

Other Situations of Violence: Classification Issues and Concerns: The Nigerian Situation*

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Abstract

The classification of conflicts into two broad categories – international and internal armed conflicts is to help determine the law that applies in any given situation of conflict. Beside these broad classifications, there are other situations of violence which according to the provisions of Additional Protocol II are not covered by IHL. This distinction has given rise to unsettled areas which revolves around when a given situation becomes an armed conflict and the applicable law when there is an intervention by foreign armed troops either on the side of the government or the insurgents. The issue of the applicable law in any situation of violence usually begins with the analysis of the distinctions that have been drawn between internal conflicts and other situations of violence which a lot of people find very difficult to understand when placed against the backdrop of IHL's objectives of humanity and being effective and credible. This paper discusses the concerns that have arisen as a result of the classification and the non applicability of IHL to other situations of violence in Nigeria and the justification for such. It also discusses the relevant provisions of AP II and the effect on IHL's aim of protecting humanity and suggests a possibility for reform by reconsidering the threshold question. The paper also suggests ways of ensuring that State do not hide under the guise of other situations of conflict and allow such situations to continue to claim the lives of civilians.

Keywords: Violence, Conflicts, Nigeria, Boko Haram, Chibok, Additional Protocol, Humanitarian, Law, International

I. Introduction

This paper discusses other situations of violence in International Humanitarian Law and the concerns that have arisen as a result of the classification of armed conflicts in this regime of Law with particular reference to the Nigerian situation. This is borne out of the fact that in recent times, Nigerians have witnessed series of conflicts in the different parts of the country and these conflicts have left in their trail tails of woes. People have been killed and others maimed without the government accepting that there is a situation of conflict in Nigeria. This is as a result of the classification of conflicts in International Humanitarian Law. The government believes that the conflict in Nigeria has not satisfied the minimum threshold specified in Additional Protocol II to qualify as internal conflict and therefore does not come within the ambit of IHL. This is a serious problem as Nigerians in the affected areas live in fear of their lives as a result of the classification of these conflicts as 'other situations of Violence' (OSV), a term which most Nigerians find extremely difficult to understand and appreciate. Classification of conflict as internal or international or other situations of violence helps in determining the relevant or applicable law² to such situations. In dealing with the concept of armed conflict in International Humanitarian Law, this distinction is often clearly made. Although this distinction has been criticized, it still remains a part of the law of war or armed conflict.

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²It helps in determining whether the Geneva Conventions, the Additional Protocols or the domestic law of the affected state would apply.

In discussing the concept of armed conflict and the need or basis for the classification, one must not forget to make reference to the decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic* case.³ In International Humanitarian Law, importance is also placed on the two principal claims of the law: the claim to effectiveness and credibility and humanitarianism. In fact where a conflict is classified as internal or international there may be little or no problem but problem arises when dealing with situations of internal violence which have not met the requirements of the minimum threshold to qualify as armed conflict particularly violent internal tensions and disturbances.⁴ Such situations by the provisions of Additional Protocol II⁵ would include: riots, isolated and sporadic acts of violence or acts of a similar nature which would result to mass arrests, the use of police and sometimes the armed forces to restore order. The above lists do not fall within the ambit of IHL as they are not considered as armed conflicts in the real sense of the word and this has raised serious challenges to members of the armed forces who have been drafted to the affected states to protect the lives of Nigerians in what seem to be a peace keeping operations. The Joint Task Force (JTF) in Nigeria (operating mostly in the Northern part of the country) have been trained in the military to observe the rules of IHL in combat and may not be versatile in the field of Human rights law and this is a great challenge. Another challenge that is encountered is the determination of the point at which a mere situation of violence becomes an armed conflict so that IHL will apply and to understand and appreciate the law governing the use of force and that protecting the victims of such armed conflict⁶. Some Nigerians are of the opinion that the conflict in the North-East part of the country can now be described as internal conflict in view of the fact that military and not police action has been adopted by the federal government to quell the insurgency. The question now arises as to whether the use of military force alone qualifies other situations of violence as internal conflict or conflict not of an international character without the conflict satisfying the other crucial criteria's set out in the Additional Protocol to the Geneva Conventions of 1949. In the light of the above, this paper would be divided into seven parts. Part II would look at the concept of armed conflict, in part III the paper would consider the distinction between armed conflict and other situations of violence with particular reference to the Nigerian situation, part IV will discuss the unsettled areas that have arisen from the classification, part V will review the reasons for the classification, part VI will examine the effects/outcome of such classification on IHL's claim to humanity and credibility and part VII concludes by making a suggestion for a reform.

II. The Concept of Armed Conflict

It is important to understand that before anyone can conclude that a particular rule of IHL will apply in a given situation of conflict that conflict must satisfy the threshold as an "armed conflict" within the framework of International Humanitarian Law. Again, where there is a situation of violence, this necessary classification must be made as it helps to determine whether the conflict is internal or international.⁷ This is very crucial as it helps those who have the responsibility of implementing the law to determine to applicable rule. Two legal regimes of IHL exist: the first regime applies to situations of armed conflict described as international⁸ while the second applies to situations of belligerency within the territory of a High Contracting party between its armed forces and an armed group or between two armed groups within the state.⁹ The four Geneva Conventions and Additional Protocol I exhaustively made provisions for the rules to be applied in times of international armed conflict.

³ *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on jurisdiction) case No. IT-94-AR 72 (2 October 1995) *Prosecutor v Dusko Tadic* (Trial Chamber Opinion and Judgment) Case No. IT-94-I-T (7 May 1997). *Prosecutor v Dusko Tadic* (Appeal Chamber Judgment) Case No. IT-94-I-A (15 July 1991).

