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THE USE OF FORCE IN INTERNATIONAL LAW: A CRITIQUE

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Introduction

The word "force" has been defined as power, violence, pressure directed against a person or thing. International Law is defined as the legal principles governing the relationship between nations, participants as international organizations, multinational corporations, non governmental organizations, and even individuals who invoke their human rights or commit war crimes. It can also be called 'Laws of Nations'.[1] International Law encompasses International Humanitarian Law which is that aspect of international law that regulates the conduct of war or armed conflict[2].

This paper seeks to critically analyse the use of force amongst and between States *vis a vis* the provisions of International law.

The Use of Force

The rules governing resort to force is a central element within International law and together with other principles such as territorial sovereignty, independence and equality of states etc. provide the framework for international order. While domestic systems have, on the whole, managed to prescribe a virtual monopoly on the use of force for governmental institutions, reinforcing the hierarchical structure of authority and control, International law is in a different situation. It must seek to minimize and regulate the resort to force by States without itself being able to enforce its will. Thus International law seeks to provide mechanisms to restrain and punish resort to violence.[3] According to Hall[4], international law has no alternative but to accept war, independently of the justice of its origin, as a relation to which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation. It is thus evident herein that war is an inevitable part of human existence.

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1 Bryan Garner (ed) Black's Law Dictionary, 7th Ed, West group Publishing Co, Minnesota,(1999)

2 Available at www.icrc.org accessed on 23 January 2010

3 M. N. Shaw, International Law 5th ed Cambridge University Press, London, 2004 p.1013.

4 An International Law expert

War[5] may begin, first by declaration of war. Secondly, it may arise upon the commission of an act of force, under the authority of a state, which is done *animo belligerendi*, or which is done *sine animo belligerendi*, the State against which it is directed expressly or impliedly elects to regard as creating a state of war thus repelling force by force. It is enough if only one of the parties asserts the existence of a state of war.[6] It is however pertinent to state that the question whether a state of war exists, remains of significance in International law (e.g. the law of neutrality), and Municipal law (e.g. concerning the status of the aliens), where parties to hostilities regard themselves as legally at war. However, the importance of the above question has been greatly reduced due to the fact that the United Nations Charter on the use of force draws no distinction between war and armed force short of war. Article 2(4) states thus: *All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations.*

Furthermore, the 1949 Geneva Conventions and the 1977 Protocols, which deal with the protection of persons not actively, engaged in wars and armed conflicts, Apply to all cases of declared war or any other armed conflict which may arises between two or more High contracting parties even if the state of war is not recognised by one of them[7]

Historical Analysis of the Use of Force

Historically, there existed the "Doctrine of Just War" which was a product of the Christianisation of the Roman Empire in the thirteenth century. The doctrine clearly stipulated that force could be used by any state provided it complied with divine will. St. Augustine[8] defined "just war" in terms of avenging of injuries suffered where the guilty party has refused to make amends, and thus the war was to punish wrongs and restore the peaceful *status quo* but not further. Herein, aggression was unjust and the recourse to violence had to be strictly controlled with. St. Thomas Aquinas[9] in the thirteenth century, expanded the scope of just war by stating that it was the subjective guilt of the wrongdoer that had to be punished rather than objectively wrong activity. Therefore where

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5 This is a state of open, armed, often prolonged conflict carried on between nations, states, or parties. Definition is derived from http://www.thefreedictionary.com/war, Accessed on 23 January, 2010.

6 McNair and Watts, The Legal Effects of War, 4th Ed, 1966 . P78

7 5. Article 2 common to the four Conventions of 1949.

8 J. Eppstein: The Catholic Tradition of the Law of Nations, 1935, P. 65.

9 Von Elbe: The Evolution of the Concept of Just War in International Law; 33 AJL, 1930.

war was waged by a sovereign authority and accompanied by a just cause (i.e. the punishment of the wrongdoer), such war was justified.

When the European States started emerging, there was a paradox of wars as Christian States were fighting one another, each justified in the justice of its causes and this greatly affected the approach to Just war. There arose the need to adopt peaceful resolution of disputes amongst States before resorting to the use of force. This new state of international affairs emphasised the legal doctrine of maintaining the international order by peaceful means rather than applying force to suppress wrongdoers. States herein were encouraged and expected to communicate the existence of conflicting situations between themselves, and request for reparation before the resort to force. Therefore the legality of recourse to war was to depend upon the formal processes of the law. Eventually, the concept of Just War disappeared from the domain of International law as States were now regarded as sovereign and equal. No state could presume to judge whether another's cause was just or not.[10] States were expected to honor treaties amongst them, respect the independence and integrity of other States, and try to resolve their differences by peaceful methods. However where war did occur, it entailed a series of legal consequences such as laws of neutrality, the legality of force, general conduct of the war etc. Apart from the direct use of force at war, there existed other methods of force such as reprisals, pacific blockades etc.

