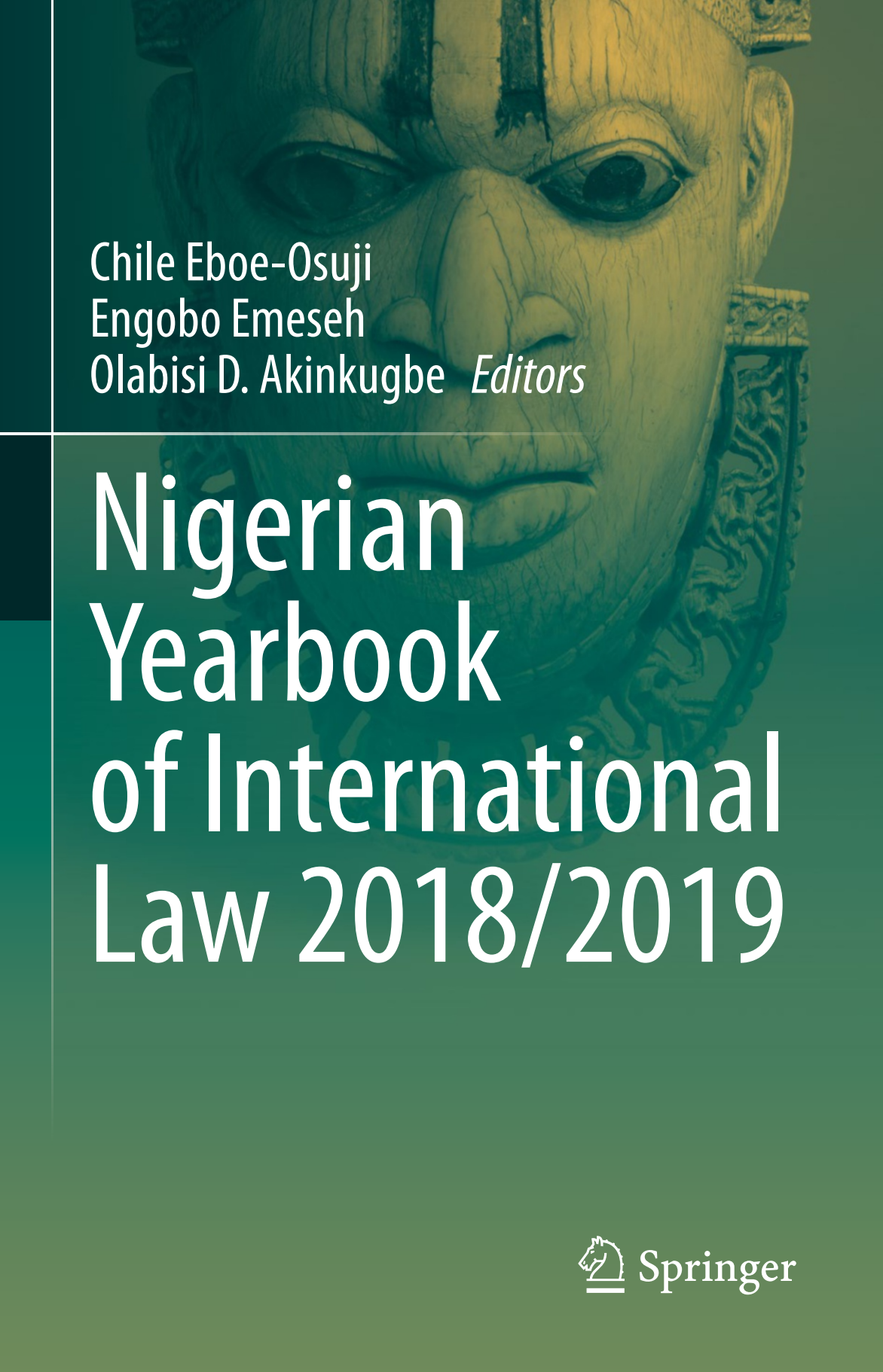

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Determining the Termination of a Non-International Armed Conflict: An Analysis of the Boko Haram Insurgency in Northern Nigeria

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1 Introduction

The capture of Camp Zero,[1] the headquarters of the *Boko Haram* group in Sambisa Forest,[2] North-eastern Nigeria, by the Nigerian Army on 22 December 2016,[3] was hailed as signifying an end to the insurgency that has plagued Nigeria since 2009, and which rose to the level of a non-international armed conflict (NIAC) in 2013.[4] The *Boko Haram* group, or "People Committed to the Propagation of the Prophet's Teachings and Jihad" (*Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad*)[5] grew from a small Islamic sect into one of the deadliest terrorist groups in the world,[6] active in Nigeria and her neighbours Cameroon, Chad and Niger. The insurgency has spawned a grave humanitarian crisis in the Lake Chad region.[7]

The overrunning of the Camp in Sambisa Forest had largely been seen by the government as the last push that delivered the 'killing blow' to the insurgency.[8]

[1]Camp Zero (also spelled "Camp Zairo") is said to have comprised of a "cluster of dreaded camps and cells," chief among them being a former structure built for the training of the now disbanded National Guards, established in 1989 by the then military President, Ibrahim Babangida to combat crime and terrorism. The structure has underground cells and an armoury. Ironically, it became the "strongest and most fortified" camp of a criminal and terrorist group when the Boko Haram group seized and adopted it as its base. See 'The Rise and Final Fall of Boko Haram in Nigeria' NTA (2016).

[2]Sambisa Forest, which takes its name from the Sambisa village in Gwoza Local Government Area, Borno state in Northeastern Nigeria, close to the border with Cameroon, covers an area of about 60,000 km^2, cutting across six states in Northern Nigeria namely Borno, Yobe, Gombe, Bauchi, Jigawa and Kano. Originally created as a Game Reserve, the forest entered infamy when it became one of the strongholds of the Boko Haram group. It is particularly infamous for being the rumoured site where the Chibok Secondary School girls abducted in April 2014 were held. See generally, Kayode (2014).

[3]See 'The Rise and Fall of Boko Haram' NTA (2016).

[4]This will be discussed in detail in Sect. 3 below.

[5]This is the proper name of the group. However, it is widely known by 'Boko Haram,' which translates into "western education is forbidden" in the local Hausa language.

[6]See Dudley (2018).

[7]See UNHCR 'Nigeria Emergency.' No attempt is made here provide an exhaustive review of the Boko Harm insurgency or the burgeoning literature on it. The scope of the present article is limited to issues relating to legal determination of the end of the Boko Haram insurgency. Our review of the insurgency is accordingly only to the extent that is necessary for this objective. For some more details on the insurgency itself, see the following: Adesoji (2010), Onuoha (2011, 2014), Mantzikos (2014), de Montclos (2014a), International Crisis Group (2014), Pantucci and Jesperson (2015), Cold-Ravnkilde and Plambech (2015), Torbjörnsson and Jonsson (2017), Langer et al. (2017), Adelaja et al. (2018), Campbell and Harwood (2018), Brechenmacher (2019), and International Crisis Group (2019).

[8]President Muhammadu Buhari in a goodwill address to the troops on 24 December 2016, stated thus: "I am delighted at, and most proud of the gallant troops of the Nigerian Army, on receipt of the long-awaited and most gratifying news of the final crushing of Boko Haram terrorists in their last enclave in Sambisa Forest." See Adetayo (2016).

Thus, when the troops of Operation *Lafiya Dole*[9] accomplished the mission, the government considered it a consolidation of the technical defeat of the group which had been announced at the end of 2015.[10] However, neither the 'technical defeat' of Boko Haram in December 2015 nor even the subsequent capture of Camp Zero put an end to attacks by the group on the Nigerian forces and citizens. Though the group has been degraded, it retains a demonstrated capability to strike at military and non-military objectives.[11] The group is still alive and somewhat well enough to operate, diminished as its capacity may be. Although the government insists that Boko Haram today attacks mostly non-military objectives, civilians in particular, there are also widely reported lethal attacks on the military as well.

The situation with the declaration of defeat of Boko Haram in 2015 and its continued activities afterwards raises a key question: At what point is a NIAC such as the Boko Haram insurgency, considered over? What, indeed, conclusively determines that a NIAC has ended? The international law rule for the end of a NIAC is quite complicated.[12] This will be critically scrutinized in the legal perspective of the Boko Haram insurgency set out in the pages that follow.

