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GOVERNING LAW AND APPLICABLE  
RIGHTS**

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## **BOKO HARAM AS A NON-STATE ACTOR: GOVERNING LAW AND APPLICABLE RIGHTS**

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### **ABSTRACT**

*In 2015, the Institute for Economics and Peace, in its Global Terrorism Index, stated that Boko Haram terrorists in Nigeria have become the deadliest terrorist organization in the world. The Nigerian government is alleged to have applied measures that violate both international humanitarian law and human rights principles. This has sparked criticism from the international community. Some international bodies continue to call for the Nigerian government to prosecute some members of its security forces for war crimes and crimes against humanity. This paper, therefore, attempts to examine: (1) the armed conflict between Nigeria and Boko Haram; (2) rights available to Boko Haram suspects; and (3) the obligation to enforce accountability owed by parties according to international human right standards. This paper discusses the applicable law, cases of violations, and regulating law that guarantees rights in cases of armed conflict and the role of regional and international bodies in ensuring compliance.*

**Keywords:** Non-state Actors, Non-International Armed Conflict, International Humanitarian Law, Human Rights Law.

### **1.0. INTRODUCTION**

There have been several casualties as a result of the armed conflict between the Nigerian government and the Boko Haram terrorist group, drawing international attention and raising salient international humanitarian law issues which this paper attempts to address. Since the extra-judicial killing of its first leader, Muhammad Yusuf in 2009, the non-state actors (NSAs) have become more brazen and vicious in their attacks. They have carried out several abductions of civilians, bombed churches, mosques, bases of the Nigerian military and police stations, expanding their territory to Cameroon, Niger and, Chad. The Boko Haram insurgency has, therefore, become one of international concern.

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The NSAs are argued to have violated the core principles of international humanitarian law, one of which is “distinction”. It is further argued that these actors in addition to their drastic actions have continued to violate human rights norms without fear of consequences from the local and international community.

Boko Haram drew attention from the international sphere, including from the Obama administration and members of Congress after it abducted the Chibok girls. Its high death toll and its pledge of allegiance to the Islamic State (IS, also known as ISIL or ISIS) in March 2015 further raised the concern of US policymakers.<sup>1</sup> The group has sought to rebrand itself as the Islamic State’s West Africa Province (ISWAP), though it remains more popularly known by its original nickname.<sup>2</sup> The US State Department has named several individuals linked to Boko Haram, including its current leader, Abubakar Shekau, as Specially Designated Global Terrorists, and the group was designated as a Foreign Terrorist Organization in November 2013.<sup>3</sup>

On the other hand, the retaliation of Nigeria’s armed forces has been critiqued by international bodies as lacking responsibility and accountability measures to international humanitarian law standards and is alleged to have violated several human rights provisions in its actions against the insurgents. Human rights activists in Nigeria argue that Nigerian citizens fear both Boko Haram and the Joint Task Force, whose abusive tactics have strengthened the Islamist group’s narrative of battling government brutality.<sup>4</sup>

The Nigerian Government has allegedly failed and continues to delay in punishing its military personnel who debase the values of international humanitarian law and also violate human rights principles. It is argued that these military personnel have often failed to distinguish common civilians from insurgents in their response. Therefore, many

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<sup>1</sup> L.P. Blanchard, “Nigeria’s Boko Haram: Frequently Asked Questions”, (2016) R43558 *Congressional Research Service Report*.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> Human Rights Watch, “Spiraling Violence – Boko Haram Attacks and Security Force Abuses in Nigeria”, available at <https://www.hrw.org/report/2012/10/11/spiraling-violence/boko-haram-attacks-and-security-force-abuses-nigeria> (accessed 11 February 2020).

civilians, especially in Northeast Nigeria are subjected to horrendous situations, which include being killed without trial, tortured and detained indefinitely, thereby violating the provisions of the Geneva Convention<sup>5</sup> and the International Convention on Civil and Political Rights (ICCPR)<sup>6</sup>. Given the alleged violation, Amnesty International, a non-governmental human rights organization with its headquarters in the United Kingdom, called on the International Criminal Court (ICC) to commence an investigation into atrocities committed in the Boko Haram insurgency.<sup>7</sup>

The foregoing therefore raises questions of the appropriate standard to which the Nigerian Government can be held in the resulting armed conflict with Boko Haram. What is the applicable law? Do these NSAs have the prisoner of war status? Should they be treated as such? What accountability measures can be utilized by the Nigerian Government to ensure that its military personnel comply with humanitarian and human right standards in these circumstances? Does the spread of the Boko Haram insurgency raise international law questions?

### **I.1. Boko Haram across Borders: Cameroon, Niger and Chad**

Following its several attacks and reprisal by Nigeria's Armed Forces, Boko Haram insurgents have expanded their strongholds from the camps in Sambisa forest, Northeast Nigeria, to neighbouring countries of Cameroon, Niger and Chad, collectively called the Lake Chad Basin.<sup>8</sup> Boko Haram's campaign to capture and control territory in Borno, Yobe, and Adamawa states escalated further in 2015, alongside attacks in Cameroon, including repeated abductions and the mass kidnapping of children.<sup>9</sup> In February 2015, the border town of Bosso

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<sup>5</sup> 75 UNTS 287 (Common Article 3).

<sup>6</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, Art 4, 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>7</sup> A. France-Presse, "Amnesty Calls On ICC To Fully Probe Boko Haram Conflict Atrocities", available at <https://www.voanews.com/africa/amnesty-calls-icc-fully-probe-boko-haram-conflict-atrocities> (accessed 10 January 2021).

<sup>8</sup> V. Comolli, "The Evolution and Impact of Boko Haram in the Lake Chad Basin", available at <https://odihpn.org/magazine/the-evolution-and-impact-of-boko-haram-in-the-lake-chad-basin/> (accessed 10 January 2021).

<sup>9</sup> *Ibid.*

in Niger and Ngouboua village in Chad came under attack, signalling the spread of violence beyond Nigeria's borders; making it clear that Niger, Chad, and Cameroon had become part of Boko Haram's fighting ground.<sup>10</sup>

Operations by regional forces, notably from Chad and Nigeria, reversed the territorial advances that Boko Haram made from mid-2014 into early 2015 when the latter took nominal control of large swathes of territory in North-eastern Nigeria under a self-described Islamic caliphate.<sup>11</sup> The group has since reverted to asymmetric attacks, largely against soft targets in North-eastern Nigeria and Northern Cameroon.<sup>12</sup> Despite its loss of territory, Boko Haram maintains the ability to move and conduct attacks in an area that stretches from Southern Niger's Diffa region into Northern Cameroon.<sup>13</sup> The group has also demonstrated its ability to attack the Chadian capital, N'djamena, killing scores in multiple bombing incidents.<sup>14</sup> Notably, there has been a significant increase over the past year in the use of suicide bombers, most of them being women and children.<sup>15</sup> This attempted expansion raises international law questions and concerns. Despite the regional operations carried out by regional forces, there are still significant traces of Boko Haram in these regions, particularly in Nigeria. This raises several questions like: is international intervention required? On what basis would the international community intervene? Is this an issue that requires the assent of the United Nations Security Council for intervention? Has the "unwilling and unable" requirement been met by these countries? Is this an internal or international armed conflict?

## **1.2. Non-State Actor under International Law**

In its Global Terrorism Index of 2015, the Institute for Economics and Peace ranked Boko Haram as the deadliest terrorist organization in

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<sup>10</sup> *Ibid.*

<sup>11</sup> *Supra* n 1.

<sup>10</sup> *Ibid.*, at 1.

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

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

<sup>15</sup> *Ibid.*

the world.<sup>16</sup> The Institute, in its 7th edition in 2019,<sup>17</sup> maintains that the impact of Boko Haram on the Lake Chad Basin of West Africa has remained deadly, although it has been displaced from being the deadliest to the 4th deadliest terrorist organization.<sup>18</sup> Boko Haram in its operations has continued to pose a significant concern to the international community. Internal rifts have led Boko Haram to split into multiple factions, which now appear relatively distinct.<sup>19</sup> The largest splinter group is the ISIL-aligned Islamic State West African Province (ISWAP), led by Musab al-Barnawi, reported to control territory on the shores of Lake Chad and collect taxes in Northeast Nigeria.<sup>20</sup> The rival to ISWAP is the faction led by Abubakar Shekau.<sup>21</sup> While ISWAP predominantly targets the Nigerian military and government agents, the Shekau faction is known for considering Muslims that do not follow him as potential targets. This ideological difference is thought to have motivated their split.<sup>22</sup>

What then is the status of Boko Haram under international law? Since Boko Haram is not a state nor a contracting party recognized under International Law and the Geneva Conventions, they are classified as (NSAs). These are unlawful combatants involved in the continual use of force or armed activities which results in the loss of their status as civilians under international humanitarian law.<sup>23</sup> The International Committee of the Red Cross (ICRC) has noted that though NSAs are considered combatants, they cannot enjoy the legal privileges that are attributed to State combatants.<sup>24</sup> This, therefore, affects the status, rights and governing law applicable to Boko Haram as an NSA. Though the Boko Haram conflict has raised international concerns, it has not

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<sup>16</sup> Institute for Economics and Peace, “Measuring and Understanding the Impact of Terrorism” (2016) *Global Terrorism Index*, p. 20.

