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A New Application of Article 36 of the Geneva Convention's Additional Protocol: The Case of Autonomous Cyber Weapons

Khalifa Alkuwari*

Abstract

Article 36 of the Geneva Convention's Additional Protocol ('Article 36') was introduced to deter, prevent, or limit the development and use of weapons that violate international law. In this regard, states are bound by the article to review the legality of all new weapons, the means, and methods of warfare. The advent of autonomous cyber weapons ('ACWs') challenges the implementation of this state obligation. The rationale is that cyber warfare has significantly different characteristics than conventional war or weapons initially targeted by Article 36. Consequently, this paper examines the problems associated with using ACWs and the problem of accountability for such. A conclusion is made that the state should be held liable for AI cyberweapons that are made or launched within its jurisdiction. The liability applies regardless of whether the AI cyberweapons are developed by the affected state's military agencies or private entities.

Key words: international law, autonomous cyber weapons, AI, liability

1. Introduction

The use of cyber weapons in warfare is increasingly becoming common worldwide, given the advancement of artificial intelligence ('AI') and automation. Subsequently, humanity has had to contend with unprecedented and unpredictable perils such

weapons pose.[1] The events highlight the importance of this research, particularly given how the existing international legal mechanisms can be exploited to hold culprits liable for the resultant impacts. Many cyber kits deployed are autonomous, moving autonomous cyber weapons ('ACW') systems from mere science fiction to present realities humans must learn to live with. These developments, which bring enormous benefits to humans and states in general, greatly endanger the human species. Supporters of using ACWs argue that it allows states to strengthen their cyber defensive capabilities, thus overcoming the threats prevalent in cyberspace.[2] Proponents equally argue that deploying cyber weapons in the digital domain replaces the need for the physical presence of armed combatants in the territory of an enemy state, thus reducing the risk posed to human soldiers.[3] In addition, since the creation and deployment of cyber capabilities do not require substantial infrastructures, funding, or physical space, the capital investment will also be minimal.[4] These seeming benefits of cyber weapons encourage states to adopt offensive and defensive cyber capabilities on different levels.[5]

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[1] JA Lewis, 'Cyber War and Ukraine' (2022) Center for Strategic and International Studies <https://www.csis.org/analysis/cyber-war-and-ukraine> accessed 26 June 2023

[2] SL Sanchez, 'Artificial Intelligence (AI) Enabled Cyber Defence' [2017] European Defence Matters no. 14 <https://eda.europa.eu/webzine/issue14/cover-story/artificial-intelligence-(ai)-enabled-cyber-defence> accessed 25 March 2023

[3] Ibid

[4] D Trusilo and T Burri, 'Ethical Artificial Intelligence: An Approach to Evaluating Disembodied Autonomous Systems,' in R Liivoja and A Väljatag (Eds), *Autonomous Cyber Capabilities under International Law*, (NATO CCDCOE, Talinn 2021) 58

[5] DE Sanger and N Perlroth, 'US Escalates Online Attacks on Russia's Power Grid' New York Times (New York, 17 June 2019) <https://www.nytimes.com/2019/06/15/us/politics/trump-cyber-russia-grid.html> accessed 2 March 2023

Cyber weapons are, narrowly, a software and/or IT systems that are used to destructive effects.[6] A more encompassing definition is that:

> cyber weapons are cyber means of warfare that are used, designed, or intended to be used to cause injury to, or death of, persons or damage to, or destruction of, objects, that is, that result in the consequences required for qualification of a cyber operation as an attack.[7]

An argument is explored in a later part of this work on whether cyber weapons can be autonomous or are merely automated. However, cyber weapons within this paper's context include non-ACWs and those considered autonomous. They include 'computer code that is used, or designed to be used, to threaten or cause physical, functional, or mental harm to structures, systems, or living beings;[8] and software and IT systems that, through ICT networks, manipulate, deny, disrupt, degrade, or destroy targeted information systems or networks.[9] These weapons either disable affected systems or cause physical damage to critical infrastructures, like shutting down a power grid infrastructure. The first recorded cyber weapon was Stuxnet, the first highly autonomous weapon.[10] A Stuxnet attack was recorded in Iran in 2010, where tens of thousands of Windows machines were [11]

[6] RE Schmidle Jr, M Sulmeyer, and B Buchanan, 'Nonlethal weapons and cyber capabilities, in G Perkovich, and AE Livite (eds), *Understanding cyber conflict: 14 analogies*, (GUP 2017)

[7] T Uren, B Hogeveen and F Hanson, 'Defining Offensive Cyber Capabilities' (Australian Strategic Policy Institute, 4 July 2018) <https://www.aspi.org.au/report/defining-offensive-cyber-capabilities> accessed 2 March 2023

[8] T Rid and P McBurney, 'Cyber-weapons', (2012) 6 The RUSI Journal 157 (1)

[9] *Uren, Hogeveen, and Handson*, (n 7).

[10] J Thurnher, 'Feasible Precautions in Attack and Autonomous Weapons' in Wolff Heintschel von Heinegg, Robert Frau and Tassilo Singer (eds), *Dehumanization of Warfare* (Springer 2018) 104

[11] J Alvarez, 'Stuxnet: the world's first cyber weapon' Center for International Security and Cooperation (Stanford, 3 February 2015) <https://cisac.fsi.stanford.edu/news/stuxnet> accessed 2 March 2023

Stuxnet proliferates affected systems with cyber worms, causing the systems to shut down. Denial of service attacks is another kind of cyber [12] This was used against Estonian websites in 2007. During the attack, Estonian internet services suffered "Denial of Service (DDoS) attacks, website defacements, DNS server attacks, and mass email and comment spam.[13]

Cyber weapons could either be human-in-the-loop, human-on-the-loop, or human-out-of-the-loop weapons.[14] Human-in-the-loop weapons require a human command to select targets and deliver force; human-on-the-loop weapons operate under the supervision of a human operator who can override the robots' decisions; and human-out-of-the-loop weapons can choose targets and deliver force autonomously.[15] Human actors' mere use of these cyber weapons calls for discussions on the accountability or criminal guilt for crimes committed using these weapons, whether the human is in the loop, on the loop, or out of the loop. It should be highlighted that human actors using cyber weapons may either be independent or state-sponsored. As states are the custodians of international law, this article, therefore, focuses on the state-sponsored use of cyber weapons. The provisions of the Rome Statute of the International Criminal Court,[16] the work of the 2004 United Nations Group of Governmental Experts on the 'developments in the field of information and telecommunications in the context of international security', and the opinions of experts reflected in the Tallinn Manuals 1.0 from 2013 and 2.0

[12]A denial of service attack (DDOS) is meant to shut down a machine or network by flooding the target with traffic or sending information that triggers a crash. The ability of DDOS to cause a crash to an affected system makes it fitting to be categorised as a weapon.

[13]A Schmidt 'The Estonian Cyberattacks' in Jason Healey, *the fierce domain-conflicts in cyberspace 1986 - 2012*, (Atlantic Council, Washington DC 2012)

[14]A Guiora, 'Accountability and Decision Making in Autonomous Warfare: Who is Responsible?' (2017) 4 Utah L.Rev. 393, 397

[15]I bid

[16] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) [Rome Statute]

from 2017 are frequently cited in this paper.[17] Depending on the degree of human involvement in the functioning of cyber weapons, these weapons may be either automated or autonomous. Thus, the question to be considered now is; Does the internet provide for autonomy?

The concept of autonomy varies across various fields. For instance, the NATO Cooperative Cyber Defence Centre of Excellence explains that the term has been applied to developments like driverless trains, self-driving cars, uncrewed aircraft, and loitering munition such as Harpy.[18] In other words, what constitutes autonomy varies across different disciplines.[19] However, some definitions have been put forward by scholars to assist in the determination of whether cyber systems can be rightly described as fully autonomous or merely automated. Christman argues:

> to be autonomous is to be one's person, to be directed by considerations, desires, conditions, and characteristics that are not simply imposed externally upon one but are part of what can somehow be considered one's authentic self.[20]

This is similar to Pertti Saariluoma's submission that '[a]utonomous systems are technologies with the capacity to perform tasks that previously required human operators to

[17] M Schmidt (ed), Tallinn Manual on the International Law Applicable to Cyber Warfare (CUP 2013); M Schmidt (ed), Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (CUP 2017)

[18]R Liivoja, M Naagel, and A Väljataga, Autonomous Cyber Capabilities under International Law (NATO Cooperative Cyber Defence Centre of Excellence 2019)

[19]T Smithers, 'Autonomy in Robots and Other Agents' (1997) 34 Brain & Cognition, 88-110; WFG Haselager, 'Robotics, Philosophy and the Problems of Autonomy' (2005) 13 Pragmatics & Cognition (3), 515-536

[20]J Christman, 'Autonomy in Moral and Political Philosophy in EN Zalta (ed), The Stanford Encyclopedia of Philosophy (Metaphysics Research Lab, Stanford University 2018)

contribute the higher cognitive processes associated with human thinking'.[21]

Following the above reasoning, ACWs, within the context of this paper, are cyber weapons that have the propensity to conduct attacks without human oversight or control. However, it is arguable whether cyber weapons can be autonomous or automated. This argument flows from the understanding that the actions taken by ACWs are based on pre-established logarithms encoded into the system, causing the weapons to attack based on pre-determined capabilities. Thus, the system merely follows the instructions imputed into it by human actors. The question now revolves around whether cyber weapons are autonomous or are automated. The two concepts, while they appear similar, are quite different. Saariluoma attempts to distinguish between automated and autonomous systems somewhat differently.

Most importantly, there are attempts to understand the legal connotations of these autonomous systems based on the existing international laws of war. The concerns extend to who should be liable for destruction from automated weapons. Since 1977, Article 36 has provided a framework for preventing weapons that violate international law. Subsequently, this article relied on its provisions to ascertain liability in the cyberweapons' use context.

2. Article 36

The aim of Article 36 of the Geneva Convention's Additional Protocol ('Article 36') is to "prevent the use of weapons that would violate international law."[22] The article further imposes

[21]P Saariluoma, 'Four challenges in structuring human-autonomous systems interaction design processes' in A Williams and P Scharre (eds), Autonomous Systems: Issues for Defence Policymakers (Headquarters Supreme Allied Commander Transformation 2016) 22

[22] Damian Copeland, Liivoja Rain, and Sanders Lauren. "The Utility of Weapons Reviews in Addressing Concerns Raised by Autonomous Weapon Systems." *Journal of Conflict & Security Law* (2022):2.

restrictions on weapons likely to violate international law. Subsequently, it recommends that states determine the lawfulness of weapons before they are developed, acquired, or incorporated into their military's arsenal. In this regard, it is a binding mechanism in the international community that can be relied on to compel nation-states to ensure that their new or emerging weapons comply with international humanitarian law (IHL).[23] Compliance with Article 36 also implies compliance with the international human rights law (IHRL).

In terms of the background of the Article, the 1960s and 1970s witnessed an upsurge in various armed conflicts globally. Some of these conflicts were attributed to self-determination among colonies, alien occupation and racist regimes, such as Apartheid in South Africa. The armed combatants often disregarded human rights and IHL.[24] Subsequently, Article 36 was introduced as a countermeasure to protect civilian victims. In practice, the Additional Protocol I update reaffirmed the international laws of war as earlier postulated in the Geneva Convention of 1949.[25] The earlier provisions of the convention had accommodated warfare developments since WWII.

The weapons targeted at the time were the conventional weapons that were deemed to be excessively injurious or those with indiscriminate effects. The weapons included "land mines, booby traps, incendiary devices, blinding laser weapons and clearance of explosive remnants of war."[26] The article further covers new

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[23] Franklyn Ohai, "Transparency and accountability in the design of lethal autonomous weapons in the EU: Adding legal elements to Value Sensitive Design." (2022):4.

[24] ICRC, 'Treaties, States Parties, and Commentaries - Additional Protocol (I) to the Geneva Conventions, 1977 Commentary of 1987 New Weapons' <https://www.icrc.org/en/doc/assets/files/other/irrc_864_icrc_geneva.pdf > Accessed 03 July 2023.

[25] Franklyn, 6

[26] Chicago Onwuatuegwu, "An Appraisal of the Laws on Conventional Weapons." *Journal of Refugee Law and International Criminal Justice* 1.1 (2022): 4.

weapons, means and methods of warfare. As a result, there is a general view that the law covers all types of weapons. The open interpretation thus led to some countries adding reservations to the scope of weapons covered when ratifying the law. The interpretation issues thus challenge whether non-conventional weapons, such as cyber weapons, are also controlled by the law.

States are the primary enforcers of Article 36. In this regard, they are expected to create national legal systems, diplomatic channels and international dispute-resolution mechanisms necessary for enforcing the article. Violators can also be subjected to prosecution by the International Criminal Court and the International Court of Justice.[27] Other institutions that can adjudicate cases contravening Article 36 include regional courts such as the European Court of Human Rights and the Court of Justice of the European Union. The rationale for adjudicating these cases in international and regional courts is that they represent shared principles by the member-states.

3. Autonomy in the Cyber Space

Cyberweapons are a subset of weapons that use computer code "intending to threaten or cause physical, functional, or psychological harm to structures, systems, or persons."[28] Cyberweapons are also commonly used in information communication technology systems. In such incidences, the aim is to manipulate, deny or disrupt information systems. In some incidences, such disruptions or manipulations can harm structures or persons. Unlike conventional weapons, cyberweapons tend to be decentralised and require fewer resources. Subsequently, they will likely be acquired more easily and pose a regulation challenge.

