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Two is Better Than One: Systemic Integration of International Humanitarian Law and International Human Rights Law to Boko Haram Conflict

Ogunnaike O. Taiwo

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TWO IS BETTER THAN ONE: SYSTEMIC INTEGRATION OF INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW TO BOKO HARAM CONFLICT

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I. INTRODUCTION

The troops of armed forces¹ were deployed to the contested zone² to contain and rout the Boko Haram insurgency in Northeastern Nigeria using a tactic of “relentless pursuit.”³ By the wake of 2017, not only did the troopers turn the tide of the insurgency, there were also records of serial institutional culpability for human rights violation and war crime: Sporadic shootings with consequent pock-marking of homes with bullets,⁴ wanton destruction and looting of properties belonging to civilians,⁵ arbitrary detention of innocent people without charge, in some cases, for the apparent purpose of

1. James Adewunmi Falode, *The Nature of Nigeria's Boko Haram War, 2010-2015: A Strategic Analysis*, 10 PERSPS. ON TERRORISM 41, 42 (2016) (including the Nigerian Joint Task Force which is comprised of the Nigerian Police Force, Nigerian Navy, Nigerian Air Force, and Nigerian Army; the Civil Joint Task Force which consists of vigilante groups, hunters, farmers and youths who are fluent in the local language and also understand the local culture, religion, and geography of the contested zone; and the Special Military Joint Task Force which includes personnel from the Nigerian Police Force, the Department of State Security (DSS), the Nigerian Immigration Force and the Defense Intelligence Agencies).

2. *Id.* (defining contested zones as that space where the opposing forces meet, with a view to realizing their economic, political, social, and religious objectives by means of force and psychological operations).

3. *Id.* (noting that this is a tactic used to match Boko Haram's hit-and-run strategy, and it has been effective in defending against Boko Haram).

4. *Human Rights Watch: Satellite Images Show Army Abuse in Baga*, LOGBABY.COM (May 2, 2013), http://logbaby.com/news/human-rights-watch-_16638.html#.Wl_8traZPVp (reporting that in a fire fight between the Joint Task Force and Boko Haram in Baga, a Nigerian border with Lake Chad and Cameroon, the residents reportedly accused the Joint Task Force of firing indiscriminately).

5. See Borno & Yobe States Peoples Forum, *Nigeria: Memorandum to the National Conference on the Security Challenges in Borno and Yobe States*, ALLAFRICA (Apr. 7, 2014), <http://allafrica.com/stories/201404081256.html> (lamenting that security agents often break into people's homes in the middle of the night on the excuse of the state of emergency and sometimes commit acts of robbery and looting of people's homes and business properties in the name of hunting for members of Boko Haram).

extorting money in return for their release,⁶ and the arbitrary killings of both members of Boko Haram⁷ and unarmed civilians.⁸

Indeed, the institutional culpability of the armed forces in Nigeria predates the Boko Haram counter-insurgency operation. It began with the 1967 Asaba Massacres during the Nigeria's Civil War⁹ and reached its crescendo sometime in 1999 with the invasion of a community named Odi by the armed forces.¹⁰ Although, in Odi's case, the Federal High Court sitting in Port Harcourt awarded damages against the Nigerian Army, it is somewhat curious that the military, again, took offensive in its anti-Boko Haram operation.¹¹

6. Sani Tukur, *How Nigeria Military Arrest, Torture, Exploit Innocents at Giwa Barracks*, PREMIUM TIMES (Jan. 13, 2013), <https://www.premiumtimesng.com/news/114950-how-nigeria-military-arrest-torture-exploit-innocents-at-giwagiwa-barracks-html> (detailing how innocent people are randomly arrested and detained at Giwa barracks and adding that those released were asked to pay a high sum of money as 'bail').

7. See Adeolu Ade Adewumi, *The Battle for the Minds: The Insurgency and Counter Insurgency in Northern Nigeria*, 4 WEST AFR. INSIGHT 3, 5 (2014) (narrating that by July 30, 2009, Shiek Mohammed Yusuf, the alleged leader of Boko Haram, was killed under questionable circumstances in police custody); see also Falode, *supra* note 1, at 44 (arguing that the unlawful killing of Yusuf pushed Boko Haram to embrace a more combative approach).

8. See *Human Rights Watch: Satellite Images Show Army Abuse in Baga*, *supra* note 4 (highlighting that, in a fight between the Nigerian armed forces and Boko Haram in Baga, reportedly up to 187 people were killed and 77 others were injured).

9. See S. Elizabeth Bird & Fraser M. Ottanelli, *Revisiting The 1967 Asaba Massacre*, VANGUARD (Oct. 29, 2016, 5:20 AM), <https://www.vanguardngr.com/2016/10/revisiting-1967-asaba-massacre/> (recalling that during the war over the secession of the predominantly Igbo Eastern Region, renamed Biafra, soldiers occupied Asaba and began killing hundreds of civilians accused of Biafran collaboration).

10. See HUMAN RIGHTS WATCH, WORLD REPORT 2000: THE DESTRUCTION OF ODI AND RAPE IN CHOBA DECEMBER 22, 1999 (2000), <https://www.hrw.org/report/1999/12/22/destruction-odi-and-rape-choba/december-22-1999> (highlighting how President Olusegun Obasanjo sent soldiers from the Nigerian army to Odi's community in revenge of the killing of twelve Nigerian policemen in the community over a rising clamor from those living in the oil producing areas for a greater share of the oil wealth; and how the soldiers killed nearly everybody in the community of perhaps 15,000 people, and demolished every single building, barring the bank, the Anglican church and the health center).

11. This is curious because the military seems to be undeterred by the public condemnation of their action which led the court to order them to pay \$37.6 billion as compensation to the people of Odi in Bayelsa State.

The Nigerian military carried out various extra-judicial killings, enforced disappearances, and tortures and other ill-treatments, most of which led to deaths in custody. A recent Preliminary Examination Report¹² on Nigeria released by the International Criminal Court's Office of Prosecutor identified two possible cases of war crimes and crime against humanity perpetrated by the Nigerian military in its anti-Boko Haram operation.¹³

Views have been expressed to the effect that the Nigerian armed forces are betting on the nature of the humanitarian law of internal armed conflict.¹⁴ Therefore, the essence of considering the applicable International Humanitarian Law (IHL)¹⁵ in Nigeria's Boko Haram conflict is not only for the sources of Nigerian humanitarian law, but also for the practical necessity of determining how IHL can be complementarily applied with International Human Rights Law (IHRL).¹⁶ This approach is deliberate, and an important one; IHL governs the issue of the existence of an armed conflict, and parties

12. INTERNATIONAL CRIMINAL COURT, OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES (2015).

13. *Id.* This report summarizes the preliminary examination activities conducted by the Office of the Prosecutor between November 1, 2014 and October 31, 2015. According to the report, the Nigerian military's indiscriminate arrest, detention, torture, and extra judicial killings of people suspected to be Boko Haram fighters and collaborators constituted the first instance of crimes against humanity. The report also stated that the second crime committed by the military was its attacks on certain populations as well as the recruitment of child soldiers by pro-government military called the civilian Joint Task Force. See Ronald Mutum & Abbas Jimoh, *Boko Haram: Insurgents, Army Committing War Crimes - ICC*, DAILY TR. (Nov. 15, 2015, 12:26 AM), <https://www.dailytrust.com.ng/news/general/boko-haram-insurgents-army-committing-war-crimes-icc/119421.html>.

14. See Gus Waschefort, *Africa and International Humanitarian Law: The More Things Change, the More They Stay the Same*, 98 INT'L REV. RED CROSS 593, 608 (2016) (discussing a study that found that seventy-one percent of Nigerians found that the Geneva Convention has helped in reducing internal conflict).

15. See Adam Roberts, *Counter-Terrorism, Armed Force and the Laws of War*, 44 SURVIVAL 7, 8 (2002) (noting that this is also referred to as laws of war, and IHL is the product of negotiations between states, and reflect their experiences and interests, including those of their armed forces).

16. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); see also International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3 (entered into force Jan. 3, 1876).

are laden with obligations which they must comply with.

Despite the International Court of Justice's (ICJ) clarification that IHRL does not cease to apply in times of armed conflict,¹⁷ its reference to the concept of *lex specialis* to address the issue of coordination is somewhat vague. The implication is that where there is a conflict between rules of IHL and that of IHRL, IHL should prevail by reason of its specificity. However, the major weakness in the position of the ICJ is that it does not offer guidance as to how the possible antinomies between the two bodies of the rules should be identified and addressed in practice.¹⁸ Thus, the aim of this Article is to take a sober look at IHL applicable to internal conflict; briefly touching on IHRL, and identifying coordinating criterion for their relationship which shall bring about remedy and reparation for victims of human rights violation in Nigeria's Boko Haram conflict.

The goal of this Article is to show that, due to a minimal provision of Common Article 3 and its principal subsequent Additional Protocol II, there still remains a normative deadlock in Nigerian internal armed conflict. Necessities for military observance of the rules of engagement are waning, and concern for the respect of the rules of law continues to suffer neglect. Lest it be misunderstood, I do not doubt the relevance of Nigerian municipal laws¹⁹ and certain customary norms.²⁰ Rather, I show that there is a blank canvas in the

17. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 240 (July 8) (determining the relationship between human rights law and humanitarian law in terms of the right to life).

18. Marco Pertile & Chiara Vitucci, *Introduction to On the Relationship Between IHL and IHRL 'Where It Matters Once More: Assessing the Position of the European Court of Human Rights After Hassan and Jaloud*, 16 QUESTIONS INT'L L. 1, 1 (2015), <http://www.qil-qdi.org/on-the-relationship-between-ihl-and-ihrl-where-it-matters-once-more-assessing-the-position-of-the-european-court-of-human-rights-after-hassan-and-jaloud/>.

19. Criminal Code Act (1990) Cap. (77), §§ 306, 315, 351, 352, 353, 355, 360, 364, 369, 443, 452 (Nigeria), <http://www.nigeria-law.org/Criminal%20Code%20Act-Tables.htm> (demonstrating insights into the Nigeria's penal regulation on inhumane conduct during armed conflict).

20. These include the requirement that action taken in self-defense must not exceed what is necessary and proportionate. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgement, 1986 I.C.J. Rep. 14, ¶ 194 (June 27); see also Jasmine Moussa, *Can Jus ad Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law*, 90 INT'L REV. RED CROSS 963, 963 (2008) (attempting to settle confusion over the concepts of *Jus ad*

treaty-based humanitarian law applicable to internal conflict.

For the avoidance of doubt, the emphasis in this Article is on the coordination of normative rules between IHL and IHRL applicable to internal armed conflict. The choice of the principle of Systemic Integration in the coordination thereof, as well as reference to Nigeria's Boko Haram's 'war' as an internal conflict in focus are not less important. Therefore, for completeness of treatment, it is important to make a few points at this juncture.

First, Systemic Integration *lex specialis*²¹ figures among the rules of coordination included in the Vienna Convention on the Law of Treaties (VCLT)²² and has been codified as a rule of general application in international law. Secondly, Systemic Integration is a mandatory part of the interpretative process which demands that a rule of international law be construed taking into account all other international norms deriving from any source, that are applicable in and relevant to a certain situation.²³ The third point is that, insofar as the principle allows interpretation of one body of law in light of the other, it can be employed as a legal-theoretical basis to provide remedies under IHRL for violation of IHL in Nigeria's Boko Haram conflict.

Despite the contrary shared views of the advocates of state sovereignty and the corollary principle of consent, the move to coordinate the rules of IHL and IHRL through the principle of Systemic Integration in the Nigeria-Boko Haram conflict is a necessity.²⁴ Some rules, like peremptory human rights norms, are of

Bellum and Jus in Bello).

21. See Silvia Borelli, *The (Mis)-Use of General Principles of Law: Lex Specialis and the Relationship Between International Human Rights Law and the Laws of Armed Conflict*, in GENERAL PRINCIPLES OF LAW AND THE JUDICIARY: THE ROLE OF THE JUDICIARY 265 (Laura Pineschi ed., 2015) (tracing the principle commonly expressed in the maxim *lex specialis derogate legis generali* to Roman law and quoting the definition given to the maxim by the 2006 ILC's Study Group "that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific").

22. See Vienna Convention on the Law of Treaties art. 31(3)(c), *opened for signature* May 23, 1969, 1155 U.N.T.S. 340.

23. See Borelli, *supra* note 21, at 265.

24. See Father Robert Araujo, *Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law*, 24 FORDHAM INT'L L.J. 1477,

such great necessity to human kind that the requirement of consent to establish binding obligations on states would be undesirable.

Part I beams a search light on anti-Boko Haram operations in Nigeria. Part II proceeds with the IHL applicable to anti-Boko Haram operations. Part III discusses that the human rights violation of the armed forces in anti-Boko Haram operation under humanitarian law of internal armed conflict, while Part IV argues that IHRL is a complementary body of law to IHL. Now, it is the philosophy of accepting IHL and IHRL as complementary laws of war that brings clearly into focus the principle of Systemic Integration as a coordinating criterion for their relationship. Part V, concludes by demonstrating how the principle of state sovereignty and consent will inhibit the criterion of Systemic Integration.

II. GENERAL REFLECTION ON ANTI-BOKO HARAM OPERATIONS

A. THE BIRTH AND GROWTH OF A TERROR

From the beginning when the British formally took control of northern Nigeria to 1914 when both the South and the North were amalgamated, oppositions among most Northerners to the British Western influence grew by the decade.²⁵ In particular, many Muslims in the area felt that education had too many western influences because of its emphasis on democratic ideas and strengthening the social position of girls and their matureness.²⁶ Muslims seem to argue that all knowledge of western origin is suspect, and educating girls is Western cultural imperialism.²⁷

Sometime in 1995, a movement named Sahaba emerged to purge the region of its western legacy of British administration.²⁸ This

1480 (2000) (highlighting that popular sovereignty is essential to human rights).

25. See Femi Owolade, *Boko Haram: How a Militant Islamist Group Emerged in Nigeria*, GATESTONE INST. (Mar. 27, 2014, 5:00 AM), <https://www.gatestoneinstitute.org/4232/boko-haram-nigeria> (emphasizing that Boko Haram's emergence is a result of military misadventure into Northern Nigeria).

26. See *id.*

27. *Id.*

28. Shehu Sani, *Boko Haram: The Northern Nigeria (Hausa land) (2)*, VANGUARD (July 1, 2011, 12:00 AM), <https://www.vanguardngr.com/2011/07/>

group openly condemned the thriving culture of western education in the region.²⁹ With the change of its name to Jama'atu Ahlis Sunna Lidda'awati Wal Jihad in 2002,³⁰ the group widely known by its Hausa name Boko Haram, vigorously indoctrinated considerable followers with the campaign of Western education as sin.

During this period, Boko Haram's activities consisted mainly of civil, social, and religious acts of disobedience to established local norms.³¹ It was only after 2009 that the group morphed into a salafi-jihadist terrorist organization.³² Since then, the group has committed heinous crimes against Nigerian citizens and their neighbors.³³ Indeed, Boko Haram militants have carried out numerous gun attacks and bombings, in some cases using suicide bombs on a wide array of venues including police stations, military facilities, churches, schools, beer halls, newspaper offices, and the United Nations building in the capital, Abuja.³⁴

Given the increased frequency of bomb attacks and shootings carried out by Boko Haram, the United States Department of State,

boko-haram-the-northern-nigeria-hausaland-2/ (reporting that the group sought to abolish the secular Nigerian constitution in favor of the Islamic state and wanted to establish a complete Sharia-based state in 19 Northern states and all over Nigeria).