After the First World War,[11] a general international institution to oversee the conduct of the world community to prevent wars was created and called the League of Nations. The Covenant of the League declared that member States should submit disputes likely to lead to a rupture to arbitration, judicial settlement or Inquiry by the Council of the League, and members agreed not to go to war with members who comply with such decision. However the Covenant gave a period of three months after the Council's decision (supposedly called cooling off period) after which States could decide to go to war.[12] From the above, it is evident that the League did not prohibit war or the use of force but instead set up procedures to restrict them to tolerable levels. Therefore, in a bid to correct this anomaly, the General Treaty for the Renunciation of War[13] was eventually signed amongst the member

10 L. Gross: "The Peace of Westphalia" 1948, 42 AJIL P.20; Brownlie, Use of Force Op cit, P. 14.

11 In 1918

12 Brownlie, Use of Force Chapter 4. Articles 10-16 of the Covenant

13 The Kellogg-Briand Pact of 1928

states in which State's recourse to war was condemned and renounced. Somewhat ironically, 63 states[14] were parties to the Treaty when the Second World War started in 1939. The Treaty still being in existence, the prohibition of the resort to war is a valid principle of international law. This however, does not mean that the use of force in all circumstances is illegal[15] After the formation of the United Nations, the United Nations Charter has been quite so instructive on the use of force in international law and international humanitarian law.

The United Nations Charter and the Use of Force

Article 2(4) of the United Nations Charter of 1945 has reiterated that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations. This provision of the Charter as confirmed by the Nicaragua (Merits) Case [16] and is a rule of Customary international law applying to all states, despite the fact that the Article referred to "members of the Charter." The reference to "force" rather than "war" is beneficial and thus covers situations where violence is employed, so as not to fall short of the technical requirement of the state of war.[17]. From the text of the United Nations Charter above, the extent of prohibition in Article 2(4) is not clear but this has further explained the 1970 Declaration on Principles of International law.[18] Firstly, wars of aggression constitute a crime against peace for which there is responsibility under international law. Secondly, States must not threaten or use force to violate existing international disputes. Thirdly, States are under a duty to refrain from acts of reprisal involving the use of force. Fourthly, States must not use force to reprove people of their right to self-determination and independence. Fifthly, States must restrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State and must not encourage the formation of bands for incursion into another State's territory.[19] According to Rosen Tock, although the Declaration is not of itself a binding legal document, it is important in the interpretation chapter provisions.[20] On the word "Force", Article 2(4) prohibits the use of

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14 Virtually the whole of the International Community as at then .

15 M. N. shaw Op cit p. 1017.

16 *Nicaragua v. United States* ICJ Reports (1986) P. 14

17 M. N. Shaw Op cit. P. 1018

18 ibid

19 ibid

20 The Declaration on Principles of International Law Concerning Friendly Relations " 65 AJIL (1971) P. 713

armed force, whether amounting to war or not. It seems not to prohibit political pressure (e.g. severance of diplomatic relations) or economic pressure. (e.g.trade boycott) which will render these actions illegal. It has however been argued that while various forms of economic or political coercion can be regarded as threats to peace, they are not to be regarded as coming under the prohibition of Article 2(4) which is to be understood as directed against the use of armed force.[21] On the other hand, it can be argued that some of the 1970 Declarations of Principles of International law, recalled the duty of States to refrain from using military, political, economic or and other forms of coercion aimed against the political independence or territorial integrity of any State. The International Covenants on Human Rights of 1966, emphasised the right of all persons to freely pursue their economic, social and cultural development.[22] A case may be made that such action are contrary to the United Nations Charter, but it is still unclear whether it violates Article 2(4) above. However the use of armed force by a State against another is clearly a breach of Article 2(4) and any State that assists the offending State with armed forces or military equipments and facilities is indirectly engaged in the use of force contrary to Article 2(4).

Article 2(4) covers threat of force as well as use of force. The International Court of Justice in its Advisory Opinion to the General Assembly of the United Nations on the Legality of the Threat or Use of Nuclear Weapons[23] noted that "a signaled intention to use force if certain events occur" could constitute a threat under Articles 2(4), where the envisaged use of force would itself be unlawful. The Court herein appeared to accept that mere possession of nuclear weapons did not constitute a threat except the projected use of those nuclear weapons would be a consequential and necessary breach of territorial integrity, political independence of a state, against the purposes of the United Nation or whether, in the event that it were intended for self defense, it would or necessarily rotate the principles of necessity and proportionality, as same will make it unlawful.[24] States are allowed to maintain order within their territory through the use of some force example to quell insurrection, rebel attacks, riots etc, without contravening Article 2(4) above but where alien persons or property are

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21 Goodrich et al, Charter of the United Nations, 3rd ed, 1969, P49

22 See also Charter Economic Rights and Duties of States, 1974

23 18 (1997) 35. I.L.M 809

24 M.N. Shaw op cit P. 1020. See also Nuclear Weapon case, Opinion supra Paras 47-48

destroyed, the state has to pay reparation to the State of the alien concerned[25].

