

## **Boko Haram Insurgency and Challenges to Implementation and Enforcement of International Humanitarian Law in Nigeria**

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**ABSTRACT:** Challenges to the implementation and enforcement of International Humanitarian Law (IHL) in the Boko Haram insurgency and war against terrorism in Nigeria can be traced to the country's law on implementation of treaties. Nigeria's dualist approach to treaty implementation requires that no treaty between the federation and any other country shall have the force of law, except to the extent to which any such treaty has been enacted into law by the National Assembly. This has had the negative implication of weakening the legal and institutional framework for implementing and enforcing International Humanitarian Law in the country, and especially in the on-going War against terrorism in particular. Thus, this paper aims at encouraging the Nigerian government to review its dualist system of treaty implementation, by removing the legal stricture in section 12(1) of the 1999 constitution of Nigeria (as amended), and replacing it with a less stringent requirement. This has become necessary as only few relevant treaties have been implemented in Nigeria in spite of the fact that the country's treaty ratification table is impressive. The situation is exacerbated by certain challenges that have plagued the implementation and enforcement of IHL in the armed conflict between Nigeria and Boko Haram insurgents. Notable among these are: the character and characterization of the armed conflict; non-commitment to the obligation to respect and ensure respect for IHL; and weak implementation and enforcement mechanisms. To surmount these challenges and enhance the implementation and enforcement of IHL in Nigeria, the country should domesticate the Rome statute of the International Criminal Court 1998, and its Additional protocol. Additional protocol to the Geneva conventions and other relevant instruments. These could be facilitated by the adoption of a monist approach to treaty implementation.

**KEYWORDS:** Boko Haram, Armed Conflict, Insurgency, Implementation/Enforcement, International Humanitarian Law.

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### **I. INTRODUCTION**

Boko Haram insurgency has posed challenges to the implementation and enforcement of International Humanitarian Law in Nigeria, and exposed yawning gaps in the country's adopted measures for implementing and enforcing the law. This has found expression in the inability or unwillingness of the country to implement and enforce International Humanitarian Law against alleged perpetrators of war crimes and crimes against humanity, not withstanding widespread allegations and manifest instances of impunity. Thus, this paper sets out to critically appraise the performance or non-performance of the Nigerian Government, a State party to the *Geneva Conventions*, and those of its opponent, *Boko Haram*, a non-State armed group, in their obligations to implement and enforce International Humanitarian Law.

For the purposes of achieving this set objective, this paper, has been divided into the following sub-headings: 1) Introduction; 2) Conceptual Framework; 3) Historical Background to Boko Haram Insurgency; 4) Boko Haram Insurgency and the Challenge of Implementing and Enforcing International Humanitarian Law in Nigeria, and; 5) Conclusion and Recommendations.

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## II. CONCEPTUAL FRAMEWORK:

It is germane and necessary to present and explain certain relevant concepts that constitute the framework for this discourse. They are as follows: “International Humanitarian Law”; “International Criminal Law”; “Armed Conflict”; “Insurgency”; “Terrorism”; “Combatant”; “Implementation”; and “Enforcement”.

**International Humanitarian Law:** International Humanitarian Law (IHL) hitherto known as the Law of War has been defined as:

The branch of international law limiting the use of violence in armed conflicts by:

- a) Sparing those who do not or no longer directly participate in hostilities;
- b) Restricting it to the amount necessary to achieve the aim of the conflict, which – independently of the causes fought for can only be to weaken the military potential of the enemy<sup>2</sup>

In other words, International Humanitarian Law is applicable only in times of armed conflict<sup>3</sup> and protects persons not or no longer taking a direct part in hostilities; and regulates permissible means and methods of warfare.<sup>4</sup> Flowing from the foregoing definition are the following basic principles of International Humanitarian Law: i) The principle of distinction between civilians and combatants, ii) The principle prohibiting attacks on those *hors de combat*, iii) The principle prohibiting the infliction of unnecessary suffering, iv) The principle of necessity, and v) The principle of proportionality.<sup>5</sup>

On the other hand, the following inherent limits of International Humanitarian Law have been acknowledged:

- i) It does not prohibit the use of violence; ii) It cannot protect all those affected by armed conflict; iii) It makes no distinction based on the purpose of the conflict; It does not bar a party from overcoming the enemy; iv) It presupposes that the parties to an armed conflict have rational aims and that those aims as such do not contradict International Humanitarian Law.<sup>6</sup>

Hans-Peter Gasser defines International Humanitarian Law to include all those rules that for humanitarian reasons limit the resort to force in an armed conflict between states or in an intrastate conflict situation. He went on to state that those rules limit the right of parties to an armed conflict to choose methods or means of warfare, and emphasized that they prohibit the use of force against persons who are not or who are no longer taking part in hostile acts, as the civilian population and individual civilians, military and civilian prisoners or detainees described

as “protected persons”, and against civilian property, described as “protected objects”.<sup>7</sup> He further observed that International Humanitarian Law imposes on a party to the conflict the obligation to provide, if necessary, assistance to persons under its control or to allow relief operations to be undertaken by third parties, including non-governmental humanitarian organizations.<sup>8</sup>

Furthermore, the International Committee of the Red Cross (ICRC) defines International Humanitarian Law as:

International rules established by treaties or custom, which are specially intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of parties to a conflict to use the methods, and means of warfare of their choice, or protect persons and property that are, or may be, affected by conflict<sup>9</sup>

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<sup>2</sup>Sassoli, M, and others, A., *How Does Law Protect in War?: Cases, documents and Teaching Materials on contemporary practice in International Humanitarian Law* Vol. 1 (3rd ed.), ICRC, Geneva 2011, 93.

<sup>3</sup> As established in *Prosecutor v Tadic (IT-94-I-A)* May, 1997, an armed conflict is said to exist ‘whenever there is a resort to armed forces between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state’. Treaty law does not define the term; it merely regulates permissible means and methods of warfare.

<sup>4</sup>Sassoli, M and Bouvier, A.A., *How Does Law Protect in War?* Vol. 1 (2<sup>nd</sup> ed.), ICRC, Geneva 2006, 81. See also, Ibezim, E.C; ‘Contemporary Challenges to International Humanitarian Law: the Private Military Companies’ [2009/2010], *African year Book on International Humanitarian Law*, Cape Town, Juta & Co Ltd., 87.

<sup>5</sup>Sassoli, M., and others, *op.cit*

<sup>6</sup>*Ibid.*, 94.

<sup>7</sup> Gasser, H., ‘Humanitarian Law’, [2009], *Encyclopedia of Human Rights* (Vol. 2), 462. See also, Gasser, H., *International Humanitarian Law: An Introduction*, Haupt, Henry Dunant Institute, 1993, 15-20.

<sup>8</sup>*Ibid.*

<sup>9</sup>Pictet, J., *et.al* (eds.), *Commentary on the Additional Protocols of 8 June (1977) to the Geneva Convention of 12 August, 1949*, Geneva, ICRC, 1987, xxvii.

It is noteworthy, that the foregoing definitions emphasize the fact that IHL embodies rules and regulations of warfare, and thus antithetical to a reign of impunity in warfare, while debunking the notion that laws are silent in the event of war, ‘...silent enimleges inter arma’<sup>10</sup>, as pleaded by Cicero in his defence of Milo during an armed conflict in Rome.<sup>11</sup>

International Humanitarian Law comprises two regimes, namely, the law applicable in international armed conflict, or conflicts between States; and the rules designed to apply in non-international armed conflict, or conflicts within the territory of a State. However, the former is more developed than the latter, though the underlying principles are the same. On the whole, International Humanitarian Law has been viewed as comprising two bodies of law, namely Geneva Law and Hague Law. While Geneva law comprises the rules protecting individual persons from violence, Hague Law limits the right to use certain methods or means of warfare.<sup>12</sup>

**International Criminal Law:** As has been widely acknowledged, formulating the definition of International Criminal Law is not an easy task.<sup>13</sup> This is because of the overwhelming volume of controversial definitional issues<sup>14</sup> that have been generated by scholars in their attempt to define the concept. Thus, a review of such definitions become absolutely necessary.

