requirement of responsible command has been met based on the above analysis.

Closely related to the factionalisation is the issue of the style of attacks. It can be argued that Shekau has achieved a sufficient level of organisation to maintain a punishing pace of coordinated attacks even though organisation is still comprised on a composite of different actors.[231] Boko Haram's attacks have also been reported as being widespread and systematic[232] and non-discriminating in its target. It is argued that this is one of the reasons Ansaru through Al-Barnawi broke ranks with Shekau because there were too many Muslim fatalities.[233] Ansaru, in its operations, directly targeted Christians and security services. Other reports submit that Ansaru mainly targeted military bases and Boko Haram continued to utilise suicide bombings and targeting civilians.[234] Another argues that Ansaru concentrates its attacks almost exclusively on foreign (western) targets. Attacks conducted by the Boko Haram have changed in nature relying predominantly on guerrilla warfare strategies and suicide bombing. Boko Haram had staged suicide bombings against government forces, civilians and the United Nations Headquarters. Suicide bombing deaths have accounted for an increasing proportion of deaths[235] and they accounted for a third of all casualties in the first half of 2018.[236] Boko Haram demonstrated flexibility and remains a formidable threat to the Nigerian State despite losing much of its territory.[237] Boko Haram faction leader Abu Musab Al-Barnawi has said that kidnapping and enslavement of non-Muslim people are justified.[238] One can argue that although these two factions employed different methods, they were working towards the same purpose and were still coordinated under the broader Boko Haram umbrella.

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[230] Cullen, A., *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press, 2010), at 151; *Prosecutor v Hadžihasanovic* (Judgment) IT-01-47-T (15 March 2006).
[231] Pham, *supra* n.21.
[232] Human Rights Watch, *supra* n.54, at 76.
[233] Campbell, *supra* n.4, at 9-10.
[234] Channels TV, *supra* n.40.
[235] Campbell and Harwod, *supra* n.1.
[236] *Ibid*.
[237] *Ibid*.
[238] *Ibid*.

In addition, control of territory is another criterion for proving organisation.[239] Over the years, Boko Haram established control in a significant amount of territory in North East Nigeria. It was argued that by September 2014, Boko Haram operated freely in a particular sized territory about the size of Rhode Island and in August 2014 claimed Gwoza as the caliphate.[240] Although the group's control waned by 2015 and it has suffered crucial loss in territorial control; it still retains control over a small portion of Nigeria.[241] These areas include: Sambisa Forest, Mandara Mountains and a number of islands in Lake Chad[242] and as of 2018 had waned to some small villages.[243] The group has however resurged since 2018 and proceeded to sack villages, earlier reclaimed by the Nigeria Army and the Multinational Joint Task Force.

Lastly, another criterion that proves organisation is the ability to "procure, transport, and distribute arms as well as recruit new members."[244] This fulfilment of this criteria is supported by Campbell who argues that "funding and weapons are largely locally sourced."[245] Boko Haram is reportedly able to raise funds through ransom payments and bank robberies. It is also able to amass weapons by attacking Nigerian military installations and convoys. Some of these weapons included "automatic rifles, heavy artillery such as tanks, rockets, Improved Explosive Devices and mines."[246] Its ability to recruit and raise funds is also corroborated by Amnesty International who submit that "as the group's influence grew, so did its financial resources, which were used to recruit new members. Young unemployed men found themselves with money, access to weapons and the power to extort money from others in society."[247]

It has been argued that the threshold for proving organisation is not very high[248] and as such it can be said that Boko Haram has surpassed the threshold for organisation based on the above submissions. Having shown that the core elements for a non-international armed conflict are evident in the Boko Haram insurgency.

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[239] *Prosecutor v Haradinaj, Balaj and Brahimaj* (Judgment) IT-04-84-T, Judgment (3 April 2008), at paras. 60, 70–5; *Prosecutor v Đorđević* (Judgment) IT-05-87/1-T (23 February 2011), at para. 1557; *Prosecutor v Thomas Lubanga Dyilo* (Decision on the confirmation of charges) ICC-01/04-01/06, (Pre-Trial Chamber I, 29 January 2007), at para 236.
[240] Campbell, *supra* n.4, at 10; Channels TV, *supra* n.40.
[241] Geneva Academy (RULAC), *supra* n.101.
[242] *Ibid*.
[243] Campbell and Harwod, *supra* n.1.
[244] Sivakumaran, *supra* n.185, at 171; *Prosecutor v Milosević* (Decision on Motion for Acquittal) IT-02-54-T (16 June 2004), at para. 23; *Haradinaj, Balaj and Brahimaj, supra* n.240, at paras. 60, 76–82; *Boškoski and Tarčulovski* (Judgment), *supra* n.213, at paras. 281 and 286; *Boškoski and Tarčulovski* (Appeal Judgment), at para. 23; *Đorđević* (Judgment), at paras. 1566–8; *Prosecutor v Limaj* (Judgment) IT-03-66-T (30 November 2005), at para. 118;
[245] Campbell, *supra* n.4, at 10.
[246] Kingah S., "Legal Treatment of Boko Haram militants captured by Cameroon" (2018) 26(1) *African Journal of International and Comparative Law* 44, at 55.
[247] Amnesty International, *supra* n.164, at 14.
[248] Sivakumaran S., *The Law of Non-International Armed Conflict* (Oxford University Press, 2012), at 170

3.3.3 Applicable Law

The above analysis has illustrated that Boko Haram is a non-state armed terrorist group that has been involved in a Non-International Armed Conflict with Nigeria since at least 2012. Thus, in instances where there is found to be a Non-International Armed Conflict both International Humanitarian Law and International Human Rights Law are said to apply although this may not be binding on all parties. International Humanitarian Law is binding on both parties but International Human Rights Law is only binding on the Nigerian State.[249] All parties to the conflict including Boko Haram are bound by the rules of International Humanitarian Law, which explicitly prohibits any direct attacks against civilians and civilian objects,[250] even though Boko Haram is not a party to the law[251] as "there is no judgment on the motive of fighting."[252] However, within the umbrella of International Humanitarian Law, there is the argument concerning which of the laws applicable to non-international armed conflict applies in this instance. On the one hand common article 3 of the Geneva Conventions could apply alongside customary international humanitarian law, on the other hand they both could apply alongside Additional Protocol II of 1977. The application of the law is dependent on if the thresholds have been met. The threshold for common article 3 is below that of Additional Protocol II.

RULAC has made the case that conflict in Nigeria does not rise to the level of Additional Protocol II and thus only common article 3 and customary international humanitarian law applies.[253] Conversely Amnesty International argues that parties are bound by Common Article 3, Additional Protocol II and Customary International Humanitarian Law and I am inclined to agree with this position. The analysis provided above has shown evidence of "responsible command, exercise of control over of part of territory to enable them carry out sustained and concerted military operations,"[254] elements stated in Article 1(1) of Additional Protocol II, 1977.

A case can also be made for the application of International Human Rights Law. According to Amnesty International, respect for Human rights is not only a fundamental constitutional and

[249] Amnesty International, *supra* n.164, at 19.
[250] Amnesty International, *supra* n.102.
[251] Amnesty International, "Nigeria Counter insurgency: is human rights a distraction or a sine qua non?", Paper presented at the 55th session of the NBA Conference, 25 August 2015.
[252] ICRC, "Changing world, unchanged protection? 70 years of the Geneva Conventions and Humanitarians devised these laws and principles for practical and pragmatic use in the field", 13 March 2019. Available at: https://www.icrc.org/en/document/changing-world-unchanged-protection-70-years-geneva-conventions. Last accessed on 29 December 2021.
[253] Geneva Academy (RULAC), *supra* n.101.
[254] Article 1(1) Second Protocol Additional to the Geneva Conventions of 12 August 1949, 1977.

international legal obligation but also an intrinsic element of any effective counter-insurgency operation and thus ought to be embedded in Nigeria's counter-insurgency strategy.[255]

In light of the above it can be argued that not only is Boko Haram a non-state armed group but a non-state armed terrorist group. In view of which, the laws applicable should not only be those relating to domestic terrorism but those relating to Non-International Armed Conflict as shown above.

Beyond this, there is the argument that can be made for the application of domestic terrorism laws in conjunction with international humanitarian law and this will be the subject of further discourse in the subsequent chapter.

[255] Amnesty International, *supra* n.251.

4. Enforcement of International Humanitarian Law: Effectiveness of the Nigerian Judicial System

The previous chapter considered the different actors (agents) and the various ways of framing the conflict as 'terrorism', an 'international armed conflict' or a 'non-international armed conflict.' Furthermore, this thesis adopted the frame of the Boko Haram Insurgency as a non-international armed conflict, assessed how the insurgency meets the intensity, organisation and control elements required for such classification and concludes that both Common Article 3 of the Geneva Conventions 1949 and Additional Protocol II to the Conventions 1977 are applicable in this instance. Having arrived at this summation and acknowledging that a number of violations have been committed by both sides of the conflict in contravention of the aforementioned laws. It is imperative that there is a discussion on responsibility for offences committed, the enforcement of international humanitarian law, individual criminal responsibility and the interrelationship between International Humanitarian Law and International Criminal Law. In discussing the foregoing, violations of International Humanitarian Law will be examined within the context of war crimes and crimes against humanity committed in the pendency of the conflict. It is arguable that in discussing the responsibility for offences committed, the question of whether justice has been served in the circumstances comes to the fore.

Although its origins can be traced to the Nuremberg Trials and the International Military Tribunal after the Second World War in 1945, International Criminal Justice has gained increasing prominence with the establishment of the International Criminal Tribunal of Yugoslavia and the International Criminal Tribunal of Rwanda. Justice in this regard has been defined as "an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs."[1] As Kapur puts it, "its purpose is to attribute responsibility to a particular individual for specifically articulated acts on the basis of admitted evidence."[2] This need for criminal responsibility is grounded in the 1949 Geneva Conventions which "expressly oblige states to punish perpetrators of grave violations in national law: the "ensure respect" and the repression of obligations."[3] Reka states that "the essence of individual criminal responsibility [is] to avoid impunity of persons for the most heinous crimes."[4] With the rise in non-international armed conflicts globally and violation of international legal

[1] Hassan I. and Olugbuo B., "The Justice versus Reconciliation Dichotomy in the Struggle Against Gross Human Rights Violations: The Nigerian Experience" (2015) XL (2) *Africa Development* 123, at 125.
[2] Kapur A., "The rise of international criminal law: intended and unintended consequences: a reply to Ken Anderson" (2009) 20(4) *E.J.I.L* 1031, at 1040.
[3] Reka, V., "Challenges of domestic prosecution of war crimes with special attention to criminal justice guarantees" (Doctoral Thesis, Pazamny Peter Catholic University 2012), at 24-25.
[4] *Ibid*, at 22.

provisions governing same, there has been a growing call for greater responsibility for such acts, which saw the establishment of the International Criminal Court and the introduction of the principle of complementarity, as a commitment by States to address such crimes. This has also further opened up the conversation on national prosecution of international crimes, not necessarily under universal jurisdiction, but jurisdiction premised on territory and nationality, that is, a government prosecuting its own citizens for war crimes and crimes against humanity, as well as violation of applicable international humanitarian law. One could therefore argue that over the years there has been "a convergence of legal and political interests in the application of international criminal justice…in the actions and inactions of officials, lawyers, judges, victims, survivors, and the general public."[5]

Consequently, this chapter will firstly, undertake a theoretical discussion of the law surrounding the issues of enforcement of international humanitarian law, the examination of the relationship between International Humanitarian Law and International Criminal Law and a brief synopsis of the implementation through national prosecutions will be provided. Secondly, this chapter will explore how the Nigerian justice sector has addressed the issue of criminal responsibility by assessing judicial decisions emanating from criminal cases tied to the Boko Haram Insurgency. In this analysis, the laws upon which charges are brought and the treatment of the conflict by the judiciary will be addressed. In this section, arguments would be presented from the frame of terrorism adopted by the Nigerian justice sector, which in itself is a criticism.

4.1 Enforcement of Violations of International Humanitarian Law

As mentioned in chapter 1, ICL is seen as a means of enforcing violations of IHL. In regard to the wider International Humanitarian Law, that is, the provisions of the Geneva Conventions 1949 and Additional Protocol I of 1977 that address international armed conflict, the onus of taking penal action for violations is placed on the State. Simply, "IHL obliges States to suppress all its violations."[6] Article 146 states that "the High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article."[7] As the ICRC put it, "IHL requires States to enact legislation to punish

[5] Olugbuo B., "Acceptance of International Criminal Justice in Nigeria: Legal Compliance, Myth or Reality?" in Buckley-Zistel S. et al (eds.), *After Nuremberg. Exploring Multiple Dimensions of the Acceptance of International Criminal Justice* (International Nuremberg Principles Academy, 2016), at 3.
[6] ICRC Casebook, "Criminal Repression". Available at: https://casebook.icrc.org/law/criminal-repression#_ftn_001. Last accessed on 30 December 2021.
[7] Art. 146 Geneva Conventions 1949 I-IV.

such grave breaches, to search for persons who have allegedly committed such crimes, and to bring them before their own courts or to extradite them to another State for prosecution." [8]

The Grave Breaches indicated under the Conventions are those involving:

> wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[9]

While under the Additional Protocol I it is stated that,

> the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:
> (a) making the civilian population or individual civilians the object of attack;
> (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);
> (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii) ;
> (d) making non-defended localities and demilitarized zones the object of attack;
> (e) making a person the object of attack in the knowledge that he is ' hors de combat';
> (f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.[10]

On grave breaches, it is worth reiterating that by the Conventions, this is strictly applicable to International Armed Conflict. This does not mean that there are no other violations criminalised under International Humanitarian Law. It is pertinent to note that "all grave breaches are war crimes but not all war crimes are grave breaches."[11] It is in this niche, that enforcement of violations of provisions relating to non-international armed conflict may be situate.

As it pertains to Non-International Armed Conflict, it can be argued that the applicable IHL rules are silent on criminal repression of violations. Graditzky notes that "there is broad consensus that the treaty law applicable in non-international armed conflicts does not make any specific provision for the prosecution of serious violations of its rules."[12] However, it has

[8] ICRC Casebook, *supra* n.6.
[9] Art. 147 Geneva Conventions 1949 I-IV. For full reference see Chapter 1, *supra* n.2.
[10] Art. 85 First Protocol Additional to the Geneva Conventions of 1949, 1977. For full reference see Chapter 1, *supra* n.2.
[11] Reka, *supra* n.3, at 29.
[12] Graditzky T., "Individual Criminal Responsibility for violations of International Humanitarian Law committed in Non-International Armed Conflicts" (1998) 322 *IRRC* 29, at 33.

been argued that "the duty to suppress them has been interpreted to include their repression."[13] This submission was evidenced in *Tadić*, where the ICTY found that:

> It is true that, for example, common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions. Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg [...] considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalise the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals [...]. Where these conditions are met, individuals must be held criminally responsible, because, as the Nuremberg Tribunal concluded:
>
> > [c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."
>
> Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. [...]Furthermore, many elements of international practice show that States intend to criminalise serious breaches of customary rules and principles on internal conflicts.[14]

This makes clear that the basis for criminal repression of IHL violations in a NIAC is through customary international humanitarian law.[15] This view is buttressed by international statutes such as the UN Statutes of the ICTY[16] and ICTR[17] and the International Criminal Court Statute,[18] by international criminal tribunals[19] and is replicated in National Legislations.[20]

There is also the argument made that by virtue of the customary status of Common Article 3, the specific elements of offences as enumerated therein can be tried in separate counts. This was seen in *Blaškić* where the ICTY having found that Common Article 3 has achieved customary status concluded that "the specific provisions of Common Article 3 also satisfactorily cover the prohibition on attacks against civilians as provided for by Protocols I and II", permitting the consideration of nine offences under Common Article 3 in the determination of individual criminal responsibility of General *Blaškić*.[21] This therefore infers that as it relates to criminal repression in NIACs it can be done both on the basis of treaty law and customary law.

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[13] ICRC Advisory Service, "Obligations in terms of penal repression", March 2014.

[14] *Prosecutor v. Dusko Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995), at paras. 128-130.

[15] The customary international humanitarian law that has emerged in relation to non-international armed conflict is discussed extensively in chapter 1, particularly at 1.2.1.2.

[16] Art.3 Second Protocol Additional to Geneva Conventions 1949, 1977. For full reference see Chapter 1, *supra* n.2.

[17] *Ibid,* Art.4.

[18] *Ibid,* Art.8.

[19] *Prosecutor v. Zdravko Mucić, Hazim Delić, Esad Landžo & Zejnil Delalić* (Judgment) IT-96-21-T (16 November 1998), at para 301; *Prosecutor v Akayesu*, (Judgment) ICTR-96-4-T (2 September 1998), at para. 608.

[20] Germany, International Criminal Code, Section 8; United States, War Crimes Act, B. 1997 Amendment to the War Crimes Act of 1996; Canada, Crimes Against Humanity and War Crimes Act, section 4(3); Belgium, Law on Universal Jurisdiction, A. 2003 Criminal Code, Art 136(c).

[21] *Prosecutor v. Tihomir Blaskic* (Judgment) IT-95-14 (3 March 2000), at paras. 166, 170 and 179.

So far, it was be surmised that violations of IHL governing international armed conflict are governed under a grave breaches regime and that although there are no clear provisions relating to NIAC and repression of violations, it has been determined that there can be criminal responsibility of violations by virtue of common article 3 having attained customary status and the core of APII being customary in nature. Notwithstanding, there have been some suggestions that the grave breaches regime ought to be extended to non-international armed conflicts. For instance, Ferdinandusse posits that, where national law allows, a serious violation of common article 3 may be prosecuted as a grave breach.[22] A similar argument in relation to grave breaches and NIACs is also gleaned from the Amicus Curiae brief submitted by the United States in *Tadić* that "the 'grave breaches' provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character."[23] In a separate opinion Judge Abi-Saab noted that,

> on the basis of the material presented in the Decision itself, that a strong case can be made for the application of Article 2, even when the incriminated act takes place in an internal international armed conflict… "the 'subsequent practice' and *opinio juris* of the States party to the Conventions have led to a new teleological interpretation whereby non-international conflicts have come to be included in the system of 'grave breaches.'[24]

Some national legislation has also taken on this position as expressed in the Amicus Curiae brief highlighted in the case of *Tadić*. This position is supported by Hill-Cawthorne who argues that the Canadian Crimes Against Humanity and War Crimes Act that states that "for greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, *crimes according to customary international law*…this does not limit or prejudice in any way the application of existing or developing rules of international law"[25] (emphasis added). The German International Criminal Code, section 8 provides for war crimes, which include crimes that were traditional considered grave breaches such as inhumane treatment, conscription of child soldiers, forcibly deportation or expulsion of protected persons. More instructive is that it does not differentiate between types of conflict by saying that "whoever in connection with an international armed conflict or with an armed conflict not of an international character."[26] This is also exemplified in Article 136(c) of the Belgian, Law on Universal Jurisdiction by generally stating 'crimes under international law'.[27]

[22] Ferdinandusse W., "The Prosecution of Grave Breaches in National Courts" (2009) 7 *Journal of International Criminal Justice* 723 at 728.
[23] *Tadić, supra* n.14, at para. 83.
[24] Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić,* at 5 and 7.
[25] Section 4(4) Crimes Against Humanity and War Crimes Act", in *Annual Statutes of Canada 2000,* Chapter 24.
[26] Sections 8- 12 German International Criminal Code 2002.
[27] Article 136(c) of the Belgian, Law on Universal Jurisdiction 1993.

A more glaring is found in the US Military Commissions Act, 2006, which provided for criminal jurisdiction over conduct which constitutes a grave breach of common Article 3.[28]

The appeal of this reasoning was acknowledged by the Tribunal when they stated that "there is no gainsaying its significance: that statement articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in opinio juris of States. Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the "grave breaches" system might gradually materialise."[29] Although this idea appears attractive, Moir argues that:

> Whether the law has developed to a point where grave breaches can equally be committed during internal armed conflict, or where violations of the laws of internal armed conflict can be considered grave breaches such that the obligations to investigate those offences and to prosecute or extradite offenders now also apply - either through the adoption of a teleological approach to the Geneva Conventions, or else through the development of a new customary rule to that effect - is rather more dubious.[30]

It is however acknowledged that even though it is stretch to apply grave breaches to NIAC, "it has had an impact on rules regulating internal armed conflict."[31] This is "first, in terms of the development of a body of customary rules applicable to internal armed conflict; and second, in terms of accepting that criminal responsibility should exist for the violation of those rules."[32] In buttressing this point, Moir advances that "an assessment of the specifically prohibited acts demonstrates congruence in significant areas."[33] He further argued that:

> This approach not only led to the conclusion that violations of common Article 3 and Additional Protocol II could represent war crimes, but also resulted in an acceptance that many of the other rules of international armed conflict must also be equally applicable to internal armed conflict - and that criminal responsibility could attach to their violation as well.[34]

This is also seen in *Tadić*, where the Tribunal confirms that "only a number of rules and principles governing international armed conflicts have gradually been extended to apply in internal conflicts; this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts."[35] In

[28] Section 6, US Military Commissions Act, 2006; Moir L., "Grave Breaches and Internal Armed Conflicts" (2009) 7 *J Int'l Crim Just* 763, at 783-784.
[29] *Tadić, supra* n.14, at para. 83.
[30] Moir L., "Grave Breaches and Internal Armed Conflicts" (2009) 7 *J Int'l Crim Just* 763, at 763.
[31] *Ibid,* at 764.
[32] *Ibid,* at 766.
[33] *Ibid*.
[34] *Ibid,* at 767-768.
[35] *Tadić, supra* n.14, at para. 126; Hill-Cawthorne L., "Humanitarian law, human rights law and the bifurcation of armed conflict" (2015) 64(2) *I.C.L.Q.* 293, at 296.

line with these conclusions, the ICRC has also found that "individual criminal responsibility for war crimes is a norm of customary international humanitarian law, applicable both in international and internal armed conflicts."[36]

A practical examination of the impact of the grave breaches regime on NIACs is seen in the understanding of protected persons. In *Tadić*, the understanding of protected persons was at the heart of the issue. Under art. 4 of the Fourth Geneva Convention Protected persons "are those who at a given moment and, in any manner, whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals". At the Trial Chamber, *Tadić* was found not guilty of grave breaches since it only applied to protected persons. The Appeal Chamber overturned this decision by expanding the interpretation of protected persons on the basis of nationality to ethnicity. The Tribunal stated that "while previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts, ... ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance."[37] The Tribunal's position was reflected in *Delalić*, where it held that:

> The nationality requirement **...** should be ascertained within the context of the object and purpose of humanitarian law, which 'is directed to the protection of civilians to the maximum extent possible'. This in turn must be done within the context of the changing nature of the armed conflicts since 1945, and in particular of the development of conflicts based on ethnic or religious grounds.[38]

It was also confirmed in *Galic*, that "the jurisprudence of the Tribunal has already established that the principle of protection of civilians has evolved into a principle of customary international law applicable to all armed conflicts. Accordingly, the prohibition of attack on civilians embodied in the above-mentioned provisions reflects customary international law."[39] Moir also concludes that:

> Although much of the ICTY discussion above was framed in terms of international armed conflict, once a more teleological approach is taken to the Geneva Conventions, and 'protected' status extended beyond the issue of nationality as strictly required by Article 4 of Convention IV, it does become difficult to justify the continuing inapplicability of such provisions to internal armed conflict. After all, once it is accepted that violations of the law entail criminal responsibility in *any* armed conflict, and that conflicts are increasingly internal, rather than international in character (or, at least, that the parties to an armed conflict can be differentiated along ethnic or religious, rather than national lines - as is likely to be the case in most internal armed conflicts), the pre-existing reasons for limiting grave breaches to international armed conflict certainly seem to vanish. The distinction between grave breaches and violations of the laws of internal armed conflict seems similarly difficult to justify when approached from the perspective of the

[36] Henckaerts J. M. and Doswald-Beck L., *Customary International Humanitarian Law, Volume I: Rules*, Ed. (Cambridge University Press, 2009), rule 151 at 551. See Chapter 1 (1.2.2) for discussions on war crimes and crimes against humanity and NIAC.

[37] *Prosecutor v Tadić* (Judgment, Appeals Chamber) IT-94-1-A (15 July 1999), at para. 166 and 168.

[38] *Prosecutor v. Zdravko Mucić, Hazim Delić, Esad Landžo & Zejnil Delalić* (Judgment) IT-96-21-A (20 February 2001), at para. 73.

[39] *Prosecutor v. Stanislav Galic*, (Judgement and opinion) IT-98-29-T (5 December 2003), at para. 19.

> perpetrator of an offence, and in light of the substance of those violations classed as grave breaches.[40]

McKnight adds that "with the emergence of internal conflicts and non-state actors in the 1990s, international criminal law has focused on individual criminal responsibility, abandoning distinctions between international and non-international armed conflict or determination of liability based upon the nature of the conflict or the alliance of the perpetrator."[41] This position is also acknowledged in Article 8 of the Rome Statute of the International Criminal Court; as Blum put it "this mirroring approach of emulating the laws applicable in international armed conflicts in the non-international context was subsequently adopted by the drafters of the Rome Statute of the International Criminal Court in 1998."[42] Notwithstanding, this in no way indicates the existence of a new customary rule. Having considered the complexities and debates surrounding enforcement of international humanitarian law governing NIACs, the attention of this thesis would not focus on efforts at enforcing IHL at State level, having shown that individual criminal responsibility is obtainable in a NIAC.

4.2 Enforcement of International Humanitarian Law at State Level

As indicated in the above analysis, the enforcement of International Humanitarian Law falls under the purview of States. Under the Geneva Conventions and its Additional Protocols enforcement is "based on a three-pillar system: obligation to repress or suppress grave breaches and the two elements of the *aut dedere aut judicare* principle: the obligation to search for persons having committed grave breaches and an obligation to try them or hand them over to another state."[43] This essentially puts the onus for enforcement of International Humanitarian Law on States as the principal agents. The ICRC Customary Law study "affirms that states have an obligation to "ensure respect" for international humanitarian law, that serious violations of international humanitarian law constitute war crimes and that States must investigate war crimes and prosecute them."[44] Graditzky argues that "in this regard the State is required not only to ensure that its own agents respect these provisions, but also to ensure that all the people under its jurisdiction do so."[45] Attendant to this responsibility is the "obligation to investigate war crimes allegedly committed by their nationals or armed forces…the obligation to prosecute and punish implies the obligation to incorporate as crimes

[40] Moir, *supra* n.30, at 777.
[41] McKnight J., "Accountability in northern Uganda: understanding the conflict, the parties and the false dichotomies in international criminal law and transitional justice" (2015) 59(2) *J.A.L.* 193, at 199.
[42] Blum G., "Re-envisaging the international law of internal armed conflict: a reply to Sandesh Sivakumaran" (2011) 22(1) *E.J.I.L.* 265, at 265.
[43] Reka, *supra* n.3, at 4.
[44] *Ibid*.
[45] Graditzky, *supra* n.12, at 32.

in their national criminal law the gross human rights violations and crimes under international law."[46] Furthermore, "the categorisation of conduct prohibited by international law as crimes under domestic law is an essential element of effective compliance with the obligation to prosecute and punish."[47]

This obligation put on them mandates them to pass legislation to give them powers to adhere to their obligation. It can be said that this obligation has been adhered to by many States as gleaned from discourse between scholars at Chatham house wherein it was noted that "common law States have legislation incorporating the grave breaches provisions [in the Geneva Conventions] into national law."[48] This is evidenced by the Kenyan Geneva Conventions Act "which incorporated into Kenyan law certain provisions of the Geneva Conventions, specifically the criminalisation and punishment of grave breaches."[49] Similar legislation was also enacted by India through the Geneva Conventions Act of 1960; Nigeria through the Geneva Conventions Act of 1960; United Kingdom in the Geneva Conventions Act of 1957 and War Crimes Act of 1991; Zimbabwe in the Geneva Conventions Act of 1981, to name a few.

It can however be argued that this onus placed on States is rarely exercised. One of such rare occurrences is illustrated in the 2006 UK case wherein a soldier, Corporal Payne, was "convicted for 'inhuman treatment of a person protected under the provisions of the fourth Geneva Convention 1949,"[50] it was acknowledged that he was "the first British soldier in history to be convicted of a war crime under international law."[51] It is also evidenced by trials conducted by the Bosnia War Crimes Chamber from 2005 who prosecuted persons responsible for serious violations of International Humanitarian Law as adopted by the ICTY. The Chamber also applied domestic laws which incorporated international law and criminal offences based on the Rome Statute. Other instances can be seen in the exercise of universal and not territorial or nationality jurisdiction in *Pinochet*. Despite this, "it has often been noted that prosecutions for grave breaches are scarce, and that impunity still appears to be the norm."[52]

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[46] International Commission of Jurists, *International Law and the Fight Against Impunity: A Practitioners Guide No.7,* (International Commission of Jurists, 2015), at 200.
[47] *Ibid*.
[48] Chatham house, "Meeting Summary: Beyond the ICC: The Role of Domestic Courts in Prosecuting International Crimes Committed in Africa", 30 April 2010.
[49] Okuta A., "National Legislation for Prosecution of International Crimes in Kenya" (2009) 7 *J Int'l Crim Just* 1063, at 1065.
[50] Ferdinardusse, *supra* n.22, at 725; Rasiah N., "The Court-martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice" (2009) 7 *Journal of International Criminal Justice (JICJ)* 177.
[51] Ferdinardusse, *supra* n.22, at 725.
[52] *Ibid,* at 724

Considering that International Criminal Law has become a mechanism for the enforcement of IHL, it is necessary to analyse how this has aided the cause of enforcement of violation of IHL and addressing impunity. The principal legislation guiding this is the Rome Statute, which has been ratified by 123 states and entered into force on 1 July 2002. It has been the hope that the passage of such legislation would help in bridging the impunity and accountability gap, "and fill a need for the adjudication of international law previously filled only by ad-hoc tribunals,"[53] but this remains to be seen. A fundamental pillar of the Rome Statute is the principle of complementarity, which operates on the understanding that "States will share the burden of investigating, prosecuting and adjudicating core international crimes by undertaking proceedings at the national level."[54] By this principle, "the complementary jurisdiction of the International Criminal Court vis-à-vis national jurisdictions imposes a duty on State parties to exercise criminal jurisdiction over those responsible for international crimes."[55]

It can be said that the understanding is that the International Criminal Court ought to step in only in instances where a State is unwilling and unable as seen in Article 17. This position is corroborated by Ludwin King who states that, "complementarity… embeds the notion of deference to national courts into the heart of the ICC."[56] This position was adopted in recognition of the view that "national courts will often be the best placed to deal with international crimes."[57] This approach is buttressed by Ocampo who posits that "national investigations and prosecutions, where they can properly be undertaken, will normally be the most effective and efficient means of bringing offenders to justice; States themselves will normally have the best access to evidence and witnesses."[58] Furthermore, Cassel argues that "one might anticipate that an International Criminal Court would reduce the need for national courts to take such cases; on the contrary, the ICC Statute makes the role of national courts even more important."[59] Ludwin King argues that "an examination of the purpose of complementarity and how the principle was borne out in the negotiations indicates that the ICC was designed to intervene only in extraordinary situations."[60] Cassel simplifies this by stating that "the ICC is intended to focus on only the most serious cases, there may be

[53] ICC Rome Statute, "International justice and the rule of law: strengthening the ICC through domestic prosecutions" (2009) 1(1) *H.J.R.L.* 79, at 80.
[54] Bekou O., "Crimes at Crossroads: Incorporating International Crimes at the National Level" (2012) 10 *J Int'l Crim Just* 677, at 677.
[55] Dinokopila B. R., "The Prosecution and Punishment of International Crimes in Botswana" (2009) 7 *J Int'l Crim Just* 1077, at 1077.
[56] Ludwin King E. B., "Big Fish, Small Ponds: International Crimes in National Courts" (2015) 90 *Indiana Law Journal* 829, at 840.
[57] Cryer R., "International Criminal Law vs State Sovereignty: Another Round?" (2005) 16(5) *E.J.I.L.* 979, at 986.
[58] ICC Rome Statute, *supra* n.53, at 80.
[59] Cassel D., "The ICC's New Legal Landscape: The Need to Expand U.S. Domestic Jurisdiction to Prosecute Genocide, War Crimes and Crimes Against Humanity" (1999) 23 *Fordham Int'l L.J.* 378, at 396.
[60] Ludwin King, *supra* n.56, at 840.

situations where it prosecutes only the most senior commanders, leaving lower ranking offenders- who may nonetheless have committed heinous crimes-for prosecution by national courts."[61]

From the foregoing, it can be argued that the onus placed on States under the Geneva Conventions and their attendant protocols is also evident in the Rome Statute. This is however with a caveat that allows the higher authority, being ICC, to take responsibility when States fail in this obligation. However, this can only be done when the national court is unwilling or unable[62]. This phrase has been subject to wide discourse and interpretation. In looking at this issue the ICC has come up with possible scenarios and the consequence in each instance. The Office of the Prosecutor has summed it up as follows where:

i. the state is investigating or prosecuting AND is also (willing)/able to genuinely carry out the prosecution: the case is inadmissible,
ii. (the state would be investigating or prosecuting BUT is not (willing)/able to genuinely carry out the prosecution: the case is admissible (OR: the state is investigating BUT is not able to prosecute: the case is admissible),
iii. the state is not investigating or prosecuting NO MATTER if it would be willing/able to genuinely carry out the prosecution: the case is admissible.[63]

The Statute itself mentions three factors "weighing toward a finding that a state is acting in a manner that calls into question its genuine willingness to hold individuals accountable: where the national proceedings are being undertaken to protect the person from criminal responsibility, where there is an undue delay in the proceedings, or where the proceedings lack impartiality or independence."[64] When the principle of complementarity was tested in court it was found that "even if a State has initiated an investigation or prosecution against an individual, the ICC may prosecute that individual for the same crimes or even a more selective range of crimes, so long as the State is willing to close the on-going investigation or prosecution at the request of the ICC Prosecutor."[65] The Trial Chamber also found that unwillingness relates to "unwillingness motivated by the desire to obstruct the course of justice."[66]

In looking at the issue of inability, this focuses mainly on the capacity of the State to investigate and prosecute. Ludwin King maintains that "a state will be found to be unable to carry out

[61] Cassel, *supra* n.59, at 392.
[62] Article 17 Rome Statute of the International Criminal Court 1998.
[63] Reka, *supra* n.3, at 84-85.
[64] Ludwin King, *supra* n.56, at 843.
[65] Sacouto S. and Cleary K., "The Katanga complementarity decisions: sound law but flawed policy" (2010) 23(2) *L.J.I.L.* 363, at 363; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case) ICC-01/04-01/07-OA8 (25 September 2009).
[66] Sacouto and Cleary, *Ibid*, at 367.

