A CRITICAL ANALYSIS OF THE LAW ON ARMED CONFLICT: STRIKING A BALANCE ON HUMANITARIAN INTERVENTION.

BY

KILUKO .S. NDEWA

LLB/36713/121/DU

A RESEARCH PAPER SUBMITTED TO THE SCHOOL OF LAW FOR FULFILLMENT OF THE AWARD OF THE BACHELORS DEGREE IN LAW OF KAMPALA INTERNATIONAL UNIVERSITY.

DECEMBER, 2013

DECLARATION

I declare that this research paper is my original work and has not been submitted for any Bachelors or Masters or PhD or Diploma in any University.

APPROVAL

I hereby certify that this work contained in this research paper entitles "A critical analysis of the law on armed conflict: striking a balance on humanitarian intervention", has been under my supervision and I have approved it for submission to the School of Law, Kampala International University.

Signature : ……..

Mr. Muundane

Date: ……8/5/14……

HEAD OF DEPARTMENT

I certify that this dissertation is submitted, received and signed hereunder as required by the department.

Name..... Kalenge Mubarak .....

Signature.....

Date..... 9/5/14 .....

DEDICATION

I dedicate this research paper to the following people who have ensured that my education is a success.

God being my first priority in everything I do great thanks to him for the knowledge and wisdom he has granted to me throughout the four years.

My Supervisor Mr. Mundane for the great work he has done in supervising my research work without giving any hardship and ensuring that the research is complete and a success.

My beloved parents for the support they have given me both financially and morally and the advices they have given me through the difficult timers.

My message I owe you all so much that I cannot pay back.
My prayer is that the almighty God reward you all abundantly in accordance with his riches in glory.

ABSTRACT

The research is about the analysis of the law of armed conflicts and how the international intervention strikes a balance. The main objective of the study is to critically analyse the law of armed conflict and how to strike a balance on the humanitarian intervention.

The study will also look into the use of force, define what humanitarian law is, issues of the principles of international humanitarian law and to evaluate the application of international humanitarian law.

In additional, the study will examine the methods of warfare and which persons are protected under international humanitarian law.

The findings of the study is that in as much as the law of armed conflict is justified, the law gives guidelines during the war and after the war. Such laws are, the four Geneva Conventions of 1949 and The Additional Protocols. These and more shall be discussed in depth in the subsequent chapters of the study.

LIST OF ACRONYMS

G.A	:	General Assembly
ICC	:	International Criminal Court
I.C.J	:	International Court of Justice
ICTY	:	International Criminal Tribunal for Former Yugoslavia
NATO	:	North Atlantic Treaty Organization
R to P	:	Responsibility to Protect
S.C	:	Security Council
UN	:	United Nations
VS	:	United States.

LIST OF CASES

Nicaragua Vs United States, 1986 I.C.J 14

Nicaragua Vs United States, 1986 I.C.J 14 Dissenting Opinion of Judge Schwebel

Democratic Republic of Congo Vs Uganda, 2003 I.C.J 168

Bosnia- Herzegovina Vs Serbia.

List of International Instrument

Additional Protocol 1 1977

Geneva Conventions of 1949

United Nations charter

Hague Convention 1907

Hague Convention 1954

Customary International Law Roles.

TABLE OF CONTENTS

CHAPTER ONE

1.1 Introduction

This chapter entails the proposal to the area of study. The chapter deals with the statement of the problem, research objective, scope of the study, research questions, significance of the study and chapterization.

In addition the chapter shall contain the methodology, research design and the literature review. The above mentioned areas are of significance in this study since the chapter is the very foundation and reason why we are to carry out this study.

1.1.1 Background of the study

The international law of armed conflict, although of relatively recent origin in its present form and shape, has a long history behind it, 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. 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[1].

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. 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. 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.

The legality permissible to use force in international conflicts is hearity restricted by the provisions in the UN Charter. What need to determine is that could, the use of force have suffered from normative deficit in that itexcludes situations where the use of force might be

[1]Frits Kalshovon, Constraints on the waging of war pg 7

morally justified, or does such proposition erode the general prohibition on the use of force and spur further conflict ? Article 2[2] 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.

1.2 Statement of the problem

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[3]. 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*"[4]. 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. 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 view of the above, my research is paged on analyzing the law of armed conflict and how humanitarian intervention strikes a balance and to determine whether it is necessary to resort to armed conflict.

1.3 Objective of the study

1.3.1 General Objective

The main objective of the study is to analyse the law of armed conflict and how to strike a balance on the humanitarian intervention.

[2] Second Geneva Convention of 1949
[3] Obama Full Command of NATO
[4] Ibid

1.3.2 Specific Objective

- To examine the legal regulation on the use of force in international relations.
- To analyze the principles of International Humanitarian Law.
- To evaluate the application of International Humanitarian Law.
- To examine the principle of use of force.
- To examine the methods of warfare.
- To analyze the protected persons under International Humanitarian Law
- To examine the collective and industrial responsibility principles.
- To make recommendations and conclusions with regard to gaps on the law and how it can be bridged.

1.4 Scope of the study

This study focuses on the controversial uses of force and humanitarian intervention. Specifically, the study evaluates the observance of the legal regulations by the international community inspite the fact that there are strong legal regulations on the use force by questioning when it is justifiable thus making its legality permissible.

The area of study will be in country like Libya and Sudan where use of force has been used under the protest of humanitarian intervention.

1.5 Significance of the study

The findings of the study will be important in the following ways.

1.5.1 To states

With all the uprisings, revolutions and civil unrest experienced across the world. It is important that States comprehend what exactly happens before they choose to wage war with another State.

1.5.2 To the researcher

The study will help the researcher enrich his / her knowledge with the information gathered from different consulted materials that are relevant to the study.

It will also assist the researcher to tabulate data and come up with possible recommendations relating to the law of armed conflict and how to strike a balance on the humanitarian intervention. Consequently, if presented and approved by the concerned constitution, the researcher will quality for the award of bachelors degree in law.

1.5.3 To target evidence

The study will provide information to the whole world who may or may have undergone situations of armed conflict and make them understand that there is humanitarian intervention that responds to atrocities committed to them.

1.6 Research Questions

The research questions to be answered include:

- What is international humanitarian law?
- What is the use of force?
- What recommendations are to be made with regard to gaps that exists in the law and how can the same be bridged?

1.7 Methodology

Due to Limited time and the theoretical nature of the research, most of the research will be desk and libraryresearch. There will be no use of questionnaires or research guide.

The information shall be withdrawn from the text book, Geneva convention and additional protocols.

As per the conclusions and the recommendations, personal knowledge of the law on armed forces and international intervention will be of great significance, in additional to the various literatures by various writers who have earned out the same study.

1.7.1 Research Design

My study is going to be descriptive because it is going to define the current situation of the armed conflicts and aspects of humanitarian intervention.

Itsfurther going to be analytical because it examines the law of armed conflicts.