[27] Franklyn, 17

[28] Shalini Lamba, Tripathi Vibhu, and Kapoor Ansh. "Cyberwar: A New Battle Ground." *Advances in Engineering Science and Management* (2023): 153.

Cyberweapons are different from conventional weapons because they are indirectly kinetic in their operation. Nonetheless, there are incidences that they can have indirect kinetic effects. For instance, a cyberattack targeted at critical infrastructure, such as a health and emergency services system, could disrupt emergency responders' operations.[29] In such incidences, significant loss of life is likely without dramatic events that might accompany an explosion. There are equal incidences that a self-executing and replicating malware can be employed to control an enemy's Lethal Autonomous Weapons. Subsequently, autonomous target selection and attack can be conducted. Alternatively, a cyberattack could overload a power plant and instigate an explosion. From these perspectives, cyber weapons can be used in war and cause harm.

AI can be used to develop ACWs. In this regard, the weapons are designed to replicate human capabilities, including surveillance and attacks. Some examples include autonomous sentry guns and remote weapon stations, which are programmed to fire at targets.[30] Similarly, there are killer robots and drones commonly used by the US military to target terrorists. The recent launch of ChatGpt could significantly revolutionise the application of AI in cyberweapons by accessing and generating reports from classified military information to facilitate attacks.

The application of AI in cyber weapons enhances their ability for autonomous target selection and attack. AI has predictive power, which is synonymous with human intelligence. In this regard, its actions are premeditated based on the software used and the instructions it is accustomed to from machine learning. [31]As a result, the attacks are conducted without any human-issuing commands to this effect. For instance, killer robots rely on AI to identify, select and kill human targets without human

[29] Franklyn, 18
[30] Shalini Lamba, Tripathi Vibhu, and Kapoor Ansh. "Cyberwar: A New Battle Ground." *Advances in Engineering Science and Management* (2023): 158.
[31] Franklyn, 21

intervention, indicating how AI cyber weapons become autonomous.

Article 36 is a binding agreement that the assenting states should conduct legal reviews on all new weapons before they are incorporated into their arsenal. Similarly, they are expected to review the means and methods of warfare to ascertain whether they are prohibited in international parlance.[32] Subsequently, the states' mandates, as stipulated in Article 36, cover the use of AI weapons. As indicated, AI cyberweapons pose a similar threat to life and property similar to conventional weapons.[33]

4. State Liability for AI Cyberweapons

As indicated, Article 36 was incorporated into the Geneva Convention of 1949 in 1977. The article was a reaction to the human rights violations arising from using newly introduced weapons at the time. The article imposed a practical obligation on states to prevent using weapons that violate international law.[34] The mechanism proposed is conventionally referred to as weapon review or Article 36 review. As a result, the state authorities rely on the article to ascertain the lawfulness of each new weapon or method of warfare before its use in armed conflict. From this perspective, the state is solely bound by the article to review weapons conceptualised, produced, and used within its borders. In this regard, there is room to strengthen the enforcement of Article 36 so that states are strictly liable for AI cyberweapons within their jurisdictions.

One consideration that emerges in discussions about the applicability of state liability for any AI cyberweapons made within a country's borders is anchored on the effects of the weapons. The discussions also extend to the means and methods of warfare. AI cyberweapons are different from their conventional

[32] Damian, 13
[33] Franklyn, 6
[34] Damian Copeland, 4

alternatives, which necessitated the enactment of Article 36.[35] Nonetheless, questions abound on whether the effect of the weapons or their conventional or non-conventionalism should be the basis for determining liability. The former (effect/impact) takes prominence in this regard. The rationale is that international humanitarian law provisions informed the enactment of Article 36. In this regard, there was a concern over the excessive injuries and unnecessary suffering posed by conventional weapons.[36] Some AI cyberweapons pose similar implications to civilians. As a result, the international obligation reflected in the article suffices, and the need to curb violations arising from them nubbed at the state level.

There are also incidences that some AI cyberweapons have been found to pose more harmful than those produced by traditional weaponry. However, such weapons fall outside the legal review requirement, given that their effects might not constitute an attack based on conventional interpretation. For instance, malware that hampers access to emergency responders might indirectly result in fatalities during the service outage. While difficulties might be experienced in interpreting such an attack from the conventional perspective, the state is responsible for hampering such outcomes.[37] Denial of access to medical services violates the IHL and thus falls within the mandate of the state to prevent it. In this regard, the need to make states stronger and strictly liable for any AI cyberweapons made within their borders is emphasised.

Nonetheless, there are incidences in both states or actors within their jurisdictions that have developed or used AI cyberweapons. The common expectation when a country's military takes up such an activity is that it will align its actions to its international obligations. Some of these obligations precede Article 36.[38] For instance, membership in the ICJ implies a need to implement

[35] Franklyn, 19
[36] Chicago, 5
[37] Shalini et al., 57
[38] Damian, 4

safeguards against events that could harm the public. As a result, the state is best positioned to embed norms in the AI design. In this regard, an enforcement mechanism exists for violators of ICJ's regulations on war and weapons. There are also incidences that the state is involved in procuring AI technology to develop weapons. It is assumed that the state understands its international obligations associated with such weapons in such incidences. As a result, it is essential to ensure that the design meets the state's obligation. In recent years, states have attempted to evade this obligation through secrecy and adopting more complex technologies whose impacts cannot be immediately ascertained.[39] Even under such circumstances, the responsibility to adhere to international obligations persists. The study refers to such circumstances as "willful blindness", given that the state is responsible for seeking information from private actors. In this regard, the likely implications can be determined, and appropriate interventions that enhance obligation adapted.[40] Some common approaches to determining the likely implications of such technologies include risk assessment, testing, auditing, certification and continued compliance-monitoring mechanisms.

The current Article 36's provisions also imply that states can equally bear indirect responsibility for the actions of private actors. The rationale is that states are responsible for instituting measures ensuring that private actors within its jurisdiction operate within the confines of treaties it enters.[41] It is essential to recognise that while the state might not be considered directly for the private actors' conduct, it can be held responsible for the effects of such actors' conduct. The punishment is greater in incidences where the violations infringe on the rights of other states. In this regard, there is a positive obligation to ensure that states undertake the necessary steps to respect human rights. The approach can be leveraged in the AI cyberweapons context. As a result, states will impose mechanisms to curtail the production and use of cyberwarfare weapons and military AI within their

[39] ibid
[40] ibid
[41] Franklyn, 8

jurisdictions.[42] The most commonly used tool in this context is domestic regulations. As a result, Article 36 must be made stronger by requiring states to develop new regulations to this effect. For instance, the Council of Europe has developed an obligation under the European Convention on Human Rights (ECHR) to protect human rights against interference by other actors.[43] The actors include international firms involved in the manufacture of AI technologies that might pose harm to the public.

Most importantly, states have the requisite governance and judicial structures necessary for investigating and prosecuting infringements of Article 36. The capability is limited in the international context, given the autonomy of the nation-states. Embedding these considerations to enforcing Article 36, especially regarding AI cyberweapons' control, implies the state's increased role.[44] Based on this approach, clear legal standards will be developed within the states. The approach also implies that the states will have been made stronger and strictly liable for any AI cyberweapons made within its territory. The AI regulations should uphold human rights and prevent international law violations. The state-specific regulations should further prescribe requisite technical standards and processes. For instance, the article should allow for the screening and certification of AI systems developed by the military or private actors.

5. Conclusion

ACWs have come to stay as states continually develop offensive and defensive cyber weapons. Evidence abounds where states have deployed cyber weapons in the past, and many others are putting structures in place to take advantage of the development fully. While deploying these weapons, crimes may be committed in cyberspace. An instance is when a cyber weapon disrupts critical infrastructures essential to human existence and causes

[42] ibid
[43] Franklyn, 11
[44] ibid

disastrous consequences to humans in the real world. When this happens, the states from which these weapons are deployed must be held accountable since these weapons merely carry out an automated function. The liability should be on the state regardless of whether the attack was conducted by the military or private actors within its borders. A legal framework should be developed to regulate the development and deployment of ACWs.

An Intrusion upon Seclusion Tort: Is this the Solution to the Ambiguity of the English Law of Privacy?

Melody Orhunanya Amadi*

Abstract

Despite the understanding that the concept of "intrusion upon seclusion" ('IUS') is 'exclusive' to privacy intrusions ('PI') where there is either no documentation or any distribution of data, the English Law has continuously refrained from acknowledging this concept as independent from the tort of misuse of private information ('MOPI'). Within the paper, this view is evaluated. It also analyses the courts' reluctance to the creation of a tort catering towards IUS as being rightfully circumspective and sustainable. It will do so on the claim that IUS is not just limited to Physical Privacy ('PP'). The English cases *Campbell v Mirror Group Newspapers* [2004] UKHL 22 and *Peck v UK* [2003] EMLR 287 will assist in this analysis. Instead, the explanation will be given that MOPI, (right from its developmental stage), also considers physical privacy - even privacy intrusions where there is no evidenced acquisition of private information. It will conclude with an examination of the English law's present stance and will deduce that there are still gaps to be filled.

Key words: privacy, information, intrusions, English law, tort.

1. Introduction

The notion that the scope of privacy is limited to the unwanted distribution of one's private information,[1] though myopic,[2] is quite appreciable. A recurrent theme amongst scholars[3] has been that

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[1] Nicole Moreham, 'Beyond Information: Physical Privacy in English Law' [2014] 73 TCLJ 350.

[2] Ibid.

[3] As per John Hartshorne, 'The need for an intrusion upon seclusion privacy tort within English law' [2017] CLWR 46 4 (287). See also Nicole Moreham (n3),

the English courts' interests, in relation to privacy, lie primarily (if not only) on the publication of private information. This suggests that from the analysis of claims with the principle of Breach of Confidence ('BOC'), to the development of the concept of Misuse of Private information, the English Law's focus has rarely been on other aspects of PI except in the question of whether information had been dispersed, and whether that distribution[4] was to the public's benefit.[5]

There have been counter arguments to this notion.[6] These include claims that the law requires little or no developments, because the courts already recognise privacy claims dealing with the lack of distribution.[7] Although these claims are slightly exaggerated, once they are analysed, it is evident that the law's relationship with these cases, though still obnubilated, is one of understanding. This was not so in the well-known 2001 matter of *Douglas v Hello! Ltd.*[8] The claim was subjected to the principle of BOC, even though BOC 'traditionally [and mainly still] protected confidential relationships [which was not a primary element of the case] and not [solely] confidential or private information'.[9] However, the courts' application of MOPI for IUS claims is comparatively fitting even though the element of distribution does not form the main part of the issue.[10]

This article does not dispute the claim that the principle of MOPI also approaches issues considering distribution even when dealing with IUS, neither does it contend with the view that MOPI requires further development in terms of IUS. Rather, it mainly

[4] Nicole Moreham (n 3).
[5] Madingley v Associated Newspapers Ltd [2008] QB 103.
[6] John Hartshorne, (n 5). These arguments are based on the cases of *Gulati & Ors v MGN Limited* [2015] EWCA Civ 1291 and *PJS v Associated Newspapers Ltd* [2016] UKSC 26.
[7] John Hartshorne, (n 5).
[8] (No. 3) [2005] EWCA Civ 595.
[9] Nicole Moreham, 'Douglas and Others v Hello! Ltd. The Protection of Privacy in English Private Law' [2001] 64 MLR 767.
[10] Thomas D.C. Bennett, 'Triangulating Intrusion in Privacy Law' (2019) 39 (4): 751 OJLS.

sets out to demonstrate that whilst approaching claims from the issue of distribution, the English courts, with the aid of MOPI's elements, also caters for IUS. This is especially due to the conspicuous fact that there is an increasing need for the law to ensure legal protection for public figures by developing and expanding the scope of privacy laws. This is because of the constantly invasive presence of the media in the lives of these individuals. [11]

In order to effectively develop and demonstrate the gaps in English privacy laws, we must first understand the 'nature and significance of privacy'.[12] Hence, this essay will first expound (due to the lack of clarity in the law's understanding of what privacy truly entails)[13] the relevant principles of privacy involving IUS and MOPI, their developments, what they are actually designed for, and what they are intended to cover.

It must be mentioned, nevertheless, that MOPI's elements are merely 'toolkit[s]' and not primary components when used on IUS. Therefore, there are still areas that the law has overlooked; areas essential to its development, especially with the rampant changes being made by technology. Thus, this essay will briefly explore some relevant aspects which may still require the law's attention.

2. The Concept of 'Intrusion upon Seclusion' IUS

Among scholars, invasion of privacy ('IOP') is largely recognised as consisting of two interrelated forms of privacy intrusion: 'the unwanted sensory access'[14] of a person or their activities (also known as physical privacy), and the misuse of their private information (informational privacy).[15] Dr Nicole Moreham explains physical privacy by describing it as an intrusion where

[11] Catherine Elliot and Frances Quinn, Tort Law (7th edn, Pearson Longman 2009).
[12] Kirsty Hughes, 'A Behavioural Understanding of Privacy and its Implications for Privacy Law' (2012) 75(5) MLR 806.
[13] Thomas D.C. Bennett, (n 14).
[14] Nicole Moreham (n 3).
[15] ibid.

one's physical privacy is interfered with due to another 'watching, listening to, or otherwise sensing you against your wishes'.[16] It was from this category that IUS was established.