⁴ Ewen, A and Goldman, R.K "Gray Areas in International Humanitarian Law" Crimes of War. <http://www.crimesofwar.org/a-z-guide/gray-areas-in-international-humanitarian-law/> Accessed 28th September, 2013

⁵ Article 1 (2) Additional Protocol II

⁶ For instance the *jus ad bellum* and the *jus in bello* concepts

⁷ The conflict must either be within the boundaries of a State or between two States. Where it is within the boundaries of a State, it must be between the governmental forces and a rebel group within a State or between two of such groups in a State.

⁸ That represents a situation of hostilities between two states.

⁹ This type of conflict is known as internal or non international armed conflict and regulated by Additional Protocol II. The definition of this type of conflict is also provided for in the Protocol, Article 1 (1).

Specifically, Article 2 common to the four Geneva Conventions provides that all the rules relating to international armed conflict applies to all cases of declared war arising between two or more of the High contracting Parties and to all cases of occupation whether partial or full while that of internal conflict can be found in article 3 common to the Geneva Conventions, Additional Protocol II, customary law of IHL, some relevant provisions of the Rome Statute of the International Criminal Court and the provisions of International human rights law.

The ICTY in *Dusko Tadic* case as noted earlier defined an armed conflict thus:

A conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.¹⁰ From the definition above, it is clear that the two types of conflicts are covered here and has been variously cited as the definition of an armed conflict although no clear cut distinction was made by the court. However, it will be presumed that IHL automatically applies once there is an armed conflict which is protracted in situations of internal conflict. In other words, for a conflict between government forces and non State armed group to amount to a conflict, the Tadic case set two additional requirements: the non State actor must be sufficiently organized and the conflict sufficiently intense.¹¹ Where the two-fold threshold is not met, the Court noted that the violence will merely be described as an act of banditry, unorganized and short lived insurrections or terrorist's activities which are not covered under international humanitarian law.

It therefore means that where an armed conflict meets the requirement in the Tadic case and is classified as either internal or international the Geneva Conventions and the Additional Protocols becomes operative. Furthermore, the provisions of Additional Protocol II complement common Article 3 and human rights law¹² where the conflict is internal. The legal threshold to be met going by the provisions of Additional Protocol II happens to be higher than that which the court gave in the Tadic case. It provides that the treaty would apply only in situations of internal conflict which takes place in the territory of a party to the Protocol, between its armed forces and an organized non state armed group. In addition, the Protocol further posits that the armed group must be under a responsible command and exercise such control over a part of its territory to enable it carry out sustained and concerted military operation and to implement the Protocol.¹³ The problem with the above requirements of Protocol II is that the government will likely not admit that the conflict is beyond their control neither will they also admit that they have lost control of a part of its territory as they would not like to legitimize the conflict or give a status to those they consider as mere criminal which the state would like to deal with in accordance with their domestic legislation. The question of being under a responsible command and the ability to implement the protocol is rather a subjective test.

III. Armed Conflict and Other Situations of Violence: A Case Study of Nigeria

We have noted earlier that the most important step in determining whether IHL is applicable is to decide whether a state of armed conflict exists. The Geneva Conventions apply to all cases of declared war or armed conflict which may arise between two or more of the High Contracting parties, even if the state of war is not recognized by one of them.¹⁴ The outcome or effect of this provision is that the Geneva Conventions apply whether a state of war is recognized or not between the parties. Again, declarations of war have ceased in practice.¹⁵

¹⁰ *Dusko Tadic* supra note 2, para 10.

¹¹ If these situations are met, the conflict can be termed a non international or internal armed conflict.

¹² Customary International Law also applies.

¹³ Article 1 (1) Additional Protocol II

¹⁴ Common Article 2 to the four Geneva Conventions of 1949

¹⁵ Greenwood, C "The concept of War in Modern International Law" (1987) *International and Comparative Law Quarterly*, Vol. 36, P 283

While 'war' is frequently used as an emotive term, the coming into effect of article 2 (4) of the UN Charter has resulted in the word having few legal implications.¹⁶ Practically, the term "war" has been replaced by 'armed conflict' as most contemporary conflicts do not occur between States but between non State actors. Other situations of violence is dealt with under Article 1 (2) of Additional Protocol II and it provides that "this 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, as not being armed conflicts". However, a State of conflict must exist before most of the provisions of Geneva Conventions will apply. The commentaries to the Geneva Conventions do not suggest a minimum threshold of violence, but indicates that 'any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2.¹⁷ This description leaves open the question as to the sort of difference that can be classified as internal armed conflicts for the purposes of international humanitarian law.¹⁸ The most frequently quoted passage to indicate the threshold for an armed conflict is found in the Tadic case. A critical examination of the definition of armed conflict in that case would reveal that there must be a minimum degree of intensity in the hostilities i.e. the resort to armed force must be protracted. Again, the groups involved in the conflict must have a certain level of organizational structure. As noted earlier in this paper from the Tadic case, anything short of these requirements would be seen as rebellion, short lived insurrection, an act of banditry or terrorism. This is also supported and reinforced by the provision of Article 1 (2) of AP II as noted earlier and would be considered as 'other situations of violence'.

Bartel¹⁹, in his contribution to this debate on other situations of violence argued that rebellion was seen and treated as a situation of domestic violence in which only a temporary challenge to the legitimate government was noticeable. He further posited that the situation was only a short lived insurrection against the authority of the State²⁰ and the government was bound to use Police force to bring the seditious party to respect the domestic law of the State and where the State is able to bring the rebellion under control, then the situation would not fall within the purview of International Humanitarian Law. To this end, such rebels do not have any legal rights or protection under international law when compared with combatants properly so called who have the right to engage in direct and active hostilities and enjoy the status of prisoners of war when they fall into the hands of the enemy.