The study is further to be prescriptive, as it is going to give recommendations in areas where change is necessary to meet the current needs of international standards.

1.8 Literature Review

1.8.1 Introduction

A lot has been written and talked about concerning this topic to. Many scholars have spared time laboring to explore the issue of Humanitarian intervention of the 24th June 1859, the armies of France and Sardinian engaged Australian forces near the Northern Italian Village of Solfreno. This decisive battle in the struggle for the Italian unity was also the most horrific bloodbath than Europe had known since Waterloo: in ten hours of fierce fighting, more than

6000 soldierswere killed and some 40,000 wounded. These ascertain was according to Dr. J.C Chenu[5].

According to PierreBolssier[6], medial services of the France –Sardinian armies were totally overwhelmed, exposing the negligence of the supply of corps: the French army had more veterinary surgeonsthan doctors; transport was woefully inadequate; creates of field dressings were dumped far from the front line and sent back to Paris unopened at the end of the campaign. General de la Bollardiere, French quartermaster, general, reported that it took six days to bring in 10,212 wounded for the field.

Chenu goes ahead to state, that helped their comrades, luaring on makeshift crutches or on their raffles the wounded soldiers staggered to the nearby villages in such of food and water,first aid and shelter. More than 9000 of them came to the small town of Castiglione where invalids soon outnumbered the able bodied[7].

In August 1875, rebellion flared in Herzegovina spreading to Bosnia and Bulgaria. Brustal repressive Milasuras sentChristians refugees pouring into Montenegro and Serbia; in June 1876 the two principalitiesdeclared war on the sublime Porte but within few months their armies succumbed to its superior forces[8].

The concept of preemption and preventive war.

According to Walzar in his book , "just and unjust wars": A moral argument with historical illustration[9] defines it to mean the reflexive, last minute response to an actual imminent attack and preventive war on the other hand is launched when conflict is not imminent. 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. 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.

---

[5] Dr. J.C Chens. Satistique Medico-Chirugicaledela compagned'italie in 1859 to 1860 pg 851-3

[6] Pirre Borsseur, History of the international committee for the red cross: from solfrino to Tsushima 1985 p22.

[7] Chenu,.Statistique medico-chirurgicale ,vol 1pg 378.

[8] Francois Bungnion,The international Committee of the red Cross and the protection of war Victims.

[9] Wazer , Michael just and unjust wars. A moral arguent with Historical illustrations 3rd ed (2000) pg 207.

According to Thomas Sceling in his book, "the strategy of conflict"[10] 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. This proposition by Thomas Sceling had been reformed to as the spiral of anticipation and the self fulfilling prophecy problem[11].

According to Walzar[12], his argument is that the 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.

Sceling Thomas[13] 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 David Rudin[14], he propounds that it is thesubject to an "unpalatableparadox ". By showing that any doctrine of prevention is infact a consequence to engage in attack, he claims that all such doctrines are Ipso facto morally wrong. "Ifmanifest 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 activepreparation are presumably not in themselves wrong and this implies that there no sufficient moral ground for preventive war".

---

[10] Sceling , Thomas Reforming the international Law of Humanitarian intervention in Humanitarian intervents: Ethical, legal and political ellemys 2nd ed (2003) pg 187-9

[11] See number 10 above

[12] Wazlermicheal. Just and unjust wars. A moral argument with Historical Illustrations (2000) pg 418-26

[13] Sceling Thomas. Reforming the international Law of Humanitarian intervention in Humanitarian intervention: Ethical legal and political Dilemmas (2000) pg 99.

[14] David , Rodin , the problem of preventive war in precepmption (2007) pg 10.

According toDavid Luban[15]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[16] 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 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 per lang[17], 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 attack in progress but it is still only possible to defend oneself against harm that has not yet occurred. According to Lang, 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[18] 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 meet the 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 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

[15] Rodin, David. The problem of preventive war in prevention: Military Action and moral justification, 2007 pg125.
[16] Ibid 176
[17] Lang Anthony. Humanitarian intervention in just intervention 2nd ed (2003) pg 98.
[18] Luban , David intervention war and humanitarian rights in prevention. Military Action and moral justification, 3rd ed (2007) pg 33.

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.

Chapterization

Chapter two deals with the use of force, defines what humanitarian law is, gives the principles of international humanitarian law and evaluates the application of international humanitarian law.

Chapter three deals with the humanitarian intervention and examines the methods of warfare. Chapter four pertains to the protected persons under IHL and examines the collective and individual responsibility principles.

Last chapter capitalizes on the recommendations and conclusion with regard to gaps on the law and how it bridged.

CHAPTER TWO

USE OF FORCE

2.1 Introduction

This chapter is going to deal with the principle of use of force, definition of international humanitarian law and the application of IHL.

Use of force is not clearly defined however, article 2(4)[19] does not use the term "war" but rather refers to "the thereat or use of force" although clearly encompassed by the article, it is ambiguous whether the article only refers to military force or economic, political, ideological or psychological force. The preambles to the charter declare that the armed force shall not be used, save in the common interest. Under article 51[20] right of individual or collective, self defence if armed attacks occur is preserved …

In 1970, the general assembly adopted the declaration on principles of international law concerning friendly relations and corporation among status in accordance with the charter of the United Nations. This resolution was adopted without vote by consensus but is considered an authoritative statement on the interpretation of certain provisions of the charter. The declaration reiterate article 2(4) of the UN charter and elaborate upon the accassions when the threat or use of force is prohibited but does not address the question of whether force includes nonmilitary force when the scope of the charter[21].

The declaration states that "nothing in the forgoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the charter concerning cases in which the use of force is lawful[22] certain types of armed and non armed intervention are prohibited by the declaration: "No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all against its political, economic and cultural elements, are in violation of international law!?[23] The declaration addresses the use of nonmilitary force in the context of other **international obligations such as the obligation put to intervene in the affairs of another state.** The question do exist as to whether this is the reality in practice.

---

[19]UN charter Article
[20]UN charter Article
[21]Hendricilson Ryan C. Clintons Military strikes in 1998 diversionary uses of force" armed forces society jan2002 vol 28 pg 309-332
[22]Declaration on Principles of International Law Concerning Friendly Relations and Corporation Among States in Accordance with the Chapter of the United Nations.
[23]Ibid .

For example, in 2010-2011 Libya experienced sporadic attacks from the government and the **revolutionaries.**USA through NATO decided to intervene claiming that they were acting on a humanitarian ground. This is a stark contradiction of what the declaration provides for.
A number of developing nations have maintained that force includes no military force but the developed states have resisted this view where **conceding** that nonmilitary force of various kinds may be outtlawed by other principles of international law.