Issues relating to PP are considered independent of BOC and MOPI due to the lack of disclosure to a third party.[17] However, a closer inspection of PP reveals that its scope is interconnected with MOPI (from the perspective of IUS).

The term 'intrusion upon seclusion'[18] gained popularity after it was broadly used by William Prosser in his seminal article of 1960, 'Privacy'.[19] The term was used regarding situations when 'a person intrudes upon "the solitude or seclusion of another or his private affairs or concerns" in circumstances where the "intrusion would be highly offensive to a reasonable person".[20] This element, which is strictly linked to physical privacy, is identified when it is an unauthorised physical observation of an individual.[21]

This led to the current view that intrusion should only be considered based on the defendant's physical actions (PI), but the involvement of public disclosure signifies that the interference should be examined based on the dissemination of information (IP).[22] These violations usually involve 'Intrusion-type violations of privacy;…those that involve physical intrusions into personal space or property, as well as unwanted watching, recording or accessing of a person or their private information'.[23] Recently, it has been argued that,

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[16] ibid.
[17] 5RB, 'Intrusion into Physical Privacy' (5RB, 2016) <https://www.5rb.com/privacy-2/intrusion-into-physical-privacy/> 17 April 2022.
[18] John Hartshorne (n 5).
[19] William L. Prosser, "Privacy" (1960) 48 C.L.R. 383.
[20] Nicole Moreham (n 3).
[21] ibid.
[22] R. Post, "The Social Foundations of Privacy: Community and Self in the Common Law Tort" (1989) 77 C.L.R. 957 9as cited in Paul Wragg, 'Recognising a Privacy-Invasion Tort: The Conceptual Unity of Informational and Intrusion Claims' [2019] 78 TCLJ 409).
[23] Thomas D.C. Bennett, (n 14).

> the phrase intrusion is judged not on its own terms, as a state of mind, but almost entirely through the lens of its correlative "seclusion". [And] as a result, claims stand or fall on whether the court is satisfied that the alleged wrong happened in a place that qualifies as sufficiently "secluded". Only then is the variable nature of intrusion judged (through a second lens: "highly offensive to a reasonable person").[24]

However, when examined closely, intrusion is also judged based on the level of 'embarrassment' as in the cases of Peck v UK[25] and Campbell v Mirror Group Newspapers. [26] In Peck; a case dealing with a then clinically depressed claimant and the wrongly disseminated recordings of himself walking down an empty street with a knife, the courts, among other things, (such as the mental state of the claimant), judged the IUS aspect mainly on whether the intrusion was to be classified as a highly embarrassing act. This was combined with the issue of whether the place was sufficiently secluded. Thus, in addition to 'it being late; there was no one around; [and] he could not have foreseen the moment would be broadcast later to a national audience',[27] it was not until the element of embarrassment was sufficiently satisfied alongside the level of seclusion, was the intrusion said to have been properly weighed.[28]

In other cases, though, just as in Campbell v Mirror Group Newspapers[29] the level of seclusion is overlooked. In this case, the publication of the claimant's images and dispersion of information dealing with her attendance at the Narcotics Anonymous ('NA') group meeting (an accessible and arguably public area), was also

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[24] Paul Wragg, 'Recognising a Privacy-Invasion Tort: The Conceptual Unity of Informational and Intrusion Claims' [2019] 78 TCLJ 409.
[25] [2003] (n2).
[26] [2004] (n1).
[27] Paul Wragg (n 28).
[28] *Peck v UK* (n 2).
[29] [2004] (n 1).

judged in terms of the level of embarrassment. Despite her status and previous comments against drug addiction in the modelling industry, the fact that the area was not a private location did not diminish the level of embarrassment the claimant must have felt. Rather, the intrusion was seen as 'an affront to the [claimant's] personality, which [was] damaged both by the violation and by the demonstration that the personal space is not inviolate."30

This reveals the courts' interest in both the psychological and physical aspects of intrusion. However, if intrusion can be distinguished from seclusion, and IUS seemingly from distribution, why is IUS still considered under MOPI? To answer this, we must first look at the English Law's understanding of PI.

3. The English Beginning of The Law of Privacy

The protection of one's privacy has been as voluntary as warding off flies from a meal. The initial question surrounding this, however, was whether the need to keep certain actions personal surpassed the need for the community to be made aware; (especially in cases involving 'chief executives of multinationals who wield great economic power').[31] In addition, although the law of privacy had (and still has) no general tort protecting it,[32] there were (and are) principles developed to manage the claims surrounding it.

Originally, the initial stance of the courts regarding privacy was so arduous for claimants 'that it [could] be recognised only by legislation'.[33] However, with the help of two substantive rules, that

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[30] *R v Broadcasting Standards Commission*, *Ex p British Broadcasting Corpn* [2001] QB 885.
[31] Robert Walker, 'The English Law of Privacy - An Evolving Human Right' (2010) https://www.supremecourt.uk/docs/speech_100825.pdf accessed 20 June 2023.
[32] Kate Wilson, Privacy and misuse of private information—overview (LexisNexis, no date) <https://www.lexisnexis.com/uk/lexispsl/ip/document/393989/5DS5-S4G1-F18C-X077-00000-00/Privacy+and+misuse+of+private+information%E2%80%94overview> accessed 4 May 2022.
[33] *Kaye v Robertson* [1991] FSR 62.

is, the general tortious objective to deal with civil wrongs targeted at certain core interests, (such as one's reputation and privacy),[34] and the general stance of the English common law ('judge-made law')[35] in the creation of laws from trends,[36] the concept of Breach of Confidence (BOC) was created.

a) The Margins of Breach of Confidence

This principle of BOC was created to protect against the disclosure of confidential information and could only be applied to cases where the information is either a secret or is seen as personal. The law in Coco v A.N Clark[37] explains the key elements and elaborates that for a BOC claim to be successful, (a) the information should be private, (in the sense that, it should contain the necessary element of confidence), and (b) the defendant should be under an obligation of confidence pertaining to the information communicated, and that (c) there must be an unauthorised use of information which is consequential to the communicator.

From this development, the courts resolved issues by noting 'that communications, not limited to business matters, between husband and wife should be protected against breaches of confidence'.[38] The outcome was, 'that obligation[s] of confidence need not be expressed, but could be implied… a breach of contract or trust or faith could arise independently… [and] the court, in…

[34] John Hodgson and John Lewthwaite, *Tort Law Textbook* (2nd edn, Oxford University Press 2007). See also Paula Gilker, 'A Common Law Tort of Privacy? The Challenges of Developing a Human rights Tort' (2015) Singapore Academy of Law Journal, 27, 761-788.
[35] Robert Chambers, James Penner and William Swadling, *Equity and Trusts* (University of London 2017).
[36] N A Moreham, 'Conversations with The Common Law: Exposure, Privacy and Societal Change' (2021) 52 (3), Victoria University of Wellington Law Review 563–579.
[37] [1968] F.S.R. 415.
[38] *Argyll v Argyll* [1967] CH 302.

its equitable jurisdiction, would restrain a breach of confidence independently of any right at law'.[39]

Although the limitations of this decision have outweighed the extensions, the issues of detriment (the extent of which should be proven),[40] and cases with unorthodox duties of confidence, were not properly addressed.[41] The principle of BOC was subjected to further development. This development provided the law with enough leeway. The implication was that cases which did not fit the earlier stated limitations and the restrictive nature of the principle, did not have to meet the 'pre-existing relationship between... parties'[42] requirement. Overtime, the requirement was removed entirely. BOC was later modified to just include that a duty of confidence only comes into place on occasions when confidential information 'comes to the knowledge of a person . . . in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.'[43]

Although the elimination of the principle of pre-existing relationships did broaden the scope of privacy protection, this development did not adequately protect individuals' privacy. As indicated by Lord Justice Glidewell in Kaye v Robertson[44] (a successful case), it was still a 'graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals.'[45]

Inherently, it is evident that BOC, based on its elements and characteristics, is not fit to support and protect physical privacy or IUS claims. This is not merely due to the issue of pre-existing

[39] Ibid.
[40] John Cooke, *Law of Tort* (9th edn, Pearson Longman 2009).
[41] Ibid.
[42] Catherin Elliot and Frances Quinn, (n 15).
[43] A-General v Guardian Newspapers (No 2) [1990] 1 AC 109.
[44] [1991] (n 20).
[45] Ibid.

relationships (or the lack thereof in most cases), rather, it is because the element of IUS which includes 'states of "seclusion" that are psychological or technological in nature',[46] alongside non-disclosed information, do not fall under the principles of BOC. Moreover, it is evident from the way in which BOC was created, that the main focus of the law has been on the information and not the surrounding components. Thus, issues such as 'intrusion into grief and suffering, employers vetting employee's social media activities, or camera-equipped drones flying over private land',[47] which are integral to IUS, do not and cannot be accounted for merely through the lens of disclosure or IP.

b) The Scope of Misuse of Private Information

The principle and term of MOPI came into place shortly after the introduction of the Human Rights Act[48] (HRA). Although this act did not establish a different tort,[49] the courts agreed that it could rightly 'require... [them] to create a new law where existing law did not adequately protect the rights enshrined in it'.[50] The HRA affirms in its article eight that 'everyone has the right to respect for his private and family life, his home and his correspondence',[51] whilst its article ten explains that 'everyone has the right to receive and impart information and ideas without interference by public authority and regardless of frontiers'.[52] Due to the nature of these rights, a need arose to properly balance both rights (that is individuals' privacy and the wider community's freedom of expression) against each other. Even though the courts were initially against developing any new tort, (as was expressed in

[46] Paul Wragg (n28).
[47] ibid.
[48] Human Rights Act 1998.
[49] Catherin Elliot and Frances Quinn (n 30).
[50] Ibid.
[51] Human Rights Act (n 50).
[52] Ibid.

Wainwright v Home Office),[53] due to notable conflicting interests, the end product was the creation of MOPI.[54]

This was demonstrated in Campbell v Mirror Group Newspapers, for example;[55] 'the test for misuse of private information [deals with] whether the claimant had a reasonable expectation of privacy, and, if they did, whether their right to privacy outweighs the defendant's right to freedom of expression'.[56] Here, extensions and considerations were included on issues such as: the level of harassment on the claimant[57], reasonable expectations of privacy in public places[58] (even for every-day routines),[59] what actually constitutes public interest;[60] (that is separating between information that interests the public and information that is of real importance for and to the public),[61] and any other circumstantial differences to the above elements.[62] Nothing in the principle of MOPI alludes to it being limited to the distribution of wrongly obtained information. Instead, the origins of MOPI reveal that the courts' concerns lie, (alongside other things), with the actions of defendants regarding wrongly obtained private information. Their concerns, however, have generally been focussed on distribution.

c) Understanding The Courts' Stance

MOPI, it can be argued, has rapidly evolved and 'is now better described as protecting against unwarranted privacy invasion [in general]'.[63] When briefly analysed, however, it is evident that this tort has always been founded on the principles of both physical (IUS included) and informational privacy. It can, therefore, always

[53] [2002] QB 1334.
[54] Catherin Elliot and Frances Quinn (n 15).
[55] [2004] (n 1).
[56] Catherin Elliot and Frances Quinn (n 15).
[57] Von Hannover v Germany [2004] EMLR 379.
[58] *Peck v UK* (n 2).
[59] *Murray v Express Newspapers plc* [2008] EWCA Civ 446.
[60] *Jameel v Wall Street Journal Europe Sparl* [2007] 1 AC 359.
[61] Ibid.
[62] *McKennitt v Ash* (2006) EWCA Civ 1714.
[63] Paul Wragg (n 28).

cover intrusion claims. In addition, although 'the threshold test is ostensibly confined to information, the analytical toolkit used to determine the test is much greater and more encompassing than information alone'.[64] The test requires that:

> The judge must take "account of all the circumstances of the case", including the claimant's "attributes", "the nature [including location] of the activity" involved, as well as "the nature and purpose of the intrusion" (emphasis added), the "absence of consent" and "the effect on the claimant".[65]

All these contribute to cover the issue of IUS.

In the seminal case of Campbell v Mirror Group Newspapers[66], this can be seen. Here, the courts evaluated the case and the claimant's claim both on the issues of IUS and the dissemination of her private information. Consideration was given to the fact that the celebrity's photograph was distributed, but the conclusion that 'it was not the photography itself which generated the complaint',[67] (seeing as 'she makes a substantial part of her living out of being photographed... [and] there is nothing essentially private about that information nor can it be expected to damage her private life'),[68] but the psychological effect of that intrusion that was closely inspected. The photograph was taken at a time of vulnerability, revealing Campbell 'to be in a situation of humiliation or severe embarrassment',[69] thus causing and enhancing the claimant's emotional distress. This was an important factor of the case. Is this to say that the issue of distribution was overlooked? Not by any means. Instead, it was the impact of both the physical and the informational intrusion that

[64] Ibid.
[65] Paul Wragg (n 28).
[66] [2004] (n 26).
[67] Paul Wragg (n 28).
[68] *Campbell v Mirror Group Newspapers* [2004] UKHL 22.
[69] Ibid.

established the case. Neither element, therefore, can (or should) be overlooked.