genuine proceedings when its judicial system has substantially or totally collapsed or is otherwise unavailable, when the State cannot access evidence or gain custody over the accused, or when it is otherwise unable to carry out genuine proceedings."[67] She notes that factors considered include "lack of necessary personnel, judges, investigators, prosecutor; lack of judicial infrastructure; lack of substantive or procedural penal legislation rendering system 'unavailable'; lack of access rendering system 'unavailable'; obstruction by uncontrolled elements rendering system 'unavailable'; [and] amnesties, immunities rendering system 'unavailable'."[68] In addition to the foregoing, Nozawa and Lefas argue that the criminal justice system in many countries is underdeveloped, "chronically hampered by insufficient resources, a shortage of judges, low investigative and forensic capacities, and sparse governmental presence in remote territories, has contributed to inefficiencies in the delivery of justice."[69]

Beyond the issues of unwillingness and inability, on the issue of ICC stepping in to prosecute, there is the added condition of Art. 8(1) of the Rome Statute that requires "the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes." In the Nigerian context, it can be argued that this is not a difficult threshold to meet and if required could already be met, in view of the non-international armed conflict as indicated and particulars averred in chapter 3 and later in this chapter.[70]

This chapter so far has shown that the obligation to enforce International Humanitarian Law is put on States. It has also understood that International Criminal Law has become a vessel through which International Humanitarian Law can be enforced; this also rests on the ability and willingness of States to act. Some commentators have questioned the ability of States through their domestic courts to perform this function. Charney notes this by stating that "the proper role of domestic courts in cases involving international crimes has been hotly debated, some arguing in favour of domestic prosecution, and others in favour of international prosecution."[71] A similar position is also put forward by Roberts who notes that "many international lawyers have lamented this potential as unrealised due to the tendency of national courts to refuse to apply, or to skew the interpretation of, international law in order to

[67] Ludwin King, *supra* n.56, at 843.
[68] *Ibid*.
[69] Nozawa J. and Lefas M., "When the Dust Settles Judicial Responses to Terrorism in the Sahel", *Global Center on Cooperative Security*, October 2018. Available at: https://www.globalcenter.org/wp-content/uploads/2018/10/GC-2018-Oct-Dust-Settles-Judicial-Terrorism-Sahel.pdf. Last accessed on 30 December 2021.
[70] See Chapter 3 (3.3) and 4.3.
[71] Charney J. I., "International Criminal Law and the Role of Domestic Courts" (2001) 95(1) *The American Journal of International Law* 120, at 120.

protect national interests."[72] She further adds that it was the understanding that "international law used to be seen as an 'esoteric preserve' that did not feature significantly in the work of "ordinary practitioners and national courts."[73] Regardless, it has been acknowledged that times are changing and that time is ripe for "national courts to act as 'guardians' or 'agents' of the international legal order, impartially enforcing international law without regard for national interests *[and for them to embrace their]* roles as law creators and law enforcers."[74] The responsibility put on national courts is also captured by Cassese who states that "domestic courts do and should "play a weighty role as instruments for safeguarding the international legal order."[75] Judge Simma of the International Court of Justice argues that the growing importance of domestic jurisprudence for international law's development brings with it an "increasing responsibility on the part of these courts to maintain the law's coherence and integrity."[76]

It can be argued that hybrid tribunals were used as a means of bridging this gap particularly in situations where domestic capacity was lacking. These were set up in six States following the occurrence of a conflict, these include the Special Court of Sierra Leone, Regulation 64 panels in Kosovo, Special Panel of East Timor and others.[77] These hybrid courts were a response to criticisms following the establishment of ICTY and ICTR and their distance from the locus of the crimes … which meant "little or no connection between the affected population and the trials."[78] It can be argued that were designed to address legitimacy concerns of survivors through the combined use of international and domestic law and expertise by aiming to solve allay the fears of "bias, unfair arrests and ethnic prosecutions," and in their design were context specific.[79] It was hoped that by using these hybrid tribunals a legacy of strengthened domestic justice systems would be left and was proposed as a solution for States weary of purely domestic or international responses. In highlighting the role of hybridised courts in the advance of international criminal justice, McAuliffe notes that "each hybrid tribunal should be commended for establishing accountability as a standard of law and governance where the alternative is systematic impunity…[it] established a standard of fair or competent trial unattainable, and hitherto unprecedented, in each State."[80] Its success can be

[72] Roberts A., "Comparative international law? The role of national courts in international law" (2011) 60(1) *I.C.L.Q.* 57, at 57.
[73] *Ibid*.
[74] *Ibid*, at 68.
[75] Cassese A. and Gaeta P., *International Criminal Law* (3rd edition, Oxford University Press, 2013); *Ibid*.
[76] Roberts, *supra* n.72, at 84.
[77] McAuliffe, P., "Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan" (2011) 7 *J Int'l L & Int'l Rel* 1.
[78] *Ibid*, at 11.
[79] *Ibid*, at 25.
[80] *Ibid*, at 51.

seen with the Bosnia War Crimes Chamber, where trial verdicts in over 60 cases of war crimes, crimes against humanity and genocide between 2005 and 2010.[81] Although these hybrid tribunals were heralded, it can be said that they were not without challenges. For instance, in East Timor, legitimacy was called into question with concern expressed at "mass production of judgment to enhance the Special Panels statistics"; in Kosovo, "the issue of contracts being potentially dependent on convictions was a problem… [as it could potentially have diminished] prosecutorial independence."[82] Furthermore, it was seen that the "objective of prosecuting as many wrongdoers as possible… took precedence over the need to secure equality of arms" as prosecution units were better equipped than defence units.[83] Generally, there was a "reluctance of States to assume ownership increased likelihood of marginalisation of national judges and prosecutors" as the focus of securing convictions and not building local capacity.[84] It could be said that these challenges contributed to a cessation in its use, caused it to fall into "practical obsolescence and theoretical disfavour"[85] and resolved in a continuation of use of national courts.

In order for the national courts to exercise such powers under the Rome Statute, it is also required that these States domesticate the Statute, particularly in dualist countries. Dinokopila argues clearly that "States are required to amend their penal laws to bring them into line with the Rome Statute and to pass enabling legislation."[86] LaFontaine adds "criminalisation of the core international crimes in domestic criminal legal systems is essential for the success of the ICC."[87]

Efforts have been made to operationalise the ICC at the State level and this is evidenced by legislations passed to this effect. The US in its 2006 Military Commissions Act "codified a range of offences as war crimes, including providing material support for terrorism (MST), conspiracy, and murder in violation of the law of war."[88] Uganda took an administrative route to actualising the mandate of the ICC by establishing "the International Criminal Division in Uganda's High Court, the ICD is a national institution prosecuting international crimes though domestic legislation."[89] In Kenya, "prior to the ratification of the Rome Statute of the International Criminal Court ('ICC Statute') on 15 March 2005, the notion of international

[81] *Ibid*, at 55.
[82] *Ibid*, at 46.
[83] *Ibid*, at 47.
[84] *Ibid*, at 36.
[85] *Ibid*.
[86] Dinokopila, *supra* n.55, at 1077.
[87] Lafontaine F., "Canada's Crimes against Humanity and War Crimes Act on Trial" (2010) 8 *J Int'l Crim Just* 269, at 287.
[88] Hafetz J., "Diminishing the value of war crimes prosecutions: a view of the Guantanamo military commissions from the perspective of International Criminal Law" (2013) 2(4) *C.J.I.C.L.* 800, at 802.
[89] McKnight, *supra* n.41.

crimes was not covered by national Kenyan laws, and crimes against humanity, war crimes and genocide had never been dealt with by any court in Kenya."[90] Also Spain amended its Criminal Code to add more provisions on war crimes and a new chapter on crimes against humanity, "together with an additional section on the crimes against the administration of justice by the International Criminal Court, provisions on superior and command responsibility and on excuses, justifications and statutes of limitations for international crimes."[91] The domestication of this law is also evident in New Zealand's International Crimes and International Criminal Court Act of 2000; Netherlands' International Crimes Act of 2003 and Canada's Crimes Against Humanity and War Crimes Act of 2000 to name a few.

Notwithstanding the willingness of some countries to domesticate these laws, it has been faced with numerous issues and raised several pertinent questions. One of such issues is that of the principle of legality. This principle "means that in order to criminalise a behaviour as a penal offense, the specific conduct that is sought to be punished must be strictly defined by law as a crime and its definition as a criminal offense must be precise and unambiguous."[92] In this regard, "it is national law that defines prohibited behaviours and sets the moment in which it becomes illegal."[93] The operation of this principle is evident in the US Military Commissions Act, which has been criticised for undermining this principle enshrined in Common Article 3 "not only by expanding the scope of substantive liability, but also by allowing the government to divert cases from the regular federal criminal court system to a specially created tribunal (military commissions) that affords defendants fewer rights and protections."[94] Another example of the conflict with the principle of legality manifested in Uganda with the domesticated Geneva Conventions Act only criminalising "grave breaches of the four Geneva Conventions as it applies only to International Armed Conflict" and resulted in the charge against Thomas Kwoyelo (whose offences were perpetrated during a NIAC) being reflected in terms of recognised crimes under penal code with similar essence as those that would have been charged under Geneva Conventions and the Rome Statute.[95]

Another relevant legal principle that is affected is the non-retrospective application of the law, which means that "a statute can neither make criminal retroactively an act which was quite lawful at the time it was done, nor impose a penalty for past acts which were not penalised

[90] Okuta, *supra* n.49, at 1063.
[91] Rojo E. C., "National Legislation Providing for the Prosecution and Punishment of International Crimes in Spain" (2011) 9 *J Int'l Crim Just* 699, at 702.
[92] International Commission of Jurists, *supra* n.46, at 392.
[93] *Ibid*, at 395.
[94] Hafetz, *supra* n.88, at 820.
[95] Trust Africa, *Domestic Prosecution of International Crimes: Lessons for Kenya* (KPTJ, 2015), at 11.

when they were committed."[96] This principle is enshrined in the Geneva Conventions[97] and the Rome Statute.[98] Despite this, it has been advanced that where the legal principle or the crime is considered customary international law, it does not violate this principle. This position is supported by International Commission of Jurists who argue that "international norms, standards and jurisprudence clearly establish that the retroactive application of national criminal law to offenses that, even if they were not illegal under national laws, constituted crimes under international law at the time they were committed, does not violate the principle of …non-retroactive application of criminal law."[99] The question remains of what is the judicial treatment given to customary international law in Nigeria.

Additionally, issues could arise if the law is interpreted divergently, leading to inconsistent understanding of the law. This view is supported by Roberts who suggests that "hybridisation also occurs when national judges use domestic legal concepts to supplement or qualify international obligations" and begs the question of "whether national courts are correctly interpreting and applying these norms."[100] This position is contradicted by Ferdinardusse who notes that this is "not necessarily problematic but can be a useful and important motor for the development of the law."[101] Cassese appears to be in a similar school of thought by advancing that "it falls to them to cast light on and give legal precision to, rules of customary international law, whenever their content and purport is still surrounded by uncertainty…criminal courts play an indispensable role in ascertaining the existence and contents of CIL rules, interpreting and clarifying treaty provisions and elaborating based on general principles and rules, legal constructs indispensable for the application of international criminal rules."[102]

As an ameliorative measure, some States have taken to trying international crimes as ordinary domestic crimes. It is understood that "international law allows States to prosecute international crimes on the basis of ordinary criminal law."[103] The ICTY in *Hadžihasanovic* buttresses this point by stating that "there is no rule, either in customary or in positive international law, which obligates States to prosecute acts which can be characterised as war crimes solely on the basis of international humanitarian law, completely setting aside any characterisations of their national criminal law."[104] In addition, it can be said that "that the

[96] Steiner E., "Prosecuting war criminals in England and in France" (1991) *Mar. Crim. L.R.* 180, at 185.
[97] Article 99 of the Geneva Convention (III) relative to the Treatment of Prisoners of War 1949; Article 67 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War 1949.
[98] Rome Statute, *supra* n.62, Article 22.
[99] International Commission of Jurists, *supra* n.46, at 399.
[100] Roberts, *supra* n.72, at 74.
[101] Ferdinardusse, *supra* n.22, at 724.
[102] Cassese and Gaeta, *supra* n.75, at 8.
[103] Ferdinardusse, *supra* n.22.
[104] *Prosecutor v Hadžihasanovic* (Judgment) IT-01-47-T (15 March 2006), at para. 260.

complementarity regime of the International Criminal Court (ICC) appears to regard prosecutions of international crimes on the basis of ordinary criminal law as a sufficient response."[105] As it relates to the Article 17 criteria, "prosecuting a case as an ordinary crime does not render the State unwilling or unable' automatically."[106] Although, this in itself also has issues. Ferdinardusse notes "while prosecution of grave breaches on the basis of ordinary criminal law can be efficient, it is often not ideal."[107] He adds that "national provisions of general criminal law do not generally match all specific aspects of crimes under international humanitarian law, many national prosecutions of grave breaches on the basis of ordinary criminal law have been subjected to serious criticism regarding the charges laid, the manner in which the trials were conducted and the sanctions imposed."[108] Bekou similarly acknowledged that "treating war crimes as ordinary crimes will not always be appropriate; ordinary crimes do not carry the same stigma as genocide, war crimes or crimes against humanity and may not carry the same significance in the eyes of victims, perpetrators and the wider international community."[109]

So far, this chapter has shown that there can be individual criminal responsibility for violations of International Humanitarian Law, it has detailed principles guiding enforcement of International Humanitarian Law, noting that this enforcement could be done through International Criminal Law and the primary agent of such enforcement are States. It has further shown that States in enforcing International Humanitarian Law have done so through domestication of treaties or through ordinary crimes embodying similar elements. Although it is acknowledged that States may be unwilling or unable to take up this responsibility, the ICC provides such an avenue for addressing impunity. However, even where States do take up this onus there are still challenges. Having analysed the way in which International Humanitarian Law (by itself of through International Criminal Law) can be enforced, this chapter will now consider how Nigeria has sought to address International Criminal Justice and individual criminal responsibility in view of the Boko Haram Insurgency.

4.3 Nigeria and International Criminal Justice

As concluded in chapter 3, Boko Haram is a terrorist organisation who is engaged, at least in part, in a non-international armed conflict with Nigeria Security Forces. This position was reached based on the level of organisation, the intensity of the violence as well as the

[105] Ferdinardusse, *supra* n.22, at 729.
[106] Bekou, *supra* n.54, at 679.
[107] Ferdinardusse, *supra* n.22, at 730.
[108] *Ibid*, at 734.
[109] Bekou, *supra* n.54, at 679

widespread and systematic killings of civilians and destruction of civilian structures. This conclusion is reinforced by numerous sources as indicated above such as the prosecutor of the International Criminal Court who "has declared that the conflict in Nigeria is a non-international armed conflict between the government of Nigeria and the Boko Haram terrorists"[110] as well as Amnesty International who stated that "since 2009 North East Nigeria has been the scene of an armed conflict between [Boko Haram] insurgents and Nigeria Security Forces."[111]

Having acknowledged and understood that there is a non-international armed conflict, it has been found that Common Article 3, Additional Protocol II and Customary International law are applicable. Specifically, as it relates to terrorism, Bukar argues that,

> International Humanitarian Law formally forbids, to the greatest extent, acts that are generally categorised as "terrorists" as encoded in Article 33 and Article 4 of the four Geneva conventions and the two additional protocols which respectively states that: 'Collective punishments and equally actions of victimisation or of terrorism are proscribed' whereas, protocol II forbids actions of terrorism against individuals not or no longer taking part in conflicts.' Once an act of violence is characterised as terrorism and shares the trappings of 'terrorist acts', such an act cannot be exempted from prosecution.[112]

It has been said that that there have been serious violations of these laws as well as international human rights law.

Bukar notes that Boko Haram "in their struggle to achieve whatever objective, they employ violent means that may lead to egregious violations of the provisions of international humanitarian law."[113] Amnesty International documents "attacks *[by Boko Haram]* targeting civilians and civilian buildings are also contrary to the fundamental principles of humanity as reflected in International Humanitarian Law."[114] Other actions documented include the killing and kidnapping of civilians from attacks on scores of towns and villages[115] as well as the "increased use of suicide bombers often using women and girls who are forced to carry explosives into crowded areas."[116] From the actions taken by Boko Haram, it can be said that "Boko Haram members have committed crimes under international law including crimes

[110] Hassan and Olugbuo, *supra* n.1.
[111] Amnesty International, *Willingly Unable: ICC Preliminary Examination and Nigeria's Failure to Address Impunity for International Crimes* (Amnesty International, 2018), at 2.
[112] Bukar M. I., "Assessing the effectiveness of enforcing international humanitarian law in Nigeria: the case study of Boko Haram" (2017) 22(1) *Cov. L.J.* 28, at 34.
[113] *Ibid,* at 33.
[114] Amnesty International, *Nigeria: Trapped in the cycle of violence* (Amnesty International, 2012), at 10.
[115] Amnesty International, "Cameroon: Hundreds slaughtered by Boko Haram and abused by security forces", 16 September 2015. Available at: https://www.amnesty.org/en/latest/news/2015/09/cameroon-hundreds-slaughtered-by-boko-haram-and-abused-by-security-forces/. Last accessed on 29 December 2021.
[116] Amnesty International, "Lake Chad region: Boko Haram renewed campaign sparks sharp rise in civilian deaths", 5 September 2017. Available at: https://www.amnesty.org/en/latest/news/2017/09/lake-chad-region-boko-harams-renewed-campaign-sparks-sharp-rise-in-civilian-deaths/. Last accessed on 29 December 2021.

against humanity and war crimes."[117] Other reports document that "Boko Haram is … committing war crimes on a huge scale."[118] This position has been affirmed by the ICC who "announced that it had identified eight potential cases of crimes against humanity and war crimes in the war against insurgency in Nigeria."[119]

As mentioned earlier Boko Haram has violated international humanitarian laws. From their actions it can be said they violated common article 3 by committing violence to life and person through murder in their killing of persons taking no active part in the hostilities, including civilians,[120] taking of hostages as seen with the kidnapping of 269 Chibok schoolgirls and 112 Dapchi schoolgirls as well as the passing of sentences and carrying out executions without previous judgment as seen with the execution and beheading of several aid workers.[121] Their actions could also have violated provisions of Additional Protocol II. It has been found that Boko Haram is culpable in violence to life, taking of hostages, acts of terrorism, pillage and hampered the ability of children to receive an education.[122] Customary International Law principles of humanity and distinction were violated. Principle of Humanity is a cornerstone of contemporary International Humanitarian Law, customary and treaty law and recognises that all people have equal dignity. ICRC goes further to define humanity as "as the endeavour to 'prevent and alleviate human suffering wherever it may be found', with the purposes of protecting life and health, and ensuring respect for the human being."[123] Furthermore, it can be said that "the requirement of humane treatment for civilians and persons *hors de combat* is set forth in common Article 3 of the Geneva Conventions, as well as in specific provisions of all four Conventions. [Furthermore] it is recognised as a fundamental guarantee by both Additional Protocols."[124] This speaks to the treatment of certain categories of persons including persons deprived of their liberty, women, children and others.[125] Although, there may not be criminal responsibility emanating from the principle, it is expressed in particular customary offences such as slavery,[126] rape and other forms of sexual violence,[127] torture,

[117] Amnesty International, "Nigeria: Crimes under International law committed by Boko Haram and the Nigerian Military in North-East Nigeria", 3 June 2015. Available at: https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR4417562015ENGLISH.pdf. Last accessed on 30 December 2021.
[118] Amnesty International, *supra* n.116.
[119] Olugbuo, *supra* n.5, at 1; International Criminal Court, *Report of Preliminary Examinations* (2018), at 55 para. 217.
[120] According to the Updated ICRC Commentary 2020 on the Third Geneva Convention, "Its protective scope therefore includes civilians and members of the armed forces of the Parties to the conflict who are taking no active part in the hostilities – be they a Party's own forces or allied with or opposing them. It is logical that civilians should enjoy the protection of common Article 3 regardless of whose power they are in. See: paras. 579-580.
[121] Article 3 Common to the Geneva Conventions of 1949.
[122] Additional Protocol II, *supra* n.16, Article 4(2)(a)(c)(d) (g) and (3).
[123] Kapur, *supra* n.2, at 1032.
[124] Henckaerts and Doswald-Beck, *supra* n.36, Rule 87.
[125] *Ibid*.
[126] *Ibid*, Rule 94.
[127] *Ibid*, Rule 93.

cruel and inhumane treatment[128] to name a few. On the principle of distinction, the breach of this fundamental principle can be seen in endorsement of tactics, which lead to inevitable loss of life as seen with the increased use of suicide bombers, to achieve their ultimate goal. This is seen in the activities of Boko Haram.[129] This is corroborated by Bukar who stated that "the principle of distinction *[between civilians and combatants]* was violated on several instances."[130] In addition to the foregoing, the ICC in its preliminary examination found that there are reasonable grounds to believe that Boko Haram committed war crimes of murder, outrages upon personal dignity, intentionally attacking civilian population, attacking schools and places of worship, pillaging, rape and sexual slavery, child enlistment, cruel treatment; and crimes against humanity: murder, imprisonment, rape and sexual violence, inhumane acts and persecution.[131]

Although it is argued that Boko Haram have violated these laws, their sphere of operation has been primarily in Nigeria and there are questions as to which laws are applicable in Nigeria. By section 12 of the 1999 Nigerian Constitution before any treaty can be operational in Nigeria it needs to be domesticated. This position is affirmed by the Supreme Court of Nigeria in the case of *Abacha v Fawehinmi*, where the Court held as follows: "an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly. Before its enactment into law by the National Assembly, it has no such force of law as to make its provisions justiciable in our courts."[132] Nigeria is "a party to both the four Geneva Conventions of 12 August 1949 and the two Additional Protocols of 1977; the implications of this are that Nigeria has adopted the basic foundation of International Humanitarian Law."[133] The Geneva Conventions 1949 were domesticated in Nigeria under the Geneva Conventions Act of 1960, however the Additional Protocols do not have a corresponding domestic legislation in Nigeria. This summation is supported by James-Eluyode who states that "the four Geneva Conventions of 1949 have been incorporated into Nigerian legislation, this is, however, not the case with the Additional Protocols to the Geneva Conventions, which were adopted in 1977 and ratified by Nigeria in 1988."[134] He adds that "there is no domestic law which gives effect to the provisions of the Additional Protocols I and II to the 1949 Conventions, consequently, the Additional Protocols lack the force of law in

[128] *Ibid*, Rule 90.
[129] Hassan and Olugbuo, *supra* n.1.
[130] Bukar, *supra* n.112.
[131] Rome Statute, *supra* n.62, Article 8(2)(c) (i) (ii); 8(2)(e) and Article 7(1)(a) (e)(g)(k) (h).
[132] James-Eluyode J., "Enforcement of international humanitarian law in Nigeria" (2003) 3(2) *A.H.R.L.J.* 264; (2000) 6 *NWLR* 228.
[133] Bola- Solarin B., "Thirty Years of the Protocols to the Geneva Conventions: The journey so far", *The Humanitarian*, June 2007. Available at: https://reliefweb.int/report/afghanistan/icrc-nigeria-delegation-newsletter-humanitarian-jun-2007. Last accessed on 30 December 2021.
[134] James- Eluyode, *supra* n.132.

Nigeria."[135] The Rome Statute, which was ratified by Nigeria in 2001, has equally suffered a similar fate as it is yet to be domesticated in Nigeria. The Crimes against Humanity, War Crimes, Genocide and Related Offences Bill has been presented in several legislative assemblies since July 2012. Olugbuo notes that "since Nigeria ratified the Rome Statute in 2001, there have been three failed attempts to domesticate the Rome Statute into national law."[136] The Bill is yet to be passed by any assembly and is currently before the Nigerian National Assembly. It can therefore be argued that this causes a problem for the enforcement of international humanitarian law, international criminal law and the prosecution of Boko Haram combatants under these laws.

The challenge this poses for the enforcement of laid down international laws and principles is reiterated by a number of commentators. Olugbuo argues that "Nigeria currently does not have the necessary legal framework to prosecute those responsible for international crimes; the need to incorporate international legal instruments into national law cannot be overemphasised."[137] James-Eluyode adds that "this poses a problem, especially with regard to the protection of international humanitarian law in an internal armed conflict."[138] It is said that this is driven by the fact that "the existing framework is unmistakably handicapped due to political interference and bias of the judiciary, ineffective criminal justice system, lack of coordination between state and federal governing bodies."[139] Amnesty International has found that this has resulted in "no suspects [being] charged with crimes under international law and failure to investigate and prosecute those responsible for those crimes under international law constitutes impunity."[140] Furthermore, it has been argued that this has resulted in "minimal investigations and prosecutions of Boko Haram perpetrators in particular Boko Haram leaders and those most responsible for Rome statute crimes or conduct amounting to crimes under international law,"[141] and therefore it has also been stated that there is a "lack of justice for crimes under international law and other serious violations and abuses of human rights."[142] This state of affairs brings to the fore the question of willingness and ability as encapsulated in the Rome Statute. One can argue that the Nigerian government has "failed to take prompt

[135] *Ibid*.
[136] Olugbuo, *supra* n.5, at 1.
[137] Olugbuo B. C., "Nigeria and the International Criminal Court: Challenges and Opportunities" in van der Merwe B., *International Criminal Justice in Africa: Challenges and Opportunities* (Konrad Adenauer Stiftung, 2014), at 92.
[138] James- Eluyode, *supra* n.132.
[139] Hassan I. and Olugbuo B., "Winning the war, and not just the battle, Masterplan for ending the Boko Haram insurgency in the North East", Proposed by the Centre for Democracy and Development to the FGN, August 2015.
[140] Amnesty International, *supra* n.117.
[141] Amnesty International, *supra* n.111, at 5.
[142] Amnesty International, "Violence, death and injustice: A beginner's guide to human rights," 16 February 2015. Available at: https://www.amnesty.org/en/latest/news/2015/02/violence-death-and-injustice-a-beginners-guide-to-human-rights-in-nigeria/. Last accessed on 30 December 2021.

and effective steps to investigate and hold accountable perpetrators."[143]

As mentioned earlier the conflict in Nigeria was subject to preliminary examination by the ICC and this examination explained that the inactivity in investigations and prosecutions as indicated above could be as a result of:

> various factors, including "the absence of an adequate legislative framework; the existence of laws that serve as a bar to domestic proceedings, such as amnesties, immunities or statutes of limitation; the deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible; or other, more general issues related to the lack of political will or judicial capacity.[144]

In light of the above, it has been argued that "the preliminary examinations should advance to the 'admissibility stage' in order to assess whether the national authorities were willing or able to prosecute those responsible or whether the ICC needs to become active."[145] It can therefore be contended that since the evidence the Nigerian government appears to be unwilling and unable to investigate and prosecute international crimes, the International Criminal Court should be given the room to commence action. This view is corroborated by Bukar who notes that "the silence on the side of government toward ensuring such vital legislation is passed infers its unwillingness to take responsible legal measures towards effective enforcement of International Humanitarian Law and International Human Rights Law."[146] Amnesty International added a call to the "international community to ensure prompt, independent investigations into acts, which may constitute war crimes and crimes against humanity."[147] A similar perspective was also implicitly communicated by "the prosecutor of the ICC, Fatou Bensouda, [who] stated that Nigeria is not under investigation but preliminary analysis and as long as the government is prosecuting those responsible for international crimes, the jurisdiction of the ICC will not be activated."[148] The possibility is however met with the challenge of the perception of ICC in Africa with its likely intervention only contributing to that perception. Kailemia in expressing this sentiment states that a critique of the ICC is that "it has preoccupied itself with Africa and in the respect failed to investigate equally severe conflicts elsewhere."[149] She further argues that the African Union see the [prosecution of only Africans

[143] Amnesty International, *supra* n.117.
[144] Amnesty International, *supra* n.111, at 12.
[145] Folami O. M., "Prosecution that Never Began: An Exploration of Acceptance of International Criminal Justice in Nigeria" In S Buckley-Zistel et al (eds.) *After Nuremberg. Exploring Multiple Dimensions of the Acceptance of International Criminal Justic*e (International Nuremberg Principles Academy 2017), at 4.
[146] Bukar, *supra* n.112, at 43.
[147] Amnesty International, "Nigeria: War Crimes and Crimes against Humanity as violence escalates in North East", 31 March 2014. Available at: https://www.amnesty.org/en/latest/news/2014/03/nigeria-war-crimes-and-crimes-against-humanity-violence-escalates-north-eas/. Last accessed on 30 December 2021.
[148] Hassan and Olugbuo, *supra* n.1, at 134.
[149] Kailemia M., "International Justice in the time of 'outsourced illiberalism': Africa and the ICC" (2016) 3(1) *Journal of Global Faultlines* 16, at 17

by the ICC] as a betrayal of the spirit of the Rome Statute.[150] With these thoughts in mind, one can say that ICC intervention may not be welcomed.

Another argument worthy of consideration is the possibility of trial of Boko Haram combatants by other affected West African countries, if they have a more enabling legal framework for the trial of international crimes indicated. This view is supported by Hassan and Olugbuo who note that "the transnational nature of Boko Haram means that any of the West African countries neighbouring Nigeria where Boko Haram members operate can actually prosecute them for international crimes."[151] However, this approach has not been adopted by neighbouring affected States such as Cameroon where Boko Haram suspects were investigated and prosecuted under their Suppression of Terrorism Law 2014 with 89 persons as of 2016 being sentenced to death penalty and one to life imprisonment.[152] The conduct of these cases have also raised queries as the burden of proof is shifted to the defendant.[153] It is also seen here that the nature of the conflict is not considered in the adjudication of the cases.

Although, Nigeria is unable to actively enforce these laws save for common article 3 of the Geneva Conventions, it can be argued that similar provisions could be found in the Nigerian domestic laws that cover to some extent the scope of the provisions that have been violated. This is imperative as there is "there is an obligation incumbent upon Nigeria to respect and ensure respect for the humanitarian provisions of the Conventions and the Protocols."[154] This position has been supported by Olugbuo who argues that "majority of the crimes created in the Statute are reflected in Nigerian national legislations."[155] James-Eluyode expands on this by pointing out that,

> it cannot be concluded that Nigeria's municipal penal laws are criminally silent on inhumane conduct during conflict as the Nigerian Criminal Code…outlaws some inhuman conduct similar to that outlawed by the Conventions and the Additional Protocols. The code prohibits murder [sections 306 and 315], arson [section 443], rape [section 358], assault [sections 351 and 355], indecent assault [sections 352, 353 and 360], slave dealing, [section 369], kidnapping [section 364] attempts to destroy property by explosives [section 452] and others.[156]

Similar provisions are also contained in the Nigerian Penal Code that is applicable in Northern Nigeria such as culpable homicide [sections 220-224], mischief by fire or explosives [sections 336-337 and 339], rape [section 282], assault [sections 264 and 265], slave dealing [sections

[150] *Ibid*, at 20.
[151] Hassan and Olugbuo, *supra* n.1, at 137.
[152] Kingah S., "Legal Treatment of Boko Haram Militants Captured by Cameroon" (2018) 26(1) *African Journal of International and Comparative Law* 44, at 50.
[153] *Ibid*.
[154] James- Eluyode, *supra* n.132.
[155] Olugbuo, *supra* n.137, at 85.
[156] James- Eluyode, *supra* n.132.

275,278-279 and 281], kidnapping [sections 271-274] and others.[157]

Having considered the issues surrounding the trial of international crimes in Nigeria, this research will now proceed to evaluate cases related in the Boko Haram Insurgency that have been tried to ascertain the extent to which they have addressed international crimes and to understand the general approach adopted.

4.4 An Analysis of Selected Nigerian Cases Related to Boko Haram

Since the beginning of the insurgency, it has been reported that a significant number of persons have been arrested for activities connected to the Boko Haram Insurgency. Amnesty International in 2012 reported that "hundreds of people accused of links to Boko Haram have been arbitrarily detained without charge or trial, other extra-judicially executed or subjected to enforced disappearance."[158] Furthermore an ICC report states that "as of October 2017 over 2,300 Boko Haram suspects [have been] arrested."[159] Reports from investigations carried by other non-governmental groups found that as of 2013, only 11 convictions of Boko Haram Members were secured.[160] Human Rights Watch in a 2012 report noted that there were approximately 350 suspects in custody, 53 having undergone prosecution in various courts, specifically 42 Boko Haram suspects were arraigned in 2011- 35 in Bauchi and 7 in Abuja.[161] Their report also acknowledged that "most suspects were yet to be charged."[162] Amnesty International criticised the Nigerian government for its failure "to adequately prevent or investigate the attacks or bring [alleged] perpetrators to justice."[163]

There has been confusion as to the appropriate authority to try suspects. This confusion has been brought about because of reports of different government agencies taking the lead. Crisis Group identifies the Defence Headquarters as one of such government actors when they state that the Defence Headquarters ordered the immediate trial of over 500 suspects and the investigation of 1,400 detainees in Maiduguri, Yola and Damaturu screened by a joint investigation team.[164] The question becomes more puzzling with the Ministry of Justice wading into the situation by undertaking mass trials of these suspects in a special Federal High Court situate in Wawa Military Cantonment, Niger state, following heavy criticism of a large number

[157] Nigeria Penal Code Act 1960.
[158] Amnesty International, *supra* n.114, at 3.
[159] International Criminal Court, *supra* n.119, at 59 para. 236.
[160] International Crisis Group, *Curbing Violence in Nigeria (II): The Boko Haram Insurgency,* Africa Report No. 216 (ICG, 2014), at 30.
[161] Human Rights Watch, *Spiralling Violence: Boko Haram Attacks and Security Forces Abuses in Nigeria* (HRW, 2012), at 81.
[162] *Ibid*, at 79.
[163] Amnesty International, *supra* n.114, at 3.
[164] International Crisis Group, *supra* n.160, at 31.

of persons awaiting trial. These mass trials were carried out in three phases 1) October 2017 2) February 2018 and 3) July 2018. In these trials the cases of 1,669 suspects were attended to, some of these suspects having been in detention since 2009.[165]

These trials have been subject to significant criticism by civil society over their violation of fundamental guarantees. Human Rights Watch in 2018 concluded that Nigeria's prosecution of suspected Boko Haram Members had serious shortcomings.[166] Some these shortcomings included the trials being shrouded in secrecy, which raised concerns about fair trial and due process as proceedings were short and lasted about 15 minutes, also charges were couched in ambiguous and vague terms without the crucial information required by Nigerian Law.[167] In some instances it was reported that "some defendants said they were not given time to consult with their lawyers until the day of trial."[168] Amnesty International succinctly noted that there were "egregious violations of the fundamental rights of the suspects."[169] The Nigerian Constitution like other international human rights treaties guarantee a number of procedural safeguards as contained in sections 35 and 36 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

There have been views expressed as to the charges brought against these alleged offenders and critiques that international crimes are not captured in the prosecutions. This thesis has analysed 57 judgments emanating from trials connected to the Boko Haram Insurgency in order to ascertain the veracity of these claims, the findings of which are set out hereunder.