<sup>17</sup> *Ibid.*, at 16.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Supra* n 16.

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

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

<sup>22</sup> *Ibid.*

<sup>23</sup> W.A. Qureshi, “Applicability of International Humanitarian Law to Non-State Actors” (2019) 17(1) *Santa Clara Journal of International Law*, p. 8.

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

changed its character. For all purposes, it remains a Non-International Armed Conflict (NIAC).

### **I.3. Abduction of the Chibok Girls and Retaliation of the Nigerian Military**

In April of 2014, the Chibok girls were abducted, and news of the abduction spread like wildfire and soon gained international momentum. The former President of Nigeria, Goodluck Ebele Jonathan, in his speech, declared war against Boko Haram. While addressing the horrific incident, he stated: “I am determined to protect our democracy, our national unity, and our political stability, by waging a total war against terrorism.”<sup>25</sup> However, according to Amnesty International, the Nigerian military had more than four hours of warning about the abduction by Boko Haram but did nothing about it.<sup>26</sup>

Soon after international and local criticism on its failure to protect its citizens, the Nigerian Government employed several measures to combat the Boko Haram terrorists. Even this was met with criticism as the Nigerian Armed Forces were alleged to have violated human rights norms and humanitarian law standards in dealing with the NSAs. Amnesty International called on the ICC to investigate the alleged atrocities committed in the armed conflict, accusing Nigeria of failing to adhere to international human rights standards, and bringing those responsible to justice.<sup>27</sup>

Every government must prevent harm to its citizens. The Nigerian government failed to carry out this obligation to prevent harm and protect its citizens, as seen in different provisions of the Bill of Rights. The Nigerian security forces knew of the attack on the Chibok girls

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<sup>25</sup> D. Atkin, “Nigeria’s President Declares ‘Total War’ Against Boko Haram”, available at <https://www.nbcnews.com/storyline/missing-nigeria-schoolgirls/nigerias-president-declares-total-war-against-boko-haram-n117871> (accessed 2 March 2020).

<sup>26</sup> H. Macdonald and B. Omosore, “Nigeria had 4-Hour Warning on School Raid, Amnesty International Says”, available at <https://abcnews.go.com/International/nigeria-hour-warning-school-raid-amnesty-international/story?id=23652165> (accessed 2 March 2020).

<sup>27</sup> *Supra* n 7.

four hours before it was carried out and failed to protect the girls and prevent the attack. This raises the issue of the government's duty to protect its citizens in armed conflict and goes to buttress some of the claims of the ICC.

#### **I.4. Claims of War Crimes against Nigeria's Military**

The Nigerian government deposited its instrument of ratification to the Rome Statute in 2001.<sup>28</sup> The ratification placed Nigeria and its citizens under the authority of the ICC for investigation and prosecution of international criminal offenses from 1 July 2002 onwards.<sup>29</sup> Between 10 November 2005 and 30 September 2012, the ICC Office of the Prosecutor received 59 complaints based on different Rome Statute Articles, as well as 15 communications from government agencies, international non-governmental organizations, activists, and academics concerning war crimes, genocide, and crimes against humanity in Nigeria.<sup>30</sup>

The preliminary examination of the situation in Nigeria was made public on 18 November 2010. The same year, the Office of the Prosecutor visited Nigeria to carry out a preliminary examination of acts of war crimes and crimes against humanity alleged to have been committed by members of Boko Haram and the Nigerian army against civilians in the wake of the Boko Haram insurgency.<sup>31</sup>

The preliminary examination suggested that there was a reasonable basis to conclude that crimes against humanity had been committed in Nigeria; which included acts of murder, destruction, and ethnic cleansing attributed to Boko Haram.<sup>32</sup> The Office of the Prosecutor, therefore, decided that the preliminary examinations should advance

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<sup>28</sup> International Criminal Court, "Report On Preliminary Examination Activities" (2013), available at <https://www.icc-cpi.int/itemsDocuments/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF> (accessed 12 March 2020), p. 46.

<sup>29</sup> *Ibid.*

<sup>30</sup> O.M. Folami, "Prosecution That Never Began: An Exploration of Acceptance of International Criminal Justice in Nigeria" (2017) *After Nuremberg. Exploring Multiple Dimensions of the Acceptance of International Criminal Justice*, p. 4.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

to the “admissibility stage” to assess whether the national authorities were willing or able to prosecute those responsible or whether the ICC needs to become active.<sup>33</sup> Since the preliminary ICC examination of Boko Haram’s involvement in war crimes and the recommendation by the Office of the Prosecutor for admissibility by the Nigerian Government, prosecution processes have not begun.<sup>34</sup>

ICC chief prosecutor Fatma Bensouda opened an investigation that showed attacks on civilians, mass arrests and detention of suspects, abuse, torture, and summary executions concerning the military.<sup>35</sup> Despite promises made by the Nigerian Government to look into the matter of violation, little has been done.<sup>36</sup> The prosecutor wrote:

Eight years since the opening of the preliminary examination and faced with the continuing commission of crimes under international law and the possibility of a never-ending preliminary analysis, it is time for the OTP (Office of the Prosecutor) to open a formal investigation in Nigeria.<sup>37</sup>

Central to Amnesty International’s argument is Nigeria’s investigations into alleged military atrocities and its prosecution of thousands of Boko Haram suspects.<sup>38</sup> None of the more than 20 government inquiries launched into claims of abuse by troops and civilian militia members in the last nine years has led to formal investigations and prosecutions, instead, the proceedings appeared to be designed to provide a “veneer of accountability” and exonerate senior officers and “shield persons concerned from criminal responsibility”.<sup>39</sup>

At the same time, there has been a “minimal” number of prosecutions of mid-to-high ranking Boko Haram members for serious crimes such as terrorism, murder, or hostage-taking.<sup>40</sup> The report said that the mass trials of more than 1,000 suspects that began in October 2017

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<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Supra* n 7.

<sup>36</sup> *Ibid.*

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

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

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

were a “sham” designed to provide “legal cover” for those held in prolonged, arbitrary and unlawful detention.<sup>41</sup> Prosecutions were based on unreliable and untested confessions or guilty pleas, while defendants had lack of access to lawyers and trials were rushed through. Most of those on trial were acquitted due to lack of evidence or walked free because of time already served in custody. The majority appeared to be civilians caught up in the conflict.<sup>42</sup>

The ICC in its report of 5 December 2019 identified possible crimes against the Nigerian Security and Civilian Joint Task Force (CJTF), including “killings, torture or ill-treatment of military-aged males suspected to be Boko Haram members or supporters in Northeast Nigeria”.<sup>43</sup> Nigerian officials could also stand trial for “attacks against the civilian population and the recruitment and use of children under 15 years of age to participate in hostilities”, the latter accusation is particularly targeted at the CJTF.<sup>44</sup>

#### ***1.4.1. Non-Distinction of Civilians by Nigerian Armed forces and Boko Haram Insurgents***

One compelling issue that has pervaded the armed conflict between Nigeria’s Armed Forces and Boko Haram, is the non-observance of the principle of distinction by both sides. While it is basic that Boko Haram insurgents would target civilians to capture the attention of the government, a greater degree of observance of the principles of international humanitarian law and human rights law is expected from Nigeria’s security forces. Amnesty International, together with other human rights bodies alleges that Nigeria’s security forces have violated international standards on this point.

In 2015, Amnesty International, in its written statement to the 28th session of the United Nations Human Rights Council, alleged that in its response to Boko Haram, the Nigerian Armed Forces, often relying

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<sup>41</sup> *Ibid.*

<sup>42</sup> *Supra* n 8.

<sup>43</sup> A. Abdulaziz, “Nigeria: ICC Identifies Potential War Crimes by Nigerian Security Forces, Boko Haram”, available at <https://allafrica.com/stories/202001080045.html> (accessed 11 February 2020).