One may still argue, nevertheless, that IUS is not important in the analysis of IOP. Analysis may be based on claims that it was the distribution of the private information that triggered the distress, not just the invasion of the claimant's physical privacy. (The claimant did not witness the capturing of the image). This, however, is a myopic view. It does not consider a 'claimant's diminished emotional state. [This is especially when] combined with the actualities of his publicness... [which] all speak to an intuitive sense of unwarranted intrusion'.[70] These issues are entirely distinct from that of the dispensation of private information. Campbell's 'publicness', that is, her act of seeking medical assistance, placed her in a highly vulnerable position.

The courts, however, must also consider the 'validity of a general public right to know the details of the private lives of individuals who are in the public eye'[71], and 'the purposes for which the information came into the hands of the publisher'.[72] It is evident that an analysis of the IUS aspect is necessary in a PI case because 'liability goes beyond the dissemination of private information and extends to intrusion into the private lives of the applicants'.[73]

The threshold test in MOPI explains that one's reasonable expectation of privacy[74] must be balanced with the community's right to know. Everyone has different expectation of privacy, therefore the level of reasonableness to be analysed in each case needs to be consistent with the changes. MOPI takes note of this, ('the fact that there are different degrees of privacy')[75] and applies these different degrees in the form of principles in relation to IUS.

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[70] Paul Wragg (n28).
[71] Steve Foster, 'The public interest in press intrusion into the private lives of celebrities: the decision in Ferdinand v MGN Ltd' (2011) 4 CL 129.
[72] Paula Gilker, 'A common law tort of privacy? The challenges of developing a human rights tort' (2015) Singapore Academy of Law Journal, 27, 761-788.
[73] ibid.
[74] *Campbell v Mirror Group Newspapers* (n 69).
[75] Ibid.

Thus, not only the distribution of material, but also the effects of invasion, a core aspect of IUS, are given consideration. As with physical and informational privacy, IUS and MOPI, despite their being distinct from one another, are 'not merely linked but inseparable'.[76]

It is still reasonable to consider the effect of the issue of 'aspect blindness'[77] in the court's response. The consequence of the courts seemingly 'focusing on only one 'aspect' of privacy [claims],'[78] is that of the level of embarrassment in regard to the balancing test. Does this constitute a problem in the law's analysis of IUS? Are other factors being taken into account? If so, have they been adequately covered?

4. The Issues of MOPI in Light of IUS's Objectives

One of the important components of the tort of MOPI is 'the Lenah test'.[79] This test seeks to know whether the intrusion in question has caused or could cause 'offense to a person of ordinary sensibilities.'[80] Due to the nature of this test and the effect of the HRA's article ten on PI, it is usually split into two parts during analysis.

The first aspect deals with the impacts of the intrusion. The related psychological issues and its effects have been identified in the earlier sub-headings of this essay. The second aspect of the Lenah test revolves around the public's right to information and how important it is in the grand scheme of the claim. This test has helped balance the two well-known competing rights: the right to

[76] Paul Wragg (n 28).
[77] Thomas D.C. Bennett (n 14).
[78] ibid.
[79] All Answers ltd, 'Invasion of Privacy Is Not an Acknowledged Tort in the UK' (Lawteacher.net, August 8 2019) <https://www.lawteacher.net/free-law-essays/constitutional-law/invasion-of-privacy-is-not-law-essays.php?vref=1> accessed 2 May 2022.
[80] *Campbell v Mirror Group Newspapers* (n 69).

privacy and the public's right to receive information.[81] However, the courts' position about this principle is slightly problematic.

In the case of Campbell v MGN[82], the courts considered that the claimant 'had misled the public by claiming in an interview that she did not take illegal drugs, unlike other models'[83] (an action germane to her case given that the private information pertained to her drug treatment). They concluded that 'the right of the public to receive information about the details of her treatment was of a much lower order than the undoubted right to know that she was misleading the public when she said that she did not take drugs'.[84] In this case, the court 'was less sympathetic towards'[85] Campbell and considered that the privacy invasion correcting whatever false image she had presented in the media was most important, even though there were neither 'political or democratic values at stake here, nor... any pressing social need... identified'.[86]

Such a stance poses a great problem to MOPI's position in catering for IUS claims. It does not consider one's personal autonomy,[87] even when the weight of the effect of the intrusion is as heavy as in Campbell's case, that is, dealing with mental health recovery, an issue directly at the heart of IUS. The 'article 8... [is said to protect] a right to personal development, and the right to establish and develop relationships with other human beings and the outside world'.[88] This 'includes the right to reputation',[89] meaning that when judging a PI case, the claimant's personal development

[81] Equality and Human Rights Commission, 'Article 10: Freedom of expression' (June 3 2021) <https://www.equalityhumanrights.com/en/human-rights-act/article-10-freedom-expression> accessed 3 May 2022.
[82] [2004] (n 1).
[83] All Answers ltd (n76)
[84] *Campbell v Mirror Group Newspapers* (n 69).
[85] Ibid.
[86] *Campbell v Mirror Group Newspapers* (n 69).
[87] Pretty v United Kingdom 2346/02 [2002] ECHR 427. Elucidated by Sopinka J to mean 'the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity'.
[88] ibid.
[89] Kate Wilson (n3 6).

(especially the psychological aspects) and reputation should be largely considered.

Even with this in mind, the court still saw its Campbell judgement as befitting for 'democratic society's'[90] 'progress and... [the] self-fulfilment of'[91] individuals. This brings into question the validity of the court's technique: do the present tests properly consider that such invasions could serve as major obstructions to a claimant's 'efforts to conquer [psychological issues such as] addiction'?[92] It is advisable instead, that when balancing these rights, 'a number of factors [not yet properly included] ought to be taken into account, including the defendant's motives and beliefs, [and] the timing of the disclosure'.[93]

Nevertheless, even with the obstruction in mind, the 'publication of details of [Campbell's] therapy'[94] was still seen as 'a fairly minor intrusion into her private life and was [said to be merely] part of the journalistic latitude in reporting the fact of her addiction'.[95]

It is apparent that the theoretical approach varies greatly from practical impact. In theory, academic scholars present very interesting views regarding the correction of false images and how that correction could be properly balanced with society's right to protect the positions of both the claimants and the public. Suggestions that the courts, for example, consider 'the risk of harm [as a] principal factor'[96] of the case, and consider the impact of the timing of the publication on the claimant and their treatment[97] are quite appealing to the mind but when implemented, present a

[90] Campbell v Mirror Group Newspapers (n 69).
[91] ibid.
[92] Andrew T. Kenyon and Megan Richardson, New Dimensions in Privacy Law: International and Comparative Perspectives (Cambridge University Press 2016).
[93] Andrew T. Kenyon and Megan Richardson (n 93).
[94] Tanya Frances Aplin and Jennifer Davis, Intellectual Property Law: Text, Cases, and Materials (Oxford University Press 2017).
[95] ibid.
[96] Andrew T. Kenyon and Megan Richardson (n 91).
[97] ibid.

different outcome. (In Campbell's case, 'she would have to fear media and public attention whilst undergoing treatment.')[98]

The impact on a claimant's rehabilitation is important in the evaluation of a PI case, but should the court overlook the consequences of false representation? How is this to affect the remedies already in place? Is a defendant to apologise for what is true- that a claimant presented a false image? Moreover, are the courts' limitations in the creation of new laws being considered? Even if the defendant's dissemination is judged based on motives, does this diminish the end result? Is the private information published merely a medium to dampen the claimant's 'physical or psychological integrity',[99] or does it also serve as a correction to change wrong views?

5. Conclusion

Intrusions upon individuals' seclusion have always been at the forefront of privacy, although, it has been numerously argued that none of English Law's principles cater to these privacy invasions. Arguments have been founded on the view that IUS is inadequately judged in the light of seclusion. Were the areas surrounding the intrusion in relatively private places, for example? However, by briefly exploring both IUS and privacy's development, this article has revealed that the courts do not only consider the location of the activity. Instead, MOPI also analyses claims based on other important factors such as the level of embarrassment caused to the claimant, their diminished mental state, and the different degrees of privacy- all important aspects of IUS. Each of these factors have helped English Law (through MOPI) to deal accurately with the intrusions. Thus, the relationship between IUS and MOPI is a close one: MOPI could not be the tort that it is if it did not consider the effects of intrusion.

This article has also argued that when seeking balance between articles eight and ten of HRA, the courts' old tests are not well

[98] All Answers ltd (n 83).
[99] *Pretty v United Kingdom* (n 87).

enough equipped to cater for IUS claims. The new tests suggested amongst academic scholars seem, however, to have only a theoretical advantage that cannot be mirrored in practice. This brings back the question; is legislation or a tort of IUS the only answer to the law's ambiguity?

Legal Framework for the Protection of Women and Children against Insecurity and Terrorism in Nigeria

Dr. Peter I Gasiokwu* and Vivian C Madu**

Abstract

Terrorism is a complex cross-border crime. For this reason, nations must come together to combat it. Women and children are typical victims of terrorists' acts. They are often kidnapped, taken hostage, and used against their will as child soldiers and suicide bombers. Wives are also made to play other support roles. The Nigerian Government, on its part, has taken several steps to combat this crime through various law reforms. It is against this background that this paper seeks to examine the effectiveness of the legislations being used for the safety and protection of women and children involved in terrorism. It further explores how these laws have been applied in the investigation, arrest, and trial of suspected members of a terrorist organisation. Some support roles, unwittingly played in terrorism offences by women and children, can carry a minimum sentence of twenty years. This situation has grievous implications for people who may otherwise be considered to be victims of terrorist acts. This paper found that the Terrorism Prevention and Prohibition Act and other laws used in combatting acts of terrorism are gender neutral. This means that the laws do not consider the various factors and circumstances of the recruitment of members of terrorist organisation. For this reason, the paper recommends that when they convict, judges should be given discretionary powers to take into consideration the factors and circumstances responsible for a person's membership of a terrorist organisation. The paper finds that the new Terrorism Prevention and Prohibition Act has made laudable provisions for the protection of witnesses and victims of acts of terrorism. This is highly commendable. Equally, the provisions of the new law on witness protection will cater for and protect victims against the danger of re-traumatisation. The paper

stresses the importance of witness protection mechanisms, and their contribution towards restoring victims' and witnesses' confidence in the criminal justice system.

Keywords: Sexual and gender-based violence, victim, witnesses, women, children.

1. Introduction

Terrorism is a global menace primarily because of the ease of movement of people, goods, and services. The rapid advancement in telecommunications has also exacerbated the activities of terror outfits. The world is a global village and fighting terrorism is not simply a national affair. It is paramount for countries to come together to assist one another in this fight.[1]

. The Constitution of the Federal Republic of Nigeria and other laws entrust the Attorney General (AG) of the Federation[2] and the Attorney Generals of the States with the power to prosecute all infractions of the provisions of laws.[3] The AG can institute, take over, continue and discontinue a case at any stage before judgment is delivered. Such an action must be done in the public interest, as was decided by the Supreme Court in *Anyebe v State*[4]. Similarly, the Administration of Criminal Justice Act[5] makes similar provisions to those contained in the 1999 Constitution.

In 1999, an Islamic fundamentalist group emerged in North-Eastern Nigeria called *Boko Haram*. It advocated that its mode of worship was supreme, and that 'Western education' was

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[1] UNODC International- Corporation in Criminal Matters: Counter Terrorism UN, New-York 2010
[2] N. Y Fedetov, 'Criminal Justice Response to Support Victims of Acts of Terrorism' United Nation New York, (2011) p 6.
[3] Section 174 (1) (a) (b) (c) Constitution of Federal Republic Nigeria 1999.
[4] (1986) 1 SC 87.
[5] Sections 106 and 107 of Administration of Criminal Justice Act (ACJA) 2015.

dangerous. Group members began to perpetrate acts of violence such as suicide bombing, kidnapping and rape as a means of recruitment and emphasising their demands. This led to the Nigerian Government subsequently proscribing and declaring them a terrorist group. The paths that the youth take to join Boko Haram defy neat categories of "voluntary," or "forced", and vary from intrinsically motivated to circumstantially motivated, pressured, coerced, and forced. Many women, once they join the Boko Haram group, become involved in domestic labour, recruitment of other women, spying or acting as messengers and smugglers. Women who are supposedly "harmless" become useful in carrying out these tasks, undetected by the police or relevant security agencies.

Very few women appear to have taken part in military action. The number of female suicide bombers, however, have increased because of their involvement. In 2015, twenty-one girls were involved in suicide attacks, compared to four in 2014.[6] According to the International Crisis Group report, "the youngest female bomb-carriers are often victims themselves, with little awareness, duped by relatives and possibly drugged. But the older bombers seem to have volunteered"[7].

This paper is divided into four major parts; with the first part being the introduction. The second part addresses the various laws enacted to combat terrorism. The third part explores how these laws have been applied in the investigation, arrest and trial of persons suspected to be members of the Boko Haram terrorist group. Part three further includes discussion of the importance of those protection mechanisms which have been designed to help restore victims' and witnesses' confidence in the criminal justice system. Finally, the paper makes its conclusion in part four.

[6] S. O Damilola. Terrorism, Armed Conflict and the Nigerian Child Legal Framework for Child Right Enforcement in Nigeria. Nig. J. R (2015) pp 1-12.

