

**PROTECTION OF THE RIGHTS OF CHILDREN VICTIMS OF ARMED
CONFLICTS IN NORTH -EASTERN NIGERIA UNDER INTERNATIONAL
HUMANITARIAN LAW***

Abstract

The Boko Haram insurgency started in 2002 as an Islamic Organization in response to local grievances in Borno State. Today, it has metamorphosed into a resilient force identified internationally for its brutality and declared an armed conflict of non-international character. Their activities are visible across Adamawa, Borno and Yobe States (North-Eastern Nigeria). The 1949 Four Geneva Conventions and the 1977 two Additional Protocols (AP I and II) regulate international and non-international armed conflicts. Nigeria ratified both in 1961 and 1988 respectively but is yet to domesticate the latter. The country has several national laws and is equally a signatory to human rights instruments protecting children in situations of armed conflict. Of significance is the Convention on the Rights of the Child domesticated as the Child Rights Act (CRA) in 2003. The above-mentioned States which are hot zones for vicious attacks are yet to adopt the CRA. This paper assesses Nigeria's commitments to international and regional frameworks protecting children during armed conflict. It analyses children's rights in the CRA and the need to urgently activate the enforcement mechanism in the North East. The writer recommends both preventive and protective measures. For the former, the root causes of conflict such as poverty, inequality and collapsed social structure must be tackled. The latter are ensuring family unification of unaccompanied or separated children; providing psycho-social programs to displaced children and abused as well as support the release and reintegration of children affected by the conflict.

Keywords: *Children, Armed Conflict, North-Eastern Nigeria, Humanitarian Law, Human Rights*

1 Introduction

The Boko Haram insurgency has become a global ruthless force in the African sub region.¹ They operate specifically in the North Eastern Nigeria States of Adamawa, Borno, Yobe and neighbouring countries of Cameroun, Chad and Niger.² They used children as child soldiers; suicide bombers; killed thousands and displaced millions of people within and beyond the borders of Nigeria; committed extreme acts of sexual violence against girls as many were

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¹ Y Oke, 'Insecurity Challenges in Nigeria-Boko Haram Insurgency, Bakassi Resettlement Crisis and the Niger Delta Militancy: A Thesis for Lasting Peace', *International and Comparative Journal of Peace and Environment*; 2014, vol 1, pp.77-81.

² I O Albert, 'Rethinking the Functionality of the Multinational Joint Task Force in Managing the Boko Haram Crisis in the Lake Chad Basin', *Africa Development*, 2017, vol 42(3), pp.119-135 <<http://www.jstor.org/stable/10.2307/90018137>> accessed 20 September 2019.

raped, impregnated and used for forced marriages.³ Due to the intensity of the force and the organizational structure, it has taken the status of an armed conflict of non-international character.

Judging from the above grim situation of children, it is undeniable that they need urgent and immediate protection. International humanitarian law and human rights contain protective measures. For the former, the 1949 Four Geneva Conventions and the 1977 two Additional Protocols (AP I and II) regulate international and non-international armed conflicts. Nigeria ratified both in 1961 and 1988 respectively but is yet to domesticate the Protocols. For the latter, there are national laws and several human rights instruments protecting children in situations of armed conflict. Of significance is the Convention on the Rights of the Child domesticated as the Child Rights Act (CRA) in 2003. The above-mentioned States which are hot zones for vicious attacks of the Boko Haram are yet to adopt the CRA.

This paper assesses Nigeria's commitments to international and regional frameworks protecting children during armed conflict. It analyses other child protective laws, the children's rights in the CRA and the need to urgently activate the enforcement mechanism in the North East. The writer recommends other socio-medical supports to alleviate the suffering of such children. Part I is the introduction, Part II defines key terms and details the damaging effect of the conflict on the children. Part III analyses Child Protection in International Humanitarian Law and accesses Nigeria's Commitment. Part IV considers human rights provisions protecting children in Nigeria and internationally. Part V is the Conclusion.

2 Definition of Terms

A child is "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."⁴ In Nigeria, "a child is a person under the age of eighteen years."⁵ The term 'armed conflict' exists when there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.⁶ Nigeria consists of thirty six States, as at 2019, the estimated population is over 200 million.⁷ At the start of the conflict in 2009, non-State armed groups (NSAGs) targeted all six States in the North-east region. These are Adamawa, Bauchi, Borno, Gombe, Taraba and Yobe. The children in this axis become victims of unimaginable sufferings, this is discussed below.

2.1. Children and Effect of Armed Conflict

After almost ten years of the conflict, it is dubbed the most severe protection crises in the world, with civilians including children bearing the brunt of ongoing hostilities, malnutrition, food insecurity, displacements, and dire conditions including over-congestion and severe shortages

³2019 Report of the Secretary-General on Children and armed Conflict In February 2018, Boko Haram abducted 111 children (110 girls) from a girls' school in Dapchi, Yobe State. Five of the girls died during the abduction, 104 girls were eventually released, and one girl remains in captivity. More than 100 of the Chibok girls abducted in 2014 remain in captivity or missing General Assembly Security Council A/73?907-S/2019/509 June 2019 <https://reliefweb.int/sites/reliefweb.int/files/resources/N1918621.pdf> accessed 10 September 2019.

⁴ Convention on the Rights of the Child Article 1, GA Res. 44/25 of 20 November, 1989. <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> accessed 15 September 2019.