Table 2: Breakdown of charges against Boko Haram Insurgents and Respective Laws

Description	Number of cases	Law/ Jurisdiction	Max. and Min. Jail term	Nature of Charge
CHARGES				
Prohibition of Acts of Terrorism (omits to prevent and accessory)	7	Section 1(2) Terrorism Prevention (Amendment) Act 2013	Max- Life imprisonment Min- 2 years	Violent
Attending a meeting in support of a proscribed organisation	2	Section 4(c) Terrorism Prevention (Amendment) Act 2013	5 years	Non-violent
Soliciting and giving support to terrorist groups for the commission of terrorist	9	Section 5 Terrorism Prevention (Amendment) Act	Max- 15 years Min- 5 years	Non-violent

[165] Human Rights Watch, "Nigeria: Flawed Trials of Boko Haram Suspects- Ensure Due Process, Victim Participation", 17 September 2018. Available at: https://www.hrw.org/news/2018/09/17/nigeria-flawed-trials-boko-haram-suspects. Last accessed on 30 December 2021.
[166] *Ibid*.
[167] *Ibid*.
[168] *Ibid*.
[169] Amnesty International, *supra* n.111, at 5.

		2013		
Provision of training and instruction to terrorist groups or terrorists	3	Section 7 Terrorism Prevention (Amendment) Act 2013	Max- 12 years Min- 2 years	Non-violent
Concealing of information about acts of terrorism	20	Section 8 (1) Terrorism Prevention (Amendment) Act 2013	Max- 10 years Min- 4 years	Non-Violent
Membership of a terrorist group or proscribed organisation	17	Section 16 Terrorism Prevention (Amendment) Act 2013	Max- 15 years Min- 5 years	Non-Violent
Escape from lawful custody or aiding and abetting escape	2	Section 19 Terrorism Prevention (Amendment) Act 2013	8 years	Violent
Unlawful assumption of character of officer of any law enforcement or security	1	Section 22 Terrorism Prevention (Amendment) Act 2013	5 years	Non-violent
Failure to disclose information about an act of terrorism	1	Section 7(1) of the Terrorism and Prevention Act 2011		Non-Violent
Commits or attempts to commit an Act of Terrorism	2	Section 15(2) Economic and Financial Crimes Commissions Act	Life imprisonment	Violent
Making funds available for the commission of a terrorist act	1	Section 15(2) Economic and Financial Crimes Commissions Act	10 years	Non-Violent
Guilty	47 (of which 40 guilty pleas)			
Charges Withdrawn and Rehabilitation Ordered	6			
Acquitted (And Rehabilitation Ordered)	3 (2)			
Discharged	1			
Total Judgments Reviewed	57			

Other NGOs have also carried out their own investigations as to the prosecution of Boko Haram insurgents and their findings are in tandem with the data shown above. Human Rights Watch found that in 2012 there was only one conviction of a terrorism suspect.[170] A further investigation by the group found that "over 200 defendants were tried under offences under Terrorism Prevention (Amendment) Act 2013- 113 were convicted, 5 acquitted and 97 discharged without trial as there was no case. Most of the defendants were prosecuted solely for providing material and non-violent support to Boko Haram including their vehicles,

[170] Human Rights Watch, *supra* n.161, at 79.

laundering their clothes, supplying then with food and other items."[171] They added that "participation in the deradicalisation program aimed at deterring individuals from violent extremism [was] compulsory for all."[172]

Amnesty International working off a dataset of 179 court documents including 52 judgments found that the mass trials "appear to have targeted mainly civilians caught in the crossfire, charge with minor offences such as support to Boko Haram member; concealment of information from the authorities."[173] When crunching the numbers, it was evident that:

> Out of the 144 'Boko Haram suspects' tried in July 2018 - for whom Amnesty International was able to identify their charges:19- terrorist acts (or attempt), 1- hostage taking, 124- Boko Haram membership, 68- concealment of information from the authorities (76), supporting Boko Haram (49), and/or participation to Boko Haram trainings or meetings (13). Out of these people 107 were convicted at the end of the trial, with only seven convicted for different terrorist acts and one for hostage taking, while the rest (99 others) found guilty for Boko Haram membership or support, participation in trainings.[174]

The prevalence of non-violent charges was further corroborated by the ICC in its 2018 Report on Preliminary Activities when it found that 360 persons convicted during the mass trials were convicted on non-violent support to Boko Haram. They further discovered that there were "limited number of cases against high and mid-level Boko Haram commanders." International Criminal Court however acknowledged that this could be tied to the fact that those persons have either not been captured or killed in action. However, it was noted that there was "a trial of Kabiru Umar, a mid-level Boko Haram commander, [which] was successfully concluded in December 2013 and the trial of Mohammed Usman (aka Khalid al-Barnawi), a former high-level Boko Haram commander and subsequent leader of the break-away faction Ansaru [that] commenced in March 2017."[175]

Having provided a summary of cases treated by Nigerian actors, this chapter will now proceed to present a handful of judgments as case studies, one of such would be the trial of Kabiru Umar. The cases were selected in the basis if the gravity of charges, quality of the judgement and the level of the offender within Boko Haram ranks.

[171] Human Rights Watch, *supra* n.165.
[172] *Ibid*.
[173] Amnesty International, *supra* n.111, at 18.
[174] *Ibid*.
[175] International Criminal Court, *supra* n.119, at 60 para. 238.

Case Studies

A. Federal Republic of Nigeria v Mustapha Umar[176]

Charges: The suit was filed at the Federal High Court of Nigeria as required by the Terrorism Act 2011 and Terrorism (Prevention) (Amendment) Act 2013. Mustapha Umar was arrested for committing an act of terrorism involving the possession, acquisition, transport and use of explosives pursuant to section 1(2)(c)(v) of the Terrorism Prevention (Amendment) Act and membership of a terrorist group pursuant to section 16 of the same law.

Particulars: On April 26, 2012 at about 10am on Kotangora road in Kaduna, a Honda car was driven by Mustapha Umar close to the SOJA Plaza in Kaduna (which housed the Thisday, Moment and Sun newspapers). The accused person, Mustapha Umar apparently shouted in Hausa language "I have brought a bomb to this premises and it can explode any moment now".

Trial: Evidence from PW1- Ismail- stated that he sought assistance of the Nigerian Police Force and Nigeria Army/ Merchandised Division/Operation Yaki's assistance. Upon arrival of these security forces, Mustapha Umar brought out something that looked like a fire extinguisher and threw it and there was a large explosion, three people died. Following this initial explosion, the accused person sought to escape. In this time, two explosions emanated from the Honda vehicle. Ismail the first prosecution witness stated that the police found 12 camped gas cylinders in the Honda vehicle and these gas cylinders were wired to the car's steering. Following the arrival of the police at the scene the accused person was arrested, treated and stabilised by the Medical Director of the Nigeria Police Force. Whilst giving his statement, the accused person stated "Sir, I am not happy if I died with people in the Operation so that I will be in heaven." He also confessed to another police officer that he loaded his car with an improvised explosive device, drove to the media house- Thisday office- with the intention of destroying the premises. He added that "Thisday insulted the Holy Prophet Mohammed and on that basis do not deserve to exist." He also revealed to the police officer his relationship with suicide bomber- *Alhaji* that hit Thisday office in Abuja. At trial the confessional statement was admitted in evidence.

Decision: At trial, there were 10 witnesses called by the prosecution and 2 issues for determination were distilled:

[176] Suit No FHC/ABJ/CR/2/2013- Delivered on November 14, 2013 by Justice A F A Ademola.

1. Whether the defence is right to file his final written address out of time without the leave of this Honourable Court sought and obtained?
2. Whether from totality of evidence before this Honourable Court, the Prosecution has proven its case beyond reasonable doubt against the accused person?

In determining issue 1, the court found that issues cannot be determined on the basis of a technicalities.[177] More importantly, an accused person's fundamental right to fair hearing in a criminal trial is guaranteed by section 36 of the 1999 Constitution[178] and as such issue 1 is determined in favour of the accused person.

On issue 2, the Honourable Justice began looking at the burden and standard of proof by citing *Woolmington v DPP* (1935) AC 426 &481 and section 135(1)- (3) of the Evidence Act 2011. The judge stated that the main issue is to determine whether the prosecution has proved the ingredients of the offence of the act of terrorism. The accused person's defence of an innocent bystander was rejected in its entirety. Also, the accused person's intention to commit the act is contained in his confessional statement. The evidence of five prosecution witnesses were deemed credible and were not challenged by the Defence at trial. The Judge also found that "the accused's persons overt acts of terrorism can be gleaned from the five mentioned prosecution witnesses evidence and 14 documentary evidence tendered. The Court found that the prosecution has proved its case against the self-professed member of Boko Haram. The action of the accused person resulted in the deaths of 3 persons while many more sustained various degrees of injury. Mustapha Umar was sentenced to life imprisonment and fined the sum of 150 Million Naira.

B. Federal Republic of Nigeria v Kabiru Umar (Alias Kabiru Sokoto)[179]

Charges: The accused person, Kabiru Umar, was arraigned on an amended two count charge before the Federal High Court in April 2013. The charges brought were as follows:

1. Being a member of a known terrorist organisation, Boko Haram between 2007 and 2012 at Mabira Sokoto, Sokoto State facilitated the commission of a terrorist act by assisting and facilitating boys at Mabira Sokoto with the intention to bomb the police headquarters and other government organisations committed an offence punishable under section 15(2) of the Economic and Financial Crimes Commission Act 2004
2. On 25 December 2011, at St. Theresa's Church Madalla, Niger State the accused person had information about the bombing at the church and failed to disclose to law

[177] *AG Bendel State v AG of the Federation & Ors* (1981) 10 *SC*.
[178] *Akinlega v Benue State Civil Service Commission* (2002) 2 *CHR* 1.
[179] FHC/ABJ/CR/38/13 delivered on 20 December 2013 by Hon. Justice Ademola.

enforcement officers and therefore committed and offence punishable under section 7(1) of the Terrorism and Prevention Act 2011.

Trial: The prosecution in conducting its case called four witnesses and tendered 4 exhibits. Having failed in their no case submission application, the Defence opened its case and called the accused person as its sole witness. In closing its case, the Defence argued that the failure of the prosecution to call all witnesses listed and averred that it is fatal to the foundation of the prosecution's case, citing the principle in *Archibong v State*[180], which states that the prosecution must call a witness whose evidence is material for the determination of the case. Furthermore, the Defence argued that the testimonies of PW1 and PW2 were hearsay and inadmissible. It was also his contention that the documents tendered were fabricated. On the second charge he submitted that due to the detention under the Terrorism Prevention Act 2011 a video recording is mandatory pursuant to sections 25 and 27 of the Act and failure to produce and tender same is detrimental to the case. In addition, that there is no information before the Court showing knowledge of the bombing.

Decision: The judge in determining the suit raised one issue for determination to wit: "Whether the Prosecution has proved the accused person's guilt beyond reasonable doubt on the 2 counts of the second amended charge. He relied on the section 135 of the Evidence Act 2011, which states that he who asserts must prove. The Court found that the confessional statement in which the accused person confessed to be a Boko haram member and visiting members of the sect was voluntarily and freely given. He also confessed "I planted them with intention to bomb the Police Headquarters and some government organisations in the state. I purchased one AK47 and K2 Rifle." Furthermore, that it can utilise documents in the file although not tendered, to reach a judgment (*State v Salawu*[181]). On the second charge, the accused person confessed to "knowledge and even mentioned the names of those who did the bombing" and were members of the Boko haram military hierarchy. The Judge found that the accused person was not a credible witness and was economical with the truth. On both charges, the Court found that the accused person was guilty and sentenced him to life imprisonment for count one and 10 years for count two, to run consecutively.

The judge in commenting on the case noted that "the intelligence gathering, and investigation methods need to be improved." Furthermore that "the Police and SSS are yet to investigate

[180] (2004) 1 NWLR (Pt. 855) 488 @512.
[181] (2011) 18 NWLR (pt 1279) 580 SC.

fully the case and arrest other suspects in light of the evidence". He added that "terrorism, as the new monster in our midst continues unabated".

C. *Federal Republic of Nigeria v Murktar Ibrahim*[182]

Charges: The accused person was arraigned on a 5-count amended charge before the Federal High Court in March 2013. The charges brought were as follows, the accused person:

- received a message deemed preparatory to an act of terrorism and committed an offence contrary to section 1(1)(a) of the Terrorism (Prevention) Act, 2011 and punishable under section 33(1)(a) Terrorism (Prevention) Act, 2011
- posted a message soliciting for support for an act of terrorism and committed an offence contrary to section 4(1)(a) of the Terrorism (Prevention) Act, 2011 and punishable under section 33(1)(a) Terrorism (Prevention) Act, 2011
- sent two messages constituting an act to promote an act of terrorism and committed an offence contrary to section 1(1)(b) of the Terrorism (Prevention) Act, 2011 and punishable under section 33(1)(a) Terrorism (Prevention) Act, 2011 [charged separately]
- kept records in a personal diary indicating intention to promote acts of terrorism contrary to section 15(2) of the Economic and Financial Crimes Commission Act 2004

Trial: The prosecution in conducting its case called two witnesses representing the National Intelligence Agency (NIA) and Counter-Terrorism Unit, Directorate of State Security Services (DSS). In the testimony of the NIA officer, the accused person was handed over by security operatives of Niger republic at Konny Ilela, the border between Nigeria and Niger Republic. The DSS officer in his testimony stated that he was asked to investigate postings by an Abu Sabaya that celebrated bombing campaigns of the Boko Haram sect and were generally in support of terrorism and after investigation he was able to ascertain the email of Abu Sabaya and the personality behind him. He also stated that there was an international element to the Abu Sabaya case as the United States House of Representatives committee on Homeland Security and its sub-committee on Counter-Terrorism and Intelligence had issued an official document titled: Boko Haram: An Emerging threat to the US Homeland. It was noted that Abu Sabaya was cited severally in this document for soliciting funds for the Boko Haram sect and instigating a global jihadist forum to attack the United States. He stated that in the accused person's statements, he claimed to be the owner of the email linked to Abu Sabaya and the online name. Upon perusal of the email and online platform belonging to Abu Sabaya as ansar1.info, he saw a number of emails and posts, which celebrated Boko Haram bombings

[182] Charge No. FHC/ABJ/CR/178/2012 delivered on 20th November 2015 by Hon. Justice G O Kolawole.

and acts of terrorism. Upon cross-examination, the DSS officer amongst other things stated that as at the date of arrest, Boko Haram was not outlawed in Nigeria.

Following their testimonies, a no case submission was filed by the defence counsel, which resulted in charges 2 and 5 being struck out. The defence is opening their case called four (4) witnesses including the accused person. The first two witnesses were character witnesses, the third was an information technology consultant and expert and the fourth, the accused person. The IT expert gave testimony to the effect that the printout of the online posts were altered and thus stating that those statements had no probative value. Poignant also, was the testimony of the accused person where he stated that he admitted being Abu Sabaya under duress and after three days of torture. He stated, "during the torture, he used electric shocks on me and pulled off my nail on my left index finger. At the same time, he threatened to arrest my mother and my father if I did not admit that I was Abu Sabaya." He further stated that the DSS officer tortured him "with batons at my joints"; he "was subjected to hunger as I was fed once a day in a cell with an air conditioner of 16 degrees" and that he still had "traces of the scars on my body till date".

In the final addresses, the Defence argued that the prosecution had not proved the essential elements of the offence and further that the statements of the accused person sought to be relied on were obtained involuntarily and as such the veracity of the alleged confessional statement was lacking in line with the ration in *Igri v State*.[183] Furthermore, the testimony of the IT Consultant was not contradicted. The prosecution countered by arguing "in the course of [the Defence's evidence], none of the witnesses including the Defendant denied that the offence was committed." Furthermore, they argued that the alleged involuntariness of the confessional statements was not raised in a timely fashion.

Decision: Justice Kolawole in determining the case found that should the confessional statements be put through section 29 of the Evidence Act 2010, it may not have passed the evidential tests, particularly those on involuntariness of the confession as there was evidence of coercion, torture and intimidation. Furthermore, he found that the prosecution did not recall its witness- DSS officer- to disprove the testimony of the Defendant. These issues "cast huge shadow of doubts on the credibility of the investigation method and procedure adopted by the DSS officer in relation to the Defendant". Furthermore, going by the testimony of the IT expert, the Court found that the printout of the messages and the confessional statement were of doubtful probative value and probably illegal. The judge noted that the IT expert's testimony

[183] (2012) 16 NWLR (pt.1327) 522 @ 550.

left “a huge gap and doubt on the culpability of the Defendant”. In addition, it was found that the offences were committed in 2011 and the amended charge brought in 2013, the Act under which the amended charges were brought had no provision for retrospective application, Boko Haram was also not proscribed in accordance with the law till 2013. In view of the foregoing, the prosecution had not proved their case beyond reasonable doubt and the Defendant was acquitted. In concluding his judgment, a warning note was given by the Judge saying, “If the Defendant ever harbour any violent or extreme religious disposition, he stands the greater risk of either being re-arrested on another such offence again and charged to court or to be killed in the process.”

D. FRN v HM[184] **(one of the mass trial cases)**

Charges: HM was charged with to two counts of furthering acts of terrorism by participating in several terrorist attacks in Maiduguri and Damaturu and one count of membership of a terrorist group, to which HM pled guilty. It is unclear when HM was arrested, how long he had awaited trial, or the particular sections upon which HM was charged.

Decision: The judge convicted him based solely on his confessional statement and noted that by HM’s actions and attacks he was party to, led to the death of many people. HM was sentenced to imprisonment of two twenty years sentence that will run concurrently and one eight-year term during which he would be rehabilitated and de-radicalised.

4.5 Findings

One of the key takeaways from the select analysis of Boko Haram Judgments is the way in which the Nigerian Justice Sector frames the conflict. The Justice Sector has framed the conflict as purely a terrorism issue and by so doing limits it to a domestic criminal issue. This is evident in the limiting of the applicable law to the Terrorism Prevention Act 2011, Terrorism Prevention (Amendment) Act, 2013 and Economic and Financial Crimes Commission Act 2004. This particular point is poignant because these are purely domestic laws and they could be said to limit the understanding of the conflict to a domestic issue. By so doing, it ignores the violations of international crimes as well as fails to address fair labelling concerns for harm done to victims. In the way the charges are drafted recourse is not had to applicable International Humanitarian Laws and International Criminal Law espoused earlier. This may be as a result of the prosecutors not averting their minds in the framing of the charges to

[184] FHC/KAINJI/CR/74/18 Delivered on 13 February 2018 by Justice Yellim Bogoro; An acronym is being used as this is one of the judgments obtained from the Federal Ministry of Justice and they requested that the defendants’ names be anonymised for national security reasons.

existing domesticated international law such as the Geneva Conventions Act 1960 or a tunnel focus on counter-terrorism efforts. Amnesty International found that "attacks by armed groups can violate national criminal laws, the indiscriminate or deliberate attacking can also violate International Humanitarian Law and certain circumstances constitute crimes under international law."[185] Even though, the applicable international laws were not used, the domestic provisions that cover the crux of the violations were also not utilised. It can therefore be said that the Nigerian Justice Sector did not avail itself of the full gamut of the law. Furthermore, it can be seen in *FRN v Mustapha Umar; Kabiru Umar; Murktar Ibrahim* that the cases were treated as mere criminal law cases, with the reversion to the technical interpretation and application of the law, which appeared to divorce itself from the gravity of the offences charged.

It can be argued that the charges as considered above could have been expanded to include charges for violation of Common Article 3 under the domesticated Geneva Conventions Act 1960. However, this may not be feasible considering the Act caters primarily to violations emanating from an international armed conflict as seen in the Uganda example given above. On the other hand, it can be argued that a saving provision is included which gives Nigeria the power to provide for punishment of other breaches of Conventions. Section 4 of the Nigerian Geneva Conventions Act stipulates that:

> (1) The President may, by order provide that if any person-
> *(a)* in Nigeria commits, or aids, abets or procures any other person to commit, whether in or outside Nigeria; or
> *(b)* being a citizen of Nigeria, or a member of, or attached or seconded to the armed forces of Nigeria, or a person to whom section 292 of the Armed Forces Act, applies, or a member of or serving with any voluntary aid society formed in Nigeria and recognised as such by the Federal Government, commits, whether in or outside Nigeria, or aids, abets or procures any other person to commit, whether in or outside Nigeria,
> any breach of any of the Conventions which may be specified in the order other than one punishable under section 3 of this Act, he shall be liable to imprisonment for a term not exceeding seven years.

This provision suggests that this approach may be plausible and if so, the justice sector did not take the necessary steps to test this in the courts.

Furthermore, a case can be made for the trial of such offences, being war crimes and crimes against humanity, under the auspices of customary international law.[186] Earlier in this chapter it was argued, as seen in *Blaškić*, that specific offences of common article 3 can be tried by virtue of it having attained customary status. There are war crimes and crimes against

[185] Amnesty International, "Nigeria: Provisions of the Prevention of Terrorism Bill, 2009 are incompatible with Nigeria's Human Rights Obligations", 27 May 2010. Available at: https://www.amnesty.org/en/documents/afr44/005/2010/en/. Last accessed on 30 December 2021.
[186] This was also addressed in chapter 1 (1.2.2).

humanity that can emanate from a non-international armed conflict as exemplified by Article 8(2)(c) and (e) of the Rome Statute, which is said to embody what is now accepted as customary international law. According to Henckaerts and Doswald-Beck, "there is sufficient practice to establish the obligation under customary international law to investigate war crimes allegedly committed in non-international armed conflicts and to prosecute the suspects if appropriate."[187] A question that arises is whether violators can be tried using customary international law without an enabling legislation giving the courts' jurisdiction. An ICRC report suggested that "IHL can also be implemented by direct application of the rules of international law by the country's courts, without inserting a deliberate reference to those rules into domestic legislation."[188] It is however noted that this approach carries a degree of uncertainty especially in countries with common law traditions,[189] such as Nigeria.

It has been subject to debate whether customary international law can be applied in Nigerian courts. Oji advances that customary international law may be applied in Nigeria if it is established before the Nigerian court, and it passes the repugnancy test, incompatibility test and public policy test, as is done with ethnic customary law, which is not codified in legislation.[190] In expanding on the compatibility issue, she further argues it could pose an issue as the Nigerian Constitution provides that the Constitution is supreme, therefore for a customary international law principle to apply it cannot conflict with its provisions.[191] In concluding her commentary on this issue, she notes that "courts are particularly useful in the implementation of [customary international law] because unlike treaties, they do not require implementation through domestic re-enactment."[192] An alternative proposal is that by virtue of received English law, customary international law is applicable in Nigeria. Azoro argues that since customary international law is part of the common law of England and the common law of England is made part of the Nigerian legal system under section 32 of the Interpretation Act, which is an Act of the Nigerian National Assembly and is thus justiciable by the Courts.[193]

Another proposition, which was hinted above was trying these persons under domestic provisions that hold the same essence as the war crimes and crimes against humanity. Such opportunity can be seen in the *HM* case where the accused person could have been charged

[187] Henckaerts and Doswald-Beck, *supra* n.36, at Rule 158.
[188] ICRC Advisory Service on International Humanitarian Law, *Preventing and Repressing International Crimes: Towards an "Integrated" Approach Based on Domestic Practice* (ICRC, 2014), at 36.
[189] *Ibid*, at 36-37.
[190] Oji E. A., "Application of Customary International Law in Nigerian Courts" (2010) *NIALS Law and Development Journal* 165, at 165.
[191] *Ibid, at* 166.
[192] *Ibid*, at 168.
[193] Azoro C. J. S., "The Place of Customary International Law in the Nigerian Legal System – A Jurisprudential Perspective" (2014) 1(3) *International Journal of Research,* at 97.

for culpable homicide or *Mustapha Umar* who could have been charged with a number of offences such as mischief by explosives. These could be done in addition to the charges under the extant terrorism law at the very least. It can be argued that these offences under the Nigerian Penal Code can be tried in the Federal High Court. This position is supported by section 7(4) of the Federal High Court Act which states that the jurisdiction of the Court "include[s] original jurisdiction in respect of offences under the provisions of the Criminal Code Act being offences in relation to which proceedings may be initiated at the instance of the Attorney- General of the Federation." This provision is also given judicial approval in *James and Others v NSCDC and ors*.[194]

To dwell further on the Terrorism Prevention Act, it can be argued that this law is not linked to or acknowledges the principles of International Humanitarian Law and International Human Rights law. Amnesty International found that "several key provisions of the Terrorism Prevention Act 2011 are incompatible with Nigeria's Human Rights obligations."[195] This critique is also not rectified in the amendment law of 2013. This view is further buttressed by the Terrorism Prevention (Repeal and Re-enactment) Bill, 2018, which is before the Nigerian National Assembly that seeks to amend the existing law. This bill also does not reference international humanitarian law, international human rights law or human rights as guaranteed by the Nigerian Constitution. The focus of the bill is on bringing its terrorism laws in tandem with International protocols and conventions on terrorism financing and suppression of terrorism activity such as the UN Convention on the Prevention and Combatting of Terrorism and the Convention on the Suppression of Financing of Terrorism.[196] This is also seen in *Karumi v FRN* where reference was made to the 2003 UN Convention against Transnational Organised Crimes (Palermo Convention).[197] One could go so far as to argue that the focus has not been on acknowledging the gravity of offences committed by these persons or the impact on society or victims but the terrorism laws have been a means of bolstering Nigeria in the face of the Financial Action Task Force (as an implementing body for the Palermo Convention) and Inter-Governmental Action Group against Money Laundering in West Africa.

In addition, one can contend that evident in the trials is the dismissal of certain human rights principles. Some of these infractions have been documented above, but two issues stand out. Firstly, there is the issue of bail. It is widely acknowledged that there are thousands of persons awaiting trial without a hearing of their cases that led to mass trials. In an appeal of one of

[194] (2014) LPELR-24068 (CA), at 19-20 paras. B-G.
[195] Amnesty International, *supra* n.185.
[196] Terrorism (Prevention and Prohibition) Bill, 2018 (HB 1296).
[197] *Karumi v FRN*, at 26.

the judgments, the Court of Appeal held that "Courts should therefore be very circumspect in granting bail pending appeal to a person convicted for any offence relating thereto… In the case of *Dokubo-Asari v Federal Republic of Nigeria,* the Supreme Court gave its nod of approval to the refusal to grant bail pending trial to the appellant on the ground, inter alia, of threat to national security."[198] Secondly, how is it possible that majority of the persons (from cases analysed in table 2) tried pled guilty. In documenting this guilt, the court in its judgment is meant to cover the points of determination, the decision and reasons for the decision. These were few and far between in the judgments, particularly those emanating from the mass trials,[199] as seen in the case of *HM*. The drafting of the charges was mostly scant in their details and the judgments averaging about four pages. Although these by themselves are not evidence of non-compliance with international human rights norms and the adherence to fundamental guarantees as given in Common Article 3 of the Geneva Conventions, it raises questions as to the level of observance. This viewpoint could be said to have been countered by Justice Ikyegh in *Karumi v FRN* where he accepted that,

> Terrorism is a serious offence and its effect is beyond the offence of just killing one human being. The effects of Terrorism include injuries, deaths, psychological trauma of the immediate victims. It has short and long term effects on the society and Nation. It also impacts on the economy of the entire nation. Buildings and infrastructure are damaged. It has no classified enemy except total destruction. Life is reduced to an imaginable state of no value. The gravity of the offence of terrorism which involves the use of violence or force to achieve something, be it political or religious, is a grave affront to the peace of society with attendant unsalutary psychological effect on innocent and peaceful members of the society who may be forced to live in perpetual fear. It is an offence that may even threaten the stability of the state. The sophisticated planning and execution of the acts of terrorism show it is an offence that requires premeditated cold-blooded organisation. The circumstances under which such a crime is organised calls for appropriate sentencing to deter its recurrence by potential or prospective offenders.[200]

In the same case Justice Abubakar Tijjani, JCA acknowledging the grave nature of the crimes added that "failure to impose proper punishment facilitates escape from justice and serves as incentive to commission of grievous crimes."[201] This is however the views of two judicial officers and may not necessarily reflect the views of the entire sector.

On the non-acknowledgement of international crimes, it has been argued that "international crimes were intended to be prosecuted at the national level."[202] In this instance, the Nigerian government has shirked this responsibility. This could be attributed to the reluctance to try government forces for violations of these laws. Cryer in agreeing with this assessment states that "national prosecutions of international crimes have been highly selective and generally

[198] *Ogwu Achem v FRN* (2014) LPELR-23202(CA).
[199] Section 308 Administration of Criminal Justice Act 2015.
[200] *Adamu Ali Karumi v Federal Republic of Nigeria* (2016) LPELR-40473(CA), at 21 and 25 Paras. A-D.
[201] *Ibid*, at 27; *Ibrahim Usman Ali v Federal Republic of Nigeria (*2016) LPELR-40472(CA), at 27.
[202] Cryer R. et al, *An Introduction to International Criminal Law and Procedure* (3rd ed, OUP, 2018), at 73.

states have been unwilling to prosecute their own nationals…the political willingness to pursue national prosecutions is divisive."[203] There have been reports of gross violations on the part of the Nigerian forces, to which government has turned a blind eye. This reasoning could be linked to the view that with the frame of terrorism- government forces are seen as the "good guys" against the terrorists as the "bad guys" and the good guy does not violate laws. However, with the frame of armed conflict, the two sides are viewed as "equals" although the application of the law does not legitimise the armed group, and both sides of the conflict can be susceptible to violations.

This issue could also be tied to the politico-legal issue of sovereignty. As indicated in the previous chapter, one of the reasons why the Justice Sector as an agent of the Nigerian government would be reluctant to acknowledge the applicability of these laws is because it could be perceived as an admission of the vulnerable state of the nation. One could then argue that if we are assessing this issue on the behavioural relevance scale, the justice sector is tilting towards upholding national interest as opposed to adhering to global norms that would put it in good standing before the international community. Cryer captures this as the concept of 'political willingness', he notes that "national courts often expose uneasiness and insecurity when dealing with international crimes…political considerations prevent national prosecutions altogether make them highly selective."[204] Eyre goes into further detail by highlighting some of the possible political considerations that may have factored into the decision that the justice sector would prefer to remain hidden. These factors are that the "extent of crimes will stretch Nigeria's judicial system- the scale of crimes alone will test the ability of Nigeria's criminal justice system- high number of persons awaiting trial, chances of the justice system being able to handle such investigations is near to medium term is slim."[205]

Another critical finding is the use and willing acceptance of other non-judicial measures to address the violations. A review of the judgments saw that all persons were referred to a rehabilitation centre for proper rehabilitation and re-integration into the society regardless of guilt or innocence. This programme is known as Operation Safe Corridor, which is a platform for repentant Boko Haram members to undergo deradicalisation, disassociation, rehabilitation and reintegration. As suggested it is for repentant members but when utilised in conjunction with the justice sector, it begs the question of whether persons who have pled guilty to certain crimes are willing to be rehabilitated and whether those who were found guilty of non-violent offences such as providing assistance, need to undergo the programme in the first instance.

[203] *Ibid*, at 73-74.
[204] *Ibid*, at 74.
[205] Eyre D., "Nigeria: the ICC's Next Challenge in Africa?" *Justice in Conflict*, 3 March 2017.

Furthermore, this question is also supported by the view that "to date only those deemed to be "defectors" have been cleared for entry"[206] into the programme. This programme lasts 16 weeks and covers "various social and spiritual counselling, introductory elementary formation education and vocational training, among others."[207] It is seen that government is more focused on rehabilitation of terrorists than fully holding them to account for crimes committed as over 1,400 Boko Haram suspects have allegedly "repented and been re-integrated into society."[208] This focus could also be seen in the efforts put towards three separate rehabilitation programme including Operation Safe Corridor. This process in and of itself is flawed as it raises the question of how one truly assesses their level of contrition and what is to say that these persons will not go forward to re-offend.

A further key question is to what extent do these efforts help in moving towards post-conflict recovery as communities often reject these persons. This has been recently reported with the 602 persons recently released.[209] These statements exemplify these views: "They are expected to agree for these people to be with them in society? How do you expect us to live with the killers of our parents? Those who attacked us and burnt down our houses?"[210] Another is: "You are asking me to live next door to the murderer of my father and you call that win-win...Give me a break. We will kill all of them if they bring them back… They do not deserve to be treated as humans."[211] Commentary on this issue has noted that there is no room for reintegration when the conflict is still ongoing, and the hurt of victims is still fresh in their minds. A member of the civilian joint task force is quoted to be saying, "no reconciliation or reintegration effort will succeed without punishing perpetrators for their offences. If justice is not done and people appropriately counselled, any repentant [Boko Haram] member brought back will be executed."[212]

[206] Brechenmacher S., "Achieving Peace in Northeast Nigeria: The Reintegration Challenge" *Carnegie Endowment*, 5 September 2018.
[207] Premium Times, "95 ex-Boko Haram fighters set for release – CDS", 18 January 2018. Available at: https://www.premiumtimesng.com/news/top-news/255973-95-ex-boko-haram-fighters-set-release-cds.html. Last accessed on 30 December 2021.
[208] Adibe J., "Should Nigeria have released Boko Haram suspects?" *The Conversation*, 20 February 2020. Available at: https://theconversation.com/should-nigeria-have-released-boko-haram-suspects-131987. Last accessed on 30 December 2021.
[209] Owolabi F., "'Take them to govt house or Aso Rock' – Borno residents reject 'reformed' Boko Haram fighters", *The Cable*, 24 July 2020. Available at: https://www.thecable.ng/take-them-to-govt-house-or-aso-rock-borno-residents-reject-reintegration-of-ex-boko-haram-fighters. Last accessed on 30 December 2021.
[210] *Ibid*.
[211] Bukarti A. B., "Making Peace with Enemies: Nigeria's Reintegration of Boko Haram Fighters", *The National Security Review: War on the Rocks*, 27 March 2019. Available at: https://warontherocks.com/2019/03/making-peace-with-enemies-nigerias-reintegration-of-boko-haram-fighters/. Last accessed on 30 December 2021.
[212] *Ibid*.

