THE THRESHOLD OF ARTICLE II OF ADDITIONAL PROTOCOL II TO THE GENEVA CONVENTIONS AND THE APPLICATION OF INTERNATIONAL HUMANITARIAN LAW TO ASYMMETRIC CONFLICTS: THE SHORTFALL OF INSURGENCY IN NORTH-EAST NIGERIA[1]*

Abstract

This essay set out to consider the thresholds of Article II of Additional Protocol II to the Geneva Conventions and the application thereof to asymmetric conflicts, using the shortfall of Boko Haram insurgency in north-east Nigeria as a pivot. It adopted the doctrinal methods of legal research with heavy recourse, as it were, to books, journal articles, international law documents and the like for its execution. It was discovered, in the course of same, that the threshold established by Article 2 of Protocol II in the definition of NIAC is very high when measured against asymmetric conflicts, especially terrorism, because while terrorists, by their modus operandi, may meet nearly all the requirements in Article 2 of Protocol II, they are most unlikely, as the last of the holistic cumulativeness of these conditions to implement Protocol II. Thus, the strict construction and application of Article 2 of Protocol II in ascertaining armed conflicts to which Protocol II would apply is most likely to oust its application in most asymmetric conflicts, leading to the absurd result where Protocol II ousts itself by the conditions it contains that are mandatory for its application. In other words, it cures its own headache by cutting off its own head. Thus, it was recommended that a more liberal approach to its construction is apt and necessary in the circumstances – one which takes into cognizance the degree of violence and the certainty of the intensity thereof. Furthermore, that recourse should be made to practice and practicability as distinguished from theory, in a manner that generally accepts that the threshold of hostility necessary for the application of IHL to internal conflicts should be very low and determined on a case-by-case basis, to ensure in all circumstances, that humanity which is the concern of International Humanitarian Law (IHL) is, at all times protected.

Keywords: Terrorism, International Humanitarian Law, conflict, asymmetric armed conflict.

1. Introduction

States in their bid to keep up the duty of protecting their citizens, in modern times, are confronted with a myriad of challenges which have become even more convoluted as a result of the sophistication that accompanied the advent of the modern state itself. Modern technological advancement has generated complex societal relations by facilitating easy means of information, communication and transport, amplified by the easy movement of persons and information, all of which absent in ancient times, have converge in contemporary times to further worsen matters, albeit the advantages thereof are unquantifiable. This has affected every area of human concern including means and methods of warfare which have evolved from the conventional engagements of parties to acquire more sophistication than it used to be. War has now become a matter of intelligence and no longer fire power, because fire power is itself useless when confronted with a faceless enemy; this facelessness being the major characteristic of modern terrorism.

In contemporary times, the menace of terrorism alone has wreaked more havoc and is highly catastrophic to the security architecture of states than the impact of other security threats put together. Terrorism has defied all rules of conventional warfare and has become a daunting challenge to states in the bid to realize the essence of states' existence. Thus, while states agree, by various international covenants, on how hostilities should be conducted and same is codified in the Geneva Conventions of 1949, the Additional Protocols of 1977 and other international instruments, modern terrorism surfaces as a complete aberration, defying all rules, and having not been envisaged at the time of making these conventions, have bored a hole through which the security stamina of states continue to be drained and thereby posing a major threat, not only to the internal security arrangement of states, but also to international peace and security. War against terror is asymmetric in nature, with the terrorist employing

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unconventional means and methods of warfare prohibited by international humanitarian law to outdo states which armies are bound and must conduct operations within the ambit of the law. Unlike international conflicts to which IHL applies automatically, there are conditions for the application of IHL in internal conflicts. These conditions are clearly spelt out in Article 2 of Protocol II of 1977 and this piece is focused on measuring the thresholds laid down by same vis-à-vis the *Boko Haram* insurgency in North-East Nigeria to ascertain whether it qualifies as a conflict to which IHL should apply.

