

CHALLENGES TO INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW IN ASYMMETRIC ARMED CONFLICT IN AFRICA

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Abstract

Most Armed Conflicts in Africa are NIAC involving the Armed forces of States against armed groups. In most cases, the military strength of Armed Forces of States supersedes that of the opposition armed groups who will naturally adopt unconventional strategy in the conduct of the armed conflict in order to score an advantage against the superior military adversary. The paper adopts the doctrinal methodology and argued that the adoption of unconventional method of warfare has a wide implication to the application of the rules of international humanitarian to most conflicts in Africa.

Keywords: Asymmetric armed conflict, International humanitarian law, human rights

1.0 Introduction

Post-colonial Africa is marred by armed conflict resulting in deaths of millions of people within the continent and upsurge of refugees across Europe, Australia and Asia. Deaths arising from armed conflicts in Africa are the biggest cause of man-made humanitarian disaster in the world. These conflicts are persistent and seem to be exacerbated by the crude means and method by which they are conducted.¹ Indeed, the theatre of armed conflicts in Africa is the scene of the gross human cruelty.²

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¹ See generally Rialize Ferreira, *Irregular Warfare in African Conflicts* (*Scientia Militaria, South African Journal of Military Studies* Vol. 38, NRL, 2010)

² The carnage of the genocide in Rwanda is a constant reminder of human cruelty in its crudest form.

A noticeable feature of most armed conflicts in Africa is that these conflicts are asymmetric. This is due in part to the fact that these conflicts are mostly non-international in character involving the conduct of hostilities between states and organised armed groups.³ The asymmetric nature of these conflicts consequentially results in the distortions of the principles of international humanitarian and international human rights law.

This paper analyses the concept of asymmetric warfare and its implication to effective implementation and application of the rules and principles of international humanitarian and human rights law to armed conflict situations in Africa. The author posits that asymmetric strategy adopted during armed conflict violates the principles of international humanitarian law and human rights law. The paper concludes that both states and non-states armed groups are responsible for the violation of rules of international humanitarian and human right laws during asymmetric armed conflict in Africa.

2.0 Typology of Armed Conflict

Armed conflict exists in basically two situations; International and non-international. Thus, the definition of armed conflicts varies depending on whether the hostilities are international or non- international.⁴

According to the International Criminal Tribunal for the Former Yugoslavia in the *Prosecutor V Tadic* case,⁵ a state of armed conflict “exists whenever there is a resort to armed forces between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.”⁶ The

³ This is not to suggest that armed conflict invariable becomes asymmetric if it is non-international. Indeed, and as reality has showed, an armed conflict may be asymmetric even if it is international in nature. This will be the case if a powerful nation is involved in an armed conflict with a relatively less powerful country. An example is the Russo- and Georgian armed conflict of August 2008 between states of Russia and Georgia over South Ossetia

⁴ ICTY, *Prosecutor V Tadic*, IT-94-1-AR-Appeal Chambers Decision, 1995 para 67.

⁵ *supra*

⁶ *Ibid* see also ICTY, *Prosecutor v Martić*, IT-95-11-12, 2007 paras.41

term “armed conflict” is a technical word having a special meaning in law.⁷

2.1 International Armed Conflict

Applying the Tadic test, an armed conflict is international (IAC) if the act of belligerency is between two or more states.⁸ As observed by Pictet, “any difference arising between two states and leading to the intervention of the armed forces is an armed conflict within the meaning article 2” of the Geneva Conventions.⁹ Under common article 2 of the Geneva Conventions, a state of armed conflict exists between two or more states even if a state of war is not recognised by one of the parties’.¹⁰

The existence of IAC is based on objective considerations without recourse to the subjective believe or political considerations of the parties to the conflict. it follows therefore that an armed intervention between states will constitute an armed conflict even if a state denies its existence or there is no official declaration of war by one or all the parties to the conflict.¹¹

A direct military intervention by one state in support of organised armed groups in an internal conflict against another state may constitute an international armed conflict between the state intervening and that other state. In the *Prosecutor V Rajic*¹², the ICTY held that;

the significant and continuous military action by the armed forces of Croatia in support of the Bosnian Croats against the forces of the Bosnian Government on the territory of the latter was sufficient to convert the domestic conflict

⁷ Jelena Pejic, ‘Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications’ (*International Review of the Red Cross* Vol.96. No. 893, 2014) p 74

⁸ *ibid*

⁹ Jean Pictet *Commentary on the Geneva Conventions* (International Committee of The Red Cross, 1952) p 32

¹⁰ Article 2 common to the Geneva Conventions 1949

¹¹ *ibid*

¹² ICTY Prosecutor V Rajic Case No. IT-95-12-S 2006

between the Bosnian Croats and the Bosnian Government into an international one.

In a similar vein the ICJ in its decision in the *Armed Activities on the Territory of the Congo (Democratic Republic of Congo V Uganda)*¹³ finds that;

The Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending, military, logistics, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principles of non-intervention.