[7] O Adeniyi, Power, Politics, and Death, A front-row Account of Nigeria under President Yar'adua, (Kachifo Ltd Lagos Nig.2011), p. 102-114.

2. A Review of Literature on the Protection of Women and Children Against Acts of Terrorism in Nigeria

Justifying the activities of the Boko Haram group amounts to an act of terrorism. There have been various definitions of terrorism in the literature. Terrorism is the use of threat or violence to intimidate or cause panic, especially as a means of effecting political conduct.[8] Furthermore, Silke describes terrorism as violence against the innocent.[9] A comprehensive definition of terrorism has also been provided by the United Nations Ad Hoc Committee on International Terrorism in its Convention against International Terrorism. It provides that any person commits terrorism if that person, by any means, unlawfully and internally, causes death or serious bodily injury to any person, or serious damage to public or private property resulting in major economic loss.[10] It further provides that acts of terrorism occur where such acts intimidates a population, or is/are aimed to compel a government or an international organisation to do or abstain from doing any act.[11] Nigeria's Terrorism (Prevention) Act 2011 only states that an "act of terrorism' means any act specified in section 1 of this Act." However, the Economic and Financial Crimes Commission (Establishment, etc.) Act No 1 of 2004 provides that terrorism is an act which may endanger life or property or is intended to intimidate or induce any government or the public to do or abstain from doing any act or disrupt any public service.[12] From these definitions, one can find that the acts of violence

[8] Bryan A Garner (ed.), *Black's Law Dictionary* (8th ed., West Publishing Company, St. Paul, Minn, USA, 2004) 1513.

[9] Andrew Silke, 'Children, Terrorism and Counterterrorism: Lessons in Policy and Practice' in Magnus Ranstorp & Pul Wilkinson (eds.), Terrorism and Huma Rights (Routledge, London, Britain, 2008), 12

[10] United Nations Ad Hoc Committee on International Terrorism Comprehensive Convention (draft), Article 2 A/C/6/56/L.9, annex I.B. quoted by Alex P. Schmid, "Terrorism and Human Rights: A Perspective from the United Nations," in Magnus Ranstorp & Paul Wilkinson (eds.), *Terrorism and Human Rights* (Routledge, London, Britain, 2008), 16-17.

[11] Alex P. Schmid, (eds.), op cit., 17.

[12] Section 45 of Economic and Financial Crimes Convention (Establishment, etc.) Act No. 1 of 2004.

perpetrated by the Boko Haram group qualify as acts of terrorism. It is for this reason that this paper refers to the Boko Haram group as a terrorist group.

There are three main areas of discussion within or emanating from reviewed literature. First is the question of Nigerian society's perception of gender identity. Second is how women and children are perceived by the society. Thirdly, what is the level of advocacy for human rights protection for women and children? According to Njoku and Akintayo,[13] the existing gender identities, structures, and inequalities in Nigerian society during peacetime, such as household headship, privilege the male gender. Under this arrangement, women and children assume subservient roles and perform household chores. Women provide care for children and are often excluded from participating in decision making. These subservient roles, and the related economic dependence, increase women's vulnerability to abuse and sexual violence. Central to this expectation is the logic that women are naturally expected to satisfy their male partners sexually, and that men, by default, have authority over, and the right to the bodies of women. Davies and True describe this as the gender structural inequalities and identities that provide explanations for conflict-related sexual violence.[14] Baaz and Stern posit that the stereotypical association of women and girls with feminine attributes and men and boys with masculine attributes leads to a construct in which women and girls are susceptible to the instruments of sexual violence in both conflict and post-conflict settings.[15] Violent crimes also result as a product of long-time neglect and abuse of human rights. For Oyebade,[16] violence against women can be said to be as age long as

[13] E. T Njoku and J. Akintayo, Sex for Survival: Terrorism, Poverty and Sexual Violence in North-Eastern Nigeria, South African Journal of International Affairs, 28:2 (2021), p. 287.

[14] S. E Davies and J. True, Reframing Conflict-Related Sexual and Gender-Based Violence: Bringing Gender Analysis Back, Security Dialogue 46, 6 (2015), p. 495.

[15] M. Baaz and M. Stern, *Sexual Violence as a Weapon of War? Perceptions, Prescriptions, Problems in the Congo and Beyond* (Zed Books, 2013), p. 300.

[16] A. D Oyebade, Human Rights Protection: A Panacea for the use and Involvement of Women in Terrorism, available at http://www.fbi.gov/publications/terror/terrorism2002.

society. Violence against women is manifested in many forms; physical, sexual, economic, emotional, mental, and psychological. Seifert further acknowledges that the perpetuation of sexual violence against women reflects the society's attitudes towards women.[17]

It is against this background that the practice of multiple and sequential marriages between girls and women and terrorist fighters are considered. For example, if a girl or woman willingly joins a terrorist fighter in Sambisa forest as his wife, but subsequently loses the supposed husband in death, she is then subsequently married out to another terrorist fighter for protection and economic welfare. Therefore, the question that persists is thus: how is the judge going to calculate the totality of consent for the purpose of determining the appropriate punishment? This scenario involves a testing and legally complex assessment. According to Aolain, if, for instance, the girl or woman, after the death of a spouse, was re-married without her consent or in highly coercive or exploitative circumstances, such a relationship and the sexual aspects of it, including rape, ought to be considered in a different light both in terms of applicable criminal law and in terms of her status as a member of a terrorist organisation or as a victim.[18] As one would expect, these different explanations lead to different expectations regarding violence in societies where females have greater rights and opportunities as opposed to societies where they have comparatively fewer rights and opportunities.

Harris and Milton[19] explained that certain cultural practices in Africa breed male propensity to violence as an attribute. Sageman opines that violence against women has an impact on a child's

[17] R. Seifert, War and Rape: A Preliminary Analysis, *The Criminology War* (1994), p 307.
[18] F.N Aolain, The Limits of Equality and Gender Discourses in Counter-Terrorism: The Case of Women and Children in Syria and Iraq, 29, 7 (2020), p. 15.
[19] C. Harris and D.J Milton, Is Standing for Women a Stand Against Terrorism? Exploring the Connection Between Women's Rights and Terrorism, Journal of Human Rights, DOI, 10 (2015), p. 2.

predisposition to violence, since children are always with their mothers.[20] There are few words to adequately capture the conditions under which boys and girls are born and live in Sambisa forest under the captivity of Boko Haram terrorist group in North-Eastern Nigeria. In these appalling circumstances of daily life, not of their own making, the retrieval or rescue of children is a humanitarian and human rights imperative. Aolain[21] argues that if children born to parents who are members of a terrorist group are not deserving of protection, then this constitutes a moral failure by their home countries, particularly those who have ample resources. State and non-State actors at all levels should affirm and respect the fundamental vulnerability of women and children who, through a range of circumstances almost always not of their own making, are involved in armed conflict.

2.1 Methodology

The study relied on both primary and secondary data. Primary data was gathered through interviews of women and girls in Internally Displaced Persons (IDP) camps in selected States in North-East Nigeria and executive programme officers of Non-Governmental Organisations (NGOs) using the strategic random sample method. The authors also conducted semi-structured interviews with executives and programme officers of international and local humanitarian, development and human rights NGOs involved in various service delivery and advocacy efforts in Yobe and Borno States.

The Nigerian Institute of Advanced Legal Studies and the Nigerian Stability and Reconciliation Programme carried out a survey of the Boko Haram attack in Borno and Yobe States in 2017. Their report states that the devastation caused by the Boko Haram terrorist

[20] M Sageman, Understanding Terror Networks (Philadelphia: University of Pennsylvania Press),2008, p. 287.
[21] Aolain, no 12.

group gave rise to almost seven million people (mostly children) requiring humanitarian assistance.[22]

The interview guidance used related to the women and girls' socio-economic conditions both before the Boko Haram insurgency and currently. Questions such as what factors made it impossible for the wife of a terrorist to report her husband to the relevant government authority, and what factors where responsible for women and children's membership of that terrorist organization, were included. Other questions also explored whether there were reports of cases of rape, or any other form of sexual violence, and if judicial remedies or any rehabilitation were sought?

Before questionnaires were disseminated, the purpose of the research project was explained to the respondents. The consent of the respondent was sought and obtained while reassuring them of the confidentiality of the report. The field researcher encountered some challenges during the process, for example, requests for food and financial assistance from respondents at the IDP camps before the distribution of the questionnaires. The field researchers were able to overcome this challenge by refocusing the people's expectation towards achieving lasting peace in the State.

In analysing the gathered qualitative data, content analysis was adopted. In doing this, each interview was transcribed carefully and subjected to a process of continual review and reflection before it was finally analysed based on the aims and objectives of the study; promoting the protection of women and children involved in armed conflict.

The study obtained secondary data from both academic and grey literature: academic literature on sexual violence and child abuse during armed conflict, and grey literature including reports from the United Nations Office for Drug and Crime (UNODC), Nigerian Institute of Advanced Legal Studies (NIALS), the United Nations High Commissioner for Refugees (UNHCR). The reports focused on

[22] Nigeria Stability and Reconciliation Programme and Nigerian Institute of Advanced Legal Studies, Dealing with the Past: Justice, Reconciliation and Healing in the North East of Nigeria, 2017, available at http://www.library.nials.ng

the Nigerian Government's counter-terrorism measures, particularly in North-East Nigeria.

2.2 Gender Aspects of the Offences under the Terrorism Prevention and Prohibition Act (TPPA)

The offences proscribed by the Terrorism Prevention and Prohibition Act are gender neutral. Nothing indicates that these offences would apply differently to men or women, nor, at least on the face of it, would any sanction enforcement impact differently on men or women either.

Support Offences

Two notable features of the Terrorism Prevention and Prohibition Act **(**TPPA) offences are:

1) The great number of provisions criminalising support roles, i.e., non-violent conduct which facilitate, aid, and abet the carrying out of terrorist attacks. Many of these offences are not necessarily linked to the preparation of a specific terrorist attack but contribute to maintaining the operations of a terrorist group by recruitment, financial and other support. These roles could be referred to as "support offences."

2) Very harsh punishment is provided for these "support offences".

Women who are actively involved in the commission of acts of terrorism in North-East Nigeria, excepting female suicide bombers, primarily play support roles. These two features of the TPPA offences deserve a more cursory look. The offence of harbouring[23] which attracts a penalty of twenty years' imprisonment, is, in my opinion, a severe sentence against the wife of a member of a terrorist organisation. This sentence could have an adverse effect on the children of such a marriage. If their mother is convicted and sentenced to twenty years' imprisonment, what happens to the children? Their father is most likely to be standing

[23] Section 14 Terrorism Prohibition and Prevention Act 2022.

trial for terrorism offences committed or may have already been convicted. For this reason, it is suggested that the penalty meted against a wife of member of a terrorist organisation, for the offence of harbouring, be reduced to five years to afford her the opportunity of returning to care for her children. In the absence of a reduction of the sentence period, government could provide welfare homes for children whose parents are standing trial for terrorism related offences. Alternatively, children below the ages of ten could be given up for adoption on the grounds that their parents lack the necessary skills to bring them up.

Another issue likely to be raised in Nigeria is how many wives will know they have committed an offence under sub section (a) – (c) of the Act.[24] Regarding the offence of concealment,[25] for instance, how does a wife get to know that her husband has committed an act of terrorism, or is about to commit an act of terrorism? In this part of the world, most men keep many of their activities as secrets, away from their wives. It is only when, for example, they are declared wanted by the police that wives first get to know of some of these activities. At other times, even when the wife is aware, she is usually incapacitated, because the husband is likely to subject her to an oath of secrecy. The Government, equally, does not provide a haven to enable such a woman to report her husband's activities. She would not be sure she would be taken care of, and again, she would usually be concerned about what would happen to her children.

In summary, the TPPA makes most of the support roles that women typically play in terrorism operations, which do not involve direct participation in acts of violence, punishable with sentences ranging from a minimum of twenty years' imprisonment to the death sentence. This, in the researcher's opinion, is harsh and extreme for offences which the offender may not have willingly and voluntarily committed. There should be a gender allowance factored into the penalty and sentencing. This could involve taking into consideration the mental capacity of a man viz-a-viz that of a

[24] Section 14 (a) – (c) Section 14 Terrorism Prohibition and Prevention Act 2022.
[25] Section 15 Terrorism Prohibition and Prevention Act 2022.der

woman, who is often, in our Nigerian culture, first subjected to doing the wish or will of her father and upon marriage is then further subjected to the wishes or will of her husband. The courts should be given a discretionary power to determine an appropriate sentence based on the merits of each case.

The Act provides for the offence of membership.[26] An organisation can be proscribed as a terrorist organisation on an application made by either the Attorney General, the Inspector General of Police, or the National Security Adviser to a judge ex parte. The application must be brought pursuant to the approval of the President.[27] This arrangement is, to a large extent, a fair arrangement. For the proscription to take place, it must pass through the court and not be carried out on the whims of the government. The proscription order must be published in two national dailies and the official Gazette and in such other places as the court may decide. If an organisation is proscribed, membership and participation in its activities attracts twenty years imprisonment. A proscribed organisation member who took no further participation in the activities after the proscription of that organisation would not be guilty of their activities.