29. *Id.*

30. Opayemi Agbaje, *The Evolution of Boko Haram*, KINGDOM NEWS (Nov. 9, 2014), <http://kingdomnewsng.com/articles/142-the-evolution-of-boko-haram-parts-1-3> (noting that the group's formal name, Jama'tu Ahlis Sunna Lidda'wati Wal-Jihad, means 'People Committed to the Propagation of the Prophets Teachings and Jihad').

31. See Falode, *supra* note 1, at 43-44 (explaining that before 2010 Boko Haram's attacks were unorganized and haphazardly carried out, but after 2010, Boko Haram began using more sophisticated weapons and strategic planning).

32. *Id.* at 43.

33. See *id.* at 44-46 (describing many of Boko Haram's heinous crimes, including: A 2011 suicide car-bombing in Nigeria's capital directed against the UN building that killed 21 persons and injured 73 others; a 2014 kidnapping of more than 200 schoolgirls from their dormitory in Chibok, a northern city in Nigeria; a 2014 attack on a police station in Cameroon; and a devastating attack in Ngouboua, Chad).

34. Daniel Williams & Eric Guttschuss, *Spiraling Violence: Boko Haram Attacks and Security Force Abuses in Nigeria*, HUM. RTS. WATCH (Oct. 11, 2012), <https://www.hrw.org/report/2012/10/11/spiraling-violence/boko-haram-attacks-and-security-force-abuses-nigeria> (commenting that since July 2001, suspected members of Boko Haram have committed horrific crimes against Nigeria's citizens).

in 2012, named three of Boko Haram's leaders as "Specially Designated Global Terrorists."³⁵ Two years later, Boko Haram was declared the deadliest terror group.³⁶ The group's attacks on the Chibok Government Secondary School³⁷ and elementary students in Damasack³⁸ have become emblematic of its growing pangs of terror. However, the group sees these terrorist practices as cultural relativism in the sense of disavowing British misadventure into the northern part of Nigeria.³⁹ Arguably, if the cause of the Boko Haram Sect was just by relying on cultural and religious immunity from humanitarian standards, then any means to achieving that end could

35. See Press Release, U.S. Dep't of State, Bureau of Counterterrorism and Countering Violent Extremism, Terrorist Designations of Boko Haram Commander Abubakar Shekau, Khalid al-Barnawi and Abubakar Adam Kamar (June 21, 2012), <https://www.state.gov/j/ct/rls/other/des/266615.htm> (noting that Executive Order 13224 designated three Nigerian leaders of Boko Haram as "Specially Designated Global Terrorists," blocking the identified leaders' property interests subject to U.S. jurisdiction and prohibiting U.S. persons from engaging in transactions with or for the benefit of the identified leaders).

36. Dionne Searcey & Marc Santora, *Boko Haram Ranked Ahead of ISIS for Deadliest Terror Group*, N.Y. TIMES (Nov. 18, 2015), <https://www.nytimes.com/2015/11/19/world/africa/boko-haram-ranked-ahead-of-isis-for-deadliest-terror-group.html>. (reporting that in 2014 Boko Haram was responsible for 6,644 deaths compared to 6,073 deaths at the hands of ISIS); see INST. FOR ECON. AND PEACE, GLOBAL TERRORISM INDEX 2015 at 6 (2015), <http://economicsandpeace.org/wp-content/uploads/2015/11/Global-Terrorism-Index-2015.pdf> (indicating that 6,644 deaths were attributed to Boko Haram in 2014, an increase of 317 percent).

37. See Jacob Zenn, *Boko Haram and the Kidnapping of the Chibok Schoolgirls*, 7 CTC SENTINEL, May 2014, at 1, 1, <https://ctc.usma.edu/posts/boko-haram-and-the-kidnapping-of-the-chibok-schoolgirls> (analyzing Boko Haram's ability to cause political instability and turmoil in Nigeria and internationally, as proven by Boko Haram's kidnapping of more than 250 school girls from Chibok in Nigeria's Northeastern Borno State in 2014).

38. See Conor Gaffey, *Boko Haram Kidnapped 300 Schoolchildren in Damasak*: HRW, NEWSWEEK (Mar. 31, 2016, 5:52 AM), <http://www.newsweek.com/boko-haram-kidnapped-300-schoolchildren-damasak-hrw-442565> (suggesting that the kidnapping of over 300 children from a primary school in Damasack has remained largely outside of mainstream news reporting because of pressure from the Nigerian government to keep it silent).

39. *Boko Haram: International Criminal Court Declares Conflict as Civil War*, WILL NIGERIA (Nov. 25, 2013), <https://thewillnigeria.com/news/boko-haram-international-criminal-court-declares-conflict-as-civil-war/> (noting that the International Criminal Court declared the armed confrontation between the Nigerian military and Boko Haram as a civil war and suggested that Boko Haram's attacks are carried-out pursuant to the group's goal of imposing an exclusive Islamic system of government in Nigeria).

be justified.

Nonetheless, the armed attacks carried out by the militant group, no doubt, threaten to further destabilize an already volatile nation. In fact, the Boko Haram conflict has been characterized by the International Committee of the Red Cross and the International Criminal Court as an armed conflict of non-international character.⁴⁰ This characterization triggers certain rights and obligations for the Nigerian government to protect its territorial integrity under international law. Therefore, the next part of this Section will take a look at how the Nigerian government exercises its right to self-defense against the Boko Haram insurgency.

B. IN DEFENSE OF TERRITORIAL INTEGRITY: EXERCISING RIGHT TO SELF-DEFENSE AGAINST BOKO HARAM

Since terrible and unbearable pressure, in the form of bombs, suicide bombers, cultural genocide, and oppression of women and children, are the core components of Boko Haram's tactics, nobody can deny that serious armed attacks have been carried-out within the territorial jurisdiction of Nigeria. As a response, Nigeria resorted to a countermeasure attack in self-defense against the militants.⁴¹ Surely, the only response available to a state experiencing an act of aggression is a countermeasure.⁴² That countermeasure must follow the exercise of all other peaceful diplomatic means reasonably at the state's disposal, be necessary to stop the aggression, and be directly proportional, but not necessarily exactly the same as the aggressive act. Article 51 of United Nations Charter provides that:

40. *Id.*

41. Anne Look, *Nigerian Forces Counter-Attack Against Boko Haram; Hundreds of Deaths Reported*, VOA (Jan. 9, 2015, 11:18 AM), <https://www.voanews.com/a/senator-boko-haram-attacks-northeast-nigeria/2590776.html> (describing how the unsuccessful and deadly counter-attack led by the Nigerian government against Boko Haram in the town of Baga killed hundreds, if not thousands, of innocent civilians and displaced thousands more).

42. *See* Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. Rep. ¶¶ 194-95 (noting that a state may exercise its right of self-defense if the state has been the victim of an armed attack).

Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken measure necessary to maintain international peace and security.⁴³

Although there is no mention of non-state actors in Article 51, it seems implausible to maintain that acts of terrorism for which no state is responsible are not capable of constituting armed attack within the meaning of the Article.⁴⁴ Thus, it is only logical to infer from the Article the fact that an occupying power has the right to defend its own civilian citizens if there is an armed attack. Accordingly, there is nothing in the text of Article 51 that stipulates that self-defense is available only when an armed attack is made by a state. On a whole, self-defense, being “an inherent right,” does not “require that armed attacks by terrorists be attributable to the territorial state under the rules of state responsibility.”⁴⁵

However, by invoking the right to self-defense in response to serial armed attacks carried out by the Boko Haram militant group, a wide acceptance of such a right becomes clear. Specifically, in

43. U.N. Charter art. 51, ¶ 1. The United Nations Charter, ratified on October 24, is a multilateral international treaty with 192 members states. On June 26, 1945 in the Herbst Theater auditorium in San Francisco, delegates from 50 nations sign the United Nations Charter, establishing the world body as a means of saving “succeeding generation from the scourge of war.” *Id.* pmbl.