Under use of force, a number of interpretation issues still remain problematic. The problem is of course the separation between lawful and unlawful usage of force. The mere fact that Article 2 (4) includes qualifying languages to specify what kind of force it seeks to outlaw (that is force directed against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations pursuant to Article 2 (4) (1)[24]. This implies that there are situations where the use of force might be lawful even without authorization from the Security Council in a non self defense setting. The extent this language quality the prohibition of the usage of force is however hard to determine simply by looking at the Article itself. To me Article 2 (4) is a creature and a manifest of permissiveness in the World order as it provide a lukewarm guidelines on the use of force to justify an action that the powerful state might face against the weaker one.

Article 1[25] states that aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state or in any other matter inconsistent with the charter of the United Nations.

According to Holmes and Robert, the use of force language was deliberately sought to avoid the dispute concepts of war and aggression.

The reasoning behind this choice was to leave out hostilities where the state of war had not been declared and to eschew the problem of defining aggression, as well corollary dilemma of having to determine the aggressor of any given dispute the concept of aggression has nonetheless had great importance in several of issues related to use of force , for instance in the determination of which party in a dispute who had the legal right of set defense[26]

This is a clear indication that the on charter to only gives the instances of aggression but eludes to give its definition deliberately.

---

[24] UN Charter Article .
[25] UN Charter Article .
[26] Robert Holmes. Can war be morally justified. The just was theory (2nd ED) (2002) Pg 48.

Article 2[27] clarifies that the first of use of force by a state in contravention of the charter shall constitute prima facie evidence of an act of aggression, and the Article lists examples of acts that quality as aggression.

The prevailing view according to majority of states and most international lawyers is "that any coercive incursion of armed troops into a foreign state without its consent impairs that states territorial integrity and any use of force to coerce a state o adopt a particular policy or action must be considered as an impairment of that states political independence[28]. In **Bosnia Herzegovina Vs Serbia,** [29], the court upheld this conclusion after it had considered a lower standard applied by the international criminal Tribunal for the former Yugoslavia (ICTY) in the case of **Prosecutor VsTadic**[30]

The preamble of the UN Charter specifically states that "*to save succeeding generations form the scourge of war, which twice in our life time has brought untold sorrow to mankind*"[31], is a principal aim of UN as such. This principle is now considered to be part of customary international law, and has the effect of banning the use of armed force except for two situations authorized by the UN Charter. Firstly, the Security Council under powers granted in

Articles**24**[32]and **25**[33]and chapter VII of the charter, may authorize collective action to maintain or enforce international peace and security. Secondly article 51[34] also that "nothing in the present charter shall impair the inherent right to individual or collective self-defense if an armed attack occurs against a state" than an also more controversial claims by some ships over a right of humanitarian intervention, reprisals and the protection of nationals abroad.

2.2 Self Defense

Article 51[35]**of the UN charter 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

---

[27]. UN Charter Article .
[28]Robert Holmes cam war be morally justified] the just war theory (2nd Ed) 2002 pg 66
[29]2007 (I.C) 191.
[30]ICTY Case No. IT -94-1-A, 38 ilm 15,18 1999.
[31] UN Charter Article.
[32]Ibid.
[33]Ibid.
[34]Ibid.
[35]Ibid.

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**[36] 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.

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.[37]

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[38].

In the oil platform case[39] the ICJ found that the US actions were neither nor proportional under the circumstances and in the armed activities on the territory of Congo case[40]. The court noted that " The faking of airports and towns many hundreds of kilometers from Uganda's border would not seem proportionate to the serious of trans border attacks if claimed had given rise for the fight of self-defense to be necessary for that and"

In Carolines case, 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

[36] 1986 (C) 14.
[37] Robert, Holmes Can War be morally Justified? The just war theory (2nd Ed) 2002 Pg 74
[38] Ibid 77.
[39] 2004 IC 136.
[40] Democratic Republic of Congo Vs Uganda (2005) 168.

furthermore that any action taken must be proportional, since the act justified by the necessity of self-defense , must be limited by that necessity and kept clearly within it.[41]

2.3 Collection Action/use of force

The Security Council is authorized under article 24[42] and 25[43] 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. 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[44].

Article 2(7)[45]provides that non intervention principle "shall not prejudice the application of enforcement measures under chapter VII"

2.4 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[46]. 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. 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 its was originally envisaged by the framers of the UN charter to use for enforcement, the intervention was effectively controlled by forces under US command.

---

[41]Statement by the US Secretary of State to the British Authorities.
[42]UN Charter. Article
[43]Ibid.
[44]Robert , Holmes, can war be morally justified/ the just war theory 2nd (2002) pg 77.
[45] UN Charter Article.
[46]Ibid.

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's 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.

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 peace to a conception of "threats to peace"

The right to use intervnetionary, 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.

2.5 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.

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

Nation 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 10, making the total members for the council 15. Resolution 1990 was ratified by two-thirds of the UN members and then approved by the G5. 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[48].

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 will of 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[49]. 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.

There is nothing in the UN Charter, which in Article 108[50] gives the GS the right to veto any attempt to weaken, their power, which provides that they relinquish the right of veto[51].

Japan and Germany, since becoming economic powerhouses in the mid-1990s, 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[52]

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 ECOWAS are recognized as sub regional organizations. African Union will also lead to

[47] Thomas Weiss, The illusion of UN Council Reform (2003) pg 35.
[48] Ibid pg 38.
[49] Thomas Weiss the illusion of UN Security Council Reform (2003) pg 45.
[50] Reform (2003) pg 45.
[51] UN Charter Article.
[52] Thomas Weiss the illusion of UN Security Council Reform (2003)pg 49.

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[53]. 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[54]

2.6 Principles of international Humanitarian Law

2.6.1 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 civilians and 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) [55]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.

2.6.2 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

[53]Ibipg 52.
[54]Thoma Weiss, The illusion of UN Council. (2003) pg 61.
[55]Common to the four Geneva Conventions Article 3 (1).

ICRC to form part of customary international law in international and non-international armed conflicts[56]

2.6.3 Principles of human treatment

This principle requires that civilians be treated humanely at all times. Common Article 3[57] 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 there manners and customs. This principle is when inscribed in the four GCS applicable in both international and non-international armed conflicts.

Principles of non-discrimination

This principle is a cornerstone of IHL. Under Article 3[58] 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)[59] 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.

2.7.1 The situations of application of IHL

2.7.1 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 Article 2[60] provides that in addition to the provisions which shall be implemented in peacetime, the present convention shall apply to al 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.

---

[56]Hendrisilson , Ryan C. Clinton's Military Strikes in 1998: Dictionary uses of force? Armed forces and society, 1996; vol 123 pg 49-80.

[57]Common to four Geneva Conventions 1949 Article 3 (1).

[58]Supra.

[59]Third Geneva Convention of 1949.

[60]First Geneva Convention of 1949.

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.

According to Article 1 (4) [61], 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)[62] 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.

2.7.2 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. .

Article 36[63] 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[64] 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

[61] Additional Protocol 1 of 1949 of Geneva Conventions.
[62] Ibid.
[63] Common to the Four Geneva Convention.
[64] Additional Protocol II of 1977.

conflicts and 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)[65], 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.

