

Internationalization of Armed Conflict in Africa: Appraisal of Sub-Saharan African Countries of Democratic Republic of Congo, Somalia and Nigeria

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Abstract

Non-international armed conflict is one between the government and rebel group(s) within the borders of a state or between rebel group(s) among themselves. This has clear legal regimes applicable and assessment is also simple. However, various armed conflicts fought across Africa today have changed both in dimension and characteristics. Foreign state actors and non-state actor have occupied the space in battle-field fighting for one faction or the other. This has convoluted the notion of international and non-international armed conflict and confused the legal dichotomy inherent in them. The greatest culprit of this is Sub-Saharan African counties with the highest theater of war. This article considers the argument on internationalization of armed conflict generally and within the precinct of the armed conflicts in three Sub-Sahara African countries of DRC, Somalia and Nigeria. The paper finally recommends the removal of the dichotomy between international armed conflict and non-international armed conflict in order to operate a single legal regime that will regulate all types of armed conflict. It argues further that this will engender a seamless assessment and prosecution of violations of laws of armed conflict especially in Africa.

Keywords: Non-international armed conflict, international armed conflict, internationalization of armed conflict, DRC, Somalia, Nigeria

Introduction

The notion of internationalization of armed conflict connotes a non-international armed conflict characterized by the intervention of the armed forces of a foreign state. The law of armed conflict is situated within a number of rules and regulations which is anchored on various distinctions². These distinctions are between international and non-international armed conflicts, state actors and non-state actors, civilians and combatants.³ Internationalization of armed conflict occurs more frequently and raises myriad legal qualification and application of international humanitarian law (IHL). One of the paramount distinctions in the law of armed conflict is the regulation of international and non-international armed conflicts. Unfortunately, internationalized armed conflicts are not accommodated within the precinct of the legal rules of these two categories. In recent times, conflict that may seem internal take place on a globalized context in which international actors play increasing role in the theatre of conflict. While traditional inter-state wars have diminished, there are few wars that can be described as neatly 'internal' in nature.⁴

It must be stated that compared to other continents, Africa shows the highest degree of internationalization of armed conflicts.

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² Hans-Peter Gasser, 'Internationalized Non - International Armed Conflict: Case Studies of Afghanistan, Kampuchea and Lebanon', [1983] *The American University Law Review*, (Vol. 33), 145

³ Jed Odermatt, 'Between Law and Reality: "New Wars" and Internationalized Armed Conflict', [2013] *Amsterdam Law Forum*, (Vol. 5) 19.

⁴ *Ibid.*

For the total conflicts which affected the world between 1945 and 2015, the degree is about 85% for Africa while the average for the world was about 15%.⁵ The internationalization of armed conflict in Africa is as a result of different factors. These factors may include economic profits by foreign actors, cultural rivalries and identity based proximities and geo-political competition by foreign powers and states.⁶ Also, this trend is facilitated by the large window of opportunity for external forces to penetrate different countries and the region as a whole.

The various conflicts in Sub-Saharan African state of Democratic Republic of Congo's (DRC), Somalia and Nigeria have witnessed interventions by armed forces of foreign or multinational states. These conflicts by their nature and context were principally internal or civil wars occurring within the borders of these states between non-state actors against the state or non-state actors against each other. France, United States of America, Belgium, the United Nations, African Union and others at one time or another mustered armed forces to intervene in these conflicts both on peacekeeping, peace-enforcement, or peace-building. Indeed, the Sub-Saharan African states have had fair share of this trend in armed conflict. IHL applies different rules to armed conflict depending on the nature or classification of the conflict.⁷ However, there have been various arguments as to the appropriateness and rationality of this classification and that it frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs.⁸ These views have been expressed by International Committee of the Red Cross (ICRC) in 1948,⁹ 1971¹⁰, 1972¹¹ and in 1975, the Norwegian Delegation of Experts¹² has, as well, advanced similar views. Somewhat surprisingly, calls for a unified body of IHL have died out, even though "the manifold expressions of dissatisfaction with the dichotomy between international and internal armed conflicts¹³ still persist.¹⁴ This work examines the notion of internationalization of armed conflicts and its practical experience in some sub-Saharan African states.

The Notion of Internationalization of Armed Conflict

Internationalization of armed conflict describes the concept of internal hostility that is rendered international.

⁵ Anastase Shyaka, 'Understanding the Conflicts in the Great Lakes Region: An Overview', [2008] *Journal of African Conflicts and Peace Studies*, (Vol. 1), (issue 1) 5 – 12.

⁶ *Ibid*, 10

⁷ James G. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict', [2003] *International Review of the Red Cross*, (Vol, 85), (No. 859), 313

⁸ Michael Reisman and J. Silk, 'Which law Applies in the Afghan Conflict?', [1988] *American Journal of International Law*, (vol. 82), 465, "The distinction between international wars and internal conflicts is no longer factually tenable or compatible with the thrust of humanitarian law, as the contemporary law of armed conflict has come to be known. One of the consequences of the nuclear statement is that most international conflict now takes the guise of internal conflict, much of it conducted covertly or at a level of low intensity. Paying lip service to the alleged distinction simply frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs".

⁹ In 1948, the ICRC presented a report recommending that the Geneva Conventions apply the full extent of IHL "in all cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties. See generally, Jean Pictet (ed), *Commentaries on the Geneva Conventions of 12 August 1949, Vol. 111: Geneva Convention Relative to the Treatment of Prisoners of War* (ICRC, Geneva, 1960) 31

¹⁰ In 1971, ICRC submitted a draft to a Conference of Government Experts recommending a further proposition that was intended to make the whole body of IHL applicable to a civil war if foreign troops intervened. The paragraph reads: "when, in case of non – international armed conflict, one or the other party, or both, benefit from the assistance of operational armed forces afforded by a third state, the parties to the conflict shall apply the whole of the IHL applicable in international armed conflicts. See ICRC, *Report on the Work of the Conference of Government Experts*, (Geneva, 1971) para. 284.

¹¹ In 1972, ICRC put forward a more subtle proposal along the same lines. The proposal sought to apply the full body of IHL to internal conflicts when third states intervened in support of both sides. See ICRC, *Report on the Work of the Conference of Government Experts*, (Geneva, 1972, Vol. 1) para. 2 at 332

¹² Finally, in 1978 the Norwegian delegation in the same conference proposed that the two categories of armed conflicts be dropped in favour of a single law for all kinds of armed conflict. See generally, *Diplomatic conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Official Records*, (Summary Record, Vol – 5, 9, (CDDH./SR. 10) 1978).

¹³ S Boelaert – Suominen, 'Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law moving Towards a Uniform Enforcement Mechanism for all Armed Conflicts?', [2000] *Journal of Conflict and Security Law*, (Vol. 5), (NO. 63) 5.

¹⁴ James G. Stewart, *supra*, 313

The factual situations that nurture internationalization are various and sometimes complex: this includes armed conflict between two internal factions both of which are backed by different states, direct hostilities between two foreign states that military intervene in an internal armed conflict in support of opposing sides, and war involving a foreign intervention in support of an insurgent group fighting against an established government.¹⁵ The most transparent internationalized internal armed conflicts in recent history, include North Atlantic Treaty Organization's¹⁶ intervention in the armed conflicts between Federal Republic of Yugoslavia and the Kosovo Liberation Army in 1999¹⁷ and the intervention undertaken by some states in the Great Lake region¹⁸ in support of opposing sides of the internal armed conflict in the Democratic Republic of Congo and in Somalia.

The proliferation of nuclear weaponry and its inhibiting impact on direct form of aggression during the Cold War led to many less transparent internationalized armed conflicts, which although superficially internal were in fact wars by proxy, taking place in the territory of a single state with the covert intervention of foreign governments.¹⁹ The United State support of the *contra* rebels against state's forces in Nicaragua in the 1980s, perhaps is the pure example of this trend.²⁰ Motivations for intervention in civil wars may have changed since the end of the Cold War, but the increased economic interdependence of states born of globalization, the development of nuclear capabilities among previously incapable states, the greater incidence of terrorism in Western countries and the increasing scarcity of natural resources all provide incentives for foreign intervention in domestic internal conflicts. As a reflection of that reality, internal conflicts are presently more in number, brutal and damaging than their international counterparts,²¹ despite the fact that the state remains the main war – waging machine.²²

The difficulty from humanitarian point of view is that although internationalized armed conflict has special features distinguishing them from both international and internal armed conflicts,²³ there is absolutely no basis for a halfway house between the law applicable in internal armed conflicts and that relevant to international warfare.²⁴ Therefore, the application of IHL to internationalized armed conflicts involves characterizing events as either wholly international or non-international according to the various tests espoused in the Geneva Conventions, their Additional Protocols and Customary IHL.