Again, the International Criminal Tribunal for the former Yugoslavia observed in the Tadic case that:

States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This dichotomy was clearly sovereign-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demand.²¹ Consequently, the interpretation of the above is that rebellion within a territory of a sovereign State is clearly within the exclusive jurisdiction of such a State as it is a domestic concern and was not regulated by IHL. This position has its root in Articles 1 and 3 of AP II and would be discussed. The importance attached to this minimum threshold by States is shown in the definition of a non international armed conflict in Additional Protocol II. The Protocol provides that: ... and which takes 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 carry out sustained and concerted military operations and to implement this Protocol.²² The Protocol by the above provision excludes other situations of violence from its material field of application. The appropriate question would be to determine at what point one can conclude that a 'situation of violence' has met the threshold to qualify as an internal conflict for the purposes of the application of the AP II?

¹⁶ Ibid.

¹⁷ Jean Pictet (ed) Commentary: Geneva Convention for the Amelioration of the condition of the wounded and sick in Armed Forces in the field (Vol. 1) 1952, P 32.

¹⁸ Duxbury, A "Drawing Lines in the Sand – Characterizing Conflicts for the Purposes of Teaching International Humanitarian Law" (2007) Melbourne Journal of International Law, Vol. 8, p 6. http://www.law.Unimelb.edu.au/801266_co-51BB-11_EZ-95000050568_D0_140. Accessed 28th September, 2013

¹⁹ Bartel, R. "Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non International Armed Conflicts" (2009) International Review of the Red Cross (IRRC), Vol. 91, No. 873, pp35 -67 at 48-49.

²⁰ Ibid, p 49

²¹ *Prosecutor v Tadic*, ICTY, Supra note 2, para.96.

²² Article 1(1) Additional Protocol II

A review of the Nigerian situation reveals that at certain points, Nigeria has been involved in a situation of armed conflict although the government would constantly deny this fact. A classical example would be the violence in the oil rich Niger Delta Region of the country. After the execution of Ken Saro Wiwa and eight others²³ by the then military government of General Sanni Abacha, the region was thrown into a state of conflict for what they perceived as injustice and marginalization of the region by successive governments although the Region produces the wealth that sustains the entire country. For years, the Movement for the Emancipation of the Niger Delta (MEND) and other armed groups emerged in the region²⁴. These armed groups effectively engaged the armed forces of the state using sophisticated weapons. They distinguished themselves by having military uniforms, they had a chain of command as the government was constantly negotiating with their leaders and a structure which enabled them to recruit and train more militants. They occupied a part of the territory and were able to carry out sustained and concerted military operations and basically targeting military objectives, thereby fulfilling a substantial part of the requirements of Additional Protocol II.²⁵ By 2008, the groups decided to lay down their arms on the ground that government should grant them amnesty. This was an agreement between the armed groups and the militants. They were subsequently granted amnesty for taking part in hostilities but none has been tried for their acts during the period of hostilities. The conduct of hostilities ceased and the militants received pardon and prisoners were exchanged and today, most of these militants are on government scholarship all over the world, an attempt by the government at addressing the perceived injustice and inequality that led to the struggle. One wonders why the government refused to acknowledge that the situation had gone beyond a mere rebellion to insurgency/belligerency and call for the application of IHL. Another example is the case of the Boko Haram group operating in the northern part of the country. This will be discussed in line with the provision of AP II.

Article 1 (2) provides that:

This Protocol shall not apply to situations of internal disturbances and tension such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.²⁶ This means that situations in Article 1 (2) of Additional Protocol II are not within the ambit of international humanitarian law as they do not qualify as armed conflicts. This position has been reaffirmed with the adoption of the Rome Statute of the International Criminal Court (ICC) which made use of the same language to distinguish internal armed conflict from other acts of violence for the purpose of defining War Crimes.²⁷ Another problem in identifying the threshold of an armed conflict is that presented by acts of terrorism whether international or internal but particularly international terrorism. Although International law and International humanitarian law have not comprehensively defined terrorism, there is no doubt that terrorism is prohibited in times of armed conflict. Additional Protocol I prohibit terrorist activities that are primarily directed against civilians.²⁸ Geneva Convention IV also prohibits all measures of intimidation or of terrorism.²⁹ In addition Protocol II also prohibits "acts of terrorism" in times of internal armed conflicts.³⁰ These provisions go to show that the prohibition on terrorism is well established. It also shows that terrorism is different from armed conflict. While terrorism is absolutely prohibited, armed conflict is not.³¹ Having noted that terrorism is prohibited expressly in times of conflict and that terrorism is different from armed conflict, one wonders where terrorism belongs and what rule regulates such conduct. Since 2009, Nigeria has experienced attacks by the Boko Haram group but the attacks increased after the announcement of the presidential election results that brought the current President (Goodluck Jonathan) to power.

²³ Popularly referred to as the Ogoni Nine (9). A typical case of unfair trial and execution of the Abacha led Military junta which rained terror in Nigeria.

²⁴ Such groups include but not limited to Ijaw Youth Congress (IYC), the Egbesu Boys, Niger Delta Peoples Volunteer Force (NDPVF) and others.

²⁵ Article 1 (1) Additional Protocol II

²⁶ Article 1(2) Additional Protocol II

²⁷ Article 8(2) (c) (d) Rome Statute of the ICC

²⁸ Article 51(2) Additional Protocol I

²⁹ Article 33 Geneva Convention IV

³⁰ Article 4, Additional Protocol II

³¹ Although Article 2(4) of UN Charter prohibits the threat or use of force, the Charter also made provision for exceptions i.e. Art 51 self defence and action by the Security Council pursuant to its power under chapter VII.

