COUNTERINSURGENCY: IS THE QUEST FOR HUMAN RIGHTS A DISTRACTION OR SINE QUÀ NON?

Protocol

I have been asked to speak on a topic that has been framed as a question. After a careful contemplation on what I would describe as an apt topic – meet for this season, I have concluded that the esteemed Nigerian Bar Association wishes to know whether counterinsurgency operations and observance of human rights norms are mutually exclusive or rather reinforcing. The Association wishes to know whether violation of human rights in COIN are the norm rather than the exception. I will attempt to answer these questions in this lecture.

INTRODUCTION

1. The 21st Century has ushered in a dramatically changed security environment with profound implications for the military profession. The armed forces the world over, long used to preparing to fight conventional wars, are now mostly confronted by enemies without any discernible orders of battle. Their shapes and sizes, tactics, strategies and methods of operation may change several times in a day. Non-state actors and indeed, insurgent forces do not adhere to rigid hierarchical structures that can be easily held accountable for atrocities committed. The enemies we face today are averse to observing the laws of war, no weapon is beyond their use and tactics is abhorrent to insurgent forces. This new security environment with its ever-changing challenges has tasked the imaginations of some nations’ armed forces. The aim of insurgent elements, according to the “Guide to the Analysis of Insurgency” published by the US Government in 2012, is to undercut the ability of the government to provide the population with security and public services, including utilities, education, and other critical services. They equally seek to push and provoke government forces into committing abuses that drive neutral civilians towards them. Insurgent forces aim at undermining international support for the government and, if possible, to gain

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international recognition or assistance for the insurgency. Insurgencies are usually protracted politico-military struggle designed to weaken the control and legitimacy of an established government. They are characterized by protracted, asymmetric violence particularly terrorism. Insurgents therefore, avoid conventional battle spaces where they are weakest and resort to the use of complex terrains such as jungles, mountains and urban areas to mask their activities.

2. Some nations’ armed forces are therefore, dealing with desperate, blood thirsty and callous groups like Al-Qaida, the Taliban, ISIS, and Boko Haram. These terrorists and insurgents rejoice the most when their atrocities like bombings, attacks on defenseless villages and civilian populations result in mass deaths and extreme sufferings. They have no respect for human rights and Rules of Engagement (ROE). While insurgent forces do not feel obligated to obey and observe human rights norms, treaties or rules of international humanitarian law, regular forces maintained by nation states have no alternative. The use of force, weapons and certain conducts or acts in military operations are limited by the law of armed conflict and international human rights law. However, insurgents feel no obligation to subject themselves to such limitations. Fighting insurgents especially through conventional forces is normally a messy affair – it is like learning to eat soup with a knife. Counterinsurgency (COIN) is thus a battle between David and Goliath, between insurgents and the more powerful, better trained, organized and equipped conventional forces. Unfortunately, for the insurgents desiring to win battles and even the campaign or to get conventional forces bogged down in protracted operations, no method, weapon or tactics is abhorrent enough to be ruled out. Conventional forces must therefore be careful not to be drawn into retaliatory acts that will offend human rights norms. However, in tackling insurgents embedded in civilian populations, unintended casualties and human rights violations occur. Most human rights instruments allow governments under strict conditions, to derogate from certain rights when confronted with serious public threats, for instance during dangerous disturbances or armed conflicts. However, there is a “hard
core” of basic rights from which governments, the world over are not allowed to derogate under any circumstance.

