

**Applicability of International Humanitarian and Human Rights
Law to Hybrid Irregular Forces: A Case Study of the Civilian
Joint Task Force in Nigeria's Counterinsurgency Against Boko
Haram**

**A thesis submitted to the University of Hertfordshire in partial
fulfilment of the requirements of the degree of Doctor of
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Olusola Babatunde Adegbite

Student ID: 19034938

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Abstract

In contemporary counterinsurgency warfare, non-state entities such as Civilian Defence Forces (CDFs) are increasingly operating as hybrid irregular forces i.e., as both combat forces as well as providers of local governance functions. Frequently, these groups act in manners in which they potentially violate international law norms. It is important to determine whether and under what basis States can be held responsible for such conducts. International law provides that state responsibility for the conduct of non-state entities only arises in some instances, which are primarily contained in Articles 4 – 11 of the Articles on State Responsibility 2001. The conditions created under these articles relate to when such non-state entities act as organs of the state, are empowered to perform governmental functions based on an enabling internal law and generally operate under the direction and control of the State. These rules have been affirmed in a variety of tests developed by the International Court of Justice as well as other international criminal tribunals. These rules and the tests developed by the courts are rather strict/restrictive and do not cover emerging non-state entities such as CDFs operating as hybrid irregular forces.

This thesis presents the first comprehensive analysis on the issue of state responsibility for the conduct of hybrid irregular forces. It conducts this analysis adopting as case study, the Civilian Joint Task Force (CJTF), a CDF that has been operating in this manner in Nigeria's counterinsurgency warfare against Boko Haram. The thesis examines the question of whether and on what basis can the Nigerian State be held responsible for the conduct of this group. It addresses this question from a broader international law perspective, specifically International Humanitarian Law (IHL), International Human Rights Law (IHRL), and the law of state responsibility. It argues that there is a dissonance between the rules of attribution under the law of state responsibility framework and States' use of CDFs operating as hybrid irregular forces. It therefore recommends an expansive approach to states responsibility in this context, by canvassing a broadening of the standard of empowerment under Article 7 of the Articles on State Responsibility. In particular, it canvasses a broadening of the empowerment framework, so that in addition to the existing framework of 'empowerment through an internal law', the rules be expanded to include empowerment through factual circumstances i.e., the existence of an informal link/working relationship between the State and the hybrid irregular force. It is hoped that the outcome of this thesis will inspire a broadening of the current framework, as this holds benefits, chief among which are the possibility of more States been held responsible in an increased number of cases and the potential of compelling States to developed domestic mechanisms to regulate their engagement of these groups.

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Dedication

I return all the praise to God Almighty through My Lord Jesus Christ for the inspiration and wisdom to prepare this Thesis. He alone takes all the glory.

Declaration

I declare that this research is my own work and that the sources of all the materials used have been appropriately acknowledged.

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Table of Abbreviations

ACHPR – African Charter on Human and Peoples Rights

AFRC – Armed Forces Revolutionary Council

ANSAs – Armed Non-State Actors

API – Additional Protocol I

APII – Additional Protocol II
 AU – African Union
 BITs – Bilateral Treaties
 BOYES – Borno Youth Empowerment Scheme
 CAT – Convention on Torture
 CDFs – Civilian Defence Forces
 CEDAW – Convention on the Elimination of All Forms of Discrimination Against Women
 CERD – Convention on Elimination of All Forms of Racial Discrimination
 CJTF – Civilian Joint Task Force
 CIHL – Customary International Humanitarian Law
 CRC – Convention on Rights of the Child
 CRPD – Convention on the Rights of Persons with Disabilities
 CPPED - Convention for the Protection of All Persons from Enforced Disappearance
 CPMWMF - Convention for the Protection of All Migrant Workers and Members of their Families
 DSS – Department of State Service
 EPLF – Eritrean People’s Liberation Front
 FCT – Federal Capital Territory
 FRY – Federal Republic of Yugoslavia
 FTO – Foreign Terrorist Organisation
 HRC – Human Rights Committee
 HRW – Human Rights Watch
 IAC – International Armed Conflict
 ICC – International Criminal Court
 ICCPR – International Covenant on Civil and Political Rights
 ICESCR – International Covenant on Economic, Social and Cultural Rights
 ICG - International Crisis Group
 ICJ – International Court of Justice
 ICRC – International Committee of the Red Cross
 ICSID – International Centre for Settlement of Investment Disputes
 ICTs – International Criminal Tribunals
 ICTY – International Criminal Tribunal for Yugoslavia

IDP – Internally Displaced Persons
IHL – International Humanitarian Law
IHL – International Human Rights Law
ILC - International Law Commission
ISDS – Investor State Dispute Resolution
ISIS – Islamic State of Iraq and Syria
ISWA – Islamic State West Africa
JTF – Joint Task Force
MJTF – Multinational Joint Task Force
NPFL - National Patriotic Front of Liberia
NATO – North Atlantic Treaty Organisation
NGOs - Non-Governmental Organisations
NIAC - Non-International Armed Conflict
NYSC – National Youth Service Corps
PCIJ – Permanent Court of International Justice
PGMs – Pro-Government Militias
PhD – Doctor of Philosophy
PMF – Popular Mobilisation Front
RUF - Revolutionary United Front
SGBV – Sexual and Gender Based Violence
TPLF – Tigray Peoples Liberation Front
UDHR – Universal Declaration of Human Rights
UN – United Nations
UNGA – United Nations General Assembly
UNHCR – United Nations High Commissioner for Human Rights
UNSC – United Nations Security Council
US – United States
VDP – Volunteers for the Defence of the Homeland
VRS – Vojska Republike Srpske (Army of the Republika Srpska)
WTO – World Trade Organisation

CHAPTER ONE

BACKGROUND TO THE STUDY

1.0. Introduction

The purpose of this thesis is to identify and examine the specific standards regarding the responsibility of States for internationally wrongful acts, with a particular focus on the conduct of irregular forces operating in a hybrid form in a counterinsurgency. With increasing ubiquity, irregular forces continue to exercise elements of governmental authority, such as the performance of local governance functions, alongside their ordinary combat roles. Much of this flows from the fact that in contemporary times, States have found it more expedient to privatise otherwise traditional functions, engaging non-state entities such as armed groups, terrorist organisations, multinational corporations, and Non-Governmental Organisations (NGOs) in public-private collaborations.¹ The increasing proliferation of armed conflicts and the realisation by States of the utility of forces outside their conventional Armed Forces have therefore turned irregular forces into dominant players within this ecosystem. Historically, these groups operated on the fringes of counterinsurgencies. This has, however, changed with time. Today, the growing influence of Civilian Defence Forces (CDFs), a subset of the broader irregular forces, continues to transform how counterinsurgency warfare is conducted. Whereas CDFs are generally difficult to define, they have been described as:

*Members of civil self-defence groups, community defence forces, and civil militias which are formed to protect their communities from non-state or state actors or to combat insurgents.*²

This term is used interchangeably with other related concepts such as Pro-Government Militias (PGMs) and Paramilitary Groups,³ such that in several literature on states' engagement of such groups, there is considerable overlap in the terminology. Nonetheless, what these terms have in common is the fact that groups of this nature consist mostly of pro-state actors, employed outside the regular Armed Forces of a State.⁴ They are informal armed groups that do not form a part of the regular Military i.e., the Army, Navy, and Air Force, and are typically drawn from the civilian population.⁵ CDFs are a sedentary, low-cost, and

¹ Daniel Bodansky and John R. Crook, 'Symposium on The ILC's State Responsibility Articles: Introduction and Overview' (2005) 96 *American Journal of International Law*, 73 – 791 at 782.

² ICG, 'Double-Edged Sword: Vigilantes in African Counterinsurgencies' (2017) *African Report No. 251 International Crisis Group*, 1 – 39 at 1.

³ Yelena Biberman, 'Self Defence Militias, Death Squads and State Outsourcing of Violence in India and Turkey' (2018) 41 (5) *Journal of Strategic Studies*, 751 – 781 at 754.

⁴ *ibid.*

⁵ Phillip Nelson and Marina G. Petrova, 'The Other Dark Side of Pro-Government Militias: Deterring Nonviolent Action and Spoiling Prospects for Peace During Civil Wars' (2023) *Studies in Conflict & Terrorism*, 1 – 19 at 2.

defensive form of PGM and, in contemporary times, have become an important part of armed conflicts.⁶ From Nigeria to Syria, Afghanistan, Iraq, Libya, Yemen, and even Ukraine, the operations of these groups have become prevalent. In a bid to achieve success in counterinsurgency warfare, States are increasingly turning to these groups, the result being that unprecedented powers are ceded to them.⁷ Some of the benefits derived by States when they use CDFs include the fact that their engagement increases the number of available counterinsurgent forces to civilians; enhances the quantity and quality of intelligence gathering through their knowledge of the local environment; encourages the defection of insurgents; and generally help commanders of counterinsurgent units to support and protect the local community.⁸ Through the use of these groups, States allow for a reduction of their monopoly over the use of violence within their territory.⁹ Notwithstanding that their use can be counterproductive, States increasingly turn to these groups, with some even investing in them.¹⁰ Additional motivation for using such groups extends to the fact that their use provides a cover for States looking to evade international responsibility for abusive behaviour that may be committed against civilians.¹¹ In short, it gives States plausible deniability for their conduct while retaining and enjoying the gains that come from using them.

However, the engagement of CDFs by States has become increasingly problematic. States' use of these unofficial groups presents significant risks to the civilian population as their activities often result in varying levels of human rights violations, including extrajudicial killings, torture, and enforced disappearances.¹² While serving State's interest, they mostly operate outside recognisable legal frameworks thereby posing concrete problems for governance, the rule of law, and human security.¹³ Whereas States mostly engage these groups to make up for manpower shortages in the area of combat operations as well as local intelligence gathering, they end up acting in other ways outside their regular combat functions. In the course of this hybrid operation, they engender egregious violations of human

⁶ Daniel O. Shaw and Huseyn Aliyev, 'The Frontlines Have Shifted Explaining the Persistence of Pro-State Militias After Civil Wars' (2021) *Studies in Conflict & Terrorism*, 1 – 21 at 1.

⁷ As Clegg notes, irregular forces support a broader counterinsurgency strategy by ensuring cooperation between themselves and counterinsurgent forces. See W. Clegg, 'Irregular Forces in Counterinsurgency Warfare' (2009) 5 (3) *Security Challenges*, 1 – 25 at 2.

⁸ *ibid.*

⁹ Bailee Donahue, 'Outsourcing Counterinsurgency: State Investment in Pro-Government Militia as a Response to Rebel Strength' Master of Arts (MA) Thesis, Department of Political Science, University of North Carolina-Chapel Hill, 1 – 29 at 1.

¹⁰ *ibid.*

¹¹ *ibid* at 2, 3.

¹² Lucie Konecna, 'Recent Trends in Pro-Government Militias in Africa: A Use Tool or a Threat?' (2024) 12 (2) *Asian Journal of Peacebuilding*, 257 – 278 at 261, 262.

¹³ *ibid.*

rights as well as violations of other norms of international law, such as extrajudicial killings, torture, arbitrary detention, disappearances, etc. As would be expected, members of vulnerable groups such as women, children, and Persons with Disabilities (PWDs) are often disproportionately impacted by such violations, further raising concerns about issues of development.

This presents problems to the traditional framework of international law, which remains focused on States as the main actors in counterinsurgency warfare. More significantly, it raises questions on whether and to what can the conduct of such CDFs, committed in the context of their engagement by the State, be attributed to the State. Addressing this question is critical, given that under the existing law of state responsibility framework, a State is only responsible for conducts that are attributable to it. Where the conduct is not attributable to the State, it is considered private conduct, the implication being that, whereas the State may factually have been acting through such a group, it can potentially escape responsibility. Broadly speaking, there is increasing scholarly focus on issues of state responsibility for the conduct of non-state entities; however, the more specific question of how and whether a State can be held responsible for the conduct of a CDF operating in hybrid form in a counterinsurgency remains for the most part neglected and understudied. Indeed, a comprehensive examination of the status of such groups, as well as the international legal framework applicable to them, remains missing. This thesis aims to fill this gap by examining the international legal framework governing the attribution of conduct of irregular forces to States, particularly when such groups operate in a hybrid form in a counterinsurgency during which they generate human rights violations and violations of other norms of international law. It is, however, important first to understand how a CDF can operate in a hybrid form, outside the regular combat function for which it was engaged by the State.

1.1. States' engagement of CDFs and their Evolving Hybrid Operation.

In recent years, States' engagement of CDFs for the primary purpose of acting in combat roles has been an important counterinsurgency strategy. In more than half of the civil wars since 1989, States have enjoyed support from militias in prosecuting their counterinsurgency operations.¹⁴ Hundreds of CDFs have operated and/or are currently operating as combat forces in counterinsurgencies alongside State Armed forces in different parts of the world. Sabine Carey, Neil Mitchell, and Katrin Paula in their *Pro-Government Militia Guidebook*,

¹⁴ Jessica A. Stanton, 'Regulating Militias: Governments, Militias, and Civilian Targeting in Civil Wars' (2015) 59 (5) *Journal of Conflict Resolution*, 899 – 923 at 899.

provide an extensive list of groups that have operated in this manner in the last forty years.¹⁵ A few notable examples will be highlighted in this section of the thesis to give context to the discussion. For instance, in Burundi, the Guardians of Peace were created by the State to act in self-defence against rebels in several parts of the country.¹⁶ In the same vein, in Ethiopia, the *Weyane* or *TPLF* Militia was formed to assist in the government's counterinsurgency operation in the Ogaden region of the country, fighting against the ONLF rebels.¹⁷ In Myanmar, the *Pyusawhti* Militia has been operating alongside government troops in counterinsurgency operations, while in Nicaragua, the *Sandinista Popular/Peoples'* Militia was formed in the '80s to fight against the Contra rebels.¹⁸ In Peru, the *Rondas Campesinas* were deployed by the State in counterinsurgency against armed opposition groups such as the Sendero Luminoso.¹⁹ During the Sierra Leone Civil War, a band of traditional hunter militias and civil defence force known as the *Kamajor*, assisted the State as well as the ECOWAS Monitoring Group (ECOMOG) Forces, in counterinsurgency warfare against the Revolutionary United Front (RUF) rebels as well as other forces.²⁰ In Sri Lanka, the Home Guard/Civil Defence Force was deployed by the State to protect villages and civilians from LTTE attacks.²¹ In Sudan, the *Janjaweed* Militia was used by State Authorities to fight against rebels in the Darfur region of the country, while in Uganda, groups such as the *Amuka* and *Arrow* Militias were used to fight alongside State Armed Forces against the Lord's Resistance Army (LRA) insurgents.²² In Ukraine, groups known as the *AZOV* Militia and *Donbas* Battalion are currently in action, supporting the Ukrainian Army in its war against pro-Russian armed rebels in the separatist regions.²³ Since the 1950s, several State-supported armed militias known as the *Alsa Masa* have operated in the Philippines to fight alongside the Philippine Army against communist insurgents known as the News Peoples' Army.²⁴ In Colombia, the United Self Defence Forces of Colombia (AUC) has been active in counterinsurgency against the Revolutionary Armed Forces of Colombia (FARC) and National Liberation Army (ELN) rebels in the country.²⁵ In Somalia, the *Darwish* and other

¹⁵ Sabine Carey, Neil Mitchell, and Katrin Paula, 'Pro-Government Militia Guidebook' <https://militias-guidebook.com/groups/>

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ *ibid.*

²² *ibid.*

²³ *ibid.*

²⁴ Minnie M. Joo and Santiago Sosa, 'Governance Interrupted: Rebel Governance and Pro-Government Militias' (2023) 8 (3) *Journal of Global Security Studies*, 1 – 17 at 2.

²⁵ *ibid.*

local militias have been involved in years of counterinsurgency warfare against Al Shabaab.²⁶ In Sudan and Iraq, the Janjaweed and Sahwa militias were deployed as combat forces against rebel groups.²⁷

The above examples point to the preexisting approach by States of engaging CDFs to perform combat functions in counterinsurgency. However, though CDFs are still engaged by States to perform combat functions in counterinsurgencies, an emerging phenomenon in the activities of such groups is their role as governance actors, in which they replace the State in areas of limited statehood providing local governance functions. Taking advantage of the absence of the State as well as State institutions in territories where the insurgency is rife, these groups take over inherently governmental functions, during which widespread human rights violations, as well as violations of other international law norms, take place. Within this context, they feature as hybrid actors, operating simultaneously in both combat and governance roles.

1.2. The Civilian Joint Task Force (CJTF) as a Hybrid Actor in Nigeria's Counterinsurgency against Boko Haram

Nigeria is a notable example when it comes to this phenomenon of hybrid operation by CDFs. Since 2013, the government has coopted an irregular force by the name Civilian Joint Task Force (CJTF) into its counterinsurgency operations against the insurgent group, Boko Haram. Members of the group are lightly armed, trained, paid, and provided uniforms by the Nigerian State.²⁸ The group in turn operates alongside the Nigerian Armed Forces in military operations, engaging Boko Haram insurgents in combat while also providing much-needed intelligence for the Armed Forces. They also take on other military-related functions such as manning checkpoints, conducting searches, arresting suspected insurgents and their collaborators, etc. The group has been instrumental in combatting the activities of the insurgents as well as recovering territories they once held.²⁹ In a future demobilisation plan, the State has stated its intention to absorb some members of the groups into the regular Armed Forces and others into related security agencies.³⁰

²⁶ Vanda Felbab-Brown, 'The Problem with Militias in Somalia: Almost Everyone Wants Them Despite Their Dangers' in Adam Day (ed.) *Hybrid Conflict, Hybrid Peace: How Militias and Paramilitary Groups Shape Post-Conflict Transitions* (New York: United Nations University, 2020), 1 – 156 at 119.

²⁷ Yaniv Voller, 'Rethinking Armed Groups and Order: Syria and the Rise of Militiocracies' (2022) 98 (3) *International Affairs*, 853 – 871 at 856, 857.

²⁸ Donahue, (n 9) 4.

²⁹ *ibid.*

³⁰ *ibid* at 5.

While the group was coopted by the State to primarily operate alongside the Armed Forces as a combat force, over time it has continued to act in other ways, outside this primary role. In particular, in addition to being a combat force, it has exploited the absence/weakness of State authority due to the outbreak of the insurgency to become a provider of local governance functions in several territories in the northeast, effectively becoming the new face of government in the region. The result is that, as a part of the counterinsurgency, it features as a hybrid actor, operating simultaneously in both combat and governance roles. The CJTF in its hybrid operation exemplifies the characteristics of similar groups who also operate as hybrid actors in counterinsurgency in other countries. In Somalia, the *Darwish* militia operates as a combat force in counterinsurgency against Al Shabaab while also functioning as an extension of the State, performing a variety of functions from revenue generation to protection of elites' interests and governance.³¹ Another example is Burkina Faso, where the *Koglweogo* (Guardians of the Bush) militia has been involved in military operations against Islamic jihadists while also performing local governance functions such as local security and justice delivery.³² Another group operating in this manner is the *Wazalendo* (We Are the True Patriot) militia in the Democratic Republic of Congo (DRC), which has been operating alongside the Congolese Military (FARDC) against the M23 rebels in the North Kivu province of the country while also engaging in governance functions.³³ In Syria, the *Shabiha* (Ghosts) militia was an active operator alongside State Forces in counterinsurgency against the Free Syria Army as well as providing governance functions.³⁴ In Iraq, the *Al-Hashd Al-Shaabi* (Popular Mobilisation Forces) militia, was a key combat force in the country's counterinsurgency against the Islamic State, while at the same time involved in the provision of local governance functions.³⁵ The hybrid operation of the groups identified above supports the conclusion that this is not an isolated issue but an emergent phenomenon.

Like the broader class of irregular forces, the hybrid operation of the CJTF has generated a wave of human rights violations and violations of international law norms. In the last ten years, it has allegedly committed atrocities such as extrajudicial killings, torture, inhuman and degrading treatment, sexual violence, etc. Despite these violations, which are well

³¹ Felbab-Brown (n 26) 126.

³² Sidney Leclercq and Geoffrey Matagne, 'With or Without You: The Governance of (Local) Security and the Koglweogo Movement in Burkina Faso' (2020) 9 (1) *Stability: International Journal of Security & Development*, 1 – 22 at 5, 6.

³³ Paul Nantulya, 'Understanding the Democratic Republic of the Congo's Push for MONUSCO's Departure' *Africa Centre for Strategic Studies* (20 May 2024) <https://africacenter.org/spotlight/understanding-drc-monusco/>

³⁴ Voller (n 27) 861, 868.

³⁵ Hassan Abbas, 'The Myth and Reality of Iraq's Al-Hashd Al-Shaabi (Popular Mobilisation Forces): A Way Forward' *Policy Paper, Friedrich-Ebert-Stiftung (FES)* (September 2017), 1 – 15 at 8.

documented in reports, several of which will be considered in greater detail in Chapter Four of this thesis, the group's hybrid operation remains an underexplored issue in relevant literature. Much of this has to do with the focus on the State as the main subject regarding responsibility for such violations. Traditionally, international law was conceived as a system set up to regulate affairs between States.³⁶ This system is viewed as indicative of a State's authority over its subjects,³⁷ in which States as first-line subjects are deemed primary norm bearers,³⁸ a position flowing from their status as sole subjects in the international system.³⁹ This is based on international law's horizontal technique of legal ordering, which embodies a legal system of coordination between sovereign independent States.⁴⁰ While international law obligations are binding on States, they are also expected to incorporate international law into their domestic legal framework to be applied by domestic courts.⁴¹ Within this framework, non-state entities were not considered subjects of international law; they only enjoyed a derivative international personality based on being created by or under a State's internal law, and so could not bear direct obligation.

However, the hybrid operation of CDFs as well as the violations it engenders creates novel problems for this longstanding framework. It challenges the existing law of state responsibility framework, in particular the question of how and to what extent the State can be held responsible for the conduct of these groups in their hybrid form. The dehumanizing effects of the violations arising from these groups' hybrid operation illustrate very significantly the kind of threat they pose to the international law framework. Also, resolving such issues has become most pressing given that in some situations, a country's internal laws may say nothing about such engagement, or may just be lacking in the instant. The law of state responsibility plays a fundamental role in understanding how responsibility is to be determined in such situations. This is done through the framework of attribution, which connotes the principle of attaching an act or omission by an actor, other than the State, to the State. The international community of States has a central objective in ensuring clarity in the

³⁶ David Bilchitz, 'Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law' (2016) 23 (1) *Indiana Journal of Global Legal Studies*, 143 – 170 at 144.

³⁷ Samantha Besson, 'Sovereignty, International Law, and Democracy' (2011) 22 (2) *European Journal of International Law*, 373 – 387 at 376.

³⁸ *ibid.*

³⁹ Bilchitz (n 36).

⁴⁰ Goerges Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline' (1962) 8 (2) *Howard Law Journal*, 95 – 121 at 103.

⁴¹ Louis Henkin, 'International Law as Law in the United States' (1984) 82 *Michigan Law Review*, 1555 – 1569 at 1556.

application and interpretation of these rules so that States do not escape responsibility for acts such groups commit.⁴²

1.3. The Law of State Responsibility Framework and the Attribution of Conduct of Irregular Forces to States.

The legal landscape on state responsibility has witnessed paradigmatic shifts in contemporary times. Considering that a codification of the law of state responsibility was necessary for the development and maintenance of peaceful relations among States, the United Nations General Assembly (UNGA) in 1953 adopted Resolution 799 (VIII),⁴³ based on which it requested the International Law Commission (ILC) to produce a draft instrument laying down these principles.⁴⁴ Through the work of the ILC, a framework defining the scope of state responsibility was developed under the Articles on the Responsibility of States for Internationally Wrongful Acts (*Hereinafter* the ‘Articles on State Responsibility’) 2001.⁴⁵ Notwithstanding the status of the Articles on State Responsibility as draft articles,⁴⁶ they are regarded as the most authoritative statement on the determination of state responsibility as well as a restatement of customary international law.⁴⁷ Affirming this position, the United Kingdom (UK) government noted as follows:

⁴² Remy Jorritsma, ‘International Responsibility and Attribution of Conduct: An Analysis of Case Law on Human Rights and Humanitarian Law’ (Doctoral Thesis Maastricht University, 2021), 1 – 252 at 1.

⁴³ UN Doc A/RES/799 (VIII) (1953).

⁴⁴ The International Law Commission (ILC) was created following UNGA Resolution 174 (II) of November 21, 1947. *See* UN Doc A/RES/174 (II) (1947). Amongst other responsibilities, under Article 13 of the UN Charter, the ILC has the responsibility to “*initiate studies and make recommendations to encourage the progressive development of international law and its codification*”. Also, as noted by Rosenstock, the Commission’s work on the draft articles revealed its strengths and limitations. *See* Robert Rosenstock, ‘The ILC and State Responsibility’ (2002) 96 (4) *American Journal of International Law*, 792 – 797 at 792.

⁴⁵ ILC, *Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, Yearbook of the International Law Commission, (YB ILC) 2001-II (2) 30, para.77. UNGA Resolution 56/83 of December 12, 2001. *See* UN Doc A/RES/56/83 (2001). International Law Commission (ILC), ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ in Report of the International Law Commission on the Work of its Fifty-third Session [*Hereinafter* ILC 53rd Report], UN GAOR 56th Sess. Supp. No. 10, at 43, UN Doc. A/56/10 (2001), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf *See* UN Doc A/RES/59/35 (2004); UN Doc A/RES/62/61 (2007); UN Doc A/RES/65/19 (2010); UN Doc A/RES/68/104 (2013); UN Doc A/RES/71/133 (2016); UN Doc A/RES/74/180 (2019).

⁴⁶ The Articles and the Commentary aren’t viewed as a ‘source of law’, but as ‘evidence of source of law’. Article 38 (1) of the Statute of the International Court of Justice (ICJ) states that are “*subsidiary means for the determination of the rules of law*”. *See* David D. Caron, ‘The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority’ (2002) 96 (4) *American Journal of International Law*, 857 – 873 at 867.

⁴⁷ *Biwater Gauff (Tanzania) Ltd. v. Tanzania* (2008), ICSID, para. 773; *Kotov v. Russia* (2012), European Court of Human Rights (ECtHR), para. 30; *Samsonov. Russia* (2014) European Court of Human Rights (ECtHR), para. 45; *Hulley Enterprises Ltd. (Cyprus) v. Russia* (2014), Permanent Court of Arbitration (PCA), para. 113; UNGA, *Report of the Secretary-General, Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, tribunals, and other bodies*, UN Doc A/62/62/Add 1 (2007); UN Doc A/65/76 (2010); UN Doc A/68/72 (2013); UN Doc A/71/80 (2016); UN Doc A/74/83 (2019); David D. Caron, ‘The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority’ (2002) 96 (4) *American Journal of International Law*, 857 – 873 at 872.

*States generally have accepted the draft articles in their current form. At present, the draft articles reflect an authoritative statement of international law and have been referred to by international courts and tribunals, writers, and more recently, domestic courts... Since 2001 the draft articles have gained widespread recognition and approval. Many States, including the United Kingdom, regularly turn to the draft articles and the commentaries as guidance on issues of state responsibility that arise in day to day practice.*⁴⁸

The Articles on State Responsibility operate to govern the enforcement and compliance with a State's obligation under international law,⁴⁹ when certain conducts cause harm in breach of such obligation⁵⁰ as well as the consequences thereof.⁵¹ It occurs when one State breaches its international law obligation by infringing on the rights of another State.⁵² It is a comprehensive framework of legal obligations, covering general principles of States' international responsibility; the primary rules establishing attributable internationally wrongful acts, and the secondary rules that flow as a legal consequence from a state's breach of an international obligation.⁵³ In general, it comprises secondary or functional rules of international law developed to promote the practical realisation of the substantive or primary rules of international law, which defines the content of a State's legal obligation.⁵⁴

According to Article 1 of the Articles on State Responsibility, "every internationally wrongful act of a State entails the international responsibility of that State".⁵⁵ Crawford in referring to the above provision notes that though at various stages in the drafting process, it was suggested that it be amended to include the phrase "towards another State" or "to an injured State", ultimately no attempt was made to limit the scope of the articles to just obligations owed by a State to other States.⁵⁶ He equally notes that the Articles on State Responsibility don't make a distinction between treaty and non-treaty obligations of States.⁵⁷ Despite this

⁴⁸ UNGA, 'Responsibility of States for Internationally Wrongful Acts: Comments and Information Received from Governments' (9 March 2007) UN Doc. /A/62/63, 6 para. 5.

⁴⁹ Alan Nissel, 'The ILC Articles on State Responsibility: Between Self-Help and Solidarity' (2005) 38 *New York University Journal of International Law and Politics*, 355 – 371 at 355.

⁵⁰ Gordon A. Christenson, 'Attributing Acts of Omission to the State' (1990) 12 (2) *Michigan Journal of International Law*, 312 – 370 at 312.

⁵¹ Bodansky and Crook (n 1) 773.

⁵² John E. Noyes and Brian E. Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 (2) *Yale Journal of International Law*, 225 – 267 at 226.

⁵³ Sompong Sucharitkul, 'State Responsibility and International Liability under International Law' (1996) 18 *Loyola of Los Angeles International and Comparative Law Journal*, 821 – 839 at 828.

⁵⁴ Kenneth B. Hoffman, 'State Responsibility in International Law and Transboundary Pollution Injuries' (1976) 25 (3) *International & Comparative Law Quarterly*, 509 – 542 at 509.

⁵⁵ Article 1, Articles on State Responsibility 2001.

⁵⁶ James Crawford, *The International Law Commission Articles on State Responsibility: Introduction, Text, and Commentaries*, (Cambridge: Cambridge University Press, 2002), 1 – 381 at 11.

⁵⁷ *ibid.*

seeming unambiguity, the scope concerning the general application of the law of state responsibility remains problematic, generating continuous debates and practical difficulties.⁵⁸ Indeed, it has been the focus of a significant number of international law scholarly works in recent years.⁵⁹ Relevant legal regimes such as International Humanitarian Law (IHL) and International Human Rights Law (IHRL) make it the obligation of the State, within whose territory non-state entities operate, to investigate, prosecute, and punish alleged violations of international law norms while also providing reparations to victims.

Under the law of state responsibility, States only bear responsibility for a limited number of entities under their jurisdiction and not general responsibility for all actors.⁶⁰ Underpinning this strict/restrictive interpretation is the public/private divide, in which a State is only considered responsible for public acts of its organs defined under an internal law, i.e., *de jure* organs of the State and, in few exceptions, those who satisfy certain conditions as *de facto* organs of the State. The current framework does not consider the State as responsible for the private conduct of a non-state entity when such an entity is not defined under an internal law of the State or doesn't satisfy the strict conditions that would qualify it as a *de facto* organ of the State. That an act occurred within the territory of a State or by an entity connected to it is not considered as a sufficient basis for establishing attribution; rather, there must be in existence a much stronger connection, providing the needed link between the State and the

⁵⁸ Rene Provost, *State Responsibility in International Law*, (Milton Park, Abingdon: Routledge, 2016),

⁵⁹ For a general overview, see Pierre-Marie Dupuy, 'The International Law of State Responsibility: Revolution of Evolution?' (1989) 11 (1) *Michigan Journal of International Law*, 105 – 128 at 105; Sompong Sucharitkul, 'State Responsibility and International Liability under International Law' (1996) 18 *Loyola Los Angeles International & Comparative Law Journal*, 821 – 839 at 821, 823; Marco Sassoli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 (846) *International Review of the Red Cross*, 401 – 434 at 402, 403; Greg Travalio and John Altenburg, 'Terrorism, State Responsibility, and the Use of Military Force' (2003) 4 (1) *Chicago Journal of International Law*, 97 – 119 at 100; Marko Milanovic, 'State Responsibility for Genocide' (2006) 17 (3) *European Journal of International Law*, 553 – 604 at 560; Damira Kamchibekova, 'State Responsibility for Extraterritorial Human Rights Violations' (2007) 13 (7) *Buffalo Human Rights Law Review*, 87 – 149 at 99; Christina Voigt, 'State Responsibility for Climate Change Damages' (2008) 77 *Nordic Journal of International Law*, 1 – 22 at 2; Ulf Linderfalk, 'State Responsibility and the Primary-Secondary Rules Terminology – The Role of Language for an Understanding of the International Legal System' (2009) 78 *Nordic Journal of International Law*, 53 – 72 at 56; Cedric Ryngaert and Holly Buchanan, 'Member States Responsibility for the Acts of International Organisations' (2011) 7 (1) *Utrecht Law Review*, 131 – 146 at 131; Annie Bird, 'Third State Responsibility for Human Rights Violations' (2011) 21 (4) *European Journal of International Law*, 883 – 900 at 883; Kimberley N. Trapp, *State Responsibility for International Terrorism: Problems and Prospects*, (Oxford: Oxford University Press, 2011), 1 – 291 at 2; Helmut P. Aust, *Complicity and the Law State Responsibility*, (Cambridge: Cambridge University Press, 2011), 1 – 475 at 1; Robert D. Sloane, 'On the Use and Abuse of Necessity in the Law of State Responsibility' (2012) 106 *American Journal of International Law*, 447 – 508 at 449.

⁶⁰ Rachel L. Johnstone, 'State Responsibility for Wrongful Conduct' in M. Fitzmaurice, P. Merkouris, & P. Okowa (eds.) *Offshore Oil and Gas Development in the Arctic under International Law: Risk and Responsibility*, *Queen Mary Studies in International Law, Vol. 14* (Leiden, Netherlands: Brill Nijhoff, 2015) 1 – 309 at 194.

conduct in question.⁶¹ Such a link ultimately designates the entity as an organ of the State, with the possibility that such a link can be established either through reference to an internal law of the State or by demonstrating evidence of a factual relationship. When such a link is established by reference to an internal law of the State, the entity in question is referred to as a *de jure* organ of the State.⁶² Relevant examples include the executive, legislative, and judicial bodies of a State as well as other agencies established under an enabling law such as the Armed Forces or the Police. On the other hand, when the link is derived based on evidence of a factual relationship, the entity concerned is deemed a *de facto* organ of the State.⁶³ These are entities that aren't defined under the internal law of a State but share a link in terms of the State's control over them and/or evidence of their complete dependence on the State.⁶⁴

The law of state responsibility provides for both *de jure* and *de facto* organs of the State under Article 4 of the Articles on State Responsibility as well as its commentary and further extends the scope of attribution for *de facto* organs to Article 8 of the Articles on State Responsibility. Whereas determining whether a non-state entity qualifies as a *de jure* organ of the State is quite straightforward, given the presence of an internal law defining such a status, doing the same for a *de facto* organ of the State is problematic because evidence of factual relationships can only be established by demonstrating that the State indeed exercises significant control over the group in question and its activities and/or the group operates in complete dependence on the State. This framework leaves out non-state entities that are neither defined under an internal law of the State nor operate in complete dependence on the State yet have a clear link with the State in terms of their working relationship. It is within this narrow margin that CDFs operating as hybrid irregular forces fall. For the most part, in nearly all jurisdictions where they operate, they are not defined under the internal law of the State to qualify as *de jure* organs of the State; at the same time, the State often does not exercise the threshold of control/direction over their activities to make them *de facto* organs of the State and meet current attribution standard under the law of state responsibility framework. The only link between the two parties is often evidence of a working relationship, which the State exploits to its advantage.

⁶¹ Jennifer H. Maddocks, 'State Responsibility for International Law Violations Involving Non-State Actors in Armed Conflict' (Doctoral Thesis University of Reading, 2021), 1- 387 at 18.

⁶² Article 4, Articles on State Responsibility 2001.

⁶³ Para. 11, Commentary to Article 4, Articles on State Responsibility 2001.

⁶⁴ *ibid.*

Among the relevant provisions, Article 7 of the Articles on State Responsibility, which provides for attribution based on the exercise of elements of governmental authority, is the most proximate in understanding how and whether a State can be held for the conduct of an irregular force operating in hybrid form. Challengingly, the wording of this provision only provides for empowerment by an internal law of the State, leading to the exercise of elements of governmental authority, and does not accommodate empowerment by other means such as a verifiable working relationship between a State and an irregular force. The necessary implication of this narrow and restrictive approach is that the courts have remained incapacitated in terms of attributing the conduct of several irregular forces to States, even when it was clear that such groups had sufficiently been empowered by the State, enabling them to carry out the acts leading to internationally wrongful conducts.

This narrow space represents a responsibility gap in the current framework of the law of state responsibility. This gap indicates that the scope of state responsibility for irregular forces remains underdeveloped in law and practice. It mirrors a dissonance between international law's restrictive approach to state responsibility and the growing influence of CDFs operating as hybrid irregular forces. This gap remains a problem to the current framework, in that it has allowed an environment in which States are increasingly incentivized to coopt such groups into their counterinsurgency framework, with such groups exploiting the absence of State authority in conflict zones to metamorphose into hybrid actors, engendering violations of human rights as well as other norms of international law, without prospects of responsibility. Indeed, cases of States being held responsible for the conduct of such irregular forces in hybrid operations are non-existent. This thesis contends that this responsibility gap is caused by the strict and restrictive approach to the attribution of acts of non-state entities to States under the current law of state responsibility framework, in particular as it relates to Article 7 of the Articles on State Responsibility. This narrow wording of Article 7 reflects, to a large extent, an international law not in tune with current development. The thesis argues that an expansive approach to this provision is best suited to closing the identified responsibility gap.

In light of the above, it is important to understand the problem with the international law framework relating to state responsibility for the conduct of irregular forces, especially in terms of their working relationship, which leaves such relationships out of the scope of the current framework. The Westphalia treaty led to the establishment of the international law

system, which is exclusively centered on sovereign States.⁶⁵ Having made international law, States were only accountable to each other in meeting their international legal obligations.⁶⁶ The initial ILC report of January 1956 noted that it was necessary to do more than codify the law; rather, international law must be adapted to reflect the profound transformations that have taken place in the system and bring the principles of state responsibility in line with the realities of the international law system.⁶⁷ However, for the most part, the ILC's Articles on State Responsibility have reflected the traditional international legal order, focusing on States and the rules they use to hold each other responsible for substantive international obligations.⁶⁸ As Maddocks notes, "...ARSIWA is not a complete or perfect representation of the law of state responsibility; it is the best description of the law that the ILC was able to agree at that time".⁶⁹

In the years since the United Nations General Assembly (UNGA) adopted the resolution empowering the ILC to codify these rules, the international legal order has evolved significantly, especially in terms of the increasing role of non-state actors.⁷⁰ Though the current framework enjoys great appeal, as shown in the alacrity with which the courts have applied its provisions, one may wonder whether this alacrity itself does not mask the possibility of a more nuanced interpretation of the law that may have been the case if the current framework wasn't in place.⁷¹ Whereas several provisions in the Articles on State Responsibility enjoy broad acceptance and are uncontroversial, others remain in a state of development.⁷² Generally, the Articles have not progressed in the manner expected, as to reflect the changing dynamics of States/irregular forces relationships. While the law of state responsibility is of general application, understanding its applicability in counterinsurgency operations requires focus on a specific armed conflict situation, in this case, the Boko Haram insurgency. It is within this context that this thesis problematises relevant provisions in the Articles on State Responsibility, to understand how the Nigerian State can be held responsible for the conduct of the CJTF as a hybrid actor in its counterinsurgency against Boko Haram.

⁶⁵ Edith B. Weiss, 'Invoking State Responsibility in the Twenty-First Century' (2002) 96 *American Journal of International Law*, 798 – 816 at 798.

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ *ibid.*

⁶⁹ Maddocks 'State Responsibility for International Law Violations Involving Non-State Actors in Armed Conflict' (n 61) 22.

⁷⁰ Weiss, (n 65) 799.

⁷¹ Maddocks 'State Responsibility for International Law Violations Involving Non-State Actors in Armed Conflict' (n 61) 22,

⁷² *ibid.*

There is a need to develop an understanding of how the hybrid operation of these groups implicates the current international law framework on state responsibility. If we can understand the responsibility gap in the current framework, then we can strengthen identified pathways while at the same time plugging the identified gap. By so doing, we disincentivize the increasing use of these groups by States and make international law work better for all.

1.4. Central Argument of the Thesis.

Academic focus on issues of state responsibility for the conduct of irregular forces is not unprecedented. In the development of the doctrine of the law of state responsibility as well as general international law, an increasing number of scholarly works have been devoted to understanding the responsibility of States for internationally wrongful acts, including those related to counterinsurgencies and other forms of armed conflicts. For instance, Ramsundar, in her book, underscores the point that mass atrocities occur most times in the context of State and State support, and so, effort geared at ensuring direct responsibility of individuals is hopeless.⁷³ In this material, she engaged the question of whether such state support in situations where the commission of mass atrocities by an armed group is imminent ought to have a bearing on the attribution of the conduct of such groups to the State.⁷⁴ Noting that the current approach by the International Court of Justice (ICJ) does not cover this question or its implication on the interpretation of the direction/control when considering attribution, her work examined whether doctrines and tests derived under international criminal law can be adopted for a proposed variation of consideration made in applying tests of attribution under the law of state responsibility framework.⁷⁵ Ultimately, she proposed a widening of the scope of responsibility through modification to the interpretations of the tests of control and dependence.

Within the same vein, Maddocks in her work has examined issues around the vague status of groups such as the *Shabiha* militia coopted by the Syrian government to fight opposition forces, as well as the *PMF* engaged by the Iraqi government in its counterinsurgency against the Islamic State of Iraq and the Levant (ISIL).⁷⁶ In her work, she argued that even though both groups operate as CDFs, and exercised public power, in that they acted alongside State security forces in counterinsurgency, it appears that the authority to do so was not delegated

⁷³ Narissa K. Ramsundar, *State Responsibility for Support of Armed Groups in the Commission of International Crimes*, (The Netherlands: Koninklijke Brill NV, Leiden, 2020), 1 – 232 at 3.

⁷⁴ *ibid.*

⁷⁵ *ibid* at 4, 6.

⁷⁶ Jennifer Maddocks, 'Outsourcing of Governmental Functions in Contemporary Conflict: Rethinking the Issue of Attribution' (2019) 59 *Virginia Journal of International Law*, 49 – 95 at 81, 82.

to them in line with Syrian and Iraqi internal laws.⁷⁷ The implication is that despite performing state-like actions, their conduct is not attributable to the State on whose behalf they acted.⁷⁸ Arman has equally examined issues around the ‘complex, non-transparent, and evolving’ relationship between States and community defence groups, locating it within the context of the relationship between the CJTF in its combat activities and the Nigerian State in counterinsurgency against Boko Haram.⁷⁹ He examined the applicability of relevant rules of attribution under the Articles on State Responsibility as well as the tests developed by international criminal tribunals to the group, highlighting the practical challenges involved in determining the State’s potential responsibility.⁸⁰ He concluded that developing the right framework in this regard could be a useful tool in mobilising States to work towards reducing the risks associated with the work of such groups.⁸¹

Aside from books and articles, issues of state responsibility for the conduct of irregular forces have also been the focus of some doctoral research. For instance, Eatwell in her thesis examined the extent to which the conduct of an armed group is attributable to the State supporting it, or the State to which the armed group becomes the new government, and how overall, state responsibility for the conduct of such groups participating in armed conflicts is regulated by international law.⁸² To address this problem, her research suggested a formulation of general rules of derivative responsibility or complicity, based on specific primary rules prohibiting complicit conduct under IHRL and IHL.⁸³ Similarly, Varga in her research examined questions surrounding when a State can be held responsible in connection with private conduct, when such the State loses effective control over its territory, leading to an enhanced role for armed groups i.e., when an effective government is absent.⁸⁴ She further engaged the issue of how the rules can be changed to address the responsibility gap, while at the same time respecting the principles that provide limitations to the scope of state responsibility.⁸⁵ Her work argued for a general rule prohibiting state complicity in the

⁷⁷ *ibid.*

⁷⁸ *ibid.*

⁷⁹ Jemma Arman, ‘State Responsibility for Community Defence Groups Gone Rogue’ (2020) 102 (915) *International Review of the Red Cross*, 1099 – 1123 at 1105.

⁸⁰ *ibid* at 1114, 1115.

⁸¹ *ibid* at 1123.

⁸² Tatyana J. Eatwell, ‘State responsibility for the Unlawful Conduct of Armed Groups’ (Doctoral Thesis University of Cambridge, May 2019), 1 – 247 at 1, 2.

⁸³ *ibid* at 4.

⁸⁴ Andrea Varga, ‘Establishing State Responsibility in the Absence of Effective Government’ (Doctoral Thesis Leiden University, June 2020), 1 – 389 at 3.

⁸⁵ *ibid.*

wrongful conduct of such private actors as well as the fact that in certain limited situations, complicity should be considered a basis of attribution.⁸⁶

Furthermore, Maddocks in her research examined questions concerning the circumstances in which the harmful conduct of a non-state actor, committed in an armed conflict, could be attributed to the State.⁸⁷ Her work notes the conflict between humanitarian calls for a less strict interpretation of the rules of attribution such that States can be held responsible when they support non-state actors who violate international law and the fact that such a framework may simply just stretch state responsibility too far.⁸⁸ Her research canvasses a more relaxed interpretation of the rules of attribution, a complicity rule holding States responsible when they enable harmful conduct of non-state actors, and a strengthening of the relevant primary norms of international law.⁸⁹ In a similar fashion, Jorritsma in his research examined the question of whether human rights courts and international criminal tribunals when dealing with issues of IHL have followed the rules of attribution as provided in Articles 4 – 11 of the Articles on State Responsibility, as a representation of customary international law or whether these courts have adopted *lex specialis* rules in determining what conduct constitutes acts of the state.⁹⁰ He argued in his work that the legal operation of the rules of attributions under the law of state responsibility framework shows that the State is viewed in law as the true author of factual conduct, a development that may have implications for the applicable legal framework within which such conduct is to be assessed.⁹¹ His work concluded that human rights courts and other quasi-judicial monitoring bodies do not recognise the existence of special rules of attribution but that they apply the general rules of attribution laid down in the Articles on State Responsibility.⁹²

The aforementioned works have, for the most part, focused on the broad issue of state responsibility for the conduct of irregular forces operating in combat roles. This thesis extends research in this area by being the first research to examine the question of state responsibility for the conduct of irregular forces operating both as combat forces as well as providers of local governance functions. Whereas scholars such as Maddocks have canvassed a broadening of the general rules of attribution, to accommodate state responsibility for the

⁸⁶ *ibid.*

⁸⁷ Maddocks, 'State Responsibility for International Law Violations Involving Non-State Actors in Armed Conflict' (n 61) 2.

⁸⁸ *Ibid.*, 23.

⁸⁹ *Ibid.*, 322.

⁹⁰ Jorritsma (n 42) 16.

⁹¹ *Ibid.*, 247.

⁹² *Ibid.*, 251.

conduct of armed groups performing combat functions, this thesis goes further to more specifically canvas an expansion of Article 7 of the Articles on State Responsibility, on the basis that “empowerment by other means such as a working relationship” carries significant legal weight to be an attribution standard, given that such relationship hinges on the irregular force drawing its legitimacy from the State which sponsored it, as well as the fact that it operates through a customary rule of law system, both of which are sufficient to equate it with other *de facto* organs of the State.

As stated in Section 1.1. of this Chapter, the Articles on State Responsibility provide standards based on which conducts of non-state entities are considered attributable to a State. Generally, such conduct must be the conduct of an organ of the State established by an internal law, with such organ exercising elements of governmental authority as well as operating under the direction/control of the State. As noted by Chinkin, state responsibility operates as a legal construct assigning the result of wrongful acts to the State, based on the doctrine of attribution, which provides a human link between the conduct in view and the State.⁹³ Under the Articles on State Responsibility, for the conduct of a group such as the CJTF to be attributable to the Nigerian State, it must be established that such conduct falls within the scope of either Article 4 (Attribution Based on Being an Organ of the State), Article 7 (Attribution Based on Exercise of Governmental Authority) or Article 8 (Attribution Based on Direction or Control), or a combination of these articles. This is because the Articles on State Responsibility do not contemplate situations in which, based on the existence of an informal link/working relationship, the conduct of a non-state entity can be attributed to the State on whose behalf it operates.⁹⁴

The central argument in this thesis is that there is a responsibility gap under the current framework due to the strict/restrictive approach to the ground for attribution based on being a *de facto* organ of the State, in particular under Article 7 of the Articles on State Responsibility. Given the insufficient clarity under the current framework, examining the practice of the International Court of Justice (ICJ) as well as other international criminal tribunals, with regards to how they have applied these rules to irregular forces in recent times, is of great importance. In light of this, the central argument in this thesis will be tested and validated by analysing the content of the relevant provisions of the Articles on State Responsibility alongside international judicial practice in this area. Through an analysis of the

⁹³ Christine Chinkin, ‘A Critique of the Private/Public Distinction’ (1999) 10 *European Journal of International Law*, 387 – 395 at 395.

⁹⁴ Jorritsma (n 42) at 3.

reasoning and decisions of these courts on the application of these rules, the thesis will show that not only is there a lack of consistency as well as unity on how the courts have applied the rules and interpreted the required attribution standards, there also is a responsibility gap under Article 7 requiring attention. It will show the existence of considerable confusion on qualification on key issues such as what would constitute an organ of the State, direction/control, and the key question of what ought to constitute “empowerment of an irregular force by a State” to attribute the conduct of the former to the latter to a State.

The thesis will argue that the key focus under this framework ought to be the question of whether a State has empowered an irregular force in a binary manner, i.e., either through its internal law or through a verifiable informal link/working relationship. To underpin this argument, it will canvass an expansive approach to the interpretation of Article 7 of the Articles on State Responsibility, one that accommodates the possibility of a working relationship between States and irregular forces as a basis of attribution of conduct. Article 7 provides that:

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law, if the organ, person, or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

While this provision deals with issues of unauthorised or ultra vires acts of State organs or entities, it also builds on earlier provisions such as Article 4 and 5 of the Articles on State Responsibility. Given the impossibility of applying the provisions of Articles 4 and 5 as basis for engaging state responsibility for the conduct of irregular forces, the core argument of this thesis is that the wording of Article 7 ought to be expanded to reflect a binary form of empowerment i.e., empowerment by an internal law as well as empowerment by other means. The thesis notes that this position aligns better with the goals and aspirations of the international community on state responsibility. The intent of the attribution framework under the law of state responsibility is to prevent a State from avoiding responsibility by engaging in interactions that allow a non-state entity to perform certain public functions other than its regular organs. Within this context, if an irregular force, as a result of being coopted by the State in counterinsurgency, goes ahead to provide local security functions, which can be considered as a form of empowerment, such conduct ought to come within the framework of attribution under Article 7. Challengingly, the current wording of the provision does not allow for such an interpretation, a situation that has denied the court the opportunity of doing substantive justice in this area. Resolving this issue is extremely relevant for Nigeria in its

relationship with the CJTF, in which civilians have suffered large-scale violations of their human rights as well as other norms of international law.

The goal of this thesis, therefore, is to engage these issues, using as case study the CJTF in its hybrid operation as a combat force as well as performer of elements of governmental authority in Nigeria's counterinsurgency against Boko Haram. The thesis will argue that the current wording of Article 7 represents a narrow approach to the real intent of attribution, especially when considered within the context of the overall purpose of the Articles on State Responsibility. In demonstrating this point, it will develop an analytical framework within which it will examine the scope of attribution standard under Article 4, 7, and 8 of the Articles on State Responsibility to show the incapacitation of the courts in attributing the conduct of irregular forces to States. States as abstract entities lack the characteristics of human beings and can only act through organs, with the reality being that such organs can either be created under an internal law (*de jure*) or emerge as a product of a working relationship with the State (*de facto*). In light of modern development regarding the increased working relationship between States and irregular forces, and with the possible effect of such relationship being that the State is allowed to escape responsibility, expanding Article 7 is beneficial to the purpose of state responsibility.

This central argument will be developed systematically through Chapters Two to Six of the thesis. Chapter 2 starts with the conceptual framework of the research. It develops the concept of 'Hybrid Irregular Force' as an irregular force coopted by a State in counterinsurgency, in which it then operates as both a combat force as well as a provider of local governance functions. Noting in a report, the United Nations (UN) Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions on Armed Non-State Actors, Agnes Callamard,⁹⁵ referred to the governance dimension of irregular forces in counterinsurgency warfare as follows:

They may be called armed opposition groups, insurgents, rebels, terrorists, militias, criminal cartels or gangs. They may hold or have held a sizeable territory, or a smaller one, or none at all. Some have launched deadly operations extraterritorially, including in Europe, Asia, Africa, and the Middle East. Some operate in the context of armed conflicts. Others operate at the intersection of peace and war, or in the context of low intensity or unconventional violence. Some are driven by ideology or profit, many by both. The vast majority engage in governance-like functions, ranging from registering births, running clinics and schools, collecting taxes, developing

⁹⁵ See, 'Report of the Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' Human Rights Council, A/HRC/38/44, (7 Dec. 2020), para. 4.

*rules and policies, and operating dispute resolution mechanisms or prisons. Some have political or State-like ambitions. All use violence.*⁹⁶

The expression “the vast majority engage in governance-like functions, ranging from registering births, running clinics and schools, collecting taxes, developing rules and policies and operating dispute resolution mechanisms or prisons” is instructive, as it underscores the role of irregular forces as providers of local governance functions which forms a key focus of this research. Aside from regular combat-related international law violations, such as handling the government’s dirty business of abductions and targeted killing,⁹⁷ the incursion of irregular forces into the governance space has become problematic to the prevailing international law framework on state responsibility. It has been established that in recent times, groups performing such governance functions do violate the human rights of the local civilian population in the process.⁹⁸ The thesis also underscores why hybrid irregular forces ought to be valued as a distinct group from the broader class of irregular forces. It highlights certain characteristics that conceptually separate groups that fall within the category of hybrid irregular forces from the majority. These characteristics offer a starting point for an analytically consistent typology of hybrid irregular forces.

The conceptual analysis is later underpinned by a discussion on the concept of the State alongside interrelated concepts such as sovereignty, legitimacy, rule of law, and legal pluralism to explain the phenomenon of hybrid irregular forces, especially the dimension of the provision of local governance functions. These concepts locate hybrid irregular forces in the domain of *de facto* organs of the State, highlighting the much-overlooked fact that, despite their loose relationship with the State, through these concepts, the groups demonstrate state-like attributes that ought to grant them the same status as other *de facto* organs of the State, organs who have that status based on complete dependence on the State. By engaging with existing arguments, it posits that such groups enjoy legitimacy based on their acceptability by the local population; a legitimacy that is consensual, voluntary, and organic, while they also operate based on an informal rule of law system, that enables them to perform local governance functions. The concepts of legitimacy and the rule of law operate as insightful analytical tools for understanding the provision of local governance functions by hybrid irregular forces in counterinsurgencies.

⁹⁶ *ibid.*

⁹⁷ Ulrich Schnekenner, ‘Fragile Statehood, Armed Non-State Actors, and Security Governance’ in Alan Bryden & Marina Caparini (eds.) *Private Actors and Security Governance*, (LIT & DCAF, 2006) 1 – 314 at 26.

⁹⁸ Antonio De Lauri and Astri Suhrke, ‘Armed Governance: The Case of the CIA-Supported Afghan Militias’ (2021) 32 (3) *Small War & Insurgencies*, 490 – 508 at 496.

In Chapters Three, Four, and Five, the thesis conducts a legal and doctrinal analysis of Nigeria's constitutional framework as well as relevant international law regimes such as IHRL, IHL, and the law of state responsibility to understand how they address the issue at hand. In carrying out this analysis, an examination of the legal regimes of IHRL and IHL would be carried out, given that both are considered applicable during an armed conflict such as Nigeria's counterinsurgency warfare against Boko Haram. IHL and IHRL differ in terms of their origins; however, both share similar objectives, which is the protection of individuals in all circumstances.⁹⁹ While IHL applies exclusively in armed conflict situations as the *lex specialis*, IHRL is considered complementary, applying at all times, both in armed conflicts as well as in peacetime.¹⁰⁰ The thesis embarks on a doctrinal analysis of the positive law, examining the scope and content of relevant international law rules regarding state responsibility for the conduct of hybrid irregular forces. Flowing from the argument in Chapter 2, that hybrid irregular forces possess legitimacy and also operates on a system of rule of law, it challenges the current law of state responsibility framework which adopts a strict and restrictive approach to recognising an entity as a *de facto* organ of the state. It argues that not only do *de facto* organs of the State represent the majority of cases in counterinsurgencies, but most, if not all, come into existence based on a working relationship with the State, rather than based on an internal law or evidence of complete dependence. The

⁹⁹ Hans-Joachim Heintze, 'On the Relationship Between Human Rights Law Protection and International Humanitarian Law' (2004) 86 (856) *International Review of the Red Cross*, 789 – 814 at 789.

¹⁰⁰ The authoritative position on the relationship between IHL and IHRL is found in the 2004 Wall Advisory Opinion of the International Court of Justice (ICJ). See, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, para. 106. For a general discussion on the applicability of IHL and IHRL in armed conflicts, see generally *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, para. 25; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgement, 19 December 2005, para. 216 – 220; Human Rights Committee, *General Comment 29*, States of Emergency (Article 4) UN Doc. CCPR/C/21/Rev.1/Add 11 (2001), para. 3; Louise Doswald-Beck and Sylvain Vite, 'International Humanitarian and Human Rights Law' (1968) *International Review of the Red Cross*, 94 – 119 at 94; Noam Lubell, 'Challenges in Applying Human Rights Law in Armed Conflicts' (2005) 87 (860) *International Review of the Red Cross*, 737 – 754 at 738; Alexander Orakhelashvili, 'The Interaction Between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism or Convergence?' (2008) 19 (1) *European Journal of International Law*, 161 – 182 at 162; Francoise J. Hampson, 'The Relationship Between International Humanitarian Law and International Human Rights Law from the Perspective of a Human Rights Treaty Body' (2008) 90 (871) *International Review of the Red Cross*, 549 – 572 at 550; Oana Hathaway, et al 'Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law' (2012) 96 *Minnesota Law Review*, 1883 – 1944 at 1888; Daniel Bethlehem, 'The Relationship Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2013) 2 (2) *Cambridge Journal of International & Comparative Law*, 180 – 195 at 184; Waseem A. Qureshi, 'Untangling the Complicated Relationship Between International Humanitarian Law and Human Rights Law in Armed Conflicts' (2018) 6 (1) *Penn State Journal of Law & International Affairs*, 204 – 241 at 209; Helen Duffy, 'Trails and Tribulations: Co-Applicability of IHL and Human Rights in Age of Adjudication' *Grotius Centre Working Paper Series* (Grotius Centre for International Legal Studies, Leiden University, No 2020/086 - HRL – 29 January 2020), 1 – 72 at 2; Katharine Fortin, 'The Relationship Between International Human Rights Law and International Humanitarian Law: Taking Stock at the end of 2022?' (2022) 40 (4) *Netherlands Quarterly of Human Rights*, 343 – 353 at 345.

utility of this PhD research, therefore, lies in the fact that it develops additional pathways towards broadening the current state responsibility framework while also bringing an improved understanding of how the responsibility of States for the conduct of hybrid irregular forces can be better realised.

1.5. Review of Relevant Concepts and Applicable Legal Regimes

Before concluding the discussion in this chapter, there is a need for a brief overview of relevant concepts employed in the thesis to put them in the proper context. This section examines relevant works around two concepts, i.e., irregular forces and Civilian Defence Forces (CDFs), to determine how they are understood in current literature. Given that the focus of the thesis is counterinsurgency, which is a form of Non-International Armed Conflict (NIAC), the main regimes of international law that are relevant are IHL and IHRL. These two regimes operate as primary norms of international law containing the substantive obligation of States. There is a need to examine the norms arising from both treaty and customary international law under these two regimes relevant to States' interaction with irregular forces. Lastly, it is also important to examine the legal literature on the law of State Responsibility, which contains the secondary rules based on which violations of these primary norms by other actors, other than the State, can be attributed to the State.

1.5.1. Irregular Forces.

There has been significant scholarship on the development of irregular forces, the motivation for their use, and the challenges they pose in counterinsurgency warfare. Moreso, they have become key actors in modern counterinsurgency warfare.¹⁰¹ Irregular forces differ from other armed groups in several respects, especially in terms of factors such as their character, nature, objectives, structure, command/control, link to the State, mode of operation, support base, and financing. Kasfir, Frerks, and Terpstra observe that “the uncertainties unleashed by civil war leads to different types of armed groups intent on civilian protection or predation, military advantage or uneasy collusion with the state”.¹⁰² Whereas some irregular forces are at war with the State, some fight on its side, others operate in loose coalitions with the two sides, and some operate independently.¹⁰³ Generally, irregular forces thrive in armed conflict

¹⁰¹ Clegg notes that Irregular forces help to ensure and sustain the relationship between counterinsurgency forces and the civilian population, but where poorly utilised, they may pursue a private interest. Clegg (n 7) 1.

¹⁰² Nelson Kasfir, Goerg Frerks and Niel Terpstra, ‘Introduction: Armed Groups and Multi-layered Governance’ (2017) 19 (3) *Civil Wars* 257 – 278 at 257.

¹⁰³ Ariel I. Ahram, ‘Armed Non-State Actors and the Challenges of 21st Century State Building’ (2019) 20 *Georgetown Journal of International Affairs*, 35 – 41 at 36.

situations such as civil wars and insurgencies. Their use in intrastate armed conflicts has been a consistent aspect of both domestic insurgencies and those inspired by external intervention.¹⁰⁴ This is due to the continuously changing pattern of counterinsurgency,¹⁰⁵ especially the changes between classical and contemporary counterinsurgency,¹⁰⁶ which, as Kilcullen notes, is “possibly requiring fundamental re-appraisals of conventional wisdom”.¹⁰⁷ Irregular forces bring immense benefit to States fighting insurgencies. They bolster shortages in manpower while at the same time showcasing the potential locked in local intelligence. Also, they are important in creating the necessary connection between State actors and the local population, which may have been severely damaged due to poor governance and perceived marginalisation. As noted by Clegg, irregular forces support a broader counterinsurgency strategy, increase the quantity and quality of available intelligence, intercept collaboration between insurgents and local communities, and grant counterinsurgent commanders a means of protecting loyal local communities.¹⁰⁸ They play a significant role in ensuring law, order, and security in areas ravaged by insurgency. As Jardine and Palamar observe, the extent to which counterinsurgent forces succeed in providing order and security for the civilian population is critical in determining whether a counterinsurgency would be won or lost.¹⁰⁹

With regard to motivation, Yasutomi has identified factors such as the lure of economic reward, family/clan ties, ideology, and the need to protect the local community, as instrumental to irregular forces’ participation in counterinsurgency warfare.¹¹⁰ Looking at motivation from a different perspective, Reno makes a number of important points - that protective armed groups and insurgents pool their recruits from the same social background; that these recruits share similar grievances against corrupt politicians and the collapse of

¹⁰⁴ Geraint Hughes, ‘Milicias in Internal Warfare: From the Colonial Era to the Contemporary Middle East’ (2016) 27 (2) *Small Wars & Insurgencies*, 196 – 225 at 197.

¹⁰⁵ Appreciating this point, Kilcullen, for instance, notes that ‘counterinsurgency in its classical form, is optimised to defeat the insurgency in one country, and not counter a global insurgency’. See D. J. Kilcullen, ‘Countering Global Insurgency’ (2005) 28 (4) *The Journal of Strategic Studies*, 597 – 617 at 607; David Jones and Michael R. Smith, ‘Whose Hearts and Whose Minds: The Curious Case of Global Counterinsurgency’ (2010) 33 (1) *The Journal of Strategic Studies*, 81 – 121 at 98.

¹⁰⁶ Louise W. Moe, ‘The Strange Wars of Liberal Peace Hybridity, Complexity and the Growing Rationalities of Counterinsurgency in Somalia’ (2016) 4 (1) *Peacebuilding*, 99 – 117 at 103.

¹⁰⁷ David Kilcullen, ‘Counter-insurgency Redux’ (2006) 48 (4) *Survival*, 111 – 130 at 111.

¹⁰⁸ Clegg (n 7) 2.

¹⁰⁹ Eric Jardine and Simon Palamar, ‘From Medusa Past Kantolo: Testing the Effectiveness of Canada’s Enemy-Centric and Population-Centric Counterinsurgency Operational Strategies’ (2013) 36 (7) *Studies in Conflict & Terrorism*, 588 – 608 at 590.

¹¹⁰ Atsushi Yasutomi, ‘Characterising Irregular Forces’, in A. Yasutomi, R. A. Hall and S. Kiba (eds.) *Pathway for Irregular Forces in Southeast Asia – Mitigating Violence with Non-State Armed Groups*, (London, Routledge, 1st ed. 2022), 14 – 30 at 14.

public services evidenced in ineffective state institutions; that youths join these groups to shore up their social relevance as well as for personal security; and that these youths generally come from backgrounds marked by abject poverty.¹¹¹ Irregular forces are often an offshoot of groups that had been relatively marginal to the pre-conflict political patronage and rentier system in the country. Though they operate in an informal relationship with the State, they are most times linked to the political contest for power, by which they gain relevance and enjoy continued patronage. Groups of this nature can also have a greater level of legitimacy concerning the use of force, to end that they can bring insurgents over to the government's side.¹¹²

Also, special operations which cannot be done legitimately and overtly by regular military units are delegated to irregular forces, with some of these operations leading to serious crimes.¹¹³ For instance, irregular forces may be commissioned to attack civilian residents in communities under the control of insurgents¹¹⁴ They can pose great human rights and security risks in the sense that given their lack of proper training, they tend to be susceptible to violence and indiscipline.¹¹⁵ Within such an environment, they can become predatory, extorting communities to support their activities, abducting youths for forced recruitment, and kidnapping for ransom.¹¹⁶ Lastly, irregular forces may also engage in the provision of local governance functions, often in a sort of reciprocal relationship with the local community.¹¹⁷ Within this context, they provide a broad range of public goods, which may include the provision of basic amenities, building roads, providing security and public safety, etc, while in return, the local people support their activities and also provide intelligence regarding the activities of the enemy.¹¹⁸

1.5.2. Civilian Defence Forces (CDFs).

As far back as there have been insurgencies, there has also been counterinsurgency warfare. From the insurgencies that arose in response to the Napoleonic expansion through Europe to British repression of colonial insurgencies, as well as the United States (US) war in

¹¹¹ William Reno, 'Patronage Politics and the Behaviour of Armed Groups' (2007) 9 (4) *Civil Wars*, 324 – 342 at 325.

¹¹² Ahram, 'Armed Non-State Actors and the Challenges of 21st Century State Building' (n 103) 36

¹¹³ Yasutomi (n 110) 16.

¹¹⁴ *ibid*, 16.

¹¹⁵ Ahram, 'Armed Non-State Actors and the Challenges of 21st Century State Building' (n 103) 36.

¹¹⁶ Yasutomi (n 110) 17.

¹¹⁷ *ibid*.

¹¹⁸ *ibid*.

Indochina, States have had to deploy different methods of counterinsurgency warfare.¹¹⁹ Generally, the use of military force through repression has been the dominant method in counterinsurgency warfare. However, over time, this approach has proved to be inadequate, encouraged insurgents and helped them to fuel hatred of counterinsurgent forces amongst the local population, thereby gaining more support.¹²⁰ With a shift in strategy and the need to be ahead of insurgents through access to quality intelligence, the need to incorporate members of the local population in the form of CDFs into counterinsurgency operations emerged. With their increasing attractiveness, not only do CDFs now form a significant percentage in the makeup of most States' counterinsurgent forces, but they also wield enormous power, courtesy of the roles ceded to them.

In defining CDFs, the International Crisis Group (ICG) uses the term 'vigilante' referring to them as "members of civil self-defence groups, community defence forces, and civil militias which are formed to protect their communities from non-state or state actors or to combat insurgents".¹²¹ Thomson, on his part, calls them "community-based pro-government militias mobilised among civilians to undertake security and limited counterinsurgency roles to protect their own neighbourhoods or villages from insurgents in the context civil conflict".¹²² For Clayton and Thomson, CDFs mean groups composed mainly of civilians who carry out intelligence functions as well as limited combat functions for government forces to extirpate insurgents from their local environment.¹²³ CDFs are essentially community-based initiatives, with recruits living in their houses instead of the military barracks and often times, their work is part-time.¹²⁴ In some places, CDFs operate as an anti-insurgent movement such as a neighbourhood watch, while in some other places, their roles are much more expanded involving functions like manning checkpoints, gathering intelligence on insurgents, and combat functions in which they target insurgents.¹²⁵ They operate mainly in counterinsurgency warfare, with several notable ones currently operating on the African continent. While there are conceptual difficulties in distinguishing CDFs from other types of

¹¹⁹ Oscar Palma Morales, 'The Evolution of Counterinsurgency Warfare: A Historical Overview' (2011) 6 (2) *Revista-Bogota (Colombia)*, 195 – 220 at 198, 199, 201.

¹²⁰ *ibid* at 201.

¹²¹ ICG (n 2).

¹²² Andrew Thomson, 'Civilian Defence Forces and Violence Against Civilians' in P.L. Johnson & W. Wittels, (2016), *Militias, States, and Violence Against Civilians* (Milton Park, Abingdon: Routledge, 2023), 1 – 206 at 55.

¹²³ Govinda Clayton and Andrew Thomson, 'Civilianising Conflict: Civilian Defence Militias and the Logic in Intrastate Conflict' (2016) 60 *International Studies Quarterly*, 499 – 510 at 499.

¹²⁴ Thomson (n 122) 56.

¹²⁵ *ibid*.

irregular forces, notable ones in literature include groups such as the Tribal Security Forces (Arbakai) in Afghanistan, the Guardians of Peace in Burundi, the Koglweogo in Burkina Faso, the Civilian Defence Patrol in El Salvador, the Civil Defence Patrols in Guatemala, the Sons of Iraq, the Village Defence Committee in India, the Dan Na Ambassagou in Mali, the Karen Border Guard Force in Myanmar, the Civilian Joint Task Force in Nigeria, the Kamajors in Sierra Leone, the Home Guard in Sri Lanka, the Arrow Boys in South Sudan, the Shabiha group in Syria, the Ronda Campesina group in Peru, the *Tadtad* and *Alsa Masa* groups in the Philippines, the Village Guards in Turkey, Popular Resistance Committees in Yemen, etc. The examples represent groups between the period from the end of World War II to the present time. Therefore, the term CDFs is used in this research to mean a type of irregular force, made up of civilian volunteers, formed independently or by the state, who bear arms to protect their communities from the violence of insurgents.