[65] Additional Protocol II of 1977 of Geneva Conventions.

CHAPTER THREE

HUMANITARIAN INTERVENTION

3.1 Introduction

Today , Syria is in formal and the international community is either watching from the comfort of their territories or arranging on how to force president Assad out need power. History seems to be dating back in 1994 where the international community did nothing stop the bloodbath in Rwanda. In this chapter we analyze critically humanitarian intervention.

3.2 Meaning of humanitarian invention

"It refers to a State using military force against another state when the chief. Publicly declared aim of that military action is ending human rights violations being perpetrated by the State against which it is directed."

Humanitarian intervention may also be defined as "forcible action by a state , a group of states or international organizations to prevent or to end gross violations of human rights on behalf of the nationals of the target, through the use of threat of armed force without the consent of the target government with or without UN Authorization for example in 2001 United States of America attacked Iraq after the UN had object to such attack.

Humanitarian information is a practice pertaining to the advancement and protection of human rights. This process gained momentum in the post 1945 world, particularly following the demise of the cold war.

Despite its moral appeal as a norm to promote universal human wellbeing, however, the humanitarian intervention debate cannot escape the wider political context it belongs to military intervention in international relations the question of intervention raises two complementary issues:

First, the question of whether force can be used legitimately in international intervention[66].

For the organization of coercion has been the basic concern of any social structure, including international society. Therefore the place given to humanitarian intervention is directly related to the international community towards military intervention. Since the principles of nonintervention and use of force under pin the current international system, the room allowed for humanitarian intervention has been limited.

[66]Thakur, Ramush "Intervention, Sovereignty, and the respon sible to protect : Experiences from ICISS. " Security dialogue (vol 33 No. 3, 2002) pg 324.

Second, humanitarian intervention is closely intervene with the international society's attitude toward intervention into domestic affairs. Modern international relations have been characterized by a clear separation between the internal and external affairs of the states , basic actors of the international Society[67].

3.3 Arguments against Humanitarian Intervention

The subject of humanitarian intervention has remained a compelling foreign policy issues especially since NATO's intervention in Kosovo in 1999 as it highlights the tension between the principle of State sovereignty. A defining pillar of the UN System and International Law and evolving International norms related to human rights and the sue of force. Moreover it has spaced normative and empirical debates over its legality, the ethics of using military force to respond to human rights violations, when it should occur, who should intervene and whether it is effective[68].

According to Walzer,[69]naitons have individual histories that shape their political process a communal integrity that should be protected. He acknowledges that humanitarian interventions can be justified in a very limited number of cases, when it is response to acts that would shock the moral conscience of mankind. The argument can however e interrupted in several ways, some rule out humanitarian intervention entirely and some allow it in Limited cases.

The two main objections to preventive war are also relevant in the debate o humanitarian intervention. Permitting humanitarian intervention would, just like permission on preventive war undermine the stability of the international order[70]

Although it is possible to engage in humanitarian intervention without killing of significant members of non-combatants, this is more than likely considering the kinds of weaponry frequently used by government who favor intervention. The idea that this long term protection of human rights can justify the overriding of some peoples rights is commonly referred to as the utilitarianism of rights. This position cannot be defended if one believes that there are

---

[67] Annan, Kofi, Secretary General' Speech to the 54th concepts of sovereignty, the economist (18 sept1999 pg40.
[68]Walzar , Michael: The moral standings of states. A response to critics in inphilosophyand public affairs 3rd Ed (1980) pg 89.
[69]Ibid.

limits to what one may permissibly do to another human being, regardless of how desirable the anticipated consequences are[71]

3.3. Arguments for humanitarian intervention

Opposite to the claims that states should mind their own business to preserve world order, those who favor humanitarian intervention argue that serious wrong doings of states must be stopped in the interest of the global justice[72]. This position relies on the assumption that the main purpose of the state is to respect individual autonomy and protect citizen from rights abuses. If the state fails to deliver on this purpose and people are deprived of their autonomy, either because of an extreme luck of order (anatomy) or because of governmental of individual freedom (tyranny) than the rest of the word has an obligation to help these people. The prime duty is to help others deriver from the general duty to assist victims of grave injustice.

A noninterventionist respect the state sovereignty and national border .these who favor the right to military intervention generally question this significance since Makes an unwarranted distinction between internal and external intervention, but anon interventionist would object if the very same troops had to cross an international border to stop similar violence in a neighboring state.

To be reasonable, national borders are to be respected as long as status keeps their end of social contact, that is so long as they secure their autonomy of individuals .But if they do not, the moral significance of borders is no longer a valid reason to contain foreign acts aimed at stopping atrocities [73]

In response to the argument that humanitarian intervention would undermine the stability of international order, an interventionist could first of all argue that preserving the current system is not worth, the cost of mass slaughter and human suffering. Secondly, it is fur from certain that allowing humanitarian intervention in appropriate causes could increase instability. ignoring tyranny and anarchy is at least as likely to cause chaos as intervention [74] what need to be understood in view of the above is that the humanitarian intervention is necessary when mechanisms to equal the internal turmoil has been exhausted and it must be

[71]Ibid pg 74.
[72]Ibid pg 88.
[73]Ibid pg 81.
[74]Walzer, Michael. The moral standings of states. A response to critics in philosophy and public affairs 3rd Ed (*1980) pg 91.

borne in every person mind that the road to stability and ensuring world order is through the support we get from humanitarian interventionist.

However care must be exercised especially when humanitarian intervention is attached with interest , since when it is attached with interest , since when it is so , if no longer quality to be called humanitarian intervention but a catalyst to more turmoil .

3.4 The principle of responsibility to protect

This is a norm or set of principles based on the idea that sovereignty is not a privilege , but a responsibility. R to P focuses on preventing and halting crimes of genocide , war crimes ,crimes against humanity and ethnic cleansing , which if places under the generic umbrella from of , ''mass atrocity crimes '' [75]

The responsibility to protect can be thought of a state has a responsibility to protect population from genocide, war crimes, crimes against humanity and ethnic cleansing (mass atrocity).

It the state unable to protect its own population, the international community has a responsibility to assist the state by building early warnings capabilities, mediating conflicts between political parties strengthening the security sector, mobilizing standby forces.

It a state is manifestly failing to protect its citizen from mass atrocities and peaceful measures are not working, the international community has the responsibility to intervene at first diplomatically, then more coercively, and as a last resort with military force[76].

The emergence of the responsibility to protect (R to p) deserves mention. R to P is the name of a report produced in 2001 by the international commission on intervention and state sovereignty (ICISS) which was established by the Canadian government in response to the history un satisfaction humanitarian interventions. The report sought to establish a set of clear guidelines for determining when intervention is appropriate; what the appropriate channels for approving an intervention itself should be carried out[77].

The responsibility to protect seeks a clear code of conduct for humanitarian interventions and also advocates a greater reliance on nonmilitary measures. The ICSS report criticizes and attempts to change the discourse and farminology surrounding[78],

---

[75] Ibid pg 94.