44. Laurie R. Blank, *International Law and Cyber Threats from Non-State Actors*, 89 INT’L L. STUD. 406, 411-13 (2013) (explaining that Article 51 does not limit the right of self-defense in response to only threats or use of force by other states and highlighting post-9/11 state practice as evidence of the existence of the right of self-defense against non-state aggressors).

45. Nico Schrijver & Larissa van den Herik, *Leiden Policy Recommendations on Counter-Terrorism and International Law*, 57 NETH. INT’L L. REV. 531, 544 (2010); see Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors*, 106 AM. J. INT’L L. 769, 773-74 (2012) (observing that while states have a right to self-defense against attacks by non-state actors, the complexity of modern-day cross-border terrorist organizations produces questions of where, how, and when an attacked state may assert its right of self-defense); *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT’L & COMP. L.Q. 963, 969-70 (2006) (recognizing the right to self-defense regardless of whether the source of the attack is a state or non-state actor and noting that when a state is unable or unwilling to assert control over a terrorist organization within its territory, an attacked state may act in self-defense against the terrorist organization in the state where the terrorist organization is located).

Northeastern Nigeria, four civilian regimes have invoked the right to use force in self-defense against the Boko Haram Sect.⁴⁶ These four regimes, all practicing a presidential system of government, are the regimes of Obasanjo,⁴⁷ Yar'adua,⁴⁸ Jonathan,⁴⁹ and Buhari.⁵⁰ The regimes engaged security forces to mount defenses against Boko Haram members.⁵¹ The nature of the defense consisted of the cooperation among the Joint Task Force (now Special Military Joint Task Force) and the involvement of troops from neighboring countries and local communities.⁵²

These four civilian regimes had remarkable successes in high profile arrests of insurgents and offensive operations on the terrorist camps and dislodgement of several bases. Especially, with the provision of intelligence by local communities to armed forces so as to ensure that innocent people were not targeted wrongly as Boko-Haram members.⁵³

46. See E. Remi Aiyede, *Democratic Security Sector Governance and Military Reform in Nigeria*, in *LEARNING FROM WEST AFRICAN EXPERIENCES IN SECURITY SECTOR GOVERNANCE* 97, 98-99, 114-15 (Alan Bryden & Fairlie Chappuis eds., 2015) (analyzing the efforts of recent Nigerian presidents and government officials to reform the countries security forces).

47. See *List of Nigerian Presidents From 1960 Till Present*, ONLINE NIGERIA (Jan. 22, 2017, 8:51 PM), <https://news2.onlinenigeria.com/nigeria-article/404111-list-of-nigerian-presidents-from-1960-till-present.html> (noting Olusegun Aremu Obasanjo, the twelfth President of Nigeria, was in office between May 29, 1999 and May 29, 2007).

48. See *id.* (mentioning Umaru Musa Yar'Adua, the thirteenth President of Nigeria, was in office between May 29, 2007 and May 5, 2010).

49. See *id.* (noting that Goodluck Ebele Jonathan, the fourteenth President of Nigeria, was in office between May 6, 2010 and May 29, 2015).

50. See *id.* (explaining that Muhammadu Buhari, the fifteenth and President of Nigeria, assumed office on May 29, 2015).

51. See Aiyede, *supra* note 46, at 110, 112-14 (discussing how the Nigerian government's efforts since the late-1990s to reform its military in order to rid the country of corruption and better protect its citizens from contemporary threats to security have been largely unsuccessful; although some progress has been made).

52. Falode, *supra* note 1, at 44.

53. *Defeating Boko Haram*, THIS DAY (Mar. 21, 2016), www.thisdaylive.com/index.php/2016/03/21/defeating-boko-haram/ (explaining that with increased civil-military cooperation and effective implementation of intelligence-gathering and intelligence-sharing, security in the northeastern Nigeria has improved tremendously recently with nearly all the territories recovered).

Nevertheless, the successes are often opportunistic rather than strategic.⁵⁴ The absence of a clear defense strategy in any of the campaigns launched by the four regimes against the Boko Haram Sect takes away the element of direction and systematic approach to successful ‘war’ on the Boko Haram Insurgency. Far too often members of security forces have been accused of damages, tortures, and deaths of innocent people in the name of territorial defense against terrorism.⁵⁵ Meanwhile, in any armed conflict, including the one of Boko Haram, the fact that an action is taken in self-defense does not preclude it from complying with certain rules of law.⁵⁶ Instead, there exist certain laws of war that apply in situations of armed conflict.

III. THE HUMANITARIAN LAWS APPLICABLE TO ANTI-BOKO HARAM OPERATIONS

Within the international legal system, Common Article 3 of the Geneva Convention of 1949⁵⁷ is generally accepted as an enumeration of the regulations of internal armed conflicts. These regulations are an affirmative obligation to collect and care for the wounded and sick, and express prohibition of four specific categories of acts:

- a) violence to life and person, in particular murder of all kinds, mutilations, cruel treatment and torture; b) taking of hostages; c) outrages

54. See Eromo Egbejule, *They’re Defeating Boko Haram But Are They Nigeria’s Next Security Threat?*, IRIN NEWS (Aug. 22, 2016), <https://www.irinnews.org/feature/2016/08/22/they%E2%80%99re-defeating-boko-haram-are-they-nigeria%E2%80%99s-next-security-threat> (noting concern among local communities and the Nigerian government that the Civilian Joint Task Force (CJTF), a group of vigilantes who have been instrumental in protecting their communities from Boko Haram, have used their allegiance to and power from the national security forces in order to commit human rights violations such as extrajudicial killings, sexual abuse, and exploitation).

55. See *id.* (explaining that because of the Civilian Joint Task Force’s association to the Nigerian military’s Joint Task Force, the group of vigilantes has often acted as if it is above the law when protecting local communities from Boko Haram).

56. *Id.*

57. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950).

upon personal dignity, in particular humiliating and degrading treatment; d) the passing of sentences and carrying out of execution without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.⁵⁸

The above obligations and prohibitions were impliedly provided in the proviso contained Martens Clause⁵⁹ on which Common Article 3 is built upon. However, due to the brevity of Common Article 3,⁶⁰ a legal regime of 263 words, Additional Protocol II to the Geneva Convention was adopted to improve upon the “minimum” protection afforded by both the Martens Clause and Common Article 3.

Nigeria, being a party to both the Geneva Convention and the two Additional Protocols,⁶¹ has adopted the basic foundation of laws of war with its attendant regulation of internal conflict. In fact, Nigeria domesticated the Geneva Convention through the promulgation of the Geneva Convention Act in 1960 that was re-enacted in 2004.⁶² Nevertheless, the provisions of Additional Protocols to the Geneva Convention, especially Additional Protocol II, which governs a specific type of non-international conflict, were not included in this domestication.⁶³ Rather, the Nigerian political administrations objected to the domestication of the Additional Protocol II, perhaps,

58. *Id.*

59. Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 INT'L REV. RED CROSS 125, 125 (1997) (providing that the Martens Clause was introduced into the preamble to the 1899 Hague Convention II-Law and Customs of War on Land and that the Clause took its name from a declaration read by Friedrich Martens, the Russians delegate at The Hague Peace Conference of 1899).

60. See THE GENEVA CONVENTIONS OF 12 AUGUST 1949 COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 34 (Jean S. Pictet ed., 1958) (providing commentary on Common Article 3); David A. Elder, *The Historical Background of Common Article 3 of the Geneva Convention of 1949*, 11 CASE WESTERN RES. J. INT'L L. 37, 54 (1979) (explaining that Article 3 is characterized as a convention in miniature).

61. *Treaties, State Parties and Commentaries Nigeria*, INT'L COMM. RED CROSS, https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelect.ed.xsp?xp_countrySelected=NG (last visited Jan. 17, 2018) (listing all four Conventions that Nigeria became party to by accession on June 9, 1961, and by ratifying the Additional Protocols in 1988).