2. Conceptual Analysis

The International Committee of the Red Cross defines the concept from the point of view of the object of international humanitarian law thus:

> International humanitarian law applicable in armed conflict means international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems that arise directly from international or non-international armed conflicts. For humanitarian reasons, these rules protect persons and property that are, or may be affected by armed conflict by limiting conflicting parties' rights to choose their means and methods of warfare. The expression 'International humanitarian law' is often abbreviated to international humanitarian law or humanitarian law.[2]

Intricately linked to the application of the principles of IHL is the notion of armed conflict. In the older theories of IHL the thrust usually was the notion of war. Thus, according to Greenwood:

> During the course of the century, the international community has substantially modified its approach to the scope of the application of treaties on the laws of war. First, the treaties adopted since 1945 are not confined to application in a formal state of war but apply to any armed conflict, irrespective of whether a formal state of war exists or not. The practice of most states has also been to treat the older treaties which are still in force and which refer to 'war' as applicable to any international armed conflict. This development has been of great importance and benefit.[3]

Consequently, Pictet, in his commentary to the first Geneva Conventions of 1949,[4] states as follows:

> The substitution of this much general expression (armed conflict) for the word 'war' was deliberate. One may argue almost endlessly about the legal definition of 'war.' A state can always pretend when it commits a hostile act against another state, that it is not making war but merely engaging in a police action, or acting in legitimate self-defence. The expression 'armed conflict' makes such arguments less easy. Any difference arising between two states and leading to the intervention of armed forces is an armed conflict… even if one of the parties denies the existence of a state of war.

The adoption of the concept of 'armed conflict' as against 'war' therefore obliterates the possibility of any meaningful arguments on the operation of IHL. In other words, the principles of IHL automatically become operational whenever there is armed conflict regardless of the declaration by the parties of a formal state of war or not. This is precisely why the definition adopted herein uses the term armed conflict instead of war.

Having made the preceding preliminary remark, we proceed to define asymmetric warfare/armed conflict as a war/ armed conflict between belligerents whose relative military power and strategy or

[2] Definition elaborated by the International Committee of the Red Cross and generally accepted. Source: Commentary on the Additional Protocols of 8th June, 1977, ICRL, Geneva, 1987, P. xxvii.

[3] Christopher Greenwood, International Humanitarian Law and the Laws of War, 1997 Preliminary Report on the Centennial Commemoration of the First Hague Peace Conference 1899, III.2 the Scope of the Laws of War, p. 26 available at www.advisorycommitteeinternationallaw.nl.199806.pdf, and accessed on 22/11/2020 at 08.29am

[4] Pictet, J. S., Commentary on the first Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, International Committee of the Red Cross, 1952, P. 32.

tactics differ significantly. This is typically an armed conflict between a standing professional army and an insurgency or resistance movement militias who often have status of unlawful combatants. For example, the Nigerian Military as a professional force of a High Contracting Party in armed conflict with *Boko Haram* insurgents in North- East Nigeria. Asymmetric warfare can further be described as a conflict in which the resources of two belligerents differ in essence and in the struggle, interact and attempt to exploit each other's characteristic weaknesses; such struggles often involving strategies and tactics of unconventional warfare, the weaker combatant attempting to use strategy to offset differences in quantity or quality of their forces and equipment. This is in contrast to symmetric warfare, where two powers have comparable military power and resources, and rely on tactics that are similar overall, differing only in details and execution. The term is frequently used to describe what is called 'guerilla warfare', 'insurgency', 'counter insurgency', 'rebellion', terrorism' and 'counter terrorism', essentially violent conflicts between a formal military and informal, less equipped and supported, undermanned but resilient and motivated opponent. Asymmetric warfare is a form of irregular warfare. Because asymmetric warfare is irregular, it is often most likely to occur as an internal conflict within the territory of states. Thus, Article 2 of Protocol II therefore defines NIAC as:

> All conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations *and to implement this protocol.*

This is the main concern of this essay which seeks to measure the *Boko Haram* insurgency against the thresholds therein to determine whether it meets the requirements for the application of IHL. Recall that these considerations are made in the context of international humanitarian law. The word 'international' in this context used to mean a conflict that occurs between two or more states or one that exceeds the territory of one state. One is immediately left to wonder what international law has to do with municipal occurrences, and whether it is appropriate for international law to concern itself with the internal affairs of state. Yes, it is akin to asking what the Rhine has to do with the Tiber. These conspicuous parallels had implications for the applicability of IHL to internal conflicts. Thus, until the adoption of the four Geneva Conventions containing Common Article 3, IHL had nothing to do with internal conflicts. However, with the insertion of Common Article 3 in the Geneva Convention of 1949 international humanitarian law became amenable to internal conflicts, making in fact, the first time a rule of international humanitarian law applied in internal conflicts which hitherto had been the sole preserve of states. Often termed as ' a Convention within the Conventions' or as 'convention in miniature,' Art 3 does in fact consist of a kind of summary of the most important rules germane to international conflicts applicable in cases of NIAC.