3. COIN campaigns or operations of the nature being waged by Nigeria against Boko Haram are normally conducted by duly-elected or politically recognized governments against insurgent forces that violate their sovereignty or territorial integrity. The best COIN campaigns integrate and synchronize political, security, economic, and informational components that reinforce governmental legitimacy and effectiveness while at the same time avoiding incidents of human rights violations. Early COIN theorists have at different times advocated for modest observance of human rights during military operations. Observance of human rights norms in operations is always a challenge for conventional forces pushed into overreacting by insurgents groups. The United States for instance, has had to learn and evolve. It conducted COIN campaigns during the Philippine American War, Vietnam War, post 2001-War in Afghanistan, and the Iraq War with a mixed record on human rights. The success of the United States-led coalition forces in Iraq largely depended in part, on their ability to treat the civilian population humanely despite the operational requirement to protect fighting forces from imminent threats and rampant deaths. At the height of the campaign, deaths caused by road side bombs or Improvised Explosive Devices (IEDs) were rampant and daily occurrences. Although a certain degree of human rights violations took place, they were minimized. Perpetrators were also sanctioned openly. Conversely, the French COIN campaigns in colonial Algeria were characterized by gross human rights violations. For instance, the Battle of Algiers in 1957 resulted in 24,000 detentions, mass torture and deaths of over 3,000 civilians.

4. The notable author on the subject, David Galula argues that COIN is a combination of military, political and social actions under the strong control of a single authority. Accordingly, he proposes that the aim of COIN must always be to gain the support of the population rather than control of territory normally achieved through the effective protection of the population. Thus, a successful COIN campaign involves
denying insurgents’ freedom of action coupled with their permanent isolation from the population. Robert Thompson on the other hand, argues that a successful counter-insurgency effort must be proactive in seizing the initiative from insurgents while functioning in accordance with the law. General Patrick Walters, the then British commander of troops in Northern Ireland, contends that his objective was not to kill as many terrorists as possible, but to ensure that few people on both sides were killed. It is against this backdrop that Lorenzo Zambernardi identifies 3 main goals of COIN operations which are however, difficult to achieve simultaneously. These are force protection, distinction between enemy combatants and noncombatants, and physical elimination of insurgents. Therefore, in pursuing any two of these three goals, a state must forgo some portion of the third objective. For states that do not adhere strictly to the observance of human rights norms, their armed forces may be protected while destroying insurgents, but only by indiscriminately killing civilians as the Ottomans, Italians, and Nazis did in the Balkans, Libya, and Eastern Europe respectively.

5. The spate of insurgent activities in the North Eastern Nigeria necessitated the declaration of a state of emergency in Borno, Yobe and Adamawa States by the former President, Dr Goodluck Jonathan on 14 May 2013. The then President was exercising the powers conferred by Section 305 subsections 3 and 4 of the 1999 Constitution (as amended). The declaration of the state of emergency and subsequent proscription of Jama’atu Ahlul Sunna Lidda’awati Wal Jihad otherwise known as Boko Haram paved way for the launching of military offensive involving the 3 arms of Services in conjunction with para-military and civilian components against the illegal organization. This was preceded by the enactment of Terrorism (Prevention) Act 2011, amended in 2013 by the National Assembly. The enactment of the legal framework for terrorism in Nigeria enhanced the determination of the government to vigorously pursue judicial actions in concert with political and socio-economic measures to curtail the menace of terrorism and insurgency. Government has also rightly expressed concerns over the increasing number of detainees arrested in the course of COIN operations and the perceived human rights violations. Amnesty International has equally, at different times,
accused the Nigerian military of gross human rights violations in the prosecution of the ongoing COIN operations in the North East. While the claims by Amnesty International are over-exaggerated, the Government being mindful of its obligations under treaty laws and human rights norms has decided to look into the matter. Consequently, the Defence Headquarters has set up various joint investigation teams comprising relevant stakeholders to investigate, screen and categorize suspected insurgents with a view to prosecuting those found culpable and decongesting the limited available detention facilities. This presentation proposes that a viable COIN strategy must be anchored on a capacity to protect civilians from human rights abuses and violent attacks. It insists that this is what the Nigerian Armed Forces are doing in the COIN campaign in the NE. The purpose of this paper therefore, is to discuss COIN operations involving the Nigerian Armed forces and the efforts to protect human rights while stemming their violations. It would be demonstrated that COIN operations and observance of human rights are not mutually exclusive.