62. Geneva Conventions Act (1990) Cap. (162) (Nigeria).

63. Jide James-Eluyode, *Enforcement of International Humanitarian Law in Nigeria*, 3 AFR. HUM. RTS. L.J. 264, 264-74 (2003).

on the ground that the provisions might actually favor guerilla fighters and terrorists, affording them a status that the Nigeria believes they do not deserve.⁶⁴

Notwithstanding its non-domestication, some of the provisions of the Additional Protocols are protected under the Nigerian Constitution.⁶⁵ The Constitution, like the Additional Protocols, guarantees persons charged with an offence the right to be presumed innocent until proven guilty according to law,⁶⁶ and to be fairly and publicly tried.⁶⁷ In addition, Nigeria's municipal penal laws are not criminally silent on inhumane conducts during conflict.⁶⁸ The Nigerian Criminal Code, for example, outlaws some inhumane conducts similar to those outlawed by the Convention and Additional Protocols.⁶⁹ Furthermore, the Nigerian Army Act⁷⁰ contains offences relating to the conduct of warfare and peace time activities of the army.

On the plane of customary international law, the requirement that action taken in self-defense must not exceed what is necessary and proportionate continues to apply notwithstanding Nigeria's objection to the domestication of Additional Protocol II.⁷¹ As the ICJ explained in the Nicaragua case, there is a "specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it."⁷² While the

64. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 47, 49 (2005) (stating that Nigeria has stated that "military advantage" refers to the advantage anticipated from the military attack considered on the whole and not only from isolated or particular parts of that attack); *Applying International Humanitarian Law Rules to the 'War' Between Nigeria and the Boko Haram Sect* By Nonso Robert Attoh, EDUC. RES. PROVIDERS, <https://www.educationalresourceproviders.com/applying-international-humanitarian-law-rules-to-the-war-between-nigeria-and-the-boko-haram-sect/> (last visited Jan. 17, 2018) (stating that Nigeria has not domesticated Additional Protocol II of the Geneva Conventions).

65. CONSTITUTION OF NIGERIA (1999), §23.

66. *Id.* § 36(5).

67. *Id.* § 36(2), (4).

68. *Id.* § 15.

69. Criminal Code Act (1990) Cap. (77), §§ 306, 315, 351-53, 355, 360, 364, 369, 443, 452.

70. Armed Forces Act (2004), Cap. (A20), §§ 36-38, 66, 68, 71 (Nigeria).

71. HENCKAERTS & DOSWALD-BECK, *supra* note 64, at 47.

72. Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. ¶

requirement of proportionality limits a state's ability to resort to force, necessity declares that a state may not resort to armed force unless it has no other means to defend itself.

Strict adherence to the above rules of war has become imperative in Nigeria's Boko Haram conflict because there can be strong prudential considerations that militate in its favor. These include securing public and international support, ensuring that Boko Haram is not given the propaganda gift of atrocities, and maintaining discipline and high professional standards in anti-Boko Haram squads. In contrast, the following Section will take a look at how these laws of war are flagrantly violated in anti-Boko Haram operations. Most especially, it will show that the counterbalance targeted strikes of Nigerian security forces constitute war crimes and crime against humanity.

IV. VIOLATION(S) IN THE OPERATIONS: THE BREACH OF INTERNATIONAL HUMANITARIAN LAW

After identifying the laws of war, particularly IHL applicable to anti-Boko Haram operation, serious concern remains with the impunity with which these laws are violated. To be sure, the laws of war are designed to limit the effects of armed conflict on people who are not or are no longer participating in hostilities and to restrict the means and methods of warfare. But a sampling of today's conflicts shows that the laws of war are being completely ignored.⁷³

Despite Nigeria's obligation under the humanitarian laws of war; it would be difficult to conclude that the Boko Haram offensive attacks and, worst still, the counter-balance targeted strikes of Nigerian security forces are consistent with core rule of law norms.⁷⁴ As stated in the Introduction, a Preliminary Examination Report on Nigeria released by the International Criminal Court's Office of

176.

73. Egbejule, *supra* note 54; AMNESTY INT'L, STARS ON THEIR SHOULDERS. BLOOD ON THEIR HANDS. (2015).

74. John Thomas Didymus, *HRW: Satellite Images Reveal 'Nigerian Army Abuse' in Baga*, DIGITAL J. (May 3, 2013), <http://www.digitaljournal.com/article/349366>; Borno & Yobe States Peoples Forum, *supra* note 5.

Prosecutor identified two possible cases of war crimes and crime against humanity perpetrated by the Nigerian Military.⁷⁵

In particular, in the April 2013 Baga clashes,⁷⁶ officials of the task force were allegedly accused of summary execution, torture, arbitrary detention amounting to internment and outrages against the dignity of civilians, as well as rape. Reported by Amnesty International, the armed forces also starved, suffocated and tortured more than 7,000 to death in military detention camps since March 2011, and a further 1,200 were rounded up and unlawfully killed.⁷⁷

The general indignation caused by terrorist attacks can affect the implementation of *jus in bello* when fighting terrorism is the basis for resorting to war under the *jus ad bellum*.⁷⁸ In other words, because the Boko Haram Sect started the war, it is sometimes argued, they are responsible for all the death and destruction that ensue. More so, there is a little doubt that concern about the whole principle of thinking about terrorism in a laws of war framework might lead to the violation of the rules of law⁷⁹ by the Nigerian military. To refer to such a framework, which recognizes rights and duties, might seem to imply a degree of moral acceptance of the right of any particular group to resort to acts of violence, at least against military target.⁸⁰ Conversely, by the legal maxim *ex-injuria non oritur jus*,⁸¹ it seems unacceptable that an aggressor should benefit from the protections afforded by the laws of war.

Despite its plausibility, implying that certain reasoning might override the rules of war has no basis in law. To reiterate, in anti-terrorist war as in other wars, there can be strong prudential

75. ICC, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES ¶¶ 210-15 (2015), <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf>.

76. Didymus, *supra* note 74.

77. *New Amnesty Report: Senior Members of Nigerian Military Must be Investigated for War Crimes*, AMNESTY INT'L (June 2, 2015), <https://www.amnestyusa.org/press-releases/new-amnesty-report-senior-members-of-nigerian-military-must-be-investigated-for-war-crimes/> [hereinafter *New Amnesty Report*].

78. *See supra* Part II.

79. *Id.*

80. *Id.*

81. *See* Moussa, *supra* note 20, at 966 (interpreting *ex injuria non oritur jus* to mean one should not be able to profit from one's own wrongdoing).

considerations in favor of observing the laws of war.⁸² Nevertheless, the conflict between Nigeria and Boko Haram has rendered the straight forward observance of IHL difficult. Indeed, such a conflict involves a blurring of the distinctions between war, organized crime and large scale violation of human rights; and differs from traditional warfare in its goal, method and economy.⁸³

As a result, IHL is becoming incapable of acting alone for the sake of human security. To recall, Common Articles 3, which is the core of rules applicable to internal armed conflict, is a legal regime in miniature; and does not regulate the conduct of hostilities at all. Meanwhile, Additional Protocol II only does so with respect to civilians, and then only in general terms. Neither instrument, for example, provides any guidance on the legality of attacks taking part in hostilities. It then follows that recourse could be made to IHRL, at least to regulate the conduct of hostilities in internal conflicts. As will be discussed in Part IV, IHL and IHRL, while distinct, may both be applicable to a particular situation. The relationship between IHL and IHRL has been one of concurrency.

V. INTERNATIONAL HUMAN RIGHTS LAW AS THE COMPLEMENTING RULES FOR NON- INTERNATIONAL ARMED CONFLICT

A. THE ICJ APPROACH

The classic recognition of the application of IHRL as applied in situations of armed conflict is the ICJ's observation in its 1996

82. See *supra* Part II (listing prudential considerations including securing public and international support and maintaining discipline and high professional standards).

83. Andrea Kazan, *The effect of new wars on the relationship between international humanitarian law and international human rights law*, HUM. SECURITY CTR. (July 1, 2015), <http://www.hscentre.org/security-and-defence/effect-new-wars-relationship-international-humanitarian-law-international-human-rights-law/> (explaining that a new type of organized violence has emerged in which the goal of warfare shifted from geopolitical and ideological goal to identity politics: the method of warfare shifted from territory to a drive to “mobilize extremist policies based on fear and hatred;” and the economy of new wars is decentralized, as opposed to the centralized war economies of traditional conflict).