The view that active military support by a state to armed groups operating within a territory of another state may internationalised the conflict was also reiterated by the ICC in its decision in the of case of *The Prosecutor V Thomas Lubanga Dyilo*¹⁴ where it finds dealing with the presence of armed forces of Ugandan at Ituri and its active support to the armed groups UPC that;

On the evidence admitted for the purpose of the confirmation of hearing, the Chambers considers that there is sufficient evidence to establish substantial grounds to believe that, as a result of the presence of the Republic of Uganda as an occupying power, the armed conflict which occurred in Ituri can be characterised as an armed conflict of international character from July 2002 to 2 June 2003, the date of the effective withdrawal of Ugandan army.¹⁵

The transformation of an armed conflict from internal to international can take place through the following instances: 1. when the organised armed group is sent by a state, 2. a state is in effective or overall control

¹³ Judgements I.C.J Reports 2005

¹⁴ Prosecutor V Thomas Lubanga Dylio ICC-04/04-01 Pre-Trial Chamber, 2006

¹⁵ ibid

of the armed group.¹⁶ However the ICTY in the *Tadic Case* criticised the *effective control test* and proposed the *overall control test*.¹⁷ The ICJ reaffirmed the position of *effective control test* in the Bosnian Genocide Case¹⁸

The threshold for the existence of armed conflict is determined by international law. A State may still be held to be participating in an armed conflict even if the situation does not qualify as such under its municipal law.

2.2 Non-International Armed Conflict

A non-international armed conflict is a protracted armed conflict between armed forces of states and organised armed groups or between such groups only. Applying the *Tadic* definition, for a situation of violence to crystallise into NIAC it will have to meet the requirement of the following basic threshold:

1. The threshold of *protraction*;
2. The threshold of *intensity*;
3. Threshold of *sufficient organisation*

In the *Tadic case* the ICTY noted that the essence of the criteria is to distinguish situations of armed conflict from “banditry, unorganised and short lived-lived insurrections or terrorist activities which are not subject to international humanitarian law.”¹⁹ In *Prosecutor V Boskoski*,²⁰ the ICTY noted that the various factors that should be taken in determining the intensity of a conflict includes the seriousness of an attack, geographical spray of the conflict, increase in number of

¹⁶ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua V U.S.A)* I.C.J. 1986

¹⁷ Emily Chertoff et al, ‘State Responsibility for Non-State Actors Detain in the Course of NIAC’ (*Center for Global Lega Challenges, Yale Law School*) p 20

¹⁸ *Bosnian Genocide* I.C.J 2007 43

¹⁹ *The Prosecutor V Tadic* paras. 562

²⁰ ICTY, *The Prosecutor V Ljube Boskoski and Johan Tarculovski*, IT-04-82-T Judgement of July, 2008

personnel and armament of both parties to the conflict and the interest generated by the conflict to the international community.²¹

In addition, the tribunal also noted that for an armed group to be considered as organised, it must have some "hierarchical structure and its leadership requires the capacity to exert authority over its members."²² AP II added another dimension or threshold to NIAC which can trigger the application of its provisions. For AP II to apply the armed group are required to have a responsible command, control of part of the state's territory of a state and to have the ability to conduct a sustained and concerted military operations and to implement AP II.²³ This threshold is higher than the threshold under Common article 3 AP II.²⁴ This suggests that there are two categories of NIAC one meeting the threshold of set out in common article 3 and second meeting the threshold of AP II. However, common article 3 applies in all situations of NIAC.

The fact that multiple states are jointly involved in fighting an identified armed group within the territory of a state will not transform the conflict to an international armed conflict.

3.0 The Notion of International Humanitarian and International Human Rights Law

IHL and IHLR regulate the conduct of hostilities during armed conflict. In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case,²⁵ the ICJ overruled the argument of Israel that only IHL applies in the occupied Palestinian territory and noted that;

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogations of the kind to be found in Article

²¹ Ibid paras 177.

²² Ibid paras 195

²³ Article 1 (1) AP II

²⁴ Marko Milanovic, *The End of Application of International Humanitarian Law* (International Review of the Red Cross Vol. 96, No. 893) p 178

²⁵ ICJ Advisory Opinion, 2004

4 of the International Convention on Civil and Political Rights.²⁶

On the relationship between IHL and IHRL, the Court held further that;

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some may be exclusively, matters of international humanitarian law. Others may be exclusive matters of human right law, yet others may be matters of both these branches of international law.²⁷

Both IHL and IHLR attempt to provide certain basic standards of protection to individuals during armed although from a different manner.²⁸ In the *Prosecutor v Anto Furundzija*²⁹ the ICTY, reiterate the position that the promotion of the respect for the dignity of the human person is the basic underpinning of both IHL and IHLR.

The applications of human IHL and IHLR are govern by the *lex specialis* principle. In the province of armed conflict, IHL is generally recognised as *lex specialis*. This principle places a premium of IHL over IHLR during armed conflict. The subsidiary character of human rights law during armed conflict is confirmed by the jurisprudence of the ICJ.³⁰

²⁶ ibid

²⁷ ibid

²⁸ Noelle Quinivet, *The History of The Relationship Between International Humanitarian Law and International Human Rights Law: Towards a Merger* (Martnus Nijhoff, Leiden, 2008) p 3

²⁹ ICTY, Case No.IT-95-17/IT Judgement of 10 December 1998 paras 183

³⁰ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J Reports 1996, p226; Legal Consequences of the Construction a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J Reports 2004 p.136and Armed Activities on the Territory of the Congo cases

3.1 International Humanitarian Law

International Humanitarian Law is a set or body of rules developed to provide basic standard of protection to victims of armed conflict by limiting the means and method of armed conflict with the view to mitigating the effect of armed conflict. The philosophical basis of IHL is to provide a minimum humanitarian standard in the use of violence during armed conflict. The law applies as *jus in bello* and is concern primarily with the legality of the means and method of conducting armed conflicts³¹ and does not regulate the right to the use of force the *jus ad bellum*.³²

IHL is expressed in the Hague laws, Geneva Laws³³ as well as statutes of international criminal court and international crime tribunals and international conventions and treaties. The *corpus juris* of IHL reflects a compromise between military necessity and protection of victims' armed conflict.