3. IHL and Internal Armed Conflicts

Historical declarations of war addressed traditional declarations of war between nations. When the Geneva Conventions were updated in 1949 after the Second World War, delegates sought to define certain minimum humanitarian standards to situations that had all the characteristics of war, without being an international war.[5] These negotiations resulted in Article 3, common to all four of the basic treaties of Geneva Conventions of 1949. Common Article 3 applies to armed conflicts that are not of an international character, but that are contained within the boundaries of a single country. It provides limited protection to victims, including:

1. Persons taking no active part in hostilities should be treated humanely (including military persons who have ceased to be active as a result of sickness, injury, or detention).
2. The wounded and sick shall be collected and cared for.

By the 1970's diplomats were attempting to negotiate clarifications to the brief language of Article 3, and to extend the scope of international law to cover additional humanitarian rights in the context of

[5]Picket Jean (1958) Geneva Conventions of 12 August, 1949: Commentary International Committee of the Red Cross, Retrieved 6/08/2009.

internal conflicts. These efforts resulted in Protocol II of 1977 Additional to the Geneva Conventions of 1949. The debate over this protocol centered on two conflicting ideas.[6] First, that the distinction between internal and international armed conflict is artificial from the point of view of a victim, and thus humanitarian principles should apply regardless of the identity of the combatants. Second, that international law does not apply to non-international situations. A nation has sovereignty within its borders, and must not accept judgments by and orders from other countries. Common Article 3 was therefore only a first step towards narrowing IHL to bear or apply in situations of armed conflicts within a state's territory in which unequivocal hostilities break out between the armed forces and organised armed groups.

4. Common Article 3

Article 3 common to the four Geneva conventions marked a breakthrough, as it covered, for the first time, situations of non-international armed conflicts. These types of conflicts vary greatly; they include traditional civil wars, internal armed conflicts that spill over into other states or a multi-national force intervenes alongside the government. Common Article 3 establishes fundamental rules from which no derogation is permitted. It is like a mini-convention within the conventions in a condensed format and makes them applicable to conflicts not of an international character. In other words, Common Article 3 relates to non-international armed conflicts. This article states that certain minimum rules of war apply to armed conflicts where at least one party is not a state party.[7] There are two criteria to distinguish NIAC from lower forms of violence. The level of violence has to be of certain intensity, for example, when the state cannot contain the situation with regular police forces. Also, involved non-state groups need to have a certain level of organisation like a military command structure.[8] The other Geneva Conventions are not applicable in this situation but only the provisions contained within Article 3 and additionally within the language of Additional Protocol I. The rationale is to avoid conflict with the rights of sovereign states that were not part of the treaties when the provisions of this article apply, it states that:

> The type of situations to which Article 3 would apply was among the most debated issues of the diplomatic conference of 1946. Although some delegations tried to establish clear parameters for Article 3, the conference ultimately decided to set this delicate issue aside. Accordingly, Article 3 only vaguely defines when it is applicable; 'in the case of armed conflict not of an international character occurring on the territory of one of the High Contracting Parties.

Therefore, one must refer to the *travoux preparatoires*, and to an even larger extent to the practice, to assess the real field of application. For example, it is now generally accepted that the threshold of hostility necessary for employment of Article 3 should be very low. Indeed Article 3 should apply to any situation within a state's territory in which unequivocal hostilities[9] break out between the armed groups. Although legally problematic, the ambiguous definition of Article 3 has also facilitated a highly flexible application of this provision. Often termed as 'a convention with the conventions' or as a 'convention in miniature,' Article 3 does in fact constitute a kind of summary[10] of most important rules germane to international conflicts. Article 3 begins by defining the categories of protected persons; it establishes specific prohibitions and a general obligation to collect and care for the wounded. This article additionally invites parties to conclude special agreements, in order to broaden the protection offered to the victims, and stipulates that 'an impartial humanitarian body, such as the ICRC,' may offer its services to the conflicting parties.