Nuclear Weapons⁸⁴ Advisory Opinion.⁸⁵ There, the court noted that the protection of the International Covenant for Civil and Political Rights (“ICCPR”). does not cease in times of war.⁸⁶ This recognition was not only reiterated, but consequently expanded upon by the ICJ in 2004 when it was called upon to address the lawfulness of the construction of a Wall in the Occupied Palestinian Territory.⁸⁷ The Court affirmed that IHRL continued to apply in case of armed conflict, and can thus help to strengthen the resiliency of vulnerable population.

The emphasis of the ICJ showed the jurisprudential acceptance of the logic and necessity of applying IHRL in armed conflict. As the court has clearly observed in its 2004 opinion, there are situations in which some rights may be exclusively matters of IHL; some, exclusively matters of Human Rights Law; and others, matters of both regimes.⁸⁸ By this observation, the Court presented the understanding that the explicit terms of both IHRL and IHL instruments are in accord, and especially obvious (as one may add) in non-international armed conflict.⁸⁹

Nevertheless, the ICJ failed to suggest any general coordinating criterion for the third situation (i.e. those in which the rights in question were ‘matters of both . . . branches of International Law’).⁹⁰ The Court only went on to caution that, in order to answer the question facing it (i.e. whether the actions of Israel were inconsistent with its international obligations, and if so, what were the consequences), it has to “take into consideration both these branches of International Law, namely human rights laws and, as *lex specialis*, international humanitarian law.”⁹¹ The Court’s reference to the application of humanitarian law as *lex specialis* to human rights law

84. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. at 240.

85. *Id.*

86. *Id.*

87. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 131, ¶ 106 (July 9).

88. *Id.* (explaining that the Court will have to consider “these branches of international law”—international humanitarian law and human rights law—when answering questions concerning the relationship between the branches).

89. *Id.* ¶¶ 106-11.

90. *Id.* ¶ 106.

91. *Id.*

has been the origin of tension between these bodies of International Law.⁹²

Conceding that the rules provided by humanitarian law are typically fairly specific as they are designed to be interpreted and applied by military commanders, such rules are far less extensive in situation of internal armed conflict. Therefore, the presumption that IHL is more specific; and so can be applied by way of *lex specialis* principle is, while attractive, not always entirely accurate. Thus, the move for customary international law to fill the blank canvas appears decisive. This move is the archetype of jurisprudence of International Criminal Tribunal for the former Yugoslavia (ICTY)⁹³ and the customary international humanitarian study conducted by the International Committee of the Red Cross.⁹⁴

Although both contributions are ground-breaking and gap-filling, it remains doubtful whether their *opinio juris* are drawn from state practice.⁹⁵ Do the methodology and the underlying evidence on which they rely relate with state practice? For instance, if Nigeria is obstinate to acknowledge the applicability of treaty based humanitarian law, it will be out of place to draw a conclusion as to *opinio juris* from her practice just because she is a party to both the Geneva convention and its Protocols. Even if one were to accept filling the gaps with customary international law, the task of

92. *See id.*

93. *See, e.g.,* Prosecutor v. Hadžihasanović, Case No. IT-01-47-AR73.3, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98BIS Motion for Acquittal, ¶ 26-30 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 11, 2005); Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 100-18 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

94. Int'l Committee Red Cross, *Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, 23-27 January 1995: Recommendations*, (Sept. 1, 1995), <https://www.icrc.org/eng/resources/documents/article/other/57jmbm.htm>.

95. John B. Bellinger, III & William J Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443, 443-44 (2007) (explaining that the United States is not in a position to accept the ICRC's conclusions that particular rules related to the laws and customs of war in fact reflect customary international law without the authors providing sufficient facts and evidence in support of those rules).

precisely ascertaining the rules that have customary status, as well as the possibility of a situation where there is no analogous rule in IHL, may override the essence of such an acceptance.⁹⁶

On the other hand, the practice of using IHRL to complement IHL is a critical point: the nationality and area of operations of the non-state actors are critical for both the jurisprudential and normative bases for applying human rights obligations.⁹⁷ Although born in Nigeria, Boko Haram has spread across the world. The sect perpetrates its heinous crimes against the people of Cameroon⁹⁸, Niger⁹⁹, and Chad.¹⁰⁰ Even, its connection to ISIL is never in doubt.¹⁰¹ Furthermore, IHRL was not designed specifically to regulate armed conflict situations and does not concern specific rules governing the use of force and the means and methods of warfare in that context.¹⁰² Together, this suggests that these bodies of International Law can be mutually reinforcing; and as such, a coordinating criterion, other than *lex specialis*, for the relationship between IHL and IHRL in situation of internal armed conflict like

96. Sandesh Sivakumaran, *Re-envisioning the International Law of Armed Conflict*, 22 EUR. J. INT'L L. 219, 244 (2011) (emphasizing that identification of customary rules proves elusive).

97. *Id.* at 252 (pointing out that even if there are theoretically-satisfying reason to explain how non-state armed groups are bound by international human rights law, State may not accept this position for fear of likening non-state armed group to States).

98. *See Boko Haram suicide bombers attack Cameroon*, PREMIUM TIMES (Nov. 24, 2016), www.premiumtimesng.com/news/top-news/216257-boko-haram-suicide-bombers-attack-cameroon.html.

99. *See 5 soldiers, 30 Boko Haram Militants Killed in Niger Fighting*, PRESSTV (Sept. 14, 2016), <http://www.presstv.com/Detail/2016/09/14/484677/Niger-Boko-Haram-Toumour-Nigeria> (recognizing Niger as one of the countries that years of Boko Haram militancy has affected).

100. *See Meria Svirsky, Boko Haram Infiltrates Chad in Precedent-Setting Attack*, CLARION PROJECT, Feb. 15, 2015, www.clarionproject.org/news/boko-haram-infiltrates-chad-precedent-setting-attack (stating that Boko Haram group infiltrated the Chadian fishing village of Ngouboua on canoes in a predawn raid that killed the local leader among others).

101. *See ISIL Accepts Boko Haram's Pledge of Allegiance*, ALJAZEERA, Mar. 16, 2015, www.aljazeera.com/news/2015/03/isil-accepts-boko-haram-pledge-allegiance-150312201038730.html (indicating that the Islamic State of Iraq and Levant has accepted a pledge of allegiance made by Nigeria's Boko Haram).

102. Pertile & Vitucci, *supra* note 18 (affirming that it is only IHL that is specifically designed to regulate armed conflict).

that of Nigeria-Boko Haram conflict is a necessity.

B. COORDINATION OF IHL AND IHRL: A CASE FOR SYSTEMIC INTEGRATION

Since the rules of IHL and IHRL are complementary and mutually reinforcing, care needs to be taken when applying human rights norms to complement IHL.¹⁰³ As the ICTY recognized, norms developed in the field of human rights can be transposed into IHL, only if they take into consideration the specifics (regulatory design) of the latter body of law.¹⁰⁴ For instance, what constitutes an “unlawful killing” in situations of armed conflict must be assessed on the basis of the relevant rules of IHL, including the fact that combatants or other persons taking a direct part in hostilities may be attacked- even with lethal force; and that killing of civilians in certain circumstances may not be prohibited- one suggested criterion for such a co-ordination is the principle of ‘Systemic Integration’.¹⁰⁵ The principle, codified in Article 31(3)(C) of the VCLT, requires that in interpreting a treaty provision, the interpreter should take into account “any relevant rules of International Law applicable in relations between the parties.”¹⁰⁶

One should applaud the stand taken by the ICJ in the leading Case of the Nuclear Weapon.¹⁰⁷ Contrary to the belief of many, it has been argued that the reference to the *lex specialis* nature of humanitarian law has nothing to do with IHL prevailing over or displacing IHRL, but rather would appear to be used as a shorthand for the proposition that, where human rights obligations fall to be applied in situation of

103. Emanuela-Chiara Gillard, *Humanitarian Law, Human Rights and Refugee Law-Three Pillars*, (Apr. 21-23, 2005) (explaining that in certain matters for which IHL lays down a “self-contained” set of rules, the provisions of IHL apply to the exclusion of human rights).