CDFs are to be contextualised within the broader literature on irregular forces, a common phenomenon in situations of state fragility, in which the State is either unable or unwilling to deal with issues of violence towards the civilian population. According to the ICG, the initial mobilisation of CDFs is mostly based on volunteerism, as their main goal is to protect their local communities against insurgents.¹²⁶ They mobilise to counter insurgents in their communities, consequent on which they target insurgents as well as the civilians who support them, in a bid to weaken insurgent control. Given that CDFs are generally made up of members of the local population, they possess unique knowledge of the local environment, which in turn helps state patrons to effectively target insurgents.¹²⁷ This conceptualisation is important to this research in the sense that it shows how instrumental CDFs' affinity with the local environment is key for success in their operation as combat forces as well as providers of local governance functions. Relating this to the CJTF, the fact that the group consists of persons who are members of the local communities in Nigeria's northeast region, as well as their knowledge of the local environment, puts them in an advantageous position when it comes to providing local governance functions. On their use in enhancing counterinsurgency warfare, while Peic refers to their usefulness in gathering good intelligence,¹²⁸ Agbiboa calls them 'knowledge brokers' who enhance the military's surveillance power.¹²⁹ In the view of

¹²⁶ ICG (n 2)

¹²⁷ Clayton and Thomson (n 123).

¹²⁸ Goran Peic, 'Civilian Defence Forces, State Capacity, and Government Victory in Counterinsurgency Wars' (2014) 37 (2) *Studies in Conflict & Terrorism*, 162-184 at 165.

¹²⁹ Daniel E. Agbiboa, 'Eyes on the Street: Civilian Joint Task Force and the Surveillance of Boko Haram in Northeastern Nigeria' (2018) 33 (7) *Intelligence and National Security*, 1022 – 1039 at 1022.

Asfura-Heim, a key benefit of CDFs is not so much about their effectiveness in fighting, but rather about their ability in keeping their members on the side of the government, as well as reducing the infiltration of insurgents,¹³⁰ in particular as they undermine the ability of insurgent forces to mobilise from neighbouring regions.¹³¹ They are also able to provide sufficient men to secure at-risk communities, given that they are easy to mobilise, compared to formal military or police units.¹³²

Beyond these benefits, as CDFs are usually not well-trained, they are best used on short-range tactical missions. As Clayton and Thomson observe, using CDFs to identify insurgents often provokes retaliatory attacks from insurgents against the local population.¹³³ Such attacks increase violence in which insurgents seek to reassert their control over the local population, the result being that insurgent fragmentation helps perpetuate conflicts.¹³⁴ According to the ICG, weak African States fighting insurgencies, who are either unable or unwilling to adequately secure their people, engage these groups, ultimately ceding local security functions to them.¹³⁵ Though CDFs hold great benefits when used properly, when used improperly, especially as part of a state's security set-up, or when not supported with logistics or backup, they can be intimidated, become targets of reprisal attacks, or even join the insurgents.¹³⁶ For instance, States sometimes exploit entrenched ethnic rivalries within such groups to co-opt one side into their counterinsurgency efforts.¹³⁷ This may offend a rival group, exposing other members to attacks. In other instances, States' use of CDFs may just make an entire community become the target of insurgents.

On the flip side, CDFs may end up abusing the power delegated to them, especially when coopted by States lacking the required capacity and resources to control them. Reinforcing this position, Asfura-Heim notes that where States do not establish or enforce a legal framework governing CDFs or do not provide them with a mandate respecting the rule of law, they often end up abusing their positions as well as the use of force.¹³⁸ Within this spectrum, those among them who get out of control can undermine state legitimacy by

¹³⁰ Patricio Asfura-Heim, 'Risky Business: The Future of Civil Defence Forces and Counterterrorism in an Era of Persistent Conflict' (October 2014) *CNA Corporation Strategic Studies (CSS)*, 1 - 86 at 56.

¹³¹ *ibid.*

¹³² *ibid.*

¹³³ Clayton and Thomson (n 123).

¹³⁴ *ibid.*

¹³⁵ ICG (n 2) 2.

¹³⁶ Asfura-Heim (n 130) 68.

¹³⁷ Goran Peic, 'Divide and Co-Opt: Private Agendas, Tribal Groups, and Militia Formation in Counterinsurgency Wars' (2021) 44 (12) *Studies in Conflict & Terrorism*, 1022 – 1049 at 1023.

¹³⁸ Asfura-Heim (n 130) 68.

empowering local powers at the expense of the government.¹³⁹ Engaging the issue of challenges posed by CDFs, Wither notes that they can be unreliable, and difficult to manage, while their own local agenda may end up complicating the conflict into which they have been coopted.¹⁴⁰ He further asserts that while they may be essential in counterinsurgency, they can frequently challenge the sponsoring government's authority and end up usurping its sovereignty.¹⁴¹

The possibilities of international law violations by CDFs have emerged more forcefully through the emerging phenomenon of hybrid irregular forces in counterinsurgency warfare, where they provide local governance functions alongside being combat forces, to the extent that they can become the face of government. The CJTF and several other CDFs in notable counterinsurgency warfare across the globe, all of which will be examined later in this research, manifest this characteristic sufficiently to warrant a legal inquiry into this emerging phenomenon. Noting this point, Wither states that militias in Nigeria's northeast region have become providers of policing, security, and governance functions in several local communities.¹⁴² Indeed, the CJTF is the arrowhead of militia wartime governance in the country's counterinsurgency, performing essential governance functions such as arrest, interrogation, and detention of offenders; undertaking criminal trial proceedings and the issuing of penalties such as corporal punishments, fines; settlement of civil and communal disputes; collection of levies, taxes, and rates; trade and commerce, etc. These activities have had a severe impact on the enjoyment of human rights by the local population in areas where the group operates.

1.5.3. International Humanitarian Law (IHL).

It is important to explore how and to what extent the operation of the CJTF as a hybrid irregular force in Nigeria's counterinsurgency warfare is currently understood within the rules of IHL. The right place to start is to state that the Boko Haram insurgency in which the group has been operating has been classified as a NIAC, i.e., a conflict between the Armed Forces of a Sovereign State and a particular Armed Group, or between Armed Groups, in which such group (s), are deemed to possess a certain level of organisation, and the outbreak of violence

¹³⁹ *ibid.*

¹⁴⁰ James K. Wither, 'Outsourcing Warfare: Proxy Forces in Contemporary Armed Conflicts' (2020) 31 *Security & Defence Quarterly*, 17 – 34 at 26.

¹⁴¹ *ibid* 27.

¹⁴² *Ibid* 27.

between the parties has attained a particular threshold or intensity.¹⁴³ The rules of IHL applicable in NIACs consist of the minimum protection provided in Article 3 common to all four (4) Geneva Conventions,¹⁴⁴ as well as the rules enshrined in Additional Protocol II (AP II),¹⁴⁵ and those that are part of customary international law.¹⁴⁶

IHL recognises the principle of equality of belligerents in a NIAC, and so, as signatories to IHL treaties, the above rules are binding on state parties. While Armed Non-State Actors (ANSAs), like other non-state entities, cannot be parties to international treaties, including IHL treaties,¹⁴⁷ it is a generally accepted position that the above rules are nonetheless binding on them.¹⁴⁸ As Vanhullebusch notes, the enjoyment of equal rights and obligations is predicated on the capacity of parties to comply with IHL obligations.¹⁴⁹ Though the legal basis for applying these rules to Armed Non-State Actors remains uncertain, as Murray explains, five key theories, i.e., customary law, general principles, state succession, third-party consent, and legislative jurisdiction, underpin the application of the rules.¹⁵⁰ Also, such ANSAs can rely on four legal instruments, i.e., unilateral declarations, codes of conduct, special agreements, and multilateral treaties, to express their consent to be bound by these rules.¹⁵¹

However, as Callamard notes, the definition of organisation and control in IHL are mostly framed in a military context and do not capture the provision of governance functions by groups, particularly functions outside their combat roles.¹⁵² Yet these governance functions have far-reaching implications for the human rights protection afforded to the population

¹⁴³ ICRC, 'Summary of the Geneva Conventions of 12 August 1949 and their Additional Protocols' (2005) *International Committee of the Red Cross (ICRC)*, 1 – 20 at 2; See *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72; (1996) 35 ILM 32.

¹⁴⁴ Geneva Conventions I – IV, 12 August 1949.

¹⁴⁵ Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts of 1977, ratified by Nigeria 10 October 1988.

¹⁴⁶ For the ICRC's interpretation of customary IHL see generally Jean-Marie Henckaert and Louise Doswald-Beck, *Customary International Humanitarian Law*, (Cambridge: University of Cambridge Press, 2005), 1 – 621.

¹⁴⁷ Ben Saul, 'Enhancing Civilian Protection by Engaging Non-State Armed Groups under International Humanitarian Law' (2017) 22 (1) *Journal of Conflict & Security Law*, 39 – 66 at 40.

¹⁴⁸ Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2015) 20 (1) *Journal of Conflict & Security Law*, 101 – 131 at 101.

¹⁴⁹ Matthias Vanhullebusch, 'Do Non-State Armed Groups have a Legal Right to Consent to Offers of International Humanitarian Relief?' (2020) 25 (2) *Journal of Conflict & Security Law*, 317 – 341 at 324.

¹⁵⁰ Murray (n 148) 102.

¹⁵¹ Cedric Ryngaert and Anneleen Van de Meulebroucke, 'Enhancing and Enforcing Compliance with International Humanitarian Law by Non-State Armed Groups: An Inquiry into Some Mechanisms' (2011) 16 (3) *Journal of Conflict & Security Law*, 443 – 472 at 445.

¹⁵² Agnes Callamard, 'Towards International Human Rights Law Applied to Armed Groups' (2019) 37 (1) *Netherlands Quarterly of Human Rights*, 85 – 100 at 92.

under the control of such groups and responsibility.¹⁵³ Callamard also argues that these governance functions show a level of capacity on the part of these groups on which a case for human rights protection can be anchored.¹⁵⁴ For Rodenhauser, the applicable IHL framework does not contain the necessary rules on how ANSAs must administer territories in their control of the civilian population.¹⁵⁵ Even where IHL applies to governance by ANSAs, contentions remain. Schabas, for instance, has challenged the applicability of IHL rules in this respect, arguing whether certain governance acts of the Al Mahdi insurgent group in destroying historic monuments during its governance of some territories in the Malian insurgency could constitute a violation of IHL rules.¹⁵⁶ Equally, Saul notes that the law applicable in NIAC remains largely underdeveloped when compared with that of International Armed Conflicts (IACs), such as concerning the protection of the civilian population.¹⁵⁷ Addressing these issues is critical as it is fundamental to understanding the extent to which IHL rules can bind the CJTF as a provider of local governance functions in Nigeria's counterinsurgency warfare.

1.5.4. International Human Rights Law (IHRL).

This research identifies itself with the existing literature, which demonstrates that human rights obligations are framed essentially as state-centric. Within this understanding, Hessbruegge has identified three dimensions of right-obligation bearing i.e., the vertical, diagonal, and horizontal obligations.¹⁵⁸ While vertical obligation speaks of the State's obligation to refrain from certain conduct in its interaction with a non-state actor as such could invoke human rights, diagonal obligation relates to the duty of the State to protect one non-state actor from the activities of the other.¹⁵⁹ Horizontal obligation connotes the duty of a non-state actor not to engage in certain conduct against other non-state actors as each possesses inherent human rights.¹⁶⁰ Generally, the notion of vertical obligation accounts for most of the discussion on human rights, given that modern rights were primarily developed

¹⁵³ *ibid.*

¹⁵⁴ *ibid.*

¹⁵⁵ Tilman Rodenhauser, 'The Legal Protection of Persons Living under the Control of Non-State Armed Groups' (2020) 102 (915) *International Review of the Red Cross*, 881 – 1020 at 995.

¹⁵⁶ William Schabas, 'Al Mahdi Has been Convicted of a Crime he did not commit' (2017) 49 *Case Western Reserve Journal of International Law*, 75 – 102 at 98.

¹⁵⁷ Saul (n 147) 41.

¹⁵⁸ Jan Arno Hessbruegge, 'Human Rights Violations Arising from Conduct of Non-State Actors' (2005) 11 (3) *Buffalo Human Rights Law Review*, 21 – 88 at 25.

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.*

against the backdrop of struggle against State oppression.¹⁶¹ This notion of vertical obligation is also central to this discussion in this research. The conventional view is that the responsibility for protecting the human rights of individuals lies in the positive (vertical) obligation of States.¹⁶² Non-state actors are expected to be regulated under the domestic legal system of the State.¹⁶³ This position derives from related theoretical perspectives, such as the theory of sovereignty in which the State is seen as the loci of political obligation,¹⁶⁴ as well as having exclusive oversight over its internal affairs.¹⁶⁵ As a sovereign nation, Nigeria has the primary obligation of ensuring the proper implementation of IHRL on its territory.¹⁶⁶ The scope of this obligation is defined in Article 2 (1) of the International Covenant on Civil and Political Rights (ICCPR), which states that:

*Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction, the rights contained in the present Covenant, without distinction of any kind, such race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth, or other status.*¹⁶⁷

The above point has been reiterated by the United States' (US) Supreme Court in its decision in *Kiobel v. Royal Dutch Petroleum Co.*¹⁶⁸ This framework regarding Nigeria's human rights obligation applies in the context of its counterinsurgency warfare against Boko Haram. This obligation is also a key feature of the Nigerian Constitution under Chapter IV.¹⁶⁹ In line with Section 5 of the Constitution, the President, as the nation's Chief Executive and Commander-in-Chief, has an obligation to give effect to the provisions of this chapter at all times, principally through the execution and maintenance of the Constitution. This is supported by Section 14 (2) (b), which states that "the security and welfare of the people shall be the primary purpose of government".¹⁷⁰ This constitutional framework essentially imposes

¹⁶¹ *ibid*, 26.

¹⁶² Lottie Lane, 'The Horizontal Effect of International Human Rights Law in Practice' (2018) 5 *European Journal of Comparative Law and Governance*, 5 – 88 at 6.

¹⁶³ *ibid*.

¹⁶⁴ Justin C. Mueller, *The Temporality of Political Obligation*, (New York: Routledge Publishers, 2016), 1 – 184 at 65.

¹⁶⁵ Fernando R. Teson, 'International Obligation and the Theory of Hypothetical Consent' (1990) 15 *Yale Journal of International Law*, 84 – 120 at 84.

¹⁶⁶ Daniel Augenstein, 'Paradise Lost: Sovereign State Interest, Global Resource Exploitation, and the Politics of Human Rights' (2016) 27 (3) *European Journal of International Law*, 669 – 691 at 670.

¹⁶⁷ ICCPR 1966.

¹⁶⁸ (2013) 1851 Ed. 2d671.

¹⁶⁹ These notable amongst which are the right to life, right to human dignity, right to personal liberty, and right to fair hearing are listed in sections 33 – 44. *See* Constitution of the Federal Republic of Nigeria, 1999.

¹⁷⁰ Constitution of the Federal Republic of Nigeria, 1999.

responsibility on the state and makes no room for groups such as the CJTF to provide local governance functions.

Additionally, Nigeria's obligation concerning human rights protection comes from the fact that it is a signatory to major IHRL treaties¹⁷¹ whose provisions the CJTF's activities as a hybrid irregular force impact. This follows the fact that human rights treaties provide for norms regulating the relationship between a state and persons under its jurisdiction.¹⁷² Although the CJTF's role in the counterinsurgency generally affects most provisions under IHRL, given its direct bearing on certain rights, this research will limit its scope to an examination of these rights. These include the right to human dignity under Articles 1 and 2 of the Universal Declaration of Human Rights (UDHR)¹⁷³ and Article 5 of the African Charter on Human and Peoples' Rights (ACHPR);¹⁷⁴ the right to life, liberty, and security of the person under Article 3 of the UDHR, Articles 9, 10, 11 and 12 of the ICCPR,¹⁷⁵ and Article 4 and 6 of the ACHPR; the right to freedom from discrimination and equal protection of the law under Article 7 of the UDHR¹⁷⁶ as well as Article 2, 3, and 18 of the ACHPR¹⁷⁷; the right to freedom from torture, inhuman and degrading treatment or punishment under Article 5 of

¹⁷¹ Some of these treaties are the Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GOAR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [*hereinafter* UDHR]; International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316, 999 UNTS. 85 (*entered into force* Mar. 23, 1976) [*hereinafter* ICCPR]; International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 999 UNTS. 3 (*entered into force* Jan. 3, 1976) [*hereinafter* ICESCR]; Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 UNTS. 3 (*entered into force* Sept. 2, 1990) [*hereinafter* CRC]; Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, at 3, U.N. Doc. A/54/263 (May 25, 2000) [*hereinafter* Child Soldier Protocol]; United Nations Convention Against Torture - Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (*entered into force* June 26, 1987) G.A. Res.39/46, 39 U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, *reprinted in* 23 I.L.M. 1027 (1984) [*hereinafter* Convention Against Torture]; Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR, Supp. No. 46, at 193, U.N. Doc. A/34/46 (*entered into force* Sept. 3, 1981) (*hereinafter* CEDAW); African Charter on Human and Peoples' Rights June 27, 1981, 1520 U.N.T.S. 217 [*hereinafter* ACHPR].

¹⁷² Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen, 'International Law and Armed Non-State Actors Afghanistan' (2011) 93 (881) *International Review of the Red Cross*, 47 – 79 at 64.

¹⁷³ UDHR 1948.

¹⁷⁴ ACHPR 1981.

¹⁷⁵ ICCPR 1966.

¹⁷⁶ UDHR 1948. As it relates specifically to women, see the counterpart provisions in the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR, Supp. No. 46, at 193, U.N. Doc. A/34/46 (*entered into force* Sept. 3, 1981) (*hereinafter* CEDAW).

¹⁷⁷ ACHPR 1981.

the UDHR;¹⁷⁸ the right to freedom from arbitrary arrest and detention under Article 9 of the UDHR; and the right to a fair trial under Article 10 and 11 of the UDHR, Article 14 of the ICCPR, and Article 7 of the ACHPR. Following the transformation of the ACHPR into Nigeria's domestic law,¹⁷⁹ these rights can also be enforced under the Nigerian Constitution,¹⁸⁰ just like other constitutional rights.¹⁸¹

The use of CDFs in counterinsurgencies and its implications for states' responsibility for their conduct must be seen against the several contending perspectives on human rights and Armed Non-State Actors. There are scholars such as Worster who allude to the distinction which holds that only states can be liable under IHRL, while both states and ANSAs can be made accountable under IHL.¹⁸² For Bartels, the development of the IHRL regime from the 1960s onwards further encroached on a state's dealing with its citizens.¹⁸³ Over the years, there have been significant developments, alongside this scholarly thinking, which have altered the longstanding state-centric approach, majorly on three scores. Firstly, there is the understanding that ANSAs can be held responsible for customary human rights law obligations on the basis that they exercise control over territory. According to Rodenhauser, the state-centric view has been expanded to include ANSAs, which are a party to an armed conflict and also exercise control over some territory.¹⁸⁴ Taking it further, Fortin notes that extending IHRL to such ANSAs has an added value for those living in territories under their control¹⁸⁵ and takes the view that armed groups may be bound by human rights law through the human rights obligation of the State, where they exercise authority over a territory.¹⁸⁶ On this point, the Human Rights Committee (HRC) has made the important observation that "the

¹⁷⁸ *ibid.* See, United Nations Convention Against Torture - Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (entered into force June 26, 1987) G.A. Res.39/46, 39 U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, reprinted in 23 I.L.M. 1027 (1984) [hereinafter Convention Against Torture], ratified by Nigeria on June 28, 2001.

¹⁷⁹ In 1983 Nigeria passed into law of the African Charter on Human and Peoples' Rights (ratification and enforcement) Act Cap 10 Laws of the Federation of Nigeria.

¹⁸⁰ See Section 12, Constitution of the Federal Republic of Nigeria, 1999.

¹⁸¹ See respectively Section 33 (Right to Life); Section 34 (Right to Dignity of the Human Person); Section 35 (Right to Personal Liberty); Section 36 (Right to Fair Hearing); and Section 42 (Right to Freedom from Discrimination) - Constitution of the Federal Republic of Nigeria 1999.

¹⁸² William T. Worster, 'Relative International Legal Personality of Non-State Actors' (2016) 42 (1) *Brooklyn Journal of International Law*, 207 – 273 at 231.

¹⁸³ Rogier Bartels, 'The Relationship Between International Humanitarian Law and the Notion of State Sovereignty' (2018) 23 (3) *Journal of Conflict & Security Law*, 461 – 486 at 474.

¹⁸⁴ Tilman Rodenhauser, 'International Legal Obligations of Opposition Armed Groups in Syria' (2015) 2 *International Review of Law*, 1 – 16 at 3.

¹⁸⁵ Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford: Oxford University Press, 2017), 1 – 421.

¹⁸⁶ Katharine Fortin, 'The Application of Human Rights Law to Everyday Civilian Life under Rebel Control' (2016) 63 *Netherlands International Law Review*, 161 -181 at 162.

rights enshrined in the Covenant belong to the people living in the territory of the State party”.¹⁸⁷ This right continues to belong to the people of this territory, notwithstanding any change in government.¹⁸⁸ This has formed the practice of UN commissions, including the UN Commission of Inquiry in Libya and Syria.¹⁸⁹ Even accepting this assumption, it would, however, be important to determine whether the CJTF exercises effective control over the civilian population within its sphere of operation, especially in its role of providing local governance functions as a hybrid irregular force, to know if this can bind the group to IHRL obligations.

Secondly, peremptory human rights that have been declared *ius cogens*, such as torture and enforced disappearance, are binding on ANSAs, notwithstanding that they are not a party to an armed conflict or do not control territory.¹⁹⁰ Clapham, for instance, has noted that an acceptable theoretical basis on which non-state actors must have human rights obligations is the fact that human rights protection is built on the dignity of the human person, the protection of which is expected to be the duty of everyone.¹⁹¹ Toeing this same line, Clapham, in work on detention by armed groups in international law, quotes the UN Human Rights report on the conflict in South Sudan, which noted that:

*The most basic human rights obligations, in particular those emanating from peremptory international law, (ius cogens) binds both the State and armed opposition groups in times of peace and during armed conflicts. In particular, international human rights law requires states, armed groups, and others to respect the prohibitions of extrajudicial killings, maiming, torture, cruel inhuman, or degrading treatment or punishment, enforced disappearance, rape, or other conflict related sexual violence, sexual or other forms of slavery, the recruitment or use of children in hostilities, arbitrary detentions as well as of any violations that amounts to war crimes, crimes against humanity, or genocide.*¹⁹²

Thirdly, certain aspects of IHRL directly provide for the human rights obligation of ANSAs. An example is Section 4 (1) of the Optional Protocol to the Convention on the Right of the Child on the Involvement of Children in Armed Conflict which states that “armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or

¹⁸⁷ UN Human Rights Committee (HRC), CCPR General Comment No. 26: Continuity of Obligations, CCPR/C/21/Rev.1/Add.8/Rev.1, General Comment 26 (Contained in document A/53/40, annex VII).

¹⁸⁸ UN Human Rights Committee (HRC), CCPR General Comment No. 26: Continuity of Obligations, CCPR/C/21/Rev.1/Add.8/Rev.1, General Comment 26 (Contained in document A/53/40, annex VII).

¹⁸⁹ Rodenhauer (n 184) 4.

¹⁹⁰ *ibid.*, 5.

¹⁹¹ Andrew Clapham, ‘Non-State Actors’ in D. Moeckli, S. Shah, S. Sivakumaran, and D. Harris (eds.) *International Human Rights Law* (Oxford, UK: Oxford University Press, 2nd ed. 2017), 1 – 611 at 3.

¹⁹² Andrew Clapham, ‘Detention by Armed Groups under International Law’ (2017) 93 *International Law Studies*, 1 – 44 at 24.

use in hostilities persons under the age of 18 years”.¹⁹³ Also, Article 7 (5) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa¹⁹⁴ prohibits ANSAs from a number of acts during an armed conflict situation. With respect to determining the human rights obligation of ANSAs, the HRC has noted that more specific rules of IHL may be especially relevant in interpreting these rights, noting that both spheres of law are deemed complementary.¹⁹⁵ In general, the application of IHRL to ANSAs remains controversial. There is the challenge of lack of capacity in which most are unable to fully implement the human rights obligation of states.¹⁹⁶ Also, the lack of clarity with respect to their human rights obligation makes difficult efforts to help them internalise norms towards compliance.¹⁹⁷

1.5.5. *Law of State Responsibility.*

Alternatively, international law provides for a framework in which the conduct of irregular forces such as the CJTF can be imputed to the State for whom, and on whose behalf, it acts in determining responsibility. This is especially because the human rights responsibility of states is not just about preventing violations by its official agents but also by semi-officials or even unofficial agents, once that is established. Noting this point, the HRC has stated that:

*The positive obligation on State Parties to ensure Covenant rights would only be fully discharged if individuals are protected by the State, not just against violation of Covenant rights, by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons and entities.*¹⁹⁸

To make the determination of attribution between a state and non-state entities that may impair the enjoyment of rights in the covenant, the International Law Commission’s (ILC) Draft Articles on Responsibility of the State for Internationally Wrongful Acts,¹⁹⁹ provides for a number of rules based on which attribution is anchored. Relevant to this research are Article

¹⁹³ Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, at 3, U.N. Doc. A/54/263 (25 May 2000) (*entered into force* 12 Feb. 2002) [*hereinafter* Optional Protocol].

¹⁹⁴ African Union Convention for the Protection and Assistance of Internally Displaced Persons, adopted by the Special Summit of the African Union (AU) in Kampala Uganda, on 22 Oct. 2009 [*hereinafter* Kampala Convention].

¹⁹⁵ UN Human Rights Committee (HRC), General Comment No. 31: The Nature of the General Legal Obligation imposed on State Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (26 May 2004).

¹⁹⁶ Saul (n 147) 41.

¹⁹⁷ *ibid.*

¹⁹⁸ UN Human Rights Committee (HRC) (n 195).

¹⁹⁹ Articles on State Responsibility 2001 (n 45).

4 which provides for situations where such a group is acting as an organ of the State;²⁰⁰ Article 7 covers instances where a group is empowered to exercise governmental authority;²⁰¹ and Article 8 which deals with situations in which a group acts under the direction/control of the State.²⁰²

However, the application of these rules to the relationship between the CJTF and the Nigerian State may likely be fraught with practical challenges, such for instance how to determine when a non-state entity can be classified a *de facto* organ of the State as well as deemed as when such entity is empowered to exercise governmental authority in the absence of an internal law. Another likely challenge relates to determining what would constitute ‘direction/control’, especially in light of the several tests developed by the ICJ and other international criminal tribunals, for understanding when a non-state entity’s conduct becomes attributable to the State. For a CJTF whose engagement by the Nigerian State remains legally debatable, and whose activities are mostly irregular, understanding whether the group has so far been operating as a *de facto* organ of the Nigerian state, whether the State has in anyway empowered it to exercise governmental authority, and finally whether, its operations have been carried out under the direction/control of the government, is central to determining proper responsibility for its well-documented abusive conduct.

This literature review shows that issues bordering on the hybrid operation of CDFs as combat forces as well as providers of local governance functions, within the context of wartime governance, remains contested and complicated. It shows that Nigeria’s engagement of the CJTF in its counterinsurgency and the group’s operations as a hybrid irregular force pose a major challenge to the applicability of IHL and IHRL. Their activities as providers of local governance functions interrogates the international law regime governing their status as parties to armed conflicts and the responsibility framework applicable to the Nigerian State.

This thesis provides a unique opportunity to examine these issues towards broadening the available pathways to state responsibility under the current rules. To make this examination novel, it developed the notion of ‘Hybrid Irregular Forces’ a term which connotes a sustained and informal relationship between a State and an irregular force, in which the irregular force operates in a dual role within the counterinsurgency framework i.e., being a part of the State’s

²⁰⁰ *ibid.*

²⁰¹ *ibid.*

²⁰² *ibid.*

military operations as well as being involved in the provision of local governance functions in the conflict zone.

1.6. Objectives of the Study and Research Question.

The aim of this research is to examine whether and to what extent the Nigerian State can be held responsible for the conduct of the CJTF in its operation as a hybrid irregular force in counterinsurgency warfare against Boko Haram. It seeks to challenge current thinking on state responsibility for the conduct of non-state entities in a counterinsurgency through the lens of relevant international law regimes such as IHRL, IHL, and the law of state responsibility. Through its novel concept, i.e., hybrid irregular forces, it seeks to examine the content of relevant rules such as Articles 4, 7, and 8 of the Articles on State Responsibility as well as recent international judicial practice in this regard, determining the gap and ways in which it can be addressed. It argues that it is possible to create a link between groups of this nature and the States on whose behalf they operate, from an analysis of their performance of local governance functions, using related concepts such as customary law and legitimacy, that helps explain their state-like attributes. The value of this analysis is that it provides justification for such groups to be considered as *de facto* organs of the State, to the end that the State may be held responsible for their conduct, the absence of an internal law notwithstanding. The thesis thus brings a fresh perspective to the existing scholarship on state responsibility for the conduct of non-state entities and areas where further clarity is required. With this goal in mind, the main research question in this thesis is as follows:

How and to what extent can the Nigerian State be held responsible under the existing rules of international humanitarian and human rights law, for activities of the Civilian Joint Task Force (CJTF), in its hybrid operation as a combat force as well as a provider of local governance functions, in counterinsurgency against the Boko Haram insurgent group?

To address this main question, the thesis will seek to explore the following sub-questions:

1. How can 'Hybrid Irregular Force' be conceptualised through the concepts of state, sovereignty, legitimacy, rule of law, and legal pluralism?
2. How can the CJTF's operations as a hybrid irregular force in Nigeria's Counterinsurgency against Boko Haram be examined in the context of the country's constitutional and legal framework?

3. How can the international legal personality of the CJTF be determined, through the applicability of international humanitarian and human rights law to the group?
4. What is the implication of the CJTF as a hybrid irregular force for the application of the law of state responsibility in attributing its conduct to the Nigerian State?
5. How can an additional pathway be created under the law of state responsibility framework that would ensure that States are held responsible for violations of international law by these groups?

1.7. Research Methodology.

In exploring the main research question, this thesis employs a doctrinal research methodology, starting with primary sources on relevant domestic and international law regimes as well as case laws of international courts. Essentially, the doctrinal method engages in a systematic examination of the legal rules governing a particular legal category, the relationship between rules, areas of legal difficulty, and future developments.²⁰³ With respect to primary sources, four key materials will be considered in this thesis. The first legal material is the Nigerian Constitution, which as the main domestic legal framework, will be useful in determining how the CJTF is defined domestically. The second legal material is provisions under relevant IHL and IHRL treaties, which are necessary to provide an understanding of how the relevant primary/substantive rules frame human rights responsibility between non-state entities and states. The third legal material is the Articles on State Responsibility, which is an important text necessary to analyse the framework of secondary rules designed for the attribution of conduct related to a breach of the primary rules. The fourth legal material is the body of case laws of the ICJ and other international criminal tribunals, having jurisdiction over violations of IHL and IHRL. An examination of a variety of decisions by these courts will be a helpful guide in showing how the courts have in the past, interpreted the provision of the Articles on State Responsibility concerning categorizing irregular forces as *de facto* organs of the State.

The analysis of the third and fourth legal materials, both of which represent the central discussion in this thesis, rest on the premise that the rules in Articles 4, 7, and 8 of the Articles on State Responsibility being customary international law, and alongside relevant case laws from the ICJ and international criminal tribunals, represents the most appropriate

²⁰³ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 (1) *Deakin Law Review*, 83 – 119 at 101.

basis of exploring the main research question in this thesis. In particular, the main findings from this thesis will be based on an analysis of the provisions of the Articles on State Responsibility and relevant case law from the ICJ and various international criminal tribunals. An analysis of these rules, as well as their interpretation by the courts, is necessary to show whether they were intended to be of general application or designed to be applicable in specific instances. In addition to the primary sources, secondary sources of information such as textbooks, journal articles, reports of human rights organisations like the Human Rights Watch and Amnesty International, policy papers, newspaper materials, internet materials, etc. will all be analysed. The accuracy of these secondary sources would also be cross-referenced with other secondary as well as primary sources.

Two key limitations to this research include the following. First is the fact that finding appropriate and pertinent state practice is difficult, particularly as regards the operational framework of the Nigerian Military in counterinsurgency operations against Boko Haram. As Crawford notes, it is always difficult distinguishing between what states proclaim to do in military manuals and what actually happens in armed conflict situations.²⁰⁴ For most states that have coopted CDFs in counterinsurgency, there is a lack of available and identifiable practice around how this was done. This is further compounded by the huge deficit in available materials documenting such engagements. For instance, concerning the CJTF, there are inadequate official materials documenting the nature, characteristics, and functions of the group's incorporation into Nigeria's counterinsurgency framework as well as its operationalisation under the command and control of the Military. Some available military manuals simply reinstate the relevant rules of IHL without adding anything new. As such, much of the discussion in this thesis on the concept of hybrid irregular forces is based on an examination of related concepts.

The second limitation relates to the inability of the researcher to conduct field research in the northeast region of Nigeria where the focus of the research, i.e., the CJTF, has been operating as a hybrid irregular force. This is due mainly to the heightened state of insecurity in the region, a situation that is likely to pose great risk to the life of the researcher, and the likelihood of being kidnapped by insurgents and branded an agent of the State. To address this limitation, the researcher conducted extensive desk research on the counterinsurgency insurgency in Northeast Nigeria to analyse and understand the context as well as the

²⁰⁴ Emily Crawford, *Non-Binding Norms in International Humanitarian Law: Efficacy, Legitimacy, and Legality*, (Oxford University Press, 2021), 1 – 284 at 177.

implications of the CJTF's hybrid operation. The researcher equally studied background reports produced by credible and globally-acclaimed international human rights organisations such as Amnesty International and Human Rights Watch (HRW), as well as UN agencies. For instance, since 2015, the Office of the UN High Commissioner for Human Rights (OHCHR) has deployed human rights officers to countries affected by Boko Haram to collect information on violations of IHL and human rights.²⁰⁵ Within this same period, other UN organs and Special Rapporteur have also submitted reports on the insurgency in general, and the activities of key actors, in particular.²⁰⁶ The researcher leveraged these documents, which contain valid accounts of the events on the ground, in addressing the challenge of the inability to get firsthand accounts. This has helped build the researcher's knowledge and contextual understanding of the hybrid operation of the CJTF in the government's counterinsurgency warfare. In relying on the existing empirical literature, the researcher understands the risk related to such data, such as a lack of knowledge of the context in which the original data was collected, as well as a lack of control over the quality of the data, including the possibility of such being full of errors.²⁰⁷ To address this limitation, the researcher referred to a variety of reports by organisations spanning different geographic environments to eliminate the possibility of bias.

The doctrinal approach has two distinct methodological advantages. First is the fact that it is the safest and achievable of the available research methods. This is because, connected to the statement above, it doesn't pose any danger to the life of the researcher and the fact that relevant materials, which majorly laws, are readily available through primary and secondary sources such as treaty documents, statutes, books, journal articles as well as online sources. Second is the fact that this approach is indeed the most appropriate method for answering the main research question. This is because the key question in this research relates to an analysis of the law, i.e., a determination of the current state of the international law framework regarding state responsibility for the conduct of non-state entities operating as hybrid irregular forces. Given that the main question in this work is based on determining what the law says and what it does not say and given that the main goal of the doctrinal approach is to examine what the law 'is' at a period towards proposing what the law 'ought to be', the

²⁰⁵ See, *Report of the UN High Commissioner for Human Rights on violations and abuses committed by Boko Haram and the Impact on Human Rights in the Affected Countries*, (29 Sept. 2015) A/HRC/30/67.

²⁰⁶ See, *Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Agness Callamard*, (31 March 2021), A/HRC/47/33/Add. 2.

²⁰⁷ Emma Smith, 'Pitfalls and Promises: The Use of Secondary Data Analysis in Educational Research' (2008) 56 (3) *British Journal of Educational Studies*, 323 – 339 at 328.

researcher considers it the best tool to arriving at the right determination. Furthermore, in choosing this approach, the researcher draws on the fact that the same methodology had been adopted in similar doctoral research works conducted in recent times.²⁰⁸ All these works adopted the doctrinal methodology in engaging their main research questions simply because those questions were matters of law.

Overall, the researcher's choice of the doctrinal approach rests on it being the most sufficient tool in answering the research's main question. Much of the discussion and analysis in this thesis concerns the CJTF and its relationship with the Nigerian State. However, this research is not limited to considering just the responsibility of the Nigerian State for this group but seeks to draw parallels with the conduct of other irregular forces operating as hybrid actors and how the gap identified under the international law framework may also apply to them.

Finally, in executing this research, the researcher has chosen Nigeria as its case study, and this is based on a number of reasons. Firstly, the insurgency and counterinsurgency operation by the Nigerian state as well as the eventual coopting of the CJTF into these operations, are timely and the most broadly engaged by scholars in related fields. Secondly, the country has had a history of the presence of irregular forces involved in complex and problematic alliances with state authorities. It, therefore, offers the right environment to understand the role of such groups as hybrid actors providing local governance functions. Thirdly, amongst the available case studies, the events in Nigeria are occurring in a stable country, where the central government is still mostly in charge, making it an appropriate case study to understand how an irregular force can demonstrate state-like attributes in some part of the country, operating in an environment where a viable State is in charge of other parts. Fourthly, among ongoing insurgencies, the event in Nigeria is the most mature, as the insurgency has lasted for more than ten years. For this reason, there is an abundance of research materials on the relevant issues, especially given that, over this period, human rights organisations have produced a sufficient body of work on the activities of the different actors in the counterinsurgency operations. Lastly, Nigeria is a signatory to several IHRL and IHL instruments that would be examined in the research. Accordingly, Nigeria's obligations under these instruments form an interpretative framework for the analysis running through the work.

Overall, there is an extent to what this thesis can cover. At the heart of this is the fact that the more the elements in the work intersect, the more problem areas appear to become evident.

²⁰⁸ Eatwell, (n 82) 1, 2; Varga, (n 84) 3; Maddocks, (n 61) 2.

Thus, the decision on what areas to cover and what areas to leave out, has been carefully made having regard to how best to analyse the intersection between the key concept in the work, i.e., hybrid irregular forces and the related regimes of international law.

1.8. Significance of Research.

The aim of this research is to examine whether the Nigerian State can be held responsible for the conduct of the CJTF in its operation as a hybrid irregular force in counterinsurgency warfare against Boko Haram and in so doing, close or attempt to close the vacuum in the current state responsibility framework arising from this novel situation. Based on this, the significance of this research lies in the fact that these issues are within the context of the emerging phenomenon of hybrid irregular forces, a characteristic that the CJTF sufficiently displays in Nigeria's counterinsurgency against Boko Haram. Added to this is that a growing list of other groups already documented in this research shares the hybrid irregular forces' characterisation. Beyond determining the scope of Nigeria's responsibility for the conduct of the CJTF, the outcome of this research has the broader significance of equally determining how and to what extent the responsibility of States where these groups operate can be defined.

The research illustrates the relatively untapped potential of international law in determining whether and the extent to which a State can be held responsible when a CDF, it engaged in counterinsurgency, acts in multiple ways. It highlights the crisis that the international law framework faces when a state engages a CDF in a specific instance, only for such a group to, on that basis, then act in several other ways. Concerning hybrid irregular forces, this is especially true as such groups would not be able to act as providers of local self-governance functions if, in the first place, the state did not co-opt them as combat forces. This research brings to the fore the lack of clarity on how international law ought to respond when non-state entities act in the place of the State and, in so doing, violate the state's international obligations.

Importantly, this research engages violations of established international law norms, in particular, IHRL and IHL norms. Though CDFs such as the CJTF have become major players in contemporary counterinsurgency, the international community still faces the problem of how best to deal with the conduct of these groups. This research contributes to existing knowledge in this area through its development of the novel concept of 'hybrid irregular forces'. It explains this concept by further developing unique characteristics that separate

groups falling within this classification from broader irregular forces. More so, the outcome of the research is useful in two important ways. First, it provides a better understanding of legal avenues of redress available to victims in a counterinsurgency. Contemporary IHRL provides a framework in which individuals can invoke a State's international obligation to seek redress in domestic courts and international tribunals for harm suffered during an armed conflict. This is because multilateral international human rights treaties that have come into operation since the founding of the UN in 1945 not only define the substantive rights of individuals viz a viz States, but they also recognise individuals' right to a remedy when their rights have been violated.²⁰⁹ As correctly observed by Spiro, "human rights has built significantly from the basic premise nations cannot treat their subjects as they please".²¹⁰ In the context of this research, thousands of Nigerians who have suffered harm connected to the action of the State's Armed Forces as well as that of the CJTF in its activities as a provider of local governance functions can explore the opportunity to seek redress as stated above. For such victims, they must have assurance that the conduct that caused them harm is attributable to the Nigerian state, to the end that their potential claim for redress can be a legal possibility.

Second, examining how a State can be held responsible for the conduct of a hybrid irregular force helps to clarify the legal regime under which the State may potentially be held responsible. This also relates to broadening the scope of the law of state responsibility. This is important in light of states' behaviour about complying with international law. As correctly observed by Goldsmith and Posner, when it comes to obeying international law, the action of states is based on a rational choice to further their identifiable interest, in light of their perception of the interest of other states and the distribution of state power.²¹¹ States have a great incentive to act through non-state actors, and it is increasingly in their interest to do so. This they do based on two key reasons, i.e., the low cost of maintaining such groups compared to regular troops and the deniability of their conduct. Challengingly, the demonstrable benefits of this relationship between state and non-state entities impose considerable weight on the broader international legal order and weaken it. As such, beyond victims' likely claim for redress, examining a state's international obligation through the lens of attribution of conduct of hybrid irregular forces, especially given their increasingly

²⁰⁹ Naomi Roht-Arriaza, 'State Responsibility to investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 (2) *California Law Review*, 449 – 513 at 474, 475.

²¹⁰ Peter J. Spiro, 'The States and International Human Rights' (1997) 66 (2) *Fordham Law Review*, 567 – 596 at 569.

²¹¹ Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, (Oxford University Press, 2005), 1 - 262 at 3, 4.

dominant role in counterinsurgency warfare, is important in the broader legal, political, and international context, especially to ensure that States cannot escape international responsibility by simply acting through such proxy forces. Third, adopting the approach of state responsibility instead of accountability under the State's domestic legal framework may be preferable in light of the shortage of political will as well as limitations in resources to prosecute such cases.

1.9. Structure of Thesis and Scope of Research.

To address these issues, the thesis is divided into six chapters. The first is Chapter One, which starts with the background to the study/introduction. This chapter introduces the research, explaining the current approach to the issue of state responsibility for the conduct of non-state actors generally. It identifies the area of potential gap in literature, by demonstrating that whereas issues related to state responsibility for conduct of CDFs acting in combat operations is increasingly becoming the focus of scholarly inquiry, attention is yet to be given to an evolving pattern in which the same groups operate as hybrid irregular forces i.e., acting as combat and governance actors simultaneously. In particular, the chapter acknowledges the fact that this dimension of their operation in counterinsurgency warfare raises novel issues for the determination of state responsibility for their conduct, ultimately impacting the broader international law framework. The chapter also examines relevant concepts such as counterinsurgency, irregular forces, and CDFs, as well as applicable legal regimes such as IHL, IHRL, and the law of state responsibility. The Chapter ends with the objectives of the study, the research question, research methodology, the significance of the research, as well as the structure of the research.

Chapter Two provides an understanding of the concept of 'hybrid irregular forces'. It highlights and discusses characteristics that qualify a CDF to be categorised as a hybrid irregular force, distinguishing such groups from others outside the purview of the research. It develops an analytical framework for the thesis examining the concept of the State alongside related concepts such as sovereignty, legitimacy, rule of law, and legal pluralism, as the basis for explaining the concept of hybrid irregular forces and the provision of local governance functions by such groups.

Chapter Three examines the role of the CJTF as a hybrid irregular force in Nigeria's counterinsurgency against the Boko Haram insurgent group. It examines how the group was engaged by the state in limited combat functions and how it later became a *de facto* and

alternative provider of local governance functions. It also examines the group's legal relationship with the Nigerian state and how this underscores its operation in a hybrid form. Chapter Four examines the current state of international law regarding the international legal personality of ANSAs. The broader category of ANSAs was adopted as this offers the best approach to understanding whether groups such as the CJTF can be said to enjoy some form of international legal personality. It also highlights allegations of human rights violations as well as violations of other norms of international law, drawing from reports of UN Special Rapporteur and agencies as well as leading international human rights organisations. The chapter further examines the extent to which existing rules of international law, specifically IHRL and IHL, apply to the CJTF in its characterisation as a hybrid irregular force.

Chapter Five examines how the Nigerian state can be held responsible for international law violations of the CJTF, based on the law of state responsibility. It examines the legal basis on which the primary obligations in IHRL and IHL, discussed in Chapter Four, will be achieved. It analyses how the framework governing attribution and the Articles on State Responsibility can be applied toward attributing the conduct of the CJTF to the Nigerian state. It further examines the standards of attribution as defined under Articles 4, 7, and 8 of the Articles on State Responsibility. The Chapter ends by canvassing an expansion of Article 7 of the Articles on State Responsibility to include empowerment by other means such as evidence of a working relationship. It calls for the expansion of the current law of state responsibility framework by adopting a more liberal interpretation of the rule governing when a non-state entity is empowered to exercise governmental authority under Article 7 of the Articles on State Responsibility. It recommends, that aside from the existing framework of empowerment through an internal law provided for in Article 7 of the Draft Articles, other forms of empowerment such as clear evidence of a factual relationship, be included as a way of determining that a State has delegated governmental functions to a non-state entity, thereby rendering the State responsible for the conduct of such a group. Chapter Six, which is the final chapter, concludes the discussions in the thesis with a summary as well as recommendations.

Finally, concerning the scope of this research, the thesis focuses mainly on state responsibility for the conduct of CDFs operating as hybrid irregular forces, with the case study being Nigeria and its engagement of the CJTF in counterinsurgency warfare against Boko Haram. As such, discussions on areas such as state responsibility arising out of omission, individual criminal responsibility, the doctrine of responsibility to protect,

attribution standard in individual and collective self-defence, application of attribution rules in domestic law, etc, all fall outside the scope of the thesis.

1.10. Conclusion.

This Chapter has dealt with the main introduction to the PhD thesis. The Chapter reiterated the focus of the thesis, which is to examine CDFs in their operation as hybrid irregular forces in counterinsurgency operations and the novel issues related to engaging state responsibility for their conduct. It highlights the fact that this examination is carried out using the CJTF as a case study, in particular, the extent to which the Nigerian state can be held responsible for the conduct of the group in its operation as a hybrid irregular force. It notes that this question would be examined within the context of the primary rules of IHL and IHRL, as well as the secondary rules of the law of State Responsibility. It states that the significance of examining state responsibility for the conduct of hybrid irregular forces is because the current framework of the law of state responsibility does not contemplate situations in which, based on the existence of a working relationship, a State can be held responsible for the conduct of such groups. The Chapter reiterates the key recommendation in this thesis, which is that the problem of whether a State can be held responsible for the conduct of a hybrid irregular force can be resolved by broadening the framework of attribution under Article 7 of the Articles on State Responsibility. In particular, it notes the recommendation that empowerment by evidence of a working relationship be included as a ground of attribution, alongside the existing framework which is based on empowerment through an internal law as a determinant of whether a State has delegated the exercise of governmental authority to a non-state entity. This recommendation stipulates that the courts should be empowered to assess the facts on the ground in a counterinsurgency i.e., the facts surrounding the working relationship between a State and a hybrid irregular force, and once it can infer empowerment, this should be sufficient to trigger state responsibility.

CHAPTER TWO

THE PHENOMENON OF HYBRID IRREGULAR FORCES

2.0. Introduction

States are widely recognised political authorities with the mandate to govern,²¹² an idea rooted in the concept of state sovereignty that became more commonly espoused in the post-World War II era.²¹³ States sign treaties, create international law, and promulgate numerous rules to regulate and govern activity in multiple ways.²¹⁴ Also, in a traditional sense, the maintenance of law and order, as well as the provision of security, are considered the exclusive responsibility of the State to its citizens.²¹⁵ Accordingly, state security and justice institutions are statutorily empowered to provide security as well as guarantee the safety of lives and property.²¹⁶ However, this model of the State as a centralised authority that taxes, conscripts, and enjoys the monopoly of legitimate violence within a territory is continuously being challenged on all fronts.²¹⁷ As noted by Clapham, “the state is not disappearing, it is disaggregating into its separate functionally distinct parts”.²¹⁸ The modern State is more of an amalgam of several actors co-existing in a polity. This is the reality of the 21st century, i.e., a complex and multi-faceted world, where States as well as unofficial and unacknowledged non-state entities operate simultaneously. Indeed, the longstanding conceptualisation of security through the lens of the State has lost its monopoly over security thinking.²¹⁹

²¹² Deborah D. Avant, Martha Finnemore and Susan K. Sell, ‘Who Governs the Globe?’ in D.D. Avant, M. Finnemore & S.K. Sell (eds.) *Who Governs the Globe? Cambridge Studies in International Relations*, (Cambridge University Press, 2010), 1 – 416 at 1.

²¹³ Natasha Ezrow, *Global Politics and Violent Non-State Actors*, (SAGE Publications Ltd., 2017), 1 – 142 at 11.

²¹⁴ Avant, Finnemore and Sell (n 212).

²¹⁵ Jimam Lar, ‘Policing Actors, Plural Processes and Hybridisation: Histories of Everyday Policing Practice in Central Nigeria’ (2018) 7 (1) *Stability: International Journal of Security & Development*, 1 – 15 at 1.

²¹⁶ *ibid.*

²¹⁷ David Nugent, ‘Governing States’ in D. Nugent & J. Vincent (eds.) *A Companion to the Anthropology of Politics*, (Blackwell Publishing Ltd., 2004), 1 – 310 at 198.

²¹⁸ Andrew Clapham, *Human Rights Obligation of Non-State Actors*, (Oxford University Press, 2006), 1 – 613 at 6.

²¹⁹ Robin Luckham and Tom Kirk, ‘The Two Faces of Security in Hybrid Political Orders: A Framework for Analysis and Research’ (2013) 2 (2) *Stability: International Journal of Security & Development*, 1 -30 at 2.

In several parts of the post-colonial world, this Weberian model has also been significantly eroded, leading to an environment where socio-political order is exercised by States and non-state entities.²²⁰ Most post-colonial systems are constructed on manifold and historical relationships between the dictates and doings of state-making as well as that of customary life.²²¹ What this means is that the Weberian model of the State is insufficient in understanding the provision of governance functions in post-colonial States, in particular, to determine state responsibility for the conduct of non-state entities. Fragile States contending with insurgents do not generally operate along the same model of statehood as their Weberian peers. Rather they reflect a system of “Mediated Stateness” in which the Mediated State conceptually allows an environment of multi-layered governance.²²² Within this space, inherently governmental functions are outsourced to other actors, other than the State, to ensure that governance is delivered. This framework of mediated statehood effectively mirrors the relationship between States and CDFs operating as hybrid irregular forces, in which the State outsources core state functions such as the provision of local security and law enforcement to these groups. The thesis argues that rather than adopting the Weberian state-centric view that considers the post-colonial State as having exclusive authority over its affairs, a better approach is thinking in terms of hybrid irregular forces.

In light of the above, this Chapter introduces the analytical framework of this thesis, examining concepts that best explain the notion of hybrid irregular forces as well as their relationship with the State. To do so, the Chapter starts by establishing the nature, character, and operationalisation of hybrid irregular forces, demonstrating that such groups are distinct from the broader class of irregular forces. The chapter demonstrates how such groups perform local governance functions alongside their traditional combat functions in counterinsurgency, towards offering a contextual framework for discussions in later chapters. As this concept is relatively unexplored, much of the literature to be engaged in this chapter will be drawn from a few related concepts, that best explain the concept. Also, given that the relationship between States and irregular forces cannot be generalised to fit all non-state entities, this chapter identifies certain characteristics that bind several irregular forces together, bringing them within the concept of hybrid irregular forces. The vastness of irregular forces and the variety of groups that have evolved in recent years, make the

²²⁰ Kwesi Aning and Ilana Z. Axelrod, ‘Hybrid Security Provision in African Post-Colonial Setting: The Case of Burkina Faso and Sierra Leone’ (2023) 58 (2) *The International Spectator*, 140 – 157 at 140.

²²¹ *ibid.*

²²² Nora Stel, ‘Mediated Stateness as a Continuum: Exploring the Changing Governance Relations Between the PLO and the Lebanese State’ (2017) 19 (3) *Civil Wars*, 348 – 376 at 349.

identification of these shared characteristics necessary. The goal is to show that such groups indeed conduct their affairs as *de facto* organs of the State and that such a status is anchored on the working relationship between both parties.

To demonstrate this fact, the Chapter examines the concept of the State alongside related concepts such as sovereignty, legitimacy, rule of law, and legal pluralism, all of which have theorised on the intersection between States and irregular forces. Through these concepts, the thesis hopes to establish that groups of this nature, share a close and interdependent relationship with the State, and in line with this central argument in this thesis, that such relationship ought to be a basis on which attribution of their conduct, as *de facto* organs of the State, can be anchored. Through the analysis in this Chapter, the thesis contends that the concept of hybrid irregular forces produces a different understanding of how a relationship of State/*de facto* state organ can be formed between a State and a non-state entity, notwithstanding the absence of an internal law of the state and/or evidence of complete dependence. This is more so, as hybrid irregular forces have become, in reality, an overarching feature of the counterinsurgency framework in post-colonial states. The Chapter plays a key function as the analytical framework that solidifies the thesis's central argument.

To achieve this objective, the chapter is broken down into three sections. The first section presents an overview of the concept of counterinsurgency, highlighting the fact that some CDFs already have a recognised status as governance providers in counterinsurgencies. This section considers how counterinsurgencies have become a major form of armed conflict in recent years, especially in Africa, and how this provides an opportunity for States to increasingly co-opt CDFs into their operations. It shows how CDFs have leveraged their role as combat forces to take up governance-like functions in areas with limited state presence, demonstrating a hybrid role in counterinsurgency warfare. The discussion in this section reflects doctrinal realities and how the emergence of CDFs as hybrid actors poses novel problems for international law.

The second section discusses the concept of hybrid irregular forces and also identifies key characteristics that define groups of this nature and how this is central to their ability to fill the governance vacuum in counterinsurgency. This is the first time groups sharing such characteristics will be identified in research and classified together. This is important to the effort to conceptualise hybrid irregular forces in this thesis, as it shows a clear distinction between which CDFs fall within this framework and those that don't, thereby demonstrating

the viability of the concept. Indeed, as the chapter shows, the hybrid operation of CDFs in counterinsurgency warfare is a global phenomenon as these characteristics cut across groups in different parts of the world, with relevant examples cited in the chapter. In conceptualising the notion of hybrid irregular forces, this chapter hopes to demonstrate changes in trends and evolution in the role of CDFs in counterinsurgency, a development that has altered the landscape in armed conflict.

The third section discusses the concept of the State as well as related concepts best positioned to explain hybrid irregular forces and their relationship with the State. By discussing these concepts, the chapter seeks to develop an analytical framework that demonstrates that CDFs are state-sponsored entities, that their engagement challenges the traditional understanding of the State and its monopoly of power and authority, and that its legitimacy enjoys a degree of validity. It also seeks to show that as governance actors, these groups are often guided by rules, which though are not entirely formal in structure, may still be considered as a form of rule of law system. The discussion in this chapter forms the main plank on which further discussions on the applicability of IHL, IHRL, as well as law of state responsibility to the CJTF as a hybrid irregular force, are later considered in Chapters Three, Four, and Five.

2.1. Counterinsurgency Warfare

Counterinsurgency is an important concept underpinning the discussion in this thesis, as it provides the context in which CDFs perform local governance functions. While this chapter does not aim to provide a comprehensive analysis of counterinsurgency, a general understanding is necessary to explain how it provides the environment for CDFs to perform governance functions. Accordingly, this section examines its contemporary dimensions and, by so, explains what makes governance by CDFs a possibility. This section begins with preliminary comments on definitions of insurgency. This is important, as counterinsurgency warfare is only possible when there is an ongoing insurgency.²²³ The US Army Counterinsurgency Field Manual defines an insurgency as:

*the organised use of subversion and violence to seize, nullify, and challenge political control of a region.*²²⁴

On their part, Metz and Millen note that an insurgency is characterised by:

protracted, asymmetric violence, ambiguity, the use of complex terrain (jungles, mountains, urban areas), psychological warfare, and political

²²³ Kilcullen (n 107) 112.

²²⁴ See, 'Insurgencies and Countering Insurgencies' FM 3-24 MCWP 3-33.5, (13 May 2014) <https://irp.fas.org/doddir/army/fm3-24.pdf> para. 1-3.

*mobilisation – all designed to protect the insurgents and eventually alter the balance of power in their favour.*²²⁵

This thesis aligns with the above description, as it aptly captures the main essence of an insurgency, an example being the Boko Haram insurgency which is the focus of this research. At the core of insurgencies is the asymmetry relationship between ruling and non-ruling groups, with the fight for legitimacy being the focus of the conflict.²²⁶ As Pratt correctly observes, an insurgency is a “civil war characterised by a power asymmetry between belligerent groups”.²²⁷ Insurgency is not a new phenomenon, rather, it has been a prevalent type of armed conflict since the creation of organized political communities.²²⁸ For instance, in contemporary times, terrorism and guerrilla warfare have increased as types of political violence such that between the 60s and the 80s, most of the terrorist activities were the work of insurgent groups seeking to achieve certain objectives.²²⁹ In the 21st century, insurgencies have become prevalent, especially in a significant number of African countries, where it is wreaking massive havoc. The surge in insurgencies has, therefore, made counterinsurgency warfare a venture that affected states must embark on.

As with most concepts, defining counterinsurgency has remained controversial, with the number of definitions pertaining to the concept quite broad. The North Atlantic Treaty Organisation (NATO) defines a counterinsurgency as “comprehensive civilian and military efforts made to defeat an insurgency and address any core grievances”.²³⁰ On his part, Kitzen refers to it as “a battle between insurgents and a state’s government for control over segments of the population”.²³¹ Two related definitions are those offered by Mucha and Rineheart. While Mucha defines it as “military, political, economic, psychological and civic actions applied by governments to defeat an insurgency”,²³² Rineheart, on his part, calls it “those military paramilitary, political, economic, psychological, and civic actions taken by a

²²⁵ Steven Metz and Raymond Millen, ‘Insurgency and Counterinsurgency in the 21st Century: Reconceptualising Threats and Response’ (2004) *Strategic Studies Institute*, 1 – 43 at 2.

²²⁶ Matt Calvin, ‘People, Partnerships, and Collaboration: Understanding and Improving Intelligence in Counterinsurgency’ (2009) *Josef Korbel Journal of Advanced International Studies*, 54 – 73 at 55.

²²⁷ Simon Pratt, ‘What is the Difference Between Counterinsurgency and Counterterrorism’ *E-International Relations*, (21 December 2010), 1 – 4 at 2.

²²⁸ Bard E. O’Neill, *Insurgency & Terrorism: From Revolution to Apocalypse*, (Washington, DC: Potomac Books, Inc., 2005), 1 – 231 at 1.

²²⁹ *ibid.*

²³⁰ See, ‘Counterinsurgency: A Generic Curriculum’ *North Atlantic Treaty Organisation (NATO)*, 1 – 81 at 3.

²³¹ Martijn Kitzen, ‘Legitimacy is the Main Objective: Legitimation in Population-Centric Counterinsurgency’ (2017) 28 (4) *Small Wars & Insurgencies*, 853 – 866 at 854.

²³² Witold Mucha, ‘Securitisation and Militia During Civil War in Peru’ (2016) 16 (4) *Conflict, Security, & Development*, 327 – 346 at 329.

government to defeat an insurgency”.²³³ However, an important definition is that used in US military doctrine, which defines the term as:

*Comprehensive civilian and military efforts designed to simultaneously defeat and contain insurgency and address its root causes.*²³⁴

While this definition is quite inclusive, it has been described as being too broad as it doesn’t exclude several other acts, the implication being that any act can simply qualify as counterinsurgency so long as the goal is to defeat an insurgent group.²³⁵ Expounding on the concept further, Braun notes that counterinsurgency “is a complex and holistic system of systems approach, that is deployed to ensure peace and stability within a region, preferably with an existing legitimate government”.²³⁶ The nature of counterinsurgency is not static but continuously evolving in response to changes in an insurgency.²³⁷ Throughout history, its scope, practice, and actors have changed significantly.²³⁸ Eighteenth and early nineteenth-century indiscriminate use of violence, which focused on the eradication of insurgents and their base, has since been replaced by moderate politically-focused approaches directed at destroying the social bond between the insurgents and the local population.²³⁹ Whereas every insurgency is different depending on the unique circumstances in terms of root causes and the environment, counterinsurgencies are largely the same.²⁴⁰ For a counterinsurgency to be successful, the State must identify the legitimate grievances that insurgents ride on, to secure the loyalty of the people and equally displace the insurgents.²⁴¹ This is because insurgents are largely products of an environment and a population, and in order to be successful, they ensure that their operations are sympathetic to their environment while they also maintain a close-knit relationship with the local population.²⁴²

²³³ Jason Rineheart, ‘Counterterrorism and Counterinsurgency’ (2010) 3 (4) *Perspectives on Terrorism*, 31 – 47 at 40.

²³⁴ See, ‘Insurgencies and Countering Insurgencies’ FM 3-24 MCWP 3-33.5, (13 May 2014) <https://irp.fas.org/doddir/army/fm3-24.pdf> para. 1-3.

²³⁵ David H. Ucho, ‘Counterinsurgency and its Discontent: Assessing the Value of a Divisive Concept’ *SWP Research Paper*, (April 2011), 1 – 21 at 7.

²³⁶ Thomas Braun, ‘Beyond Counterinsurgency: Why the Concept is Failing’ (2012) *The Quarterly Journal*, 77 – 85 at 80.

²³⁷ Kilcullen (n 107) 112.

²³⁸ Morales, (n 119) 197.

²³⁹ *ibid.*

²⁴⁰ Eliot Cohen, et al, ‘Principles, Imperatives, and Paradoxes of Counterinsurgency’ (2006) *Military Review*, 49 – 53 at 49.

²⁴¹ Thomas R. Mockaitis, ‘From Counterinsurgency to Peace Enforcement: New Names for Old Games’ (1999) 10 (2) *Small War & Insurgencies*, 40 – 57 at 41.

²⁴² John Mackinlay and Alison Al-Baddawy, ‘Rethinking Counterinsurgency’ (2008) 5 *RAND Counterinsurgency Study*, 1 – 65 at 7, 8.

Counterinsurgencies largely hinge on a ‘win the population’ strategy.²⁴³ While the military and paramilitary actions in counterinsurgencies represent a direct approach relying on strict operations of violence, detentions, and elimination of insurgents, the indirect approach encompasses political, economic, and psychological measures designed to improve the welfare of civilians, thus winning their ‘hearts and minds’ and turning them away from the insurgents.²⁴⁴ The winning ‘the hearts and minds’ approach is population-centric and is based on the view that it is more important to win the support of the local population than to focus on killing of insurgents.²⁴⁵ This is because at the centre of most insurgencies and counterinsurgencies are legitimacy and control.²⁴⁶ According to Rid, counterinsurgency is military activities anchored on civilians in an ecosystem where insurgents and counterinsurgents fight for the trust of the civilian population.²⁴⁷ As insurgents derive strength from the acquiescence of the people, counterinsurgent forces also focus on building the people’s trust and confidence in the government, as well as their cooperation.²⁴⁸ Also, aside from military operations, counterinsurgencies encompass economic, political, and social reconstruction to build an orderly society that can be resistant to future insurgencies.²⁴⁹ In designing counterinsurgency operations, therefore, an awareness of the environment in which insurgents operate, i.e., the combat milieu, goals, and tactics of the insurgents, is key, as a corporate knowledge of the best tactics that will work in such an environment is important.²⁵⁰ Counterinsurgent forces must also operate in tandem with existing laws of war and international law.²⁵¹

States battling insurgencies face a myriad of challenges, especially given the asymmetric nature of insurgencies. For instance, a key challenge faced in most counterinsurgency warfare is the problem of manpower shortage, particularly that of combat forces. Highlighting this point, Melshen states that “counterinsurgency warfare is manpower intensive” and that “in counterinsurgency, there is need for a wide range of quality of forces”.²⁵² For

²⁴³ Ganesh Sitaraman, ‘Counterinsurgency, the War on Terror and Laws of War’ (2009) 95 (7) *Virginia Law Review*, 1745 – 1839 at 1773.

²⁴⁴ Anna O. Pechenkina and D. Scott Bennett, ‘Violent and Non-Violent Strategies of Counterinsurgency’ (2017) 20 (4) *Journal of Artificial Societies and Social Simulation*, 1 – 25 at 2.

²⁴⁵ Braun (n 236) 80.

²⁴⁶ See, ‘Insurgencies and Countering Insurgencies’ (n 234).

²⁴⁷ Thomas Rid, ‘The Nineteenth Century Origins of Counterinsurgency Doctrine’ (2010) 33 (5) *The Journal of Strategic Studies*, 727 – 758 at 727.

²⁴⁸ Sitaraman (n 243) 1771.

²⁴⁹ *ibid.*

²⁵⁰ Paul Melshen, ‘Mapping Out a Counterinsurgency Campaign Plan: Critical Considerations in Counterinsurgency Campaign’ (2007) 18 (4) *Small War & Insurgencies*, 665 – 698 at 678.

²⁵¹ *ibid.*, 679.

²⁵² *ibid.*, 685.

counterinsurgency operations to succeed, different levels of troops are required. In most operations, there will be a need for highly trained, moderately trained, as well as minimally trained troops to perform different tasks, ranging from sophisticated counterinsurgency missions to less sophisticated missions, as well as guarding of static positions.²⁵³ Most times, too, the financial and human resources required in counterinsurgency warfare are massive. Quite fundamentally, given its asymmetric nature, counterinsurgent forces fight in battle zones most times containing insurgents and civilians, in which drawing a line of demarcation between combatants and non-combatants can be problematic. In counterinsurgency warfare, civilians are not often aloof but are active participants that can be recruited as fighters by both sides, either through coercion or volunteerism.²⁵⁴ Within the same space, insurgents are not just enemy combatants subject to targeting but become useful allies or potential sources of intelligence.²⁵⁵ To resolve the manpower crisis, counterinsurgent forces often turn to the use of auxiliary forces in the form of irregular forces such as CDFs, in which civilian volunteers are co-opted to fight alongside government troops.

In Africa, problems associated with counterinsurgency warfare are characterised and shaped by several factors. Years of poor political governance and military interregnum, coupled with dictatorial rule, lack of clear policy direction, and corruption have been major facilitators of military institutions being short in adequate firepower, ridden with undisciplined troops, and lacking motivation as well as character. For instance, concerning Nigeria's counterinsurgency warfare against Boko Haram, Banini notes that the diversion of funds meant for military missions in counterinsurgency was a setback to counterinsurgency operations, while corruption also affected the morale of troops on the field.²⁵⁶ The result is that in most critical moments, the military is unable to deliver on its mandate. Also describing the state of counterinsurgency on the continent, Day and Reno notes that African counterinsurgencies are often rebel-centric, in which the State's relationship with the civilian population continues to oscillate, with much of it depending on the relationship between the State and insurgents.²⁵⁷ In some instances, they can be ignored, while the government uses full military force against the insurgents, and in other instances, they can be co-opted to fight on behalf of the State.²⁵⁸

²⁵³ *ibid.*

²⁵⁴ Daniel H. Levine, 'Care and Counterinsurgency' (2010) 9 (2) *Journal of Military Ethics*, 139 – 159 at 139.

²⁵⁵ *ibid.*

²⁵⁶ Daniel K. Banini, 'Security Sector Effectiveness and Military Corruption: The Influence of Corruption on Countermeasures Against Boko Haram in Nigeria' (2020) 31 (1) *Small War & Insurgencies*, 131 – 158 at 144.

²⁵⁷ Christopher R. Day and William S. Reno, 'In Harm's Way: African Counterinsurgency and Patronage Politics' (2014) 16 (2) *Civil Wars*, 105 – 126 at 105, 110.

²⁵⁸ *ibid.*

Generally, counterinsurgency warfare on the continent is long-drawn and remains intractable, becoming a space where state and non-state actors feature prominently, all in the quest to crush the insurgents and to take up large swathes of ungoverned spaces. After being grafted into the counterinsurgency framework, these spaces as well as the governance opportunities offered by the political economy of war, are mostly utilised by CDFs, who then become face of government, performing local governance functions in territories under their sphere of influence.

2.2. The Phenomenon of Hybrid Irregular Forces.

The main contribution that this thesis makes to existing research is its conceptualisation of the term ‘Hybrid Irregular Forces’. The concept points to the different reasoning of political order that underpins the post-colonial state, especially in Africa. More significantly, the role of such groups in counterinsurgency warfare has become increasingly relevant, challenging the traditional perspective on state responsibility under international law. In this respect, the form of non-state local governance produced by hybrid irregular forces has become an avenue for undermining the international obligation of the sponsoring state as well as well-established norms of international law. From a legal standpoint, conceptualising the phenomenon is key to demonstrating the sense in which it operates as a practitioner of non-state social order and authority as well as in a legal asymmetry. Understanding what they represent and how they differ from other types of CDFs is central to later analysis on how and whether the Nigerian state can be held responsible for the conduct of a group operating in this manner. To do this, it is key to start with an analysis of the term itself.