To achieve the above stated aim, the discussion in this paper is divided into five parts. The first part is this introduction, while the second part provides a brief account of the Boko Haram insurgency. The third part ascertains the legal status of the insurgency as a NIAC under international law, while the fourth part delves into the crux of the paper, which is determining the endpoint for the insurgency as a NIAC. The fifth and final part concludes the paper.

[9] *Lafiya Dole* is a Hausa language phrase which translates into "peace by force." See 'Army Chief in Maiduguri; Changes Code to *Lafiya Dole*' Vanguard Nigeria (2015).

[10] The President of Nigeria, Muhammadu Buhari, declared, that the war with Boko Haram was "technically" won, as the group could no longer launch conventional attacks, but were now confined to Borno State. See 'Nigeria Boko Haram: Militants 'Technically Defeated'- Buhari' BBC News (2015).

[11] See Counter Extremism Project, 'Boko Haram,' pp. 32–34, for a list of some 38 attacks carried out by Boko Haram against both military and civilian targets, between December 25, 2015 to January 14, 2019.

[12] Bellal (2018), p. 26.

2 Understanding the Boko Haram Insurgency in Nigeria: An Account of the Crisis

Nigeria is no stranger to religious sectarianism.[13] Several sects, predominantly Islamic,[14] have existed, and currently exist, within the nation's borders, many of them in relatively peaceful coexistence.[15] Some others turned out be violent to the extent of challenging the authority and sovereignty of the Nigerian State. An earlier major incident of violent Islamic insurgency was the *Maitatsine* sect, whose clash with security forces caused the December 1980 riots in Kano State, Nigeria, and led to the death of at least 4179 persons and considerable loss of property.[16] The group was a precursor to Boko Haram but on a much-localised scale and was short-lived.[17]

The Boko Haram group has its origins in Maiduguri, Borno State, North-east Nigeria, where it was founded by an Islamic Scholar, Mohammed Yusuf. About 2002, Yusuf started a religious movement where he preached against the political institutions and other Islamic scholars.[18] Yusuf advocated rule by *Sharia* law in Nigeria as against constitutional secular rule,[19] proposing it as the panacea to the corruption prevalent in the political system that has resulted in social inequalities that

[13]Nigeria is deeply divided by religion, which is a very influential force in the socio-political stability of the country. The country is almost equally divided between a predominantly Muslim North, and a predominantly Christian South. As an author surmised, "hardly can the Nigerian State be talked about without reference to religion." See Danjibo (2009), p. 3.

[14]Islamic sects in Nigeria are said to include the *Derika*, the *Kaulu* (*Kablu*), the *Izala*, the *Tijjaniya* and the *Quaddiriya*, the Shiite, the Muslim Brotherhood, etc. See ibid, p. 5.

[15]de Montclos (2014b), p. 6.

[16]The *Maitatsine* sect was formed by an Islamic Scholar, Muhammed Marwa, who was concerned with purification of Islam which he believed had been corrupted through westernization and "the formation of the modern State." Marwa, based in Kano, attracted a large and faithful following among the poor with his fiery and provocative preaching against the established political institutions as well as the ruling emirate. His "abusive" style of preaching earned him the name '*maitatsine'* which means "one who curses." He consistently spoke against western influence and modernization. See Danjibo (2009), pp. 6 and 9.

[17]Parallels are often drawn between the Maitatsine sect and the Boko Haram group because of their ideological similarity. See de Montclos (2014b), p. 8; Cook (2011), p. 6; Bagaji et al. (2012), p. 33; Adesoji (2011), pp. 98–119.

[18]de Montclos (2014b), p. 7.

[19]Section 10 of the Constitution of the Federal Republic of Nigeria (as amended) states as follows: "The Government of the Federation or of a State shall not adopt any religion as State religion." Although there are possible competing interpretations, the provision is almost universally cited for the mandate that Nigeria is a constitutionally secular State. It can be argued, therefore, that this provision was violated when 12 Northern States (Kano, Kaduna, Katsina, Kebbi, Jigawa, Sokoto, Borno, Yobe, Bauchi, Gombe, Zamfara and Niger) adopted *Sharia* Law beginning in 2000. This would seem to have been a move designed to pacify and quell elements that were agitating against the secular nature of the Nigerian State. However, this limited application of *Sharia* within a democratic and "secular" country did not go far enough for sects like the Boko Haram group, who want full implementation of *Sharia* not only in Northern Nigeria, but in the entire country. See Adesoji (2011), p. 103.

were, and are still, very apparent in North-eastern Nigeria. He rejected elements of westernization, attributing the ills of the country to its embrace of western civilisation.[20] Yusuf's movement attracted a large following, which came mostly from the poor, as they saw in him some hope for social justice and an end to social inequalities.[21] Over the years leading up to 2009, Boko Haram expanded in followership and influence. Yusuf became established as a major political player, no longer a mere religious figure, with the Nigerian authorities starting to recognise him as a threat.[22]

In June 2009, some members of the group in a funeral procession were killed by law enforcement officers.[23] This led to an uprising by Boko Haram in July 2009, where the city of Maiduguri was held to siege for about a week.[24] The armed forces were called in to dislodge the sect, which it did with a heavy hand, resulting in the death of several members of Boko Haram and the destruction of the group's main mosque.[25] Yusuf was arrested, but was subsequently killed extrajudicially in police custody.[26]

After a brief period underground, Boko Haram resurfaced with Abubakar Shekau[27] as their new leader in July 2010.[28] The structure of the group is reported as decentralised and fluid. It has a Supreme Council (*Shura*) headed by the leader, with its various cells operating with "relative autonomy and control."[29] Shekau

[20]Boko Haram indeed rejects more than western education. They reject the entire western culture and way of life in preference for Islamic culture. This was clarified by Sani Mohammed, a temporary leader of the group on August 8, 2009 in a statement that reads in part thus:

> . . .Boko Haram does not in any way mean "Western Education is a sin" as the infidel media continue to portray [sic] us. Boko Haram actually means "Western Civilization" is forbidden. The difference is that while the first gives the impression that we are opposed to formal education coming from the West, that is Europe, which is not true, the second affirms our believe [sic] in the supremacy of Islamic culture (not Education), for culture is broader, it includes education but is not determined by Western Education.

See Cook (2011), pp. 13–14.

[21]However, even educated youths fell for Yusuf's teachings largely because of his charisma to the extent that some reportedly tore up their degree diplomas to show full commitment to the cause. See Danjibo (2009), p. 7.

[22]See 'Boko Haram: Behind the Rise of Nigeria's Armed Group' Al Jazeera Special Series (2016).

[23]ibid.

[24]ibid.

[25]Arraf (2018), p. 102.

[26]ibid.

[27]Ironically, Shekau, who Yusuf had named as his right-hand man before his death (see Al Jazeera Special Series (Text), "Boko Haram," (n 32)) had been declared dead by the security operatives in 2009. This will not be the last time Shekau "miraculously" rises from the dead after been declared killed or mortally wounded by the Nigerian authorities. See Akinyelure (2016).

[28]Arraf (2018), p. 103.

[29]See Amnesty International (2015), p. 15. See also de Montclos (2014b), p. 11; Counter Extremism Project, 'Boko Haram' p. 3; Stratfor (2014).

pledged to exact vengeance for the killing of Yusuf and other members of the group.[30]

Boko Haram attacked a prison in September 2010, where it freed over 700 inmates, 150 of whom were suspected members of the group.[31] Between September 2010 to November 2011, Cook noted not less than 45 major operations by the group.[32] These attacks were not limited to the North-east, which had been the main base of the group but spread across to Kano, Plateau, Bauchi, Kaduna, and Abuja, the federal capital territory. The major modes of attack by the group included direct gun-fire, drive-by shootings, bombings, assassinations, and suicide attacks.[33]

Perhaps the most audacious of the Boko Haram's attacks during that period were the suicide attacks it carried out in Abuja, the nation's capital and seat of power, on the National Police Headquarters on 16 June 2011,[34] and the United Nations compound on 26 August 2011.[35] These attacks made President Goodluck Jonathan to send the army to North-east Nigeria in a bid to stamp out the insurgency.[36] However, the introduction of the army had the effect of intensifying the insurgency. They caused more harm than good by indiscriminate extra-judicial killings and repressive action, which drove more people to join Boko Haram for protection.[37] In May 2013, a state of emergency was declared in the North-Eastern states of Borno, Yobe and Adamawa states.[38]

In March 2014, the Boko Haram insurgency became a cross-border phenomenon when it began executing attacks in Cameroon, thus, introducing a 'regional dimension' to the conflict.[39] In April 2014, Boko Haram abducted 276 secondary school girls from Government Secondary School, a boarding school in Chibok, Borno State.[40] Shekau, in a video address, announced his intention to sell the girls.[41] This incident brought the group wider global attention and coverage. In mid-2014, Boko Haram also expanded its territory, seemingly having an upper hand against the Nigerian army.[42] It seized and held several towns in North-eastern Nigeria (Borno

[30] Amnesty International (2015), p. 10.