[6]Levie Howard, *The law of Non-International Armed Conflict: Protocol II to the 1949 Geneva Convention*, (Martinus Nijhoff Publishers, 1987) p 7.
[7] ICRC (2016) "2016 Commentary on the Geneva Conventions" ICRC p. 393.
[8]ICRC (2018) How is the Term Armed Conflict Defined in International Humanitarian Law? (PDF) Retrieved 12/05/2018.
[9] Excluding Anarchy, Rebellion or Plain Banditry.
[10] Applicable in Cases of Non-International Armed Conflicts.

Since Article 3 constitutes the keystone of humanitarian law that protects victims of non-international armed conflicts, and since it is applicable in the 193 states that are bound by the 1949 Geneva Conventions, Article 3 begins by defining the categories of protected persons; it establishes specific prohibitions and a general obligation to collect and care for the wounded. It additionally invites parties to conclude special agreements in order to broaden the protection offered to the victims, and stipulates that 'an impartial humanitarian body, such as the ICRC,' may offer its services to the conflicting parties. It seems appropriate to reproduce the text here:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bund to apply, as minimum, the following:
>
> 1. Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded n race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> a. Violence of life to person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> b. Taking hostages;
> c. Outrages upon personal dignity, in particular humiliating and degrading treatment;
> d. The passing of sentences and the carrying out of executions without previous judgment, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
>
> 2. The wounded and sick shall be collected and care for.
>
> a. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> b. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present convention.
>
> c. The application of the preceding provisions shall not affect the legal status of the parties to the conflict.

5. Additional Protocol II

Protocol II is a 1977 amendment protocol to the Geneva Conventions relating to the protection of victims of non-international armed conflicts. It defines certain international laws that strive to provide better protection for victims of internal armed conflicts that take place within the borders of a single country. The scope of these laws is more limited than those of the rest of the Geneva Conventions out of respect for sovereign rights and duties of national governments. Thus the long name: 'Protocol Additional to the Geneva Conventions of 12 August, 1949 and relating to the protection of victims of Non-International Armed Conflicts (Protocol II).' Adopted on 8 June, 1977 it came into force on 7 December, 1978 with 168 states being parties of same as at January, 2015. Though it was one of paramount importance, Article 3 was only a first step adapted to the specific nature of non-international armed conflicts. Defining the parameter of this new instruments' field of application was even more difficult in 1974 – 1977 than it had been during the Diplomatic conference of 1949. Protocol II therefore applies only to conflicts of a relatively high degree of intensity.[11] It does not apply in situations like

[11]Picket, Jean: *Development and Principles of International Humanitarian Law*, (Martinus Nijhoff Publishers, 1985) P. 48.

wars of national liberation, which are considered to be international armed conflicts according to Article 1.4 of Additional Protocol I.

6. Article 3 and Additional Protocol Ii 1977: The Siamese and Less

Common Article 3 to the 1949 Geneva Conventions was only a first step towards narrowing international humanitarian to bear or apply in situations of armed conflicts within a state's territory in which unequivocal hostilities break out between the armed forces and organised armed groups. The substance was achieved with the making of Additional Protocol II in 1977. In the 1970's, the ICRC decided that a more comprehensive instrument was needed. To that end, a simplified Protocol, a document parallel to the Additional Protocol (applicable to international conflicts) but adapted to the specific nature of non-international armed conflicts. Defining the parameters of this new instrument's field of application was even more difficult in 1974 – 1977 than it has been during the Diplomatic Conference of 1949.[12]Finally 'the price which had to be paid' for a detailed Protocol of this character was to define its field of application restrictively, making it less extensive than that of Article 3. It was accordingly limited to armed conflicts between governmental forces and organised armed forces under responsible command, which exercise such control over part of the national territory as to enable them carry out sustained and concerted military operations and to implement the Protocol. The additional precaution was taken of excluding specifically such activities as riots, sporadic acts of violence, and other acts of a similar nature. Protocol II therefore applies only to conflicts of a relatively high degree of intensity.[13] It does not apply in situations like wars of national liberation, which are considered to be international armed conflicts according to Article 1.4 of Additional Protocol I. Thus, the respective fields of application of Article 3 common and of Additional Protocol II are different. Article 3 can be utilised in a broader range of situations. In brief, in all cases when Protocol II can be employed, Article 3 is also relevant; however, there are situations in which only Article 3 is applicable. This distinction has been clearly recognised in Aticle I of Protocol II, which states that: 'This Protocol… develops and supplements Article 3 common to the Geneva Conventions of 12 August, 1949 without modifying its existing conditions or application.' Thus, the respective fields of application of common Article 3 and of Additional Protocol II are different. Article 3 can be utilised in a broader range of situations. In brief, in all cases when Protocol II can be employed, Article 3 is also relevant; however, there are situation in which only Article 3 is applicable. The distinction has been clearly recognised in Article I of Protocol II, which states that, 'This Protocol… develops and supplements Article 3 common to the Geneva Conventions of 12 August, 1949 without modifying its existing conditions or application.'