Largely, the expression can be divided into two key terms, i.e., ‘hybrid’ and ‘irregular forces’. The term ‘hybrid’ means crossbreed, mixture, compound, composite, and amalgam. It refers to a thing that is of mixed origin or composition, as well as a thing that is a mixture of two or more things. For instance, we talk of hybrid cars, i.e., automobiles whose performance is based on alternating between combustion and battery systems. There is also the example of hybrid work, which refers to a work arrangement which encompasses both onsite and remote work. Equally, there is something called hybrid war, referring to warfare involving both military and non-military actions such as misinformation and cyberwarfare. In recent times, the term has also featured prominently in discussions on security governance. Bagayoko, Hutchful and Luckham for instance, refer to it as “the coexistence and interaction of multiple

state and non-state providers of security, as the state shares authority, legitimacy and capacity with other actors, networks and institutions across the informal/formal divide”.²⁵⁹

The term ‘irregular forces’, on its part, refers to armed groups separate from the conventional armed forces of a state. According to the US Army, irregular forces are “armed individuals or groups who are not members of the regular armed forces, police, or other internal security forces”.²⁶⁰ They operate outside the regular military forces that ought to exercise the monopoly of legally sanctioned violence²⁶¹ and are used to supplement the regular armed forces, often in informal and illegitimate ways.²⁶² They may be used by the government to carry out so-called ‘dirty jobs’ while they may also predate community civilians.²⁶³ Importantly, irregular forces may provide the local population with public services in the form of governance.²⁶⁴ This can be in the form of providing basic amenities like roads, water, and housing, monitoring neighbourhood crimes, providing community security patrols, settling disputes, etc., In return, they receive the support and loyalty of the local population, who may supply them with regular intelligence on the activities of insurgent forces.²⁶⁵

As a concept, this thesis uses the term ‘Hybrid Irregular Force’ to refer to an irregular force operating as a hybrid actor in a counterinsurgency, i.e., operating in both combat and governance space in a counterinsurgency. Pivotal for the understanding of hybrid irregular forces is the fact that such groups take up hybrid roles in a counterinsurgency, in which it undertakes combat functions on behalf of the State while at the same time acting as a source of social order and authority evidenced by its provision of local self-governance functions to the local population. These groups execute these tasks while operating on behalf of or on the side of the State in counterinsurgency warfare. In contrast to other types of CDFs who simply engage in combat assignment on behalf of the State, hybrid irregular forces effectively become the face of governance in areas of limited statehood. Hybrid irregular forces differ from existing forms of non-formal governmental actors providing services to people. They

²⁵⁹ Niagale Bagayoko, Eboe Hutchful and Robin Luckham, ‘Hybrid Security Governance in Africa: Rethinking the Foundations of Security, Justice and Legitimate Public Authority’ (2016) 16 (1) *Conflict, Security & Development*, 1 – 32 at 7.

²⁶⁰ US Army, ‘Irregular Forces’ US Army TRADOC G2 Handbook No. 1.08, (20 December 2010) JP 3 – 24, available at https://www.benning.army.mil/mssp/security%20topics/Potential%20Adversaries/content/pdf/1.08%20IrregularForcesTRADOC_G2_Hdbk_1.08%2020dec10.pdf

²⁶¹ Yasutomi (n 110) 15.

²⁶² *ibid.*

²⁶³ *ibid.*, 16

²⁶⁴ *ibid.*, 17

²⁶⁵ Atsushi Yasutomi, ‘Characterising Irregular Forces’ in A. Yasutomi, R. Arcala Hall, & S. Kiba, (eds.) *Pathway for Irregular Forces in Southeast Asia: Mitigating Violence with Non-State Armed Groups* (Routledge, 1st ed. 2022), 1 – 214 at 17.

assume the role and functions of the State in a counterinsurgency, operating under a rule of law system and enjoying legitimacy from the governed population. This phenomenon challenges the traditional understanding of state sovereignty and the state power of monopoly over governance.

In different parts of the world, non-state order and authority has become an abiding phenomenon. Hitherto castigation of non-state order as injurious has since been overtaken by its acceptance as a medium of social order and authority.²⁶⁶ At the core of non-state order is the hybrid governance in which the State operate alongside informal and other forms of non-state entities in the exercise of public authority and provision of governance functions.²⁶⁷ The role of irregular forces operating in a hybrid form is a topic of considerable scholarly interest, especially in regions where armed conflicts are the most prevalent, such as Africa. Studies have shown that such groups can be viewed from two important perspectives, i.e., that which considers groups of this nature as a problem and that which views them as governance actors.²⁶⁸ This duality of views aptly applies to how the role of CDFs in counterinsurgency warfare is generally perceived. Within this first perspective, such groups are not just considered as actors who may cause or trigger violent conflict but also as players that may increasingly make it difficult to end such conflicts and restore peace and stability.²⁶⁹ As noted by Aliyev, discussions on the role of CDFs in counterinsurgency are majorly dominated by notions of state delegation or outsourcing of violence to these groups and the principal-agent paradigms in which it is assumed that the state relies on them to evade accountability for civilian persecution and human rights violations.²⁷⁰ On their part, Klosek and Souleimanov note that such collaboration is considered a trade-off for the government, dictated on the one hand by the need to deploy extra-state armed force, and on the other hand by the group's interest in allying itself with the state against their common enemy.²⁷¹ This relationship is considered incrementally in favour of the State.²⁷²

²⁶⁶ Kate Meagher, 'The Strength of Weak States? Non-State Security Forces and Hybrid Governance in Africa' (2012) 43 (5) *Development and Change*, 1073 – 1101 at 1074.

²⁶⁷ *ibid.*, 1075.

²⁶⁸ Ulrich Schneckener, 'Spoilers of Governance Actors? Engaging Armed Non-State Armed Groups in Areas of Limited Statehood' *SFB-Governance Working Paper Series, No. 21, Research Centre (SFB) 700, Berlin, (October 2009)*, 1 – 31 at 7.

²⁶⁹ *ibid.*

²⁷⁰ Huseyn Aliyev, 'Pro-government, Anti-government Armed Groups: Towards Theorising Pro-Government Government Challengers' (2022) 34 (7) *Terrorism and Political Violence*, 1369 – 1385 at 1370.

²⁷¹ Kamil C. Klosek and Emil A. Souleimanov, 'One or Many? Disentangling the Puzzle of Pro-Government Militia Deployment' (2022) *Critical Studies in Conflict & Terrorism*, 1 – 25 at 3.

²⁷² Aliyev (n 270).

The second perspective, which underpins the focus of this research, does not consider CDFs as a problem but is rather concerned with whether and under what conditions such groups may act as governance actors, able and willing to provide governance services to the broader civilian population.²⁷³ Under some circumstances, these services may operate as equivalents to the regular state activities and also provide a certain level of stability in areas of limited statehood.²⁷⁴ While irregular forces such as CDFs may have differing agendas, most often they are united in their belief that they need to provide their security in a political environment where the State is either unable or unwilling to protect the people.²⁷⁵ Buttressing this point, Tapscott notes that such organisations usually emerge due to a security or governance vacuum and are then able to survive based on their relationship with central and local powerbrokers.²⁷⁶ This second perspective is the prevailing view, with more CDFs becoming providers of local governance functions, even when still operating as combat forces. Such actions, even when within the knowledge of state actors, are ignored as the State is sometimes unable to provide governance for the entire generality of the people. In some other circumstances, the State does not mind yielding such governance space to such groups, so long as it can still derive benefits from using them in combat. It is within this space that the CJTF has assumed its hybrid role in Nigeria's counterinsurgency warfare.

For a long time, counterinsurgency was considered through the lens of two main actors, i.e., the State and insurgents, however, this thesis demonstrates the fact that the emergence of hybrid irregular forces has reshaped the landscape, bringing in a third force. Further understanding the notion of hybrid irregular forces requires a discussion of concepts that the operation of these groups implicates. This includes primarily the concept of the State, as well as related concepts such as sovereignty, state fragility, legitimacy, rule of law, and legal pluralism. However, before considering these concepts, it is important to first highlight characteristics that separate hybrid irregular forces from the broader class of irregular forces.

2.3. Hybrid Irregular Forces – Shared Characteristics.

Categorising CDFs in terms of distinguishing one group from the other is difficult, given their fluidity and continuous fragmentation. Also, the factors and elements that differentiate these groups overlap. Though each country is unique in terms of the nature of its insurgency and the way such groups have been co-opted by the state in counterinsurgency warfare, they

²⁷³ Schneckener, (n 268)

²⁷⁴ *ibid.*

²⁷⁵ Robert Mandel, 'The Privatisation of Security' (2001) 28 (1) *Armed Forces & Society*, 129 – 151 at 130.

²⁷⁶ Rebecca Tapscott, 'The Government Has Long Hands: Institutionalised Arbitrariness and Local Security Initiatives in Northern Uganda' (2007) 48 (2) *Development and Change*, 263 – 285 at 267.

however share common characteristics. To further explain the concept of hybrid irregular forces, for the purpose of careful distinction and clarification, this thesis has developed several characteristics that it deems as unique to several CDFs and which brings the groups in view, within the concept of hybrid irregular forces.

2.3.1. *Existence of Formal Government Structures.*

The first and most critical characteristic of CDFs operating as hybrid irregular forces, is that they operate in countries with formal government structures in place. This characteristic is important given that there are irregular forces that operate in countries where the Westphalia idea of Statehood i.e., a central government having the monopoly of power, has collapsed leading to a variety of armed groups exercising governance in different parts of the country.²⁷⁷ This has been referred to this as a sort of ‘heterarchical political order’. Capturing this in the light of the collapse of central authority in Iraq, Doyle and Dunning, for instance, refer to this as ‘fragmented sovereignty’, a non-hierarchical political order where multiple, competing, as well as opposition state and non-state actors assert legitimacy, exercise political authority, and ride on violence, towards predetermined political, economic and security ends.²⁷⁸ They further note that “many armed actors occupy a grey area between state and non-state, a situation of hybrid political authority that is both a product of, and a contributor to, fragmented sovereignty”.²⁷⁹

Groups that this thesis consider as hybrid irregular forces operate in places where state failure is in view, as against a collapse of state authority. For such groups, a distinguishing characteristic is an existence, not just of a formal governance structure, but that such government is in full charge of other parts of the country, save for the conflict zone where authority is fragmented. In such fragmented areas, overlapping governance becomes the order of the day. As Hinnebusch notes, state failure does not connote a lack of governance or the replacement of formal authority by anarchy, but a state of limited statehood existing side by side with ungoverned spaces, where though vacuums are filled by multiple groups, none amongst them is able to establish state-wide hierarchy.²⁸⁰ This scenario correctly reflects

²⁷⁷ A collapsing state has lost legitimacy, lacks few or no functioning institutions, can no longer confer identity and cannot guarantee the security of its population. See Sebastian Von Einsiedel, ‘Policy Responses to State Failure’, in S. Chesterman, M. Ignatieff, & R. Thakur, (eds.) *Making States Work: State Failure and the Crisis of Governance*, (United Nations University Press, 2005), 1 – 400 at 15.

²⁷⁸ Damian Doyle and Tristan Dunning, ‘Recognising Fragmented Authority: Towards a Post-Westphalian Security Order in Iraq’ (2018) 29 (3) *Small War & Insurgencies*, 537 – 559 at 538.

²⁷⁹ *ibid.*

²⁸⁰ Raymond Hinnebusch, ‘From Westphalian Failure to Heterarchic Governance in MENA: The Case of Syria’ (2018) 29 (3) *Small War & Insurgencies*, 319 – 413 at 395.

countries where hybrid irregular forces have become an emergent phenomenon. A relevant example is Syria, where this idea of state failure occurred with the 2011 uprising against President Bashar Al Assad, when opposition militias sprang up to take on the central government.²⁸¹ By the end of the year, the country had descended into a bloody civil war, with the result that the central government lost control over more far-flung parts of the country and continuously shifting frontlines between the government and opposition armed groups.²⁸² A standout feature of the conflict is its characterisation as a proxy war,²⁸³ manifested in a high fragmentation of armed groups as well as interference by regional and international actors.²⁸⁴ However, the central continued still pay government officials delivering services in opposition areas to depict itself as the legitimate to which citizens should turn.²⁸⁵ Examples of other countries where groups manifesting this characteristic have operated or are operating include Sierra Leone, Burkina Faso, Mali, and Nigeria. This is distinct from countries such as the Democratic Republic of Congo, Libya, Somalia, Yemen, etc, where the central government has significantly abdicated authority, giving way to a state of unrestrained non-state rule. In Libya, for instance, armed group fragmentation is the defining feature of the country due to the absence of a central government to administer the political functions of the state.²⁸⁶ A result is an extensive number of groups, local and foreign, controlling different parts of the country.²⁸⁷

2.3.2. *The Groups operate simply in counterinsurgency warfare.*

A second characteristic related to hybrid irregular forces is that these groups operate strictly in counterinsurgency warfare and not in other types of armed conflict situations. The Kamajors, Koglweogos, Ganda Koya, Ganda Iso, and CJTF²⁸⁸ all come within this classification. This characteristic is important in that it helps to distinguish this class of CDFs from others who emerge to fight local criminal gangs for example, the Sungusungu

²⁸¹ Christopher Phillips and Morten Valbjørn, 'What is in a Name? The Role of Different Identities in the Multiple Proxy Wars in Syria' (2018) 29 (3) *Small War & Insurgencies*, 414 – 433 at 419.

²⁸² Hinnebusch (n 280) 396.

²⁸³ Reinoud Leenders and Antonio Giustozzi, 'Foreign Sponsorship of Pro-Government Militias Fighting Syria's Insurgency: Whither Proxy Wars?' (2020) *Mediterranean Politics*, 1 – 30 at 2.

²⁸⁴ Irene Constantini and Ruth H. Santini, 'Power Mediators and Illiberal Peace Momentum: Ending Wars in Libya and Syria' (2021) *Third World Quarterly*, 1 – 17 at 10.

²⁸⁵ Hinnebusch (n 280) 399.

²⁸⁶ Andrea Carboni and James Moody, 'Between the Cracks: Actor Fragmentation and Local Conflict Systems in the Libyan Civil War' (2018) 29 (3) *Small War & Insurgencies*, 456 – 490 at 457.

²⁸⁷ *ibid*, 474.

²⁸⁸ Okoli Al Chukwuma, 'Nigeria: Volunteer Vigilantism and Counter-insurgency in the Northeast' (2017) 20 *Conflict Studies Quarterly*, 34 – 55 at 46; Christopher Kinsey and Andreas Krieg, 'Assembling a Force to Defeat Boko Haram: How Nigeria Integrated the Market into its Counterinsurgency Strategy' (2021) 37 (2) *Defence & Security Analysis*, 232 – 249 at 241.

village groups in Tanzania, and the Mungiki Youth Movement in Kenya.²⁸⁹ There are also other groups that fight in internationalised armed conflicts such as the conflicts in Syria and Yemen, where a variety of foreign actors are involved. This class of groups does not come within the purview of this thesis.

2.3.3. *The Insurgency is local in nature.*

A third characteristic peculiar to hybrid irregular forces is that they operate in localised insurgencies, i.e., insurgencies that developed locally, as against those inspired by foreign/external interference in domestic issues. This characteristic is relevant to the extent that it helps provide a further distinction concerning a multitude of groups operating in different forms of insurgencies. The Kamajors, Koglweogos, Ganda Koya, Ganda Iso, and CJTF, groups which this thesis focuses on, share similarities in this regard. For instance, for over 10 years, successive Sierra Leonean governments fought an insurgency instigated by the Revolutionary United Front (RUF), spearheaded by Liberian special forces from the National Patriotic Front of Liberia (NPFL). Also, Nigeria has been battling Boko Haram, a Salafist-jihadist group, which, since 2009, has been operating in the northeast region of the country and has also formed alliances with other terror groups across the Sahel.²⁹⁰ Mali has also been in a protracted civil war with an assortment of armed groups, made up of militias from the Songhai, Arabs, and Tuaregs ethnic groups, as well as jihadists and paramilitary groups, also representing Songhais, Arabs, and Fulanis.²⁹¹ In addition, the Burkina Faso government has been confronting jihadist elements in the Sahel.

The unique character of these conflicts is that they are all insurgencies that started locally, are based on domestic socio-political and ethno-religious issues, and have largely remained localised. This is distinct from insurgencies in countries such as Afghanistan, Libya, Syria, and Yemen, which resulted from the activities of foreign countries, intervening militarily in the domestic affairs of these countries. Notable examples include militia groups in countries

²⁸⁹ Daniel Agbibo, 'Origins Hybrid Governance and Armed Community Mobilisation in Sub-Sahara Africa' Resolve Network (October 2019), 1- 28 at 15; Ray Abrahams, 'Village Vigilante Groups in Tanzania' (1987) 86 (343) *African Affairs*, 179 – 196 at 181, 182.

²⁹⁰ The emergence of the group and its horrific cycle of violence against the Nigerian State is well documented in a vast body of literature. See generally Iro Aghedo and Oarhe Osumah, 'The Boko Haram Uprising: How Should Nigeria Respond' (2012) 33 (5) *Third World Quarterly*, 853 – 869 at 858; Oarhe Osumah, 'Boko Haram Insurgency in Northern Nigeria and the Vicious Cycle of Internal Security' (2013) 24 (3) *Small Wars & Insurgencies*, 536 – 560 at 541; Wisdom O. Iyekekpolo, 'Boko Haram: Understanding the Context' (2016) 37 (12) *Third World Quarterly*, 2211 – 2228 at 2212; Suranjan Weeraratne, 'Theorising the Expansion of Boko Haram Insurgency in Nigeria' (2017) 29 (4) *Terrorism and Political Violence*, 610 – 634 at 611; Wisdom O. Iyekekpolo, 'Political Elites and The Rise of the Boko Haram Insurgency in Nigeria' (2020) 32 (4) *Terrorism and Political Violence*, 749 – 767 at 754.

²⁹¹ Adib Bencherif, Aurelie Campana and Daniel Stockemer, 'Lethal Violence in Civil War: Trends and Micro-Dynamics of Violence in the Northern Mali Conflict' (1998) 3 (2) *Studies in Conflict & Terrorism*, 1 – 23 at 6.

such as Afghanistan, Syria, etc which were mobilised and funded by foreign government, to counter state-backed forces. Though in some respect, groups operating in these insurgencies may appear like those in localised insurgencies, the fact that the counterinsurgency framework is foreign inspired takes such groups out of the scope of this thesis.

2.3.4. *The Existence of a Security Vacuum.*

A fourth characteristic of hybrid irregular forces is that they operate where the security vacuum is sufficiently acute, in which the community security approach has been neglected, exposing the civilian population to violence by insurgent/rebel groups. Whereas they may end up exhibiting criminal tendencies, the motivation of such groups is often to provide local security functions. The *Kamajors*, for instance, served as the main security apparatus in Sierra Leone in place of an effective state military or police force.²⁹² In Burkina Faso, the emergence of the *Koglweogos* was due to the growing insecurity and the one-year political transition programme in the country.²⁹³ The same is the case with Mali, where a lack of skills, leadership, and morale in the Military led to political support for the militia to be co-opted into counterinsurgency warfare.²⁹⁴ In the same vein, the Nigerian CJTF arose from the grassroots population of Maiduguri, the capital city of Borno State Nigeria, in response to the military's neglect of the community security approach and the failure of the State to protect the people from Boko Haram insurgents.²⁹⁵ They subsequently became involved in daily patrol of the streets as well as house-to-house searches for Boko Haram members.²⁹⁶

2.3.5. *Composed of Civilian Volunteers from the local population.*

A fifth characteristic of hybrid irregular forces is that they are mostly made up of civilian volunteers from members of the local population. They are civilians organised in a citizen-led bottom-up approach, though in a few instances, some of their members may also be ex-soldiers. In this context they are mostly community-based groups, who having experienced the horrors of insurgency, organise themselves as volunteers taking up arms, to confront the problem. They start out by organising themselves, towards protecting their territory from the activities of insurgents/rebels. The *Kamajors* for instance were not formed and trained by the

²⁹² Patrick Johnston, 'The Geography of Insurgent Organisation and its Consequences for Civil Wars: Evidence from Liberia and Sierra Leone' (2008) 17 (1) *Security Studies*, 107 – 137 at 133.

²⁹³ Sten Hagberg, 'Performing Tradition While Doing Politics: A Comparative Study of the Dozos and Koglweogos Self-Defence Movements in Burkina Faso' (2019) 62 *African Studies Review*, 173 – 193 at 182.

²⁹⁴ Tor A Benjaminsen and Boubacar Ba, 'Fulani-Dongon Killings in Mali: Farmer-Herder Conflict as Insurgency and Counterinsurgency' (2021) 14 (1) *African Security*, 4 – 26 at 17.

²⁹⁵ Seun Bamidele, 'The Civilian Joint Task Force and the Struggle Against the Insurgency in Borno State, Nigeria' (2017) 7 (2) *African Conflict and Peacebuilding Review*, 85 – 98 at 91.

²⁹⁶ Daniel Agbibo, 'National Heroes or Coming Anarchy: Vigilant Youth and the War on Terror in Nigeria' (2018) 11 (2) *Critical Studies on Terrorism*, 272 – 294 at 285.

Sierra Leonean government. On the basis of this, they fought not just against the RUF, but also against elements of the Sierra Leonean Army who committed human rights abuses against the civilian population.²⁹⁷ The CJTF, known as the Borno Youth Association for Peace and Justice, also came into being in this manner, organising themselves to confront the terrorism of Boko Haram insurgents as well as human rights abuses by the military.²⁹⁸ This distinguishes hybrid irregular forces from other groups, which though civilian militias, were formed by the State, funded by the State and so have the scope of their operation limited. As civilian volunteers, the groups that this thesis focuses on often act as a ‘defensive’ rather than an ‘offensive’ force.

2.4. Concepts Underpinning Hybrid Irregular Forces.

As noted in Section 2.0. Fragile States do not often follow the Weberian model of statehood but rather a system of mediated statehood in which the exercise of governmental power is shared with non-state actors. Within this framework, inherently governmental functions are outsourced to actors such as CDFs, who tacitly operate as de facto organs of the State in their sphere of influence. Hybrid irregular forces typify this model in that not only are they engaged by States as combat forces in counterinsurgency operations, during which the State outsources governance functions such as provision of local security and law enforcement to them, but they also exploit continued state absence in certain areas to take on additional governance functions. The implication is that the State is transformed into a hybrid political order rather than the conventional Weberian model. Within this political order, the activities of CDFs as combat forces as well as providers of local governance functions intersect with the nature, character, and survival of the State, in which they derive legitimacy from being state-sponsored entities while at the same time augmenting the legitimacy of the State in areas with limited state presence. A major concept that constitutes a frame of reference for understanding hybrid irregular forces is the concept of the State. It provides a framework for analysing the nature, power, functions, and transformation of the Modern State. It equally encompasses dimensions such as sovereignty, legitimacy, rule of law, and legal pluralism. These dimensions are inextricably linked as well as interrelated, and the thesis appropriates them, alongside the concept of the State, as its analytical framework.

²⁹⁷ Jeremy Ginifer and Hooman Peimani, ‘Civilian Defence Forces and Post-Conflict Security Challenges: International Experience and Implications for Africa’ in David J. Francis (ed.), *Civil Militia: Africa’s Intractable Security Menace?* (London and New York: Routledge, 2005) 1 – 328 at 255.

²⁹⁸ Agbiboa (n 296) 280.

2.4.1. *The Concept of the State.*

The ideal starting point for discussion on the concept of the State is to consider what the term means. In the ordinary sense, it refers to “an independent political organisation of sufficient authority and power to govern a defined territory and population”.²⁹⁹ Beyond this description, scholars have offered several other definitions. According to Weber, a State can be defined “as a human community that successfully claims the monopoly of the legitimate use of physical force within a given territory”.³⁰⁰ It is worth stating that this definition is the most widely referenced in contemporary political thought. Weber’s thought has been subsequently echoed by Sabine, who notes that the State is primarily a power, in that it makes and enforces law, and that behind that law is a system of organised power which is acknowledged to have a right of coercion against those who do not obey.³⁰¹ The key observation here is that the political relation in question is that of sovereign and subject.³⁰² More so, Nettl, on his part, defines a State as “...a collectivity that summates a set of functions and structures to generalise their applicability”.³⁰³

In further explaining the term, Krasner identifies four (4) different conceptualisations relating to the concept of the State, namely - the state as a government made up of personnel occupying decisional authority in the polity; the State as a public bureaucracy or administrative apparatus and an institutionalised legal order; the State as the ruling class; and lastly, the State as a normative order.³⁰⁴ For Rutgers, the term ‘State’ may be used in two distinct ways. The first approach relates the State being an apparatus of rule as well as a monopoly of coercion associated with an entity, e.g., a government.³⁰⁵ In this context, the State is equated with government. This first idea of the State is captured in the definition given by scholars such as Weber and Krasner earlier stated in this section. The second approach considers the State as beyond just government but views it as an ordering of politics

²⁹⁹ Robert H. Jackson, ‘Juridical Statehood in Sub-Sahara Africa’ (1992) 46 (1) *Journal of International Affairs*, 1 – 16 at 1.

³⁰⁰ Phillip Lottholz and Nicolas Lemay-Hebert, ‘Re-reading Weber, Reconceptualising State Building: From Neo-Weberian to Post-Weberian Approaches to State, Legitimacy, and State Building’ (2016) 29 (4) *Cambridge Review of International Affairs*, 1467 – 1485 at 1467.

³⁰¹ George H. Sabine, ‘The Concept of the State as Power’ (1920) 4 (29) *The Philosophical Review*, 301 – 318 at 302.

³⁰² *ibid.*

³⁰³ J.P. Nettl, ‘The State as a Conceptual Variable’ (1968) 20 (4) *World Politics*, 559 – 592 at 562.

³⁰⁴ Stephen D. Krasner, ‘Approaches to the State: Alternative Conceptions and Historical Dynamics’ (1984) 16 (2) *Comparative Politics*, 223 – 246 at 224.

³⁰⁵ Mark R. Rutgers, ‘The Purpose of the State’ (2008) 30 (3) *Administrative Theory & Praxis*, 349 – 354 at 349.

and society.³⁰⁶ It refers to the political, social, and/or economic order of the society, having the purpose or function of making an ordered society possible.³⁰⁷

The root of the modern State is traceable to medieval Europe.³⁰⁸ Whereas territories in other regions of the world did demonstrate similar traits, it was early European States that first displayed attributes unique to a State, such as governments developing institutional capacities synonymous with sovereign rule and far detached from the politics of the pre-modern age.³⁰⁹ With time, this model was transplanted from Europe to other parts of the world.³¹⁰ However, it was the Peace of Westphalia (1648)³¹¹ that indeed produced the concept of the modern sovereign state.³¹² This treaty, for the first time, firmly established the principle of sovereign, territorial rule, emphasising sovereignty as the key criterion for determining statehood. With the growth of territorial States around the 19th century, effectively sovereign, able to protect their societies, as well as provide goods and services to their people, sovereignty attained legal, moral, and socio-economic status.³¹³

Sovereignty is central to understanding the contemporary origins, nature, power, central functions, and continuous transformation of the concept of the State. Once statehood is recognised, a State is considered to be sovereign, meaning it now possesses the power to exercise supreme dominion, authority, or rule.³¹⁴ The sovereign State model operates on four key principles i.e., territory, mutual recognition, autonomy, and control.³¹⁵ The meaning is that a sovereign State is deemed to exercise political authority over a defined geographic space, free from external interference, is recognised by other juridically independent

³⁰⁶ *ibid*, 350

³⁰⁷ *ibid*.

³⁰⁸ Hendrick Spruyt, 'The Origins, Development, and Possible Decline of the Modern State' (2002) 5 *Annual Review of Political Science*, 127 – 149 at 131.

³⁰⁹ *ibid*.

³¹⁰ *ibid*.

³¹¹ The Peace of Westphalia is the name commonly used to refer to the treaties of Osnabruck between the Empire and Sweden, and the treaties of Munster between the Empire and France as well as their confederates and allies, signed in 1648 which ended the Thirty Years War following the decline of Habsburg Empire. *See generally*, Leo Gross, 'The Peace of Westphalia 1648 – 1948' (1948) 42 (1) *American Journal of International Law*, 20 – 41 at 21; Stephen D. Krasner, 'Compromising Westphalia' (1995) 20 (3) *International Security*, 115 – 151 at 115; Derek Croxton, 'The Peace of Westphalia 1648 and the Origins of Sovereignty' (1999) 21 (3) *International History Review*, 569 – 591 at 569; Jason Farr, 'Point: The Westphalia Legacy and the Modern Nation-State' (2005) 80 (3) *International Social Science Review*, 156 – 159 at 156.

³¹² Mary M. Sackflame and Bolaji Omitola, 'Ungoverned Spaces and Alternative Sovereignties in Nigeria: Terror Groups, National Security, and Sustainable Development' (2022) 8 (1) *Law Research Review Quarterly*, 133 – 152 at 138; Stephen D. Krasner, 'Sovereignty' (2001) *Foreign Policy*, 20 – 29 at 21.

³¹³ Sackflame and Omitola, (n 312) 139.

³¹⁴ *Black's Law Dictionary*, Bryan A. Garner (ed.) (St. Paul, MN: West Publishing, 9th ed. 2009) 1 – 1920 at 1524.

³¹⁵ Stephen D. Krasner, 'Rethinking the Sovereign State Model' (2001) 27 *Review of International Studies*, 17 – 42 at 18.

territories as competent to enter into contractual agreements e.g., treaties, and effectively acts over its population and regulates movement within and across its borders.³¹⁶ The root of sovereignty is to be found in the early works of Jean Bodin, who established the principle that the King as Sovereign, did not possess supra-mundane sovereignty i.e., a sovereignty which had nothing above it, but rather that the King was subject to God, as God is above the King.³¹⁷ Bodin noted that the King was submitted and only accountable to God and that he was no longer a part of the people and the body politic but was a separate and transcendent whole.³¹⁸ To this end, his power was considered supreme, absolute, and consequently unlimited.³¹⁹

Sovereignty is defined as the power of the State to exercise supreme legitimate authority within a given territory,³²⁰ as well as the responsibility to provide security, through peace and common defence of all individuals that have covenanted.³²¹ Kelsen notes that to be sovereign means that the State is not subject to a legal order superior to its national law.³²² Conventional sovereignty is based on a world of independent, internationally recognised, and properly governed States.³²³ For Krasner, the term sovereignty has been used in four (4) different ways, which include international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty.³²⁴ International legal sovereignty refers “to the practices associated with mutual recognition, usually between territorial entities that have formal juridical independence”.³²⁵ In other words, it means the recognition of juridically independent territorial entities, as well as non-intervention of external forces in the internal affairs of a state. Westphalian sovereignty means “political organisation based on the exclusion of

³¹⁶ *ibid.*

³¹⁷ Jacques Maritain, ‘The Concept of Sovereignty’ (1950) 44 (2) *American Political Science Review*, 343 – 357 at 344.

³¹⁸ *ibid.*, 346

³¹⁹ *ibid.*

³²⁰ Daniel Philpott, ‘Sovereignty: An Introduction and Brief History’ (1995) 48 (2) *Journal of International Affairs*, 353 – 368 at 357.

³²¹ Ronald A. Brand, ‘External Sovereignty and International Law’ (1994) 18 (5) *Fordham International Law Journal*, 1685 – 1697 at 1687.

³²² Hans Kelsen, ‘Sovereignty and International Law’ (1960) 48 (4) *Georgetown Law Journal*, 627; Stephen D. Krasner, ‘The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law’ (2004) 25 (4) *Michigan Journal of International Law*, 1075 – 1101 at 1077, 1078; Robert Araujo, ‘Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law’ (2000) 24 (5) *Fordham Journal of International Law*, 1477 – 1532 at 1488; Robert Jackson, ‘Introduction: Sovereignty at the Millenium’ (1999) 47 *Political Studies*, 423 – 430 at 425; Pavlos Eleftheriadis, ‘Law and Sovereignty’ (2010) 29 *Law & Philosophy*, 535 – 569 at 537.

³²³ Stephen D. Krasner, ‘Sharing Sovereignty: New Institutions for Collapsed and Failing States’ (2004) 29 (2) *International Security*, 85 – 120 at 85.

³²⁴ Stephen D. Krasner, *Sovereignty: Organised Hypocrisy*, (New Jersey: Princeton Uni. Press, 1999) 1 – 264 at 3.

³²⁵ *ibid.*

external actors from authority structures within a given territory”.³²⁶ Put differently, it means that each country has a right to independently determine its government and its institutions.³²⁷ Domestic sovereignty connotes “the formal organisation of political authority within the State and the ability of public authorities to exercise effective control within the borders of their polity”.³²⁸ It also refers to the institutions within a country, based on which its territory is governed.³²⁹ Instead of a norm or rule, domestic sovereignty is about the nature of domestic authority structures and the extent to which they can control activities within the State’s territory.³³⁰ Normally, such authority structures will ensure things like peace in society, protection of human rights, and a rule of law system based on a shared appreciation of justice.³³¹ Indeed, early theorists of sovereignty, such as Jean Bodin and Thomas Hobbes, had much of their focus on domestic sovereignty.³³² Finally, interdependence sovereignty relates to “the ability of public authorities to regulate the flow of information, ideas, goods, people, pollutants, or capital across the borders of their State”.³³³ Modern sovereignty encompasses both an older supreme power, e.g., a Monarch, and a newer system of legitimate authority e.g., through institutions such as the Legislature, tied to constitutionalism, which separates State institutions from the society.³³⁴ This is a framework of legally sanctioned institutions.³³⁵ Within this framework, the State is viewed as a legal association, organised under and based on a Constitution, as well as a system of rule of law, which guarantees the rights of citizens and also establishes their duties.³³⁶

Under international law, the Convention on the Rights and Responsibilities of States 1933 (*Hereinafter* the ‘Montevideo Convention’)³³⁷ provides important criteria for determining statehood. Article 1 states that “the State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government;

³²⁶ *ibid.*, 4.

³²⁷ Stephen D. Krasner, ‘The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law’ (2004) 25 (4) *Michigan Journal of International Law*, 1075 – 1101 at 1077.

³²⁸ Krasner, ‘Sovereignty: Organised Hypocrisy’ (n 324) 4.

³²⁹ Krasner, ‘The Hole in the Whole’ (n 322).

³³⁰ Krasner, ‘Sharing Sovereignty’ (n 323) 88.

³³¹ *ibid.*

³³² Stephen D. Krasner, ‘Abiding Sovereignty’ (2001) 22 (3) *International Political Science Review*, 229 – 251 at 231.

³³³ Krasner, ‘Sovereignty: Organised Hypocrisy’ (n 324).

³³⁴ John Bendix, et al, ‘Going Beyond the State’ (1992) 86 (4) *American Political Science Review*, 1007 – 1021 at 1008.

³³⁵ *ibid.*

³³⁶ *ibid.*

³³⁷ Convention on the Rights and Responsibilities of States 1933 (*Hereinafter* the ‘Montevideo Convention’) signed at Montevideo, 26 Dec. 1933 and entered into force 26 Dec. 1934, 165 L.N.T.S. 19.

and (d) capacity to enter into relations with the other States”.³³⁸ These criteria, which incorporate factors beyond sovereignty, have significantly shaped the modern understanding of statehood. In an attempt to respond to new challenges and complexities, such as the crisis of state fragility and the increasing activities of non-state entities, the theory of statehood has continued to evolve, challenging the Westphalian model and disrupting long-existing boundaries. Moving away from the Westphalian model as well as the Montevideo Convention criteria, the contemporary understanding of statehood leans towards the view that statehood is not based on legal criteria alone but rather on the ability of an entity to provide security, maintain public order, and deliver social welfare. It recognises the importance of a multi-dimensional approach to statehood, in particular, an approach focusing on issues such as effective governance, the rule of law, human rights, and the ability of a State to meet the expectations of its people. Thus, the notion of a strong State is no longer tied to just economic or military power, but to standards of good governance in which the State can perform its internal obligations.³³⁹

Compared to Europe, the evolution of the State in Africa is relatively recent. Much of the history is traced to the resolutions of the 1884 – 1885 Berlin West Africa Conference.³⁴⁰ Convened by German Chancellor, Otto Von Bismarck, as a diplomatic gathering but turned out to be for purely economic purposes, conference, the conference is widely regarded as the forum where the early Western powers divided Africa among themselves.³⁴¹ The result was that colonial boundaries were drawn, with pre-existing kingdoms and territories handed over to these powers as colonies.³⁴² These colonies later metamorphosed into Africa’s inherited political geographies known as independent States.³⁴³ As this research is mainly concerned

³³⁸ *ibid.*

³³⁹ Keith Krause and Oliver Jutersonke, ‘Seeking Out the State: Fragile States and International Governance’ (2007) 42 *Politorbis – The Fragile States Debate: Considering Ways and Means to Achieve Stronger Statehood*, 1 – 55 at 6.

³⁴⁰ The Conference was convened in the capital of the newly formed nation-state of Germany i.e., Berlin held between 15 November 1884 and 26 February 1885. *See* General Act of the Berlin Conference on West Africa, 26 February 1885.

³⁴¹ The Western powers include Austria-Hungary, Belgium, Denmark, France, Germany, Netherlands, Portugal, Spain, Sweden-Norway, Russia, Turkey (Ottoman Empire), the United Kingdom, and the United States of America. *See generally* Daniel De Leon, ‘The Conference at Berlin on the Westy African Question’ (1886) 1 (1) *Political Science Quarterly*, 103 – 139 at 103; G.N. Uzoigwe, ‘Reflections on the Berlin West Africa Conference, 1884 – 1885’ (1984) 12 (3) *Journal of the Historical Society of Nigeria*, 9 – 22 at 9; Ikechukwu Umejesi, ‘The Nation State, Resource Conflict, and the Challenges of Former Sovereignties in Nigeria’ (2012) 13 (3) *Africa Studies Quarterly*, 47 – 66 at 47; Matthew Craven, ‘Between Law and History: The Berlin Conference of 1884 – 1885 and the Logic of Free Trade’ (2015) 3 (1) *London Review of International Law*, 31 – 59 at 31, 32.

³⁴² Ieuan Griffiths, ‘The Scramble for Africa: Inherited Political Boundaries’ (1986) 152 (2) *The Geographical Journal*, 204 – 216 at 204.

³⁴³ *ibid.*

with Nigeria, it is important to provide a brief overview of the crisis of statehood in the country and how this intersects concepts such as sovereignty and state fragility. What later became Nigeria started as a British colonial holding, following the grant of a Royal Charter to Royal Niger Company (RNC) in 1885, a charter that was put in place to legitimise the presence of the British on Nigerian territory pending the formal authorisation by the Foreign Office.³⁴⁴ From 1885 to 1900, the RNC applied both coercion and diplomacy on the indigenous kingdoms making up the country, resulting in the signing of treaties of friendship and protection with several kingdoms as well as many communities.³⁴⁵ Following the expiration of the RNC rule on 31 December 1899, the British government took over full administration of all these territories, leading to the creation of counties, districts, provinces, and protectorates.³⁴⁶ In 1906, the Eastern and Western protectorates alongside the Colony of Lagos were joined to become the Colony and Protectorate of Southern Nigeria. Later, in 1914, the Colony and Protectorate of Southern Nigeria was formally amalgamated with the Protectorate of Northern Nigeria to form the Protectorate of Nigeria by Governor-General Frederick Lugard, who then laid the ground rules for the running of the country. Though the country finally gained independence on 1 October 1960, the existence of the Nigerian State can be traced to the events of 1914.

Nigeria is a sovereign state in the Westphalian sense, but one which, since independence, has remained in constant crisis.³⁴⁷ It has a total land area of 923, 769 sq. km, making it the third largest country in sub-Saharan Africa.³⁴⁸ It is bordered on the West by the Republic of Benin, on the East by Cameroon, on the North by Niger and Chad Republic, and the South by the Atlantic Ocean.³⁴⁹ Nigeria is Africa's most populous country, with its population as of July 2024 estimated at 229 million people.³⁵⁰ The country's population is projected to reach 235 million people by 2025 and a further 246 million people by 2027.³⁵¹ This figure makes the country the most populous in Africa and the 6th most populous in the world, accounting for

³⁴⁴ Umejesi (n 341) 48.

³⁴⁵ *ibid.*

³⁴⁶ *ibid.*

³⁴⁷ The Constitution provides that “*Nigeria is one indivisible and indissoluble sovereign state to be known by the name of the Federal Republic of Nigeria*”. Section 2 (1), 1999 Constitution.

³⁴⁸ Emmanuel I. Onah, ‘Nigeria: A Country Profile’ (2014) 10 *Journal of International Studies*, 151 – 162 at 151.

³⁴⁹ *ibid.*

³⁵⁰ See, ‘World Population Day 2024: Implications of Population Growth and Human Capital Development in Nigeria’, *Issue Brief - Development Research and Project Centres (DRPC)*, dRPC/FP/IB/Vol 1/9th July 2024, https://drpcngr.org/wp-content/uploads/2024/07/dRPC_World-Population-Day-Issue-Brief-Formatted.pdf

³⁵¹ *ibid.*

2.78% of the world population.³⁵² The country has about 250 ethnic groups, with the three dominant being the Hausa-Fulani in the north, the Yoruba in the Southwest, and the Ibos in the Southeast geopolitical zones respectively.³⁵³ It is a country endowed with vast natural and mineral resources, much of which consists of precious stones and remains largely untapped.³⁵⁴ Chief among its huge deposits of natural resources is crude oil, with the country ranked as a leading producer of crude oil in the world. It also boasts proven oil reserves estimated at 36 billion barrels as well as having one of the largest deposits of natural gas in the world.³⁵⁵ At the same time, it is endowed with an abundance of human resources with the capacity to utilise these natural resources and bring wealth to the country.³⁵⁶

However, from its inception till now, the country has remained in a state of constant crisis. The neo-patrimonial character of the State, as well as its inability to address this crisis, explains the sequence of violence from non-state actors against the State.³⁵⁷ A 3-year civil war, a succession of military coups as well as military dictatorships, political instability, economic dislocations, ethnoreligious and sectarian upheavals, as well as widespread corruption and bad governance have starved the country of much-needed development. This is seen in issues such as high poverty and unemployment rates in the country as well as widespread socio-economic inequality, issues which in turn operate as triggers and drivers of recurrent violence manifested in several forms such as militancy, insurgency, kidnapping, and armed banditry. A demographic breakdown of the country's population shows that while 53.9% reside in urban areas, the remaining 46.1% live in rural areas.³⁵⁸ The developmental issues mentioned above are more prevalent in these rural areas, providing a fertile ground for the activities of non-state entities.

The most devastating of the country's post-independence outbreak of violence is the Boko Haram insurgency, which has claimed thousands of lives, displaced over two million people, and significantly destroyed life in the northeast region of the country. Due to the insurgency, the State has continued to experience contestations for its sovereignty by non-state actors, made up of two sets of actors i.e., Boko Haram insurgents as well as irregular forces such as

³⁵² *ibid.*

³⁵³ Onah (n 345) 152.

³⁵⁴ Oliver Maponga and Olumuyiwa B. Alaba, 'State Fragility in Nigeria: Causes and Possible Solutions' in *Fragile States and Development in West Africa* (Economic Commission for Africa, February 2012) 1 – 277 at 219.

³⁵⁵ *ibid.*

³⁵⁶ Maponga and Alaba, (n 354).

³⁵⁷ Alabi Usman and Salihu Bashir, 'Fragility of the Nigerian State and the Challenge of Boko Harm Violence' (2018) 6 (1) *Covenant University Journal of Politics & International Affairs*, 19 – 41 at 20.

³⁵⁸ World Population Day 2024 (n 350).

the CJTF. All of this explains the fragility of the Nigerian State. In 2004, the country was listed among forty-six countries globally considered as fragile states.³⁵⁹ Currently, it is ranked 15th on the Fund for Peace Fragile States Index 2024.³⁶⁰ Challengingly, this fragility has been exacerbated by the impact of the current insurgency, with the cycle of violence robbing the State of its ability to effectively exercise governance over all of its territory. Nigeria unarguably demonstrates all the forms of sovereignty enunciated by Krasner, i.e., international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty. However, among these forms, it has struggled to fully exercise its powers of domestic sovereignty. While its international legal sovereignty is still intact, it lacks domestic sovereignty on its territory. In several parts of the country's northeast, the Boko Haram insurgency has created large swathes of areas of limited statehood, further complicating the crisis of state fragility.

In recent times, a noticeable trend has been the failure of domestic sovereignty in post-colonial States, mostly in Africa, despite that such States may still enjoy some form of international legal as well as Westphalian sovereignty. In such States, failed, inadequate, and incompetent national authorities sabotage the economic well-being of the people, engender human rights violations, and affect the security of the country.³⁶¹ The result of such failure of domestic sovereignty is poor governance. Within such territories, the physical security of citizens is undermined while the State also becomes incapacitated concerning providing adequate governance in every part of the territory.³⁶² States with such an experience end up facing a variety of problems, some of which may include widespread corruption, rampant crime, infrastructure deficit, etc.³⁶³ Aside from this, within the territory of such States, the activities of armed groups are rife, with most operating outside the control of government.³⁶⁴ At the same time, governmental authority may simply be exercised by local entities in some parts of the country, or in some cases, by no one at all.³⁶⁵ In those parts, the upsurge in armed conflicts, including activities by non-state actors such as terrorists often leads to the collapse

³⁵⁹ Some other countries on the list include Afghanistan, Angola, Burundi, Comoros, Congo, Democratic Republic of Congo (DRC), Central African Republic (CAR), Liberia, Guinea Bissau, Haiti, Kosovo, Myanmar, Sao Tome and Principe, Togo, Somalia, Sudan, Zimbabwe, Tajikistan, and Uzbekistan. *See generally*, Maponga and Alaba, (n 354).

³⁶⁰ *See*, 'Fragile States Index 2024', *Fund for Peace* <https://fragilestatesindex.org/global-data/>

³⁶¹ Stephen D. Krasner, 'Governance Failures and Alternatives to Sovereignty' CDDRL Working Papers: Stanford Institute on International Studies (2 November 2004), 1 – 50 at 6.

³⁶² Sackflame and Omitola (n 312) 139.

³⁶³ Krasner 'Governance Failures and Alternatives to Sovereignty' (n 361) 7.

³⁶⁴ *ibid*, 8.

³⁶⁵ *ibid*.

of state authority thereby creating alternative sovereignties.³⁶⁶ Alternative sovereignty here refers to the control of normal State territory by non-state actors as well as their exercise of state power. The existence of such alternative sovereignties represents a direct challenge to the traditional notion of state sovereignty.³⁶⁷ The conduct of the CJTF as a provider of local governance functions reflects such alternative sovereignty.

Nigeria's northeast region is a prime example of areas of limited statehood. Since the outbreak of the Boko Haram insurgency around 2010, the State has been unable to effectively exercise its authority over every part of this region. State presence concerning provisions of governance functions is practically absent in most communities due to the heightened insecurity engendered by the insurgency as well as the challenge of inadequate resources, which has impacted the ability of the State to meet its obligations. The outbreak of the insurgency, coupled with the inadequate response by the government in providing security, as well as a long history of vigilante operations in this region, which dates back to the pre-colonial era, accounts for the increasing role now played by community-based protection groups, who have picked up arms to fight the insurgents.³⁶⁸ The activities of insurgents and the inability of the government to quickly and decisively address the insecurity that followed have made many rural communities vulnerable.³⁶⁹ Within this space, the power of the State is now exercised by the CJTF, which provides local governance functions. This peculiar circumstance of the Nigerian state aptly typifies the intersection between the concept of the State and the hybrid operation of irregular forces.

2.4.2. *Legitimacy.*

Determining the status of the CJTF as a *de facto* organ of the State, within the context of its working relationship with the Nigerian State, necessarily puts questions of legitimacy at the centre of the concept of hybrid irregular forces. An analysis of legitimacy is crucial if we are to understand the nature of the relationship between the group and the State, as well as how the group can provide local governance functions in Nigeria's northeast region. The analysis in this section offers insight into how legitimacy is constructed in the context of counterinsurgency hybrid political orders. It explains how the localised legitimacy of the CJTF is derived from the State, as a state-sponsored entity as well as from the local

³⁶⁶ Sackflame and Omitola, (n 312) 139.

³⁶⁷ *ibid.*

³⁶⁸ Adam Day, *Hybrid Conflict, Hybrid Peace: How Militias and Paramilitary Groups Shape Post-Conflict Transitions*, (New York: United Nations University, 2020), 1 – 156 at 77.

³⁶⁹ Joffrey A. Doma, et al, 'The Fragmentation of Public Power: Non-State Security Actors and Community Security in Rural Southwest Nigeria' (2024) 42 (4) *Journal of Contemporary African Studies*, 596 – 611 at 602.

community. This is done by analysing arguments around the state sponsorship of the group, as well as its organic embeddedness within the local population. It notes that this localised legitimacy accorded the CJTF as a provider of local governance functions, validates its permissibility in the absence of constitutionally-recognised State organs, that ought to exercise elements of governmental authority.

The term ‘legitimacy’ derives from the Roman and Medieval concept of “*legitimus*” used to denote the legitimate ruler, invested according to the law of the land and the Will of God.³⁷⁰ The modern origin of the term can be traced to the works of Max Weber, who was one of the early scholars to theorise on the concept.³⁷¹ Weber identified three grounds for legitimacy i.e., rational-legalistic, traditional, and charismatic, while his conceptualisation also consisted of both belief and action.³⁷² First, people’s perception of power as legitimate can be based on beliefs that follow established rules or norms.³⁷³ Second, beliefs concerning what is legitimate can shape the understanding based on which power is perceived as having legitimacy.³⁷⁴ For a non-state entity, this would mean the belief that the local population has in its agenda, in that those who have mobilised this belief, perceive such group as the rightful or just authority to superintend over them and thus accept its provision of local governance functions.

The Weberian sociological approach has been supplemented by the works of historians, psychologists, philosophers, and social scientists, most of which can be seen from two approaches i.e., normative and descriptive approaches.³⁷⁵ The normative perspective regards legitimacy as addressing the rightfulness of power relationships, while for the descriptive approach, legitimacy is viewed as the psychological property of an authority, institution, or social arrangement, based on which those who believe in it, view it as appropriate and just.³⁷⁶ Explaining these two approaches further, Termer speaks of normative and performative sources of legitimacy.³⁷⁷ According to him, while on the one hand normative legitimacy refers to what a socio-political actor says, on the other hand, performative legitimacy deals with

³⁷⁰ Jost Delbruck, ‘Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?’ (2003) 10 *Indiana Journal of Global Legal Studies*, 29 – 43 at 31.

³⁷¹ Isabelle Duyvesteyn, ‘Rebel & Legitimacy: An Introduction’ (2017) 28 (4) *Small Wars & Insurgencies*, 669 – 685 at 670.

³⁷² *ibid*, 671.

³⁷³ *ibid*.

³⁷⁴ *ibid*.

³⁷⁵ *ibid*.

³⁷⁶ *ibid*.

³⁷⁷ Agnes Termeer, ‘Rebel Legal Order, Governance, and Legitimacy: Examining Islamic State and the Taliban Insurgency’ (2023) *Studies in Conflict & Terrorism*, 1 – 26 at 4.

what the actor does.³⁷⁸ Put differently, for normative legitimacy, the socio-political actor bases his claims on tradition and ideology, or by invoking a common enemy, while performative legitimacy focuses on pragmatic output deriving from certain beliefs, such as the credibility of the leader of the group, or his provision of public goods.³⁷⁹ Normative legitimacy focuses on the legal discourse of non-state entities and the cultural, religious, and ideological beliefs providing inputs for such discourse.³⁸⁰ Performative legitimacy deals with how these groups have translated their discourse into practice as well as how they have used these institutions to foster legitimacy in areas such as lawmaking and enforcement, dispute resolution, etc.³⁸¹ For instance, regarding normative legitimacy, in the eyes of jihadist groups such as ISIS and the Taliban, legitimacy can only be conferred by Islamic law, i.e., the Sharia.³⁸² Overall, legitimacy refers to the quality conferred on a social or political entity by those who form a part of it or are subject to it, thereby granting it authority.³⁸³ It is the recognised right to rule, enhancing a State's sovereignty and supplying the ability to enforce it more fully. Essentially, it reflects in the peoples' beliefs, perceptions, and expectations of such an entity. A situation of lack or poor legitimacy is a key driver of state fragility.³⁸⁴ This is because legitimacy relates to issues of whether the State can meet the people's expectations, a duty that often becomes difficult to fulfil in armed conflict situations. Legitimacy is a fundamental aspect of all forms of power relations, operating at the heart of state-citizen relations and underlying the whole idea of state-building.³⁸⁵ It reflects the supremacy of the regular laws and the foundations upon which these are built, i.e., the collective will of the people through the consent of the governed.³⁸⁶ It comes from the legal framework by which the State is governed as well as the source of that authority.³⁸⁷ Legitimacy is fundamental to the effective provision of local governance functions in areas of limited statehood.³⁸⁸ This makes it an important topic of enquiry in this chapter.

³⁷⁸ *ibid.*

³⁷⁹ *ibid.*

³⁸⁰ *ibid.*, 5.

³⁸¹ *ibid.*

³⁸² *ibid.*, 6.

³⁸³ Severine Bellina, et al, 'The Legitimacy of the State in Fragile Situations' (2009) *Research Report: Organisation for Economic Cooperation and Development – Development and Aid Committee (DAC)*, 1 – 43 at 7.

³⁸⁴ *ibid.*

³⁸⁵ Aoife McCullough, *The Legitimacy of State and Armed Non-State Actors: Topic Guide*, (Birmingham, UK: GSDRC, University of Birmingham, 2015), 1 – 33 at 7.

³⁸⁶ US Department of the Army, *Stability Operations*, Field Manual No. 3-07, (Washington DC: US Department of the Army, 2008), 1-7, available at <https://irp.fas.org/doddir/army/fm3-07.pdf>

³⁸⁷ *ibid.*

³⁸⁸ Heike Krieger, 'International Law and Governance by Armed Groups: Caught in the Legitimacy Trap?' (2018) 12 (4) *Journal of Intervention and State Building*, 563 – 583 at 565.

Much of the literature on legitimacy has, for the most part, focused on the State, with insufficient attention given to the legitimacy of actors other than the State.³⁸⁹ For instance, whereas rebels have come to be regarded as capable providers of governance, as standalone providers, or as alternatives in times of state absence, scant attention has been given to where they derive their legitimacy.³⁹⁰ The notion that, just like States, legitimacy is a prized commodity often pursued by other competitors for authority in a counterinsurgency, such as hybrid irregular forces, has undergirded much recent scholarship. This is, in fact, important to the survival of hybrid irregular forces who, by their nature, are excluded from the formal source of legitimization available to state actors, i.e., the internal laws of the State.³⁹¹ This happens mostly in ungoverned areas or areas with limited statehood with weak or unwilling state apparatuses. There is an inherent necessity for non-state entities to legitimise their authority relationships.³⁹² As noted by Schlichte and Schneckener, no matter what motivated the formation of an armed group, its leaders, as well as followers, are often confronted with the issue of legitimacy from an early stage.³⁹³ Just like other forms of political actors, such groups also have to justify their agenda and actions.³⁹⁴ At the same time, they equally need material and moral support from the communities within their sphere of influence both within and outside the conflict zone.³⁹⁵ Without a minimum amount of legitimacy, they are bound to fail in their effort to stay in power.³⁹⁶ Like regular political actors, armed groups depend on legitimate claims to convert elusive power into long-lasting political positions.³⁹⁷

As noted by Ledwidge, compared to conventional wars, insurgency/counterinsurgency isn't a fight for territory or to destroy the enemy, but a competition by two opposing groups to be recognised by the population in a territory as the legitimate government.³⁹⁸ According to Swed, anywhere these kinds of groups flourish, the government is often weak and incapable of governing the territory.³⁹⁹ Podder observes that "NSAGs have to be understood in terms of

³⁸⁹ Duyvesteyn (n 371) 672.

³⁹⁰ *ibid.*

³⁹¹ Krieger, (n 388).

³⁹² Duyvesteyn (n 371) 673.

³⁹³ Klaus Schlichte and Ulrich Schneckener, 'Armed Groups and the Politics of Legitimacy' (2015) 17 (4) *Civil Wars*, 409 – 424 at 410.

³⁹⁴ *ibid.*

³⁹⁵ *ibid.*

³⁹⁶ *ibid.*

³⁹⁷ *ibid.*, 411.

³⁹⁸ Frank Ledwidge, *Rebel Law: Insurgents, Courts, and Justice in Modern Conflicts*, (London: C. Hurst & Co. (Publishers) 2017), 1 – 222 at 17.

³⁹⁹ Ori Swed, 'Implausible Sovereigns and their Organisational Logic: Violent Non-State Actors' Response to COVID-19' (2021) 32 (8) *Small Wars & Insurgencies*, 1302 – 1331 at 1304.

the diversity of the roles that they fulfil”.⁴⁰⁰ He notes that certain NSAGs when compared to others known for havoc “offers alternatives to a weak and inefficient government as the legitimate representative of minority grievances”.⁴⁰¹ The loyalty and support of the civilian population, which traditionally is the exclusive preserve of the State, is negotiated and procured by armed groups. For Podder, this is “a key means for rebel survival and success”.⁴⁰² In the opinion of Kasfir and colleagues, as soon “as rebellion breaks out, the state faces competition for civilian loyalty” with the result being that the idea of ‘government’ can no longer be seen through the lens of a monolithic concept.⁴⁰³ Sharing similar sentiments, Schievels and Colley state that “rebels compete with the State for the population’s consent to be ruled”.⁴⁰⁴ For Schlichte and Schneckener, legitimacy is “the belief in the rightfulness of an armed group’s agenda and violent struggle”.⁴⁰⁵ As Schlichte observes, the development of forms of legitimacy helps such groups stabilise and survive the challenges of war.⁴⁰⁶ It is, therefore, important to say that by governing, the acts of hybrid irregular forces are not to be considered simply as acts of private actors but as actions engaging questions of political legitimacy.

Though a rebel organisation may use coercion to establish its rule, it may still desire legitimacy to ensure compliance from the civilian population.⁴⁰⁷ This is important, as it has to justify its agenda, as well as meet the requirement of material and moral support from the community where it operates.⁴⁰⁸ Reinforcing this position, Terpstra and Frerks state that “since civilians can provide food, information be a source of new recruits, the leadership of rebel groups will attempt to consolidate support among its constituents”.⁴⁰⁹ Swed highlights the importance of legitimacy, stating that it is the reason why governments often do not want to directly negotiate with groups they refer to as terrorists.⁴¹⁰ As canvassed by Duyvesteyn,

⁴⁰⁰ Sukanya Podder, ‘Non-State Armed Groups and Stability: Reconsidering Legitimacy and Inclusion’ (2013) 34 (1) *Contemporary Security Policy*, 16 – 39 at 19.

⁴⁰¹ *ibid.*

⁴⁰² Sukanya Podder, ‘Understanding the Legitimacy of Armed Groups: A Relational Perspective’ (2017) 28 (4) *Small Wars & Insurgencies*, 686 – 708 at 687.

⁴⁰³ Nelson Kasfir, Georg Frerks, and Niels Terpstra, ‘Introduction: Armed Groups and Multi-Layered Governance’ (2017) 19 (3) *Civil Wars*, 257 – 278 at 258.

⁴⁰⁴ Jelte J. Schievels and Thomas Colley, ‘Explaining Rebel-State Collaboration in Insurgency: Keep Your Friends Close but Your Enemies Closer’ (2021) 32 (8) *Small Wars & Insurgencies*, 1332 – 1361 at 1334.

⁴⁰⁵ Schlichte and Schneckener (n 393) 413.

⁴⁰⁶ Klaus Schlichte, ‘With the State Against the State? The Formation of Armed Groups’ (2009) 30 (2) *Contemporary Security Policy*, 246 – 264 at 248.

⁴⁰⁷ Niels Terpstra and Georg Frerks, ‘Rebel Governance and Legitimacy: Understanding the Impact of Rebel Legitimation on Civilian Compliance with LTTE Rule’ (2017) 19 (3) *Civil Wars*, 279 – 307 at 279.

⁴⁰⁸ Schlichte (n 406).

⁴⁰⁹ Terpstra and Frerks (n 407) 283.

⁴¹⁰ Swed (n 399) 1306.

“based on the social contract theory, legitimacy can emerge as result of the establishment of social order by the actor the ensuing predictability in social relations”.⁴¹¹ Though the credibility of the order in question must be established before legitimacy is acquired, once that is done, social order is a veritable vehicle for a responsible actor to receive acceptance.⁴¹² Peic states that rebel groups, in addition to preserving information superiority over the State, look towards mobilising civilian support, which ensures that they can tap into critical resources in this area.⁴¹³

In many countries in Africa, the power and ability to provide public goods don’t rest entirely on the State and its institutions, which are rarely present in rural and semi-urban areas and, even when present, often have limited influence.⁴¹⁴ Within this space, welfare and security provisions are often contingent on a myriad of social governance systems.⁴¹⁵ Where state institutions are unable or unwilling to provide governance functions, communities turn to non-state entities, building alternative governance structures.⁴¹⁶ Counterinsurgency, which traditionally was the exclusive business of the State, is not immune to this development. Unofficial non-state entities such as irregular forces now play dominant roles in counterinsurgency warfare.

Legitimacy, as discussed in this Chapter, revolves around the perception of the people as well as their interaction with the State. As citizens cannot perceive abstract concepts such as legitimacy, their understanding of this concept can only be distilled from their acceptance of the entity that caters to their security and welfare. In States contending with state fragility, such as during a counterinsurgency, the relationship between the State and the people often becomes complicated, with the people having low expectation of the State. This is based on the State’s lack of needed resources to provide governance functions, flowing from a multiplicity of factors such as the high financial cost of counterinsurgency, corruption, and general bad governance. This breeds general distrust between the people, who are often just concerned about the security of their lives and property and the State. In such situations, the people are likely to be naturally beholden to any individual or group that can provide such governance functions, in one way or the other. This points to the fact that a hybrid irregular

⁴¹¹ Duyvesteyn (n 371) 679.

⁴¹² *ibid.*

⁴¹³ Goran Peic, ‘Civilian Defence Forces, State Capacity, and Government Victory in Counterinsurgency Wars’ (2014) 37 (2) *Studies in Conflict & Terrorism*, 162-184 at 164.

⁴¹⁴ Aning and Axelrod (n 220).

⁴¹⁵ *ibid.*

⁴¹⁶ *ibid.*

force's legitimacy can only be measured by the civilian population's response to its actions.⁴¹⁷ For this reason, providing tangible governance functions that the people can enjoy becomes a priority for such groups. When it comes to providing local governance functions, rebel groups exploit every vacuum created by the State to procure legitimacy for themselves. For example, the Coronavirus (COVID-19) pandemic provided both a crisis as well an opportunity for rebel groups, revealing vacuums by weak states and strengthening governance by non-state actors.⁴¹⁸ During this period, they saw a market of legitimacy wherein they could offer leadership to local populations in a time of public health and economic crisis.⁴¹⁹ Generally, NSAGs gain legitimacy through a myriad of strategies, which may include filling gaps in state performance such as the Al Shabaab in Somalia as well as drawing on nationalist and religious narratives to build a shared identity as adopted by the LTTE in Sri Lanka.⁴²⁰ Legitimacy is just one aspect of the social relationship that armed groups maintain in their social environment.

In sum, legitimacy as a concept has three important characteristics. While it relies on an interactive relationship between a socio-political actor and its supporters, this relationship is also dynamic, consisting of evolving claims, continuous acceptance, and increased actions showing allegiance to the established social order.⁴²¹ Lastly, as a concept, it is context-dependent, meaning that it is difficult to tell whether there are universal characteristics of legitimacy when it comes to the activities of non-state entities in situations of social disorder.⁴²²

In Nigeria, local vigilante groups cum irregular forces such as the CJTF derive their legitimacy from the nation-state. This has long been a part of the state's operationalisation. As Pratten notes the fracturing of the state, privatisation of lawful violence, creation of different jurisdictional entities as well as the role of everyday security actors has been a key feature of the Nigerian State.⁴²³ Whereas the State enjoys the prerogative of governance and civil rule, inherent weaknesses and limited institutional capacity often lead to situations such as in a counterinsurgency, whereby it is compelled to seek alternative arrangements to handle

⁴¹⁷ Andrew J Gawthorpe, 'All Counterinsurgency is Local: Counterinsurgency and Rebel Legitimacy' (2017) 28 (4) *Small Wars & Insurgencies*, 839 – 852 at 843.

⁴¹⁸ Cyanne E. Loyle, et al, 'Revolt and Rule: Learning About Governance from Rebel Groups' (2022) 24 (4) *International Studies Review*, 1 – 29 at 3.

⁴¹⁹ Swed (n 399) 1313.

⁴²⁰ McCullough, (n 385) 2.

⁴²¹ Duyvesteyn (n 371) 674.

⁴²² *ibid.*

⁴²³ David Pratten, 'The Politics of Protection: Perspectives on Vigilantism in Nigeria' (2008) 78 (1) *Africa: Journal of the International African Institute*, 1 – 15 at 4, 5.

inherently governmental functions such as the provision of local security, collection of revenues, resettlement of displaced persons, etc. This arrangement of state sponsorship ends up conferring some degree of localised legitimacy on the activities of state-sponsored irregular forces.

The CJTF has been a major beneficiary in this regard. The legitimacy it enjoys as a practitioner of non-state order and authority in Nigeria's northeast flows from two points. First is its informal link/working relationship with the Nigerian State, which is evidenced by the act of the State in coopting the group as a combat force in 2013. With the State's vulnerability in terms of mobilising the needed military manpower to defeat the insurgents and confidence in its ability to manage the security situation becoming questionable, it has had to rely heavily on the group. This hinges on the fact that for most States battling insurgents, mobilising irregular forces has become a major counterinsurgency strategy. For long, discussions around counterinsurgency strategies have focused on the dichotomy between the use of kinetic measures, i.e., military force, and the provision of public goods, i.e., the hearts and mind approach.⁴²⁴ At the same time, irregular forces are important for both States and armed groups as they help create links between them and the local population.⁴²⁵ What has now become apparent to States is that irregular forces can indeed help them enhance their 'hearts and mind' approach through the use of such groups as providers of local security.⁴²⁶

Since the working relationship between the Nigerian State and the CJTF began, the group has been credited with game-changing moves, which have seen the Military put the insurgents on the back foot. As a combat force, the group, through its deep knowledge of the local environment as well as the fact that a sizeable number of its members were once Boko Haram members, has assisted the Military in successfully conducting several military missions, resulting in severe decimation of the insurgents as well as the recovery of territories. These military successes underpin how the group is perceived and accepted by the local population. The group's combat collaboration with the Military has resulted in the group's larger-than-life image before the local population, buying it immense support. Notwithstanding the State's ineffectiveness in terms of its formal governance system in the region, when the group provides local functions, it depends on the former as its point of reference.

⁴²⁴ Corinna Jentzsch, Stathis N. Kalyvas, and Livia I. Schubiger, 'Milicias in Civil War' (2015) 59 (5) *Journal of Conflict Resolution*, 755 – 769 at 762.

⁴²⁵ Corinna Jentzsch, 'Auxiliary Armed Forces and Innovations in Security Governance in Mozambique Civil War' (2017) 19 (3) *Civil Wars*, 325 – 347 at 327.

⁴²⁶ Jentzsch, Kalyvas, and Schubiger (n 424).

Second, for irregular forces, while one-half of their legitimacy is derived from the fact that they are state-sponsored entities, their relationship with the local population is their next source of legitimacy i.e., the fact that they are embedded within the local community. It is within this context that hybrid irregular forces derive a greater part of their legitimacy i.e., from their affinity with the local population and territory. They acquire legitimacy and authority from the fact that their activities reflect the cultural and moral framework of the local environment. This point is better explained by Peter Ekeh's concept of the primordial public. Engaging African conceptions of citizenship, as against the Western model, he argues that there are two publics in the post-colonial African States; the first being the primordial public, a structure in which primordial groupings ties and sentiments influence and determine the individual's public behaviour; the second is, the civic public, which is associated with the colonial administration and based on civil structures i.e., the civil service, military, police, etc.⁴²⁷ Within the framework of the primordial public, individuals see their obligation as moral and necessary to sustain the primordial public to which they belong.⁴²⁸ He notes that in Africa, the foci of such obligation are often emergent ethnic groups.⁴²⁹ He identified, as an example, voluntary contributions to ethnic associations to help out with the group's programmes, which can be described as a form of 'informal taxation'.⁴³⁰ In return, the individual gains intangible benefits such as a sense of identity and psychological security.⁴³¹ Within this relationship, voluntary compliance is sought over the use of force. In the case of the CJTF's operation as a hybrid irregular force, the legitimacy accorded it by the local people stems from the fact that it evolved out of the local communities and its operations are controlled by the native/customary law structure of the local people, accounting for much of its successes. The fact that the group comes from the community in which it is operating makes its acceptance start at a higher level than that of troops of the Nigerian military who come from different parts of the country.⁴³²

Another important factor is that most of its members come from the Kanuri ethnic group, which is the dominant ethnic group in the northeast region of Nigeria where the Boko Haram insurgency has raged the most and the same ethnic group that produced a majority of the

⁴²⁷ Peter P. Ekeh, 'Colonialism and the Two Publics in Africa: A Theoretical Statement' (1975) 17 (1) *Comparative Studies in Society and History*, 91 – 112 at 92.