**AIM**

6. The aim of this presentation therefore is to discuss COIN and observance of human rights norms with a view to demonstrating that they are not mutually exclusive.

**SCOPE**

7. This presentation will cover the following:

   a. Conceptual Clarification.
   c. Counterinsurgency operations and human rights.
   d. Legal and ethical challenges in our COIN operations.
   e. Conclusion.
CONCEPTUAL CLARIFICATION

8. The topic we have been given throws up two key concepts that need clarifications for us to better situate and perhaps anchor our discussion. COIN and human rights are concepts that do not easily lend themselves to commonly acceptable definitions. However, we will look at a number of definitions that will shed some light on the key concepts that underpin our discourse. But, to arrive at the desired destination, we will smuggle into this lecture the concept of insurgency to further amplify our understanding of COIN.

9. **Insurgency.** In order to understand COIN and the dynamics of revolutionary warfare, one must understand insurgency. Insurgency can be defined as “an organised, violent subversion used to effect or prevent political control, as a challenge to established authority”. It is thus, primarily a political struggle, in which armed force is used to exert political and economic control of a state or region. Insurgents capitalize on societal problems, often called gaps while COIN addresses the closing of such gaps. It is a rebellion against a constituted authority when those taking part in it are not recognized as belligerents. An insurgency can be brought to an end through COIN warfare, and may also be opposed by measures to protect the population through political and economic actions of various kinds - aimed at undermining the insurgents’ claims against the incumbent regime. Insurgents and terrorists use a mixture of subversion, propaganda, terrorism and armed force to achieve their objectives. It must be noted that not all rebellions are insurgencies. There have been many cases of non-violent rebellions, using civil resistance, as was the case in Philippines in the 1980s during the ouster of the then President Marcos and the Egyptian Revolution of 2011. Where a revolt takes the form of an armed rebellion, it may not be viewed as an insurgency if a state of belligerency exists between one or more sovereign states and rebel forces. For instance, during the American Civil War, the Confederate States, as then an entity was not recognized as a sovereign state, but it was recognized as a belligerent power. Confederate warships were therefore given the same rights as United
States warships in foreign ports. Galula defines insurgency as a protracted struggle conducted methodically, step by step, in order to attain specific intermediate objectives leading finally to the overthrow of the existing order. Galula’s definition will suffice as a working definition for this paper.

10. **Counterinsurgency.** COIN as a concept has attracted so many definitions. The US Army’s Field Manual for instance defines COIN as “Those military, paramilitary, political, economic, psychological, and civic actions taken by a government to defeat insurgency”. In the same vein, the United States Government Counterinsurgency Guide 2009, views COIN as “comprehensive civilian and military efforts taken to simultaneously defeat and contain insurgency and address its root causes.” It involves military, political, economic, psychological and civic actions taken to defeat insurgency, while addressing its root causes. COIN is thus a complex effort that integrates the full range of civilian and military agencies. It is often more population-centric (focused on securing and controlling a given population or populations) than enemy-centric (focused on defeating a particular enemy group). Successful COIN requires the adoption of multifaceted approaches that address the political, economic, social, and cultural and security dimensions of the unrest. The US Government insists that an effective COIN integrates and synchronizes political, security, legal, economic, development, and psychological activities to create a holistic approach aimed at weakening the insurgents while bolstering the government’s legitimacy in the eyes of the population. The US COIN Guide 2009’s definition will underpin our discussion of the concept.

11. **Human Rights.** Human rights are commonly understood as those inalienable fundamental rights which every human being is inherently entitled to. Human rights are thus conceived as universal and egalitarian in nature, hence they are uniformly applicable everywhere irrespective of race, religion and jurisdiction. These rights may exist as natural rights or as legal rights, in local, regional, national, and international laws. The doctrine of human rights in international practice, within the policies of states
and activities of non-governmental organizations has been the cornerstone of public policy around the world. However, the question of what is meant by a ‘right’ is itself controversial and the subject of continued philosophical and legal debate. The University of Minnesota Human Rights Centre defines human rights as “those basic standards without which people cannot live in dignity”. The Centre argues that to violate someone’s human rights is to treat that person as though she or he were not a human being. To advocate human rights is thus to demand that the human dignity of all people be respected. In claiming these human rights, everyone also accepts the responsibility not to infringe on the rights of others and to support those whose rights are abused or denied.