[31] 'Boko Haram Attack' Frees Hundreds of Prisoners' BBC News (2010).

[32] Cook (2011), p. 16.

[33] ibid.

[34] Two persons were killed in this attack. See 'Blast Rocks Police Headquarters in Nigeria' Al Jazeera News (2011).

[35] 18 persons were killed in this attack. See 'Abuja Attack: Car Bomb Hits Nigeria UN Building' BBC News (2011).

[36] See 'Boko Haram: Behind the Rise of Nigeria's Armed Group' Al Jazeera Special Series (2016).

[37] ibid.

[38] See ibid, and de Montclos (2014b), p. 10.

[39] Arraf (2018), p. 105.

[40] See 'The Rise and Final Fall of Boko Haram in Nigeria' NTA (2016).

[41] See 'Boko Haram 'to sell' Nigeria Girls Abducted from Chibok' BBC News (2014).

[42] See 'Boko Haram: Behind the Rise of Nigeria's Armed Group' Al Jazeera Special Series (2016).

and its environs), proclaiming an Islamic state of its own within the borders of Nigeria, a Caliphate under its sole rule.[43]

In January 2015, a Multinational Joint Task Force (MNJTF) formed by a coalition between Nigeria, Chad, Cameroon and Niger began a joint offensive against Boko Haram.[44] In response to this, Boko Haram spread its attacks to Niger and Chad.[45] Boko Haram, on 7 March 2015 pledged its allegiance to the Islamic State (IS), even renaming itself "Islamic State West Africa Province (ISWAP),"[46] a move that was regarded in some quarters as an attempted morale and image boost.[47] The tide of the battle had begun to turn against them, following the creation of the MNJTF and a reported delivery of new military hardware to the Nigerian Army, with many of their captured towns and districts reclaimed by the end of March 2015.[48]

With the inauguration of President Muhammadu Buhari in May 2015 came a renewed fight against Boko Haram, with shake-ups in the military command.[49] By the end of the year, Boko Haram had retreated into Sambisa forest, the Mandara mountains along the Nigerian-Cameroonian border and the islands of Lake Chad.[50] In December 2015, President Buhari declared a technical defeat of the Boko Haram group.[51]

In August 2016, a rift in Boko Haram's leadership was revealed with the declaration by IS of Abu Musab al-Barnawi[52] as leader of ISWAP, a move Shekau rejected. This led to two main factions within Boko Haram,[53] with Shekau reverting to his position as leader of *Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad* (JAS)[54] and al-Barnwai operating as Islamic State in West Africa (ISWA).[55] By the end of December 2016, Boko Haram's base at Sambisa forest, Camp Zero was captured by the Nigeria army to much elation by President Buhari. This could be seen as a consolidation of the 'technical defeat' already achieved.[56]

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[43]The area held by Boko Haram was estimated to be around 50,000 km^2 in January 2015. See 'The Rise and Final Fall of Boko Haram in Nigeria' NTA (2016).

[44]ibid.

[45]Arraf (2018), p. 107.

[46]ibid.

[47]See Adegoke (2015). See also Arraf (2018), p. 107.

[48]See 'The Rise and Final Fall of Boko Haram in Nigeria' NTA (2016) and Adegoke (2015).

[49]Arraf (2018), p. 108.

[50]See 'The Rise and Final Fall of Boko Haram in Nigeria' NTA (2016); Arraf (2018), p. 108.

[51]See 'Nigeria Boko Haram: Militants 'Technically Defeated'- Buhari' BBC News (2015).

[52]He is reported to be the son of the late Boko Haram leader, Mohammed Yusuf. See Arraf (2018), p. 108.

[53]ibid.

[54]See Institute of Security Studies (2018), pp. 3 and 14. However, Shekau has not revoked his pledge of allegiance to IS. See ibid, p. 14.

[55]ibid, 3. It is noted that ISWA is also referred to as ISWAP (Islamic State West Africa Province).

[56]Adetayo (2016).

Unfortunately, however, the capture of Camp Zero has not led to a cessation in attacks by Boko Haram. Though their capacity is diminished, both factions of the group have not relented in their attacks.[57] For example, in June 2017, Boko Haram attacked Maiduguri, although it was repelled by the Nigerian Army.[58] In July 2017, an ambush by the group on a Nigerian National Petroleum Corporation (NNPC) oil exploration team, near Maiduguri, resulted in the death of 67 persons.[59] On 19 February 2018, 110 school girls were abducted by Boko Haram from a school in Dapchi, Yobe state.[60] On 18 November 2018, Boko Haram attacked a military base in Melete, Borno state, resulting in the death of over 100 soldiers.[61] The attacks by Boko Haram have continued into 2019.[62]

The general trend in the attacks of the factions of Boko Haram i.e. JAS and ISWA, are different. JAS mainly employing suicide bombings by civilians, whereas ISWA concentrates mostly on attacking the military security forces.[63] ISWA is currently regarded as the bigger threat.[64] There have been reported clashes between both factions, although such were sporadic, with no evidence of further confrontations.[65] This split of Boko Haram into two main factions, though separated in organization and operation, has not necessarily altered the legal character of the armed conflict. The Rule of Law in Armed Conflicts (RULAC) Project notes that although it cannot be confirmed, with the information at hand, that the factions can still be regarded as forming a single armed group, "arguably the conflict remains a single non-international armed conflict in light of the absence of fighting between Boko Haram factions."[66]

[57]Counter Extremism Project's Report on Boko Haram contains a record of violent activities by the group from December 2003 to January 14, 2019. It lists over 35 attacks executed by the group (both factions) between 25 December 2015 (just after the alleged technical defeat) and January 14, 2019, with 27 of those attacks were carried out after December 2016 (after the capture of Camp Zero). See Counter Extremism Project 'Boko Haram' pp. 25–33.

[58]'Boko Haram Launches Major Attack on Northeast Nigerian City' Reuters (2017).

[59]Human Rights Watch 'Nigeria: Events of 2017.'

[60]101 girls have since been returned. See Maclean and Abrak (2018) and 'Nigeria Dapchi Abductions: Schoolgirls Finally Home' BBC News (2018). However, one girl, Leah Sharibu, remains in Boko Haram captivity.

[61]See Burke (2018) and Ogundipe (2018).

[62]See for example, Ogundipe (2019) and 'Police Reinforce Stations, Armouries After Boko Haram Attack in Borno' Channels TV (2019).

[63]See Institute of Security Studies (2018), pp. 3, 19–21.

[64]See ibid, pp. 36–37.

[65]RULAC 'Non-international Armed Conflict in Nigeria: Classification- Organization.' See also Institute of Security Studies (2018), pp. 3 and 15.

[66]RULAC 'Non-international Armed Conflict in Nigeria: Classification- Organization.'

3 Establishing the Status of the Boko Haram Insurgency Under International Law

The Boko Haram insurgency has run for over one decade (since 2009). In November 2013, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) determined that the insurgency had risen to the status of a non-international armed conflict (NIAC) since at least May of that year.[67] The goal of this section of the article is to assess whether the insurgency did indeed rise to such status, by an examination of the criteria for the existence of a NIAC under international law.

The initial question is, What is an armed conflict? The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), held in *Prosecutor v. Tadic*, Decision on Jurisdiction,[68] that, "an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[69] This definition reveals two types of armed conflicts—international armed conflicts (IAC) and NIACs. These conflicts are regulated by different sets of treaty rules under international law.

IACs are essentially inter-state conflicts.[70] These are mainly regulated by the Geneva Conventions of 12 August 1949[71] (save for the provisions of Article 3 which is common to all the Conventions (Common Article 3)) as well as the First Additional Protocol to the Geneva Conventions (Additional Protocol I).[72] NIACs on the other hand are, generally, internal conflicts within a State.[73] They are regulated by

[67] See Office of the Prosecutor, ICC (2013a), paragraph 218. It is also noted that in the International Committee of the Red Cross, in its Annual Report for 2013, referred to the situation in north-eastern Nigeria as an "armed conflict between military forces and armed groups." See ICRC (2014), p. 183.