According to Ratner and his co-authors, ‘the term refers broadly to the international law assigning criminal responsibility for certain particularly serious violations of international law?’<sup>15</sup> They further observe that although some scholars limit it to responsibility for violations of human rights and humanitarian law, its scope is in fact, far wider, and includes, for instance, drug crimes and terrorism offenses and caution that beyond their seemingly straight forward definitions is ‘a core difficulty in clarifying the nature of both international criminal law and an international crime namely, what does it mean to say that international law assigns criminal responsibility?’<sup>16</sup> To answer this question, the learned authors insist that three subsidiary issues that essentially correspond to different strategies for providing international criminal responsibility must be examined, namely:

i) To what extent does international law directly provide for individual (or other) culpability or responsibility? ii) To what extent does international law obligate some or all States or the global community at large to try and punish, or otherwise sanction, offenders? iii) To what extent does international law authorize these same actors to try and punish, or otherwise sanction, offenders?<sup>17</sup>

In other words, they acknowledge the fact that jurisdictional limits must be recognized, in any consideration of international criminal responsibility.<sup>18</sup> In acknowledging this, they go on to state the possible scope of international criminal law by observing that international law can explicitly provide for individual criminality or require states to make an act a crime under domestic law, or both, as does the *Genocide Convention*.<sup>19</sup> They, further observe that it can obligate States or an international court to carry out prosecutions or punishment, as with the *Genocide Convention or the Geneva Conventions*, or to extradite or prosecute offenders, as with the *Torture Convention*.<sup>20</sup> They also further observe that it can simply allow States or

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<sup>10</sup> Latin meaning ‘Laws are silent among [those who use] weapons’ (cited in Cicero, Pro Milone, 4.11). See also Sassoli, M. and others (vol 1) *op.cit.*,95.

<sup>11</sup> Sassoli, M and others...*ibid.*

<sup>12</sup> *Ibid.*, 114.

<sup>13</sup> See, Than, C. and Shorts, E., *International Criminal Law and Human Rights*, London, Sweet & Maxwell, 2003, 13; Sjocrona, J.M., and Orie, A.A.M., *International Criminal Law*, Devenver, *Strafrecht*, 2002, 1-10; and Ratner, S.R *et.al.*, *op.cit.*, 10.

<sup>14</sup> Such issues include the scope of international criminal law, and the hybrid nature of the field—a combination of international law and criminal law involves the inculcation of individuals, but is developed and enforced by the actions of state. This includes the fact that tribunals, courts and procedure to secure compliance by individuals as are required by criminal Law have only just begun to evolve. Moreover, many authors argue that a crime is not an international crime unless it may be prosecuted in an international criminal tribunal whether permanent or *ad hoc*, but that definition would exclude some of the oldest international crimes with the most accepted status, including piracy.

<sup>15</sup> Ratner, *ibid.*

<sup>16</sup> *Ibid.*, 11.

<sup>17</sup> *Ibid.*

<sup>18</sup> See Noritz, J.H., (ed.), *Pirates, Terrorists, and Warlords: The History, Influence, and future of Armed Groups Around the World*, New York, Skyhorse Publishing, 2009, 101.

<sup>19</sup> *Op.cit.*

<sup>20</sup> *Ibid.*

international courts to try and punish individuals for certain acts, irrespective of normal jurisdictional limits<sup>21</sup>. In concluding, they declare that the foregoing strategies have been combined to a certain extent in the Security Council's Statutes for the *ad hoc* tribunals for Yugoslavia and Rwanda, and the Rome statute of the International Criminal Court.<sup>22</sup>

However, these strategies which derive from the wide-ranging scope of the Law reflect the fact that International Criminal Law is capable of multifarious meanings. Chukwumaeze notes the six senses in which the term has been used, as identified by Schwarzenberger<sup>23</sup> and goes on to state that basically, international criminal law encompasses both the criminal aspects of international law and the international aspects of domestic criminal law. He observes as follows:

International Criminal law in the first sense involves *inter-alia*, internationally prescribed and internationally authorized criminal law, that is where a customary or treaty based rule obliges or empowers a State to enact a crime in its domestic criminal law, and to punish offenders, as well as bilateral and multilateral treaties relating to international co-operation in criminal matters. In the second sense, international criminal law encompass a States laws laying down the ambit or spatial scope, of its criminal law and the competence of its court as well [as] other forms of mutual assistance in criminal matters.<sup>24</sup> It further includes extradition and co-operation in gathering evidence between the police, prosecution and courts in different countries. Mutual assistance in relating to the recognition and enforcement of foreign judgments in criminal matters, transfer of prosecution and transfer of convicted prisoners,<sup>25</sup>

By the foregoing observations, Chukwumaeze points to the sources of international criminal law, and the fact that international criminal law depends essentially on the political will and the cooperation of the individual States, in matters of crime; its repression, adjudication and law enforcement. More importantly, he defines international criminal law as:

A body of international rules designed both to prescribe international crimes and to impose upon states, the obligation to prosecute and punish at least some offenders of those crimes. It also regulates international proceedings for prosecuting and trying persons accused of such crimes.<sup>26</sup>

He describes the first limb of the definition as consisting of the substantive law, while the second limb consists of procedural law, which governs the action by prosecuting authorities and the various stages of international trials.<sup>27</sup>

**Armed Conflict:** "Armed Conflict" is a relatively new concept in International Humanitarian Law. In fact, it is an interventionist concept. Before 1949, such situations which otherwise would have been regulated by Treaty laws of war, or International Humanitarian Law were denied such regulations even in the face of impunity, and grave violations of the *Geneva Conventions* in the absence of formal declarations of war. To remedy this mischief, the *Four Geneva Conventions* of 1949 and the *Additional Protocols* 'introduced the concept of armed conflict into this legal regime for the first time'.<sup>28</sup> Before then, the term "war" was generally employed,<sup>29</sup> and "war" simply means 'fighting carried on by armed force between nations or parts of a nation,'<sup>30</sup> but technically and legally speaking, it requires a formal declaration by either or both parties.

According to Pictet:

The substitution of this much more general expression ('armed conflict') for the word 'war' was deliberate. One may argue almost endlessly about the legal definition of 'war'. A state can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression 'armed conflict' makes such arguments less easy. Any

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<sup>21</sup> *Ibid.*

<sup>22</sup> See, Security Council Resolution 827, para.2 (1993) wherein it was stated that the tribunal's purpose is 'prosecution of persons responsible for serious violations of international humanitarian law'. See also *Rome Statute of International Criminal Court*, article 1 ('jurisdiction over'), and 17 (rules on admissibility).

<sup>23</sup> Chukwumaeze, U. U., *International Criminal Law*, Owerri, Imo State University Press, 2018, 12.

<sup>24</sup> *Ibid.*, 13.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, 27.

<sup>29</sup> Cassese, A., (ed.) *International Criminal Justice*, Oxford, Oxford University Press, 2009, 247

<sup>30</sup> Barnhart, C.L and Barnhart, R.K., *The World Book Dictionary* (vol.2), Chicago, Field Enterprises Educational Cooperation, 1976, 2356.

difference arising between two states and leading to the intervention of armed forces is an armed conflict, even if one of the Parties denies the existence of a state of war...<sup>31</sup>

This commentary on the meaning of “armed conflict” is important for proffering for the very first time, a definition for “armed conflict”, for apart for referring to it in Common *Articles 2* and *3*, the 1949 *Geneva Conventions* did not define the notion.<sup>32</sup>For instance Common *Article 2* provides:

In addition to the provision which shall be implemented in peace time, the present Convention shall apply to all cases of 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...<sup>33</sup>

On the other hand, *Article 3* makes reference to “armed conflict” only in passing, as follows: ‘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...’<sup>34</sup>

Clearly, the use, of this new phraseology is practically significant. Following the ban on “war” by the International Community as embodied in the *Briand Kellogg Pact* of 1928, the United Nations balked at the use of the word, “war” preferring instead, the phrase “use of force”.<sup>35</sup> Thus, the *UN Charter* employs the term or phrase “use of force” instead of “war”.<sup>36</sup> However, the term “armed conflict” has been so controversial ‘with conflicting views being propounded by scholars as to its concrete content.’<sup>37</sup>

Interestingly though, the International Committee of the Red Cross Commentary to the 1949 *Geneva Conventions* explains that the term “armed conflict” was deliberately left undefined by the Conventions as the States parties’ intention was to rely on a *de facto* standard rather than on legal technicalities.<sup>38</sup>

However, recent case law has attempted to define “armed conflict”. The International Criminal Tribunal for the former Yugoslavia has attempted to define the notion in the case of *Prosecutor v Tadic*.<sup>39</sup> It held that an armed conflict exists ‘whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state’. This definition has been applied repeatedly by the *Ad hoc* Criminal Tribunals.<sup>40</sup>

**Terrorism:** The concept of terrorism is controversial. Many have viewed its use as often subjective and pejorative, as it is meant to convey the condemnation of an adversary.<sup>41</sup> Thus, its use is believed to be mostly subjective, as one man’s terrorist may be another man’s freedom fighter or human rights fighter.<sup>42</sup> In this regard, Wardlaw observes that it is difficult to generate a definition which is both ‘precise enough to provide a meaningful analytical device yet general enough to obtain agreement from all participants’<sup>43</sup> because terrorism engenders such extreme emotions, partly as a reaction to the horrors associated with it and partly because of its

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<sup>31</sup>Pictet, J.S., *Commentary on the first Geneva Convention for the Amelioration of the Condition of the Wounded and sick in Armed Forces in the Field*, Geneva, ICRC, 1952, 32.