One of the challenges of the proscription is that there is no provision for the members to go and challenge the proscription in court. This amounts to a breach of the right to a fair hearing, a constitutionally guaranteed right,[28] and the right to freedom of association within the limit of the law.[29]

Sexual and Gender Based Violence (SGBV) Offences by Terrorist Groups Under the Terrorism Prevention and Prohibition Act

The Terrorism Prevention and Prohibition Act (TPPA) 2022, makes no mention of Sexual and Gender Based Violence **(**SGBV) offences. There are, however, some offences under the TPPA that may be

[26] Section 25 Terrorism Prohibition and Prevention Act 2022.
[27] Ibid.
[28] Section 36 of Constitution of the Federal Republic of Nigeria 1999.
[29] Section 40 of Constitution of the Federal Republic of Nigeria 1999.

applicable to the acts of SGBV against women and girls. Some of such offences can be "acts of terrorism,"[30] "an attack upon a person's life, which may cause serious bodily harm or death"[31] and "kidnapping."

This will be the case if the attack or kidnapping:

i. May seriously harm or damage a country or an international organization" [32]; and

ii. Are committed with one of the intents listed in sub-section (2) (b), which include to "unduly compel a government to perform or abstain from performing any act", or "seriously intimidate a population" or "otherwise influence such government by intimidation or coercion.

Under the Terrorism Prevention and Prohibition Act 2022, whoever "does, attempts or threatens any act of terrorism" is liable, on conviction, to the maximum sentence of death. The same penalty applies to whoever contributes in one of the numerous ways listed in section (2) TPPA, which includes organising, directing, assisting, facilitating, and being an accomplice.

Hostage Taking

It is unclear whether for this offence to be committed,[33] it is sufficient to "seize, detain or attempt to seize or detain" a person, or whether this must be accompanied by threats, or the giving of explicit or implicit conditions for the release of the person held hostage. Whoever commits this offence is liable on conviction to life imprisonment. Cases involving jurisdiction under the Terrorism Prevention and Prohibition Act are prosecuted by the

[30] Section 1 of the Terrorism Prevention and Prohibition Act 2022.
[31] Section 2 sub-section (c) (i) and (ii) of the Terrorism Prevention and Prohibition Act 2022.
[32] Section 2 sub-section (2)(a) of the Terrorism Prevention and Prohibition Act 2022.
[33] Section 24 of the Terrorism Prevention and Prohibition Act 2022.

Director of Public Prosecutions of the Federation and tried in the Federal High Court.

Sexual and Gender Based Violence (SGBV) Offences Under the Penal Code (Northern States) and Federal Laws

There are several laws in Nigeria proscribing SGBV-related offences such as rape, sexual assault, forced/unlawful domestic servitude, abduction, and human trafficking. In Northern Nigeria, particularly the North-East States where Boko Haram has been most active, the Penal Code of 1960 is the most prominent statute creating, defining, and prescribing punishment.

Rape

The relevant provision under the Penal Code is Section 282(1) which provides that:

A man is said to commit rape who, save in the case referred to in subsection (2), has sexual intercourse with a woman in any of the following circumstances-

(a) Against her will;

(b) Without her consent;

(c) With her consent, when her consent has been obtained by putting her in fear of death or hurt;

(d) With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes to be lawfully married;

(e) With or without her consent, when she is under fourteen years of age or of unsound mind."

One of the ingredients that the court needs to establish in order to sustain a conviction of rape under section 282 of the Penal Code, is that the woman is not the wife of the accused. The elements of the

offence of rape under the Penal Code are further established in case law in *Ezigbo v the State*.[34]

The offence of rape[35] is punishable with imprisonment for a term, which may extend to fourteen years and a fine.

Rape Under the Violence Against Persons Prohibition Act (VAPP) 2015

The offence of rape is also provided for in the newly enacted Violence Against Women Person's (Prohibition) Act 2015 (VAPP); under section 1 of VAPP 2015, which provides thus;

"(1) A person commits the offence of rape if:

(a) He or she intentionally penetrates the vagina, anus or mouth of another person with any other part of his or her body or anything else;

(b) The other person does not consent to the penetration; or

(c) The consent is obtained by force or by means of threat or intimidation of any kind or by fear of harm or by means of false or fraudulent representation as to the nature of the act or the use of any substance or additive capable of taking away the will of such a person or in the case of a married person by impersonating his or her spouse."

The VAPP Act deals with rape more comprehensively than existing criminal laws, which limit rape to penal penetration of a vagina, broadening the definition and expanding the scope of rape to protect males and to include anal and oral penetration with any part of the body or thing. It contains provisions to protect the identity of rape victims, grant protection orders and compensation for victims of violence.[36]

Child Rights Act (CRA)

[34] (2012) LPELR-S 35/2010.
[35] Section 283 of the Penal Code.
[36] Sections 28 and 30 of Violence Against Persons Prohibition Act.

The Child Rights Act is yet another enactment that protects the interest of children. Under the Act any person who sexually abuses or sexually exploits a child commits an offence and is liable on conviction to imprisonment for a term of fourteen years.[37] It is however the opinion of this researcher that the punishment of fourteen years could be made a minimum sentence so that a Judge can have a discretionary power to increase the sentence depending on the peculiarity of each case.

The act provides for the offence of abduction reading thus:

"Whoever by force compels or by any deceitful means induces any person to go from any place, is said to abduct that person and whoever kidnaps or abducts any person shall be punished with imprisonment for a term which may extend to ten years and shall also be liable to a fine''[38]

In *Ese Oruru's* case, the girl was abducted by one Dahiru from Yenagoa in Bayelsa State and was taken to Kano State, where he forcibly converted her into Islam and raped severally which resulted in pregnancy.[39] At the time of abduction, Ese Oruru was fourteen years old. She was eventually rescued by the police in February 2016, two years after her adoption and brought back to Yenagoa in early March, where she gave birth to a baby girl in May of the same year. The abductor, Dahiru, on March 8th, 2016, was arraigned before the Federal High Court on a five-count charge bordering on criminal abduction, illicit intercourse, sexual exploitation, and unlawful carnal knowledge of a minor and he was found guilty of the charges and sentenced appropriately.

The Violence Against Persons Prohibition Act (VAPPA) contains the offence of depriving a person of his or her liberty, which is punishable by up to two years imprisonment including criminalisation of those who attempt, incite, aid, abet, counsel, receive or assist another to commit the offence.[40]

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[37] Section 32 of the Child Right Act.
[38] Section 27 of the Child Rights Act.
[39] Ese Oruru gets justice at last, reported by https://www.vanguard.com
[40] Section 10 (1) - (4) Violent Against Persons Prohibition Act.

Forced Servitude/Labour

Forced servitude[41] can be likened to forced slavery or compelling a person to be of service to another against the person's will. Section 280 of the Penal Code provides:

> Whoever compels any person to labour against the will of that person, shall be punished with imprisonment for a term which may extend to one year or with a fine or with both." However, in the cases of terrorism it is recommended that prosecutors bring the offender under the Terrorism Prevention and Prohibition Act (TPPA) since it provides for stiffer punishment.

The Child Rights Act[42] provides that no child shall be subjected to forced labour. The Act further provides that anyone who contravenes section 28 (1) commits an offence and is liable on conviction to a fine of fifty thousand naira or imprisonment for a term of five years, or both fine and imprisonment.[43] It is the opinion of this author that the drafters of the law had domestic help employers in mind when making this provision of the law. This opinion is premised on the fact that prior to this law, many under-aged children were trafficked and used as domestic helps within and outside Nigeria whilst subjecting such children to inhumane treatment, so the law was enacted to prevent child labour. However, in cases of terrorism, when drafting their charges, prosecutors should recourse to laws that provide stiffer punishments.

Human Trafficking

Human trafficking is prohibited under the Penal Code, Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003 and its amendment of 2005, and the 1999 Constitution of

[41] D. Abah. and A. Hembe, Ethnic Militias and Security in Contemporary Nigeria: An appraisal of Ombatse in Nasarawa State (2015) POLAC International Journal Humanities and Security Studies.
[42] Section 28 (1) (a) Child Right Act.
[43] Section 28 (3) of the Child Right Act.

Federal Republic of Nigeria. The Penal Code[44] prohibits the import, export, removal, buying, selling, disposal, trafficking, or dealings with any person as a slave or their acceptance, receipt or detention against the will of any person as a slave, and punishes with imprisonment for a term which may extend to fourteen years and a fine. Whilst the term 'trafficking' is not defined under the penal code, a definition of the term is provided under section 82 of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003 and amendment of 2005. It provides that:

> All acts involved in the recruitment, transportation within or across Nigerian Borders, purchases, sale, transfer, receipt or harbouring of a person, involving the use of deception, coercion, or debt bondage for the purpose of placing or holding the person whether or not in voluntary servitude (domestic, sexual or reproductive) in forced or bonded labour or in slavery-like conditions.

The Act prohibits the act of trafficking in persons under Section 13(1) and makes any person who commits the offence liable on conviction to imprisonment for a term of not less than two years and a fine of not less than two hundred and fifty thousand naira. The Act[45] also prohibits forced labour,[46] the procurement or recruitment of a person for use in armed conflict.

Forced Marriages

The forced marriage (of adult women) does not appear to be criminalised under existing Nigerian laws. The Child Rights Act[47] provides that, "No person under the age of 18 years is capable of contracting a valid marriage and accordingly, a marriage so contracted is null and void and of no effect whatsoever." The Act[48] further provides that, "Any person who marries a child commits an

[44] Section 279 of Penal Code.
[45] Section 19 of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act.
[46] Section 22 of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act.
[47] Section 21 of the Child Rights Act.
[48] Section 23 of the Child Rights Act.

offence and is liable on conviction to a fine of five hundred thousand naira or imprisonment for a term of five years or both fine and imprisonment." This, the author supposes, is one of the reasons why the Child Rights Act has not yet been established in some States in the Northern part of Nigeria, and that Islamic fundamentalists insist that their religion permits early marriage. Moreover, child victims of underage marriage lack the economic willpower to institute any legal action against their abuser. This is an area in which this author thinks that non-governmental agencies could step in to come to the rescue of child brides.

Jurisdiction

Offences under the Penal Code are tried in the State High Court or Magistrate Court. Jurisdiction to try offences under the Child Rights Act lies with the Family Court at the State High Court in each State.[49] Unfortunately, only very few State High Courts have the Family Court. The Trafficking in Persons (Prohibition) Act[50] provides that offences under the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003 are tried at the Federal High Court, the High Court of the Federal Capital Territory, or the High Court of a State.

Trafficking in Persons by Terrorist Groups

The United Nations Convention Against Transnational Organized Crime (UNTOC, also known as the "Palermo Convention"), defined the crime of people-trafficking and provides a framework to effectively prevent and combat people-trafficking. Nigeria is a party to the Convention and the Protocol.[51]

"For the purposes of this Protocol:

(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by

[49] Sections 151 and 152 of the Child Right Act.
[50] Sections 36 and 82 of the Trafficking in Persons (Prohibition) Act.
[51] Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of the United Nations Convention against Transnational Organized Crime (UNTOC).

means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation is defined to include the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

The Act goes further to provide:

> (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
>
> (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article.

This provision applies mostly to parents who for economic benefits send out their under-aged children as domestic helps.

The Act defines Child to mean any person under eighteen years of age."[52]

The UN identifies that abduction and trafficking of women and girls is one of the ways for terrorist groups to obtain funds and to recruit new members:[53]

i. "Trafficking in persons, in particular women and girls, remains a critical component of the financial flows to certain terrorist groups;" and that,

[52] Article (d) of the United Nations Convention Against Transnational Organized Crime (UNTOC).
[53] UN Security Council Resolution 2331 (2016).

ii. "When leading to certain forms of exploitation, is being used by these groups as a driver for recruitment."

The Security Council therefore urges all States to ensure that their domestic laws and regulations establish serious criminal offences sufficient to provide the ability to prosecute and penalise. This should be done in a manner duly reflecting the seriousness of the offence of trafficking in persons committed with the purpose of supporting terrorist organisations or individual terrorists. These domestic laws should equally cover offences of financing of and recruitment for the commission of terrorist acts.

Sexual and Gender Based Violence (SGBV) Offences as War Crimes and Crimes Against Humanity

Under certain circumstances, acts of violence committed by terrorist groups may constitute a war crime or a crime against humanity.

The Rome Statute of the International Criminal Court (ICC) criminalises acts of SGBV both as war crimes and as crimes against humanity:

i. Under the Rome Statute,[54] "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" constitute a crime against humanity "when committed as part of a widespread or systematic attack directed against any civilian population."

ii. Under the Rome Statute,[55] war crimes include:

   (a) In the case of an international armed conflict, "committing outrages upon personal dignity, in particular humiliating and degrading treatment;

   (b) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other

[54] Article 7 of the Rome Statute.
[55] Article 8 of the Rome Statute.

form of sexual violence also constituting a grave breach of the Geneva Conventions.

(c) In the case of an armed conflict not of an international character, "committing outrages upon personal dignity, in particular humiliating and degrading treatment.

International Instruments for Combating of Terrorism

Nigeria ratified the International Covenant on Civil and Political Rights (ICCPR), which guarantees the right to effective remedies by competent judicial, administrative, and legislative authorities to men and women whose rights have been violated.[56] The criminal justice system is a core redress mechanism for victims of crime, including terrorist crimes.