[68] *Prosecutor v. Tadic,* IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995.

[69] ibid, paragraph 70.

[70] Situations of struggles against colonial domination and alien occupation and racist regimes, in the exercise of the right to self-determination, also qualify as IACs. This is as provided in Article 1(4), Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts, (Additional Protocol I), June 8, 1977, 1125 UNTS 3.

[71] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85 (Geneva Convention II); Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135 (Geneva Convention III); and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (Geneva Convention IV).

[72] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, (Protocol I), June 8, 1977, 1125 UNTS 3.

[73] While NIACs are generally internal conflicts within a state's territory, the category of NIACs also covers all armed conflicts wherein at least one of the involved parties is not a state. This is because, under extant international law, only two types/categories of armed conflicts are recognised—IACs and NIACs. IACs only cover conflicts where two or more states are in opposition as under Common Article 2 to the Geneva Conventions, save for the exception under Article 1(4) of Additional

the provisions of Article 3 common to the Geneva Conventions of 12 August 1949 and the Second Additional Protocol to the Geneva Conventions (Additional Protocol II).[74]

The body of laws regulating NIACs is not as robust as those regulating IACs. This is because, traditionally, they fell outside the scope of international humanitarian law (IHL) because they were held to be within the scope of the internal affairs of States wherein other States could not interfere. However, this way of thinking gradually eroded over time because of the spate of violence in NIACs which recommended them to international attention and concern. Thus, in 1949, Common Article 3 was included in the Geneva Conventions to regulate NIACs or "armed conflict not of an international character" as stated in the Article. This was to provide minimum guarantees of protection in such conflicts. In 1977, under Additional Protocol II, more detailed, but still limited, provisions dealing with NIACs were agreed upon.[75] Additional Protocol II is intended to develop and supplement "Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application."[76] Thus, the legal regimes of Common Article 3 and the provisions of Additional Protocol II coexist. Common Article 3 applies in all NIACs while Additional Protocol II applies only in NIACs that fulfil the specific requirements needed to trigger its application.[77]

Protocol I relating to wars of national liberation (against colonial domination, alien occupation, and racist regimes). The international element in IACs is the fact of sovereign states being on opposing sides. Every other conflict falls under the NIAC category—'an armed conflict not of an international character' as stated in Common Article 3 to the Geneva Conventions. It does not matter whether there is a transnational element to the conflict, i.e. whether the armed group is operational in more than one state or in a region. The conflict is assessed from the perspective of every state involved in a conflict with the armed group. Hence for example, Boko Haram may simultaneously be in a NIAC with Nigeria, and in a separate NIAC with Chad, depending on the factual circumstances within the states. See further, Vite (2009) and generally, Sassoli (2019), pp. 168–186.

[74]Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts, (Protocol II), June 8, 1977, 1125 UNTS 609.

[75]The provisions of Customary International Humanitarian Law (CIHL) are helping to bridge this gap. See the International Committee of the Red Cross' compilation of CIHL rules as it relates to NIACs in Henckaerts and Doswald-Beck (2005).

[76]See Article 1(1) of Additional Protocol II.

[77]The ICRC Commentary on the Article states in part:

> . . . in circumstances where the conditions of application of the Protocol are met, the Protocol and Common Article 3 will apply simultaneously, as the Protocol's field of application is included in the broader one of Common Article 3. On the other hand, in a conflict where the level of strife is low and which does not contain the characteristic features required by the Protocol, only Common Article 3 will apply. In fact, Common Article 3 retains an autonomous existence, i.e., its applicability is neither limited nor affected by the material field of application of the Protocol. This formula, though legally rather complicated, has the advantage of furnishing a guarantee against any reduction of the level of protection long since provided by Common Article 3.
>
> Sandoz et al. (1987), p. 1350, paragraph 4457.

3.1 Identification of a Non-International Armed Conflict

As to the definition and identification of a NIAC, the provisions in Common Article 3 and that of Additional Protocol II are not very helpful. On its part, Common Article 3 only mentions the phrase "armed conflict not of an international character" and leaves it unexplained.[78] Article 1 of Additional Protocol II also does not define what a NIAC is. However, the article does one better by excluding in its paragraph (2), "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature," from situations that qualify as armed conflicts.[79] While this is undoubtedly useful, it still left the gap for a positive definition of a NIAC.[80]

In 1995, the ICTY Appeals Chamber in *Tadic,* Decision on Jurisdiction[81] set out a definition of a NIAC which is widely regarded as authoritative.[82] The Appeals Chamber defined it as "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[83] The Trial Chamber of the ICTY in applying the definition stated out by the Appeals Chamber noted indeed, that:

> The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rule contained in Common Article 3 focuses on two aspects of a conflict: the intensity of the conflict and the organization of the parties.[84]

By this, the Trial Chamber thus clarifies 'protracted' in the test, to mean 'intensity' and not a reference to length or duration of the conflict.[85] To the mind of the Trial Chamber, the two criteria i.e. intensity of the conflict and the organization of the parties, were the distinguishing factor between NIACs and other forms of internal violence within a state.[86] However, whether these two criteria i.e. the necessary levels of intensity of violence and organization of the armed group, are

[78] See the text of Common Article 3 to the Geneva Conventions.

[79] See Article 1(2) of Additional Protocol II.

[80] See Casey-Maslen and Haines (2018), pp. 52–53.

[81] *Prosecutor v. Tadic,* IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995.

[82] Sivakumaran (2012), pp. 157 and 166. See also Cullen (2010), pp. 120–122; Casey-Maslen and Haines (2018), pp. 57–61.

[83] *Prosecutor v. Tadic* IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, paragraph 70.

[84] *Prosecutor v. Tadic* IT-94-1-T, Opinion and Judgement, 7 May 1997, paragraph 562.

[85] See Casey-Maslen and Haines (2018), p. 57.

[86] *Prosecutor v. Tadic* IT-94-1-T, Opinion and Judgement, 7 May 1997, paragraph 562.

present in a situation to make it a 'NIAC *simpliciter*'[87] must be determined on a case-by-case basis.[88] The two criteria will now be examined.

3.1.1 Intensity of Violence

Several factors are used to show that the requisite intensity of violence has been reached to elevate an internal crisis/disturbance to the status of a NIAC. They include: the duration of such violence;[89] its geographical spread over the territory of the State;[90] the resultant casualties and destruction;[91] the types of weapons used;[92] involvement in the situation of external bodies such as the United Nations Security Council;[93] the choice by the State to use its armed forces to quell the violence;[94] etc.[95]

It should be noted that none of these factors is compelling and can only assist in making the determination as to whether the requisite threshold of intensity of

[87]The term *simpliciter* is used to refer to NIAC as under Common Article 3. It has already been explained above that Article 1(1) of Additional Protocol II adopts the notion of NIAC under Common Article 3 but attaches additional requirements for the application of Additional Protocol II in any given situation. This term is adopted from Sivakumaran's usage of it, to distinguish between "the 'ordinary' non-international armed conflict" and "the non-international armed conflict that is required to satisfy certain additional elements in order for particular rules to apply." See Sivakumaran (2012), p. 164, footnote 66.

[88]See *Prosecutor v. Rutaganda*, Trial Chamber Judgment, 6 December 1999, I-96-3, paragraph 93.

[89]See *Prosecutor v. Tadic* IT-94-1-T, Opinion and Judgement, 7 May 1997, paragraphs 565–566 and *Prosecutor v. Haradinaj, Balaj and Brahimaj,* IT-04-08-T, Judgment, 3 April 2008, paragraph 49.

[90]*Prosecutor v. Milosevic,* IT-02-54-T, Decision on Motion for Judgment of Acquittal,16 June 2004, paragraph 29 and *Prosecutor v. Boskoski and Tarculovski,* IT-04-82-A, Judgment, 19 May 2010, paragraph 22.

[91]See *Prosecutor v. Tadic* IT-94-1-T, Opinion and Judgement, 7 May 1997, paragraphs 565–566 and *Prosecutor v. Limaj, Bala and Musliu,* IT-03-66-T, Judgement, 30 November 2005, paragraphs 135–167.

[92]See *Prosecutor v. Boskoski and Tarculovski,* IT-04-82-A, Judgment, 19 May 2010, paragraph 22 and *Prosecutor v. Haradinaj, Balaj and Brahimaj,* IT-04-08-T, Judgment, 3 April 2008, paragraph 49.