There are concerns whether there is a state of armed conflict between the State of Nigeria and a terrorist group within its borders. The President Goodluck Jonathan administration has taken steps against the Boko Haram group³² but the attack on civilians and civilian property by the group is not abating. This kind of conflict is not contemplated by the existing humanitarian law, and not covered by any of the Geneva Conventions. Many in Nigeria have argued that it should be regarded as an internal conflict but a careful study of the Boko Haram sect in Nigeria based on the decision of the ICTY in Tadic case reveals that the sect do not fit into any of the defined categories of non – State actors as opposed to the Niger Delta Militants. It does not have a high level of organization, with a structured military force, political and social component and does not have the *de facto* control over a defined territory.³³ The Nigerian government is expected to use police/ military force to bring the group under control. The government is expected to put legislations in place to effectively combat the menace. In 2011, Nigeria enacted the Prevention of Terrorism Act and the penalty for the offence of terrorism is death but how effective has the law been in this regard. This is very important as Nigeria still witnesses attacks from this group. The re- emergence of Boko Haram Sect since 2009 has left Nigeria with tales of bloody and senseless killings of civilians and destruction of civilian property. Boko Haram literally means that “western education is forbidden. To this extent, the group is anti western. This paper will attempt to list a few of the groups’ atrocities in the recent past and they include:

- In 2009-2013, the group unleashed unprecedented terror in Nigeria: bombing the Eagle Square, UN building, Churches, Bus stations and University Campuses i.e. Bayero University Kano, and students’ hostels.
- In 2013 March 13, Kano bus bombing, 22 dead, 65 injured. May 7, 55 killed in army barrack and police post, July 6, Yobe school shooting, 42 students killed. Sept. 25 & 26, 27 killed in Borno, Sept. 29, 78 students of College of Agric. Gujba murdered while sleeping in their hostel, same day 20 persons killed on Damaturu highway, Oct. 26, 125 killed in Borno and Nov. 3, massacre in Borno as Boko Haram attacked a wedding convoy, killing groom and 29 others.
- Tuesday January 14, 2014 the group, using a suicide bomber killed 30 persons in Maiduguri, injured 50 and destroyed 10 vehicles;
- On Tuesday February 14, the dailies reported the Izghe Massacre which led to the death of 146 civilians;
- On Tuesday February 24, 2014 Nigerians were greeted by the news of gruesome and senseless murder of 59 school children. The insurgents invaded the school premises at about 2am while the students were asleep in their hostels. They set the hostel ablaze, before shooting and slitting the throats of some students that tried to escape through the windows. Some of the students were burnt alive. The Secretary General of the United Nations, Mr. Ban Ki-Moon expressed worries over the incessant killings and attacks on educational facilities and has urged the government to bring the perpetrators’ to justice.
- 37 persons were killed in Adamawa on Wednesday, February 26, 2014.
- From the 2nd to 4th of March, 2014, The Punch reported that 87 persons lost their lives to different attacks carried out by the sect in Mafa and Maiduguri in Borno State.
- On Friday, 14th March 2014, The Punch also reported that Gunmen attacked and killed 69 persons in Katsina.
- Between the 22nd and 23rd March, 2014, another 90 persons lost their lives in Maiduguri and Benue respectively.
- The 14th of April, 2014 was a black Monday as the Nigerians woke up to the news of a bomb blast at Nyanya a suburb town in Abuja the capital city of Nigeria. Official sources put the death toll at 72 and 124 injured, but eyewitnesses say the official figure is not reliable. On Tuesday the 15th of April, it was reported that the Boko Haram group had abducted over 270 school girls from Government Secondary School, Chibok in Borno although 53 of them found some way of escape. The girls were said to be preparing for their Senior Secondary School Certificate Examination (SSSCE) when they were forcibly taken away by the gunmen around 3 a.m. (0200 GMT). The abduction has been described as a threat to girl child education and has been widely condemned. This is less than 24 hours of the Monday bomb blast.

³² The government did set up a Joint Task Force (JTF) made up of the Military and Police in addition to the declaration of a state of emergency in three states- Borno, Yobe and Adamawa states of Nigeria. There is also the Prevention of Terrorism Act, 2011 with a death sentence as the penalty for terrorism. The state of emergency in the three affected states has been extended to six months by the National Assembly although with some conditions that must be met by the government. The state of emergency does not include full military administration of the states. The extended emergency has elapsed and the government is seeking a further extension.

³³ This group has remained faceless and there is no state of protracted conflict. The attacks against civilians and civilian objects have been sporadic.

- On the 1st May, 2014 at the Karshi Taxi Park, a few meters away from the Nyanya bomb blast spot in Abuja, there is another report from the media of an explosion believed to be a suicide attack, killing about 30 persons. This is barely three weeks after the Nyanya incident not forgetting the fact that the abducted school girls were yet to be rescued.
- On the 5th of May, 2014 the sect attacked and killed 300 people in Gamboru Ngala, and also abducted 11 more girls in Warabe and Wala Communities in the Chibok Local Government Area of Borno State.
- It was reported on the 18th of May, 2014 that letters were written by the sect to some schools in Benue State that they will be attacked so that the sect can get schoolboys to marry the Chibok girls. The attacks were to take place on the 14th of May. Although the attacks did not take place on the day in question, efforts have now been made by the government to beef up security in and around the schools.
- On Saturday, the 17th of May, 2014, the sect invaded the village of Dalwa-Masuba in Damboa Local Government Area of Borno State killing 40 persons with so many injured.
- Same day, the sect attacked and killed 29 more persons in Ngurosoye village, Bama Local Government Area, Borno State. The insurgents fired a rocket propelled grenade at the market in addition to shooting indiscriminately.
- 19th May, 2014 the sect killed 24 persons in Kano
- Tuesday, the 20th of May 2014, twin bomb blasts/explosion at the Terminus Market in Jos, Plateau State killing about 150 persons with so many injured. Civilian properties were also destroyed in the attack.
- Thursday 22nd May 2014, 30 persons were killed by insurgents in three villages in Marte Local Government Area of Borno State. It was alleged that throughout the operation that lasted for about five hours, no security operative confronted the insurgents. The sect also killed additional 19 persons in Alagarno in Damboa Local Government Area of Borno state.
- Sunday 25th May, 2014, 24 persons were again killed by the insurgents. In addition over 100 houses, vehicles and shops in the market were burnt in Kamuyya village, Biu Local Government Area of Borno State.
- Monday, 26th May 2014, 20 soldiers and 20 policemen were killed in Buni Yadi, Gujba Local Government Area of Yobe state. Same day, the insurgents killed 9 civilians in Chinene, Gwoza Local Government Area of Borno state.
- Friday, 30th May 2014, Emir of Gwoza, Alhaji Idris Timta was killed by the sect.
- Monday, 2nd June 2014, 60 persons were killed in the Adamawa bombing. Between this date and December 2014 there has been series of other attacks on civilians and civilian objects and this resulted in the death and displacement of several persons.