Article 2(4) further prohibits the use of force "against the territorial integrity or political independence of any state, or in any manner in consistent with the purposes of the United Nations." This includes that no State shall use armed force and deprive another State of the whole or part of its territory [26]or bring another state under its own control,[27]or claiming the territory of another state through armed forces.[28] The words, "territorial integrity" and "political independence" are interpreted widely to encompass the all legal rights which a state has.[29] This is so as the relevance of international relations lay in the due regard and respect that States have towards the territorial sovereignty of other States.

Circumstances where Use of Force is Permitted

It must be noted that since the establishment of the United Nations Charter regime, there still exists various circumstances under which the use of force by States in permissible. This includes :

a. ***Self Defence*** *:*

The right to use force in self defence was enunciated in the Caroline Case[30] wherein the American Secretary of State laid down the essentials of self defence, to include: the necessity of self defence, instant, overwhelming, leaving no choice of means and no moment for deliberation. Furthermore, it was therein stated that action taken in pursuance of self defence must not be unreasonable nor excessive. This has evolved and accepted as part of customary international law. Article 51 of the UN Charter clearly stipulates that nothing in the present Charter shall impair the inherent right of an individual or collective self defense, if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measure necessary to maintain international peace and security. Measures taken by members in the exercise of this right to self defence shall be immediately reported to the Security Council and shall not in any way,

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25 M. N. Shaw op cit P. 1036

26 Example the 1939 invasion of Poland by Germany

27 The 1978 Afghanistan case where USSR was guilty of this .

28 Example is the Iran-Iraq war of 1980 where Iran attacked Iraq in order to regain part of Shatal-Arab waterway which it had conceded to Iran by a 1975 Treaty of Reconciliation between the two states

29 1970 Declaration on Principles of International law, 4th and 5th paragraphs of the Section on the Use of Force

30 RY Jennings, "The Caroline and Mc Leod Cases" 32 AJIL,1938 P.8

affect the authority and responsibility of the United Nations Security Council under the present Charter to take at anytime such action as it deems necessary in order to maintain or restore international peace and security.

Arguments have arisen as to the exact extent of the right to self defence under Article 51. Some persons agree that Article 51, together with Article 2(4) provide the limitations for the doctrine of self defense (i.e. limited to where an armed attack occurs) while other writers opined that there exists in customary international law a right of self defence over and above the specific provision of Article 51. This is due to the words "nothing in this present Charter shall impair the inherent right of States to self defence."[31] Whatever the case may be, the International Court of Justice in the Nicaragua case, clearly established that the right to self defence exists as an inherent right under International law and under the UN Charter. Thus, customary law has existed with treaty law (i.e. the UN Charter) herein.

The term "an armed attack" has been said to include attacks of regular armed forces across an international border; sending armed personnel to carry out acts of armed attack and activities which are usually conducted by regular armed forces.[32] It is however uncertain whether assisting rebels by providing them with weapons or logistical support could warrant the excuses of self defence in the use of force.[33] It is opined herein that indeed this could warrant the excuse of self defence. The lack of specifics as to what constitutes armed attack has led to difficulty in categories of the particular uses of force in self defence. Therefore the United States of America launched missile attacks on the installations of Sudan and Afghanistan associated with the organization of Osama Bin Laden in 1998, as self defence, due to the bombing of the United States Embassy in Kenya and Tanzania. This defense was said to be in accordance with Article 51 of the Charter and in exercise of its right to self defence.[34] They stated that the missiles were necessary and proportionate to the imminent threat of further terror attacks on United States personnel and facilities.

It can be admitted that the use of force as self defence against terror attacks is permissible as this was utilised by the Charter States against Afghanistan for the Taliban regime providing bases for Al Qaeda

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31 J Brierly , The Law of Nations , 6th Ed, Oxford,1963,P 417-41

32 See The Nicaragua case supra

33 M N Shaw op Cit 1027

34 See Contemporary Practices of The United States 93 AJIL, 1999

Organization from which the organization bombed the World Trade Centre in New York on September 11, 2001. This they did with the support and acquiescence of the international Community and NATO alliance.[35] Here, Article 5 of the NATO Treaty was invoked, on the collective self defence with the use of force of NATO[36] members, where any armed attack is taken against any of their members. This writer however, has reservations about the use of force in self-defence. Indeed, it has been opined that this case has set a dangerous precedent and has expanded the scope of self-defense to which other states may emulate[37]