7. The Binding Effects of the Law On NIAC: Cases and Application

From a legal stand point, Common Article 3 and Protocol II bind the states party to those treaties; this commitment includes all individuals that can be considered agents of those states. However, International Humanitarian Law must also bind non-state parties in a non-international armed conflict; even those who are fighting against the government. By including non-state actors in the regulations, IHL not only protects victims from rebel forces, it also emphasis the principle of equality of belligerents in non-international armed conflicts. If IHL did not respect the equality of belligerents in non-international armed conflicts, it would have little chance of gaining respect from either the government forces, because they would not benefit from any protection under it, or by the opposing forces, because they could claim not to be bound by IHL. Additional Protocol II has significantly developed the basic guarantees provided for in common Article 3. Its substantive provisions can be divided into four general sections:

1. Protection of the wounded, sick, and shipwrecked Articles 7 and 8.
2. Protection of civilian population Articles 13, 14, 17 and 18.
3. Protection of certain objects and; Articles 14, 15 and 16
4. Humane treatment of victims of Non-International Armed Conflicts. Articles 4, 5 and 6.

[12] Cf. Article I Protocol II.
[13]Picket Jean, (n. 2) p. 48.

It is because of Article 3 and Protocol II that we can today talk about the laws of humanity in internal military operations. Thus, NIAC which traditionally used to be the sole preserve of states internal affairs has now become a subject of IHL and individuals can now face the music for their own misconducts and horrendous offences in armed conflict.[14] Practice with respect to NIAC is less extensive and more recent. However, the practice that does exist indicates that it is uncontroversial that this rule also applies to war crimes committed in NIACs. In particular, the Statute of the ICC, of the ICTY and ICTR and of the Special Court for Sierra Leone and UNTAET Regulation No. 2000/15 for East Timor explicitly provide for this rule in the context of NIAC.[15] The fact that this rule would also apply to crimes committed in NIAC did not occasion any controversy during the negotiations of the Statute of the ICC. The evolution of Common Article 3 to the four Geneva Conventions and subsequently Additional Protocol II of 1977 has made this topic a necessity. These laws have made it possible to try and punish leaders like Slobodan Milosevic, Simone Gbagbo, and Charles Taylor etc for matters that would otherwise have been internal affairs of states in the past. In the *Hadzihasanovic and Others case*, the ICTY held that the doctrine of command responsibility, as a principle of customary international law, also applies with regard to NIAC[16]. This as a rule has also been confirmed in several cases brought before the ICTR[17] There is also a national case-law applying this rule to situations outside IACs. A US Federal Court in Florida applied it in the case of *Ford v. Garcia* in 2000, which concerned a civil lawsuit dealing with acts of extra-judicial killing and torture committed in El Salvador.[18] The ad hoc Tribunal on Human Rights for East Timor applied it in the *Abilio Soares case* in 2002 in which the Tribunal considered that the conflict in East Timor was an internal one within the meaning of common Article 3 of the Geneva Conventions.[19] In the *Boland case* in 1995, Canada's Court Martial Appeal Court found a superior guilty of having neglected to prevent the death of a prisoner even though he had grounds to fear that his subordinate would endanger the prisoner's life.[20] in the *Military Junta case*, Argentina's Court of Appeal based its judgment on the failure of the commanders to punish perpetrators of torture and extra-judicial killings.[21] Other practices to this effect includes the report of the UN Commission on the Truth of El Salvador in 1993, which pointed out that the judicial instances failed to take steps to determine the criminal responsibility of the superiors of persons guilty of arbitrary killings.[22]

In other Situations

It does not apply in situations of internal violence and tensions. This point is clear in Article 1 (2) APII

> The protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, not being armed conflicts.