⁴²⁸ *ibid.*, 106

⁴²⁹ *ibid.*, 107

⁴³⁰ *ibid.*

⁴³¹ *ibid.*

⁴³² Elise B. Lavik, 'Protective or Predatory? An Exploration of a Non-State Security Group's Road to Legitimacy: Evidence from the Civilian Joint Task Force' Masters' Thesis in Peace and Conflict Studies, Department of Political Science, University of Oslo (2022), 1 – 81 at 37.

insurgents.⁴³³ Many members of the groups are youths, mostly exercising their agency amid great adversity, insecurity, and heightened fear.⁴³⁴ Most of them were born in these communities and are well-versed in the local customs and values of the people. For this reason, they are children of the local environment who have simply summoned the courage to defend their parents, relatives, and the larger community. Thus, gaining the acceptance of the community as well as the support of the elders, especially following reports of their heroics against the insurgents, was a foregone conclusion. Echoing this point, Agbiboa correctly notes that “the local perception of the CJTF as ‘sons of the soil’ afforded them a powerful position of access and trust in the local community”.⁴³⁵ Many were compelled to join the group after their parents, relatives, and friends were killed by the insurgents.⁴³⁶ Members of the group have a rich knowledge of the local terrain and know their neighbours who belong to the insurgent group.⁴³⁷ Given its emergence from the grassroots populace rather than local elite forces, the CJTF has enjoyed widespread support and acceptance in the Northeast region. This is a central factor in the local population’s perception of the group as legitimate and the acceptability of its authority as a provider of local governance functions. Agbiboa acknowledges the peoples’ positive perception of the group in another light, stating that “the perception of CJTF members as children of the respective communities afforded them a privileged and powerful position of trust and access that Nigerian security forces lacked”.⁴³⁸

In most post-colonial states, social order is a production of polycentric governance rooted in several sources of political legitimacy, authority, and agency.⁴³⁹ The State is simply one out of a plethora of actors conveying political orders.⁴⁴⁰ Within the African ecosystem, community-based armed groups exist in a symbiotic relationship with communities.⁴⁴¹ Mostly, they derive their legitimacy from pre-existing political institutions and play an active role in shaping power and identity among local actors.⁴⁴² The delivery of social order through the provision

⁴³³ Jude T. Omenma and C.M. Hendricks, ‘Counterterrorism in Africa: An Analysis of the Civilian Joint Task Force and Military Partnership in Nigeria’ (2018) 31 (1) *Security Journal*, 1 – 31 at 11.

⁴³⁴ Agbiboa, ‘National Heroes or Coming Anarchy’ (n 296) 280.

⁴³⁵ Daniel E. Agbiboa, ‘Vigilante Youths and Counterinsurgency in Northeastern Nigeria: The Civilian Joint Task Force’ (2020) 48 (4) *Oxford Development Studies*, 360 – 372 at 363.

⁴³⁶ *ibid* 366.

⁴³⁷ Omenma and Hendricks (n 433).

⁴³⁸ Agbiboa, ‘Origins of Hybrid Governance and Armed Community Mobilisation in Sub-Sahara Africa’ (n 289) 18.

⁴³⁹ Aning and Axelrod, (n 414) 142.

⁴⁴⁰ *ibid*.

⁴⁴¹ Rida Lyammouri, Jakana Thomas and Lauren Van Metre, ‘Community-Based Armed Groups: A Problem or Solution?’ *United States Institute for Peace* (22 Feb. 2022)

<https://www.usip.org/publications/2022/02/community-based-armed-groups-problem-or-solution>

⁴⁴² *ibid*.

of local governance functions is often a vehicle through which localised legitimacy is established. As Aina notes, civilians are inclined to support NSAGs through acts of cooperation that can be in three ways i.e., obedience, spontaneous support, and enlistment.⁴⁴³ When this is absent, what follows is resistance.⁴⁴⁴ According to Arjona, often, NSAGs transform the daily lives of those living within their social environment.⁴⁴⁵ In some instances, there may be a moral as well as spiritual capacity to this provision of local governance functions. For instance, regarding Boko haram, Dele-Adedeji notes that “the moralisation of social service provision by the Boko Haram prior to July 2009 meant that the sect provided agency and spiritual certitude to Muslims in ways that the Nigerian State cannot realistically compete with”.⁴⁴⁶ Within the context of such transformation, acceptance is fluid and willingly granted.

While their violence, coercion, and disruption of formal institutions often engender disorder, these groups also bring about new forms of social order, where both civilians and combatants follow clear rules of conduct, thereby giving rise to stable patterns of behaviour and interaction.⁴⁴⁷ For such groups, creating social order and establishing a system of rule of local communities is important as this helps facilitate monitoring, punishing defectors, and ensuring civilian cooperation.⁴⁴⁸ Also, by ruling, they can regulate economic, social, and political behaviour in their environment in ways that are beneficial to them, such as accessing resources and socio-political networks as well as gaining the recognition of the local population.⁴⁴⁹ For these benefits to materialise, the people have to obey, and so such groups maintain social order based on widespread obedience and modest support.⁴⁵⁰ As Aina further notes, such groups could derive legitimacy from outside threats based on which they claim that their actions are towards liberating and defending threatened communities.⁴⁵¹ Thus, such legitimacy rests on the common goal of addressing the security concerns of their communities.⁴⁵²

⁴⁴³ Folahanmi Aina, ‘Politics of Localised Legitimacy, Vigilantism, Non-State Policing and Counter-Banditry in Northwest Nigeria: Evidence from the Epicenter’ (2024) 19 (1) *Journal of Applied Security Research*, 70 – 97 at 76.

⁴⁴⁴ *ibid.*

⁴⁴⁵ A. Arjona, ‘Civilian Cooperation and Non-Cooperation with Non-State Armed Groups: The Centrality of Obedience and Resistance’ (2017) 28 (4) *Small Wars & Insurgencies*, 755 – 778 at 756.

⁴⁴⁶ Ini Dele-Adedeji, ‘Rationalising the Appeal of the Boko Haram Sect in Northern Nigeria Before July 2009’ (2020) 48 (4) *Oxford Development Studies*, 345 – 359 at 346.

⁴⁴⁷ Arjona (n 445).

⁴⁴⁸ *ibid.*, 760.

⁴⁴⁹ *ibid.*

⁴⁵⁰ *ibid.*

⁴⁵¹ Aina (n 443).

⁴⁵² *Ibid.*, 77.

A case in point is that of the Bakassi Boys, a vigilante group that was once operational in the Southeast region of Nigeria and that aptly demonstrated this point. The group emerged on the heels of rampant armed robbery and crime within the Aba sector in Abia state and the impotence and complicity of the State Police outfit.⁴⁵³ Within a short period had reestablished security, creating a reign of peace and security.⁴⁵⁴ Through its alliance with small-scale business groups and local trader associations, it was able to protect property rights, facilitate regional and global trade integration as well as make the region safe for the citizens and economic activities.⁴⁵⁵ In the process, the group took on a range of state-like governance functions such as policing, arrest and trials of suspects, collection of taxes, etc.⁴⁵⁶ The group epitomised a shift of regulatory authority to an informal provider of security and justice, displacing the State's dysfunctional policing and judicial institutions.⁴⁵⁷ It was after it had acquired this status that the state government then took steps to incorporate it into its security system and bring it under government control.

For this reason, it enjoyed tremendous support, given its reputation for fairness and resistance to corruption.⁴⁵⁸ This ultimately made the local population gravitate towards it, conferring it with some sort of localised legitimacy.⁴⁵⁹ For instance, though the group's method of punishment and the justice system were barbaric and brutal, such as convicts being decapitated and burnt, the local people nonetheless welcomed the group and widely supported them.⁴⁶⁰ For the local people, the arrival of the group meant that they could go to bed without worries.⁴⁶¹ However, the group's reputation for justice and accountability, which earned it its legitimacy, began to wane once state governors in the region assumed regulatory control.⁴⁶² With time, it came under the economic and political influence of powerful state officials, and it became increasingly known for its involvement in political thuggery, extortion, partisan killings, kidnapping, and various forms of criminal activities.⁴⁶³ The political capture of the group was met with public resentment as well as protests against its activities by human rights and civil society organisations.⁴⁶⁴

⁴⁵³ Meagher (n 266) 1091.

⁴⁵⁴ *ibid.*

⁴⁵⁵ *ibid.*

⁴⁵⁶ *ibid.*

⁴⁵⁷ *ibid.*

⁴⁵⁸ *ibid.*, 1092.

⁴⁵⁹ *ibid.*

⁴⁶⁰ *ibid.*

⁴⁶¹ *ibid.*

⁴⁶² *ibid.*, 1093.

⁴⁶³ *ibid.*

⁴⁶⁴ *ibid.*

The localised legitimacy enjoyed by the Bakassi Boys mirrors the sort that the CJTF enjoys. The CJTF has profited greatly from the incompetence of the Military in guaranteeing security in the northeast following the outbreak of the insurgency by Boko Haram. It has also gone to great lengths to exploit both its relationship with the State as well as the absence of the latter, also due to the insurgency, to deliver public goods and provide local governance functions. As Aina notes, “the nature of relationships between vigilante groups and the state as well as society, plays a significant role in determining the extent of support and legitimacy accorded to these groups”.⁴⁶⁵ While the CJTF’s relationship with the local population is rooted in the fact that nearly all of its members come from within the community, more significantly, its provision of local governance functions has further solidified this relationship. An important case in point is its operation as a provider of local security services, an action due mainly to the incapacitation of the regular military and police to deliver adequate security to the people. Section 14 (2) (1) of the Nigerian Constitution provides that “the security and welfare of the people shall be the primary purpose of government”. With the State abysmally failing to guarantee security to the people in this region, the CJTF has become the face of government providing extensive policing services to the local people, the political elites, and even government officials at different levels.⁴⁶⁶ As Wisler and Onwudiwe observe, “one of the key variables associated with vigilant forms of community policing is the lack of service delivery capacity of the state. Weak states, incomplete states from a state-building perspective, create a ‘policing gap’”.⁴⁶⁷ This singular act has significantly enabled it to enjoy acceptance and support from the local population. As Aina rightly notes “where citizens have lost confidence in the ability of the state to perform one of its most fundamental responsibilities, which is the protection of lives and property, their disenchantment towards the state potentially leads to a ‘transfer of legitimacy’ to other alternatives such as non-state armed groups”.⁴⁶⁸ The localised legitimacy accorded the CJTF is further strengthened by its continued successes in delivering adequate local security to the people, effectively winning over their hearts and minds.

The above discussion reveals the localised legitimacy granted to the CJTF by the local population, reflecting the people’s acceptance and reliance on the group as an appropriate and

⁴⁶⁵ Aina (n 443) 77.

⁴⁶⁶ An instance was during the 2015 General Elections when the group offered to provide local security services to Officials of the country’s main Electoral body, the Independent National Electoral Commission (INEC). See, ‘2015 Elections: Civilian JTF Offers Protection for INEC Officials’ *Nigerian Eye* (21 Feb. 2015) <https://www.nigerianeye.com/2015/02/2015-elections-civilian-jtf-offers.html>

⁴⁶⁷ Dominique Wisler and Ihekwoaba D. Onwudiwe, ‘Community Policing in Comparison’ (2008) 11 (4) *Police Quarterly*, 427 – 446 at 434.

⁴⁶⁸ Aina (n 443) 78.

just actor in the counterinsurgency. For the CJTF, while one-half of its legitimacy flows from the fact that it was sponsored by the state as a combat force in its counterinsurgency operations, the other half hinges on its provisions of local governance functions which have endeared the local population to it. Being a state-sponsored entity as well as the fact that within this sponsorship, some inherently governmental functions such as the provision of local security were outsourced to it, is evidence of a working relationship between the State and the group. More so, its embeddedness with the local population, which further underpins its legitimacy, reveals that it is an organic part of the society's architecture, especially one whose activities of provision of local governance bring benefits to the State. This strengthens the central argument in this thesis that the working relationship between the two parties ought to be a basis for attributing the conduct of the group to the State, as a *de facto* organ of the State. It is important to state that cooperation and support from the local population may not always translate into legitimacy, given that ultimately legitimacy as a status can only truly come from the legal backing of the State.⁴⁶⁹ With regards to most irregular forces, such legal backing is mostly absent, as States are not always inclined to enact the necessary laws that will confer such status. However, this does not mean that such groups can not still lay claim to some form of backing from the State. As noted earlier in this chapter, state-sponsored irregular forces such as the CJTF, even when they strive to establish social order, often take their reference point from the state. The fact that such groups are sponsored by the state, further evidenced by their informal link/working relationship, solidifies such a claim of state backing, hence some form of borrowed legitimacy.

2.4.3. *Rule of Law Framework.*

A system of rules is at the heart of governance by hybrid irregular forces. This implicates the traditional understanding of the rule of law, which is essentially deemed a component aspect of the functioning of the Sovereign State. The rule of law is perhaps the most popular and invoked concept in modern constitutional thought. It is considered as one suggesting 'values central to nearly all conception of a well-functioning government.'⁴⁷⁰ A.V. Dicey's landmark work, 'Introduction to the Study of the Law of the Constitution,' provides the first comprehensive definition of the rule of law and states that it forms a fundamental principle of the Constitution.⁴⁷¹ He described the rule of law as:

⁴⁶⁹ *ibid*, 77.

⁴⁷⁰ Ronald A. Cass, *The Rule of Law in America*, (Baltimore and London: The John Hopkins University, 2001), 1 -214 at 3.

⁴⁷¹ Allen V. Dicey, *Introduction to the Study of the Law of the Constitution*, (Indianapolis: Liberty Classics, 1982), 1 – 435 at 120.

*(1) absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power; (2) equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; (3) the law of the constitution is the consequence of the rights of individuals, as defined and enforced by the courts.*⁴⁷²

In the context of counterinsurgency, the US Army Stability Operations Field Manual offers a more relatable description of the rule of law. It states that:

*Rule of Law is a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated equally enforced, and independently adjudicated, and that are consistent with international human rights principles. It also requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in applying the law, separation of powers, participation in decision-making, and legal certainty. Such measures also help to avoid arbitrariness as well as promote procedural and legal transparency.*⁴⁷³

The rule of law framework provides for governments' conduct to be according to prescribed and publicly recognised rules while also protecting the rights of every member of society.⁴⁷⁴ It contains principles limiting the power of government through the provision of rules and procedures prohibiting the accumulation of autocratic power.⁴⁷⁵ It provides for the resolution of disputes through non-violent means to ensure peace and stability.⁴⁷⁶ The rule of law is at the centre of governance in a counterinsurgency. It plays an important role in the contest between state and non-state actors for legitimacy, which ultimately defines counterinsurgency warfare.⁴⁷⁷ While the government's provision of a functioning legal system is to establish its authority over its territory, it is also to displace competitors such as non-state actors.⁴⁷⁸ What separates the state from other providers of governance functions is the ability of the state to promulgate laws in its territory and enforce them.⁴⁷⁹

However, just as the State governs based on a rule of law framework, hybrid irregular forces also govern by the same token, only that there is a difference in terms of the character of the rules and their nature in terms of formality and procedure. Whereas the State's rule of law framework derives from a formal system of law-making which inheres in the legislature, for

⁴⁷² *ibid.*, 121.

⁴⁷³ US Department of the Army, 'Stability Operations' (n 386).

⁴⁷⁴ *ibid.*

⁴⁷⁵ *ibid.*

⁴⁷⁶ *ibid.*

⁴⁷⁷ Thomas B. Nachbar, 'Counterinsurgency, Legitimacy, and the Rule of Law' (2012) 42 (1) *Parameters*, 27 – 38 at 34.

⁴⁷⁸ *ibid.*

⁴⁷⁹ *ibid.*

hybrid irregular forces, their rules proceed from customs, norms, and traditions. Such groups operate by a system of informal rules and informal authority, accepted by a large base, mostly drawn from the local population. This contrasts with the formal rule of law of the State. While this system of informal rules may not derive from a validly constituted law-making body, the fact that the rules are obeyed by the local population as well as the orderly running of the areas where they operate points to the fact that it can be viewed in the character of regularly made laws.

The mainstream perspective on the concept of rule of law, i.e., the state/rule of law nexus, frames the concept in terms of legal institutions and processes within the modern State. This rests on the positivist concept of law itself, which accommodates four key monism (that law is a unified coherent regime), centralism (the notion that power to create valid legal standards is associated with state sovereignty), positivism (connecting validity with pre-existing legal standards and viewing law as proceeding from distinguishable from facts) and prescriptivism (explaining legal norms as external limitations deployed to shape the pattern of behaviour).⁴⁸⁰ Within this understanding, norms adopted by non-state actors aren't deemed as laws, while institutions created by them to enforce the norms are also disdained.⁴⁸¹ The question has been asked whether the rule of law can operate during governance by non-state actors, especially as the modern State combines three key institutions, i.e., the State, the rule of law, and democratic accountability.⁴⁸² When any of these is absent, it is taken that the State has broken down. The idea is that if the rule of law is deemed as based on consolidated statehood, then non-state actors in governance lack what it takes to live up to the conditions of the rule of law as expected from states.⁴⁸³ If the rule of law can only proceed from consolidated functioning States, for non-state actors to govern by the rule of law, they must strive to create a form of statehood.⁴⁸⁴

Understanding the rule of law framework in the context of governance by hybrid irregular forces must start with separating the concept of the State from that of governance. The traditional understanding had been that governance could only proceed from a sovereign State exercising its authority and control of territory and population. This implies a

⁴⁸⁰ Rene Provost, 'FARC Justice: Rebel Rule of Law' (2018) 8 (2) *UC Irvine Law Review*, 227 – 274 at 231.

⁴⁸¹ *ibid.*

⁴⁸² Amichai Magen and Zachariah Parsons, 'Thinking About Areas of Limited Statehood and Rule of Law' in Linda Hamid and Jan Wouters, (eds.) *Rule of Law and Limited Statehood: Domestic and International Dimensions*, (Edward Elgar Publishing Ltd. 2021), 1 – 268 at 23.

⁴⁸³ *ibid.*

⁴⁸⁴ *ibid.*

framework of strict state-governance nexus in which non-state actors did not have a role. However, this conception of the sovereign State as the locus of all authority has become inadequate for capturing the modern realities of governance. The rise in activities of non-state actors has demystified the idea of governance being the exclusive preserve of sovereign States, to the end that when non-state actors govern, a certain system of the rule of law comes into place. The intertwined relationship between the State and the people means that the latter looks unto the former for the provision of local governance functions. Much of this flows from the fact that the State enjoys legal legitimacy being the *de jure* authority responsible for the people. However, in areas of limited statehood, whoever exercises governmental authority, whether or not such authority devolves directly from the formal State structure, often enjoys a measure of legitimacy with the people, enabling it to perform such functions. The conceptual space created by the demystification of state-governance nexus has thrown up the need for a broader interpretation of the rule of law, to show that the rule of law as it operates in the modern era is not inherently a function of consolidated statehood alone.

Some insight on this can be drawn from the 2004 definition of the rule of law stated in the UN Secretary-General's report on Rule of Law and Transitional Justice, which defines the rule of law as:

*A principle of governance in which all persons, institutions, and entities public and private, including the state itself, are accountable to laws that are publicly promulgated equally enforced, and independently adjudicated, and which are consistent with international human rights norms. It requires, as well, measures to ensure adherence to the principles of the supremacy of law, equality before the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.*⁴⁸⁵

The question of applying the state-governance rule of law framework to every community of human beings will always be complicated, especially as it ignores the issue of how best to interpret contemporary and real-life situations thrown up by the governance activities of hybrid irregular forces. However, if some of the constitutive elements of the rule of law can be established in areas of ungoverned spaces, then we can demolish the idea that the rule of law is simply a component of the modern state.⁴⁸⁶ For instance, in every society and culture, people live by a set of rules that shape their lives and determine what is accepted and what is prohibited. In prehistoric societies, such rules were not even formally made, yet they were

⁴⁸⁵ UN Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' UN. Doc. S/2004/616, (23 August 2004), para. 6.

⁴⁸⁶ Magen and Parcels (n 482) 24.

considered laws, by which societal order and peace were achieved. The emerging phenomenon of hybrid irregular forces operating within a rule-of-law framework reflects these realities. Hybrid irregular forces do not typically enforce a coherent, procedure-driven set of laws, given that in the first instance their foray into governance most times is opportunistic as well as uncoordinated and informal. This is at variance with the State's rule of law framework, which mostly happens through a formal legislative process. For government, rule systems emerge as formalised structures.⁴⁸⁷ Also, because the composition of the basic organisational structure of these groups varies from place to place, compared to that of formal governments, which is largely the same in most jurisdictions, interpreting their rule of law framework through the state-governance nexus lens is bound to be problematic.

Typically, the understanding of counterinsurgency environments has often been driven by the Western Weberian perspective of the State. This perspective, which views the State as legally homogenous and an environment where the central government exercises a monopoly over legitimate violence, does not take into cognisance the fact that counterinsurgencies operate in culturally, socially, and legally diverse contexts, especially as relating to the engagement of irregular forces. This environment of cultural, social, and legal diversity is present in most post-colonial States, with Nigeria being one of them. Nigeria is one such country where citizens are subject to more than one legal order, i.e., State law, statutes, codes, and the subsidiary legislation made according to them, as well as customary/religious law.⁴⁸⁸ The provision of local governance functions by the CJTF based on a customary rule of law system flows from this two-tier system of laws and is indicative of the people's preference for other normative orderings, notwithstanding the legal authority of regular State laws. This is suggestive of a framework of legal pluralism.

Legal Pluralism refers to the existence of two or more legal systems within the same territory.⁴⁸⁹ In Africa, it is viewed as the co-existence of international, state, customary, and religious laws within a population.⁴⁹⁰ This phenomenon is a practical reality in many countries, especially those grappling with how to preserve their customary heritage while at

⁴⁸⁷ Rafael D. Villa, Camilla de Macedo Braga, and Marcos Alan S.V. Ferreria, 'Violent Nonstate Actors and the Emergence of Hybrid Governance in South America' (2021) 56 (1) *Latin American Research Review*, 36 – 49 at 38.

⁴⁸⁸ Chilenye Nwapi, 'Land Grab, Property Rights, and Gender Equality in Pluralistic Legal Orders: A Nigerian Perspective' (2016) 9 *African Journal of Legal Studies*, 124 – 146 at 124.

⁴⁸⁹ *ibid*, 125.

⁴⁹⁰ Anthony C. Diala, 'The Shadow of Legal Pluralism in Matrimonial Property Division Outside the Courts in Southern Nigeria' (2018) 18 *African Human Rights Law Journal*, 706 – 731 at 707.

the same time functioning as modern constitutional States.⁴⁹¹ It is also commonplace in countries battling insurgency and civil wars in which there is fragmented sovereignty, and where non-state actors exercise a measure of authority over territory and population. As against the positivist narrow lens on norms creation as being essentially state-driven, legal pluralism expands the conception of law to include forms of normativity beyond those created by the State.⁴⁹² As underlined by Provost, “the exclusive association of the rule of law with the state is conceptually both recent and unjustified, as there are non-state institutions and practices corresponding to the rule of law”.⁴⁹³ A system of legal pluralism in which regular state laws co-exist with customary/native rules, which hybrid irregular forces adopt in the provision of local governance functions, is condoned by the government because it provides an opportunity for the State to borrow from the legitimacy of such a group, just as the group itself has its legitimacy rooted in being state-sponsored. It also allows the State to selectively comply with its international obligations, especially those related to human rights protection, while deflecting the rest to hybrid irregular forces.

In most African States, the Constitution preserves a role for customary/religious law, a framework that recognises the inevitability of legal pluralism.⁴⁹⁴ In Nigeria, while State law typically regulates every area of existence, customary law operating alongside State law deals with matters such as family, marriage, land, inheritance, etc.⁴⁹⁵ While State law in the country is based on the legal institutions and norms of the State, the system also gives recognition to customary laws, which refers to laws that were observed by the generality of the people before the colonial period, and which are largely derived from local culture, norms, and traditions. These laws could also be religious. The existence of legal pluralism in the country is traceable to the advent of colonialism.⁴⁹⁶ Before the arrival of the colonial masters, the two main regions that were eventually amalgamated, i.e., the northern and southern protectorates had their autonomous and distinct legal systems, which regulated relations between them.⁴⁹⁷ The southern part of the country, largely made up of Christians, was governed by customary law consisting of customs, norms, and traditions.⁴⁹⁸ On the other hand, in the northern part of the country, which is predominantly Muslim, the operative customary law was the Islamic

⁴⁹¹ David Pimentel, ‘Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique’ (2011) 14 *Yale Human Rights and Development Journal*, 59 – 104 at 59.

⁴⁹² Provost ‘FARC Justice: Rebel Rule of Law’ (n 480) 232.

⁴⁹³ *ibid*, 252.

⁴⁹⁴ Pimentel (n 491).

⁴⁹⁵ Nwapi (n 488) 125.

⁴⁹⁶ *ibid*, 132.

⁴⁹⁷ *ibid*.

⁴⁹⁸ *ibid*.

Sharia Law.⁴⁹⁹ The existence of legal pluralism in the country's legal architecture is seen in the establishment of the Sharia and Customary Court of Appeal for the Federal Capital Territory (FCT) under the Constitution.⁵⁰⁰ It is worth noting however that in the hierarchy of laws, aside from the Constitution, which is the supreme law of the land, State law takes precedence over customary law.⁵⁰¹

During counterinsurgency warfare in which States engage CDFs, legal pluralism has significant governance implications. In African insurgencies, several armed groups have been known to be involved in governance activities through the provision of goods as well as the creation of institutions such as the Eritrean Peoples' Liberation Front (EPLF), and the Tigray Peoples' Liberation Front (TPLF), to mention a few.⁵⁰² The same goes for the main focus of this thesis, i.e., the CJTF, which acts as a provider of local governance functions in the northeast region of Nigeria, where the government's counterinsurgency warfare is ongoing. This is in addition to its regular combat functions as well as other instances where it also acts as police auxiliaries, arresting suspects and participating in interrogations.⁵⁰³ These governance activities share three common themes, i.e., the security of persons and property, justice and accountability, and access to public goods and services. An example is the case of rebel courts, in which irregular forces establish judicial institutions in an insurgency as a foundation for broader governance and to penetrate the community more effectively.⁵⁰⁴ In this state of affairs, the non-state justice system is often an alternative to the regular courts, as the people find it difficult to rely on the state's justice system.⁵⁰⁵ It has been noted that "this suggests a vision of the rule of law from below that is strikingly at odds with a traditional approach that links the rule of law to state sovereignty".⁵⁰⁶

For instance, in the context of Nigeria's counterinsurgency against Boko Haram, the CJTF, making the most of opportunity structures, engages in law enforcement functions such as making arrests, conducting criminal trials of suspects, and apportioning punishments. Another key aspect of the group's provision of local governance functions lies in its establishment of a non-state justice system that handles disputes and accordingly provides

⁴⁹⁹ *ibid.*

⁵⁰⁰ Section 260 – 269, 1999 Constitution.

⁵⁰¹ Nwapi (n 488) 134.

⁵⁰² Ana Arjona, 'Wartime Institutions: A Research Agenda, (2014) *Journal of Conflict Resolution*, 1 – 30 at 18.

⁵⁰³ ICG 'Double Edged Sword' (n 2) 18.

⁵⁰⁴ Rene Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents* (Oxford University Press, 2021), 1 – 457 at 10.

⁵⁰⁵ Geoffrey Swenson, *Contending Orders: Legal Pluralism and the Rule of Law* (Oxford University Press, 2022) 1 – 269 at 8.

⁵⁰⁶ Provost 'Rebel Court' (n 504).

justice. These services increase the group's acceptance among the local population. Contrary to the Weberian framework in which the State rules over the entirety of its territory, the opportunity structure provided by the counterinsurgency has created an environment in which the group provides these services in several communities. The factors that plausibly explain why this thrives are mainly the absence of regular law enforcement agencies, the challenge of accessing the regular courts on account of the risk posed to human life by the insurgency, as well as the prohibitive cost of legal representation before such courts. In the areas where the counterinsurgency is ongoing, people live under conditions where they constantly fear for their lives and those of their loved ones. Also, because of the insurgency and the counterinsurgency, most people living in these areas have disposed of all they own and now live in Internally Displaced Person (IDP) camps.

Diffuse support for governance actors ultimately ensures voluntary compliance with rules. If the people view a governance actor as legitimate and also see the content of the actor's rules and policies as acceptable to them, they will continue to comply and cooperate, even when they may not fully agree with the actor's action in every instance.⁵⁰⁷ Thus, it is the responsibility of every governance actor to ensure that the content of its rules does not violate the boundaries of acceptability to guarantee continuous compliance.⁵⁰⁸ Indeed, once governance is socially accepted, less force is required for enforcement purposes.

In conducting its law enforcement and justice delivery functions, the group applies local laws, customs, and traditions, which are laws that have been a part of the peoples' way of life for centuries. The application of these laws takes away the bureaucracy of the regular court system, shortens time, and focuses more on reconciliation than retribution, thereby making justice outcomes more acceptable to the parties. With the provision of justice by such a group quick and mostly fair, members of the local populations have a great incentive to use it. Justice outcomes of such informal systems in turn solidify the connection between the group and the local population. The CJTF can ride on customary laws to govern due mainly to the fact that this legal system is recognised under the constitution.

Finally, within this context of the rule of law framework, the CJTF's relationship with the people in the local communities is in two parts. First, is the vertical relationship between the group and the local population, in which rules are obeyed willingly and the provision of local

⁵⁰⁷ Thomas Risse and Eric Stollenwerk, 'Legitimacy in Areas of Limited Statehood' (2018) 21 *Annual Review of Political Science*, 403 – 418 at 407.

⁵⁰⁸ *ibid.*

governance functions flows. they demanded compliance with its rules. Second, is the horizontal relationship between the people themselves, seen in the enforcement of norms of equality, cooperation, and resolution of private disputes. The group's performance of local governance functions is often over small groups of local communities, whose way of life is largely rural and, in a way, detached from the State that ought to bring governance to them. What this means is that the kind of rules promulgated by hybrid irregular forces in governing population and territory is not always strange or new. Rather, it often reflects the people's local norms, values, and traditions, the result being that acceptability becomes easy. Whether they are laws on property, marriage issues, settlement of disputes, or trade and commerce, functionally, these rules are norms that the people would have been familiar with for a long time. Within this relationship, international law norms, for instance, human rights guaranteed to the people, compared to what is obtained under a sovereign state, operate within the bounds of limitation. Notwithstanding these limitations, they are rights, nonetheless. Civil and political rights as well as socio-economic rights, are affected the same way. While rights such as life, liberty, and dignity of the human person are guaranteed, they could be taken away at any time, upon the slightest accusation, such as working for the insurgents.

It seems, therefore, that a sophisticated rule of law framework existed underpinning the provision of local governance functions by the CJTF, and this, alongside other concepts already discussed above, underscores the viability of the concept of hybrid irregular forces. This understanding demonstrates the complex nature of current counterinsurgency warfare, in which irregular forces are not just combat actors but also local governance providers. When a people view a government as illegitimate, there is little or no incentive to obey laws, thereby making the social contract unworkable. Where their loyalty is obtained through coercion, they are likely to become problematic to the authority in place and resist their leadership.⁵⁰⁹ In the context of the rule of law framework through which the CJTF operates, the local population wasn't resistant to its rules. As the people's perception of the group was to see it as legitimate, submitting to its rules was not difficult, thereby informing the reciprocity of obligations and rights. The dual role played by the establishment of a customary rule of law framework as well as legitimacy in the provision of local governance functions by hybrid irregular forces demonstrates the fact that they ought to be recognised as *de facto* organs of the State, thereby making attribution of their conduct to the State possible. Notwithstanding

⁵⁰⁹ An example is the case of armed groups in certain parts of Libya where armed groups used excessive violence to enforce compliance, showing lack of a social contract. See generally Sara Merabti, 'Ruling in the Name of the Revolution: The Local Grounding of Non-State Armed Groups in Western Libya' (2019) 5 (1) *Interdisciplinary Political Studies*, 89 – 114 at 101, 102.

their informal structure, their ability to command social order and direct the affairs of the population and territory under their control makes them entities whose operation viz a viz international law deserves new thinking in terms of the scope of state responsibility for their conducts.

2.5. Conclusion.

At the outset of this chapter, the objective was to establish the concept of hybrid irregular forces, determine characteristics that help identify CDFs that fall within this category, undertake an analysis of concepts that provide the best justification for how hybrid irregular forces provide local governance functions as well as how this reflects the relationship between such groups and the State. What has been identified above, and illustrated through an examination of current literature is that while CDFs have traditionally been viewed as combat forces, intelligence brokers, and local security actors assisting the state to defeat insurgents, their operation in contemporary counterinsurgency warfare transcends these traditional roles. While somewhat obscure, their role as governance actors is increasingly becoming established. Recent scholarship has produced major insights into the norm creation of these groups, in their role as providers of local governance functions. This chapter has shown how these groups not only operate as governance actors, but that much of their actions in this regard intersect concepts such as the notion of the state, sovereignty, and also rest on the legitimacy they enjoy as state-sponsored entities as well as their embeddedness in the tradition and norms of the local population reflected in their customary rule of law framework.

The main point that emerges from this Chapter is that the provision of local governance functions by groups such as the CJTF is sufficiently explained by the above concepts. Added to this is the fact that the provision of local governance functions by the CJTF is imbibed and influenced by Nigeria's system of legal pluralism. The discussion in this Chapter highlights the socio-legal realities of how the co-existence of two normative legal orders in Nigeria's counterinsurgency against Boko Haram has facilitated the hybrid operation of the CJTF. It offers a new perspective for analysing the relationship between official State legal order and customary rule of law systems and how this helps the hybrid operation of irregular forces in counterinsurgency warfare. The analysis provided in this chapter is of importance as it provides glimpses of a problem to which much thought has not been given before now. In a final analysis, this chapter concludes by stating that to ensure that there is a clear pathway of state responsibility for the conduct of this category of non-state actors, it is important that the

working relationship between a State and an irregular force be recognised as a granting the latter the status of a *de facto* organ of the State. Having established the concept of hybrid irregular forces as well as the dynamics of their relationship with the State, Chapter 3 of this thesis presents a discussion on how the case study in this thesis, the CJTF has manifested this character in Nigeria's counterinsurgency against Boko Haram. This chapter analyses how the group was co-opted into counterinsurgency operations by the Nigerian government and how it then exploited this relationship to act in other ways, in particular, taking up the additional role of being a provider of local governance functions. In a final analysis, it looks at how the country's constitutional and legal framework defines the group and its conduct.

CHAPTER THREE

CIVILIAN JOINT TASK FORCE AS A HYBRID IRREGULAR FORCE IN NIGERIA'S COUNTERINSURGENCY AGAINST BOKO HARAM

3.0. Introduction.

The status of a non-state entity, as recognised under the internal law of a State, is considered an important link between both parties when determining attribution under the current law of state responsibility framework.⁵¹⁰ At the same time, relevant case laws by international criminal tribunals have established that such a link could also be based on an analogous relationship between both parties, in which there is evidence that the State did create the non-state entity, unilaterally selected its leaders, entirely financed its operation, and that the entity depends completely on the State for its survival. It is important to understand whether these two grounds apply to the relationship between the Nigerian State and the CJTF. Hybrid irregular forces operate within the framework of an existing government while also filling the security vacuum. In the last decades, the number of groups operating in this form has grown exponentially, making it increasingly challenging to understand and engage them.⁵¹¹ As rightly noted by the International Committee of the Red Cross (ICRC), “armed conflicts feature an ever-growing number of actors organised in overlapping webs of alliances, proxy dynamics, and other types of support relationships”.⁵¹² As such, understanding the engagement of the group as a combat force in Nigeria's counterinsurgency operations will help demonstrate the extent to which there is an analogous relationship between both parties.

Generally, States bear responsibility only for their conduct, i.e., the act of persons or entities considered as organs of the State. However, international law provides that a State can also be held liable for the actions of non-state entities, where it is established that the State has not sufficiently protected its citizens from such actions.⁵¹³ More so, the Nigerian Constitution under Section 14 (2) (b) provides that “the security and welfare of the people shall be the

⁵¹⁰ Article 4, Articles on State Responsibility 2001.

⁵¹¹ ICRC, ‘The Roots of Restraint in War’ (December 2018), 1 – 74 at 13, file:///C:/Users/oluso/Downloads/4352_002-ebook.pdf

⁵¹² ICRC, ‘Allies, Partners, and Proxies: Managing Support Relationships in Armed Conflict to Reduce the Human Cost of War’ (2020) 102 (915) *International Review of the Red Cross*, 1331 – 1333 at 1331.

⁵¹³ Oluwafifehanmi Ogunde, ‘State Responsibility, Boko Haram, and Human Rights Law’ *LSE Blog* (9 April 2019) <https://blogs.lse.ac.uk/africaatlse/2019/04/09/human-rights-boko-haram-nigeria/>

primary purpose of government”.⁵¹⁴ Aside from entrusting sovereignty to the people of the country, this portion of the Constitution defines the primary obligation of government as being the security and welfare of the people.⁵¹⁵ Furthermore, the obligation of the Nigerian government to protect the people is more strongly defined in Chapter IV, which contains a broad range of fundamental rights such as the right to life, the right to dignity of human persons, rights to personal liberty, etc. that are all justiciable as well as guaranteed under international law.⁵¹⁶ Whereas the Nigerian government and its agencies responsible for governance, do so within the ambit of validly granted constitutional and statutory powers,⁵¹⁷ in the case of the CJTF, its activities are, for the most part, outside the framework of the country’s constitutional and legal framework. To answer the main question in this research, there is a need to understand how the group became a part of the government’s counterinsurgency structure, the circumstances underpinning this engagement, how this opened up opportunities for the group to simultaneously act as a governance actor, how such governance activities are addressed under the country’s constitutional and legal framework, as well as the extent of the relationship between the two parties.

To accomplish the above, this chapter is divided into two (2) sections. The first section examines the response of the Nigerian state to Boko Haram’s insurgency, and the government’s counterinsurgency measures, explaining the factors that informed the co-opting of the CJTF as a combat force. This provides a context for understanding how the CJTF consequently assumed the State’s role, i.e., as a provider of local governance functions in the counterinsurgency. The second section undertakes an examination of relevant portions of the Nigerian Constitution and relevant domestic legislation to determine how the provision of local governance activities by the CJTF is characterised. In sum, the main objective of the Chapter is to understand how the CJTF became a hybrid irregular force in the government’s counterinsurgency and how Nigeria’s constitutional and legal framework addresses such activities.

⁵¹⁴ 1999 Constitution.

⁵¹⁵ Dauda Abubakar, ‘The Legal and Constitutional Framework of the 2011 Elections in Nigeria’ (2012) 11 (1) *Journal of African Elections*, 8 – 30 at 16.

⁵¹⁶ Article 2 (1), ICCPR 1966.

⁵¹⁷ Under the Nigerian Constitution, powers related to governance is covered by Section 5, which deals with Executive powers. It provides that “(1) *Subject to the provisions of this Constitution, the executive powers of the federation (a) shall be vested in the President and may subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him directly or through the Vice President and Ministers of the Government of the Federation or officers in the public service of the federation; and (b) shall extend to the execution and maintenance this Constitution and all laws made by the National Assembly to all matters with respect to which the National Assembly, has, for the time being, powers to make laws*”.

3.1. The CJTF and Nigeria's Counterinsurgency Against Boko Haram.

3.1.1. State Response to Boko Haram's Insurgency.

For a clear understanding of whether and to what extent the Nigerian state can be held responsible for the conduct of the CJTF as a hybrid irregular force, this section first examines how the group was coopted by the State into its counterinsurgency operations, how this opened up opportunities for the group to perform local governance functions, and whether this establishes a link/relationship between the two parties. Since 2009, the radical Islamist movement, Boko Haram,⁵¹⁸ a Sunni Muslim organisation of Salafi-Wahhabi variant, otherwise known as '*jama'at ahl al-sunna li-'l da'wa wa-'l-jihad*' (Sunnis for Proselytization and Armed Struggle) has engaged the Nigerian State in an aggressive and violent insurgency, and in the process, it has become a serious national, regional, and international threat.⁵¹⁹ In response, the Nigerian government began by mounting a variety of counterinsurgency measures, which include legislative, prosecutorial, security, bilateral, and multilateral initiatives,⁵²⁰ with the principal aim of defeating the group.⁵²¹ After several peace overtures failed, on 15 May 2013, the government declared a state of emergency in the states of Adamawa, Borno, and Yobe, which were the three northern states where the insurgency was most active.⁵²² This declaration of a state of emergency triggered the powers of the government to use coercive force against the insurgents.

Following the state of emergency, the government established the Joint Task Force (JTF), and in a military operation deemed the largest since the end of the 1967 – 1970 civil war, it deployed 8, 000 soldiers to the northeast region, in a direct military offensive against the insurgents.⁵²³ The JTF consisted of regular troops from the Military, the State Security Services, as well as the Police, all operating under a unified command, with forces relying on

⁵¹⁸ The expression Boko Haram means 'Western Education is Sin'.

⁵¹⁹ Freedom C.C. Onuoha, 'A Danger Not to Nigeria Alone: Boko Haram's Transnational Reach and Regional Responses' *FES Peace and Security Series No. 17, (2014)*, 1 – 13 at 3; William Hansen, 'The Ugly Face of the State: Nigerian Security Forces, Human Rights and the Search for Boko Haram' (2020) 54 (2) *Canadian Journal of African Studies*, 299 – 317 at 299.

⁵²⁰ Onuoha, (n 519) 5.

⁵²¹ Daniel E. Agbibo, 'Resistance to Boko Haram: Civilian Joint Task Forces in North-East Nigeria' (2015) *Conflict Studies Quarterly*, 3 – 22 at 12.

⁵²² *ibid.*

⁵²³ *ibid.*

the ‘kill or capture’ strategy to neutralise the insurgents.⁵²⁴ It also involved the application of force to defeat the insurgents and create a safe corridor in the region for citizens, as well as moves to recover and hold lost territories.⁵²⁵ These operations have imposed a heavy burden on the government in terms of human, material, and financial costs. It is estimated, for instance, that between 2013 and 2018, the Nigerian government spent over \$6.64 Billion in prosecuting its counterinsurgency operations.⁵²⁶ The expectation is that a successful counterinsurgency would not just stop the carnage but create the right environment to promote development in the region. Not only has the Nigerian government, as well as other authorities in the region been receiving considerable military support, but regional initiatives such as the Multinational Joint Task Force (MJTF) and the G5 Sahel Joint Force were also set up to prevent the insurgency from spreading across borders, prevent transborder incursions, as well as stop violence against civilians.

Despite the huge amount spent on the counterinsurgency operations, insecurity in the region has remained on the rise.⁵²⁷ More significant, is the case of millions of civilians who remained trapped between the violence of the insurgents and the inability of the JTF to protect them.⁵²⁸ The government’s use of force has also been deemed as repressive, counterproductive, as well as problematic, and this is for two reasons. First, the use of force by the Military has further hardened the group, leading to an escalation in attacks within its stronghold in the northeast region of the country as well as in other parts of the country.⁵²⁹ Second, the threat posed by the group has been magnified by issues such as the military’s lack of proper understanding of insurgent warfare,⁵³⁰ a huge deficit in available military personnel,⁵³¹ as well as reports of the unwillingness of troops to fight the insurgents.⁵³² For example, the Military comprising the Army, Air Force, and Navy, are reported to have a combined manpower of

⁵²⁴ Idayat Hassan and Zacharias Pieri, ‘The Rise and Risks of Nigeria’s Civilian Joint Task Force: Implications for Post-Conflict Recovery in Northeastern Nigeria’ *Boko Haram: Beyond the Headlines, Combatting Terrorism Centre at Westpoint* (May 2018), 74 – 86 at 76.

⁵²⁵ Babatunde F. Obamamoye, ‘Counter-terrorism, Multinational Joint Task Force and the Missing Components’ (2017) 15 (4) *African Identities*, 428 - 440 at 434.

⁵²⁶ ICIR, ‘How Nigeria Spent \$2.6 Billion on Boko Haram in 2016’ *International Centre for Investigative Reporting* (23 March 2017), <https://www.icirnigeria.org/nigeria-spent-2-6-billion-boko-haram-2016/>

⁵²⁷ Hassan and Pieri, (n 524).

⁵²⁸ *ibid.*

⁵²⁹ Onuoha, (n 519) 5.

⁵³⁰ Akali Omeni, *Counterinsurgency in Nigeria: The Military and Operations Against Boko Haram 2011 – 17* (Abingdon, UK: Routledge Publishers, 2017), 1 – 274 at 53.

⁵³¹ Daniel Torbjörnsson and M. Jonsson, ‘Boko Haram: On the Verge of Defeat or a Long-term Threat?’ (2017) *FOI* 1- 85 at 57.

⁵³² Kyle Dietrich, ‘When we can’t see the Enemy, Civilians become the Enemy: Living Through Nigeria’s Six Year Insurgency’ (2015) *Centre for Civilians in Conflict*, 1 – 69 at 31.

around 181, 000 troops, with a sizeable part of the force already deployed in internal security operations across thirty-two of the thirty-six states in the country.⁵³³

3.2. The Relationship between the Nigerian State and the CJTF.

It is important to determine whether there is a working relationship between the Nigerian State and the CJTF, sufficient to underpin attribution. The analysis in Chapter Two has shown that the legitimacy enjoyed by the group is a result of being a state-sponsored entity as well as its embeddedness within the local population. To further strengthen this point, it is necessary to examine the operations of the group demonstrating this state sponsorship and legitimacy. To do this, there is a need to understand the nature as well as the extent of support provided by the State to the group, as well as its role as both a combat force and a provider of local governance functions.

3.2.1. The CJTF as a Combat Force in Nigeria's Counterinsurgency Operations.

In recent years, the world has been experiencing a paradigm shift in which due to the seeming inadequacy of state military forces, arming non-state actors as well as their use for security purposes, in exchange for some material benefit has become attractive to political actors across the course of human history.⁵³⁴ In the Northern part of the country, informal security or communal protection groups go way back to pre-colonial traditional policing institutions, in which vigilantes operated within chieftaincy institutions with the main objective being to protect traditional rulers as well as enforce social norms and values.⁵³⁵ Most of these groups are rooted in local ethnic groups evolving from among the urban and rural poor, while also enjoying trust and legitimacy with members of the local community.⁵³⁶ More than ten years after the Boko Haram insurgency began, these groups made up of multiple militias and vigilante groups, have become major players in counterinsurgency operations in the northeast region fighting Boko Haram and its affiliate ISWA.⁵³⁷ The rise and survival of non-state

⁵³³ GFP, '2022 Nigeria Military Strength' *Global Fire Power* https://www.globalfirepower.com/country-military-strength-detail.php?country_id=nigeria

⁵³⁴ The US government popularized this in its War in Iraq when it began to arm Sunni militias in the country to fight Al Qaeda-backed insurgents. See Ariel I. Ahran, 'Learning to Live with Militias: Towards a Critical Policy on State Frailty' (2011) 5 (2) *Journal of Intervention and State Building*, 175 – 192 at 181; Metin Gurcan, 'Arming Civilians as a Counterterror Strategy: The Case of the Village Guard System in Turkey' (2015) 8 (1) *Dynamics of Asymmetric Conflict*, 1 – 22 at 5.

⁵³⁵ Jimam T. Lar, 'Violence and Insecurity in Northwest Nigeria: Exploring the Role and Resilience of Local Actors' (2019) 9 (2) *African Conflict and Peacebuilding Review*, 123 – 142 at 135.

⁵³⁶ Day (n 368).

⁵³⁷ *ibid.*

security actors in Nigeria reflects the insecure nature of the country.⁵³⁸ As already established in Chapter One of this thesis, the flagship of these groups is the CJTF.

To make up for the deficits in its counterinsurgency structure, from 2013 the government began to coopt the group into its counterinsurgency operations. In exchange for support from the Military, the group began to collaborate with the Military and multinational forces primarily in the area of intelligence gathering.⁵³⁹ The explanation for the sudden rise of the group is rooted in the fact that whereas the insurgents continued to perpetrate relentless attacks against innocent citizens in the region, the Military was equally incapacitated in ensuring the security of the local population.⁵⁴⁰ Indeed, the frustration produced by the violence of the insurgents as well as the repressive acts of the Military, contributed a great deal to the formation of the CJTF.⁵⁴¹ For instance, there are allegations that during raids, the military would go on a rampage, setting houses and property on fire, arresting people indiscriminately, and in some cases, executing them extrajudicially.⁵⁴² The military has also been implicated in activities such as the arrest and detention of local youths on the ground that they were harbouring insurgents.⁵⁴³ The CJTF youths locally known as ‘*kato da gora*’ i.e., ‘*youths with sticks*’, and local hunters ‘*yan faratua*’ initially carried sticks, bows, arrows, and machetes for their patrol, but with time expanded their weapons to include handmade muskets i.e., dane guns or traditional guns.⁵⁴⁴ Whereas several communities in the region already had different militias in operation, the CJTF was different as it was not established based on ethnicity or to fight against the state,⁵⁴⁵ but its main goal was to clear Boko haram insurgents out of the local communities.⁵⁴⁶ The ability of the group to organise was also

⁵³⁸ Doma, et al, (n 369) 604.

⁵³⁹ Jakub Zbytovsky and Jan Prouza, ‘Towards Modern Counterinsurgency in Sub-Sahara Africa: Lessons Learnt from Nigeria and Mozambique’ (2024) 35 (2) *Small Wars & Insurgencies*, 256 – 283 at 259.

⁵⁴⁰ Samuel Oyewole, ‘Sweat is invisible in the Rain: Civilian Joint Task Force and Counterinsurgency in Borno State, Nigeria’ (2020) 31 *Security & Defence Quarterly*, 172 – 188 at 177.

⁵⁴¹ David J. Dan-Azumi and Ademola Azeez, ‘The Intervention of the Civilian Joint Task Force (CJTF) in the War Against Boko Haram in Northeast Nigeria (A Theoretical Approach)’ (2018) 6 (5) *Journal of Research in Humanities and Social Sciences*, 40 – 48 at 45.

⁵⁴² S. B. Owonikoko and F. C. Onuoha, ‘Child of Necessity: (AB)Uses of the Civilian Joint Force in Borno State, Nigeria’ (2019) 3 (1) *AfSol Journal – Journal of African-centred Solutions in Peace and Security*, 7 – 41 at 30.

⁵⁴³ Oyewole, ‘Sweat is invisible in the Rain’ (n 540); Agbiboa, ‘Origins of Hybrid Governance and Armed Community Mobilisation in Sub-Sahara Africa’ (n 289) 16.

⁵⁴⁴ Daniel E. Agbiboa, ‘Eyes on the Street: Civilian Joint Task Force and the Surveillance of Boko Haram in North-eastern Nigeria’ (2018) 33 (7) *Intelligence and National Security*, 1022 – 1039 at 1028; Adewunmi J. Falode, ‘Hybrid Doctrine: The Grand Strategy for Counterinsurgency and Counterterrorism Operations in Nigeria’ (2019) 11 *Defence Against Terrorism Review*, 1 – 31 at 18.

⁵⁴⁵ Attila Gulyas, ‘The Role of the Civilian Joint Task Force in the Improvement of Security in Borno state, Nigeria’ (2021) *Journal of Central and Eastern European African Studies*, 32 – 48 at 37.

⁵⁴⁶ *ibid.*

informed by the deep knowledge of the workings of the insurgents by the youths in Borno State.⁵⁴⁷ Their historical knowledge of the emergence of Boko Haram and the involvement of a number of their peers in the group forearmed these youths, who later became members of the CJTF, with the knowledge of who is an insurgent and who is not.⁵⁴⁸

Since its formation, membership in the CJTF has remained fluid. The group's members are mostly made up of civilian volunteers or those sent by their community to join, though there are also a few instances where persons were forced either by the militia or their communities to join the group.⁵⁴⁹ The group consists of boys and men between the ages of 14 and 30 years, most of whom are trained at the National Youth Service Corps (NYSC) camp by the troops of the Nigerian Military as well as the Police, and paid a stipend by the Borno State Government.⁵⁵⁰ While men make up the majority of its ranks, the group also allows women to join, and in some instances, some of the women have even been trained on combat missions and given control over command positions.⁵⁵¹ The inclusion of women in the group's activities was necessitated by Boko Haram's increasing use of women as suicide bombers.⁵⁵² According to Agbiboa, women join the group for a variety of reasons ranging from personal losses, revenge, family ties, a sense of belonging in the community, as well as a need to ensure their protection.⁵⁵³ He further notes that by joining the group, the women of the region have found a way of subverting the restrictive purdah system in the Northern part of the country, which veils and secludes Muslim women from the society.⁵⁵⁴

The group supplies about 60% of the government's counterinsurgency structure, providing support to the military in different units.⁵⁵⁵ For instance, as a pro-state force, its members collaborate with Military troops in intelligence gathering while also performing combat functions whenever the need arises.⁵⁵⁶ The group's active part in the counterinsurgency is enabled by its socio-cultural affiliation with the local community as well as its deep

⁵⁴⁷ Umar L. Yusuf, 'Community Perception of the Role of the Civilian Joint Task Force (CJTF) in Resisting Boko Haram Culture of Violence in Borno State Nigeria' Unpublished PhD Thesis, School of Postgraduate Studies, University of Maiduguri & Faculty of Education and Social Sciences, University of Hildesheim, (March 2020), 1 – 102 at 60.

⁵⁴⁸ *ibid*, 61.

⁵⁴⁹ Gulyas (n 545) 38.

⁵⁵⁰ *See*, 'Stars on Their Shoulders, Blood on Their Hands: War Crimes Committed by the Nigerian Military' *Amnesty International*, 1 – 129 at 24 <file:///C:/Users/HP/Downloads/AFR4416572015ENGLISH.pdf>

⁵⁵¹ Hassan and Pieri (n 524).

⁵⁵² *ibid*.

⁵⁵³ Daniel E. Agbiboa, 'Out of the Shadows: The Women Countering Insurgency in Nigeria' (2022) 18 (4) *Politics & Gender*, 1011 – 1042 at 1013.

⁵⁵⁴ *ibid*.

⁵⁵⁵ Idayat Hassan, 'Counterinsurgency from Below: The Need for Local Grassroots Defenders in Curbing the Insurgency in North-East Nigeria' (2014) 4 (2) *West African Insight*, 25 – 28.

knowledge of the geographical terrain, which gives it incredible advantage, concerning identifying insurgents and their collaborators.⁵⁵⁷ Embedded within the local community, the group generally draws on existing local structures and so does not often come off as a threat to the local leadership mechanism. For this reason, the Military authorities plan their operations, having the group in mind.⁵⁵⁸ Coopting the CJTF in intelligence gathering has overtime help remedy a critical deficit in the government's counterinsurgency framework i.e., troop's lack of knowledge of the local environment. As the Military troops are mostly from different ethnic backgrounds and parts of the country, when deployed in counterinsurgency to the northeast understanding the local language and the terrain has remained a problem.⁵⁵⁹ With many of the villages and towns in the region made up of mountainous terrains and thick forests which the insurgents effectively use as a cover, the CJTF assists the Military in understanding the landscape as well as navigating these terrains.⁵⁶⁰ The group performs additional functions such as search operations, manning checkpoints, and securing infrastructure,⁵⁶¹ as well as facilitating the arrest and decapitation of Boko Haram insurgents.⁵⁶² Generally, the group is viewed by the local communities as playing a significant role in counterinsurgency operations against Boko Haram,⁵⁶³ while its acts of bravery have attracted public commendation from both the military high command and the state political leadership.⁵⁶⁴ Overall, the group has over the years become a critical part of the government's counterinsurgency structure and security architecture in the northeast region.

⁵⁵⁶ O. Bamidele, 'Civilian Joint Task Force (CJTF) - A Community Security Option: A Comprehensive and Proactive Approach to Counter-Terrorism' (2016) 7 *Journal for Deradicalization*, 124 – 144 at 124.

⁵⁵⁷ Modu L. Gana, 'Strategy of Civilian Joint Task Force Militia in Combatting Boko Harm in Northern Nigeria' (2020) 1 (7) *International Journal of Legal Studies*, 345 – 360 at 353.

⁵⁵⁸ Yusuf (n 547) 65.

⁵⁵⁹ Hassan and Pieri, (n 524) 77.

⁵⁶⁰ Emmanuel A. Alebiosu, 'Counterinsurgency Operation in Nigeria: The Civilian Joint Task Force Approach' (2019) 3 (2) *FU Wukari Journal of Politics and Development*, 1 – 9 at 5.

⁵⁶¹ Owonikoko and Onuoha (n 542) 32.

⁵⁶² Lere Amusan and Samuel Oyewole, 'Between Terrorism and Counterterrorism' (2015) 64 *The Thinker*, 58 – 61 at 60.

⁵⁶³ Adetayo O. Sowale, 'Public Perception of Civilian Joint Task Force in Safeguarding Human Security in North-East Nigeria' (2020) 5 (1) *Lead City Journal of the Social Sciences*, 120 - 125 at 123.

⁵⁶⁴ The group was commended by erstwhile Chief of Army Staff, Lt. Gen. Tukur Buratai and immediate past Governor of Borno-state, Kashim Shettima for its heroic contributions to the government's counterinsurgency and counterterrorism campaign. See Bola G. Amaike, 'Civilian Joint Task Force and Nigeria's Counter Terrorism Operations', in P. E. Adejoh & W. Adisa (eds.) *Terrorism and Counter-Terrorism War in Nigeria – Essays in Honour of Lt-Gen. Tukur Y. Buratai*, (Akoka-Yaba, Lagos: University of Lagos Press and Bookshop Ltd. 2017), 1 – 653 at 501.

3.2.2. The Nature and Extent of Support provided by the State to the CJTF.

The discussion in this Chapter shows that the Nigerian State did not create the CJTF. Rather the group emerged sometime in June 2013, in response to relentless violence by the insurgents, coupled with the brutality of the Military Forces. The government, seeing the value in the group, especially concerning local intelligence gathering and its usefulness in limited combat roles, began a process of coopting it into the counterinsurgency structure. Because the State did not create the group, it is also unable to unilaterally select its leaders or ensure its complete dependence. Indeed, the CJTF is a complex and hierarchical organisation that operates under an opaque leadership structure. It lacks central leadership but is divided into geographic sectors, with several commanders to control different units.⁵⁶⁵ Shrouded in much secrecy and constantly subject to changes, the group's coordination across these sectors is also irregular.⁵⁶⁶ A critical point worth stressing is that the group operates outside the country's domestic legal framework. Rather, it is put under the supervision of the Attorneys General in the states of the Northeast where it is active,⁵⁶⁷ while also operating under the command and control of the Nigerian Military.⁵⁶⁸

The group can be classified into four categories. The first part is the group of 2,000 youths recruited by erstwhile Governor Kassim Shettima, known as Borno Youth Empowerment Scheme (BOYES), trained by the military, and paid a stipend of N20,000 every month.⁵⁶⁹ This unit was created to assuage the discontent of CJTF members who sacrificed their job opportunities to join the group.⁵⁷⁰ Members of the BOYES unit were made to undergo limited military training, given uniforms, patrol cars, and identification documents, while about 750 of them additionally got training as 'special forces' based on which they fought alongside military troops.⁵⁷¹ This is the unit most favoured by the military and is mostly deployed in the capital city of Maiduguri.⁵⁷² The second part is the 2900-strong Neighbourhood Watch established by Governor Shettima in 2017 whose members are paid a stipend of N10,000 per month.⁵⁷³ The third part, made up of thousands of individuals, includes groups that were armed by the military as well as the Borno state government but

⁵⁶⁵ Day (n 368) 78.

⁵⁶⁶ *ibid.*

⁵⁶⁷ *ibid.*

⁵⁶⁸ *ibid.*

⁵⁶⁹ *ibid.*

⁵⁷⁰ Gulyas (n 545).

⁵⁷¹ *ibid.*

⁵⁷² *ibid.*

⁵⁷³ *ibid.*

were not paid any stipend or trained.⁵⁷⁴ The last group are those who have not received arms or training from the armed forces and also are not paid any stipend⁵⁷⁵ While in some places these four categories cooperate and collaborate, in some other instances they do not respond to each other.

Aside from payment of stipends, the Borno State government also funds the group in other ways, such as providing vehicles for their operations.⁵⁷⁶ The group also receives donations from residents of Borno state, politicians, and several organisations.⁵⁷⁷ The group is equally supported financially and logistically by governments in the two other neighbouring states affected by the insurgency, i.e., Adamawa and Yobe states.⁵⁷⁸ This point reflects the fact that the group is not unilaterally financed by the Nigerian State. In two of Nigeria's territorial units, i.e., Adamawa and Yobe states, the group operates under the names 'Pace Group' and 'Sakin Baka'.⁵⁷⁹ In addition, at the level of the federal government, several CJTF members have been integrated into regular security agencies such as the Army, Air Force, and Department of State Services (DSS).⁵⁸⁰

As a component of the government's counterinsurgency structure, not only has the group over the years received significant support from governments at different levels, it has also continued to work actively with state actors, mainly the Military.⁵⁸¹ This point is significant as it shows that, whereas the group can not be said to have a relationship of complete dependence with the Nigerian State, it nonetheless has a working relationship with the State, which ought to be a sufficient basis for attribution. Its working relationship with the State does not arise out of the fact that it was created by the State or completely controlled by it, but out of the fact that the State has carefully appropriated the local abilities of the group for its benefit, while distancing itself in terms of how the group operates. It deliberately does not control the activities of the group, but at the same time does not intervene to curtail such

⁵⁷⁴ *ibid.*

⁵⁷⁵ *ibid.*

⁵⁷⁶ Hassan and Pieri (n 524).

⁵⁷⁷ *ibid.*, 79.

⁵⁷⁸ Gana (n 557) 353.

⁵⁷⁹ *ibid.*

⁵⁸⁰ Agbiboa, 'Resistance to Boko Haram' (n 521) 17.

⁵⁸¹ Scholars such as Jibrin have put in perspective, the nature and extent of support provided to the group by the government as well as the degree to which the government incorporated the group into its counterinsurgency operations. See Hussaini Jibrin, 'Civilians in the Frontline of Counterinsurgency Operations: The Civilian Joint Task Force in the War Against the Boko Haram in Northeast Nigeria' in Usman A. Tar (ed.) *The Routledge Handbook of Counterterrorism and Counterinsurgency in Africa* (Routledge, 2021), 1 - 641 at 609, 611; Agbiboa, 'Origins of Hybrid Governance and Armed Community Mobilisation in Sub-Sahara Africa' (n 289) 18.

activities. Within this loose relationship, the State, while allowing and enabling the group to perform inherently governmental functions, ensures that it does not bind itself to the group in a manner that can suggest a deep relationship between the two parties. This environment of loose relationship has been made possible by two important factors, i.e., the proliferation of ungoverned spaces in the region where the insurgency has hit hard the most and the crisis of state fragility that the Nigerian State has become encumbered with in its post-colonial existence.

3.2.3. *The CJTF a Provider of Local Governance Functions.*

As stated in Chapter 2, the necessary consequence of the failure of domestic sovereignty is the existence of alternative sovereignties by non-state actors. It is also important to reiterate that alternative sovereignties thrive in ungoverned spaces. This concept is synonymous with failed States, or States lacking the ability to effectively exercise sovereignty.⁵⁸² While there is much controversy as to what amounts to ungoverned spaces, the concept mostly refers to failed or failing States, land, maritime, and airspace poorly controlled, or areas within a sovereign state, where the authority of the central government does not cover.⁵⁸³ It equally connotes places or locations such as borderlands, forestlands, wetlands, mountain regions and inaccessible terrains, which are characteristically devoid of government presence, where non-state actors typically operate.⁵⁸⁴ Perhaps the most expedient definition is that which defines ungoverned spaces as “complex social spaces that are shaped by internal relations between local populations, alternative authority structures and informal economies, as well as external influences that contribute to how these spaces are both constructed and perceived by the outside world”.⁵⁸⁵ In the context of ungoverned spaces, governance typically happens outside of the State apparatus, in which formal governance structures are replaced by informal non-state entities, thereby impacting the functionality of the social environment.⁵⁸⁶ A new form of

⁵⁸² Anne L. Clunan, ‘Ungoverned Spaces? The Need for Re-evaluation’ in Anne L. Clunan & Harold A. Trinkunas, (eds.), *Ungoverned Spaces: Alternatives to State Authority in an Era of Softened Sovereignty*, (California: Stanford University Press, 2010) 1 – 301 at 3.

⁵⁸³ John S. Ojo, ‘Governing ‘Ungoverned Spaces’ in the Foliage of Conspiracy: Toward (Re) Ordering Terrorism, from Boko Haram Insurgency, Fulani Militancy to Banditry in Northern Nigeria’ (2020) 13 (1) *African Security*, 77 – 110 at 83; Sylvanus H. Bernard and Mwanret G. Daful, ‘Assessment of the Impact of Ungoverned Spaces on Insurgency in Borno State, Nigeria’ (2021) 13 (2) *Ghana Journal of Geography*, 31 – 65 at 32

⁵⁸⁴ Oluwatobi P. Adeniyi, Musharafa O. Rosenje, and Nofiu O. Salami, ‘An Appraisal of Ungoverned Spaces, Armed Banditry, and Human Security in South-West, Nigeria’ (2023) 1 (3) *Journal of Political Science*, 55 – 70 at 56.

⁵⁸⁵ Chloe A. Diggins, ‘Ungoverned Space, Fragile States, and Global Threat: Deconstructing Linkages’ (2011) 3 (3) *Inquiries Journal*, <http://www.inquiriesjournal.com/articles/413/ungoverned-space-fragile-states-and-global-threats-deconstructing-linkages>

⁵⁸⁶ Ojo (n 583).

security and protection for the local population is promoted by the existence of illegitimate governance actors, mainly non-state actors who operate side by side with state actors.⁵⁸⁷ While the State may ensure the provisions of amenities such as electricity, banking, water, etc., these non-state entities may take over services such as local security and waste disposal.⁵⁸⁸ Such areas are usually characterised by a lack of penetration by formal state institutions, absence of law enforcement, as well as lack of access to social and welfare goods such as health, justice delivery, etc, the implication being that the people look to the informal sector for succour.⁵⁸⁹

Ungoverned spaces intersect with the concept of the State and state fragility. Three (3) functions of the modern State are security, welfare, and representation, with all three rooted in an understanding of a stable system emanating from a sort of social contract between the State and its citizens.⁵⁹⁰ These functions are also the central variable for determining a State's performance and foundations for its legitimacy.⁵⁹¹ This is the model on which most, if not all, contemporary States are built.⁵⁹² Whether these functions are provided by the State or non-state entities, the State is considered as ultimately responsible.⁵⁹³ States are considered sovereign entities, representing and acting on behalf of their society's interests.⁵⁹⁴ It is within this framework, that it performs the above functions, with State and society seen as constructively connected.⁵⁹⁵

Concerning security, the State is responsible for protecting society and the people from internal as well as external threats.⁵⁹⁶ This is a fundamental component of most country's constitutions. In Nigeria, the Constitution provides that "the security and welfare of the people shall be the primary purpose of government". The fundamental attribute defining the State is its monopoly over the use of physical violence.⁵⁹⁷ The State is often regarded as having sole control over the use of violence and sometimes it is defined by such exclusive

⁵⁸⁷ *ibid.*

⁵⁸⁸ *ibid.*, 84.

⁵⁸⁹ *ibid.*

⁵⁹⁰ Krause and Jutersonke (n 339) 6.

⁵⁹¹ *ibid.*, 7

⁵⁹² Bellina, et al, (n 383) 6.

⁵⁹³ *ibid.*

⁵⁹⁴ *ibid.*

⁵⁹⁵ *ibid.*

⁵⁹⁶ *ibid.*

⁵⁹⁷ Karl Dusza, 'Max Weber's Conception of the State' (1989) 3 (1) *International Journal of Politics, Culture, and Society*, 71 – 105 at 89.

control.⁵⁹⁸ The State's monopoly over legitimate violence only makes sense when exercised in the context of other constitutive elements such as territory.⁵⁹⁹ Security is connected to sovereignty which internally refers to the position of the State as the highest authority in the society.⁶⁰⁰ Externally, this means its borders define the scope of its authority, delimiting it from that of other States.⁶⁰¹ Regarding representation, the State is seen as acting on behalf of the people, promoting the common interest of the society.⁶⁰² This means that state power is seen as proceeding from the society, while state sovereignty is the institutional expression of the sovereignty of the people.⁶⁰³ To carry out the functions of security, welfare, and representation, States establish institutions such as the Police, Military, and other government agencies, who are granted powers to so act. How these functions are connected in a continuum of social action is important for understanding state fragility.⁶⁰⁴

One idea that binds all sovereign States is 'effective sovereignty', which refers to an environment in which the machinery of a State's power and authority extends throughout its territory.⁶⁰⁵ Under this idea, there is a framework of functional equilibrium within which the economic, social, and political obligations of the State are performed through institutional relations.⁶⁰⁶ The flipside of effective sovereignty is limited statehood, referring to areas within a country's territory where the central government cannot enforce rules and/or authority. However, at the end of this continuum of equilibrium lies the idea of 'contested sovereignty', which refers to a condition in which due to the inability or unwillingness of the State to exercise its socio-political mandate, there is a partial or total relinquishing of its sovereignty to non-state entities.⁶⁰⁷

Among the three elements of sovereignty developed by Krasner, the concept of domestic sovereignty is most relevant to the issue of contested sovereignty. State fragility is a process that conflict-ridden States enter into as a result of institutional failure. The term is used to describe developing countries facing violence and conflict, poverty, political instability, and

⁵⁹⁸ Yoram Barzel, *A Theory of the State: Economic Rights, Legal Rights, and the Scope of the State*, (Cambridge University Press, 2002), 1 – 282 at 4.

⁵⁹⁹ Dusza, (n 597).

⁶⁰⁰ Bellina, et al, (n 383).

⁶⁰¹ *ibid.*

⁶⁰² *ibid.*

⁶⁰³ *ibid.*

⁶⁰⁴ Krause and Jutersonke (n 339).

⁶⁰⁵ Doma, et al, (n 369) 596.

⁶⁰⁶ *ibid.*

⁶⁰⁷ *ibid.*

threats to security and development.⁶⁰⁸ State fragility rests on three (3) normative assumptions i.e., that the inability of the State to fulfil its obligations to its people is indicative of fragility; that the absence of stability, if not addressed timeously, will lead to state failure; and lastly that the fragile State is considered an anomaly within the community of stable and strong States.⁶⁰⁹ Underpinning fragility is a lack of capacity, which is often caused by a lack of legitimacy. States are fragile when state institutions lack the political will or capacity to provide basic governance functions and/or public goods. Echoing this point, the Department for International Development (DFID) notes that “weak institutions are the central drivers of fragility...States whose political systems and institutions are in some form of transition, are more likely to show signs of fragility...violent conflict is the ultimate manifestation of state fragility”.

