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Critical Examination of the Law on Armed Conflict: Striking a Balance of Humanitarian Intervention

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ABSTRACT

This article analyzes the law of armed conflict and how humanitarian intervention strikes a balance. With due respect to the super powers, their intentions in their interventions in most of the wars taking place or that have taken place across the globe is questionable. For instance, Rwanda was not assisted by the super powers when it was passing through genocide because it had nothing to offer them. It is on this note that the article calls for the need to do away with the GS veto powers and introduce a system that expand at least G10 adding Nigeria, Kenya and south Africa immediately and elect 14 nations to the council for a term of 1 year with all nations having the equal vote. Additionally, authorization of the use of force should require a super majority of at least 16 nations voting yes before force of any kind can be used. Finally, it is time that UN has its own standing military force that is governed and controlled by the United Nations Security Council.

Keywords: Armed conflict, Humanitarian intervention, international laws, International organizations, Refugees.

INTRODUCTION

The international law of armed conflict, although of relatively recent origin in its present form and shape, has a long history behind it[1]. Even in the distant past, military leaders sometimes ordered their troops to spare the lives of captured enemy, civilian population and often upon the termination of hostilities, belligerent parties agreed to exchange the prisoners in their hands[2]. In the cause of time, these and such like parties slowly developed into a body of customary rules relating to the conduct of war; rules, that is, which parties to an armed conflict ought to respect even in the absence of a unilateral declaration or reciprocal agreement to that effect[3]. On the advent of the terrorists bombing the twin towers on September 11 2001, it was the most fatal, four coordinated terrorist attack U.S has ever experienced in its history. The United States made a vow to do whatever it takes to fight terrorism inside their borders and go beyond borders to the last end of the world[4]. Following this, U.S attacked Iraq even after countries like Russia, China and Britain vetoing the action as mission impossible, with U.S arguing that the attack on Iraq was a just war. In 2011 after the sporadic attacks by the Alshabaab Militia Group into Kenyan territory and kidnapping of the tourists in LAMU, Kenya decided to invade the territory of Somalia on a mission dubbed "Linda nchi" with the help of and cooperation of AMISOM, Kenya managed to uproot the Alshabaab Militia Group from their territory[5]. The international human rights activists blamed Kenya for not obeying the human rights as most of the civilians were caught on the crossfire between the Kenyan armed forces and the Alshabaab Militia Group[6].

The legality permissible to use force in international conflicts is rarely restricted by the provisions in the UN Charter. Article 2 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War[7] provides that the provisions which shall be implemented in peace time, the convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High contracting parties even if the state of war is not recognized by one of them. This practically indicates that be it the use of force, that force must be reasonable. Mohiuddin[8] noted that in the wake of various revolutions around the world like in Libya,

Egypt, Tunisia and Syria, there is need to understand the efficacy of the international armed conflict and how humanitarian intervention plays part to quell such insurgencies. For example in Libya, the bombing by the NATO forces has received a lot of criticism. The morality and legality of these and other military operations have been debated vividly. The American president Barrack Obama said on a national television that .his administration kept its pledge that the mission would be limited in size and scope announcing that the NATO alliance would assume full command. He further stated that *"To brush aside America's responsibility as a leader and more profoundly our responsibilities to our fellow human beings under such circumstances would be a betrayal of who we are*[9]. In Syria, United States of America is accusing president Asad of using chemical weapons against the civilians and the rebel group and the drums of war between US and Syria are already beating[10]. The question is whether the use of armed conflict is a necessary option to solve problems of international nature and how do humanitarian intervention prevents such. In the light of the above, this article analyzes the law of armed conflict and how humanitarian intervention strikes a balance.

The concept of preemption and preventive war

Under international law, the right of self defence gives every state a right to respond to an armed attack that has already taken place. Whether it includes a right to use force in anticipation of an attack that is not under contention[11]. However, if it does then the right it limited to preemptive use of force. Use of force is clearly outlined under the under Article 2 of the UN charter. However the popular view is that preemption can be legitimate when there is need to respond to immediate threats which pose great harm[12].