Collectively, these attacks have led to the death of thousands of civilians and destruction of civilian objects and a large number of internally displaced persons. These attacks can qualify as crimes against humanity. Thus, the use of bombs and suicide bombers as well as other acts by armed non state actors in Northern Nigeria against civilians especially may amount to genocide and /or crimes against humanity. The African Union has expressed concern over the killings by Boko Haram. The African Union termed the attacks as "senseless killings."³⁴ In response to these recent attacks the federal government finally declared that they were at 'war' with the sect. One wonders whether the term 'war' is used connotatively as war can only be declared against another state and not a non state actor. They have shut down all the Unity Schools in the affected Northern States and have also deployed military troops and counter-terrorism Commissioner of Police to the affected States. The Chief of Army Staff has relocated to the North Eastern part of the country. Brigade commanders have also been redeployed. Following the incessant attacks by the sect, one wonders whether the conflict has met the required threshold to qualify for the application of IHL or still below the standard giving the Nigerian government an opportunity to exercise its power as a sovereign State in dealing with its citizens thereby not attracting international attention and help. Most people would argue that the conflict has met the threshold, but it is the submission of this paper that the attacks may not have met the threshold and consequently, it is still within the powers of the government of Nigeria to use both Military and Police force to quell the insurgency and restore peace in the affected areas, a step which it has taken although the citizens believe that the government lacks the political will to effectively combat this menace which seems to have been highly politicized.

³⁴ "AU Raises Fresh Concern Over Boko Haram Terror", The Guardian, (Monday March 10, 2014)pp 2 and 4

The international community especially the United Nations Secretary General, Mr. Ban-Ki Moon has condemned the attack of 14th April and called for full investigation of the attack and to ensure that the culprits are brought to justice.³⁵ The charge by the UN Secretary General would have been fruitful if Nigerian Government had taken the issue of security of lives and property of civilians as a priority. But unfortunately Nigerians are living with the reality that the government can do little or nothing to save the civilians. Shortly after the attack it was reported that the N76 Billion Abuja Closed Circuit Television (CCTV) had been destroyed and stolen barely two years after the project was completed.³⁶ Officials of various government agencies have been trading blames for their inefficiency. If the CCTV was working, it would have been easy to investigate this crime. Reports also have it that Nigeria has extended its search for the kidnapped schools girls to Cameroon and Chad borders. This came after 18 of the girls escaped from the Lorries in which they were being conveyed broke down close to Cameroon border leaving more than 240 of these girls in the custody of the Boko Haram sect.³⁷ A video clips showing some of the abducted girls was sent by the sect to the government and the video was on most local and international television stations. Some of the abducted girls were identified on the video by their parents.

IV. The Unsettled Areas

Having noted the difference between armed conflicts and other situations of violence, one area that needs to be settled involves whether a conflict is international or internal in the event of intervention from outside. For instance, if the Nigerian government agrees that the situation has met the threshold to qualify for an internal conflict and subsequently solicits for help from another state to fight the insurgents will the domestic law or human rights law still apply with respect to the foreign troops? To be precise, following the kidnap of over 200 school girls on the 15th of April, 2014 the federal government of Nigeria deployed troops to help rescue the school girls but the efforts failed to produce tangible results. In May 2014, the government of the United States, United Kingdom, China, France and other African countries offered to help the government of Nigeria and the offer of assistance has been accepted by the Nigerian government. United States and United Kingdom have deployed Military troops to Nigeria and France is assisting with intelligence. David Cameron while addressing the British Parliament on the 7th of May, reiterated the fact that the fight against terrorism is a global fight and not for Nigeria alone. He noted that 'the act of abduction is pure evil and it shows that there are Islamist extremist who are against education, against progress and against equality and we must look for them and get them anywhere they are'.³⁸ He also noted that Britain should be proud that they are assisting Nigeria by sending Military troops that are already in Nigeria training over 800,000 (Eight Hundred thousand) and about 600,000 (six hundred thousand) girls³⁹. In the event that full military action is used against the sect by the foreign troops in support of the government, what rule will govern their engagement? Events and history have revealed that this distinction is rather artificial. For example, where foreign troops fight alongside government troops or rebels involved in internal hostilities,⁴⁰ what law will apply if such intervention happens? Would the intervention change the nature and character of an internal conflict? It may be uncertain whether the situation will be governed by the rules of internal or international armed conflict. This type of conflict is generally known as internationalized internal armed conflict and must be dissected to determine the applicable law.

