

# ANALYSING THE LEGAL STATUS OF A TERRORIST IN A NON-INTERNATIONAL ARMED CONFLICT

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## Abstract

*Recently, the world have seen an increasing number of intra-state wars unfold. The issue of terrorism attacks has increasingly impacted on the legal definition of non-international armed conflict. Thus, creating a lacuna in determining the applicable legal norms that delimit the State's military might and to regulate the warring parties during the conducts of hostilities. Even though the legal test for the applicability and enforcement of international humanitarian law in non-international armed conflicts. Terrorism has caused much imbalance in the course of such legal determination. This article in examines this situation and submits that by subjectively classifying an internal situation and the conduct of hostilities as terrorism, the State has not displaced the applicability circumstances. The impact that terrorism has on the legal assessment is non-international armed conflict is insignificant.*

**KEYWORDS: Terrorism, Armed Conflict, Insecurity, Terrorism.**

## Introduction

The word terrorism was first used in France to describe a new system of government adopted during the French Revolution from 1798 to 1799<sup>1</sup> from that time to the present day, terrorism has had a negative meaning. For the United States, the worst attacks happened on September 11, 2001. In the years that followed, attacks also happened in Spain and London.<sup>2</sup> Traditionally, every State in international law has the legitimate unfettered rights and power to regulate violence occurring within its domestic sphere. If such violence escalates to a sufficient intensity between the State and an organised armed group, the situation may fall under the classification of international humanitarian law. The applicability of IHL in that circumstances is definable by the legal existence of an armed conflict. Presently, with the advent of terrorism the actual and real definition of non-international armed conflict is no longer so clear cut. Thus, leaves most States with the options to provide for the establishment and enactment of domestic legislations in response to the issues.

This article will analyse the impact that terrorism has on the legal establishment of non-international armed conflict (NIAC). The need to focus on NIAC is manifested in the frequent commission of terrorist acts and

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<sup>1</sup> Ifeanyi, L. (Sept. 2011) 'The Impact of Terrorism in Nigeria: In view of Recent Attacks by Boko Haram' <<http://www.linusifeanyiblogspot>> Accessed 28 January 2020

<sup>2</sup> Jackson, S. 'History of Terrorism' <<http://www.kidshealth.org>> Accessed 28 January 2020

the label of counter terrorism in these situations. It will begin by recalling the essential elements in establishing NIAC and the challenges that can be identified in relation to terrorism. The article will also examine the relationship between IHL and the enforcement of the law with regard to terrorism. Most often, because of the involvement of the domestic legal framework has occasioned a lack of understanding in the role of terrorism in establishing Non-International armed conflict.

### **Classification of Terrorism as Non-International armed conflict**

The event and practice of the post 9/11 war on terror, has focused attention on whether violence by and against terrorists can be classified as armed conflict and regulated by IHL or not. Article 2 (2) of the second Additional Protocol to the Geneva Conventions (AP II) 1977 negatively defines a non-international armed conflict by excluding violence of insufficient intensity. To determine the existence of a NIAC, the sources of law include treaties and customary IHL. Despite the clear non exhaustive list of indicators provided by the ICC Appeal Chamber, difficulties abound in the classification of terrorism under NIAC. The situation is not helped by the fact that terrorism acts often possess characteristic that make the evidence available obscure. The term terrorism does not have any single generally acceptable definition. It has many meanings like most of the scholars say that terrorism means human impose disasters.<sup>3</sup> According to Czinkota (2005), he said terrorism is also known as the systematic threat and a way to give the political message through the fear.<sup>4</sup> However, for our present purpose, terrorism is seem as a violent act committed by people who want to get attention for their unholy or holy cause. The act of violent may include but not limited to deliberate creation and exploitation of fear, the attack upon a person's life, Kidnapping, Banditry, Robbery, as well as the destruction of public facilities or private properties in a manner likely to endanger human life or threat to National security, freedom national values of Nigerian. The goal of terrorists is to wage an extended campaign through asymmetric warfare by causing substantial, physical and economic damage that would force government to loss public trust and submit to their demands.<sup>5</sup>

### **International Armed Conflicts**

In principle, terrorist groups may be involved in various types of international and non-international armed under IHL. An international armed conflict foremost exists under IHL where there is military violence between two states, as provided by common article 2 of the four Geneva Conventions 1949. Descriptive mention of state terrorism in this context add just little to the legal classification. What matters is that a state engages in armed violence against another. Where force is applied by conventional armed forces. The means and methods used are regulated by IHL rules on the conduct of hostilities and.