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

on assistance from the CJTF, have committed serious human right violations.<sup>45</sup> The evidence in Amnesty International's possession suggests that Nigeria's military has also committed crimes under international law, which may include war crimes and crimes against humanity.<sup>46</sup> The organization expressed its concern about the number of deaths of suspects in custody. It stated, "more than a thousand suspects have died in military detention facilities as a result of extrajudicial executions, torture, starvation, disease, suffocation or other reasons associated with extremely poor detention conditions..."<sup>47</sup>

Most of these civilians were citizens, whose only crime could be being at the wrong place at the wrong time. As there were hardly efficient and speedy court trials, many civilians met their deaths as suspects. The military has arrested large numbers of civilians since 2009 without reasonable grounds, including using unreliable hidden informants to screen entire communities of villages and towns in Borno and Yobe states. The military has also arrested relatives of Boko Haram suspects in place of the suspect.<sup>48</sup> This is a problem for the Nigerian authorities. How can security operatives identify insurgents who cannot be recognized by uniforms or are distinct in peculiarity, but dress as civilians do? How can security operatives properly distinguish civilians from insurgents, especially where there is an invisible theatre of war? This is one of the pitfalls the Nigeria's Armed Forces face to this day. Maybe speedily charging suspected insurgents to court could help, as they would get to tell their story and are tested on the veracity and credibility of their testimonies. Then again, how efficient and effective are Nigerian courts? The issue of efficiency in speedily adjudicating war claims is debatable.

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<sup>45</sup> Amnesty International, "Nigeria: Boko Haram and Nigerian Military Committing Crimes Under International Law in North-East Nigeria" *Written Statement to the 28th Session of the UN Human Rights Council* (2 – 27 March 2015).

<sup>46</sup> *Ibid.*

<sup>47</sup> *Supra* n 45, at 2.

<sup>48</sup> *Supra* n 16.

## 2.0. APPLICATION OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW TO NIGERIA'S CONFLICT WITH BOKO-HARAM

In a diagram by Carlson,<sup>49</sup> two US military officers were shown holding a terrorist by his legs side by side, his head pointing towards the ground. The following conversation followed:

“Have you read him his Miranda rights?” asked one officer to the other.

“As an Enemy Combatant,” said the second officer, talking to the terrorist, “You have no right to remain silent!

No right to know the charges against you!!

No right to a swift trial and no right to an attorney!!

Do you understand these non-rights? I'll take your muffled groan as a yes.”<sup>50</sup>

The above conversation chronicles the controversy of rights available to NSAs in armed conflict. This would be determined by the law governing armed conflict between States and NSAs, particularly terrorists. To properly assess and evaluate the claims of war crimes alleged by international bodies against Nigeria's armed forces and Boko Haram insurgents, one needs to examine the law that regulates such conflict.

The question then arises, what law regulates the armed conflict between Nigeria and Boko Haram? Does human rights law displace international humanitarian law? Can they co-exist? How can both laws be interpreted to propel adherence to international standards?

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<sup>49</sup> H. Hannum et al., *International Human Rights: Problems Of Law, Policy And Practice*, 6<sup>th</sup> ed. (Wolters Kluwer: New York, 2018), p. 263.

<sup>50</sup> *Ibid.*

## 2.1. Approaches to the Application of Human Rights Norms and International Humanitarian Law

The relationship between international humanitarian law and human rights law is the subject of much ongoing legal analysis. Particular interest in this topic has arisen in recent years, as the delineation between peacetime and war is complicated by changes like contemporary armed conflict; including the rise of transnational terrorism, the increase of non-international armed conflict and conflicts in urban settings, and the greater involvement of NSAs, blurring the distinction between combatants and civilians.<sup>51</sup>

The controversy on the applicability and scope of international humanitarian law and human rights law in war and peacetime is an old one. While one school of thought argues international humanitarian law applies in times of armed conflict and therefore suspends human rights law, a second school of thought asserts that human rights law is applicable at all times, war or not. Another school of thought also asserts that they are complementary in application.

It must be noted, as this author believes, that a question on the applicability of international humanitarian law does not arise unless there is war, and aside from the derogation from provisions in human rights instruments, a question of suspension of human rights law does not rise. The real controversy is whether human rights law applies together with international humanitarian law in times of war.

### 2.1.1. Displacement Model

The Displacement Model provides that whenever there is an armed conflict, humanitarian law displaces human rights law.<sup>52</sup> Defining the zone of armed conflict is thus the first and last step for determining the appropriate body of law in the Displacement Model.<sup>53</sup> If the

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<sup>51</sup> S. Mccosker, “Human Rights Law/Armed Conflict – International Humanitarian Law and International Human Rights Law” (2014) 4(2) *Asian Journal of International Law*, p. 425.

<sup>52</sup> O.A. Hathaway Et Al., “Which Law Governs During Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law” (2012) 96 *Minnesota Law Review*, p. 1894.

<sup>53</sup> *Ibid.*

conduct occurs within the zone of armed conflict, humanitarian law governs exclusively and displaces any human rights law that might otherwise apply.<sup>54</sup> If the conduct is outside that zone, human rights law remains operative. Displacement models may vary in their definition of armed conflict, making the field for application of humanitarian law larger or smaller, but the basic trade-off remains the same.<sup>55</sup> The US favours this position. Proponents of the Displacement Model rely on an aggressive reading of the International Court of Justice's (ICJ)'s Nuclear Weapons advisory opinion.<sup>56</sup> The ICJ wrote:

In principle, the right not arbitrarily to be deprived of one's life [codified in Article 6 of the ICCPR] 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 [ICCPR], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the [ICCPR] itself.<sup>57</sup>

### 2.1.2. Complementarity Model

The Complementarity Model provides that both bodies of law are applied and interpreted in concert with one another, sometimes called the “mutual elaboration” or “coordinated interpretation” approach.<sup>58</sup> The model is grounded on the principle that the two bodies of law are engaged in a common mission to protect human life and dignity.<sup>59</sup> The

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<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, at 1895.

<sup>57</sup> *Supra* note 52; International Court of Justice, “Legality of the Threat or Use of Nuclear Weapons”, available at <https://www.icj-cij.org/en/case/95> (accessed 13 May 2020).

<sup>58</sup> *Supra* n 52, at 1897.

<sup>59</sup> *Ibid.*; International Committee of the Red Cross, “Protection through Complementarity of the Law”, available at <https://www.icrc.org/en/doc/resources/documents/statement/5rfgaz.htm> (accessed 13 May 2020).

Complementarity Model assumes that, in any instance where both bodies of law apply, the laws can be interpreted in such a way that they do not conflict.<sup>60</sup> That is, the laws exhibit a “relationship of interpretation”.<sup>61</sup> Thus, the only operative question is whether there is an armed conflict (and whether humanitarian law applies). If so, then that law is applied in conjunction with human rights law. If not, then only human rights law applies.<sup>62</sup>

The Complementarity Model relies on the authority of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT),<sup>63</sup> which requires treaty parties interpreting their obligations to take into account “any relevant rules of international law applicable in the relations between the parties.”<sup>64</sup> This Model suggests a different reading of the ICJ's Nuclear Weapons advisory opinion than that offered by advocates of the Displacement Model described above.<sup>65</sup> In language that immediately precedes that quoted above, the ICJ expressly states that the ICCPR applies in hostilities. The protection of the ICCPR does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision.<sup>66</sup>

The ICRC also agrees with this position. In its 27th Annual Round Table on Current Problems of International Humanitarian Law, Jakob Kellenberger, President of the ICRC, took the position that the bodies of law are distinct but complementary.<sup>67</sup> This position of the court may be problematic. Stating that human rights law will be interpreted through international humanitarian law restricts the application of human rights law only to that which is permissible under international humanitarian law. In other words, human rights law would only apply

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<sup>60</sup> *Supra* n 52, at 1898.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at <https://www.refworld.org/docid/3ae6b3a10.html> (accessed 13 May 2020).

<sup>64</sup> *Supra* n 52, at 1899.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> International Committee of the Red Cross, *supra* n 59.

in armed conflict to the extent that international humanitarian law allows.

### 2.1.3. Conflict Resolution Model

The Conflict Resolution Model provides that when armed conflict is present, human rights law and international humanitarian law are applied as they would be under the Complementarity Model unless they conflict.<sup>68</sup> Under this model, when legal rules (or norms) drawn from the two bodies of law have a “relationship of interpretation”; one legal rule assists in the interpretation of another. In such cases, it is unnecessary to choose between the two applicable legal rules.<sup>69</sup> In cases where human rights law and international humanitarian law have a “relationship of conflict”, it is necessary to look to conflict resolution rules to choose between the two.<sup>70</sup>

### 2.2. *Democratic Republic of Congo v Uganda*<sup>71</sup> and *Hassan v The United Kingdom*;<sup>72</sup> The Application of Human Rights in Armed Conflict A Fallacy?