Other critiques of the programmes include the view that there is a lot of opacity in the management of these programmes and their intent unclear. A Carnegie Endowment Report states that "Operation Safe Corridor currently lacks a clear reintegration strategy... [people] are sceptical that those who surrender are truly repentant, and resent that the government provides assistance to former insurgents while neglecting the victims of the conflict."[213] Other challenges it points out are "clarifying eligibility of participants, merging the ideals of countering violent extremism and rehabilitation and sustainability as it lacks a clear reintegration component."[214] Although there are argument in favour of the programme such as the perception that "Nigeria's deradicalisation programmes form an instructive case study for neighbouring countries, arguing that the focus of the programme is clear."[215] It appears this focus has taken the place of justice efforts. This shift in focus is supported by Bukarti who argues, "court proceedings are unlikely to produce results that will satisfy communities…[as] justice is not straightforward and critical issues need to be resolved. These include delays in the justice system, burden of proof, and capacity on the part of prosecutors already stretched thin by other cases."[216] Notwithstanding the foregoing, the willingness to look at alternate means of addressing this conflict are reminiscent of the Serendi Rehabilitation centre for low level Al-Shabaab members and the Early Release Scheme in Northern Ireland, which "was deemed essential to sustaining the country's peace process."[217] This reasoning ties into Kelsall argument that the national level is the best to try violations of ICL as this allows for greater sensitivity to cultural differences and tailored responses such as rehabilitation.[218]

It can be said that there is a preponderance of evidence to the effect that Nigeria has failed in its responsibility to try international crimes and violations of international crimes despite having the requisite tools. This opens the room for consideration of ICC ascertaining whether the situation in Nigeria should be escalated to the admissibility stage. It is arguable that Nigeria is indeed unwilling, in its justice sector refusing to use all available law such as the Geneva Conventions Act 1960, and unable by virtue of the inability of the National Assembly to domesticate the Rome Statute and the Additional Protocols. Amnesty International makes a similar argument when they posit that "there is no legal basis for the Court to find the case to be inadmissible. In other words, 'domestic inactivity', the absence of national proceedings, is sufficient ground to make a case admissible before the ICC, even without considering other

[213] Brechenmacher, *supra* n.206.
[214] *Ibid*.
[215] Bukarti A.B. and Bryson R., *Dealing with Boko Haram Defectors in the Lake Chad Basin: Lessons from Nigeria* (Tony Blair Institute for Global Change, 2019), at 4.
[216] Bukarti, supra n.211.
[217] Brechenmacher, *supra* n.206.
[218] Kelsall T., *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (CUP, 2009)

factors laid out under Article 17 of the Statute, including the questions of unwillingness or inability of the state concerned."[219]

This opens up a conversation about how the Nigerian government through the justice sector acting as an agent can best hold Boko Haram insurgents to account to aid the peace and justice process when it gets to a post-conflict stage. This will be the subject of the next chapter.

[219] Amnesty International, *supra* n.111, at 11.

5. A Proposal for a More Coherent Transitional Justice Response to Boko Haram Violence

In the previous chapter, this thesis analysed a number of cases tried in the Federal High Court of Nigeria related to the non-international armed conflict in North East Nigeria and found that arrested Boko Haram insurgents were solely tried based on domestic Terrorism Prevention Laws. This analysis shed light on the preferred framing of the violence by the Nigerian government, through its justice sector, as purely a law and order issue and the equation of convicted Boko Haram affiliates as 'ordinary' criminals, as would be the case in any other crime. As shown in the previous chapter, this framing is evident in the fact that the law under which these convicted combatants were tried only covers terrorism offences such as membership and broadly couched acts of terrorism and does not address fair labelling concerns by fully describing the crimes committed and harm done and as a result justice may be elusive for the victims. This framing by the Nigerian Justice sector has created a situation unsatisfactory to the victims as the quantum of the harm suffered by the victims is arguably not reflected by offences of appropriate seriousness, and crimes not fairly labelled as terrorism frame does not adequately cover the full spectrum of harm suffered by victims such as war crimes and widespread crimes against humanity.[1] This issue of a victim-centred approach to justice is at the heart of this chapter as justice must not only be done but also seen to be done. Another issue highlighted in the previous chapter is that, even though the Nigerian Justice Sector framed the issue as one of "law and order", instead of resorting to the usual "law and order" responses (such as criminal prosecutions), it made frequent use of rehabilitation for combatants – a transitional justice response. However, because of its framing, the government did not implement a systematic and sequenced transitional justice response to the violations, which would include the pursuit of justice and accountability through prosecution as well as other transitional justice mechanisms.

This chapter argues that the Nigerian actors (the justice sector and military) need to formally acknowledge, as indicated in chapter 3, that the crimes committed by Boko Haram and its members have given rise to a non-international armed conflict that has shaken and destabilised, at least part of, Nigerian society, as well as its political and legal institutions. Therefore, these crimes should be treated as violations of International Humanitarian Law that trigger transitional justice in Nigeria. In doing this, this chapter will address the concept of justice and accountability, the preferred use by the Nigerian justice and military actors of rehabilitative measures as a means of ending the conflict and the perspectives of victims on this chosen method. This chapter will then argue that if the Boko Haram Insurgency is framed,

[1] Chalmers J. and Leverick F., "Fair Labelling in Criminal Law" (2008) 71(2) *MLR* 217, at 238.

understood and accepted as also including elements of a non-international armed conflict, and not simply a law and order issue, certain transitional justice mechanisms that aim to address victims-centred justice can be utilised as a means of best addressing harm caused by Boko Haram. Considering that a tool of transitional justice is prosecution, this chapter argues that a consequence of framing the insurgency as a non-international armed conflict would be an expansion of offences and laws under which perpetrators of the most serious offences may be charged to include violations of International Humanitarian Law in order to address fair labelling concerns and fully describing the harm done to victims. Lastly, this chapter would put forward other actions that the Nigerian Justice Sector and legislature can take to maximise outcomes through prosecutions, application of transitional justice mechanism and how the quest for improved victims' and survivors centred justice can be achieved.

5.1 Framing Justice and Accountability

It is important that this chapter is situated within the context of justice and accountability as these issues are at the core of the arguments canvassed in this chapter. There is a plethora of research on the issues of justice and accountability. On the surface, it can be said that justice and accountability are oftentimes seen as synonymous with one another although they each connote different meanings. This is albeit an overly simplistic understanding of the nuances underpinning these concepts. One fact is clear that justice and accountability have a symbiotic relationship and feed into each other. This warrants further discussion.

What is Justice? This question has been subject to varied academic discourse, with theorists attempting to proffer a definition yet failing to come to a consensus. This view is evident in Kelsen's work on *What is Justice?*, wherein he analyses various meanings given by theorists before him to the concept of justice. He argues that the Bentham view of justice was "the greatest possible happiness of the greatest possible number of individuals."[2] He posits that Marx's golden rule on justice is "behave in relation to others as the others shall behave in relation to you."[3] He adds that the Marxist view of justice was that "justice is predetermined by an established social order."[4] In the Kantian thinking, "one's act should be determined only by the principles that we shall wish to be binding on all men."[5] Kelsen comes to the conclusion that one can only define what justice means for oneself and within their context. In this regard,

[2] Kelsen H, *What is Justice?: Justice, Law and Politics in the Mirror of Science: Collected Essays* (University of California Press 1957), at 3.
[3] *Ibid*, at 17.
[4] *Ibid*.
[5] *Ibid*, at 18.

he states that for him justice "is that social order under whose protection the search for truth can prosper."[6] In elaborating on this he notes that "every system of values, especially a system of morals and its central idea of justice, is a social phenomenon, the product of a society and hence according to the nature of the society within which it arises."[7] The point that is however made clear is that the meaning of justice is subjective, being dependent on the prevailing society.

In a different vein, other scholars have addressed the concept of justice by breaking it down to different components. This is seen in the work of Ahmad and Ali who present the concept of formal justice and substantive justice. To them, formal justice "belongs to the domain in application of the rules" and "consists in the ordering of human relations in accordance with general principles applied impartially", whereas substantive justice "concentrates on the content and substance of justice…[dealing] with end of the law."[8]

Taking into cognisance the fact that there is a myriad view on what justice is, this thesis' understanding of justice builds on Kelsen's definition looking at a social order where truth as conceived and understood by a society can thrive. This leads to a debate on "justice on the ground", what it means in a practical sense, how justice is achieved in the truest sense. This subject is covered by Stromseth in the context of trials and she contends that there are demonstration effects and capacity building effects of "justice on the ground". As it relates to demonstration effects, she enumerates three effects:

1. Trials should convey the message that certain conduct is out of bounds and is subject to criminal law and individual accountability
2. Trials should make it clear that impunity for those who commit such crimes is being punctured
3. Trials for atrocity crimes should aim to demonstrate and to re-assure people that justice can be fair.[9]

The nature of what this "justice" should embody, when a person falls out of step with this social order or the way truth is achieved, has equally been subject of extensive literature. The two broadly utilised frames are retributive and restorative justice. It is noteworthy that the type of justice sought oftentimes informs the accountability measures adopted. Retributive justice is conceived as punishing a guilty individual or group to make up for crimes committed.[10] Ahmad and Ali state that it "seeks by a mechanism of rewards and punishments to make each man share in the fruits of his action and bring home to him what he has done."[11] According to

[6] *Ibid*, at 24.
[7] *Ibid*, at 7.
[8] Ahmad W. and Ali M. A., "Aspects of Justice" (2011) 72(1) *Indian Journal of Political Science* 309, at 309.
[9] Stromseth J. E., "Justice on the Ground? International Criminal Courts and Domestic Rule of Law Building in Conflict-Affected Societies" (2011) 50 *Getting to the Rule of Law* 169, at 177.
[10] Fichtelberg A., "Crimes beyond Justice - Retributivism and War Crimes" (2005) 24 *Crim Just Ethics* 31, at 33.
[11] Ahmad and Ali, *supra* n.8, at 310.

Greenawalt, retributivism's core claim is that "desert is necessary to morally justified punishment and provides an inherently good (if not exclusive) reason to punish irrespective of potential social benefits."[12] Simply, it is an "approach that justifies punishment based on the desert of the offender,"[13] it considers punishment as the "moral response to crimes" committed.[14] This type of justice is usually evident in criminal trials where the offender's behaviour is put against what the law is and said offender is held to account for breaching said law. This is sometimes viewed as an offender centred approach.

Although there are arguments that posit that retributive justice is solely focused on punishment, some scholars such as Villa-Vicencio have advanced that retributive justice has higher ideals (restorative qualities) than merely punishing the offender. He argues that by ensuring punishment for crimes committed the values of society are promoted, persons inclined to similar criminal conduct are deterred, the dignity of victims are restored, serves as a reminder of the moral responsibility of the offender and create an environment for conversations of peace and forgiveness.[15] He states "retribution is not punishment in order to satisfy some basic need for revenge, but as a means of restoring the moral order of society. Retribution seeks to restore the perpetrator as a moral agent in society."[16] Similarly, Cassese claims that "the easing of tensions through the meting out of impartial justice can, in turn, create the conditions for a return to peaceful relations on the ground."[17] This view is supported by Greenawalt who argues in favour of "consequentialist retributivism" which acknowledges non-retributive values without maximising the punishment of the guilty to the exclusion of other, equally valuable states of affairs."[18] Clark adds that there are merits to trials (as conceptualised by retributivism and using the International Criminal Tribunal of Yugoslavia as her example) and these include dissipation of calls for revenge, individualisation of guilt, establishment of a historical record and contribution to reconciliation.[19] She also acknowledges scholarship that maintains that "trials can aid reconciliation by establishing truth."[20] Villa-Vicencio states that trials "create a space for the possibility of mercy and forgiveness- recognising that its telos is restoration not punishment per se."[21] The Berkeley

[12] Greenawalt A.K.A., "International Criminal Law for Retributivists" (2014) 35 *U Pa J Int'l L* 969, at 1024.
[13] *Ibid*, at 978.
[14] Fichtelberg, *supra* n.10, at 31.
[15] Villa-Vicencio C., "The Reek of Cruelty and the Quest for Healing – Where Retributive and Restorative Justice Meet" (1999) 14 *J L & Religion* 165, at 172-176.
[16] *Ibid*, at 176.
[17] Clark J. N., "The Limits of Retributive Justice" (2009) 7 *J Int'l Crim Just* 463 at 483; Cassese A., "On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law" (1998) 9 *European Journal of International Law* 2, at 9.
[18] Greenawalt, *supra* n.12, at 1008.
[19] Clark, *supra* n.17, at 471.
[20] *Ibid*.
[21] Villa-Vicencio, *supra* n.15, at 185.

Human Rights Centre buttresses this point by stating that "conventional wisdom holds that criminal trials promote several goals, including uncovering the truth; avoiding collective accountability by individualising guilt; breaking cycles of impunity; deterring future war crimes; providing closure for the victims and fostering democratic institutions."[22]

Conversely, restorative justice "is a theory of justice that emphasises repairing the harm caused or revealed by criminal behaviour."[23] It is "often broadly defined as a process that involves those who have committed harm and those who have been harmed, collectively seeks accountability from the accused, and protects victim safety and supports victim autonomy."[24] It insists that "justice repair those injuries and that the parties be permitted to participate in that process."[25] Restorative justice also means "policies and practices that emphasise rehabilitation of those who commit crimes and reparation of the harm done to victims, perpetrators, and communities as a result of crime and the justice system itself."[26] Menkel-Meadow argues that it includes a "variety of different practices, including apologies, restitution, and acknowledgments of harm and injury, as well as to other efforts to provide healing and reintegration of offenders into their communities, with or without additional punishment."[27] She adds that in "its most idealised form, there are four R's of restorative justice: repair, restore, reconcile, and reintegrate the offenders and victims to each other and to their shared community."[28] She also acknowledges that it is "more of an idea, philosophy, set of values, or sensibility than a single concrete and uniform set of practices or processes."[29] For Walgrave restorative justice is "an option for doing justice after the occurrence of an offence that is primarily oriented towards repairing the individual, relational, and social harm caused by that offence."[30] This usually occurs outside the scope of the formal justice system as depicted by courts, legislation and legal professionals.

Rehabilitation is considered a form of restorative justice. It has a two-pronged focus, the first seeks to provide some form of redress for victims. This view is supported by 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

[22] Fletcher L. E. and Weinstein H. M., "Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors" (2000) 18 *Berkeley J Int'l L* 102, at 106.
[23] Centre for Justice & Reconciliation, "Restorative Justice Briefing Paper", May 2005, at 1.
[24] Jewish Council for Public Affairs, "Resolution on Restorative and Rehabilitative Justice" Adopted by the 2020 JCPA Delegates Assembly, at 2.
[25] Centre for Justice & Reconciliation, *supra* n.23, at 1.
[26] Jewish Council for Public Affairs, *supra* n.24, at 2.
[27] Menkel-Meadow C., "Restorative Justice: What is it and Does it Work?" (2007) 3 *Ann. Rev. L. & Soc. Sci*. 161, at 162.
[28] *Ibid*.
[29] *Ibid*, at 179.
[30] Ward T. et al, "Restorative justice, offender rehabilitation and desistance" (2014) 2(1) *Restorative Justice* 24, at 25; Walgrave, L*., Restorative justice, self-interest, and responsible citizenship* (Willan Publishing, 2008), at 21.

Humanitarian Law "that indicate that in certain situations persons who have suffered certain types of serious human rights or humanitarian law violations should be redressed by way of, among others, rehabilitation, meaning physical and psychological care as well as social and legal services."[31] The second looks at how the offender can be rehabilitated to prevent the person from returning to a life of crime.[32] This brief description is significant as rehabilitation is one of the modes taken to address the non-international armed conflict in North East Nigeria. This rehabilitation has however focused on the offender and not on the victim. This would be subject of further discussion later in this chapter.

Generally, in this chapter it is thought that there is tension between these two forms of justice- retributive and restorative- as the former is offender focused and the latter is victim and survivor centred. Hoyle and Ullrich argue that advocates for retributive justice have been "highly critical of attempts to integrate victims into justice responses."[33] They add that "victim participation in criminal proceedings…makes the victim a participant in an adversarial judicial process that is ultimately aimed at proving the guilt of the defendant rather than reconciliation between the victim and the defendant."[34] Simply, "Courts punish for the purposes of retribution, deterrence, incapacitation or rehabilitation, not to make the victim feel better."[35] A proponent of restorative justice, Poulson, argues that "victims have been satisfied with what they perceive to be greater accountability in restorative justice and, not surprisingly, victims were more likely to forgive the offender in restorative justice processes than in court proceedings, probably because offenders are much more likely to apologise."[36] Another view is espoused by supporters of restorative justice who question "trial truths" and contend that trials only present a partial truth and it is about whatever the law is after and not the whole story.[37] Using the ICTY as a case study, it was surmised that the truths revealed by the tribunal were partially contested truths "which compete with each side's own victim-centred narrative."[38] The selectivity of trials has also been raised as a disadvantage of retributive justice as not all persons can be tried.[39] Persons who support retributive justice argue that

[31] 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, UNGA Res 60/147 (21 March 2006) UN Doc A/Res/60/147.
[32] REDRESS, *Rehabilitation as a Form of Reparation under International Law* (REDRESS, 2009), at 18-20.
[33] Hoyle C. and Ullrich L., "New Court, New Justice - The Evolution of Justice for Victims at Domestic Courts and at the International Criminal Court" (2014) 12 *J Int'l Crim Just* 681, at 687.
[34] *Ibid.*
[35] Ibid, at 688.
[36] Poulson B., "A third voice: a review of empirical research on the psychological outcomes of restorative justice" (2003) *Utah Law Rev.* 167, at 189.
[37] Clark, *supra* n.17, at 474.
[38] *Ibid*, at 483.
[39] Drumbl, M. A., *Atrocity, Punishment, and International Law* (Cambridge University Press, 2009), at 133; Amann D. M., "Group Mentality, Expressivism, and Genocide" (2002) 2 *Int'l Crim. L. Rev.* 93, at 149; Greenawalt, *supra* n.12, at 972-973.

there is "a need to exercise prosecutorial discretion, noting that not all crimes–must be prosecuted.[40] Buttressing this point, Clark states that "in societies where mass atrocities have been committed, not only is it impossible to prosecute every war criminal but also there are necessarily issues of broader responsibility to be addressed."[41] It can be argued that this could create a deference to alternative justice mechanisms in order to cast a wider accountability net. Trials as embodiments of retributive justice also face the challenge of legitimacy. Although Duff raises this comment in relation to international criminal tribunals, similar arguments can be made when applying it to domestic trials such as lack of political community that benefits from a shared citizenship,[42] especially in societies where citizens feel there are different standards for different classes of people. Restorative justice has also been subject of criticism. Waldorf argues that although advocates claim restorative justice is more successful than retributive justice in effecting general deterrence, offender rehabilitation, and victim satisfaction… [it has been] conceded [that] none of the optimistic claims for restorative justice have yet been "satisfactorily demonstrated" by empirical research.[43]

So far, this thesis in previous chapters, has argued and proved that war crimes and crimes against humanity have been committed in the non-international armed conflict existing in Nigeria. There has been a push for a uniform concept of International Criminal Justice and what it should include. The main advancers of this view have attempted to internalise the norm of prosecution as the preferred response to atrocities. It is widely accepted that there has been a shift towards demanding prosecution as the appropriate response to atrocities committed. Evenson expresses this view when she states that "more recently there has been a renewed demand for criminal prosecutions as the universally appropriate response to mass atrocity; this "prosecution preference" has been articulated academically, but also enacted internationally."[44] Scholars such as Snyder and Vinjamuri have argued that this shift occurred as a result of the "justice cascade" wherein norm entrepreneurs have sought to internalise the norm of prosecution as the moral response to atrocities committed through naming and shaming.[45] It has been argued that this quest for individual accountability through the employment of a prosecution preference has been conceptualised as a norm that has served to "more than regulate behaviour; but to mould the identities of actors, define social roles,

[40] Snyder J. and Vinjamuri L., "Trials and Errors: Principle and Pragmatism in Strategies of International Justice" (2003/2004) 28(3) *International Security* 5, at 12.
[41] Clark, *supra* n.17, at 473.
[42] Duff A., "Authority and Responsibility in International Criminal Law" in Besson S. and Tasioulas J. (eds) *The Philosophy of International Law* (Oxford University Press, 2010), at 595; Greenawalt, *supra* n.12, at 991.
[43] Braithwaite J., "Restorative Justice: Assessing Optimistic and Pessimistic Accounts" (1999) 25 *Crime & Just*. 1, at 107; Waldorf L., "Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice" (2006) 79 *Temp L Rev* 1, at 15.
[44] Evenson E. M., "Truth and Justice in Sierra Leone: Coordination between Commission and Court" (2004) 104(3) *Columbia Law Review* 730, at 749.
[45] Snyder and Vinjamuri, *supra* n.40, at 9.

shape actors' understanding of their interests, confer power on authoritative interpreters of institutions of norms, and infuse institutions with guiding principles."[46] The effects of this "justice cascade" can be seen for Rwanda with the establishment of the ICTR and the ICTY for the former Yugoslavia.

It can be advanced that the dichotomy between retributive and restorative justice as well as the shortcomings seen with the ICTR and ICTY such as distance between the locus of the crime and the location of the court, the focus on guilty verdicts and not on the recovery process for the victims,[47] inadequate prison sentences and questions about their deterrent effect,[48] created space for the emergence of transitional justice. Although this is sometimes seen as a restorative justice tool, this thesis views transitional justice as a tool that is independent of the aforementioned justice schools of thought whilst incorporating elements of each. Its main objectives are "the recognition of the dignity of individuals, the redress and acknowledgment of violations."[49] Freeman adds that the fundamental goals of transitional justice include accountability, truth, social reconciliation, victim recognition, compensation for victims [and survivors] and institutional reform."[50] This position is supported by Murphy who states that "transitional justice is its own type of justice, not reducible to retributive, corrective, or distributive justice and distinct from restorative justice."[51] Advocates of transitional justice such as Clark argue that "transitional justice takes many forms and 'it is unimaginative to think that criminal trial processes exhaust the means of achieving justice some commentators see little or no distinction between revenge and retribution."[52] Murphy defines transitional justice as "the process of dealing with wrongdoing in the midst of an attempted transition away from an extended period of conflict and/or repression to democracy."[53] According to Amir, "the building blocks of transitional justice are the short-term objectives of truth, accountability, re-narrativisation and memorialisation."[54] Hoyle and Ullrich advance that the objective of transitional justice is "not only punishing offenders, but healing victims and repairing communities in which the social fabric and the economic and physical infrastructure have been torn apart."[55] The balance struck between the normatively desirable and the politically viable clearly reflects and highlights the politics embedded in processes of transitional justice.

[46] *Ibid*, at 8.
[47] Clark, *supra* n.17, at 480.
[48] Snyder and Vinjamuri, *supra* n.40, at 29.
[49] ICTJ, "What is Transitional Justice?" Available at: https://www.ictj.org/about/transitional-justice. Last accessed on 11 December 2021.
[50] Freeman M., "Transitional Justice: Fundamental Goals and Unavoidable Complications" (2000) 28 *Man LJ* 113, at 114.
[51] Murphy C. I., "The Ethics of Diversity in Transitional Justice" (2018) 16 *Geo JL & Pub Pol'y* 821, at 824.
[52] Clark, *supra* n.17, at 464.
[53] Murphy, *supra* n.51, at 822.
[54] Amir R., "Transitional Justice Accountability and Memorialisation: The Yemeni Children Affair and the Indian Residential Schools" (2014) *47 Isr L Rev* 3, at 5.
[55] Hoyle and Ullrich, *supra* n.33, at 683.

Herman et al argue that "transitional justice may utilise judicial and non-judicial mechanisms to ensure accountability, serve justice and achieve reconciliation."[56] It is important to investigate these methods in further depth.

Furthermore, "recent decades have seen a gradual shift in international criminal law toward greater victim recognition and centrality, which, in many respects, parallels the rise of victims' rights and restorative justice in Western domestic criminal justice systems."[57] Proponents of transitional justice advocate that "transitional justice mechanisms…provide a victim-centred approach allowing victims a public voice, as potentially cathartic or healing."[58] Some of measures in the toolkit of transitional justice may include the use of trials/ prosecutions at the domestic and international level, investigative commissions, truth commissions (the purpose of these first three is to 'establish both guilt and responsibility'),[59] reparations, amnesty; others include official apologies, memorials, and lustration.[60] The choice of measures is dependent on context of each conflict.

I would briefly discuss a few of these mechanisms. Truth Commissions are "officially established bodies charged with investigating and documenting the causes, patterns, and consequences of a delimited set of abuses over a specified period of time."[61] They "offer an alternative and sometimes more efficient, more effective way of restoring the moral order of society in a manner that makes for peaceful coexistence."[62] Evenson praises truth commissions "for capturing values beyond criminal liability essential to long-term stability and prevention of further abuses."[63] She adds that Truth Commissions can be seen as an alternative to prosecution in the pursuit of accountability. She argues that,

> Perpetrators of such abuses may escape criminal punishment, but accountability may nevertheless attach through the widespread publication and dissemination of a truth commission's final report. Truth commissions then, even they do not serve the goals of individual punishment, can establish a historical group accountability.[64]

Truth Commissions have been used in several countries Nigeria, Ghana, Sierra Leone, Timor-Leste and South Africa,[65] and each has been tailored to fit the peculiarities of the context.

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[56] Herman J. et al, "Beyond justice versus peace: transitional justice and peacebuilding strategies" in Aggestam K & Björkdahl A. (eds.), *Rethinking Peacebuilding: The Quest for Just Peace in the Middle East and the Western Balkans* (Routledge, 2014), at 6.
[57] Hoyle and Ullrich, *supra* n.33, at 681-682.
[58] Herman et al., *supra* n.56, at 9.
[59] Amir, *supra* n.54, at 6.
[60] Murphy, *supra* n.51, at 823.
[61] *Ibid*; Teitel R. G., "Transitional Justice Genealogy" (2003) 16 *Harv Hum Rts J* 69, at 78.
[62] Villa-Vicencio, *supra* n.15, at 176.
[63] Evenson, *supra* n.44, at 731.
[64] *Ibid*, at 751-752.
[65] Clark, *supra* n.17, at 481.

However, it is important to caution as Bassiouni did that truth commissions should not be viewed as substitutes for prosecution.[66]

Amnesties are "best categorised as a carrot used by the State in an effort to obtain peace or, at the very least, higher levels of peace by removing some armed actors from the conflict."[67] Essentially, they grant immunity from prosecution and criminal liability, this in itself is a challenge as it could be seen as promoting impunity. This argument is countered by the late Archbishop Desmond Tutu who argues in the context of the amnesty given in South Africa that the amnesty granted is not a free pass but fulfils the needs of retributive justice by mandating the admittance of responsibility by perpetrators.[68] Despite this view by Tutu, there is a general perception that amnesties are a political tool aimed at causing harm-doers to drop their arms. This is seen in the shift away from endorsement of peace agreements that include amnesties for war crimes and crimes against humanity by the United Nations.[69]

Reparations are also considered a tool of transitional justice, and they "aim to repair damage suffered by victims of wrongdoing."[70] It has been argued that "strengthening of the international system to ensure accountability for crimes against humanity and justice for victims involves a stronger focus on the right to reparation."[71] It is important to note that prosecutions still have a role to play where transitional justice mechanisms are deployed. These could be at the international or national level both. According to Bassiouni, "this includes prosecutions before a permanent international criminal court or before an ad hoc international criminal court…limited to leaders, policy-makers, and senior executors,"[72] and this does not preclude national trials. In this regard, Cassese argues that National courts "can and should prosecute persons suspected of committing grave breaches of the Geneva Conventions, genocide and other violations of international humanitarian law."[73]

It can be said that at the core of Transitional Justice is a quest for truth that can lead to reconciliation and peace. This position is extensively supported by Amir, who argues "truth is fundamental to the process…it constitutes a necessary condition both for achieving

[66] Bassiouni M. C., "Searching for Peace and Achieving Justice: The need for accountability" (1996) 59(4) *Law and Contemporary problems* 10, at 20.
[67] Reiter A. G., "Examining the Use of Amnesties and Pardons as a Response to Internal Armed Conflict" (2014) *47 Isr L Rev* 133, at 141.
[68] Greenawalt, *supra* n.12, at 1014.
[69] Reiter, *supra* n.67, at 135.
[70] Murphy, *supra* n.51, at 823.
[71] Sveaass N., "Gross human rights violations and reparation under international law: approaching rehabilitation as a form of reparation" (2013) 4 *European Journal of Psychotraumatology* 1, at 1.
[72] Bassiouni, *supra* n.66, at 20.
[73] Cassese A., "Reflections on International Criminal Justice" (1998) 61(1) *The Modern Law Review* 1, at 6.

democratic accountability and for the re-narrativisation and memorialisation of wrongs."[74] She adds that "uncovering the facts of the wrong is vital... [noting that] truth must be established as formally as possible and be widely recognised, accepted, rigorous and objective; it must join all the relevant facts about the violation into an undisputable narrative."[75] As it relates to the victims of Boko Haram's activities, Hassan points out that what is sought is the exercise of the victims' and survivors right to truth, "the truth of what actually happened, who Boko Haram is, who their sponsors are, why the state allowed the crises to fester until now, and other questions."[76] Van der Merwe goes further to argue that it is "about understanding why things happened, understanding the context, the chain of events, the motives involved and how people could justify to themselves what they did."[77] This appears to be at the heart of transitional justice.

However, for transitional justice to be successful in achieving this truth towards a path of reconciliation, the issue of legitimacy ought to be addressed. According to Bottoms and Justice Tankebe, "legitimacy is to be found where there is a positive *recognition* by citizens of the powerholder's *moral right* to exercise that power."[78] Transitional justice tools as seen with the gacaca courts in Rwanda and the *mato oput* in Uganda have shown that local justice tools utilised often respond to the legitimacy challenge faced by Western stylised quest for justice. In recent times, this has been interpreted to mean the utilisation of local justice to address justice and accountability. The contention being that these local justice measures have greater legitimacy and capacity. According to Kofi Annan "due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their often-vital role and to do so in conformity with both international standards and local tradition."[79]

It is said that for justice to be seen to be done, there must be some level of accountability. In speaking on the relationship between accountability and justice, Crisis group argues that "while accountability is often used synonymously with "justice", it is narrower and best used to refer to efforts to operationalise justice norms when negotiating peace after the commission

[74] Amir, *supra* n.54, at 5.
[75] *Ibid.*
[76] Hassan I., "What is Justice? Exploring the need for accountability in the Boko Haram Insurgency", *Harvard Human Rights Journal (HHRJ)* 27 December 2017.
[77] Van der Merwe H., "What survivors say about justice: An analysis of the TRC Victim Hearings" in Chapman A. and van der Merwe H. (eds) *Truth and Reconciliation in South Africa: Did the TRC Deliver?* (University of Pennsylvania Publishers, 2008), at42.
[78] Bottoms A. and Tankebe J., "Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice" (2013) 102 *J. Crim. L. & Criminology* 119, at 125.
[79] Waldorf, *supra* n.43, at 4.

of mass atrocities."[80] Accountability can be "understood in terms of demands that the perpetrators [are] confronted with the immorality of their actions and required to explain what they did and how they could act as they did."[81] The objectives of accountability are arguably six-fold including retribution, the incapacitation or the purging and removing of disruptive actors from a post-conflict society, deterrence, truth telling or establishing an accurate historical record, institutionalisation of human rights norms, and finally, de-legitimisation of the individuals responsible for atrocity crimes and help dismantle the institutions they created or used for support.[82] According to Bassiouni there are policy considerations to pressing for accountability, these are:

> (1) the cessation of the conflict and thereby the ending of the process of victimisation; (2) prevention of conflicts in the future; (3) deterrence of conflicts in the future; (4) rehabilitation of the society as a whole and of the victims as a group; and (5) reconciliation between the different peoples and groups within the society.[83]

Philosophically, "accountability mechanisms … may appear to be solely punitive, but they are also designed to be preventive through enhancing commonly shared values and through deterrence."[84]

Yusuf advances that "the imperative of accountability has both normative and transformational underpinnings in the context of restoration of the rule of law and democracy."[85] It is said that accountability is the direct opposite of impunity taking into consideration the possibility that it may be more politically expedient to have an outcome that favours political ends over the more complex task of confronting responsibility.[86] Bassiouni contends that "accountability embodies the goals of both retributive and restorative justice…it is the restoration of justice, and the use of law to mediate and resolve inter-social and inter-personal discord."[87] Reiter taking this further posits that there is now a strong global norm of accountability in favour of prosecutions. In his article he contends that some scholars are of the opinion that "the failure to effectively address the past through accountability and the lack of deterrence can entrench divisions within society and make them increasingly susceptible to future episodes of violence."[88] "In addition, States have an obligation to pursue individual accountability to avoid the emergence of collective guilt that would unfairly stigmatise parts of society connected with perpetrators

[80] Grono N. and Flintoft C., "Negotiating Justice to Understand Accountability", *Crisis Group*, 25 June 2007
[81] Van der Merwe, *supra* n.77, at 31.
[82] Grono and Flintoft, *supra* n.80.
[83] Bassiouni, *supra* n.66, at 23.
[84] *Ibid,* at 26.
[85] Yusuf, H. O., "Calling the Judiciary to Account for the Past: Transitional Justice and Judicial Accountability in Nigeria" (2008) 30 *Law & Pol'y* 194, at 194.
[86] Bassiouni M. C., "Justice and Peace: The Importance of Choosing Accountability over Realpolitik" (2003) 35 *Case W Res J Int'l L* 191, at 191.
[87] *Ibid*, at 192.
[88] Reiter, *supra* n. 67, at 134.

of human rights violations, but who are themselves innocent of any wrongdoing."[89] Snyder and Vinjamuri note that "advocates of strict, legal accountability argue that bringing suspected war criminals to trial strengthens global norms and institutions of justice over the long term."[90] In this regard, "States have a moral obligation to bring justice to victims and survivors of past crimes… such obligations cannot be abrogated for political or strategic purposes."[91] Transitional justice has however expanded the scope of tools that can be used to bring about accountability for crimes committed beyond trials.

This thesis argues that the Nigerian government (through its actors in the justice sector and the military) ought to acknowledge that the crimes committed in a non-international armed conflict, to which the armed group is a party, has so destabilised the society, and this ought to give rise to the use of transitional justice mechanisms in order for healing to occur and to create an avenue for reconciliation. This thesis acknowledges the importance of accountability for Boko Haram's victims, which is not currently evident in the method the justice sector has adopted in addressing the issue.

5.2 Nigeria's Response to the Justice and Accountability question

As indicated in Chapter 4, the Nigerian Justice Sector has adopted a two-track approach to dealing with Boko Haram combatants, Prosecution, on the one hand and Rehabilitation, on the other. Brechenmacher expresses a similar understanding when she states that in Nigeria "a rehabilitation path [is] open to low-risk fighters and persons associated with Boko Haram (whether or not they have defected), and a criminal justice path for higher-risk combatants and commanders."[92] It can be asserted that the Nigerian Justice Sector has shown a preference for utilising the Deradicalisation, Rehabilitation and Re-integration (DRR) programmes as a way of addressing the Boko Haram conflict and countering violent extremism.