An international armed conflict also exist where a state deploys irregular forces against another state, as provided under article 4 (2) of the 1949 Third Geneva Convention.<sup>6</sup> The provision non-exhaustively mentions 'militias', 'volunteer corps' and 'organized resistance movements', but the principle equally covers other armed groups however described whether as paramilitaries, private military companies, guerrillas, insurgents, terrorists or something else). The description of such group is largely immaterial. Legally what is decisive is whether these are forces belonging to a state under article 4 (2), meaning that

<sup>3</sup>< <https://www.journals.sagepub.com/doi/pdf>> accessed 23 August 2019.

<sup>4</sup> Ibid.

<sup>5</sup> Barde, J. and Yinang, Y. 'The Economic and Psychological Consequences of Terrorism in Nigeria' (2015) (10) (1) UJIL; 76

<sup>6</sup> Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) adopted 12 August 1949

the state exercise ‘overall control over them’<sup>7</sup> (but without requiring a higher degree of effective control over their operations).<sup>8</sup> The provision expressly applies to forces operating in or outside their own territory, including occupied territory. While autonomous terrorist groups such as Al Qaeda and Boko Haram do not belong to any state, it is conceivable for a terrorist group to be sufficiently connected to and commanded by state authorities in a given situation.

Furthermore, such forces must comply with four minimum conditions of combatancy under the same provision, namely, that they are under responsible command, display a fixed distinctive sign recognizable at a distance, carry arms openly, and conduct their operations in accordance with IHL. Even where a terrorist group belongs to a state, most will fail to satisfy all these cumulative conditions, whether because their operations by nature do not respect IHL norms of distinction or proportionality, or because they do not comply with the procedural fair play requirement of showing themselves to the adversary as fighters (instead, mingling with civilians or committing criminal perfidious attacks). A harder case is whether an armed group sometimes respects IHL and sometimes violates it, making it difficult to determine whether the group as a whole should not be recognised.

An international armed conflict may also exist where civilians spontaneously resist the invading force of a foreign state (a *levee en masse*), a situation which may trigger accusations of terrorist conduct. Another situation is where a state occupies another state’s territory without initially meeting armed resistance, whether from military or irregular forces of the occupied state or a *levee en masse*. Subsequent, terrorist violence by civilian resistance forces of occupied territory may still be classified as part of the international armed conflict brought about by occupation.

Similarly, there may be an international armed conflict involving civilian resistance forces which succeed any national armed forces that resisted an invading military but dissolved upon the establishment of the occupation. The Israel’s conflict against Palestinian terrorist organisations is one of such international conflict,<sup>9</sup> albeit with *sui generis* characteristics. A distinction should be drawn between non-state groups comprised of inhabitants of occupied territory and foreign terrorist groups which fight an occupying power, only the latter may be characterised as part of an international armed conflict, while the former may form part of a separate non-international armed conflict.

The fourth consideration is the armed conflict situation potentially involving terrorist groups where a national liberation movement is recognised under Article 1 (4) of Additional Protocol to the Geneva Convention of 1977.<sup>10</sup> The effect of this provision is to transform what might otherwise be classified as a non-international armed conflict into an international one. This is because, self-determination struggles are unlike ordinary civil wars between a people and its own government, but are instead assimilable to an international armed conflict between two states. While Protocol I dispenses with the earlier legal fiction, states which are not parties to it such as Israel, occupying Palestine, and Morocco, occupying Western

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<sup>7</sup> Tadic’s case (Appeal Judgment) ICTY Case No. IT-94-1-A 15 July 1999. The standard was implicitly endorsed by the International Court of Justice in the *Bosnian Genocide’s* case. And the application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) [2007] ICJ Rep 43 404-405.

