

# Internationalization of Armed Conflicts - Indian Perspective

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## INTRODUCTION

International humanitarian law applies different rules depending on whether an armed conflict is international or internal in nature. Commentators agree that the distinction is arbitrary because reality can be messy, and armed conflicts in the real world do not always fit neatly into the two categories – international and non-international – into which international humanitarian law is divided.<sup>1</sup> The distinction has also held to be undesirable because it is difficult to lay down legitimate criteria to distinguish international wars and internal wars and it must be undesirable to have discriminatory regulations of the Law of War for the two types of conflict.<sup>2</sup> 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.<sup>3</sup>

One of the consequences of the nuclear stalemate 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. The views are not new. In 1948 the International Committee of the Red Cross (ICRC) presented a report recommending that the Geneva Conventions apply the full extent of international humanitarian law “in all cases of armed conflict which are not of an international character, especially 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”.<sup>4</sup>

In 1971, it submitted a draft to a Conference of Government Experts recommending a further proposition that was intended to make the whole body of international humanitarian law applicable to a civil war if foreign troops intervened. The ICRC put forward a more subtle proposal along the same lines the following year. Finally, in 1978 the Norwegian delegation of experts to the same Conference proposed that the two categories of armed conflict be dropped in favour of a single law for all kinds of armed conflict, again without success. Somewhat surprisingly, calls for a unified body of international humanitarian law have since died out, even though “the manifold expressions of dissatisfaction with the dichotomy between international and internal armed conflicts”<sup>5</sup> persist.

It is in this context of blurring distinction between internal and international armed conflicts that there is a growing need for and significance of defining a new category- internationalization of armed conflict. There are many situations of violence that cannot be straight jacketed into either of the aforementioned two categories. For example, there might be situations where a civil war erupts within a country and one of the warring factions is actively aided by a foreign state. There are many real instances of a conflict that started out as being internal and later spiralled on to become internationalised due to the spread of geographical expanse of war zone and inclusion of international actors.

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<sup>1</sup> G. Aldrich, “The Laws Of War On Land”, American Journal of International Law, Vol. 94, 2000, p. 62.

<sup>2</sup> Detter, “The Law of War”, Cambridge University Press, London, 2002, p. 49.

<sup>3</sup> W. Michael Reisman and J. Silk, “Which law applies to the Afghan conflict?”, American Journal of International Law, Vol. 82, 1988 p. 465.

<sup>4</sup> J. Pictet (ed.), Commentaries on the Geneva Conventions of 12 August 1949, Vol. III: Geneva Convention relative to the Treatment of Prisoners of War, ICRC, Geneva, 1960, p. 31

<sup>5</sup> S. Boelaert-Suominen, “Grave breaches, universal jurisdiction and internal armed conflict: Is customary law moving towards a uniform enforcement mechanism for all armed conflicts?” Journal of Conflict and Security Law, Vol. 5, No. 63, 2000, at section 5.

The events following 11 September 2001 highlighted the phenomenon of inter-national involvement in internal conflicts. Numerous countries were drawn into the conflicts of other states. Countries as diverse as Norway, El Salvador, and Tonga have sent regular troops to fight in Afghanistan and Iraq. Others have provided logistic support or opened up their territories for land transportation or over flights. Of course, an external dimension in internal conflicts is not a new phenomenon. During the Cold War, external actors sent troops and supported warring parties by various means. Of the 165 internal armed conflicts active since the end of World War II, 36 have involved troops from an external state.<sup>6</sup>

Therefore, in the post 9/11 scenario, where a lot of countries are advocating the strategy of pre-emptive strikes and supporting rival factions in a civil war, both covertly and overtly, the category of internal armed conflict or civil war has undergone some revision. For example, the Northern Alliance was heavily aided and supported by America and its allies in the fight against Taliban. This calls for a renewed attempt to recognize a separate category of “internationalizing armed conflict” to expand the reach of international humanitarian law.