According to Marko Milanovic, the concept of internationalization is only legally useful if it denotes the transformation of a *prima facie* non-international armed conflict into an international one, thereby rendering applicable to the said conflict the more comprehensive international armed conflict legal regime.²⁵ There is crucially one striking distinction between the two legal regimes. In international armed conflicts, the parties to the conflict are two equal sovereign states. Lawful participants in the hostilities who in effect represent those sovereign states have combatant status, and enjoy the privilege of belligerency. They cannot be prosecuted by the other state for their mere participation in the hostilities, but solely for the violations of international humanitarian law.

¹⁵ D. Swindler, 'International Humanitarian Law and Internationalized Internal Armed Conflicts', [1982] *IRRC*, (NO. 230) 55

¹⁶ Hereinafter called "NATO"

¹⁷ S. Alexeyevich Egorov, 'The Kosovo Crisis and the Law of Armed Conflicts', [2000] *IRRC*, (NO. 837) 183

¹⁸ The states include: Rwanda, Angola, Zimbaabive, Uganda and others deployed their forces into DRC in August 1998. "By 1999, a new war was raging in the renamed Democratic Republic of Congo. The Rwandan and Ugandan government now supported the anti – kabila opposition. Zimbabwe, Angola and other states backed Kabila. See M. Shaw, 'From the Rwandan Genocide of 1994 to the Congo Civil War', <http://www.hrw.org/reports/2000/drc/Drcoo5-01.htm#p68>

¹⁹ G. Abi-Saab, 'Non-International Armed Conflicts', in *International Dimensions of Humanitarian Law*, (Henry Dunant Institute/UNESCO, Geneva, 1988) 22

²⁰ See generally, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua V. United States of America)* Merits, Judgment, ICJ Reports 1986, 14.

²¹ *Ibid*, 38

²² *Ibid*, 38

²³ According to Detter, '... most apparently internal wars do, in fact, receive some kind of outside support' See, I, Detter, *The Law of War*, (Cambridge University Press, London, 2002) 49. See also, L. Moir, *The Law of Internal Armed Conflict*, (Cambridge University Press, London, 2000) 46: Even in the Post-Cold War International Order, outside involvement in internal armed conflicts is still far from uncommon. See also Hans – Peter Gasser, *supra*, 157.

²⁴ C. Byron, 'Armed Conflicts: International or non-international?', [2001] *Journal of Conflict and Security Law*, (Vol. 6) (No. 1 June) 87

²⁵ Marko Milanovic, 'What Exactly Internationalizes an Internal Armed Conflict?', *European Journal of International Law*, 2010, Online, <ejiltalk.org>accessed on 24 September, 2017.

In Non-international armed conflicts, however, the parties are fundamentally different, most commonly a government and a rebellious non-state actor. Since governments have every right to suppress rebellions against them, no combatant status or privilege exists in this type of conflict.²⁶ A rebel can be prosecuted for the mere fact that he is a rebel, even if he has been completely observant of the rules of IHL. Thus, the Nigerian government has every right to prosecute and imprison a *Boko Haram* insurgent, even if the insurgent committed no war crime.

Under *Common Article 2* of the Geneva Conventions, international armed conflicts are defined as conflicts between states. There are thus two basic ways of internationalizing a non-international armed conflict:

1. for treaties and or custom to exceptionally expand the definition of an international armed conflict to include as parties some sufficiently state-like entities, or
2. for the non-state actor which is a party to a non-international armed conflict with a state to be considered as acting on behalf of a third state.

For the first option, there are only two exceptions: *Article 1(4)* of Additional Protocol I, which renders international a conflict between a state and an oppressed people, which would otherwise be considered a non-international armed conflict; and the recognition of belligerency, which has now fallen into disuse, but not desuetude. As for the former, the idea behind *Article 1(4)* of Additional Protocol I is that a people entitled to self-determination, whose right thereto is being denied by a state, exhibits a form of proto-statehood or sovereignty, an innate legitimacy that requires the application of international armed conflict regime, the privilege of belligerency and all. However, *Article 1(4)* is not widely accepted as reflecting customary law, and it has never actually been applied. As for the recognition of belligerency, it allows the state fighting an insurgent and or third state to recognize the fact that the magnitude of the insurgency is such that it would be appropriate to treat it as a belligerent.²⁷

The Effective Legal Divide

There is effectively a deep striking difference between the substantive legal regulation of international and non-international armed conflict. As a reflection of the historical bias in IHL towards the regulation of international armed conflict, the 1949 Geneva Conventions and the 1977 Protocols contain close to 600 articles of which only *Article 3 common* to the 1949 Geneva Conventions and the 28 articles of Additional Protocol II apply to internal conflicts.²⁸ In addition, the law of The Hague addressing methods and means of combat and conduct of armies in the field is not applicable in internal armed conflict.²⁹

A strict reading of the Conventions and their Protocols suggest that there exist wide range of significant disparities between the two regimes. For instance, *Common Article 3* covers only non-participants and persons who have laid down their arms, and does not regulate combat or protect civilians against the effects of hostilities.³⁰ *Common Article 3* also fails to define elaborate rules of distinction between military and civilian targets³¹ and makes no mention of the principle of proportionality in target selection.³² Although Additional Protocol II does address the protection of civilian populations more explicitly,³³ its coverage does not compare to the prohibitions on indiscriminate attack,³⁴ on methods and means of warfare causing unnecessary suffering³⁵ and on damage to the natural environment³⁶ that are applicable under Additional Protocol I.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ See, Boelaevt – Suominen, *op. cit.*

²⁹ *Ibid.*

³⁰ Antonio Cassese, “A Tentative Appraisal of the Old and New Humanitarian Law of Armed Conflict”, in A. Cassese, *Armed Conflict*, (Editoriale Scientifica Naples, 1971) 492 - 493

³¹ *Article 48* of API states that “in order to ensure respect for and protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

³² API, *Arts. 51(5)(b), 57(2)(iii) and 85(3)*

³³ APII, *Arts. 13 – 15*, relating to the Protection of the Civilian Population of Objects in dispensable to the survival of the civilian population and of works and installations containing dangerous forces.

³⁴ AP I, *Art. 51*

³⁵ *Ibid*, *Art. 33(2)*

³⁶ *Ibid*, *Art. 35(3)*

Most clearly shown is the fact that *Common Article 3* or Additional Protocol II do not contain any provisions affording combatants prisoner of war status in non – international armed conflict, nor any provision relating to prevention of the prosecution of enemy combatants for taken up arms.³⁷ Furthermore, while *Common Article 3* prevents a combatant from being tortured, it does not prevent him or her from being executed for treason.³⁸ This was also reinforced by the Rome Statute of the International Criminal Court, which perpetuates the legal dichotomy between international and non–international armed conflicts. This is so as the statute limits the grave breaches regime to international conflicts,³⁹ and despite similarities,⁴⁰ the serious violations provision of *Common Article 3* that are applicable in “armed conflicts not of an international character” are both different and less comprehensive than their international counterparts.⁴¹

Given the diametric opposition to clearly assimilating the laws of armed conflict, applicable in international and non–international armed conflicts, there is extensive literature that suggests that customary international law has developed to a point where the gap between the two regimes is less remarkable.⁴² The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Tadic* Jurisdiction Appeal held that customary rules governing internal conflicts include:

Protection of civilians from hostilities, in particular from
Indiscriminate attacks, protection of civilian objects, in
Particular cultural property, protection of all those who do
not (or no longer) take active part in hostilities, as well as
Prohibition of means of warfare proscribed in international
armed conflicts and ban of certain methods of conducting
Hostilities.⁴³

Similarly, Judge Abi-Saab, in his Separate Opinion considered that “a growing practice and *opinio juris*, both of states and international organizations, has established the principle of personal criminal responsibility for acts figuring in the grave breaches articles, even when they are committed in the course of an internal armed conflict.”⁴⁴ Also, International Committee of the Red Cross (ICRC) has chosen to address what it calls “the insufficiency with respect to content and coverage” of treaty law applicably in non – international armed conflicts by analysis of custom and not promulgation of further treaty – based law.⁴⁵ The position reflects the reality that national legislation,⁴⁶

³⁷ API, *Art. 43 (2)*. Under international armed conflict, combatants have “right to participate directly in hostilities.”