Buzan[13] argues against preventive war / use of force that either the issue relates to global security or to the rights of innocent individuals. The first category focuses on the security dilemma that preventive war give rise to. The preventive war doctrine assumes military force is required thus creates problems that are long term in nature. More so, there are non military tools that might be used to dismantle long term problems and the prospect of the resort to preventive force enhances the risk of military force being applied as actors would assume that this is necessary. The threat and use of preventive force increases insecurity as others may respond by armament in fear of a preventive attack. Therefore ,preventive doctrine will enhance military advancements and add pressure to conduct preventive war in a various circle of mutual fear[14].

According to Lango[15], preventive war would violate the individual rights stating that human beings have rights and that paramount among these is the right not to be killed or harmed significantly. In contrast, this is exactly what happens in wars including the defensive wars. The problem with the preventive war is that it includes the killing of those who have not yet committed any wrongful acts of aggression.

Luban[16] goes further to state that the perspective of a right based theory of self defence, it is difficult to see how there can exist liability to harm without the presence of active aggression.

According to Rodin[17], any doctrine of prevention is in fact a consequence to engage in attack, he claims that all such doctrines are Ipso facto morally wrong. "If manifest intent and active preparation together constitute a wrong sufficient to ground preventive war then any doctrine of prevention are impermissible. If on the other hand doctrine or prevention is permissible, the combination of manifest intent and active preparation are presumably not in themselves wrong and this implies that there no sufficient moral ground for preventive war".

According to Luban[16], legitimate preventive force may only be applied to counter large scale attacks on the basic human right. This he argues means that "unless the preventive war itself aims at a large scale attack on basic human rights planning for it, is not wrongful and the paradox is last. However, Rodin[17] contrast that even attacks in accordance with the principles of proportionality and necessity directed at a military targets may violate human rights if the attack in itself is unjustified. Since the issue at hand is whether preventive war can be justified or not. Luban's[16] distinction does not remove the basic dilemma of the paradox; meaning that its conspiracy to carryout preventive attack is wrong then doctrines of prevention are also wrong.

As for Eenmaa[18], all forms of defense are preventive in the sense that one can only defend oneself against future harm. In other words there is no defence against harm that has already been inflicted. Of course, one can defend oneself against the continuation of harm by an attackin progress but it is still only possible to defend oneself against harm that has not yet occurred. According to Lango[15], a successful defence is the prevention of harm. He goes ahead to state that some moral theorists insist that the presence of an actual attack or at least an imminent threat of attack, is necessary for the use of force to be justified. To him, the relevance of an actual or imminent attack is that it provides compelling evidence that is stopped, the attack will inflict unjust harm.

Luban[16] argues that an actual attack obviously provides strong evidence for future harm, the weaker evidence accorded by an imminent attack is nevertheless considered sufficient to meetthe burden

of evidence. According to this view, the objection to preventive war is that in the absence of an actual or imminent attack, the probability of future unjust harm is not high enough to justify the resort to war.

Buchanan[19] argues that in some cases the killing of innocent obstacles can be justifiable. This requires that three conditions be satisfied; the attack must be necessary to omit the harm, sufficient reasons must be taken to reduce the harm to the innocent obstacles and the harm averted by the preventive action must be significantly greater than the harm, to the innocent obstacles.

In as much as the above authors give some justifications with regard to preventive war, it is quite unnecessary especially in the 21st Century where there is need to employ diplomatic measures of settling disputes. I suggest that where there is a grievance between states, it is important to exhaust the international legal frame work instead of resorting to armed conflict which is expensive, time consuming and has long term effects. Respect for the humanity and their rights should be the priority. Therefore, the authors and princes of war should be defected with the strongest form possible and preachers of peace accepted.

Self Defense

Article 51 of the UN charter[20] provides that nothing in the present charter shall impair the inherent right of collection or individual self-defense if an armed attack occurs against a member of the united nations until the security council has taken measures necessary to maintain international peace and security, measures taken by members in exercise of this right of self-defense shall be immediately reported to the security council under the present charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. Thus, there is still a right of self-defense under customary international law. As the ICJ affirmed in the **Nicaragua Vs United States,**[21] some commentators believe that the effect of article 51 is only to preserve this right when an armed attack occurs, and that other acts of self-defense are banned by article 2(4). The more widely held opinion is that article 51 acknowledges this general right and proceeds to lay down procedures for the specific situation when an armed attack does occur. Under the latter interpretation, the legitimate use of self-defense is situations when an armed attack has not actually occurred are still permitted. It is also worth noting that not every act of violence will constitute an armed conflict/attack. The ICJ has tried to clarify, in the Nicaragua case, what level of force is necessary to quality as an armed attack[22].