Another area to examine in the use of force is whether states have a right to anticipatory or pre-emptive self defence or whether it exists at all. Viewing from the point that self defence is restricted to actual armed attacks, preemptive self defence may seem unlawful. Nowadays, weapons can attack other states at very tremendous speed, which may not give the other state a time to prevent its accomplishment. Thus, States at times resort to preemptive self defence.[38] However, States are normally suspicious of preemptive self defence except in strict conditions relating to proof of the imminence of armed attack, that would jeopardize the life of the target State, and the absence of peaceful means to prevent the proportionate to the perceived imminent attack.[39] Thus the type of weaponry to be used and the profound risks associated with them, are of relevant consideration.

The term "necessity of preemptive self-defence" has been greatly attacked by some writers, including Cassimatis, who argues that this right can be easily taken advantage of and given subjective interpretation, particularly where the imminent actual armed attack did not seem immediately threatening and military action did not seem of urgent necessity (nor was there any practicable alternative). He strongly criticized[40] the US military action against Iraq in 2002. On the other hand, Sofaer considers a strong case can be made for necessity of preemptive action and that the narrow standard can only apply

35 Available at http//.www/nato.int/terrorism/fact sheet Html Accessed on 23 March 2009.

36 North Atlantic Area

37 Williamson: Terrorism, War and International Law' p 202

38 Israel used preemptive self defense against Egypt in 1967

39 I. C. J. Reports 1969 PP 226, 245.

40 A. Cassimatis, 'Confronting Iraq. Does International Law Matter?' International Law Association Twilight Seminar, Brisbane, 2003, P. 6

where the potential victim is able to rely on police powers of state which the attack is anticipated.[41]

In the nineteenth century, it was clearly regarded as lawful the use of force to protect nationals and properties situated abroad and many incidents occurred to demonstrate the acceptance of this position.[42] However, since the adoption of the UN Charter, it has become more controversial due to the fact that such actions will affect the territorial integrity and political independence of the target State infringed. These actions were evident in the Entebbe incident where Israel commandos rescued their Nationals from a flight that had been hijacked by Arab terrorists and landed in Uganda[43]. The Israelis claimed that their inherent right to self defense extended to a right to defend their nationals abroad, thus suspending the sovereignty of the local State .[44] Although the Israel action was not widely condemned and may indeed be said to be accepted, there in still doubt whether the rules stretch this far. This will provide infinite opportunities for abuse.[45] The United States has in recent years justified armed action on other States on the grounds partly for the protection of American citizens abroad such as the invasion of Grenada in 1984, the invasion of Panama in 1989,[46] bombing of Iraq in 2003 etc. Herein, indeed when United States launched missiles at the headquarters of the Iraq's military intelligence in Baghdad, a consequence of an alleged plot to assassinate former President Bush of USA, it argued that the resort to force was a justified means to protect its citizen in future.

To balance the contradictory approvals or disapprovals on this, the writer opines that the defence of nationals by using force should be done as the last resort. It is also opined that the difficulty with advocating a wide legal interpretation for self defence to incorporate a right to anticipatory attacks is that it may become so elastic that the prohibition against the use of force enshrined in Article 2(4) of the UN Charter would be seriously compromised. The recent terrorist attacks[47] all over the globe and their associated strikes, have only encouraged

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41 Q U. T Journal, Op cit P.7

42 M.B Akehurst, " Intervention in The World Politics" Oxford, 1984 P.95

43 Who were unwilling to to help

44 Harris, Cases and Materials, International Law, 6TH Ed, Sweet and Maxwell, 2004 P.933

45 Harris Op Cit

46 M N Shaw Op cit 1033

47 Recently and sadly too, Nigeria has been tagged a terrorist State by the Obama-led United States government just because of the foiled attempt by the 23year old Nigerian named Abdulmallab Farouk (reputed to be linked with Al Qaeda in Yemen), to blow up a US plane on 25 December 2009.

the extension of the self defence doctrine, thus leading to a significant loosening of the legal constraint on the use of force. Therefore, there is the need for a careful and controlled extension of the doctrine in the international political landscape.

The Reason Of Collective Self Defence

The term collective self defence has been said to mean the act of defending other designated forces apart from that of ones country by reason of association.[48] Only the National Command Authorities may authorize US forces to exercise the right of collective self-defense. Article 51 of the UN Charter clearly stipulates that States have the inherent right of collective self defense. This itself predates the Charter as a rule of customary international law. However the exact definition of collective self defense may seem ambiguous. Some writers have preferred that this may be used by States under certain treaties or organizations. And, other writers opined that this is based on comprehensive regional security systems. In practice, the later comprehensive regional security systems have been adopted by States and organizations like NATO, [49] Warsaw Pact etc. have been established pursuant to Article 51. Thus, where one member is attacked, this is treated as an attack on all the members.