Briefly, it might be important to understand the etymology of the words deradicalisation and rehabilitation to better understand the intent of this path. Deradicalisation has been defined as "the process of changing an individual's belief system, rejecting the extremist ideology, and

[89] *Ibid,* at 136.
[90] Snyder and Vinjamuri, *supra* n.40, at 39.
[91] Reiter, *supra* n. 67, at 136.
[92] Brechenmacher, S., "Achieving Peace in Northeast Nigeria: The Reintegration Challenge" *Carnegie Endowment*, 5 September 2018. Available at: https://carnegieendowment.org/2018/09/05/achieving-peace-in-northeast-nigeria-reintegration-challenge-pub-77177. Last accessed on 11 December 2021.

embracing mainstream values."[93] Furthermore, "deradicalisation does not end with changing the beliefs of a radicalised individual, but actually includes preventive measures that can discourage an environment conducive for radicalism and strategies for rehabilitation and reintegration of radicalised individuals."[94] Rehabilitation by the dictionary definition is the "process of restoring someone to a useful and constructive place in society."[95] The aim of which is to reduce recidivism. It can be said that "techniques vary from educational and vocational training to help the offender learn a skill for use outside the prison, to psychological rehabilitation, dealing with various problems the individual offender may experience."[96]

At the time of writing, there were three active programmes of rehabilitation as shown in Table 3 below, the most popular of these programmes is Operation Safe Corridor. This programme, which was launched in 2015, "works with Boko Haram defectors by addressing extremist ideology and providing them with trauma counselling."[97] Its purpose is to utilise alternative non-military strategies to combat violent extremism and reduce violence. Felbab-Brown states that "the program is developed under the general framework of counterterrorism operations of Nigeria, which has the principal objectives of deradicalisation, rehabilitation, and reintegration of defectors of Boko Haram."[98] The programme was informed by the view that "dominant military-based counter-terrorism approach used more by the government over the last decade…has not only contributed to killings and generated more insecurity but also contributed to the push factors for radicalisation in the conflict zone."[99] It is described as a "Defence Headquarters-led non-kinetic multi-national and multi-agency humanitarian operation conducted in tandem with extant international humanitarian laws to encourage willing and repentant Boko Haram terrorists in the North East to shun violent extremism."[100] Others describe it as "a rehabilitation camp aimed at repatriating captured/surrendered Boko Haram fighters, and encourages others to abandon the insurgency."[101] It is seen to be an alternative to traditional criminal justice measures as prior to the inception of the programme

[93] Onapajo H. and Ozden K., "Non-military approach against terrorism in Nigeria: deradicalisation strategies and challenges in countering Boko Haram", *Security Journal,* 17 February 2020, at 4.
[94] *Ibid*.
[95] Merriam-Webster Dictionary.
[96] Available on: https://www.politics.co.uk/reference/prison-rehabilitation. Last accessed on 11 December 2021.
[97] Young A., "Nigeria Considers National DRR Agency Amid Boko Haram Setbacks", *Council for Foreign Relations*, 18 March 2020.
[98] Felbab-Brown V., "Nigeria case study" In Felbab-Brown V. et al (eds.), *The Limits of Punishment: Transitional Justice and Violent Extremism*. (United Nations University and Institute for Integrated Transitions, 2018), at 101; Onapajo and Ozden, *supra* n.93, at 2.
[99] Onapajo and Ozden, *supra* n.93, at 10.
[100] Mutum R., "Nigeria: Operation Safe Corridor Hands over 86 Boko Haram Fighters to Borno Government", *Daily Trust*, 7 November 2019.
[101] Ogbugu J. C., "Nigeria's Approach to Terrorist Rehabilitation" (2016) 8(4) *Counter Terrorist Trends and Analyses* 16, at 18.

"militants who surrender have been held in jail awaiting trial."[102] According to the Nigerian Army, "its activities [being the DRR programme] are guided by extant provisions of international humanitarian and human rights laws and the Nigerian constitution."[103] It is important to note that the creation of these programmes was informed by consultation with the international community and based on lessons learnt from similar programmes in other countries. The programme has been likened to an amnesty programme. An Institute of Security Studies report states that "in Nigeria, the government established an amnesty program for repentant Boko Haram fighters through *Operation Safe Corridor*."[104] It can be said that there is an amnesty element to the programme as the defectors participate in the process on the basis that no prosecutory action would be taken against them.

Table 3: Overview of Rehabilitation Programmes Operational in Nigeria[105]

	Implementer	**Location**	**Participants**	**Inception**	**Duration**	**Programme Focus**
Prison Programme	Nigerian government	Kuje Prison, Abuja	Persons convicted of terrorist offences and awaiting trial inmates	2014	Dependent on time spent in the prison	Combating religious ideology and offering vocational training
Yellow Ribbon Initiative	Neem Foundation	Communities in Borno state	Women, children and young people associated with Boko Haram	2017	1 year	Providing psychosocial, behavioural and reintegration training
Operation Safe Corridor	Nigerian government	Temporary facility in Gombe and Bulumkutu	Surrendered Boko Haram Combatants	2016	In theory, 16 weeks; in practice, one year	Combating religious ideology, grievances and trauma

Source: Tony Blair Institute for Global Change (2019)

Operation Safe Corridor's predecessor was "a Countering Violent Extremism agency headed by a psychologist, Fatima Akilu, under the Office of National Security Adviser (ONSA), code-named National Security Corridor to counter recruitment and mobilisation into Boko Haram

[102] Felbab-Brown V. et al, *The limits of punishment transitional justice and violent extremism*. (United Nations University and Institute for Integrated Transitions 2018), at 21; BBC, "Nigeria Boko Haram militants offered olive branch by army", *BBC News*, 7 April 2016. Available on: https://www.bbc.com/news/world-africa-35989401. Last accessed on 11 December 2021.

[103] Umeh K., "FG set to reintegrate 606 rehabilitated Boko Haram fighters", *The Guardian,* 6 March 2020.

[104] Mahmood O. S. and Ani N. C., "Responses to Boko Haram in the Lake Chad Region: Policies, Cooperation and Livelihoods", *Institute for Security Studies Research Report*, July 2018, at 21.

[105] Bukarti A.B. and Bryson R., *Dealing with Boko Haram Defectors in the Lake Chad Basin: Lessons from Nigeria* (Tony Blair Institute for Global Change, 2019), at 10.

and rehabilitate defectors."[106] The initial design of the programme categorised defectors under three broad headings according to risk factor: low risk, medium risk and high risk, with the intention that the first two categories would undergo disengagement, rehabilitation, and reintegration, while the last category of persons would be prosecuted.[107] The current format- Operation Safe Corridor- focuses on mainly low risk and high risk with only the former being given the opportunity to participate in this programme. It is important to note that the basis or criteria for this classification is not known especially in the absence of a peace agreement,[108] indicating an end to the conflict. Its methods include the development of "counter narratives, provision of vocational training…paid jobs in support of the counter-terrorism operations"[109] and civic programmes. It has been argued that "much secrecy surrounds Operation Safe Corridor for low-risk "repentant" male defectors, this secrecy stimulates fears, resentments, and rejection of the program within local communities."[110] From research, Operation Safe Corridor can be said to have primarily four main stages and these repentant Boko Haram combatants are considered as clients (and not perpetrators) and are placed in different rehabilitation centres including Gombe and the 500 capacity Bulumkutu Rehabilitation Centre in Maiduguri.[111]

Figure 1: Operation Safe Corridor's Process

The first is Documentation and Profiling. It is believed that participants biometrics are collected by the National Identity Management Commission (NIMC) and their DNA samples collected; generally necessary identification information is collected, and clients are made to undergo a comprehensive medical screening.[112] The next stage is aimed at gaining the trust of the combatants. According to Bukarti and Bryson, "it begins with lectures on atonement and redemption."[113] Central to this stage is the explanation of the "aim of the scheme and their roles, and assure clients that their confidentiality is guaranteed and that no criminal proceedings will be taken against them."[114] This encompasses "team-to-group engagement,

[106] Onapajo and Ozden, *supra* n.93, at 10.
[107] *Ibid*.
[108] Brechenmacher, *supra* n.92.
[109] Ogbugu, *supra* n.101, at 18.
[110] Felbab-Brown, *supra* n.98, at 101.
[111] Umeh, *supra* n.103.
[112] Sahara Reporters, "601 Repentant Boko Haram Terrorists Graduate in Gombe, Reintegrated to Communities", *Sahara Reporters,* 25 July 2020
[113] Bukarti and Bryson, *supra* n.105, at 16.
[114] *Ibid.*

in which a group of experts (an imam, a psychologist, a drug counsellor, a social worker and so on) engage with about 30 clients to further personalise the process;" an imam is preferred as the point person.[115]

This is followed by the actual de-radicalisation process. This is said to focus on "religious ideology, structural or political grievances and post-conflict trauma"[116] and "involves a combination of psychotherapy, art therapy and psycho-spiritual counselling, extremist narrative is also broken down by imams, who hold lectures aimed at shifting the participants' simplistic worldview by offering alternative interpretations of Islamic texts and values."[117] Vocational training is also incorporated at this stage, to provide a source of income and counter the challenges of poverty, illiteracy and unemployment. This training may include "carpentry, farming, plumbing, shoe-making, and perhaps other skills. Sports and recreation facilities are also supposed to be provided."[118] These sessions are held in a multi-purpose hall. During their stay at the centre, it is reported that "the clients appeared to be cared for and in a good condition: they are well fed, given uniforms and mattresses to sleep on."[119] Noteworthy is the fact that although combatants who have defected are meant to be isolated in these centres "they are allowed controlled visits from their relatives during their stay."[120]

Lastly, having successful covered these stages, re-integration then occurs. The military claims that persons who pass through this programme are returned to their respective communities with the involvement of the community leaders. It has been argued that "the military has the mechanism in place with partners to monitor those that have been released, adding that they are handed over to the state and the local government authorities as well as the community."[121] Bukarti and Bryson argue that the process of reintegration is led by the Federal Ministry of Women Affairs and Social Development and involves placing the repentant and deradicalised persons with family members.[122] It is reported that that these persons once set for reintegration are given a "small amount of exit money"- a stipend of 20,000 Naira and basic equipment to continue their learnt vocation.[123] This process has been fraught with challenges as communities are reluctant to receive them, which has resulted in these persons being

[115] *Ibid,* at 17.
[116] *Ibid.*
[117] Mules I. and Al-Amin M., "Boko Haram: Nigeria moves to deradicalize former fighters", *Deutsche Welle,* 8 August 2019.
[118] Felbab-Brown, *supra* n.98, at 107.
[119] Bukarti and Bryson, *supra* n.105, at 23.
[120] Felbab-Brown, *supra* n.98, at 106.
[121] Olugbode M., "No Extremist Boko Haram Fighter Reintegrated into Society, Says Military", *Thisday Newspaper*, 22 September 2020.
[122] Bukarti and Bryson, *supra* n.105, at 21.
[123] Felbab-Brown, *supra* n.98, at 107; Akinkuotu, E. and Azubuike, C., "601 repentant terrorist graduate, padi N20,000 each", *Punch Newspaper,* 26 July 2020.

placed in a transit camp. They are apparently monitored for six months to ward against re-radicalisation. Following the programme, 'clients' are required to renounce the membership of the terrorist group and swear an oath of allegiance to the country.[124] It is also understood that "when the handlers believe that a client has not been sufficiently de-radicalised, such client is made to repeat the programme."[125]

The programme is reported to last for about 16 weeks. An Institute of Security Studies (ISS) Research Report states that "the operation involves a 16-week rehabilitation programme, which graduated 95 ex-combatants in February 2018."[126] Others have argued that although it is meant to be 16 weeks, in practice, it spans about a year.[127] Conversely, it has been advanced that the programme runs for less than the stipulated 16 weeks. Felbab-Brown notes that "the maximum stay at the facility is supposed to be twelve weeks."[128] Irrespective of whether the programme lasts for 12 or 16 weeks, this short duration has been met with criticism as "some Nigerian military officials privately express disquiet about this, arguing that no one can be deradicalised in such a short stay, instead preferring an open-ended design."[129] As stated above, Operation Safe Corridor is particularly for persons who have defected. It is reported that about 2,000 members of Boko Haram and the splinter group, ISWAP who have defected have gone through this programme.[130] Other reports indicate 1,400 Boko Haram suspects have been released.[131] Adibe states that this release has occurred in tranches,[132]- the most recent of which being 601 in July 2020 and 881 in August 2020.[133] It would be recalled that in the previous chapter, it was mentioned that persons processed and tried through mass trials were all sent to rehabilitation centres, irrespective of their guilt. It is unclear whether the persons sent to the rehabilitation centres by the court form part of these numbers. This view is advanced by Felbab-Brown who posits that "although there are plans for such deradicalisation and rehabilitation facilities for detainees, they do not yet exist. The Gombe centre, detailed below, is solely meant for low-risk defectors, not for Boko Haram detainees who did not voluntarily surrender; it is not clear what has happened to those the court ordered to be released."[134]

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[124] Abu-Bashal A., "Nigeria: 600 Boko Haram members released", *Anadolu Agency,* 14 July 2020.
[125] Umeh, *supra* n.103.
[126] Mahmood and Ani, *supra* n.104, at 21.
[127] Bukarti and Bryson, *supra* n.105, at 10.
[128] Felbab-Brown, *supra* n.98, at.107.
[129] *Ibid.*
[130] Young, *supra* n.97.
[131] Adibe J., "Should Nigeria have released Boko Haram suspects?" *The Conversation*, 20 February 2020.
[132] *Ibid.*
[133] Toromade S., "'They are innocent,' military says released 'repentant' Boko Haram fighters were forcefully recruited", *Pulse.ng*, 7 August 2020.
[134] Felbab-Brown, *supra* n.98, at 105.

Although DRR is a well-known method of restoring peace in post-conflict societies, it is usually implemented at the end of the conflict, however, in Nigeria it is being used as a means to bring an end to the conflict.[135] Ogunleye argues that for this tool to be utilised there must be concrete evidence of repentance such as a peace deal or cease fire agreement. This position is buttressed by the United Nations Approach to Disarmament, Demobilisation and Reintegration (DDR) 2.10 which states that "there are certain preconditions for DDR to take place, including: the signing of a negotiated peace agreement that provides a legal framework for DDR; trust in the peace process; willingness of the parties to the conflict to engage in DDR; and a minimum guarantee of security."[136]

These pre-conditions are however lacking in the Nigerian context. This can have the negative effects of not having significant buy-in from communities/ survivors upon reintegration. Ugwueze et al argue that "the failure to mainstream the concerns of local communities both in policy and programming of Operation safe Corridor severely undermines the prospect of successful and effective reintegration of ex-Boko Haram fighters."[137] At the core of the concerns is that government efforts for not address the survivors quest for justice. Furthermore, there is no check against recidivism as the conflict is still on-going. This was evident in the Democratic Republic of Congo wherein participants in demobilisation programmes were later "re-recruited or re-joined armed rebel groups due to the absence of alternative livelihoods in the context of sustained insecurity," additionally, reintegration efforts had a lower success rate.[138] Douglas et al further argue that a consequence of exclusion of "ex-combatants" economically, politically, socially and culturally, [is that] they may then resort to violence and criminal activity as a means of income generation and survival."[139] In some quarters it was described as "a bold attempt by the Nigerian government to incentivise terrorism particularly as the insurgent group has not declared a ceasefire."[140] Likened to the 'failed' Niger Delta programme, it was argued that the leniency of these efforts "promoted impunity and moral hazard which created more problem for societies in Nigeria."[141]

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[135] Ogunleye A. A., "Ending terrorism in Nigeria: is Operation Safe Corridor the right approach?" *Global South Development Magazine*, 21 September 2020.
[136] Integrated Disarmament, Demobilisation and Reintegration, *Module 2.10 The UN Approach to DDR* (United Nations, 2006), at 1.
[137] Uguweze, M. et al, "Operation Safe Corridor Programme and Reintegration of Ex-Boko Haram Fighters in Nigeria", *Journal of Asian and African Studies*, Oct. 2021, doi:10.1177/00219096211047996. The concerns of citizens will be further illustrated in the sub-section.
[138] IOM, *Disarmament, Demobilisation and Reintegration: Compendium of Projects 2010-2017* (IOM, 2019), at 46
[139] Douglas I. et al, *Disarmament, Demobilisation and Reintegration: A Practical Field and Classroom Guide* (GTZ, NODEFIC, PPC, SNDC, 2004), at 26.
[140] Dataphyte, "Operation Safe Corridor and the Misplaced Investment on Terrorism", *Dataphyte*, 28 august 2020. Available on: https://www.dataphyte.com/latest-reports/security/operation-safe-corridor-and-the-misplaced-investment-on-terrorism/. Last accessed on 5 December 2021.
[141] *Ibid*.

Additionally, it could exacerbate tensions between civilians and ex-combatants "either through relative insecurity on the part of civilians or resentment towards ex-combatants based on targeted benefits;" also it can "generate perverse incentives that lead to individual and group behavior (whether by civilians or ex-combatants) that contributes to violence, instability, and lack of economic progress both in the short and long term."[142]

Another noteworthy programme is the one that operates out of Kuje prison in the Federal Capital Territory. Participants in this programme include "combatants convicted of violent extremist offences and inmates awaiting trial."[143] Furthermore, "the project engages Imams to work with those in the programme on [religious matters], participants are also offered training in rudimentary vocational skills and therapy to overcome the trauma they faced as members of Boko Haram."[144]

Below are some pictures of the clients/ combatants, before and after rehabilitation and this is juxtaposed against pictures of some IDP camps where victims of Boko Haram are resident. Image 1 shows insurgents turned "clients" at the beginning of their rehabilitation process. It highlights their manner of dress and the tent in the background connotes some form of induction ceremony has taken place. Image 2 shows these "clients" sitting in a properly constructed room (the multi-purpose hall), wearing uniforms and sitting on comfortable chairs as they undertake their rehabilitation lectures. Image 3 presents an image of graduates from the Operation Safe Corridor rehabilitation programme with provision made for neat clothing, footwear and in an environment that depicts a ceremony. This treatment of surrendered combatants stands in stark contrast to the images of persons displaced by the conflict and the provision made for them. Images 4 and 5 show the squalid nature of the IDP camps, the haphazard presentation of its occupants and the way provision is made for them. These two sets of pictures set a grim tale of how persons who are self-confessed members of the armed terrorist group are given treatment better than that meted to victims of their crimes- internally displaced persons, majority of whom were displaced by the conflict.

[142] Schulhofer-Wohl J. and Sambanis N., *Disarmament, Demobilization, and Reintegration Programs: An Assessment* (Folke Bernadotte Academy, 2010), at 23.
[143] Adibe, *supra* n.131.
[144] *Ibid.*

Image 1: Boko Haram Insurgents entering programme

Source: Council on Foreign Relations (2020)

Image 2: Image of Class setting in the Multipurpose hall

Source: Tony Blair Institute for Global Change

Image 3: Graduation Ceremony from Operation Safe Corridor

Source: Sahara Reporters (2020)

Image 4: IDP camp for Boko Haram Victims and Survivors

Source: Order Paper 2018

Image 5: IDP camp for Boko Haram Victims and Survivors

Source: Premium Times 2020

Investigations have been carried out to ascertain the views of victims on this programme and it can be argued that it is unfavourable. This can be seen with "the hostility towards insurgents becom[ing] particularly noticeable since the commencement of the DRR programme."[145] From a survey conducted by Folami and published by the International Nuremberg Principles Academy consisting of 81 participants, the following were expressed:

> "…Further investigation of war crimes and crimes against humanity would enhance peace in the war-torn communities, most especially in north-east Nigeria..."
>
> "…further investigations would expose the major actors in the conflict which might serve as a healing mechanism to many victims who want their violators to be prosecuted."[146]

Others like Hauwa Adamu stated "Boko Haram killed my husband while he was praying inside the mosque, two of my brothers were slaughtered, they should find a place to keep [the former fighters], but not in our society, please."[147] Another, Malam Abduallahi notes that "people like Gabage (an ex-Boko Haram member currently in the rehabilitation program) were the ones who killed my brother, how can they bring such a person to where I live? Whoever destroys your family…I don't think it is wise to live with them."[148] Furthermore, a poll conducted on social media soliciting the views of citizens on amnesty for Boko Haram combatants, which is

[145] Hassan, *supra* n.76.
[146] Folami O. M., "Prosecution that Never Began: An Exploration of Acceptance of International Criminal Justice in Nigeria" in Buckley-Zistel S. et al (eds.), *After Nuremberg. Exploring Multiple Dimensions of the Acceptance of International Criminal Justic*e (International Nuremberg Principles Academy, 2017), at 10.
[147] Mules and Al-Amin, *supra* n.117.
[148] *Ibid.*

essentially provided by DRR mechanisms shows that of "14,076 and 5,481 respondents on Facebook and Twitter respectively, 92 per cent and 91.9 per cent voted against the idea of amnesty for ex-insurgents."[149]

As an ancillary concern, people have also rejected the idea that "Boko Haram fighters are capable of repentance and believe the deradicalisation program has become a breeding ground for spies and recruitment agents — especially considering their recent release has coincided with an increase in attacks in neighbouring Chad."[150] These sentiments are evidence of views that some level of justice is required. In support of these sentiments, it has been argued that the government is more focused on the rights of the perpetrators as opposed to striving to balance between rights of the victims and rights of the perpetrators, which is where justice lies.[151]

To buttress the position of victims and survivors, critics have raised questions about the programme, popularly known as Operation Safe Corridor. Adibe notes that "the announcement [of the commencement of the programme] generated a lot of angst, opposition leaders attacked the decision, as did soldiers fighting the terrorists."[152] Another commentator posited that the decision to implement this programme has "reopened old wounds and [is] forcing Nigerians to endure the humiliation and terror of living with the very people who plotted their deaths by the numbers."[153] A legislator raised a question similar to that posed by victims, being, "how can an enemy be rehabilitated? These are people who have done Nigeria so much harm."[154] Another- Senator Ali Ndume (present Senate Committee Chair on Army) argued that the programme is ill-timed and that "the memory is still fresh in our mind because our people are still displaced, and then you say you're bringing them back, pampering them and giving them start-up (capital)."[155] Ekhomu further expressed that "the Operation Safe Corridor programme amounts to recycling of Boko Haram fighters. Terrorists that have been taken off the battle fields are apparently being returned as new and improved fighters to cause more havoc, this is appalling, there is no evidence that these people were in fact reprogrammed and de-radicalised successfully, there is no objective measure of the success of de-radicalisation."[156]

[149] Nextierspd. "Accepting Ex-Boko Haram fighters", *Nextierspd Daily Analysis*, 1 July 2020.
[150] Mules and Al-Amin, *supra* n.117.
[151] Hassan, *supra* n.76.
[152] Adibe, *supra* n.131.
[153] Obiezu K., "Nigerian Army: Rubbing salt on nation's sore", *The Nation,* 5 August 2020.
[154] Young, *supra* n.97.
[155] Toromade, *supra* n.133.
[156] Ijediogor G, "Military should halt operation safe corridor now", *The Guardian,* 22 February 2020.

Felbab-Brown adds that from her interviews with affected persons in the region, there is a sense that "it was too early to accept Boko Haram associates, including those who lived under Boko Haram rule a frequently expressed position was that fighting would need to cease before such acceptance could be feasible, and that the houses and livelihoods of community members who fled would have to be rebuilt first."[157] Following a consultative meeting involving government officials, security agencies, religious and traditional leaders, women's and youth groups, civil society, media and academia organised by Centre for Democracy and Development, one of the key takeaways was "the importance of accountability for all parties in the insurgency was emphasised, it was unanimous amongst participants that unless all perpetrators are brought to account, it will be difficult for communities to accept the rehabilitated Boko Haram extremists."[158] Furthermore that "any attempt to reintegrate repentant Boko Haram fighters back into communities that remain negatively affected by Boko Haram's violence will be met with staunch resistance and may lead to subsequent violence. Particular care must be taken on this issue."[159] Onapajo and Ozden argue that "the government fails to recognise that communities who have had a very traumatic experience from the activities of Boko Haram would struggle to accept former combatants or people who might have been exposed to their ideologies."[160] They recommend the government "include systems of reconciliation and forgiveness in the process of reintegrating the individuals back to the society."[161] Felbab-Brown seconds this recommendation by arguing that community opposition to DRR efforts suggests that the Nigerian government "needs to invest more in open and comprehensive discussions with society about rehabilitation, reintegration, leniency, and victims' rights."[162]

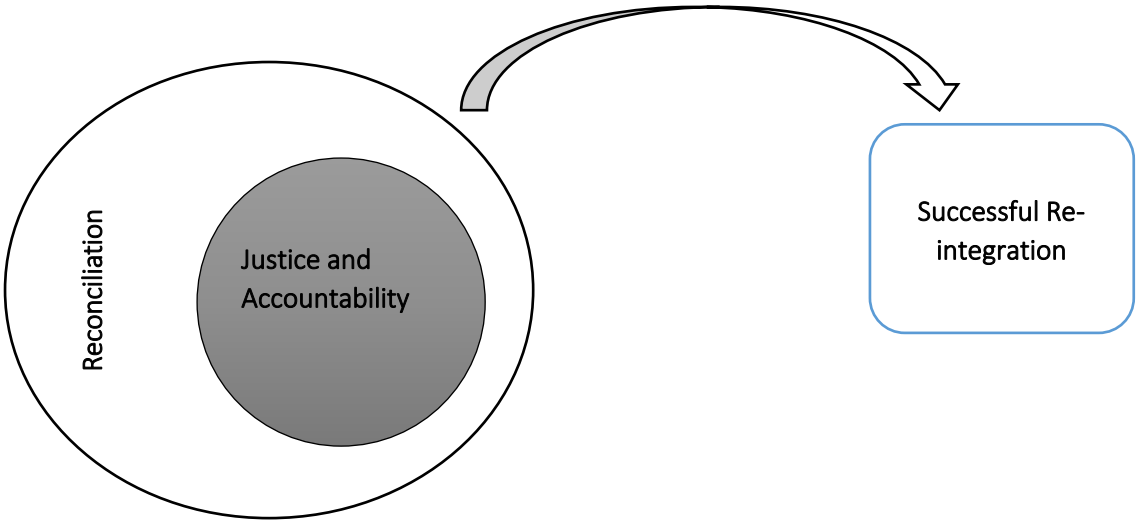
However, there are contrasting views on the programme. Ogbogu, a Federal Ministry of Defence analyst, has argued that "Nigeria's approach to rehabilitation, though at its early stages, is a step in the right direction at *ensuring* that captured/ surrendered terrorists are reintegrated into mainstream society."[163] The Coordinator of Operation Safe Corridor, Maj. Gen. Bamidele Shaffa argued that more persons have been processed through the programme than have been tried and sentenced,[164] and thus this programme might be a better way of addressing the backlog of awaiting trail inmates. It is worthy of note that positive

[157] Felbab-Brown, *supra* n.98, at 107.
[158] Centre for Democracy and Development, "Policy Brief: Stakeholders' Dialogue on Government Approaches to Managing Defecting Violent Extremists", *CDD West Africa*, 6 April 2015.
[159] *Ibid.*
[160] Onapajo and Ozden, *supra* n. 93, at13.
[161] *Ibid.*
[162] Young, *supra* n.97.
[163] Ogbugu, *supra* n.101, at 20
[164] Olugbode, *supra* n.121.

commentary on this programme primarily emanates from government quarters.

From these positions expressed, there is an understanding that for some victims "justice means accountability through prosecution of Boko Haram insurgents"[165] as well as some platform created for truth telling. On this note it can be said that "punishing individuals for the harms they have caused, particularly when their crimes were committed on a massive scale, is intended to re-establish (or establish in the first instance) an equilibrium between victims and perpetrators."[166] For true re-integration to be achieved, reconciliation must be addressed. The reconciliation indicated is that which is connected to justice and accountability.

Figure 2: Reconciliation and Reintegration Nexus



It can be said that the approach being taken now does not address the issue of retributive and rehabilitative justice as indicated from feedback from survivors. At the heart of this challenge is the choice in the framing of the conflict by the Nigerian government. As shown in the previous chapter, the Nigerian Justice Sector has chosen to treat the conflict as purely terrorism and situate it in the realm of the domestic. Limiting the understanding of the situation in Nigeria to merely a combination of extremist religious ideology and poor socio-economic conditions, minimises the conflict. By purely conceiving it as merely a domestic issue without accepting the destabilising effects crimes committed have had on the society, confines the range of responses to the conflict as it is argued in chapters 3 and 4. It is advocated that for the harm caused by the conflict to be better addressed transitional justice mechanisms ought to be adopted. This includes addressing fair labelling concerns to appropriately describe the harm done in prosecutions, which inadvertently will lead to the acknowledgment on international crimes committed. This position is supported by the view that from a survey

[165] Hassan, *supra* n.76.
[166] Grono and Flintoft, *supra* n.80.

conducted consisting of civil society organisations, academia, community leaders (consisting of religious leaders, IDPs and traditional leaders) and political parties, it showed that "a thorough investigation [of crimes committed and harm done] would bring about justice and peace in the region."[167]

5.3 Postulating a new response

It can be argued that the laws governing non-international armed conflict have key provisions that promote reconciliation. For instance, Article 6(5) of Additional Protocol II asks that "at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."[168] By the 1987 Commentary of the ICRC, this provision was designed to "encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided."[169] In addition, the guarantees in Common Article 3 laid down for when prosecution is contemplated aid in building fairness and objectivity into the prosecutorial process. As an example, the ICRC commentary stated that "Article 6 is quite open and applies to civilians and combatants who have fallen in the power of the adverse party and who may be subject to penal prosecution."[170] Considering that these laws were written in a time when amnesty was an acceptable practice when dealing with combatants in traditional war-like settings, amnesties have received less than favourable reports recently as they fail to address victim's right to truth and accountability for harm. It can therefore be argued that an expanded reading of these provisions looking at their intent and applying the teleological approach could allow for the use of other transitional justice mechanisms. If this expanded reading is adopted in conjunction with other humanitarian principles aimed at providing relief for civilians and ameliorating their suffering, some level of justice and accountability may be achieved.

The main question that however arises is how best to adopt transitional justice mechanism to create a pathway for promoting reconciliation between victims and perpetrators. The path to justice used being the judicial approach, especially between 2009 and 2017 has been heavily criticised because channelling thousands of detainees through the criminal justice system has created further backlog and delays as "many of the alleged insurgents were arrested based on questionable intelligence and denunciations by local militia groups, the prosecutable

[167] Folami, *supra* n.146, at 10.
[168] Article 6(5) Second Protocol Additional to the Geneva Conventions 1977.
[169] Junod, S.S., *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of Non-International Armed Conflict (Protocol II)* (1987), at para. 4618.
[170] *Ibid*, at para. 4599.

evidence against them is scant or non-existent."[171] The criticisms have centred on "the prevalence of poorly investigated case files; overreliance on confession-based evidence; lack of forensic evidence; absence of cooperation between investigators and prosecutors; scarcity of trained forensic personnel; inadequate security for lawyers; and difficulties in converting military intelligence into admissible evidence."[172] Furthermore, there has been a critique of prosecutions "being ill-equipped to deal with the institutional and structural issues that fed into the violence, not contributing to the healing process and worsening existing bias."[173] As mentioned above, some actors have advanced the view that "trying to prosecute too many can weaken useful alternatives under a thoughtful transitional justice strategy (e.g., conditional amnesties or suspended sentences)."[174] Perhaps, Nigeria ought to consider some measure of transitional justice as a means of striking a balance that it beneficial to all parties.

Due to the critique of prosecution, it can be argued that other transitional justice mechanisms could be utilised. It has been recommended that "the potential role of judicial and non-judicial forms of accountability, such as truth-telling, with the aim of understanding the range of mechanisms most acceptable to Nigerian society, while complying with the country's international obligations,"[175] should be considered. This recommendation is supported by the critique of prosecution of Boko Haram Combatants in Nigeria.

One of such transitional justice truth telling mechanisms that can be utilised and is being advocated from certain quarters is the use of Truth and Reconciliation Commissions (TRCs). The essence of this method is to "offer a platform for individuals to share their own truths concerning past violations with the larger community, as well as a vehicle for deep analysis of the structural and institutional causes of those violations."[176] They can be empowered to "establish a historical record of abuse and to investigate the causes and consequences of these abuses, including the assignment of blame."[177] Stromseth argues that Truth Commissions can "supplement trials and acknowledge more fully the truth of what occurred and the pain and needs of victims, potentially contributing to reconciliation over time."[178] They "aim to substantiate concretely, and to demonstrate, a norm of accountability" and are seen as "more likely to be effective in compiling a comprehensive "truth" that addresses the larger context of a conflict and provides a fuller account of the factors contributing to atrocities and

[171] Brechenmacher, *supra* n.92.
[172] Felbab-Brown, *supra* n.98, at 105.
[173] Felbab-Brown, *supra* n.102, at 23.
[174] *Ibid,* at 33.
[175] Felbab-Brown, *supra* n.98, at 115.
[176] Felbab-Brown, *supra* n.102, at 38.
[177] Evenson, *supra* n.44, at 751.
[178] Stromseth, *supra* n.9, at 209.

can provide a greater opportunity for direct participation by a larger number of victims."[179] Truth Commissions are a means of establishing both guilt and responsibility. It can allow for naming and shaming, and this is a form of punishment.[180]

Although this method has been successfully used in other climes, it has not recorded such feats in Nigeria. This is exemplified by the Human Rights Violations Investigation Commission (popularly known as the Oputa Panel), which was set up in 1999 upon the return to democracy to investigate gross human rights violations committed by Nigerian security forces between 1966 and May 28, 1999. This Commission received over 10,000 submissions but only heard 200 publicly, the final report was however not released as a result of a court judgment from the Nigerian Supreme Court in *Fawehinmi v Babangida* that stated that the Federal Government had no power to set up such commission and was the mandate of the States.[181] As such, for this tool to be utilised in Nigeria, the main States of- Borno, Adamawa and Yobe- being the primary region of operation for Boko Haram, would have to independently set up Panels of Enquiry. This idea was floated by Hassan and Olugbuo who acknowledge the challenge faced by pursuing Truth Commissions at the Federal level and posit that "states that are currently affected by Boko Haram can set up truth and reconciliation commissions to probe atrocities."[182] This could have the benefit of being closer to the people. However, other challenges exist such as clumsiness of multiple enquiries, securing the attendance of perpetrators who are held in the custody of Nigeria security forces and the cost of such operations, considering that the aforementioned States are some of the poorest in the country.