The rules of IHL are based essentially on identified basic principles designed to provide protection to victims of armed conflict. The principles which govern the *copus juri* of IHL are:

1. Principles of Distinction³⁴
2. Principle of Necessity³⁵

³¹ Elijah O. Okebukola, *Post-War Conflicts in Africa: Attuning Jus in Bello and Jus Ad Bellum to New Realities*, (Nig. L.J Vol.20. No.20, 2017) p. 321

³² *Jus ad bellum* is govern primary by principles of public international law expressed in the UN Charter 1945.

³³ Elijah O. Okebukola, op cit. P 321

³⁴ This principle requires belligerents to distinguish between civilian and civilian objects on the one hand and members of armed forces or armed groups and military objectives on the other hand. Thus, under the rules encapsulated by this principle, only military personnel, members of armed groups and military objectives are subject to attack. Civilians are to be protected from attack except the directly participate in hostilities.

³⁵ This principle seeks to make a compromise between two choices; one military the other humanitarian. When are choice have to be made, only actions which meet the military necessity of that time will be justified.

3. Principle of Proportionality³⁶
4. Principle of precaution³⁷

3.2 International Human Rights Law

International human rights law (IHLR) provide minimum standard of protection for persons against the states. It provides certain rights which individuals are entitled to claim benefit of from government.³⁸ The rules of IHLR seek to protect and enhance the exercise of rights inherent to man derived from his status as a human being.³⁹ IHLR is encompassing and applies both in time of peace and war.⁴⁰ It complements the rules of IHL in armed conflict. The rules of IHLR are found in UN Universal Declaration on Human Rights and other UN human rights treaties and other regional human rights convention.⁴¹

The application of IHLR to armed conflict opens debate as to duty bearers in NIAC. Generally, states are the primary bearers of obligation derived from rules of IHLR.⁴² Hence, it will appear that non-state actors in NIAC are not bound by the rules of IHLR.⁴³ However, the practice of states, UN Security Council,

³⁶ Under this rule attack which is disproportionate to military advantage to be derived the attack is prohibited. Thus, for an attack to be justify, damages resulting from an attack must be proportionate to the military advantage

³⁷ This principle prohibits the use of means and method of armed having indiscriminate effect. The rule-imposed obligations on combatants and parties to armed conflict to take precautions to ensure t

³⁸ ICRC Advisory Service on International Humanitarian Law, *International Humanitarian Law and International Human Rights Law, Similarities and Differences* (ICRC Geneva)

³⁹ *ibid*

⁴⁰ *ibid*

⁴¹ Core UN human rights treaties include: International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms Discrimination, Convention on the Rights of the Child, Convention on the Elimination of All Forms of Discrimination Against Women and Convention Against Torture.

⁴² However common article 3 imposed minimum obligation non-state actors during NIAC

⁴³ Under general international law only parties to treaties are bound by its provisions.

statutes of ICC and Ad-hoc international criminal tribunals recognise the obligations of non-state actors to obey and abide by the principles IHLR during armed conflict.⁴⁴

3.2 Asymmetric Armed Conflict

Generally speaking, most contemporary armed conflicts are asymmetric in nature and character. The idea of symmetric warfare has long been overshadowed by unequal advancement in military technology among states.⁴⁵ Asymmetric warfare is not a new phenomenon.⁴⁶ From the history of warfare, belligerents have always been influenced by the idea of defeating their adversary with the minimum effort possible thus creating the means of making them superior to their adversary. The famous David and Goliath story is classical depiction of asymmetric warfare in ancient times.

The idea of asymmetric armed conflict is based on the notion of inequality in the relatively military strength and capabilities of parties to armed conflict. Unlike the classic Europe of 19th century where hostilities in armed conflict are executed between states having relatively symmetric military capability, the military of contemporary times are arranged in an unparallel order of strength and capabilities.

The term asymmetric armed conflict itself is understood in different scope by lawyers and military strategist. Asymmetric armed conflict is the opposite of symmetric armed conflict. Thus, in defining the term, Pfanner view it as the opposite of symmetric warfare in the sense that a symmetric warfare is “generally understood to mean a classic armed

⁴⁴ See Katherine H.A Footer and Leonard S.Rubenstein *Human Rights Approach to Health Care in Conflict* (International Review of the Red Cross Vol.95, No.889, 2013) p7

⁴⁵ See Robin Geib, *Asymmetric Conflict Structures*, (International Review of the Red Cross, Vol. 88, No.864, 2006)

⁴⁶ See Eliav Lieblich and Owen Alterman, *Transnational Asymmetric Armed Conflict Under International Humanitarian Law: Key Contemporary Challenges* (Isreal Institute of National Security Studies, University of Tel Aviv)

conflict between states of roughly equal military strength.”⁴⁷ Thus an armed conflict between belligerents of unequal military strength becomes asymmetric.

Wolff von Heinegg argues that the term asymmetric warfare is to be understood from the perspective of conduct of hostilities in armed conflict in which the weaker actor endeavours to compensate for his military weakness or inferiority by resorting to the means and method of armed conflict that are not in accordance with law of armed conflict or other rules of public international law.⁴⁸

Asymmetric warfare arises from disparity of economic, resources and military powers between belligerents with one actor in the conflict occupying a superior position to the other based on the resources available to it to conduct the conflict.⁴⁹

States are investing and committing a lot of resources in the funding of their armed forces with the view of maintaining an edge over their prospective adversaries.⁵⁰ The annual budgetary spending of the armed forces of states is increasing exponentially. The aim for every state is to afford for its armed forces certain military advantage over its prospective adversary whether a state or organised armed group. Indeed, the outcome of contemporary armed conflicts has acquired relative level of mathematical predictability.