⁵ Section 277 Child Rights Act (CRA) 2003.

⁶ *The Prosecutor v Dusko Tadic*, Case No IT-94-1-AR72, Appeals Chamber, 2 Oct 1, para 70.

⁷ Nigeria Population 2019, <http://worldpopulationreview.com/countries/nigeria-population/> accessed 10 July 2019

of shelters.⁸The 2018 UNDP Report on Nigeria stated worryingly, that due to the Boko Haram insurgency and the prolonged conflict in the North Eastern Nigeria, there is multi-dimensional humanitarian crisis. Many children have lost their lives whilst some were raped and subjected to gender based violence. There is food scarcity due to low production and massive displacement. There are incidences of chronic malnutrition amongst children and exposure to various diseases such as cholera and measles and lack of access to education.⁹

According to the UNICEF Humanitarian Action for Children (2019-2021) Nigeria, as at 2018, 1.8 million people have been subjected to conflict-related displacement in the North East. Violence has weakened the coping capacities of communities and left more than 2 million girls and boys in need of psychosocial support. Access to adequate water, sanitation and hygiene remains a challenge. Across the areas, particularly Borno States, at least 867 primary, junior and secondary schools remain closed.¹⁰Worryingly, the nature of the armed conflict is intensifying and probably getting worse. The situation described above remain the same. In most cases, communities totally depend on humanitarian aid to survive. However, those in the innermost villages cannot access humanitarian assistance. It was noted that there has been an increase in sexual violence perpetrated by all parties to the conflict.¹¹ The next section will consider laws that protect children in such situation in Nigeria.

3 Child Protection in International Humanitarian Law (IHL)

IHL is a body of laws and rules applicable when armed violence reaches the level of armed conflict, and is confined only to armed conflicts, whether international or non-international.¹² In describing armed conflict in international humanitarian law, Detter maintains, it is broader than war as it includes all kinds of hostilities between two or more States or among States and other contenders, such as belligerent, insurgents and rebel.¹³ Kuper asserts that there should be a special body of rules regarding the protection of children in armed conflict due to their physical vulnerability as well as the relative economic, political and military powerlessness in situations of armed conflict.¹⁴

⁸ North East Nigeria: Borno, Adamawa, Yobe States Humanitarian Dashboard (august 2019) <<https://reliefweb.int/report/nigeria/north-east-nigeria-borno-adamawa-and-yobe-states-humanitarian-dashboard-august-2019?> accessed 1 July 2019.

⁹ UNDP, 'National Human Development Report 2018'. The Report covered Adamawa, Bauchi, Borno, Gombe, Taraba and Yobe. <http://hdr.undp.org/sites/default/files/hdr_2018_nigeria_finalfinalx3.pdf> accessed 8 November 2019.

¹⁰ UNICEF, 'Humanitarian Action for Children 2019 Overview' <https://www.unicef.org/media/48796/file/Humanitarian-action-overview-cover-eng.pdf> accessed 8 November 2019.

¹¹ North Eastern Nigeria: The Conflict is intensifying and the Needs are Massive. <https://www.msf.org/conflict-intensifying-northeast-nigeria-and-needs-are-massive> accessed 18 April, 2021.

¹² *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, documents prepared by the International Committee of the Red Cross for the 30th International Conference of the Red Cross and Red

Crescent, Geneva, Switzerland, 26-30 November, International Review of the Red Cross, Volume 89, Number

867, (September 2007), p. 722

¹³ I Detter, *The Law of War* (2nd edn, Cambridge: University Press 2000) p12.

¹⁴ J Kuper, 'Children and Armed Conflict: Some Issues of Law and Policy' in: Deirdre Fottrell (ed.), *Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child* (London: Kluwer Law International, 2000), pp.101-113.

The IV Geneva Convention 1949 apply to all cases of declared war or any other armed conflict which may arise between the High Contracting Parties. One Power in the conflict may not be a party to the Convention but the Powers who are parties shall remain bound by it in their mutual relations.¹⁵ It relates to the protection of victims of war; the wounded and sick; wounded, sick and shipwrecked; prisoners of war; and categories of civilians who have as a result of some situation or other been rendered outside the conflict. Specifically, it is the Geneva Convention IV that relates to the protection of civilian persons, including children, in time of war.¹⁶ Prior to the 1949 Conventions, international humanitarian law made no specific mention of children as a particularly vulnerable group requiring special protection. It remedies this omission and contains various provisions relating to the protection of children.¹⁷

Common Article 3 of the Geneva IV states:

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. It prohibits:

- 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

¹⁵ Article 2.

¹⁶ Geneva Conventions of 1949 <<https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf>> accessed June 2019; 'Article 38, The Rights of Children in Armed Conflict' <<http://law2.wlu.edu/faculty/facultydocuments/drumbm/rightsofchild.pdf>> accessed 26 December, 2019.