³⁸ T. Farer, ‘Humanitarian Law and Armed Conflict: Towards the Definition of International Armed Conflict’, [1971] *Columbia Law Review*, (vol. 71) 39 - 40

³⁹ Rome Statute, *Art. 8(2)(b)*

⁴⁰ The ICTY has held that there is no material difference between the term “willful killing” within the grave breaches regime and Common Article 3’s prohibition of “murder” and that “torture” is the same legal phenomenon in both types of conflict. See, Boelaert – Suominen, *op. cit.*, citing *Prosecutor v. Delalic et al*, Case No. IT – 96 – 21 – T, Judgment, 16 Nov. 1998, para. 421 – 423. Other provisions in the Rome Statute, such as those dealing with inhuman treatment including biological experiments, *Art. 8 (2) (a) (ii)* and willfully causing great suffering or serious injury to body or health, *Art.8 (2)(a)(iii)*, correspond to provisions in relating to violence to life and person, *Art. 8 (2)(c)(ii)* and outrages upon personal dignity, *Art.8(2)(c)(i)*.

⁴¹ See, H. Spieker, ‘The International Criminal Court and Non – international Army Conflicts’, [2000] *Leiden Journal of International Law* (Vol. 13) 417

⁴² See Boelaert–Suominen, *op.cit.*, C Bryon, *op.cit.*, M. Henckaerts, “The Conduct of Hostilities: Targets selection, Proportionality and Precautionary Measures under International Humanitarian Law”, in the Netherlands Red Cross, Protecting Civilians in 21st Century Warfare: Target Selection, Proportionality and Precautionary Measures in Law and Practice, 8 December, 2000, 11

⁴³ *Prosecutor v. Tadic*, IT–94–1–AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, para. 127

⁴⁴ *Ibid.* Separate Opinion

⁴⁵ See, Henckaerts, *op. cit.*, 11

⁴⁶ See (Belgium): Law of 16 June 1993 concerning repression of grave breaches of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 8 June 1977; (Spain) *Codigo Penal*, Law 10/1995 of 23 November, (Finland): Chapter 11 of the Revised Penal Code Dealing with War Crimes and Crimes Against Humanity, 21 April 1995, Finnish Law Gazette 1995/587; (United States): *Article 6* of the US War Crimes Act 1996; (Netherlands): The Dutch Law of War Crimes 1952; (Sweden): Chapter 22, Section 11 of the Swedish Penal Code, National Council for Crime Prevention, Stockholm (1986); (Switzerland): *Code Penal Militaire*, Federal Law of 13 June 1927

International instruments,⁴⁷ and judicial reasoning,⁴⁸ all show that “states are chipping away at the two-legged edifice of the law of armed conflict”.⁴⁹ On the other hand, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia warns that even though the chipping away process may have come some distance in eroding the disparity between the laws applicable in international and non-international armed conflict, “this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts”.⁵⁰ Consequently, the process has created what Meron describes as “a crazy quilt of worms that would be applicable in the same conflict, depending on whether it is characterized as international or non-international”.⁵¹ Thus, the struggle to determine the law applicable in armed conflicts that involve both international and non-international elements, becomes a complex but important task.⁵²

The Test for Internationalization

In the *Tadic* Appeal Judgment, the Appeals Chamber of the International Criminal Tribunal for former Yugoslavia, held that:

It is indisputable that an armed conflict is international if it takes place between two or more states. In addition, in case of an internal armed conflict breaking out on the territory of a state, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other state.⁵³

State Proxies

Tadic Appeal Judgment’s test for determining whether an internal armed conflict has become international is whether “some of the participants in the internal armed conflict act on behalf of another state.”⁵⁴ The International Court of Justice (ICJ) was asked to answer a similar question in the Military and Paramilitary Activities in and against Nicaragua case, in order to determine the responsibility of the United States for armed conflict between the *Contras* it had sponsored and the Nicaraguan government.⁵⁵ In defining the circumstances in which an insurgent’s acts can be attributed to a state, the court applied what it described as an “effective control” test,⁵⁶ which involved assessing:

⁴⁷ The Amended Protocol II of 1996 to the UN Weapons Convention, the 1997 Ottawa Convention on the Prohibition of Anti-personnel Mines and the 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict, all apply equally to international and non-international armed conflicts.

⁴⁸ See Boelaert – Suominen, *op. cit.*, section 4.3.2

⁴⁹ *Ibid.*, Section 5

⁵⁰ See, *Tadic* Jurisdiction Appeal, *op. cit.*, para. 126

⁵¹ Theodor Meron, ‘Classification of Armed Conflict in the former Yugoslavia: Nicaragua’s Fallout’, [1998] *American Journal of International Law*, (Vol. 92) 238

⁵² James G. Stewart, *op. cit.*

⁵³ *Prosecutor v. Tadic*, T-94-1-A, Judgment 15 July 1999, para. 84

⁵⁴ *Ibid.*

⁵⁵ *Nicaragua Case*, *op. cit.* The ICJ somewhat confusingly distinguish the question of whether the acts of the *Contras* were imputable to the United States from the question of whether the US had breached its international obligations to Nicaragua through its relationship with the *Contras*. The Court concluded that it “... does not consider that the assistance given by the United States to the *Contras* warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to the state. It takes the view that the *Contras* remain responsible for their acts, and that the United States is not responsible for the acts of the *Contras*, but for its own conduct *vis-à-vis* Nicaragua, including conduct related to the acts of the *Contras*.” See, para. 116

⁵⁶ The Court stated that “for this conduct to give rise to a legal responsibility of the United States, it would in principle have to be proved that the state had effective control of the Military or Paramilitary operations in the course of which the alleged violations were committed.” See, para. 115

Whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government⁵⁷

In applying that test to the facts, the ICJ found that despite a high degree of participation and a general degree of control over the *Contras*, who were highly dependent on that foreign assistance, the United States was not responsible for violations of humanitarian law perpetrated by the *Contras* since those violations "... could be committed by members of the *Contras* without the control of the United States."⁵⁸

It is indicative here to state that the *Tadic* Appeal Judgment overruled the Trial Chamber's support for the strict "effective control" test espoused in the Nicaragua's case, declaring the ICJ's reasoning "unconvincing based on the very logic of the entire system of international law on state responsibility."⁵⁹ As a result of the overruling, an apparently less stringent⁶⁰ test for determining when parties can be considered to be acting on behalf of states has gained ascendancy in international criminal law. The test espouse three different standards of control under which an entity could be considered a *de facto* organ of a state, each differing according to the nature of the entity.

Firstly, where the question involves the acts of a single private individual or a not military organized group that is alleged to have acted as a *de facto* state organ, it is necessary to ascertain whether specific instructions concerning the commission of that particular act has been issued by that State to the individual or group in question, or alternatively, it must be established whether the unlawful act has been publicly endorsed or approved *ex-post facto* by the State at issue.⁶¹ In the Second instance, involving control by a state over subordinate armed forces, militias or paramilitary units, "control must be of an overall character". The Appeals Chamber declared that: "... control by a state over subordinate armed forces or militias as paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training)".⁶²

The Appeal Chamber made clear that the overall control test under the second category requires that a state "has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group" but that it "does not go so far as to include the issuing of specific orders by the state, or its direction of each individual operation".⁶³ The third and final test involves "assimilation of individuals to state organs on account of their actual behaviour within the structure of a state."⁶⁴ Despite the now extensive literature addressing the issue, application of the three-pronged test remains complex, convoluted and the subject of considerable confusion, even among Appeal Chamber Judges themselves.⁶⁵ That complexity is plainly undesirable when, as Judge Shahabuddeen persuasively reiterated in the *Blaskic* Judgment, the degree of control required to internationalize an armed conflict is simply that which "is effective in any set of circumstances to enable the impugned state to use force against the other state through the intermediary of the foreign military entity concerned."⁶⁶

⁵⁷ *Ibid.*, para. 109

⁵⁸ *Ibid.*, para. 115

⁵⁹ *Tadic* Appeal Judgment, *op. cit.*, para. 116

⁶⁰ The Appeals Chamber in *Aleksovski* declared that "bearing in mind that the Appeals Chamber in the *Tadic* Judgment arrived at this test against the back ground of the "effective control" test set out by the decision of the ICJ in Nicaragua, and the "specific instructions" test by the Trial Chamber in *Tadic*, the Appeal Chamber considers it appropriate to say that the standard established by the "overall control" test is not as rigorous as those tests'. *Prosecutor v. Alesovski*, IT-95-14/ 1-A, Judgment, 24 March 2000, para. 145.