[93]See *Prosecutor v. Haradinaj, Balaj and Brahimaj,* IT-04-08-T, Judgment, 3 April 2008, paragraph 49 and *Prosecutor v. Boskoski and Tarculovski,* IT-04-82-A, Judgment, 19 May 2010, paragraph 22.

[94]See *Prosecutor v. Boskoski and Tarculovski,* IT-04-82-A, Judgment, 19 May 2010, paragraph 22 and *Jean Carlos Abella v. Argentina,* Case 11.137, 18 November 1997, OEA/Ser.L/V/II.98, Doc.6 rev, 13 April 1998, paragraphs 154–156.

[95]See *Boskoski and Tarculovski,* IT-04-82-T, Judgment, 10 July 2008, paragraphs 177–178; and Sivakumaran (2012), pp. 167–170. See also Cullen (2010), pp. 128–129; Bartels (2014), p. 307.

violence to qualify a security situation as a NIAC has been reached.[96] They must be assessed within the context of the peculiarities of the situation at hand.[97]

3.1.2 Organization of the Armed Group

The requirement for organization in determining a NIAC is relevant only to the armed group or groups in question, as the armed forces of a State are presumed to meet the requirement.[98] The necessary degree of organization for an armed group in this regard is quite unclear as a result of somewhat conflicting statements by judicial bodies, such as: they are groups "organized to a greater or lesser extent,"[99] or that, "some degree of organization by the parties will suffice."[100] It has been suggested that this shows that "the threshold is not all that high."[101]

Just as in the case of 'intensity of violence,' several indicative factors can be used to determine whether the requirement of organization has been met. These factors[102] include: the presence of an official chain of command within the group;[103] existence of group headquarters;[104] use of uniforms by group members;[105] ability to recruit

[96] Sivakumaran (2012), p. 168.

[97] ibid, 169–170.

[98] See ibid, 170; Bartels (2014), p. 306.

[99] *Prosecutor v. Jean Paul Akayesu,* ICTR-96-4-T, Judgment, 2 September 1998, paragraph 620.

[100] See *Prosecutor v. Limaj, Bala and Musliu,* IT-03-66-T, Judgement, 30 November 2005, paragraph 89.

[101] Sivakumaran (2012), p. 170.

[102] In *Boskoski and Tarculovski,* IT-04-82-T, Judgment, 10 July 2008, paragraphs 199–203, the ICTY categorises the factors that prove the organization of an armed group in five: "factors signalling the presence of a command structure;" "factors indicating that the group could carry out operations in an organized manner;" "factors indicating a level of logistics;" "factors relevant to determining whether an armed group possessed a level of discipline and the ability to implement the basic obligations of Common Article 3;" and "factors indicating that the armed group [is] able to speak with one voice." See ibid.

[103] See *Prosecutor v. Milosevic,* IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, paragraph 23; *Boskoski and Tarculovski,* IT-04-82-T, Judgment, 10 July 2008, paragraph 271; *Prosecutor v. Boskoski and Tarculovski,* IT-04-82-A, Judgment, 19 May 2010, paragraph 23 and *Prosecutor v. Limaj, Bala and Musliu,* IT-03-66-T, Judgement, 30 November 2005, paragraphs 97 and 110.

[104] See *Prosecutor v. Haradinaj, Balaj and Brahimaj,* IT-04-08-T, Judgment, 3 April 2008, paragraphs 60 and 65–68 and *Prosecutor v. Milosevic,* IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, paragraph 23.

[105] See *Prosecutor v. Limaj, Bala and Musliu,* IT-03-66-T, Judgement, 30 November 2005, paragraph 123 and *Prosecutor v. Boskoski and Tarculovski,* IT-04-82-T, Judgment, 10 July 2008, paragraph 285.

and train members;[106] the ability to acquire, transport and supply/distribute arms;[107] issuance of communications by the group such as political statements;[108] territorial control;[109] existence of designated zones of operations;[110] existence of regulations and disciplinary measures within the group;[111] delegation of tasks and responsibilities within the group;[112] etc.[113]

An important factor is the notion of 'responsible command.' This is said to be "inherent in the idea of organization."[114] The ICTY Appeals Chamber in *Prosecutor v. Hadzihasanovic, Alagic and Kubara*[115] stated that "military organization implies responsible command,"[116] and that "there cannot be military force save on the basis of responsible command."[117] This also holds true for organized armed groups.[118]

Where a number of these factors showing organization of an armed group which is involved in a situation of internal tension or disturbance are found to be present, along with the necessary indicative factors to show that the requisite intensity of violence has been met, the existence of a NIAC *simpliciter* can be determined.

[106]See *Prosecutor v. Limaj, Bala and Musliu,* IT-03-66-T, Judgement, 30 November 2005, paragraph 118 and *Prosecutor v. Haradinaj, Balaj and Brahimaj,* IT-04-08-T, Judgment, 3 April 2008, paragraph 60.

[107]See *Prosecutor v. Boskoski and Tarculovski,* IT-04-82-T, Judgment, 10 July 2008, paragraph 281 and 286; and *Prosecutor v. Haradinaj, Balaj and Brahimaj,* IT-04-08-T, Judgment, 3 April 2008, paragraph 60.

[108]See *Prosecutor v. Limaj, Bala and Musliu,* IT-03-66-T, Judgement, 30 November 2005, paragraph 101.

[109]*Prosecutor v. Haradinaj, Balaj and Brahimaj,* IT-04-08-T, Judgment, 3 April 2008, paragraphs 60, 70–75; and *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, paragraph 236.

[110]See *Prosecutor v. Limaj, Bala and Musliu,* IT-03-66-T, Judgement, 30 November 2005, paragraph 95; and *Prosecutor v. Milosevic,* IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, paragraph 23.

[111]See *Prosecutor v. Haradinaj, Balaj and Brahimaj,* IT-04-08-T, Judgment, 3 April 2008, paragraph 60; *Prosecutor v. Limaj, Bala and Musliu,* IT-03-66-T, Judgement, 30 November 2005, paragraphs 110, 113–117; *Prosecutor v. Boskoski and Tarculovski,* IT-04-82-T, Judgment, 10 July 2008, paragraph 274–275; and *Prosecutor v. Boskoski and Tarculovski,* IT-04-82-A, Judgment, 19 May 2010, paragraph 23.

[112]See *Prosecutor v. Limaj, Bala and Musliu,* IT-03-66-T, Judgement, 30 November 2005, paragraphs 100–101.

[113]See generally, Sivakumaran (2012), pp. 170–171. See also Cullen (2010), pp. 123–127.

[114]Sivakumaran (2012), p. 174.

[115]IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003.

[116]ibid, paragraph 17.

[117]ibid, paragraph 16. See generally Sivakumaran (2012), pp. 174–175.

[118]It is should be noted that responsible command is not the same as command responsibility. See Sivakumaran (2012), p. 175.

3.2 *Non-International Armed Conflict for the Purpose of Additional Protocol II*

Attention is turned now to the scope of Article 1(1) of Additional Protocol II, which prescribes its own requirements for NIAC. Article 1(1) provides as follows:

> This Protocol... shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party *between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.*[119]

The requirements of the Article are examined in turn.

3.2.1 Armed Forces of a State as a Party to the Conflict

Additional Protocol II specifically requires that government armed forces be a party to a NIAC before it can fall within its purview. Thus, where the conflict is merely between two armed groups, however the intensity of the conflict or the organization of the armed groups, Additional Protocol II is inapplicable.

3.2.2 Organized Armed Groups Under Responsible Command

As seen above, the organization of an armed group and with it, responsible command within the group is already a requirement for a NIAC *simpliciter.* However, to fall within the scope of Additional Protocol II, a higher degree of organization on the part of the armed group in the conflict is required.[120]

The ICRC Commentary on the Additional Protocols describes the notion of responsible command under Article 1(1) thus:

> The existence of a responsible command implies some degree of organization of the insurgent armed group or dissident armed forces but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other hand imposing discipline in the name of a defacto authority.[121]

[119] Emphasis ours.

[120] Sivakumaran (2012), p. 185. See further *Prosecutor v. Boskoski and Tarculovski,* IT-04-82-T, Judgment, 10 July 2008, paragraph 197.

[121] Sandoz et al. (1987), p. 1352, paragraph 4463.