In both cases of *Democratic Republic of Congo v Uganda* and *Hassan v The United Kingdom*, the question arose for the ICJ and the European Court of Human Rights respectively to determine whether human rights law would be applicable in armed conflict. The Courts opined amongst other things that human rights law would be applicable only when interpreted through international humanitarian law. The ICJ in the *Congo* case posits that human rights law will be applicable together with international humanitarian law in an armed conflict,<sup>73</sup> and the European Court of Human Rights also holds the same position in *Hassan* case<sup>74</sup>. The only question the Courts answered was how human rights law will be applied. They suggested the application of

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<sup>68</sup> *Supra* n 52, at 1902.

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

<sup>70</sup> *Ibid.*, at 1903.

<sup>71</sup> ICJ 168 (19 December 2005), available at <https://www.icj-cij.org/en/case/116> (accessed 13 May 2020).

<sup>72</sup> App. 29750/09, European Court of Human Rights, Judgment of 16 September 2014 (GC).

<sup>73</sup> *Supra* n 71.

<sup>74</sup> *Supra* n 62.

human rights law through international humanitarian law. The seeming application of human rights law in armed conflict, through this approach, is a fallacy. If human rights law is applied only to the extent permitted by international humanitarian law, international humanitarian law is what is being applied in essence.

From the foregoing, it may seem that the controversy between international humanitarian law and human rights law is yet to be resolved, but that is not the case. Though it continues to be an academic debate, the ICRC emphatically states “International humanitarian law and international human rights law are two distinct but complementary bodies of law.<sup>75</sup> They are both concerned with the protection of life, health, and dignity of individuals. International humanitarian law applies in armed conflict while human rights law applies at all times, in peace and war.”<sup>76</sup> The Committee further states:

States have a legal duty to respect and implement both International humanitarian law and human rights law. Compliance with International humanitarian law requires a state to introduce national legislation to implement its obligations, to train its military and to bring to trial those in grave breach of such law. Human rights law also contains provisions requiring a State to take legislative and other appropriate measures to implement its rules and punish violations.<sup>77</sup>

Therefore, International humanitarian law and human rights law are applicable in Nigeria’s armed conflict with Boko Haram. Non-compliance with both laws as has been alleged can lead to sanctions against Nigeria and its military personnel. It is however suggested that new regulations of International humanitarian law be drafted, which would take cognizance of human rights law in its application. This may put an end to the academic debate.

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<sup>75</sup> International Committee Of The Red Cross, “IHL and Human Rights Law”, available at <https://www.icrc.org/en/doc/war-and-law/ihl-other-legal-regimes/ihl-human-rights/overview-ihl-and-human-rights.htm> (accessed 22 April 2020).

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

### 2.3. Does Nigeria have obligations under the Geneva Conventions to Boko Haram suspects?

In this context, it has become pertinent to find out if Nigeria owes Boko Haram any obligation to comply with under the Geneva Conventions. The Geneva Conventions regulate the relationship between contracting parties, and Boko Haram is not a party. On what basis then do international bodies bring allegations of violation against Boko Haram? Since Boko Haram is not a party to the Geneva Conventions and other International humanitarian law supplements or additional protocols, Boko Haram cannot be a beneficiary of the protection of International humanitarian law. Therefore, every claim against the Nigerian military, for the alleged violation of International humanitarian law against Boko Haram should fail. Nigeria owes no obligation under the Geneva Conventions to Boko Haram.

Common Article 3 of the 1949 Geneva Conventions<sup>78</sup> provides the minimum standards through which Contracting Parties can engage in armed conflict, not of an international character. Solis posits that the humanitarian norms are that the application of Common Article 3 is said to extend to international armed conflicts as well; its norms subsumed in the humanitarian norms of any armed conflict.<sup>79</sup> In *Prosecutor v Delalic*, the Tribunal held that Common Article 3 may be considered as the “minimum yardstick” of rules of international humanitarian law applicable to both internal and international conflicts.<sup>80</sup> If Boko Haram is not a party to this contract and cannot make claims under the Conventions, neither should other parties make claims on its behalf under the Conventions. Claims may, however, be considered under the violation of core principles of international humanitarian law against civilians, and a general violation of rights of civilians and Boko Haram under human rights law.

### 3.0. DEROGATION OF NON-DEROGABLE RIGHTS

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<sup>78</sup> *Supra* n 7.

<sup>79</sup> G.D. Solis, *Law of Armed Conflict: International Humanitarian Law in War*, 2<sup>nd</sup> ed., (Cambridge University Press: 2016), p. 106.

<sup>80</sup> *Ibid*; *Prosecutor v Delalic* No. IT-96-21-T, 1998.

Human rights institutions are concerned about the derogation from the rights of civilians and Boko Haram suspects. These rights are guaranteed by human rights instruments, domestic and international, signed and ratified by Nigeria, particularly the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended) and the ICCPR.

In the ICJ's Nuclear Weapons advisory opinion, the Court observes that the protection of the ICCPR does not cease in time of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in time of national emergency.<sup>81</sup> Respect for the right to life, however, is not such a provision. The Court further held that the right to not be arbitrarily deprived of one's life also applies in hostilities.<sup>82</sup> The test of what is an arbitrary deprivation of life, however, 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.<sup>83</sup>

Article 4 of the ICCPR provides thus:

1. 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.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.<sup>84</sup>

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<sup>81</sup> ICJ Advisory Opinion, *supra* n 57.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> *Supra* n 8.

In the later opinion of the ICJ,<sup>85</sup> the Court confirms that both branches of international law, namely international human rights law and international humanitarian law would have to be taken into consideration.<sup>86</sup> On the other hand, Section 33 of the CFRN 1999<sup>87</sup> provides:

Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.

2) A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary – a) for the defence of any person from unlawful violence or for the defence of property; b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or c) for the purpose of suppressing a riot, insurrection or mutiny.<sup>88</sup>

The focus, therefore, is to examine these claims of unsanctioned derogation and violation, in line with these provisions and in conjunction with the core principles of international humanitarian law.

### **3.1. Extra-Judicial killings of Civilians and Boko Haram Suspects**

There have been several claims of extra-judicial killings by the Nigerian Armed Forces in response to attacks by Boko Haram. Unfortunately, these killings have often involved innocent citizens, violating the core principles of international humanitarian law and provisions of the non-derogable right to life under human rights law. Amnesty International reports that hundreds of men have been extra-judicially executed by the military while in detention or upon arrest.<sup>89</sup> On 14 March 2014,

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<sup>85</sup> ICJ Advisory Opinion, *supra* n 57.

<sup>86</sup> *Supra* n 49, at 250.

<sup>87</sup> Constitution of the Federal Republic of Nigeria, Act No. 24, 5 May 1999, available at <https://www.refworld.org/docid/44e344fa4.html> (22 April 2020).

<sup>88</sup> *Ibid.*

<sup>89</sup> *Supra* n 45, at 2.

Nigerian soldiers executed more than 640 recaptured detainees in Maiduguri, after they were released during a Boko Haram attack on Giwa barracks.<sup>90</sup>

In August 2014, the Amnesty International published video footage showing soldiers and CJTF members cutting the throats of six of these recaptured detainees in front of two open mass graves.<sup>91</sup> According to eyewitness accounts, nine people were killed this way, while eight others were shot to death.<sup>92</sup> Human Rights Watch confirms that during raids into communities, soldiers set fire to houses, shops, and cars, randomly arresting men from the neighbourhood, and in some cases executing them in front of their shops or houses.<sup>93</sup> These raids have become so common in Maiduguri, especially after the Boko Haram attacks on the JTF, that parents have advised their sons to flee as soon as they hear of an attack.<sup>94</sup> As one young man in Maiduguri recalled, “My father told us anytime soldiers are shot, the [Joint Task Force] will come and attack the community and kill the youth, so we should run away and save our lives.”<sup>95</sup>

These allegations violate the principles of international humanitarian law and human rights law. Killing members of Boko Haram extra-judicially violates not just international provisions on this matter, but also the domestic provisions of the CFRN 1999 (as amended). Unfortunately, the civilians in Northeast Nigeria have been caught in this crossfire and are subjected to the same treatment meted out to members of Boko Haram, with no objective method of distinction.

### **3.1.1. Unlawful Execution: The case of Muhammad Yusuf**

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<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Supra* n 4, at 59.