104. *Id.* (emphasizing that IHRL must be applied in armed conflict through the prism of IHL).

105. *See id.* (cautioning that the lawfulness of deaths resulting as a consequence of permissible “collateral damage” must be assessed pursuant to IHL’s principle of proportionality which requires a balancing of the incidental loss of civilian life or injury to civilians with the concrete and direct military advantage expected from a particular attack).

106. *See* Vienna Convention on the Law of Treaties, *supra* note 22, at 340.

107. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. at 240.

armed conflict, due effect should be given to the requirement to interpret the relevant obligations in light of, and consistently with, the equally applicable rules of IHL.¹⁰⁸ Indeed, the Court interpreted human rights provision taking into account IHL rules, which is an application of the principle of Systemic Integration.¹⁰⁹

International bodies, and even courts, have frequently invoked the principle as a coordinating criterion for the relationship between IHL and IHRL.¹¹⁰ They have done so expressly and by implication, or on the basis of equivalent provisions included in some constitutive instruments. In General Comment (GC) no.3 on the right to life, the African Commission on Human and Peoples' Rights, confirmed that Systemic Integration is the appropriate coordinating criterion for the relationship between these two bodies of law in that it gives room for the rule of one to be interpreted in light of the other.¹¹¹

However, it is possible to interpret rules of humanitarian laws in light of the one of human rights law which may not even emanate from the freewill of sovereign states and vice versa. In this regard, the remainder of this Article will conclude that certain rules are peremptory in nature; and thereby free from the attack of the

108. Borelli, *supra* note 21, at 7 (noting that the use of the words "*lex specialis*" in Nuclear Weapons occurred in the specific context of the court's discussion of the narrow question of the operation is situations of armed conflict of the right to life under Article 6 of the ICCPR, which prohibits the "arbitrary" deprivation of life).

109. *Id.* at 9 (arguing that far from being an application of the *lex specialis* principle, an approach that the ICJ resorted to is far closer to the principle of systemic integration).

110. See Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2008 I.C.J. 412 (Nov. 18); Coard v. United States, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Serv.L/V/II.106, doc. 3 rev. ¶ 37 (1999). Case Concerning Armed Activities on the Territory of the Congo (Congo v. Uganda), Request for the Indication of Provisional Measures, 2000 I.C.J. 111 (Jul. 1).

111. Vito Todeschini, *The Relationship between International Humanitarian Law and Human Rights Law in the African Commission's General Comment on the Right to Life*, EIJL: TALK (June 7, 2016), <https://www.ejiltalk.org/the-relationship-between-international-humanitarian-law-and-human-rights-law-in-the-african-commissions-general-comment-on-the-right-to-life/> (stating that the African Commission refrained from invoking *lex specialis* to read the interplay between humanitarian law and human rights law, but rather the principle of systemic integration).

principle of state sovereignty and its consensual theory.

VI. IS SOVEREIGN CONSENSUAL THEORY IN TENSION WITH SYSTEMIC INTEGRATION? RE-AFFIRMING THE PEREMPTORY NATURE OF HUMAN RIGHTS

The resort to coordinate the norms of IHL and IHRL through the principle of systemic integration leaves open the question of why a sovereign state would agree to a mandatory rule of treaty interpretation which could have as a consequence that the interpretation of a treaty to which that state is a party is affected by other rules of International Law which that state has decided not to accept.¹¹² Accordingly, why must Nigeria, as a sovereign nation, be bound by rules of treaty-based humanitarian law which do not emanate from her freewill? After all, treaties are principally dependent on the consent of the contracting parties, and they cannot give rights and impose obligations on third states.¹¹³

To recapitulate, Article 31 (3)(C) stipulates that, in interpreting a treaty, there shall be taken into account “any relevant rules of International Law applicable in the relations between the parties”.¹¹⁴ While it is concluded that the “relevant rules” referred to in this provision can be norms having their pedigree in any of the human rights charters, it is still unsettled whether the term ‘parties’ refers to all parties to, for instance, the treaty establishing the “relevant rules,” or whether it is sufficient that the parties to a particular dispute are bound by the rule in question.¹¹⁵ The whole idea behind the approach

112. Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, ¶¶ 7-68, WT/ DS291/R; WT/DS292/R; WT/DS293/R, (Sept. 29, 2006) [hereinafter WTO panel report].

113. See Vienna Convention on the Law of Treaties, *supra* note 22, at 332 (noting that free consent is one of the universally recognized principles of international law).

114. *Id.*

115. See Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT'L L. 265 (2009) (quoting the ILC's Study on Fragmentation that a construction of the term ‘parties’ makes it practically impossible ever to find multilateral context where reference to other multilateral treaties as aids to interpretation under Article 31 (3) (c) will be allowed due to the

of WTO panel in the EC-Approval and Marketing of Biotech Products case¹¹⁶ is that every society or state should be the master of its own fate. The will of state is said to be expressed in domestic law through legislation and in the case of international law through consent to international rules. Thus, no treaty binds a state that has not consented to it.

Generally, though sovereign consensual theory¹¹⁷ is in tension with the application of Systemic Integration, it is not as much as it imagined being the basis of international law. An understanding of *jus cogens* norms¹¹⁸, together with courts' practices, exposes the limitation of sovereign consensual theory. As stated in the Introduction, some rules are of such great necessity to human kind that the requirement of consent to establish binding obligations on states would be undesirable, such as the norms of *jus cogens*.¹¹⁹

First embodied in Article 53 of the 1969 VCLT, *jus cogens* (or *ius cogens*) is a Latin phrase for peremptory norm; and in private law, it means those contractual terms that are forbidden because they violate a public norm.¹²⁰ The older notion of *jus cogens*, which is expressed in the VCLT, limits the scope of international legal obligation (a treaty or a customary obligation) that would violate certain overarching principles.¹²¹ The newer version of *jus cogens* imposes an obligation in and of itself. In other words, *jus cogens* shields a state from assuming certain international legal obligation, as much as it directly imposes certain international legal obligations, even if a

unlikely of the precise congruence in the membership of most important multilateral convention).

116. *Id.* at n. 87.

117. *See* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. at 238 (noting that states have used the principles of sovereignty and consent to argue that they are only bound by treaties to which they are parties and customary international law).

118. *See* Gennady Danilenko, *International Jus Cogens: Issues of Law-Making*, 2 EUR. J. INT'L L. 42, 42 (1991) (identifying *jus cogens* as a "higher law" with overriding importance in international law).

119. *See supra* Part I.

120. *See* William E. Conklin, *The Peremptory Norms of the International Community*, 23 EUR. J. INT'L L. 837, 837 (2012) (noting that *jus cogens* or peremptory norms are universal principles from which no state may derogate).

121. *See id.* (arguing that *jus cogens* are norms which are superior to other rules of international law and can only be overridden by subsequent peremptory norms).

state has not accepted it. Thus, the bootstrap aspect of it is that *jus cogens* gives room for both international and municipal tribunals in getting around limits on their jurisdictions.