The increase in military spending has resulted in the establishment of a hierarchy of military super powers with technological and military

⁴⁷ Toni Pfanner, *Asymmetric Warfare from the Perspective of Humanitarian Law and Humanitarian Action* (International Review of the Red Cross, Vol.87, No.857, 2005) p152

⁴⁸ Wolf Heintschell von Heinegg, *Asymmetric Warfare: How to Respond?* In *International Law and the Changing Character of War*, (Ed. Raul Pedrozo and Daria Wollscahlear) (International Law Studies, Vol 87) p 465

⁴⁹ Fuller discussion, see Ekaterina Stepanova, *Terrorism in Asymmetric Conflict: Ideological and Structural Aspects* (SIPRI Research Report No.23 Oxford University Press)

⁵⁰ Show increase in military spending?

advantage. As state compete to upgrade their military strength and capabilities, the balance of military power between states and non-state armed groups becomes increasingly uneven. Thus, states will presumably occupy a more superior position when compare to non-states armed groups during a NIAC.⁵¹

Asymmetric conflict occurs in different form and dimension. Scholars have identified certain forms which asymmetric warfare may be conducted.⁵² Asymmetric conflict may be based on one or more of the following: Means, power, technology, organisation, values and time.⁵³ Any of these factual conditions can tilt an armed conflict in favour or against a party to the conflict.

3.3 Asymmetric strategies in armed conflict

Asymmetric strategies vary in form and complexity. In asymmetric armed conflict, the unmatched strength of the parties usually results in the inferior or the militarily disadvantage party adopting means and method of combat that will compensate for its inadequacies and deficiencies. As observed by Pfanner;

The weaker party, recognising the military superiority of its opponent, will avoid open confrontation that is bound to lead to the annihilation of its troops and to defeat. Instead it will tend to compensate its inadequate arsenal by employing unconventional means and method of prolonging the conflict through an undercover war of attrition against its well-equipped enemy.⁵⁴

The objective for the weaker party will be the avoidance of direct dictation by the superior adversary. While the tendency is for the weaker party to initiate unconventional methods of warfare, the superior may be cajole by the situations resulting from the adoption of unconventional

⁵¹ There are instances however, that non-state armed have turned the balance of power against state thus creating a factual situations of symmetric conflict in a NIAC and to some extend asymmetric in favour of the non-state armed group.

⁵² See Wolf Heintschell Von Heinegg, *Asymmetric Warfare: How to Respond?* Op cit

⁵³ *ibid*

⁵⁴ *Ibid.*

tactics by the weaker party to also engage the weaker party by unconventional means. This fact is well noted by Pfanner when he further observed that:

In order to offset comparative disadvantages resulting from its cumbersome military apparatus, the stronger adversary is likewise tempted to employ asymmetric tactics and unconventional means and method.⁵⁵

The weaker party thus adopts unconventional military tactics to counter the superior force of its adversary without regards to the laws of armed conflict. The objective for the weaker party is to even the conflict with the resources at its disposal. Some operational strategies common in asymmetric armed conflict include:

3.3.1 Terrorism: The use of terrorist strategy of war is prominent in contemporary asymmetric armed conflict around the globe.⁵⁶ The use of terror as a strategy of warfare varies in the means and method of its execution. Terrorist acts are perpetrated by both states and non-state actors. There is no universally accepted definition of terrorism.⁵⁷ Acts of terrorism are motivated by different by factors and ideologies. Acts of terrorism in armed conflict refers to the deliberate use of violence or threat of the use of violence against the civilian population for the purpose for the purpose of achieving political or ideological goal.⁵⁸

The use of terrorism against the civilian population as a strategy of war is prohibited by the rules of IHL and IHLR. Article 51 (2) of Additional Protocol 1 and article 4 of Additional Protocol II prohibits attack against the civilian population the purpose of which is to cause terror and other forms of terrorism in armed conflict of international and non-international character respectively. In *Prosecutor v Galic*,⁵⁹ the ICTY noted that the prohibition of terror as contained in both article 51 AP I

⁵⁵ Ibid p 153

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⁵⁷ Pfanner, op cit

⁵⁸ ibid

⁵⁹ ICTY, *Prosecutor v Stanislav Galic*, Case No.IT-98-29-A- Judgements, Appeal Chambers, November, 2009

and 13 AP II “amounts to specific prohibition within the general (customary) prohibition of attack on civilians.”

3.3.2 Guerrilla Strategy of Warfare

Guerrilla strategy is the use of unconventional method of tactics in armed conflict for the purpose of gaining military advantage through the element of surprise and invisibility. Guerrilla tactics involves the use of covets operations such as espionage, hit and run, use of adversary camouflage and uniform, disguise among others. While guerrilla strategy itself is not prohibited by IHL the various form of its execution may violates the rules of IHL.