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

<sup>95</sup> *Ibid.*

Muhammad Yusuf, the leader of Boko Haram up until 2009, was captured on 30 July 2009.<sup>96</sup> Soldiers took him to Giwa military barracks in Maiduguri, Nigeria for interrogation.<sup>97</sup> Video footage from the interrogation shows him with a bandage on his left arm.<sup>98</sup> The commander of the military task force in Maiduguri, Col. Ben Ahonatu, said he then handed Yusuf over to the police.<sup>99</sup> Human Rights Watch interviewed a journalist as well as a 24-year-old woman who lived near the police headquarters in Maiduguri who both said they witnessed the police shooting Yusuf inside the police compound early that evening. The 24-year-old woman described what she saw:

On Thursday [July 30], about 6:30 p.m., I heard that they [the police] had brought in Mohammed Yusuf... We went inside the compound of the police headquarters. There were many people watching. I saw him sitting on the ground. He was handcuffed with a bandage on his arm. He was saying they should pray for him. The MOPOL [anti-riot Police Mobile Force] were enraged. They said he killed their leader who is a 2IC [second-in-command of the Police Mobile Force]. The MOPOL said we must kill him. But the commissioner of police [Christopher Dega] said they should leave him alive. Then three of the MOPOLs started shooting him. They first shot him in the chest and stomach, and another came and shot him in the back of his head. I was afraid and started running. When I came back, he was dead.<sup>100</sup>

### 3.2. Violation of Due Process

Extra-judicial killing is a violation of due process established by international and domestic instruments. The CFRN 1999 (as

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<sup>96</sup> I. Mshelizza “Nigerian Security Forces Capture Islamic Sect Leader”, available at <https://www.reuters.com/article/us-nigeria-sect-idUSTRE56TIN520090730> (accessed 13 May 2020).

<sup>97</sup> *Ibid.*

<sup>98</sup> Al Jazeera, “Video shows Nigeria ‘executions’”, available at <https://www.aljazeera.com/news/2010/2/9/video-shows-nigeria-executions> (13 May 2020); BBC Online, “Sect leader ‘alive when captured’”, available at <http://news.bbc.co.uk/2/hi/africa/8180475.stm> (accessed 13 May 2020).

<sup>99</sup> *Supra* n 4, at 35.

<sup>100</sup> *Ibid.*

amended) provides for the “presumption of innocence” until found guilty by a court of law. This means that even where one is caught *in flagrante delicto*, there can be no execution until such person has been found guilty by a court of competent jurisdiction and sentenced accordingly. The extrajudicial killings engaged in by Nigeria’s armed forces are nothing short of the famous “jungle-justice”, a violation of human rights protection. This claim can best be pursued under human rights law and not international humanitarian law.

**3.2.1. Mass Trials of Boko Haram Suspects and Section 36 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).**

In October 2017, the biggest mass trial was conducted for Boko Haram members in Nigeria. About 1,669 suspects were tried for offences under the Terrorism Prevention Amendment Act of 2013.<sup>101</sup> The Nigerian armed forces had arrested thousands of suspected Boko Haram members in recent years, and military detention facilities were overcrowded.<sup>102</sup> Human rights groups say most of those detained, including women and children, had been picked up at random and without reasonable suspicion.<sup>103</sup> Former detainees have described malnutrition, mistreatment, and deaths in the facilities. The closed-door proceedings raised the concerns of human rights groups about whether the hearing was fair.<sup>104</sup>

The proceedings were very short, with some lasting less than 15 minutes, raising several fair trials and due process concerns. Most charges were couched in ambiguous and vague terms without the crucial information Nigerian law requires, like the specific date, place, and details of the alleged offence.<sup>105</sup> Other procedural lapses included

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<sup>101</sup> The Guardian Online, “Dozens Of Boko Haram Members Convicted In Mass Secret Trial In Nigeria”, available at <https://www.theguardian.com/world/2017/oct/14/dozens-of-boko-haram-members-convicted-in-mass-secret-trial-in-nigeria> (accessed 30 March 2020).

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> Human Rights Watch, “Nigeria: Flawed Trials Of Boko Haram Suspects”, available at <https://www.hrw.org/news/2018/09/17/nigeria-flawed-trials-boko-haram-suspects> (accessed 30 March 2020).

a lack of official interpreters and the use of untrained unofficial interpreters; reliance on alleged confessions; charging previously discharged defendants again for the same offences; and unclear orders for rehabilitation for some defendants whose releases were ordered. All had public defenders and some defendants told Human Rights Watch that they had not been able to consult with their lawyers until the day of trial.<sup>106</sup>

The conduct of the Nigerian Government is not just a violation of international human rights law, but is also in violation of Section 36 of the CFRN 1999 (as amended) which provides for a fair trial for any person charged with a crime.

Section 36 provides thus:

(1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality....<sup>107</sup>

The section goes on to provide for representation rights; public trial within a reasonable time; presumption of innocence until proven guilty; right to be informed promptly in the language a suspect understands and in detail of the nature of the offence; be given adequate time and facilities for the preparation of defense, amongst others. It is suggested that the government should make improving trial procedures a priority.<sup>108</sup> It should also consider creating truth commissions or other community reconciliation efforts for those accused of lesser, non-violent, crimes so that the justice system can focus first on those accused of the worst crimes.<sup>109</sup>

Another concern of international bodies is the involvement of innocent civilians in this disarray. Lots of civilians are detained for years

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<sup>106</sup> *Ibid.*

<sup>107</sup> *Supra* n 87.

<sup>108</sup> *Supra* n 105.

<sup>109</sup> *Ibid.*

on unproven suspicions of their involvement with Boko Haram, subjected to hideous conditions, and released years after (for those lucky enough to survive detention) without apologies.

a. Detention and Torture of Boko-Haram Suspects

Administrative detention or preventive detention has long been recognized as an aspect of armed conflict.<sup>110</sup> Solis defines this security detention as “the deprivation of liberty, without criminal charges, of a protected person, ordered by the executive branch, for security reasons in international or non-international armed conflicts, or other situations of violence”.<sup>111</sup> He further states, “although the Geneva Conventions address the treatment and trials of detainees in non-international armed conflict, the Conventions do not explicitly authorize detention as they do for wars between States. The drafters expected that the power to detain, in such conflicts would be covered by domestic law.”<sup>112</sup>

Indeed, the CFRN 1999 (as amended) makes adequate provision for this. It states in section 35 that every person shall be entitled to his liberty and no person shall be deprived of such liberty, save as provided by the Constitution.<sup>113</sup> The section goes on to provide that a person detained shall be brought before a court of competent jurisdiction within a reasonable time. The Constitution goes on to specify what is meant by a reasonable time as shall be seen below.

International bodies assert that the Nigerian government has violated human rights law by engaging in the unlawful and prolonged detention of Boko Haram suspects. In *Al Nashiri v Poland*,<sup>114</sup> it was held that the detention of terrorist suspects in secret facilities amounted to a violation of Article 5 of the European Convention on Human Rights, which provides against unlawful detention.

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<sup>110</sup> *Supra* n 49, at 818.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Supra* n 52.

<sup>113</sup> *Supra* n 87.

<sup>114</sup> European Court of Human Rights, App. 28761/11, 24 July 2014 (internal references omitted)

There have also been allegations of torture against Nigerian armed personnel. It is agreed by international bodies that subjecting terrorist suspects to inhumane, degrading treatment and torture is illegal and a violation of both international humanitarian law and human rights law. The controversy, however, arises as to what exactly can be regarded as torture, and inhumane and degrading treatment. Many of Boko Haram suspects are being subjected to ridiculous conditions that any right-thinking being should find repulsive and enraging.<sup>115</sup> Human Rights Watch gave accounts of several detainees interviewed. One stated that while he was being interrogated by security agents in an office at the barracks, he saw soldiers at another table torture a detainee by pulling on his genitals with a pair of pliers.<sup>116</sup> He also described seeing soldiers try to “peel the skin” off a detainee with a razor and kill another detainee while he was suspended from a tree at the barracks. “His legs were suspended – bent and tied. They [the soldiers] hit him with a gun and he died. I saw him on the ground and his body was lifeless. They then threw his body into the back of a pickup [truck].”<sup>117</sup>

i. Arising Criminal Law Issues

It is common practice that domestic laws regulate criminal conduct and trials, and the CFRN 1999 (as amended) has also made adequate provision for criminal law issues that arise in the Boko Haram conflict. Section 36(5) of the CFRN 1999 (as amended) provides:

Every person who is charged with a criminal offense shall be presumed to be innocent until he is proved guilty; Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts”.<sup>118</sup>

Sub-Section 6 further provides:

Every person who is charged with a criminal offence shall be entitled to – (a) be informed promptly in the

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<sup>115</sup> *Supra* n 4, at 71.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

<sup>118</sup> *Supra* n 87.

language that he understands and in detail of the nature of the offence; (b) be given adequate time and facilities for the preparation of his defence; (c) defend himself in person or by legal practitioners of his own choice; (d) examine, in person or by his legal practitioners, the witnesses called by the prosecution before any court or tribunal and obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court or tribunal on the same conditions as those applying to the witnesses called by the prosecution; and (e) have, without payment, the assistance of an interpreter if he cannot understand the language used at the trial of the offence.<sup>119</sup>

The foregoing shows that the Nigerian operatives have violated the constitutional provisions that regulate criminal trials, suspects, and how they should be handled. It is suggested that an open reinforcement by the Government in support of these provisions should be made as a means of deterrence. An open declaration or warning issued to security operatives may go a long way in emphasizing what the constitution already stipulates.

