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Research Paper

Legal Restraints of States during Armed Conflict

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ABSTRACT
Armed conflict causes a wide range of human tragedies, leaving in their wake people with basic needs that humanitarian and human rights organisations endeavor to meet, according to the means at its disposal. This therefore suggests that, had restraints been observed there could not be that type of tragedy beyond proportion, to the international concern, which states may bear the burden, in a form contribution to solve the attendant problems resulting from such an armed conflict. This paper reveals that there is abundant non observance of humanitarian tenet, some due to the claim of states that they are not party to a particular treaty or the other. This is necessary, since there is a new development of modern armed conflict, with new categories of combatants. That being the case, it is worthy of note that, many tenets have already found their bearing in customary international humanitarian law. In addition, modern humanitarian law had been strongly influenced by human rights doctrines It is therefore recommended that, whether a state is a party to an international humanitarian law treaty or not, the need to safeguard humanity is therefore necessary.
KEYWORDS: *Civilians, Combatants, Humanitarian law, Observance, Restraints.*

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I. INTRODUCTION.

Humanitarian law can be defined as the human rights component of the law of war; it is a branch of human rights law which applies in international armed conflicts and, in certain limited circumstances, in internal armed conflicts. Humanitarian law therefore, aims to mitigate the human suffering caused by war, or, as it is sometimes put, to 'humanise war'.[1] Also, humanitarian law has become less geared to military necessity and increasingly impregnated with human rights values.

The ICTY in *Tadic˘* (*decision on Interlocutory Appeal*) rightly emphasized this new trend. When dealing with the distinction between the laws regulating international armed conflict and those governing internal armed conflicts, the Appeals Chamber pointed out that, one of the most conspicuous developments of modern humanitarian law was that, it had been strongly influenced by human rights doctrines. The principal sources of IHL are the four Geneva Conventions of 1949 and the two 1977 Protocols Additional to these treaties. There are also some earlier instruments on the subject and some customary rules. This paper therefore seeks to bring to the limelight the responsibilities of states in the observance of restraints during armed conflict. This will be done by first understanding the features of international humanitarian law, the development of modern armed conflict and the categories of participants to an armed conflict. By so saying regard will also be had to the method and means of warfare.

II. FEATURES OF INTERNATIONAL HUMANITARIAN LAW

International humanitarian law has become less geared to military necessity and increasingly impregnated with human rights values. When dealing with the distinction between the laws regulating international armed conflict and that governing internal armed conflicts, the Appeals Chamber pointed out that one of the most conspicuous developments of modern humanitarian law was that it had been strongly influenced by human rights doctrines. In addition, the '*si omnes* clause' has been gradually abandoned. While the majority of the Hague Conventions has turned into customary law, recent agreements such as the four 1949 Geneva Conventions, as well as the 1977 Additional Protocols, explicitly apply to the Contracting States Parties to an

*LL.B Hons,LL.M, Ph.D
[1] *Kalshoven F. and Zegveld L. Constraints of Waging War, ICRC, Geneva Switzerland, (2001*).

armed conflict , irrespective of whether or not, one of the belligerents is not bound by a specific treaty. Today it has therefore become difficult or even impossible for belligerents to claim that they are free to disregard the existing law.

III. DEVELOPMENTS IN MODERN ARMED CONFLICT

The main treaties of international humanitarian law are the four Geneva Conventions of 1949 and their Additional Protocols of 1977. Regard being had to modern armed conflicts, the following is worth noting;

- New classes of combatants emerged (for example, partisans in countries under German occupation; guerrillas in colonial countries)
- Two classes of war: war of the rich – wars between highly developed countries, using sophisticated methods and weapons and the war of the poor – in colonial countries, usually conducted by guerrillas, In this sense it is apt to give an instance of U.S invasion of Iraq and the dethronement of Saddam Hussain.
- New means of destruction: the aircraft which was first used in the war between Italy and Turkey in 1911-1912; atomic bomb used on Hiroshima and Nagasaki in 1945; manufacturing and stocking of nuclear weapons, along with missiles, chemical and biological weapons. Assad of Syria is being accused of using biological weapons against the opposition at the beginning of a four-year old conflict in the country. There was also the use of white phosphorous by Israel on the Palestinian civilians.
- Spread of civil wars (Great Powers have fought each other by proxy; in developing countries conflicts are fueled by tribal and political differences)
- Spread of terrorism. There is the Boko Haram insurgency in Nigeria, which presently lasted for over eleven years and the issue of Islamic States, dominating most of the Arab countries.
- The rules on neutrality have been frequently ignored and have fallen into decline.