The ICCPR guarantees women equality before courts and tribunals on the same basis as men without discrimination[57] and the equal protection of the law.[58] The Convention on All Forms of Discrimination against Women similarly recognises women's equality with men before the law.[59] This requires the mainstreaming of gender perspectives into laws, protocols, and procedures within criminal justice systems. Beyond the formal normative framework, the right to equality and equal protection for women under the law requires the adoption of gender responsive approaches in the practices, attitudes, skills, and gender composition of personnel. Some states in Nigeria have gender desks and units in the police force, trained personnel, as well as sexual violence assaults referral centres.

It is widely recognised in various normative frameworks that terrorism and crime target men and women differently and have a disparate impact on them. The Declaration of the Elimination of all Forms of Violence against Women identifies that violence against

[56] Article 3 of ICCPR.
[57] Article 14 of ICCPR.
[58] Article 26 of ICCPR.
[59] Article 15 of ICCPR.

women is a social mechanism by which women are forced into a subordinate position compared to men.[60]

Unequal gender power relations and gender stereotypes stemming from biological, socio-cultural, and economic differences that assign status and value to the sexes, often filter into public institutions. Thus, while criminal justice mechanisms are charged with dispensing justice and ensuring accountability through equal protection and application of the law, women and men victims undergo different experiences in these institutions[61].

Personnel in criminal justice systems may consciously or not reinforce the pervasive unequal power relations that characterise wider societal patterns of gender relations. Even where the victims of terrorist acts are of the same sex, for example, female victims, they are not homogeneous. Depending on the age, status, and vulnerability, among other factors, women and girls experience suffering and trauma differently. They all deserve equal protection and equality before the law. This should inform the design of multi-layered interventions.

Dignity as a fundamental human rights value must underscore the work of criminal justice systems as they handle victims. It is important that criminal justice actors avoid secondary traumatisation of victims. The Global Counter-Terrorism Strategy links terrorism to deliberate attempts to dehumanise victims.[62] A criminal justice system that places equal value on men and women is vital as part of transformative approaches to addressing societal gender inequalities.

Nigeria has a broad and comprehensive legal framework that constitutes a basis for the rule of law and human rights-compliant responses to terrorism. At the international level, Nigeria has ratified many human rights instruments, including those related to women and girls such as the Convention on the Elimination of All

[60] General Assembly, Resolution 48/104 of 20 December 1993
[61] UNODC, Gender Mainstreaming in the work of UNODC, 2013
[62] The United Nations Global Counter-Terrorism Strategy A/RES/60/288, 20 September 2009.

Forms of Discrimination against Women and the Convention on the Rights of the Child and its Optional Protocols on the sale of children, child prostitution and child pornography, and on the involvement of children in armed conflict.

Nigeria has ratified fifteen of the nineteen universal counter-terrorism instruments and is also bound by United Nations resolutions. The General Assembly[63] adopted the Global Counter-Terrorism Strategy that includes Pillar II, focusing on measures to prevent and combat terrorism. The UN[64] calls on States to prevent and suppress the recruitment by terrorist groups. The UN[65] "underscores that countering violent extremism, which can be conducive to terrorism, including preventing radicalization, recruitment, and mobilization of individuals into terrorist groups and becoming foreign terrorist fighters is an essential element of addressing the threat to international peace and security posed by foreign terrorist fighters, and calls upon Member States to enhance efforts to counter this kind of violent extremism".

The UN[66] "calls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict". These measures should guarantee the respect for human rights of women and girls, especially when related to the judiciary. The resolution also urges States to prosecute crimes of sexual and other violence against women and girls and to "take into account the particular needs of women and girls" while in camps and during reintegration programmes.

Furthermore, the UN[67] encourages States to consider that sexual and gender-based violence can be a strategy used by terrorist groups. States should ensure that victims of acts of terrorism should benefit from relief and recovery programmes such as legal

[63] Resolution 60/288 (2006).
[64] Security Council resolution 1373 (2001).
[65] Security Council resolution 2178 (2014).
[66] Security Council Resolution 1325 (2002).
[67] Security Council Resolution 2331 (2016).

aid. Nigeria has become a state party to the International Criminal Court by ratifying the Rome Statute. However, Nigeria has so far not enacted any legislation to domesticate the Rome Statute and make the ICC offences punishable in Nigeria at the regional level. Nigeria is party to the African Charter on Human and Peoples' Rights, its 2003 Protocol on the Rights of Women in Africa and the 1990 African Charter on the Rights and Welfare of the Child, and it recognises the African Court on Human and Peoples' Rights.

At the national level, the 1999 Constitution of the Federal Republic of Nigeria as amended, safeguards the human rights of everyone. The Constitution[68] proclaims that "national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited". Legislation of particular importance to the protection of women's rights includes: The Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003 and its subsequent amendment in 2005, the Violence against Person's (Prohibition) Act 2015 (VAPP Act), and the Child Rights Act of 2003. The impact of these federal acts is limited by the failure of some states to enact the laws and make them applicable in their territory. The Terrorism Prevention and Prohibition Act 2022 is the pillar of Nigeria's domestic counter-terrorism legal framework.

3. Gender Aspects of Special Investigation Techniques (Electronic Surveillance and Undercover Operations)

The clandestine nature of terrorist conspiracies and activities, and the mode of operation of terrorist organisations require specialised investigation methods.[69] With developments in modern technology, a wide array of investigative techniques lies at the disposal of law enforcement agencies for combating terrorism. Many different forms of covert surveillance are possible, covering all the modern forms of communication, as well as visual

[68] Article 15 Constitution of the Federal Republic of Nigeria (as amended).
[69] UNODC Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism, p. 65

surveillance of suspects or the audio surveillance of premises in which they live or meet. The use of covert human intelligence - whether undercover agents or informers, is also a common method used in preventing, detecting, and prosecuting acts of terrorism.

While special investigative techniques are useful and, indeed, often necessary in combating terrorism, their very aim, which is to gather information about persons in such a way as not to alert the target, means that the use of Special Investigation Techniques will nearly always involve interference with the right to private life of the target and other persons. In many cases, the targets of the investigation will be a terrorist group with purported political or religious motivations. Religious or political leaders, or meeting places might be placed under covert surveillance. Such surveillance will interfere with the fundamental freedoms of expression, religion, and association. One way in which gender is a consideration in the use of special investigation techniques, which can be observed in several countries, is the use of women offering sexual intercourse to approach male targets of investigation (suspects).[70]

The person using sexual relationships to infiltrate an organisation and obtain information need not necessarily be a woman. In a recent case in the United Kingdom,[71] the police infiltrated an animal rights group they suspected of committing violent crimes. One of the male undercover officers established sentimental and sexual relationships with several of the female activists to strengthen his cover and obtain information. The UN Special Rapporteur on the rights to freedom of assembly and association noted with concern in his UK visit report, that the duration of the infiltrations, and the resultant trauma and suspicion caused

[70] Center for Human Rights and Global Justice, "A decade lost: locating gender in U.S. counter-terrorism" (New York, New York University School of Law, 2011), pp. 82 and 85.

[71] United Kingdom, Her Majesty's Inspectorate of Constabulary (United Kingdom), Review of National Police Units which Provide Intelligence on Criminality Associated with Protest (2012), pp. 8 and 25

among the groups, to the women with whom the undercover police officers had intimate relationships, were totally unacceptable. [72]

Despite these constraints, special investigation techniques have their own specific good practices, but its use must be regulated and carefully supervised in other to ensure professionalism and maintenance of human rights. For this reason, a gender analysis should inform the design and application of special investigative techniques to assess their impact not only on the primary target but also on anyone else who could be affected.

Interviewing Female Victims, Witnesses and Suspects

Interviewing victims[73], witnesses and suspects is a major part of investigations in terrorism cases, particularly for those cases in which special investigative techniques, advanced forensic capabilities and other advanced technologies are not available. The questioning of suspects by law enforcement personnel is a specialist task that requires specific training to be performed successfully and in accordance with the highest standards of professionalism.[74] Interviewers must seek to gather accurate and reliable information in the pursuit of truth. Before questioning a suspect, evidence must be gathered with respect to the case, and preparation and planning of interview questions must be made based on the evidence gathered. The use of open-ended questions, allowing the suspect to speak freely, and listening attentively, helps the interviewer to get to the truth. The interviewer must maintain a professional, fair, and respectful attitude during questioning, scrutinise the interviewee's account and analyse the information obtained against previously available information or evidence.[75]

[72](A/HRC/23/39/Add.1, para. 25.
[73] F. M Watson, Political Terrorism; the threat and Response. R. B. Luce Co. Inc. Washington-New York (1976) 117.
[74] Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/71/298), para. 56.
[75] O Onovo, Interagency Intelligence Gathering and Sharing for effective Crime Control: Perspective from the Police. (ed) Alemika E and Chukwuma I, in Crime and Policing in Nigeria Challenges and Options (2004) p150.

It has been noted that in many countries, detainees are mistreated during the investigations of common crimes because of pressure from politicians, supervisors, judges, and prosecutors to solve high volumes of cases.[76] This mistreatment is even worse for suspects of terrorism offences. Interviewers must avoid coercive interview methods, just as they must avoid secondary victimisation of the those dealt with during investigation. Such people include victims and witnesses. The questioning of victims and witnesses of violence, including sexual violence, caused by terrorist groups brings with it a high risk of secondary victimisation.

1. In the case of Boko Haram victims, female witnesses may require a greater level of physical and emotional safety before being able to cooperate fully. In the case of witnesses who are also victims, one should be aware that the presence of a psychologist or other mental health professional could be conducive for a healthy and effective questioning session.

Law enforcement agencies and practitioners are under extreme pressure to produce results in terror investigations. Questioning may become coercive and too invasive, particularly with female witnesses, who are generally more vulnerable to these methods. Good practice urges the recruitment, training, and retention of female law officers and counter-terror practitioners, to ensure the better questioning of female witnesses.

Investigators must also ensure that they supplement all witness and victim testimony with physical documentation of injuries or trauma. A key strategy for reducing the negative psychological impact of being a witness and the risk of secondary victimisation, is to reduce the number of interviews a witness must undergo. For this reason, the investigator must plan and prepare their questions and ensure continuity and recording of the interview. This will help to reduce the likelihood of the witness being interviewed a second time by the investigator. Owing to the complexity of terrorism cases, considerable time may elapse between the first

[76] Ibid.

meeting of the investigators and the witness, and the day that witness is required to give evidence at trial. A long waiting period increases the risk that the suspect, as well as his or her associates, will seek to unduly influence the witness. Prosecutors may explore legal means to obtain testimony from witnesses during the investigation and pre-trial stages in a form that makes subsequent appearance at the trial unnecessary, while respecting the defendant's right to examine witnesses against him. The Administration of Criminal Justice Act provides that …

> Where a suspect who is arrested with or without a warrant volunteer to make a confessional statement, the police officer shall ensure that the making and taking of the statement shall be in writing and may be recorded electronically on a retrievable video compact disc or such other audio-visual means.[77]

It follows, therefore, that if a suspect's statement can be recorded via video recording for the purpose of tendering it as evidence in court, then, in the same vein, a witness's statement can also be so recorded.

The Rome Statute[78] provides that the pre-trial Chamber of the International Criminal Court, upon request of the prosecutor, may decide to take testimony or a statement from a witness, or examine, collect, or test evidence, which may not be available subsequently for the purposes of a trial. In such a case, the Chamber may take such measures as may be necessary to ensure the efficiency and integrity of the proceedings, and to protect the rights of the defence.

This provision of the Rome Statute was effectively used in the case of *Prosecutor v Dominic Ongwen,* to admit the testimony obtained prior to the trial and to be played in the court room using a video link. The testimony was from several victim-witnesses who had

[77] Section 15 (4) Administration of Criminal Justice Act 2015.
[78] Article 56 Rome Statute.

been subjected to pressure that might have impacted on both their willingness to testify at trial and the content of the testimony.

According to the charges against *Ongwen,* the witnesses were victims of sexual and gender-based crimes, including forced marriage, rape, sexual slavery, and enslavement, among other crimes. The prosecutor's application for such measures included the following arguments:

i. Possible witness intimidation/tampering of evidence: The prosecutor adduced an incident which, as they persuasively argued, constituted an attempt to intimidate the witnesses and might have resulted in witnesses being unwilling or unable to testify before the court.

ii. Societal Pressure: Recurring, similar attempts to dissuade witnesses from testifying or persuade them to change their testimony before the trial would increase the unwillingness of witnesses to testify. Equally as a result of stigma victims/witnesses are often pressurized and discouraged from coming out to give testimony of what happened to them for fear that it will become general knowledge and it can possibly reduce their chances of getting married.

iii. Avoiding secondary victimization: The prolonged delay between making a complaint of a crime involving sexual and gender-based violence and the eventual trial might in itself cause psychological harm or other distress to victims who are already likely to have been harmed by their abduction and treatment, a fact which would make the testimony of such witnesses at the eventual trial less likely to be competent and reliable.[79]

[79] See International Criminal Court, Prosecutor v. Dominic Ongwen, public redacted version of "Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute", 26 June 2015, ICC-02/04-01/15-256-Conf, case No. ICC-02/04-01/15-256-Red, 27 May 2016, para. 12; and

Similar provisions exist in numerous national jurisdictions. In the case of victims of crimes involving sexual and gender-based violence, the Austrian Code of Criminal Procedure[80] permits the use of video testimony that has been given prior to trial, upon request of the victim or prosecutor. The Code of the Criminal Procedure of the Netherlands also provides for testimony in advance on the grounds that, inter alia, the health or well-being of a witness will be endangered by in-court testimony. In applying such provisions, great care must be taken not to unduly limit the right of accused individuals to prepare their defence and examine witnesses against them.