<sup>8</sup> As is the different legal standard for state responsibility: *Military and Paramilitary Activities in and against Nicaragua* 9 *Nicaragua v United States of America* (Merits) 1986 ICJ Rep 14

<sup>9</sup> *Public Committee against Torture in Israel v Government of Israel* (Targeted Killings case) Israel Supreme Court HCI 769/02 11 December 2005

<sup>10</sup> 1977 Additional Protocol to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts Protocol I adopted 8 June 1977.

Sahara remain free to treat liberation fighters as domestic rebels, including an can so criminalised them as terrorist under domestic law.

A minimum threshold of intensity is required to establish a distinction between non-international armed conflict and lesser violence under both common article 3 of the four Geneva Conventions 1949 and article 1 (2) of the Additional Protocol II of 1977.<sup>11</sup> Article 1 (2) of Protocol II expressly excludes situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature. The same exclusion is understood to apply to common article 3 of the Geneva Conventions.<sup>12</sup> Thus, terrorist acts which are isolated, sporadic, low-level, or in the nature of ordinary crime, and which do not provoke intense and sustained military response by the victim state, will not cross the threshold of a non-international armed conflict. However, this does not mean that terrorist violence cannot trigger or be part of a no-international armed conflict.

In the case of Tadic, supra, the Appeal Chamber interpreted the legal norms in Common Article 3 as reflective of customary IHL,<sup>13</sup> The Chamber interpreted Non-international Armed conflict as a situation of protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.<sup>14</sup> This formulation has a two-prolonged test of thresholds as to; first, the intensity of violence and secondly, the degree of organisational structure of the non-state armed group.<sup>15</sup>

#### a. Intensity of Violence

In determining the intensity of violence, the International Criminal Tribunal for Yugoslavia has laid down numerous factors, particularly in the case of Prosecutor v Ramush Haradinaj, concerning the conflict between the Federal Republic of Yugoslavia and Kosovo Liberation Army, the Trial Chamber took into consideration *inter alia* the number, protraction, and intensity of individual confrontation, including the types of weapons and the military equipment used; the number of persons and types of forces partaking in the fighting; and the number of casualties.<sup>16</sup> It is worthy to note that terrorist acts may also be factored in this intensity threshold, which will be examined subsequently.

This indicative factors are nonetheless non-exhaustive, as one still needs to proceed to assess the existence of a Non-international Armed Conflict by reference to the overall context.<sup>17</sup> It is an objective determination without the need to resort to State's declaration.<sup>18</sup>

<sup>11</sup> Ibid.

<sup>12</sup> ICRC Commentary on Protocol II (1978) Article 1 (4).

<sup>13</sup> The Chamber stated that the International Tribunal is not called upon to apply conventional law but instead is mandated to apply customary international law.

<sup>14</sup> Supra Prosecutor v Dusko Tadic

<sup>15</sup> This is the common view of the ICRC, in its opinion paper titled 'Armed Conflict' Defined in IHL? (March 2008) 4 where it stated that the group only needs to control the portion of territory sufficient to enable them carrying out sustained and concerted military operations.

<sup>16</sup> Trial Chamber Judgment ICTY-04-84—T [3 April 2008] 49

<sup>17</sup> Prosecutor v Fatmir Limaj Trial Chamber Judgment ICTY-03-66-T [30 November 2005] 86

<sup>18</sup> Under the same rationale, the fact that a State announces public emergency derogation from human rights treaties is irrelevant.

## b. Degree of Organisational Structure of Non-State Armed Groups

The ICTY has also set out useful indicators to determine whether a certain non-State armed group is sufficiently organised to be considered a party to an armed conflict. These include, inter alia, the existence of a command structure within the group; its control over a certain territory; its ability to gain access to weapons, other military equipment, recruits and military training; and its ability to plan, coordinate and carry out military operations, including troop movements and logistics.<sup>19</sup> As far as terrorism is concerned, the motivation of or the purpose advanced by the group is irrelevant.<sup>20</sup>

In the situation of Syria, the main opposition armed group, the Free Syrian Army, is composed of insurgents who have carried out coordinated attacks. They were capable of controlling certain parts of the territory, including northern Syrian and towns around Damascus.<sup>21</sup> An opposition example are the Al-Qaeda, and Boko Haram which does not control a certain territory and operates across borders.