These issues are however remediable as there is no one size fits all policy of how TRCs can be administered. Snyder and Vinjamuri state that well designed Truth Commissions in the future might be able to minimise such resentments. It can be argued that despite the challenges TRCs could be made to work in Nigeria. For instance, a joint agreement would be reached between the Borno, Adamawa and Yobe State governments for the establishment of a joint Truth and Reconciliation Commission. This could be administered under the auspices of the North East Development Commission, which is tasked with rebuilding the North East (where the three states are situated), this could be crafted as part of the rebuilding efforts. This can be complementary with prosecution efforts as seen in East Timor wherein, "the United Nations Transitional Administration in East Timor (UNTAET) (sought) to incorporate a truth-seeking commission (the Commission for Reception, Truth and Reconciliation, or CRTR)

[179] *Ibid,* at 178.
[180] Amir, *supra* n.54, at 6.
[181] Hassan, *supra* n.76; *Fawehinmi vs. Babangida* (2003) 3 NWLR (Pt.808) 604.
[182] Hassan I. and Olugbuo B., "The Justice versus Reconciliation Dichotomy in the Struggle Against Gross Human Rights Violations: The Nigerian Experience" (2015) XL(2) *Africa Development* 123 at 136.

into the larger prosecution mechanism.'' Evenson further stated that,

> Through this process, amnesty from prosecution is granted for lesser offenses only in exchange for fulfilling the terms of a Community Reconciliation Agreement (ordinarily admission of wrongdoing and performance of an act of reconciliation, as determined by the panel overseeing the Community Reconciliation Process). The act of reconciliation to be performed is then entered as an order in the Dili district court. Granting the CRTR this quasi-judicial role does not diminish criminal accountability for the serious offenses prosecuted by the UNTAET-established Office of the General Prosecutor and Special Crimes Panel but does prevent criminal docket from being overburdened by diverting low-level offenders through the CRTR.[183]

Furthermore, the challenge of funding can be addressed by possibly channelling funds allocated for Operation Safe Corridor to a mechanism that potentially would yield better results. It could also be important to frame alternative punishments not as amnesties even though they do not have incarceration terms attached.

Other transitional justice mechanisms that can be used that could have greater legitimacy involve local justice tools as a means of addressing accountability. Such measures were utilised in Rwanda with the gacaca courts and *mato oput* by the Acholi people in Uganda. In the Uganda, *mato oput* was a process whereby "elder chiefs ask those in need of forgiveness to step on a raw egg and drink the bitter root from an oput tree to symbolise resolution of a dispute and purification of cen [evil spirits]. In some cases, the ceremony also includes compensation for the person wronged."[184] In the Rwanda case, gacaca was used to "to reveal the truth about what happened during the genocide, creating local knowledge in each community."[185] It was a community-run conflict resolution mechanism adapted to prosecute low-level genocide perpetrators. Megwalu and Loizides from their research found that the "state-established Gacaca courts meet once a week in each of Rwanda's approximately 9,013 cellules and 1,545 sectors… community members are elected to act as judges while cellule and sector residents act as juries, witnesses, prosecutors and defence."[186] Waldorf argues that "gacaca has always been an uneasy mix of restorative and retributive justice: confessions and accusations, plea-bargains and trials, forgiveness and punishment, community service and incarceration."[187] According to Kirkby, gacaca courts sought to strike a balance between vengeance and forgiveness.[188] This gacaca process had its benefits and drawbacks. Some of its benefits include promotion of public participation in justice efforts, local determination of justice outcomes, justice was seen to be done, it was time and cost efficient and enabled the

[183] Evenson, *supra* n.44, at 753-754.
[184] McKnight J., "Accountability in northern Uganda: understanding the conflict, the parties and the false dichotomies in international criminal law and transitional justice" (2015) 59(2) *J.A.L.* 193, at 206.
[185] Waldorf, *supra* n.43, at 68.
[186] Megwalu A. and Loizides N., "Dilemmas of justice and reconciliation: Rwandans and the Gacaca courts" (2010) 18(1) *AJICL* 1, at 5.
[187] Waldorf, *supra* n.43, at 53.
[188] Kirkby C., "Rwanda's gacaca courts: a preliminary critique" (2006) 50(2) *J.A.L* 94, at 108.

standardisation of right and wrong.[189] However, it grew unpopular because of the level of state involvement in the process as well as the lack of adherence to international fair trial standards and the judges were untrained.[190] Building on lessons learned from the use of *mato oput* and gacaca, the use of local justice tools in Nigeria could be subject to further research into the application of transitional justice in North East Nigeria.

In the meantime, it can be argued that although some transitional justice mechanisms could be utilised and have started to be used in Nigeria, the fundamental issue of accountability for harm done is not being met, as majority of Boko Haram combatants are processed through the DRR tool that gives them amnesty from prosecution. Also, this rehabilitation is solely focused on the perpetrators and not on the victims. And even in situations where they are prosecuted, the full nature of crimes committed are not adequately described and captured. Furthermore, it can be argued that the preferred use of this DRR method impacts on the safety of victims in breach of the 1997 Declaration of Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights Law and Serious Violations of International Humanitarian Law provides that "victims should be treated humanely and respect for their human dignity, calling for appropriate measures to be taken to ensure their safety, physical and psychological well-being." To do this, it is required that states investigate those violations as evident in the Nigerian case. In addition, it can be said that applicable International Humanitarian Law puts an obligation on States to ensure accountability for violations and perpetrators of serious crimes under international law are not allowed to benefit from such amnesty-like measures.[191] This position is buttressed by United Nations Security Council Resolution (UNSCR) 1373 (2001) which states that "States are required to "bring to justice" those responsible for terrorism by criminalising such acts under domestic law and punishing those responsible in a way that reflects the seriousness of their acts."[192] TRCs "do not replace the need for prosecutions, they offer some form of accountability that serves the interests of addressing situations where prosecutions for massive crimes are impossible or unlikely."[193] As argued earlier TRCs could be used together with prosecution efforts with the chosen truth telling mechanism or local justice tool being applicable to low level perpetrators and prosecutions being reserved for mid to high level perpetrators.

Considering that "criminal prosecutions are the most familiar element of transitional justice

[189] Megwalu and Loizides, *supra* n.186, at 21.
[190] *Ibid.*
[191] OCHCR, "International Legal Protection of Human Rights in Armed Conflict", (2011) HR/Pub/11/01.
[192] Felbab-Brown, *supra* n.102, at 29.
[193] OCHCR, *supra* n.191.

practice, a successful prosecution strategy can help address legacies of mass abuse and conflict by removing particularly violent individuals from society (specific deterrence); signalling that such activity has consequences (general deterrence); reinforcing the moral repudiation of such activity (expressive function); and fulfilling retributive expectations, particularly of persons and communities most affected."[194] As argued by Felbab-Brown even in the cases of prosecution, "the broader lack of accountability in Nigeria's conflict with Boko Haram remains a major problem."[195] This challenge is succinctly put by Felbab-Brown who states that:

> It is important that offences are clearly articulated, and publicised, and prosecutorial priorities are likewise formalised and explained. The case studies, however, illustrate a tendency to criminalise mere membership in the extremist group rather than commission of a specific act. This implicitly lumps together die-hard believers and coerced followers, raising problems of legality and effectiveness by not sending a clear responsibility message that can contribute to general deterrence and by expending precious prosecutorial resources on individuals who could benefit from an alternative accountability process. The better path is to articulate the prosecutable offences and apply the law to those who commit the crimes, regardless of affiliation.[196]

It has been said that "the act of punishment for wrongdoing is itself a deeply symbolic gesture. By not punishing a person for crimes against humanity, a society implicitly validates, or at least condones, those acts."[197] Thus noting that crimes committed by Boko Haram – war crimes and crimes against humanity- which go to the root of the society, a consequence of applying transitional justice mechanisms means that the scope of laws under which perpetrators can be charged expands to include international crimes. To address this, this thesis proposes the revision to the charges usually proffered by the Nigerian Justice Sector to ensure that fair labelling concerns are addressed, truly describing in charge sheets the harm done to victims in a bid to move closer to accountability on the continuum.

5.3.1 Model Indictment Sheet

This Model Indictment Sheet is based on the indictments currently in use before Nigerian courts against persons who have been charged solely under terrorism laws. To develop this draft charge sheet, inspiration was drawn from decided cases, building on the charges under the Terrorism Prevention Act and the details of the offences. The idea was to contemplate other charges under other domestic laws that could apply to offences committed- war crimes and crimes against humanity. As found in Chapter 4, there is a plethora of laws under which perpetrators of harm in the North East can be tried under and this includes International

[194] Felbab-Brown, *supra* n.102, at 23.
[195] Felbab-Brown, *supra* n.98, at 103.
[196] Felbab-Brown, *supra* n.102, at 35; Similar views are also expressed by Brammertz S. and Jarvis M., *Prosecuting Conflict-Related Sexual Violence at the ICTY* (OUP, 2016), at 334.
[197] Kirkby, *supra* n.188, at 95.

Humanitarian Law. Being aware of the limits to applying International Humanitarian Law in Nigeria, similar crimes that address the elements of war crimes and crimes against humanity under the domestic penal code could be used as replacements as well as a blanket violation of Common Article 3 under the Nigerian Geneva Convention Act, 1960.

It is important to note that although this charge sheet draw inspiration from decided cases, there are hypothetical elements to some of the charges that take into consideration recorded war crimes and crimes against humanity that have not been reflected in existing charges. This charge sheet is indicative recommendations of actions available to the prosecutors in the Nigerian Justice Sector. The purpose of this hypothetical charge sheet is to adequately describe the harm done to the victims, rather than state offences in generic terms, as is the case under the extant Terrorism Preventions laws in Nigeria. From the discourse above, it can be inferred that this quest for a judicial solution is sought from the victims.

Guiding Notes

- Location of the Court- By the draft charge sheet, all cases at set to be heard in Wawa Cantonment in Niger State. This temporary site of the court was selected as it is the operating special court within the Federal High Court system for the mass trials. If as advocated later in this chapter that a special division of the Federal High Court be set up, it is likely this would be what is obtainable. In addition, the commission of the crimes in other States of the Federation does not have a bearing on the location of the court as the Federal High Court (irrespective of judicial division) is viewed as one court not bound by the territorial jurisdiction of the federated States. This position has long since been decided in *Abiola v FRN.*[198] And is further supported by section 32 of the Terrorism Prevention (Amendment) Act, which states that "the Federal High Court located in any part of Nigeria, regardless of the location where the offence is committed, shall have jurisdiction to try offences… hear and determine proceedings arising under the Act."[199]

- Adherence to criminal procedure guidelines in drafting- The drafting style of the charges is done in accordance with the Nigerian Administration of Criminal Justice Act 2015, being the operative criminal procedure law in Nigeria.

- Exclusion of High-Level Combatants- The choice to exclude this group from the draft charge below is simply because at present, there is yet to be a trial of high-level

[198] [1995] 3 NWLR (Pt. 383) at 203

[199] This is also supported by section 19 of the Federal High Court Act LFN 2004.

combatants through which fact-based hypothesising can occur.

- Choice of year- The hypothetical offences based on real charges have been stated to have occurred in 2020. This is to lend credence to the argument that the nature of the sample charges has previously not been done. They are futuristic.

Table 4: Model Indictment Sheet for Mid- to High-Level Insurgents (Based on charge and judgment in *FRN v Mustapha Umar*)[200]

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE WAWA CANTONMENT JUDICIAL DIVISION
HOLDEN AT KAINJI-NIGER STATE

CHARGE NO: FHC/KAINJI/CR/79/20

BETWEEN

FEDERAL REPUBLIC OF NIGERIA …….. COMPLAINANT

AND

MUSTAPHA UMAR ……..……. DEFENDANT

At the session holding at Wawa Cantonment on the 1st day of December 2020, the court is informed by the Attorney General of the Federation on behalf of the State that Mustapha Umar is charged with the following offences:

COUNT 1:

STATEMENT OF OFFENCE

Act of terrorism- contrary to section 1(2) (c)(v) of the Terrorism Prevention Amendment Act 2013.

Particulars of offence

Mustapha Umar, on the …. day of ….. 2020 in the division of Maiduguri, Borno State, willingly committed an act of terrorism by possessing, acquiring, transporting and driving a

[200] Considering that this is a draft charge sheet, the laws applied would be the laws as of the December 31, 2020, as it aims to project future charges against persons. Therefore, although elements of existing charges and judgments were used in the preparation of this sample draft, it is important to note that this charge sheet is hypothetical.

White Honda vehicle loaded with explosive devices into SOJA Plaza located at….

COUNT 2:

STATEMENT OF OFFENCE

Membership of a terrorist group - contrary to section 16 of the Terrorism Prevention Amendment Act 2013.

Particulars of offence

Mustapha Umar, on the …. day of ….. 2020 in the division of Maiduguri, Borno State, professed to be a member of the proscribed terrorist group, Boko Haram.

COUNT 3:

STATEMENT OF OFFENCE

Breach of Article 3 common to the Geneva Conventions 1949- contrary to section 4 of the Geneva Conventions Act 1960.

Particulars of offence

Mustapha Umar, on the …. day of ….. 2020 in the division of Maiduguri, Borno State, violated Article 3 common to the Geneva Conventions 1949 by committing violence to life and person of A.M when he drove a White Honda vehicle loaded with explosive devices into SOJA Plaza located at….

OR

STATEMENT OF OFFENCE

Violation of customary international humanitarian law.

Particulars of offence

Mustapha Umar, on the …. day of ….. 2020 in the division of Maiduguri, Borno State, violated Article 3 common to the Geneva Conventions 1949 by committing violence to life and person of A.M when he drove a White Honda vehicle loaded with explosive devices into SOJA Plaza located at….

[include other violations of Common Article 3 as separate counts]

COUNT 4:

STATEMENT OF OFFENCE

Culpable Homicide- contrary to section 221 of the Penal Code Act.

Particulars of offence

Mustapha Umar, on the …. day of ….. 2020 in the division of Maiduguri, Borno State, willingly committed culpable homicide by detonating an explosive device and causing the death of one A.M.

OR

STATEMENT OF OFFENCE

Culpable Homicide- contrary to section 224 of the Penal Code Act.

Particulars of offence

Mustapha Umar, on the …. day of ….. 2020 in the division of Maiduguri, Borno State, willingly committed culpable homicide by detonating an explosive device and causing the death of one B.K.

COUNT 5:

STATEMENT OF OFFENCE

Voluntarily causing hurt or grievous hurt by dangerous means- contrary to contrary to section 248 of the Penal Code Act.

Particulars of offence

Mustapha Umar, on the …. day of ….. 2020 in the division of Maiduguri, Borno State, voluntarily caused grievous hurt to K.W. by detonating an explosive device at SOJA Plaza.

OR

STATEMENT OF OFFENCE

Causing hurt by act endangering life or personal safety of others- contrary to section 253 of the Penal Code Act.

Particulars of offence

Mustapha Umar, on the …. day of ….. 2020 in the division of Maiduguri, Borno State, knowingly endangered lives and the personal safety of others by detonating an explosive device at SOJA Plaza.

COUNT 6:

STATEMENT OF OFFENCE

Mischief by explosive with intent to cause damage- contrary to section 336 of the Penal Code Act.

Particulars of offence

Mustapha Umar, on the …. day of ….. 2020 in the division of Maiduguri, Borno State, willingly committed mischief by detonating an explosive device and causing the destruction of the Thisday Newspaper building located at…..

COUNT 7:

STATEMENT OF OFFENCE

Kidnapping- contrary to section 273 of the Penal Code Act.

Particulars of offence

Mustapha Umar, on the …. day of ….. 2019 in the division of Maiduguri, Borno State, knowingly took E.F, a female below the age of 16, without the consent of her legal guardian and took E.F. to a hidden location.

Dated this ……. day of …… 2020

A.B. Juris

Director of Prosecution

For: Attorney General of the Federation

5.4 Supplementary options

Although this model indictment sheet is a shift toward accountability for victims and survivors by attempting to secure convictions based on charges that fully capture and describe the harm caused by Boko Haram, it can be argued there are other actions that could be taken by Nigerian actors in order to fully maximise this approach of expanding the laws under which charges are brought. These actions focus on strengthening the legal framework upon which international crimes such as War Crimes and Crimes against humanity may be charged, easing the judicial process by creating a specialised division and the use of technical expertise

from the International Criminal Court (ICC). These are:

- *Domestication of Critical Legislation:* This responsibility rests with the Legislative (Nigerian National Assembly) and the Executive arms of government. Legislation requiring domestication include the 1977 Additional Protocol II to the Geneva Conventions and the 2002 Rome Statute. These two legislations would expand the foundation for the prosecution of international crimes in Nigeria and violation of international norms by Boko Haram combatants from the time of enactment as the conflict is still ongoing. LaFontaine has argued that "criminalisation of the core international crimes in domestic criminal legal systems is essential for the success … of the enterprise of international criminal justice."[201] Particularly, as it relates to the Rome Statute in attempting to domesticate it, the judicial treatment to be given to customary international law should be indicated clearly and the position on immunity harmonised with the provisions of the Nigerian Constitution. Efforts have been made toward the domestication of the Rome Statute in Nigeria as seen with the 2001 International Criminal Court (Ratification and Jurisdiction) Bill, the 2006 Rome Statute (Ratification and Jurisdiction) Bill and the 2012 Crimes against Humanity, War Crimes, Genocide and Related Offences bill. The 2006 Bill went the furthest in the process having been passed by both the Senate and House of Representatives but was not harmonised nor presented to the President for assent before the end of his administration in 2007.[202] Achieving domestication may prove difficult as the failure of prior attempts are evidence of an unwillingness on the part of the identified political actors to effectively enforce applicable international laws.[203]
- *Establishing a specialised court or division of the Federal High Court*: The Nigerian Judiciary, specifically the Chief Judge of the Federal High Court, could designate a division of the Federal High Court in the country to strictly handle these cases. The Federal High Court would be the preferred locus as the Nigerian Terrorism Prevention Act expressly states this,[204] and as it also has jurisdiction to try other offences under the Penal Code. From indications of the bill seeking to domesticate the Rome Statute, the Federal High Court is one of the indicated courts for trying offences under the bill. The benefit of this would be that an existing structure would be utilised and would minimise having to establish a new court or rely on legislation to create such court, which would cause significant delays. There is also the advantage of the Federal High

[201] Lafontaine F., "Canada's Crimes against Humanity and War Crimes Act on Trial" (2010) 8 *J Int'l Crim Just* 269.
[202] Olugbuo B. C., "Nigeria and the International Criminal Court: Challenges and Opportunities" in van der Merwe B., *International Criminal Justice in Africa: Challenges and Opportunities*, (Konrad Adenauer Stiftung 2014).
[203] Bukar M. I., "Assessing the effectiveness of enforcing international humanitarian law in Nigeria: the case study of Boko Haram" (2017) 22(1) *Cov. L.J.* 28.
[204] Section 32 Terrorism Prevention (Amendment) Act, 2013.

Court being acknowledged as a superior court of record by the Nigerian Constitution under section 6. Also, this may go a long way in addressing the issue of backlog of cases. Other benefits would include Judges becoming specialised in handling cases and bring about a uniform practice in addressing them. A similar system was utilised in Uganda through the creation of the International Crimes Division of the High Court.[205] At most, what would be required would be specialised practice directions for the division, which is an administrative measure, which is permissible under Federal High Court Act.

- *Collaboration with the ICC*: A lesser-explored alternative is a collaboration with the ICC to give support to the prosecutorial process. The ICC could provide technical investigative and analytical support to Nigeria's courts in order to establish standards and best practices for domestic prosecution of international crimes.[206] From a survey conducted by Folami, respondents indicated the expectation that more assistance would be provided by the ICC in view of the preliminary examination.[207] This may also be challenging as although Nigeria is a party and has ratified the Rome Statute, it is yet to domesticate it. And under section 12 of the Nigerian 1999 Constitution any treaty not domesticate has no legal force.
- *Establishment of a legal/ administrative framework for complementary use of truth commissions and prosecutorial process*: This thesis has argued for the mixed use of transitional justice tools- being truth telling mechanisms such as Truth and Reconciliation Commission and Prosecutions. However, the peculiarities of the Nigerian legal system make it necessary for a guiding framework for the seamless use of both tools. Evenson stresses the importance of a guiding framework when she states that:

> Transitional justice requires more than just the creation of accountability for past abuses: It also demands the civic and social transformation needed to ensure that abuses are not repeated in the future … An appropriate framework for deciding each issue, therefore, would consist of:
>
> (a) articulation of context-specific transitional justice goals
>
> (b) identification of all relevant policy options; and
>
> (c) evaluation of each policy option, measured by its ability to achieve articulated goals.[208]

In Nigeria this framework is imperative because firstly, the prosecution would be at the Federal level because of the nature of crimes charged emanating from the Terrorism

[205] Trust Africa, *Domestic Prosecution of International Crimes: Lessons for Kenya* (KPTJ, 2015).
[206] Kaye D. A., "Justice Beyond the Hague: Supporting the Prosecution of International Crimes in National Courts", *Council on Foreign Relations Council Special Report No.* 61 June 2011; ICC Rome Statute.
[207] Folami, *supra* n.146, at 11.
[208] Evenson, *supra* n.44, at 753.

Prevention laws and secondly, the truth commissions would be implemented at the joint state level.

5.5 Conclusion

It is evident in Nigeria that there is a non-international armed conflict persisting, which has seen violations of international humanitarian law and gross human rights violations that have had a consequential effect on society. This chapter has advocated for the Nigerian actors notably the justice sector and the military to acknowledge this frame, in order for transitional justice mechanisms be used to bring about justice and accountability for victims, reconciliation and healing. This chapter showed that the preferred method for addressing the conflict by the Nigerian justice sector and the military has been to use DRR methods aimed at reforming the offenders without catering to the needs of the victims- being adequate description of harm done, punishment for perpetrators, accountability of perpetrators and rehabilitation for victims. These are issues that can be addressed under the auspices of transitional justice mechanisms tailor made for the Nigerian context. This could include the complementary use of truth telling tools such as a Truth and Reconciliation Commission or other local justice methods for low level perpetrators and prosecution for mid- to high-level offenders. Specifically, as it relates to prosecution, this chapter has argued that a consequence of the framing of the insurgency in North East Nigeria as a non-international armed conflict by Nigerian actors is the application of International Humanitarian Law treaties and acknowledgment of crimes committed under these treaties and applicable International Human Rights treaties. This framing would allow for prosecution of cases with expanded charges that go beyond terrorism charges to cover domestic offences that address elements of war crimes and crimes against humanity, as international treaties covering these crimes are yet to be domesticated in Nigeria. It could also allow for the broad charge of violation on common article 3. The aim of which is to address fair labelling concerns and accountability for said harm. Lastly, for this prosecutorial process to have an improved chance of success, other measures can be taken such as the establishment of a special division of the Federal High Court to attend to cases emanating from the conflict, domestication of key international laws and the establishment of a framework for the complementary use of Truth and Reconciliation Commissions and Prosecution.

6. Concluding Remarks

Overall, this thesis has sought to respond to the main research question of: To what extent may the Boko Haram violence be framed as an armed conflict? It was found that to a large extent the Boko Haram insurgency can be framed, at least in part, as a NIAC. It further argues that this is therefore an appropriate and necessary framing for the conflict, to fairly label the full extent of violence in North East Nigeria. This conclusion was informed by answers to the sub-questions of:

a. Who are the key stakeholders in the framing of the violence?
b. How has the Boko Haram violence been framed by different stakeholders?
c. How does their differing framing of the violence impact on the domestic and international laws applicable to the violence?

Identified stakeholders were the Nigerian government (Army, Executive and the Justice Sector); INGOs operating in the field such as Amnesty International, ICRC, Human Rights Watch and Crisis Group); and the wider international community. Nigerian government actors mainly sustained the frame of terrorism especially the Nigerian Justice Sector. However, there was a shift in the rhetoric of the Nigerian Army with the acknowledgment of application of IHL to the conflict. Whereas INGOs and wider international community through their speech acts advanced the NIAC frame. This is important as a frame of terrorism limits the scope of applicable laws to domestic counter-terrorism legislation and infers that insurgents are mere criminals. Conversely adopting a frame of NIAC opens up protections for civilians, allows for the application of transitional justice measures aimed at achieving accountability for victims.

In Chapter 1, this thesis set out introductory contextual matters, providing a positivist understanding of the issues to be interrogated. It defined key concepts that would be subject of analysis in the thesis including armed conflict- international and non-international, international humanitarian law and terrorism. It provided a background of legal frameworks to be considered in the thesis by analysing the range of laws that could come into play with the Boko Haram conflict with emphasis on International Humanitarian Law applicable to international and non-international armed conflict, International Criminal Law, International Human Rights Law and Terrorism as well as the interplay between these laws. It further gave a synopsis of existing general literature on Boko Haram. Lastly, it highlighted the gaps in the literature and listed the contributions this thesis would make to the existing body of work. Having set the necessary legal background, it was also important to further interrogate from a practical perspective the relationship and IHL and Terrorism, as this issue is integral to the examination and framing of the Boko Haram Insurgency.

Chapter 2 through its analysis of the non-international armed conflicts in Afghanistan and Somalia showed that international humanitarian law can apply where conflicts are fuelled by designated terrorist groups and where their acts of terrorism meet the threshold to be classified as Non-international armed conflicts. While examining this relationship between International Humanitarian Law and Terrorism and relying on the constructivist understanding of how structures, in this case States, affect norm emergence, it was found that there were two contrasting views on the relationship. The first being a restrictivist approach by that found if terrorism laws are applicable to a situation of violence, IHL could therefore not apply. The second being the expansionist school of thought that the application of both sets of laws do not have to be mutually exclusive but can co-exist. This conclusion was reached through an extensive analysis of United Nations Security Council resolutions emphasising the binding effect of their resolutions especially those made pursuant to chapter VII of the UN Charter as well as the principal-agent relationship between UN Member states and the Security Council and the role of the Security Council in norm emergence.

After finding that IHL can in fact apply to situations of violence fuelled by terrorism and terrorist groups, it was important to explore the Boko Haram Insurgency in greater depth, to ascertain the nature of the violence. Chapter 3 established that Boko Haram was an armed terrorist group guided by Salafist ideology and insistent on the establishment of an Islamic State. A timeline of its activities was provided from the group's inception. It linked the emergence of the group to the dire political and socio-economic situation in North East Nigeria. It was instructive that several actors had an impact in the framing of the insurgency. The actors included the international non-governmental organisations (INGOs), the Nigerian government especially the Nigerian Army and Nigerian Justice sector. The central point was that whatever frame was applied has a different legal consequence and application of the law. The three frames considered were Boko Haram Insurgency as: simply terrorism, International Armed Conflict or Non-International Armed Conflict. This thesis argued that the Nigerian government sought to protect its interests through use of language such as "domestic", "criminal", "terrorist", "counter-terrorist" and "militant", to give credence to the classification of simply terrorism. However, from the analysis, it was overwhelming clear from the actions of Boko Haram amounted to a non-international armed conflict. This frame was mostly projected by norm entrepreneurs such as International Non- Governmental Organisations. This chapter found that through norm internalisation actions taken and Nigeria's in a bid to be viewed as participatory in the development of norms and compliant, it was able to acknowledge in words that it abides by international laws governing Non-International Armed Conflict. Having argued that the most sustainable frame is that of Non-International armed conflict, the chapter proved that the insurgency met the threshold for the application of international humanitarian law

relevant to Non-International Armed Conflicts and concluded that the conflict rose to the level to be governed by Common Article 3, Additional Protocol II and customary international humanitarian law.

At this stage, it was imperative to address the issue of enforcement of IHL, individual criminal responsibility for violations of applicable International Humanitarian Law. Chapter 4 identified that war crimes and crimes against humanity had been committed in the pendency of the conflict. It analysed the approach of the Nigerian Justice Sector to individual criminal responsibility by reviewing 57 trial judgments against insurgents in the conflict and found that there was a non-acknowledgment of international crimes committed as only the frame of terrorism was sustained with charges being based on Terrorism Prevention laws. It concluded that the charges brought could have been expanded to cover violations of common article 3 as domesticated under the Nigerian Geneva Conventions Act 1960 or trying war crimes and crimes against humanity through customary internal law or trying elements captured in domestic penal law. Another critical finding was the use and willing acceptance of other non-judicial measures to address the violations through the employment of DRR mechanisms. Furthermore, it was concluded that there is a preponderance of evidence to the effect that Nigeria has failed in its responsibility to try international crimes and violations of international crimes despite having the requisite tools.

Lastly, this thesis rested its argumentation by proposing in Chapter 5 that the Nigerian justice sector should accept the frame of NIAC and attendant consequences and adopt a victim and survivor centred approach to justice by applying transitional justice mechanisms. It critiques the adoption of DRR tools as a means of providing redress and notes that this does not address victim's quest for retribution and rehabilitation. This chapter found that a combination of transitional justice measures of truth and reconciliation commissions and prosecutions may address the needs of victims. Critical was also the finding that in applying the frame of NIAC, there would be an expansion of offences and laws under which perpetrators may be charged to include violations of International Humanitarian Law to address fair labelling concerns and fully describing the harm done to victims. An example of how this could theoretically be presented was illustrated in a model indictment sheet. It concludes that although TRCs have a poor track record in Nigeria, lessons can be learned from experience and utilised to improve its efficacy. To support the effectiveness of these advanced solutions, this chapter argued that the administrative creation of a specialised court within the Federal High Court would aid prosecutions, the domestication of critical international instruments such as Additional Protocol II and the Rome Statute establishing the International Criminal Court as well as the

establishment of a legal/ administrative framework for complementary use of truth commissions and prosecutorial process.

In addition to its contribution to existing literature on several themes, this thesis highlights future research paths such as the application of local justice tools as used in Rwanda and Uganda to support the prosecutorial process as a localised form of truth telling as well as the use of first hand victim accounts to shape tailor made transitional justice responses in Nigeria. It is only by taking such an approach that the full extent of the violence in North East Nigeria may be truly captured and meaningful remedies for victims/survivors developed.

Bibliography

Books

Abi-Saab R., *Droit Humanitaire et conflicts internes: origines et évolution de International Law Paris 1986 Final Record of the Diplomatic Conference of Geneva 1949* (Berne, 1951) Vol 2-B

Austin J., *The Province of Jurisprudence Determined* (Weidenfeld & Nicolson, 1955)

Barnett M. and Finnemore M., *Rules for the World: international organizations in global politics* (Cornell University Press, 2014)

Baty T. and Morgan J. H., *War: Its Conduct and Legal Results* (John Murray, 1915)

Bellal A.(ed), *The War Report. Armed Conflicts in 2014* (Oxford University Press, 2015)

Bellal A. (ed), *The War Report. Armed Conflicts in 2016* (The Geneva Academy of International Humanitarian Law and Human Rights, 2017)

Bothe M., et al, *New Rules for Victims of Armed Conflict: Commentary on the two 1977 protocols additional to the Geneva Conventions of 1949* (Martinus Nijhoff Publishers, 1982)

Bouchat C. J., *The Causes of Instability in Nigeria and Implications for the United States* (Strategic Studies Institute and U.S. Army War College Press, 2013)

Brammertz S. and Jarvis M., *Prosecuting Conflict- Related Sexual Violence at the ICTY* (OUP, 2016)

Brunnée J and Toope S, *Legitimacy and Legality in International Law: An Interactional Account*, (Cambridge University Press, 2010)

Bukarti A.B. and Bryson R., *Dealing with Boko Haram Defectors in the Lake Chad Basin: Lessons from Nigeria* (Tony Blair Institute for Global Change, 2019)

Burton J., *Conflict Resolution and Prevention* (St. Martins Press, 1990)

Campbell J., *US Policy to Counter Nigeria's Boko Haram* (Council on Foreign Relations, Centre for Preventive Action, 2014) Special Report No. 70

Cassese A. and Gaeta P., *International Criminal Law*, (3rd ed, Oxford University Press, 2013)

Comolli V., *Boko Haram: Nigeria's Islamist Insurgency (Hurst 2015)*

Cryer R. et al, *An Introduction to International Criminal Law and Procedure* (3rd ed, OUP, 2018)

Cryer R. et al, *Research Methodologies in EU and International Law* (Hart Publishing, 2011)

Cullen A., *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press, 2010)

David O. et al, *Boko Haram: The Socio-Economic Drivers* (Springer, 2015)

De Vattel E., *The law of nations,* (Newbery, Richardson, Crowder, Caslon, Longman, Law, Fuller, Coote and Kearsly, 1760)

Dinstein Y., *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 2004)

Drumbl M. A., *Atrocity, Punishment, and International Law* (Cambridge University Press, 2009)

Felbab-Brown V. et al, *The limits of punishment transitional justice and violent extremism* (United Nations University and Institute for Integrated Transitions, 2018)

Falola T., *Colonialism and Violence in Nigeria* (Indiana University Press, 2009)

Greenberg Research, *People on War: Country Report Nigeria* (ICRC, 1999)

Grotius H. and Loomis L. R., *The Law of War and Peace (de Jure Belli Ac Pacis)* (Classics Club by Walter J. Black, 1949)

Habermas J., *The Theory of Communicative Action: Reason and the Rationalization of Society* (Beacon Press, 1984)

Hart H. L. A., *The Concept of Law* (Clarendon Press, 1961).

Henckaerts J. M. and Doswald-Beck L., *Customary International Humanitarian Law, Volume I: Rules*, Ed. (Cambridge University Press, 2009)

Henckaerts JM. and Doswald-Beck L. (ed.), *Customary International Humanitarian Law, Volume II: Practice Part 1* (Cambridge University Press, 2009)

ICRC, *International Humanitarian Law: Answers to your Questions* (ICRC, 2015)

ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to protection in armed conflict on the 70th Anniversary of the Geneva Conventions* (ICRC, October 2019).

ICRC Advisory Service on International Humanitarian Law, *Preventing and Repressing International Crimes: Towards an "Integrated" Approach Based on Domestic Practice* (ICRC, 2014)

Integrated Disarmament, Demobilisation and Reintegration, *Module 2.10 The UN Approach to DDR* (United Nations, 2006)

International Commission of Jurists, *International Law and the Fight Against Impunity: A Practitioners Guide No.7* (International Commission of Jurists, 2015)

Junod S.S., *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of Non-International Armed Conflict (Protocol II)* (1987)

Keck M. E. and Sikkink K., *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998)

Kelsall T., *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (CUP, 2009)

Kelsen H., *General Theory of Law and State* (Wedberg trans., 1945)

Kelsen H., *What is Justice?: Justice, Law and Politics in the Mirror of Science: Collected Essays* (University of California Press, 1957)

Klamberg M.(ed.), *Commentary on the Law of the International Criminal Court* (FICHL Publication Series No. 29, 2017)

Kratochwil F., *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, 1989)

La Haye E., *War Crimes in Non-international armed conflicts* (CUP, 2015)

Lauterpacht H., *Recognition in international law* (Cambridge University Press, 1947)

Melzer N., *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016)

Meron T., *Human Rights and Humanitarian Norms as Customary law* (OUP, 1989)

Moir L., *The Law of Internal Armed Conflict* (CUP, 2002)

Nnoli O., *Ethnic Politics in Nigeria*. (Fourth Dimension Press, 1980)

O'Neill M., *The Evolving EU Counter-Terrorism Legal Framework* (Routledge, 2011)

Ohlin J. D. (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP, 2014)

Onuf N., *Making sense, making worlds: Constructivism in social theory and international relations* (Routledge, 2012)

Persson H., *Nigeria- An overview of challenges to peace and security* (Sweden Ministry of Defence (FOI), 2014)

Pictet J., *Commentary on the Geneva Conventions of 12 August 1949: Vol.1* (ICRC, 1952)

Pictet J*., Commentary on the Geneva Conventions of 12 August 1949: Vol. 2* (ICRC, 1960)

Raz J., *The Authority of Law* (Clarendon Press, 1979)

REDRESS, *Rehabilitation as a Form of Reparation under International Law* (REDRESS, 2009)

Reus- Smit C., *The Politics of International Law* (Cambridge University Press, 2004)

Saul B., *Defining Terrorism in International Law* (Oxford University Press, 2008)

Schindler D. and Toman J. I. (eds.), *The Laws of Armed Conflicts. A Collection of Conventions, Resolutions and Other Documents*, (3rd edn, Institute Henry-Dunant, 1988)

Shaw M., *International law* (6th edition, CUP, 2008)

Sinclair A., *International Relation Theory and International Law: A critical approach* (Cambridge University Press, 2010)

Sivakumaran S., *The Law of Non-International Armed Conflict* (Oxford University Press, 2012)

Solis G. D., *The Law of Armed Conflict: International Humanitarian Law in War* (CUP, 2010)

Taft P. and Haken N., *Violence in Nigeria* (Springer, 2015)

The Commonwealth, *International Humanitarian Law and International Criminal Justice: An Introductory Handbook* (Commonwealth Secretariat, 2014)

Trust Africa, *Domestic Prosecution of International Crimes: Lessons for Kenya* (KPTJ, 2015)

UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP, 2004)

Vibhute K. V. and Aynalem F., *Legal Research Methods* (Justice and Legal System Research Institute, 2009)

Walgrave L*., Restorative justice, self-interest, and responsible citizenship* (Willan Publishing, 2008).