[76] Ibid pg94.

[77] Christophe Mikuluschek. Actualizing the responsibility to protect (available on http://www.Stanley foundation.Org publications/ UNND 808.pdt.

[78] 2005 world summit outcome document (available on http// www.worldsummitdoc.org/en).

The issue of humanitarian intervention, It argues that the notion of a right to intervene problematic and should be replaced with the "responsibility to protect". Under R to P doctrine, rather than having a right to intervene in the conduct of other states, states are said to have responsibility to intervene and protect the citizens of another state where that other state has failed in its obligations to protect its own citizens. This responsibility is said to have three stages: to protect, react and rebuild.

3.5 Responsibility to protect in the UN

At the 2005 world summit, member states included R to P in the outcome document agreeing to paragraphs 138-139. These paragraphs gave final language to the scope of R to P that is it applies to four crimes only and to whom the responsibility actually falls i.e. nation's first, regional and international community second.

Paragraph 138-139[79] states that each individual state has the responsibility to protect its population from genocide, war crime, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including incitement, through appropriate and necessary means. We accept that responsibility and the will to act in accordance it. The international community should as, appropriate, encourage and help states to exercise this responsibility and support the R to P in establishing an early warning capability. And that the international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means in accordance with chapters VI and VIII of the UN charter to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action in a timely and decisive manner through the security council in accordance with the charter including chapter VII on a case by case basis and in cooperation with the relevant authorities/ regional organizations as appropriate, should peaceful means be inadequate and national authorities manifest, fails to protect their population from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for general Assembly to continue consideration for responsibility to protect populations from genocide, war crime, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the charter and international law. We also intend to commit ourselves as necessary and appropriate, to helping state build capacity to protect their populations from crimes and to assisting those which are under stress before crisis and conflicts break out.

[79] 2005 World summit outcome document (available onhttp:www world summit doc.org /enl).

In 2006, the UN Security Council reaffirmed the provisions of paragraphs 138and 139 in resolution (SIRES/ 1674)[80], thereby formalizing their support for the norm. The next major advancement in R to P came in Jan 2009, when UN security- general Bun Ki- Moon[81] released a report called "Implementing the responsibility to protect". This report argued for the implementation of R to P and outlined the three principles of R to P:

Principle one, stresses that states have the primary responsibility to protect their population from genocide, war crimes, ethnic cleansing and crimes against humanity.

Principle two addresses the commitment of international community to provide assistance to states in building capacity to protect their populations from mass atrocities and to assisting those which are under stress before crisis and conflicts breakout.

Principle three focuses on the responsibility of international community to take timely and decisive action to prevent band halt mass atrocities when a state is mass atrocities when a state is manifestly failing to protect its populations[82]. Once the outcome of the debate was the first R to P resolution adopted by the general assembly. The resolution (A/RES/63/308) showed that the international community had taken note of the debate and not forgotten about R to P. The text of the resolution acknowledged the secretary general Ban Ki Moon's report as well as the debate and promised to commit R to P to discussion in the general assembly[83].

3.6 Striking the balance on humanitarian intervention

Leaders of the African union inserted the right of intervention in the decision by the assembly of Heads of states and government of the OAU who adopted the constitutive act of the African Union to incorporate the right of intervention in that act stemmed from concern about the OUA's failure to intervene in order to stop the gross and massive human rights violations witnessed in Africa in the past, such as the excesses of Idi Amin in Uganda and Bokassa in the central African in the 1970[s]and the genocide in Rwanda in 1994[84]. Indeed this concern about their inability to prevent or halt the Rwandan genocide had already led the said heads of state and government to set up an international panel of eminent personalities to investigate the 1994 genocide in Rwanda and surrounding events. Most people felt that the reluctance to act by the international community was a great betrayal to humanity.

---

[80]The Security Council Resolution of 1674.
[81] UN Secretary General.
[82]Bank 14 moon. A Report on Responsibility to protect.
[83]Resolution (ALRES / 63/308) of the UN debate on Responsibility to protect.
[84]Ben Kloko . The right of International Law under the African Union's Constitutive Act: From Non-interference to non intervention (2008) pg.

So the question is whether it is right to sacrifice the life of few people to prevent a greater loss. In other words in committing a lesser evil to prevent bigger one morally justified?

This panel not only blamed the neighboring countries, but also the OAU, the United Nations and the international community at large for failing to call the killings in Rwanda by their proper name genocide and for failing to stop the violence . Along the same lines, some of the heads of states might have recalled the ringing words of president Museveni of Uganda in his molden speech to the ordinary session of Heads of States and government of the OAU in 1986[85], in which he accused them of condoning the whole sale massacre of Ugandans by Idi Amin under the guise of not interfering because it was an internal affair of Uganda. Referring to previous regimes in his country he stated: "over a period of 20 years three quarters of a million Ugandans perished at the hands of governments that should have protected their lives..., I must state that Ugandans ....felt a deep sense of betrayal that most of Africa kept silent.....[86]. Fast forward 25 years later and Museveni is singing a totally different song. Though Museveni's anger was directed to the western countries for interfering in an African affair without first consulting with the AU, one can not help but wonder; is help not help regardless of where it is coming from? To one, this seems a war of us against them. And "us" depends on who you support.

Similarly, in his address to the 29th ordinary session of the assembly of Heads of States and government of the OAU held in Cairo in June 1993, president Attarwerki of Eritrea more or less reported Museveni's accusation by stating that the OAU had failed the people of Africa and the people of Eritrea and was therefore a useless organization. Following these candid expressions of the above presidents, do we take sides with the law or do we uphold our moral standing and rebuke all forms of violence regardless of the reasons behind each war[87].

It is agreeable that the human life is sacred and should be protected at whatever cost and therefore, it's only natural that we as people in touch with our humanity and do good for others. Thus, not being guided by selfish reasons, when our neighbor raise arms against each other, it's only human and natural that we intervene for greater good shall be based on the natural laws. Being humane to humanity; which I would not hesitate to point out that is a selfless act and selfless people are very rare to find later on selfless states[88].

[85] Ibid pg 22.
[86] Ibid pg 22-3.
[87] Wokoro ,Emeka, Towards a model for African Humanitarian Intervention (2009).
[88] Supra pg 11.

3.7 State practice and customary international law

Both physical and verbal acts of a state constitute practice that contributes to the creation of customary international law. Physical acts include, for example, battlefield behavior, the use of certain weapons and the treatment afforded to different categories of persons. Verbal acts include military manuals, national legislations, national case laws, instruction to the armed and security forces, military communiqués during war, diplomatic protests, opinions of official legal advisors, comments by government on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international fora, and government positions on resolutions adopted by international organizations.