12. Maiese on the other hand, defines human rights as the basic rights and freedoms to which all humans are considered entitled; the right to life, liberty, freedom of thought and expression, and equal treatment before the law, among others. Amnesty International (AI) sees human rights as basic rights and freedom that all people are entitled to regardless of race, sex, national or ethnic origin, religion, language or other status. These rights include civil and political rights such as the right to life, liberty and freedom of expression. They also consist of social, cultural and economic rights including the right to participate in culture, the right to food, and the right to work and receive an education. It suggests that these rights are inalienable, and are required for freedom and preservation of a reasonable quality of life. The definition by Amnesty International will form the basis for our discussion of the subject.

13. The history of individual rights shows clearly that the ancient world did not possess the concept of universal human rights. The true forerunner of human rights discourse which featured prominently in the political discourse of the American and French Revolutions, was the concept of natural rights which appeared as part of the medieval natural law tradition that became prominent during the era of enlightenment with such philosophers as John Locke and Francis Hutcheson. From this foundation, the modern human rights arguments emerged over the latter half of the 20th Century and
found expressions in various human rights regimes both nationally and internationally. As stated earlier, some of these rights may be derogated when a state of emergency has been declared in any part of or in an entire nation. Derogation as you well know, is a temporary suspension of an obligation under international law, which takes place under specific circumstances. Because the NE has been under a state of emergency, some rights have obviously been derogated. Despite the derogation, the Armed Forces have continued to respect especially the inalienable rights of Nigerians residing in the NE, the theatre of COIN operations.

**NATURE AND CHARACTER OF COUNTERINSURGENCY OPERATIONS**

*This is a game of wits and will. You’ve got to be learning and adapting constantly to survive.* - **General Peter J. Schoomaker, USA, 2004**

*The illiterate of the 21st Century will not be those who cannot read and write, but those who cannot learn, unlearn, and relearn.* - **Alvin Toffler, Rethinking the Future**

*This is another type of war, new in its intensity, ancient in its origin—war by guerrillas, subversives, insurgents, assassins, war by ambush instead of by combat; by infiltration, instead of aggression, seeking victory by eroding and exhausting the enemy instead of engaging him. It is a form of warfare uniquely adapted to what has been strangely called ‘wars of liberation,’ to undermine the efforts of new and poor countries to maintain the freedom that they have finally achieved. It preys on economic unrest and ethnic conflicts. It requires in those situations where we must counter it, and these are the kinds of challenges that will be before us in the next decade if freedom is to be saved, a whole new kind of strategy, a wholly different kind of force, and therefore a new and wholly different kind of military training.*

President John F. Kennedy
Remarks at West Point Graduation
June 6, 1962
14. The characteristics of warfare are evolving, as are the physical and virtual environments in which it is likely to be conducted. War has without doubt, continued to evolve from generation to generation and our generation is witnessing this evolution. War has thus, moved from the first generation of warfare, epitomized by the tactics of line and column, to the second generation with its reliance on mass fire power to the third generation where maneuver was the dominant feature. Today’s wars are characterized by unconventional forces employing asymmetric warfare to defeat well equipped, technologically advanced forces as we saw in Vietnam, Afghanistan, Somalia, Iraq and Lebanon. Boko Haram has borrowed liberally from the tactics and strategies of Al Qaida and ISIS. Nigeria is witnessing a specie of Fourth Generation Warfare (4GW). Contemporary conflicts are dominated by non-state actors, irregular forces adopting insurgent and asymmetrical tactics, because they cannot win using conventional tactics. Another interesting feature of contemporary conflicts is that they are largely intra-state as opposed to wars between nation states. However, if permitted by contiguous nations, insurgents attack and run into such nations for sanctuary. Given the successes recorded by insurgents against well developed nations with highly trained and equipped forces, regular armies have had to re-learn the principles of COIN to maintain some sort of parity and in come out victorious after several painful years typified by gains and reversals. For conventional forces, COIN warfare is always a stiff learning curve. The Marine Corps Warfighting Publication has underscored this point by asserting that “[The] military forces that successfully defeat insurgencies are usually those able to overcome their institutional inclination to wage conventional war against insurgents.” It must be added that such military forces must equally be trained to observe and respect human rights to win hearts and minds while eliciting international support.