## INTERNATIONAL ARMED CONFLICTS

### Definition of “International Armed Conflict”

The term “internationalized armed conflict” describes internal hostilities that are rendered international. The factual circumstances that can achieve that internationalization are numerous and often complex: the term internationalized armed conflict includes war between two internal factions both of which are backed by different States; direct hostilities between two foreign States that militarily 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. The most transparent internationalized internal armed conflicts in recent history include NATO’s intervention in the armed conflict between the Federal Republic of Yugoslavia (FRY) and the Kosovo Liberation Army (KLA) in 1999<sup>7</sup> and the intervention undertaken by Rwanda, Angola, Zimbabwe, Uganda and others, in support of opposing sides of the internal armed conflict in the Democratic Republic of Congo (DRC) since August 1998.<sup>8</sup>

### Proliferation of Nuclear Weapons

The proliferation of nuclear weaponry and its inhibiting impact on direct forms 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. The United States government’s support of the contras in Nicaragua in the early 1980s is perhaps the best documented example.<sup>9</sup>

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 continuing incentives for foreign intervention in domestic conflicts. As a reflection of that reality, internal conflicts are presently more numerous, brutal and damaging than their international counterparts,<sup>10</sup> despite the fact that the State remains the main war-waging machine. Consequently, international humanitarian law still very much exists against a backdrop “d’une fusion des éléments politiques internes et internationaux dont l’effet cumulatif est le phénomène de conflit interne internationalisé: l’intervention d’Etats tiers dans les guerres civiles est un fait constant.” There is almost invariably some form of foreign state involvement in internal armed conflicts.

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<sup>6</sup> Lotta Harbom & Peter Wallensteen, “Armed Conflict and its International Dimensions”, available at [http://info.uu.se/press.nsf/166B1EC86A3FAF93C125706D0037D2E3/\\$File/JPRarticle.pdf](http://info.uu.se/press.nsf/166B1EC86A3FAF93C125706D0037D2E3/$File/JPRarticle.pdf), last visited on 8<sup>th</sup> March, 2009.

<sup>7</sup> S. Alexeyevich Egorov, “The Kosovo crisis and the law of armed conflicts”, International Review of the Red Cross, No. 837, 2000, p.183.

<sup>8</sup> Human Rights Watch, “Eastern Congo ravaged: Killing civilians and silencing protest”, Vol. 12, No. 3(A), [http://www.hrw.org/reports/2000/drc/Drc005-01.htm#P68\\_1748](http://www.hrw.org/reports/2000/drc/Drc005-01.htm#P68_1748), last visited on 8<sup>th</sup> March, 2009.

<sup>9</sup> Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 14.

<sup>10</sup> B. De Schutter and C. Van De Wyngaert, “Non-international armed conflicts: The borderline between national and international law”, Georgia Journal of International and Comparative Law, Vol. 13, 1983, p. 279.

The difficulty from a humanitarian perspective is that although internationalized armed conflicts have special features distinguishing them from both international and internal armed conflicts,<sup>19</sup> there is absolutely no basis whatsoever for a halfway house between the law applicable in internal armed conflicts and that relevant to international warfare.<sup>11</sup> Therefore, the application of international humanitarian law to internationalized armed conflicts involves characterizing events as either wholly international or wholly non-international according to the various tests espoused in the Geneva Conventions, their Protocols and customary international law.<sup>12</sup>

### TEST FOR INTERNATIONALIZATION

#### THE TADIC TEST:

In the Tadic Appeal Judgement<sup>13</sup>, the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia (ICTY) stipulated 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.”<sup>14</sup>

#### AGENTS OF THE STATE:

The most frequently applied limb of the Tadic Appeal Judgement’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.” 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. 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,<sup>15</sup> which involved assessing:

“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 Government.”<sup>16</sup>

#### TADIC<sup>17</sup> V. NICARAGUA<sup>18</sup>:

The Tadic Appeal Judgement overruled the Trial Chamber’s support for the strict “effective control” test espoused in the Nicaragua case, declaring the ICJ’s reasoning “unconvincing [...] based on the very logic of the entire system of international law on State responsibility.”<sup>19</sup> As a result of the overruling, an apparently less stringent and some suggest

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<sup>11</sup> H-P. Gasser, “Internationalized non-international armed conflicts: Case studies of Afghanistan, Kampuchea, and Lebanon”, American University Law Review, Vol. 33, 1983, p. 157.

<sup>12</sup> C. Byron, “Armed conflicts: International or non-international?”, Journal of Conflict and Security Law, Vol. 6, No. 1, June 2001, p. 87.

<sup>13</sup> Prosecutor v. Tadic, T-94-1-A, Judgement, 15 July 1999.