State fragility is in view when the government in a sovereign state cannot or will not provide basic services to the citizens or cannot fulfil the minimal functions of government.⁶¹⁰ Such States are unable to exercise authority over the entirety of their territory, with people in some parts of the country not recognising the authority of the central government either due to discontent or based on the fact that such territories are controlled by non-state actors, e.g., insurgents.⁶¹¹ For example, in the course of counterinsurgency, the inability of the Police to effectively provide security to the generality of the people or the inability of the court to adjudicate matters and dispense justice are indicative of state fragility. A major characteristic of fragile States is their inability to regulate the basic parameters of everyday practices in different domains. States in situations of fragility are often unable to govern or rule their society and develop mutually constructive and reinforcing relations with the society. This reflects the concept of limited statehood, referring to areas within a country’s territory where the central government cannot enforce rules and/or does not exercise monopoly over the means of violence.⁶¹² Within the international system, only a few States can boast of full and effective domestic sovereignty, i.e., exercise of full control over the entirety of their territory.⁶¹³ Rather, the vast majority of States display areas of limited statehood to different degrees. Within this space are States experiencing fragility, as well as failed or failing States.

⁶⁰⁸ Olivier Nay, ‘Fragile and Failed States: Critical Perspectives on Conceptual Hybrids’ (2013) 34 (3) *International Political Science Review*, 326 – 341 at 327.

⁶⁰⁹ Raza Saeed, ‘The Ubiquity of State Fragility: Fault-lines in the Categorisation and Conceptualisation of Failed and Fragile States’ (2020) 29 (6) *Social & Legal Studies*, 767 – 789 at 768, 769.

⁶¹⁰ Daniel A. Tonwe and Surulola J. Eke, ‘State Fragility and Violent Uprisings in Nigeria: The Case of Boko Haram’ (2013) 22 (4) *African Security Review*, 232 – 243 at 234.

⁶¹¹ *ibid.*

⁶¹² Risse and Stollenwerk, (n 507) 405.

⁶¹³ *ibid.*, 406.

While many of these countries enjoy Westphalian as well as international legal sovereignty, what is absent is full and effective domestic sovereignty.

In the case of Nigeria, non-state entities are the direct response to the absence of constituted authority and state institutions in rural communities.⁶¹⁴ For instance, the CJTF's emergence and its subsequent foray into the provision of local governance functions reflects the crisis of statehood that the post-colonial Nigerian State has been grappling with. Over the years, Nigerians have only had superficial contact with the State and its institutions, with governance services provided mostly to the country's elites and privileged urban dwellers. Much of the rural areas and hinterland, with a large portion being the northern region of the country, were devoid of government presence. The State's limited reach as well as authority and legitimacy in the northern region, is rooted in its colonial past, when the British Colonialists deployed the indirect rule system in governing this part of the country. Under this system, the colonial authorities relied on northern traditional chiefs as well as native authority to ensure compliance with its laws. Even after self-government and independence were attained in 1960, this system, which was simply remodelled, remained, creating large areas with limited state presence and perpetuating underdevelopment. Within this system, even in the post-colonial era, the traditional and customary authorities remained the most visible face concerning the provision of order, justice, and security for rural and semi-urban communities.

Since the Boko Haram insurgency plunged the northeast region into a spiral of conflict and instability, governance has been divided between State and non-state actors, mainly the Nigerian government, the Boko Haram insurgent group, and the CJTF. Service provisions such as security, welfare, health, trade, formal justice delivery, etc, have all deteriorated due to the retreat of state actors from a lot of communities following insurgent violence. As established above, a common feature of most communities in the region is ungoverned spaces, a situation connected to a lack of means or ability on the part of the state to bring development to these places. As Nigeria's counterinsurgent forces recorded more gains on the battlefield, territories held by the insurgents before the 2015 General Elections have since come into the hands of government forces, with control of these territories now handled by troops of the Nigerian Military and members of the CJTF. With the absence of State-provided governance as well as the tacit acquiescence of the State to the broad activities of the CJTF, many communities in the region have come to depend on the group for basic governance

⁶¹⁴ Doma, et al, (n 369) 601.

provisions. Basic services such as healthcare, education, etc are mostly concentrated in the state capitals or other big cities, meaning that members of the local population have to travel hundreds of kilometres to access government services. A general feeling of being abandoned by the State pervades most of these communities, ultimately alienating the people from the state, thereby creating vacuums waiting to be filled. This is the context in which the CJTF emerged, operating as a provider of local governance function, filling the governance vacuum, even though it was primarily coopted as a combat force by the State.

For instance, the group has been operating as a provider of local security functions i.e., a local police outfit, protecting Internally Displaced Persons (IDP) camps, markets, buildings, etc. and several communities in the northeast region, providing patrol services, and screening people to ensure the safety of the local population.⁶¹⁵ With the heightened level of insecurity, it secures traffic on the highways, provides security escorts to farmers transporting their goods to the market, and also takes part in the protection of the regular police stations as well as military formations.⁶¹⁶ Its security service equally extends to the resettlement of displaced persons and the restoration of economic life to the affected communities.⁶¹⁷ A report by the United Nations University Centre for Policy Research notes that of all the actors operating as main security providers in the northeast region, the CJTF provide about 86% of the security services to communities, followed by the Military and Police providing about 47% security.⁶¹⁸ In essence, with the absence of a formal governmental presence, the group's provisions of local security functions indicate a takeover of the constitutional responsibility of the Nigeria Police, the Military, and other security agencies.

Furthermore, the group's provision of local governance extends to law enforcement and the performance of judicial functions. It conducts the arrest of persons alleged of various crimes such as robberies, stealing of mobile gadgets, and other fraudulent activities.⁶¹⁹ In several instances, the job of law enforcement was delegated to the group by the regular Police. According to reports, the Nigeria Police Command in Maiduguri the Borno state capital, often ask the group to investigate robberies and burglaries, detain suspects, as well as

⁶¹⁵ Chitra Nagarajan, *Civilian Perceptions of the Yan Gora (CJTF) in Borno state Nigeria*, (Centre for Civilians in Conflict, 2018), 1 – 25 at 3.

⁶¹⁶ Gulyas (n 545) 41, 42.

⁶¹⁷ Yusuf (n 547) 71.

⁶¹⁸ Siobhan O'Neil, Sherif Mabrouk, and Kato Van Broeckhoven, 'Volunteer Security Outfits in Northeast Nigeria' *MEAC Reports Finding 5: United Nations University Centre for Policy Research (April 2021)*, 1 – 11 at 6.

⁶¹⁹ Day (n 368) 83.

accompany police officers on raids to seize illicit drugs.⁶²⁰ This happens, notwithstanding that the group does not operate under a legal framework.⁶²¹

In addition, reports point to the group's involvement in dispute resolution and judicial functions, much of which is traceable to the fact that civil authorities, such as the local courts, have fled these communities following attacks by the insurgents.⁶²² The performance of judicial functions by the group is indicative of the primary role that customary justice has historically played in the region. Due to the absence of formal justice systems, such as regular courts, customary justice systems based on the authority of traditional chiefs had long been the main source of justice delivery in large parts of the region. In fact, in most of the local government areas, the traditional authorities serve both as the Police and the courts.⁶²³ Against this backdrop, the group's justice system is widely accepted amongst the local population, much of which underpins the legitimacy it enjoys, as discussed in Chapter Two of this thesis. For example, in places where traditional authorities have become absent, the local communities have welcomed the governance functions of the CJTF.⁶²⁴ This is based on a few reasons. First, compared to the CJTF, the people have a lower level of trust in the traditional institutions, which they view as selfish and ineffective.⁶²⁵

Second, reporting cases to the traditional leaders requires payment of a certain amount of money which, oftentimes, most people cannot afford due to low commercial activities because of the insurgency.⁶²⁶ As the CJTF does not demand payment to perform its judicial functions, the people are generally drawn to it and more open to bringing their matters before members of the group. Third, women and children were hardly able to access justice under the traditional institution framework, as cases could only be heard when such a matter is channelled through the older men in the family.⁶²⁷ Much of this is rooted in the patriarchal system that has held sway in most parts of the northern region of the country. Fourth, due to the risk involved in moving around due to insurgent violence, many displaced persons are unable to go to the traditional institutions to have their matters heard and decided, thereby creating governance opportunities for the CJTF.⁶²⁸ Overall, most people saw the CJTF's

⁶²⁰ *ibid*, 84.

⁶²¹ *ibid*.

⁶²² Nagarajan (n 615) 14.

⁶²³ Day (n 368) 85.

⁶²⁴ *ibid*.

⁶²⁵ Nagarajan (n 615) 16.

⁶²⁶ *ibid*.

⁶²⁷ *ibid*.

⁶²⁸ *ibid*.

justice system as quick, impartial, and fair, as they were always able to get amicable resolutions to matters, compared to the Police who may refer their cases to the regular courts.⁶²⁹

It must be noted that the respect the local people accord the group flows from the enviable status it had attained by confronting Boko Haram insurgents and beating them to a retreat.⁶³⁰ Lastly, the people feel that the group has the tacit approval of the Nigerian Military to perform these functions since the two parties were known to be working together.⁶³¹ The group enjoys great patronage from both States as well as non-state actors in the region, who turn to it to perform a broad range of governance functions, thereby altering official and unofficial power structures in the region.⁶³² Its ability to face Boko Haram insurgents and the fact that it was working with the military increased its standing amongst the local population.⁶³³

The emergence of the CJTF as a provider of local governance functions has a lot to do with the destructive impact of close to fifteen (15) years of insurgency unleashed on the State by Boko Haram. For instance, due to the scale of the insurgency, hundreds of schools have closed to avoid mass kidnappings; livestock has been stolen through cattle rustling, and farming has generally been abandoned, given the killing of farmers by the insurgents. It is also symptomatic of the crisis of the development in the Nigerian State as a collective, with the northeast region being disproportionately affected. Since 2009, Boko Haram has remained the major driver of insecurity across this region.⁶³⁴ Persistent violence has led to a staggering loss of lives and properties, the destruction of social amenities and critical infrastructure, the displacement of millions, and the destabilisation of economic, health, and education systems, significantly impacting the productivity, prosperity, and development of the region.⁶³⁵ The impact of the insurgency and overall insecurity in the region are inseparable from pre-existing socio-economic deprivation and general under-development in the region.⁶³⁶ The three (3) states most affected by the insurgency, i.e., Adamawa, Borno, and Yobe, are some of (if not) the poorest and most underdeveloped in the country.⁶³⁷ Despite the country's endless crises, in

⁶²⁹ *ibid*, 15.

⁶³⁰ *ibid*, 16.

⁶³¹ *ibid*.

⁶³² Day (n 368) 88.

⁶³³ Nagarajan (n 615) 16.

⁶³⁴ See, 'Assessing the Impact of Conflict and Development in Northeast Nigeria' *United Nations Development Programme (UNDP) (2020)*, 1 – 76 at 4.

⁶³⁵ *ibid*.

⁶³⁶ *ibid*.

⁶³⁷ *ibid*.

none of these crises is the nexus between development and security most acute as the Boko Haram insurgency. Indeed, the insurgency, the government's counterinsurgency, and the hybrid operation of the CJTF in the government's counterinsurgency operations are all manifestations of the crisis of development in the region and the country at large.

This equally reflects current thinking in the international community, where development has been placed on the front row of States' international obligations since the 90s. In 1990, the United Nations Development Programme (UNDP) launched its *Human Development Report*, in which it declared that "people must be at the centre of all development" and that "the purpose of development is to offer people more options".⁶³⁸ For the first time, in its 1994 *Human Development Report*, it introduced the notion of human security. In the same report, it noted that for long the idea of security had been strictly defined in terms of security from external aggression while overlooking the legitimate need of the ordinary people, craving for security in their daily lives.⁶³⁹

The connection between conflict, security, and development is irrefutable. In situations of conflict, there is bound to be a lack of security, the implication being that economic development is hampered.⁶⁴⁰ On the flip side, it is also clear that in environments where people have been deprived of economic development, they tend to vent their anger against each other as well as the State.⁶⁴¹ Conflict is development in reverse. It damages societies in diverse ways, killing both combatants and civilians.⁶⁴² Its effects are also felt in areas such as stagnation of economic production and income generation, breakdown in critical systems such as agriculture, health and education, and the forced displacement of people into horrific living conditions.⁶⁴³ Highlighting the connection between development and security, former UN Secretary-General Kofi Annan observed in a 2004 UN report as follows:

*Development and security are inextricably linked. A more secure world is only possible if poor countries are given a real chance to develop. Extreme poverty and infectious diseases threaten many people directly, but they also provide a fertile breeding ground for other threats, including civil conflict...*⁶⁴⁴

⁶³⁸ See, 'Human Development Report 1990' *United Nations Development Programme (UNDP)*, <https://hdr.undp.org/system/files/documents/hdr1990encompletenostats.pdf>

⁶³⁹ Mark Duffield, 'The Liberal Way of Development and the Development-Security Impasse: Exploring the Global Life Chance Divide' (2010) 41 (1) *Security Dialogue*, 53 – 76 at 55.

⁶⁴⁰ Kamal Matinuddin, 'Conflict, Security, and Development' (2009) 48 (4) *Pakistan Development Review*, 991 – 1001 at 991.

⁶⁴¹ *ibid.*

⁶⁴² 'Assessing the Impact of Conflict and Development in Northeast Nigeria' (n 634) 22.

⁶⁴³ *ibid.*

Under international law, development has increasingly been recognised as a part of the broader class of human rights. The 1986 UN Declaration on the Right to Development states that:

*The Right to Development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.*⁶⁴⁵

Furthermore, in several of its reports, the UN has continued to link the issue of human security to human development and, in extension, to the protection of human rights.⁶⁴⁶ As noted earlier in Chapter Two, the Boko Haram insurgency is one of the several manifestations of the crisis of statehood in the country since independence. Since its post-independence existence, the country maintained a stance of resistance towards international interventions, whether for humanitarian or military purposes.⁶⁴⁷ While the mistrust towards foreign development aid intervention was strengthened by events such as the Nigerian Civil War from 1967 - 1970, the Structural Adjustment Programme (SAP) crisis of the 90s, etc., it was not matched by a corresponding domestic investment by the State in social and economic development.⁶⁴⁸ Successive governments have paid lip service to development-driven sectors such as education, health, child and maternal health, agriculture, water, environment, housing, etc., the result being that these critical aspects of the nation have continued to experience perennial underfunding. During this period, other areas of the development index, such as good governance, the rule of law, fundamental human rights, etc, had taken a back seat.

Instead, during this same period, the rise in domestic insecurity fuelled by Islamic fundamentalism, terrorism, militancy, insurgency, kidnapping, banditry, etc has seen a geometric rise in State defence spending.⁶⁴⁹ As noted in the 2024 *Human Development Report*, the UNDP notes that the implications of conflicts for human development is

⁶⁴⁴ See, 'A More Secure World: Our Shared Responsibility' United Nations (UN) (2004),

https://www.un.org/peacebuilding/sites/www.un.org.peacebuilding/files/documents/hlp_more_secure_world.pdf; Maria Stern and Joakim Ojendal, 'Mapping the Security-Development Nexus: Conflict, Complexity, Cacophony, Converge?' (2010) 41 (1) *Security Dialogue*, 5 – 29 at 5.

⁶⁴⁵ Article 1, *Declaration on the Right to Development*, GA Res. 41/128 (adopted 4th December 1986).

⁶⁴⁶ Bjorn Hettne, 'Development and Security: Origins and Future' (2010) 41 (1) *Security Dialogue*, 31 – 52 at 34.

⁶⁴⁷ Sara De Simone and Alessio Locchi, 'The End of the Security-Development Nexus? Reflections from Counterinsurgency in Northeast Nigeria' (2022) 43 (12) *Third World Quarterly*, 2757 – 2774 at 2763.

⁶⁴⁸ *ibid*, 2764.

⁶⁴⁹ *ibid*.

staggering manifesting in areas such as high fatalities, mass displacement of people, persecution and human rights violations, increase in military spending, etc.⁶⁵⁰ All of these indices are present in the Boko Haram insurgency and the State counterinsurgency operations. For instance, counterinsurgency operations aimed at decimating the Boko Haram insurgents have put a huge strain on the government's finances, severely limiting its ability to meet its constitutional obligation of providing governance to the mass of its citizens.⁶⁵¹ Funds that ordinarily ought to go into the provision of basic amenities and the delivery of development-based socio-economic goods are continuously committed to the purchase of weapons as well as the overall funding of military operations to bolster counterinsurgency efforts. As Ikpe notes, "at a macro level, violent conflict can drive the diversion of financial resources into defence spending and result in divestment in hitherto development priorities".⁶⁵² As stated earlier in Section 3.2.1 of this Chapter, between 2013 and 2018, the government was reported to have spent over \$6.64 billion in prosecuting its counterinsurgency operations against the insurgents.⁶⁵³

With such a hefty financial burden caused by increased defence spending, realising development-oriented objectives such as the Sustainable Development Goals (SDGs) has become problematic. Currently, the country ranks 161 out of 193 on the 2023/2024 Human Development Index (HDI) of the UNDP, with an HDI value of 0.548.⁶⁵⁴ Consistently, development actors have recognised armed conflict as one of the biggest hindrances to realising the SDGs. It is, therefore, no surprise that in the same HDI report, countries with the lowest HDI were mostly those currently battling one form of armed conflict or the other, thereby validating the position in the 2024 UNDP Human Development Report about the significant implication of conflicts for human development. These countries include Congo Democratic Republic (180 out of 193), Afghanistan (182 out of 193), Mozambique (183 out of 193), Mali (188 out of 193), Sierra Leone (184 out of 193), Burkina Faso (185 out of 193), Yemen (186 out of 193), Chad (189 out of 193), Niger Republic (189 out of 193), Central Africa Republic (CAR) (191 out of 193), South Sudan (192 out of 193), and Somalia (193 out

⁶⁵⁰ See, 'Human Development Report 2023/2024' United Nations Development Programme (UNDP), 1 – 307 at 36.

⁶⁵¹ Sackflame and Omitola (n 312) 146.

⁶⁵² Eka Ikpe, 'Counting the Development Costs of the Conflict in Northeastern Nigeria: The Economic Impact of the Boko Haram Insurgency' (2017) 17 (5) *Conflict, Security, & Development*, 381 – 409 at 385.

⁶⁵³ ICIR (n 526).

⁶⁵⁴ See, 'Human Development Insights' Human Development Reports, United Nations Development Programme (UNDP), <https://hdr.undp.org/data-center/country-insights#/ranks>

of 193).⁶⁵⁵ Insecurity does not just discourage foreign investment, it hinders domestic development initiatives as local investors are frightened away by the risk to their lives and investment.⁶⁵⁶ With growing insecurity, increasing unemployment, economic instability, and a cost of living crisis caused by the recent foreign exchange and fuel subsidy removal crisis, the poverty rate in Nigeria is set to increase by 38.8% in 2024. Indeed, the counterinsurgency has significantly impacted the government's ability to provide governance for all its citizens, especially the people of the northeast region where the insurgency is most prevalent.⁶⁵⁷

Within the under-development-insecurity vortex, the local population is forced to turn to non-state actors for succour, a gap that the CJTF is effectively filling as a provider of local governance functions. By providing local governance functions, the group may be said to have taken over the development obligations of the State, obligations that ordinarily rest on *de jure* organs of the State. The ability of the group to take over such obligations flows from its relationship with the state, i.e., being state-sponsored for combat purposes, as well as its embeddedness with the local population. This is indicative of a link between the State and the group, bringing the group within the class of a *de facto* organ because of a working relationship. It equally reinforces the central argument in this thesis that relationships of this kind ought to be accorded the same weight as relationships based on an internal law of the State or complete dependence.

3.1. The Status of the CJTF under Nigeria's Constitutional and Legal Framework.

Having established that the CJTF operates as a governance actor in Nigeria's counterinsurgency in the northeast region, as well as the fact that it is a possible violator of international law norms, it is important to understand how Nigeria's domestic legal framework defines the governance activities of the group. Whereas a working relationship between the group and the Nigerian state has been established in the discussion in Sections 3.2.2 and 3.2.3., the analysis in this section is useful in that it helps determine whether, in addition to the working relationship, a legal link between the group and the Nigerian State can be identified, as a basis for determining state responsibility for the group's conduct.

Nigeria is a sovereign state governed by law, with the Constitution operating as the supreme law. Affirming this, the preamble to the Constitution states that "Nigeria is one indivisible

⁶⁵⁵ *ibid.*

⁶⁵⁶ Kingsley Nnorom, 'Boko Haram and Rising Developmental Crisis in Nigeria: Overview and Sociological Implications' (2021) 16 (1) *International Journal of African Renaissance Studies*, 82 – 99 at 85.

⁶⁵⁷ Sackflame and Omitola (n 312) 147.

and indissoluble Sovereign State to be known as the Federal Republic of Nigeria”.⁶⁵⁸ The sovereignty in question is both internal and external. In light of this, the idea of ungoverned spaces concerning the country ought to be a misnomer, because as a sovereign state, its sovereignty is suggestive of the fact it holds and governs an indivisible territory. Regarding the country’s internal sovereignty and whether irregular forces such as the CJTF enjoy any legal endorsement within this space, the starting point must be the supremacy clause of the Constitution. Section 1 (1) of the Constitution states that “this Constitution is supreme and its provision shall have binding force on all persons and authorities throughout the Federal Republic of Nigeria”.⁶⁵⁹ In addition, Section 1 (2) of the Constitution declares that “Nigeria shall not be governed, neither shall anyone take over the government of Nigeria or any part thereof, except in accordance with the provisions of the constitution”.⁶⁶⁰ For governance functions to be performed in a sovereign state, laws must be enacted under a valid law-making process, with the expectation that these laws are then obeyed.⁶⁶¹ It must, however, be stated that to enact any law, the legislative authority must enjoy constitutional backing.⁶⁶² In the context of Nigeria, Section 4 (2) of the Constitution provides that “The National Assembly shall have power to make laws for the peace, order, and good government of the federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to this Constitution”.⁶⁶³ This power is to be exercised within the substantive limit prescribed by the Constitution, as the courts have had on different occasions declared unconstitutional, laws made by the National Assembly.⁶⁶⁴ Concerning governance at the level of sub-national units called states, Section 4 (7) of the Constitution states that:

The House of Assembly of a State shall have power to make laws for the peace, order, and good government of a State or any part thereof with respect to the following matters that is to say - (a) any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule to the Constitution; (b) any matter included in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to the Constitution to the extent prescribed in the second column opposite thereto;

⁶⁵⁸ Preamble, Constitution of the Federal Republic of Nigeria, 1999.

⁶⁵⁹ 1999 Constitution. See Andrew U. Iwobi, ‘Tiptoeing Through a Constitutional Minefield: The Great Sharia debate’ (2004) 48 (2) *Journal of African Law*, 111 – 164 at 127.

⁶⁶⁰ 1999 Constitution.

⁶⁶¹ Lambert H. B. Asemota, ‘Non-State Law in Nigeria: A Treasure Trove or Pandora Box?’ (2017) 1 *Austrian Law Journal*, 39 – 54 at 48.

⁶⁶² *ibid.*

⁶⁶³ 1999 Constitution.

⁶⁶⁴ See generally, *Attorney General Ogun State v. Attorney General of the Federation* (2002) 18 NWLR (pt. 798) p. 232; *Attorney General Lagos State v. Attorney General of the Federation* (2003) 12 NWLR (pt. 833) p. 1; *Attorney General Abia, Delta & Lagos States v. Attorney General of the Federation* (2006) 9 MJSC, p. 1

*and (c) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.*⁶⁶⁵

The laws made pursuant to this power are the only ones validly recognised with respect to exercise of governance functions over any part of the country. Specific legislative powers and the extent of such powers exists for both the federal and state governments.⁶⁶⁶ Similarly, a local government has the power to make laws for a local government area, in line with functions granted by the Constitution.⁶⁶⁷ Whereas, the above analysis represents the correct position of the law, what operates on ground in Nigeria bears a different reality. In different parts of the country, non-state entities especially armed groups such as bandits, militants, terrorists, are known to superintend over ungoverned spaces, where they replace the government and impose their own rule. Affirming this point, the UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Agnes Callamard, in her 2021 report submitted with regards to her visit to Nigeria, noted as follows:

*Many armed non-state actors are active in Nigeria. Their motivation may be political, criminal, or a mixture of both. Some groups such as Boko Haram and the Islamic State of West Africa Province (ISWAP) have territorial control and exact terrible losses on the local population. Other groups seem more fluid in their composition, aims, and control. These includes armed groups allied to the 'Fulani Herders' and farmers and militias based around ethnic affiliation, some of whom are responsible for mass killings. A third type is gangs or cartels, referred to as "cults" in the Niger Delta region and "bandits" in the Northwest. The widespread loss of public trust and confidence in the security forces has also led to the proliferating vigilante self-protecting armed militias looking for revenge. The resulting gruesome killings, with impunity, of alleged criminal gang members only add to the public security challenges confronting Federal and State Authorities.*⁶⁶⁸

The CJTF is one of the “vigilante self-protecting armed militias” referenced in the above report. As discussed in Chapter Two of the thesis, the group, in its performance of governance functions, governs by a system of rules based on which it enjoys acceptance by the local population. However, this acceptance does not derive from its recognition as an organ of the State under a validly enacted law of the land; rather, it flows from the fact that members of the group come from amongst the local population and so are seen as an intrinsic part of the

⁶⁶⁵ 1999 Constitution.

⁶⁶⁶ Vincent O. Nmehielle, ‘Sharia Law in the Northern States of Nigeria: To Implement or Not to Implement, Constitutionality is the Question’ (2004) 26 (3) *Human Rights Quarterly*, 730 – 759 at 742.

⁶⁶⁷ Section 7 (5) and Fourth Schedule to the Constitution. See also *Akingbade v. Lagos Town Council* (1955) 2 NLR 90; *Ekpo v. Calabar LGV* (1993) 3 NWLR (pt. 281) p. 324

⁶⁶⁸ See, *Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Agness Callamard*, (31 March 2021), A/HRC/47/33/Add. 2, para. 23.

community. As noted in Chapter Two, the ability of the group to act as a governance actor in the country reflects the crisis of statehood and the inability of the State to exercise effective control over the entirety of its territory. It is instructive to state that in light of the provisions of the Constitution above, the activities of the group are unlawful and undermine the sovereign powers of the Nigerian State. A look at other parts of the Constitution and related laws sheds more light on the point. For instance, the ability of the group to operate as a local security provider, i.e., as the Police force in the areas where the insurgency is ongoing, is indicative of the lack of government presence and the resulting ungoverned spaces that pervade the region. More importantly, the provision of an essential service such as policing by the group indicts the State as lacking the capacity to exercise effective governance over all of its territories through the regular Police Force. This is contrary to Section 214 of the Constitution⁶⁶⁹ as well as Section 4 of the Police Act,⁶⁷⁰ which exclusively grants the Police the power to provide local security in every part of the country. Section 214 (1) of the Constitution provides that “there shall be a Police Force for Nigeria which shall be known as the Nigeria Police Force and subject to the provisions of this section no other police force shall be established for the federation or any part thereof”.⁶⁷¹ The Constitution further states in Section 214 (2) (b) that “the members of the Nigeria Police shall have such powers and duties as may be conferred upon them by law”.⁶⁷² Section 4 (a-e) of the Police Act provides that:

*Prevent and detect crimes, and protect the rights and freedom of every person in Nigeria as provided in the Constitution, the African Charter on Human and Peoples’ Rights, and any other law; maintain public safety, law, and order; protect the lives and property of all persons on Nigeria; enforce all laws and regulations without any prejudice to the enabling Act of other security agencies; discharge such duties within and outside Nigeria as may be required of it under this Act or any other law.*⁶⁷³

Furthermore, in line with Section 217 of the Constitution, the Military may also provide domestic security when there is a breakdown of law and order and civil insurrection to the extent that the Police have become overwhelmed or require its assistance. Section 217 (2) (c) provides for the duties of the Military to include “suppressing insurrection and acting in aid of civil authorities to restore order when called upon to do so by the President, but subject to

⁶⁶⁹ 1999 Constitution.

⁶⁷⁰ Section 4 (a-e), Nigeria Police Act 2020, Act. No. 2, (15 September 2020).

⁶⁷¹ Section 214 (1), 1999 Constitution.

⁶⁷² Section 214 (2) (b), *ibid.*

⁶⁷³ Nigeria Police Act 2020.

such conditions as may be prescribed by an Act of the National Assembly”.⁶⁷⁴ Other security agencies such as the Department of State Services (DSS), the Nigeria Immigration Services (NIS), the Nigeria Correctional Services (NCS), and the Nigeria Security and Civil Defence Corps (NSCDC), are all empowered under different federal laws to complement the work of the Police in providing local security functions at different times.⁶⁷⁵

More so, Chapter VII of the Constitution contains provisions that establish the country’s judiciary and provide for courts, which are exclusively empowered to exercise judicial powers and provide justice delivery in the country.⁶⁷⁶ This part of the constitution does not provide for non-state entities to share in the exercise of judicial powers, thereby making the provision of quasi-judicial functions by the CJTF a violation of the country’s constitutional framework. What this means is that the provision of local governance functions by the CJTF in areas such as being a local security actor and law enforcement are violations of powers of the Police, the Military, and other security agencies under the Constitution, the Police Act, and other relevant laws. Similarly, its performance of governance function concerning the administration of justice violates the Constitution, as only the courts listed in the Constitution are empowered to perform such functions.

From the above discussion, the status of the CJTF under Nigeria’s constitutional and legal framework is clear, i.e., the country’s laws prohibit groups of this nature from exercising governmental powers or performing local governance functions. The provisions of the Constitution discussed above affirm that it is a legal impossibility for any part of the country to be governed under any other form, by any person or entity, other than the procedure prescribed by the Constitution.⁶⁷⁷ This implies that the provision of local governance functions by the CJTF is illegal and runs contrary to the country’s constitutional and domestic legal framework. The broader implication is that it makes the applicability of relevant provisions of the Articles on State Responsibility to the relationship between the Nigerian State and the group problematic. Two provisions from the Articles requiring the existence of

⁶⁷⁴ Section 217 (2) (c), 1999 Constitution.

⁶⁷⁵ See generally, Immigration Act 2015, No. 8, Nigerian Correctional Service Act 2019, Nigeria Security and Civil Defence Act 2007, No.73.

⁶⁷⁶ These courts include the Supreme Court of Nigeria, the Court of Appeal, the Federal High Court, High Court of the Federal Capital Territory (FCT) Abuja, Sharia Court of Appeal of the Federal Capital Territory (FCT) Abuja, Customary Court of Appeal of the Federal Capital Territory (FCT) Abuja, High Court of a State, Sharia Court of Appeal of a State, Customary Court of Appeal of a State, and Election Tribunals. See generally, Sections 230, 237, 249, 255, 260, 265, 270, 275, 280 and 285.

⁶⁷⁷ John O. A. Akintayo, ‘Ungoverned Space: Some Perspectives on Legal Denials and Factual Realities’ in Richard A. Olaniyan & Rufus T. Akinyele (eds.) *Nigeria’s Ungoverned Spaces (Studies in Security, Terrorism, & Governance)* (Ile-Ife, Nigeria: Obafemi Awolowo University, 2016), 1 – 154 at 9.

an internal law of a State as a basis for attributing the conduct of non-state entities to States are Articles 4 and 7 of the Articles on State Responsibility. Article 4 states that:

*The conduct of any State organ shall be considered an act of the State under international law, whether the organ exercises legislative, executive, judicial, or any other function, whatever position it holds in the organisation of the State and whatever its character as an organ of the central government or of a territorial unit of the State. An organ includes any person or entity which has that status in accordance with the internal law of the State.*⁶⁷⁸

Similarly, Article 7 provides that:

*The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.*⁶⁷⁹

Generally, CDFs operating as hybrid irregular forces groups do not qualify as legislative, executive, or judicial organs of the State, however, they may be classified within organs defined as exercising “any other function” as well as those having that character, either as an organ of the “central government or a territorial unit of the State”. In the case of the CJTF, the group has been performing other functions, starting with combat functions and then extending to its activities as a provider of local governance functions. Also, as noted in the earlier part of this Chapter, the group holds that character as an organ of a territorial unit of the Nigerian State, i.e., the Borno state government. To a reasonable extent, the group satisfies some of the requirements for the applicability of Article 4 of the Articles on State Responsibility. However, a second and perhaps more important requirement under the Article is that such status must be “...in accordance with an internal law of the State”.

As already analysed above, the CJTF lacks such status under Nigeria’s constitutional and domestic legislative framework. Indeed, the Nigerian Constitution recognises government in the country as made up of the Legislature,⁶⁸⁰ Executive,⁶⁸¹ and Judiciary⁶⁸² and prescribes the powers and functions of each of these branches. As the country’s sovereignty is absolute and total, the Constitution repudiates the right of any person or group of persons, such as the CJTF, from exercising inherently governmental powers or taking control of any of the

⁶⁷⁸ Article 4, Articles on State Responsibility 2001.

⁶⁷⁹ Article 7, *ibid.*

⁶⁸⁰ Section 4, 1999 Constitution.

⁶⁸¹ Section 5, *ibid.*

⁶⁸² Section 6, *ibid.*

country's territory.⁶⁸³ In addition, it is important to stress that whereas the CJTF has been operating as a hybrid irregular force in the government's counterinsurgency warfare against Boko Haram, the Parliament i.e., the National Assembly has not enacted a specific law to define the scope of the group's work in the counterinsurgency or to regulate its activities. Thus, although, on the one hand, there is a working relationship between the group and the Nigerian state, which ought to be a sufficient basis for attribution, on the other hand, there is a lack of a specific legal framework governing the activities of the group. Though this working relationship has developed organically, there remains a gap, given the lack of an internal law relating to the group, making state responsibility for the conduct of the group difficult.

It is worth stating that the situation in Nigeria is contrary to what obtains in Burkina Faso, where a group similar to the CJTF, i.e., the Volunteers for the Defence of the Homeland, with the local name 'Koglweogos' has also been operating as a hybrid irregular force. In Burkina Faso, the government has enacted a specific law to regulate the activities of the Koglweogos, thereby creating a legal link between the group and the state. This occurred on 21 January 2020, when the National Assembly of Burkina Faso passed into law the Volunteers for the Defence of the Homeland Act (*Hereinafter* VDP Act),⁶⁸⁴ which allowed civilian volunteers to be recruited at the village level or their residence voluntarily and with the approval of the village development committee or municipal council.⁶⁸⁵ Following their selection, members of the group are to be trained for two weeks and then deployed for one year, subject to renewal. The Burkina Faso law empowers the government to train and arm these civilian volunteers in different communities to fight against insurgents. This law implies that in line with current rules of state responsibility, the fact that the Koglweogo's activities are governed under an internal law operates as a sufficient basis for its conduct to be attributed to Burkina Faso as a *de jure* organ of the State. When compared with the Nigerian scenario, it also means that, with the absence of such a law in Nigeria, it is difficult to classify the CJTF as a *de jure* organ of the State, as a basis on which its conduct then becomes attributable to the Nigerian state. This legal vacuum creates problems for the current framework of law of state responsibility, making imperative the need for alternative pathways of realising responsibility given hybrid operations by groups such as the CJTF.

3.2. Conclusion.

⁶⁸³ Akintayo, (n 677).

⁶⁸⁴ Volunteers for the Defence of the Homeland Act, Law No. 002 – 2020 (21 January 2020).

⁶⁸⁵ Article 5, VDP Act 2020.

This Chapter has examined the role of the CJTF as a hybrid irregular force in Nigeria's counterinsurgency operation against Boko Haram as well as how the group's local governance activities are addressed under Nigeria's constitutional and legal framework. In undertaking this task, the following key points have been established. First, the Chapter shows that the CJTF was coopted by the Nigerian government as a combat force in its counterinsurgency operations against Boko Haram, which subsequently opened up governance opportunities, and that this was enabled by years of governmental absence that bred large ungoverned spaces. Second, it demonstrated that the Boko Haram insurgency, the government's counterinsurgency operations, and the hybrid operation of the CJTF are all indicative of the crisis of development that has been the bane of the Nigerian state since independence. Third, and more significantly, it was able to establish that the group's activities as a hybrid irregular force takes place outside the country's constitutional and legal framework. It asserts that the absence of such a law renders the CJTF an illegal actor in Nigeria's counterinsurgency operations against Boko Haram. In the absence of such a law, the legal link required for attribution is lacking, and therefore, engaging state responsibility becomes problematic.

The most pivotal finding in this Chapter is that despite the lack of the required legal link, there is evidence of a working relationship between the CJTF and the Nigerian state, which creates an informal link between both parties. This point is evident in the analysis in Section 3.2 of this Chapter regarding the coopting of the group as well as its activities as a provider of local governance functions. This research notes that evidence of such a working relationship is a sufficient basis for attribution, as it establishes a reasonable threshold of cooperation and dependence. It further asserts that, based on the above, the group accordingly ought to enjoy the status of a *de facto* organ of the State, notwithstanding the lack of a specific law as well as the absence of the group's complete dependence on the State.

However, to determine whether the group's activities come within the contemplation of international law or whether it operates outside of it, there is a need to examine the relevant legal regimes. Since at least May 2013, the Office of the Prosecutor of the International Criminal Court (ICC) has regarded the situation in Nigeria's northeast as constituting an

NIAC.⁶⁸⁶ Accordingly, and as established in Chapter One of this thesis, it means that IHL primarily operates as the applicable law. More so, given the possible violation of other rights not covered by IHL rules, as well as the fact that there may be a need to determine the scope of attribution, the regimes of IHRL and the law of state responsibility are also applicable. To understand how relevant provisions under these regimes apply to the CJTF as a hybrid irregular force, there is a need to first answer the preliminary question of whether the group can be considered as having an international legal personality. The next Chapter, i.e., Chapter Four, will focus on addressing this question. Determining this will show whether the group can be brought within the class of non-state actors captured under the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict,⁶⁸⁷ as well as Article 7 (5) of the 2009 Kampala Convention.⁶⁸⁸

⁶⁸⁶ See, *Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Agnes Callamard*, (31 March 2021), A/HRC/47/33/Add. 2, para. 26.

⁶⁸⁷ Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, at 3, U.N. Doc. A/54/263 (25 May 2000) (*entered into force* 12 Feb. 2002) [*hereinafter* Optional Protocol]. Section 4 (1) of the Protocol states that provides that “armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years”.

⁶⁸⁸ African Union Convention for the Protection and Assistance of Internally Displaced Persons, adopted by the Special Summit of the African Union (AU) in Kampala Uganda, on 22 Oct. 2009 [*hereinafter* Kampala Convention]. The Kampala Convention prohibits Armed Non-State Actors (ANSAs) from committing certain acts in an armed conflict.

CHAPTER FOUR

APPLICABILITY OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW TO THE CIVILIAN JOINT TASK FORCE

4.0. Introduction.

It is necessary to examine whether the norms of IHL and IHRL, which are directly applicable to the Nigerian State counterinsurgency operations against Boko Haram, can be applied in determining responsibility for the conduct of the CJTF. This is in addition to the fact that the provisions of these two regimes form the primary rules, whose violation must be established before the secondary rules of the law of state responsibility can be engaged. If these two regimes can be applied to determine responsibility for the conduct of the group, the problem of attribution under the law of state responsibility may be bypassed. However, where the two regimes are directly inapplicable, the need arises to determine other possible pathways of attribution in international law. To make this determination, there is a need to understand current perspectives regarding the application of these two regimes to non-state entities in general and to groups such as the CJTF in particular.

To achieve the above, this Chapter commences its discussion by examining the current state of international law regarding the international legal personality of Armed Non-State Actors (ANSAs).⁶⁸⁹ The goal is to determine, through the lens of ANSAs, how the rules of IHL and IHRL apply to a group such as the CJTF in its operation as a hybrid irregular force. This is especially true as ANSAs possess characteristics that make them less open to international legal oversight, the result being their uncertain status in international law.⁶⁹⁰ A plurality of

⁶⁸⁹ Whereas the term Non-State Actors' remains elusive with regards to attempts at defining it, O'Connell adopts a simplistic perspective stating that "*non-state actors can be any actor on the international plane other than a sovereign state*". See Mary Ellen O'Connell, 'Enhancing the Status of Non-State Actors Through a Global War on Terror?' (2005) 43 *Columbia Journal of Transnational Law*, 435 – 458 at 437.

⁶⁹⁰ Vladimir V. Merkushin, 'Non-State Actors as Quasi-Subjects of Transnational Organised Crime: Implications for the Security of States' (2022) 1 *Journal of the Belarusian State University*, 66 – 73 at 67.

actors fall within what is considered as ANSAs; however, using this broader group remains the most appropriate basis for examining the international legal personality of a group like the CJTF. This is due to the paucity of literature on the international legal personality of CDFs as a specific group. In any case, groups of this nature have, in recent times, been recognised as belonging to this broad classification. This was well captured in the report by the United Nations (UN) Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions on Armed Non-State Actors, Agnes Callamard, stated in Section 1.4. of Chapter One.⁶⁹¹

International law takes the issue of international responsibility seriously, given that this is the framework through which the international legal system ensures that human relations are governed by a rule of law system, as against the rule of actors. International responsibility is a product of international legal personality, meaning once an entity can bear rights and duties, where these duties are breached, such entity can be held responsible.⁶⁹² As already established in Chapter One, international law has traditionally been a subject-centered system, and within this framework, States were considered the sole subjects.⁶⁹³ This framework began to give way following the creation of the League of Nations as well as the International Labour Organisation (ILO). At the same time, the establishment of the United Nations (UN) in 1945 allowed the International Court of Justice (ICJ) to formulate important requirements, which has over time shaped the debates around the legal personality of non-state entities, for example, international organisations.⁶⁹⁴ Despite shifts in thinking, the legal personality of non-state entities remained a matter of debate among international law scholars, especially given the difficulty in treating all non-state entities as a homogenous group as well as the need to approach each group based on its peculiar characteristics.

The recognition of States as primary subjects of international law derives from the fact that they constitute the most complete type of subject, one having a stable authority over a defined territory as well as a population of people.⁶⁹⁵ This status confers international legal personality on States and it is the basis on which they enjoy rights and obligations. Whereas the status of States is well-established, that of ANSAs remains controversial, even though,

⁶⁹¹ ‘Report of the Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions on Armed Non-State Actors’ (n 95).

⁶⁹² Jean d’Aspremont, ‘Abuse of the Legal Personality of International Organisations and Responsibility of Member States’ (2007) *International Organisation Law Review*, 91 – 119 at 93.

⁶⁹³ Wladyslaw Czaplinski, ‘Recognition and International Legal Personality of Non-State Actors’ (2016) 1 *Pecs Journal of International and European Law*, 7 – 17 at 7.

⁶⁹⁴ *ibid.*

⁶⁹⁵ Guido Acquaviva, ‘Subjects of International Law: A Power-Based Analysis’ (2005) 38 (2) *Vanderbilt Journal of Transnational Law*, 346 – 396 at 346.

from both a legal and practical perspective, their likelihood of violating IHL and IHRL norms is as real and worrisome, as that of States. Groups such as the CJTF fall within this category and determining whether or not they enjoy international legal personality is central to addressing the main question in this research. In light of the above, the focus of this chapter is to determine whether irregular forces such as the CJTF enjoy international legal personality and the implication of this for determining state responsibility for their conduct under international law. The Chapter will equally be addressing alleged human rights violations by the CJTF in its hybrid operation as well as the applicability of IHL and IHRL in determining responsibility for these violations.

The structure of this chapter is as follows: First, Section 4.1. examines the concept of international legal personality. It will be shown that while current perspectives support the notion that certain non-state entities enjoy a measure of international legal personality, the same cannot be said of groups like the CJTF. At best, the group can be said to enjoy a form of derivative legal personality i.e., legal personality flowing from that of the Nigerian State, on whose behalf it operates. Second, Section. 4.2. analyses how responsibility for the conduct of non-state entities is currently construed under IHL and IHRL. The key objective of the chapter is to understand whether, through the applicability of these two regimes, some pathway to responsibility can be identified.

4.1. The Concept of International Legal Personality.

The legal personality of ANSAs is one of the most perplexing questions of international law. This derives from the theoretical foundations of international law being a system rooted in a state-centric framework. Answering this question has also become important given the reality that addressing the legal personality of ANSAs has become central to understanding what shape the current international legal order ought to take. Noting this point, Seller states that “the metaphor of legal personality has always been, and remains, the foundation of the international legal system”.⁶⁹⁶ International legal personality is considered a condition precedent for the possibility of acting within a given legal situation.⁶⁹⁷ According to Lauterpacht “as in any other legal system, so also in the international sphere the subjects of law are the persons, national, and juridical upon whom the law confers rights and imposes duties”.⁶⁹⁸ Highlighting the importance of international legal personality, Pellet remarks that

⁶⁹⁶ Mortimer N.S. Sellers, ‘International Legal Personality’ (2005) 11 *Ius Gentium*, 67 – 78 at 68.

⁶⁹⁷ Jan Klabbers, ‘The Concept of Legal Personality’ (2005) 11 *Ius Gentium*, 1 – 133 at 37.

⁶⁹⁸ Hersch Lauterpacht, ‘The Subject of International Law’ in Andrea Bianchi (ed.) *Non-State Actors and International Law* (Routledge Publishers, 2009), 1 – 601 at 136.

“responsibility is at one and the same time an indicator and consequence of international legal personality; only a subject of international law may be internationally responsible; the fact that any given entity can incur responsibility is both a manifestation and the proof of its international legal personality”.⁶⁹⁹ Addressing the issue of international legal personality also distinguishes entities that are States recognised as subjects and participants, from those who are not.⁷⁰⁰ This is more so as today's responsibility is not just reserved to States, but is connected to the international legal personality of other subjects of international law.⁷⁰¹

There is a lack of universal definition or consensus on the concept of international legal personality.⁷⁰² Rather, the term is understood as relating to the capacity of an entity to be the bearer of legal rights and obligations, as well as the capacity to undertake certain types of action in the international arena.⁷⁰³ Oftentimes, when the term is used, what is in view are Sovereign States. According to Maluwa, to best understand the concept of international legal personality one must determine what international law itself means.⁷⁰⁴ The right place to start is to first reinstate the fact that international law is not a framework of rules, but a normative system.⁷⁰⁵ Within this system, all groups, and structures regard certain conduct as obligatory and which when violated, will attract consequences.⁷⁰⁶ At the centre of this system, are States considered as the main subjects. For instance, these norms are binding because States consent to them, a position based on the sovereignty of states and their freedom to either act unilaterally or be constrained.⁷⁰⁷ Within this normative system, continuous non-compliance by States over some time causes these norms to lose their character.⁷⁰⁸ What is however important is the fact regarding the centrality of the State to the general workings of the international law framework. Indeed, a critical look at various definitions of international law

⁶⁹⁹ Allain Pellet, ‘The Definition of Responsibility in International Law’ in James Crawford, Allain Pellet, & Simon Olleson, (eds.) *The Law of International Responsibility*, (Oxford University Press, 2010), 1 – 1253 at 6.

⁷⁰⁰ Agata, Kleczkowska, ‘Filling the Gap: The New Regime of Responsibility for Armed Non-State Actors’ (2018) 25 *Australian International Law Journal*, 137 – 162 at 140.

⁷⁰¹ Pellet (n 699).

⁷⁰² Olivia Herman, ‘Righting Wrongs: Non-State Armed Groups and Reparations for Victims of Armed Conflicts, with a Case Study of Colombia’ Ph.D. Dissertation, KU Leuven, 2021, 1 – 341 at 26.

⁷⁰³ Emeka Duruigbo, ‘Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges’ (2008) 6 (2) *Northwestern Journal of International Human Rights*, 222 – 261 at 225; Catherine Brolmann and Janne Nijman, ‘Legal Personality as a Fundamental Concept of International Law’ in J. d’Asprement & S. Singh (eds.) *Concepts for International Law – Contributions to Disciplinary Thoughts*, (London: E. Elgar, 2017) 1 – 913 at 1; Klabbers (n 697) 35, 46.

⁷⁰⁴ Tiyanjana Maluwa, ‘The Holy See and the Concept of International Legal Personality: Some Reflections’ (1986) 19 (1) *The Comparative & International Law Journal of Southern Africa*, 1 – 26 at 3, 4.

⁷⁰⁵ Rosalyn Higgins, *Problems and Processes: International Law and How We Use It*, (Oxford University Press, 1994), 1 – 274 at 1, 2.

⁷⁰⁶ *ibid.*

⁷⁰⁷ *ibid.*, 14.

⁷⁰⁸ *ibid.*, 19.

would reveal the centrality of States to its classical understanding. For instance, Brierly defines international law as “the body of rules and principles of action which are binding upon civilised States in their relations with one another”.⁷⁰⁹ However, amongst its several definitions, perhaps the most accepted is that of Fauchille who refers to international law as “the body of rules which determines the respective rights and duties of States in their mutual relations”.⁷¹⁰ From this definition, the clear emphasis on the State as international law’s primary subject is unambiguous.

From its early origins, international law had been considered both as a body of laws regulating the relationship between sovereign states, with its provisions equally binding on individuals without the intermediary of their State.⁷¹¹ Following the Peace of Westphalia,⁷¹² a new international legal order based on sovereign, independent, and territorially defined States that sought to maintain political independence and territorial integrity was created.⁷¹³ This international legal system which was largely European, was centred on relations between states, with defined territories as well as equality among sovereign states.⁷¹⁴ Until the 20th century, international law was focused on States as its most important subjects.⁷¹⁵ It was simply viewed as a body of laws applying between nations.⁷¹⁶ It was considered a body of rules and principles governing the rights and duties of States, concerning their dealings with other states, as well as citizens of these States.⁷¹⁷ While international law is made up of rules and institutions, it was also known as a system of traditions as well as a political project.⁷¹⁸ It reflected first and foremost the elementary state-oriented character of world politics, as the State had become the primary repository of peoples’ hope, both for their protection and objectives.⁷¹⁹ Thus, its rules were essentially aimed at regulating the behaviour of States, and not individuals.⁷²⁰ Traditional international law treated States as exclusive subjects, holding

⁷⁰⁹ Peter Marshall, *Positive Diplomacy*, (Palgrave Macmillan, 1997), 1 – 222 at 45.

⁷¹⁰ Paul Fauchille, *Traite de droit international public* Vol. 1, Part 2, (1922) 1 – 1095 at 4.

⁷¹¹ Marek St. Korowicz, ‘The Problem of the International Personality of Individuals’ (1956) 50 (3) *American Journal of International Law*, 533 – 562 at 534.

⁷¹² Peace of Westphalia (n 311).

⁷¹³ Edith B. Weiss, ‘The Rise or the Fall of International Law?’ (2000) 69 *Fordham Law Review*, 345 – 372 at 346.

⁷¹⁴ *ibid*, 347.

⁷¹⁵ Petra Perisic, ‘Some Remarks on the International Legal Personality of Individuals’ (2016) 49 (2) *The Comparative and International Law Journal of Southern Africa*, 223 – 246 at 223.

⁷¹⁶ Chiara Giorgetti, ‘Rethinking the Individual in International Law’ (2018) 22 *Lewis & Clark Law Review*, 1085 - 1149 at 1090.

⁷¹⁷ Vaughan Lowe, *International Law*, (Oxford Univ. Press, 2007), 1 – 291 at 5.

⁷¹⁸ Martti Koskeniemi, ‘The Fate of Public International Law: Between Techniques and Politics’ (2007) 70 (1) *Modern Law Review*, 1 – 30 at 1.

⁷¹⁹ Malcolm N. Shaw, *International Law*, (Cambridge Univ. Press, 8th ed. 2017), 1 - 1019 at 33.

⁷²⁰ Antonio Cassese, *International Law*, (Oxford Univ. Press, 2nd ed. 2005), 1 – 529 at 3.

the view that they alone had international legal personality and that they only enjoyed the capacity to bear rights and duties.⁷²¹ Within that context, individuals were not considered subjects, but only objects, in the sense that by customary and conventional law, States may observe certain rules of conduct concerning them.⁷²² In the *SS Lotus Case*, the Permanent Court of International Justice (PCIJ) made the following remarks on the character of international law:

*International law governs relations between independent States. The rules of law binding upon States, therefore, emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.*⁷²³

This traditional model of international law was based on three important grounds i.e., (1) that the primary rules of international law applies to States only, and does not cover non-state entities; (2) that under the secondary rules of international law, only states could be responsible for a breach of the primary rules; and (3) that private parties incur obligations by reason of whatever domestic law gives legal force to the rights and obligations contemplated by a treaty.⁷²⁴ The idea that states are considerably the main subject of international law reflects in the theory of scholars such as Goldsmith and Posner, who contend that international flows from states acting rationally to further their interest, in light of their perception of the interest of other states and the distribution of state power.⁷²⁵ This state-centric approach to international law was a strict one, so much so that even territorial entities operating as *de facto* States, were not considered subjects, so long as they had not attained statehood.⁷²⁶ As the sole subject of international law therefore, States were the only entities capable of breaching rules of the international system and consequently incurring

⁷²¹ *ibid*, 71; Shaw (n 719) 261; Jonathan I. Charney, 'Transnational Corporations and Developing Public International Law' (1983) *Duke Law Journal*, 748 - 788 at 753; Joel R. Paul, 'Holding Multinational Corporations Responsible under International Law' (2001) 24 (3) *Hastings International and Comparative Law Review*, 285 - 296 at 285; Julian G. Ku, 'The Limits of Corporate Rights under International Law' (2012) 12 (2) *Chicago Journal of International Law*, 729 - 754 at 733; Christiana Ochoa, 'The Individual and Customary International Law Formation' (2007) 48 *Virginia Journal of International Law*, 119 - 186 at 152.

⁷²² Lauterpacht (n 698) 136.

⁷²³ *Case of the SS Lotus*, (Fr. V. Turk) Judgement, 1927 P.C.I.J. (ser. A) No. 10 at 18.

⁷²⁴ Carlos M. Vazquez, 'Direct vs. Indirect Obligations of Corporations under International Law Essays' (2005) 43 *Columbia Journal of Transnational Law*, 927 - 959 at 933, 935.

⁷²⁵ Goldsmith and Posner (n 211) 3, 4.

⁷²⁶ William T. Worster, 'Territorial Status Triggering a Functional Approach to Statehood' (2020) 8 (1) *Penn State Journal of Law & International Affairs*, 119 - 180 at 119.

responsibility.⁷²⁷ In short, they were considered the most important subjects of international law as well as possessing original international legal personality.⁷²⁸

It is important to state that several works in international law view the concept of international legal personality as having developed mostly around the concept of legal positivism,⁷²⁹ which for long provided the theoretical basis for understanding international law itself.⁷³⁰ Prior to positivism, it was not theoretically definitive that international law only applied to states. For instance, Blackstone insisted that both States and individuals were proper subjects of international law arguing that the rules of international law are universal, developing from principles of natural justice or the practice of States, distinguished from other bodies of laws, and not based on its subjects but the sources.⁷³¹ In his 1789 groundbreaking work, *Introduction to the Principles of Morals and Legislation*, Jeremy Bentham created the term ‘inter-national law’ defining it as “*the mutual transactions between sovereigns as such*” and postulating that individuals were regulated by the internal laws of nations and that international law only had States as its subjects.⁷³² This supports the notion that the public law of nations operates horizontally for states only.⁷³³ More specifically, legal positivism redefined the 18th-century conceptualisation of international law, transforming it into public and private international law, with the former applying to States and the latter to individuals.⁷³⁴ This positivist conception of international law has largely shaped the modern understanding of the individual and international law, in particular the rules that individuals are not subjects of international law.⁷³⁵ It is worth noting that when it comes to international legal personality, the same rule that binds individuals, also applies to non-state entities such as international organizations, liberation movements, insurgent groups, etc.

From this classical understanding, international law has developed rapidly, shaped remarkably by the events of the First and Second World Wars. For instance, at the end of the

⁷²⁷ Pellet (n 699).

⁷²⁸ See, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, (2006) African Commission on Human and People Rights, para. 135; *David v. Ambassador Uwechue*, (2010), Community Court of Justice of the Economic Community of West African States, para. 42; *Union Trade Centre Ltd. (UTC) v. Attorney General of Rwanda*, (2014) East African Court of Justice, para. 19.

⁷²⁹ Mark W. Janis, ‘Individuals as Subjects of International Law’ (1984) 17 (1) *Cornell International Law Journal*, 61 – 78 at 61.

⁷³⁰ *ibid.*

⁷³¹ *ibid.*, 62

⁷³² *ibid.*

⁷³³ Harold H. Koh, ‘Why Do Nations Obey International Law?’ (1997) 106 (8) *The Yale Law Journal*, 2599 - 2659 at 2608.

⁷³⁴ Janis (n 729) 62.

⁷³⁵ *ibid.*, 64.

First World War, international law began to change quite dramatically, especially with the emergence of the League of Nations as the first organisation of its kind, designed to foster international cooperation and also the signing of international agreements and conventions on a wider scale.⁷³⁶ Following the unprecedented horrors of the Second World War, and with the League of Nations unable to deliver on its mandate, it became more pressing for the international community to get international law to work for everyone. These efforts culminated in the establishment of the UN, the implication being that the development of international law entered a more aggressive phase, such as the creation of a number of regional bodies as well as the adoption of several landmark human rights law treaties. These institutions have been instrumental in the creation of a new international legal order, as well as the development of new rules, with these bodies also becoming bearers of international rights and duties.⁷³⁷

This contemporary development of international law is indicative of the restructuring of the international space at this time. On the strength of this, there has been a push for a new definition of international law to reflect these realities.⁷³⁸ Jenks, for instance, argues that:

*The emphasis of law is increasingly shifting from the formal structure of the relationship between States and the delimitation of their jurisdiction to the development of substantive rules on matters of common concern vital to the growth of an international community...individuals, organisations, and corporate bodies which call for appropriate legal regulation on an international basis.*⁷³⁹

Against the backdrop of calls for a shift from the state-centric approach, Starke has defined international law as:

*That body of law which is composed for its greater part of the principles and rules of conduct which States feel themselves bound to observe and therefore, do commonly, observe in their relations with each other, and which include also: (a) the rules of law relating to the functioning of international institutions or organisations and their relations with each other and with States and Individuals and; (b) certain rules of law relating to individuals and non-state entities as far as the rights and duties of such individuals and non-state entities are the concern of the international community.*⁷⁴⁰

⁷³⁶ Maluwa (n 704) 5.

⁷³⁷ *ibid*, 6.

⁷³⁸ *ibid*.

⁷³⁹ Clarence W. Jenks, *The Common Law of Mankind*, (New York: Frederick A. Praeger, 1958).

⁷⁴⁰ Joseph G. Starke, *An Introduction to International Law*, (Butterworths and Co. 9th ed., 1984) 3.

The Permanent International Court of Justice (PICJ) which was later succeeded by the International Court of Justice (ICJ), is one institution that has played a central role in this renaissance of international law. An examination of its interpretation of international law would reveal that as far back as the late 1940s, the court itself leaned towards a shift in understanding of the concept, especially the move towards a redefinition. For instance, in its 1928 decision in the *Beamtenabkommen Case*, the Court observed that “the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and enforceable by the national courts”.⁷⁴¹ The implication of this reasoning is to suggest that international law could indeed create rights for individuals.⁷⁴²

There exist several theories related to the concept of international legal personality of ANSAs, however, the most authoritative jurisprudence is that of the International Court of Justice (ICJ) in its 1949 *Reparations for Injuries Advisory Opinion*.⁷⁴³ Notwithstanding its view that the concept is controversial,⁷⁴⁴ the Court nonetheless adopted an open approach in addressing questions related to it.⁷⁴⁵ In this case, it held that the UN does enjoy legal personality under international law, given that its members i.e., Sovereign States, in entrusting certain functions to it, had clothed the organisation with the competence for those functions to be effectively discharged.⁷⁴⁶ As a subject of international law, therefore, the ICJ considered the UN as an entity capable of possessing international rights and duties, as well as enjoying the capacity to maintain these rights by bringing an international claim.⁷⁴⁷ Quite significantly, it remarked that “whereas a State possess the totality of international rights and duties recognised by international law, the rights and duties of an entity such as the organisation must depend on its purpose and functions as specified or implied in its

⁷⁴¹ PCIJ, Jurisdiction of the Courts of Danzig, (*Beamtenabkommen*) PCIJ Reports, Series B, No. 15.

⁷⁴² Cendric Ryngaert, ‘Non-State Actors: Carving Out a Space in a State-Centred International Legal System’ (2016) 63 *Netherlands International Law Review*, 183 – 195 at 186. See also the decisions of the PCIJ in the *Minority Schools Case*, PCIJ Minority Schools in Albania, Advisory Opinion, PCIJ Reports, Series A/B, No. 64, and the *German Settlers Case*, PCIJ Questions Relating to Settlers of German Origin in Poland, Advisory Opinion, PCIJ Reports, No. 6, where it held that protection of individuals’ rights could be the object of a treaty. One could also look at the opinion of Clapham who notes that in over 6 decades after the end of the Second World War, there has been a change in the status of the individual as a holder of rights under international law. See Andrew Clapham, ‘The Role of the Individual in International Law’ (2010) 21 (1) *European Journal of International Law*, 25 – 30 at 27.

⁷⁴³ *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion: ICJ Reports, 11 Apr. 1949, p. 174.

⁷⁴⁴ *ibid*, 178.

⁷⁴⁵ Janne E. Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, (The Hague: Netherlands: T.M.C. Asser Press, 2004), 1 – 494 at 4.

⁷⁴⁶ ‘Reparations for Injuries Suffered in the Service of the United Nations’ (n 743) 174, 179.

⁷⁴⁷ *ibid*.

constituent documents and developed in practice”.⁷⁴⁸ From this decision, three widely accepted criteria have emerged on what is to be considered when determining whether an entity has international legal personality. The first criterion is that legal persons can bear rights; the second criterion is that legal persons can bear responsibilities; and the third criterion is that legal persons have the capacity to bring international claims.⁷⁴⁹ The Court further observed, quite broadly, that:

*The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirement of international life, and the progressive increase in collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.*⁷⁵⁰

From its reasoning above, the ICJ established the important doctrine that a non-state entity indeed had implied powers that could define it as a legal person.⁷⁵¹ This point has been properly explained by Jorritsma who notes that international legal personality does not operate in a binary spectrum.⁷⁵² She makes the point that international law does not view states and other non-state actors the same way, but instead, there are various degrees of international legal personality.⁷⁵³ The meaning is that international legal personality is a relative concept, and so the several actors in the international system differ in their measure of international legal personality as well as the scope of their rights and obligations.⁷⁵⁴ Further development in the understanding of the international legal personality of ANSAs could also be gleaned from the ICJ’s 1980 *WHO-Egypt Advisory Opinion* which affirmed international organisations as subjects of international law.⁷⁵⁵ In this Opinion, the ICJ noted that “international organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties”.⁷⁵⁶

⁷⁴⁸ *ibid.*

⁷⁴⁹ Andres Felipe Lopez Latorre, ‘In Defence of Direct Obligations for Businesses Under International Human Rights Law’ (2020) 5 *Business and Human Rights Journal*, 56 – 83 at 62.

⁷⁵⁰ ‘Reparations for Injuries Suffered in the Service of the United Nations’ (n 743) 178.

⁷⁵¹ James E. Hickey, ‘The Source of International Legal Personality in the 21st Century’ (1997) 2 *Hofstra Law & Policy Symposium*, 1 – 18 at 6.

⁷⁵² Jorritsma (n 42) 84.

⁷⁵³ *ibid.*, 84, 85.

⁷⁵⁴ *ibid.*

⁷⁵⁵ Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980, ICJ Rep. 73, 89 - 90 (Dec. 20) [*Hereinafter* ‘WHO-Egypt Advisory Opinion’].

⁷⁵⁶ Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion: ICJ Reports, 11 Apr. 1949, p. 174.

The *Reparations for Injuries Advisory Opinion* reasoning, significantly shaped later perspectives on the legal personality of ANSAs. For example, it has become increasingly clear that there are other non-state entities such as international organisations,⁷⁵⁷ corporations,⁷⁵⁸ Non-Governmental Organisations (NGOs),⁷⁵⁹ self-determination groups,⁷⁶⁰ National Liberation Movements,⁷⁶¹ belligerents,⁷⁶² Indigenous peoples,⁷⁶³ religious entities,⁷⁶⁴ private organisations,⁷⁶⁵ as well as individuals,⁷⁶⁶ worthy of being considered as having limited or a measure of international legal personality.

What is therefore clear is that, as against the earlier classical and narrow understanding of international law, contemporary perspectives have shifted, witnessing the emergence of a redefinition of the concept of international legal personality, especially about granting limited legal personality to non-state entities. This means ANSAs may be considered as having international legal personality, though this may be in a limited form, and may oftentimes be

⁷⁵⁷ Zhu Lijing, 'The Legal Personality of the Asia-Pacific Space Cooperation Organisation' (2012) 1 (1) *AALCO Journal of International Law*, 159 – 168 at 159.

⁷⁵⁸ Corporations were initially treated as objects to be regulated by the State. See Gralf-Peters Calliess, 'Introduction: Transnational Corporations Revisited' (2011) 18 (2) *Indiana Journal of Global Legal Studies*, 601 – 605 at 603. Traditionally, they also played a backseat role in human rights protection; Barbara A. Frey, 'The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights' (1997) 6 *Minnesota Journal of International Law*, 153 - 188 at 154. However, over the years there have been increasing efforts to develop more specific corporate human rights obligations. See David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises concerning Human Rights' (2003) 97 *American Journal of International Law*, 901 – 922 at 901; Jonathan Kolieb, 'Advancing the Business and Human Rights Treaty Project Through International Criminal Law: Assessing the Options for Legally-Binding Corporate Human Rights Obligations' (2019) 50 *Georgetown Journal of International Law*, 789 – 838 at 793, 794; Mariam Mafessanti, 'Corporate Misbehaviour & International Law: Are There Alternatives to Complicity?' (2010) 6 (2) *South Carolina Journal of International Law and Business*, 167 – 252 at 170.

⁷⁵⁹ Adefolake Adeyeye, 'Corporate Responsibility in International Law: Which Way to Go?' (2007) 11 *Singapore Yearbook of International Law*, 141 – 161 at 154.

⁷⁶⁰ Legal Consequences for States of the Continued Presence of South Africa in Namibia, (Sw. Afr.) notwithstanding S.C. Res. 276, (1970) Advisory Opinion, 1971 I.C.J. Reps. 16, 31 (21 June 1971); Western Sahara, Advisory Opinion, 1975 I.C.J. Reps. 12, 32-3, (16 Oct. 1975); East Timor (*Portugal v. Australia*) Judgement 1995, I.C.J. Reps. 90, 102 (30 June 1995).

⁷⁶¹ William T. Worster, 'The Exercise of Jurisdiction by the International Criminal Court over Palestine' (2011) 26 (5) *American University International Law Review*, 1153 – 1209 at 1153.

⁷⁶² Steven R. Ratner, 'The Cambodian Settlement Agreement' (1993) 87 (1) *American Journal of International Law*, 1 – 41 at 1; *Prosecutor v. Kony*, et al, Case No. ICC-02/04-01/05, Situation in Uganda, Decision on the Admission of the Case under Article 19 (1) of the Statute of the International Criminal Court, Pre-Trial Chamber II (10 Mar. 2009).

⁷⁶³ Western Sahara, Advisory Opinion, 1975 I.C.J. Reps. 12, 75-84, (16 Oct. 1975); Land & Maritime Boundary Between Cameroon and Nigeria, (*Cameroon v. Nigeria*) Judgement 2002, I.C.J. Reps. 303, 205 – 207 (10 Oct. 2002).

⁷⁶⁴ Treaty Between Holy See and Italy, 130 Br. St. Papers Ser. 791 (11 Feb. 1929).

⁷⁶⁵ See e.g., *Prosecutor v. Simic*, et al, Case No. IT-95, ex parte confidential, Decision on the Prosecutor Motion under Rule 73 for ruling Concerning the Testimony of a Witness, (International Criminal Tribunal for the Yugoslavia) (27 July 1999).

⁷⁶⁶ *U.S. et al. v. Goering*, Judgement (International Military Tribunal for the Trial of Germany Major War Crimes) (Sept. 30 – 1 Oct. 1946).

circumscribed by their nature, competencies, and ultimately, the functions they perform. Within the same breadth, the status of individuals in the international legal system has radically been altered. Generally, individuals are now considered as having the status of beneficiaries of rights and bearers of obligations, though, just like ANSAs, they are not subjects of international law of the same kind as States.⁷⁶⁷ This would also mean that subjects in international law are not entirely identical in nature or extent of rights, and as such the legal personality of ANSAs cannot be considered as being of the same character as that of States. Lauterpacht for example notes that international practice has recognised that entities other than States may in some circumstances be endowed by international law with rights and made subject to its duties.⁷⁶⁸ This may apply for instance when one considers persons engaged in hostilities against their government, who have been recognised as belligerents by other States, and thus become subject to the rules of IHL.⁷⁶⁹ Ruggie on his part submits that corporations, as types of non-state entities, have acquired significant rights under some bilateral investment treaties as well as host governments' agreements and also set international standards in some sectors.⁷⁷⁰ Based on this, he argues that they have become participants in the international system, a pointer to their capacity to bear some rights and obligations under international law.⁷⁷¹ For Worster "there is considerable authority supporting the notion that non-state actors are international legal persons".⁷⁷² Speaking concerning international organisations, Pellet identifies two key factors as responsible for the difficulty in completely transmitting the legal personality of States to Armed Non-State Actors i.e., the principle of speciality, which limits the competencies of international organisations and limitations regarding the resources to discharge their obligations.⁷⁷³

However, despite this progress, even for those who assert that ANSAs possess international legal personality, for the most part, there is a lack of clarity regarding the basis for making such a determination. For instance, Zegveld claim that ANSAs have limited international legal personality under Common Article 3 of the Geneva Conventions and Additional

⁷⁶⁷ Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law*, (Cambridge University Press, 2011), 1 – 413 at 3.

⁷⁶⁸ Lauterpacht (n 698) 137.