In the Nicaragua case,[50] the International Court of Justice emphasised that customary law had already established self-defence. It further stated that the exercise of that right depended upon both a prior declaration by the State concerned that it was victim of an armed attack, and a request by the Victim State for assistance. The Court further stated that where a State wants to use force against another State, on the ground that State has committed a wrongful act of force against a third State, that wrongful act of force must be an armed attack. This right to collective self-defence can be seen in the invasion of Kuwait by Iraq on 2nd August 1990, as States allied against the invasion used force to end Iraq's conquest and occupation of Kuwait.[51] It is worthy to also mention that the UN Security Council Resolution

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48 Definition is derived from http://www.thefreedictionary.com/war accessed on 23 January, 2010.

49 North Atlantic Treaty Organization (NATO). This organization has been quite instrumental in the U S led Afghanistan war.

50 ICS Report, 1986 pp14,103-105.

51. H. Wilson, International Law and the Use of Force by National Liberation Movements, Oxford, 1988 P.20

661 also recognised the Kuwait inherent right of individual and collective self defence.

(b) Self Determination [52]

Another name for self determination among States is national liberation. The use of force for self determination may emerge in the form of using force by national liberation movement, using force on behalf of a group of people struggling for independence or using of force against these movements. The end of the Second World War in 1945 witnessed to the break up of colonial empires and the increasing consensus about the right of people to self-determination. Thus it seemed that wars of national liberation were not outside the concern of international law, although they are seemingly intra-State wars.

Until 1946, the people of the 20th century witnessed the worst horrors of the use of force in the history of mankind. Millions of people had been killed in the first and second world wars before the United Nations Organisation was set up to create a peaceful world. Nonetheless, the UN Charter did not prohibit the use of force in Article 2 and Article 51. Thus, when the demands of self-determination were not met, the use of force for the attainment of it was seen as one of the ways of realising it. It was argued indecisively in the Security Council upon India invading Goa. This eventually led to the adoption of the Declaration on Principles of International Law in 1970 which emphasised that States must refrain from any forcible action which deprives people of their right to self determination. Here, the legitimacy of the struggles of people for liberation from colonial domination and alien subjugation was reaffirmed. Most third world countries appreciated this.

However, the view that people have the valid right to use force in self defense and self determination remains foggy.[53] Some however argued that where forcible action has been taken to suppress the right to self determination, then force may be used to counter this and achieve self determination. [54]

Another issue here is the Third State involvement in the self determination conflicts of another State. These States have supported by arming, financing, providing bases of their territories to conflicting

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52 M. Sahin, The Use of Force in Relation to Self Determination in International Law, Central and Eastern European Online Library available at www.ceel.com accessed on 28 May 2009.

53 N. Macormick, 'Is Nationalism Philosophically Credible' in William Tunning Ed, Issues of Self. Determination' Aberdeen University Press Aberdeen, 1991, pg.8

54 M. N. Shaw Op Cit P. 1038

States. This situation is contrary to the rule of International law which gives States the duty of not assisting armed bands that operate in the territory of another State.[55] Article 2(4) of the UN Charter imposes a duty on all States to refrain from organising, assisting or participating in acts of civil strife or terrorist acts within another State. However, the 1970 Declaration of International Law Principles gives States the right to seek and get support for self determination in accordance with the purposes of the UN Charter.[56] There is indeed ambiguity in the distinction between each of these situations.

(c) Humanitarian Intervention

Humanitarian Intervention means the threat or use of force across State borders by a group or group of States aimed at preventing or ending widespread and grave violations of fundamental human rights of persons other than its own citizens without the permission of the State within whose territory force is applied.[57] It has been supported in order to protect the lives of persons in the warring States and not necessarily the citizens of the intervening state.[58] In the nineteenth century, intervention was accepted in international law[59] but recently, with Article 2(4) of the UN Charter on territorial integrity of states, and also the abuse of it by more forceful states into the territories of the weaker states, it is now viewed with a lot of caution and restraints. It is thus the case that the international community might refrain from a condemnatory stand of humanitarian intervention, particularly as cases abound where large numbers of lives have been saved in circumstances of gross oppression by a State, due to outside humanitarian intervention. An example can be seen in the Kosovo Crisis of 1999 when NATO argued that its bombing campaign on Kosovo was humanitarian intervention in support of the repressed ethnic Albanian population of the province of Yugoslavia. Once again, International law had seemed unsettled therein. Furthermore, it seems likely that the statement of the Court in *Nicaragua v. United States,*[60] that humanitarian aid cannot be regarded as unlawful intervention, may soon be true. It is however opined by the writer that