The main argument from this position is that if the right to self-defense want to be expanded, the room for unilateral recourse to force would increase. However, it has been argued by international lawyers that a non-liberal interpretation of the self-defense right is necessary to compensate for the lack of collection remedies against illegal force[23]. Two general restrictions on how the use of force in self-defense may be applied are prescribed to the principles of necessity and proportionality. These principles require that the amount of force is reasonable and applied only in situations where no other cause of action is possible. The debate on same of the firms of self-defense does exist[24].

In the oil platform case[25] the ICJ found that the US actions were neither nor proportional under the circumstances and in the armed activities on the territory of Congo case4°. The courtnoted that " The faking of airports and towns many hundreds of kilometers from Uganda's border would not seem propo1tionate to. the serious of trans border attacks if claimed had given rise for the fight of self-defense to be necessary for that. In Carolines case[26], it was established that a necessity of self defence exist when there is instant, overwhelming, leaving no choice of means, and no moment of deliberation, and furthermore that any action taken must be proportional, since the act justified by the necessityof self-defense , must be limited by that necessity and kept clearly within it.

Collection Action/use of force

The Security Council is authorized under article 24 and 25 for determine the existence and taken action to dismiss, any threat of international peace and security. Practically this power has been reluctantly little used because of the presence of five veto embracing also certain international conflicts [27]. For instance it has authorized the use of force for humanitarian causes in certain settings, thus controlling legitimacy and legality that perhaps would have been lacking had the intervention been unilateral. An example of such an intervention was the operation in Somalia, authorized by the Security Council in 1992. In this case, Somalia was considered a failed state without an effective government who could give consent to the intervention and consequently the authorization of the information was fairly uncontroversial [28]. Article 2(7) provides that nonintervention principle "shall not prejudice the application of enforcement measures under chapter VII"[29].

Pre-emptive force

There is limited right to pre-emptive self-defense under customary law. Its continuing permissibility under the charter hinges on the interpretation of article 51[30]. If it permits self defense only where an armed attack has occurred, then there can be no right to pre-emptive self-defense. However, few

observers really think that a state must wait for an armed attack to actually begin before taking action. A distinction can be drawn between "preventive "self defense when it talks place when an attack is morally possible or force able and permitted "interventionary" or "anticipatory "self-defense which falls place when an armed attack is eminent and inevitable. Wielding permanent members with interests in a given issue[23]. Typically, measures short of armed force are taken before armed force, such as the imposition of sanctions. The first time the Security Council authorized the use of force was in 1950 to secure North Korean withdrawal from South Korea. Although it was originally envisaged by the framers of the UN charter to use for enforcement, the intervention was effectively controlled by forces under US command.

The Security Council did not authorized the significant armed force again until the invasion of Kuwait by Iraq in 1990. After passing resolution demand a withdrawal, the council passed per Res 678, which authorized the use of force and requested all member states to provide the necessary support to a force operating in cooperation with Kuwait to ensure the withdrawal of Iraq forces. This resolution was never revoked, and in 2003, the Security Council passed resolution 1441, which both recognized that Iraq' noncompliance with other resolutions on weapons constituted a threat to international peace and security. Thus it is arguable that 144 impliedly authorized the use of force [31]. The UN has also authorized the use of force in peacekeeping or humanitarian intervention notably in the former Yugoslavia, Somalia and Sierra Leon. The Security Council has broaden the charter's original understanding of "international peaceto a conception of "threats to peace". The right to use interventionary, pre-emptive armed force in the face of imminent attack has not been ruled out by the ICJ but state practice and opinion Juris overwhelmingly suggests that there is no right of preventive self-defense under international law[31].