Where a conflict is classified as international armed conflict, the whole of Geneva Conventions and Additional Protocol I will apply.⁴¹ Moreover, the legal consequences of classifying a conflict as entirely internal have been quite significant. In the first place, the Geneva Conventions provide only very basic protection in the event of civil strife through the common Article 3 to the four Geneva Conventions. Common Article 3 prohibits certain violations to human dignity.⁴² It provides the minimum standard to be observed in times of internal conflict without defining what constitutes an internal conflict but this minimum standards contained in the mini convention were later developed and supplemented by the Additional Protocol II.

³⁵ Nigeria: Abuja Bomb Blast, Supra notes 40 and 41.

³⁶ "N76BN Abuja CCTV Destroyed, Stolen". The *PUNCH* (Saturday, April 19, 2014)

³⁷ "Kidnapped School Girls: Nigeria Extends Search to Cameroon, Chad Borders". The *PUNCH* (Sunday, April 20, 2014).

³⁸ Channels TV News Track. 7th May, 2014.

³⁹ Ibid.

⁴⁰ The Libyan crises which ended in 2012 saw the North Atlantic Treaty Organization fighting alongside the rebels against the government.

⁴¹ Common Article 2 to the four Geneva Conventions.

⁴² Such as murder, torture, ill-treatment and taking of hostages

Additional Protocol II which supplements common Article 3 specifically addresses internal conflicts but has only eighteen (18) substantive provisions for protections in situations of internal conflict. This is far less than what the Geneva Conventions did for situations of international armed conflicts. Furthermore, for the prosecution of war crimes, the Conventions create criminal liability only for violations committed in international armed conflicts.⁴³ However, recent developments have shown the possibility of prosecuting war crimes in internal conflicts without having to find some sort of affiliation to an international conflict, through reliance on special statutes and customary international law⁴⁴ which exists. The International Committee of the Red Cross (ICRC) in its 2005 study of customary international humanitarian law, attempted to down play the significance of this distinction by stating that the evidence now demonstrates that many rules of customary international law apply in international and internal armed conflicts.⁴⁵ Despite the findings, the study continues to show the distinction between international and internal principles.⁴⁶ This method of dealing with the individual rules of IHL is understandable – the aim behind the ICRC's study is to identify whether particular principles of IHL have attained the status of customary international law.⁴⁷ Given that the law currently distinguishes between international and internal conflicts, the study must deal with each type of conflict separately. But the division of the study into international and internal armed conflict demonstrates that international legal practitioners still have recourse to traditional boundaries when describing the legal principles. This study as observed did not make mention of any rules which applies in other situations of violence. This is so because these situations are considered not to be armed conflicts and therefore not regulated by IHL rules.

V. Why the Classification

As noted earlier in this paper, the reasons for the grouping of conflict is predicated on the applicable rules i.e. being able to determine the IHL rule that applies and to allow states to exercise their sovereignty by using military or police force to maintain peace and order in their territories and also to avoid giving legitimacy or status to rebels or non state actors operating within the territories of a High Contracting party. Common Article 2 provides that it applies in all situations of declared war even though one of the parties does not recognize the state of war. Declaration of war is the prerogative of States but with the prohibition of the threat or use of force against another State by the UN Charter;⁴⁸ the term armed conflict has been adopted. An armed conflict between two independent States will be regarded as an international armed conflict to be regulated by the Geneva Conventions and Additional Protocol I but when the conflict is between a high contracting party and a rebel group and the threshold of violence⁴⁹ is met, the conflict will be regulated by common Article 3 to the Geneva Conventions and Additional Protocol II in addition to human rights provisions and customary international law. Such a conflict is termed internal or non international or internal armed conflict. For other situations which do not fall within the coverage of international humanitarian law⁵⁰ the High Contracting Parties are encouraged to use all legitimate means to re-establish law and order. One reason for the non applicability of IHL in this case as noted earlier, is to allow the state to defend itself and assert its sovereignty in its territory.

⁴³ Ratner, S.R "International VS. Internal Armed conflicts" <http://www.crimesofwar.org/a-zguide/international-vs-internal-armed-conflict/>. Accessed 28th September, 2013

⁴⁴ The statutes of the International Criminal Tribunal for Rwanda explicitly gave the court jurisdiction over serious violations of common Article 3 and Additional Protocol II; again the ICTY interpreted its statutes to allow for jurisdiction over serious violations of the law and customs of war in internal conflict. Finally, the statutes of the International Criminal Court specifically provides for criminality over many acts committed in non international armed conflicts.

⁴⁵ ICRC , Jean-Marie Henckaarts and Louise Doswald – beck (eds.) Customary International Humanitarian Law – Volume 1 Rules (2005) xxix.

⁴⁶ Ibid. which divides the evidence for many of the rules into International and non – International armed conflicts

⁴⁷ Duxbury, A Supra note 17

⁴⁸ Article 2(4) UN Charter

⁴⁹ Article 1(1) Additional Protocol II

⁵⁰ IHL 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, as not being armed conflicts. Article 1(2) Additional Protocol II

The Protocol provides that:

Nothing in this Protocol shall be invoked for the purpose of affecting the Sovereignty of a state or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.⁵¹ The High Contracting Parties understood that the issue of riots, isolated or sporadic acts of violence and other acts of a similar nature were not to be covered by IHL and the ICC Statute has reiterated this position.