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55 The 1970 Declaration of Friendly Relations which interprets Article 2(4) of UN charter

56 Nicaragua Merits case Supra P. 824

57 J LHolzgrefe and Robert Kochane, 'Humanitarian Dilemna, Ethical, Legal,and Political Dilemna' available at http://catdir.loc.gov/catdir/samples/cam034 /2003269355. pdf accessed on 23 January 2010

58 Ibid-The United Nations have been accused of not doing this to prevent the genocide in Rwanda in 1994.

59 H. Ganji, International Protection of Human Rights, New York 1962

60 supra

force should only be used in humanitarian intervention when all non violent methods have been exhausted and the scale of real or potential suffering will justify the use of military action. This may not be the case in the US –Iraq war. Furthermore, the use of force in humanitarian intervention should be collective, limited in scope, proportionate to achieving the humanitarian objective and consistent with International Humanitarian Law.

(d) International Humanitarian Law and the Use of Force

International law treats civil wars as purely internal matters with the possible exception of self determination conflicts. Article 2(4) of the UN Charter forbids the use of force or threat of same in international relations, not in domestic situations. However, International Humanitarian law has come to regulate the use of force in domestic armed conflicts as it does regulates all manners of armed conflicts.

International law, apart from prescribing laws governing resort to force (*Jus ad bellum*), also seeks to regulate the conduct of hostilities amongst states (*Jus in bello*) or International Humanitarian law. These principles cover, such areas as treatment of prisoners of war, civilians in occupied territory, sick and wounded personnel, prohibited methods of warfare, the use of force, etc. Humanitarian Law developed in the middle of the nineteenth century i.e. 1864, as a result of the pioneering work of Henry Dunant,[61] who being appalled by the brutality of the battle of Solferino five years earlier, engineered the adoption of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Fief. As its influence on the use of force in armed conflict, in 1868, the Declaration of St. Petersburg prohibited the use of small explosives or incendiary projectiles in armed conflict. The Laws of war were codified at the Hague Conferences of 1899 and 1907.[62]

In 1949, the Four Geneva Conventions, which are still in force today, were adopted. Each deals with the care of the wounded and sick

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61 Jean Henri Dunant (May 8, 1828 – October 30, 1910), aka Henry Dunant or Henri Dunant, was a Swiss businessman and social activist. During a business trip in 1859, he was witness to the aftermath of the Battle of Solferino in modern day Italy. He recorded his memories and experiences in the book A Memory of Solferino which inspired the creation of the International Committee of the Red Cross (ICRC) in 1863. The 1864 Geneva Convention was based on Dunant's ideas

62 The Hague Conventions were international treaties negotiated at the First and Second Peace Conferences at The Hague, Netherlands in 1899 and 1907 available at www.wikipedia.org accessed on 23 January 2010

members of armed forces in the field; the care of the wounded, sick and ship wrecked members of armed forces at sea; the treatment of prisoners of war and on the protection of civilian persons in times of war. Practically, all States are parties to the Geneva Conventions. However, the Geneva Conventions of 1949 did not cover some fields of armed conflict such as the protection of the civilian population against the direct effects of hostilities amongst other fields. Furthermore, new technologies had produced new weapons and civil wars had increased in number more than before. Thus in 1977, two new treaties of International Humanitarian law were adopted i.e: the Protocols additional to the Geneva Conventions.[63] It is therefore evident that International Humanitarian law has with its complex set of rules placed restrictions on the use of force during armed conflicts.

These rules can be summarized in a few foundational principles:

1 Persons who are not, or are no longer, taking part in hostilities shall be respected, protected, and treated humanely without discrediting or the use of any force on them [64]

2 Captured combatants, and other persons whose freedom have been curtailed should be treated humanely and shall be protected against all acts of force or violence particularly torture.

3. Parties to an armed conflict do not have the choice of unlimited methods or means of warfare but should use methods and means of force whereby no superfluous injury or unnecessary suffering shall be inflicted.

4. No force nor violence should be meted on civilian population and objects by parties in armed conflict.

It is the case that armed conflicts can be divided into international armed conflict[65] On the other hand, we have non -international armed conflict and this is generally governed by Article 3, common to the four Geneva Conventions of 1949. The Article 3 enjoins the parties to an internal conflicts to respect some basic principles of International Humanitarian law as stated above. The Article 3 also binds not only governments but also the insurgents, without however conferring any special status on them.