⁷⁶⁹ *ibid.*

⁷⁷⁰ John G. Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 (4) *American Journal of International Law*, 819 – 840 at 824.

⁷⁷¹ *ibid.*

⁷⁷² Worster (n 182) 208.

⁷⁷³ Pellet (n 699).

Protocol II,⁷⁷⁴ Sassoli argues that the international legal personality of ANSAs is a functional one.⁷⁷⁵ In his work, *Human Rights Obligations of Non-State Actors*, Clapham observes that the application of human rights law to private actors has implications for the way human rights are conceived and also affects how we imagine and promote human freedom, human security, and human development.⁷⁷⁶ In particular, he argues for the possibility of moving beyond the formalistic legal problem of subjectivity and instead focusing on legal capacity.⁷⁷⁷ For him, a case can be made for limited international legal personality for business corporations, to the degree required to enjoy some rights and also to be held accountable for violations of international obligations.⁷⁷⁸ This reasoning by Clapham directly challenges the notion that international legal personality can only flow from possessing state-like characteristics or pretensions.⁷⁷⁹ He notes that “that international rights and duties depend on the capacity to enjoy those rights and bear those obligations; such rights and obligations do not depend on the mysteries of subjectivity”.⁷⁸⁰ He further states that “trying to squeeze international actors into the state-like entities box is, at best, trying to force a round peg into a square hole”.⁷⁸¹ More importantly, he asserts that:

*The burden would now seem to be on those who claim that states are the sole bearers of human rights obligations under international law to explain away the obvious emergence onto the international scene of a variety actors with sufficient international personality to be the bearer of rights and duties under international law. If the Sunday Times has Sufficient personality and the capacity to enjoy rights under the European Convention on Human Rights, it might surely have enough personality and capacity to be subject to duties under international human rights law.*⁷⁸²

Callamard has argued against the dilution of IHRL by extending it to non-state entities such as corporations, pointing out that they are already the objects of international law through the focus on the role of the State to prevent violations by third parties.⁷⁸³ Lastly, Alvarez warns of the danger in relying on the enticing proposition that non-state entities such as corporations, are international legal subjects, highlighting for example, the implication of such assertion for

⁷⁷⁴ Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, (Cambridge University Press, 2002), 1 – 260 at 57.

⁷⁷⁵ Marco Sassoli, ‘Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law’ (2010) 1 *International Humanitarian Legal Studies*, 5 – 51 at 13.

⁷⁷⁶ Clapham, ‘Human Rights Obligations of Non-State Actors’ (n 218) 1.

⁷⁷⁷ *ibid*, 77.

⁷⁷⁸ *ibid*, 78, 79.

⁷⁷⁹ *ibid*, 80.

⁷⁸⁰ *ibid*, 68 – 69.

⁷⁸¹ *ibid*, 80.

⁷⁸² *ibid*, 82.

⁷⁸³ Agnes Callamard, ‘The Human Rights Obligation of Non-State Actors’ in Rikke F. Jorgensen, (ed.) *Human Rights in the Age of Platforms*, (The MIT Press, 2019), 1 - 342 at 199.

the rules of investment arbitration.⁷⁸⁴ Two immediate conclusions can be drawn from the above discussion i.e., that non-state entities may have a measure of international legal personality, making them subjects in international law and this personality may vary in terms of nature and character, which will ultimately inform their capacity to bear certain rights and obligations. As already established in Chapter One, CDFs operating as hybrid irregular forces shared some unique characteristics. These characteristics which define their nature and character, make them distinct from the broader category of non-state entities and even ANSAs that the scholars discussed above have focused on. Hybrid irregular forces are unique in the sense that they are mostly volunteer corps, they operate in defensive combat functions, they operate within the framework of local counterinsurgency warfare and are for the most part coopted by States into such operations. Generally, they do not have the nature and character of regular ANSAs such as insurgents or even non-state entities such as corporations.

With this uniqueness in their character, one may say that perhaps they are far removed from the concept of limited international legal personality as analysed above. Rather, they appear to be closer to the idea of derived international legal personality i.e., the legal personality of a non-state entity flowing from that of a State. In this wise, the CJTF may be said to derive a legal personality, only from that of the Nigerian on whose behalf it acts. It therefore means that the current attempt to extend international legal personality to ANSAs may not be sufficient to indeed determine responsibility for the conduct of the group in its operation as a hybrid irregular force. Even if, an argument can be made that such groups enjoy a measure of international legal personality, the question remains as to whether IHL and IHRL, as specialised regimes of international law could be directly applicable to them. This is because obligation to comply with international law norms under these two regimes, still rest squarely with the state. To give more clarity to this point, it is important to examine how these two regimes apply to groups like the CJTF, concerning international obligations.

4.2. Human Rights Violations by the CJTF as a Hybrid Irregular Force.

Under domestic and international law, the Nigerian government has a responsibility to respect, protect, and promote the human rights of its citizens and ensure that its agents as well as third parties do not violate these rights. This obligation includes taking steps to prevent human rights violations, investigating violations when they occur, prosecuting those found responsible, providing appropriate remedies for victims, as well as preventing the

⁷⁸⁴ Jose E. Alvarez, 'Are Corporations Subjects of International Law?' (2011) 9 *Santa Clara Journal of International Law*, 1 – 36 at 9, 23 and 24.

reoccurrence of such violations. In a time of emergency such as in a counterinsurgency, measures taken by the government under derogation are lawful, in so far as they comply with the provision of IHRL. Relevant in this regard is Article 4 of the ICCPR which though permits derogation to some rights, does not allow derogation from rights such as the right to life, right to freedom from torture, inhuman, and degrading treatment or punishment, right to freedom from slavery, right to freedom from imprisonment, right to personal liberty and security of person, right not to be prosecuted for retroactive criminal offences, right to recognition as a person before the law, and right to freedom of thought, conscience, and religion, respectively.⁷⁸⁵ In General Comment No. 29, while noting that Article 4 of the ICCPR is of paramount importance to the protection of human rights, the Committee on Civil and Political Rights (CCPR) notes that two conditions are important in triggering the provisions of the article i.e., first, the situation on the ground must amount to a state of emergency which threatens the life of the nation, and second, the government must have officially proclaimed a state of emergency.⁷⁸⁶ These two conditions have been fulfilled regarding the Boko Haram insurgency. Nigeria declared Boko Haram a terrorist organisation on 4 June 2013 and afterward declared a state of emergency in Adamawa, Borno, and Yobe States on 20 May 2013. The implication is that the provisions of Article 4 of the ICCPR become applicable.

However, as would be seen in the discussion in this section many of the rights against whom Article 4 prohibits non-derogation, are majorly the class of rights that the CJTF has been alleged to have violated in its conduct as a hybrid irregular force. Despite being instrumental in the government's fight against Boko Haram, the group has been described as “increasingly unruly, frustrated, and mobilising forces that challenge various forms of authority”.⁷⁸⁷ While the involvement of the group in counterinsurgency with the Military has helped bridge the language gap between the troops and the local population, enhanced intelligence gathering, and detected suicide bombers and the curtailment of movement of Boko Haram members, the group has been criticised for a broad range of human rights abuses.⁷⁸⁸ Significant human rights abuses such as unlawful and arbitrary killings including extrajudicial killings, forced

⁷⁸⁵ Article 4 (1) (2) (3) ICCPR 1966.

⁷⁸⁶ CCPR, ‘General Comment No. 29 – State of Emergency (Article 4)’ Committee on Civil and Political Rights (CCPR) (31 August 2001) CCPR/C/21/Rev.1/Add.112, para. 2

⁷⁸⁷ Vanda Felbab-Brown, ‘In Nigeria, We Don’t Want Them Back’ *Brookings* (May 2015), <https://www.brookings.edu/articles/in-nigeria-we-dont-want-them-back/>

⁷⁸⁸ Kelvin Ashindorbe, Fortune Afatakpa, and Saheed B. Owonikoko, ‘Civilian Joint Task Force and Nigeria’s Counterterrorism Operation: A Critique of the Community-Based Approach to Security’ (2021) 14 (3) *African Security*, 286 – 305 at 300.

disappearance, torture, arbitrary detention, and crimes involving violence or threats of violence targeting members of the local population, have been levelled against the group in the course of its hybrid operation. For instance, there have been allegations that members of the group go from house to house, asking people to give up their children suspected to be Boko Haram members and in situations where families refuse to comply, they are killed, and their houses set ablaze.⁷⁸⁹ There are also reports of families refusing to take back their daughters abducted by Boko Haram, for the fear of such families being labelled by the CJTF as sympathetic to the insurgents.⁷⁹⁰ More so, there are reports of assault and murder of civilians, even when such persons even are not suspected of being members of Boko Haram.⁷⁹¹

Furthermore, in the IDP camps where members of the CJTF perform local security functions, human rights violations have been alleged. There are reports of members of the group charging people a fee in exchange for a pass to leave these camps, much of which is because such passes are required either to access or exit these camps.⁷⁹² There are equally reports alleging that members of the group steal rations meant for the IDPs, claiming it to be payment for the security they provide.⁷⁹³ Likewise, the group has been accused of using its administration of justice system to settle personal scores with people, as well as using violent and punitive means to dispense justice.⁷⁹⁴ For instance, there are reports of the group tying up members of the civilian population, who have been accused of one wrongdoing or the other, just in the same way it does to Boko Haram members.⁷⁹⁵ Similarly, the group has been accused of asking members of the local population to bring their goods into the community, as a form of payment of taxes, which is then used by the group to generate revenue, especially when the government fails to pay stipend to its members.⁷⁹⁶ The group has also been accused of diverting humanitarian aid from intended recipients.⁷⁹⁷

At a fundamental level, there have been allegations of widespread sexual violence by members of the CJTF. According to reports, such violations range from acts of rape to the use

⁷⁸⁹ Nagarajan (n 615) 17.

⁷⁹⁰ *ibid.*

⁷⁹¹ *ibid.*

⁷⁹² *ibid.*

⁷⁹³ Kemal Ozden and Mercy Kwabe, 'Analysing the Impact of Non-State Actors in Providing Security in Borno, State Nigeria: A Case of the Civilian Joint Task Force' (2019) 6 (12) *Journal of Economics and Social Research*, 17 – 28 at 24.

⁷⁹⁴ Nagarajan (n 615) 19.

⁷⁹⁵ *ibid.*

⁷⁹⁶ *ibid.*

⁷⁹⁷ *ibid.*

of physical force such as beating, to conditioning freedom of movement as well as access to food on sexual intercourse.⁷⁹⁸ Regarding these acts of sexual exploitation, a major target for members of the group are unaccompanied young girls under the age of twenty as well as widows whose husbands have died in the insurgency, and who have become vulnerable given the many children they have to feed. Due to the larger-than-life image of the group as well as its connection with the Military, these women have no way of reporting these actions or stand up for their rights.⁷⁹⁹ Even when they attempt to do so, there is the fear that camp and security officials could send them out of the camp and accuse them of collaborating with the insurgents.⁸⁰⁰ Given that the CJTF's activities as a provider of local governance functions occur simultaneously with its combat function with the Military, the above violations of international law norms are effectively masked in the hybrid operation of the group.

There is ample evidence to support the occurrence of these violations as detailed in this research. Much of the evidence comes from well-documented reports prepared by UN agencies as well as other institutions actively operating in the northeast region where counterinsurgency operations are ongoing. An important report is the one prepared by the UN Office of the High Commissioner for Human Rights (OHCHR).⁸⁰¹ This report is relevant for two reasons i.e., it provides sufficient evidence of an existing link/working relationship between the CJTF, and the Nigerian State, and contains varied instances of human rights violations. On a link/working relationship, the report states that:

*The inability of security forces to protect civilians from Boko Haram attacks and the deterioration of the security situation have led to the emergence of local self-defence groups, known as vigilantes, in northeast Nigeria and Cameroon. In both cases, the vigilantes seem to operate with the tacit approval of the security forces, and it appears that, in both countries, the authorities benefited from the activities of the groups against Boko Haram.*⁸⁰²

With respect to human right violations by the CJTF, the report states as follows:

OHCHR learnt that the Civilian Joint Task Force has assisted Nigerian security forces in identifying and arresting Boko Haram suspects, controlling security checkpoints, providing information, and monitoring the movement of people, and has also used firearms against Boko Haram in self-defence and to safeguard communities. It has also received information

⁷⁹⁸ *ibid.*

⁷⁹⁹ *ibid.*, 20.

⁸⁰⁰ *ibid.*

⁸⁰¹ See, 'Violations and Abuses Committed by Boko Haram and the Impact on Human Rights in the Countries Affected' *Human Rights Council (HRC)*, A/HRC/30/67, (9 Dec. 2015), para 64.

⁸⁰² *ibid.*

*on allegations of beatings, detention of suspects, bribery, food deprivation, killings, and the recruitment of children by the Task Force, despite the advisory issued the government on 21 January 2015 on the prohibition of the use or abuse of children and young persons in counterinsurgency efforts in the northeastern states. Some falsely-identified Boko haram suspects were allegedly killed by the Task Force, including, in at least one case, a person with a disability.*⁸⁰³

Another important report where the above human rights violations have been affirmed, is the 2017 UN Secretary-General Report on the Situation in the Lake Chad Basin. This report provides as follows:

*Community-based local vigilante groups in Cameroon and Nigeria were reportedly responsible for human rights abuses, including killings and the recruitment and use of children in combat operations and in support functions. Concerns were raised about the rule of law and the possibility that affected communities were taking justice into their own hands.*⁸⁰⁴

In the 2017 UN Report of the Secretary-General on Children and Armed Conflict in Nigeria, the leadership of the CJTF confirmed that as of 2016, inclusive of its 26, 000 members were reportedly many boys aged 10 to 18 years old.⁸⁰⁵ Also, the 2020 UN Report on Children and Armed Conflicts in Nigeria, noted that between 2013 and 2017 the group reportedly recruited and used about 2, 203 children in its role as a combat force in the government's counterinsurgency in the northeast region.⁸⁰⁶ This report highlighted the case of a 14-year-old boy, who though at a point was associated with Boko Haram, later got arrested by the CJTF, after which he was used by the group together with the Nigerian Military to arrest 62 suspected Boko Haram members in an IDP Camp in Bama local government, Borno State.⁸⁰⁷ The report further stated that in September 2017, two girls aged 14 and 16 years were used by the group to conduct body searches for women at another IDP Camp.⁸⁰⁸ Indeed, in its 2016 Trafficking in Persons Report, the US government indicted the group regarding its use of child soldiers.⁸⁰⁹

As stated earlier, the group has been flagged by international agencies as a perpetrator of Sexual and Gender-Based Violence (SGBV). Some allegations levelled against the group

⁸⁰³ *ibid*, 66.

⁸⁰⁴ See, 'Report of the Secretary-General on the Situation in the Lake Chad Basin Region' *United Nations Security Council (UNSC)*, S/2017/764, (7 September 2017), para. 22.

⁸⁰⁵ UNSC, 'Report of the Secretary-General on Children and Armed Conflict in Nigeria' (S/2017/304) (10 April 2017), para. 29.

⁸⁰⁶ See, 'Children and Armed Conflict in Nigeria: Report of the Secretary-General' *United Nations Security Council (UNSC)*, S/2020/652, (6 July 2020), para. 22.

⁸⁰⁷ *ibid*, para. 28.

⁸⁰⁸ *ibid*.

⁸⁰⁹ See, 'Trafficking in Persons Report' *US Department of State*, (June 2016), 1 – 418 at 290.

include harassing vulnerable women, forcing themselves on young girls, and taking advantage of their status to exploit females in society.⁸¹⁰ There are also allegations that in the course of the counterinsurgency, women and girls have been subjected to coercive and exploitative sexual relations by the group. For instance, it is alleged that in some IDP camps, as soon as troops of the Nigerian Military hand over control of the facility to the CJTF at night, members of the group enter the shelter of women and girls whose husbands or fathers have been killed or detained during the insurgency, and offer them access to food distribution in exchange for sex.⁸¹¹ An important report in this regard is that of the UN Country Task Force for Nigeria in its Report on Children and Armed Conflicts.⁸¹² In that report, this agency verified three cases of grave violations and sexual violence against children committed by members of the CJTF, which occurred between January 2020 and December 2021.⁸¹³ A member of the CJTF was also reported to have allegedly raped a 14-year-old girl in Damboa local government area in June 2020.⁸¹⁴ Equally important, is the 2020 Report of the United Nations Security Council (UNSC), in which it identified the group as a perpetrator of conflict-related sexual violence, such as rape and forced marriage.⁸¹⁵

Further evidence of the group's violation of children in its combat role in the counterinsurgency is seen in the fact that in 2017 it committed itself to an action plan to end and prevent the recruitment and use of children in armed conflicts.⁸¹⁶ In its 2020 Report, the UNSC noted that during this period, a total of 217 girls were separated from the CJTF and consequently supported to be reintegrated into their communities.⁸¹⁷ The UN again reaffirmed this point in its 2020 Report on Children and Armed Conflicts, stating that:

CJTF continued to fight alongside the Nigerian Security Forces to protect communities against Boko Haram. CJTF is based in Maiduguri, Borno State. Of the 27 local government areas in Borno, CJTF is present in all but 3 in southern Borno, where the presence of Boko Haram is limited.

⁸¹⁰ Yusuf (n 547) 74.

⁸¹¹ Elizabeth Pearson and Chita Nagarajan, 'Gendered Security Harms: State Policy and the Counterinsurgency Against Boko Haram' (2020) 10 (2) *African Conflict and Peacebuilding Review*, 108 – 140 at 123.

⁸¹² See, 'Children and Armed Conflict in Nigeria: Report of the Secretary-General' *United Nations Security Council (UNSC)*, S/2022/596, (4 August 2022), para. 13, 14, 19, 21, 35

⁸¹³ *ibid*; See also, 'Children and Armed Conflict: Report of the Secretary-General' *United Nations Security Council (UNSC)*, A/74/845 – S/2020/525, (9 June 2020), para. 207.

⁸¹⁴ 'Children and Armed Conflict in Nigeria: Report of the Secretary-General' (n 812) para. 38.

⁸¹⁵ See, 'Conflict-Related Sexual Violence: Report of Secretary-General' *United Nations Security Council (UNSC)*, S/2020/487, (3 June 2020), para. 70

⁸¹⁶ See, 'Civilian Joint Task Force in Northeast Nigeria Signs Action Plan to end Recruitment of Children' UNICEF (15 September 2017), <https://www.unicef.org/press-releases/civilian-joint-task-force-northeast-nigeria-signs-action-plan-end-recruitment>; See, 'Nearly 900 Children Released By Northeast Nigeria Armed Group' United Nations (10 May 2019), <https://news.un.org/en/story/2019/05/1038252>

⁸¹⁷ 'Conflict-Related Sexual Violence' (n 815) para. 71.

*Following the signing of an action plan with the United Nations in September 2017 to end and prevent the recruitment and use of children, CJTF stopped recruiting and using children and has since separated from its ranks 2,203 boys and girls recruited and used between 2013 and 2017. This significant progress was a result of a progressive effort and a detailed roadmap for the implementation of the action plan, with support from the United Nations and humanitarian partners through the Ministry of Justice Borno state.*⁸¹⁸

The above reports provide clear evidence of the link/working between the CJTF and the Nigerian State as well as the fact that in the course of this ‘working relationship’ the group has indeed been violating international law norms. Furthermore, in its 2023 ‘Conclusions on Children and Armed Conflict in Nigeria’, while commending the CJTF for its constructive role in the implementation of the action plan, the UN urged the group to complete its remaining obligation under the action plan to end and prevent the recruitment and use of children in armed conflicts, such as training of its units on the rights of children and setting up an accountability mechanism.⁸¹⁹ The UNSC through Resolution 2349 has also urged the Nigerian government to develop and implement appropriate plans for the disarmament, demobilisation, reintegration, and where appropriate, prosecution of the CJTF and other community-based groups in the northeast region.⁸²⁰

In addition to the above, alleged human rights violations by the group have been documented by Non-Governmental Organisations (NGOs). An important report is that of the International Crisis Group (ICG) which states as follows:

*Particularly during their early years and in the heat of the fight to expel Boko Haram from Maiduguri, vigilantes engaged in summary executions, often in collusion with the military. The CJTF reportedly burned alive several Boko Haram suspects in 2013. In one of the most notorious cases, task force members and soldiers rounded up hundreds of prisoners who had escaped from a military detention centre in Maiduguri before killing them. Vigilantes in a town in Southern Borno reportedly paraded with the heads of 40 alleged Boko Haram militants on pikes.*⁸²¹

⁸¹⁸ See, ‘Children and Armed Conflict in Nigeria: Report of the Secretary-General’ *United Nations Security Council (UNSC)*, S/2020/652, (6 July 2020), para. 17; ‘Children and Armed Conflict’ (n 813) para.6; See also, ‘Children and Armed Conflict: Report of the Special Representative of the Secretary-General for Children and Armed Conflict’ *United Nations General Assembly (UNGA)*, A/HRC/46/39 (23 December 2020), para. 13; See, ‘Children and Armed Conflict: Report of the Secretary-General’ *United Nations General Assembly/Security Council*, A/75/873 – S/2021/437, (6 May 2021), para. 258.

⁸¹⁹ See, ‘Conclusions on Children and Armed Conflict in Nigeria’ *United Nations Security Council (UNSC)* S/AC.51/2023/2, (29 September 2023), para. 4 (w).

⁸²⁰ See, ‘Resolution 2349 (2017)’ *United Nations Security Council (UNSC)*, S/RES/2349 (2017) (31 March 2017), para. 29.

⁸²¹ ICG, ‘Double-Edged Sword’ (n 2) 19.

The local population as well as human rights organisations have also accused the CJTF of harassment and assault, including the torture and killing of Boko Haram members.⁸²² Amnesty International for example notes that the group has been involved in carrying out arbitrary arrests, torture, and extrajudicial killing of suspects both independently and in cahoots with the Military.⁸²³ It states that “Civilian JTF members play a key role in ‘screening’ operations and mass arbitrary arrests, and have been involved, as Amnesty International has documented, in beatings and killings of detainees after arrest”.⁸²⁴ It further notes that “in Bama for example, after the military took over in March 2015, several Civilian JTF members and residents told Amnesty International that the military shot and killed everyone who was not cleared by the Civilian JTF as a resident”.⁸²⁵ The group is alleged to have collaborated with the Military in several incidences of extrajudicial killings, with the 23 July 2013 incident in Bama, Maiduguri being a notable example.⁸²⁶ Amnesty International released a video showing horrific images of detainees having their throats slit one by one and dumped in mass graves, allegedly by people who appear like men of the Nigerian Military and members of the CJTF.⁸²⁷

It is instructive to note that the CJTF allegedly committed the above human rights violations while in an active working relationship, as a combat force with the Nigerian Military, during which it was also performing governance functions such as the provision of local security. Whereas some violations directly occurred within the context of its combat functions, others took place in the course of its provision of governance functions. For instance, many of the group’s acts of sexual violence occurred while it was providing local governance functions such as local security and administration of justice. The implication is that the group indeed committed these violations as a hybrid irregular force. Overall, despite earlier reports of the

⁸²² See, ‘Civilian Vigilante Groups Increase Dangers in Northeast Nigeria’ *The New Humanitarian* (12 December 2013) [https://www.thenewhumanitarian.org/news/2013/12/12/civilian-vigilante-groups-increase-dangers-northeastern-nigeria#:~:text=Civilian%20vigilante%20groups%20increase%20dangers%20in%20northeastern%20Nigeria,-Aminu%20Abubakar%20FIRIN&text=Members%20of%20the%20civilian%20joint%20task%20force%20in%20Maiduguri.&text=Members%20of%20civilian%20vigilante%20groups,against%20Boko%20Haram%20\(BH\).](https://www.thenewhumanitarian.org/news/2013/12/12/civilian-vigilante-groups-increase-dangers-northeastern-nigeria#:~:text=Civilian%20vigilante%20groups%20increase%20dangers%20in%20northeastern%20Nigeria,-Aminu%20Abubakar%20FIRIN&text=Members%20of%20the%20civilian%20joint%20task%20force%20in%20Maiduguri.&text=Members%20of%20civilian%20vigilante%20groups,against%20Boko%20Haram%20(BH).)

⁸²³ Alexis Okeowo, ‘Inside the Vigilante Fight Against Boko Haram’ *The New York Times Magazine*, (5 November 2014) <https://www.nytimes.com/2014/11/09/magazine/inside-the-vigilante-fight-against-boko-haram.html>

⁸²⁴ ‘Stars on their Shoulders, Blood on their Hands’ (n 550) 25.

⁸²⁵ *ibid.*, 40 – 41.

⁸²⁶ *ibid.*, 47 – 48.

⁸²⁷ See, ‘Nigeria: Gruesome throat slitting Footages Implicate Military in Mass Atrocities’ *Amnesty International UK* (5 August 2014), <https://www.amnesty.org.uk/press-releases/nigeria-gruesome-throat-slitting-footage-implicates-military-mass-atrocities>; See, ‘Nigeria: Gruesome Footage Implicates Military in War Crimes’ *Amnesty International* (5 August 2014), <https://www.amnesty.org/en/latest/news/2014/08/nigeria-gruesome-footage-implicates-military-war-crimes/>

group's heroic accomplishments against Boko Haram, these incidents portray the CJTF as a possible violator of human rights,⁸²⁸ as well as a violator of norms that may also entail breaches of extant IHL rules. The seriousness of these violations forms the basis for arguing for better clarity on how the group's conduct can be attributed to the Nigerian State on whose behalf it operates.

4.3. Responsibility of Non-State Entities under Applicable Rules of International Law

The primary regimes of international law applicable to Nigeria's counterinsurgency against Boko Haram are the rules of IHL and IHRL. This is based on its classification of the counterinsurgency as a NIAC. Examining these two regimes is critical for two important reasons. First, the violation of these primary regimes gives rise to the application of the secondary rules of attribution under the law of state responsibility and so determining their violation is necessary to know whether relevant provisions of the Articles on State Responsibility will even apply at all. Second, there are developing arguments on the possibility that these primary regimes may be directly applicable to nonstate entities including irregular forces. It is important to understand the scope of such arguments and whether they could apply to CDFs operating as hybrid irregular forces.

In recent years, the traditional state-centric model of international law has undergone significant transformation, with the emergence of the regimes of IHL, IHRL, and International Criminal Law (ICL).⁸²⁹ This transformation flows from the fact that the traditional conception of international law has proved insufficient in dealing with real-world problems. Issues of human rights violations associated with CDFs and the inability and/or unwillingness of States to regulate their conduct reflect an aspect of this reality. In particular, the reality of human rights violations in the context of the provision of local governance functions by CDFs, as is the case with the CJTF, engages the issue of whether the traditional model of international law could indeed address the challenges of the international system, and whether it did. As established in the earlier part of this chapter, the concept of international legal personality has shifted from the earlier subject-object dichotomy which viewed States as the main subject of international law and non-state entities as mere subjects, to the understanding that international legal personality may be a matter of degree, in which

⁸²⁸ Maria Bordas 'Current Issues of International Law in Regulating Counterinsurgency and Counterterrorism' (2014) 3 (4) *Journal of Governance and Regulation*, 7 – 20 at 12.

⁸²⁹ Latorre (n 749) 58.

non-state entities may enjoy limited personality. To address the main question in this research, it is important to consider how this understanding of international legal personality has shaped the current perspective on IHL and IHRL.

It is however important to recall the important point that international law is a normative system than a rule-based framework.⁸³⁰ This point applies to international regimes such as IHL and IHRL, which generally contain norms that States, and other entities are expected to comply with. Generally, the regimes of IHL and IHRL do not bind non-state entities in most situations.⁸³¹ Contemporary IHL treaties such as the Geneva Conventions,⁸³² as well as those of IHRL such as the UDHR,⁸³³ the ICCPR,⁸³⁴ the International Covenant on Economic, Social, and Cultural Rights (ICESCR),⁸³⁵ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁸³⁶ Convention on Rights of the Child (CRC),⁸³⁷ Convention Against Torture (CAT),⁸³⁸ Convention on the Elimination of All Forms of Racial Discrimination (CERD),⁸³⁹ Convention on Rights of Persons with Disabilities (CRPD),⁸⁴⁰ Convention for the Protection of All Persons from Enforced Disappearance (CPPED),⁸⁴¹

⁸³⁰ Higgins (n 705) 1, 2.

⁸³¹ Laura T. Dickinson, 'Government for Hire: Privatising Foreign Affairs and the Problem of Accountability under International Law' (2005) 47 *William & Mary Law Review*, 135 - 237 at 161.

⁸³² The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (Hereinafter Geneva I) (*entered into force* 21 Oct. 1950); The Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (Hereinafter Geneva II) (*entered into force* 21 Oct. 1950); The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Hereinafter Geneva III) (*entered into force* 21 Oct. 1950); and The Geneva Convention Relative to the Protection of Civilian Person in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (Hereinafter Geneva IV) (*entered into force* 21 Oct. 1950).

⁸³³ Universal Declaration on Human Rights, G.A. Res. 217A, at 71, U.N. GOAR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [*Hereinafter* 'UDHR'].

⁸³⁴ International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316, 999 UNTS. 85 (*entered into force* Mar. 23, 1976) [*Hereinafter* 'ICCPR'].

⁸³⁵ International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 999 UNTS. 3 (*entered into force* Jan. 3, 1976) [*Hereinafter* 'ICESCR'].

⁸³⁶ Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR, Supp. No. 46, at 193, U.N. Doc. A/34/46 (*entered into force* Sept. 3, 1981) (*Hereinafter* 'CEDAW').

⁸³⁷ Convention on Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 UNTS. 3 (*entered into force* Sept. 2, 1990) [*Hereinafter* 'CRC'].

⁸³⁸ Convention Against Torture, (*entered into force* June 26, 1987) G.A. Res.39/46, 39 U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, *reprinted in* 23 I.L.M. 1027 (1984) [*Hereinafter* 'CAT'].

⁸³⁹ Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 UNTS. 195 (*entered into force* Jan. 4, 1969) [*Hereinafter* 'CERD'].

⁸⁴⁰ Convention on Rights of Persons with Disabilities, *adopted* Dec. 13, 2006, G.A. Res. 61/106, U.N. Doc. A/61/49 [*Hereinafter* 'CRPD'].

⁸⁴¹ Convention for the Protection of All Persons from Enforced Disappearance, *adopted* Dec. 20, 2006, G.A. Res. 61/177, U.N. Doc. A/R.ES/61/177 [*Hereinafter* 'CPPED'].

Convention for the Protection of All Migrant Workers and Members of their Families (CPMWMF),⁸⁴² were all designed and adopted, with a heavy focus on territorial states. States for example were called upon to use the UDHR as a guide in promoting democracy in their respective domestic jurisdictions.⁸⁴³ The implication is that States were deemed principal parties to these treaties and accordingly, primary bearers of rights and obligations under international law.⁸⁴⁴ This position also applies in armed conflict situations, where both IHL and IHRL are recognised as mutually complementary and reinforcing sources of obligation to all parties. This was affirmed by the Human Rights Committee (HRC) in its General Comment No. 29 of 2001 and No. 31 of 2004.⁸⁴⁵

However, the applicability of IHL and IHRL to ANSAs remains a contested issue. Whereas it is majorly settled that IHL imposes certain obligations on ANSAs, the applicability of IHRL remains quite problematic.⁸⁴⁶ IHRL directly imposes obligations on Sovereign States to respect, promote, and fulfill human rights. These terms provide a basis for determining whether human rights obligations have been violated. It means that using these terms, whether under IHRL or IHL, States can be responsible for violations of human rights based on action, omission, or inadequate response. Whereas States have the primary obligation to respect, protect, and fulfill their obligations under IHRL, it is also increasingly being recognised that non-state entities e.g., corporations, due to the power they wield, may have an obligation to respect human rights as enshrined in IHRL treaties. Given the broad nature of non-state entities, it would be important to understand how IHL and IHRL, apply to groups such as the CJTF.

4.3.1. *International Humanitarian Law (IHL).*

⁸⁴² Convention for the Protection of All Migrant Workers and Members of their Families, *opened for signature* Dec. 18, 1990, G.A. Res. 45/158, Annex, 45 U.N. GAOR, Supp. No. 49A, at 262, U.N. Doc. A/ 45/49, (*entered into force* July 1, 2003) [*Hereinafter* ‘CPMWMF’].

⁸⁴³ Teslim A. Elias, ‘New Perspectives and Conceptions in Contemporary Public International Law’ (1981) 10 (3) *Denver Journal of International Law and Policy*, 409 – 423 at 410.

⁸⁴⁴ Laura T. Dickinson, ‘Government for Hire: Privatising Foreign Affairs and the Problem of Accountability under International Law’ (2005) 47 *William & Mary Law Review*, 135 - 237 at 161.

⁸⁴⁵ The Human Rights Council in its Resolution 9/9 has noted that IHRL and IHL are complementary and reinforcing.

⁸⁴⁶ Annyssa Bellal and Stuart Casey-Maslen, ‘Enhancing Compliance with International Law by Armed Non-State Actors’ (2011) 3 *Goettingen Journal of International Law*, 175 – 197 at 176.

International Humanitarian Law (IHL) also known as the law of war, made up of the four Geneva Conventions,⁸⁴⁷ the Additional Protocols,⁸⁴⁸ relevant treaties,⁸⁴⁹ and Customary International Humanitarian Law,⁸⁵⁰ is the main body of laws defining the permissible methods of warfare as well as the protection afforded the civilian population. Under traditional international law, ANSAs such as insurgents were deemed to have international rights and obligations with respects to those States that had recognised them as having such status.⁸⁵¹ Such insurgents, recognised by the State also as a belligerent group is engrafted into the State actor with all the rights and obligations that derive from the law of armed conflict.⁸⁵² Despite this early legal framework, modern international law imposes obligations on certain parties to NIACs, whether or not such parties are granted recognition by the State they are fighting or by a third State.⁸⁵³ However, States are often reluctant to admit that the conditions for applicability of the relevant rules have been met, as such admission may connote that the State has lost control over its territory and may also elevate the status of ANSAs.⁸⁵⁴

Generally, the classification of armed conflict related to ANSAs is NIACs,⁸⁵⁵ which is regulated by Common Article 3 to all the four Geneva Conventions as well as the rules of Customary IHL.⁸⁵⁶ For IHL to apply to ANSAs, there must be an armed conflict ongoing. In the context of a NIAC, Common Article 3 to the four Geneva Convention defines what would amount to an armed conflict for the relevant rules to apply.⁸⁵⁷ Two requirements from the definition of a NIAC, are that the ANSAs is an Organised Armed Group (OAG) and that the

⁸⁴⁷ Geneva Convention, 1949.

⁸⁴⁸ Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125, U.N.T.S. 3 [*Hereinafter* 'Additional Protocol I']; Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts 8 June 1977, 1125, U.N.T.S. 609, [*Hereinafter* 'Additional Protocol II'].

⁸⁴⁹ See e.g., Hague Convention for the Protection of Cultural Property in the event of Armed Conflict of 14 May 1954, 249 U.N.T.S. 240; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be deemed to be Excessively Injurious or to Have Indiscriminate Effect as Amended on 21 December 2001 (CCW), 1342 U.N.T.S. 137.

⁸⁵⁰ Additional Protocol I & II.

⁸⁵¹ Andrew Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88 (863) *International Review of the Red Cross*, 491 – 523 at 492.

⁸⁵² *ibid.*

⁸⁵³ *ibid.*, 493.

⁸⁵⁴ *ibid.*

⁸⁵⁵ While what will constitute a NIAC is not defined under Common Article 3, however, a useful definition has over time developed, particularly within the jurisprudence of the International Criminal Tribunal for Yugoslavia (ICTY), later reaffirmed in the caselaw of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC). See *Prosecutor v. Akayesu* (Trial Judgement) ICTR-96-4-T (2 Sept. 1998) para. 619 – 620; *Prosecutor v. Fatir Limaj Haradin Bala Isak Musliu* (Trial Judgement) ICTY IT-03-66-T (30 Nov. 2005) para. 84; *Prosecutor v. Thomas Lubanga Dyilo* (Trial Judgement) ICC-01/04-01/06-2842 (14 Mar. 2012).

⁸⁵⁶ Geneva Conventions (1949) 75 U.N.T.S. 31, 85, 135, 287.

⁸⁵⁷ Common Article 3, Geneva Conventions, 1125 U.N.T.S. 609.

violence has attained the required threshold.⁸⁵⁸ This distinguishes NIACs from other types of violent situations such as internal disturbances riots, protests, unorganised insurrections, etc that may involve non-state actors.⁸⁵⁹ According to Clapham, the move to classify certain situations as “*an armed conflict not of an international character*” which triggers the application of Common Article 3 is an act of political significance for all parties to an armed conflict.⁸⁶⁰ While it confers a sort of international recognition on ANSAs, it also strengthens the special role of the International Committee of the Red Cross (ICRC).⁸⁶¹ On its part, Additional Protocol II offers broader protection than the minimum standards under Common Article 3, though the standards under Common Article 3 still apply notwithstanding the operation of Protocol II.⁸⁶² This it does by adding the ‘territorial control’ requirement on the side of ANSAs.⁸⁶³ More specifically, Article 1(1) of Additional Protocol II states that:

*This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying the existing conditions of applications, shall apply to all armed conflicts which are not covered by Article 1 of Additional Protocol of 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 organized armed groups, which under responsible command, exercise such control over a part of its territory as to enable them carry out sustained and concerted military operations and to implement this Protocol.*⁸⁶⁴

The International Criminal Tribunal for Yugoslavia (ICTY) has expanded on the understanding regarding NIACs,⁸⁶⁵ noting in *Prosecutor v. Tadic*,⁸⁶⁶ that “whenever there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a state”.⁸⁶⁷ It has also declared that the main provisions of Additional Protocol II form part of customary international law.⁸⁶⁸ While Common Article 3 does not define the degree of organisation that the ANSAs must possess for these rules to

⁸⁵⁸ *Prosecutor v. Tadic*, ICTY (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 Oct. 1995) para. 70; *Prosecutor v. Tadic* ICTY (Trial Judgement) IT-94-1-T, (7 May 1997) para. 562; *Prosecutor v. Boskoski and Tarculovski* ICTY (Trial Judgement) IT-04-84-T (10 July 2008) para. 175.

⁸⁵⁹ Article 1 (2) Additional Protocol II.

⁸⁶⁰ Clapham, ‘Human Rights Obligations of Non-State Actors in Conflict Situations’ (n 851) 496.

⁸⁶¹ *ibid.*

⁸⁶² *ibid.*, 497.

⁸⁶³ See, ‘How the Term ‘Armed Conflict’ Defined in International Humanitarian Law’, *International Committee of the Red Cross ICRC Opinion Paper*, March 2008, 1 – 5 at 4, <https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf>.

⁸⁶⁴ Article 1 (1) Additional Protocol II.

⁸⁶⁵ ICRC, ‘How the Term ‘Armed Conflict’ Defined in International Humanitarian Law’ (n 863).

⁸⁶⁶ *Prosecutor v. Dusko Tadic*, Decision on the Defence of Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70.

⁸⁶⁷ ICRC, ‘How the Term ‘Armed Conflict’ Defined in International Humanitarian Law’ (n 863).

⁸⁶⁸ *Prosecutor v. Dusko Tadic*, Judgement (Appeals Chamber), 15 July 1999, Case No. IT-94-1, para. 98.

apply, the ICTY in its caselaw has laid down the required standards.⁸⁶⁹ In particular, it notes the following:

*As for armed groups, Trial Chambers have relied on several indicative factors, none of which are, in themselves, essential to establish whether the 'organisation' criterion is fulfilled. Such indicative factors include the existence of a command structure and disciplinary rules and mechanism within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troops movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as ceasefire or peace accords.*⁸⁷⁰

Generally, the accepted position is that under international law, ANSAs are bound by norms of IHL, in particular Common Article 3 and Additional Protocol II,⁸⁷¹ and groups that have reached that required level of organisation are bound by customary international law provision of a number of treaties, so long as the State on whose territory the armed conflict is taking place, is a party to the treaty.⁸⁷² In addition, Common Article 3 is regarded as having become a part of international law having customary status.⁸⁷³ Groups such as insurgents and belligerents operating in an armed conflict are deemed to bear direct rights and obligations.⁸⁷⁴ In *Prosecutor v. Sam Hinga Norman*,⁸⁷⁵ the Appeals Chambers of the Sierra Leone Special Court stated that:

It is well settled that all parties to an armed conflict, whether states or non-state actors are bound by international humanitarian law, even though only states may become parties to international treaties. Customary International Law represents the common standard of behaviour within the

⁸⁶⁹ *Prosecutor v. Haradinaj*, Case no. IT-04-84-84-T, Judgement (Trial Chamber) 3 April 2008, para. 60; *Prosecutor v. Boskoski*, Case No. IT-04-82, Judgement (Trial Chamber) 10 July 2008, para. 199-203.

⁸⁷⁰ *ibid.*

⁸⁷¹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, (Cambridge University Press, 2005), 1- 628 at 497, 498; Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 (2) *International and Comparative Law Quarterly*, 369 – 394 at 372; Ezequiel Heffes and Brian E. Frenkel, 'The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules' (2017) 8 *Göttingen Journal of International Law*, 39 – 72 at 41; Jann K. Kleffner, 'The Applicability of International Humanitarian Law to Organised Armed Groups' (2011) 93 (882) *International Review of the Red Cross*, 443 – 461 at 443, 444.

⁸⁷² Bellal and Casey-Maslen (n 846) 184.

⁸⁷³ Sivakumaran (n 871).

⁸⁷⁴ Article 3, Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 75 U.N.T.S. 287; Article 1 (3) Inter-American Convention on Duties and Rights of States in the Event of Civil Strife, 1 May 1957, 134 L.N.T.S. 45. See also *Ireland v. United Kingdom*, (1978) 25 Eur. Ct. H. R., (Ser. A) at 149.

⁸⁷⁵ Case No. SCSL-2004-14-AR72E, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Decision of 31 May 2004, para. 22; Rule 139, in J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, ICRC & Cambridge University Press, 2005 and 2009.

*international community, thus even armed groups hostile to a particular government have to abide by these laws.*⁸⁷⁶

Also, UN-mandated commissions of inquiry have investigated violations of Common Article 3 and Additional Protocol II by ANSAs,⁸⁷⁷ while the Security Council has equally condemned violations of IHL norms by ANSAs, calling on them to respect the rules.⁸⁷⁸ The opinion of UN Experts has also affirmed the same position. An example is the Report of the Group of Eminent International and Regional Experts in Yemen which stated that the conflict between the Armed Forces of the Government of Yemen and the Houthi rebels qualifies as a NIAC between a State Party and an ANSA, to which both Common Article 3 and Additional Protocol II are applicable.⁸⁷⁹ Common Article 3 provides that the provision shall apply “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Party, each party to the conflict shall be bound to apply, as a minimum, the following provisions”.⁸⁸⁰ Additional Protocol II which develops and supplements Common Article 3 applies to conflicts taking place “in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups...”.⁸⁸¹ Regarding ANSAs, it additionally provides that they must be “under a responsible command, exercise such control over a part of its territory as to enable them carry out sustained and concerted military operations and to implement this Protocol”.⁸⁸² The use of the words ‘high contracting party’ referring to a ‘State’ and ‘party’ in the clear text of Common Article 3 shows its bindingness on such groups as parties to a NIAC.

The above understanding is consistent with the dominant view that an armed conflict requires at least two collective entities rather than individuals.⁸⁸³ This position has been affirmed by international bodies and legal scholars who have noted that the word ‘each party’ in Common Article 3, points to ANSAs as distinct entities from the Armed Forces of the State, showing that such groups immediately take up certain international obligations the moment they are deemed to have become parties to an armed conflict.⁸⁸⁴ Several ANSAs are also known to

⁸⁷⁶ Case No. SCSL-2004-14-AR72E, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Decision of 31 May 2004, para. 22.

⁸⁷⁷ Report of the International Commission of Inquiry on Darfur (25 Jan. 2005) para. 172.

⁸⁷⁸ See e.g., UNGA, Res. 54/96B (21 Dec. 1999); UN Doc. A/Res/54/96A-D Preamble; UNSC, Res. 2340 (8 Feb. 2017); UNSC, Res. 2461 (27 Mar. 2019); UNSC, Res. 2502 (19 Dec. 2019).

⁸⁷⁹ HRC, ‘Report of the Detailed Findings of the Group of Eminent International and Regional Experts on Yemen’ (3 Sept. 2019) UN Doc. A/HRC/42/CRP. 1, para. 45 – 47.

⁸⁸⁰ Common Article 3, Geneva Conventions 1949.

⁸⁸¹ Article 1 (1) Additional Protocol II.

⁸⁸² Article 1 (1) Additional Protocol II.

⁸⁸³ Herman (n 702) 33.

⁸⁸⁴ Zegveld (n 774) 9; Bellal, Giacca, and Casey-Maslen (n 172) 55.

have the capacity to issue binding unilateral statements, in which they promise to comply with IHL rules,⁸⁸⁵ while some others are known to have entered into agreements with States and international organisations, under which they accepted certain IHL obligations.⁸⁸⁶

Though there is general agreement among States and international law scholars that ANSAs are bound by IHL, the theoretical justification for making such a determination remains unclear.⁸⁸⁷ To address this issue, the existing legal arguments base the applicability of IHL rules to such groups on justifications such as customary law, the doctrine of legislative jurisdiction of the host State, control of territory, and consent of third-party States.⁸⁸⁸ For instance, the International Commission of Inquiry in Darfur noted as follows:

*The SLM/A and JEM, like all insurgents that have reached a certain threshold of organisation, stability and effective control of territory, possess international legal personality, and are therefore bound by the rules of customary international law on internal armed conflicts referred to above. The same is probably true also for the NMRD.*⁸⁸⁹

The question may however be asked about how ANSAs can be bound by treaties to which they are not high contracting parties. In the context of this research, the same question may be asked how the CJTF which was not a party to IHL treaties made by the Nigerian State can be bound by the same rules. Some insight can be drawn from the ICRC Commentary of 1949, which states that:

*The Commitment made by a State not only applies to the government but also to any established authorities and private individuals within the national territory of that State and certain obligations are therefore imposed upon them. The extent of rights and duties of private individuals is therefore the same as that of the rights and duties of the State. Although the argument has occasionally been questioned in legal literature, the validity of the obligation imposed upon insurgents has never been contested.*⁸⁹⁰

What seems clear is that all armed actors in an armed conflict both state and non-state actors are required to comply with the rules of IHL, so long as they are all involved in an armed conflict ongoing on the territory of a high contracting party. In specific terms, such an

⁸⁸⁵ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 91; *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement 627, (2 Sept. 1998).

⁸⁸⁶ Anthea Roberts and Sandesh Sivakumaran, 'Law-making by Non-State Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37 *Yale Journal of International Law*, 107 – 152 at 128.

⁸⁸⁷ Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (n 851) 499.

⁸⁸⁸ Sivakumaran (n 871) 371, 375, 381.

⁸⁸⁹ Report of the International Commission of Inquiry on Darfur (25 Jan. 2005) para. 172.

⁸⁹⁰ See, *Commentary on the Additional Protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Yves C. Sandoz, Christophe Swinarski, and Bruno Zimmerman (eds.) (Geneva: ICRC/Martinus Nijhoff Publishers, 1987), para. 4444.

obligation has been highlighted concerning CDFs operating in a counterinsurgency. In *Prosecutor v. Sam Hinga Norman*,⁸⁹¹ Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa, all leaders of the CDF i.e., Kamajors of Sierra Leone, were charged and indicted by the Special Court for Sierra Leone, for crimes against humanity, violations of Common Article 3 to the four Geneva Conventions, Additional Protocol II, as well as other serious violations of IHL according to Articles 2, 3, and 4 of the Statute of the Special Court.⁸⁹² There are a number of facts from this case, that validate the position that all armed actors in an armed conflict are required to comply with IHL rules. For example, the indictment referred to organised armed factions in the Sierra Leonean armed conflict as including the CDF i.e., the Kamajor which then was fighting against the Revolutionary United Front (RUF) rebels as well as the Armed Forces Revolutionary Council (AFRC).⁸⁹³ In particular, the indictment recognised the status of the Kamajor as an organised armed force comprising several tribally-based traditional hunters.⁸⁹⁴ It also noted that the accused persons and all members of the CDF were required to comply with the rules of IHL as well as the law and custom governing conduct of armed conflicts, inclusive of the Geneva Conventions of 12 August 1949 and the Additional Protocols which Sierra Leone acceded to on 21 October 1986.⁸⁹⁵

What is therefore clear from the above analysis, is that as a CDF operating in Nigeria's counterinsurgency warfare against Boko Haram, the CJTF must comply with the rules of IHL. This is more so as the insurgency in question has been recognised as a type of NIAC in which the rules of IHL such as Common Article 3, Additional Protocol II, and Customary IHL are all applicable. As already established in Chapter 3, there are allegations of violation of international law norms including IHL rules against the group, raising the question of how its responsibility is to be determined. One option is to adopt the Sierra Leonean approach in which, just like the case of the Kamajors, an ad hoc international criminal tribunal could be set up to hold members of the CJTF responsible for their actions relating to violations of IHL rules. Such tribunal would be set up mainly to hold to account all actors from the two main sides i.e., the Nigerian State and the Boko Haram insurgents, and can also be extended to other actors such as the CJTF. However, this approach is problematic, as it would only work based on the cooperation of the Nigerian State, as the success of such a tribunal would

⁸⁹¹ *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72 (E); See also *Prosecutor v. Sam Hinga Norman – Order of Delegation Pursuant to Rule 22*, (SCSL 14 of 2004) [2004] SCSL 105 (20 May 2004).

⁸⁹² *Ibid.*

⁸⁹³ *Prosecutor v. Samuel Hinga Norman*, The Special Court for Sierra Leone, Case No. SCSL-03-14-01, para. 4 and 6, <http://www.rscsl.org/Documents/Decisions/CDF/131/SCSL-04-14-PT-003.pdf>

⁸⁹⁴ *ibid.*

⁸⁹⁵ *ibid.*, para. 8.

ultimately hinge on how much its proceedings can be conducted unhindered within the state's territory as well as the extent to which it can receive testimonies from victims on the ground. However, an important point that must be made is that whereas both the Kamajors and the CJTF are CDFs demonstrating the characteristics of hybrid irregular forces, when it comes to their interaction with IHL rules in these two different armed conflicts, both differ in a little respect. On the one hand, the role of the Kamajor in the Sierra Leone civil war was more of a rebel force, which more involved in more extensive combat functions and military operations alongside Sierra Leonean forces, which made it that its activities impacted more extensively on IHL rules. On the other, the CJTF in Nigeria's counterinsurgency warfare against Boko Haram has only been deployed in limited combat roles, majorly in areas such as accompanying troops on missions so as to identify suspect Boko Haram insurgents, intelligence gathering and holding recovered territories. Aside these limited combat roles, much of the group's activities has revolved round the provision of local governance functions. Rather than the Kamajor, a group that correctly typifies the character of the CJTF is the Koglweogos in Burkina Faso, which was discussed in Chapter Three. And so, the extent to which the Kamajors given their high combat roles were required to comply with IHL rules, is not the same for the CJTF. It therefore means that the option of an ad hoc international criminal tribunal may not be the correct approach to hold a group like the CJTF responsible for its actions, but rather through the State on whose behalf it has been acting.

This brings into view the second option i.e., for the Nigerian State to deploy the instrumentality of its internal laws to hold members of the group to account. This is equally problematic a major reason being the absence of an internal law governing the activities of the group. Even with the absence of such a law, the State may still be able to prosecute members of the group under other relevant criminal laws, however, has noted earlier in this research, the government so far has demonstrated its inability and/or unwillingness to act in this regard. Faced with such difficulties, a third option is to hold the State responsible for the conduct of the group. Clearly, allegation of IHL violations levelled against the group represent a breach of the primary rules. There would however be a need to determine if under the secondary rules, activities of such a group are attributable to the Nigerian State, or to any other State for that matter.

4.3.2. International Human Rights Law (IHRL).

As much as the issue of whether IHRL should apply to ANSAs has gained increased attention, in the same manner it has remained somewhat difficult to address the pertinent

questions. Under the IHRL framework, individuals are generally viewed as rights holders, while States are considered as duty-bearers, having the obligation to protect these rights.⁸⁹⁶ Within this framework, ANSAs lack direct obligations and so cannot be held responsible for violations.⁸⁹⁷ Compared to the level of progress achieved under IHL, the IHRL framework has proved rather difficult to unravel. According to Alston, while IHL had continually reached out to all parties in armed conflicts, groups who base themselves on the framework of IHRL were reluctant to respond.⁸⁹⁸ With respect to armed conflict situations, the mainstream view is that the IHRL is applicable at all times.⁸⁹⁹ Also, a number of regional human rights instruments show that human rights are an intrinsic part of the rules applicable in armed conflicts and situations of emergency.⁹⁰⁰ Nonetheless, the application of IHRL to ANSAs, in particular groups such as the CJTF in a counterinsurgency like the type Nigeria is waging against Boko Haram, remains complicated. A fundamental reason underpinning this is that IHRL is designed for the regulation of States that shoulder the obligation to protect the rights of their citizens and not private actors.⁹⁰¹ As Zegveld notes:

*Various bodies, including the Inter-American Commission, the special rapporteurs and working groups of the UN Commission on Human Rights, and the UN Secretary-General have answered the question whether human rights treaties can be applied to armed opposition groups negatively. The principal reason is that human rights regulate the relationship between the government and the governed and aim to check the exercise of state power.*⁹⁰²

IHRL provides for obligations that States are bound to respect.⁹⁰³ As parties to IHRL treaties, States assume obligations and duties under international law, to respect, to protect, and to

⁸⁹⁶ Chris Jochnick, 'Confronting the Impunity of Non-State Actors: New Fields for the Protection of Human Rights' (1999) 21 (1) *Human Rights Quarterly*, 56 – 78 at 59.

⁸⁹⁷ Tom Obokota, 'Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors Under International Human Rights Law' (2005) 17 (2) *International Journal of Refugee Law*, 394 – 415 at 403.

⁸⁹⁸ Phillip Alston, 'The Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Phillip Alston (ed.) *Non-State Actors and Human Rights* (Oxford University Press, 2005), 1 – 369 at 18.

⁸⁹⁹ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ [1996] ICJ Rep. 226, para. 25; Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory ICJ [2004] ICJ rep. 136, para. 106; Case Concerning Armed Activities on the Territory of the Congo (Congo v. Uganda) ICJ (Judgement) [2005] ICJ Rep. 168, para. 216.

⁹⁰⁰ Examples of such instruments include the European Convention on Human Rights (ECHR) and the American Convention on Human Rights (ACHR). See generally, Hans-Joachim Heintze, 'On the Relationship Between Human Rights Law Protection and International Humanitarian Law' (2004) 86 (856) *International Review of the Red Cross*, 789 – 814 at 791.

⁹⁰¹ William A. Schabas, 'Punishment of Non-State Actors in Non-International Armed Conflict' (2002) 26 (4) *Fordham Journal of International Law*, 907 - 933 at 908.

⁹⁰² Zegveld (n 774) 40.

⁹⁰³ See, 'International Human Rights Law' *United Nations Human Rights – Office of the High Commissioner*, <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law>

fulfill human rights.⁹⁰⁴ As primary subjects exercising public authority, States bear first-line obligation for the implementation of IHRL,⁹⁰⁵ as reflected in international as well as regional human treaties concluded by them. IHRL regulates the vertical relationship between States and the people within their jurisdiction; meaning that States hold the principal responsibility to address human rights violations carried out by ANSAs within their territory.⁹⁰⁶ In contrast to the text of relevant IHL rules such as Common Article 3 and Additional Protocol II, IHRL treaties do not include ANSAs as direct duty-bearers. For example, a look at two instruments at the core of IHRL i.e., the ICCPR and the ICESCR, will reveal that their provisions refer to “each State party to the present covenant...”,⁹⁰⁷ which the Human Rights Committee (HRC) interpreted, saying that “the Article 2, paragraph 1 obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law”.⁹⁰⁸

Though the desire to apply IHRL to ANSAs is recognisable, fears abound that this may undermine the entire IHRL regime, especially the status of States. However, in recent times the IHRL landscape has begun to change, with the view that IHRL become applicable to ANSAs gaining more ground, in particular with the activities of key agencies of the UN. An example is the Special Representative of the UN Secretary-General for Children and Armed Conflicts, who was able to extract commitments from groups such as Sudan’s Peoples’ Liberation Movement, the Revolutionary United Front in Sierra Leone, the Liberation Tigers of Tamil Eelam of Sri Lanka, and the Revolutionary Armed Forces of Colombia.⁹⁰⁹ There has equally been increased commentary amongst scholars who accept that non-state actors are bound by IHRL.⁹¹⁰ Clapham for example argues that “in such situations where the State is collapsing or has already collapsed, it is almost perverse to insist that human rights norms and procedures only be invoked through the prism of the State and the government authorities”.⁹¹¹ He then notes that “the most promising theoretical basis for human rights obligations for non-state actors is first, to remind ourselves the foundational basis of human rights is best explained as rights which belong to the individual in recognition of each person’s dignity. The

⁹⁰⁴ *ibid.*

⁹⁰⁵ Nigel S. Rodley, ‘Can Armed Opposition Groups Violate Human Rights?’ in Kathleen E. Mahoney & Paul Mahoney (eds.) *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff Publishers, 1993) 298 – 299.

⁹⁰⁶ Clapham, ‘Human Rights Obligation of Non-State Actors’ (n 218) 25.

⁹⁰⁷ Article 2 (1) ICCPR 1966; Article 2 (1) ICESCR 1966.

⁹⁰⁸ HRC, ‘General Comment No. 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant)’ (26 May 2004), UN Doc. CCPR/C/21/Rev1/Add. 13, para. 8.

⁹⁰⁹ Alston (n 898) 18.

⁹¹⁰ Amrei Muller, ‘Can Armed Non-State Actors Exercise Jurisdiction and Thus Become Human Rights Duty Bearers?’ (2020) 20 *Human Rights Law Review*, 269 – 305 at 273.

⁹¹¹ Clapham, ‘Human Rights Obligation of Non-State Actors’ (n 218) 13.

implication is that these natural rights should be respected by everyone and every entity”.⁹¹² Clapham’s views appear to reflect the opinion of the HRC which states that “the rights enshrined in the Covenant belong to the people living in the territory of the State party”,⁹¹³ a view that informed the practice of UN commissions, such as the UN Commission of Inquiry in Libya and Syria.⁹¹⁴

For Mastorodimos, the justification for applying IHRL to ANSAs rests on the subject matter of IHL, which operates in a two-way direction.⁹¹⁵ According to him, on the one hand, IHRL largely resembles IHL in the sense that most provisions of IHL are largely the protection of existing human rights norms in armed conflict.⁹¹⁶ What he appears to suggest is that IHRL ought to apply to ANSAs given the applicability of IHL. He notes on the other hand, that they are indeed rights under IHRL not covered by IHL for example the right to property.⁹¹⁷ The argument is that such areas lacking protection, which are likely to be impacted in an armed conflict ought to be protected. Other legal justifications that have been invoked for the application of IHRL to ANSAs include the wording in preambles of human rights treaties referring to responsibilities of all individuals, by devolution i.e., that the human rights responsibility of States devolve to ANSAs the moment they replace formal state authorities as well as through the application of the evolutionary principle to the interpretation of treaties in which ANSAs are accepted as parties to these treaties.⁹¹⁸

There is also the more recent viewpoint that supports the notion that human rights norms should apply to ANSAs in certain circumstances, such as when they perform governmental functions and exercise *de facto* control of territory.⁹¹⁹ For instance, Fortin and Murray contend that though ANSAs are not parties to human rights treaties, they can however bear human rights responsibility when they exercise *de facto* authority over part of a territory,⁹²⁰ with Fortin noting more specifically that this has an added value for the ‘everyday life’ of the

⁹¹² Andrew Clapham, ‘Weapons and Armed Non-State Actors’ in Stuart Casey-Maslen (ed.) *Weapons Under International Human Rights Law*, (Cambridge University Press, 2014), 1 – 633 at 176.

⁹¹³ UN Human Rights Committee (HRC), CCPR General Comment No. 26: Continuity of Obligations, CCPR/C/21/Rev.1/Add.8/Rev.1, General Comment 26 (Contained in document A/53/40, annex VII).

⁹¹⁴ Rodenhauer (n 184) 4.

⁹¹⁵ Konstantinos Mastorodimos, *Armed Non-State Actors in International Humanitarian and Human Rights Law (Foundation and Framework of Obligations and Rules on Accountability)*, (Ashgate Publishing, 2016), 1 – 241 at 144.

⁹¹⁶ *ibid.*

⁹¹⁷ *ibid.*

⁹¹⁸ Muller, (n 910).

⁹¹⁹ Bellal and Casey-Maslen (n 846) 187.

⁹²⁰ Fortin, (n 186) 167, 169.

civilian population.⁹²¹ Even in armed conflict situations, the everyday life of the people continues, with the need to protect certain rights that may not have a direct connection with the violence. As Murray observes, “life goes on for individuals affected by armed groups activity, and despite the uncertain circumstances in which they live, it is essential that efforts be undertaken to ensure that their fundamental human rights are respected and protected”.⁹²² Due to the peculiar situation of armed conflicts, it is often difficult for States to protect the human rights of civilians living in rebel-controlled territories, the implication being that such people are deprived of protection under IHRL.⁹²³ This position appears to be justified by the fact that, after all, IHRL is expected to govern the relationship between those who govern and those who are being governed, meaning that any authority in charge of a territory at any point in time, ought to bear responsibility for human rights protection. This position has been challenged by Sivakumaran who argues that making IHRL binding on the basis of *de facto* control exercised by ANSAs over territory and population is problematic because *de facto* control of territory does not equal a right to represent the State.⁹²⁴

The ‘control of territory’ approach also underpins the practice of the UN which from time to time has called upon ANSAs to respect IHRL and that when violations occur, they have a responsibility, like States, to provide reparation. For instance, the United Nations Security Council (UNSC) as well as other UN agencies, have in their reports demanded that ANSAs abide by human rights responsibilities, respect human rights, and also bring an end to human rights violations.⁹²⁵ In its 2007 resolution on the armed conflict in Afghanistan, the UNSC for example “called upon all parties to uphold international humanitarian and human rights law and to ensure the protection of civilian life”.⁹²⁶ Also, in its 2010 report on Afghanistan, the UN Secretary-General noted that “closely linked to impunity and abuse of power are attacks on freedom of expression, carried out by both State and Non-State Actors”.⁹²⁷ Protection of the rights of children in armed conflicts is another aspect of human rights responsibility directly applicable to ANSAs. Instructive in this respect are UNSC resolutions 1612 and 1882

⁹²¹ *ibid.*

⁹²² Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing, 2016), 1 – 307 at 6.

⁹²³ UNHCR, ‘Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life’ (5 June 2018) UN Doc. A/HRC/38/44, para. 25.

⁹²⁴ Sivakumaran (n 871) 380.

⁹²⁵ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 Jan, 2005, para. 600 and 603; Report of the UN Secretary-General Panel of Experts on Accountability in Sri Lanka, 31 Mar. 2011, para. 419.

⁹²⁶ S/Res/1746 (2007) para. 25.

⁹²⁷ Report of the Secretary-General, *The Situation in Afghanistan and its Implication for International Peace and Security*, 10 Mar. 2010, UN/Doc. A/64/705-S/2010/127, para. 28.

of 2005 and 2009 respectively.⁹²⁸ Generally, some rules of IHRL have reached the status of custom. For instance, it is broadly accepted that some provisions of human rights have attained the status of *jus cogens* and that they bind every subject of international law.⁹²⁹ Several such rights include the right to life; the right to humane treatment; the prohibition of slavery or forced labour; the prohibition of discrimination based on race, colour, sex, language, religion, or social origin; prohibition of imprisonment for civil debt; prohibition of crimes against humanity; right to legal personhood; and the freedom of conscience.⁹³⁰ The meaning is that whether or not ANSAs exercise *de facto* control of territory, they could be legally bound by core IHRL norms defined as *jus cogens*.⁹³¹

An examination of the practice within the mainstream UN community and in extension, its human rights system, will show progressive recognition of the application of IHRL to ANSAs. Member-states have engaged with such groups politically for example towards securing ceasefires, while UN agencies as well as international Non-Governmental Organisations (NGOs) have also interacted with ANSAs toward protecting the civilian population in territories where such groups operate.⁹³² In the last twenty years, there have been well over one twenty-five UNSC resolutions,⁹³³ with another sixty-five by the UN General Assembly (UNGA) as well as several statements by the President of the UNSC concerning the human rights responsibility of ANSAs.⁹³⁴ Reports of Special Rapporteurs show that states' central role under IHRL extends to other actors and that the sources of international legal personality and human rights responsibility for ANSAs can be traced to customary as well as treaty law.⁹³⁵ Referring to human rights abuses by the Islamic State of Iraq and the Levant (ISIL), the UN Human Rights Council (HRC), for example, stated that it condemned:

⁹²⁸ UNSC, Res. 1612, operative paragraphs, 2-3; UNSC, Res. 1882, 4 Aug. 2009, operative paragraph 3.

⁹²⁹ Ellen Campbell, et al, 'Due Diligence Obligations of International Organisations under International Law' (2018) 50 *New York University Journal of International Law and Politics*, 541 – 604 at 549.

⁹³⁰ *ibid.*

⁹³¹ Bellal and Casey-Maslen (n 846) 187.

⁹³² See, 'Report of the Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' Human Rights Council, A/HRC/38/44, (7 Dec. 2020), para. 9.

⁹³³ See e.g., UNSC, 'Resolution 1325 (2000)' United Nations Security Council, S/Res/1325/2000 (31 Oct. 2000); UNSC, 'Resolution 2213 (2015)' United Nations Security Council, S/Res/2213/2015 (27 Mar. 2015); UNSC, 'Resolution 2510 (2020)' United Nations Security Council, S/Res/2510/2020 (12 Feb. 2020); UNSC, 'Resolution 2542 (2020)' United Nations Security Council, S/Res/2542/2020 (15 Sept. 2020); UNSC, 'Resolution 2656 (2022)' United Nations Security Council, S/Res/1325/2656 (28 Oct. 2022); Resolution 2325 also called on States to uphold their international obligation to prevent Non-State Actors from acquiring weapons of mass destruction. UNSC, 'Resolution 2325 (2016)' S/Res/2325 (2016) (15 Dec. 2016).

⁹³⁴ 'Report of the Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions on Armed Non-State Actors' (n 95) para. 10.

⁹³⁵ *ibid.*

*In the strongest possible terms the systemic violations and abuses of human rights and violations of international humanitarian law resulting from the terrorist acts committed by the so-called Islamic State of Iraq and the Levant and associated groups, that took place since 10 June 2014 in several provinces of Iraq, which may have amounted to war crimes and crimes against humanity, and strongly condemn in particular all violence against persons based on their religious or ethnic affiliation, as well as violence against women and children.*⁹³⁶

As noted earlier while a number of these groups are known to have the capacity to issue binding unilateral statements in which they promised to comply with IHL,⁹³⁷ there also exist agreements between States and ANSAs, as well as between such groups and the UN, suggestive of their capacity to enter into agreements.⁹³⁸ The UN and regional organisations such as the African Union (AU), have equally played significant roles in negotiating and drafting such agreements, with their representatives also involved in the verification and monitoring process. In additions, the UNSC has set up several missions to assist in verifying and implementing peace agreements during peace processes and has requested States to support such agreements and refrain from jeopardising their implementation. It is worth stating that, because such agreements do not fall within the traditional framework of treaties, scholars and the courts have noted that they cannot be considered international legal agreements, sufficient to trigger responsibility under international law.⁹³⁹ However, this position has been countered by the case law of the International Criminal Tribunal for Yugoslavia (ICTY), and the report of the Darfur Commission of Inquiry.⁹⁴⁰ In some instances, the opinion of the UNSC is relied upon as possible areas to infer responsibility, even though

⁹³⁶ See Human Rights Council, 'The Human Rights Situation in Iraq in the Light of Abuses Committed by the So-Called Islamic State in Iraq and the Levant and Associated Groups' Res. S-22/1, 1 U.N. Doc. A/HRC/RES/S-22/1 (3 Sept. 2014), para. 1.

⁹³⁷ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 91; *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement 627, (2 Sept. 1998).

⁹³⁸ A number of such agreements include the Agreement on the Civilian Protection Component of the International Monitoring Team Between the Government of the Republic of the Philippines and the International Monitoring Team, 27 Oct. 2009.

⁹³⁹ *Prosecutor v. Kallon and Kamara*, Case No. SCSL. 04-15-AR72(E), Decision on Challenge of Jurisdiction: Lomé Accord Amnesty, para. 45 – 50, where the Special Court of Sierra Leone held that the Lomé Agreement between the Government of Sierra Leone and the Revolutionary United Front (RUF) rebel group, wasn't a treaty, due to the fact that it was signed by a State and a NSAG. See also, the decision of the Supreme Court of the Philippines, in *The Province of Cotabato v. The Government of the Republic of the Philippines*, et al, Judgement, 14 Oct. 2008, PHSC 1111 [2008].