¹⁷ Article 24 states that, the Parties ... shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition. The Parties ... shall facilitate the reception of such children in a neutral country for the duration of the war with the consent of the Protecting Power... They shall furthermore, endeavour to arrange for all children under the twelve to be identified by the wearing of identity discs, or by some other means. Article 24, is rather an expression of parental or family rights and States' concern in retaining their children. As indicated in commentaries, it arises from the fear and experience of children being lost, never to return, to their immediate or wider family and nation as a result of separation or ill-organized evacuation. Thus, there is an emphasis on the continuance of the child's religion and cultural education to facilitate easy return, rather than an emphasis on ensuring that the individual child's best interests are the first consideration. Carolyn Hamilton and Tabatha Abu El-Haj, 'Armed Conflict: The Protection of Children under International Law' (1997) 5 (1) *International Journal of Children's Rights* 1-46.

judicial guarantees which are recognized as indispensable by civilized peoples.¹⁸

Does the Geneva IV provision offer effective protection to children? It purports to render protection to victims who are vulnerable. Unfortunately, the notion of vulnerability is narrowly defined to include only the sick, wounded and shipwrecked. The concept of vulnerability is not conceived to include all civilians. Furthermore, the main function of the Convention is to protect a strictly defined category of civilians from arbitrary action by the enemy, protection from the conduct of hostilities is outside its scope, hence children are not so much protected from military operations. It fails to protect every child in his or her status as a child, and very little attention is paid to children's special needs.¹⁹ Notwithstanding, it allows for the mechanism of enforcement to regulate international and non-international conflicts.

In 1977, two Additional Protocols came into being. The objective was to strengthen humanitarian law and alleviate the extensive suffering of civilians in contemporary armed conflict, particularly those fought in the name of self-determination. Protocol I is to protect victims of international armed conflict. Protocol II is to protect victims in the situation of non-international armed conflict. For it to apply, (i) there is an armed conflict not covered by Protocol I; ii the armed conflict takes place in the territory of the high contracting party; iii the conflict involves the armed forces of a high contracting party and dissident armed forces or other armed groups; iv the dissident armed forces are under responsible command; and such armed groups have control over a part of the territory of the high contracting party so as to enable them to carry out sustained and concerted military operations and to implement Protocol II.

In Protocol II, for the first time in humanitarian law:

Article 4(3) provides:

Children shall be provided with the care and aid they require, and in particular:

- a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;
- b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;
- c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;
- d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured;
- e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care,

¹⁸ It should be noted as well that *Common Article 3* encourages parties to a non-international conflict to make special agreements bringing into force as much of the Conventions as possible. *Article 146* states that: ". . . Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article." In as much as *Common Article 3* is a provision in the Convention, breaches of it can and should be prosecuted. High Contracting Parties embroiled in a non-international conflict clearly have a responsibility to suppress breaches of *Common Article 3* in their national courts. *Ibid.*

¹⁹ *ibid.*

to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

Arguably Protocol II offers some protection to children, however, the qualifying trigger seem to make the protection a mirage.

There is a threshold of confrontation to qualify as an armed conflict within the class of non-international armed conflict whether in Common Article 3 or Protocol II.²⁰ The Appeal Chambers of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v Tadic*,²¹ held that first is the level of force and intensity, The hostilities should be of collective character or when the government is obliged to use military force against insurgents as opposed to mere police forces and actions.²² Furthermore, that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. In determining the level of intensity, recourse must be had of the types of equipment and weapons used in the situation. According to Rogers , once heavy armour tanks, artillery and ground attack aircraft (attack helicopters) had been deployed in action, even if by only on one side, then that hostility amounts to armed conflict that satisfies the first leg of the requirement for non-international armed conflicts to which common article 3 and Additional Protocol II apply.²³

Secondly, the non-governmental group in the conflict must, to be considered as 'parties to the conflict', possess a certain level of organization of the forces. That is to say, they must possess organized armed forces. The question of the organization of the forces in conflict is indeed a relevant consideration because this helps to distinguish between criminal and terrorists activities on one hand and armed conflict on the other hand.²⁴ Thus, it is only when the level of violence and the parties involved meet the requirements for a non-international armed conflict do the present rules of international humanitarian law apply.²⁵

3.1. Nigeria and International Humanitarian Law

In Nigeria, two issues are paramount: first, the level of implementation of the Geneva Conventions and the Additional Protocols. Secondly, to determine whether the ongoing armed conflict is that of international or non-international character. For the first, a good starting point is to assess Nigeria obligations upon ratification of the IV Geneva Conventions. In the

²⁰ *How is the Term 'Armed Conflict' defined in International Humanitarian Law?* International Committee of the

Red Cross (ICRC) Opinion Paper, March 2008 <http://www.icrc.org/web/eng/siteeegO.nsf/html/armed-conflictarticle-170308> accessed 15 June 2019.

²¹ Case No. IT-94-1-1, Decisions on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October, 1995, 35 ILM 1996, 35, para 70. O C Nwachukwu, 'Armed Conflict under International Humanitarian law' (2014) 5 *Nnamdi Azikwe University Journal of International Law and Jurisprudence* 62-74.

²² Okubor *ibid*

²³ D D Jividen, 'JUS in Bello in The Twenty First Century: Reaping the Benefits and Facing the Challenges of Modern Weaponry and Military Strategy' in A.P.V. Rogers', *Unequal Combat and The Law of War, Yearbook of International Humanitarian Law* 2004.

²⁴ *Ibid* 9

²⁵ *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, (n11) 516, 743.

country's legal regimes, treaties²⁶ are mainly implemented by express legislative assent. For instance, section 12 of the 1999 Constitution states that “no treaty between the Federation and any other country shall have the force of law except to the extent to which such treaty has enacted into law by the National Assembly.”²⁷ Thus, “enabling statute enacted pursuant to implementation of a treaty rather than the treaty *per se* which is considered by the courts as source of law.”²⁸

This position was reaffirmed by the Nigerian Supreme Court in *Abacha v Fawehinmi*²⁹ when the court held as follows:

An international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly, it has no force of law as to make its provision justiciable in our courts. This was the tenor of section 12 (1) of the 1999 Constitution, now re-enacted into section 12 (1) of the 1999 Constitution.