The use of espionage in armed conflict is prohibited. And the use of certain emblem to deceive the adversary is perfidious thus prohibited.⁶⁰ What is more in attempt to remain invincible from the superior adversary, the armed forces or armed groups of the weaker party may disguised as civilians therefore blurring the line of distinction between civilian and members of armed forces or armed groups.⁶¹ In armed asymmetric armed conflict the existence of combatant having the character of soldiers at night, farmers in the morning is common place and remains one of the greatest challenges to the IHL in armed conflict.⁶²

3.3.3 Perfidy

Perfidy is the use of unlawful deception in armed conflict.⁶³ The term is the direct opposite of ruse which is a lawful deception.⁶⁴ The law of armed conflict does not as a matter of principle prohibit the legitimate use of deception as a strategy of war but places restriction on acts of deception that will undermine respect for its rules.

⁶⁰ The use of the emblem of ICRC and other UN bodies as means of disguise is prohibited by the rules of IHL

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⁶³ See Mathew Greer, *Redefining Perfidy*, (Georgetown Journal of International Law, 2005) p.242

⁶⁴ *ibid*

Perfidy is inviting the confidence of adversary that he is under legal obligation to act in a particular way in favour of a party to the armed conflict with the intention of betraying that confidence.⁶⁵ Perfidious act varies in form and method of perpetration. The following act constitutes perfidy in armed conflict:

1. Feigning of intention to negotiate under a flag under a flag of peace
2. Feigning of incapacity to fight as a result of injury or sickness
3. Pretending to be a civilian or a non-combatant
4. Unauthorised use of the emblem of the ICRC, UN, neutral states and other recognise humanitarian agencies in armed conflict

3.4 Some Asymmetric Armed Conflict in Africa

3.4.1 Boko Haram Conflict

The Boko Haram conflict is an ideological transnational asymmetric armed conflict between the states of Nigeria, Cameroun, Chad and Niger Republic on the one hand and the Islamic Jihadist group Boko Haram.⁶⁶ The conflict is taking place between armed forces of states which are relatively better organised, financed and equipped and the Boko Haram Islamist group with limited human and capital and financial resources.

The asymmetric nature of the conflict has led to the adoption of unconventional strategy of warfare by both the multinational armed forces and the Boko Haram armed groups resulting in the deaths of thousands of civilian and the displacement of an estimated 2.5 million people.⁶⁷

Prominent among the asymmetric strategy employ in the conduct of hostilities is the recruitment of children as fighters in the ranks of the Boko Haram armed group, the use of terror against the civilians by both the armed forces of states and the armed groups, suicide bombings of

⁶⁵ See article 37 (1) API

⁶⁶ See O.D Olaniyan, *Effect of Boko Haram Insurgency on the Nigerian Education System* (Journal of Research Development, Vol.24, No.2, 2015)

⁶⁷ Human Right Watch Report on Nigeria 2017

civilians kidnapping and hostage taking for ransom by the armed group, the use of perfidy, looting and pillaging by Boko Haram.

In response to the tactics of the Boko Haram tactics, the multinational armed forces have also employed brutal tactics of their own which include shelling of civilian settlements and extra-judicial killings of captured and wounded members of the Boko Haram group.

3.4.1 Sierra Leone Armed Conflict

The Sierra Leone armed conflict was a civil war that began in 1992 and ended in 2002. It is estimated that about 50,000 Sierra Leoneans were killed during the conflict.⁶⁸ The conflict was fought primarily by the Sierra Leone government against the rebel group the Revolutionary United Front (RUF). RUF rebels were involved in unwarranted killings of civilians such as local community chiefs, elderly people, recruitment of child soldiers, amputation of detainees, slavery, forced labour, sexual violence pillage as well as looting of properties belonging to the civilians.⁶⁹ The conflict led to political instability in Sierra Leone until the intervention of ECOMOG force which led to the restoration of peace in 2002.

3.4.2 Liberian civil wars

The armed conflict in Liberia took place in two phases. The first civil war took place around 1989 between the government of Liberia under the leadership of Samuel Doe and National Patriotic Front of Liberia (NPFL) under the leadership and control of Charles Taylor.⁷⁰ Although the NPFL were victorious in the conflict, they started the conflict as the military disadvantage side and had employed one of the most brutal asymmetric tactics known to the history of warfare.⁷¹ The conflict witness massive recruitment of children to the ranks of the rebel, pillage

⁶⁸ Human Right Watch on Sierra Leone 1999

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⁷⁰ James Shah Shilue and Patrice Fagen, *Liberia: Links Between Peace Building, Conflict Prevention and Durable Solutions to Displacement I* (Brookings-LSE, Project on Internal Displacement) p 1

⁷¹ These include the recruitment of children, killing of aid workers, kidnapping of foreigners, slavery, illegal exploitation of resources and forced labour

against properties and natural resources, unprovoked attack against civilians, the use of perfidy as a means and method of war and torture, slavery and the terrorising of the civilian population by both parties to the conflict.⁷²

It was estimated that about one third of the civilian population were displaced by the conflict.⁷³ The intervention of ECOMOG force, did not prevent the continue violation of IHL and IHLR.⁷⁴ Splinter groups began to appear each battling for supremacy and claiming territories of its own until peace was restored through a peace accord signed in Abuja 1995 in what was known as the Abuja Agreement.

The second armed conflict was fought in 2003 between the governments of Liberia under the leadership of the rebel leader Charles Taylor and the rebel armed group Movement for Democracy in Liberia. Like the one before it the conflict was marred by massive abuse of human rights, violation of the rules of IHL.