All of these developments prompted States to supplement and update the traditional rules of the fundamental dichotomy between combatants and civilians. It should be clear from the above that, international humanitarian law is premised on a basic distinction between combatants and civilians.

Combatants who meet the requirements for legitimately participating in armed hostilities (we can call them *lawful combatants or legitimate belligerents*), if captured, are entitled to prisoner of war status, according to the provisions of Geneva Convention III of 1949, (unless they have the nationality of the Detaining Power (or owe a duty of allegiance to such Power), as the British Privy Council specified that they:[2]

(i) may not be punished for participating in hostilities;
(ii) are entitled to the treatment (rights and privileges) accorded to combatants who satisfy all the requisite conditions and
(iii) may only be tried and punished for war crimes they may have perpetrated during the hostilities (or for offences committed while in detention after capture).

IV. STATES DUTY TO OBSERVE RESTRAINTS

According to the British *Manual of the Law of Armed Conflict (2004):*

> The UK 'would only consider using nuclear weapons in self-defense, including the defence of its NATO allies, and even then only in extreme circumstances.

The Third Geneva Convention of 1949 also specified that *militias and volunteer corps*, already contemplated by the 1907 Hague Regulations as well as customary law, as possible legitimate combatants if they met four requisite conditions, were to satisfy a fifth requirement: that of belonging to a Party to the conflict.[3]

Plainly, the rationale for adding or at least spelling out this requirement was that, in this way at least the most glaring abuses were prevented (the lack of the requirement entailing the forfeiture of prisoner of war status in case of capture). A greater onus was placed on irregular combatants, and belligerents were implicitly made accountable for any misconduct by irregulars.

It is however noteworthy that , parties to an armed conflict are limited in their choice of weapons, means and method of warfare, by rules of international humanitarian law, governing conduct of hostilities. Relevant rules include the prohibition on using means and method of warfare of a nature to cause superfluous injury or unnecessary suffering and on the prohibition on using means and method of warfare that are incapable of distinguishing between civilians or civilian objects and military targets.[4]

[2] *Public Prosecutor* v. *Koi et al* at 856–8.)

[3] *See Kassem* case, at 476–8).

[4] Henckaerts, J.M. and Doswald-Beck, L., (eds), Customary International Humanitarian Law, (Cambridge University Press, 2005).

A state that is a party to Additional Protocol I of 1977, determining the legality of weapons, has a treaty obligation pursuant to Article 36, which requires each state to determine whether the employment of a weapon, means and method of warfare, by international law, it studies, develops, acquires or adopts, would, in some or all circumstances, be prohibited, applicable to the state.[5]

The most basic tenet of international humanitarian law, with respect to the employment of means of warfare is the rule laid down in Article 22 of the Hague Regulations, with regard to 'the rights of belligerents to adopt means of injuring the enemy, is not unlimited'. If therefore this is applicable to belligerents, what more of a state, which may likely be a state party to some of the humanitarian law instruments? As such, subsequent technical developments and state practice have made the prohibition on use of light explosives or inflammable projectiles lose much of its significance

Other prohibitory rules dating from the period of Hague Peace Conference and which have retained their validity, concern the employment of dum-dum bullets and of poison or poisoned weapons.[6]

The Hague Regulation contains only few rules relating to methods of warfare. Article 23(b) prohibits killing or wounding treacherously individuals belonging to the hostile nation or army. The Hague Regulation also prohibits not so much on account of their treacherous nature because of the cruelty and lowered standard of civilization they betray, by providing: to kill or wound an enemy, who having laid down his arms or no longer having no means of defence, has surrendered at discretion *hors de combat*.[7]

4.1. NEW CATEGORIES OF COMBATANTS.

(i) Partisans. In 1949, in order to take account *ex post facto* of the partisan war waged in many countries of Europe during the Second World War, the Third Geneva Convention added in Article 4(2) on the categories of combatants entitled to prisoner of war status in case of capture, that of 'organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied', provided they fulfilled the same four conditions established in 1899 for other irregular combatants (a fifth condition was also spelled out, stipulating that the combatants must be linked to a party to the conflict).

(ii) Guerrillas. After 1949 the question of guerrilla fighters (that is, irregular combatants resorting to guerrilla warfare within the framework of inter-State wars or wars of national liberation) became increasingly important. In the 1974–7 Geneva Conference the debates were complex and protracted, but eventually led to the adoption of a compromise formula laid down in a particularly convoluted provision of Article 44.