Gender Sensitive Witness Protection Mechanisms

Almost all witnesses and victims suffer from some degree of stress during or after their involvement in investigations and prosecutions of terrorism cases. The stress is mostly caused by the formal nature and particular demands of the proceedings, unfamiliar to most witnesses and victims, and by the importance of the process. More importantly, most witnesses and victims testify about events that have had a significantly negative and often-traumatic impact on their lives, their communities, and societies. They may have lost loved ones, were injured, or lost their place in the community. Others have been eyewitnesses of horrific events. All these witnesses require some form of support and assistance to be able to testify truthfully. For some of them it is sufficient to provide information on how the process works. Some other witnesses, especially women and children, however, need extensive assistance and support throughout their involvement in the justice process, because of their increased vulnerability.

The growing crimes against women by terror groups mean that there needs to be some interventions to assist women to go through the very difficult task of testifying about their ordeal. For the successful engagement of women victims and in particular

Prosecutor v. Dominic Ongwen, "Decision on request to admit evidence preserved under article 56 of the Statute", Case No. ICC-02/04-01/15-520, 10 August 2016.

[80] Section 165 of the Austrian Code of Criminal Procedure.

victims of sexual violence in the justice processes, it is critically important that their peculiar needs and rights including their mental health, be properly reflected in national legal frameworks. Several international instruments have developed guidelines on the protection of witnesses in judicial processes. The framework of key instruments such as the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)[81] have addressed the needs of specific groups of vulnerable witnesses and victims, mostly victims of specific crimes, such as human trafficking.[82]

Governments including the government of Nigeria are required to address the protection of vulnerable witnesses through legislation pertaining to victim assistance, focusing on psychosocial and general support measures, and the use of procedural protective measures to facilitate testimony and to minimise the risk of re-traumatisation.

Witness Protection at Trial

The Terrorism Prevention and Prohibition Act makes provision for the protection of an informant and a witness.[83]

Section 72 provides;

> Where a person voluntarily provides to a relevant agency, information that may be useful in the investigation or prosecution of an offence under this Act, the relevant agency shall take all reasonable measures to protect the

[81] Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, protocol to the UNCTOC.

[82] The UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, adopted by ECOSOC in 2005, offer a general framework with a focus on an interdisciplinary approach towards protection of children in justice mechanisms. The UNODC 'Toolkit to Combat Trafficking in Persons' includes information and guidance on the support and protection of victims of trafficking, including victims of gender-based violence. The UN 'Good Practices for the protection of witnesses in criminal proceedings involving organised crime' very briefly mentions measures to support witnesses.

[83] Sections 72 and 73 of the Terrorism Prevention and Prohibition Act 2022.

identity and life of that person and the information so provided shall be treated as confidential.

The new law has made provisions for the protection of informants and information. This is highly commendable as this provision was lacking in the repealed law. It is hoped that the protection now provided will encourage those with useful information that may lead to the prevention and arrest of members of a terrorist organisation to come forward.

Where the investigator finds that a suspect would best serve as a prosecution witness he shall so recommend and consider the options of a witness protection programme.

The court has a legal basis to take protective measures, as it deems fit, to keep the identity and address of a witness or person secret; so, protecting witnesses at risk, where it is satisfied that the life of the person or witness is in danger.[84]

The measures which the court may take under this section may include:

a. holding the proceedings at a place to be decided by the court.

b. avoidance of the mention of the real name and address of the witness or person in its orders, judgements, or records of the case, which are accessible to the public.

The above provides, a legal basis for the court to "take such measures as it deems fit to keep the identity and address of the witness or person secret" to protect witnesses at risk, where it is satisfied that the life of the person or witness is in danger. Equally the "court may, on an application by or on behalf of the relevant law enforcement or security agency, in the interest of public safety or order, exclude from proceedings for any offence under the Act, any person other than the parties and their legal representatives." The court can order the measures detailed in sections 73 where "it is satisfied that the life of the person or witness is in danger."

[84] Section 73 of the Terrorism Prevention and Prohibition Act 2022.

However, the question that may arise is could the court equally order such measures where there is no threat to the life of the witness, especially where there is a risk that the witness may suffer serious psychological damage if she must testify without protective measures? The Prosecutors Guidelines Applicable to Prosecutors of a Federal Offence and any prosecution at a Federal Court or Court at the Federal Capital Territory (FCT)[85] provides that in addition to factors affecting the seriousness of an offence, other matters, which may arise when considering whether the public interest requires a prosecution includes, *inter alia*, whether a prosecution could put at risk confidential informants or matters of national security.

The Terrorism Prevention and Prohibition Act[86] envisages all limits to public disclosure of the identity of the witness. There seems to be no provision made explicitly for keeping the identity of a witness secret vis-à-vis the accused. The Act[87] explicitly states that any person "other than the parties and their legal representatives" can be excluded from the proceedings. This provision of the Act can, however, be interpreted to allow the court to keep the identity of the witness secret from the defendants and their counsel. Keeping witness identities secret from the defendant is a measure that will, in many cases, have a considerably adverse impact on the ability of the defendant to challenge the evidence against him, therefore on the right to a fair trial. Thus, it must remain an exceptional measure.

Confidentiality is among the first and most critical tools for witness protection. Aside from its importance in minimising physical risk to witnesses, it is also a key condition to ensuring psychological protection of vulnerable witnesses. In cases where children interviewees are involved in a justice mechanism, legal guardians will be required to provide informed consent. However, children's right to participation should also be taken into

[85] Issued by the Attorney General of the Federation and Minister of Justice, Abuja on 12th September 2013
[86] Section 73 of the Terrorism Prevention and Prohibition Act 2022.
[87] Ibid.

consideration in the process of informed consent. The Child Right convention provides that…

> children have the right to express their views, opinions, and beliefs freely, in their own words, and to contribute especially to decisions affecting their life, including those taken in a judicial process, and have those views taken in consideration, according to their ability, age, intellectual maturity and evolving capacities.[88]

Alternatives to Prosecution, Availability of Lesser Sentences upon Conviction and Mitigating Circumstances

The United Nations[89] requires that all States bring to justice those who plan, prepare, or perpetrate acts of terrorism and that "the punishment duly reflects the seriousness of such terrorist acts". The international counter-terrorism treaties ratified by Nigeria similarly require State parties to "make those offences punishable by appropriate penalties which take into account the grave nature of those offences."[90]

As already discussed in enacting the TPPA, the Nigerian legislature has considered the seriousness of terrorist acts in general, and the exceptional seriousness of the crimes perpetrated by Boko Haram. Consequently, the TPPA provide that all forms of involvement in acts of terrorism are punishable, with sentences ranging from a minimum of twenty years' imprisonment to the death penalty.

A second trend, observable at the international level, and reflected in the Nigerian legislation, is the expanded use of offences targeting preparatory acts and support roles in a terrorist organisation, at the earliest possible stage, before an act of violence is committed.

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[88] Article 12 of the Child Right Convention.
[89] Security Council Resolution 1373 (2001).
[90] Article 4 (b) of the International Convention for the Suppression of Terrorist Bombings.

As a result, terrorism laws increasingly capture the conduct of – often large numbers of –

a. First-time offenders;

b. People suffering from diminished mental capacity;

c. Radicalised women and juveniles who have not yet been involved in violence;

d. Persons involved in the "maintenance" of a terrorist group in roles far removed from violent action.

For many States, this raises complex questions of criminal justice strategy.

1. How should the criminal justice system deal with these categories of "terrorist offenders"?

2. Should every case be investigated and, where the evidence suffices, prosecuted?

3. What mechanisms are available to give flexibility to the criminal justice system?

4. What alternatives to prosecution can take care of the threat possibly emanating from these "terrorist offenders"?

According to available information,[91] a large share of the women involved with Boko Haram fall into these categories (first-time offenders who have no direct participation in acts of violence). This calls into question the criminal justice strategy on how to deal with these offenders (or suspects). This is particularly relevant when we look at the gender dimension of counter-terrorism.

Terrorism cases are felonious in nature and needs to be dispensed with quickly to give the victims of the dastardly acts of terrorism a sense of justice. The equitable principle of justice delayed is justice denied and justice hastened is justice denied as well (?) should be adhered to. One of the earliest cases of terrorism handled in Nigeria by the courts was that of the Boko-Haram members in FHC

[91] Onovo, n. 86.

Abuja. The suspects were tried on five count charges following the 8th of April 2011 attack on the Independent National Electoral commission in Suleja, Niger State. In addition, two other bombings that took place in Abuja and Suleja. Two years later the judgment was delivered in 2013. Thus, notwithstanding the fact that terrorism is a criminal case and requires critical analysis to establish the facts which must be proved beyond reasonable doubt, the court deserved commendation in that regards. Early dispensation of terrorism cases will send the right signal to those who are perpetrating same. There is no hiding place as the long arms of the law will catch up with perpetrators, as can be seen in the case of *FRN v Shuaibu Abu-Bakar AKA Abu Quatada & 5 others.*[92]

International Humanitarian Law (IHL) regarding the Punishment of Offences Committed in the Context of Non-International Armed Conflict

Many of the terrorist acts committed by persons associated with Boko Haram took place within the context of a non-international armed conflict in North-East Nigeria. Consequently, International Humanitarian Law ("IHL", the law governing armed conflict) may be applicable.

International Humanitarian Law (IHL) assumes that violence is a constitutive part of armed conflict. It defines the distinction between acts of violence, which are permissible, and those which are not. In the broadest terms, violence against civilians is prohibited. Conversely, violence against members of the opposing party to the conflict is permissible, unless it violates a particular rule concerning the means or methods used; (for example, where they are perfidious or involve unnecessary pain and suffering). In other words, participation in combat operations on the side of a rebel or insurgent armed group, is not of itself a violation of IHL.

International Humanitarian Law prohibits "acts or threats of violence, the primary purpose of which are to spread terror among

[92] FHC/ABJ/CR/113/2011.

the civilian population"[93] and "acts of terror" against the civilian population.[94] Equally prohibited are the killing, torture, and outrages against human dignity of persons not or no longer taking part in hostilities.[95] Such acts may amount to war crimes and shall be prosecuted. In contrast, within international armed conflicts, combatants shall enjoy immunity from prosecution for lawful acts of war.

In non-international armed conflicts, participation in hostilities can be subject to national criminal laws and criminal punishment, including counter-terrorism legislation. However, Additional Protocol II to the Geneva Conventions (applicable to non-international armed conflict) encourages States to grant amnesties at the end of hostilities to those who have engaged in conduct which is lawful under International Humanitarian Law, if not under domestic law.[96] The Paris Principles add to this that children, (that is, those under eighteen), recruited or used illegally by armed groups, should never be arrested, prosecuted, sanctioned, or threatened with prosecution or sanctions on the grounds of mere association with the armed group. [97]

4. Conclusion

This paper's introduction considered the complex nature of terrorism offences as a cross-border crime, and the need for nations to come together to combat terrorism. The paper identified that women and children are mostly victims of terrorist acts. There have been instances where women have voluntarily joined the Boko Haram group for purposes best known to themselves, with others being deceived into joining. It is the finding of this paper that the Terrorism Prevention and Prohibition Act, amongst other laws used in combating acts of terrorism, are gender neutral and do not consider the various factors and circumstances of the recruitment of members of a terrorist

[93] Additional Protocol I, art. 51(2,).
[94] Additional Protocol II, art. (4)(2)(d) Additional Protocol II, art. 13(2).
[95] Common article III of the 1949 Geneva Conventions.
[96] Additional Protocol II, art. 6(5).
[97] Paris Principles, principle 8.7

organisation. The paper recommends that the judges when exercising their judicial power, should be given discretionary powers during conviction, to take into consideration the factors and circumstances responsible for a person's membership of a terrorist organisation. This is important because some support roles which women and children ignorantly play in terrorism offences carry a minimum sentence of twenty years' imprisonment. This has grievous implications for those who could otherwise be considered as victim of acts of terrorism.

Under the legal framework for the combating and protection of women and children caught up in acts of terrorism, the paper explored how these laws have been applied in the investigation, arrest and trial of persons suspected to be members of a terrorist organisation. This paper finds that the new Terrorism Prevention and Prohibition Act, has made laudable provisions for the protection of witnesses and victims of acts of terrorism. This is highly commendable. The provision of the new law on witness protection will equally cater for and protect victims against the danger of re-traumatisation. The paper stresses the importance of witness protection mechanisms, which would help victims and witnesses restore their confidence in the criminal justice system.

In conclusion, the Nigerian Government has made huge efforts to curb acts of terrorism and bring perpetrators to justice while providing protection for victims. However, a lot still must be done for female victims of terrorism, particularly around re-integration with their host community. Women who have been associated with Boko Haram or other terrorist organisations may feel unable to co-operate with investigations for fear of reprisal from the terrorist organisation and of the social stigma from being associated with the terrorist group.