3.4.3 Conflict in Mali

While armed struggle between the government of Mali and Tuaregs secessionist groups have been ongoing for decades it was sporadic until 2012 when the Tuareg rebel group under the umbrella of Tuareg National Movement for the Liberation of Azawad MNLA seized some large swath of territory in Northern Mali leading to a direct military hostilities with the Malian armed forces. The group took advantage of the political turmoil in Mali to seize some towns in the northern region of the country.⁷⁵

Afraid that the occupation by MNLA posed a threat to world peace, armed forces belonging to ECOWAS member states, African Union, France, European Union and the United States of America were put in place as a joint task force with the mandate to oust the group from the

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⁷⁵ Human Watch Report on Mali 2013

northern Mali.⁷⁶ MNLA grossly violated rules of IHL and IHLR including the unlawful killing of civilians, pillage against property, destruction of cultural objects, rape of women and children, recruitment of child soldiers.⁷⁷

The Malian armed forces were also guilty of violations of rules of IHL and IHLR.⁷⁸ The government forces were accused of extra-judicial killings of suspected members of MNLA in their custody.⁷⁹ The ongoing asymmetric strategy adopted by the rebel groups in the Malian has undermined humanitarian effort at easing the pains and sufferings of civilian caught up in the conflict. Persistent attacks against personnel of international relief organisation are undermining efforts at providing necessary humanitarian assistance to victims of the armed conflict.⁸⁰

3.4.4 Conflict in Democratic Republic of Congo

The Democratic of Congo has been inflicted with armed conflicts of various forms from successive regimes that have ruled the country. The country has witness asymmetric armed conflict from organised armed groups supported by other states since 1997.⁸¹ Following the overthrow of the government in 1997 and swearing of the rebel leader Laurence Kabila as President there was increase ethnic tension around the region of Ituri leading to hostilities between rebel groups supported by Ugandan and the armed forces of DRC. The conflict left many civilians death, massive of reports of human rights violation, rape, torture and widespread bombings by the armed forces of Ugandan in support of rebels.⁸² There followed an intervention by French forces and a UN peace mission MONUC.

⁷⁶ *ibid*

⁷⁷ *ibid*

⁷⁸ Human Right Watch Report on Mali 2017

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *ibid*

⁸² See The Armed Activities on The Territory of the Congo (Congo DRC V Uganda) *supra*

Following the assassination of Laurence Kabila and the ascension to power by his son Joseph Kabila, there is a renewed asymmetric armed conflict around the Kivu and Ituri regions of the country between the armed forces of DRC and rebel groups supported by third states such as Uganda. The conflict in the region of Kivu and Ituri has witness great violations of IHL and IHLR.

There is report of recruitment of child soldiers by armed groups such as CNDP, massive unwarranted attacks against civilians, acts of terror against civilians by both government and armed groups, burning, pillage other human rights violations such as torture, rape, forced labour and slavery.⁸³

Armed forces of DRC in coalition with Rwandan forces were reported to have in several instance violated the rules of IHL and IHLR particularly during operations Umoja Wetu were soldiers massacred civilians in places such as Ndorumo, Massi, Nyabionda and Kimia territories, unlawful destruction of houses, arbitrary arrest, sexual violence and forced labour.⁸⁴ The situation as it stands still remains volatile as attacks on civilians is still ongoing.⁸⁵

3.4.5 Conflict in Sudan

The Sudan conflict is one of the longest and persistent asymmetric armed conflicts in contemporary African history. The armed conflict is primarily between the state of Sudan supported by armed Arab militia groups against rebel groups in the South, Kordofan, and Blue Nile and Darfur regions.⁸⁶ With the attainment of statehood by South Sudan, the conflict in Sudan is concentrated in the Kordofon, Blue Nile and Darfur regions between the armed forces of Sudan and rebel groups.⁸⁷

⁸³ Human Right Watch Report 2008

⁸⁴ *ibid*

⁸⁵ Human Right Report 2017

⁸⁶ Human Rights Watch Report 2013

⁸⁷ See The Sudan Consortium, (*Humanitarian Crisis in Sudan's Two Areas and Darfur, African and International Civil Society Action for Sudan 2015*)

The conflict in the Darfur region is between the governments of Sudan assisted by allied militia groups the Janjaweed and the rebel groups Sudan Liberation Army/Movement (SLAM) and the Justice and Equality Movement (JEM).⁸⁸ In reaction to the insurgency of the rebel groups, the government of Sudan deployed earth sweeping tactics. Killing and targeting civilians, raping and abducting women, civilian villages were bombed and burned by the Sudanese army and Janjaweed militias.⁸⁹ An estimated 1.4 million people have been displaced by the conflict in the Darfur region.⁹⁰

In the Kordofan and Blue Nile, the government forces and the rebel groups are engaged hostilities. Government forces and their allied militia groups have been attacking and killing civilians including burning of houses and denial of humanitarian access to territories held by rebels.⁹¹

3.4.6. Conflict in Uganda

The Uganda armed conflict between the government of Uganda and the Lord Resistance Army has been one of the longest and persistent conflicts in Africa. The conflict has been ongoing for decades and is most noted for its use of child soldiers and the unwarranted killing of civilians. The LRA is notorious for abduction and recruitment of child soldiers.⁹² The armed forces of Uganda in response to the asymmetric strategy of the rebel group have trained and armed militias to fight the rebels. Between the periods of 2011-2012, an estimated 273 attacks were reportedly carried out by the LRA leading to the death of 53 civilians and the abduction of about 741 others.⁹³

The atrocities committed by the LRA in Uganda and other neighbouring countries moved the ICC to issued arrest warrants on key commanders

⁸⁸ Human Rights Watch Report 2006

⁸⁹ *ibid*

⁹⁰ UNAMID/ OHCHR Report on Human Rights Situation in Darfur in 2013. P 7

⁹¹ Human Rights Watch Report 2017

⁹² Ploughshares Armed Conflict Report on Uganda 2009 www.justice.gov/eoir/vii/country/armedreport/uganda, accessed 23 September 2017