In such cases, human rights law becomes applicable. It does not apply in situations like wars of national liberation, which are considered to be international armed conflicts according to Art 1. 4 of Protocol I.

> Thus, the respective fields of application of Article 3 and Protocol II are different. Article 3 can be used in a broader range of situations. In brief, in all cases when Protocol II applies, Article 3 is also relevant; however, there are situations in which only Article 3 is applicable.

The distinction has clearly been recognized in Article 1 of Protocol II which states thus:

> This protocol… develops and implements Article 3 Common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application.

[14] See the Nuremberg and Tokyo IMTs and the ICTY and ICTR where this principle of law has been cast in iron.
[15] ICC Statute, Article 28; ICTY Statute, Article 7 (3); ICTR Statute 6 (3); Statute of the Special Court of Sierra Leone, Article 6 (3); UNTAET Regulation No. 2000/15, Section 16.
[16] ICTY, *Hadzihasanovic and Others case*
[17] ICTR, *Akayesu's case*, Judgment (cited in Vol. II, Ch. 43, Ss 702) and Ruzindana's case, Judgment (Ibid., Ss 703)
[18] United States, Federal Court of Florida. *Ford v. Garcia's case*
[19] Indonesia, Ad Hoc Tribunal on Human Rights for East Timor, *Abilio Soares case*
[20] Canada, Court Martial Appeal Court, *Boland case*
[21] Argentina, National Court of Appeals, *Military Junta case*
[22] UN Commission on the Truth of El Salvador, 1993

8. *Boko Haram* Insurgency: An Asymmetric Warfare

Terrorist tactics tend to favour attacks that avoid effective counter measures and exploit vulnerabilities.[23] As such, terrorist groups have the potential to utilise many and different types of terrorism tactics depending on the circumstances and the perceived likelihood of success. Some tactics are more conventional and widely used in the operations of many terrorist groups. These tactics include shootings, hijackings, kidnappings, bombings and suicide attacks. Other tactics are seen more unconventional and have only been used in a few instances, if at all. However, these unconventional tactics are perceived by government officials and experts are bioterrorism, agro terrorism, nuclear terrorism and cyber terrorism. In this conundrum, one thing is clear; IHL prohibits acts of terrorism with respect to parties to a conflict against each other. However, the rise of terror groups across the globe which know nothing about IHL, and their concomitant breaking of the rules of IHL has made compliance difficult even on the part of legitimate parties to a conflict, who for the challenge of the asymmetric nature of terrorist warfare may resort to means and methods of warfare that may not be permissible under IHL.

It is a basic principle of IHL that those engaged in armed conflict must at all times distinguish between civilians and combatants and between civilian objects and military objectives. IHL thus prohibits deliberate or direct, as well as indiscriminate attacks on civilians or civilian structures. The use of human shields or hostage taking is similarly proscribed. When a situation of violence amounts to an armed conflict, there is little added value in calling such acts 'terrorism', because they already constitute war crimes under international humanitarian law.[24] Moreover, IHL also specifically prohibits acts of terrorism against civilians in the hands of the adversary, as well as spreading terror among the civilian population by parties to an armed conflict in the conduct of hostilities. These prohibitions, which refer to acts, the sole purpose of which is to intimidate civilians, are additional to the already mentioned rules aimed at protecting civilian life and property more generally.[25] International Humanitarian law operates on the premise that the conduct of hostilities is allowed against the adversary. Terrorism on the other hand, is for all its intent and purposes, a complete outlaw. The ICRC corroborated this point when it draws a distinction between both cases thus:

> A crucial difference between IHL and the legal regime governing terrorism is that IHL is based on premise that certain acts of violence in war – against military objectives and personnel – are not prohibited. Any act of 'terrorism', however, is by definition prohibited and criminal. The two legal regimes should not be blurred given the different logic and rules that apply. This is particularly important in situations of non-international armed conflict where a 'terrorist' designation may act as additional disincentive for organized armed groups to respect IHL (they are already subject to criminal prosecution under domestic law)[26]

Furthermore, it is a cardinal principle of International Humanitarian Law that the right of parties to adopt of means and methods of warfare of their choice is not unlimited. It is with regard to this principle that terrorism is a clear violation and threat to the relevance of international humanitarian law.