<sup>32</sup>*Op.cit.*

<sup>33</sup> See *G.C.I, Art.2*. Italics supplied.

<sup>34</sup>*G.C.I, Art 3*.

<sup>35</sup> See, *Legality of the Threat or use of nuclear Weapons case(ICJ), Nuclear Weapons Advisory Opinion, Reports 1996*, ss 105; Advisory Opinion (1997) 35 I.L.M. 809 and 1343 where the court appraised the *United Nations Charter* provisions relating to the threat or use of force, and observed that even though there is a general prohibition on the use of force under Article 2(4), the charter recognizes the inherent right of individual or collective self-defence. The court further observes that the charter also provides for lawful use of force under Article 42, whereby the Security Council may take military enforcement measures in keeping with chapter VII of the charter.

<sup>36</sup> Cassese, A. (ed.) *op.cit.*

<sup>37</sup>*Ibid.*

<sup>38</sup>*Ibid.*

<sup>39</sup> Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadic* (IT-94-1), October 1995, S 70.

<sup>40</sup> See Judgment, *Furundzija* (IT-95-17/1-T), TC, 10 December 1998 § 59; Judgment, *Kunarac and others* (IT-96-23), AC, 12 June 2002, §56.

<sup>41</sup> Noritz, J. H. (ed.), *op.cit.*, 402.

<sup>42</sup> Ludwikowski, R., ‘Aspects of Terrorism’, [2003], *Nigerian Journal of International Affairs*, (Vol. 29, N0. 12), 284, cited in Okoronye, I., *Terrorism in International Law*, Okigwe, Whytem Publishers Nigeria, 2013, 7.

<sup>43</sup> Wardlaw, G., *Political Terrorism*, Cambridge, Cambridge University Press, as cited in Okoronye, I., *ibid.*

ideological context.<sup>44</sup> On the other hand, Laquer attributes the difficulty in defining terrorism to the fact that the character of terrorism has changed greatly over the years. For him:

Terrorism is not an ideology but an insurrectional strategy that can be used by people of very different political convictions... it is not merely a technique... its philosophy transcends the traditional dividing lines between political doctrine. It is truly all-purposed and value-free.<sup>45</sup>

At this point, it may be necessary to outline a number of definitions of terrorism before any further discussion on the difficulty of arriving at a generally acceptable definition of the concept. The World Book Dictionary renders the meaning of 'terrorism' as:

- (1) The act of terrorizing; use of terror, especially the systematic use of terror by a government or other authority against particular persons or groups.
- (2) A condition of fear and submission produced by frightening people.
- (3) A method of opposing a government internally through the use of terror.<sup>46</sup>

The dictionary goes on to describe a person who uses or favours terrorism as a "terrorist". *The Oxford Dictionary of Law* defines "terrorism" as 'the use or threat of violence for political ends, including putting the public in fear.'<sup>47</sup> The dictionary alludes to the *English Terrorism Act 2000* and reproduces the definition by the Act as follows:

- (a) The use or threat of action that involves serious violence against a person or serious damage to property, endangers a person's life, creates a serious risk to the health or safety of the public or a section of the public, or is designed to interfere with or disrupt an electronic system, or
- (b) The use or threat of violence designed to influence the government or intimidate the public or a section of the public in both cases, the use or threat of such action or violence is made for the purpose of advancing a political, religious, or ideological cause ...<sup>48</sup>

*Black's Law Dictionary's* definition of terrorism is not much different from that of the *Oxford Dictionary of Law*, except that it went further to define such typologies of terrorism as cyber-terrorism, domestic terrorism and international terrorism.<sup>49</sup>

Meanwhile, Okoronye catalogues an impressive spectrum of definitions of Terrorism, including that by Nigeria's *Economic and Financial Crimes Commission (Establishment) Act*.<sup>50</sup> The Act defines "Terrorism" as:

1. a) Any act which is a violation of the *Criminal code* or the *Penal Code* and of freedom of, or cause serious injury or death to any person, any number of group of persons or causes or may cause damage to public property, natural resources, environmental or cultural heritage and is calculated or intended to
  - (i) intimate, 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 or abandon a particular standpoint, or to act according to certain principles or
  - (ii) Create general insurrection in a state,
- b) any promotion, sponsorship of, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organization or procurement of any person with the intent to commit any act referred to in paragraph (9)(i)(ii) and (iii).<sup>51</sup>

More importantly, Nigeria's *Terrorism (Prevention) Act 2011* as amended in 2013 defines "Terrorism" as:

2. In this section, "act of terrorism" means 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,

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<sup>44</sup>*Ibid.*

<sup>45</sup>*Ibid.*, 8.

<sup>46</sup> Barnhart, C. L. and Barnhart, R. K. (eds.), *The World Book Dictionary*, Vol. 2, *op.cit.*, 2167.

<sup>47</sup> Martin, E. A., *A Dictionary of Law* (5<sup>th</sup> edn.) Oxford, Oxford University Press, 2003, 495.

<sup>48</sup>*Ibid.*, 495 – 496.

<sup>49</sup> Garner, B. A. (ed.), *Black's Law Dictionary* (8<sup>th</sup> edn.), St. Paul, MN., West, a Thompson business, 2004, 1512-1513.

<sup>50</sup> Okoronye, I., *op.cit.*, 8-11

<sup>51</sup> Section 40, Economic and Financial Crimes Commission (Establishment) Act No. 5 of 2002.

- 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, transport system, an infrastructural facility including an information system, a fixed platform located on the continental shelf, public place or private property likely to endanger human life or results 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.
3. An act which disrupts a service but is committed in pursuance of a protest. However, demonstration or stoppage of work is not a terrorist act within the meaning of this definition provided that the act is not intended to result in any harm referred to in subsection (2) (b)(i),(ii) or (iv) of this section.

Lastly, the United Nations Security Council defines terrorism as:

Criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act.<sup>52</sup>

**Insurgency:** *The Black's Law Dictionary* describes an “insurgent” as a person who, for political purposes, engages in armed hostility against an established government, while denoting “insurgency” as the adjective of “insurgent”.<sup>53</sup> Thus, it could be inferred that “insurgency” is the state of engaging in armed hostility against an established government for political reasons or purposes. Typically, insurgent movements often use terrorism as a tactic, among several other tactics; and to be described as a “terrorist” carries with it, an important legal connotation that is different from mere membership in an insurgent group.<sup>54</sup> Maybe, herein lay the primary difference between “terrorism” and “insurgency” – a functional distinction.

**Armed Groups:** The term “armed group” is not defined by treaty Law.<sup>55</sup> Albeit, granted that “parties” to an armed conflict vary widely in character, organized armed groups are particularly and extremely diverse.<sup>56</sup> The International Committee of Red Cross (ICRC) describes them thus:

They range from those that are highly centralized (with a strong hierarchy, effective chain of command, communication capacities, etc.) to those that are decentralized (with semi-autonomous or splinter factions operating under an ill-defined leadership structure). Groups may also differ in the extent of their territorial control, their capacity to train members, and the disciplinary or punitive measures that are taken against members who violate humanitarian law.<sup>57</sup>

According to Rondeau, this description meets the general requirements of the definition of “non-State armed groups” as proposed by the United Nations’ Office for the Coordination of Humanitarian Affairs (OCHA) in its Manual on Humanitarian Negotiations with Armed Groups. The Manual defines “armed groups” as:

Groups that: have the potential to employ arms in the use of force to achieve political, ideological or economic objectives; are not within the formal military structures of States, state-alliances or intergovernmental organizations; and are not under the control of the State(s) in which they operate.<sup>58</sup>

In other words, the critical distinguishing factor, according to this definition is that armed groups fall outside the ambit of State control.