The germane issue here is that Nigeria need to ensure the observance of the Convention as well as the Additional Protocols. The pathway, judging from the provision of the Constitution and the Nigerian Supreme Court is through domestication. To fulfil its obligations, it ratified the Geneva Conventions in 1961 and domesticated it through the promulgation of Geneva Convention Act 1960.³⁰ The country also ratified the Additional Protocols in 1988, however, it is yet to domesticate it. In 2007, the Geneva Convention and Additional Protocol Bill was introduced to the National Assembly to repeal the Geneva Convention Act. This would have facilitated the domestication of the Additional Protocol, sadly 12 years after, it remains a Bill. Impliedly, the Additional Protocols have not been incorporated into the Municipal Law and does not have the force of law.³¹

This translates to the fact that if there is armed conflict of international or non-international character in Nigeria, the Geneva Convention will apply to protect children. However, Article 4 (3) of the Protocol II that contains elaborate provisions cannot apply to protect children since it has not been domesticated. Urgently, the Bill should be passed into law.

As noted by the writer at the beginning of this section, there is an ongoing Boko Haram insurgency in Nigeria. It is imperative to consider if it is a conflict of international or non-international character. The *Tadic's* case had established two thresholds for non-international armed conflict in a contracting State: intensity of violence and level of organisation. These factors include, seriousness of attacks and whether there has been an increase in armed clashes, spread of clashes over territory and over a period of time, any increase in the number of governmental force, mobilization and the distribution of weapons among both parties to the conflict, number of civilians forced to flee from the conflict zone, types of weapons used (in

²⁶ The Vienna Convention on the Law of Treaties 1969 defines a treaty in its Article 2 as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

²⁷ Cap. C23 (LFN), 2004.

²⁸ A Oyeboode, *International Law and Politics: An African perspective* (Lagos: Bolabay Publications 2003).

²⁹ (2000) 6 NWLR (pt. 660) 228 SC.

³⁰ <[https://ihl-](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=NG)

[databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=NG](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=NG) >accessed 6 November, 2019.

³¹ J J-Eluyode, ‘Enforcement of International Humanitarian Law in Nigeria’ (2003) 3 *African Human Rights Law Journal* 264-274.

particular use of heavy weapons and other military equipment such as tanks and heavy vehicles, extent of destruction, involvement of the United Nations Security Council.

As indicated above the first is the level of force and intensity. The first armed confrontations between Boko Haram and the Nigerian Government took place in July 2009 and resulted in five days of intense fighting. Between 2011 and 2014, the attacks conducted by the armed group increased in terms of number, intensity and duration. Specifically, Boko Haram has staged suicide bombings against governmental armed forces, civilians and United Nations headquarters. The group extended its military control over significant parts of North-eastern Nigeria. As a reaction, in June 2011 the Government of Nigeria established a Joint Task Force (JTF) to ‘restore law and order’ in the regions affected by Boko Haram.³² Due to the worsening of the conflict and the increasing strength of Boko Haram, and following spill over attacks conducted by the armed group in neighbouring countries, a Multinational Joint Task Force (MNJTF) was created in January 2015, which includes military units from Nigeria, Niger, Chad, Cameroon and Benin. Intervention succeeded in weakening the group and regaining substantial parts of the territory under its control. Specifically, by the end of 2015 Boko Haram remained present in limited areas, such as the Sambisa Forest, the Mandara Mountains and a number of islands in the Lake Chad. Since then, the attacks conducted by the armed group have changed in nature, relying predominantly on guerrilla warfare strategies and suicide bombings. The *Tadic* judgment asserted that “the test to apply is whether the acts are ... in isolation or as part of a protracted campaign that entails the engagement of both parties in hostilities. The requirement of protracted fighting is significant in excluding mere cases of civil unrest or single acts of terrorism.”³³

The Nigerian Government has purchased a significant amount of military equipment in order to fight Boko Haram. Specifically, in July 2017 it purchased \$593 million worth of military equipment from the United States, such as Super Tucano A-29 surveillance and attack planes. On the other hand, Boko Haram’s military equipment and weaponry includes AK47s, improvised explosive devices, petrol bombs and Hilux vehicles.³⁴ Since 2009, Boko Haram has killed more than 30,000 people. Currently, 1.7 million people are internally displaced and nearly 200,000 refugees are in neighbouring States such as Cameroon, Chad and Niger; almost 7 million people are in need of humanitarian assistance in the northern Nigerian States of Adamawa, Borno and Yobe.³⁵

The minimal level of organization required to constitute a common article 3 non-international armed conflict have also been outlined by the ICTY. These indicative factors are categorized into five group such as factors indicating: (1) the presence of a command structure;(2) carrying out operations in an organized manner such as like the ability to determine unified military strategy and conduct large-scale military operations etc. (3) the level of logistics such as the

³² A Multi National Joint Task Force was formed in the Lake Chad Basin in 2012 to deal with Boko Haram. In 2015, the African Union reconstituted it at a Summit level meeting. Albert (n 2) .