Zenn J. et al, *Boko Haram Beyond the Headlines: Analysis of Africa's Enduring Insurgency* (Combatting Terrorism Centre at West Point, 2018)

Book Chapters

Baxter R. R., "Ius in Bello Interno: The Present and Future Law'" in Moore J.N.(ed.), *Law and Civil War in the Modern World* (Johns Hopkins University Press, 1974)

Bix B. H., "Legal Positivism" in Golding M. P. and Edmundson W. A., *The Blackwell Guide to the Philosophy of Law and Legal Theory* (John Wiley, 2008)

Brunnee J. and Toope S. J., "Constructivism and International Law" in Dunoff J. L. and Pollack M. A., *Interdisciplinary Perspectives on International Law and International Relations* (CUP, 2012)

Coleman J.L. and Leiter B., "Legal Positivism" in Patterson D., *A Companion to Philosophy of Law and Legal Theory* (2nd ed., Wiley-Blackwell, 2010)

Debarre A. S., "Countering Terrorism and Violent Extremism: The Risks for Humanitarian Action" in Tschudin A. et al, *Extremisms in Africa Volume 2* (Tracy McDonald Publishers, 2019)

Duff A., "Authority and Responsibility in International Criminal Law" in Besson S. and Tasioulas J. (eds) *The Philosophy of International Law* (Oxford University Press, 2010)

Felbab-Brown V., "Nigeria case study" in Felbab-Brown V. et al (eds.), *The Limits of Punishment: Transitional Justice and Violent Extremism* (United Nations University and Institute for Integrated Transitions, 2018)

Ferraro T., "Interaction and Overlap between counter-terrorism legislation and International Humanitarian Law" in Proceedings of the Bruges Colloquium on Terrorism, Counter-Terrorism and International Humanitarian Law, 17th Bruges Colloquium 20-21 October 2016

Ferraro T., "The Geographic Reach of IHL: The Law and Current Challenges" in Proceedings of the Bruges Colloquium on Scope of Application of International Humanitarian Law, 13th Bruges Colloquium 18-19 October 2012

Folami O. M., "Prosecution that Never Began: An Exploration of Acceptance of International Criminal Justice in Nigeria" in Buckley-Zistel S. et al (eds.) *After Nuremberg. Exploring Multiple Dimensions of the Acceptance of International Criminal Justic*e (International Nuremberg Principles Academy, 2017)

Gasser H. P., "International Humanitarian Law: An Introduction" in Haug H. (ed.), *Humanity for All: The International Red Cross and Red Crescent Movement* (Paul Haupt Publishers, 1991)

Ginkel B. V., "Combating Terrorism: Proposals for Improving the International Legal Framework" in Cassese A. (ed). *Realizing Utopia: The Future of International Law* (Oxford University Press, 2008)

Hampson F., "The Conduct of Hostilities versus the Law Enforcement Paradigm" in Proceedings of the Bruges Colloquium on Terrorism, Counter-Terrorism and International Humanitarian Law, 17th Bruges Colloquium 20-21 October 2016

Herczeg G., "Protocol Additional to the Geneva Conventions on the Protection of Victims of Non-International Armed Conflicts" in Haraszti G. (ed.), *Questions of International Law* (Springer, 1981)

Herman J. et al, "Beyond justice versus peace: transitional justice and peacebuilding strategies" in Aggestam K. & Björkdahl A. (eds.), *Rethinking Peacebuilding: The Quest for Just Peace in the Middle East and the Western Balkans* (Routledge, 2014)

Krähenmann S., "Legal Framework Addressing Terrorism and Counter-Terrorism" in Proceedings of the Bruges Colloquium on Terrorism, Counter-Terrorism and International Humanitarian Law, 17th Bruges Colloquium 20-21 October 2016

Luard E. D. T., "Civil Conflicts in Modern International Relations" in Luard E. D. T. (ed.), *The International Regulation of Civil Wars* (New York University Press, 1972)

Milanovic M., “Extraterritorial Derogations from Human Rights Treaties in Armed Conflict” in Bhuta N. (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges, Collected Courses of the Academy of European Law* (Oxford University Press, 2014)

Milanovic M., “Norm Conflict, International Humanitarian Law and Human Rights Law” in Ben-Naftali O.(ed.), *International Humanitarian Law and International Human Rights Law* (OUP, 2011)

Milanovic M., “The Lost origins of Lex specialist: Rethinking the relationship between Human rights and International Humanitarian law” in Ohlin J. D. (ed) *Theoretical boundaries of armed conflict and human rights* (Cambridge University Press, 2016)

Olugbuo B., “Acceptance of International Criminal Justice in Nigeria: Legal Compliance, Myth or Reality?” in Buckley-Zistel S. et al (eds.), *After Nuremberg. Exploring Multiple Dimensions of the Acceptance of International Criminal Justice* (International Nuremberg Principles Academy, 2016)

Olugbuo B. C., “Nigeria and the International Criminal Court: Challenges and Opportunities” in van der Merwe B., *International Criminal Justice in Africa: Challenges and Opportunities* (Konrad Adenauer Stiftung, 2014)

Pedrazzi M., “Additional Protocol II and threshold of application” in Pocar F. and Beruto G. L., *The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives: 40th Roundtable on Current Issues of IHL* (Sanremo 7 – 9 Sept 2017) (International Institute of Humanitarian Law, 2018)

Sassoli M., “Legal Qualification of the Fight against Terrorism” in Proceedings of the Bruges Colloquium on Terrorism, Counter-Terrorism and International Humanitarian Law, 17th Bruges Colloquium 20-21 October 2016

Saul B., “Terrorism and International Humanitarian Law” in Saul B. and Elgar E., *Research Handbook on International Law and Terrorism*, (2014) Sydney Law School Research Paper No. 14/16 208

Van der Merwe H., “What survivors say about justice: An analysis of the TRC Victim Hearings” in Chapman A. and van der Merwe H. (eds) *Truth and Reconciliation in South Africa: Did the TRC Deliver?* (University of Pennsylvania Publishers, 2008)

Venturini G., “From International to Non-International Armed Conflicts: IHL and the changing realities in the nature of armed conflicts”, 42nd Roundtable on Current Issues of International Humanitarian Law on the 70th Anniversary of the Geneva Conventions, 4-6 September 2019

Journals

Abah O. S. et al, “Participatory Theatre and Video: Acting Against Violence in Northern Nigeria” (2009) 40(3) *IDS Bulletin* 19

Ahmad W. and Ali M. A., “Aspects of Justice” (2011) 72(1) *Indian Journal of Political Science* 309

Alexander A., “A short history of International Humanitarian Law” (2015) 26(1) *EJIL* 109

Alford R. P., “The Nobel Effect”: Nobel Peace Prize Laureates as International Norm Entrepreneurs” (2008) 49 *VA. J of Int’l L*. 61

Alubo A. O. and Piwuna M., “Observance of Human Rights and International Humanitarian Law by Nigeria Armed Forces in Internal Security Operations” (2015) 5(9) *International Journal of Humanities and Social Science* 141

Amann D. M., “Group Mentality, Expressivism, and Genocide” (2002) 2 *Int'l Crim. L. Rev.* 93

Amaraegby D. A., “Violence, terrorism and security threat in Nigeria’s Niger Delta: An old problem taking a new dimension” *Africa Journal of Political Science and International Relations*

Ambos K. et al, “Some Reflections on the Legal Treatment of Terrorism: Marking the 11th Seminar of the Latin American Study Group on International Criminal Law” *EJIL Talk,* 2 Dec 2014

Amir R., “Transitional Justice Accountability and Memorialisation: The Yemeni Children Affair and the Indian Residential Schools” (2014) *47 Isr L Rev* 3

Armed Conflict Location & Event Data Project, “Real-Time Analysis of African Political Violence” (2017) 55 *Conflict Trends* http://www.acleddata.com/wp-content/uploads/2017/02/ACLED_Conflict-Trends-Report-No.55-February-2017_pdf..pdf accessed 3 October 2018

Asiedu M., “Boko Haram and the African Union’s Attitude towards Terrorism” (2019) *Global Political Trends Centre*

Azoro C. J. S., “The Place of Customary International Law in the Nigerian Legal System – A Jurisprudential Perspective” (2014) 1(3) *International Journal of Research*

Bassiouni M. C., “Justice and Peace: The Importance of Choosing Accountability over Realpolitik” (2003) 35 *Case W Res J Int'l L* 191

Bassiouni M. C., “Searching for Peace and Achieving Justice: The need for accountability” (1996) 59(4) *Law and Contemporary problems* 10

Bederman D. J., “Constructivism, Positivism, and Empiricism in International Law” (2001) *89 Geo LJ* 469

Bekou O., “Crimes at Crossroads: Incorporating International Crimes at the National Level” (2012) 10 *J Int'l Crim Just* 677

Bellal A. et al. “International law and armed non-state actors in Afghanistan” (2011) 93 (881) *IRRC* 47

Bellal A. and Heffes E., “‘Yes, I Do’: Binding Armed Non-State Actors to IHL and Human Rights Norms Through Their Consent” (2018) 12 *HR & ILD* 1

Blum G., “Re-envisaging the international law of internal armed conflict: a reply to Sandesh Sivakumaran” (2011) 22(1) *E.J.I.L.* 265

Bothe M., 2Article 2 and Protocol II: case studies of Nigeria and El Salvador” (1982) 31 *American University Law Review* 904

Bottoms A. and Tankebe J., “Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice” (2013) 102 *J. Crim. L. & Criminology* 119

Braithwaite J., “Restorative Justice: Assessing Optimistic and Pessimistic Accounts” (1999) 25 *Crime & Just*. 1

Brechenmacher, S., “Achieving Peace in Northeast Nigeria: The Reintegration Challenge” *Carnegie Endowment*, 5 September 2018.

Brechenmacher S., “Stabilising Northeast Nigeria after Boko Haram”, *Carnegie Endowment for International Peace Working Paper* May 2019

Brill, “Popular discourses on Salafi Radicalism and Salafi Counter-Radicalism in Nigeria: A Case Study of Boko Haram” (2012) 42 (2) *Journal of Religion in Africa* 118

Brubacher M. et al, “The AU Task Forces: an African response to transnational armed groups” (2017) 55(2) *J. of Modern African Studies* 275

Brunnee J. and Toope S. J., “International Law and Constructivism: Elements of an Interactional Theory of International Law” (2000) 39 *Colum J Transnat'l L* 19

Brunnée J., “A Constructivist Theory of International Law?” *EJIL Talk* 23 September 2015

Bryne M., “Consent and the use of force: an examination of ‘intervention by invitation’ as a basis for US drone strikes in Pakistan, Somalia and Yemen” (2016) 3(1) *Journal on the use of force and international law*

Bukar M. I., “Assessing the effectiveness of enforcing international humanitarian law in Nigeria: the case study of Boko Haram” (2017) 22(1) *Cov. L.J.* 28

Bukarti A. B., “Making Peace with Enemies: Nigeria’s Reintegration of Boko Haram Fighters”, *The National Security Review: War on the Rocks*, 27 March 2019

Campbell J., “Boko Haram: Origins, Challenges and Responses”, *NOREF, Norwegian Peacebuilding Resource Centre Police Brief* Oct 2014

Carlson K. B., “International Criminal Law and Its Paradoxes: Implications for Institutions and Practice” (2017) Spring *Journal of Law and Courts* 33

Cassel D., “The ICC's New Legal Landscape: The Need to Expand U.S. Domestic Jurisdiction to Prosecute Genocide, War Crimes and Crimes Against Humanity” (1999) 23 *Fordham Int'l L.J.* 378

Cassese A., “Reflections on International Criminal Justice” (1998) 61(1) *The Modern Law Review*

Cassese A., “Status of rebels under 1977 Additional Protocols” (1981) 30 *ICLQ* 416

Chalmers J. and Leverick F., “Fair Labelling in Criminal Law” (2008) 71(2) *MLR* 217

Charney J. I., “International Criminal Law and the Role of Domestic Courts” (2001) 95(1) *The American Journal of International Law* 120

Chidi I., “Nigeria’s Religious and Cultural Conflict” (2000)

Clark J. N., “The Limits of Retributive Justice” (2009) 7 *J Int'l Crim Just* 463

Cryer, R., “International Criminal Law vs State Sovereignty: Another Round?” (2005) 16(5) *E.J.I.L.* 979

Dersso S. A., “The Somalia Conflict Implications for peacemaking and peacekeeping efforts” (2009) *ISS Paper* 198

Desgrandchamps ML., “Organising the unpredictable: the Nigeria-Biafra War and its impact on the ICRC” (2012) 94(888) *IRRC* 1409

Dill J. and Rosenberg B., “Law, Legitimacy and Morality of Warfare: A conversation about legitimate targets?” *OXPOL*, July 19, 2015

Dinokopila B. R., “The Prosecution and Punishment of International Crimes in Botswana” (2009) 7 *J Int'l Crim Just* 1077

Ejeh E. U., “Nature of Terrorism and Anti-Terrorism Laws in Nigeria” (2019) 10(1) *NAUJILJ* 186

Eke S. J., “No pay, no peace: Political settlement and post-amnesty violence in the Niger Delta” (2015) 50 (6) *Journal of Asian and African Studies* 750

Elder D. A., “The Historical Background of Common Article 3 of the Geneva Convention of 1949” (1979) 11 *Case W Res JIL* 37

Evenson E. M., “Truth and Justice in Sierra Leone: Coordination between Commission and Court” (2004) 104(3) *Columbia Law Review* 730

Eyre D., “Nigeria: the ICC’s Next Challenge in Africa?” *Justice in Conflict*, 3 March 2017

Ferdinandusse W., “The Prosecution of Grave Breaches in National Courts” (2009) 7 *Journal of International Criminal Justice* 723

Fichtelberg A., “Crimes beyond Justice - Retributivism and War Crimes” (2005) 24 *Crim Just Ethics* 31

Finnemore M. and Sikkink K., “International Norm Dynamics and Political Change” (1998) 52(4) *International Organisation (International Organisation at Fifty: Exploration and Contestation in the Study of World Politics)* 887

Forster T., “International humanitarian law’s old questions and new perspectives: On what law has to do with armed conflicts” (2016) 98(3) *IRRC* 995

Fox G., “Security Council Resolutions as Evidence of Customary International Law” *EJIL Talk*, 1 March 2018

Fox G. H. et al, “The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law” (2018) 67 American *University Law Review* 649

Freeman M., “Transitional Justice: Fundamental Goals and Unavoidable Complications” (2000) 28 *Man LJ* 113

Fry J. D., “The UN Security Council and the law of Armed Conflict: Amity or Enmity” (2006) 38 *Geo Wash Int'l L Rev* 327

Gasser H. P., “Acts of terror, terrorism, International Humanitarian Law” (2002) 84 (847) *IRRC*

Gasser H. P., “International Humanitarian Law, the Prohibition of Terrorist Acts and the Fight against Terrorism” (2001) 4 *Yearbook of International Humanitarian Law* 329

Geib R., “Asymmetric conflict structures” (2006) 88(864) *IRRC* 757

Goble P., “Back to Biafra? Defending Borders and Human Rights in Post-Cold War Environment” (1994) 18(5) *Fordham Int’l LJ* 1679

Graditzky T., “Individual Criminal Responsibility for violations of International Humanitarian Law committed in Non-International Armed Conflicts” (1998) No. 322 *IRRC*

Greenawalt A.K.A., “International Criminal Law for Retributivists” (2014) 35 *U Pa J Int'l L* 969

Guillaume G., “Terrorism and International Law” (2004) 53 (July) *ICLQ* 537

Hafetz J., “Diminishing the value of war crimes prosecutions: a view of the Guantanamo military commissions from the perspective of International Criminal Law” 2(4) (2013) *C.J.I.C.L.* 800

Hampson F. and Murray D., “ESIL- International Human Rights Law Symposium: Operationalising the relationship between the law of armed conflict and international human rights law”, *EJIL: Talk!* 11 February 2016

Hassan I., “What is Justice? Exploring the need for accountability in the Boko Haram Insurgency”, *Harvard Human Rights Journal (HHRJ)* 27 December 2017

Hassan I. and Olugbuo B., “The Justice versus Reconciliation Dichotomy in the Struggle Against Gross Human Rights Violations: The Nigerian Experience” (2015) XL (2) *Africa Development* 123

Hassan I. and Olugbuo B., “Winning the war, and not just the battle, Masterplan for ending the Boko Haram insurgency in the North East”, Proposed by the Centre for Democracy and Development to the FGN, August 2015

Higazi A., “The Jos Crisis: A Recurrent Nigerian Tragedy” (2011) *Friedrich Ebert Stiftung Discussion Paper No.2*

Hill-Cawthorne L., “Humanitarian law, human rights law and the bifurcation of armed conflict” (2015) 64(2) *I.C.L.Q.* 293

Hillyard P., “Irish People and the British Criminal Justice System” (1994) 21(1) *Journal of Law and Society, The Royal Commission on Criminal Justice* 39

Hoyle C. and Ullrich L., “New Court, New Justice - The Evolution of Justice for Victims at Domestic Courts and at the International Criminal Court” (2014) 12 *J Int'l Crim Just* 681

Human Rights Centre and the International Human Rights Law Clinic, “Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors” (2000) *18 Berkeley J Int'l L* 102

ICC Rome Statute, “International justice and the rule of law: strengthening the ICC through domestic prosecutions” (2009) 1(1) *H.J.R.L.* 79

ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993

ICRC, “Fundamentals of IHL”, Chapter C, 26 March 2012

Idemudia U. and Ite, U., “Demystifying the Niger Delta Conflict: Towards an Integrated explanation” (2006) 33(109) Review *of African Political Economy* 391

Ike T. J., “Reconceptualising the Role of Law in Countering Terrorism: A Case Study of Boko Haram in Nigeria” (2018) 6(1) *Journal of Law and Criminal Justice* 107

Ip J., “The Supreme Court and House of Lords in the War on Terror: *Inter Arma Silent Leges?”* (2010) 19(1) *Michigan State Journal of International Law 1*

James-Eluyode J., “Enforcement of international humanitarian law in Nigeria” (2003) 3(2) *A.H.R.L.J.* 264

Junod S., “Additional Protocol II: History and Scope” (1983) 33 *Am U L Rev* 29

Kailemia M., “International Justice in the time of ‘outsourced illberalism’: Africa and the ICC” (2016) 3(1) *Journal of Global Faultlines* 16

Kamatali J., “The Application of International Human Rights Law in Non-International Armed Conflicts” (2013) 4 *J Int'l Human Legal Stud* 220

Kapur A., “The rise of international criminal law: intended and unintended consequences: a reply to Ken Anderson” (2009) 20(4) *E.J.I.L* 1031

Kaye D. A., “Justice Beyond the Hague: Supporting the Prosecution of International Crimes in National Courts”, *Council on Foreign Relations Council Special Report No.* 61 June 2011

Kilgore K. E., “Geneva Convention Signatories Clarify Applicability of Laws of War to Non-international armed conflict” (1978) *8 Ga JICL* 941

Kingah S., “Legal Treatment of Boko Haram militants captured by Cameroon” (2018) 26(1) *African Journal of International and Comparative Law* 44

Kirk-Greene A. H. M., “The Genesis of the Nigerian Civil War and the Theory of Fear” (1975) Research report No 27, *Scandinavian Institute of African Studies*

Kirkby C., “Rwanda’s gacaca courts: a preliminary critique” (2006) 50(2) *J.A.L* 94

Kleffner J., “The applicability of international humanitarian law to organised armed groups” (2011) 93(882) *IRRC* 443

Lakes D. A. and Rothschild D., "Containing fear: The Origins and Management of Ethnic Conflict" (1996) 21(2) *International Security* 41

Koskenniemi M., “Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law”, Report of the study group of the International Law Commission, UN General Assembly International Law Commission 58th session A/CN.4/L.682 13 April 2006

Krause J., “A Deadly cycle: Ethno- religious conflict in Jos, Plateau state, Nigeria” (2011) Geneva Declaration Secretariat Working Paper

Lafontaine F., “Canada's Crimes against Humanity and War Crimes Act on Trial” (2010) 8 *J Int'l Crim Just* 269

Lisinski K., “Explaining War: A Comparison of Realism and Constructivism”, *E-International Relations*, 3 May 2012

Ludwin King E. B., “Big Fish, Small Ponds: International Crimes in National Courts”, (2015) 90 *Indiana Law Journal* 829

Mahmood O. S. and Ani N. C., “Responses to Boko Haram in the Lake Chad Region: Policies, Cooperation and Livelihoods”, *Institute for Security Studies Research Report*, July 2018

Maiangwa B., “Revisiting the Nigeria-Biafra war: The intangibles of post-war reconciliation” (2016) 33(4) *International Journal on World Peace* 39

Marmor A., "Legal Positivism: Still Descriptive and Morally Neutral" (2006) 26 *Oxford Journal of Legal Studies*

McAuliffe P., "Hybrid Tribunals at Ten: How International Criminal Justice’s Golden Child Became an Orphan" (2011) 7 *Journal of International Law and International Relations* 1

McCormack T. L. H., “The law of war crimes: national and international approaches” (2000) 4(1) *E. & P. 73*

McInerney-Langford S., “Book Review: Humanitarian Law in Action within Africa” (2015) 64(2) *I.C.L.Q.* 495

McKeever D., “International humanitarian law and counter-terrorism: fundamental values, conflicting obligations” (2020) 69(1) *I.C.L.Q*. 43

McKnight J., “Accountability in northern Uganda: understanding the conflict, the parties and the false dichotomies in international criminal law and transitional justice” (2015) 59(2) *J.A.L.* 193

Mednicoff D. M., “Humane Wars? International Law, Just war Theory and contemporary armed humanitarian intervention” (2006) 2 *Law, Culture and Humanities* 373

Megret F., “The Anxieties of International Criminal Justice” (2016) 29 *LJIL* 197

Megwalu A. and Loizides N., “Dilemmas of justice and reconciliation: Rwandans and the Gacaca courts” (2010) 18(1) *AJICL* 1

Menkel-Meadow C., “Restorative Justice: What is it and Does it Work?” (2007) 3 *Ann. Rev. L. & Soc. Sci*. 161

Milanovic M., “The Genesis of Lex Specialis” *EJIL: Talk* April 30, 2014

Morrow J. D., “When do State Follow the Laws of War?” (2007) 101(3) *The American Political Science Review* 559

Murphy C. I., “The Ethics of Diversity in Transitional Justice” (2018) 16 *Geo JL & Pub Pol'y* 821

Mustapha A. R., “Ethnic Structure, Inequality and Governance of the Public Sector in Nigeria” (2005) *CRISE Working Paper No.18*

Mustapha A. R., “Synthesis Paper on Lessons Learned from Responses to Violent Conflicts in Nigeria Since 2009: With Special Reference to Northern Nigeria” (2014) *Nigeria Stability and Reconciliation Programme*

Muthushani D., “Theories of Law: Natural Law, Legal Positivism, the Morality of Law, Dworkin’s Third Theory of Law, Legal Realism and Critical Legal Studies”. Universita di Trento

Nigerian Research Network, “A Decade of Fear & Violence: Ethno-religious Conflicts on the Jos Plateau, Nigeria” (2013) *University of Oxford Policy Brief* No.3

Njioku C. I., “A Paradox of International Criminal Justice: The Biafra Genocide” (2013) 48(6) *Journal of Asian and African Studies* 710

Nwogugu E. I. V., “The Nigerian Civil War: A Case Study in the Law of War” (1974) 14 *Indian journal of international law* 13

O’Donnell D., “International Treaties Against Terrorism and the Use of Terrorism during armed conflict and by armed forces” (2006) 88 (864) *IRRC* 853

Öberg M. D., “The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ” (2006) 16(5) *EJIL* 879

Ogbimi F. E., “Structural Adjustment is the Wrong Policy” (2001) 8(1) *African Technology Forum, Massachusetts Institute of Technology*

Ogbugu J. C., “Nigeria’s Approach to Terrorist Rehabilitation” (2016) 8(4) *Counter Terrorist Trends and Analyses* 16

Oji E. A., “Application of Customary International Law in Nigerian Courts” (2010) *NIALS Law and Development Journal* 165

Ojukwu C. C. and Onifade C. A., “Social capital, indigeneity and identity politics: The Jos crisis in perspective” (2010) 4(5) *African Journal of Political Science and International Relations* 173

Okoli A. et al, “Terrorism and Humanitarian Crisis in Nigeria” (2014) XIV(1) *Global Journals of Human Social Science* 39

Okuta A., “National Legislation for Prosecution of International Crimes in Kenya” (2009) 7 *J Int'l Crim Just* 1063

Oladipo T. D., “Social Welfare and the Niger Delta Conflict” (2017) 7(11) *International Journal of Humanities and Social Science* 181

Omolaye-Ajileye A., “Legal Framework for the Prevention of Terrorism in Nigeria” [2015] 11 *National Judicial Institute Law Journal* 19

Onapajo H. and Ozden K., “Non-military approach against terrorism in Nigeria: deradicalisation strategies and challenges in countering Boko Haram” *Security Journal* 17 February 2020

Onuf N., “Making Terror/ism” (2009) 23(1) *International Relations* 53

Orakhelashvili A., “The interaction between human rights and humanitarian law: fragmentation, conflict, parallelism, or convergence?” (2008) 19(1) *E.J.I.L.* 161

Osaghae E. E. and Suberu R. T.; “A History of Identities, Violence and Stability in Nigeria” (2005) *CRISE Working Paper* No.6

Oyewole S., “Boko Haram and the challenges of Nigeria's war on terror” (2013) 29(3) *Defense & Security Analysis* 253

Pejic J., “The protective scope of Common Article 3: more than meets the eye” (2011) 93(881) *IRRC* 1

Pérouse de Montclos MA., “Humanitarian Aid and the Biafra War: Lessons not Learned” (2009) 34(1) *Africa Developmen*t 69

Pham J. P., “Boko Haram’s Evolving Threat”, *Africa Security Brief No. 20*, April 2012

Policinski E., “Terrorism, Counter-Terrorism and International Humanitarian Law: Primer on a recurring conversation” *ICRC Humanitarian and Policy Blog* November 2, 2016

Poulson B., “A third voice: a review of empirical research on the psychological outcomes of restorative justice” (2003) *Utah Law Rev.* 167

Raleigh C., Linke A., Hegre H. and Karlsen J. (2010). “Introducing ACLED-Armed Conflict Location and Event Data.” 2017 47(5) *Journal of Peace Research* 651; ACLED. (2017). “Armed Conflict Location & Event Data Project (ACLED) Codebook, 2017

Rasiah N., “The Court-martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice” (2009) 7 *Journal of International Criminal Justice (JICJ)* 177

Raz J., “Authority, Law and Morality” (1985) 68 *The Monist* 295

Reiter A. G., “Examining the Use of Amnesties and Pardons as a Response to Internal Armed Conflict” (2014) *47 Isr L Rev* 133

Rice C. E., “Some Reasons for a Restoration of Natural Law Jurisprudence” (1989) 24 *Wake Forest L. Rev.* 539

Roberts A., “Comparative international law? The role of national courts in international law” (2011) 60(1) *I.C.L.Q.* 57

Rodenhauser T., “Human Rights Obligations of Non-State Armed Groups in Other Situations of Violence: The Syria Example” (2012) 3 *International Humanitarian Legal Studies* 263

Rojo E. C., “National Legislation Providing for the Prosecution and Punishment of International Crimes in Spain” (2011) 9 *J Int'l Crim Just* 699

Rona G., “Interesting Times for International Humanitarian Law: Challenges from the ‘War on Terror’” (2003) 27(2) *the Fletcher Forum of World Affairs* 55

Ruggie J. G., “What makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge” (1998) 52(4) *International Organisation* 855

Sacouto S. and Cleary K., “The Katanga complementarity decisions: sound law but flawed policy” (2010) 23(2) *L.J.I.L.* 363

Sagan A., “African Criminals/African Victims: The Institutionalised Production of Cultural Narratives in International Criminal Law” (2010) 39(1) *Journal of International Studies* 3

Samuel O., “The International Criminal Court as a Political Tool”, KEDISA Research Paper No. 9

Sassoli M., “Terrorism and War” (2006) 4 *J Int'l Crim Just* 959

Saul B., “Definition of ‘Terrorism’ in the UN Security Council: 1985-2004” (2005) 4(1) *Chinese Journal of International Law* 141

Saulawa M. A. and Karumi B., “Terrorism in Nigeria: An Overview of Terrorism (Prevention) Act 2013” (2015) 8(4) *International Journal of Business, Economics and Law* 8

Schmitt M., “Counter-Terrorism and the Use of Force in International Law” (2003) 79 *International Law Studies Journal* 7

Shola O. J., “Globalisation of Terrorism: A Case Study of Boko Haram in Nigeria” (2015) 6(1) *International Journal of Politics and Good Governance* 1

Sivakumaran S., “Re-envisaging the International Law of Internal Armed Conflict” (2011) 22(1) *E.J.I.L* 219

Snyder J. and Vinjamuri L., “Trials and Errors: Principle and Pragmatism in Strategies of International Justice” (2003/2004) 28(3) *International Security* 5

Stanford, “Legal Positivism”, 17 December 2019. Available at: https://plato.stanford.edu/entries/legal-positivism/

Stanley W. R., “Socioeconomic Impact of Oil in Nigeria” (1990) 22(1) *GeoJournal* 67

Steiner E., “Prosecuting war criminals in England and in France” (1991) *Mar. Crim. L.R.* 180

Stromseth J. E., “Justice on the Ground? International Criminal Courts and Domestic Rule of Law Building in Conflict-Affected Societies” (2011) 50 *Getting to the Rule of Law* 169

Stuurman Z., “Terrorism as Controversy: The Shifting Definition of Terrorism in State Politics”, *E-International Relations*, 24 September 2019

Sveaass N., “Gross human rights violations and reparation under international law: approaching rehabilitation as a form of reparation” (2013) 4 *European Journal of Psychotraumatology* 1

Tallgren I., “The sensibility and sense of international criminal law” (2002) 13(3) *EJIL* 561

Talton B., “African resistance to colonial rule”, *African Age*

Teitel R. G., “Transitional Justice Genealogy” (2003) 16 *Harv Hum Rts J* 69

Totaro M. V., “Legal Positivism, Constructivism, and International Human Rights Law: The Case of Participatory Development” (2008) 48 *Va J Int'l L* 719

Trapp K., “Ukraine v Russia (Provisional Measures): State ‘Terrorism’ and IHL”, *EJIL Talk* 2 May 2017

Turk D., “The Role of the UN Security Council in Preventing Internal Conflicts” (2001) 8(1) *International Journal on Minority and Group Rights* 71

Ukah M., “Structural Adjustment Programme and its Negative Effect on Education in Nigeria: A philosophical reconceptualisation” (2014) 2(2) *International Journal of Public Administration and Management Research* 170

Umozurike U. O., “The Application of International Humanitarian Law to Civil Conflicts” (1992) 4 *African Journal of International and Comparative Law* 43

Villa-Vicencio C., “The Reek of Cruelty and the Quest for Healing – Where Retributive and Restorative Justice Meet” (1999) 14 *J L & Religion* 165

Vité S., “Typology of armed conflicts in international humanitarian law: legal concepts and actual situations” (2009) 91 (873) *IRCC* 69

Waldorf L., “Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice” (2006) 79 *Temp L Rev* 1

Ward T. et al, “Restorative justice, offender rehabilitation and desistance” (2014) 2(1) *Restorative Justice* 24

Wendt A., “Collective Identity Formation and the International State” 1994) 88(2) *The American Political Science Review* 384

Wilson P., “The myth of international humanitarian law” (2017) 3 *International Affairs* 563

Yusuf H. O., “Calling the Judiciary to Account for the Past: Transitional Justice and Judicial Accountability in Nigeria” (2008) 30 *Law & Pol'y* 194

Zegveld L., “The Inter-American Commission on Human Rights and international humanitarian law: A comment on the Tablada Case” (1998) 324 *IRRC* 505

Zorzetto S., “The Lex Specialis Principle and its Uses in Legal Argumentation: An Analytical Inquire” (2012) 3 *Eunomia, Revisit en Cultura de la Legalidad* 61

(No Author) “Biafra/Nigeria--Assembly of Heads of State and Government *Documents*” (1969) 2(2) N.Y.U. J. Int'l L. & Pol. 398

Articles

Abdulkareem H., “Nigerian soldiers repel 10 Boko Haram attacks in 2 weeks – Theatre Commander”, *Premium Times*, 7 December 2016

Abu-Bashal A., “Nigeria: 600 Boko Haram members released,” *Anadolu Agency* 14 July 2020

Adibe J., “Should Nigeria have released Boko Haram suspects?” *The Conversation*, 20 February 2020

Advisory Service on International Humanitarian Law, “General Principles of International Criminal Law”, *ICRC*, 2014

Ahmed I. and Eckel M., “In the home of peace, a siege of fear- Boko Haram: A VOA Special Report”, *Voice of America*, 2014

Akinkuotu E. and Azubuike C., “601 repentant terrorist graduate, padi N20,000 each”, *Punch Newspaper*, 26 July 2020

Akinyemi D. and Akinrefon D., “Boko Haram has killed 3000- Chief of Army Staff”, *Vanguard Newspaper*, 5 November 2012

Al Jazeera, “Al-Shabab claims deadly attack in Somalia’s Mogadishu”, *Al Jazeera*, 31 December 2019

Al Jazeera, “Somalia: Over a dozen killed in hours-long Mogadishu hotel siege”, *Al Jazeera*, 17 August 2020

Al Jazeera, “Suicide bomber kills at least eight in Somali capital”, *Al Jazeera*, 25 September 2021

All Africa, “Nigeria: Trial of Moh’s Ashafa- the making of another Mohammed Yusuf, Boko Haram Leader”

Audu O., “Boko Haram insurgents in military khaki kill 23, burn scores of houses, vehicles in Borno village”, *Premium Times,* 18 September 2013

Baghen S., “IHL and Counter-Terrorism: Turkey and the PKK”, *Foreign Policy Association*, March 11, 2016

Barise H., “At least 7 killed in suicide bombing in Somalia’s capital”, *AP News*, 28 April 2021

BBC, “Afghanistan profile- Timeline”, 9 September 2019

BBC, “Nigeria Boko Haram militants offered olive branch by army”, *BBC News* 7 April 2016

BBC Africa, “Nigeria's Daily Trust undermined security, army says”, *BBC.com*, 9 January 2019

BBC, “Nigerian Easter bomb kills many in Kaduna”, 9 April 2012

BBC News, “Somalia al-Shabab militants attack Afrik hotel in Mogadishu”, *BBC News*, 1 February 2021.