<sup>14</sup> Prosecutor v. Tadic, T-94-1-A, Judgement, 15 July 1999, para. 84.

<sup>15</sup> Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, para 115.

<sup>16</sup> Ibid at para 109.

<sup>17</sup> Prosecutor v. Tadic, T-94-1-A, Judgement, 15 July 1999.

<sup>18</sup> Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986

<sup>19</sup> Tadic Appeal Judgement, para. 116.

“dubious” test for determining when parties can be considered to be acting on behalf of States has gained ascendancy in international criminal law. The Appeals Chamber made clear that the overall control test under the second category requires that a State “has a role in organising, 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.”<sup>20</sup>

The test espouses 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 militarily organized group that is alleged to have acted as a de facto State organ. 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 third and final test involves “assimilation of individuals to State organs on account of their actual behaviour within the structure of a State.” The Appeals Chamber’s only explanation of the somewhat undeveloped category consisted of three illustrations: an Austrian Jew elevated by German camp administrators to positions of authority over the other internees; a Dutch national who in fact behaved as a member of the German forces; and the attribution of international responsibility to Iran for acts of five Iranian “Revolutionary Guards” in “army type uniforms”.

#### APPLICATION OF THE THREE-PRONGED TEST:

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 Appeals Chamber Judges themselves.<sup>21</sup> That complexity is plainly undesirable when, as Judge Shahabuddeen persuasively reiterates in the **Blaskic Judgement**<sup>22</sup>, 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.”<sup>23</sup> This was also followed in the landmark **Akayesu case**<sup>24</sup>.

In sum, the three-pronged test may well 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. As this paper will show, that failing is unfortunately inevitable in a regime that requires armed forces to artificially categorize internationalized armed conflict as wholly international or non international. The solution is thus to abandon the distinction rather than redefine the three-pronged test.

#### CONCLUSION AND SUGGESTIONS

Commentators are unanimous in their disrespect for the strict dichotomy between international and non-international armed conflicts, but few have attempted to tackle the concerns underpinning the political unwillingness to adopt a single law of armed conflict applicable in all situations. Traditionally, those concerns have been based on a fear of premature recognition of belligerence, the potential for promoting internal uprisings, a real reluctance to be prevented from dealing with individuals participating in such groups under domestic law and, in some instances, an uneasiness about applying the full body of international humanitarian law to internal conflicts. Moir has opined that “we would appear to be moving tentatively towards the position whereby the legal distinction between international and non-international armed conflict is becoming outmoded. What will matter as regards legal regulation will not be whether an armed conflict is international or internal, but simply whether an armed conflict exists per se.”<sup>25</sup>

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<sup>20</sup> Ibid at para 137.

<sup>21</sup> 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.” Tadic Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 17.

<sup>22</sup> Prosecutor v Blaskic, IT-95-14, Judgement, 3 March 2000.

<sup>23</sup> Prosecutor v Blaskic, IT-95-14, Judgement, 3 March 2000.

<sup>24</sup> Prosecutor v. Jean Paul Akayesu (Trial Chamber), Case No. ICTR-96-4-T, ¶627 (2 September 1998).

<sup>25</sup> L. Moir, “The Law of Internal Armed Conflict”, Cambridge University Press, London, 2000, at p. 46.

A particular sticking point in developing a single law of armed conflict is defining a generic definition of the term in light of the different levels of intensity that trigger international and non-international armed conflicts at present. Specifically, a single definition of armed conflict will need to ensure that States continue to enjoy an ability to deal with internal disturbances under domestic law but that international conflicts of low intensity remain subject to international humanitarian protection. One possible solution is to adapt the approach proposed by the Brazilian government's experts in relation to the application of Additional Protocol II, which defined armed conflict as conflict between "organized armed forces or other organized armed groups under a responsible and identifiable authority, and clearly distinguished from the civilian population".<sup>26</sup>

The requirement that armed forces must be distinguished from the civilian population would provide a basic protection of a State's ability to deal with internal tensions under domestic law since those conflicts normally involve asymmetrical guerrilla warfare from within civilian populations as a result of the insurgents' military inferiority, limited weaponry, and lack of significant control over territory.

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<sup>26</sup> Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) Vol VIII, CDDH/I/SR.22, p. 204.