## Challenges of Establishing the Existence of Non-International Armed Conflicts

Under international law, the mere fact that an international border has been crossed does not absolved the parties of their IHL obligations, much less permitting the deprivation of civilian protection.<sup>22</sup> In a situation where the non-state armed group from one state crosses the border to the territory of another state, there are two possibilities. First, if the sporadic violence within the former is in itself insufficient to trigger the application of IHL, domestic legal order would fill the regulatory gap.<sup>23</sup> Secondly, in case a sufficient nexus can be established between the military operations in the later state and the ongoing Non-international armed conflict in the later state, those operations can nonetheless be attributed to become part of the overall armed conflict. In the same vein, the ICTY Appeals Chamber has stated that one can merge the cross-border violence if it is closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.<sup>24</sup> The Taliban fighting that spread from Afghanistan onto the Pakistani territory is a case study.

## Classification of the Status of Terrorism in Armed Conflict

There is no special legal status for terrorists nor any lacuna excluding them in IHL. In international conflict, a person is generally either a combatant or a civilian. Those described as terrorists may be combatants if they meet the conditions of irregular force under Article 4 (2) of the Third Geneva Convention. In non-international conflict, there is no combatant status, unless a state chooses to recognise non-state combatancy as a matter of policy, and subject to IHL's encouragement to states to confer amnesties as the end of a conflict.<sup>25</sup> States are reluctant to legally recognise non-state combatant status for fear of legitimising such groups. However, the failure to accord combatant privileges reduces incentives for terrorist groups to comply with IHL. Some have accordingly

<sup>19</sup> ICTY decisions in *The Prosecutor v Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj* (Trial Chamber Judgment) ICTY-04-84-T [3 April 2008] 60

<sup>20</sup> Akande, D. 'Classification of Armed Conflicts: Relevant Legal Concept' (Oxford University Press 2012) 52

<sup>21</sup> Grignon, J. 'The beginning of application of international humanitarian law: A discussion of a few challenges'[2014](96); IRRC 893

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

<sup>23</sup> This is the position of the ICC in the case of *Milanovic and Hadzi-Vidanovic*

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

<sup>25</sup> Article 6 (5) Additional Protocol II

argued for the extension of combatant status to certain non-state groups,<sup>26</sup> though certain terrorist actors are unlikely to commit to respect IHL's basic norms.

If a person is not a combatant, by default he or she is civilian. A civilian may, of course, choose to take part in the conflict, whether by committing direct acts of violence or episode member of such groups, or an armed group. Such person may also be a constant or episodic member of such groups, or commit sporadic or isolated hostile acts loosely affiliated with the cause of the group. The treatment of such person is governed less by category-based statuses and more by functional rules of IHL, particularly in the key areas of targeting and detention. By and large, with distance from 9/11, the challenges of terrorism have not led to any fundamental revision of the rules through interpretation, state practice, and policy-oriented consensus building.

### **Detention of Terrorists in Armed Conflict**

In international armed conflict, IHL permits states to administratively detain civilians where absolutely necessary for security or for imperative reasons of security.<sup>27</sup>

In law, detention must be subject to a regular procedure<sup>28</sup> and periodic independent review at least six monthly<sup>29</sup> and satisfy minimum conditions of humane treatment.<sup>30</sup> There are also constrains on transferring inhabitants of occupied territory out of such territory, although the same restrictions do not apply to nationals of third neutral states.

Whereas in non-international armed conflict,<sup>31</sup> this is because, the Common Article 3 does not expressly authorise or stipulate the grounds and the procedures of detention. As in international conflict, persons may be detained for a range of security reasons: as members of armed groups performing a continuous combat function; for past participation in hostilities; on suspicion of an international or national criminal offences; or for other dangerous activities including for direct participation in hostilities, such as by providing various kinds of non-combat support for terrorist operations or organisations.