15. 4GW is an evolved form of warfare rooted in the fundamental precept that superior political will power, if properly employed can defeat a superior military power. This type of insurgency makes use of all available networks; military, political, economic and social to prosecute its agenda. 4GW is normally lengthy and aims at
destroying the governments political will. A typical 4GW has strategic, operational and tactical goals to accomplish. However, the insurgent knows he cannot win a real military battle. The enemy’s approach requires a conventional force to equally make changes to its strategic concepts, operational execution, and tactical techniques. John M. Collins has defined strategic concepts as, “judgments concerning ways armed forces might best perform respective functions and accomplish assigned missions, taking relevant theories, facts, assumptions, and policies into account.” According to Galula, conventional warfare achieves only limited results against insurgent forces. Conventional warfare prescribes the conquest of the enemy’s territory, the destruction of his forces but insurgents hold no territory and refuse to fight for it. Insurgent forces are everywhere and nowhere. As stated earlier COIN operations are therefore, frustrating learning curves for conventional forces and full of painful setbacks and experiences. Sometimes, due to despicable and cruel actions of the insurgents, conventional forces overact and infringe upon human rights norms consequently eroding their gains. Counterinsurgents generally hold monopoly of violence, legitimacy as well as other material resources often exclusively reserved for states. However, insurgent forces thrive on hitting soft targets, specifically after every decisive blow by COIN troops, to cause pain, anguish and fear. They seek to cement the belief that COIN operations are not yielding the desired results, while leveraging the ensuing extensive media coverage to create fear. As stated earlier, they induce conventional forces into spontaneous reactions that result in human rights violations. It is against this backdrop that troops conducting COIN operations must be careful to uphold law and order, technically limiting their potential actions in the fight against the insurgents. This is partly why COIN becomes protracted.

**OUR COUNTERINSURGENCY OPERATIONS AND HUMAN RIGHTS**

16. In 2013, the International Criminal Court (ICC) came to the determination that the conflict between Boko Haram Terrorists and the security forces in northern-eastern Nigerian was a civil war. In a report from the Office of the Prosecutor (OTP) of the
ICC titled: “Report on Preliminary Examination Activities 2013”, which in the main, focused on conflicts, genocide and crimes against humanity in 10 countries, including Nigeria, it concluded that after a careful review of the situation, the violence in Nigeria qualified as an armed conflict of non-international character. Under the Geneva Conventions, a "non-international armed conflict" (NIAC) is the technical name for a civil war. This determination brought the ICC into line with a similar one made by the International Committee for the Red Cross (ICRC) in early 2013.

17. The determination that the situation is a NIAC implies that the norms of international humanitarian law, including in particular, Article 3 under the Geneva Conventions, are formally deemed to be applicable to the theatre of conflict. Common Article 3 of the Geneva Conventions is to the effect that 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 bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of 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 on 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 to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of 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 pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. 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. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

18. The aggregate implication of the foregoing provisions is that observance of human rights law and rules of IHL by Nigerian troops is not an optional choice. We are bound to comply with generally acceptable rules of armed conflict. Nigerian troops are thus scrupulous in observing human rights laws especially where the operating environment permits. In conducting our COIN operations, the armed forces have taken into consideration generally acceptable principles. In his book ‘Defeating Communist Insurgency’, Robert Thompson argued that a successful COIN effort must be proactive in seizing the initiative from insurgents. He then outlined 5 basic principles for a successful COIN as follows:

a. The government must have a clear political aim to establish and maintain a free, independent and united country which is politically and economically stable and viable.

b. The government must function in accordance with the law including respect for human rights.

c. The government must have an overall plan.

d. The government must give priority to defeating political subversion, not necessarily the insurgents.

e. In the guerrilla phase of an insurgency, government must secure its base areas first.