BBC News, “Somalia profile- Timeline”, 4 January 2018

BBC News, “Who are Somalia’s al-Shabaab?” (2018) Available at: https://www.bbc.com/news/world-africa-15336689 accessed 3 October 2018

Bola- Solarin B., “Thirty Years of the Protocols to the Geneva Conventions: The journey so far”, *The Humanitarian*, June 2007

Botelho G., “Nigerian Presidency declares emergency in 3 states during rebellion”, *CNN*, 14 May 2013

Campbell J., “Suspected Leadership changes to is- Backed Boko Haram faction continue”, 12 March 2019

Campbell J., “Recent Boko Haram attacks along Nigeria-Niger Border”, *Council on Foreign Relations*, 30 Nov 2018

Campbell J. and Harwod A., “Boko Haram’s Deadly Impact”, *Council on Foreign Relations*, 20 August 2018

Centre for Democracy and Development, “Policy Brief: Stakeholders’ Dialogue on Government Approaches to Managing Defecting Violent Extremists”

Centre for Justice & Reconciliation, “Restorative Justice Briefing Paper”, May 2005

Channels TV, “Boko Haram: From Islamic sect to armed threat”, 9 February 2019

Chatham house, “Meeting Summary: Beyond the ICC: The Role of Domestic Courts in Prosecuting International Crimes Committed in Africa”, 30 April 2010

Chivers C. “What's Inside a Taliban Gun Locker?” *NY Times At War Blog*, 15 September 2010

Dhaysane M., “Somalia: Al-Shabaab attacks UN compound in capital”, *Anadolu Agency*, 19 March 2020

Editorial, “Tackle Southern Kaduna Sectarian Killings Resolutely”, *Punch Newspaper*, January 4, 2017

Emetulu K., “Buhari’s Chatham House Charade: Not a statemanlike presentation and not statemanlike exit!” *Sahara Reporters*, 1 March 2015

Fairbairn, A., “Mercy Corps is extremely concerned about on-going closures in North East Nigeria”, Mercy Corps Press Release, 25 October 2019

Geneva Academy (RULAC), “International armed conflict in Ukraine”

Geneva Academy, Rule of Law in Armed Conflicts (RULAC), “Non-International Armed Conflict in Afghanistan”

Geneva Academy, Rule of Law in Armed Conflicts (RULAC), “Non-International Armed Conflict in Nigeria”

Geneva Academy, Rule of Law in Armed Conflicts (RULAC), “Revised Classification of the Armed Conflicts in Afghanistan following US Withdrawal”, 21 September 2021

Guled A., “Somalia bombing kills dozens; airstrikes target militants”, *AP News*, 30 December 2019

Gunaratna R., “The full circle of counterterrorism”, *Council of Councils: Global Perspectives*, 1 September 2021

Gurmendi A., “The Last Recognition of Belligerency (and Some Thoughts on Why You May Not Have Heard of It)”, *Opinion Juris*, 10 December 2019

Hamid S. and Dar R., “Islamism, salafism and Jihadism: A primer”, *Brookings Institute*, 15 July 2016

Ijediogor G, “Military should halt operation safe corridor now”, *The Guardian* 22 February 2020

Irobi E. G., “Ethnic Conflict Management in Africa: A Comparative Case Study of Nigeria and South Africa” (2005) *Beyond Intractability Blog: Constructive Conflict Initiative***.** Accessed on: http://www.beyondintractability.org/casestudy/irobi-ethnic

Jewish Council for Public Affairs, “Resolution on Restorative and Rehabilitative Justice” Adopted by the 2020 JCPA Delegates Assembly.

Kessler G., “Boko Haram: Inside the State Department debate over the ‘terrorist’ label”, *Washington Post*, 19 May 2014

Maiangwa B. and Anyaduba C. A., “Memory practices are not enough to remedy Nigeria-Biafra war injustices,” *The Conversation*, 8 March 2021

Maruf H., “Al-Shabab Mortar Attacks Hits Area Around Mogadishu Airport”, *VOA News*, 13 October 2019

Mohammed A., “Gunmen Kill Borno Attorney-General, Ex-Prison Boss,” *Daily Trust*, 19 September 2012

MSF, “The Practical Guide to Humanitarian Law”. Accessed on: https://guide-humanitarian-law.org/content/article/3/international-armed-conflict-iac/

Mules I. and Al-Amin M., “Boko Haram: Nigeria moves to deradicalize former fighters”, *Deutsche Welle*, 8 August 2019

Mutum R., “Nigeria: Operation Safe Corridor Hands over 86 Boko Haram Fighters to Borno Government”, *Daily Trust*, 7 November 2019

Nextierspd. “Accepting Ex-Boko Haram fighters”, *Nextierspd Daily Analysis*, 1 July 2020

Nozawa J. and Lefas M., “When the Dust Settles Judicial Responses to Terrorism in the Sahel”, *Global Centre on Cooperative Security*, October 2018

Obasanjo O., “Letter of Appeal to President Goodluck Jonathan titled Before it is too late”, 2 Dec 2013

Obiezu K., “Nigerian Army: Rubbing salt on nation’s sore”, *The Nation*, 5 August 2020

Ochonu M., “The roots of Nigeria’s religious and ethnic conflict”, *Global Post* March 10, 2014. Accessed on: http://www.pri.org/stories/2014-03-10/roots-nigerias-religious-and-ethnic-conflict

Odunsi W., “We have developed new strategies to tackle Boko Haram- Army Chief”, *Daily Post*, 6 July 2014

Ogunlami Y., “Boko Haram is sheer propaganda, Islam is a religion of peace”, *Pulse.ng*, 10 January 2015

Ogunleye A. A., “Ending terrorism in Nigeria: is Operation Safe Corridor the right approach?” *Global South Development Magazine*, 21 September 2020

Olidort J., “Does ISIS really follow Salafi version of Islamic law and theology?” *The Washington Institute*, 21 September 2016

Olidort J., “What is Salafism? How a Nonpolitical Ideology became a political force” *Foreign Affairs* 24 November 2015

Olugbode M., “No Extremist Boko Haram Fighter Reintegrated into Society, Says Military”, *Thisday Newspaper*, 22 September 2020

Oluokun A., “5 Suspects arrested over Abuja bombings”, *PM News* 12 May 2014

Oluokun A., “Boko Haram: How Kabiru Sokoto was re-arrested”, *PM News*, 10 February 2014

Omilana T., “Nigeria inflation surges to 33-month high”, *The Guardian*,16 February 2021

Onu E. et al, “Six People Fall into Extreme Poverty in This Nation Every Minute”, *Bloomberg*, 22 February 2019

Osuagwu P. et al, “Why I sacked Azazi- Jonathan”, *Vanguard Newspaper*, 25 June 2012

Owolabi F., “‘Take them to govt house or Aso Rock’ – Borno residents reject ‘reformed’ Boko Haram fighters”, *The Cable*, 24 July 2020

Politics.co.uk, “Prison Rehabilitation” Available on: https://www.politics.co.uk/reference/prison-rehabilitation

Premium Times, “95 ex-Boko Haram fighters set for release – CDS”, 18 January 2018. Available at: https://www.premiumtimesng.com/news/top-news/255973-95-ex-boko-haram-fighters-set-release-cds.html

Premium Times, “Red Cross says 187, not 185, died in Borno village, Baga, during JTF, Boko Haram fight”, 22 April 2013

Reuters, “Nigeria says violence does not threaten Boko Haram talks to free girls”, *Newsweek*, 27 October 2014

Sahara Reporters, “601 Repentant Boko Haram Terrorists Graduate in Gombe, Reintegrated To Communities”, *Sahara Reporters*, 25 July 2020

Sahara Reporters, “Boko Haram Militants Attack Football Viewing Center in Damaturu”, 17 June 2014

Securitycouncilreport.org. (2018). *Security Council Report*. [online] Available at: https://www.securitycouncilreport.org/ [Accessed 27 Sep. 2018].

Shepler S., “Fear and Loathing in Jos, Nigeria”. Accessed on: https://matsutas.wordpress.com/2014/07/14/fear-and-loathing-in-jos-nigeria-by-susan-shepler/

Shuaibu I., “Nigeria: Horror, Anger in Kano as Death Toll Reaches 200”, *Thisday*, 22 January 2012.

Sieff K., “Nigeria war expands as Chad, Niger send troops to fight Boko Haram”, *Washington Post*, 9 March 2015

Soyombo F., “Nigeria’s ‘fake’ ceasefire with Boko Haram”, *Al-Jazeera*, 11 November 2014

Stroehlein A., “On the trail of Boko Haram”, *The Independent*, 12 March 2012

The Guardian, “Boko Haram attacks – timeline”, 25 September 2012

The New Humanitarian, “NGO closure in Nigeria, climate action at the UN, and a $500m cheque for Yemen: The Cheat Sheet”, 27 September 2019

The New Humanitarian, “Nigeria: A History of Conflicts”, 31 March 2003

The New Humanitarian, “Obasanjo declares state of emergency in Plateau State”, 18 May 2004

Toromade S., “'They are innocent,' military says released 'repentant' Boko Haram fighters were forcefully recruited”, *Pulse.ng*, 7 August 2020

Umeh K., “FG set to reintegrate 606 rehabilitated Boko Haram fighters” *The Guardian*, 6 March 2020

Vanguard, “How suicide bombers killed 30 football fans at Borno viewing centre”, 17 June 2019
World Bank, “Nigeria releases new report on poverty and inequality in country”, 28 May 2020. See: https://www.worldbank.org/en/programs/lsms/brief/nigeria-releases-new-report-on-poverty-and-inequality-in-country

Young A., “Nigeria Considers National DRR Agency Amid Boko Haram Setbacks”, *Council for Foreign Relations*, 18 March 2020

Zak B., “Boko Haram Insurgency and How To Curb Future Terrorism In Nigeria”, *Sahara Reporters*, 3 March 2018. Available on: http://saharareporters.com/2018/03/03/boko-haram-insurgency-and-how-curb-future-terrorism-nigeria-bin-zak

Cases

International Case Law
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro (Judgment) [2007] ICJ Rep 43

*Armed Activities on the Territory of the Congo (Congo v Uganda) (*Judgment) [2005] ICJ Rep 168

Barcelona Traction Light and Power Company Limited (Judgment), [1970] ICJ Rep 4

[Case T-208/11] LTTE v Council (General Court, Judgment. 16 October 2014)

[Case T-289/15] Hamas v Council (Court of Justice of the European Union, Judgment, 6 March 2019)

Colombia v Peru (Asylum case) [1950] I.C.J Rep 266

Ethiopia-Eritrea Claims Commission, *Partial Awards on the Claims relating to Prisoners of War* (2003) 42 ILM 1056

Fisheries case (United Kingdom v. Norway) (Judgment), [1951] ICJ Rep 138

Hamdan v Rumsfeld (2006) 548 U.S. 557

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion [2004] ICJ Rep 136

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 [1971] ICJ Rep 16

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, [1996] ICJ Rep. 226

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, [1986] I.C.J. Reports 14

North Sea Continental Shelf cases (Judgment) [1969] ICJ Rep 43

Prosecutor v Akayesu (Judgment) ICTR-96-4-T (2 September 1998)

Prosecutor v Bemba Gombo, (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges) ICC-01/05-01/08 (15 June 2009)

Prosecutor v Tihomir Blaškić (Judgment) IT-95-14 (3 March 2000)

Prosecutor v Delalić, Mucić, Delić and Landžo (Judgment) IT-96-21-T (16 November 1998)

Prosecutor v Đorđević (Judgment) IT-05-87/1-T (23 February 2011)

Prosecutor v. Erdemović (Judgment) IT- 96-22-T (29 November 1996)

Prosecutor v. Stanislav Galic (Judgement and opinion) IT-98-29-T (5 December 2003)

Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case) ICC-01/04-01/07-OA8 (25 September 2009)

Prosecutor v Hadžihasanović, Alagić, and Kubura (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility) IT-01-47-AR72 (16 July 2003)

Prosecutor v Hadžihasanović (Judgment) IT-01-47-T (15 March 2006)

Prosecutor v Haradinaj, Balaj and Brahimaj (Judgment) IT-04-84-T (3 April 2008)

Prosecutor v Kupreškić et al (Judgment) IT-95-16-T (14 January 2000)

Prosecutor v Limaj (Judgment) IT-03-66-T (30 November 2005)

Prosecutor v. Ljube Boškoski and Johan Tarčulovski (Judgment) IT-04-82-T (10 July 2008)

Prosecutor v Boškoski and Tarčulovski (Appeal Judgment) IT-04-82-A (19 May 2010)

Prosecutor v Milosević (Decision on Motion for Acquittal) IT-02-54-T (16 June 2004)

Prosecutor v. Mucić et al ("Elebici" Case) (Appeal Chamber Judgment) IT-96-21-A (20 February 2001)

Prosecutor v Nikolic (Rule 61) (1995) IT-94-2-R61, 108 ILR 21

Prosecutor v. Rajić (Review of the indictment pursuant to Rule 61) IT-95-12-R61 (13 September 1996)

Prosecutor v Rutuganda (Judgment) ICTR-96-3-T (December 1999); 39 ILM 557 (2000)

Prosecutor v. Dusko Tadić, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995)

Prosecutor v Tadić (Opinion and Judgment, Trial Chamber) IT-94-1-T (7 May 1997); 36 ILM 908

Prosecutor v Tadić (Judgment, Appeals Chamber) IT-94-1-A (15 July 1999)

Prosecutor v Taylor (Decision on Immunity from Jurisdiction) SCSL-2003-01-I (May 31, 2004)

Prosecutor v Thomas Lubanga Dyilo (Decision on the confirmation of charges) ICC-01/04-01/06, (Pre-Trial Chamber I, 29 January 2007)

The Supreme Court of Israel, *Public Committee against Torture in Israel v. Government of Israel*, HCJ 769/02, (13 December 2006)

Ukraine v Russia (Provisional Measures)

United States District Court for the Eastern District of Missouri, Eastern Division, No.4:15CR49CDP/DDN, 9 May 2018,

Woolmington v DPP (1935) AC 426

Nigerian Case Law

Abacha v Fawehinmi (2000) 6 NWLR 228

Abiola v FRN [1995] 3 NWLR (Pt. 383) 203

Archibong v State (2004) 1 NWLR (Pt. 855) 488

Adamu Ali Karumi v. Federal Republic of Nigeria (2016) LPELR-40473(CA)

AG Bendel State v AG of the Federation &Ors (1981) 10 SC

Akinlega v Benue State Civil Service Commission (2002) 2 CHR 1

Dokubo-Asari v Federal Republic of Nigeria (2007) 12 NWLR (1048)

Fawehinmi vs. Babangida (2003) 3 NWLR (Pt.808) 604

FRN v HM, Charge No. FHC/KAINJI/CR/74/18 Delivered on 13 February 2018 by Justice Yellim Bogoro

Federal Republic of Nigeria v Kabiru Umar (Alias Kabiru Sokoto) FHC/ABJ/CR/38/13 delivered on 20 December 2013 by Hon. Justice Ademola

Federal Republic of Nigeria v Murktar Ibrahim Charge No. FHC/ABJ/CR/178/2012 delivered on 20th November 2015 by Hon. Justice G O Kolawole

Federal Republic of Nigeria v Mustapha Umar Suit No FHC/ABJ/CR/2/2013- Delivered on November 14, 2013 by Justice A F A Ademola

Ibrahim Usman Ali v Federal Republic of Nigeria (2016) LPELR-40472(CA)

Igri v State (2012) 16 NWLR (pt.1327) 522

James and Others v NSCDC and Ors. (2014) LPELR-24068 (CA)

Ogwu Achem v FRN (2014) LPELR-23202(CA)

State v Salawu (2011) 18 NWLR (pt. 1279) 580 SC

International Treaties and Conventions

African Charter on Human and People's Rights 1981

American Convention on Human Rights 1969

Arms Trade Treaty 2013

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 (Adopted 16 December 2005)

Convention against the Taking of Hostages 1979

Convention for the Prevention and Punishment of Terrorism 1937

Convention for the Suppression of the Financing of Terrorism, 1999

Convention for the Suppression of Terrorist Bombing 1997

Convention for the Suppression of unlawful seizure of Aircraft 1970

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988

Convention on Duties and Rights of States in the Event of Civil Strife, Havana, 20 February 1928

Convention on the Rights of the Child 1989

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973

Convention on the Prohibition of Terrorism 1937

European Convention on Human Rights 1950

Hague Convention (II) with Respect to the Laws and Customs of War on Land, and its Annex: Regulations Concerning the Laws and Customs of War on Land, 29 July 1899

Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949

Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 1949

Geneva Convention (III) relative to the Treatment of Prisoners of War of 1949

Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1949

Havana Conventions and Duties of Rights of States in the event of Civil Strife of 20 February 1928

ILC Draft Code 1954

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

International Covenant on Economic and Social Rights 1966

International Convention for the Protection of All persons from Enforced Disappearance 2006

International Criminal Tribunal for the former Yugoslavia Statute 1992

International Criminal Tribunal of Rwanda Statute 1994

Jurisdiction of the Courts of Danzig, (Advisory Opinion), [1928] PCIJ, Series B, No. 15

Lieber Code 1863

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I),1977

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 1977,

Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf 2005

Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land 1907

Rome Statute of the International Criminal Court 1998

Statute of the International Criminal Tribunal for Rwanda 1994

United Nations Charter 1945

UN Convention against Transnational Organised Crimes (Palermo Convention) 2003

United Nations, *Statute of the International Court of Justice*, 18 April 1946, available at: https://www.refworld.org/docid/3deb4b9c0.html [accessed 30 March 2021]

Universal Declaration of Human Rights 1951

Vienna Convention on the Law of Treaties 1969

Nigerian Legislation

Administration of Criminal Justice Act, 2015

Criminal Code Act 1960

Economic and Financial Crimes Commission Act 2004

Evidence Act 2011

Federal High Court Act CAP F12, Laws of the Federation of Nigeria, 2004

Interpretation Act Cap I7 Laws of the Federation of Nigeria, 2004

Penal Code Act 1960

Terrorism Act 2011

Terrorism Prevention (Amendment) Act, 2013

Terrorism (Prevention) (Proscription Order) Notice, 2013 pursuant to Terrorism Prevention Act (No.10, 2011) (as amended)

Terrorism (Prevention and Prohibition) Bill, 2018 (HB 1296)

Other Legislations/ Legislative Documents

Belgian, Law on Universal Jurisdiction, A. 2003 Criminal Code

Cameroon, Suppression of Terrorism Law 2014

Canada, Crimes Against Humanity and War Crimes Act S.C. 2000, c. 24

Germany, Act to Introduce Code of Crimes against International Law of 26 June 2002

Indian Geneva Conventions Act of 1960

Kenyan Geneva Conventions Act

Netherlands' International Crimes Act of 2003

New Zealand's International Crimes and International Criminal Court Act of 2000

UK Evidence Act 2011

UK Geneva Conventions Act of 1957

UK House of Lords Hansard HL Deb 15 July 1968 vol. 295 cc1-8

UK Prevention of Terrorism (Temporary Provisions) Act 1989

UK Terrorism Act 2000

UK War Crimes Act of 1991

US Immigration and Nationality Act

US Military Commissions Act 2006

US Title 22, Section 265f

United States Exec. Order No.13224 (July 2, 2002)

US Executive Order 13284 of January 23, 2003

United States, War Crimes Act, B. 1997 Amendment to the War Crimes Act of 1996

Zimbabwe Geneva Conventions Act of 1981

UN Documents

Commission on Human Rights Special Rapporteur P. Alston, *Civil and Political Rights, Including The Question of Disappearances and Summary Executions*, *-Extrajudicial, Summary or Arbitrary Executions*, E/CN.4/2006/53/Add.5, 27 March 2006

Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, A/HRC/19/69, 22 February 2012

Human Rights Council, A/HRC/21/50, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* 15 August 2012 Annex II

OCHA, *Nigeria: Situation Report*, 4 Feb 2021

OCHCR, International Legal Protection of Human Rights in Armed Conflict, (2011) HR/Pub/11/01

Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005

UNAMA and OHCHR, “Afghanistan: Protection of Civilians in Armed Conflict” Annual Report 2013, Published February 2014

UNAMA and OHCHR, “Afghanistan: Protection of Civilians in Armed Conflict” Annual Report 2016

UNGA Res 49/60 (17 February 1995) UN Doc A/Res/49/60.

UNGA Res 60/158 (20 February 2006) UN Doc A/Res/60/158

UNGA, “National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 Somalia”, (2011) UN Doc. A/HRC/WG.6/11/SOM/1

UNGA Sixth Committee (59th Session), “Report of the coordinator on the results of the informal consultations on a draft comprehensive convention on international terrorism, held from 25 to 29 July 2005” (12 August 2005) UN Doc A/59/894

UNSC, “Report of the Secretary-General on the protection of civilians in armed conflict” (2009) UN Doc S/2009/277

UNSC, “Identical letters dated 19 June 2012 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council” (2012) UN Doc S/2012/453

UNSC, “Report of the Secretary-General on the activities of the United Nations Office for West Africa” (2013) UN Doc S/2013/732

UNSC, “Report of the Secretary-General on the activities of the United Nations Office for West Africa” (2015) UN Doc S/2015/1012

UNSC, “Report of the Secretary-General on the protection of civilians in armed conflict” (2016) UN Doc S/2016/447

UNSC, “Report of Monitoring Group on Somalia and Eritrea pursuant to Security Council Resolution 2244 (2015)” (2016) UN Doc S/2016/919

UNSC, “Report of the Secretary-General on children and armed conflict in Nigeria” (2017) UN Doc S/2017/304

UNSC, “Report of the Secretary-General on the activities of the United Nations Office for West Africa and the Sahel” (2017) UN Doc S/2017/1104

UNSC and UNGA, “The situation in Afghanistan and its implications for international peace and security: Report of the Secretary General on Afghanistan” (2018) UN DOC A/73/374- S/2018/824.

UNSC Res 1193 (28 August 1998) UN Doc S/Res/1193

UNSC Res 1417 (14 June 2002) UN Doc S/Res/1417

UNSC Res 1772 (20 August 2007) S/Res/1772

UNSC Res 1805 (20 March 2008) UN Doc S/Res/1805

UNSC Res 1894 (11 November 2009) UN Doc S/Res/1894

UNSC Res 1904 (17 December 2009) UN Doc S/Res/1904

UNSC Res 1963 (20 December 2010) UN Doc S/Res/1963

UNSC Res 1989 (17 June 2011) UN Doc S/Res/1989

UNSC Res 2082 (17 December 2012) UN Doc S/Res/2082

UNSC Res 2083 (17 December 2012) UN Doc S/Res/2083

UNSC Res 2129 (17 December 2013) UN Doc S/Res/2129

UNSC Res 2160 (17 June 2014) UN Doc S/Res/2160

UNSC Res 2170 (15 August 2014) UN Doc S/Res/ 2170

UNSC Res 2248 (20 November 2015) UN Doc S/Res/2248

UNSC Res 2349 (31 March 2017) UN Doc S/Res/2349

UNSC Res 2354 (24 May 2017) UN Doc S/Res/2354

UNSC Res 2379 (21 September 2017) UN Doc S/Res/2379

UNSC Res 2395 (21 December 2017) UN Doc S/Res/2395

Regional Instruments
African Union, Communique of the Peace and Security Council 489th Meeting 3 March 2015 (PSC/PR/COMM.CDLXXXIX)

Constitutive Act of the African Union 2000

Organisation of African Unity, Assembly of Head of State and Government Resolution 51(IV) September 1967

Organisation of African Unity, Assembly of Head of State and Government Resolution 54(V) September 1968

Protocol on Amendments to the Constitutive Act of the African Union 2003

The Republic of Biafra Foreign Ministry, “Biafra-The Case for United Nations Intervention” 29 August 1969

Amnesty International
Amnesty International, “Boko Haram, Bombing Campaign sees civilian deaths spiral”, 24 September 2015

Amnesty International, “Boko Haram: Civilians continue to be at risk of human rights violations by state security forces”, 24 September 2015

Amnesty International, “Cameroon: Hundreds slaughtered by Boko Haram and abused by Security Forces”, 16 September 2015

Amnesty International Comment, “In light of the terrorist attacks and Human rights abuses and violations committed by the terrorist group- Boko Haram” 1 April 2015

Amnesty International, “Joint Public Statement- Nigeria: Unlawful Killings by the Joint Military Task Force in Maiduguri must stop”, 14 July 2011

Amnesty International, *Keep Away from schools or we’ll kill you: Right to education under attack in Nigeri*a, (London, 2013)

Amnesty International, “Lake Chad Region: Boko Haram’s renewed campaign sparks sharp rise in civilian deaths”, 5 September 2017

Amnesty International, “Nigeria: Boko Haram killing of aid worker Hauwa Liman”, 16 October 2018

Amnesty International, “Nigeria Counter insurgency: is human rights a distraction or a sine qua non?”, Paper presented at the 55th session of the NBA Conference, 25 August 2015

Amnesty International, “Nigeria: Crimes under International law committed by Boko Haram and the Nigerian Military in North-East Nigeria”, 3 June 2015

Amnesty International, “Nigeria: Deadliest Boko Haram attack on Rann leaves at least 60 people murdered”, 1 Feb 2019

Amnesty International, “Nigeria: Killing by Security Forces in Northern Nigeria- Public Statement”, 31 July 2009

Amnesty International, “Nigeria: Provisions of the Prevention of Terrorism Bill, 2009 are incompatible with Nigeria’s Human Rights Obligations”, 27 May 2010

Amnesty International, *Nigeria: ‘Our Job is to Shoot, Slaughter and Kill’: Boko Harm’s Reign of Terror in North East Nigeria*, 14 April 2015

Amnesty International, “Nigeria: Threats from the military won’t deter us from defending human rights” 7 June 2018

Amnesty International, *Nigeria: Trapped in the cycle of violence* (Amnesty International, 2012)

Amnesty International, “Nigeria: Unlawful killings by the Joint Military Taskforce in Maiduguri must stop”, Joint Public Statement, 14 July 2011

Amnesty International, “Nigeria: War Crimes and crimes against humanity as violence escalates in North East”, 31 March 2014

Amnesty International, *Stars on their shoulders. Blood on their hands: War crimes committed by Nigerian Military*, (2005)

Amnesty International, UN Human Rights Council, 30th Session 14 Sept- 2 Oct 2015, 30 Sept 2015

Amnesty International, “Violence, death and injustice: A beginner’s guide to human rights”, 16 February 2015

Amnesty International, *Welcome to Hell Fire: Torture and other ill- treatment in Nigeria*, (2014)

Amnesty International, *Willingly Unable: ICC Preliminary Examination and Nigeria’s Failure to Address Impunity for International Crimes* (Amnesty International, 2018)

International Crisis Group (Crisis Group)

International Crisis Group, *Curbing Violence in Nigeria (II): The Boko Haram Insurgency,* Africa Report No. 216 (ICG, 2014)

International Crisis Group, “Negotiating Justice to understand accountability” presented at Nuremberg Conference: Building a Future on Peace and Justice 25 June 2007

International Crisis Group, *Understanding Islamism*, Middle East/North Africa Report No. 37 (ICG, 2005)

Crisis Group, “Managing the Disruptive Aftermath of Somalia’s Worst Terror Attack”, 20 October 2017

Crisis Group, “Somalia”, April 2017

Crisis Group, “Somalia: Al-Shabaab it will be a long war”, 26 June 2014

Crisis Group, “Somalia: Transforming Hope into Stability” (Crisis Group, 2017)

Hogendoorn E. J., “Somalia’s Current Security and Stability Status”, *Crisis Group*, 14 March 2018

Obasi N., “Nigeria’s faltering response emboldens Boko Haram”, *International Crisis Group* 31 January 2015

Human Rights Watch

Human Rights Watch, “International Criminal Court: The Mandate of the International Criminal Court”, *HRW*, September 2004

Human Rights Watch, “Kaduna: Indigeneity and Intra-State Conflict”

Human Rights Watch, “Leave Everything to God: Accountability for the Inter-Communal Violence in Plateau and Kaduna States, Nigeria”, December 2013

Human Rights Watch, “Nigeria: Flawed Trials of Boko Haram Suspects- Ensure Due Process, Victim Participation”, 17 September 2018

Human Rights Watch, *Nigeria: Jos: A City Torn Apart* (HRW, 2001)

Human Rights Watch, *Shell Shocked: Civilians under siege in Mogadishu* (HRW, 2007)

Human Rights Watch*, Spiralling Violence: Boko Haram Attacks and Security Force Abuses in Nigeria* (HRW, 2012)

Human Rights Watch, *Revenge in the name of religion: the cycle of violence in Plateau and Kano States* (HRW, 2005)

Human Rights Watch, “They don’t own this place: Government Discrimination against ‘Non-Indigenes’ in Nigeria”, April 2006

Human Rights Watch, “The Miss World Riots: Continued Impunity in Killings in Kaduna” Vol 15 No 13 (A) July 2003

ICRC

ICRC, “Applicability of IHL to Terrorism and Counter-Terrorism”, 1 October 2015

ICRC, “Changing world, unchanged protection? 70 years of the Geneva Conventions and Humanitarians devised these laws and principles for practical and pragmatic use in the field

ICRC, *Commentary on the Third Geneva Convention,* 2020. Available at: https://ihl-databases.icrc.org/ihl/full/GCIII-commentary.

ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993

ICRC Blog, “What does humanitarian law say about terrorism?” (2017) [Online] Available at: http://blogs.icrc.org/ilot/2017/08/14/humanitarian-law-say-terrorism/

ICRC, “What are *jus ad bellum* and *jus in bello*?” 22 January 2015.

International Committee of the Red Cross, “The ICRC in Afghanistan – Overview” [online] Available at: https://www.icrc.org/en/document/icrc-afghanistan-overview [Accessed 26 Sep. 2018].

ICRC Casebook, “Criminal Repression”. Available at: https://casebook.icrc.org/law/criminal-repression#_ftn_001

International Criminal Court

Report on Preliminary Examination Activities (2013)

Report on Preliminary Examination Activities (2017)

Report of Preliminary Examinations (2018)

Doctoral Theses

Milly A., *The Convenience of Norms and the ICC: A neorealist explanation for non- cooperation (*Masters Dissertation, Leiden University, 2015)

Reka V., “Challenges of domestic prosecution of war crimes with special attention to criminal justice guarantees”, (Doctoral Thesis, Pazamny Peter Catholic University:2012)

Miscellaneous

Advert sponsored by the American Committee to Keep Biafra Alive, Look magazine. (1968); https://rememberingbiafra.com/timeline/founding-of-the-american-committee-to-keep-biafra-alive

African Union Mission in Somalia, http://amisom-au.org/mission-profile/military-component/

Australian National Security, “Listed terrorist organisations”. Available at: https://www.nationalsecurity.gov.au/what-australia-is-doing/terrorist-organisations/listed-terrorist-organisations

Counter-Extremism Project, “Boko Haram”. Available on: https://www.counterextremism.com/threat/boko-haram.

Counter-Extremism Project, “Nigeria: Extremism and Counter-Extremism” Available on: https://www.counterextremism.com/countries/nigeria

Federal Security Service of the Russian Federation, “A single federal list of organizations, including foreign and international organizations recognized as terrorist in accordance with the legislation of the Russian Federation (as of June 2, 2017) [Online] Available form: http://www.fsb.ru/fsb/npd/terror.htm

Fund for Peace, *Fragile States Index 2020*, 11 May 2020

ICTJ, “What is Transitional Justice?” Accessed on: https://www.ictj.org/about/transitional-justice

Japanese Public Security Intelligence Agency, “International terrorist organizations overview and trends of terrorist organisations in the world” [online] Available from: http://www.moj.go.jp/psia/ITH/organizations/index.html

Merriam-Webster Dictionary

Motion of urgency public importance raised at the Nigerian House of Representatives on 10 June 2020 by Hon. Usman Zannah on the “Attacks on 2 villages in Gubio Local Government Area of Borno State by Boko Haram Insurgents”. See: Nigerian House of Representatives Votes and Proceedings 10 June 2020. Available at: https://placng.org/i/wp-content/uploads/2020/07/House-of-Reps-votes-and-proceedings-Wednesday-10th-June-2020.pdf

New Zealand Police, “Designated terrorist entities”. Available at: https://www.police.govt.nz/advice/personal-community/counterterrorism/designated-entities?nondesktop

Public Safety Canada, “Currently listed entities” [Online] Available from: https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx

UK Home Office, “Policy Paper: Proscribed terrorist groups or organisations”, 26 November 2021. Available at: https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2/proscribed-terrorist-groups-or-organisations-accessible-version

UK Submission on *Nuclear Weapons case* Letter dated 16 June 1995 from the Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland

UNDP, “About UNDP in Nigeria” www.ng.undp.org
US Department of State, “Bureau of Counterterrorism: Foreign Terrorist Organisation”. Available at: https://www.state.gov/foreign-terrorist-organizations/

United Nations Security Council, “Al-Shabaab”. Available at: https://www.un.org/securitycouncil/sanctions/751/materials/summaries/entity/al-shabaab.

UN Peacekeeping, “UNMOGIP Factsheet”, United Nations. Available at: https://peacekeeping.un.org/en/mission/unmogip.

U.S. Department of the Treasury (2018). “Treasury Sanctions Taliban and Haqqani Network Financiers and Facilitators” [online] Available at: https://home.treasury.gov/news/press-releases/sm0265

World Bank. Accessed on: https://data.worldbank.org/indicator/SP.POP.TOTL?locations=NG

World Poverty Clock compiled by the Brookings Institute