### **3.2.2. Chapter 4 of the Nigerian Constitution 1999 (as amended) and the ICCPR**

The actions of Nigeria's Armed Forces that are alleged to have violated human rights law also violates the domestic law and the fundamental human rights provisions as provided for in Chapter 4 of the CFRN 1999 (as amended). Just as the ICCPR provides for the right to life and protection from arbitrary deprivation; prohibition of torture, inhuman and degrading treatment; prohibition of slavery and servitude; holding a person guilty on account of a retrogressive law; freedom of conscience, thought and religion in Articles 6, 7, 8(1)(2), 15, and 18 of the ICCPR, the CFRN 1999 (as amended) makes similar provisions. Sections 33, 34, 35, 36, and 38 of the CFRN 1999 (as amended) make comparable provisions. Section 34 for instance provides:

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

- I. Every individual is entitled to respect for the dignity of his person, and accordingly - (a) no person shall be subject to torture or inhuman or degrading treatment; (b) no person shall be held in slavery or servitude, and (c) no person shall be required to perform forced or compulsory labour.<sup>120</sup>

The Nigerian government has a responsibility to protect its citizens from violence, and also to respect its laws and international human rights law related to the use of force by its security forces, treatment of detainees, the prohibition of torture, and the obligation to hold speedy and open trials. These rights are guaranteed by various international treaties, including the ICCPR and the African Charter on Human and Peoples' Rights, which Nigeria has ratified.

#### **4.0. RESPONSIBILITY AND ACCOUNTABILITY TO INTERNATIONAL STANDARDS**

Should superior officers of security forces be held responsible for the acts of their subordinates? Are security personnel solely responsible for actions or inactions in obedience to an unlawful order given by his superior? In the Muhammad Yusuf case, Col. Ahanotu stated that he handed the suspect to the Chief of Police to detain for questioning.<sup>121</sup> A few moments after, the suspect was reported dead. Who should be held accountable, and by what means? Solis states that commanders are liable for the unlawful battlefield acts of which they know or should know of their subordinates. The liability is not that of an aider or abettor. Instead, it is grounded in his negligence in acting or not acting in regard to the subordinate's criminal acts.<sup>122</sup>

Responsibility increases when soldiers believe that they have personal control over their mission performance, performing out of the desire

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<sup>120</sup> *Ibid.*

<sup>121</sup> LiveLeak, "Mohammed Yusuf, Nigerian Sect Leader, Killed in Police Custody", available at [https://www.liveleak.com/view?i=406\\_1249057506](https://www.liveleak.com/view?i=406_1249057506) (accessed 22 April 2020).

<sup>122</sup> *Supra* n 79, at 441.

to do well instead of just following orders.<sup>123</sup> There have been many studies that have suggested that when a soldier feels that they have personal control over work performance, the result is that the soldier has a better task performance, better problem solving, a higher persistence in accomplishing the task, more positive emotions, and even better psychological and physical health. Responsibility and accountability are two of the main factors in being a successful soldier.<sup>124</sup>

While the above position is admirable, it is not always the case. In the armed conflict between Nigeria and Boko Haram, responsibilities apportioned to soldiers have suffered abuse in several circumstances. It may be difficult to point to any soldier or commander who has successfully been held accountable for abuse of the duties and obligation placed on the military by either domestic or international regulations.

The Nigerian Terrorism Prevention Act<sup>125</sup> permits the violation of the country's *grundnorm*, the CFRN 1999. Despite the provision of the CFRN 1999 (as amended) that "if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void".<sup>126</sup> The enactment of the principal Terrorism Act in 2011 (as amended in 2013), generated concerns from human rights circles because some aspects of the Act were seen as constituting serious threats to some of the fundamental rights guaranteed in Chapter 4 of the CFRN 1999 (as amended).<sup>127</sup> For instance, the Act gave broad and sweeping

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<sup>123</sup> Graduateway, "The Importance of Accountability and Responsibility in the U.S. Army", available at <https://graduateway.com/the-importance-of-accountability-and-responsibility-in-the-u-s-army/> (accessed 4 April 2020).

<sup>124</sup> *Ibid.*

<sup>125</sup> Terrorism (Prevention) Act 2011 Act No. 10, amended by Terrorism (Prevention) (Amendment) Act 2013.

<sup>126</sup> *Supra* n 87, at s. 1(3).

<sup>127</sup> Terrorism (Prevention) (Amendment) Act 2013.

powers to security and intelligence officers, without any judicial oversight.<sup>128</sup>

An example is section 25 (a-e) of the Act<sup>129</sup> which empowers the National Security Adviser or Inspector General of Police to enter and search any place, persons, or vehicle “without a warrant”, if the officer has reason to suspect that an offence is being committed. The officer may also search, detain, and arrest any person if he has a reasonable suspicion that the person has committed or is about to commit an offence under the Act.<sup>130</sup> Section 26 of the Act empowers the Attorney General of the Federation, the National Security Adviser or the Inspector General of Police “for the purposes of the prevention or detection of offences or the prosecution of offenders give such direction as appear necessary to any communication service providers in intelligence gathering”.<sup>131</sup>

Although the Terrorism (Prevention) Amendment Act<sup>132</sup> amended some provisions, it still enables security operatives to violate the fundamental rights of suspects by restricting their liberties amongst others. While it is clear that the Act violates the Constitution and international standards for the protection of human rights in armed conflict, security operatives will rely on its provisions to justify the abuse of their duties and obligations.

#### **4.1. Common Article 3: Conduct and Obligations**

Common Article 3 of the Geneva Conventions places obligations on contracting states to observe, as a minimum, the protection it provides, particularly for civilians caught up in armed conflict. The rules of warfare are said to be applicable without giving recognition to rebel forces. Common Article 3, therefore, provides some minimum protections for victims of internal armed conflicts while avoiding any

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<sup>128</sup> A.T. Akujobi, “An Assessment of The Nigerian Terrorism Prevention Act and its Impact on National Security”, (2018) 18(1) *Global Journal of Human Social Science Research*.

<sup>129</sup> *Supra* n 49.

<sup>130</sup> *Ibid*.

<sup>131</sup> *Ibid*.

<sup>132</sup> *Supra* n 128.

recognition of the rebel forces or any rebel entitlement to the prisoner of war status.<sup>133</sup> The Article provides:

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 recognized as indispensable by civilized 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.<sup>134</sup>

One claim of international bodies against the Nigerian government is the violation of sub-Article 1 and 2 of Common Article 3. Civilians

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<sup>133</sup> *supra* n 47, at 237.

<sup>134</sup> *Supra* n 5.

have often been subjected to inhumane and degrading treatments, treated as if they were Boko Haram members without proper distinction in violation of the principles of International Humanitarian Law.

#### **4.1.1. Does Common Article 3 Apply to Boko Haram?**

Common Article 3 was made to apply to civilians and protect them.<sup>135</sup> A question, however, arises as to whether Boko Haram suspects can lay claims to the provisions of the Article. However, Article 3 cannot apply to Boko Haram suspects for the following reasons: first, the Article contemplates that its provisions will apply to “High Contracting Parties” and obligates each Party to comply with the minimum protection requirements of civilians. A Party is a State that has signed and ratified the Convention.<sup>136</sup> Secondly, the purpose of the Article was not to give recognition to rebel forces but to protect citizens.<sup>137</sup> This position, however, is a double-edged sword. If Boko Haram cannot make claims under the Article, they also, cannot be bound by it. Because of the nature of terrorist organizations like Boko Haram, it is almost impossible that they would observe rules of engagement in armed conflict.

#### **4.2. Role of International Bodies in Ensuring Accountability by Parties**

The role of international bodies in ensuring compliance with international standards in armed conflict cannot be over-emphasized. More often than not, domestic law and its application may not be sufficient to remedy violations. This may be due to interference by the domestic government, the inefficiency of domestic courts, or the inability of the government to prosecute offenders who may have left the jurisdiction of the State. International enforcement bodies and groups have been relevant in these instances, either in enforcing and remedying violations of international law or reminding State parties of their obligations and required conduct according to international

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<sup>135</sup> *Ibid*, at 238.