The UN Security Council

It was intentionally formed as a small body in order to make it more capable of acting effectively in times of crisis. Ineffectiveness had been the defect in the League of Nations as the body was far too large to come to any consensus. Through the Security Council, these problems were hoped to have been solved. From its inception, the Security Council was encountered with problems/challenges. The peaceful co-existence that existed between the capitalist west and the communist east as a result of common enemy quickly turned and, and by 1948 it seemed as though there would soon be another major war, one that had the potential to go nuclear and result in millions of deaths. With the creation of NATO in 1949 and the subsequent responsive of the USSR with the creation of the Warsaw pact it seemed as though the world wan heading down a path towards nuclear war[32, 33].

This danger instantly put a lot of pressure on the UN and the Security Council. As the cold war unfolded, the world was again forced to draw sides. As the main body for world affairs this side were evident in the UN and in the Security Council. By 1963, the first wave of decolonization in Africa and Asia had taken place, and UN membership doubled from 51 Nations to 114 nations. More than half of the UN was now from either Africa or Asia soon, these countries demanded to be better represented in the Security Council and by 1965, in the only resolution passed concerning Security Council reform, the number of temporary members was increased from 6 to I0, making the total members for the council 15. Resolution 1990 was ratified by two-thirds of the UN members and then approved by the *GS*. Still, the GS remained the only veto powers[47]

In the next few years; peace keeping began to pick up, essentially in regions of the world that the UN has previously been unable to act in. the new peace keeping initiatives, along with the council's hands on approach to the Iraq invasion of Kuwait, the UN seemed to have decided upon increased activism and authority in regards to international peace and security. This was how the Security Council was intended to act. Countries that previously had be excluded began defending their view points from being ignored by the GS. Since 1990, there has been a push by many non-veto nations to double the number of permanent members and to remove the veto power. These reforms, particularly the latter willof course, have an extremely difficult time coming to fruition. The five veto powers, citing the League of Nations, say that they need the veto to avoid circumstances that will cause the UN to become ineffective. However, the rest of the UN, which equals 186 nations, feels as though this is inequitable. Despite these, the GS are using the veto to safeguard their power[34]. There is nothing in the UN Charter, which in Article I gives the GS the right to veto any attempt to weaken, their power, which provides that they relinquish the right of veto[35].

Japan and Germany, since becoming economic powerhouses in the mid-l 990s, have been campaigning for inclusions among the GS countries. This measure is backed by the GS, specifically the United States, France and Oil. These two argue that their large wealth and the amount result in a Security Council seat[36]. African Union is classified by the United Nations as a regional organization within the meaning of Chapter VII of the charter of the United

Nations, whilst the regional mechanisms., such as ECOWAS are recognized as sub regional organizations. African Union will also lead to political and socio-economic integration as member states progressively cede their sovereignty. The issue of common values and standards-therefore becomes even relevant. In deciding in intervention, the African Union will have to consider whether it will seal the authorization of the UN Security Council as it is required to do under Article 53[37]. When questions were raised as to whether the Union could possibly have an inherent right to intervene other than through the Security Council, they were dismissed not of hand. This decision inflected a sense of frustration with the slow pace of reform of the international order, and with instances in which the international commuted tended to focus attention on other parts of the world at the expense of more pressing problems in Africa[38].

Principles of international Humanitarian Law

Principles of distinction

The principle of distinction protects civilian persons and civilian objects for the effect of military operations, it requires parties to an armed conflict to distinguish at all times, under all circumstanced, between the combatants and military objectives on the one hand, and civiliansand civilian objects on the other and only target the former. Civilians only lose the protection upon taking a direct part in hostilities. Article 3 (1)[39] proceeds that persons taking no active part in the hostilities including member of armed forces who have laid down their arms and those placed horse de combat by sickness , wounds, detention, or any other cause, shall in all circumstances be treated humanly, without any adverse distinction founded on color, race, religion, faith , sex, birth or wealth or any other similar criteria. The principle of distinction has also been found by the ICRC to be reflected in practice, it is therefore an established norm of customary international law in both international and non-international armed conflicts[40].