This list shows that the practice of the executive, legislative and judicial organs of a state can contribute to the formation of customary international law[89]. The negotiation and adoption of resolutions by international organizations or conferences, together with the explanations of the vote, are acts of the states involved. It is recognized that, with a few exceptions, resolutions are normally not binding in themselves and therefore the value accorded to any particular resolution in the assessment of the formation of a rule of customary international law depends on its content, its degree of acceptance and the consistency of related state practice [90]. The greater the support for resolution, the more important it is to be accorded.

Although decisions of international courts are subsidiary sources of international law, [91] they do not constitute state practice. This is because unlike national courts, international courts are not state organs. Decisions of international courts are nevertheless significant because a finding by an international court that a rule of customary international law exists constitutes persuasive evidence to that effect. In addition, because of the precedential value of their decisions, international courts can also contribute to the emergency of a rule of customary international law by influencing the subsequent practice of states and international organizations.

The practice of armed opposition groups, such as cudus of conduct, commitments made to observe certain rules of international humanitarian law and other statements, does not constitute state practice as such. While such practice may confirm evidence of the acceptance of certain rules in non international armed conflicts, its legal significance is unclear and, as a result, was not ruled upon to prove the existence of customary international law.

---

[89] International Review of the red crossvol 87 No. 87 No.857 2005.

[90] Advisory Opinion , 8th July [C] Reports pg 254-5 of International Law.

[91] Statute of the International Court of Justice Article 90 Statute of the International Court of Justice Article 38 (1) (d).

3.7.1 Assessment of state practice

State practice has to be weighed to assess whether it is significantly "

Dense" to create a rule of customary international law[92]

For a state practice to create a rule of customary international law, it must be virtually uniform. Different state must not have engaged in substantially different conduct. The jurisprudence of international court of justice shows that contrary practice which, at first sight, appear to undermine the uniformity of the practice concerned, does not prevent the formation of a rule of customary international law as long as this contrary practice is condemned by other states or denied by the government itself. Through such condemnation or denial, the rule in question is actually confirmed[93]. To establish a rule of customary international law, state practice has to be virtually uniform, extensive and representative[94]. For a rule of general customary international law to come into existence, the state practice concerned must be both extensive and representative. It does not however, need to be universal, a "general" practices suffices[95].

No precise number or percentage of states is required. One reason it is impossible to put an exact figure on the extent of participation required is that the criterion is a sense qualitative rather than quantitative. That is to say, it is not simply a question of how many states participate in the practice, but also which states[96]. In the words of the international court of justice in the North Sea continental shelf case, the practice must "include that of states whose interests are specially affected[97]. This consideration has two implications:(1) if all "specially affected states" are represented, it is essential for a majority of states to have actively participated, but they must have at least acquiesced in the practice of "specially affected states" and (2) if "specially affected states" do not accept the practice, it cannot mature into a rule of customary international law even though unanimity is not required as explained[98] who is specially affected under international humanitarian law may vary according to circumstances. Concerning the legality of the use of blinding laser weapons, for example," specially affected states" include those identified as having been in the process of developing

---

[92]Sir Humphrey Waldock , Geneva Course on Public International Law" Collected Course of the Hage Academy of International Law, Vol. 106, (1962)P44.

[93]I.C.J Case concerning military and paramilitary activities in against Nicaragua, Merits, Judgments, 27 June 1986, K. J Report 1986 pg 98, and 186.

[94] I.C.J North Sea continental shelf cases (note 7)pg 47.

[95]Final Report of the Committee on the formation of customary (Geneva) International Law, Statement of Principles Applicable to the formation of General Customary International Law.

[96]Ibid Commentary (d) and € to principle 14 pg 736-7.

[97]I.C.J North Sea Continental Shelf Cases, OP. Cit (note 7) pg 43-74.

[98]ILA Report of Cit (Note 13) commentary € to principle 14 pg 737.

such weapons even through other state could potentially suffer from their use. Similarly, states whose population is in need of humanitarian aide are "specifically affected just as are states which frequently provide such aide. With respect to any rule of international humanitarian law, countries that participated in an armed conflict are specialty affected" when their practice examined for a certain rule was relevant to that armed conflict. Although there may be specially affected states certain arises of international humanitarian law interest in requiring respect for international humanitarian law by other states even if they are not a part to the conflict[99]. While sometime will normally elapse before a rule of customary international law emerges, there is no specified time frame. Rather, it is the accumulation of a practice of sufficient density, in forms of uniformity extent and representativeness, which is the determining factor[100].

[99] Customary international Humanitarian Lw (vol 1) commentary to Rule 144.

[100] ILA Report OP Cit (Note 13) Commentary (b) to principle 12 pg 731.

CHAPTER FOUR

PROTECTED PERSONS, COLLECTIVE AND INDIVIDUAL RESPONSIBILITY AND JUST WAR THEORY.

4.1 Introduction

This chapter is going to deal with the persons protected under the international and non-international armed conflicts. More so, collective and individual responsibility is also an area of great importance to this study not forgetting the just war theory.

4.2 Protected Persons.

Generally, protected persons are those who do not get involved in the armed conflicts. They are nonpartisan in any way or connected to armed conflicts such as civilians. However the protection is extended to persons taking active part in hostilities including members of armed forces who have laid down their arms and those placed "horse combat" by sickness wounds, detention or any other cause.

A civilian is any person who does not belong to a category of armed forces or combatant, prisoners of war, members of militia and members of crew such as pilots, masters and apprentices, pursuant to article 50 (1)[101].

According to article 51 (1)[102], the civilian population and individual civilians are to enjoy general protection against dangers arising from military operations. In addition, article 3 (1)[103] espouses into alia that persons who are not taking any active part in the hostilities, including members of armed forces who have laid down their arms and placed hors de combatant by sickness, wounds and detention shall in circumstances be treated humanly without adverse distinction on the ground of sex, race, religion or faith or any other criteria.

Protected persons are entitled in all circumstances to respect for their persons, their honor, their family rights, their religious convictions and practices and their manners and customs. They shall of all times be humanly treated and shall be protected especially against all acts of violence or threats and against insult and public curiosity. On the same footing, women shall be protected against any attack on their honor, in particular against rape, enforced prostitution or any form of indecent assault. Therefore, in all circumstances, all protected persons shall be treated with the same consideration by the par3ty to the conflict in whose power they are without discrimination pursuant to article 27[104].

---

[101] Protocol I Additional to Four Geneva Conventions Of 1949.
[102] Ibid.
[103] Common to the Four Geneva Conventions of 12th August 1949.
[104] Fourth Geneva Convention of 1949.

The high contracting parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment or of protected persons but also to any other measures of brutality whether applied by civilian or military agent as provided for in article 32[105]. Consequently, no protected person my be punished for an offence he or she has not personally committed, collective penalties all measures of intimidation or terrorism. Any act that is physical in nature directed to a protected person, in particular to obtain information fro them is prohibited as provided in article 31[106].