³³ International Humanitarian Rules to the War Between Nigeria and the Boko Haram Sect <<https://www.educationalresourceproviders.com/applying-international-humanitarian-law-rules-to-the-war-between-nigeria-and-the-boko-haram-sect/Applying>> accessed 8 November, 2019

³⁴ Boko Haram Storm Military Base in North Eastern Nigeria, eearly this year.. Boko Hram outran an army outpost in North East Nigeria-they came in a pick up truck with heavy machine guns, three armoured personnel carrier etc.<<https://www.aljazeera.com/news/2019/04/boko-haram-storm-military-base-northeastern-nigeria-190427162501857.html>> accessed 8 November, 2019.

³⁵ Non international armed conflict in Nigeria, <<http://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-nigeria#collapse4accord>> accessed 7 Nov 2019.

ability to recruit new members and provide military training, (4) level of discipline and ability to implement. Common Article 3 obligations like establishment of disciplinary rules and mechanisms etc (5) ability to speak with one voice like the capacity to act on behalf of members in political negotiations with representatives of international organizations etc.

Boko Haram is a non-State armed group, operates in Nigeria in particular and in the Lake Chad Basin region in general, notably in Cameroon, Chad and Niger. In 2015, it pledged allegiance to the Islamic State group. It has strong links with other Islamist groups, such as al-Qaeda in the Islamic Maghreb (AQIM), Islamist groups fighting in Mali and al-Shabab. The leader of Boko Haram, the Amir, is the head of the Shura, namely the council of elders. The council has seven members, and each one of them leads a ministry across the administration of the group. After the death of its founding leader, Mohammed Yusuf, in July 2009, Abubakar Shekau became the leader. In 2016, when the Islamic State group claimed Abu Musab al-Barnawi was the leader.³⁶ According to Amnesty International, Boko Haram Army has grown to about 15,000 members.³⁷

Over the years, Boko Haram established control of a significant amount of territory in north-eastern Nigeria. This area was declared to be a caliphate, and was used to launch military operations against targets in Nigeria as well as in neighbouring countries.³⁸ This writer submits when the threshold established in *Tadic's* case is juxtaposed with the activities of the Boko Haram insurgency as indicated above, it is a non-international armed conflict. The rules of humanitarian law applies.³⁹ The above fact is corroborated by several humanitarian partners carrying out protective strategy in the North East concluding that the areas is likely to remain in the situation of non-international armed conflict for some time.⁴⁰

The writer submits further that it has been discussed that Protocol II needs a higher level of threshold to apply that is, 'the dissident armed forces or other armed forces are under responsible command, have control over a part of the territory of the high contracting party so as to enable them to carry out sustained and concerted military operation'. Presently, this is no longer the situation as the Boko Haram group have been dislocated by the Joint Task Force. Hence, if the situation in the North East is not at the level to trigger Protocol II, definitely Common Article 3 for non-international armed conflict will apply. According to the International Court of Justice (ICJ) in *Nicaragua v United States*, Common Article 3 is fundamental to preserving a measure of humanity in war that they are now referred to as 'elementary considerations of humanity' and elevated to the status of customary international law. In the words of Hans- Peter- Gasser:

³⁶ Non International Armed Conflict in Nigeria, <<http://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-nigeria#collapse4accord>> accessed 7 November, 2019

³⁷ How does Boko Haram Recruit its Soldiers <<https://www.seeker.com/how-does-boko-haram-recruit-its-soldiers-1954346409.html>> accessed 7 November, 2019

³⁸ Non International Armed Conflict in Nigeria, <<http://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-nigeria#collapse4accord>> accessed 7 November 2019.

³⁹ T M Abubakar, 'The Place of Boko-Haram Insurgency Under International Humanitarian Law' (2016). Available at SSRN <<https://ssrn.com/abstract=3013564> or <http://dx.doi.org/10.2139/ssrn.3013564> > accessed 25 December 2019.

⁴⁰ Protection Strategy for the Humanitarian Crisis in the North-East Nigeria November, 2016. https://www.globalprotectioncluster.org/_assets/files/field_support/protection_strategies/protection-strategy-for-the-humanitarian-crisis-in-the-north-east.en.pdf. accessed 25 December 2019.

Article 3 is binding, not only because it is part of international Treaty Law, but also an expression (unwritten) general principles of law. It is absolutely binding international law, *jus cogens*, even though it is observed to be so limited compared to the numerous texts regarding the so called international armed conflicts. Consequently, Nigerian children in the North East are entitled to protection of their lives, from sexual violence and inhumane treatment. Clearly, the Governors in those States are bound to protect the children even if the Boko Haram group refuses to enforce any humanitarian law. It may be very difficult to prosecute the Boko Haram group for now, but the Governors must continue to work with international protector working groups to address the humanitarian crises.

4.0. Child Protection and Human Rights

In 1924, the League of Nations unanimously adopted the Declaration of the Rights of the Child, being the first global charter focusing on children's rights. It affirms that "mankind owes to the child the best it has to give".⁴¹ Following the atrocities of World War II, securing sufficient protection of children's rights became the focus of international attention.⁴² In 1948, the UN General Assembly proclaimed the universality and inalienable rights of every human being, including children by adopting the Universal Declaration on Human Rights.⁴³ Though at its inception it was just a Declaration with moral authority, presently some of its provisions are customary international laws.⁴⁴ A second, more detailed Declaration on the Rights of the Child was adopted in 1959 but with no binding resolution.⁴⁵ In 1979, the International Year of the Child was marked with a lot of fanfare to commemorate the twentieth anniversary of the 1959 Declaration of Rights. It served as a major platform to sensitize the world community on the state of the children around the world. In 1989, the United Nations (UN) adopted the Convention on the Rights of the Child (CRC).⁴⁶ For the first time, it sets out in legally binding terms comprehensive rights of the child.⁴⁷ It accords children with specific rights that is part of the corpus of international human rights law.