It is true that International Humanitarian Law contains basic principles and rules governing not just the conduct of war, but also the choice of

63 Available at www.icrc.org accessed on 23 January 2010

64 H. Gasser, International Humanitarian Law, An Introduction, 1998, Paul Haupt Publishers ,Geneva .

65 This also includes wars of national liberation .The Four 1949 Geneva Conventions and Protocol (I) deal extensively with the humanitarian issues raised here.

weapons and prohibits or restricts the employment of certain weapons, means and methods of warfare. Combatants are prohibited from using weapons which are inherently indiscriminate or which are of a nature to inflict suffering greater than that required to take combatants "out of action". The use of weapons which cause widespread long-term and severe damage to the natural environment is also prohibited.[66] Specific treaties prohibit or restrict the use of certain weapons such as biological, chemical, blinding laser or incendiary weapons or bullets which explode or flatten easily in the human body.[67]

Indeed, International humanitarian law concerns were central to the worldwide ban of anti-personnel mines which culminated in the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.[68] International Humanitarian Law has influenced the new international agreement to prevent and remedy the effects of explosive remnants of war called the Protocol on Explosive Remnants of War.[69] This law came into force in 2006. Large numbers of civilians are killed or injured each year by explosive remnants of war. These include unexploded artillery shells, hand grenades, mortars, cluster sublimations, rockets and other explosive remnants of armed conflicts. These have serious consequences on the civilians and their communities. Thus, this Protocol requires that each party to an armed conflict should remove, and provide for assistance for the removal of, these weapons and take other measures to reduce the threat of them on civilians. This Protocol restricts the use of force and minimizes death and injuries in war torn areas.[70] Indeed, Israel was accused of using illegal weapons against civilians in southern Lebanon in 2006. Such weapons included cluster bombs, white phosphorus, suction bombs which blast inwards and kill every person therein.[71] Indeed these weapons which cannot distinguish combatants and civilians contravene international humanitarian law.

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66 See 'Weapons and International Humanitarian Law' available at www.icrc.org. accessed on 25 March 2009.

67 They include Treaty Relating to use of Submarines and Noxious Gases in Warfare, Washington, 1922; Convention or Prohibitions or Restrictions of the Use of Certain Conventional Weapons Deemed Excessively Injurious to have Indiscriminate Effects, 1980, Protocol on Non Detectable Fragment, 1980. Also, Article 35 of the Additional Protocol 1.

68 i.e. the Mine Ban Convention.

69 Protocol V to the 1980 Convention available at www.icrc.org. accessed on 25March 2009.

70 See 'Explosive Remnants of War and International Humanitarian Law' available at www. icrc.org. Accessed on 26 March, 2009

71 D. Jamail, Mideas, Israelis Accused of Using Illegal Weapons, US. Human Rights Watch July, 2006 available at http;//ipsnew.net accessed on 28 March 2009

Finally, it is the case that the indictment of persons for war crimes is a result of the effect International Humanitarian Law has on the use of force. Persons in breach of these provisions of the law are made to face criminal prosecution before the International Criminal Court and other competent courts all over the world. Former President of Liberia Charles Taylor, the first African Head of State to be tried by an international court, is charged with 11 counts of murder, torture, rape, sexual slavery and using child soldiers in Liberia. Prosecutors at the UN-backed special court for Liberia said he supported rebels in that country to help gain control of it and strip its vast mineral wealth. Some of the 91 witnesses called so far have claimed Taylor shipped weapons to rebels in rice sacks in contravention of an arms embargo, and in return received "blood diamonds" mined by slave labour. Taylor aged 61, has pleaded not guilty.[72] Furthermore, On 4 March 2009, President Omar al-Bashir of Sudan became the first sitting head of State to be indicted for war crimes and crimes against humanity by the International Criminal Court. He joins Slobodan Milosevic of Yugoslavia, and Jean Kambanda of Rwanda as heads of state subject to international justice for their international crimes. The fact that al-Bashir, sitting at the apex of a corrupt and brutally repressive state, is about being prosecuted internationally is very important in furthering the course of international criminal justice.[73]

Worth commenting on the use of force in international law is reprisal attack. Reprisals are measures of coercion, derogating from the ordinary rules of the law of the people, determined and taken by a State, following the commission of illicit acts against it by another State, and having as their aim to impose on the second State, through pressure exerted by means of harm, a return to legality.[74] Article 2 of

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72 Available at http://www.guardian.co.uk/world/2009/jul/14/liberia-taylor-war-crimes-defence acccessed on 2 January 2010. He is accused of supporting the Revolutionary United Front in Sierra Leone in its fight to depose President Joseph Momoh and his successors. Prosecutors say Taylor received military trained in Libya along with the front's leader, Foday Sankoh. About 500,000 people are estimated to have been victims of killings, systematic mutilation and other atrocities in the civil war that lasted from 1991 until 2002. Some of the most atrocious crimes were carried out by gangs of child soldiers, who were given drugs to desensitise them.