Nevertheless, protected persons who as a result of war, have lost their gainful employment, shall be granted opportunity to find paid employment an such an opportunity shall be subject to security considerations and as such, protected person may in any case receive allowances from home country, the protecting power, or the relief societies such as ICRC pursuant to article 39[107]. According to article 51 paragraph 1[108], the occupying power may not compel protected persons to work unless they are over 18 years of age, and then on work which is necessary either for the heads of the army of occupation, or for the public utility services, or the feeding, sheltering, clothing, transportation or health of the population of occupied country. Protected persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations. The occupying power may not compel protected persons to employ forcible means to ensure; the security of the installations where they are performing compulsory labor.

Paragraph 2 thereof is to the affect the work shall be carried out only in the occupied territory where the persons whose services have been requisitioned are.

Every such person shall, so far as possible be kept in his usual place of employment. Workers shall be paid a fair wage and the work proportionate to their physical and intellectual capacities. The legislation in force in the occupied country concerning working conditions and safe guards as regards in particular. Such matters as wages, hours of work equipment,

[105] Fourth Geneva Convention of 1949.
[106] Ibid.
[107] Ibid.
[108] Fourth Geneva Convention of 1949.

preliminary training and compensation for occupational accidents and diseases, shall be applicable to the protected persons assigned to the work.

Article 51 (2)[109] provided that the civilian population as such as well as individual civilians shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among civilian population are prohibited. Civilians shall enjoy the protection offered unless and for such time as they take a direct part in hostilities as par article 51 (3)[110]. Indiscriminate attacks are prohibited. Indiscriminate attacks are those which are not directed at specific military objectives, those which employ a method or means of combat which can not be directed at a specific military object or those which employ a method or means of combat the attacks of which can not be limited as required. Consequently, in each such case are of a nature to strike military objectives and civilians or civilian objects without distinction.

Under article 51(5)[111], provides that among other things, the following attacks are considered as indiscriminate

Any article by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian object.
An attack which may be expected to cause incidental loss of civilians life, injury to the civilians, damage to civilian, objects or combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. Hence attacks against the civilian population or civilians by way of reprisal are prohibited.

However article 28[112] and article 51(7)[113] is to the effect that the presence or movement of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations. In particular in attempts, to shield military objectives from attacks or to shield favor or impede military operations. The parties to the conflict are not required to direct the movement of the civilian population or individual civilians in order to attempt to should military objectives from attacks or to should military operations.

[109]Protocol 1 Additional to Geneva Conventions of 1949.
[110]Ibid.
[111]Ibid.
[112]Fourth Geneva Convention of 1949.
[113]Protocol 1 Additional to Geneva Conventions f 1949.

Consequently, article 51(8)[114] espouses that any violation of any prohibition shall not absolve the parties to the conflict fro their royal obligations with respect to the civilian population and civilians, including the obligation to take precautionary measures.

4.3 Civilian Objects

Under Article 52,[115]civilian objects shall not be the object of the attack or of reprisals. Civilian objects are all objects which are not military objectives. It is therefore necessary that all attacks be limited strictly to military objectives. Military objectives are limited to those objects which by their nature ,locations, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

In addition, it is a prohibited act to comment any acts of hostility directed against the historic monuments, works of art or places of worship which constitutes the cultural or spiritual heritage of peoples to use such objects in support of the military effort; to make such objects the object of reprisals.

Consequently, subject to Article 54[116], it is prohibited to attack, destroy,remove render useless objects indispensable to the survival of the civilian population such as foodstuffs, agricultural areas for production of food stuffs, crops, livestock, drinking water installations and supplies and irrigation works for the specific purpose of denying there for their sustenance value to the civilian population or to the adverse party, whatever the motive, whether in order to store out civilians to cause them to a way or for any other motive except when such objects are used by the adverse party as a substance solely for members of its armed forces or it is not as sustenance, then in direct support of military action provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

It is therefore a requirement that if any party to the conflict is in the defense of its national territory against invasion, derogation from prohibitions may be made by a party to the conflict within such territory under its control whether required by imperative military necessity. Where civilians protect there territory against invasion, they are referred to as "levee en masse".

---

[114]Ibid.
[115]Protocol 1 Additional to the Four Geneva Conventions of 1949..
[116]Ibid

Nevertheless, it is importance that care be taken in warfare to protect the natural environment against widespread, long term and severe damage. This protection includes a prohibition of the use of methods or means of war fare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

According to Article 56[117], works or installations containing dangerous forces, namely: dams, dykes and nuclear electrical generating stations shall not be made the object of attack even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Hence, military objectives located at or in the vicinity of works or installations shall not be made the object of attack.

In all cases,. The civilian population and individual civilians shall remain entitled to all the protection accorded to them by international law, including protection the precautionary measure. If the protection ceases and any of the works or installations or military objectives are attacked, all practical precautions shall be taken to avoid the realize of dangerous forces.

4.4 Relief in favor of the civilian population

In as far as occupied territory is concerned the Fourth G.C of 1949 already deals with the subject in a fairly adequate manner. Thu, Article 55[118] lays an obligation on the occupying power to fullest extent means available to it to ensure the food and medical supplies of the population, in particular, if the resources of the occupied territory are inadequate. Article 69[119] provides for clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population necessary for religious worships should be availed to the civilian population. The inclusion of other supplies essential to survival removes the danger inherent in any such detailed specification.

In contrast, with the situation in occupied territory, the provisions in the fourth convention relating to relief to the civilian population in non-occupied territory were totally inadequate. Article 70[120] (1) designated to fill the gap. It provides that; if the civilian population conflict, other than occupied is not adequately provided with supplies relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the parties concerned in such relief action offers of

[117]Protocol 1 Additional to the Four Geneva Conventions of 1949.
[118]Geneva Convention of 1949.
[119]Protocol 1 additional to Four Geneva Conventions of 1949.
[120]Protocol 1 Additional to the Four Geneva Conventions of 1949.

such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons , such as children , expectant mothers, maternity cases and nursing mothers.

It is a striking aspect to formulate the need of the civilian population. However out 70 does not specify who should undertake the relief actions or who are the parties concerned. Among the parties concerned, two appear to be crucial interests: the receiving party and an adverse in a position to prevent the passage of relief consignments for instance because it has established a blockade. The Article does not enter into details concerning the position of the receiving party; notably, it does not state in so many words that this party is obliged to permit necessary relief actions. Therefore one feels inclined to conclude the existence of such obligations in a situation where all conditions are fulfilled, notably the condition that in any reasonable assessment the civilian population is threatened in its survival.

As regards to parties concerned, Article 70 (2)[121] provides that each parties to the conflict shall allow and facilitate rapid and un impended passage of all relief consignments, equipment and personnel provided in accordance with this section, even if such assistance is designed for the civilian population of the adverse party; this provision effectively provides the practice, applied sometimes in blockades, of cutting off literally all supplies with enemy distinction. The remaining paragraphs of Article 70 deal with some practical aspects of relief actions, including the aspect of international co-ordinaiotn. Article 72[122] , finally lays down some rules relating to the position of personnel involved in relief actions. It provides that where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the party in whose territory they will carry out their duties; and such personnel shal be respected and protected.