In the same vein, David Kilcullen, the Chief Strategist of the Office of the Coordinator for Counterterrorism of the U.S. State Department in 2006, described a framework for interagency cooperation and formulated the 3 pillars of COIN operations based on information. These pillars namely, security, political and economic factors, must
integrate a broader information strategy at global, regional and local levels. Each pillar must be developed in parallel and progress measured by assessing operational effectiveness and legitimacy. Although not expressly stated, respect for human rights runs through every COIN strategy.

19. In the conduct of COIN operations, the quest for human rights is not a distraction but a *sine qua non*. Human rights are the fundamental and inalienable rights of the human person which are guaranteed in Chapter IV of 1999 Constitution of the Federal Republic of Nigeria (as amended). Specifically, these fundamental rights earlier enumerated are provided for in Sections 33-44 of the Constitution. All forms of conflicts are regulated by laws including COIN. The Armed Forces of the Federal Republic of Nigeria, comprising the Army, the Navy and the Air Force owe their existence to Section 217 (1) of 1999 Constitution and are charged with the following responsibilities:

a. Defending Nigeria from external aggression.
b. Maintaining its territorial integrity and securing its borders from violation on land, sea or air.
c. Suppressing insurrection and acting in aid of civil authorities to restore order when called upon to do so by the President, but subject to such conditions as may be prescribed by an Act of the National Assembly and
d. Performing such other functions as may be prescribed by an Act of the National Assembly.

20. COIN operations fall strictly under Section 217 (2) (c) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). Therefore, in working to suppress the insurrection and restoration of order in the North East of the Federation, the Armed Forces are guided by Rules of Engagement (ROE). These are directives to the Armed Forces that define the circumstances, conditions, degree, and manner in which the use of force may be applied. Among other things, they provide authorization and limits on the
use of force and employment of certain specific capabilities. In some nations, ROE have the status of guidance to military forces, while in other nations like Nigeria, ROE are lawful commands. ROE do not normally dictate how a result is to be achieved but will indicate what measures may be unacceptable in achieving such a result. These rules are used in both domestic and international operations by most militaries. An abbreviated description of ROE referred to as ROE Card is normally issued to all personnel. The aim is to prevent or at least limit infringements of human rights.

21. Often violations of the laws of war are confused with violations of ROE. Breaches of the Geneva Conventions and other laws of war fall outside of the ROE. The usual question is whether or not a soldier has authority to use deadly force during a mission. If the answer is in the affirmative, then the next question is whether or not that force was reasonable and necessary under the circumstance. A prisoner of war or detainee under captivity is afforded special protection under IHL. If the detained person is abused or murdered, the violation is one of international criminal law rather than of ROE. It should be observed that there are no universal ROE, as what informs the formulation in a particular situation may differ from the other. Nonetheless, in drafting such rules, military commanders consider the literacy levels of their troops, mission statements for the operations and presence of combatants and non-combatants. Other factors considered include the nature of the equipment used by the combatants, humanitarian institutions, Non-Governmental Organizations (NGOs) providing humanitarian services, nature of the terrain, friendly forces and civilian populations. For the operations in the NE, the ROE have been clearly spelt out. Commanders at all levels have been ordered to constantly ensure they are understood and enforced.