⁹⁴⁰ See *Prosecutor v. Galic*, Case No. IT-98-29-A, Judgement, 30 Nov. 2006, para. 119; *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgement, 3 Mar. 2000, para. 172; The Court here held as binding on the parties, a 1992 agreement between representatives of the President of the Republic of Bosnia-Herzegovina, the President of the Serbian Democratic Party, the President of Democratic Action, and the President of the Croatian Democratic Community.

such resolutions oftentimes may simply state that the ANSAs in question have violated IHRL, without referring to its human rights responsibility as a legal fact.⁹⁴¹

A recent approach is to treat the non-state actors like a state-like entity, designating it as a *de facto* authority, thereby requiring it to comply with IHRL norms like a State. Ben Emmerson, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, accordingly, notes that “it is worth recalling that non-state actors that exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control”.⁹⁴²

As stated earlier in Chapter One, two notable instances in which ANSAs have been accorded direct human rights responsibility are under Section 4 of the Optional Protocol to the Convention on Rights of the Child on the Involvement of Children in Armed Conflicts (*Hereinafter* the ‘Optional Protocol’),⁹⁴³ and Article 7 (5) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons (*Hereinafter* ‘the Kampala Convention’).⁹⁴⁴ Aside from these two provisions, the issue of whether IHRL be extended to ANSAs remains a continuing debate. It is worth reinstating that, this debate notwithstanding, the dominant perspective leans towards treating IHRL as applicable to ANSAs. At the core of this reasoning is the fundamental argument that, whether derived from natural law or international legal sources, human rights are considered the entitlement of all human beings.⁹⁴⁵ They are regarded as inalienable and thus any actor, State or non-state, group, or person, seeking to violate these rights, ought to be held responsible.⁹⁴⁶ In light of this, it is only correct to say that while States remain the main plank on which the IHRL regime is built, other planks provide support, in particular planks such as ANSAs, who are increasingly considered as additional duty-bearers.⁹⁴⁷ Noting this point, former UN Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions, Philip Alston notes that:

It is increasingly understood, however, that the human rights expectations of the international community operate to protect people, while not thereby affecting the legitimacy of actors to whom they are addressed. The Security

⁹⁴¹ See e.g., S.C. Res. 1882, 14 (4 Aug. 2009); S.C. Res. 2088, 31 (24 Jan. 2013).

⁹⁴² See H.R.C. Rep. Pursuant to Res. S-21/1.

⁹⁴³ Optional Protocol, 2000, 2173 U.N.T.S. 222.

⁹⁴⁴ Kampala Convention, 2009.

⁹⁴⁵ ‘Report of the Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions on Armed Non-State Actors’ (n 95) para. 38.

⁹⁴⁶ *ibid.*

⁹⁴⁷ *ibid.*, para. 39.

*Council has long called upon various groups that Member States do not recognise as having the capacity to formally assume international obligation to respect human rights. The LTTE and other armed groups must accept that in so far as they aspire to represent a people before the world, the international community would evaluate their conduct according to the Universal Declaration's common standard of achievement.*⁹⁴⁸

Notwithstanding the significant convergence of opinions on the applicability of IHRL to ANSAs, there are a number of challenges. For instance, a major contention is on the issue of whether such groups possess the capacity needed to indeed protect, respect, and fulfill IHRL. While there are few impediments regarding such groups respecting negative rights, it remains problematic whether they have the necessary infrastructure to fulfill the requirements of certain rights, such as example, the right to a fair hearing. There is also the view that States may be unwilling to recognise the fact that IHRL applies to ANSAs, as that would be tantamount to attributing state-like prerogatives to these groups, thereby legitimising their activities. Instead, states would rather prefer to treat such groups as criminal organisations and regulate their conduct either through their internal law or the instrumentality of international criminal law.⁹⁴⁹

The above analysis reveals the complicatedness of applying IHRL to ANSAs, which is the broader category that accommodates the CJTF. As stated repeatedly in this work, the unique character of the CJTF even makes such an application much more difficult. This is because the regular ANSAs that are covered in the analysis above, are considered as being potential duty-bearers given the related argument that such groups may possess limited international legal personality. However, for a group such as the CJTF, which in this chapter has been described as having a derived legal personality, it appears difficult to consider the group a potential human rights duty bearer. Even at that, despite its activities as a provider of local governance functions, from the discussion in Chapter Three, the group does not exercise control over any Nigerian territory. Rather, it has exploited the opportunity of limited State presence in certain areas, to replace the State and perform local governance functions. With this clarification, it means that the 'control of territory' argument canvassed above, as a basis for according to ANSAs the status of human rights duty bearer, does not apply to the group.

However, what this Chapter has been able to establish, is that the group has violated norms of primary regimes of international law i.e., IHL and IHRL. Such violations imply that they

⁹⁴⁸ See, Report of Special Rapporteur – Phillip Alston, Extrajudicial, Summary, and Arbitrary Executions, Civil and Political Rights, Including the Question of Disappearances and Summary Executions, E/CN.4/2006/53/Add.5, (27 March 2006), para. 27.

⁹⁴⁹ Zegveld (n 774) 162.

immediately trigger the application of the secondary rules of state responsibility. While the group may not be able to bear direct responsibility, the violation of norms under these primary regimes means that there must be a way of holding the Nigerian State responsible for these actions. For the opposite to happen, is to leave thousands of victims of such conduct without access to remedies, while at the same time empowering the State as well as the group to continue with their actions, and/or act in like manner in the future. The loose relationship between the Nigerian State and the group as well as a lack of an internal law creating the needed legal link between the two parties, underscore the need for a broadening of the current law of state responsibility framework, in particular an expansion of Article 7 of the Articles on State Responsibility to accommodate situations of “working relationship” between States and nonstate entities, which are novel developments. To establish the validity of such a recommendation, there is a further need to examine the law of state responsibility, to further highlight this responsibility gap.

4.4. Conclusion.

This Chapter has engaged the issue of whether CDFs such as the CJTF do have international legal personality, human rights violations by the CJTF, as well as the extent to which IHL and IHRL may be considered applicable to the group. Discussions under this section established the complicated nature of the debate on the concept of international legal personality and how matters in this area remain unsettled. To gain further understanding, particularly regarding the legal personality of the CJTF, the chapter examined the scope of responsibility of ANSAs under relevant rules of IHL and IHRL to determine, whether development in the rules provides more insights.

While from the above discussion, an argument can be made that ANSAs generally may have limited international legal personality, depending on the conditions and circumstances, it is difficult to see how the rule can be extended to groups such as the CJTF. It would appear that a more convenient position is to view their personality as grafted into that of the State, for and on whose behalf they operate. From the discussion in this chapter, holding them directly to account for IHL violations is also problematic, given the low threshold of their combat involvement and the fact that, in any case, the Nigerian State has so far demonstrated its inability and/or unwillingness to even hold the group to account.

The discussion on applicability of IHRL established the fact that there is a developing proposition that this regime of international law be extended to ANSAs, especially when they

exercise control over territory. The significance of this proposition is seen in the fact that it has increasingly been recognised by the UN, its organs, and agencies. The Chapter however noted that extending such a proposition to the CJTF presents familiar challenges, the most important being the fact that, as established in the earlier part of this Chapter, the group cannot be said to possess the kind of limited international legal personality associated with the broader category of ANSAs. This is aside from the fact that the group does not exercise control over any Nigerian territory, as to make the ‘control of territory’ rule applicable to it.

Similar to Chapter Three, the most significant finding from this Chapter is that there is clear evidence of a working relationship between the CJTF and the Nigerian State, sufficient to grant the group the status of a *de facto* organ of the State and be a basis for attribution. In addition to evidence of a combat relationship between the group and the Nigerian State established in Chapter Three, more evidence of a working relationship is seen in several UN reports, which hold credible information on the interaction between the group and the Nigerian Military in the counterinsurgency operations. These include the report by the OHCHR has alluded to such an informal link/relationship,⁹⁵⁰ the first report of the UN Secretary-General submitted to the UNSC on the armed conflict situation in the country, covering the period of January 2013 to December 2016;⁹⁵¹ the second report, spanning January 2017 to December 2019;⁹⁵² and the 2021 report of the UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Agnes Callamard.⁹⁵³

In addition, the work of human rights groups in the region also reflects the views captured in the above-referenced UN reports. For instance, Amnesty International notes that in practice, the group falls under military command i.e., the authority of the Nigerian Military.⁹⁵⁴ In particular, the organisation referred to a document sent in July 2013 to the Defence Headquarters, from a Commander of the Military Joint Task Force in Maiduguri, the capital of Borno state, in which it was stated that the CJTF operates under close supervision of troops and work together with them to effect the arrest of Boko Haram insurgents.⁹⁵⁵ The

⁹⁵⁰ See, *Report of the UN High Commissioner for Human Rights on violations and abuses committed by Boko Haram and the Impact on Human Rights in the Affected Countries*, (29 Sept. 2015) A/HRC/30/67, para. 64.

⁹⁵¹ See, *Report of the Secretary-General on Children and Armed Conflict in Nigeria*, (10 April 2017) S/2017/304, Para. 17, 18.

⁹⁵² See, *Children and Armed Conflict in Nigeria: Report of the Secretary-General*, (6 July 2020), S/2020/652, para. 17.

⁹⁵³ See, *Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Agnes Callamard*, (31 March 2021), A/HRC/47/33/Add. 2, para. 38.

⁹⁵⁴ ‘Stars on their Shoulders, Blood on their Hands’ (n 550) 25.

⁹⁵⁵ *ibid.*

Military also put in place further checks to align the operations of the group with that of its troops.⁹⁵⁶ In fact, by July 2014, members of the group had been organised into units, working in close coordination with relevant military units.⁹⁵⁷ This shows that the military and the CJTF have been active partners in this counterinsurgency, with this working relationship benefitting the Nigerian State. Connected to this point, is the fact that the CJTF's performance of governance functions has been occurring simultaneously within its working relationship with the Military. It is clear from the above reports that despite the absence of an internal law creating the necessary legal link between the CJTF and the Nigeria State, there is sufficient evidence of a working relationship between both parties.

The existence of such a working relationship between the CJTF and the Nigerian State, ought to be a sufficient basis for engaging the responsibility of the Nigerian state for the conduct of the group. However, under the current framework, this is not the case given the strict requirement of an internal law to engage state responsibility as well as evidence of complete dependence. This demonstrates that there is a problem with the current framework regarding state responsibility, as it does not sufficiently cover all scenarios in which a State may be involved with a non-state entity, for attribution of conduct. While many States are likely to be incentivised to work with non-state entities in informal relationships, there is a corresponding likelihood that not many of such States would be equally incentivised to enact laws governing the activities of these groups. Therefore, allowing a State to escape responsibility, simply because it deliberately refuses to enact an internal law, undermines the international framework on state responsibility, especially, as it is unclear where responsibility would lie, for violations of international law norms committed in the course of such informal relationships. With the problems regarding determining responsibility under the regimes of IHL and IHRL established in this Chapter, examining the possibility of attribution under the law of state responsibility becomes more important. In light of this, Chapter Five of this thesis will investigate whether the existing conditions for attribution under the Articles on State Responsibility and the different tests developed by international courts apply to the conduct of the CJTF and its relationship with the Nigerian State. It will explore current practices in international law and perspectives on how attribution can be achieved.

⁹⁵⁶ *ibid.*

⁹⁵⁷ *ibid.*

CHAPTER FIVE

INTERNATIONAL RESPONSIBILITY OF THE NIGERIAN STATE FOR THE CONDUCT OF THE CIVILIAN JOINT TASK FORCE

5.0. Introduction.

The law of state responsibility provides a framework for determining whether and how the conduct of non-state entities can be attributed to States. This is governed by the Articles on State Responsibility and the case laws of different international courts developed from an interpretation of these articles. This makes it an important regime in addressing the main question in this research. As established in Chapter One of this thesis, in the context of the relationship between the Nigerian State and the CJTF, the relevant provisions are Articles 4, 7, and 8 of the Articles on State Responsibility, and central to these articles is the concept of the ‘organ of the State’ which is often the basis on which attribution becomes possible.

Under Customary IHL, groups such as the CJTF are referred to as militias and/or volunteer units and are considered as forming a part of the Armed Forces of the State, implying that their conduct may be attributable to the State on this basis. However, in making such a determination, four conditions must be satisfied i.e., that the group in question is commanded by a person responsible for its subordinates; that the group wears a fixed distinctive emblem recognizable at a distance; that the group carries arms openly; and that the group conducts its operations in line with the law and custom of war. In addition, there must be an incorporating legislation i.e., an internal law of the state or evidence of continuous combat function in which the group operates alongside the state in an armed conflict, which establishes a link between the two parties. With specific reference to the relationship between the CJTF and the Nigerian State, it is important to determine whether a conclusion can be reached that the group is a member of the Nigerian Armed Forces, specifically as an organ of the State.

This Customary IHL framework provides a window in answering the main question of this research. The opportunity for such examination is provided by Article 4 of the Articles on State Responsibility which governs attribution based on being an organ of the State. If the

group can be considered a part of the Armed Forces, then attribution of its conduct to the State becomes possible. If not, there would be a need to examine other relevant provisions of the Articles on State Responsibility as well as relevant case laws of international courts regarding the current position when it comes to attributing the conduct of these kinds of groups to States. This will be the focus of this chapter. In sum, the Chapter examines the framework of the law of state responsibility as a secondary rule, in understanding whether the CJTF's violation of the primary rules of IHL can be attributed to the Nigerian State.

Accordingly, the structure of this chapter is as follows. Section 5.1. examines which factual and legal circumstances will be relevant in attributing the conduct of the CJTF to the Nigerian State under the law of state responsibility framework. Under this section, three forms of attribution standards i.e., attribution based on being an organ of the state (Section 5.1.1.), attribution based on exercise of governmental functions (Section 5.1.2.), and attribution based on direction/control (Section 5.1.3.), would be carried out. While examining attribution based on being an organ of the state, the chapter will further analyse the rules of Customary IHL that provide that militia/volunteer forces are considered a part of the Armed Forces of a State. The CJTF's involvement in combat operations with the Nigerian Armed Forces, which has enabled it to perform local governance functions raises the question of whether the existing standards under Customary IHL are sufficiently designed to define this group as a member of the Armed Forces. To better understand the notion of attribution based on direction/control in Section 5.1.3 an analysis of the several tests developed by the ICJ as well as international criminal tribunals will be undertaken. More precisely, three tests that have been developed over the years will be examined. These include the Effective Control test (Section 5.1.3.1), the Overall Control test (Section 5.1.3.2), and the Strict Control test (Section 5.1.3.3.).

5.1. Attributing Conducts of the CJTF to the Nigerian State under the Law of State Responsibility.

In contemporary times, the extent to which a State would be deemed responsible under international law, for conduct involving non-state actors is increasingly attracting attention. This is more so as such entities e.g., terrorist groups, multinational corporations as well as, and Non-Governmental Organisations (NGOs) now play dominant roles in the public space, as States continue to privatize traditional state functions, engaging private actors in public-private collaborations.⁹⁵⁸ Also, resolving such a quagmire has become necessary given that in

⁹⁵⁸ Bodansky and Crook, (n 1).

some situations a country's internal law may say nothing about such engagement, or may just be imperfect, in dealing with the situation. A relevant mechanism for determining where responsibility may lie in such circumstances is the framework of attribution under the law of state responsibility, which connotes the principle of attaching an act or omission by an actor, other than the State, to the State. Condorelli and Kress offer the most widely accepted definition of the term 'Attribution' stating that:

*Attribution or (imputation) is the term used to denote the legal operation having as its function, to establish whether given conduct of a physical person, whether consisting of a positive action or an omission, is to be characterised, from the point of view of international law, as an act of the State (or the act or any other entity possessing international legal personality).*⁹⁵⁹

It refers to a body of connections and conditions required to be satisfied to determine that it is a State that has indeed acted in a particular instance, while the actual author of the act is forgotten and perceived simply as a means or tool of the State.⁹⁶⁰ In legal doctrine, the liability of a subject of international law, including a State, arises when such an entity breaches its international obligation, irrespective of the origin of that obligation.⁹⁶¹ Such obligation may be established under customary international law, the provision of a valid international treaty, decisions of relevant international bodies such as a resolution of the UN Security Council, or general principles of law.⁹⁶² Generally, the law of state responsibility for internationally wrongful acts is divided into primary and secondary rules, with the primary rules concerning a State's compliance with its obligations under relevant regimes of international law and the secondary rules being those triggered when a State commits an internationally wrongful act.⁹⁶³

The law of state responsibility operates to govern the enforcement as well as compliance with a state's obligation under international law⁹⁶⁴ when certain conducts cause harm in breach of such obligation⁹⁶⁵ and the consequences thereof.⁹⁶⁶ It occurs when one state breaches its

⁹⁵⁹ Luigi Condorelli and Claus Kress, 'The Rules of Attribution: General Considerations' in James Crawford, Allain Pellet, & Simon Olleson, (eds.) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 1 – 1253 at 221.

⁹⁶⁰ *ibid.*

⁹⁶¹ Oleksandr Basov, Dmytro Melnyk, and Nataliia Verenia, 'Topical Issues of Doctrine and Court Practice on the International Responsibility of the State for the Activities of Foreign Non-State Armed Groups' (2024) 10 (3) *Baltic Journal of Economic Studies*, 78 – 88 at 80.

⁹⁶² *ibid.*

⁹⁶³ *ibid.*

⁹⁶⁴ Nissel, (n 49).

⁹⁶⁵ Christenson, (n 50).

⁹⁶⁶ Bodansky and Crook (n 1) 773.

international law obligation by infringing on the rights of another state.⁹⁶⁷ Today, the authoritative restatement of the law of responsibility is the ILC's Articles on Responsibility of States for Internationally Wrongful Acts 2001 (*Hereinafter* the 'Articles on State Responsibility') which the UN General Assembly recommended to all States in 2002.⁹⁶⁸ It is a document resulting from nearly 40 years of legal analysis and deliberations by the ILC under the leadership of different Special Rapporteurs.⁹⁶⁹ It is a comprehensive framework of legal obligations, covering general principles of States' international responsibility; the primary rules establishing attributable internationally wrongful acts, and the secondary rules that flow as a legal consequence from a state's breach of an international obligation.⁹⁷⁰ It is a restatement of the customary international law of the secondary principles of state responsibility.⁹⁷¹ The framework generally deals with the responsibility of states, meaning that the responsibility of other subjects of international law, such as individuals and international organisations, are outside its scope.⁹⁷² The main basis for the international responsibility of the State is that an act of that State constitutes an international violation, though it is expressed in the action or inaction of its bodies or officials violating its international obligation.⁹⁷³ Under the Articles on State Responsibility, conditions for possible attribution are spelled out in the eight articles under Chapter II, in particular, Articles 4 to 11, which determine how and when such acts can be considered that of the State. In formulating the rules of attribution, the ILC relied on state practice and jurisprudence, relying heavily on situations in armed conflicts.⁹⁷⁴

Defining state responsibility, Article 1 of the Articles on State Responsibility provides that "every internationally wrongful act of a State entails the international responsibility of that State".⁹⁷⁵ As noted earlier, the entire framework is premised on the distinction between primary and secondary rules of international law.⁹⁷⁶ According to Article 2, there are two main elements to an internationally wrongful act. First, there must have been a violation of

⁹⁶⁷ Noyes and Smith (n 52).

⁹⁶⁸ 'International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts' (n 45). See Kristen E. Boon, 'The Law of Responsibility: A Response to Fragmentation?' (2012) 25 (16) *Pacific McGeorge Global Business & Development Law Journal*, 395 – 407 at 399.

⁹⁶⁹ Rosenstock (n 44).

⁹⁷⁰ Sucharitkul (n 53).

⁹⁷¹ Caron, (n 46) 872.

⁹⁷² Kyoji Kawasaki, 'Draft Articles on State Responsibility Adopted by the International Law Commission in 2001: A Brief Overview' (2002) 30 *Hitotsubashi Journal of Law and Politics*, 35 – 55 at 36.

⁹⁷³ Basov, Melnyk, and Verenia, (n 961).

⁹⁷⁴ Eatwell (n 82).

⁹⁷⁵ Article 1, Articles on State Responsibility 2001.

⁹⁷⁶ Nicholas Tsagourias, 'Non-State Actors, Ungoverned Spaces, and International Responsibility for Cyber Acts' (2016) 21 (3) *Journal of Security & Conflict Law*, 455 – 474 at 461.

primary rules of international law, i.e., the conduct in question must represent a breach of the State's obligation under international law, and second it must engage any of the secondary rules of state responsibility i.e., it must also be attributable to the State under international law.⁹⁷⁷ For the first element to be satisfied, the conduct in question must be a violation of the State's international obligation, arising under treaty or customary law. When applied to this research, it means that a violation of any of Nigeria's obligations under substantive IHL or IHRL treaties is capable of triggering attribution. This can be further explained in this light: First, Nigeria is a signatory to the Geneva Conventions and Rome Statute of the International Criminal Court (ICC).⁹⁷⁸ Second, since at least May 2013, the Office of the Prosecutor of the ICC has stated that the insurgency in the Northeast region of Nigeria is an NIAC and that her office would begin investigations into war crimes and crimes against humanity perpetrated by all parties to the conflict.⁹⁷⁹ In an NIAC, civilians, as well as other categories of individuals such as religious and medical personnel, enjoy protected status and only lose this protection when they take direct part in hostilities.⁹⁸⁰ Taking this together, as an NIAC, it means that a breach of the primary rule of civilian protection in Nigeria's counterinsurgency against Boko Haram, automatically triggers the application of the secondary rules of law of state responsibility, so long as the conduct leading to these violations falls within one of the conditions captured under the Articles on State Responsibility.

Concerning the second element, the conduct must be attributable to the State in question. Attribution of conduct to a State is at the core of the law of state responsibility and from the very beginning of its work on the Articles on State Responsibility, the ILC had noted that no responsibility would be conceivable, if, from the outset the conduct in question, could not be attributed to the State.⁹⁸¹ What this means is that there must be a link between the conduct considered a potential violation of international law and an organ or entity of the State. This is because, as a longstanding rule of law of state responsibility, a State generally is not considered responsible for the conduct of non-state actors or entities.⁹⁸² This follows the reasoning that there is a distinction between private and public acts, a principle that has long

⁹⁷⁷ *ibid*; Thomas Weatherall, *Rules of Attribution in the Law of State Responsibility in Duality of Responsibility in International Law*, (Brill, Nijhoff, 2022) 1 – 352 at 178.

⁹⁷⁸ Human Rights Council (HRC), Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, Agnes Callamard, A/HRC/47/33/Add. 2, para. 26 (31 March 2021).

⁹⁷⁹ *ibid*.

⁹⁸⁰ Rule 25, 27, and 47, Customary International Law (CIHL); Article 13, 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 U.N.T.S 609 [*Hereinafter* 'Additional Protocol II'].

⁹⁸¹ Santiago M. Villalpando, 'Attribution of Conduct to the State: How the Rules of State Responsibility May be Applied Within the WTO Dispute Settlement System' (2002) 5 (2) *Journal of International Economic Law*, 393 – 420 at 395.

shaped the political and legal theory of the State.⁹⁸³ In a situation where conduct is considered public, it is attributable to the State and can constitute an internationally wrongful act, however, where it is deemed a private act, it cannot lead to state responsibility. This rule, however, is considered problematic given that a State as an abstract entity can only act through individuals i.e., non-state actors. For instance, Macak and Boutin have noted that a State being an artificial entity can only act through individuals, agents, and representatives, the implication being that what constitutes the acts of the State sufficient to engage state responsibility, are nothing but the acts and omissions of individuals acting on the State's behalf, which the law imputes to the State.⁹⁸⁴ As Macak further notes, inclusive in these attributable conducts must be acts that a State would not normally carry out through its organs, or else States would simply resort to outsourcing their lower work to individuals and private actors, thereby escaping international responsibility.⁹⁸⁵ Speaking in a similar light, Lanovoy observes that attribution entails the normative process of connecting the wrongful act of an individual to an action or omission of the State.⁹⁸⁶ The individual's act engages the responsibility of the State by showing that the State was in the wrong, either by its acts of giving positive encouragement to the individual's conduct or by its omission to prevent or punish it.⁹⁸⁷

The above explanation implies that Nigeria would be in breach of its obligations under IHL or IHRL if members of its regular armed forces, as well as 'militias and volunteer units' such as the CJTF, for instance, attack the civilian population, thereby violating their protected status under IHL. In such a situation, while the attack in question satisfies the first element of being a violation of the State's obligation under IHL, it also satisfies the second element, in the sense that it is attributable to the State as the conduct of its organ, having a link with it. However, where, irrespective of the fact that there has been a clear violation of an international obligation, it becomes difficult to determine whether the individual or group

⁹⁸² Kubo Macak, 'Decoding Article 8 of the International Law Commission's Articles on State Responsibility' (2016) 21 (3) *Journal of Conflict & Security Law*, 405 – 428 at 406.

⁹⁸³ Vladyslav Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (2017) 28 (2) *European Journal of International Law*, 563 – 585 at 573.

⁹⁸⁴ Macak (n 982) 407; Berenice Boutin, 'State Responsibility in Relation to Military Applications of Artificial Intelligence' (2023) 36 *Leiden Journal of International Law*, 133 – 150 at 139; Yohei Okada, 'Can Acta Jure Gestionis Be Attributable to the State? A Restrictive Doctrine of State Responsibility' (2023) 20 (20) *European Journal of International Law*, 1 – 32 at 5.

⁹⁸⁵ Macak (n 982) 407.

⁹⁸⁶ Vladyslav Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (2017) 28 (2) *European Journal of International Law*, 563 – 585 at 565.

⁹⁸⁷ *ibid*, 566.

alleged to have carried out the attack is an organ or entity of the State, due to lack of a relevant link, attribution becomes impossible.

The above is the central problem at the heart of the main question in this research. The attribution of the CJTF's conduct to the Nigerian State presents a challenge, which is principally due to the group's lack of status under Nigeria's internal law. The question is whether the legal consequences arising from the conduct of the group can be attributed to the Nigerian State. In particular, it is important to understand which standard of attribution should be read into the relevant rules of the Articles on State Responsibility in attributing the conduct of the group to the Nigerian State. Concerning Nigeria's engagement of the CJTF in counterinsurgency warfare, several articles may be relevant in determining attribution, however, articles 4, 7 8, and 9 are of particular importance and will be examined in this part of the Chapter. These articles provide separate but related points for answering the question of whether the conduct of the CJTF can be attributed to the Nigerian State, and the legal consequences arising from such attribution.

5.1.1. Attribution Based on Being an Organ of the State.

The first rule relates to the attribution of the conduct of state organs i.e., entities that are a part of a State's legal and operational machinery, which also operates on its behalf. Article 4 of the Articles on State Responsibility provides important conditions for satisfying attribution based on being an organ of the State. It provides that:

*The conduct of any State organ shall be considered an act of that State under international law whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central government or of a territorial unit of the State. An organ includes any person or entity which has that status in accordance with the internal law of the State.*⁹⁸⁸

Article 4 is at the core of attribution under the law of state responsibility. The purpose of the provision is to anchor attribution on the basis that a State has sufficient connection with the non-state entity in question.⁹⁸⁹ It defines that the conduct of an entity is attributable to the State so long as such an entity is defined under an internal law of the State, making it *de jure* organ of the State. In other words, it attributes the acts of a non-state entity to a State on the basis of a legal link between the two parties. It is clear from this text that the conduct of non-

⁹⁸⁸ Article 4, Articles on State Responsibility 2001.

⁹⁸⁹ Emily Chertoff, et al, 'State Responsibility for Non-State Actors that Detain in the Course of a NIAC' *Centre for Global Legal Challenges, Yale Law School* (7 December 2015), 1 – 42 at 18.

state entities can be attributed to a State, so long as certain additional conditions are satisfied i.e., that the organ in question exercises a degree of power or functions, and that the status upon which it exercises such powers derives from an internal law of the State. Once a group or entity is defined under the internal law of a State, it is considered a *de jure* state organ i.e., an organ of the State created by law and the State therefore bears responsibility for all actions of such an entity operating in that capacity.⁹⁹⁰ It means that both the text and the spirit of the Articles on State Responsibility conceive would-be organs of the state to be bound by law. A notable example is the case of the Armed Forces of a State, whose conduct in armed conflicts such as a counterinsurgency, which is backed by an internal law, is considered an act of a state organ and therefore attributable to the State. Attribution in this regard flows from the juridical status of such organ of the State.⁹⁹¹ Whereas it operates as the State's regular forces, the conduct of members of the Armed Forces of a State is not outside the confines of the law.⁹⁹² Generally, therefore, the conduct of a State's Armed Forces when they participate in an armed conflict, in their official capacity as organs of the State, is attributable to the State.

For irregular forces to be included in this category, they would have to be defined as a part of the Armed Forces of a State. It is in this wise that the provisions of Article 4 of the Articles on State Responsibility intersect the rules of IHL. Article 3 of the Hague Convention IV provides that a party to the conflict "shall be responsible for all acts by persons forming part of its armed forces".⁹⁹³ These provisions relate to acts committed contrary to official instructions. Generally, IHL provision are considered an exception to the general rule i.e., *lex specialis*, in which conducts of members of a State's Armed Forces are deemed attributable to the State, even when carried out in their capacity as private actors. Also, Rule 4 of Customary International Humanitarian Law (CIHL) defines 'Armed Forces' as follows "the armed forces of a party to the conflict, consist of all organised armed forces, groups and units which are under a command responsible to that party for conduct of its subordinates".⁹⁹⁴ The above definition derives from earlier definitions under the Hague Conventions as well as the Third Geneva Convention, concerning determining Prisoner of War (POW) status.⁹⁹⁵ The Hague

⁹⁹⁰ Article 4, Articles on State Responsibility 2001.

⁹⁹¹ Nicholas Tsagourias, 'Cyber Attacks, Self Defence, and the Problem of Attribution' (2012) 17 (2) *Journal of Conflict & Security Law*, 229 – 244 at 236.

⁹⁹² Frits Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces' (1991) 40 *International & Comparative Law Quarterly*, 827 – 858 at 827.

⁹⁹³ Convention (IV) Respecting the Laws and Customs of War on Land (Hereinafter, Hague Convention No. IV), The Hague, 18 Oct. 1907.

⁹⁹⁴ Rule 4, Customary International Humanitarian Law (CIHL); ICRC, 'Rule 4. Definition of Armed Force', IHL Database, Customary IHL, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule4.

⁹⁹⁵ 'Rule 4. Definition of Armed Forces', IHL Database, Customary IHL, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule4.

regulations state that, in addition to regular armies, all laws, rights, and duties of the law of war apply to militias and volunteer units that are commanded by a person responsible for its subordinates, wear a fixed distinctive emblem recognizable at a distance, carry arms openly, and conduct their operations in line with the law and custom of war.⁹⁹⁶ While Geneva Convention III provides similar rules for organized resistance groups,⁹⁹⁷ Additional Protocol I defines a State's Armed Forces as consisting:

*...of all organized armed forces, groups, and units which are under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognized by adverse party, such armed forces shall be subject to an internal disciplinary system which shall 'inter alia' enforce compliance with the rules of international law applicable in the conflict.*⁹⁹⁸

Though a rule of state practice applicable to an IAC, it is also applicable to NIAC when it comes to complying with the principle of distinction.⁹⁹⁹ The same rule is a part of the military manuals of states, such as Nigeria's Military Manual of 1994, which provides as follows:

*In general, the armed forces of a state and of a party to a conflict consist of all organized units and personnel which are under the command responsible for the behaviour of its subordinates and each state and belligerent party must determine the categories of persons and objects belonging to its armed forces... Furthermore, the armed forces shall be subject to an internal disciplinary system in order to uphold and enforce the law of war.*¹⁰⁰⁰

With respect to NIACs, Article 1(1) Additional Protocol II states that:

This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying the existing conditions of applications, shall apply to all armed conflicts which are not covered by Article 1 of Additional Protocol of 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 organized armed groups, which under responsible

⁹⁹⁶ Article 1, Hague Regulations (1899); Article 1, Hague Regulations (1907); Article 9, Brussels Declarations (1874); ICRC, 'Rule 4. Definition of Armed Forces' IHL Database, Customary IHL, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule4.

⁹⁹⁷ Article 4 (A)(1)(2) Geneva Convention III; ICRC, 'Rule 4. Definition of Armed Forces' IHL Database, Customary IHL, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule4.

⁹⁹⁸ Article 43 (1), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 8 June 1977.

⁹⁹⁹ 'Rule 4. Definition of Armed Forces' IHL Database, Customary IHL, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule4.

¹⁰⁰⁰ 'Nigeria – Practice Relating to Rule 4. Definition of Armed Forces' IHL Database, Customary IHL, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_ng_rule4.

*command, exercise such control over a part of its territory as to enable them carry out sustained and concerted military operations and to implement this Protocol.*¹⁰⁰¹

The relevant phrase here is “between its armed forces and dissident armed forces or organized armed groups”. In this context, in defining the term ‘armed forces’ in any armed conflict (NIACs inclusive), it would appear that the CJTF may be considered as a part of the Nigerian Armed Forces. This position is also line with Rule 4 of CIHL, Article 1 of Hague Regulations, and Article 1(1) of Additional Protocol II. In addition to being a CDF, the CJTF is also generally referred to as a militia group. Further elucidating on the terms ‘militia’ and ‘volunteer corps’, Rule 4 CIHL notes that “in every case, they are groups of volunteer fighters not enlisted in the regular armed forces but fighting for a Party to the conflict, along with the regular armed forces should there be any”.¹⁰⁰²

In light of the above, the question that arises is, “how is the status of the CJTF as a part of the Nigerian Armed Forces to be determined, especially in the absence of an internal law to incorporate it into the military?” The distinction between the regular armed forces of a State and other organised armed groups is extended to irregular state armed forces such as the CJTF. Since membership in such groups may sometimes not be regulated by internal law, the only way to determine their place in a State’s armed forces is based on the same functional criteria applied to organised armed groups fighting against the state in an armed conflict. This position is supported by the ICRC’s Interpretive Guidance, which notes that, though militia groups are not defined in domestic law, so long as they assume the function of the armed forces, they can be categorised as members of the State Armed Forces. The definition of a State’s Armed Forces under Additional Protocol II comprises regular armed forces and other organised armed groups or units organised under a responsible command to the State. Membership in such groups, i.e., organised armed groups, most times is not governed by an internal law or formalised through an integrating act, or the wearing of distinctive uniform. Rather, membership often occurs by members of the irregular group simply taking up certain functions for the State's armed forces. This comes under the principle of continuous combat function, which is central to the integration of a person as a part of the Armed forces. The Interpretive Guidance explains continuous combat function as:

¹⁰⁰¹ Article 1(1), Additional Protocol II, 1977.

¹⁰⁰² ‘Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary’ International Committee of the Red Cross (ICRC), Geneva, 48 (1973).

Continuous combat function requires lasting integration into an organised armed group acting as the armed forces of a non-state party to an armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act. This case must be distinguished from persons comparable to reservists who, after a period of basic training or active membership, leave the armed group and re-integrate into civilian life. Such 'reservists' are civilians until and for such time as they are called back to active duty.¹⁰⁰³

A better way to look at this is that once members of the CJTF are established as involved in continuous combat function, then they are deemed a part of the Nigerian Armed Forces. The rule of 'continuous combat function' is the basis for determining that a militia member is a member of the armed forces of a State for application of IHL rules when an internal law is lacking. The Interpretive Guidance states that "the term organised armed group, however, refers exclusively to the armed or military wing of a non-state party; its armed forces in a functional sense".¹⁰⁰⁴ Thus, for the applicability of the principle of distinction, for instance, membership cannot just be on "abstract affiliation, family ties, or other criteria prone to error".¹⁰⁰⁵ Rather, membership under IHL means the individual must assume a "continuous function for the group involving his or her direct participation in hostilities, i.e., continuous combat function".¹⁰⁰⁶ For instance, the rules state that persons continuously accompanying or supporting an organised armed group but are not involved in direct participation in hostilities cannot be deemed members of the group under IHL.¹⁰⁰⁷ These extend to recruiters, trainers, financiers, propagandists, purchasers of weapons, maintainers of weapons, and collectors of intelligence, who though may be contributing to the general war efforts of the non-state party, are not considered as members of the group, unless their function involves direct participation in hostilities such as specific military operation or one of a tactical nature.

Conversely, and perhaps more significantly, regarding irregular armed forces of a state such as the CJTF, the Interpretive Guidance states that since their membership in the State's armed

¹⁰⁰³ See, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (May 2009) (prepared by Nils Melzer) International Committee of the Red Cross (ICRC) [Hereinafter 'Interpretive Guidance'] 32, <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>

¹⁰⁰⁴ *ibid.*

¹⁰⁰⁵ *ibid.*, 33.

¹⁰⁰⁶ *ibid.*

¹⁰⁰⁷ *ibid.*, 34.

forces is not normally regulated by internal law, it then has to be determined based on the same functional criteria applicable to organised groups of non-state parties to the conflict.¹⁰⁰⁸ It means that given that the CJTF members are not direct members of the Nigerian Armed Forces via an internal law such as the Armed Forces Act, their membership must be determined based on ‘continuous combat function’ i.e., the functionality criteria. Scholars such as Kenneth Watkin have criticised the Interpretive Guidance as being too narrow and that it should have defined the notion of continuous combat function more broadly.¹⁰⁰⁹ With the increase in the use of civilians in armed conflicts such as CDFs, Militias, and Volunteer corps, especially those fighting on behalf of States in a NIAC, this rule is bound to be problematic in practical application. Members of the CJTF, though involved in limited combat functions, are largely used for intelligence gathering and other reconnaissance operations.

The analysis above demonstrates that states have positive obligations under relevant rules that define militias and volunteer corps such as the CJTF as a part of the state’s armed forces so long as the relevant conditions have been satisfied. Regarding the issue of whether this can be a basis for holding the Nigerian State responsible for the conduct of the CJTF, while the above analysis indicates that the general IHL obligations of the Nigerian Armed Forces can be deemed as the obligations of the CJTF, on the basis that the group is a part of the State’s armed forces, however, due to the irregular nature of the group, issues arise regarding whether the group’s engagement by the state satisfies the four conditions stipulated in the IHL rules. Further questions also arise regarding the extent of ‘continuous combat functions’ engaged in by the group and whether this is sufficient to validate its status as a part of the Armed Forces.

Indeed, the CJTF does not sufficiently satisfy the four conditions stipulated under Customary IHL. Whereas its different units are commanded by persons responsible for their subordinates and also carry arms openly, members of the group do not wear a fixed distinctive emblem recognizable at a distance, neither is it clear whether they conduct their operations in line with the law and custom of war. At the same time, on the requirements of ‘continuous combat functions’, it would appear that the group’s combat functions do not reach the threshold required. This is because members of the group are mostly deployed in limited combat operations such as accompanying troops on operations to identify suspected insurgents and

¹⁰⁰⁸ *ibid*, 31.

¹⁰⁰⁹ Sabrina Henry, ‘Exploring the Continuous Combat Function in Concept in Armed Conflicts: Time for an Extended Application?’ (2018) 100 *International Review of Red Cross*, 267 – 285 at 282.

their collaborators, man roadblocks, gather intelligence, reconnaissance, etc. Whilst doing this, they are mostly armed with dane guns, matchets, swords, sticks, and other light instruments. Generally, they do not interact with heavy military weapons and artillery such as assault rifles, grenades, mortars, tanks, etc. Aside from these limited combat functions, the bulk of their activities have to do with the acts related to the provision of local governance functions already discussed extensively in Chapter Three. With this understanding, it is difficult to see how ‘continuous combat function’ can be a basis for considering their conduct as that of an organ of the State.

A further question to be asked is, what is the criterion of legality or validity regarding such internal law governing a state organ? It means that such an entity must have been established by an enabling law, made by a body constitutionally created to do so i.e., the Parliament of a country. In the context of Nigeria, such body is the National Assembly granted powers of lawmaking under Section 4 of the Constitution. That same body classifies the Armed Forces of the country as an organ of the state, following its enactment of the Armed Forces Act.¹⁰¹⁰ This means Nigeria would be responsible when members of the Armed Forces violate its international obligations in the course of counterinsurgency warfare against Boko Haram. While this is the case concerning the Armed Forces of Nigeria, the same conclusion cannot be reached when it comes to the CJTF being classified as an organ of the state. As mentioned in Chapter Three, Nigeria has not enacted a law to regulate the activities of the group, nor does any internal law define its correct status. Rather, the group started in 2013 as a volunteer group and was later co-opted into the Armed Forces’ counterinsurgency warfare. The question to be asked is whether, in the context of Article 4 of the Articles on State Responsibility, the group may still be considered as an organ of the Nigerian State. Based on Nigeria’s internal laws, it appears the only entity that can be so considered as a *de jure* organ of the state is the Armed Forces of the Federation, established under the Armed Forces Act and not the CJTF.

However, the above analysis represents the narrow interpretation of Article 4 of the Articles on State Responsibility. A broader interpretation is seen in the commentaries to the Articles on State Responsibility, which states that though the provisions of Article 4 “is clearly a fundamental one”, however, “it is not absolute, and above all, not exclusive”.¹⁰¹¹ The Commentary to Article 4, for instance, acknowledges that “certain acts of individuals and

¹⁰¹⁰ See Armed Forces Act, 1994, No. 24 (came into force 6th July 1994).

¹⁰¹¹ Articles on State Responsibility with Commentaries Thereto Adopted by the International Law Commission on First Reading, January 1997, Article 5, para. 2, Yearbook 1973, Vol. 2.

collective entities which do not have the status of organs of the state may likewise be attributed to the State in international law...”.¹⁰¹² The Commentary further notes:

*On the other hand, it is not sufficient to refer to internal law for the status of state organs. In some systems, the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of organs. In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an organ, internal law will not itself perform the task of classification...Accordingly, a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law.*¹⁰¹³

The understanding from the above is that in preparing the Articles on State Responsibility, the ILC did intend that Article 4 be approached rather expansively and not narrowly. This expansive interpretation defines what will constitute ‘an organ of the state’ not just through the lens of the enactment of an internal law but also from relevant facts and circumstances sufficient to demonstrate the character of such an entity as a state organ. What this means is that, whereas ordinarily, states are only held responsible for the acts of their organs deemed a violation of international law, even acts of individuals or entities who are not *de jure* organs of the state may engage the responsibility of the state.¹⁰¹⁴ Such entities are considered *de facto* organs of the State, i.e., organs based on their exercise of public power. As observed by Jenks, “although states as a general are not liable for the conduct of non-state actors, it is now well settled that the acts of *de facto* state agents are attributable to the state”.¹⁰¹⁵ This means the conduct of private actors may be so sufficiently connected with the exercise of state public power that they are deemed state actions.¹⁰¹⁶ This broad interpretation provides a window to examining the engagement of the CJTF in Nigeria’s counterinsurgency warfare. Notwithstanding that the CJTF is not defined as a *de jure* the Nigerian state organ through an internal law, however, it has so far demonstrated the character of a *de facto* organ of the State. This is seen in the fact that, since its engagement in 2013, the group has operated in a robust relationship with a *de jure* organ of the State i.e., the Armed Forces.

¹⁰¹² Commentary to Article 4, Articles on State Responsibility 2001, para. 2.

¹⁰¹³ *ibid.*, para. 11.

¹⁰¹⁴ Marco Longobardo, ‘State Responsibility for International Humanitarian Law Violations by Private Actors in Occupied Territories and the Exploitation of Natural Resources’ (2016) 63 *Netherlands International Law Review*, 251 – 274 at 256.

¹⁰¹⁵ Derek Jinks, ‘State Responsibility for the Acts of Private Armed Groups’ (2003) 4 (1) *Chicago Journal of International Law*, 83 – 95 at 83.

¹⁰¹⁶ *ibid.*

As an active component of Nigeria's counterinsurgency warfare, the CJTF accompanies the Armed Forces on combat missions and has been severally commended as a game changer in the conflict. In addition, the group's members patrol the streets with armed machetes, bows and arrows, and sticks, identifying Boko Haram members, who they then turn in to the government Armed Forces i.e., the Joint Task Force (JTF).¹⁰¹⁷ In particular, given its knowledge of the local terrain, it has largely been instrumental in intelligence gathering, reconnaissance missions, identification of suspected Boko Haram insurgents as well as their collaborators, etc. The group has become a central part of the counterinsurgency warfare as well as the overall security architecture of the region. As members are drawn directly from the local communities that had been under the siege of Boko Haram, they act passionately and prudently, leading to less and less arbitrary arrest by the Armed Forces.¹⁰¹⁸ In fact, as far as some residents are concerned without the CJTF, they wouldn't have any security in place.¹⁰¹⁹ In 2020, while preparing for a major offensive against the insurgent group, the Chief of Army Staff, Lt. General Tukur Buratai noted that the CJTF had played a major role in the counterinsurgency, instrumental in chasing the insurgents from the town to the forests.¹⁰²⁰ Acknowledging the group's contribution, the Army Chief stated that:

*It is very important that we must get them to play that important role of identifying these terrorists and their influence from one position to other. As we collaborate today, this counterinsurgency should not be left for the military alone as its success does not fully lie with the military. The collaboration with the civil authority, as well as the volunteers, is a welcome development.*¹⁰²¹

Clearly, the 'volunteers' referred to in the Army Chief's statement is the CJTF and his continued use of the word 'collaboration' is indicative of the military's working partnership with the group. In that same event, the Theatre Commander of the government's counterinsurgency operation titled 'Operation Lafiya Dole' Major-General Farouk Yahaya equally observed that the incorporation of the CJTF into the operation of the Army was towards harnessing their skill and competencies and that the Military is keen on integrating

¹⁰¹⁷ See 'Civilian Vigilante Groups Increase Dangers in Northeastern Nigeria' *IRIN* (12 Dec. 2013), <https://www.refworld.org/docid/52aeea1c4.html>

¹⁰¹⁸ Kunle Adebajo, 'Turning Grief into a War Cry: The Women on the Frontline Against Boko Haram' *HumAngle* (5 April, 2023), <https://humanglemedia.com/turning-grief-into-a-war-cry-the-women-on-the-frontline-against-boko-haram/>

¹⁰¹⁹ Ed Cropley, 'On Boko Haram Front Line, Nigerian Vigilantes Ammas Victories and Power' *REUTERS* (15 June, 2017), <https://www.reuters.com/article/us-nigeria-security-vigilantes-idUSKBN1960FK>

¹⁰²⁰ See, 'Boko Haram: Nigeria Army Begins Fresh Manhunt for Shekau, Albarnawi, Others' *Premium Times* (11 Nov. 2020), <https://www.premiumtimesng.com/news/top-news/425716-boko-haram-nigerian-army-begins-fresh-manhunt-for-shekau-albarnawi-others.html?tztc=1>

¹⁰²¹ *ibid.*

the group into its plans, hence the guidelines for operation and conduct set in place.¹⁰²² More so, members of the group were not just trained by the Military, some were sent abroad on sponsorship by the state to learn advanced skills, for example, women members of the group were sent to Ghana to take courses on disarmament and reintegration.¹⁰²³

This shows that despite the absence of an internal law based on which the group can be categorised as *de jure* organ of the State, in line with the broad interpretation of the rules, an argument may be made that the group's relationship with the Nigerian state entitles it to be considered a *de facto* organ, making its conducts attributable. Whereas this would appear to be a possible pathway to attribution, another problem is in view. The Commentary does not state the exact conditions under which a person or entity would be deemed as acting as an organ of the State.¹⁰²⁴ In addressing this issue, Macak observes that a non-state entity would only be considered a *de facto* organ of the State where it operates in 'complete dependence' on the State, in which case the relationship between both parties would have been removed from the scope of Article 8 of the Articles on State Responsibility, making the State only responsible under Article 4.¹⁰²⁵ Mack's view is in line with the reasoning of the court in the *Genocide case* where it stated that:

*In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.*¹⁰²⁶

Based on this reasoning from the Nicaragua Case, it is clear that to determine whether a non-state entity is a *de facto* organ of the State, the court may look to factors such as whether the non-state entity was created by the State; whether the State's interaction with the group exceeded provision of financial and training assistance; whether the State chooses and installed the leaders of the group; and whether complete control was exercised by the State.¹⁰²⁷ Evidence of these factors will be sufficient basis for attribution thereby triggering state responsibility. According to Lanovoy, where as a matter of practice the conduct of an

¹⁰²² See, Boko Haram: Nigeria Army Begins Fresh Manhunt for Shekau, Albarnawi, Others' Premium Times (11 Nov. 2020) *Premium Times*, <https://www.premiumtimesng.com/news/top-news/425716-boko-haram-nigerian-army-begins-fresh-manhunt-for-shekau-albarnawi-others.html?tztc=1>

¹⁰²³ Agbibo 'Out of the Shadows' (n 553) 1020.

¹⁰²⁴ Eatwell (n 82) 10.

¹⁰²⁵ Macak (n 982) 410.

¹⁰²⁶ Bosnia Genocide Case, 205, para. 392.

¹⁰²⁷ Nicaragua Case, 62-63, para. 109 – 112.

entity is considered that of the State, the State won't be allowed to simply disown the entity under its internal law, just to evade responsibility.¹⁰²⁸ However, he notes that such a link between a non-state entity and a State, rendering the entity a *de facto* organ of the state, is often extremely difficult to prove, and would only happen in exceptional circumstances.¹⁰²⁹

Another way to look at it is to examine whether, as a CDF, it is best to classify the CJTF as an organ of a State or whether a more proximate categorisation would be to view it merely as an 'agent' of the state. In his doctoral research, Eatwell stresses the fact that distinguishing these terms is important in determining state responsibility.¹⁰³⁰ She argues that the terms define very distinct relationships between states and armed groups to which different rules of attribution apply.¹⁰³¹ Whereas the term 'organ' means a person or entity that constitutes a part of the organisation of a State at any level, an 'agent', on the other hand, refers to a person or entity that acts on behalf of the state and is independent of the State.¹⁰³² In other words, to be defined as an organ of the State is to establish a framework of complete dependence, while categorisation as an agent is evidence of the absence of complete dependence. It is important to state that the drafters of the Articles on State Responsibility also took the clear distinction between these two terms into consideration in crafting the rules. This is reflected in the fact that in its earlier draft of Article 5, which operates as the current Article 4, the ILC noted as follows:

*It was agreed that the article should employ only the term "organ" and not the two terms "organ" and "agent". The term "agent" would seem to denote, especially in English, a person acting on behalf of the State, rather than a person having the actual status of an organ. Actions or omission on the part of persons of this kind will be dealt with in another article of this chapter.*¹⁰³³

From state practice, irregular forces engaged in counterinsurgency warfare are seldom defined under any internal law or incorporated into the Armed Forces of the State. Also, their chain of command is mostly not linked to the Armed Forces, but to leaders in these groups. In actual sense, in most countries where States engage these groups, it is often on the basis of ad hoc arrangements, in which the State simply uses them for its own benefits.

¹⁰²⁸ Lanovoy (n 986) 575.

¹⁰²⁹ *ibid.*

¹⁰³⁰ Eatwell (n 82) 9.

¹⁰³¹ *ibid.*

¹⁰³² *ibid.*

¹⁰³³ Commentary to Draft Article 5, ILC Yearbook, 1973, Vol. II, p. 193 at 13.

Applying the analysis in the preceding sections to the CJTF, one thing that has been established is that the factors identified in the *Nicaragua case* are not present in the groups' relationship with the Nigerian state. The group was not created by the Nigerian government, and in actual fact, the government's interaction with the group has been limited to the training of its members as well as the payment of stipends. Equally, the state plays no role in the choosing or installation of the leaders of the group and, more importantly, the group does not operate in 'complete dependence' on the state, nor is the state in complete control of its activities. It therefore means that, when taken together with the distinction drawn between an organ and an agent by the ILC, the group, at best, can only be described as an agent of the Nigerian State and not a *de facto* organ of the State. In light of this, the most proximate basis of attributing the conduct of such groups to States is by examining other provisions of the Articles on State Responsibility that deal with situations in which a non-state entity may be categorised as a *de facto* organ of the State. The relevant provisions are Articles 7 and 8 of the Articles on State Responsibility.

5.1.2. Attribution Based on Exercise of Governmental Authority.

In addition to Article 4 of the Articles on State Responsibility, provisions such as Article 7 may provide further evidence of attribution. Article 7 provides that:

*The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person, or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.*¹⁰³⁴

In principle, Article 7 above is designed to govern the activities of public corporations that have been privatised but continue to exercise public or state functions. The reasoning underpinning the provision is that a State would not be simply allowed to evade responsibility by transferring inherently governmental functions to private actors.¹⁰³⁵ When assessing whether the conduct of a non-state entity is potentially attributable to a State in line with Article 7 of the Articles on State Responsibility, a primary consideration is the fact that the exercise of the governmental authority must be based on 'empowerment through law'. The meaning is that the State in question must have enacted a law through which it delegates its authority to the non-state entity. It is also important to give attention to two instructive clauses in its provisions, i.e., the first relating to "...entity empowered to exercise elements of

¹⁰³⁴ Article 7, Articles on State Responsibility 2001.

¹⁰³⁵ Chia Lehnardt, 'Private Military Companies and State Responsibility' *New York University (NYU) IILJ Working Papers* 2007/2, 1 – 22 at 6.

the governmental authority” and the second making a non-state entity’s conduct attributable “...even if it exceeds its authority or contravenes instructions”. The emphasis is therefore on demonstrating that the State indeed empowered the non-state entity to exercise elements of governmental authority. As already established in this thesis, in 2013, the Nigerian State began to coopt the CJTF into its counterinsurgency operation against Boko Haram, mainly in limited combat form. With time, members of the group began to accompany troops on missions, recording varying degrees of success. The group has received several commendations from the State regarding its members' deep knowledge of the local environment as well as their bravery in engaging the insurgents, a quality that was hitherto lacking in the troops of the Nigerian Armed Forces.

For the past ten years, the group has remained an active part of the government's fighting force against the insurgents. At no time has the Nigerian government publicly denounced the governance activities of the CJTF. It has also refrained from taking steps to prosecute members of the group under relevant domestic criminal laws for their violation of IHL and IHRL rules. Rather, as already stated in Section 5.3.1. above, at different times, the group has been commended by the government, whether at the level of federating units or the central government, for its heroics in the counterinsurgency,¹⁰³⁶ with members receiving different financial rewards.¹⁰³⁷ Also, family members of deceased CJTF members who died while fighting the Boko Haram insurgent group have at some point been rewarded.¹⁰³⁸ Notwithstanding what would seem to be a clear link between the group and the Armed Forces, the Military High Command is often quick to represent the group as an entity belonging to one of the 36 federating units under Nigeria’s federation, i.e., the Borno State government. An example was when the Army Chief referred to the group as “the state government’s CJTF”.¹⁰³⁹ One may say that such a seemingly deliberate characterisation is a calculated effort to distance the federal government from the conduct of the group as much as possible.

¹⁰³⁶ See, ‘Borno Governor Hails Civilian Joint Task Force For Repelling Boko Haram Attacks’ *The News* (7 Nov. 2018) <https://thenewsnigeria.com.ng/2018/11/07/orno-governor-hails-civilian-joint-task-force-for-repelling-boko-haram-attack/>

¹⁰³⁷ Njadvava Musa, ‘Zulum Pays Salary Bonus to 12, 735 Borno Civilian JTF Members, Others’ *The Guardian* (22 Dec. 2021), <https://guardian.ng/news/zulum-pays-salary-bonus-to-12735-borno-civilian-jtf-members-others/>

¹⁰³⁸ Maryam Abdullahi, ‘Zulum Awards Scholarships to 500 Children of Deceased Civilian JTF Members’ *The Cable* (1 Dec. 2021), <https://www.thecable.ng/zulum-awards-scholarship-to-500-children-of-deceased-civilian-jtf-members>

¹⁰³⁹ ‘Boko Haram: Nigeria Army Begins Fresh Manhunt for Shekau, Albarnawi, Others’ (n 1022).

The action of the Nigerian State in coopting the group into its counterinsurgency operation, to perform limited combat functions, may be considered a case of a State empowering a non-state entity “to exercise elements of the governmental authority”, however, the challenges yet lie in the fact that the National Assembly has not enacted a specific law to back this empowerment. This is notwithstanding that Section 4 (2) of the Constitution provides that “The National Assembly shall have power to make laws for the peace, order, and good government of the federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to this Constitution”.¹⁰⁴⁰ The defence of any State’s territory is a very serious matter, in particular, a matter of national security. It is an “element of the governmental authority” reposed in the State alone and often defined in the relevant constitutional and legal frameworks as the exclusive function of the Armed Forces. Capturing this in a proper light, Maddocks notes that “the exercise of powers involving the use of force or a right to constrain or control the activities of private individuals strongly indicates that the function concerned is governmental in nature”.¹⁰⁴¹ Functions such as offensive military combat operations in defence of a country’s national territory are quintessentially governmental in nature, in that they are central to the nature and purpose of government.¹⁰⁴² These are considered in international law as inherently state functions. Necessary insight on this can be drawn from the Draft Convention on Private Military and Security Companies which defines inherently state functions as:

*Direct participation in hostilities, waging war and/or combat operations, taking prisoners, law making, espionage, intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons mass destruction and police powers, especially the powers of arrest or detention including the interrogation of detainees.*¹⁰⁴³

This position is also justifiable given the nature of this function and the fact that it could affect the rights of citizens when conducted. The above reasoning applies in the case of Nigeria, and this is expressly stated in Section 217 of the Nigerian Constitution which provides that:

(1) There shall be an Armed Forces for the Federation which shall consist of an Army, a Navy, an Air Force, and such other branches of the Armed

¹⁰⁴⁰ 1999 Constitution.

¹⁰⁴¹ Maddocks ‘Outsourcing of Governmental Functions in Contemporary Conflict’ (n 76) 63.

¹⁰⁴² *ibid*, 64, 65.

¹⁰⁴³ Article 2 (i) Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by Human Rights Council, A/HRC/WG.10/1/2 (13 May 2011); Nigel D. White, ‘The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group Draft Convention’ (2011) 11 (1) *Human Rights Law Review*, 133 – 151 at 135, 138.

*Forces of the Federation as may be established by an Act of the National Assembly. (2) The Federation shall, subject to an Act of the National Assembly made in that behalf, equip and maintain the Armed Forces as may be considered adequate and effective for the purpose of - (a) defending Nigeria from external aggression; (b) maintaining its territorial integrity and securing its borders from violation on land, sea, or air; (c) suppressing insurrection and acting in aid of civil authorities to restore order when called upon to do so by the President, but subject to such conditions as may be prescribed by an Act of the National Assembly; (d) and performance of such other functions as may be prescribed by an Act of the National Assembly.*¹⁰⁴⁴

However, the above provision does not accommodate the engagement of irregular forces such as the CJTF. Also, the Constitution does not envisage such groups as part of the Armed Forces of the State. The clause “...and such other branches of the Armed Forces of the Federation as may be established by an Act of the National Assembly” under Section 217 of the Constitution, doesn't cover groups such as the CJTF, given that there is an absence of any internal law enacted by the National Assembly to confer “*governmental authority*”. This is in addition to the fact that the Constitution states in Section 1 (2) that “Nigeria shall not be governed, neither shall anyone take over the government of Nigeria or any part thereof, except in accordance with the provisions of the constitution”.¹⁰⁴⁵ As it stands, the Nigerian Constitution does not recognise the CJTF, and its relationship with the State in limited combat operations which has flowed into the performance of local governance functions. This makes the group illegal under the country's constitutional framework, a point already dealt with in Chapter Three.

The Nigerian Constitution grants the Armed Forces exclusive governmental authority to maintain the country's territorial integrity and suppress any form of insurrection. The insurgency by Boko Haram is both an attack on the country's territorial integrity as well as an armed insurrection, and it is in the exercise of the powers above that the Armed Forces have been mounting counterinsurgency operations against the group. Despite this lack of direct governmental authority from the Constitution, the CJTF has, however, been exercising this power of the Armed Forces, as empowered by the Nigerian State. Limited combat functions related to maintaining the country's territorial integrity and suppressing the armed insurrection of Boko Haram are being carried out by the group. The activities of the group must be considered as coming within the intent of Article 7 of the Articles on State

¹⁰⁴⁴ Section 217 (1) (2) 1999 Constitution.

¹⁰⁴⁵ Section 1 (2), 1999 Constitution.

Responsibility regarding when a State empowers an entity to “exercise elements of the governmental authority”.

Whereas the group’s extension of its authority in providing governance to the local population, alongside its role of limited combat missions may be considered as reflecting the provisions of Article 7 of the Articles on State Responsibility which speaks of when the empowered non-state entity “exceeds its authority or contravenes instructions” the problem of lack of an internal law remains a permanent clog. This makes attributing the conduct of the CJTF to the Nigerian State in line with the provisions of Article 7 appears a remote possibility, as the exercise of elements of the governmental authority under this provision is expected to be based on ‘empowerment through law’. This sort of situation creates opportunities for States such as Nigeria, which engage groups like the CJTF to escape responsibility. It represents a weakness in the law of state responsibility framework and leaves victims who have suffered by reasons of violations of international law norms connected to the conduct of such groups without remedy. As would be later discussed in Chapter Six of this thesis, the current framework must be revised to allow for States to bear responsibility for acts of non-state entities empowered through other means than an internal law. While such empowerment is desirable, it is important to examine the last possible means of attribution, i.e., Article 8 of the Articles on State Responsibility, to see whether this can sufficiently determine the responsibility of the Nigerian State for the conduct of the CJTF.

5.1.3. Attribution Based on Direction or Control.

As it has been well established from the analysis above, most times States that coopt irregular forces into counterinsurgency operations do not enact an internal law to designate them as organs of the state, and even when such groups ostensibly act on behalf of the state, it is rare to find any government expressly authorise groups of this nature to carry out certain actions on their behalf. There are, however, limited instances when the conduct of private actors may be attributable to a State, where it is performed based on the State’s instruction or under its direction/control. In acting on behalf of the State, such non-state entity is viewed as an extended arm of the State in question, to the end that the conduct of the entity is considered State action as a matter of consequence.¹⁰⁴⁶ In such a situation, attribution is based on the existence of a sort of principal-agent relationship, in which the non-state entity is subordinate to the State and is simply carrying out its wishes. In line with well-established practice, the criterion of control is at the core of determining whether the conduct of such entity can be

¹⁰⁴⁶ Lanovoy (n 986) 574.

attributed to the State, in particular, the threshold of control that would be sufficient to trigger state responsibility.¹⁰⁴⁷ More often than not, it is far from easy to identify what precisely connotes direction/control. The issue to be addressed here is whether the conduct of the CJTF is attributable to the Nigerian State, based on the group being under the direction/control of the State. Addressing this question requires an examination of the main provision underpinning direction/control under the Articles on State Responsibility, i.e., Article 8. As noted by Macak, Article 8 of the Articles of State Responsibility is at the very core of determining whether or not the conduct of a private or non-state entity can be attributed to a State, especially as the State will not be deemed responsible for the acts in question, once the link between the two parties falls short of the standard stipulated in the provision.¹⁰⁴⁸ As noted by Arimatsu, the ILC has noted that a state bears responsibility for the conduct of a non-state entity once it is proved that the State authorised the act in question.¹⁰⁴⁹ It is also a rule that remains a matter of continuing scholarly scrutiny.¹⁰⁵⁰ It is, therefore, the most relevant to answering the main question in this thesis, i.e., whether and to what extent can the conduct of the CJTF be attributed to the Nigerian State. Article 8 states that:

*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is, in fact, acting on the instruction of, or under the direction or control of, that State in carrying out the conduct.*¹⁰⁵¹

The purpose of this provision is to anchor attribution on the issue of whether a State has sufficient connection with the operation during which the alleged internationally wrongful act took place.¹⁰⁵² Whereas under Article 4, the focus is on the level of control exercised by the State over the non-state entity, under Article 8, the focus is on the level of control exercised by the State over the operation during which the act took place.¹⁰⁵³ States that outsourced tasks to non-state entities are required to retain control over them.¹⁰⁵⁴ Since a State can only be held responsible for allowing such non-state entities to perform the desired functions, the

¹⁰⁴⁷ *ibid.*

¹⁰⁴⁸ Macak (n 982) 410.

¹⁰⁴⁹ Louise Arimatsu, 'The Law of State Responsibility in Relation to Border Crossings: An Ignored Legal Paradigms' (2013) 89 *International Law Studies*, 21 – 53 at 27.

¹⁰⁵⁰ Leo Van den Hole, 'Towards a Test of the International Character of an Armed Conflict: Nicaragua and Tadic' (2005) 32 (2) *Syracuse Journal of International Law and Commerce*, 269 – 287 at 270; Marko Milanovic, 'State Responsibility for Genocide' (2006) 17 (3) *European Journal of International Law*, 553 – 604 at 582; Djemila Carron, 'When is a Conflict International? Time for New Control Tests in IHL' (2016) 98 (3) *International Review of the Red Cross*, 1019 – 1041 at 1023.

¹⁰⁵¹ Article 8, Articles on State Responsibility 2001.

¹⁰⁵² Chertoff, et al, (n 989).

¹⁰⁵³ *ibid.*, 19.

ultimate question is often about the scope and degree of control exercised by the State over such an entity, as this plays a critical role in determining the kind of relationship between the two parties.¹⁰⁵⁵ The ILC has noted that “it is a matter of appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it”.¹⁰⁵⁶ This position was influenced by the practice of States. As far back as 1927, in *Charles S Stephens and Bowmans Stephens (USA) v. United Mexican States*,¹⁰⁵⁷ the US-Mexico Claims Commission had held Mexico responsible for the act of a Mexican national who killed a US citizen. The Commission held that “it is difficult to determine with precision the status of these guards...but at any rate, they were acting for Mexico or its political subdivisions”.¹⁰⁵⁸

Article 8 of the Articles on State Responsibility is triggered when the person/organ in question is not an organ of the state as provided under Article 4 and is not empowered to exercise elements of governmental authority as stated by Article 7.¹⁰⁵⁹ With the emphasis on ‘conduct’, the focus of Article 8 is on an assessment of the extent of influence the state exerts over the behaviour of the person or organ in question.¹⁰⁶⁰ This is different from Articles 4 and 5, which focus on the relationship between the state and such person/organ. Accordingly, for Article 8 to be successfully triggered, three factors must be in place. Firstly, there must exist a relationship between the State and the non-state entity or group.¹⁰⁶¹ This is because Article 8 does not rely on the fact that there is a formal or legal link between the State and the non-state entity or group, but on the existence of a factual link.¹⁰⁶² The meaning is that the conduct of a private actor or group does not become attributable to the State merely because of the conduct, but due to actions of the State, either in giving instructions or exercising control over the activities of the actor or group.¹⁰⁶³ This is more so, as there are three autonomous criteria in Article 8 namely instruction, direction, and control and these three have been interpreted as being disjunctive i.e., each stands on its own and to trigger attribution, it is

¹⁰⁵⁴ M. Emrah Tanyildizi, ‘State Responsibility in Cyberspace: The Problem of Attribution of Cyber Attacks Conducted by Non-State Actors’ (2017) *Law & Justice Review*, 119 – 176 at 161.

¹⁰⁵⁵ *ibid.*, 162.

¹⁰⁵⁶ Article 8, Articles on State Responsibility, para. 5

¹⁰⁵⁷ (1927) 4 RIAA, 265.

¹⁰⁵⁸ *ibid.*

¹⁰⁵⁹ Maddocks ‘State Responsibility for International Law Violations Involving Non-State Actors in Armed Conflict’ (n 61) 138.

¹⁰⁶⁰ *ibid.*

¹⁰⁶¹ Article 8, Articles on State Responsibility, Commentary para. 1; Maddocks (n 61) 142.

¹⁰⁶² Maddocks (n 61) 142.

¹⁰⁶³ Christenson (n 50) 345.

sufficient to simply establish any one of them.¹⁰⁶⁴ Instruction is interpreted as a situation whereby a State has decided to engage in certain activities and then instructs a non-state entity to do so on its behalf.¹⁰⁶⁵ For ‘instruction’ to be in view, such an entity must not have been empowered to exercise governmental authority under an internal law, or else its conduct would fall under Article 5 of the Articles of State Responsibility.¹⁰⁶⁶ As already noted above, there must be a factual relationship between the State and non-state entity. Notable examples in this regard include irregular forces, made up of persons outside of the State’s official structures, often engaged by the State and charged with specific tasks. If the link falls below the requirement of this provision, the conduct becomes unattributable.¹⁰⁶⁷ Secondly, this relationship must be hierarchical in the sense that the group must be subordinate to the State and take orders from it.¹⁰⁶⁸ Such hierarchical authority can be deduced from the fact that the non-state entity or group accepts the instructions given by the State and agrees to comply with it.¹⁰⁶⁹ It would be a different case if the State simply called on patriotic citizens to engage in certain acts; this will not qualify as attribution.¹⁰⁷⁰ Thirdly, the instruction in question must be given concerning a specific operation in which the alleged violation occurred.¹⁰⁷¹

In light of this, determining attribution would require an assessment of the State’s level of direction/control over the specific conduct of the non-state entity, which violates the state’s international obligation.¹⁰⁷² There are issues regarding the attribution of persons or organs acting on instructions, with a major area of disagreement revolving around the determination of whether a person or group was indeed acting under the direction/control of a State.¹⁰⁷³ At the core of this is the question of what precise meaning is to be given to the notion of control/direction, whether from judicial decisions by international courts or from scholarly texts. As against the term ‘instruction’ direction/control are considered together as a single attribution standard.¹⁰⁷⁴ Applying the above to this research is suggestive of the need to

¹⁰⁶⁴ Macak (n 982) 411.

¹⁰⁶⁵ *ibid*, 414.

¹⁰⁶⁶ Commentary to Article 5 of Articles on State Responsibility, para. 7.

¹⁰⁶⁷ Macak (n 982) 410.

¹⁰⁶⁸ Maddocks ‘State Responsibility for International Law Violations Involving Non-State Actors in Armed Conflict’ (n 61) 143.

¹⁰⁶⁹ Macak (n 982) 415.

¹⁰⁷⁰ *ibid*.

¹⁰⁷¹ *ibid*; Maddocks ‘State Responsibility for International Law Violations Involving Non-State Actors in Armed Conflict’ (n 61) 143.

¹⁰⁷² Maddocks ‘State Responsibility for International Law Violations Involving Non-State Actors in Armed Conflict’ (n 61) 138

¹⁰⁷³ Carron (n 1050) 1023.

¹⁰⁷⁴ Maddocks ‘State Responsibility for International Law Violations Involving Non-State Actors in Armed Conflict’ (n 61) 144.

establish that the Nigerian State indeed exercises a degree of direction/control over the CJTF, sufficient enough to trigger attribution of the group's conduct to the government under Article 8 of Articles on State Responsibility. Worryingly, the case law of the International Court of Justice (ICJ) as well as International Criminal Tribunals (ICTs) reveals divergent judicial attitudes toward the understanding of the relationship between state responsibility, IHL, and the classification of armed conflicts in this context.¹⁰⁷⁵ In particular, in over three decades, the jurisprudence of the ICJ, as well as ICTs, have led to the development of several key tests, which have shaped the understanding of state responsibility. An examination of these tests is important in determining whether and to what extent the conduct of the CJTF can be attributed to the Nigerian State.