This stipulation leaves unaffected three of the requirements provided for in 1899 and 1949 for other categories of combatants namely,

- being linked to a party to the conflict;
- being under a responsible command; and
- complying with the laws of war.

It also reduces the two other criteria (having a distinctive sign recognizable at a distance and carrying arms openly.[8]

Thus the two traditional requirements are relaxed to the general condition of 'distinction from civilians' (presumably by insignia or any appropriate outward token, or by openly carrying weapons); in addition, combatants are only required to comply with this condition *during* an armed attack or immediately prior to it.

Furthermore, if captured by the adversary, irregular combatants not fulfilling the condition do not forfeit their status of lawful combatants; consequently, they continue to be entitled to prisoner of war treatment, although they are liable to punishment for violation.[9]

The requirements just mentioned were further relaxed with regard to such situations as *wars of national liberation* and *belligerent occupation*. With respect to these situations, the second sentence of Article 44(3) only requests that a combatant should carry his arms openly '(a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate'. This second requirement has been widely interpreted to the effect that a combatant is required to carry arms openly as from the moment he is visible while moving to the place from where the attack is going to be launched.

[5] Lawand, K., Reviewing the Legality of New Weapons, Means and Method of Warfare, International Review of the Red Cross, Volume 88 No 864, 2006, pp. 925-930.)

[6] Kalshoven, F., and Zegveld, L., Constraints on the Waging of War, (ICRC, Geneva, 2001), p.41.)

[7] *ibid*

[8] See *Commentary on the Additional Protocols*, at p.1672. See also the UK *Manual of the Law of Armed Conflict* (UK Ministry of Defence), (Oxford: Oxford University Press, 2004), at 4.3)

[9] Article 44(3).

Thus, guerrillas fighting in wars of national liberation or in occupied territory are favoured in two respects: first, the requirements exacted from them are less stringent than those necessary for irregular combatants fighting in 'normal' situations; second, they must fulfill these requirements under circumstances ('military engagement', etc.) which are narrower in scope than those for which guerrillas in 'normal' fighting must fulfill their conditions. However, in another important respect Article 44 is more exacting, or stricter, with guerrillas fighting in 'special' situations: if irregular combatants not satisfying the requirements of the second sentence of Article 44(4), are captured in the course of a war of national liberation or in occupied territory.

Article 44(4) of the Protocol Additional to the Four Geneva Conventions provides generally:

> The combatant who fall in to the power of an adverse Party while failing to meet the requirements set forth in the second sentence, of paragraph 3 shall forfeit his rights of a prisoner of war but shall nevertheless be given protection equivalent in all respect to those accorded to prisoners of war by the Third Convention and this Protocol…

(iii) Mercenaries. In 1960–70 the number of mercenaries became conspicuously large in Africa, where they were used both by the ruling elites (for internal security, intelligence, the training of special commandos, etc.)

The illustration given by G. Aldrich (a distinguished US lawyer who, as head of the US delegation) greatly contributed to the elaboration of Article 44, may be recalled. He mentioned the case of a guerrilla fighting in an occupied territory, who disguises himself as a civilian; if he is stopped and searched by occupying troops and suddenly draws his weapon and opens fire on the soldiers, on capture he will be deprived of prisoner of war status provided it can be proved that. he was engaged in a military deployment preceding the launching of an attack. Only if he was not so engaged must he be treated as a prisoner of war.[10]

It is noteworthy that many African States took a strong stand against the latter practice.

Accordingly, both in the UN and at the Geneva Conference of 1974–7, African States claimed, with the support of other developing countries and the socialist group of countries, that mercenaries should be treated as unlawful combatants (hence not entitled to be treated as prisoners of war on capture). Western countries retorted that mercenaries fulfilling the various requirements of international law should be regarded as legitimate combatants, lest an ideological element be introduced into the laws of warfare, contrary to the basic humanitarian principle of equality of treatment.

The growing insistence on this issue by countries in the UN and the Organization of African Unity (now AU) found official recognition in the adoption of Article 47 at the Geneva Convention. The provision states in paragraph 1 that, 'a mercenary shall not have the right to be a combatant or a prisoner of war' and then gives, in paragraph 2, a detailed definition of a mercenary.