3.2.3 Control of Territory for Sustained and Concerted Military Operations, and Implementation of the Protocol

Under this requirement, the control of territory by the armed group refers to such degree of control as gives it the capacity for sustained and concerted military operations and the implementation of the provisions of Additional Protocol II.[122]

As for 'sustained and concerted military operations,' there are two viewpoints as to the meaning. On one hand, it is believed that the level of intensity of violence required to meet the standard of 'sustained and concerted violence' is higher than needed to meet the standard of 'protracted violence' under a NIAC *simpliciter.*[123] Cullen in line with this, states that this requirement is "[p]erhaps the most significant of the criteria contained in Article 1(1)."[124] This is because it "sets a particularly high threshold for the application of the Protocol"[125] and "rules out all situations of low-intensity armed conflict."[126] Also in line with this view, the ICRC Commentary on the Additional Protocol II stated thus:

> 'Sustained'... means that the operations are kept going or kept up continuously. The emphasis is therefore on continuity and persistence. 'Concerted'... means agreed upon, planned and contrived, done in agreement according to plan. Thus, we are talking about military operations conceived and planned by organized armed groups... At the beginning of a conflict military operations rarely have such a character; thus it is likely that only common Article 3 will apply to the first stage of hostilities.[127]

On the other hand, 'sustained and concerted military operations' is not seen as substantially different from 'protracted violence' and thus requires the same level of violence to meet both requirements.[128]

Lastly, the armed group needs only to have the ability to implement the Protocol. Actual implementation of it is irrelevant.[129]

When the above requirements are present in a NIAC situation, the application of Additional Protocol II is triggered.

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[122] See ibid, paragraphs 4464–4467. See further, Sivakumaran (2012), p. 186.

[123] See *Prosecutor v. Boskoski and Tarculovski,* IT-04-82-T, Judgment, 10 July 2008, paragraph 197. See also Sivakumaran (2012), p. 188.

[124] Cullen (2010), p. 103.

[125] ibid.

[126] ibid, 105.

[127] Sandoz et al. (1987), p. 1353, paragraph 4469.

[128] Sivakumaran (2012), p. 188.

[129] See ibid.

3.3 *Establishing the Boko Haram Insurgency as a Non-International Armed Conflict*

As noted above, in November 2013, the OTP of the ICC determined that the Boko Haram insurgency had attained the status of a NIAC since at least May 2013.[130] This came at the backdrop of two previous reports of the OTP, in November 2012[131] and in August 2013[132] respectively, which concluded that the insurgency had not attained the status of a NIAC. The OTP did this in a bid to determine whether there was present, a situation covered by Article 8(2)(c) and (e) of the Rome Statute of the International Criminal Court (Rome Statute)[133]—in order to determine whether war crimes could be said to have been committed in Nigeria. The first step towards this is the determination of the existence of a NIAC.[134]

The OTP, in accordance with existing IHL rules, considered whether there was the requisite level of intensity of violence and organization of the Boko Haram group respectively. It is apt to note here that the OTP did not consider the existence of the additional requirements of Additional Protocol II, as those requirements are not found in the Rome Statute.[135] Regarding the level of intensity of the Boko Haram crisis in Nigeria, the OTP stated as follows:

> 216. With respect to the level of intensity of the armed confrontations between Boko Haram and Nigerian security forces, the Office has analysed over 200 incidents occurring between July 2009 and May 2013. In particular, the Office has assessed the extent and sustained nature of such incidents, as well as their seriousness; the frequency and intensity of armed confrontations; their geographical and temporal spread; the number and composition of personnel involved on both sides; the mobilization and the distribution of weapons; and the extent to which the situation has attracted the attention of the UN Security Council.
>
> 217. The Office observes that there appears to be some correlation between the deployment of the Nigerian Government Joint Task Force in June 2011 and an increase in frequency and intensity of the incidents between Boko Haram and security forces. Two declarations of a state of emergency in the north-eastern parts of Nigeria in December 2011 and May 2013 were followed by a surge of troops, increased security operations and renewed armed confrontations. The Offices [sic] notes that the latter declaration defined Boko Haram's activities as an "insurgency."[136]

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[130] See Office of the Prosecutor, ICC (2013a), paragraph 218.

[131] Office of the Prosecutor, ICC (2012), paragraph 90.

[132] Office of the Prosecutor, ICC (2013b), paragraph 130.

[133] Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90. Article 8(2)(f) of the Rome Statute explains that the preceding sub-paragraph (e) is applicable "... when there is *protracted armed conflict* between governmental authorities and organized armed groups or between such groups." (Emphasis ours.) While this is seemingly a new category of a NIAC, it is however only relevant for the purpose of establishing the jurisdiction of the ICC over specific war crimes. See Vite (2009), pp. 80–83.

[134] See Office of the Prosecutor, ICC (2013a), paragraphs 214–218.

[135] See the provisions of Article 8(2)(c) and (e) of the Rome Statute.

[136] See Office of the Prosecutor, ICC (2013a), paragraphs 216–217.

With regard to the level of organization of Boko Haram as an armed group, the OTP stated thus:

> 215. In terms of organization, the Office has considered the hierarchical structure of Boko Haram; its command rules and ability to impose discipline among its members; the weapons used by the group; its ability to plan and carry out coordinated attacks; and the number of Boko Haram forces under command. The Office has concluded that Boko Haram fulfils a sufficient number of relevant criteria to be considered an organized armed group capable of planning and carrying out military activities.[137]

In summary, the OTP stated as follows:

> 218. In view of the above, the required level of intensity and the level of organization of parties to the conflict necessary for the violence to be qualified as an armed conflict of non-international character appear to have been met. The Office has therefore determined that since at least May 2013 allegations of crimes occurring in the context of the armed violence between Boko Haram and Nigerian security forces should be considered within the scope of article 8(2)(c) and (e) of the Statute.[138]

Thus, factors such as the geographical spread of the violence, involvement of third parties, declaration of a state of emergency and the deployment of State armed forces are considered relevant to assessing the level of intensity of violence. In the same vein, factors such as the chain of command or hierarchy of Boko Haram, the number of forces under its control, and its rules and its ability to discipline its members, are indicative of the requisite level of organization of the armed group. The OTP assessment therefore rightly found to be in existence a NIAC *simpliciter* between the Nigerian armed forces and the Boko Haram armed group. The two previous reports mentioned above wherein the OTP concluded that the violence hitherto had not risen to the status of a NIAC also reflected the facts on ground.[139]

Did the situation ever exceed NIAC *simpliciter*, as to trigger application Additional Protocol II in the armed conflict between the Nigerian armed forces and the Boko Haram armed group, even during the period in mid-2014 when Boko Haram seized and held towns in Borno State and declared a Caliphate? The first requirement in Additional Protocol II, of the state armed forces being a party to the conflict ticks off easily, as the Nigerian Army has been involved in the fight against Boko Haram from July 2009 onward. The requirement, of the armed group being organized and under responsible command, is trickier. The determination of the existence of a NIAC *simpliciter* (above) means that there is some degree of organization drawing from the finding of a hierarchical structure within the group, and thus a responsible command, in the Boko Haram armed group. For Additional Protocol II however, a higher degree of organization than for an armed conflict under Common Article 3 is required. This higher degree of organization and responsible command should be such as to enable the group, according to the text, "implement th[e] Protocol." For

[137] ibid, paragraph 215.

[138] ibid, paragraph 218.

[139] See Office of the Prosecutor, ICC (2012), paragraph 90; Office of the Prosecutor, ICC (2013b), paragraph 130.

this purpose, "the existence of disciplinary procedures and internal rules" takes priority.[140]

Can it be said that Boko Haram possessed the requisite higher degree of organization and responsible command capable of imposing the discipline needed to ensure compliance with Additional Protocol II? The present writers think not. Though the level of organization of the group as described above may be sufficient to justify a NIAC *simpliciter*, the same cannot be readily said for a NIAC governed by Additional Protocol II. The best that can be said for now is that the matter is inconclusive, as there is insufficient information on the subject. However, our inclination is that the decentralised nature of the sect suggests that Boko Haram lacks the requisite organization.