5.1.3.1. *Effective Control Test.*

The first place to start is the 'effective control' test, developed in the *Nicaragua Case*.¹⁰⁷⁶ In this case, the ICJ established a high threshold for attribution, i.e., that a State's support or encouragement for the act of an irregular force would be insufficient in engaging state responsibility. Rather, it must be shown that the State, indeed, had effective control i.e., a firm grip on the activities of the group.¹⁰⁷⁷ This test requires the State to exercise a detailed level of control over the conduct of the non-state entity, and it considers this in the context of the degree of direction/control exercised by the State. In addition to the group being wholly dependent on the State, there must be evidence that the State fully devised the group's strategy and tactics.¹⁰⁷⁸ In this case, the ICJ found this a decisive factor when it came to proving that a State issued specific instructions concerning the commission of an unlawful act. If evidence of a high degree of control is established, only acts performed under the State's control are considered attributable. Unauthorised conduct outside the control of the State is considered a private act and does not trigger state responsibility. In this case, the court was faced with the question of whether the conduct of the contras could be attributed to the US government. In answering this question, the Court stated as follows:

All the forms of the United States participation mentioned above, and even the general control by the respondent State over a force with a high degree

¹⁰⁷⁵ Remy Jorritsma, 'Where General International Law Meets International Humanitarian Law: Attribution of Conduct and Classification of Armed Conflicts' (2018) 23 (3) *Journal of Conflict & Security Law*, 405 - 431 at 406.

¹⁰⁷⁶ Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*) (*Merits Judgement*) (*Hereinafter* 'Nicaragua case') [1986] ICJ Rep. 14.

¹⁰⁷⁷ Marco Sassoli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 (846) *International Review of the Red Cross*, 401 - 434 at 407.

¹⁰⁷⁸ *Nicaragua case*, para. 108.

of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that, that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.

*Even decisive participation in the financing, organising, training, supplying, and equipping of the contras, the selection of its military or paramilitary targets, and the planning of whole of its operation, is still insufficient. It would in principle have to be proved that the that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.*¹⁰⁷⁹

Indeed, the above reasoning by the Court underpins the ‘effective control test’. The position of the court is that for the United States (US) to have legal responsibility for the conduct of the *Contras*, an irregular force that at that time was fighting against the Nicaraguan government, it must be proved that it had effective control of the group, in terms of military operations during which the alleged violations were committed.¹⁰⁸⁰ On the one hand, the ICJ was satisfied that there were specific instructions from US officials to the contras in Nicaragua.¹⁰⁸¹ On the other part, though it was clear from the evidence that the *Contras*, were at that time operating in the Nicaraguan conflict as a proxy army for the US and that the group was receiving active financial and military support from the American government, the ICJ held that the conduct of the group could not be attributed to the US government.¹⁰⁸² The Court distinguished between the initial and later years of the US’ assistance to the group.¹⁰⁸³ It noted that while the *Contras* were initially dependent on the US government in the earlier years, this was not the case in later years, as the activities of the group continued despite that the US government had ceased support.¹⁰⁸⁴ It, therefore, held that there was a lack of evidence to show that the US government did exercise a significant degree of control over the *Contras*, sufficient to trigger the attribution of the conduct of the latter to the former.¹⁰⁸⁵ In effect, the

¹⁰⁷⁹ *Nicaragua case*, para. 115.

¹⁰⁸⁰ Sassoli ‘State Responsibility for Violations of International Humanitarian Law’ (n 1076) 407; Mark Gibney, Katarina Tomasevski, and Jens Vedsted-Hansen, ‘Transnational State Responsibility for Violations of Human Rights’ (1999) 12 *Harvard Human Rights Journal*, 267 – 295 at 284.

¹⁰⁸¹ Leo Van den Hole (n 1050) 282.

¹⁰⁸² Greg Travalio and John Altenburg, ‘Terrorism, State Responsibility, and the Use of Military Force’ (2003) 4 (1) *Chicago Journal of International Law*, 97 – 119 at 103.

¹⁰⁸³ Stefan Talmon, ‘The Responsibility of Outside Powers for Acts of Successionists Entities’ (2009) 58 (3) *International & Comparative Law Quarterly*, 493 – 517 at 500.

¹⁰⁸⁴ *ibid.*

¹⁰⁸⁵ Travalio and Altenburg (n 1082).

Court in the *Nicaragua case* established a high threshold of direction/control that must be met before attribution can be triggered, thereby engaging state responsibility.

The ICJ's interpretation of state responsibility was further tested in the *Iran Hostages case*,¹⁰⁸⁶ where the Court was confronted with the question of whether the action of Iranian students, who took over the US embassy, taking hostage consular staff, could be attributed to the Iranian government.¹⁰⁸⁷ In approaching the issue, the court also divided the action of the students into two scenarios, i.e., the first being the initial takeover by the students, and the second, the period of occupation of the embassy.¹⁰⁸⁸ It held that while the action of the students at the takeover phase could not be attributed to the Iranian government as the students were not acting on behalf of the State, however after the takeover, the Iranian government made known its approval of the action, an action that significantly transformed the legal interpretation of the event, making attribution to the Iranian government possible.¹⁰⁸⁹ These two decisions demonstrate that mere financial, training, and logistical support to a group by a State would not be sufficient to trigger attribution, but that there must be evidence to show that the State did direct and control the activities of the group in question, in a significant manner.¹⁰⁹⁰

Engaging the rationale behind these decisions and their significance for state responsibility under international law, Travalio and Altenburg note that States cannot be expected to monitor and prevent all activities carried on within their territory, activities that would otherwise qualify as a violation of their international obligations.¹⁰⁹¹ Accordingly, they note that it would be inconceivable for a State to be held responsible for the conduct of all persons whose activities originate within their territory.¹⁰⁹² They note that states must have the discretion of how to allocate their resources in a manner that balances their domestic obligation to their citizens as well as comply with international obligations.¹⁰⁹³ Finally, they state that “no one should expect poor states, especially, to concentrate their resources solely, or even primarily, on preventing acts of violence against the citizens or property of other states”.¹⁰⁹⁴ This reasoning seems to reflect the dilemma inherent in attributing the actions of

¹⁰⁸⁶ Case Concerning United States Diplomatic and Consular Staff in Tehran, (*United States of America v. Iran*); Order, 12 v 81, ICJ [12 May 1981].

¹⁰⁸⁷ Travalio and Altenburg (n 1082) 103.

¹⁰⁸⁸ *ibid.*

¹⁰⁸⁹ *Ibid.*, 104.

¹⁰⁹⁰ *ibid.*

¹⁰⁹¹ *ibid.*

¹⁰⁹² *ibid.*

¹⁰⁹³ *ibid.*

¹⁰⁹⁴ *ibid.*

the CJTF as a hybrid irregular force to the Nigerian State. As established in Chapter 3, the group can be said to be acting on behalf of the Nigerian State in its counterinsurgency warfare, and to some degree, enjoys financial, material, and logistical support from the State. Despite this relationship, it is uncertain whether the Nigerian State indeed directs or controls the activities of the group, including its performance of governance functions. In any case, even if the government does direct or control the activities of the group, the question still remains whether the direction/control meets the threshold set in the Nicaragua and Iran Hostage cases. Is the direction/control of such a significant manner as to make the group an extension of the State, thereby triggering attribution? The direction/control does not meet this threshold. This is because the standard under the strict control test is one of requiring the State to engage in absolute direction/control of the group's activities. As discussed earlier in the Chapter, the provision of local governance functions by the CJTF, while flowing from the 2013 engagement of the group in limited combat functions, is not directed or controlled in any way by the Nigerian State. While the State has tolerated the group and turned a blind eye, thereby profiting from the group's governance activities, it has in no way taken positive steps to encourage the group or dictate how these activities are to be carried out.

5.1.3.2. *Overall Control Test.*

A second test is the overall control test developed by the Appeals Chamber of the International Criminal Tribunal for Yugoslavia (ICTY) in the *Tadic case*.¹⁰⁹⁵ In this case, the Court was faced with the question of whether the accused person could be found guilty of grave breaches of the Geneva Conventions during the armed conflict in Bosnia and Herzegovina after 19 May 1992, the date of the withdrawal of the Armed Forces of the Federal Republic of Yugoslavia (FRY), from the territory of Bosnia and Herzegovina.¹⁰⁹⁶ The Security Council via resolution 827 (1993) established the ICTY having determined the existence of a threat to international peace and security following allegations of mass killings, organised and systematic detention, and rape of women, as well as the practice of ethnic cleansing all on the territory of Bosnia and Herzegovina.¹⁰⁹⁷ The case involved one Dusko Tadic, a guard in the internment camps in Bosnia Herzegovina who was accused of the massacre of several persons, in which the Trial Chamber had to determine whether the armed

¹⁰⁹⁵ *Prosecutor v. Tadic*, ICTY-94-1-A (1999) 38 ILM 1518, para. 106, 111.

¹⁰⁹⁶ Talmon (n 1083) 504.

¹⁰⁹⁷ Andre J.J. De Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadic Case, and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2002) 72 (1) *British Yearbook of International Law*, 255 – 292 at 255.

group that carried out the atrocities was acting on behalf of FRY. If the armed group was acting on behalf of the FRY, i.e., if the FRY exercised effective direction/control on this group, the implication is that the armed conflict is deemed of an international character, and Tadic could be tried under Article 2 of the ICTY's Statute.¹⁰⁹⁸ However, if the armed group was not acting on behalf of the FRY, the armed conflict falls under the classification of a NIAC, which ousts the jurisdiction of the Court.¹⁰⁹⁹ Applying the threshold of the effective control test set in the *Nicaragua case*, the Trial Chamber held that there was a lack of evidence that the Bosnian Serb was acting under the effective direction/control of the FRY. It therefore concluded that the requisite level of control was not attained and accordingly attribution could not be triggered. Consequently, the matter came before the Appeals Chamber, which also applied the ICJ judgement in the *Nicaragua case* to determine the attribution of acts to the State. In delivering judgement, the Court dismissed the ICJ's *Nicaragua* decision as contrary to the reasoning under the law of state responsibility and as being at variance with state and judicial practice, following which it developed the 'overall control' test.¹¹⁰⁰ Departing from the Trial chamber's position, it stated that:

*In order to attribute the acts of a military or paramilitary group, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.*¹¹⁰¹

Based on its consideration of the version of Article 8 the ILC adopted in 1998, the Appeals Chamber held that a high degree of control is not required in every situation or circumstance.¹¹⁰² Introducing the concept of 'overall control', the Appeals Chamber accepted that a State's action in equipping, financing, and coordinating the general planning of an organised group's military operation is a sufficient demonstration of control by the State.¹¹⁰³ This was a departure from the ICJ's earlier position, requiring the State to exercise control

¹⁰⁹⁸ Article 2, Statute of the International Criminal Tribunal for the Former Yugoslavia, (adopted by the UNSC Res. 827, 25 May 1993).

¹⁰⁹⁹ Maddocks 'State Responsibility for International Law Violations Involving Non-State Actors in Armed Conflict' (n 61) 156.

¹¹⁰⁰ Sassoli 'State Responsibility for Violations of International Humanitarian Law' (n 1076) 408; *Prosecutor v. Tadic*, para. 115.

¹¹⁰¹ *Tadic Appeal Chamber*, para. 131.

¹¹⁰² *ibid*, para. 117 – 120.

¹¹⁰³ Lindsey Cameron and Vincent Chetail, *Privatising War: Private Military and Security Companies under International Law*, (Cambridge University Press, 2013), 1 – 720 at 218.

over specific military operations of such a group.¹¹⁰⁴ The reasoning of the Appeals Chamber demonstrates the fact that the focus of the overall control test is the extent of direction/control exercised by the State over a non-state entity, as against direction/control over specific acts.¹¹⁰⁵ For the court, whenever a State works with organised groups, it ought to be assumed that such a group acts under the authority of the State.¹¹⁰⁶ The Appeals Chamber noted that for the conduct of private individuals to be attributable to a State, the rule under international law is that the State must exercise control over such individuals.¹¹⁰⁷ It, however, noted that the degree of control is a matter of the facts and circumstances of each case.¹¹⁰⁸ Concerning private individuals or an unorganised group of individuals, the ‘effective control’ test may be applicable; however, when it comes to individuals making up organised groups, i.e., a military unit, paramilitary groups, armbands of irregular forces, etc. the correct approach of attributing conduct of such a group to the State is the ‘overall control’ test.¹¹⁰⁹ For attribution to be possible using the ‘overall control’ test, the State must exercise overall control over the non-state entity, not just by providing financial, material, and logistical support, but by being actively involved in the process of coordinating, organising, planning, and directing the non-state entity military and other activities.¹¹¹⁰ For clarity, concerning the State coordinating, organising, and directing the military and other activities of the non-state entity, it is not necessary that the State plan or direct the particular operation in the course of which the conduct in question was committed, or choose targets for military operations, or give specific orders.¹¹¹¹ Rather, the test can be fulfilled even if the non-state entity has autonomous means and tactics in its military operations, though involved in a common strategy with the state.¹¹¹² This is in contrast to the position of Special Rapporteur Crawford, who had earlier noted that for a conduct to be attributable to the state based on direction/control, the acts in question must be a “necessary, integral, or intended part” of a specific operation.¹¹¹³

¹¹⁰⁴ *ibid.*

¹¹⁰⁵ Maddocks, ‘State Responsibility for International Law Violations Involving Non-State Actors in Armed Conflict’ (n 61) 158.

¹¹⁰⁶ Graham Cronogue, ‘Rebels, Negligent Support and State Accountability: Holding States Accountable for the Human Rights of Violations of Non-State Actors’ (2013) 23 *Duke Journal of International & Comparative Law*, 365 – 388 at 372.

¹¹⁰⁷ Talmon (n 1083) 505.

¹¹⁰⁸ *Prosecutor v. Tadic*, para. 117.

¹¹⁰⁹ *ibid.*, para. 120, 124, 125, 128, 145.

¹¹¹⁰ *ibid.*, para. 131, 137, 138, 145; *Prosecutor v. Kordic and Cerkez (Judgement)* ICTY-95-14/2-T (26 Feb. 2001) para. 115, and (*Judgement*) ICTY-95-14/2-A (17 Dec. 2004), para. 361.

¹¹¹¹ *ibid.*, para. 131, 132, 137, 145; *Prosecutor v. Aleksovski* para. 143.

¹¹¹² *Prosecutor v. Delalic, (Judgement)* ICTY-96-21-A (20 Feb. 2001), 40 ILM 630, para. 47.

¹¹¹³ Crawford, First Report (1998) p. 43 at 213.

In essence, the Bosnian Serb Armed Forces could engage the state responsibility of the Armed Forces of FRY, without the Bosnian Serb Armed Forces having to prove that it took instructions from FRY¹¹¹⁴ and even without a clear link between FRY and the human rights violations in question.¹¹¹⁵ In the view of the Appeals Chamber, the FRY clearly exercised overall control over the Bosnian Serb Armed Forces and it is immaterial that the FRY did not authorise or specifically order the specific operations during which the alleged violations were carried out.¹¹¹⁶ The reasoning undergirding the above decision is that such organised groups have a structure of command, a set of rules, some symbol of authority, as well as a series of activities.¹¹¹⁷ It is worth stating that the overall control test, as developed by the Appeals Chamber, established a lower threshold compared to the seemingly strict ‘effective control’ test developed in the *Nicaragua case*.¹¹¹⁸ However, both approaches have a convergence, i.e., that the state must in some way, direct or control the conduct of the non-state entity and not just support or condone its conduct.¹¹¹⁹

As the analysis above shows, the overall control test applies only to organised armed groups, while the effective control test applies to the unorganised groups. It therefore means that for the overall control test to apply to the CJTF, it must be clear that the groups fall within the category of an organised armed group, as against an unorganised group. The ICTY in *Prosecutor v. Boskoski and Tarculovski*,¹¹²⁰ identified several factors for a group to be considered an organised armed group. These include the existence of a command structure, an headquarters, disciplinary rules within the group, the fact that the group controls a territory, the ability of the group to gain access to weapons, or other military equipment, its ability to plan, coordinate and carry out military operations, its ability to define a unified military strategy and deploy military tactics, and its ability to conclude negotiations such as ceasefire or peace accords.¹¹²¹ These characteristics are missing in the CJTF. Even if some of the characteristics are found in the group, the majority are lacking, such as control of territory, access to weapons and other military equipment, ability to plan and coordinate military operations, and ability to negotiate a ceasefire agreement. Indeed, as a volunteer

¹¹¹⁴ *Prosecutor v. Tadic*, para. 121.

¹¹¹⁵ Cronogue, (n 1106) 372.

¹¹¹⁶ *Tadic Appeal Chamber*, para. 156.

¹¹¹⁷ Talmon (n 1083) 505.

¹¹¹⁸ *Prosecutor v. Delalic*, para. 20; *Prosecutor v. Aleksovski*, para. 145.

¹¹¹⁹ Jinks (n 1015) 89.

¹¹²⁰ *Prosecutor v. Boskoski and Tarculovski*, Case No. ICTY-IT-04-82-T, Judgement (Trial Chamber) 10 June 2008, para. 194 – 205.

¹¹²¹ *ibid.*

defensive force made up largely of hunters and local youths, the groups sufficiently lack the character of an organised armed group. Based on this, applying the overall control test to the group is difficult, meaning that the likelihood of using this as the pathway to attributing the group's conduct to the Nigerian State based on direction/control is remote.

5.1.3.3. *Strict Control Test.*

The validity of the ICJ 'effective control' approach later came up for determination in the *Bosnia Genocide case*,¹¹²² which bordered on the responsibility of the State of Serbia and Montenegro, for the activities of the group, the *Army of the Republika Srpska (VRS)*, a successionist armed group that was created in 1992 with the help of the Federal Republic of Yugoslavia (FRY). It also extended to the question of whether the VRS and the paramilitary entities that actively participated in the massacre at Srebrenica, such as 'the Scorpions', 'the Tigers', and 'the White Eagles', could be considered organs of the FRY.¹¹²³ For the most part, the Court held that a non-state entity becomes a *de facto* organ of the State only when it operates based on 'complete dependence' on the State while the State exercises strict control over the entity's activities.¹¹²⁴ This is the strict control test, considered very stringent. Once an entity qualifies as a *de facto* organ of the state, it is to be viewed as having the same status as an organ of the state designated under an internal law, meaning that all of its conducts, except for those performed in a private capacity, are attributable to the State.

In the *Bosnia Genocide case*, the Court established that the forces of the *Army of the Republika Srpska (VRS)* had perpetrated genocide in Srebrenica.¹¹²⁵ It found that there was corroborated evidence that showed that the decision to kill the adult male population of the Muslim community in Srebrenica was by the VRS.¹¹²⁶ The issue then turned to whether these forces had acted on behalf of the FRY, based on which their conduct would be attributed to the State in question.¹¹²⁷ After reaffirming the 'effective control test', the ICJ had to apply it to the genocide carried out in Srebrenica.¹¹²⁸ The Court held that the evidence before it did not

¹¹²² Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (*Bosnia and Herzegovina v. Serbia and Montenegro*) (Hereinafter 'Bosnia Genocide Case') [26 Feb. 2007] Judgment ICJ Rep. 2007, p. 43.

¹¹²³ Ademola Abass, 'Proving State Responsibility for Genocide: The ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur' (2007) 31 (4) *Fordham International Law Journal*, 871 – 910 at 890.

¹¹²⁴ *Bosnia Genocide Case*, para. 391 – 394.

¹¹²⁵ *ibid*, para. 297

¹¹²⁶ *ibid*, para. 231 – 376.

¹¹²⁷ Antonio Cassese, 'The Nicaragua and Tadic Tests Revisited in the Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 (4) *European Journal of International Law*, 649 – 668 at 650.

¹¹²⁸ Maddocks, 'State Responsibility for International Law Violations Involving Non-State Actors in Armed Conflict' (n 61) 164.

prove that the acts of VRS could be attributed to FRY. A further question was whether the VRS could be considered a *de jure* organ of FRY. The Court held that there is nothing to justify such a position. It stated in particular that “it has not been shown that the FRY army took part in the massacres, nor that the political leaders of the FRY had a hand in preparing, planning or in any way carrying out the massacres”.¹¹²⁹ Whereas there was evidence of collaborations between the FRY army and the VRS in military operations in Bosnia and Herzegovina in the years before the massacre at Srebrenica, this does not suggest a direct role of the FRY army in the massacre. The Court held that the VRS could not be considered a *de jure* organ of Yugoslavia or equated with any of its organs, since it did not have that status under the FRY’s internal laws.¹¹³⁰ According to the Court, there is no doubt that FRY was providing substantial financial assistance to the VRS, and one such way was through the payment of salaries of officers and men of the Bosnian Serb Armed Forces, however, it noted that this does not automatically make them an organ of the FRY.¹¹³¹ The Court held that officers of the Bosnian Serb Armed Forces were appointed to their command by the President of Republika Srpska and were subordinate to its political leadership. It held that in the absence of contrary evidence, these officers must be considered as receiving their orders from the President of Republika Srpska and not the FRY.¹¹³² The question that followed was whether they could be considered *de facto* organs of the same state.¹¹³³ To answer this question, the Court deployed the effective control test established in the Nicaragua case.¹¹³⁴ The Court noted that this test coincides with the standards of attribution enunciated in Article 8 of the Articles on State Responsibility, which it considers customary international law.¹¹³⁵ The Court noted that the overall control test developed in the *Tadic case* overly broadens the scope of state responsibility, as it extends beyond the three standards set out in Article 8 of the Articles on State Responsibility.¹¹³⁶

The Court held that the question of direction/control was one of the extent or the degree of dependency of the successionist group on the FRY, suggestive of the extent of control FRY exercised on the group. In this case, the ICJ distinguished between two types of controls, i.e., strict control based on complete dependence and effective control based on partial

¹¹²⁹ *Bosnia Genocide Case*, para. 386.

¹¹³⁰ *ibid.*

¹¹³¹ *ibid.*, para. 388.

¹¹³² *ibid.*

¹¹³³ *ibid.*, para. 390.

¹¹³⁴ Cassese, ‘The Nicaragua and Tadic Tests Revisited in the Light of the ICJ Judgment on Genocide in Bosnia’ (n 1127) 650.

¹¹³⁵ *ibid.*

¹¹³⁶ *Bosnian Genocide Case*, para. 406.

dependence. The strict control test was explained to mean a situation whereby the relationship of the non-state entity and the State is one of dependence on one side and control on the other side, to the extent that the authority of the non-state entity can be equated with that of a *de facto* organ of the State.¹¹³⁷ For the non-state entity to be equated with a *de facto* organ of the State, the requirements of strict control developed by the ICJ in the *Nicaragua case* must be satisfied.¹¹³⁸ This includes the fact that the non-state entity completely depends on the State; the complete dependence must involve all the activities of the non-state entity, and the State must have exercised a high degree of control, indicative of an exploitation of this complete dependence.¹¹³⁹

What this means is that the non-state entity must depend completely on the State, a scenario that can now be interpreted as having created the potential for ‘strict control’.¹¹⁴⁰ Complete dependence means that the non-state entity lacks autonomy and is merely an instrument used by the state to achieve its interests.¹¹⁴¹ In other words, to trigger state responsibility, private acts of non-state entities may be equated with state organs even if that status is not based on an internal law, so long as the private actor or non-state entity operate in complete dependence on the State, in which it is being merely used as an instrument.¹¹⁴²

Furthermore, in a situation where it can be established that the state created and organised the non-state entity, this may point to complete dependence and evidence of a strong presumption that the group is nothing but a tool in the hands of the State.¹¹⁴³ Complete dependence may also be inferred if the non-state entity would not be able to carry out its activities without the active support of the State and if the cessation of such support would mean the end of the entity.¹¹⁴⁴ On the other hand, a situation where the State simply took advantage of the existence of the entity and incorporated it into its framework would not be a sufficient basis.¹¹⁴⁵ In this case, the Court noted that while the political, military, and logistical relationship between the several forces of VRS had been strong in previous years, at the time of the Srebrenica massacre they were not of that nature that the Bosnian Serb military and

¹¹³⁷ Talmon (n 1083) 498.

¹¹³⁸ *ibid.*

¹¹³⁹ *ibid.*

¹¹⁴⁰ *Nicaragua Case*, para. 109 – 110; *Bosnia Genocide Case*, para. 392, 393.

¹¹⁴¹ *ibid.*, para. 114; *ibid.*, para. 392, 394.

¹¹⁴² *Bosnia Genocide Case*, para. 392, 393; Dapo Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’ in Wilmshurst (ed.) *International Law and the Classification of Armed Conflicts*, (Oxford University Press, 2012), 32 – 79 at 70.

¹¹⁴³ *Nicaragua Case*, para. 93, 94, 108.

¹¹⁴⁴ *ibid.*, para. 109, 110, 111.

¹¹⁴⁵ *ibid.*, para. 108.

political organisation could be equated with organs of the FRY.¹¹⁴⁶ It noted that there were even reports of differences in matters of strategic options between the FRY government and the Bosnian Serb authorities.¹¹⁴⁷ This means that the VRS had, though qualified, a real margin of independence.¹¹⁴⁸ This effectively overruled any argument of complete dependence. From the evidence adduced, it was established that the paramilitary groups operated under the control and authority of the generals of the VRS.¹¹⁴⁹ This made it difficult to assert that Serbia was in effective control of these groups or gave them direct instructions.¹¹⁵⁰ In particular, the Court stated that:

*The Applicant has not proved that instructions were issued by the Federal authorities in Belgrade, or by any organ of the FRY, to commit the massacres, still less that any such instructions were given with the specific intent (dolus specialis) characterising the crime of genocide, which would have had to be present in order for the Respondent to be held responsible on this basis.*¹¹⁵¹

Conclusively, the Court held that the acts of genocide in Srebrenica could not be attributed to the FRY, as acts committed by its organs or person completely dependent on it, making it impossible to trigger the applicability of the law of state responsibility.¹¹⁵² It is important to understand whether the strict control test applies to the relationship between the CJTF and the Nigerian State. To start with, the relationship between the *Republika Srpska* and FRY is different from the relationship between the Nigerian State and the CJTF. On January 9, 1992, the Bosnian Serb Assembly declared *Republika Srpska*, a new political entity, as the independent ‘Republic of the Serb People of Bosnia and Herzegovina’ to protect the interests of the Serbs of Bosnia and Herzegovina. And so, it was a major political entity made up of about 1.2 million Serbians. Thus, it was like the governmental authority in Bosnia and Herzegovina. Indeed, the Court in the *Tadic Case* found that the Serbian Army was a creation of the *Republika Srpska*.¹¹⁵³

On the other hand, in the case of the CJTF, the group started in 2013 as an independent volunteer corps, comprising ordinary citizens who had endured horrific attacks by the Boko

¹¹⁴⁶ *Bosnia Genocide Case*, para. 394

¹¹⁴⁷ *ibid*, para. 394

¹¹⁴⁸ *ibid*, para. 394.

¹¹⁴⁹ *ibid*, para. 395

¹¹⁵⁰ Ademola Abass, ‘Proving State Responsibility for Genocide: The ICJ in *Bosnia v. Serbia* and the International Commission of Inquiry for Darfur’ (2007) 31 (4) *Fordham International Law Journal*, 871 – 910 at 893.

¹¹⁵¹ *Bosnia Genocide Case*, para. 413.

¹¹⁵² *ibid*, para. 395

¹¹⁵³ Robert M. Hayden, ‘Bosnia’s Internal War and The International Criminal Tribunal’ (1998) 22 (1) *The Fletcher Forum of World Affairs*, 45 – 64 at 46.

Haram insurgent group for years and had also become frustrated by the inability of the Nigerian Armed Forces to effectively protect their local communities from these attacks. And so, the group came up all by itself and operated in that manner until it was co-opted by the State through the Armed Forces. Even at the time this relationship began, the co-opting was not full, rather the State started appropriating the group for its benefit without entirely integrating its members into the State's regular Armed Forces. In light of this, demonstrating that the CJTF operated based on 'complete dependence' on the Nigerian State is likely to prove challenging. Clearly, the character of the CJTF is entirely different from that of the groups for which the strict control test was developed.

Furthermore, it is necessary to examine whether the Nigerian State at any time gave direct instructions to the CJTF to carry out specific acts, as well as the extent to which the government directs or controls the conduct of the CJTF. In short, it is needful to determine whether the group can be deemed as completely dependent on the State, in order to trigger attribution. This is because, in both the *Nicaragua case* as well as the *Bosnia Genocide case*, the conclusion of the courts points to the fact that if a person or group does not satisfy the test of being a *de jure* or *de facto* organ of a State in terms of complete dependence, State responsibility could only be triggered if that person or organ were under the effective control of the State, effective control that must be fulfilled for each operation.¹¹⁵⁴ When related to this thesis, it means that where it is difficult to show that the CJTF is under the direction/control of the Nigerian State, the meaning is that attribution becomes legally impossible. It is also important to bear in mind the main intent underlying the requirement of state 'direction or control'. As Jink notes, "it is important to recall that these tests are, after all, designed to define the circumstances in which private actors are *de facto* agents or instrumentalities of the state".¹¹⁵⁵ It would, therefore, be useful to understand more precisely whether members of the group receive orders and commands from the Nigerian Armed Forces for specific operations.

There is a lack of evidence to show that the Nigerian State, either by itself or through the Armed Forces, at any time gave specific instructions to the CJTF to carry out the alleged violations of international law norms connected to its activities as a hybrid irregular force. This is not surprising, as it is rare to find States that coopt irregular forces, issuing specific instructions to such groups to do certain things. Equally, the relationship between the State and the CJTF does not show elements of direction/control. As already stated in Chapter Three

¹¹⁵⁴ Carron (n 1050) 1024.

¹¹⁵⁵ Jinks (n 1015) 89.

and the earlier part of this chapter, the group was not an idea conceived or created by the Nigerian state, rather the group emerged in 2013, as a community-based self-defense force, made up of local hunters and youths, who organized themselves into a sort of local militia group to defend their communities from attacks by the Boko Haram insurgents as well as from the violence of the Military. It is more of a citizens-driven counterinsurgent force, strengthening the existing traditional security system put in place by the State.¹¹⁵⁶ Some of its members receive little or no remuneration from the Nigerian State, and many also lack necessary insurance cover.¹¹⁵⁷ For their combat operations, they simply carried dane guns, sticks, cutlasses, etc, as their main weapons for defending their communities.

It is also important to state that the group operates in a fragmented manner. For example, in the three states of Adamawa, Borno, and Yobe, where the insurgency has hit hard the most, the group's operation is in different forms, with the group in one state differing from that in another. Whilst in Adamawa, there were very few members of the group, given the strong presence of existing vigilante groups in the state, in Yobe state, the group consists of volunteers as well as others receiving remuneration from the state government.¹¹⁵⁸ In Borno state, the epicentre of the insurgency, the group also operates in two forms. On the one hand, there is an arm that operates under the banner of the Borno Youth Empowerment Scheme (BOYES) who are paid a stipend by the Borno state government, and on the other hand, there are volunteers who received no remuneration at all.¹¹⁵⁹ The volunteers in Borno and the vigilantes in Adamawa are made up of businessmen, students, civil servants, and students, who are bi-vocational, oscillating between their work in the group and their vocations. Accordingly, concerning its set-up, the group is organised more as a self-run, self-funded organisation that depends largely on out-of-pocket finances to run its operations, with limited oversight from the State.

It is safe to say that the Nigerian State was not exercising that degree of direction/control over the CJTF, whether strict control, effective control, or even overall control, in a manner sufficient enough to be a solid basis for attributing the group's conduct to the state. While a branch of the group is paid a stipend by the Borno state government, it is clear that it was just this authority, i.e., the Borno government, a sub-national authority that oversaw the group's

¹¹⁵⁶ Oluseun Bamidele, 'Creating the Deserved Protection: Reflections on Civilian Joint Task Force Counterinsurgency Operations in North-east Region of Nigeria' (2007) 4 (1) *Journal of Law, Society, and Development*, 1 – 22 at 3.

¹¹⁵⁷ *ibid.*

¹¹⁵⁸ *ibid.*

¹¹⁵⁹ *ibid.*

activities, and even this was not based on complete control. Besides this small group that was paid, though not controlled by the Borno state government, the larger majority of the group practically operated on its own. In the context of this scenario, applying the strict control as well as the other two tests discussed earlier, becomes difficult, making attribution a problem. When one looks at the relationship between the CJTF and the Nigerian State, it seems safe to conclude that the State was simply profiting from the competencies of the group, within the boundaries of its limited relationship with the group. It seems safe to further conclude that the State cautiously and deliberately avoided significant direction/control over the group's activities, to evade the threshold of direction/control required to trigger attribution and thereby making the possibility of engaging its responsibility for the group's conduct difficult, if not impossible.

From the above discussion, it is clear that the issue of what constitute 'control' in any particular circumstance is a matter of debate. Though the ILC has endorsed the effective control test for responsibility under Article 8 and dismissed the overall control test, the Articles on State Responsibility do not define a standard of control for the purpose of attribution.¹¹⁶⁰ Also, while the ICJ's interpretation on the issue of control does carry significant weight, it is not binding on all States, except for those directly involved in the matter before the court.¹¹⁶¹ At the same time, the Court's approach to interpreting control is different from what obtains under the Articles on State Responsibility.¹¹⁶² This continuing shift is indicative of the fact that what amounts to control, remains a contentious issue in the discourse on state responsibility.¹¹⁶³ It appears unlikely attributing the conduct of a non-state entity to a State where strict control has been established, though establishing complete dependence is certain to be very difficult, if not impossible.¹¹⁶⁴ In the same breadth, while the threshold for effective control is lower than that of strict control, in practice establishing effective control is still difficult.¹¹⁶⁵ However, whether 'effective control', or 'overall control', or even 'effective overall control', it would appear that ultimately the question of whether an international or domestic court would attribute the conduct of a militia or volunteer force to a state would depend largely on how the term 'control' is defined in the light of the

¹¹⁶⁰ Marko Milanovic, 'State Responsibility for Genocide' (2006) 17 (3) *European Journal of International Law*, 553 – 604 at 583.

¹¹⁶¹ Kristen E. Boon, 'Are Control Tests fit for the Future? The Slippage Problem in Attribution Doctrines' (2014) 15 *Melbourne Journal of International Law*, 1 – 48 at 7.

¹¹⁶² *ibid.*

¹¹⁶³ *ibid.*

¹¹⁶⁴ Stefan Talmon, (n 1083) 501.

¹¹⁶⁵ *ibid.*, 502.

circumstances of the case in question. This is reflected in recent novel interpretation of control by national courts such as in the case of the *Mothers of Srebrenica v. State of the Netherlands*¹¹⁶⁶ and *Jaloud v. State of the Netherlands*,¹¹⁶⁷ in which Dutch courts attributed the conduct of UN peacekeeping forces and Iraqi Soldiers to the Netherlands respectively.¹¹⁶⁸ In the context of this research, it would have to be proved that organs of the Nigerian State, directly took part in the activities of the CJTF, or that the Nigerian political leadership indeed played an active role in preparing, planning, and carrying out the group's activities, for attribution to be possible.

5.2. Expanding the Pathways to State Responsibility for Conduct of Hybrid Irregular Forces – Rethinking the Notion of ‘Empowerment by Law’ under Article 7 of the Articles on State Responsibility 2001.

This Chapter has reinstated the challenges before the current international law framework concerning the question of whether and to what extent the Nigerian State be held responsible for the conduct of the CJTF acting as a hybrid irregular force in the country's counterinsurgency warfare against Boko Haram. It has revealed a responsibility gap regarding the issue of whether a State can be held responsible for the conduct of an irregular force operating in hybrid form. It has demonstrated that state responsibility can only be established for the conduct of organs of the state as provided in Article 4 of the Articles on State Responsibility i.e., *de jure* organs of the state, or for *de facto* organs as established in the *Bosnia Genocide case* i.e., based on complete dependence on the State. Going by the analysis in this Chapter, the conduct of irregular forces such as CDFs operating in a hybrid form leading to violations of international law does not come within the contemplation of the provision. Such irregular forces do not qualify as *de jure* organs of the State due to the absence of an internal law granting them such status (Article 4). More so, given the degree of independence they enjoy, i.e., that the State doesn't exercise complete control over them, they can't be classified as *de facto* organs of the State. Further to this, they do not also qualify as *de facto* organs of the State because the relationship between them and the State doesn't fulfill the condition established in the *Bosnia Genocide case* i.e., that they were established by the State; that their leaders were appointed by the State; that they are solely financed by

¹¹⁶⁶ Supreme Court of the Netherlands 19 July 2019, ECLI: NL: HR:2019:1284 (*The Netherlands v. Stichting Mothers of Srebrenica and Others*).

¹¹⁶⁷ Dutch Court of the Hague 20 November 2019, ECLI: NL: RBHDA: 2019:1223 (*Jaloud v. State of Netherlands*).

¹¹⁶⁸ Cedric Ryngaert, 'Attributing Conduct in the Law of State Responsibility: Lessons from Dutch Courts Applying the Control Standard in the Context of International Military Operations (2021) 36 (2) *Utrecht Journal of International and European Law*, 170 – 180 at 171.

the State; and that their operations are wholly directed by the State.¹¹⁶⁹ With the lack of an internal law and absence of complete dependence, it becomes difficult to trigger state responsibility either alternatively under Article 7 or based on a combination of both Article 4 and 7. What this Chapter has revealed is that when compared with the responsibility of a State for the conduct of its regular organs such as its Armed Forces or other State agencies, the options available for possible attribution of private conduct of irregular forces are extremely restrictive. It has shown that unless a State directly incorporates such an irregular force into its Armed Forces or any other agency of the State, granting them the status of *de jure* state organs, or it can be proven that the group is completely dependent on the State in such a manner that it is merely operating as an agent of the latter, responsibility would be practically impossible.

It has shown that an inherent limit in the current framework is that the factual working relationship between the State and Irregular Forces, within which such groups then operate as hybrid actors, isn't accommodated under the current law. Relying solely on the grounds under the existing framework, in particular, those presently provided under Articles 4 and 7 are insufficient for addressing the problems associated with the conduct of irregular forces. Given that irregular forces are increasingly assuming a more prominent role in counterinsurgency warfare, the rigid formulation of rules under the current framework provides States with an opportunity to engage such groups while escaping responsibility for their actions. Put differently, if the requirement for attribution remains at this high threshold, States would continue to evade responsibility, thereby rendering international law incompetent.

In light of this responsibility gap, the thesis argues that the most effective approach to disincentivising States' use of such groups is to adopt an expansive approach under Article 7 of the Articles on State Responsibility. It recommends that it is advisable to categorise the working relationship between a State and an irregular force as sufficient to qualify the latter as a *de facto* organ of the former, even when such may not fully satisfy the conditions established in the *Bosnia Genocide case*. It is rare to find States issuing direct instructions to irregular groups that they have coopted in counterinsurgency warfare, asking them to carry out certain wrongful actions, which would have been verifiable evidence of complete dependence. At the same time, States most often do not enact internal laws to govern the

¹¹⁶⁹ The Court in this case further notes that "...persons or entities may for the purpose of international responsibility be equated with State organs, even if that status does not follow from an internal law, provided that in fact the persons or entities act in complete dependence on the State, of which they are ultimately merely the instrument". *Bosnia Genocide case*, para. 391.

activities of these groups or empower them to act on the States' behalf, as this will most certainly directly implicate the State. Overall, the relationship between States and groups of this nature, are usually clandestine, in the sense that, active interactions between the two parties are generally concealed, disguised, and mostly conducted through informal and remote channels, that are difficult to trace, thereby making it difficult to provide evidence of direction/control or complete dependence.

This is indicative of the fact that States, being fully aware of the requirement of attribution under the law of state responsibility framework and the implications thereof, are likely to act in a manner that will shield them from responsibility. With the insistence on 'empowerment through law' under Article 7 and the strict/restrictive interpretation of what amounts to direction/control by the various courts regarding *de facto* organs of the State, the law of state responsibility fails to provide a robust framework for attributing all private conduct to states. This is notwithstanding clear evidence of a verifiable relationship, as well as the state benefiting from such a relationship. The reality, therefore, is that, despite the increase in the number of states engaging CDFs in counterinsurgency warfare and other armed conflicts, with some of these groups operating as hybrid irregular forces, only in a few situations will a move towards state responsibility succeed, that is if it does commence at all. This is a fact that the activities of the CJTF as a hybrid irregular force in this counterinsurgency sufficiently demonstrate. This is a group that has been fighting on behalf of the Nigerian State, and not for itself, like it is the case with opposition ANSAs such as Boko Haram or Al Shabab. The group's involvement in the counterinsurgency was only made possible because the Nigerian State empowered it to perform limited combat functions on its behalf, only that this empowerment was not carried out based on an internal law. The question, therefore, is – should States be allowed to profit from their deliberate game of empowering non-state entities through all other means to act on their behalf, except through the enactment of an internal law? This thesis does not think so.

This thesis therefore recommends that an expansive approach to determining the empowerment of a non-state entity by a State be developed under Article 7 of the Articles on State Responsibility, which contains the rule relating a state's delegation of governmental authority to non-state entities. It is however important to justify how this provision can be developed as a suitable basis for potential attribution of the conduct of groups such as the CJTF to States. The text of Article 7 states that:

*The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person, or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.*¹¹⁷⁰

An important part of the above provision is the clause “...entity empowered to exercise elements of the governmental authority”. The focus here is that it must be demonstrated that a State indeed empowered the non-state entity to exercise elements of governmental authority and under the current rules, the only proof of empowerment recognised is ‘empowerment through an internal law’. What this means is that to successfully trigger attribution under Article 7, the act of the State empowering a non-state entity to exercise governmental authority must be expressly defined in a written law of the State. This is so because the provisions of Article 7 build on the earlier provision in Article 5 of the Articles on State Responsibility which provides that:

*The conduct of a person or entity which is not an organ of the state under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the state under international law, provided the person or entity is acting in that capacity in the particular instance.*¹¹⁷¹

As seen in the clause “...but which is empowered by the law of that State to exercise elements of the governmental authority” it is clear that the empowerment envisaged in Article 7 is expected to be based on an internal law deriving from Article 5. Indeed, the commentary to the provision in Article 7 reaffirms this position, stating that:

*As formulated, Article 7 only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, i.e., only to those cases of attribution covered by Articles 4, 5, and 6.*¹¹⁷²

The implication of the above is that the Articles on State Responsibility oust any other form of empowerment, such as empowerment that can be implied from facts and circumstances, a verifiable principal-agent relationship, or a contract. The insistence of Article 7 on empowerment being reduced to a written law is indicative of a narrow approach to triggering attribution under this provision, which undercuts the prospects of state responsibility to a great extent. It incentivises States to clandestinely use non-state entities such as CDFs to achieve their security and defence goals, rather than their Armed Forces. One can assume that in crafting the provisions of Article 7, the ILC failed to take cognisance of the myriad of ways

¹¹⁷⁰ Article 7, Articles on State Responsibility 2001.

¹¹⁷¹ Article 5, *ibid.*

¹¹⁷² Commentary to Article 7, Articles on State Responsibility 2001, para. 9.

in which States engage with non-state entities, which often leads to one form of empowerment or the other. The point must be made that a State can indeed act in ways that give a non-state entity a sense of empowerment without the State taking the difficult path of enacting an internal law or directly controlling the entirety of the group's operations. For example, in the case of the CJTF, by simply accompanying troops of the Nigerian Armed Forces on combat missions, the group has over time acquired an elevated status in the eye of the local population who often view them as soldiers. They had acquired an identity based on their affiliation with the Armed Forces. This can be seen in their name, i.e., while troops of the regular Armed Forces are called Joint Task Force (JTF) members, the group is called Civilian Joint Task Force (CJTF). Accordingly, when they began to perform local governance functions, they were simply viewed as agents of the state, deploying governance to achieve the aims of the counterinsurgency.

In light of the above, this thesis recommends a broadening of the rules, in that while empowerment through an internal law be retained as the first means by which a State can empower a non-state entity to exercise elements of governmental authority, empowerment by other means such as the clear evidence of a working relationship in form of a State coopting a CDF into a counterinsurgency structure, be also considered an additional form of empowerment. As against the strict requirement of an internal law as evidence of empowerment, adding this additional layer of empowerment will significantly open up more opportunities for state responsibility. The recommendation of this thesis is in tandem with the views of Maddocks, whose research in the last few years has been focused on state responsibility for the conduct of non-state actors.¹¹⁷³ Speaking as follows, Maddocks notes that:

*When considering the issue of empowerment, a preliminary consideration is whether the relevant powers were delegated in accordance with the state's internal law. In this respect, any form of legal empowerment will suffice, whether this is effected through legislation, regulation, contract, or any other means permitted under the domestic legal regime. In the absence of legal empowerment, however, it is submitted that other forms of state authorisation become relevant. Provided the state positively empowered the private entity to act, even in a manner inconsistent with domestic laws, then the pursuant conduct of the entity should be attributable to the state. The contrary conclusion goes against the spirit of ARSIWA and offers an incentive to states to outsource public functions in an illegitimate manner.*¹¹⁷⁴

¹¹⁷³ Maddocks 'Outsourcing of Governmental Functions in Contemporary Conflict' (n 76) 94.

¹¹⁷⁴ *ibid.*

Maddock again reaffirms the same view, though in another form, stating that:

*...when a state effectively outsources the role of its armed forces to an NSA, that NSA's conduct should be attributable to the state, irrespective of the state's exercise of control, and irrespective of the means through which the NSA is empowered to act.*¹¹⁷⁵

Maddocks view has been strongly expressed in the literature on state responsibility for conduct of Private Military Companies (PMC), who share similarities with irregular forces. There is growing consensus that the combat-related functions of PMCs are attributable to the State as a form of exercise of elements of governmental powers.¹¹⁷⁶ Whereas, Maddock's made the above recommendation in the context of States engaging irregular forces as combat forces in counterinsurgency operations, this thesis takes this further from where Maddocks proposal stops, arguing that when a State outsources the role of state institutions to an irregular force who then exploit that relationship to go beyond its primary combat functions to perform local governance functions, such conduct should be attributable to the State. It, therefore, means that a working relationship between a State and a non-state entity, proven through verifiable evidence, should be a sufficient basis of empowerment, the absence of an internal law notwithstanding. In the case of the Nigerian State and the CJTF, as already established in Chapter Two, Three, and Four of this thesis, there is abundant evidence of a working relationship between the two actors, sufficient to engage the provisions of Article 7 of the Articles on State Responsibility, if this expansive approach is adopted.

5.3. Conclusion.

This Chapter has examined the applicability of the law of state responsibility to the conduct of the CJTF in its relationship with the Nigerian State. In particular, it has examined questions on whether the conduct of the group can be attributed to the Nigerian State based on being an organ of the State (Article 4), based on exercise of governmental authority (Article 7), and based on direction/control (Article 8). In its examination, it applied the provisions of each of these articles to the relationship between the CJTF and the Nigerian State, with each analysis demonstrating that the possibility of attribution is remote.

In sum, the Chapter finds that the CJTF falls outside the purview of the relevant rules of attribution under the Articles of State Responsibility. It equally finds that the group lacks the

¹¹⁷⁵ Maddocks 'State Responsibility for International Law Violations Involving Non-State Actors in Armed Conflict' (n 61) 237.

¹¹⁷⁶ Carsten Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies' (2008) 19 (5) *European Journal of International Law*, 989 – 1014 at 992.

character of the different groups dealt with by the ICJ and the ICTs in developing the tests in several case laws. Whereas the groups addressed in these tests were, in some respect, creations of the States in question, the CJTF is not a creation of the Nigerian State but began in 2013 as a civilian volunteer force defending the local population in the country's northeast region against Boko Haram insurgents and has since remained so. Although an arm of the group receives a form of remuneration and other support from the Borno state government, a sub-national authority in the country, the larger whole operates mostly on its own. It is therefore, clear that the group is not completely dependent on the Nigerian State, nor are its activities under the 'direction/control' of the State. Given the absence of this important requirement of complete dependence, direction, and control, attributing the conduct of the CJTF to the Nigerian State becomes problematic. From the analysis in this research, it seems fairly clear that establishing the responsibility of the Nigerian State for the conduct of the CJTF as a hybrid irregular force is not possible through direct attribution under the Articles on State Responsibility.

This finding implies that groups of this nature, though constituting an emerging threat to respect and compliance with IHL and IHRL norms, operate outside the current state responsibility framework and may be considered a law unto themselves. With the increasing number of groups of this nature acting as hybrid irregular forces in counterinsurgencies, it is evident that the international law framework must be broadened to accommodate and address the novel issues they generate. This Chapter has discussed the need for an expansive approach to Article 7 of the Articles on State Responsibility, under which evidence of a working relationship between a State and a non-state entity be accommodated as a basis of attribution. Within such a framework, evidence of the working relationship between the Nigerian State and the CJTF would operate as a basis of considering the group as a *de facto* organ of the State, to the end that its conduct becomes attributable to the State.

The reality is that in nearly all contemporary armed conflicts, evidence of state empowerment of non-state entities through an internal law is often absent. Adopting the approach suggested in this research will allow a greater number of private conducts to be attributable to States, thereby strengthening the law of state responsibility framework. It would also translate to state responsibility in an increased number of cases compared to what obtains now. So long as empowerment can sufficiently be shown to have taken place, based on an internal law or other means, state responsibility through attribution should be potentially possible. This

thesis contends that the object and purpose of the law of state responsibility would be better served if the notion of ‘empowerment’ under Article 7 is engaged using this expansive approach. More importantly, as the scope of application of the rules may overlap, an expansive approach to Article 7 helps to reinforce provisions under the commentary to Article 4 and increases the chances of holding States responsible in this regard. This approach has the added value of compelling States to better supervise the conduct of such groups acting on their behalf, thereby further enriching international law.

CHAPTER SIX

CONCLUSION

6.0. Introduction.

This thesis set out to examine the question of how and to what extent the Nigerian State can be held responsible for the conduct of the CJTF as a hybrid irregular force in the government’s counterinsurgency warfare against Boko Haram. The thesis argued that irregular forces in their hybrid operation enjoy significant working relationships with States on whose behalf they operate in a counterinsurgency, thereby impacting the applicability of the law of state responsibility. It argues that this working relationship, notwithstanding the absence of an internal law of the State and/or evidence of complete dependence, ought to be taken into consideration in the attribution of their conduct to States. To arrive at this conclusion, the thesis first proved the premise that irregular forces do indeed operate as hybrid actors in counterinsurgency warfare and then proceeded to apply this to the existing rules of IHL and IHRL as well as the law of state responsibility.

Hybrid irregular forces acquire meaning when explained through relevant concepts. Drawing from literature in the social science field, the thesis established that the provision of local governance functions by irregular forces, which is a key factor in their hybrid operation, is underpinned by the concept of the State intersecting other concepts such as sovereignty, legitimacy, rule of law, and legal pluralism. Despite the significant body of work on broader NSAGs, especially in the context of rebel governance, the thesis finds that there is very little analysis of how, other than rebels, state-sponsored irregulars also provide governance. Against this backdrop, the thesis considered that an understanding of how such groups provide local governance functions is critical to determining how and why the State should be responsible for their conduct and that this understanding is best served by unpacking the relevance of the above concepts to their activities. The thesis used insights from these concepts to shape its analysis on how the CJTF, as a hybrid irregular force in Nigeria’s

counterinsurgency against Boko Harm, enjoys legitimacy as a provider of local governance functions and how this further reflects in the fact that it governs by a customary rule of law framework.

Situating its analysis of hybrid irregular forces within the context of the thesis' case study, i.e., the CJTF, it finds that the ability of the group to provide local governance functions is undergirded principally by the swathe of ungoverned spaces as well as issues of state fragility in Nigeria. It further examined whether the group can be considered as having international legal personality as well as the applicability of the rules of IHL and IHRL to its conduct. It then examined the scope of current rules of state responsibility. Within this context, it conducted a doctrinal analysis of the current rules of attribution under the law of state responsibility framework and also analysed how state responsibility for the conduct of irregular forces (most of which has been in relation to their combat-related conduct) is articulated under the current framework. Its goal here was to problematise the current framework and draw attention to its unhelpfulness with respect to how it has been skewed in favour of the requirement for an internal law of the State and evidence of complete dependence, while alternative attribution standards have been excluded. The thesis found that the Courts have generally adopted a strict and restrictive approach to their interpretation of the rules in this area, thereby giving States a wide latitude to escape responsibility. Much of this has to do with the narrow focus of the Articles on State Responsibility on the requirement of an internal law of the State as well as the strict interpretation of the rules relating to control/direction as a basis for attribution.

The key conclusion in this thesis is that the current law of state responsibility framework does not sufficiently cover groups that often operate as *de facto* organs of the State, even when such may not be governed by an internal law of the State or operating in complete dependence on the State. This strict and restrictive approach to the rules mischaracterises the definitions of organs of the State, in particular *de facto* organs. Whereas hybrid irregular forces have become dominant players in counterinsurgency warfare, providing local governance functions, with much of this flowing from their working relationship with the State, international law is yet to recognise such relationships as sufficiently defining these groups as *de facto* organs of the State. Rather, the requirement of an internal law as a link between States and such groups is privileged over 'working relationships', which is the most ubiquitous form of association between States and groups of this nature. With regards to the requirement of complete dependence, the current framework requires the State to have

created the group, selected its leaders, be financially responsible for its survival, and completely control its actions.

These conditions are not just out of reach, but they leave an unacknowledged limitation on the current framework, such as completely excising a large percentage of irregular forces out of the responsibility framework, thereby granting States the opportunity to use such groups and still get away with their actions. This thesis is convinced that such an approach is counterproductive to the purpose of state responsibility in that it excludes groups whose actions are genuinely reflective of State culpability. In addition, the strict and restrictive approach is at variance with the universal objective of protecting human rights and other international norms. To accommodate a greater number of groups, especially CDFs operating as hybrid irregular forces, the thesis has proposed a more expanded framework than the current strict/restrictive approach. It considers that evidence of a working relationship between a State and a hybrid irregular force should be a relevant and sufficient basis to holding the State responsible for its conduct. It concludes that evidence of a working relationship between the State and hybrid irregular forces should be acknowledged in the attribution of conduct of irregular forces to States, in the light of the central role this plays in empowering such groups to act.

Many scholars engaging with the question of state responsibility for the conduct of non-state entities have not paid much attention to issues regarding irregular forces, and even among the few that have attempted to consider irregular forces, all have done so within the context of their role as combat forces. This thesis is the first research to specifically engage the conduct of a State for the conduct of an irregular force in its hybrid operation in a counterinsurgency. It has demonstrated that novel developments connected to the hybrid operation of irregular forces have significant implications for the protection of human rights and the broader norms of international law and, therefore, ought to enjoy better clarity.

6.1. An Overview of the Thesis.

This thesis has offered an answer to the main research question in this work. To understand how this answer was reached and the justification behind it, an overview of the preceding chapters is necessary. Firstly, in Chapter Two, the thesis developed the concept of hybrid irregular forces. The aim here was to correctly conceptualize the main subject of the research, i.e., hybrid irregular forces, and demonstrate that it is a novel and distinct group in the broader categorisation of irregular forces. The goal was to determine through the novelty of

these kinds of groups how best to trigger states' responsibility for their conduct. To execute this task, the chapter defined hybrid irregular forces as mostly CDFs operating in both combat and governance space in a counterinsurgency. It conceptualized the term as referring to a CDF operating in a hybrid form, i.e., being a fighting force on behalf of a state actor as well as being a provider of local governance functions, something outside its original combat engagement. It demonstrated that these are groups who have succeeded in operating in this form, i.e., performing functions ordinarily reserved for the State, due to governance opportunities provided by large areas of limited statehood in counterinsurgencies. The chapter thereafter discussed several characteristics that are unique to hybrid irregular force and distinguishes them from the broader group of irregular forces.

In providing an analytical framework for the chapter, insights were drawn from the concept of the State as well as connected concepts such as sovereignty, legitimacy, rule of law, and legal pluralism. The findings from this chapter show that groups of this nature are not just some elusive entities that are difficult to identify and inconsequential in a counterinsurgency, rather they represent a homogenous group, and are distinct and active actors within the socio-political ecosystem of a counterinsurgency, wielding great influence and re-shaping the idea of subjects in international law.

Having defined the main subject of the research, the thesis moved to Chapter Three, where the aim was to identify and establish the CJTF, a CDF engaged by the Nigerian State in its counterinsurgency warfare against Boko Haram, as a type of hybrid irregular force. The selection of the group lies in the fact that it appropriately exemplifies the problem the research is trying to put the spotlight on, i.e., the fact that hybrid irregular force today represents an emerging problem challenging the existing framework on state responsibility. The Chapter was able to successfully execute this task by showing how, from 2013 when the Nigerian State coopted the group into its counterinsurgency operations, it has progressed from being just a combat force to becoming a provider of local governance functions in territories where operations are being conducted.

It thereafter examined the legal link between the Nigerian State and the group, using the country's constitutional and legal framework as a basis. The findings from this chapter show that the Constitution repudiates the right of any person or group to exercise governmental powers under any form. It equally shows that there is the absence of an internal law, which ought to define the status of the group and prescribe how its activities should be construed in

the context of the government obligations under domestic and international law. The meaning is that the performance of local governance functions by the group is unconstitutional, a crime against the state, and that the group, like any illegal entity, ought to be prosecuted in line with national criminal legislation.

However, the chapter also finds that despite the absence of an internal law, there is a well-established working relationship between the Nigerian State and the CJTF flowing from the circumstances surrounding their interaction. The Chapter establishes this relationship on two grounds. First, it notes the fact that the group was co-opted by the State into its counterinsurgency operations against Boko Haram, and since that time, the group has been operating under close oversight of its Armed Forces, working together with troops to counter the insurgents. From this discussion the thesis was able to demonstrate that groups of this nature does wield increasingly growing powers in contemporary counterinsurgency warfare, but with the example of the CJTF it is also clear that responsibility for their conduct at the national level may remain elusive for a very long time, especially as there is not any compelling reason for States to do so. If States are unable and/or unwilling to act, it may imply that groups of this nature are simply floating actors, operating outside a responsibility framework. To address this, the thesis then proceeded to examine whether state responsibility for their conduct can be determined under international law.

Chapter Four unpacked the issue of whether hybrid irregular forces such as the CJTF can bear some responsibility in international law. To bear responsibility, it is a requirement that an entity must be considered a subject of international law, i.e., that it has international legal personality. With this in mind, the chapter examined the progressive development of theories and practices of international law regarding the concept of international legal personality. It showed that whereas current perspectives support the notion that certain non-state entities may enjoy a measure of international legal personality, groups such as the CJTF do not fall within this class of such non-state entities. Rather, the chapter concludes that their legal personality derives from that of the State on whose behalf they act. It notes that given the current realities of States wielding the most influence in the international system, it does not appear this would change anytime soon. This is more so as States remain wary of non-state entities, especially ANSAs, and are apprehensive that granting such groups elevated status would accord them legitimacy in the international system, thereby challenging the place and authority of States. The chapter further showed that because of performing governance

functions that are inherently governmental, the group has been flagged as a violator of well-established international law norms, which straddles the regimes of IHL and IHRL.

The chapter then examined whether mainstream perspectives on the rules of IHL applies to the group. It notes that the norms of IHRL and IHL apply in a complementary and mutually reinforcing manner when considering incidents that have occurred in a NIAC.¹¹⁷⁷ It reiterates the established position that parties to an armed conflict are bound by relevant rules of treaty and customary IHL applicable to NIACs, in particular, Common Article 3 and Additional Protocol II of the Geneva Conventions 1949. It, however, argues that though the CJTF as an armed actor in the counterinsurgency is under an obligation to comply with IHL rules, when it comes to holding it to account for its actions, responsibility would ultimately still lie with the Nigerian state to prosecute members of the group under domestic criminal legislations. Given that the State has so far demonstrated an inability as well as unwillingness to take steps in this regard, it means a potential pathway must still be sought under international law. On the issue of whether IHRL could apply to the group, the Chapter finds that the applicability of IHRL to the group remains unclear, especially given the predominant view that the protection of human rights during peacetime and in armed conflict situations remains the core responsibility of the State. It notes that much of the developing perspective on applying IHRL to ANSAs relates to entities which are considered as enjoying a measure of international legal personality, and as the CJTF cannot be said to enjoy such a status, applying IHRL to the group appears difficult. Moreover, whereas the group has been operating as a provider of local governance functions, it does not exercise control over territory, meaning that the proposition that groups controlling territory be duty bearers cannot be extended to it.

Chapter Five examined the law of state responsibility to see whether the rules of attribution as currently framed and as interpreted by the ICJ and other international tribunals could be applied to groups such as the CJTF. Under the current framework, the law of state responsibility is anchored on the presumption that the conduct of non-state entities is not attributable to states.¹¹⁷⁸ This is based on the public/private dichotomy that underpins the political and legal theory of the state.¹¹⁷⁹ However, in line with the indirect responsibility of States, they may be held accountable for the private conduct of non-state entities, if such an

¹¹⁷⁷ HRC, 'Situation of Human Rights in Myanmar Since 1 February 2021: Report of the United Nations High Commissioner for Human Rights' A/HRC/49/72, (15 March 2022), para. 12.

¹¹⁷⁸ Lanovoy (n 986) 573.

¹¹⁷⁹ *ibid.*

act constitutes a breach of a primary rule of international law norms and if the conduct is attributable to the State i.e., as one committed by an organ of the state. While the first condition is straightforward and can be satisfied sufficiently in NIACs, the second condition may pose major problems given the strict nature of the rules of attribution under international law. In particular the Chapter examined relevant rules prescribing when the conduct of non-state entities will be attributable to States, such as when the entity operates as an organ of the state, when the entity exercises elements of governmental authority, and when the entity acts under the direction/control of the State, rules under Articles 4, 7, and 8 respectively.¹¹⁸⁰

In particular, when examining the standard of attribution based on being an organ of the State i.e. Article 4 of the Articles on State Responsibility, the Chapter analyses the rules of IHL, in particular Customary IHL which provides that militias and volunteer units are to be considered as a part of the Armed Forces of a State. This means that their conduct may be attributable to the State, so long as certain conditions are satisfied i.e., that the group in question is commanded by a person responsible for its subordinates; that the group wears a fixed distinctive emblem recognizable at a distance; that the group carries arms openly; and that the group conducts its operations in line with the law and custom of war. There must also be an incorporating legislation, i.e., an internal law of the state or evidence of continuous combat function in which the group operates alongside the state in an armed conflict, creating a link between the group and the State. The Chapter found that the CJTF does not satisfy these four conditions in full and that there is a lack of an internal law binding the group to the State. In addition, while the group has been involved in some form of combat activities with the Nigeria Armed Forces, the Chapter notes that these combat activities does not satisfy the standard of ‘continuous combat function’ under IHL, as it is limited to acts such as accompanying troops to the frontline, gathering of intelligence, and holding of territories. This means that engaging state responsibility based on the group being a part of the Armed Forces is difficult.

Ultimately, the Chapter notes that whereas attribution of the CJTF’s conduct could have been possible under these three provisions of the Articles on State Responsibility, questions such as whether the group is an organ of the state, is empowered to exercise elements of governmental authority and whether it has been acting under the complete direction/control of the State, remain. In addition, the strict interpretation of the rules of attribution by the ICJ

¹¹⁸⁰ Articles 5, 8, 9, and 11, Articles on State Responsibility, 2001.

and other ICTs through the various tests developed over time, makes it that the relationship between the Nigerian State and the CJTF cannot trigger attribution, as it does not bear the same character as the cases addressed by the courts. Ultimately, the Chapter finds that the available pathways under the Articles on State Responsibility, for holding a State responsible for the conduct of non-state entities, appear insufficient in triggering state responsibility in this case study of this research.

In sum, the thesis's main finding points to the fact that under the other rules of attribution, and based on developments through caselaw of international courts, the likelihood of holding the Nigerian State responsible for the conduct of the CJTF remains problematic and difficult. However, it equally recognises the possibility of finding a pathway under Article 7 of the Articles of State Responsibility, which could trigger state responsibility when it comes to the conduct of hybrid irregular forces such as the CJTF. For instance, though Article 7 of the Articles of State Responsibility does recognise that non-state entities such as the CJTF can be empowered by States like Nigeria, it then shuts the door to attribution through its requirement that the empowerment it provides for must be based on an internal law. Put differently, there is no provision for other forms of extra-legal empowerment in which non-state entities are enabled by States to exercise elements of governmental authority.

The thesis argues that Article 7 of the Articles on State Responsibility weakens the current framework on state responsibility. This is because, the intendment of the provision is simple i.e., once a non-state entity is not empowered by the internal law of a State, its conduct cannot be attributed to the state, even if its engagement which later occasioned the conduct happened through positive acts of the State, and even if both had a robust relationship which enabled occurrence of the conducts. The problem with this rule is that it provides a window of escape for States to intentionally refrain from enacting an internal law when they engage groups of this nature and then turn around to argue that their responsibility cannot be triggered due to the absence of an internal law. In the context of the case study of this research, the CJTF was engaged in counterinsurgency operations through positive acts of the Nigerian state, and it was based on this engagement that it exceeded its ordinary combat duties to perform local governance functions. Yet, as the current rules prescribe, as Nigeria has not enacted an internal law to govern the group, the State cannot be held responsible for the conducts of the group.

This thesis argues that the activities of the CJTF as a hybrid irregular force and the gap under the law of state responsibility framework are indicative of current realities i.e., that though groups of this nature now play a significant role in armed conflicts such as counterinsurgency, state responsibility for their conduct is elusive. With the steady rise of groups of this nature having the intent and capability to violate international law norms, it is clear that the nature of counterinsurgency warfare has changed. States are more likely to increase their use of such groups as the years go by, especially as these groups help make up for manpower deficiencies, provide very rich local intelligence, and fill vacuums in areas with limited statehood. More challengingly, in the years to come, these groups, beyond providing governance functions, may begin to undermine the authority of States, joining transborder alliances, and may even become tools in the hands of foreign/external powers, seeking to further destabilise already failing states. As these groups play such significant roles in the conflicts of the future, with harmful effects on the civilian population, they will correspondingly continue to violate international law norms through their conduct. This thesis has shown that as States are increasingly finding it quite profitable and perhaps less legally burdensome to engage these kinds of groups in counterinsurgency warfare, the need to further expand the available pathways towards state responsibility must be considered a pressing matter. The main contribution in this chapter is that state responsibility for the conduct of groups such as the CJTF may be better realised by allowing for an expansive approach to an understanding of the rules, with an important area being the provisions of Article 7 of the Articles on State Responsibility. The thesis proposes that Article 7 be expanded to accommodate evidence of a working relationship between a State and an irregular force as a sufficient basis of attribution. The central argument in this thesis offers a starting point in the iterative process toward expanding the law of state responsibility framework.

6.2. Concluding Thoughts and Area (s) For Further Research.

The recommendation made in Chapter Five highlights where international law should be headed in the immediate future. This thesis has suggested a rethinking of the requirement of ‘empowerment through law’ as provided under Article 7 of the Articles on State Responsibility. This, it notes, will further expand the available pathways for state responsibility to be triggered under the current framework. One thing is clear: international law, especially IHL and IHRL, has evolved to the point that the operation of CDFs such as the CJTF acting as hybrid irregular forces is having a significant impact on respect for IHL and IHRL norms. The strict/restrictive nature of the attribution rules under the law of state

responsibility framework contributes to a situation where it is unclear if, and under what circumstances, a state can be held responsible for the conduct of such groups. Such uncertainty remains a continuing problem for the general international law framework, as resolving the question of whether a state can be held responsible for the conduct of a hybrid irregular force is paramount in determining the extent of remedies available to victims whose rights have been violated by the group.

The outcome of this thesis is intended to be of great interest to institutions such as the UN, its organs, and agencies, as well as subsidiaries such as the ILC. The recommendation in this thesis, if taken up in practice, can be key to any effort aimed at reviewing the Articles on State Responsibility. The outcome of this thesis is also intended to be of use to other international organisations, humanitarian actors, and international NGOs. It can play a decisive role in their engagement with States, with non-state actors as well as international and regional organisations in advocating for reforms, especially the reworking of the strict/restrictive framework under the current rules. Most significantly, it is intended to be a resource that researchers/academics can build on for further research in this area, both at the international level as well as domestically.

One area where further research is required concerns the application of attribution rules in domestic jurisdiction. While the expansion of pathways, as suggested in Section 5.2 of Chapter Five, would increase opportunities for potential state responsibility, more would be achieved through a strengthening of national judicial frameworks concerning their application of international law. In Nigeria, judicial attitude regarding the application of international law in the domestic courts considers it as below constitutional provisions and that it has the same status as federal laws. This constitutional framework is problematic in that it renders the domestic application of an expanded Article 7 of the Articles on State Responsibility practically impossible, given the diminished status of international law. Holding the Nigerian State responsible based on an expanded Article 7 can easily be torpedoed by the argument that hierarchically the provision is lower in status than provisions of the Constitution, which has discussed in Chapter Three views the CJTF's provision of local governance functions as illegal and lacking basis. With the Constitution as the supreme law, holding the Nigerian State responsible under a legal framework considered as lower in status, would require a new judicial attitude towards the status of international law with the country's domestic legal framework. It is therefore imperative that there be further research to understand how and to

what extent this judicial attitude could destroy or enhance the applicability of the law of state responsibility in Nigeria's domestic courts to facilitate access to justice for victims.

As this research has demonstrated, States' use of non-state entities operating as hybrid irregular forces and the resultant egregious violations of international law norms represent a fresh concern in international law today. States engaging these groups deprive their international obligations of substance and ultimately weaken the international law framework. The lack of clarity on whether and on what basis States can be held responsible for the conduct of these groups makes continuing violations with its damaging effects possible while also leaving victims stranded. As of today, the scope of state responsibility for the conduct of irregular forces remains deeply contested. This research is set against the context of a global moment in which irregular forces are increasingly transforming the face of counterinsurgency warfare. As these groups possess the potential to alter the armed conflict environment in the immediate future, there are high-stake decisions to be made in terms of expanding the pathways to responsibility. This thesis has triggered that process, recommending an additive option. The international community has a lot to gain by making the most of this moment.

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