For internal armed conflict, the Protocol provides that:

Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.⁵² The justification for this is based on the ground that States should handle their internal affairs and are expected to use their domestic legislations to try those that have committed crimes against the State. Again, the rebels or armed groups are citizens of the affected States and are under the jurisdiction of the State. Those the State has adjudged criminals should be dealt with in accordance with the domestic law of such states. This also helps the State in enacting appropriate legislations to help combat such situation. In enacting appropriate domestic legislations, the High Contracting Party would be fulfilling the provisions of common Article 1 to the four Geneva Conventions which encourages states to respect and ensure respect for the present Conventions.⁵³

VI. Result or Outcome of the Classification

Various areas of law – international and domestic heavily depend upon carefully determined definitions to establish threshold issues and international humanitarian law is not excluded in this regard. International humanitarian law makes available detailed prescriptive provisions, more than any other field of international law⁵⁴ that is designed to protect people in extreme cases of conflict or violence. Consequently, the inability or failure to categorically classify a state of violence as an armed conflict has very serious and disastrous legal consequences. The grouping of situations of violence has two basic outcomes for IHL and they include:

1. It reduction of IHL's claim to being an effective and credible body of law;⁵⁵
2. It shows or reveals that IHL keeps silent about certain types of conflict and violence because they are not defined as armed conflicts or are excluded from the coverage of international or internal armed conflicts.⁵⁶

The outcome or result of these is that certain types of suffering is more often than not removed from the discussion of IHL principles and this reduces the claim of IHL to humanity and being creative. It is often asserted that IHL or the law of war applies whether or not the conflict is termed as legal or illegal by the standards of the law of war but such assertion would be of no relevance when confronted with the need to ensure that the victims of armed conflict can be assured protections within the framework of IHL. Another dangerous effect with the classification of conflict is that the relationship between the law of war and humanitarian law only be applied effectively and with utmost certainty in established cases of armed conflicts. Where these classifications are not made on objective facts as observed in the field but on political considerations, the humanitarian effect and credibility of IHL will be seriously threatened.

The Appeal Chamber in *Tadic* case posited that:

This body of law is not grounded in formalistic postulates. Rather it is a realistic body of law, grounded on the notion of effectiveness and inspired by the aim of deterring deviation from its standards to the maximum extent possible.⁵⁷

⁵¹ Article 3(1) Additional Protocol II

⁵² Article 3 (2) Additional Protocol II

⁵³ Common Article 1 to the four Geneva Conventions.

⁵⁴For instance, Geneva Convention III relative to the protection of prisoners of war sets out rules relating to the amount of baggage that a prisoner of war may take if transferred. Article 48 puts it at 25kg; Article 64,65,66 provides for the establishment, management and termination of POWS' account while Article 60 provides for the amount of monthly advances of pay to POW.

⁵⁵ Duxbury, A. *Supra* note 17

⁵⁶ *Ibid.*

⁵⁷ *Prosecutor v Tadic* (Appeals Chamber Judgment) case No. 17-94-1-A(15 July 1999) 96

The above dictum does not represent the situation in the field because the various differences used in the law of armed conflict do not intend to deter deviation or non compliance with the rules, neither were they fashioned to ensure the effectiveness of the laws. The differences are motivated by realism, not the type anticipated or envisaged by the judges of the ICTY in the above dictum. Instead, the definition of the situations in which the law of armed conflict will apply is inspired by the desire of States not to allow the application of the law of armed conflict in certain situations.⁵⁸ For example, the provision in Article 1 of Additional Protocol II, including the requirement of territorial occupation excludes the activities of Boko Haram sect in Nigeria from the purview of the protection offered by IHL but it has not in any way reduced the extent of suffering, the killings and maiming of innocent civilians in the northern part of Nigeria nor the destruction of civilian objects. Even with the enactment of the Terrorism Act, the Nigerian government appears to be overwhelmed by the activities of this group. They have neither succeeded in arresting nor prosecuting any member of this group. This is a dangerous indication as the group appears to be attacking civilians at will without let or hindrance although the attacks are often sporadic, they leave in their trails a number of casualties with many dead. The group always appears to be a step ahead of the Nigerian Government and this is a dangerous trend.

By limiting the threshold of application of AP II⁵⁹ in this way, States have succeeded in ensuring that they do not give international legitimacy and recognition to groups or rebels fighting within their territories. This is reiterated by AP II and the emphasis placed on making sure that States have the duty by all legal means to maintaining law and order and to defend the national unity and territorial integrity of their State. Again, Gasser pointed out that the distinction between international and internal armed conflicts merely represents a compromise between the concept of sovereignty and humanitarian concern.⁶⁰ Duxbury maintains and rightly so that this is a pragmatic compromise. This is due to the fact that the classifications adopted in IHL do not give credibility to the law's claim to humanity by creating situations where the law becomes silent about certain types of conflicts and violence.⁶¹ The minimum or basic test for determining whether an armed conflict has occurred and the distinction between internal and international armed conflicts also creates silences.⁶² The problem generated by the definition of the minimum standard for determining the existence of an armed conflict is believed to be an effective mode of determining the limits or boundaries of IHL. It creates or draws the line within which killing and maiming is legitimized,⁶³ it also limits the boundaries of discussions with respect to the application of the rules regarding the way those *hors de combat* i.e. the wounded and the sick are treated, the involvement of the Red Cross, the granting of the Prisoner of War status and the rights to particular trial procedures take place. In fact, the definition dictates the limits of international humanitarian law.⁶⁴ The effect of these limitations is that every other issue has to be discussed in other subject areas like the refugee law, human rights law, international criminal law or international law.

⁵⁸ For instance, the definition of armed conflict in Tadic and the exclusions in Additional Protocol II are not based on any particular formulation of the type of violence they should bring this area of law into play. Rather, the list of issues that is outside the purview of this branch of law in Additional Protocol II, evidence states concern with ensuring that the prescriptive articles regarding the treatment of personnel in armed conflict should not intrude upon State' ability to deal with security situations which they regard as largely internal in nature: see Gardem, Judith "Women and Armed Conflict: The Response of International Humanitarian Law" In Durham, H and Gurd, T (eds.) Listening to the Silences: Women and War (2005) 109.