⁹³ Human Right Watch Report 2013

of the group. Two of its fighters Thomas Kwoyelo and Dominic Ongwen are in the custody of the ICC charged with committing various offences ranging enslavement, killing of civilians, sexual violence, hostage taking and extensive destructions of properties.⁹⁴

4.0 Challenges of Asymmetric Conflict in Africa to IHL and IHLR

The asymmetric characterisation of armed conflicts in Africa has serious implication to the principles of IHL and IHLR. The tactics and strategy adopted in the conduct of hostilities poses a threat to the respect and obedience to rules of IHL and IHLR. The rules of IHL and IHLR are affected in the following manner by asymmetric armed conflict.

i. Blurring the line of Distinction

One of the cardinal principles of the law of armed conflict is the requirement that distinction be made between combatants and non-combatants and between military objectives and civilian objects. This principle is blurred by the asymmetric tactics. In asymmetric conflict in Africa, armed groups disguise as civilians to attack military formations. In response, the armed forces states view every civilian within the conflict zone as a legitimate target of attack. The distortion of the principle of distinction exposes civilians to attack from both parties to the conflict.

ii. Distortion of the Principle of Proportionality

In asymmetric armed conflict, what counts is winning the war. The parties give little attention to the proportional outcome of their action. Principle of proportionality is relegated to the background with focus on winning. The weaker party to the conflict is concern with inflicting the most injury and damage possible to its superior adversary without recourse to the consequential effect. The result is that civilian lives matters not as long as the desire result is achieved.

⁹⁴ Human Rights Watch Report 2017

iii. Lack of Precaution in Attack

As experience has shown in asymmetric armed conflict in Africa precaution in the conduct of hostilities is relatively absent. Both state and armed groups in attempt to win the war engage in open ended conflict without restraint to the means and method of conducting hostilities. The superior party in order to avoid defeat that may result from the use of by the weaker party of asymmetric tactics may be compelled to throw caution to the winds and engaged in an open-ended -hostilities with the adversary.

iv. Lack of Reciprocity

Principle of reciprocity is the fulcrum on which respect for international rules are based. A state action in fulfilling its international obligation to other states is derived from the corresponding understanding that it expects a reciprocal performance from other states in relation to it. The idea that a state acts in expectation of reciprocal acts from other states is as old as the concept of international law itself. Even though principle of reciprocity holds no significance to IHL, it still influenced the attitude of states towards obedience to rules of IHL and IHLR.

When applied to asymmetric armed conflict the situation becomes complex. The parties to the conflict are driven by different values and objective. While obligation is created equal for both parties to armed conflict whether IAC or NIAC, in asymmetric armed conflict the weaker party deliberately distort the rules of armed conflict to win. It is playing against the rules. As noted by Frida Linstrom have values that are not reflected by IHL.⁹⁵ The weaker party tendency to disregard the rules draws reciprocal non-compliance of the rules by the superior party. Thus, the principle of reciprocity applies in reverse and negative terms.

v. Unlimited War

Asymmetric conflict tends to expand the notion of *military necessity* beyond the contemplation of the law of armed conflict. The adoption of strategies which violates the rules of IHL will stretched the limit of

⁹⁵ Frida Lindstrom, *Asymmetric Warfare and Challenges to International Humanitarian Law* p 71

military necessity and expands the means in which both parties conduct hostilities. The situation may become that of total war until complete victory is achieved by any of the party to the conflict.

vi. Urbanization of Armed Conflict

Because of the tendency of weaker parties to rely on civilians as a form of shield and decoy, they are motivated to bring the fight to the cities and areas full of civilian settlements. The cities and urban centres provide good ground for camouflage and cover for the weaker party. The weaker party blends with the civilian population thus exposing the civilian population to direct attack from the superior party. It sometimes uses the civilians as soft target when it cannot directly attack the forces of the superior party.

vii. Denial of Humanitarian Access

Humanitarian access in asymmetric armed conflict faces great challenge. The situation of asymmetric conflict is operated in an atmosphere of great mistrust. The weaker party facing great financial constraint may confiscate humanitarian aids for its own purpose and deprive the civilian most the benefit of access to it. Humanitarian aid becomes for the weaker an economic means of sustenance.

Another challenge to is the killing and kidnapping of humanitarian workers. The taking of aid worker as hostages poses a threat to the effort of making humanitarian aid accessible to the people. Aid workers are taken as hostages and use for ransom or as service providers.

4.1 Kidnapping and Hostage taking

Hostage and kidnapping in armed conflict is the act of forcefully taking civilians or members of armed forces of or under the control of a party to an armed conflict for the purpose of compelling the party to act or refrain from doing act.⁹⁶

The weaker party's aim when taking hostages is to achieve a political, military or economic or ideological objective. Civilians become the

⁹⁶ See article 1 International Convention Against the Taking of Hostages

bargaining chips for the weaker party and the means by which it achieves specific economic, political and ideological goals.

The taking of civilians and military personnel as hostages during armed conflict is a violation of IHL and IHLR. Articles 34 GC IV and article 75 of AP I prohibits the taking of civilians and victims of armed conflict as hostages in international armed conflict while common article 3 to the Geneva Conventions and article 4 (c) of AP II extend the prohibition to non-international armed conflict.