International human rights law applies concurrently in armed conflict<sup>32</sup> as modified by any lawful derogation in a declared public emergency, including to detention,<sup>33</sup> and even to extraterritorial conduct.<sup>34</sup> Human right law requires that detention must be prospectively authorised by law; based on sufficiently certain and precise legal criteria; necessary for security reasons including that less invasive means would not be effective to the legitimate security objective; non-discriminatory; and subject to independent judicial review. In transnational conflicts, national law must be given extraterritorial effect to ensure the legitimate

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<sup>26</sup> Crawford, Emily. *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (OUP Publishing 2010) 153-169

<sup>27</sup> Article 42 and 78 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War 1949

<sup>28</sup> Article 78 Fourth Geneva Convention

<sup>29</sup> Article 43 and 78 Fourth Geneva Convention

<sup>30</sup> Article 27 Fourth Geneva Convention, Article 75 of Additional Protocol I

<sup>31</sup> Goodman, Ryan 'The Detention of Civilians in Armed Conflict' [2009] (103) *American Journal of International Law*;48

<sup>32</sup> *Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Report 239. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 2004

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

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

detention. Notwithstanding these guarantees, administrative security detention may endure for a protracted period where a person remains dangerous and the conflict remains on foot; there is no restrict obligation to charge or release.

## International Legal Framework for Criminal Liabilities for Terrorism in Armed Conflict

### a. Substantive Provisions

Terrorist acts are mostly criminalized by various war crimes<sup>35</sup> irrespective of the type of armed conflict. This is because, IHL prohibits and criminalizes deliberate attacks on civilians or civilian objects, including by indiscriminate attacks; reprisals; the use of prohibited weapons including incendiaries; attacks on cultural property, objects indispensable to civilian survival, or works containing dangerous forces; or through illegal detention, torture or inhuman treatment. In addition, the legal obligation to prosecute for crimes against humanity also applies concurrently in armed conflict to protect civilian populations against widespread or systematic attack.

In addition to such protections for civilians, IHL specially prohibits terrorism. Article 33 (1) of the 1949 Fourth Geneva Convention prohibits collective penalties and likewise all measures of intimidation or of terrorism against protected persons in the hands of Party as in detention or occupied territory to an international armed conflict.<sup>36</sup> The provision was a response to the mass intimidation of civilians in occupied territory in the Second World War.

All civilians in international conflict including those not in the hands of a party are protected by Article 51 (2) of Protocol I of 1977, which prohibits acts or threats of violence the primary purpose of which is to spread terror among the civilian population. The same acts are prohibited in non-international conflict by Article 13 (2) of Protocol II. Both provisions are part of wider prohibitions on attacking civilians.<sup>37</sup> Article 4(2)(d) of Protocol II further prohibits acts of terrorism in non-international conflicts.

In the Galic's case, the International Criminal Tribunal for the former Yugoslavia found that a violation of Article 51 (2) of Protocol I attracts individual criminal responsibility,<sup>38</sup> despite the article not being listed as a grave breach provision. The war crime of spreading terror against a civilian population was committed by a campaign of sniping and shelling of civilians in the besieged city of Sarajevo, by deliberately targeting the routines of everyday life and thereby intending to put civilians in extreme fear.<sup>39</sup> The crime requires that the perpetrator possess the primary purpose to spread terror, but the infliction of actual terror is not required. While all civilians caught in conflict are likely to be incidentally afraid, the prohibition on spreading terror targets the special intention (*dolus specialis*) to spread terror.

The war crime of terror is not, however, the same as certain in peace-time legal conceptions of terrorism, namely violence committed to compel a government to do or refrain from doing something, or do advance a political, religious or ideological cause.<sup>40</sup> The meaning of terrorism in IHL is thus, more limited than many definition of terrorism outside of armed conflict.

<sup>35</sup> Gasser, Hans 'Acts of Terror: Terrorism and international Humanitarian Law' (2002) (84) International Review of the Red Cross; 547

<sup>36</sup> Article 4 Fourth Geneva Convention.

<sup>37</sup> Article 51(2) Additional Protocol I (1977) and Article 13(2) Additional Protocol II

<sup>38</sup> Prosecutor v Galic (ICTY Case No.IT-98-29-A 30 November 2006. Pp. 87-90

<sup>39</sup> Galic supra

<sup>40</sup> Saul, Ben Defining Terrorism in International Law (OUP Publishing 2006) 2-4

This is because, certain terrorism offences within the jurisdiction of post-9/11 US military commissions were not IHL offences as the US claimed. A crime of terrorism was defined in 2003 military instruction as violence' intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation and coercion'.<sup>41</sup>