22. COIN is one of the most difficult operations troops can be engaged in. In the case of the North East for instance, the terrain is inter-swapped by built-up areas and open grass lands. Insurgents or militant groups of every persuasion thrive in situations that provide convenient links to already existing conflicts. As stated earlier, the Common Article 3 which was developed by the Additional Protocol of 1977 provided
for cases of NIAC especially civil wars and other disturbances such as insurgoencies. In addition to catering for the wounded and the sick, the Article provides that “Persons taking no active part in hostilities to be treated humanely without any adverse distinction based on race, colour, religion or faith, sex, birth or wealth.” To this end, the following are prohibited by our ROE:

a. Violence to life and persons, in particular murder, cruel treatment and torture.
b. Hostage taking.
c. Outrages upon human dignity, in particular humiliating and degrading treatment.
d. The passing of sentences and the carrying out of executions in the absence of due process.

**LEGAL AND ETHICAL CHALLENGES IN OUR COIN OPERATIONS**

23. One of the requirements of the use of force under the law of armed conflict is that combatants must distinguish individuals presenting a threat from innocent civilians. This basic principle is accepted by all disciplined militaries. In COIN operations, disciplined application of force is even more critical because insurgents usually camouflage themselves, hiding and mingling with civilian populations. Nevertheless, the military is obligated to comply with international and domestic human rights laws. There are however, situations that derogate from the fundamental principles of human rights; recognised under the Constitution. For instance, the Nigerian Constitution provides that “Nothing in Section 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order or public health or for the purpose of protecting the rights and freedom of other persons”. In other words, the Constitution permits derogation of rights under some circumstances. Rights are generally not derogated
lightly - there must be critical factors operating in the background for nations to derogate citizens’ rights.

24. The derogation from fundamental rights and freedoms touches military men too, who have been bound by the doctrine of compact they signed on enlistment. The principle in these provisions, that the fundamental rights of individual can be restricted under certain circumstances including state security, accords with the opinion expressed by Lord Denning in his book ‘Landmarks in the Law’ where he stated that “when a person is suspected of being a terrorist, the Secretary of State can make an exclusion order against him without a trial”. It can be made on the evidence of intelligence officers of whom the suspect knows nothing about and whom he has no opportunity of cross examining. It can be made without even telling him the nature of the information against him. On the surface, the situation described by Lord Denning will appear to run contrary to the fundamental principles of natural justice. But natural justice must play second fiddle in extreme cases, to the national security. It means it must take second place to the duty of the state to protect the lives of ordinary people. Denning further stated in R V Secretary of State for Home Affairs (1977) IWLR 766 that “when the state was in danger our cherished freedoms and even the rules of natural justice, have to take second place.” Accordingly, Muhammed JSC (as he then was), in Dokubo-Asari V Federal Republic of Nigeria, (2007) All FWLR (pt 375) 558 expressed the opinion that “The pronouncement of the court below is that where national security is threatened or there is real likelihood of it being threatened, human or the individual rights of those responsible take second place. Human rights or individual rights must be suspended until the national security can be protected or well taken care of. This is not anything new. The corporate existence of Nigeria as a united, harmonious, indivisible and indissoluble sovereign nation, is certainly greater than any citizen’s liberty or rights. Once the security of this nation is in jeopardy and it survives in pieces rather than in peace, the individual’s liberty or rights may not even exist.” Now, this is not to signal
that the Armed Forces have been taking liberties with individual and collective freedoms. At all times, we have been professionally responsive.

25. As stated earlier the insurgency in Nigeria according to the rating of the ICC Prosecutor – “has grown to an armed conflict of a non-international nature.” The legal implications of this classification are as follows:

a. Boko Haram insurgents are bound to comply with International Humanitarian Law and as such, their leaders can be charged with crimes against humanity or genocide.

b. Armed Forces personnel and civilians involved in COIN operation are under similar obligations and can be tried for non-compliance with the Rules of Engagement (ROE) or International Humanitarian Law (IHL) and human rights law.

c. Where the domestic criminal jurisdiction is weak, or the government shows a brazen ineptitude to discharge its responsibility, the ICC can on its own institute criminal proceedings against such defaulting party at The Hague.