73 The ICC, based in The Hague, upheld the request of the chief prosecutor, Luis Moreno-Ocampo, to charge Bashir with war crimes and crimes against humanity. More than 200,000 people have died since 2003 in the Sudan's western Darfur region.

74 *The Naulilaa Case (Portugal v. Germany)2 reprinted in* 2 R. Int'l Arb. Awards 1011 (1949). Culled from ANDREW D. MITCHELL Does One Illegality Merit Another? The Law Of Belligerent

the UN Charter quite clearly suggests that reprisals using force are not permitted under the Charter. Article 2 is however modified by Article 51 of the Charter, which states that "nothing in the present Charter shall impair the inherent right of 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." It might be argued that although reprisals using force are illegal under the Charter, perhaps their functional equivalent could be permitted if characterised as an act of self-defense.[75] Reprisals must only be used after the State had attempted other reasonable methods of seeking redress short of force that have failed. In the circumstances where there is a need to act quickly to protect civilians or troops from further injuries arising from violations of international law, or where it is clear that the enemy will not respond to other approaches, no other attempts may be required before resort to reprisal is permissible.[76] The requirement of last resort remains appropriate as a general rule, however, because it recognises the drastic nature of reprisals and the likelihood of horrific consequences. Indeed, the United States reprisal attacks strategy against suspected militants inside Pakistani territory threatened to send moderate Pakistani tribesmen to fight alongside the extremists against coalition forces in neighbouring Afghanistan. There has been an intensified bombardment of the tribal territory with U.S. missile strikes against suspected Taliban and al-Qaeda training camps and hideouts, compounded by the first U.S. ground raid into Pakistan and this is causing serious international concern particularly with the occurrence of civilian casualties.[77]

Conclusion

It is evident that International law has been of great influence on the use of force in both times of armed conflict and when armed conflict had not yet arisen. However, the realities of international law and interstate relations mitigate against the strict application of these rules. It is clear that International law is a flexible body of laws owing much to State consent and State practice. Many States, whilst not observing the strict rules on the use of force, are really pushing forward the boundaries of law. Of course, this is arguably a dangerous precedent,

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Reprisals In International Law available at http://www.pegc.us/_LAW_/Volume170Mitchell.pdf accessed on 22 January 2010.

75 ibid

76 Frits Kalshoven, Belligerent Reprisals 26 (1971). P.340

77 Saeed Shah, 'Pakistani Tribes Vow Reprisal For U.S. Missile Attacks available at http://www.infowars.com/pakistani-tribes-vow-reprisal-for-us-missile-attacks/ accessed on 23 December 2009.

for it is open to abuse, but in the rapidly changing world system, it is unavoidable.

It is the case that Peace cannot be kept by force. It can only be achieved by understanding. The use of force in an armed conflict might be considered, in a traditional sense, as aggression, self-defence, humanitarian intervention, or the exercise of self-determination. However, as it is evident from the obligation to maintain security in occupied territory, force may also be applied in exercising what might normally be seen as a policing function, such as maintaining public order quelling riots and disturbances and countering criminal acts. It is recommended by the writer that where the use of force is necessary, such use should be closely monitored by the United Nations and other relevant institutional agencies in order to ensure that same is done within the ambits and dictates of the law.

It is recommended that in reprisal attacks the action must be preceded by a demand to redress the wrong. The delinquent State must be advised of the wrong, demand must be made for reparations or changed conduct, and the delinquent state must be given reasonable time to comply. Elements of this requirement are publication of the demand and a conclusion, through action or inaction, that the demand has been refused. The action must be taken as a last resort. This condition may be viewed as another way of looking at the previous condition but it stresses the importance of peaceful settlement. Reprisals are not to be started. Reprisals are admissible only after negotiations have taken place. It must be noted that when States have relied upon reprisals, the UN Security Council has condemned their action soundly.[78]

The pertinent questions then on the use of force are; What conditions must be met by a State before it resorts to the use of force against another State? How well will such actions be accepted by the international community? This writer therefore opines that while it is not possible to eradicate the war or armed conflict amongst or within States, such use should be as of last resort and should be of such a

78 See Falk, 417; Harlow, 90; Higgins, 314; Lillich, 132 in 'Resort to War and Armed Force: Reprisals' (US Digest, chap. 14, sec. 1); Contemporary Practice of the United States Relating to International Law, *American Journal of International Law* 80, no. 1 (January 1980): 166; Ian Brownlie, International Law and the Use of Force by States (Oxford, England: Oxford University Press, 1963). 281-82. Brownlie ;The Use of Force in Self-Defence, in *British Year Book*, vol. 37:197 ;Q. Wright ;The Goa Incident,. *American Journal of International Law* 56, no. 3 (1962): 628

nature that will have minimal effect on the persons and properties involved.

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