⁶¹ See, *Prosecutor v. Delalic, et al*, IT - 96-21- A, Judgment, 20 February 2001, paras 5 -50 (Also referred to *Celebici* Appeal Judgment)

⁶² *Tadic* Appeal Judgment, *op. cit.*, para. 137

⁶³ *Ibid.*, para. 137

⁶⁴ *Ibid.*, para 141

⁶⁵ Judge Shahabuddeen claims "I am unclear about the need to challenge Nicaragua. I am not certain whether it is being said that that much debated case does not show that there was an international armed conflict in this case. I think it does, and that on this point it was both right and adequate." See *Tadic* Appeal Judgment, *op. cit.*, Separate Opinion of Judge Shahahabudeen, para. 17

⁶⁶ *Prosecutor V. Blaskic*, IT-95-14, Judgment, 3 March 2000.

The question is, after all, whether the insurgent's action amount to "a resort to armed force between states".⁶⁷ Moreover, if the complexity of the various tests has proved difficult to apply in the context of criminal prosecutions where the full extent of hostilities can be viewed in hindsight, it must be debilitating for forces involved in hostilities on ground when the very purpose of internationalized armed conflicts is often to employ covert methods of warfare. In those circumstances, relevant information is subject of fierce controversy of a political nature giving rise to opinions about the facts that often differ widely.⁶⁸ The possibility that commanders of the Northern Alliance in the Afghan conflict could be expected to assess a test which the Appeal Chamber itself can hardly agree on, in the heat of battle, based on highly protected intelligence and on an ongoing basis seems slim. Certainly there is no need to think that, during a conflict, one could convince a military commander to respect certain rules by arguing that he is an agent of a foreign country.⁶⁹ This complexity has serious effects outside parties to the conflicts, seeking to enforce international humanitarian law norms. Not only will parties to a conflict involving various international and domestic actors struggle to determine whether detainees qualify for prisoner of war status, so too will the ICRC, which is attempting to encourage respect for that status. Moreover, from the perspective of legality the test is a shaky foundation for the application of the very different penal sanctions provided for under the two regimes. It is hardly surprising that the test unduly delayed proceedings of both the ICTY and ICTR.⁷⁰

In summary, the three pronged test may reflect the current state of public international law on state responsibility, but its application to international humanitarian law undermines the possibility of a consistent or principled application of humanitarian norms in internationalized warfare.

State Military Intervention in Internal Conflict

The Second feature which the *Tadic* Appeal Judgment considered capable of rendering an internal armed conflicts international occurs where "another state intervenes in that conflicts through its troops."⁷¹ In the *Blaskic* Judgment, the ICTY Trial Chamber seized on a range of factors in finding "ample proof to characterize the conflict as international" based on "Croatia's direct intervention in Bosnia–Herzegovina."⁷² Although, like *Tadic*, the Chamber declined to articulate any particular standard for what degree of intervention would be sufficient to internationalize a pre-existing internal armed conflict, it was satisfied that that process had taken place by the presence of an estimated 3,000 to 5,000 regular Croatian Army personnel who were mostly stationed outside the area of conflict between the Croatian Defence Council and the Bosnia Herzegovina Army. Although the Chamber accepted evidence that the Croatian Army had had some presence in the area of conflict, the principal rationale for its decision was that the Croatian Army's hostilities:

In the areas outside the conflict zone inevitably also had an impact on the conduct of the conflict in that zone. By engaging the Bosnia Herzegovina Army in fighting outside the conflict zone, the Croatian Army weakened the ability of the Bosnia Herzegovina Army to fight the Croatian Defence Council in Central Bosnia.⁷³

⁶⁷ An "armed conflict" is said to exist "when ever there is a resort to armed force between state or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state". See, *Prosecutor V. Kumarac, et al.*, IT-96-23/1-A, Judgment, 12 June 2002, Para. 56.

⁶⁸ See, Gasser, *op. cit.*, 157. For instance, as Raisman and Silk point out, "the war in Afghanistan has never been either purely internal or purely international. Any determination is further complicated by the lack of neutral accounts of the conflicts. Afghanistan is caught up in the politics of east–west rivalry, and most degree, on sources with a clear preference for or tie to one side or the other in the larger rivalry. See, W. Michael Reisman and J. Silk, 'Which Law Applies to the Afghan Conflict?' [1988] *American Journal of International Law*, (Vol. 82) 465

⁶⁹ Marco Sassoli and L. M Olson, 'International Decision: Prosecutor v. Tadic (Judgment)' [2000] *American Journal of International Law*, (Vol. 94) 576.

⁷⁰ See, Byron, *op. cit.*, 88

⁷¹ See, *Tadic* Appeal Judgment, *op. cit.*, para. 84

⁷² See, *Blaskic* Judgment, *op. cit.*, paras. 75, 76 and 94

⁷³ *Blaskic* Judgment, *Ibid.*, para. 94

Consequently, the reasoning would seem to suggest that foreign military intervention that only indirectly affects an independent internal conflict is sufficient to render that conflict international. That supposition was subsequently confirmed by the *Kordic & Cerkez* Judgment, which found that the Croatian government's intervention in the conflict against Serb forces in Bosnia internationalized a separate conflict in which the Croatian government had no direct military involvement, namely, the conflict between Bosnian Croats and Bosnian Muslims.⁷⁴ According to the Trial Chamber, it did this "by enabling the Bosnian Croats to deploy additional forces in their struggle against the Bosnian Muslims."⁷⁵ The decision also uses a range of evidence to reach its conclusion, but similarly fails to quantify the requisite extent of direct military force. The *Naletilic* Judgment followed suit, stating that:

There is no requirement to prove that Army of the Republic of Croatia troops were present in every single area where crimes were allegedly committed. On the contrary, the conflict between the Armed Forces of the Government of Bosnia and Herzegovina and the Croatian Defence Council must be looked upon as a whole and, if it is found to be international in character through the participation of the Army of Croatia troops, then Article 2 of the Statute will apply to the entire territory of the conflict.⁷⁶

Infact, a Trial Chamber's review of an indictment in *Prosecutor v. Rajic* is the only instance where the question is specifically addressed.⁷⁷ In that decision, the Chamber found that an internal armed conflict could be rendered international if troops intervene "significantly and continuously."⁷⁸ Unfortunately, significant and continuous intervention is hardly a term of precision. Moreover, the fact that the term is not mentioned in the *Kordic & Cerkez*, *Blaskic* or *Naletilic* Judgments raises the question of whether mere minor military intervention could suffice. Certainly, the Geneva Conventions apply in traditional inter-state armed conflicts "regardless of their level of intensity."⁷⁹

Internationalization of Armed conflict in Democratic Republic of Congo

Zaire had been ruled by Mobutu Sese Seko ever since 1965. From 1965 to 1997, the regime of Mobutu introduced a one party system by concentrating state power in Mobutu's Popular Movement of the Revolution (MPR) which was characterized by gross human rights abuses and state "kleptocratic scandals which turned Zaire into a byword for corruption."⁸⁰ Mobutu managed to maintain control over the population by weakening any attempt of separatism and by employing a divide and rule strategy, and he transformed military organizations into his own "private armies".⁸¹

⁷⁴ *Prosecutor v. Kordic & Cerkez*, IT-95-14/2-T, Judgment, 26 February 2001.

⁷⁵ *Ibid.*, para., 108 (2)

⁷⁶ *Prosecutor v. Naletilic et al.*, IT-98-37-T, Judgment, 31 March 2003, paras. 183 - 188

⁷⁷ *Prosecutor v. Rajic*, IT 5-12-R61, Review of the indictment Pursuant to Rule 01, 13 September 1996, para. 12. The Appeals Chamber's decision on Jurisdiction in the *Tadic* Case did not, however, set out the quantum of involvement by a third state that is needed to convert a domestic conflict into an international one.