Necessity and proportionality

These are established principles in humanitarian law. Under IHL, a belligerent may apply only the amount and kind of force necessary to defeat the enemy. Further attacks on military objects most not cause loss of civilian life considered excessive in relation to the direct military advantage anticipated. Every feasible precaution must be taken by commanders to avoid civilian causalities. The principles of proportionality has also been found by the ICRC to form part of customary international law in international and non-international armed conflicts[3].

Principles of human treatment

This principle requires that civilians be treated humanely at all times. Common Article 3 prohibits violence to life and person (including cruel treatment and torture), the taking of hostages and degrading treatment, and execution without regular trial against non- combatants, including hors de combat (wounded, sick and shipwrecked) civilians are entitled to respect for their physical and mental integrity, their honor, family rights, religious convictions and practices and their manners and customs. This principle is when inscribed in the four GCS applicable in both international and non-international armed conflicts[3].

Principles ofnon-discrimination

This principle is a cornerstone of IHL. Under Article 3[41] prohibits the adverse distinction founded on race, color, sex, race religion or faith birth or wealth or any other similar criteria. Similarly, Article 3 (1) provides inter alia that persons taking no active part in the hostilities including members of armed forces who have laid down their arms shall in all circumstances be treated without any adverse distinction founded on race, color, religion or faith, sex birth or wealth. Hence, all protected persons shall be treated with the same consideration by parties to the conflict. Every person affected by armed conflict is entitled to his fundamental rights and guarantees without discrimination. It follows therefore that the prohibition against adverse distinction is also considered by the ICRC to form part of customary international law.

International armed conflict

International armed conflict is that conflict that takes place between the High contracting parties or a conflict between states. As such, the IHL is applicable to it. Under Article1 provides that in addition to the provisions which shall be implemented in peacetime, the present convention shall apply to all cases of declared war or of any other armed conflict which may arise between to or more of the High contracting parties even if the state of war is not recognized by one of them. This provision / Article transcends across the four Geneva conventions. In addition, the convention shall also apply to all cases of partial or total occupation of the territory of a high contracting party even if the said occupation meets with no resistance[7].

According to Article 1 (4)[30], armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination as enriched in the UN Charter and the declaration on principles of International law concerning friendly relations and co-operation shall apply to international armed conflict. Article 1 (3)[30] espouses that this protocol, which supplements the Geneva conventions of August 1949 for the protection of victims of war, shall apply in the situations referred to in Article 2 common to those

conventions.

Non-International armed conflict

These are conflicts that take place between the territories of state where on organized, protected rebels fights against the government. For example Lord Resistance Army led by Joseph Kony fighting against the Ugandan government[42]. Article 36[30] provides that in case of armed conflict not of an international character occurring in the territory of the High Contracting parties, each part to the conflict shall be bound to apply, as minimum , the following provisions that persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness wounds, detention , or any other cause, shall be treated humanity without any distinction that is adverse on grounds of color, race, sex, religion or faith, birth or wealth or any other similar criteria. It follows therefore, that the following acts are and shall remain prohibited: taking of hostages, outrages upon personal dignity, passing sentences without pronounced judgment.

Article 1 provides that this protocol which develops and supplements Article 3 common to the Geneva conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered any Article 1 of the protocol addition to the GCS and relating to the protection of victims of international armed conflicts, which takes place in the territory of a high contracting party between its armed forces and dissident armed forces or other organized armed groups, which under responsible, command, exercise such control over a part of sustained and concerted military operations and to implement this protocol. However under Article 1 (2)[43], situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts shall not apply to this protocol.

CONCLUSION

With due respect to the super powers, their intentions in their interventions in most of the wars taking place or that have taken place across the globe is questionable. For instance, Rwanda was not assisted by the super powers when it was passing through genocide because it had nothing to offer them. It is on this note that the article calls for the need to do away with the GS veto powers and introduce a system that expand at least G 10 adding Nigeria, Kenya and south Africa immediately and elect 14 nations to the council for a term of 1 year with all nations having the equal vote. Additionally, authorization of the use of force should require a super majority of at least 16 nations voting yes before force of any kind can be used. Finally, it is time that UN has its own standing military force that is governed and controlled by the United Nations Security Council (UNSC).

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