The first two Guantanamo Bay detainees charged in 2004 were accused of this offence,<sup>42</sup> which seems influenced by the definition in the peace-time 1999 Terrorist Financing Convention.<sup>43</sup>

This offence was abandoned when the executive military commissions were reconstituted by the US Congress after the US Supreme Court's 2006 decision in *Hamdan v Rumsfeld*. However, the 2006 military commission were given jurisdiction over a new offence of providing material support for terrorism,<sup>44</sup> ostensibly as a pre-existing war crime under international law. In reality, this offence was derived from earlier US domestic law,<sup>45</sup> with certain jurisdictional differences. The new offence was amongst the principal charges brought against the few convicted in the military commissions after 2006.<sup>46</sup>

The issue was that such offence was unknown to international law at the time of the alleged conduct, since it imposed liabilities beyond the limited circumstances recognised by the ICTY in *Galic's* case and more likely peacetime offences. In *Hamdan v United States* in 2012, a US civilian appeal court found that the offence was not a war crime under international law at the time of its commission, and that the US law did not authorise retrospective prosecution of offences which were not war crimes at the time.<sup>47</sup> In the same vein, an Australian citizen, David Hicks, has also argued that his conviction for material support is unlawfully retrospective, contrary to the principle of legality under Article 15 of the International Covenant on Civil and Political Rights.<sup>48</sup> (More particularly, material support offences in US domestic civilian law have also adversely affected the ability of humanitarian organisations to work with non-state armed groups defined by the US as terrorist,<sup>49</sup>

Furthermore, in addition to IHL offences, domestic criminal law may apply to certain terrorist acts in armed conflict. In international conflicts, the criminal law of the occupied territory will still apply to civilians including those participating in hostilities, subject to any necessary modifications to ensure the security of the occupying power.<sup>50</sup> In non-international conflict, state party's domestic criminal law remains applicable, such that non-state actors may find themselves criminalized for terrorism, rebellion, revolution, treason, treachery, sedition, or other extant national security

<sup>41</sup> US Department of Defence, Military Commission Instruction No. 2 Crimes and Elements for Trials by Military Commission (30 April 2003) clause 18

<sup>42</sup> Lewis, N. 'US Charges Two at Guantanamo with Conspiracy' *The New York Times* (25 February 2004)

<sup>43</sup> Article 2 (1) (b) International Convention for the Suppression of the Financing of Terrorism adopted 9 December 1999

<sup>44</sup> S 950 (25) Military Commission Act 2006 USA

<sup>45</sup> 18 US Code ss2339A and 2339B

<sup>46</sup> Including an Australian (David Hicks), a Canadian (Omar Khadr), two Sudanese (Ibrahim Ahmed Mahmoud al Qosi and Noor Uthman Muhammed) and two Yemenis (Salim Ahmed Hamdan and Ali Hamza Ahmed Suleiman Al Bahlul).

<sup>47</sup> *Hamdan v United States* (US Court of Appeal DC Circuit) 16 October 2012

<sup>48</sup> *Hicks v Australia*

<sup>49</sup> Article 64 Hague Regulations Concerning the Laws and Customs of War as annexed to the Convention IV respecting the Laws and Customs of War on Land adopted 1 October 1907

<sup>50</sup> Article 64 Hague Regulations Concerning the Laws and Customs of War



offences. It is pertinent to note that IHL encourages states to confer amnesties at the end of a conflict for participation in hostilities but not for war crimes and the like.

In transitional non-international conflicts, two domestic legal systems may potentially apply: that of the non-belligerent territorial state which may not be able to practically enforce it, as well as the state whose forces are fighting extraterritorially. In the latter case, the state's domestic criminal law will only lawfully apply if two conditions are met. First, it must have been given prospective extraterritorial effect. Secondly, the offences must be defined with sufficient precision so as to give fair advance notice of the scope of the criminal liability in question. Both conditions are required so as to comply with the international human rights principles of legality and non-retrospective punishment. Thirdly, the offences must come within the competence of the state to criminalize conduct extraterritorially, namely by reference to the international principles of prescriptive criminal jurisdiction; particularly important may be the protective, nationality, and passive personality jurisdiction.