The ICTY in *Prosecutor V Randovan Karadzic*⁹⁷ dismissed the Appellant's argument that the notion of hostage taking applies only to civilians when it held that;

The Chambers considers that the Appellant's argument that the prohibition of hostage-taking in common article 3 'is no other than prohibition of civilian hostage-taking in the Fourth Geneva Convention 'is unsubstantiated. Conversely, common article 3 clearly refers the prohibition of hostage-taking of *any* person not taking no active part in the hostilities

4.2 Use of Child Soldiers

The use of child soldiers has become common feature of some asymmetric armed conflict particularly within the Africa and the Middle East.⁹⁸ Recruitment of child soldiers is motivated by economic, ideological as well as well as military convenience. The forceful recruitment of children into armed conflict offers a cheaper alternative for the weaker party in armed conflict as especially in Africa where most organised armed groups lack financial power to sustain standard army of adults.⁹⁹ Children offer a fertile ground for the planting of the

⁹⁷ ICTY, Case No.IT-95-5/18-AR72.5, 2009 Appeal Chamber Decision on Appeal of Preliminary Motion to Dismiss Count 11 of Indictment paras.22

⁹⁸ Human Rights Watch: Child Soldiers Use 2003: A Briefing for the 4th UN Security Council Open Debate on Children and Armed Conflict.

⁹⁹ International Committee of the Red Cross, *Children Associated With Armed Forces or Armed Group*. ICRC, Geneva, Switzerland 2013

ideology of an armed group and provide a convenient and cheaper means and method of attacking the enemy without dictation.¹⁰⁰

The recruitment of children to participate in armed conflict is prohibited by IHL and general body of public international law and IHLR. Article 77 of API and article 4 (3(c) of AP II expressly prohibited the use of children below the age 15 as soldiers in armed conflict in both IAC and NIAC. Prohibition of child soldiers is also extended by the Optional Protocol to the Convention on the Right of the Child on the Involvement of Children in Armed Conflict and regarded as war crimes under the Rome Statutes.¹⁰¹

The prohibition of the recruitment of children into the armed forces or as members of an armed group participating has been held to reflect customary international law. In *Prosecutor V Sam Hinga Norman*,¹⁰² the Appeal Chambers of the Special Court for Sierra Leone asserted that prior to the crisis that engulfed Sierra Leone in 1996, the rule prohibiting recruitment of children to participate in armed conflict “had also crystallized as customary international law.”¹⁰³ The prohibition of recruitment of children as soldiers into the armed forces of a party to an armed conflict also includes voluntary enlistment.¹⁰⁴

4.3 Pillage

Pillage is the taking and removal of properties and resources of civilians by the use of violence or threat of violence in armed conflict. Pillage is motivated by economic, ideological and political factors. Asymmetric armed conflict provides convenient grounds for pillage. The weaker party compel by economic, ideological and political considerations may resort to acts of pillaging as means of sustaining itself in the armed conflict and as means of making political or ideological statement to the adversary. Pillage is recognised as violation of the laws of armed

¹⁰⁰ Ibid

¹⁰¹ Article 1 Rome Statute

¹⁰² Case No. SCSL-2003-01-I paras

¹⁰³ Ibid paras 17

¹⁰⁴ See ICC, *The Prosecutor V Thomas Lubanga Dyilo* ICC601/04601/06, Pre-Trial Chamber I, Decision on Confirmation of Charges, 2009.

conflict and prohibited. Article 33 of the GC IV, article 4 AP II prohibits acts of pillage in armed conflict.

4.4 Slavery and Force Labour

Slavery and forced is also a common feature of asymmetric armed conflict in Africa. Civilian taken hostages are subjected to crude treatment. Slavery and forced labour is prominent during the Sierra Leone and Liberia civil wars and other asymmetric armed conflicts in Africa. Depending on the ideological basis for the conflict, slavery may be perpetrated as either punishment or as means of obtaining cheap labour for the party logistically disadvantaged. Civilians abducted during asymmetric conflict the use of slavery as a means of is a violation of the rules of IHL and IHLR. Article 4 (f) AP II prohibits the use of slavery and under 75 of AP I and common article 3 to the GCs, slavery is a violation of the obligation of humane treatment.

5.0 Conclusion

Asymmetric armed conflict poses a great challenge to the application of rules of IHL and IHLR during armed conflict in Africa. Most post-colonial armed conflicts in Africa are asymmetric largely between armed forces of states and rebel groups or insurgents. The threat pose by these conflicts are enormous hence, concerted effort needs to be put in place to curtail the effect associated with asymmetric armed conflict. To ensure protection of civilians from the effect of asymmetric Safe Zones should be established in areas affected by the conflict under the supervision of the international community. The establishment of Safe Zones under the control of neutral states or institutions will ensure that civilians are not use as baits by either party to an armed conflict.

In an asymmetric armed conflict involving armed forces of states the obligation to respect the rules of IHL and IHLR does not diminished by the fact that the non-state actors violate them. Thus, states should ensure that members of their armed forces abide by the rules of IHL and IHLR. States should therefore educate members of their armed forces of their obligation to respect the rules of IHL and IHLR during armed conflict. An effective monitoring and implementing regime of IHL and IHLR should be put in place by the comity of nations to ensure that parties to

an asymmetric armed conflict play the rules. Punitive mechanism should be put in place to punish violators of the rules of IHL and IHLR during armed conflict.

Mass education of the masses in peace time about the rules of IHL and IHLR will allow the citizens better appreciate the rules of IHL and IHLR since they are the potential fighters and rebels tomorrow, the need to have a basic understanding of the rules of IHL and IHLR.