[23]FEME, "Evolving Terrorist Threats: Long-Term Trends and Drivers and Their Implications for Emergency Management," September, 2011, available at http://www.fema.gov/pdf/aboutprograms/oppa/evolving-terrorist-threaat-pdf.
[24] ICRC challenges of or 1Hh – terrorism: overview (29th October, 2010) available of www.vcrc.org. accessed on 1st September, 2018
[25] Ibid.
[26] Ibid.

The question then would be whether the principles of IHL address terrorism as a means of conducting hostilities? This is in the affirmative but only as it regards state parties or its other subjects, but fails to address terrorism as a means of warfare. It is clear also that IHL rules prohibit terrorism and acts of terrorism, and so it necessarily logically flows that terrorist acts are prohibited by international humanitarian law. Thus, it is not safe for IHL to stand aloof in the face of the vicious threats occasioned by the resurgence of the menace of terrorism in the new world order. The incontrovertible conclusion is that there is a bounden need to review and reconsider the field of application of IHL with a view to bringing it to bear on the current realities that may not have been envisaged at the time of their adoption, making IHL obsolete by being a war behind reality as clearly shown in the case of terrorism, and other emerging means and methods of conducting warfare that pose grave dangers to humanity as the heart of international humanitarian law.

9. *Boko Haram* Insurgency and the Thresholds in Article 2 of Protocol Ii

Article 2 of Protocol II therefore defines NIAC as:

> All conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations *and to implement this protocol.*

Our concern is *Boko Haram* insurgency and whether it meets the thresholds set by the definition of NIAC in Article 2 of Protocol II. While this clearly applies to the Nigerian military because it automatically meets the threshold as a state party, on the other hand however, *Boko Haram*, as is the case with most terrorists groups, meets all the requirements of Article 2 of Protocol II except the last threshold '…*and to implement this protocol.'* Thus, it falls short of this last condition, and if same provision is strictly construed it may oust the application of IHL, the level of violation notwithstanding. The unwillingness of *Boko Haram* to keep IHL accounts for the difficulty the Nigerian Military faces in the war in North-East Nigeria, and sometimes the damning reports of violations; for IHL presupposes reciprocity which is not forthcoming on the part of the insurgents, who do not implement APII and so by the conditions in Article 2 of APII oust IHL.

10. Conclusion

It is manifest that the conduct of asymmetric conflict is by no means an easy task. Unfortunately, there is a proliferation of such conflicts at a time when the clarion call across the globe is for the entrenchment of human rights, thereby accentuating the necessity of every responsible military to evaluate the sustainability of its activities in the light of these new realities and the law of armed conflict. The truth is that there is no force stronger than an idea which time has come; the central idea which is sought to be concretised in the world today is the idea of humanity as taking the center stage of all conduct of military operations. While we wait for the evolution of the law to meet these emerging trends, a delicate balance must be made between the competing interests; the balance between states' subsistence and humanitarian concerns; and this mostly explains why states that are engaged in asymmetric armed conflicts are slow in winning the war against terror and insurgency. In the light of the totality of the above, suffice it to say that a military operation is successful if it defeats the adversary, but it is more successful if it defeats the adversary while adhering to international humanitarian law. The threshold established by Article 2 of Protocol II in the definition of NIAC for the purposes of the applicability of IHL is very high when measured against asymmetric conflicts, especially terrorism. This is because terrorists, by their modus operandi may meet nearly all the requirements in Article 2 of Protocol II except the last, which requires as a matter of the holistic cumulativeness of these conditions that the terrorists should implement Protocol II. Thus, the strict construction and application of Article 2 of Protocol II in ascertaining armed conflicts to which Protocol II should apply is most likely to oust its application in most asymmetric conflicts, leading to the absurd result where Protocol II ousts itself. In other words, it cures its own headache by cutting off its own head. Thus, a more liberal approach to its construction is apt and necessary in the circumstances – one which takes into cognizance the level of violence and the certainty of the intensity thereof. Furthermore, recourse should be made to practice and practicability as distinguished from theory, in a manner that generally accepts that the threshold of

hostility necessary for the application of IHL to internal conflicts should be very low and determined on a case-by-case basis to ensure, in all circumstances, that humanity which is the concern of IHL is, at all times protected.