⁵⁹ Article 3(1) Additional Protocol II

⁶⁰ Han-Peter, Gasser "Acts of Terror, Terrorism and International Humanitarian Law" (2002) *International Review of the Red Cross* (IRRC) Vol. 84, No. 547 555-6

⁶¹ Duxbury, A. Supra note 17

⁶² For instance, the distinction between international and non international armed conflicts may be based on an acceptance of the level of interference that states will tolerate in internal situations but excludes those fighting in a non-international armed conflict from large parts of the protection offered by the law despite the fact that armed conflicts within States have a reputation for ferocity.

⁶³ War on Poverty and the War on Drugs in David Kennedy, of war and law (2006) I as cited by Duxbury, A Supra note 17.

⁶⁴ Bruce Oswald "The Law of Military Occupation: Answering the Challenges of Detention during Contemporary Peace Operations" (2007) 8 *Melbourne Journal of International Law*, 311.

It is important to understand that applying these other branches in times of armed conflict will not be easy particularly when it is considered against the background that international humanitarian law is *lex specialis*, and the study group on the fragmentation of international law has dealt with this claim of *lex specialis* in its report which it submitted to the International Law Commission.⁶⁵ Cassese noted that the problem of determining whether an armed conflict has occurred or begun to occur also led to debates as to whether the terrorist attacks of September 11, 2001 should be classified as a war crime, a crime against humanity or an act of terrorism to be dealt with by the domestic law.⁶⁶ Duxbury have noted that while these debates are significant in terms of the legal classification of a particular situation, most notably for the purpose of prosecution, they do little to describe the suffering of those subject to conflict or violence.⁶⁷ It is the submission of this paper that there is a need to consider the suffering of the people affected by violence or conflict before any classification can be complete. Without factoring the sufferings of the people into the classification, the exercise will continue to be in futility. It is further submitted by this paper that factoring human suffering into the classification will help in lowering the threshold of application of AP II and this will help States that do not have effective domestic criminal and human rights prosecution systems.

VII. Conclusion

This paper considered the characterization of armed conflicts and noted that armed conflicts are basically grouped into two – international and internal. This distinction helps in determining the applicable law and to ensure that High Contracting Parties are given the right to exercise their sovereignty, maintain law and order and defend the national unity and territorial integrity of their States. The sensitive nature of interference with purely domestic matters is often cited as one of the reasons for the neglect and underdevelopment of the rules regulating internal armed conflicts. Although, sovereignty is recognized as an important international value, one must not forget that the rights and prerogatives that it confers have been limited in contemporary times especially with the recognition of international human rights values. The classification also helps to ensure that legitimacy is not given to groups that fight within the borders of any of the High Contracting Party. One serious problem faced here is the fact that there are situations or instances of violence that are not covered by IHL for the mere fact that such situations have not met the minimum threshold to qualify as armed conflicts and such situations covers acts of terrorism, riots, sporadic acts of violence and other acts of a similar nature. These are considered gray areas that need to be properly handled. Excluding such situations from the ambit of humanitarian law makes IHL's claim of humanity questionable as the classification and differences do not define the suffering of people who are affected by violence and conflict, nor does it specify the appropriate response to such tragedies. For instance, there is no difference between the killings, maiming and the sufferings of innocent civilians in the northern part of Nigeria from that being currently experienced by civilians in Syria or that experienced by the same category of protected persons during the conflict in Libya.

The increasing complex nature of armed conflicts has given rise to debates on the concept and types of armed conflicts, including whether the classification of armed conflict under IHL is sufficient to cater all the types of armed conflicts as witnessed presently. There is a need to critically assess the threshold of violence that would qualify as armed conflict. Once the threshold is lowered, it may enhance IHL's claim to humanity as the law will minimize conditions under which killings and maiming of civilians is considered legitimate. Again, most of the current conflicts around the world today are either internal or internationalized internal conflicts. There is a need for a detailed provision of IHL to regulate these conflicts as that provided in common Article 3, human rights law and customary international law may not be sufficient as gaps are still identified in these frameworks when compared with rule of IHL that applies in situations of international armed conflicts. Finally, before these required provisions become available, the Nigerian government should rise to its responsibility of protecting the lives and property of civilians. There is the need for the government to intensify its effort and ensure that perpetrators' of these atrocities are brought to book and severely punished. Effective penal sanctions would only be possible if the government makes a deliberate effort to amend the existing domestic criminal law rules to international standard or enact fresh laws or legislations in the area of criminal justice.

⁶⁵ International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 58th sess. UN Doc A/CN.4/L.682 (13 April 2006)

⁶⁶ Antonio Cassese, "Terrorism is Also Disrupting some crucial legal categories of International law" (2001) 12 *European Journal of International Law*, 993. See Rogers, APV " Terrorism and the Law of War: September 11 and its Aftermath (2001) <http://www.crimesofwar.org/expert/attack-apv.html>. Accessed 28th September, 2014.

⁶⁷ Duxbury, A Supra note 17, p 12.

Apart from improving the domestic criminal justice system, adequate technology should be put in place to track these terrorists. Fighting asymmetric warfare can be difficult and requires the use of experts, Nigerian government should bring on board experts in this field for professional advice. Nigeria should also be commended for accepting the offer of assistance from more technologically and militarily equipped countries like the US, UK, China, France and other African countries in fighting the menace of terrorism. Furthermore, the Military and Police should be adequately funded and equipped to face the challenges of terrorism. At the moment the Boko Haram sect is still unleashing unprecedented terrors on Nigerians. Between June and December 2014, there has been series of attacks by the sect leading to the death and displacement of civilians. The Chibok girls kidnapped in April 2014 by the sect are yet to be located and rescued. The government has been making efforts but has not succeeded. This paper calls for a more concerted effort on the part of the government and the military. The attacks must end and the girls must be rescued as this will endanger girl child education in the northern part of Nigeria.