⁷⁸ *Ibid.*, para 21 "There is therefore enough evidence to establish for the purpose of the present proceedings that, as a result of significant and continuous military intervention of the Croatian Army in support of the Bosnian Croats, the domestic conflict between the Bosnian Croats and their Government in Central Bosnia became an international armed conflict, and that this conflict was ongoing at the time of the attack on Stupui Do in October 1993".

⁷⁹ R. Baxter, 'The Duties of Combatants and the Conduct of Hostilities (Law of Hague)', in *International Dimensions of Humanitarian Law*, (Henry Dunant Institute/UNESCO, 1988) 98. "The proper view would seem to be that "any other armed conflict which may arise between two or more of the High Contracting parties should be taken as referring to any out break of violence between the armed forces of two states, regardless of the geographical extent and intensity of the force employed...". Fenrick argues that "the firing of weapons by soldiers of opposing sides across a contested border on the uninvited intervention of the armed forces of one state, even in small numbers, in the territory of another state may trigger the application of the Geneva Conventions in totality." See, M. Cottier, W. Fenrick, P. Visser Sellers and A. Zimmermann, 'Article 8, War Crimes,' in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court, Observers Notes, Article by Article*, (Nomos, Baden – Baden, 1999) 182, "it makes no difference how long the conflict lasts or how much slaughter takes place".

⁸⁰ Guy Arnold, *Historical Dictionary of Civil Wars in Africa* (The Scarecrow Press, 2008) 115

⁸¹ William Reno, *Warlord Politics and African States* (Boulder London, Lynne Rienner Publishers, 1998) 160 - 161

During the Cold War period Mobutu sheltered insurgent movements fighting against their government.⁸² He, as well, was in good relation with the Hutu-dominated regime from Rwanda and he allowed insurrection movements to operate out of Congolese territory against the Museveni-led Uganda.⁸³ It is against this background that during the First Congo Armed Conflict Angola, Uganda and Rwanda coalesced around a common goal, to cripple the insurgency movement challenging their governments from bases in the Congo.⁸⁴ Owing to his anti-communist stand, Mobutu received support from the United States and France.

Democratic Republic of Congo witnessed three (3) major armed conflicts. One of the major causes of the First Congo Armed Conflict was represented by the spill-over effects of the conflict and genocide in Rwanda. When the Tutsi-led Rwandan Patriotic Front (RPF) defeated the Hutu-led government in July 1994, a huge flow comprising approximately one million Hutu streamed into eastern Zaire (especially into the two Kivu Provinces). Amongst the refugee camps were also the genocidaires, members of Forces Armees Rwandaises/Rwandan Armed Forces (FAR) and Interahamwe (Hutu extremists). The United Nations High Commissioner for Refugees set up refugee camps in eastern Zaire, but could not prevent or dissuade the re-establishment of the political and military structures and leadership that were responsible for the genocide in Rwanda. This led to a situation where the camps replicated the same communal authorities they had lived under in Rwanda. The camps were subsequently used as a regrouping ground to launch offensive against the new Tutsi-dominated government in Rwanda.

The First Congo Armed Conflict broke out by Zaire accusing Rwanda of arming and backing the rebels in the Kivus, while Rwanda accused Mobutu of sheltering the Hutu extremists. Local authorities in north Kivu have been on quasi-ethnic cleansing Campaign in 1993 and in 1996 the Banyamulenge (ethnic-Tutsis) were told they had to leave Zaire or be exterminated and expelled.⁸⁵ This led to exodus of people but one armed group among them (trained and armed by RPF) started to fight the Forces Armees Zairoises/Zairean Armed Forces (FAZ) and the Hutu Militia. Uganda invoked reasons similar to Rwanda's and joined the latter in the military effort.⁸⁶

Both parties to the conflict invoked security reasons. On the other hand, Zaire accused its neighbours, Rwanda, Uganda, and Burundi of destabilizing its eastern territory and received military help from the interhamwe/ex-FAR operating out of the refugee camps. On the other hand, Rwanda, and Uganda accused Zaire of protecting the genocidaires and of breaking up insurrection movements from eastern Zaire. Mobutu accused its neighbours of foreign invasion, while his opposing party showed that it was Zairean citizen against its government (even though there were foreign troops operating within the territory). The anti-Zairean government rebellion was led by Laurent-Desire Kabila, a long time opponent of Mobutu. He merged the four dissident groups and galvanized them into the Alliance des Forces Democratiques for the Liberation of Congo Zaire (AFDL). The Rebels gained control over Shaba (the mineral-rich province in South-eastern DRC) and later moved closer to the capital Kinshasa. The last phase occurred in May 1997 when Mobutu's regime was toppled.⁸⁷

The First Congo Armed conflict displayed enormous indices of internationalized internal armed conflict as can be gleaned from the actions of Rwanda, Uganda, Angola and Burundi in their support for the coalesced rebel groups in the armed conflict which led to the collapsed regime of Mobutu Sese Seko. The Second Congo Armed Conflict was under the regime of Laurent-Desire Kabila as he emerged the new leader of DRC after the ousting of Mobutu. In order to break from the past, he renamed the country the Democratic Republic of Congo. Kabila's takeover of power was due to the Banyamulenge/Congolese Tutsi's support and to the assistance of Rwandan and Ugandan armies.⁸⁸

⁸² For instance, FNLA/National Front for the Liberation of Angola or UNITA/Union for the Total Independence of Angola. He allowed Zaire to be used as training ground.

⁸³ Tatiana Carayannis & Herbert F. Weiss, 'The Democratic Republic of Congo, 1996 – 2002', in Jane Boulden (ed.), *Dealing with Conflict in Africa: The United Nations and Regional Organizations* (Palgrave Macmillan, 2003) 259 – 260; See also, Nir Kalron, 'The Great Lakes of Confusion', [2010] *African Security Review*, 27

⁸⁴ See, Carayannis & Weiss, *Ibid.*, 260

⁸⁵ See, Arnold, *op. cit.*, 414

⁸⁶ Laura M. Herta, 'Intra-State violence in DR Congo and Human Security', [2010] *Perspectives from International Relations, HOZTS*, 194

⁸⁷ Carayannis & Weiss, *op. cit.*, 261.

⁸⁸ See, Arnold, *op. cit.*, 98

Soon, he became autocratic and authoritarian as he rejected all power-sharing arrangements with the numerous political parties that had been established during the twilight of Mobutu's regime and indeed prohibited all party activities. On the basis of these, he descended on his opponents and carried out massive killing of civilian refugees and other attacks against his political opponents.⁸⁹

As a result of these, Kabila faced domestic dissatisfaction and internal discontent. A mutiny within ADFL ensued and the breakaway Rassemblement Congo laise pour la Democratic/Rally for Congolese Democracy (RCD) started fighting against the Kabila government. This was the emergence of the Second Congo Armed Conflict, also called Africa's Great War or First African Continental War.⁹⁰ This armed conflict was characterized by the fragmentation of military troops, emergence of other groups, and shifts in alliances. Some former Mobutists and some former FAZ troops joined the rebels while Angola changed sides and joined Namibia and Zimbabwe in their support for Kabila's government. Another rebel group, Movement for the Liberation of the Congo (MLC) emerged while the Mai Mai resistance fighters⁹¹ received the support of Kabila's government.

By 1999, there was intense fighting in eastern Congo and anti-Kabila rebels who were caught were massacred and a real pogrom against all Tutsis took place. The dynamics of the civil war showed further complexities. The RCD split into two factions due to divergent views: the RCD – ML (Movement de Liberation) was backed by Uganda and the RCD–Goma was supported by Rwanda.⁹² By 2000, the Rwandan and Ugandan forces were fighting among themselves and Kabila's government had no control over Congolese territory (with the exception of the Western part).⁹³ The journey for peace was anchored on the UN resolutions which were driven by the Southern African Development Community (SADC). The Lusaka process which was engaged earlier toward the realization of peace “involved the three major Congolese groups in the conflict, namely the government, the RCD and the MLC, as well as their respective supporters, namely Namibia, Zimbabwe and Angola (governments) and Rwanda and Uganda (rebel groups)”⁹⁴ and subsequently resulted in the Lusaka Ceasefire Agreement. Also, it called for the deployment of a Chapter VII UN peacekeeping operation in the DRC. The latter materialized in United Nations organization mission in the Democratic Republic of Congo (MONUSCO) which arrived in late 1999.