The human rights of children can be conceptualized as involving a double claim that includes both children's 'equal rights' and their 'special' rights. Children's rights indeed reaffirm children as full members of the human family and assert that children have an equal right to the protection of their fundamental human rights without discrimination based on age. They also acknowledge children's developing capacity as well as their vulnerability and encompass additional, special rights for children.⁴⁸ Article 38 obligates State Parties to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts

⁴¹ League of Nations OJ Spec. Supp. 21 at 43 (1924), adopted 26 September 1924. Eglantyne Jebb (1876-1928), the founder of the British Save the Children Fund and the Save the Children International Union in Geneva was an early campaigner for children. She spearheaded the draft the League of Nations adopted. Trevor Buck, *International Child Law*, (Cavendish Publishing Limited 2005).

⁴² A B Abbott 'Child Soldiers: The Use of Children as Instruments of War' 2000 (23) *Suffolk Transnational Law Review* 499-517.

⁴³ G.A. Res. 217A (III), UN Doc. A/810, at 71 (1948), adopted 10 Dec.1948. The preamble states that "recognition of the inherent dignity, equal and inalienable rights of the human family is the foundation of freedom, justice in the world..."

⁴⁴ Article 3 guaranteeing right to life, liberty and security of persons; Article 4 prohibiting slavery, Article 5 prohibiting torture, cruel, inhuman and degrading treatment. H Hannum 'The Status of Universal Declaration of Human Rights in National and International Law' 25' *GA. J. Int & Comp. La*, (1995-96), pp 287-397.

⁴⁵ GA Res. 1386 (XIV), UN GAOR Supp. (No. 16) at 19, UN Doc. A/4354 (1959).

⁴⁶ G.A.Res.44/25, 44 UN GAOR, Supp. (No 49), UN Doc. A/44/49, at 166 (1989).

⁴⁷ C P Cohen, 'The Developing Jurisprudence of the Rights of the Child' 6 *St. Thomas L. Rev.* p.5.

⁴⁸ K Hanson, 'International Children's Rights and Armed Conflict' (2011) 5(1) *Hum. Rights International Legal Discourse* 40-62.

which are relevant to the child; ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities or recruited into armed forces; In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest and take all feasible measures to ensure protection and care of children who are affected by an armed conflict.⁴⁹

There are several arguments on the application of Article 38. First, it does not explicitly refer to distinctions between different kinds of conflict but use the single formulation of 'armed conflicts', and hence applicable both to international and national armed conflicts.⁵⁰ Secondly, it does not contain any express provision declaring them binding upon non-State actors, hence in principle only applicable to national armed forces.⁵¹ Thirdly, 'feasible measures' does not confer finality or absolute duties on State Parties, hence very low standard.⁵² The Committee on the Rights of the Child has emphasised that States should take measures to secure the rights of all children within their jurisdiction in times of armed conflict and that the principles of the Convention are not subject to derogation in times of armed conflict. In particular, it has stressed its belief that, in the light of the definition of the child and the principle of the best interests of the child, no child under the age of 18 should be allowed to be involved in hostilities, either directly or indirectly, and that no child under 18 should be recruited into armed forces, either through conscription or voluntary enlistment under article 38 of the Convention.⁵³

Hammarberg explains:

Article 38 specifically addresses the situation of children in armed conflicts however all other articles of the Convention are relevant. In fact, there is no derogation clause in this Convention, it applies in its entirety also in times of war or emergency. The child has a right to a family environment, to go to school, to play, to get health care and adequate nutrition - also during armed conflict. The principles of the

⁴⁹ The General Assembly of the United Nations, still concerned about the impact of armed conflict on children adopted The Optional Protocol on the involvement of children in armed conflict in 2000. It obligates States Parties to take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities; ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces, raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child. Articles 1,2,3. GA Res A/RES/54/263 of 25 May 2000 entry into force 12 Feb 2002. <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx>. Nigeria signed and ratified the in 2000 and 2002 respectively. United Nations Treaty Collections, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&clang=_en> accessed 7 November, 2019.

⁵⁰ F. Ang, 'Article 38: Children in Armed Conflicts' in: A. Alen 'and others' *A Commentary on the United Nations Convention on the Rights of the Child* 4 (London: Martinus Nijhoff, 2005) p87.

⁵¹ M. Maystre, *Les Enfants Soldats En Droit International: Problématiques Contemporaines Au Regard Du Droit International Humanitaire Et Du Droit International Penal* 53 (Paris: Editions Pedone, 2010). See Article 22 ACRWC, The same applies to Articles 1, 2 and 3 Optional Protocol Armed Conflict (OPAC), which explicitly refer to the national armed forces of States. The only provision that explicitly deals with non-state actors is Article 4 OPAC, which prohibits 'armed groups that are distinct from the armed forces of a State' from recruiting or using in hostilities persons under the age of 18 years

⁵² J A Robinson, 'Children in Armed Conflict: An Overview of Relevant Humanitarian Law and Human Rights Law' *Journal of South African Law* 2002, vol 4, 697-712.