<sup>136</sup> *Ibid*.

<sup>137</sup> *Ibid*.

standards. In the Boko Haram conflict, numerous groups and international organizations have continued to clamour for accountability of parties. Some of which include:

#### **4.2.1. International Criminal Court**

As stated above, the Nigerian government deposited its instrument of ratification to the Rome Statute which established the ICC in 2001.<sup>138</sup> The ICC, therefore, has jurisdiction over Rome Statute crimes committed on the territory of Nigeria or by its nationals from 1 July 2002 onwards.<sup>139</sup>

In 2015, the Office of the Prosecutor updated its subject-matter assessment in light of an increased number of allegations against Boko Haram. Based on the information available, the Office of the Prosecutor found a reasonable basis to believe that between 1 January 2013 and 31 March 2015, Boko Haram had committed crimes under the Rome Statute.<sup>140</sup> Specifically, the Office of the Prosecutor found a reasonable basis to believe that the Nigeria Security Forces (NSF) committed the war crimes of murder, torture, cruel treatment according to article 8(2)(c)(i); outrages upon personal dignity under Article 8(2)(c)(ii); and intentionally directing attacks against the civilian population or individual civilians under article 8(2)(e)(i) of the Statute.<sup>141</sup>

The ICC has and still plays a relevant role in investigating alleged war crimes against Nigeria's armed forces and Boko Haram. This has to an extent made Nigeria conscious and accountable to international bodies. The government, however, continues to delay in prosecuting armed personnel who have violated international humanitarian law

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<sup>138</sup> *Supra* n 28.

<sup>139</sup> The Office of the Prosecutor of the International Criminal Court, "Report on Preliminary Examination Activities" (2018), available at <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf> (accessed 8 April 2020), p. 55.

<sup>140</sup> The Office of the Prosecutor of the International Criminal Court, "Report on Preliminary Examination Activities" (2015), available at <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf> (accessed 13 May 2020), p. 45.

<sup>141</sup> *Supra* n 139, at 56, para. 221.

and human rights law in the Boko Haram conflict. As the ICC observes:

Since 2017, the Nigerian authorities appear to have taken concrete steps toward fulfilling their primary responsibility to investigate and prosecute ICC crimes. While there seems to be a tangible prospect of further proceedings against members of Boko Haram, including high-level commanders, at this stage the same cannot be said of the NSF, in particular since the Nigerian authorities tend to deny any allegation against the latter.<sup>142</sup>

#### **4.2.2. Amnesty International**

Amnesty International has been one active human rights organization that has continually demanded compliance with international human rights standards in times of war. The organization has been relentless in voicing its displeasure and contempt for the alleged violations of human rights in the Boko Haram conflict. Severally, the organization has called on the ICC to investigate the alleged crimes, not just against Boko Haram, but also against Nigeria's Armed Forces; stating that parties must be responsible and accountable for their actions. On 31 March 2014, the organization reported an increase in attacks by Boko Haram and uncontrolled reprisals by Nigeria's security forces which have seen the death toll in Northeast Nigeria rise to at least 1,500 people, more than half of whom are civilians.<sup>143</sup> Netsanet Belay, Research and Advocacy Director for Africa at Amnesty International stated 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. We urge the international community to ensure prompt,

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<sup>142</sup> *Ibid*, at 62, para. 249. (As at the time of writing this paper, the ICC is yet to release a 2019 report on its website).

<sup>143</sup> Amnesty International, "Nigeria: War Crimes And Crimes Against Humanity as Violence Escalates In North-East", available at <https://www.amnesty.org/en/latest/news/2014/03/nigeria-war-crimes-and-crimes-against-humanity-violence-escalates-north-east/> (accessed 13 May 2020).

independent investigations into acts that may constitute war crimes and crimes against humanity. More than 1,500 deaths in three months indicate an alarming deterioration in the situation. The international community cannot continue to look the other way in the face of extrajudicial executions, attacks on civilians and other crimes under international law being committed on a mass scale. Civilians are paying a heavy price as the cycle of violations and reprisals gather momentum.<sup>144</sup>

On 14 February 2020, Amnesty International, based on interviews with affected villagers in Borno State and satellite data analysis, reported that the Nigerian military had burned and forcibly displaced entire villages in response to a recent escalation in attacks by the armed group, Boko Haram.<sup>145</sup> The military also arbitrarily detained six men from the displaced villages, continuing a pattern of violations, which Amnesty International has documented throughout the country's decade-long armed conflict in the Northeast. The men were held incommunicado for almost a month and subjected to ill-treatment, before their release on 30 January 2020.<sup>146</sup> Director of Amnesty International Nigeria, Osai Ojigho stated:

These brazen acts of razing entire villages, deliberately destroying civilian homes and forcibly displacing their inhabitants with no imperative military grounds, should be investigated as possible war crimes.<sup>147</sup>

### **4.2.3. Human Rights Watch**

Human Rights Watch, as part of its function, has continued to investigate and release reports of violations of the rights of Boko Haram suspects. This is one of the ways the organization holds the Nigerian government accountable and responsible for the actions of its security forces. Most recently, on 10 September 2019, Human

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<sup>144</sup> *Ibid.*

<sup>145</sup> Amnesty International, "Nigeria: Military Razes Villages as Boko Haram Attacks Escalate", available at <https://www.amnesty.org/en/latest/news/2020/02/nigeria-military-razes-villages-as-boko-haram-attacks-escalate/> (accessed 13 May 2020).

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*

Rights Watch, from its investigations, reported that “the Nigerian military has arbitrarily detained thousands of children in degrading and inhumane conditions for suspected involvement with the armed Islamist group Boko Haram.”<sup>148</sup>

The report<sup>149</sup> documents how Nigerian authorities are detaining children, often based on little or no evidence. Children described beatings, overwhelming heat, frequent hunger, and being packed tightly in their cells with hundreds of other detainees “like razor blades in a pack”, as one former detainee said.<sup>150</sup> Nigerian authorities have released at least 2,200 children from detention, nearly all without charge. Human Rights Watch does not know the number of children who may be currently detained.<sup>151</sup>

Most of the children said Nigerian military or community self-defence groups like the CJTF arrested them after they fled Boko Haram attacks on their village.<sup>152</sup> Several said they were seeking refuge with their families or other villagers and that security forces singled them and other adolescent boys out for arrest, apparently because they were perceived as fighting age.<sup>153</sup> A few of the children interviewed said they had been abducted by Boko Haram or forced to “marry” a Boko Haram member, but the majority denied any involvement with the group.<sup>154</sup>

Most suspects, including women and children, are often detained without proper investigation by security officials or any concrete reasons. This is unacceptable under international human rights standards. Aside from international law, the CFRN 1999 provides that every suspect is deemed innocent until proven guilty. To be subjected

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<sup>148</sup> Human Rights Watch, “Nigeria: Military Holding Children As Boko Haram Suspects”, available at <https://www.hrw.org/news/2019/09/10/nigeria-military-holding-children-boko-haram-suspects> (accessed 13 May 2020).

<sup>149</sup> Human Rights Watch, “They Didn’t Know if I was Alive or Dead”, available at <https://www.hrw.org/report/2019/09/10/they-didnt-know-if-i-was-alive-or-dead/military-detention-children-suspected-boko> (accessed 13 May 2020).

<sup>150</sup> *Supra* n 148.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Supra* n 149, at 2.

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*

to such punishment and cruelty without trial, as most Boko Haram suspects have, is despicable and a violation of universal standards. Furthermore, considering that some of these suspects are found innocent and released, it speaks of double victimization and brutality by both Boko Haram and the Nigerian Security forces as two sides of the same coin.

Human Rights Watch, in conjunction with other international bodies mentioned above, investigates and reports these abuses, and that is one way of making the Nigerian government responsible and accountable to these abuses. But more needs to be done. Despite the investigations and reports of these bodies, violations and abuses have not stopped. On 9 July 2019, Human Rights Watch sent the Nigerian Chief of Army staff a letter outlining its preliminary findings and requesting information regarding suspects detained for alleged association with Boko Haram.<sup>155</sup> There has been no reply at the time of this writing.

Is there a better mode of accountability and enforcement of international, regional, and domestic human rights standards? What recommendations could one proffer? And what conclusion is there?