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<sup>52</sup> See UN Doc. S/RES/1566,2004, para.3.

<sup>53</sup> Garner, B. A., *op.cit.*, 823.

<sup>54</sup> Bernard, V. (ed.), ‘“Interview with David Kilcullen” on Engaging Armed Groups’, [2011], *International Review of the Red Cross*, (Vol. 93, No. 883), 590.

<sup>55</sup> Rondeau, S., ‘Participation of armed groups in the development of the law applicable to armed conflicts’, [2011], *International Review of the Red Cross*, (Vol. 93, No. 883), 650.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*, See also, Michelle, M., ‘Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts,’ [2008], Geneva, ICRC, 11, available at <http://www.icrc.org/eng/resources/documents/publications/po923.htm> (last visited 11, April 2017).

<sup>58</sup> *Ibid.*, 651, fn. 6.

On the other hand, Allen opines that the term “armed group” can refer to “organized” armed groups that operate under a responsible command and are linked to a State party to an armed conflict, to similarly organized groups that are not affiliated with any State, or to groups that fail to meet the test for an “organized” armed group.<sup>59</sup> He states that armed groups might be assisting the State in its defense against another State, an occupying force (a “resistance” movement) or another armed group; or they may be attempting to overthrow the existing government of the State (opposition groups) or to secede from the State and form a new State (perhaps invoking some version of self-determination).<sup>60</sup> Allen’s definition or explanation seem to have implied that even though armed groups maybe outside the ambit of State control, they may have links or relationships to State parties to an armed conflict or other armed groups. Thus, one could observe that the nature of armed groups is complex.

**Combatant:** The first attempt to formulate an internationally accepted definition of combatant status was made during the Brussels Conference of 1874, when the conference announced its project of an *International Declaration concerning the Laws and customs of War*.<sup>61</sup>

However it is generally agreed that the starting point for the definition of “combatant” is *Article 1 of Hague Regulations IV* and *Article 4 of the Third Geneva Convention* (which addresses treatment of prisoners of war). The definition is important because the Law of armed conflict distinguishes between civilians and combatants, so as to properly assign applicable laws, rights and obligations or duties. Thus, the *Third Geneva Convention* provides a definition of those persons who are entitled to prisoner of war status as combatants to include *inter alia*:

1. Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps including such organized resistance movements fulfill the following conditions:
  - (a) That of being commanded by a person responsible for his subordinates;
  - (b) That of having a fixed distinctive sign recognizable at a distance.
  - (c) That of carrying arms openly;
  - (d) That of conducting their operations in accordance with the laws and customs of war.
3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model ....
5. Inhabitants of a non-occupied territory who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.<sup>62</sup>

However, *Additional Protocol I* provides an alternative definition which seems to have ‘muddied’ up, the definition of a combatant,<sup>63</sup> and engendered some confusion.<sup>64</sup> *Article 43* provides:

1. The armed forces of a party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates, even if that party is

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<sup>59</sup>Norwitz, J. H., *op.cit.*, 99.

<sup>60</sup>*Ibid.*, 99 – 100.

<sup>61</sup>Crawford, E., *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, Oxford, Oxford University Press, 2010, 49.

<sup>62</sup>See *Geneva Convention III*, Art. 4. *Article 5* provides: ‘The present Convention shall apply to the persons referred to in *Article 4* from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in *Article 4*, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal’.

<sup>63</sup>Norwitz, J., *op.cit.*, 108.

<sup>64</sup>Ibezim, E. C., ‘Contemporary Challenges to International Humanitarian Law: The Private Military Companies’, *op.cit.*, 98.



represented by a government or an authority not recognized by an adverse party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a party to a conflict (other than medical personnel and chaplains covered by Article 33 of the *Third Convention*) are combatants, that is to say, they have the right to participate directly in hostilities.<sup>65</sup>

A closer scrutiny of the definitions may show that they are not irreconcilable. Whereas the provisions of the *Third Geneva Conventions* are concerned with persons that should be accorded Prisoners of War status, and thus rather inclusive of persons who may not traditionally or even be considered as combatants,<sup>66</sup> *Article 43* of *Additional Protocol 1* contemplates combatants *strictusensu*. Thus, the latter provision, other than the former is constitutive of the definition of 'combatant', under the *Geneva Conventions*.

**Implementation and Enforcement:** According to Matazu, the term "Implementation" may be somewhat obscure and in need of further clarification even to those who are familiar with International Humanitarian Law.<sup>67</sup> He cites Ladan's view that implementing International Humanitarian Law means putting the law into effect, an action which goes further than mere observance of the law<sup>68</sup>

For Ladan:

While Humanitarian law is respected when its substantial value, come to application, that is, in situations of armed conflict, it has to be implemented before an armed conflict breaks out. The implementation of an International treaty implies that its general aims results that was desired by those who adopted the treaty, is achieved or will be achieved, so that the treaty rules can be said to have been given full effect.<sup>69</sup>

Matazu acknowledges that the obligation to perform a treaty is intrinsic to its accession by a State, although he observes that it might not be expressly stipulated, as what the *Vienna Convention on the Law of Treaties* simply states is that, 'a treaty must be performed in good faith by the States which are party to it'.<sup>70</sup> However, 'with regard to International Humanitarian Law, the fact is that the treaties themselves provide for a number of ways and means aimed at ensuring that their rules are observed, if the situation requires their application'.<sup>71</sup> The treaty maintains that implementation consists of all the necessary measures that must be taken to ensure that the rules are fully respected.<sup>72</sup> Most of these measures are usually taken outside conflict zones, and both in times of peace, and war. They include the dissemination of the relevant rules to all citizens, both civilian and military; the putting in place of structures, administrative arrangements and personnel required for the application of International Humanitarian Law, in order to ensure that violations of the law are prevented and, where necessary punished.<sup>73</sup>

On the other hand, "Enforce" is said to be synonymous with the following words and phrases: ... 'Impose, administer, apply, carry out, execute, implement, insist on, prosecute, put into effect.'<sup>74</sup> For Black's Law Dictionary, "Enforcement" means 'to force obedience to; cause to be carried out; put into force ...',<sup>75</sup> while the Oxford Dictionary of Law specifically defines "Enforcement of Judgment" as "The process by which the orders of a court may be enforced..."<sup>76</sup> Thus enforcement goes beyond legislative actions to encompass both executive and judicial activities aimed at putting the law into effect. In other words, agents of the three arms of government are one way or the other involved in the enforcement of the law. However, law enforcement has

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<sup>65</sup> See *Article 43*, Additional Protocol 1

<sup>66</sup> *Geneva Convention III*.

<sup>67</sup> Matazu, A ; 'The Domestic Implementation of International Humanitarian Law in Nigeria: Issues and Challenges,' Abraham, G and others, *African YearBook on International Humanitarian Law*, 2011 Cape Town, Juta & Co.Ltd.,181.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.* See also *Article 26* of the *Vienna Convention on the Law of Treaties*, 1969.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*, 181-182

<sup>74</sup> Gilmour, L., *Harper Collins Pocket Thesaurus*, New York, Harper Collins Publishers, 2002, 186.

<sup>75</sup> Garner, B.A., *Black's Law Dictionary* (8<sup>th</sup> edn.) St. Paul, MN, West, a Thomson Business, 2004, 569.