4.2. THE FUNDAMENTAL DICHOTOMY BETWEEN COMBATANTS AND CIVILIANS.

It should be clear from the above that international humanitarian law is premised on a basic distinction, between combatants and civilians. Combatants who meet the requirements for legitimately participating in armed hostilities can be called as *lawful combatants or legitimate belligerents*), if captured, are entitled to prisoner of war status (unless they have the nationality of the Detaining Power (or owe a duty of allegiance to such Power), as specified by the British Privy Council.[11]

This entails that they;

- may not be punished for participating in hostilities;
- are entitled to the treatment (rights and privileges) accorded to combatants who satisfy all the requisite conditions; and
- may only be tried and punished for war crimes they may have perpetrated during the hostilities (or for offences committed while in detention after capture).

Combatants who instead do not meet those requirements, or some of those requirements, if captured, (i) may be tried and punished for taking part in armed action, (ii) are not entitled to the status of prisoners of war; (iii) if their status is not clear, or in other words, if it is not clear whether they belong to one of the categories of legitimate belligerents, under Article 5 of the Third Geneva Convention of 1949, they 'shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal'. Clearly, this category of persons does not constitute a third class (those of combatants and civilians making up the other two classes). These combatants are to be regarded as civilians and hence protected.

4.3 THE FLAWED CATEGORY OF 'UNLAWFUL COMBATANTS

Since the famous *ex parte* ***Quirin's*** **case** (concerning seven German servicemen, who in 1942, landed in the USA, abandoned their uniforms, and set out to carry out acts of sabotage, this category is introduced.

[10] G. Aldrich, 'New Life for the Laws of War', 75 AJIL (1981), 773–4).
[11] *Public Prosecutor* v. *Koi et al.* (at 856–8).

The US case law has identified a third category of combatants, that of 'unlawful combatants.[12]
This was also termed later, by R. R. Baxter as 'unprivileged combatants'. This category can be accepted only if it is used for *descriptive* purposes. Instead, it cannot be admitted as an intermediate category between combatants and civilians. In particular, it would be contrary to international humanitarian law to hold that this category embraces persons who may be considered neither as legitimate belligerents nor as civilians (or at any rate 'protected persons'), and are therefore deprived of any rights. Article 5 of the Third Geneva Convention provides that:

> Where in occupied territory an individual protected person is detained as a spy or saboteur or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present convention.

Furthermore, one cannot share the view that, persons engaging in armed hostilities without meeting the requisite conditions may be held in 'administrative detention without trial (and without the attendant privileges of prisoners of war). This proposition is probably intended to apply to such categories as the Taliban or members of Al Qaeda fighting in Afghanistan or to Palestinians fighting in the territories occupied by Israel.
The fact that private individuals do engage in armed hostilities against the enemy amounts to a war crime, has been stated by various authorities:[13]

A definition of 'unlawful combatants' is given in an Israeli law, the Incarceration of Unlawful Combatants Law, 5762–2002, whereby "unlawful combatant" means:

> a person who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel, where the conditions prescribed in Article 4 of the Third Geneva Convention of 12th August 1949 with respect to prisoner-of-war status in international humanitarian law, do not apply to him.'

This definition is subjective, for it only relates to the State of Israel, but not any country and it may be intended for the Palestinian people struggling tor an independent Palestinian State,

V. CONCLUSION

The foregoing discussion reveals that, the scope of international humanitarian law could be expanded, reaching out into the areas of human rights and international criminal law. In an era charecterised by the existence of nuclear weapons, there is the need for states, engaged in an armed conflict, to ensure the observance of international humanitarian law.

It is however noteworthy that, the applicability of international conventions on warfare to armed conflicts, was always uncertain and precarious. Therefore, the need to observe principles of international humanitarian law is as encapsulated by common Article 2 common to the Geneva Convention. As for the means of warfare, there existed few specific prohibitions, in addition to some general principles, very loosely set out. Various methods of combat were permitted as long as the parties could ensure that only belligerents are targeted. However the introduction of a flawed category to the scenario, by U.S and Israel, that is, unlawful combatant, is subjective and showcases the fact that these states could not exercise restraints. This was intended only to deny persons captured, the protection under the Third Geneva Convention.

It is therefore recommended that whether a state is a party to a particular treaty or not, there is thereby the need to observe the principles of international humanitarian law. However it remains arguable if a state could be allowed the use of biological or nuclear weapons for self defence.

[12] Qurin's case at 468–74).

[13] See L. Oppenheim and H. Lauterpacht, *International Law*, 7th edn. (London, New York, Toronto: Longmans, Green and Co., 1952), at 567 and 574;
M. Greenspan, *The Modern Law of Land Warfare* (Berkeley: University of California Press, 1959), at 61, 265.)
See also the 1958 British *Manual of Military Law*, at Article 626(p).
7 R. R. Baxter, 'So-called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs', 28 BYIL (1952), 323–45.