26. On the whole, it will be right to state that in COIN, the observance of human rights is a sine qua non and in fact not a distraction. Unfortunately however, at the heat of battle, collateral damage cannot be ruled out. The fog of war may sometimes create unintended consequences. The Armed Forces of Nigeria being a creation of law cannot operate outside its ambit and in contravention of international covenants to which the nation is a signatory. However, as stated earlier, under International Human Rights Law, it is possible for states to derogate from certain human rights obligations and to impose limitations on the exercise of some rights. To a lesser extent, derogations from rules protecting civilians are admissible in some circumstances in international humanitarian law, and several of its rules allow exceptions for reasons of military necessity and security. For instance, Article 4 (1) of the International Covenant on Civil and Political Rights provides that “In time of emergency which threaten the life of the nation and the
existence of which is officially proclaimed, the state parties to the present covenant may take measures derogating from their obligations under the present covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with the obligation solely on the ground of race, colour, sex, language or social origin”.

27. From the foregoing provision, it must be established, that there exists an emergency situation threatening the corporate existence of the nation and which must be officially proclaimed. Second, the proportionality test must be met. In other words, measures to be taken must be strictly required by the exigencies of the situation. In addition, such measures must not be inconsistent with other obligations under IHL and must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. One of the general defences to military offences relevant to war crimes is the defence of military necessity which is usually raised to justify the killing of people or destruction of property. However, the force and weapon used must not be forbidden by law and reasonable under the circumstance. Throughout history, a soldier has never been tried for killing an enemy in battle. What is normally criminalised and forbidden is the manner and timing of killing such an enemy. A state of insurgency ordinarily permits the killing of the insurgents and to a large extent, destruction of property insofar as the acts are not dictated by malice or negligence. These scenarios pose difficult challenges to the observance of human rights during COIN operations. The foregoing challenges notwithstanding, the Nigerian military has taken a number of measures to avoid human rights violations in the theatre of operations, the North Eastern states. The military is sticking to international best practices in the ongoing campaign against the insurgents. Apart from constant monitoring of the situation, previous reports of human rights abuses, though blown out of proportion for political reasons, have been investigated. In some cases, investigations are ongoing. The entire security architecture is being reviewed, restructured and strengthened to ensure greater safety for Nigerians and foreign workers in all parts of the country. The military has also established a long standing relation with the
International Committee of the Red Cross (ICRC) which has paid off through numerous training programmes in IHL. Invitation has been extended to the international community particularly those more technologically advanced to complement the efforts of the Government in guaranteeing public safety and fundamental freedoms.

CONCLUSION

28. Insurgents’ activities have claimed hundreds of lives and destroyed many human habitations and sources of livelihoods in Nigeria. Essentially, the rising wave of insurgency has overwhelmed the internal security capacity of the police consequently increasing the involvement of the military in internal security operations. The Nigerian military is committed to respecting humanitarian laws in all its COIN operations especially against Boko Haram in the North-East. The Armed Forces will continue to operate in line with the objectives of the Red Cross to ensure the protection of those caught in theatre of operations. This resolve has been demonstrated in the recent operations in Sambisa Forest which led to the rescue of several women and children presently in various camps of Internally Displaced Persons (IDPs) across the country. Despite the difficult nature of the conflict, the Armed Forces will continue in all operations to ensure maintenance of humanitarian laws while providing humanitarian aid to those caught in theatre of conflict. Deliberate efforts are being made to adhere strictly to the principle of proportionality which forbids the use of force disproportionate to military objective. The Nigerian Armed Forces being a creation of law, operates within the ambit of the law. All operations are guided by ROE for troops. These rules are derived from the Constitution and principles of IHL in relation to the United Nations Charter on the conduct of hostilities. Nonetheless, military necessity and the security of the state, loom very large in our operations. Issues relating to these provide the basis upon which human rights and freedoms may be restricted. The Nigerian Armed Forces thus affirms emphatically that COIN and human rights are not mutually exclusive. We are duty bound to respect them in our operations and this has never been a distraction.
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