<sup>76</sup> Martin, E.A., *Oxford Dictionary of Law*, Oxford, Oxford University Press, 2002, 174.

generally been used to refer to the police officers, prisons officers and other members of the executive branch of government charged with carrying out and enforcing the criminal law.<sup>77</sup>

### **III. HISTORICAL BACKGROUND TO BOKO HARAM INSURGENCY:**

*Boko Haram* insurgency and the resultant armed conflict between the insurgents and the Federal Republic of Nigeria was triggered by the terrorist activities of an Islamic fundamentalist group popularly known as *Boko Haram*. There may be no consensus as to the exact date of the emergence of the *Boko Haram* sect, but the group was known to the Nigerian government to have existed since 1995 under the name of *AhlulSunnaWal'jama'ahhijara*.<sup>78</sup> They were said to have begun as a group of harmless young Muslims with radical inclinations that usually converged at the Muhammadu Indimi Mosque in Maiduguri where they worshipped and held their meetings under Muhammad Ali, their leader.<sup>79</sup> In 2002, Muhammad Ali declared Borno State corrupt and irredeemable. The State governor at the time was El-haji Ali Modu Sheriff, whom he later declared an enemy of *Boko Haram*, and whose cousin was killed in an attack which targeted Modu Sheriff himself.<sup>80</sup> Incidentally, Muhammad Ali was killed in December 2003, and most of his estimated two hundred members were wiped out, when they brazenly confronted the Nigeria Police Force. All this time, Ali and his group were not known as *Boko Haram*. They were known and called the "Nigerian Taliban" probably because Ali and his people called their base Afghanistan.<sup>81</sup>

However, a few members of the "Nigerian Taliban" survived. They quietly went back to Maiduguri in Borno State under a new leader, Mohammad Yusuf, who began all over again to rebuild the group. The new leader proved to be more organized. He moved the group to a new location where they built their own Mosque called Ibn Tiamiyah Masjid. The land upon which the Mosque was built was donated to them by Mohammad Yusuf's father-in-law. The Mosque was more of a village and Yusuf's group became known as the 'Yusufiyya Islamic Movement'.<sup>82</sup>

Mohammad Yusuf is said to have had a dream in which he was directed to change the name to Jama'atulAhlus-Sunnah Lidda'AwatiWal Jihad. This name means 'people committed to the propagation of the teachings of the prophet and Jihad' or a group advocating for righteousness and holy war.<sup>83</sup> The group grew in leaps and bounds under the leadership of Yusuf. Most of the members were poor and the uneducated (in western education) masses of Hausa, Kanuri and Fulani origin, while a number of the members were from the nearby countries of Niger, Chad and Cameroon. However, in the course of time, a number of educated people joined them. A few of them who had University degrees and polytechnic diplomas destroyed their certificates. According to the Sect, the certificates were *Haram* and therefore forbidden by true Muslims. This belief signified the origin of the name *Boko Haram*. The term comes from the Hausa word *Boko* meaning "western or non-Islamic education" and the Arabic word *Haram* meaning "sin".

Thus *Boko Haram* literally means, 'Western or non-Islamic education is Sin'.<sup>84</sup> While the frequent allusion to the term *Boko Haram* by the leader of the sect made people to begin to refer to them as *Boko Haram*, they are however known to have rejected the name in a statement allegedly released on August 2009 by their acting leader, MallamSanniUmaru. Again, the Sect, in a pamphlet circulated in front of Bauchi prison, and on major streets in Bauchi after their 7<sup>th</sup> September attack on the prison renounced the name *Boko Haram*, and insisted that its name is Jama'atuAhlus-Sunnah Lidda'AwatiWal Jihad.<sup>85</sup>

After Muhammad Yusuf was killed, Muhammad AbubakarShekau emerged as leader of *Boko Haram*. Very little was known of him until he surfaced in a video almost one year after the death of Muhammad Yusuf. He was Yusuf's deputy. Many people thought that he was also killed in July 2009, but it turned out that he was only injured and decided to go underground for a while.

Under his leadership, since 2010, *Boko Haram* has carried out regular bombing and shooting missions in many parts of Northern Nigeria and has daringly confronted the Nigerian Armed Forces. His forces which were significantly 'degraded' have continued to fight on, by guerilla warfare strategy and bombing soft targets,

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<sup>77</sup> Garner, *op.cit*; 901.

<sup>78</sup> Ovisasogie, F.O., and Duruji, M.M., 'State Failure, Terrorism and Global Security: An Appraisal of the Boko Haram Insurgency in Northern Nigeria', [2013], *Journal of Sustainable Society*, (vol.2, No 1) 20. Available at <http://worldscholarship.org>. (Accessed on 17<sup>th</sup> October, 2017)

<sup>79</sup> N.I.O & D.I.B., *Boko Haram: Between Myth and Reality*, 10 (for security reasons the author's real names, and even the name and addresses of the publishers are not indicated in the book).

<sup>80</sup> *Ibid*

<sup>81</sup> *Ibid*

<sup>82</sup> *Ibid*

<sup>83</sup> *Ibid*

<sup>84</sup> Ovisasogie and Duruji, *op.cit*; 26. See also, Okoronye I., *op.cit*, 217.

<sup>85</sup> Ovisasogie F.O and Duruji, M.M., *Ibid*, 25

especially civilian objects. However, they have more recently become more brazen and successfully attacked certain Army barracks and Military locations close to the theatres of war in the North-East.

#### **IV. BOKO HARAM INSURGENCY AND THE CHALLENGES OF IMPLEMENTING AND ENFORCING INTERNATIONAL HUMANITARIAN LAW IN NIGERIA**

A number of challenges have plagued the implementation and enforcement of IHL in the armed conflict between Nigeria and Boko Haram insurgents. Notable among these challenges are :

i) The character and characterization of the armed conflict; ii) Non-Commitment to the Obligation to Respect and ensure respect for IHL; and, iii) Weak Implementation and Enforcement Mechanisms.

##### **i) Character / Characterization of Boko Haram Insurgency:**

The first challenge *Boko Haram* Insurgency presents to the implementation and enforcement of IHL in Nigeria is in its character (whether it be an armed conflict or otherwise) and its characterization (whether it be international or otherwise). Clearly, the conflict started as an internal disturbance, which is normally classified in IHL under "Other Situations of Violence".<sup>86</sup> Its violent attacks against Christians, government personnel and even fellow Muslims perceived as uncooperative with them, and their confrontations with the Nigerian army, in their bid to impose an exclusive Islamic system of government continued until they reached an unprecedented scale and intensity which has since been considered to reach the threshold of an armed conflict.<sup>87</sup>

The Office of the Prosecutor ("OTP"), International Criminal Court ("ICC") which is responsible for determining whether a situation meets the legal criteria established by the *Rome Statute* to warrant investigation by the court has examined the situation in Nigeria and published its *Article 5* Report on the situation in Nigeria generally, and the situation relative to *Boko Haram*, in particular.<sup>88</sup> The report states as follows with regard to the conflict and clashes between the *Boko Haram* insurgents and the Nigeria security operatives:

At the time of writing, analysis suggests that the security operation against Boko Haram may still fall under the category of 'internal disturbances' as opposed to a non-international armed conflict. However, the issue remains subject to on-going analysis. The Office will seek additional information on the geographical spread of Security operations and the structure and organization of the JTF and other relevant security forces in order to fine-tune its assessment.<sup>89</sup>

Apparently, since that investigation and report, the Prosecutor must have accessed additional information on the situation as it later declared in late 2013, that Nigeria was in a state of non-international armed conflict with *Boko Haram*. On its own part, and independently too, the International Committee of the Red Cross (ICRC), also declared the situation in Nigeria, as an armed conflict of non-international character in 2013, while in 2014, the National Human Rights Commission of Nigeria confirmed that the country was engaged in an armed conflict of non-international character, as had earlier been established by the Prosecutor and the International Committee of the Red Cross. Besides, extant precedent on levying of War in Nigeria supports the view that AbubakarShekau-led *Boko Haram* insurgency against the government and people of Nigeria amounts to levying of war against Nigeria.<sup>90</sup> For instance, judged against the background of *Boro and Others v The Republic*,<sup>91</sup> it is abundantly clear that AbubakarShekau and his cohorts have levied war against Nigeria. It is equally clear that the *Boko Haram* and "Nigerian war against Terrorism" is an armed conflict of non-international character in spite of its transnational scope. This is so because it is an armed conflict between a State-actor, and a non-State actor. Therefore, applicable laws may include *Article 3* common to the *Geneva Conventions* of 1949; the *Geneva Conventions Act of Nigeria* (1961); Customary International Humanitarian Law. Nigerian national laws, especially, the *Criminal and Penal codes*; Refugee laws, and Guidelines for the treatment of internally Displaced Persons, and the *Terrorism (Prevention) Act*, 2011 as amended in 2013 may also apply.