The Third Congo Armed Conflict erupted as a result of fighting between tribal groups in the northeast area of that country. The Ugandans supported the local Lundu agriculturalists and backed their militias while Rwanda provided support for the Herdsmen of Hema.⁹⁵ Conflicts between these local militias led to immense human losses. According to Human Rights Watch Report, massacres in Huri caused 50,000 deaths and 500,000 refugees in 2003, and according to International Rescue Committee, most of the deaths were a result of generalized violence, lack of medical facilities, food insecurity, due to “the disruption of the country's health services and food supplies”.⁹⁶ The prevailing and tragic characteristic is that “the vast majority of deaths has been among civilians and has been due to easily preventable and treatable illnesses.”⁹⁷

In March 28, the UN Security Council unanimously approved an unprecedented offensive “intervention brigade” with a mandate to operate in the strife-torn eastern Democratic Republic of Congo. However, while the enabling resolution authorizes the first ever offensive unit, of 2, 500 troops, to go after rebels by itself or with government troops in the nation's resource-rich eastern section on an exceptional basis and without creating a precedent for UN peacekeeping operations, it insists on a clear exit strategy before it expires on one year. The special unit will become part of the UN Organization Stabilization Mission in the DRC (MONUSCO).

⁸⁹ Human Rights Watch Report, ‘What Kabila is Hiding. Civilian killing and impunity in Congo’, [1997] available at <http://www.hrw.org/en/reports/1997/10/01/>, accessed 10/10/2017

⁹⁰ Laura M. Herta, *op-cit*, 196

⁹¹ The Mai Mai were armed Congolese groups fighting the RCD and against Rwandan and Ugandan troops in DRC territory.

⁹² Carayannis & Weiss, *op – cit*, 271

⁹³ See Arnold, *op – cit*, 100

⁹⁴ Sadiki Koko, ‘MONUC and the Quest for Peace in the Democratic Republic of Congo: Assessment of a Peacekeeping mission’, [2010] *African Security Review*, 32

⁹⁵ Arnold, *op – cit*, 106

⁹⁶ International Rescue Committee Report, Mortality in Eastern Democratic Republic of Congo, 2004, iii - iv

⁹⁷ *Ibid.*

Its objective is to counter the destabilizing activities of the March 23 Movement (M23) and other Congolese and foreign armed groups operating in the eastern Congo for violations of international humanitarian law, including patterns of rape and other forms of sexual violence in situations of armed conflict and an increasing number of internally displaced persons in and refugees from eastern DRC.

From the foregoing account of the armed conflict in DRC, it is apposite that what started as normal non-international armed conflict later became internationalized by the interventions of foreign sovereign states and the United Nations MONUSCO. An assessment of the activities of all the parties involved in the conflict show that the armed conflict in DRC satisfied the two tests set out by ICTY for internationalization.

Internationalization of Armed Conflict in Somalia

Somali armed conflict is an ongoing one taking place within the geographical territory of Somalia. It grew out of resistance to the military junta led by Major General Mohammed Siad Barre during the 1980s. By 1988 to 1990, the Somali Armed Forces began engaging various armed rebel groups including the Somali Salvation Democratic Front in the northeast, the Somali National Movement in the northwest, and the United Somali Congress in the South. The Clan-based armed opposition groups eventually managed to overthrow the Barre Government in 1991.

Somalia, situated in the Horn of Africa, is a country caught up in intractable conflict. It got independence in 1960 and was ruled by a civilian government until 1969 by corrupt and dysfunctional multiparty democracy.⁹⁸ In 1991, Said Barre fled Mogadishu. Multiple solutions to state formation and conflict have been pursued since 1991, some succeeded and others failed. External actors continue to influence the conflict and the prospects of peace, which include Ethiopia, Kenya and other members of the African Union. It must be noted that the borders of Somalia were imposed externally without much consideration for clan configurations, thus dividing kindred clans across boundaries such as Kenya and Ethiopia. This situation has led to armed conflict and diplomacy among states being shaped as much as by cross-border relationships among clans.

Ethiopia has been involved in the Somalia conflict which has continued over decades. The hostile history between the two countries followed by the nature of conflicts to “spill over” in nearby countries and affect them in different ways motivated the Ethiopian involvement in the Somali conflict. Based on Ethiopia’s proximate and underlying security concerns in the Somalia conflict, it applies multiple approaches to increase its national security and interest; those approaches include creation of bilateral collaborations with influential entities and individuals in the conflict. For instance, Ethiopia supports and collaborates with the authorities in Puntland and Somaliland in security and political respects.

Ethiopia has a border line with both entities and it allows its forces to deal with security concerns and threats in the areas controlled by those entities. Similarly, Ethiopia also has a good relationship with some of the influential warlords in Somalia and provides them with military support to fight against the Islamists.⁹⁹ Ethiopia’s strategy to increase its national security through bilateral relation with individuals and entities in the conflict is a negative impact towards a holistic resolution to Somalia’s conflict. This buttresses the point that neighbouring states are active contributors to violence and escalation of the conflict.¹⁰⁰

Again, Ethiopia’s intervention in Somalia’s conflict was to prevent other states, such as Eritrea that supported Somali factions as well as Ethiopian opposition in Somalia as proxies. It is also to maintain the trade routes that can be offered through Somaliland. This is the reason it has increased its trade with Somaliland as it relies on Port of Berbera in Somaliland for its imports and exports. Ethiopian Airlines regularly fly to Somaliland, and Ethiopia has opened a liaison office in Hargeisa.

In another development, Kenya shares historical factors with Somalia in regards to ethnic and geographical aspects. The north eastern province of Kenya is predominantly inhabited by Somalia ethnic population. Due to the changing dimensions of Somalia’s conflict, there is an increased threat to Kenya’s national security especially when Al-Shabaab and Al-Qaeda, that controlled large areas in South-Central Somalia threatened to destabilize Kenya.

⁹⁸ World Bank, “Conflict in Somalia: Drivers and Dynamics,” 2005, available: <http://siteresource.worldbank.org/intsomalia/Resources/Conflicts-Somalia>. Accessed 10/10/2017

⁹⁹ Wezeman Pieter, ‘Arms Flows and the Conflict in Somalia’, 2010, SIPRI, Oct 2010, http://books.sipri.org/product_info?_Product_id=41. Accessed on 10/10/2017

¹⁰⁰ Brown Michael E., *The International Dimensions of Internal Conflict* (Harvard University, Cambridge, 1996)

The terrorist organization carried out several attacks inside Kenya targeting tourism and other economic sources of the country. Moreover, the group started recruiting youngsters of Kenya, Somalis in Kenya and other Muslim nationals inside Kenya to join them. The Kenyan government perceived this as a serious security challenge.¹⁰¹

Consequently, the Kenyan government unleashed the Kenyan Defence Force (KDF) into Somalia to fight Al-Shabaab and its sponsor Al-Qaeda. This group also abducted and kidnapped two Spanish aid workers in northern Kenya and wounded several others. Even though the Kenyan troops intervened in Somalia and engaged in fighting with Al-Shabaab, the terrorist organization still remains an active and crucial threat to Kenyan internal security. In response to the challenges affecting the national security and interest, Kenya decided to increase its involvement in Somalia by integrating the Kenya Forces in Somalia with the African Union Mission in Somalia (AMISOM) peacekeeping forces operating under the mandate of the African Union (AU) and United Nations Security Council (UNSC).¹⁰²

Although the Kenya Defence Force now operates in Somalia under the mandate of the AU and UNSC, it is interested and critically involved and operates in the Jubaland region and plays a role in the establishment of its regional autonomy. Thus, it is giving a hand to the Somali community living in the nearby border regions to get an administration that guarantees peace and security to them.¹⁰³

Eritrea and Yemen have been major supporters of domestic opponents of Somalia's government especially Al-Shabaab.¹⁰⁴ Eritrea and Yemen have provided military and political support to this group against the constituted transitional government and AMISOM. The Gulf and Arab states are also actors in the Somali conflict. Somalia is also a member of the League of Arab States (LAS). It has a long-standing historic ties based on common cultural and religious affinity. This dual membership makes Somalia captive to the divergent interests of both African and Arab States which have differing interests in the political arrangement of Somalia. For instance, in South-Central Somalia, peace efforts consistently are thwarted by rival regional ambitions.