## **5.0. CONCLUSION AND RECOMMENDATION**

The purport of this writing is not to give credence to the activities of Boko Haram. Their activities are condemned in totality and it is recommended that they lay down their weapons, and answer for the crimes committed as provided by law. However, the Nigerian government is to be held to a higher standard than those of the insurgents. As a legitimate government and a contracting party to several international conventions, inclusive of the Geneva Conventions and ICCPR, its actions in all armed conflict are expected to comply with international humanitarian standards and adhere to the provisions of international human rights law.

While Boko Haram may not care about killing numerous civilians, the government should. It must protect civilians in times of such conflict. The core principles of distinction, military necessity, and

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<sup>155</sup> *Ibid*, at 6.

proportionality should be observed to curb the suffering civilians. The Nigerian government have constantly violated these principles. This is exemplified by the recent bombing in Borno, Nigeria.

On 13 April 2020, 17 people were said to have been killed when a fighter jet belonging to the Nigerian Air Force fired a bomb on Sakotoku village in the Damboa local government area of Borno state.<sup>156</sup> Residents disclosed that those killed included women and children who were said to be playing under mango trees.<sup>157</sup> The Air Force source said it was informed that Boko Haram insurgents were gathering around the village on Thursday afternoon.<sup>158</sup> The supposed target, according to a source, was an area in Korongilum, a neighbouring village, 12 kilometres away from where suspected Boko Haram insurgents had gathered earlier.<sup>159</sup> One of the sources stated

“Seventeen people were killed, mostly women and their children playing under mango trees. Many were also injured and have been taken to the 25 Task Force Brigade, part of an Army super camp in Damboa local government, Southwest of Maiduguri”.<sup>160</sup>

Given these numerous allegations of violations and claims, the following steps are recommended:

### 5.1. Domestic Enforcement

Domestic enforcement and punishment of persons of the Nigerian military and Boko Haram members who violate domestic and international regulations on armed conflict will reduce the number of violations and abuse that has pervaded the Nigerian civilization. Constantly, violators of international standards escape the hands of the law. They are not prosecuted by domestic courts or court marshalled. When they are at all, the procedures are non-effective,

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<sup>156</sup> Premium News Nigeria (Online), “How Nigeria Air-Force Accidentally Bomb Borno Village”, available <https://premiumnewsnigeria.com/2020/04/14/how-nigeria-air-force-accidentally-bomb-borno-village/> (accessed 14 April 2020).

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*

and they are often let go on the ground of technicalities. This was seen in the case of the officers who were accused of unlawfully executing Muhammed Yusuf.

Daily Watch's investigations have it that the five police officers who were said to have extra-judicially killed Mohammed Yusuf were fully reinstated into the Police Force after their shocking discharge by a Nigerian Court for a funny kind of Prosecution by the Nigerian Police with evidence tailored towards their acquittal.<sup>161</sup> The five who got discharged for lack of evidence by the Prosecution shows how the Nigerian Police itself seem to have made a mockery of the whole prosecution process if people who were seen in pictures dragging and shooting a suspect can now be openly discharged for lack of the same evidence because the Prosecution team refuses to tender relevant pictures and evidence to support the prosecution of the criminals.<sup>162</sup>

Amnesty International has also advised that Nigeria initiates independent, impartial, and thorough investigations into allegations of crimes under international law, including crimes against humanity and war crimes, committed by members of Boko Haram and the Nigerian military.<sup>163</sup> When sufficiently admissible evidence is gathered, alleged perpetrators should be prosecuted in fair trials, without recourse to the death penalty.<sup>164</sup> Take immediate and effective measures to guarantee the safety, security, and protection of civilians and their property; increase efforts to secure the lives and integrity of the civilians per its regional and international human rights obligations;<sup>165</sup> ensure that its security forces and members of the "Civilian Joint Task Force" adhere strictly to their obligations under international human rights law and international humanitarian law; and, in particular, ensure that detainees are protected from extra-judicial executions, torture, and other ill-treatment and are treated humanely at all times.<sup>166</sup>

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<sup>161</sup> Daily Watch, "Killers of Mohammed Yusuf Back In Nigeria Police Force", available at <https://dailywatchng.org/killers-mohammed-yusuf-back-nigeria-police-force/> (accessed 14 April 2020).

<sup>162</sup> *Ibid.*

<sup>163</sup> *Supra* n 45, at 4.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

## 5.2. Regional Enforcement

Regional enforcement of international humanitarian law and human rights standards became necessary in this context when Boko Haram began to spread through the Lake Chad Basin and the coalition of security forces was formed between the States. All African States committing to the Multi-National Joint Task Force (MNJTF) and taking a stand as a body would ultimately lead to an effective defeat of the Boko Haram insurgency group. Also, Security personnel who violate international humanitarian and human rights standards should be tried.

With the anticipated emergence of the Malabo Protocol, the African Court of Justice and Human Rights would have jurisdiction to try allegations of war crimes and crimes against humanity among others.<sup>167</sup> This would foster a new level of responsibility and accountability to which African Security forces, Nigeria inclusive, are held.<sup>168</sup> The Protocol and its annexed Statute were adopted in 2014 and ensue from multiple instruments adopted at different stages.<sup>169</sup> In particular, they should be read in conjunction with the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (1998), the Protocol of the Court of Justice of the African Union (2003) and the Protocol on the Statute of the African Court of Justice and Human Rights (2008) replacing the former.<sup>170</sup>

### 5.2.1. Other Enforcement Models

Other enforcement models which may be available to the international and regional communities include:

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<sup>167</sup> Malabo Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), available at <http://www.nuhanovicfoundation.org/en/legal-instruments-africa/malabo-protocol-on-amendments-to-the-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights-malabo-protocol/> (accessed 14 April 2020).

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

a. Economic Sanction

Economic Sanction could be a means of ensuring that States, Nigeria in this context, adhere to the principles of international humanitarian law and human rights principles. When in violation, other States may refuse to engage the accused country in trade and commerce. Being that a substantial revenue of the Nigerian government depends on its sale of crude oil to other States, a refusal to trade with the government until it ensures it complies with international guidance or punishes violators may be effective in guaranteeing that it observes the principles provided by international law, and indeed, its domestic laws too.

b. Proper Documentation and Border Control

Boko Haram has begun to spread all around the Lake Chad Basin. Benin Republic, Chad, Niger, Cameroon, and Nigeria have all been severely affected by this spread. This may be due to geographical contiguity. One problem that most African countries continue to face even to this day is the proper documentation of citizens and immigrants. The writer believes that if proper documentation and strict border control are combined effectively in the armed conflict against the Boko Haram, they would be much easier to track down. In extension, it will reduce violations of core principles of international humanitarian law such as distinction and military personality. If Nigeria can properly identify the unlawful combatants, its citizens and other civilians will be spared from a lot of horrific experiences as has been reported by human rights watchdogs like Amnesty International and Human Rights Watch; especially the residents of Borno and Maiduguri.

c. Exploring Mandatory Education

One arguable reason why the Boko Haram menace has continued is due to a lack of education on both sides. Some security operatives are neither properly trained nor are they exposed to the pressure and the anxiety that comes with the job. From the several investigations of human rights bodies, it has been shown that some members of the Nigerian security forces have often taken out their frustrations on civilians when riled up by Boko Haram. Some of these officers may not

even be aware of the provisions of domestic law, talk more of international law. A mandatory requirement for all security personnel to be educated to a minimum requirement at least may help Nigeria in curbing some of these.

On the other hand, most children in the Northeast region of Nigeria are uneducated and are often exploited by the ideas that Boko Haram is a revolutionary group fighting for their wellbeing. The government of Nigeria should consider mandatory education and rehabilitation for some of these youths caught in the crossfire in the armed conflict against the Boko Haram.

d. Proper Training on Rules of Engagement

Solis states that Rules of Engagement are the primary means of regulating the use of force in armed conflict, and situations short of armed conflict.<sup>171</sup> They are designed to provide boundaries and guidance on the use of force that are neither tactical control measures nor substitutes for the exercise of the commander's military judgment.<sup>172</sup> The Nigerian military needs to be properly trained to understand the rules of engagement when they are to deploy force in armed conflict. A proper understanding of this would curb or reduce violations of international humanitarian law and human rights law.

Conclusively, the Nigerian government has to adhere to a higher standard of compliance and not stoop to play in the mud as Boko Haram would. No one expects terrorists to comply with international principles and the laws regulating armed conflict. If they did, they would not be terrorists. To sum it up, it is in times of crisis and upheaval that principles and values must remain intact. A legitimate government cannot continue to condone the excesses of its security operatives, in the guise that the people whose rights are violated are Boko Haram suspects, or have no right.

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<sup>171</sup> *Supra* n 79, at 479.

<sup>172</sup> *Ibid.*