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<sup>86</sup>See Ibezim, E.C *Legal Protection of Women in Armed Conflicts in Nigeris, Democratic Republic of Congo and Sierra Leone*, 2019 (An unpublished Ph.D Thesis), 11.

<sup>87</sup>*Ibid.*

<sup>88</sup> See *Article 5 Report on Situation in Nigeria* dated 5 August, 2013, published by the Office of the Prosecutor, International Criminal Court.

<sup>89</sup>*Ibid.*, para 113. According to para 83, 'available information appears sufficient to establish that *Boko Haram* could be considered as an "organization" capable of defining and implementing a policy of committing crimes against humanity. The group appears to be under a responsible command, namely the leadership exerted by AbubakarShekau'.

<sup>90</sup> See *Boro and Others v The Republic* 9SC.377/66). All NLR, 263-273.

<sup>91</sup> *Supra.*

Regrettably though, Nigeria seems to have emphasized *Boko Haram's* tactic of terrorism to the detriment of the fact that the situation is essentially first and foremost an armed conflict. This has had the effect of the country seemingly losing sight of the fact that the principal legal regime that should apply to the armed conflict is International Humanitarian Law, while relevant international instruments on terrorism<sup>92</sup> and the Nigerian Statutes on terrorism<sup>93</sup> should apply simultaneously with IHL to the extent that terrorism has been involved. This situation seems to have led to the second challenge to the implementation and enforcement of IHL in the armed conflict, that of non-commitment to the obligation to respect and ensure respect for IHL.

**ii) Non-Commitment to the Obligation to Respect and ensure respect for IHL:**

Whereas State Parties to the *Geneva Conventions* undertake to respect and to ensure respect for the Conventions in all circumstances,<sup>94</sup> there has been significant evidence of non-commitment to the obligation to respect and to ensure respect for IHL in the on-going *Boko Haram* war. By virtue of Common Article 3 to the *Geneva Conventions*, this obligation to respect and ensure respect for IHL is also extended to non-State actors or armed groups like *Boko Haram* who are bound to apply certain provisions of IHL, as a minimum.<sup>95</sup>

In keeping with this obligation to respect IHL norms, Nigeria has signed up or ratified a number of international legal instruments that constitute the framework for regulating the conduct of armed conflicts and protecting their victims.<sup>96</sup> Such relevant instruments which constitute her table of ratification as at September 2017, include the following: *Geneva Conventions I-IV*, 1949<sup>97</sup>; *Additional Protocol I*, 1977<sup>98</sup>; *Additional Protocol II*, 1977<sup>99</sup>; *Additional Protocol III*, 2005<sup>100</sup>; *Child Rights Convention*, 1989<sup>101</sup>; *Optional Protocol to the Child Rights Convention*, 2000<sup>102</sup>; *Rome Statute of the International Criminal Court*, 1998<sup>103</sup>; *the Hague Convention Relative to the Protection of Cultural Property*, 1954<sup>104</sup>; *Protocol to the Hague Convention*, 1999<sup>105</sup>; *Environmental Modification Convention*, 1976<sup>106</sup>; *UN Convention Relative to the Status of Refugees*, 1951<sup>107</sup>; *O.A.U Refugee Convention*, 1969<sup>108</sup>; *African Cultural Charter*, 1976<sup>109</sup>; *African Children Charter*, 1990<sup>110</sup>; *O.A.U Convention on Nature*, 1969<sup>111</sup>; *Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)*, 1979<sup>112</sup>; and *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 1999.<sup>113</sup>

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<sup>92</sup> International instruments on terrorism include: *League of Nations Convention for the Prevention and Punishment of Terrorism, 1937* (Never entered into force because of the onset of the Second World War); *International Convention for the Suppression of the Financing of Terrorism, 1999*; *Arab Convention for the Suppression of Terrorism, 1998*; and *OAU Convention for the Prevention/Combating of Terrorism, 1999*.

<sup>93</sup> *Terrorism Act, 2011*; and the *Terrorism (Amendment) Act, 2013*.

<sup>94</sup> See common Article 1 to the *Geneva Conventions*; and Article 1 of *Additional Protocol I*

<sup>95</sup> See Article 3 (1)(a-d) and (2) of *Geneva Conventions*.

<sup>96</sup> Table of ratification as at September 2017,

<sup>97</sup> Ratified 20-06-1961; and cited as: Geneva Convention for the Amelioration of the *Geneva Conventions I-IV*, 1949

<sup>98</sup> *Additional Protocol I*, 1977. Ratified 10-10-1988, and cited as Protocol Additional to the Geneva Conventions of 12 August, 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1) of 8 June, 1977.

<sup>99</sup> *Additional Protocol II*, 1977 Ratified 10-10-1988, and cited as Protocol Additional to the Geneva Convention of August, 1949 and Relative to the Protection of Victims of non-International Armed Conflicts (Protocol II) of 8 June, 1977.

<sup>100</sup> *Additional Protocol III*, 2005. Not yet ratified.

<sup>101</sup> *Child Rights Convention*, 1989. Ratified 19-04-1991 and cited as United Convention on the Rights of the Child, 1989.

<sup>102</sup> *Optional Protocol to the Child Rights Convention*, 2000. Ratified 20-09-2012.

<sup>103</sup> *Rome Statute of the International Criminal Court*, 1998. Ratified 27-09-2001.

<sup>104</sup> *the Hague Convention Relative to the Protection of Cultural Property*, 1954. Ratified 5-06-1961.

<sup>105</sup> *Protocol to the Hague Convention*, 1999. Ratified 21-10-2005.

<sup>106</sup> *Environmental Modification Convention*, 1976. Not yet ratified.

<sup>107</sup> *UN Convention Relative to the Status of Refugees*, 1951. Not yet ratified.

<sup>108</sup> *O.A.U Refugee Convention*, 1969. Ratified 23-05-1986.

<sup>109</sup> *African Cultural Charter*, 1976. Ratified 24-09-1986.

<sup>110</sup> *African Children Charter*, 1990. Ratified 23-07-2001.

<sup>111</sup> *O.A.U Convention on Nature*, 1969. Ratified 2-04-1974.

<sup>112</sup> *Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)*, 1979. Ratified 13-06-1985.

On regulation of weapons, Nigeria also ratified the following instruments, among others: *Geneva Gas Protocol*, 1925;<sup>114</sup> *Bacteriological Weapons Convention (BWC)*, 1972;<sup>115</sup> *Chemical Weapons Convention (CWC)*, 1993<sup>116</sup>; and *Additional Protocol to the Mine Ban Convention*, 1977<sup>117</sup>. Most recently, in June and September, 2017, the country signed the *Cluster Munition* and the *Anti-Nuclear Weapons Conventions*, respectively. She also ratified a Plethora of African regional human rights instruments that may have implications for the Protection of victims of armed conflict.

No doubt, the list of treaties and international legal instruments, which Nigeria has subscribed to is impressive, but relatively few of such instruments has been domesticated by any form of legislation.<sup>118</sup> Herein lies one of the greatest challenges in implementing and enforcing IHL in Nigeria, and in the armed conflict between Nigeria and the *Boko Haram* insurgents, in particular. Non-domestication of the treaties has the effect of limiting their application in Nigeria, as implementing the rights so promoted goes beyond the obligation to respect them which is inherent in the fact of accession or ratification.<sup>119</sup> Beyond that, implementation encompasses mechanisms for their enforcement in Nigeria, which entails domestic legislations aimed at incorporating them into the *juris corpus* of Nigeria in line with the country's dualist approach to the implementation of international law.<sup>120</sup> The legislative stricture occasioned by the country's dualist approach seems to be one of the reasons, besides a general lack of political will, for the poor performance of Nigeria in the implementation and enforcement of IHL norms.

On the other hand, inspite of the fact that 'IHL governing non-international armed conflicts is binding on belligerent States, as well as "on each Party to the conflict", which means that non-State armed groups, too, must respect IHL and prevent violations by their members,'<sup>121</sup> *Boko Haram* armed group seems to have continued to operate as a party that does not subscribe to any rule of combat, and more especially any IHL rule. This is reflected in their incessant targeting of civilians and civilian objects; the use of Child-Soldiers; and Suicide bombers; hostage-taking and extra-judicial executions, among other impunities, which amount to grave breaches of the *Geneva Conventions*, War crimes and Crimes against humanity.<sup>122</sup> Generally, their strategies and tactics are geared towards blurring the distinction between combatants and civilians.<sup>123</sup> They are often deployed in densely populated urban centres where avoiding collateral injuries or damage to individuals are practically impossible. Of course, this strategy is deliberate and intentional, thereby underscoring their non-commitment to the obligation to respect and ensure respect for IHL.