The AU intervention is on the legitimate interest to stabilize Somalia. This was through the establishment and deployment of AMISOM in Somalia. Since the establishment in 2007, AMISOM has worked towards stabilizing the country as Somalia has an internationally recognized official government. However, AMISOM and the Somali national army are engaged in wars with this group and have dislodged them from several areas in Somalia. In response to the increased support of AMISOM and other international community for Somalia's government in fighting the Militant group, Al-Shabaab officially joined Al-Qaeda and intensified violence in Somalia and the region. Al-Qaeda welcomed the move and pledged assistance for the group.

Internationalization of Armed Conflict in Nigeria

The armed conflict in Nigeria is between *Boko Haram* and the Nigerian Federal Forces. *Boko Haram* emerged as a local Islamic radical *Salafist* group which transformed into a Salafi-jihadist organization after 2009.¹⁰⁵ *Boko Haram* was founded by Yobe state born Muslim Cleric, Mohammed Yusuf in 2002 with its headquarters in Maiduguri, Borno State. *Boko Haram*, is not only opposed to interaction with the western world which it forbids in its teaching, it is also against the Muslim establishment and government of Nigeria. In pursuit of their objectives, they initially fought for the establishment of a Sharia government in Borno State under the regime of Senator Ali Modu Sheriff as Governor. However after 2009, subsequent to the murder of their founder, their aim was directed towards the Islamization of the entire country – Nigeria. After the killing in police custody of Mohammed Yusuf on July 30, 2009, *Boko Haram* declared war against the state of Nigeria. The sect carried out monumental and horrendous attacks that shocked the conscience of the world. These attacks resulted in massive and unspeakable fatalities.

¹⁰¹ Moller Bjorn, 'The Somalia Conflict', Institute for International Studies, at

<http://en.diis.dk/home/research/defence+and+security/news/the+somali+conflicts>. Accessed 10/10/2017

¹⁰² Eriksson Mikael, 'Somalia's Civil War', [2013] *Security Promotion and National Interest, Swedish Defense Research Agency*

¹⁰³ Uhuru Kenyatta, 'Kenya will not Pull out its troops from Somalia', KTN News, Nairobi, Oct. 01 2013 at

<https://www.youtube.com/watch?v=7TfdlwkMzgw>. Accessed 10/10/2017.

¹⁰⁴ Barnes, C and Hassan H, 'The Rise and Fall of Mogadishu's Islamic Court', [2007] *Journal of Eastern African Studies*, 151 – 160

¹⁰⁵ Cook D; 'The Rise of Boko Haram' in Okorie H, 'Combating Boko Haram Insurgency in Nigeria: The Imperative of Adopting the Mechanism of the Rule of Law', *Ife Journal of International and Comparative Law* (Vol I No. 2), July – December 2014, 374

In response to the Sect's macabre actions of murder and madness, the Nigeria Security forces typically engaged the policy of "revenge". There was massive state murders and destruction of properties of both *Boko Haram* members, sympathizers and a motley huge number of innocent civilians. The Nigerian military forces committed various humanitarian law violations, war crimes and acts which constitute crimes against humanity.¹⁰⁶ Also Military Forces have carried out numerous extra-judicial executions of suspected *Boko Haram* members and sympathizers. In many cases arbitrary arrests are made and in many cases the arrests were made without reasonable suspicion or without investigations. Torture and other ill-treatment by the police and security forces were widespread. Demolitions of informal settlements led to the forced eviction of thousands of people.¹⁰⁷ *Boko Haram* sect and the Nigerian Military Forces have continued to commit war crimes and crimes against humanity in North-Eastern Nigeria. They have both committed various violations of international humanitarian law and must be held to account for same in order to fight impunity.

In 2013, the Office of the Prosecutor in International Criminal Court (ICC) determined the fighting in North-East Nigeria to have attained the threshold of non-international armed conflict. Nigeria became a state party to the Rome Statute on 27 September 2001 and as such under the jurisdiction of this court. The court has jurisdiction over crimes allegedly committed by all the parties in the North-East conflict. In a situation of non-international armed conflict, Nigeria remains bound by its obligations under international humanitarian law and other armed conflict and international human rights treaties.

Establishment of the Multinational Joint Task Force

In view of the *Boko Haram* insurgency which has spread to other parts of the Lake Chad Basin region and which threatens not only Nigeria's territorial integrity but also regional stability and the security of millions of people, the related countries of Nigeria, Chad, Niger and Cameroon including Benin (that is not a member of the Lake Chad Basin Commission), set up a military response. This initiative came about with the establishment of the Multinational Joint Task Force (MNJTF), under the auspices of the Lake Chad Basin Commission.¹⁰⁸

The MNJTF is an offensive and stabilization mechanism with the objective of combating *Boko Haram* and other groups labeled as terrorists operating around the Lake Chad Basin. Its establishment was determined by Lake Chad Basin Commission Heads of State and Government during the Extraordinary Summit of the Lake Chad Basin Commission member states and Benin in Niamey, Niger on 7th October 2014.¹⁰⁹ On 25th November 2014, the African Union's Peace and Security Council fully endorsed its activation.¹¹⁰ However, it was not until 29 January 2015 that the Peace and Security Council formally authorized the deployment of the MNJTF for a 12 month period. This mandate was renewed on 14 January 2016 for an additional 12 months.¹¹¹

Although the MNJTF is an initiative of the Lake Chad Basin Commission, only four of the six member states joined by non-member Benin, are part of the force. As a result, the MNJTF is a coalition of states that came into being to confront a common threat known as *Boko Haram* and other terrorist groups in the region.¹¹² Since the majority of the countries belong to the Lake Chad Basin Commission and as the ravages of *Boko Haram* have spread to the shores of the Lake Chad Basin, the Organization appeared as the 'natural' or 'default' institutional framework to take on this effort. The mandate of the Multinational Joint Task Force is as follows:

¹⁰⁶ Amnesty International, 'Stars on their Shoulders, Blood on their Hands. War Crimes Committed by the Nigerian Military' 3 June 2016 (AFR 44/1657/2016) available from <https://www.amnesty.org/en/documents/afr44/1657/2016/en> (accessed on 12/08/2017)

¹⁰⁷ Amnesty International, 'Annual Report: Nigeria 2016' from <http://www.amnesty.org/en/countries/africa/nigeria/report-nigeria> (accessed on 12/8/2017)

¹⁰⁸ *Ibid.*

¹⁰⁹ Assanvo and Jeannine Ella A Abatan and Wendyam Aristide Sawadogo, 'Assessing the Multinational Joint Task Force against Boko Haram [2016] (issue 19), *Institute of Security Studies*, 1

¹¹⁰ AU, Communiqué of the 567th PSC Meeting on the Boko Haram terrorist group, 14 January 2016, <www.peaceau.org/fr/article/567eme-reunion-du-cps-sur-le-groupe-terroriste-boko-haram>. Accessed 26/08/2017

¹¹¹ William Assanvo *et al.*, 'Assessing the Multination Joint Task Force, *supra*, 2

¹¹² AU, Report of the Chairperson of the AU Commission on Regional International Efforts to Combat the Boko Haram Terrorist Group, 29 January 2015, <www.peaceau.org/uploads.cps484-rpt-boko-haram-29-1-2015>.pdf. Accessed 26/08/2017

Create a safe and secure environment in the areas affected by the activities of Boko Haram and other terrorist groups, facilitate the implementation of overall stabilization programmes by the Lake Chad Basin Commission Member States and Benin in the affected areas, including the full restoration of state authority and the return of Internally Displaced Persons and refugees; and facilitate, within the limit of its capabilities, humanitarian operations and the delivery of assistance to the affected populations.¹¹³

Furthermore, its mandate includes, among other things, conducting military operations to prevent the expansion of the group's activities; conducting patrols; preventing all transfer of weapons or logistics to the group; actively searching for and freeing all abductees, including the girls kidnapped from Chibok in April 2014; and carrying out psychological actions to encourage defections within Boko Haram ranks.¹¹⁴ It has also been tasked to undertake specific actions in the areas of intelligence, human rights, information and the media.¹¹⁵

With respect to the areas of operation of the force, each of the country contingents is deployed within its own national borders and operates within that space.¹¹⁶ As a result, Four Sectors were defined: Sector 1, with the Command located in Mora (Cameroon); Sector 2, located in the town of Baga-Sola (Chad); Sector 3, based in Baga (Nigeria); and Sector 4, based in the town of Diffa (Southeast Niger). The MNJTF's troop strength is currently estimated at 10,000 military personnel.¹¹⁷ Officially, all the national contingents were deployed to the different operational sectors.