As regards the requirement of territorial control such that would enable the armed group to carry out sustained and concerted attacks and implement the provisions of Additional Protocol II, it is submitted that this requirement was indeed satisfied. Boko Haram did physically hold some towns and villages that gave it the ability to carry out sustained and concerted military operations and to implement the Protocol. Although, as for the requirement of implementation of the Protocol, Boko Haram never at any time pretended to obey any provisions of IHL let alone Additional Protocol II, as discussed above, it is the ability to implement the Protocol that counts and not the actual implementation of the Protocol. Lastly, on the requirement of carrying out sustained and concerted military operations, the answer will depend on the view taken as to the meaning of the phrase. If the view that it means the same as protracted violence is adopted, then that requirement has been met. If the view is taken that it means the operations must be ongoing and planned, the requirement was also met as there were indeed persistent, ongoing and planned attacks by the group around that period.

The inability of the present writers to accept that the Boko Haram NIAC ever reached the threshold in Additional Protocol II to trigger its application thus turns on the absence, seemingly, of a sufficient level of organization and responsible command to ensure compliance with the provisions of Additional Protocol II. Although the other requirements are possibly met, the absence of the level of organization and responsible command therefore kept this NIAC within the scope of Common Article 3 only.

[140]Just as important as the indicia of organization are the reasons why organization is a prerequisite for the existence of a party to a non-international armed conflict. An armed group may be organized for one purpose, such as conducting large-scale violence, but not for another, such as being able to comply with the law. The reason why a certain level of organization is a prerequisite will thus affect the weight to be afforded to the various indicia. . . . For example, if organization is required in order to demonstrate that the group has the ability to carry out intense hostilities, factors such as the ability to procure, distribute, and use weaponry should be the crucial indicia. However, if organization is required in order that the group be able to enforce international humanitarian law, factors such as the existence of disciplinary procedures and internal regulations should take priority.

Sivakumaran (2012), p. 176. See also ibid, pp. 66–68.

4 Determining the End Point for the Boko Haram Insurgency as a Non-International Armed Conflict

Having determined the commencement, the question here is, What marks the end, or termination, of a NIAC, considering the claim of the Nigerian government to have achieved the 'final crushing' of Boko Haram, and then a seeming resurgence of the group? When can we say for certain that, a NIAC has ceased to exist?

Under international law, there is a lack of clarity on the matter of the end of armed conflicts,[141] especially with regard to NIACs. For IACs, it is quite settled that they could end in a number of ways such as the conclusion of peace agreements (followed by actual cessation of hostilities between the parties), surrender by one of the parties, *debellatio* i.e. a total defeat of one of the parties to the conflict, implied mutual consent or a unilateral declaration accepted by the other party.[142] Less clear however, is the current effect of armistices in IACs, i.e. whether they still only result in a suspension of hostilities, which was their traditional role, or can now definitively terminate an armed conflict, this view resulting from some state practice since the end of World War II.[143]

For NIACs, the situation is more complicated. Compared to those of IACs, the markers for the end point of NIACs are quite unclear, with no real direction in this regard in the relevant IHL treaties. For guidance on this matter, we may turn to case law and literature. The existing views on the end point of a NIAC resulting from these sources can be grouped into two broad categories: the "peaceful settlement" standard and the "threshold of a NIAC" standard.[144] These two categories are discussed in turn.

4.1 Peaceful Settlement Standard

This standard mainly originates from the seminal decision of the Appeals Chamber of the ICTY in *Tadic* Decision on Jurisdiction.[145] While discussing the temporal application of IHL (which is directly linked with the existence of an armed conflict)

[141] Lewis et al. (2017), p. 1.

[142] Dinstein (2011), pp. 48–51.

[143] Lewis et al. (2017), pp. 31–32.

[144] Lewis et al categories the views into four: (1) The "two-way-ratchet" theory; (2) The "no-more-combat-measures" theory; (3) The "no-reasonable-risk-of-resumption" theory; and (4) The "state-of-war-throwback" theory. See ibid, p. 96.

[145] *Prosecutor v. Tadic,* IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

in the case of the NIAC, the Court held that IHL applied, "until a peaceful settlement is achieved."[146] Terming this viewpoint the "state-of-war-throwback" theory, Lewis *et al* trace the root of this viewpoint to the traditional state-of-war doctrine whereby a state of war generally existed between belligerent states until a peace agreement was reached between them.[147] According to them, the theory "presumes that the parties to a NIAC are capable in principle of agreeing to end the conflict and in practice of exercising sufficient control over their relevant components in order to effectively implement that agreement."[148]

The "peaceful settlement" standard has the advantage of presenting quite a clear benchmark for the end of a NIAC, promoting legal certainty,[149] and also a 'continuous war crime jurisdiction' for the courts.[150] A recent example of a peaceful settlement ending a non-international armed conflict is the peace accord between the government of Colombia and the Revolutionary Armed Forces of Columbia (FARC) signed in 2016, which ended over 50 years of conflict between both parties.

However, this 'peaceful settlement' standard is much disputed,[151] having been labelled by Bartels as "too strict,"[152] and "not supported by IHL."[153] The ICRC, on its own part, adopts a flexible interpretation to *Tadic's* 'peaceful settlement' standard, stating thus in the 2016 Commentary on the First Geneva Convention:

> It is necessary to rely on the facts when assessing whether a non-international armed conflict has come to an end, or, in other words, a 'peaceful settlement' has been reached. This approach not only reflects the purely fact-based assessment of the beginning of a non-international armed conflict but is also in line with modern humanitarian law more generally, for whose applicability formal requirements are not decisive.[154]

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[146] See ibid, paragraph 70. This has been cited in cases such as *Prosecutor v. Haradinaj, Balaj and Brahimaj,* IT-04-08-T, Judgment, 3 April 2008, paragraph 100; and *Prosecutor v. Lubanga*, ICC-01/04-01/06 Judgment, 14 March 2012, paragraphs 533 and 548. In *Haradinaj*, the Court in its judgment noted that: "... since according to the *Tadic* test an internal armed conflict continues until a peaceful settlement is achieved, and since there is no evidence of such a settlement during the indictment period, there is no need for the Trial Chamber to explore the oscillating intensity of the armed conflict in the remainder of the indictment period". See *Prosecutor v. Haradinaj, Balaj and Brahimai,* ibid, paragraph 100.

[147] Lewis et al. (2017), p. 103.

[148] ibid, 103.

[149] See *Prosecutor v. Ante Gotovina et al.* (Judgment) IT-06-90-T, Judgment, 15 April 2011, paragraph 1694, where the court held thus:

> Once the law of armed conflict has become applicable, one should not lightly conclude that its applicability ceases. Otherwise, the participants in an armed conflict may find themselves in a revolving door between applicability and non-applicability, leading to a considerable degree of legal uncertainty and confusion.

[150] Lewis et al. (2017), p. 104. See also Milanovic (2014), pp. 179–180.

[151] See for example Bartels (2014), p. 301; Milanovic (2014), pp. 179–180; Kleffner (2014), p. 291; Casey-Maslen and Haines (2018), pp. 70–71.

[152] Bartels (2014), p. 301.

[153] Ibid.

[154] ICRC (2016), paragraph 487.

This is in line with Kleffner's stance on the matter, having said that the 'peaceful settlement' standard, "only holds true as a matter of law to the extent that the "peaceful settlement" is also an accurate description of the factual situation on the ground."[155]

Discussing further, the ICRC noted that:

> . . . armed confrontations sometimes continue well beyond the conclusion or unilateral pronouncement of a formal act such as a ceasefire, armistice or peace agreement. Relying solely on the existence of such agreements to determine the end of a non-international armed conflict could therefore lead to a premature end of the applicability of humanitarian law in situations when in fact a conflict continues. Conversely, armed confrontations may also dissipate without any ceasefire, armistice or peace agreement ever being concluded, or before the conclusion of such an agreement. Thus, while the existence of such agreements may be taken into account when assessing all of the facts, they are neither necessary nor sufficient on their own to bring about the termination of the application of humanitarian law.[156]

The above highlights some of the drawbacks of the 'peaceful settlement standard.' A peace agreement may not be observed by the belligerent parties, or may fall apart as was the case with the 2015 South Sudan Peace Agreement made with a view to ending the South Sudanese Civil War. A revitalised agreement had to be reached in 2018. On the other hand, hostilities may cease without any such settlement or agreement reached, or have ceased for a while before an agreement is actually concluded. Also, as Lewis *et al* point out, it is unclear whether a surrender by one of the parties, without more, counts as a 'peaceful settlement' in view of this standard.[157]

Applying this "peaceful settlement" standard to the Boko Haram insurgency, it would mean that the NIAC would only end when there is a peace agreement reached between the Nigerian government and the Boko Haram group. While this would mark a clear and objective end to the conflict, subject to the agreement actually being observed, this is quite an unlikely scenario, at least currently, because the group is highly radicalized. Hence, if the "peaceful settlement" standard is indeed the accepted benchmark for determining the endpoint or termination of a NIAC, the Boko Haram insurgency may end up becoming an indefinite NIAC barring a complete military defeat of the armed group (as was the case in Sri Lanka with the Liberation Tigers of Tamil Eelam (LTTE) in 2009) or a dissolution of the group. The current factionalization of the group further complicates matters. Whatever agreement that may be reached now needs to encompass both JAS and ISWA. Also, if there comes a time when the Boko Haram insurgency is determined to involve two separate non-international armed conflicts (i.e. between the Nigerian government

[155] Kleffner (2014), p. 291.