Ironically, the Nigerian military has also been accused of committing war crimes and possible crimes against humanity. This is following allegations, by Amnesty International, of war crimes against certain senior military officers 'along the chain of command – up to the Chief of Defence Staff and Chief of Army Staff which names include nine senior Nigerian military figures who should be investigated for command and individual responsibility for the crimes committed.'<sup>124</sup> The report alleges horrific war crimes committed by Nigeria's

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<sup>113</sup> *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 1999 Ratified 2004.

<sup>114</sup> *Geneva Gas Protocol*, 1925

<sup>115</sup> *Bacteriological Weapons Convention (BWC)*, 1972

<sup>116</sup> *Chemical Weapons Convention (CWC)*, 1993

<sup>117</sup> *Additional Protocol to the Mine Ban Convention*, 1977

<sup>118</sup> See Ibezim, E.C; *Legal Protection of Women in Armed Conflicts in Nigeria, Democratic Republic Of Congo and Sierra Leone*, 2019 *op.cit.*160.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.* The 1999 *Constitution of the Federal Republic of Nigeria* provided in *Section 12* that no treaty between the federation and any other Country shall have the force of law, except to the extent to which any such treaty has been enacted into law by the National Assembly. However, for matters outside the Exclusive Legislative List, a bill to implement a treaty shall not be presented to the President for his assent nor shall it be enacted, unless it is ratified by two-thirds majority of legislative houses of the States in the Federation.

<sup>121</sup> Melzer, N. and Kuster, E; *International Humanitarian Law: A Comprehensive Introduction*, Geneva, ICRC, 2016, 304-305.

<sup>122</sup> See for example *Geneva Conventions I, Article 12-18 and Articles 49-50; Geneva Convention II, Articles 12-21; and Article 50-51; Geneva Convention III, Articles 12-16, Articles 89-99; Geneva Convention IV, Articles 13-26, and Articles 27-34* etcetera. *Additional Protocol I, Article 13-20; Additional Protocol II, Articles 7-18; and Rome Statute of International Criminal Law, Articles 7, and 8.*

<sup>123</sup> This is ensured by the faceless and anonymity of the suicide bombers who while disguised, freely comingle with civilian populations, and detonate their concealed bombs.

<sup>124</sup> Amnesty International, 'New Amnesty Report: Senior Members of Nigerian Military Must Be Investigated for War Crimes' available at: <http://www.amnestyusa.org/press-releases/new-amnesty-report-senior-members-of-nigerian-military-must-be-investigated-for-war-crimes/of-06/02/2015> (accessed on 30-7-2019) The military

military which included 8,000 people who were either murdered or starved, suffocated or tortured to death.<sup>125</sup> However, the Nigerian Military and Government have denied culpability on behalf of the named personnel, in what seems to be an attempt to shield the alleged culprits from prosecution. Therefore, the overall picture presented by this state of affairs is a general non-commitment to the obligation to respect and ensure respect for IHL in the on-going *Boko Haram* and Nigeria war against terrorism. This constitutes a huge challenge to the implementation of IHL in Nigeria.

**iii) Weak Implementation and Enforcement Mechanisms:** Besides the fore-going challenges, weak Institutional mechanisms constitute another bane in implementing and enforcing IHL in the present conflict. Such mechanisms span across, the executive, the legislature and the judiciary and include, the Army, the Police, the Prisons, relevant Parastatals, the National Assembly and relevant courts. These mechanisms which ought to be the basic institutional framework for the protection of war victims in times of armed conflicts hardly serve as such due to corruption, indiscipline and general lack of sufficient professionalism. For instance, while there hardly seems to be any record of these institutions protecting women in the present war against *Boko Haram* insurgency, Amnesty International claims to have received consistent reports that women have been raped or sexually abused by the Police in the streets, while being transferred to Police stations, while in custody or when visiting male detainees.<sup>126</sup> The reports further state that rape and other forms of sexual violence or the threat of torture and ill-treatment have been used by the Police to extract confessions or other information.<sup>127</sup>

The fact that the government does not seem to have ordered investigations into these allegations and incidents, neither does there seem to be any prosecutions in the country for war crimes and crimes against humanity in the on-going war against *Boko Haram* underscores the weakness of existing mechanisms. The weakness, and failure of existing mechanisms are symbolized by the failure of the National Committee on International Humanitarian Law.

The Committee which was inaugurated on 3<sup>rd</sup> July, 2010 by the Attorney General of the Federation and Minister of Justice, and which enjoys a broad-based representation was as at 31<sup>st</sup> July, 2018 yet to receive necessary legal imprimatur by being enacted into law by the National Assembly.<sup>128</sup> Granted that the Committee has met a few times, it is yet to be funded and thus, has not been able to take off effectively.<sup>129</sup>

Nigeria's dualist approach to treaty implementation, which insists that no treaty between the federation and any other country shall have the force of law, except to the extent to which any such treaty has been enacted into law by the National Assembly<sup>130</sup> constitutes another implementation and enforcement challenge.<sup>131</sup> This is a challenge because such enactment demands the onerous two-thirds majority votes of members of the National Assembly for treaties to come into force.<sup>132</sup>

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personnel so implicated by the report for command and individual responsibility are: General AzubuikeIhejirika(Chief of Army Staff, Sept.2010-Jan.2014); Admiral Ola Ibrahim(Chief of Defense Staff, Oct.2012-Jan.2014); Air Chief Marshal Badeh (Chief of Defence Staff, Jan.2014); and General Ken Minimah – (Chief of Army Staff, Jan.2014). Others are Major General John A.H.Ewansiha, Major General Obida T. Ethan, Major General Ahmadu Mohammed, Brigadier General Austin O. Edokpayi, and Brigadier Rufus O. Bamigboye.

<sup>125</sup> For instance, a preliminary Examination Report on Nigeria released by the ICC's Office of the Prosecutor identified eight possible cases(heads) of crimes against humanity and War Crimes under Article 7 and 8 of *the Rome Statute*, perpetrated by both the militants and the Nigerian military. See Ibekwe, N, 'ICC lists 8 possible war crimes against Nigeria military, Boko Haram', available at : <http://www.premiumtimesng.com/news/headlines/193142-ICC-lists-8-possible-war-crimes-against-nigerian-military-boko-haram.html>

<sup>126</sup> See Amnesty International, 'Nigeria: Boko Haram and Nigerian Military committing crimes under International Law in North east Nigeria' (Amnesty International written statement of the 28<sup>th</sup> session of the UN Human Rights Council) (2-27 March , 2015). See also Ibezim,E.C., *Legal Protection of Women in Armed Conflicts in Nigeria, Democratic Republic of Congo and Sierra Leone, op.cit*, 182.

<sup>127</sup> *Ibid*

<sup>128</sup> *Ibid*

<sup>129</sup> *Ibid*

<sup>130</sup> See Section 12(1) of the 1999 *Constitution of the Federal Republic of Nigeria*.

<sup>131</sup> See *Abacha v Fawehinmi*[2006] NWLR (part 660) 228.

<sup>132</sup> By the provisions of Section 12(1) of the 1999 *Constitution of the Federal Republic of Nigeria*, the National Assembly is empowered generally to enact legislations for the purpose of implementing treaties. For matters outside the Exclusive Legislative list, a bill to implement a treaty shall not be presented to the President for his assent , nor shall it be enacted unless it is ratified by two-third majority of all the legislative houses of the states in the federation.

The Judiciary seems also to have faced a peculiar challenge in adjudicating cases in the on-going *Boko Haram* conflict, particularly with regards to cases involving detention of *Boko Haram* suspects. This challenge seems to be posed by the need to choose between a law enforcement approach and an armed conflict approach. While the law enforcement approach is characterized as one that seeks to prevent criminal conduct through specific and general deterrence, the armed conflict approach can be seen as one that seeks to provide for the “common defense” of the nation and its people by employing the armed forces and related intelligence assets of the nation to combat states or armed groups that pose a security threat to the nation or its allies.<sup>133</sup> Thus, responses to threats posed by armed groups like *Boko Haram* may include detention of their members.