⁵³ *Implementation Handbook for the Convention on the Rights of the Child* https://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child_Part_1_of_3.pdf accessed 12 November 2019.

Convention are valid as well: that all children without discrimination should enjoy their rights, that the best interests of the child be a primary consideration in decisions, that the right to life, survival and development be protected.⁵⁴

Regionally, the African Charter on the Rights and Welfare of the Child (ACRWC)⁵⁵ describing a child as any person below the age of eighteen years obligates State Parties to the Charter to respect rules of international humanitarian law applicable in armed conflicts which affect the child;⁵⁶ take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child;⁵⁷ take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.⁵⁸ Arguably, Article 22(3) applies not only to children caught up in international and internal armed conflicts, but also to lower levels of violence to 'tension and strife'. Thus drafters of the African charter were sufficiently far-sighted to recognize that it is in the best interests of the child, which ought to predominate in international law and not the form of the conflict."⁵⁹

4.1. Nigeria and Human Rights

Chapter IV of the 1999 Constitution provides for a plethora of rights for Nigerians, including children. These are referred to as fundamental human rights because they are immutable and inalienable.⁶⁰ There are similar provisions in the African Charter on Human and People's Rights which the National Assembly enacted through an enabling Act.⁶¹ It has been observed that these fundamental human rights did not encapsulate the protection of women since the standard of measurement is male; hence their interpretations create a dichotomy between law and practice.⁶² It is striking that children were not equally protected under these provisions as one is not aware of any situation where such rights have been interpreted to include them. In addition, under Chapter II of the Constitution, there should be effective realization of the social, economic, cultural, educational and environmental rights of the citizens. It encompasses right to health, food, education etc. Generally, it has been difficult to enforce these two rights in the Nigerian courts because of the non-justiciable provisions of the Constitution. However, section

⁵⁴ Keynote speech: 'Children as a Zone of Peace - What Needs to be Done' in G A Aldrich and T A. Baarda (eds.) *Conference on the Rights of Children in Armed Conflict* The Hague, 1994.

⁵⁵ Nigeria signed on the 13 July 1999 and ratified on the 23 July 2001 <https://www.acerwc.africa/ratifications-table/> accessed 25 December 2019.

⁵⁶ Article 22 (1).

⁵⁷ Article 22 (2).

⁵⁸ Article 22 (3).

⁵⁹ J Kuper, *International Law Concerning Children in Armed Conflict* (USA: Clarendon Press, 1977).

⁶⁰ Eso JSC in *Ransome-Kuti v Attorney General of the Federation* (1985) 2 NWLR, 211 SC. Right to life, dignity of the human person, right to personal liberty, right to fair hearing, right to private and family life, right to freedom of thought, conscience and religion, right to freedom of expression and the press, right to peaceful assembly and association, right to freedom of movement, right to freedom from discrimination, right to acquire and own immovable property anywhere in Nigeria and compulsory acquisition of property.

⁶¹ African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap.A9, Laws of the Federation 2004.

⁶² For instance, from experience, police brutality, dehumanizing prison conditions are violation of human dignity whilst rape, sexual harassment, domestic violence and genital mutilation are not. C Agomo, 'The Legal Framework for Gender Equality in Nigeria' in Solomon Akinboye, (ed.) *Paradox of Gender Equality in Nigerian Politics Essays in Honour of Dr. Mrs Veronica Adeleke* (Lagos: Concept Publications Ltd, 2004) 95-97.

13 of the 1999 Constitution, under the Fundamental Objectives Chapter II mandates judicial powers to apply the provisions.

The Nigerian Supreme Court in *AG Ondo State v AG of the Federation* right held that the constitution has placed the entire Chapter II under the Exclusive Legislative List; the National Assembly can activate it through appropriate enactment. The Universal Basic Education Act 2004 and National Health Act 2014 contain provisions protecting children. A worthy innovation to mention is the Fourth Alteration of the 1999 Constitution which elevated the National Industrial Court to a court of superior record. It has jurisdiction on matters connected to child labour, child abuse, human trafficking.⁶³ Furthermore, it can apply international convention relating to labour which Nigeria has ratified.⁶⁴

Both the Penal and Criminal Codes enjoin parents and guardians to provide necessities for children. The Children and Young Person Laws of various states offer protection to abandoned and abused children. The African Charter provide for right to health and education.⁶⁵ Several states have laws prohibiting withdrawal of girls from school for marriage (Borno, Yobe etc). Arguably, some of these laws already protect children in some ways, the problem being that of proper implementation.

Nigeria signed the CRC in January 1990 and ratified same in April 1991.⁶⁶ However, there were objections to its domestication on the premise that it contradicts customary and sharia laws. Hence, it could not be passed via section 12 of the 1999 Constitution as noted above. Eventually, the National Assembly using section 299 of the 1999 Constitution domesticated the CRC in 2003 as the Child Rights Act (CRA) for the Federal Capital Territory. This leaves the other thirty-five States with the option of adopting it as their State Laws.