### **b. Prosecution of Terrorists**

The Terrorism Prevention Act, 2011 amended as the Terrorism Prevention (Amendment) Act 2013, is the legal framework that proscribed, prohibits and provides for the punishment of acts, conducts or omissions which may amount to terrorism in Nigeria. The Act was established in 2011 when the threat to security in Nigeria was on the increase unabated and every effort of the security agencies was not yielding the desired result. The purpose of the Act as provided in the preamble of the Act is that: "An Act to make provisions for and about offences relating to conduct carried out or purposes connected with Terrorism, 2011."<sup>51</sup> The intent and purpose of the Act is to provide for measures for the prevention, prohibition and combating of acts of terrorism, the financing of terrorism in Nigeria and for effective implementation of the convention on the suppression of the financing of terrorism. This Act also seeks to prescribe penalties for violating any of its provisions.

Even though terrorism seems noticeable and its act being felt seriously in Nigeria towards the end of 2010, since September 11 2001, when the terrorists hijacked moving plane and bombed the World Trade Centre in the USA, which virtually affected business activities and the economy of the community of nations. The International Community became more alert of the terrorists activities. Most countries of the World became more agitated on the terrorist activities. Hence, they advocated for a local legislation to criminalize activities that are of terrorist tendencies to wit: "There is a need for municipal legislation against terrorism in Nigeria. Thus, the initiative of the executive and the national Assembly on Anti-Terrorism Bill is highly commendable."<sup>52</sup> Though the decision of the Federal Government of Nigeria to promulgate the Act in 2011 seems to have been belated, it is better late than never. Therefore, the promulgation of the Act was overdue. By the provision of the Act, the government was already seeking for how to combat the acts of terrorism. This prevention also extends to the financing of the acts of terrorism in Nigeria. In order to achieve this objective by the Federal Government of Nigeria, the Act made some provisions which are wide enough to curb every envisaged field of operation by the terrorists, even though much is still desired. However, it is a well known fact that laws in the statute book if not enforceable is like a toothless bulldog that cannot only bark but also cannot bite. Therefore the question begging for answer is has the Terrorism Act 2011 been able to suppress the terrorist acts in Nigeria. In other words, what impact has the Act made on Terrorism?

<sup>51</sup> The preamble to the Terrorism Prevention Act.

<sup>52</sup> Ibid

Some criminal trials since the 9/11 have not conformed to the minimum fair trial guarantees of IHL and or international human rights law. Even before 9/11, military trials of terrorists, such as by faceless tribunals in Latin America, raised serious human rights problems. There are extensive guarantees of a fair trial in international conflicts, consolidated in Article 75 of Protocol I, and which approximate the human rights guarantees in Article 14 of the ICCPR.

In non-international conflicts, common Article 3 of the Geneva Conventions provides for a fair criminal trial by a regular court, affording all the judicial guarantees which are recognised as indispensable by civilized peoples.

In the US, there were particular concerns about the admission of evidence obtained by coercion or hearsay evidence, restrictions on access to evidence and lawyers, executive interference in trials, and the lack of structural independence and impartiality from the political branch. While the Military Commissions Act 2006 (US) made some improvements, the new trials remained dogged by procedural irregularities.<sup>53</sup>

## Conclusion

Certain terrorist acts may be regulated by the rules of international or non-international armed conflict, including where it has a transnational dimension. There is no need for any special status of terrorist in IHL, which would only serve to diminish existing humanitarian protections. Terrorists can be targeted for direct participation in hostilities; administratively detained where they are dangerous; and prosecuted for war crimes. Human rights law applies alongside the *lex specialis* of IHL to supplement its rules in certain areas, particularly as regards detention in non-international conflict.

There have been series of development in the counter terrorism legal framework since the 9/11 episode, which has raised a potential serious conflicts with IHL as to the status and definition of a terrorist. In general, the international treaties adopted prior to 9/11 tended to avoid any collision with the norms, by carving out from their scope hostile acts committed by parties to an armed conflict, thus leaving such acts to be regulated by IHL.

If non-state groups find themselves branded and delegitimized internationally as terrorist criminals, any incentive for them to comply with IHL will be lost. The consequence may be to undermine the effectiveness of IHL and its humanitarian process.

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<sup>53</sup> Faruk, A 'Terrorism and International Humanitarian Law (University of Sydney 2019) 15

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