Indeed, violations of *jus cogens* norm create an automatic right to a remedy for victims. Even when a victim cannot pursue a claim procedurally,¹²² the offending state retains an obligation to provide a remedy.¹²³ The obligations to remedy is a fundamental aspect of a state's obligation to abide by the *jus cogens* norm. It would be unusual for sovereign consensual theory to require a state to violate a *jus cogens* norm: if that were to occur the VCLT makes it clear that such a theory would be void.¹²⁴ The Vienna Convention says nothing more than that a theory or treaty in conflict with a *jus cogens* norm is void and an ambivalence can be observed elsewhere regarding further effects of *jus cogens* beyond invalidating incompatible norm.¹²⁵

However, there is almost intrinsic relationship between peremptory norms and human rights. Most of the case law in which the concept of *jus cogens* has been invoked is taken up with human rights.¹²⁶ Even before the adoption of the VCLT, human rights were perceived as inherent to *jus cogens* as opposed to *jus dispositivum*. Among the examples provided by the International Law Commission of norms which could be characterized as peremptory in character, those concerned with human rights stood out.¹²⁷

122. See Lorna McGregor, *State immunity and Jus Cogens*, 55 INT'L & COMP. L.Q. 437, 439 (2006).

123. *But see* Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 96, ¶¶ 251-53 (Feb. 3) (noting that *jus cogens* cannot be used as a justification to override other international obligations like state immunity).

124. See Vienna Convention on the Law of Treaties, *supra* note 22, at 344, 347 (stating that treaties which violate peremptory norms are void).

125. See LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS, 293-315 (1988) (pointing out that the sole invalidating power of *jus cogens* lies in the area of the law of treaties, while the mode of response to possible violation of peremptory norms seems exclusively to be collective action taken by the International Community as whole through UN bodies).

126. See Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT'L L. 491, 491 (2008) (arguing there is an "almost intrinsic relationship" between *jus cogens* and human rights).

127. *Id.* See generally *Documents of the Second Part of the Seventeenth Session*

What is even more interesting is that recently the Court of First Instance of the European Communities indirectly reviewed the legality of S.C anti-terror resolutions against the background of human rights peremptory norms.¹²⁸

So what would a peremptory nature of human rights look like? It would involve considering the following: (1) *opinio juris*, the recognition that these crimes are assumed part of general customary law; (2) language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes' higher status in international law; (3) the large number of states which have ratified treaties related to these crimes; and (4) the ad hoc international investigations and prosecutions of perpetrators of these crimes.¹²⁹ Another approach to determining the *cogens* status of general international law is the one that the International Law Commission held "it is not the form of a general rule of international law but the particular nature of the subject matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*."¹³⁰

The above approaches grant prohibition of torture and arbitrary killing in anti-terrorism operation a *jus cogens* status when we take into consideration factors that determine the nature of this subject matter that derive from the importance and attention that the international community dedicates to it. As the International Criminal Court's (ICC) Office of the Prosecutor found in its report,¹³¹ at least most of the institutional culpability in anti-Boko

and of the Eighteenth Session Including the Reports of the Commission to the General Assembly, [1966] 2 Y.B. Int'l L. Comm'n 248 U.N. Doc A/CN.4/SER.A/1966/Add. 1 (providing examples of human rights abuses as those which violate *jus cogens*).

128. See Case T-306/01, Yusuf v. Council of Eur. Union, 2005 E.C.R. II-3533 (concerning freezing funds and prohibiting trade that might aid the Taliban in Afghanistan); see also Case T-315/01, Kadi v. Council of Eur. Union, 2005 E.C.R. II-3649 (concerning restrictions placed on persons and entities associated with Osama bin-Laden).

129. Artan Sadaki, Identifying the Prohibition of Torture as Jus Cogens of International Law (Oct. 20, 2008) (unpublished essay) (examples.essaytoday.biz/essays/Prohibition-of-Torture-As-Jus-Cogens-1151090.html) (highlighting ways through which *jus cogens* status of prohibition of torture can be determined).

130. *Id.*

131. See REPORT ON PRELIMINARY EXAMINATION ACTIVITIES, *supra* note 12, ¶¶

Haram operation met the standard for crimes against humanity, the prohibitions of which may be a *jus cogens* norm.

Take for example, the slaughtering of 640 men and boys in Giwa killing,¹³² and tortures in Baga clashes¹³³ by the armed forces in Nigeria are considered as violation of *jus cogens* norm which shocked the conscience of mankind. Even, if Nigeria fails to domesticate Additional Protocol II¹³⁴ and other IHLs, she is still bound by *jus cogen* norms of prohibition of torture and arbitrary killing which gave rise to the obligation *er ga omnes*¹³⁵ to take action against those who torture or carry out acts of arbitrary killing.

VII. CONCLUSION

So much for 'Systemic Integration' as a coordinating criterion for norms of IHL and IHRL; however, the recognition of the criterion as applicable to the prohibition of torture and arbitrary killing did not have much impact on the Nigeria's Boko Haram conflict. Even though the Rome statute¹³⁶ envisions that the security agents responsible for humanitarian crime and crime against humanity should be tried in domestic courts when possible or, where the state is unwilling, by or in collaboration with the ICC,¹³⁷ remedial justice for the people, whose rights have been brutally violated, as a

211-15 (noting multiple cases of human rights abuses on the part of the Nigerian counterinsurgency forces, including arbitrary arrests, torture, killing of civilians, and the recruitment of child soldiers).

132. See Borno & Yobe States Peoples Forum, *supra* note 5 (noting that Nigeria's counterinsurgency task force was accused of killing 600 unarmed civilians during its attack on the Giwa Military Barracks in Maiduguri).

133. See *id.* (highlighting the burning of villages and attacks and torture of civilians attributed to Nigeria's security forces in their campaign against Boko Haram).

134. See James-Eluyode, *supra* note 63, at 270 (noting that Nigerian law does not give domestic effect to Additional Protocol II).

135. See Ardit Memeti, *The Concept of Erga Omnes Obligations in International Law*, NEW BALKAN POL. (2013), <http://www.newbalkanpolitics.org.mk/item/the-concept-of-erga-omnes-obligations-in-international-law#>.

WILXiOZOqA (explaining that the concept of erga omnes obligations refers to specifically determined obligations that states have towards international community as a whole).

136. Rome Statute of the International Criminal Court 106, July 17, 1998, 2187 U.N.T.S. 90.

137. *Id.*

consequence of the institutional culpability of Nigeria's armed forces in the anti-Boko Haram operation, is scarcely done.¹³⁸ In some rare instances, however, the Nigerian government has taken some promising steps to bring perpetrators of abuse to justice.¹³⁹ Yet, up till now, there had been no conviction.

This could be as a result of the Nigerian courts' own reticence to adopt a more activist stance; thereby denying justice to the victims and further solidifying the culture of impunity for 'collateral damages,' which could be a human life. This reticence might have arisen from a concern to reassure the government of the courts' fidelity to clearly established legal norms, and a healthy skepticism to apply norms *de lege ferenda* too readily. Perhaps too, many judges might simply have been out-of-touch with the growing concurrent application of the norms of human rights and humanitarian law in situations of internal armed conflict.

Now, how can the principle of systemic integration coordinate the two bodies of international law unto remedial justice? This task places responsibilities on different actors: first, the sovereign state of Nigeria as one of the principal creators of international legal rules ought to be aware of the need for integration of IHL and IHRL in particular. Secondly, international organizations and courts, when they interpret and apply these two bodies of law, need to bear in mind that they are acting within an overarching framework of international law.

Finally, Nigerian courts, which play as ever more relevant role in the application of international law, must also be aware of the impact that their activities can have on the development of international legal system; and thus systematize it unto a remedial justice.

138. See *World Report 2016: Nigeria*, HUM. RTS. WATCH (2016), <https://www.hrw.org/world-report/2016/country-chapters/nigeria> (noting that despite allegation of widespread security force abuses, the Nigerian authorities have rarely held anyone accountable, and that government of officials often issue blanket denials of alleged human rights violations).

139. See *Nigeria: Prosecute Killings by Security Forces*, HUM. RTS. WATCH (November 26, 2009), <https://www.hrw.org/world-report/2016/country-chapters/nigeria> (noting that in 2009 the Nigerian Minister of Justice, Micheal Aondoakaa told the UN High Commissioner for Human Rights that Nigeria's Government "does not condone extra judicial killing or torture and condemns in its entirety. . .").

Achieving this feat is not easy, but Nigeria can leverage its judicial strength and capability to bring about the desired justice.