The CRA, for the first time, provides gamut of rights for Nigerian children in a singular document. It provides that children shall not be recruited into the armed forces of the country; the government or other relevant agency or body shall ensure that no child is directly involved in any military operation or hostilities.⁶⁷ A child has a right to survival and development.⁶⁸ Every child is entitled to dignity of his or her person.⁶⁹ Every child is entitled to enjoy the best attainable state of physical and mental health.⁷⁰ Every child has the right to free basic education.⁷¹ The CRA prohibits child marriage, sexual abuse or other forms of exploitation.⁷² Presently about 24 states have adopted the CRA. Sadly, the North Eastern States of Adamawa, Borno and Yobe with intense attacks from Boko Haram are yet to adopt the CRA.⁷³ In this

⁶³ Section 254C (1) (i)

⁶⁴ *Ibid*, (2)

⁶⁵ Articles 16 and 17.

⁶⁶ 'Status of Ratification of the Convention on the Rights of the Child'. <<http://www2.ohchr.org/english/law/crc-ratify.htm>> accessed 24 November 2019.

⁶⁷ Section 34 CRA.

⁶⁸ Section 4 CRA

⁶⁹ Section 11 CRA

⁷⁰ Section 13 CRA

⁷¹ Section 15 CRA

⁷² Sections 21, 32 and 33 CRA.

⁷³ These are Abia, Anambra, Bayelsa, Ebonyi, Ekiti, FCT Abuja, Imo, Edo, Delta, Jigawa, Kwara, Kogi, Lagos, Nassarawa, Ogun, Ondo, Oyo, Osun, Plateau, Rivers, Benue, Akwa Ibom, Cross Rivers, Taraba. Only five Northern states such as Jigawa, Kwara, Kogi, Nassarawa and Taraba have adopted the CRA. Report from Sharon Oladiji, Project officer, Child Protection and participation Section UNICEF, U.N. House

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writer's view, the adoption of these laws is a step in the right direction. For instance, so many giant strides are recorded in Lagos State due to the use of the Child Rights Law.⁷⁴ The provisions of the CRA are compact and detailed protecting children's rights.

This writer rationalizes that the summation is that both humanitarian law and human rights should apply to protect children in situations of armed conflict like that of the North East. Specifically, Nigeria is not bereft of human rights laws protecting children.

5.0 Conclusion

Clearly, there is a dire need to ensure compliance with international humanitarian law and human rights to protect the children in North East Nigeria. In addition, other interventions such as collaborative efforts by national and international organisations on humanitarian provisions; designing new humanitarian responses that is more accountable to affected population and providing psycho social support to alleviate the suffering of the children are sacrosanct.

International Humanitarian Law offers protection during the period of armed conflict. However, the additional; Protocol II contains provisions directly protecting to children. The Protocol has not however been domesticated in the Nigeria, Nigeria has equally ratified the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child in 1999 and 2003 respectively. This has been domesticated as the Childs Rights Act of 2003. It encompasses several provisions guaranteeing rights to children in situations of armed conflict.

However, as Theodor Meron points out in *Human Rights in Internal Strife: Their International Protection*:

Scholars have assumed that in conflict situation, either 'human rights "or humanitarian rights" or sometimes both will apply, excluding a legal void ...Unfortunately, this is not always the case in reality. In many instances of armed conflict, States utilize a number of techniques to derogate from peacetime human rights without recognizing the applicability not only of humanitarian law as a whole, but even of common Article 3...In short, it must be recognized that there is a legal uncertainty , or perhaps even a lacuna in the law.⁷⁵

The writer also agrees with the assertion of the International Committee of the Red Cross that:

Armed conflict causes unspeakable suffering, whatever is done to prevent it and however well international humanitarian law is respected. It is therefore vital to encourage and intensify all efforts to tackle the *root causes* of conflicts, such as poverty, inequality, illiteracy, racism and the uncontrolled growth of huge cities, the collapse of

Central District, Abuja. States that have yet to adopt the CRA are Adamawa, Borno, Enugu, Gombe, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe, and Zamfara

⁷⁴ Family Court, Restorative Justice in Family Courts, non-custodial sentences, Child Rights Desks at Police Stations, Sex Offenders Registers etc

⁷⁵ 1987, 135-136.

governmental and social structures, corruption, crime organized on a world-wide scale, drug trafficking and arms dealing. To encourage *compliance* with international humanitarian law is not enough.⁷⁵

6. Recommendations

In view of the above, this writer makes the following recommendations:

- (1) The Geneva Convention and Additional Protocol Bill 2007 should be urgently passed by the Nigerian National Assembly. This will enable the children in the North-East to benefit from the special provisions in the Additional Protocol for children.
- (2) There is an immediate need to adopt the Child Rights Act in Adamawa, Yobe and Borno States. It will provide the necessary legislative framework for child protection in these areas.
- (3) There should be the political will to ensure compliance with the above laws by the relevant stakeholders by providing adequate budget and institutions for implementation.
- (4) These affected States should provide support for unaccompanied and separated children; establishing tracing system to reunite separated children and divided families; provide psycho-social programs to displaced children and other children affected by the violence; support the releases and reintegration of children affected by the conflict as well as provide referral pathways for children who have been abused or who are at risk.
- (5) Preventive measures is equally apposite. It is vital to encourage and intensify all efforts to tackle the root causes of conflicts such as poverty, inequality, illiteracy, tribalism, and the uncontrolled growth of huge cities, the collapse of governmental and social structures, corruption, crime organized on a world-wide scale, drug trafficking and arms dealing.

⁷⁵ Report on the Protection of War Victims", pp. 404-405 in *International Review of the Red Cross* no. 296, September/October 1993.