In order to assist the Nigerian Federal Forces and the MJTF in the combat of the militant group, Western countries intervened through different modes. This is after some intelligent report on the sect. An intelligence report by the United States Army on Boko Haram recently declassified has revealed that the group is funded by a consortium of international terror organizations, with Al-Shabaab and Al-Qaeda being the major financiers. Part of the 31-page report read:

Boko Haram is a well-financed organization, but Determining the specifics of that financing is difficult. After the 2001 bombing of the twin towers in the U.S, Al-Qaeda began funding Boko Haram and other groups in the region."¹¹⁸

There is evidence that Boko Haram historically received funding from Al-Shabaab and other Al-Qaeda affiliates. Boko Haram found new financiers in Borno and Cameroon's northern region. These funders are ethnic Kanuris like Yusuf, Shekan and large majority of Boko Haram members. These benefactors provide weapons and become intermediaries in negotiating with Cameroonian government for ransom payments. Boko's recent pivot from Al-Qaeda to swearing allegiance to ISIL may have as much to do with practical financing concerns as major shift in ideology. Additional evidence contained in the said report points to Boko Haram fighters supporting the Movement for Unity and Jihad in West Africa, (MUJAO) Al-Qaeda in the Islamic Maghreb (AQIM) and Ansar Dine in 2012 and 2013 in Mali. According to relatives of former Boko Haram and founder, Mohammed Yusuf, in 2011 as much as 40% of its funding came from outside Nigeria.¹¹⁹

¹¹³ AU, Report of the Chairperson of the Commission on the Implementation of Communiqué PSC/AHG/Cimm.2 (CDLXXXIV) on the Related International Efforts, 3 March 2015, para. 9, <www.peaceau.org/fr/article/rapport-de-la-presidente-de-la-commission-sur-le-groupe-terroriste-boko-haram-et-less-efforts-internationaux-connexes> Accessed 26/08/2017

¹¹⁴ See, Strategic Concept of Operation of the Multinational Joint Task Force of the Lake Chad Basin Commission in the Fight Against Boko Haram, 24 February, 2015

¹¹⁵ Although each national contingent is supposed to operate within its national borders, they may, in accordance with specific rules and regulations, operate in the territory of a neighbouring state within a perimeter not exceeding 25km; interview, N'Djamena, 29 March 2016. In the final analysis, the right of pursuit seems to have been granted to the force on a bilateral basis; interview, Dakar, 28 June 2016

¹¹⁶ William Assanvo *et al*, 'Assessing the Multinational Joint Force against Boko Haram, *supra*, 9

¹¹⁷ *Ibid.* 11

¹¹⁸ ICIR, 'Al-Shabaab, Al-Qaeda Sponsor Boko Haram', *International Centre For Investigative Reporting* [2017].

¹¹⁹ *Ibid.*

In March 2015, Boko Haram leader Abubakar Shekau swore allegiance to al Baghdadi and ISIL. The move away from Al-Qaeda to ISIL was an evolutionary process. Yusuf, their late leader, considered Osama bin Laden, the founder of Al – Qaeda, to be one of the four Salafist purists all Muslims should follow.¹²⁰ In 2007, bin Laden sent emissaries to hand out three million dollars in local currency to Salafist groups in Nigeria, one of which was Boko Haram. It was not surprising that documents discovered in Bin Laden’s compound in Abbottabad, Pakistan, many years later indicated that very senior leaders of Boko Haram had maintained contacts with Al-Qaeda.¹²¹

Similarly, there is reason to believe that Ansaru, Boko Haram’s dominant splinter group was indeed a creation by Al-Qaeda in Islamic Maghreb (AQIM) and that a close operational relationship exists between the two organizations. Ansaru, though a splinter group, operates as the transnational wing of Boko Haram. In early 2010, AQIM’S leader, Abdelmalik Droukdel, publicly presented an offer of assistance to Boko Haram. Boko Haram fighters played a prominent role in the assault on Algeria’s consulate in Gao, northern Mali in April 2011.¹²² In November 2012, Boko Haram reinforced AQIM and the Movement for Unity and Jihad in West Africa (MUJAO) to capture the town of Menaka in Gao of eastern Mali.

On the side of the State of Nigeria, on the aftermath of the mass abduction of Chibok School Children, the U.S, UK, France, China and Israel pledged to send forces to Nigeria to assist the Nigerian Military. However, these states already have played a role in training or supporting Nigerian Forces against Boko Haram.¹²³ For instance, Israeli firms trained Nigeria’s Special Boat Service (SBS) and supplied fast attack craft and unmanned aerial vehicles for patrolling. US Africa Command established a Nigerian Army Special Operations Command (NASOC). The United Kingdom provided training and in 2012 sent its special forces to join a disastrous raid against the Jihadists kidnappers of Briton in Northern Nigeria. French President Hollande pledged assistance against Boko Haram, stressing links to France counter insurgency operation in Mali. Its repositioning of French Forces in the Sahel in 2014 is reinforcing air and special forces deployments at bases in Chad and Niger, just across northern Nigeria’s borders. United States reconnaissance drones have been flying from Niamey, Niger since early 2013. China is now the major supplier of military aircraft and ships to Nigeria.¹²⁴

These are the various modes the internal armed conflict in the Northeast Nigeria was internationalized by Western countries, Lake Chad basin members, international terror organizations, Middle and Far East countries by their actions of one form of support or the other towards the advancement of the conflict.

Conclusion

The law of armed conflict is still premised on the distinction between international and non-international armed conflicts. However, a closer examination of the types of conflicts discussed in this work demonstrates that such a sharp distinction no longer exists in practice. These conflicts may be classified as non-international armed conflicts under international humanitarian law. In reality, they are described as internationalized non-international armed conflict, since they involve both internal and international elements. While they were internal conflicts, however, there were presence of foreign fighters and spill over into neighbouring states. While they may have involved internal grievances, ethnic and religious identities, they were also about access to resources and international markets.

It seems anomalous to describe a conflict termed “Africa’s World War”, which involved about Nine African States and many more armed groups, as a series of ‘internal’ conflicts.¹²⁵ These conflicts here are far from international conflicts in the traditional sense, involving standing armies and declarations of war, nor do they meet the strict legal criteria for being considered as an international armed conflict. Yet, the level of intervention that takes place in these wars makes more than merely internal or “tribal” conflicts.

¹²⁰ *Ibid.*

¹²¹ Jason Burke, ‘Bin Laden Files show Al – Qaeda and Taliban Leaders in Close Contact,’ *The Guardian*, April 29, 2012 at <http://www.theguardian.com/world/2012/apr/29/bin-laden-al-qaeda-taliban-Contact>. Accessed 10/10/2017

¹²² James Olusegun Adeyeri, ‘Boko Haram Islamist Insurgency in Nigeria: Transnational Dimensions and Opportunities for Peace and Security’, [2012] *YONSEI Journal of International Studies*

¹²³ Richard Reeves, ‘The Internationalization of Nigeria’s Boko Haram Campaign,’[2014] *Oxford Research Group*

¹²⁴ *Ibid.*

¹²⁵ G. Prunier, *Africa’s World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe*, (Oxford, Oxford University Press, 2011)

This is called internationalized non – international armed conflict. However, the legal regime applicable will still be *Common Article 3* as considered by ICRC and the Commission of Inquiry on Syria.¹²⁶

This writer is of the view that the dichotomy between International and non – international armed conflict, in practical terms have come into disuse. This is because there is hardly today any international armed conflict any where in the world. What is rampant in Africa and across the globe is non – international armed conflict with foreign participation. This paper recommends the abolition or abrogation of the division of armed conflict so that one single legal regime can apply or regulate all armed conflicts irrespective of their nature and characteristics. This will absolutely do away with dilemma as to legal application, prosecution and assessment of conflict will be easier to achieve.

¹²⁶ “The ICRC concluded that there is currently a non – international armed conflict occurring in Syria opposing Government Forces and a number of organized armed opposition groups operating in several parts of the country...” See, ICRC, ‘Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting’, 17 July 2012 at <http://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012> accessed 10/10/2017; Independent International Commission of Inquiry on the Syrian Arab Republic, ‘Report of Commission of Inquiry on Syria,’ A/HRC/22/59,5 Feb. 2013, 51