However, the Nigerian Constitution and the *International Covenant on Civil and Political Rights* limit the state’s power to detain an individual, while the *Geneva Conventions* which have implications for the armed conflict approach allows the detention of prisoners of war indefinitely till the end of hostilities.<sup>134</sup> In *State v Mohammed Usman & Ors*, the Federal Government of Nigeria had brought an 11 count charge against seven suspected members of the *Boko Haram* sect, to which they all pleaded not guilty. The suspects, who were arraigned before Justice John Tsoho were Mohammed Usman (also known as Khalid Albarnawi), who was described as the leader of a *Boko Haram* splinter group, *Jamatu Asuraul Muslimina Fibililadis Sudan (datti)*, Yakubu Nuhu (also known as Bello Maishayi), Usman Abubakar (Mugiratu) and a lady, Halima Haliru. The defendants were charged, with conspiracy, hostage taking, supporting a terrorist group, illegal possession of firearms and concealing information on terrorism. They were charged with conspiracy to commit terrorism, contrary to *Section 17* of the *Terrorism (Prevention) Act 2011*, as amended in 2013, and punishable under same.

According to the charge filed by the office of the Attorney General of the Federation, the defendants in February 2013, at Ikirima *Boko Haram* camp in Sambisa forest, allegedly murdered seven internationally protected persons and buried them in a shallow grave. The Court, in its ruling, granted the prosecution’s application to protect witnesses that will testify by shielding witnesses that will testify in the case; and denied the accused and defendants bail, and ordered that they be remanded in Kuje Prison, pending the determination of the case. Again, in *Mohammed Yunus v the State*<sup>135</sup> where counsel to the applicant had prayed the Court to grant his client, a *Boko Haram* suspect, bail, counsel to the respondent (State Security Service) objected and prayed the court to refuse the bail application, on at least three grounds. The grounds included that the suspect might jeopardize investigations; that there was an existing Federal High Court order which empowered the State Security Service to detain the applicant for 45 days in order for the State Security Service to carry out their investigation; and that granting the applicant bail will contravene the provision of *section 27(1)* of the *Terrorism Amendment Act* of 2013. The accused was therefore denied bail. However, in *Umar v Federal Republic of Nigeria & Ors*,<sup>136</sup> the Court of Appeal, Abuja Division had the opportunity of thoroughly espousing the law with regard to right to bail, for the *Boko Haram* terrorist suspects. The appeal is against the ruling of the Federal High Court, Abuja delivered on 7<sup>th</sup> day of March 2014<sup>137</sup>.

The facts of the case are that the Appellant was charged with two others for breach of several provisions of the *Terrorism (Prevention) Amendment Act, 2013*, as reflected at pages 1-3 of the Record of Appeal. The Appellant (Applicant at the trial Court) applied to be admitted to bail pending the hearing and determination of the charge(s) against him pursuant to *Section 34* and *35* of the *1999 Constitution* (as amended) and *Section 118 (2)* of the *Criminal Procedure Act* and under the inherent jurisdiction of the court. The trial Judge, in his considered ruling refused the application, where-upon the Appellant instituted this appeal.

The Appellant contended that the trial Court ‘delved into extraneous matter in refusing the Appellant bail instead of relying on facts before him as required by law’. The extraneous matter complained of by the Appellant is that the trial Judge took into cognizance the happenings in Borno, Yobe and Adamawa states of the North Eastern part of Nigeria, specifically, act of terrorism which is the offence with which the Appellant is charged.

The learned Justice observed that the offence with which the Appellant is charged is terrorism, a capital offence which must be taken with caution, because death sentence is the highest of all penalties, but failed to see the wrong committed by the trial Judge in taking judicial notice of the terrorist acts in the North Eastern states of Nigeria, specifically Borno, Yobe and Adamawa States. This he opined is because the court owes a duty to protect the society, and no principle of law demands that crime of terrorism should be ignored. Furthermore, the learned Justice of the Court of Appeal observed that even though bail is a constitutional right, it is not granted as a matter of course. He affirmed that there must be placed before the court, sufficient materials disclosing

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<sup>133</sup>Norwitz, J.H(ed.), *op.cit*, 105

<sup>134</sup> See *Geneva Convention III*,

<sup>135</sup> Unreported Case, available at custodyvanguard. ngr.com sourced on 20 April, 2017.

<sup>136</sup> [2014] LPELR-24051 (CA), Court of Appeal Abuja Division.

<sup>137</sup> See *Federal Republic of Nigeria v Umar*, Charge No: FHC/ABJ/CR/13/2014.

exceptional circumstance to warrant a grant. He also pointed out that the court is guided by certain criteria in granting or refusing

bail and noted the criteria as provided by the Supreme Court in the case of *Suleiman v C.O.P*<sup>138</sup> as follows:

- a) The nature of the charge
- b) The strength of the evidence which supports the charge.
- c) The gravity of punishment in the event of conviction.
- d) The previous criminal record of the accused if any.
- e) The probability that the accused may not surrender himself for trial.
- f) The likelihood of the accused interfering with witnesses or suppressing any evidence that may incriminate him.
- g) The likelihood of further charge being brought against the accused; and
- h) The necessity to procure medical or social report pending final disposal of the case.

The Court observed that the first three criteria listed above are relevant to the instant case and that bail pending trial is not normally granted *ex-debitojustitia*, where the offence is a capital offence. In dismissing the appeal, the learned Justice held that it is his view that the trial court exercised its discretion judicially and judiciously, and that the case of *Suleiman v C.O.P*<sup>139</sup> relied on heavily by the appellant is not of any assistance to his case.

It is clear from the nature of the charges brought against the *Boko Haram* suspects, in the foregoing cases, that what was adopted was the law enforcement, rather than armed conflict approach, which has implications for the enforcement of IHL. This is the case for inspite of the nexus between the armed conflict in North East Nigeria and the facts of the cases, the cases were treated as those of terrorism *simpliciter*. No mention was made of possible commission of war crimes, crimes against humanity or genocide, even when most of the facts point to them. Could this be an oversight on the part of the government or a mark of ignorance of International Humanitarian Law on the part of the prosecutors, the Judiciary and the Nigerian bar?

## V. CONCLUSION AND RECOMMENDATIONS:

Clearly, the armed conflict in the North East of Nigeria, not being conventional, has thrown up a number of formidable challenges for the application of international Humanitarian Law. These challenges range mostly from the character and characterization of the armed conflict which has witnessed the overwhelming use of terrorism transnationally as a strategy of war; the non-commitment to the obligation to respect and ensure respect for International Humanitarian Law and the weakness of the implementation and enforcement mechanisms for International Humanitarian Law in Nigeria. All these challenges seem to have combined to ensure abysmal implementation and enforcement of International Humanitarian Law in the ongoing Boko Haram insurgency and resurgence.

The following recommendations are thus imperative:

1. Nigeria should be encouraged to implement International Humanitarian Law by domesticating and enforcing such relevant treaties and conventions as the *Rome Statute for International Criminal Court*, and the *Geneva Conventions* and their *Additional Protocols*. This, she could facilitate by adopting a monistic approach to the domestication of international treaties.
2. Nigeria should be encouraged to demonstrate sincere political will by ordering and ensuring thorough investigations and prosecutions of alleged war crimes and crimes against humanity committed by all parties to the armed conflict. However, where she is unwilling or unable, the government or other interested parties should invite the Prosecutor of the International Criminal Court (ICC) to investigate and prosecute alleged perpetrators of such crimes. On the other hand, the Prosecutor should initiate investigations and prosecutions *suo motto*, if he deems it expedient.
3. The Nigerian government should strengthen such relevant national institutions as the National Committee for International Humanitarian Law (by enacting enabling legislations and funding it adequately); the Army (especially its legal department); the Police; the Prisons (by recruiting adequate number of personnel/training them); and the Judiciary (especially by appointing the requisite number of judges, at the various levels of adjudication, who are also competent in IHL and subjecting them to continuing and regular training).

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<sup>138</sup> (2008) 8NWLR (Pt 1089) 298 SC.

<sup>139</sup> *Supra*



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