[156] ICRC (2016), paragraph 490.

[157] Lewis et al. (2017), p. 103.

and JAS on one hand, and then the government and ISWA on the other hand), then peaceful settlements would again need to be reached on both fronts.

4.2 *Threshold of a NIAC Standard*

As against the "peaceful settlement" standard, another viewpoint which has gained traction in the literature, termed here the "threshold of a NIAC" standard. This argues that a NIAC ceases to exist when the conditions necessary for its existence, i.e. the requisite intensity of violence and organization of parties, are no longer present.[158] Simply put, the armed conflict has lost its qualifications to be a NIAC because either the armed group or the intensity of the conflict has degraded to a level below the lower threshold of NIAC. In this vein, Bartels contends that "if a NIAC only starts when organized groups are engaged in fighting of a certain intensity, then logically, the armed conflict ends when these two criteria are no longer present."[159] This he refers to as the use of the "lower threshold criteria," meaning the use of the threshold for determining the existence of a NIAC to also determine its termination.[160]

Similarly, with regard to the end of a NIAC, Milanovic states that "what would matter is whether the intensity of the hostilities or the organization of the non-State actor factually eroded to such an extent that the threshold is no longer met."[161] While noting that a NIAC could be said to end through a peace agreement, complete defeat or a surrender by a party to the conflict, Milanovic remarks that regardless, "the only legally relevant question would be whether the threshold continues to be satisfied."[162]

While this "threshold of a NIAC" standard seemingly takes the facts-on-the-ground reality into consideration by determining the termination of a NIAC with reference to the absence of the twin criteria for the existence of a NIAC, assessing the absence or not of the criteria is a difficult task. The difficulty of this task was recognised by Bartels,[163] and in light of the consequences that may result from a hasty assessment i.e. a "revolving door between applicability and non-applicability

[158]The content of the "threshold for a NIAC" standard as discussed here, is split in two theories i.e. the "two-way-ratchet" theory, and the "no-reasonable-risk-of-resumption" theory, by Lewis et al. The former as categorised by the authors, turns quite strictly on the absence of the criteria for the existence of a NIAC, while the latter imposes a lower standard, giving allowance for a determination to be made that there is no real risk that hostilities would be resumed between the parties. See Lewis et al. (2017), pp. 97–99 and 100–102.

[159]Bartels (2014), p. 303.

[160]See ibid.

[161]Milanovic (2014), p. 180.

[162]ibid.

[163]See Bartels (2014), pp. 309–310.

[of IHL],"[164] he notes that: "when considering the proposed lower threshold with regard to the end of a NIAC, it makes sense that this end-threshold would probably have to be set at a lower level than the threshold that would bring about the start of the conflict."[165]

Given the quite usual oscillation in intensity of an armed conflict, the ICRC cautions that a "temporary lull" in intensity of violence should not be regarded as determinative of the end of a NIAC.[166] Instead, the situation on ground must attain a degree of stabilization which "equates to a peaceful settlement."[167] Milanovic, similarly, notes that the intensity of violence needs to drop below the requisite threshold "with a certain degree of permanence and stability" so as to enable a positive determination of the end of a NIAC.[168] The ICRC notes that the length of time without "armed confrontations" by the parties—not minding "minor isolated or sporadic acts of violence"—which would determine an attainment of the necessary degree of stabilization, is heavily dependent on the circumstances of each conflict.[169] There can be no generalization in this regard. Such careful analysis would help to prevent the consequences of a hasty assessment.[170]

The above analysis is still relevant to a NIAC that qualifies under Additional Protocol II. For such a NIAC, Additional Protocol II would cease to apply when the situation on ground no longer fulfils the requirements stated in Article 2(1): a State being one of the parties to the conflict; the armed groups are organised and under responsible command; and territorial control for the purpose of carrying out sustained and concerted operations, and the implementation of the Protocol.[171] In such a case, if the factual circumstances meet the requirements of a NIAC simpliciter, then Common Article 3 becomes the applicable regime.[172]

Applying the "threshold of a NIAC" standard to the Boko Haram insurgency, it is now quite clear that although the government was quick to declare a technical defeat

[164] *Prosecutor v. Ante Gotovina et al.* (Judgment) IT-06-90-T, Judgment, 15 April 2011, paragraph 1694.

[165] Bartels (2014), p. 310.

[166] ICRC (2016), paragraphs 492 and 494.

[167] ICRC (2016), paragraph 492.

[168] Milanovic (2014), p. 180.

[169] ICRC (2016), paragraph 492.

[170] ICRC (2016), paragraph 493 and 496. Lewis *et al* also note a fourth theory, the "no-combat-measures" theory, which is to the effect that a NIAC ends "upon the general close of military operations as characterized by the cessation of actions of the armed forces with a view to combat." This concept is borrowed from IHL rules relating to IACs. Here, cessation of military actions towards combat and not actual hostilities is key. See Lewis et al. (2017), p. 100. In a sense, this theory could be brought under the "threshold for a NIAC" standard, seeing that if actual hostilities have ceased but still, some sort of military action towards combat such as deploying of troops or continued building up of military capacity remain, this signifies that the intensity of violence of the NIAC have obviously fallen below the threshold for the existence of a NIAC, although not to a degree of stabilization that would not be seen as a hasty assessment in that regard.

[171] See Milanovic (2014) p. 180; Bartels (2014), p. 304.

[172] Milanovic (2014), p. 180; Bartels (2014), p. 304.

over Boko Haram, the NIAC between Nigeria and the armed group never came to an end. This is because, despite the substantial military gains recorded against the group in 2015 and 2016, there has remained quite a consistently high intensity of violence between both parties (and between the government and both factions i.e. JAS and ISWA, although more with ISWA), and the organizational structure has remained quite firm, enough to meet the threshold for an armed conflict under Common article 3. For the insurgency to be deemed over as a NIAC, in line with this standard, the intensity of violence of the conflict must drop below the threshold required to bring a NIAC into existence, or the organisation of the Boko Haram group must erode to the extent that it fails to meet the criteria necessary for a NIAC. This must be so for such a period of time that would enable an objective determination of stabilization of the situation, and thus an end of the NIAC, despite remnants of isolated and sporadic attacks.

As with the "peaceful settlement" standard, the factionalization of Boko Haram also complicates matters with regard to the "threshold of a NIAC" standard. Even where the armed conflict continues to be seen as a single one, any determination to be done with regard to the "threshold of a NIAC" standard must of necessity take both JAS and ISWA into consideration. It may be that in future, the current single NIAC, becomes concretised as two separate ones, and then it would take both conflicts meeting the standard, for the insurgency as a NIAC to be deemed ended.

5 Conclusion

The future of the Boko Haram insurgency as a long-term or prolonged NIAC is very likely, especially given its factionalization into *Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad* (JAS) and the Islamic State in West Africa (ISWA). Although the splinter groups currently operate in a diminished capacity, they (JAS and ISWA) still retain their ability to strike at military and civilian targets, and they continue to do so, despite the efforts of the Nigerian military forces.

This paper set out to analyze the rules regarding the termination of a NIAC from the perspective of the Boko Haram insurgency. The analysis above in relation to the insurgency clearly reveals how problematic definitively determining the end of a NIAC is. This is further compounded by the current factionalization of the armed group. The two broad viewpoints on the end of a NIAC i.e. the "peaceful settlement" standard and the "threshold of a NIAC" standard both have their advantages, but they also have their drawbacks. Given that the beginning and the end of a NIAC together mark the scope of the temporal application of IHL, it is imperative that more attention should be paid to agreeing on bright markers for the end of a NIAC under international law. This is even more so in this age of counterterrorism with the current prevalence of non-state armed groups engaged in conflicts with states.

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