4.5 Individual and collective responsibility

4.5.5 Collective responsibility

The collective responsibility of a belligerent party for a violation of the law of armed conflict assumes deferent shapes. The first and the most primitive manifestation of the idea arises when the adverse party finding itself confronted with violation of a given rule or set or rules, considers itself no longer bound to respect the rule or rules in question. Such a reaction amounts to a rigorous application of the principle of negative reciprocity.

---

[121] Protocol Additional 1 to Four Geneva Conventions of 1949.
[122] Ibid.

Makers of the Geneva conventions of 1949 have banned the operation of this crude principle under Article 1,[123] which states that parties are bound to respect and ensure respect for these convention's in all circumstances.

While it may be quested whether this provision can effective to a large in the context of law of Geneva, this situation is clearly different in respect of law of The Hague. The treasure concerned does not contain a provision excluding negative reciprocity, and it is at least open to doubt whether an un conditional ban on the operation of the principle would always be appropriate here. Doubt appears particularly justified where the violation of given rules may bring guilty party a clear military advantage[124]. One may think of rules prohibiting or restricting the use of military significant weapons, it is a widely assumed that the ban on the use of chemical weapons is subject to reciprocity. This appears to be according to their military significance. The general principle is that use of weapons that can cause superfluous injury or unnecessary suffering and weapons that are by nature indiscriminate were found to be customary in any armed conflict. In addition and largely on the basis of these principles, state practice has prohibited the use of a number of specific weapons such as chemical weapons, riot control agents as a method of warfare, herbicides as a method of warfare[125]. Bit seems indeed hard to accept that a belligerent party should simply resign itself to the adverse attacks it suffers from its opponents' use of chemical weapons when it has the capacity to retaliate in kind and thus to restore the military balance.

Reciprocity is not all bad, however, and has also a positive aspect. This will be the case when respect of the by one party entails respect by the other party. This positive aspect may also be like its negative counterparts, positive reciprocity may also be demonstrated with the example of chemical weapons: while both sides in the Second World War possessed chemical weapons neither side actually started using them[126].

In article 2 paragraphs 3[127] gives a kind of a positive reciprocity. The paragraph envisions the situation which arises when some parties to the conflict are parties the conventions and another party to the conflict is not. The paragraph expresses that if the latter accepts and applies the provisions of the conventions, the former parties to the convention shall be bound to apply the conventions even in relation to the said power.

---

[123]Common Article to the Four Geneva Convention of 1949.
[124]Frits Kalshovan, Constraints on the waging of war (1987) pg 65.
[125]Rule 76 of International Customary Law.
[126]Common to Four Geneva Conventions of 1949.
[127]Frits Kalshovan, Constraints on the waging of ware [1987] pg 65.

Belligerent reprisals provide a second manifestation of the principle of collective responsibility. They are defined as the international violation of a given rule of law of armed conflict, committed by a party to the conflict with the aim of inducing the authorities of the adverse party to discontinue a policy of violation of the same or another rule of that body of law. (it follows that a measure of reprisal must be terminated soon as the adverse party discontinues the incriminated policy)[128].

Under the customary law of armed conflict, belligerent reprisals belonged to recognized measures of law enforcement. They often tended to have an escalating effect, however, and they could usually be expected to hit other persons than the culprits. For these reasons the right of recourse to belligerent reprisals has been increasingly restricted. Thus as mentioned, reprisals against protected persons and property are expressly prohibited in all the four Geneva conventions of 1949 and in the Hague convention of 1954 on cultural property. On the other hand, on looks in vain for a similar prohibition in the 1899 and 1907 Hague convention. This together with the development aerial bombardments that led to uncertainty, whether bombardments of Second World War against civilian population could justified as reprisals. In 1970[129], the general assembly by its resolution 2675 (xxv), "affirmed" as one of the basic "basic principles for the protection of civilian populations in armed conflicts" that "civilian populations or individual members thereof, should not be object of reprisals....."

According top Frits Vaissharan[130], a third form of collective responsibility consists of state responsibility in a narrow technical legal sense, that is, financial responsibility of the state for damage caused by wrongful conduct. In d1907, this form of state responsibility was formally included in the Hague convention on land warfare: as provided in article 3[131], a belligerent party which is responsible for a violation of the rules laid down in the regulations "shall if the case demands, be liable for pay compensation".

The article makes the point that such responsibility is required in particular for all acts committed by persons forming part of its armed forces. In similar vein article 12[132] and article 29[133], mentions the responsibility of the state for the treatment accorded to persons protected.

---

[128]Geneva Assembly Resolution of the UN.
[129]Frits Kalshoven, Constraints on the waging of war (1987) pg 66.
[130]1907 Hague Convention.
[131]Third Geneva Convention of 1949.
[132]Fourth Geneva Convention of 1949.
[133] Frits Koshavan , Constraints on the waging of war, (1987) pg 66-77.

Irrespective of the individual responsibilities that may exist, this article does not however refer to the possible financial implications of this form of state responsibility.

Frits Kalshovan goes further to state that in practice, the idea financial liability of the state for encroachments of the law of armed conflicts rarely loads to any significant results. At must, a peace treaty might burden the losing party with the obligation to pay the victor a lump sum, by way of reparation for the financial losses suffered on the side of the latter party as a result of war. Obviously, the amount to be paid is bound to remain for below the total financial loss suffered on that side. More important, the amount is never determined by, or even brought in direct ratio to the damage wrongfully inflicted, that sis, caused by violations of the law of armed conflicts. Later on that the damage caused by wrongful acts of one party would be compensated with the damage unlawfully caused by the other party. 0n top of all this, the vanquished party find itself compelled not only to waive any claims for damages it might have against the victor but to charge any claims its nationals might have against the latter party for its own account[134].

A clause to this effect in the peace treaty between Japan and the United States led to a remarkable case before a Japanese court, in which it claimed that, the employment by the united states of atomic bombs against Hiroshima and Nagasaki had constituted a wrongful act and that, hence, the Japanese government was liable to pay damages, the court while holding that the use of atomic bombs had indeed been unlawful, did not go to the length of awarding the claimed damages against Japan government.

This example suffices to demonstrate the odd consequences that may arise from such shifting of responsibilities on to the party that loses the war. In the Geneva Convention of 1949, this objection is met at any rule as far as grave breaches against the convention are concerned by the provision that "no high contracting power shall be allowed to absolve itself or any other high contracting party of any liability incurred by itself or any other high contracting party in respect of such breaches[135].

The main import of the various modalities of state responsibility lies probably in their different effect. The realization that any infringement of the law of armed conflicts entails the responsibility of the state (and hence, may evoke an immediate response based on the principle of negative reciprocity or the right of reprisal or in the long run may result in state having to pay damages after the war) may provider the authorities with an extra incentives to

---

134

135 Ibid pg 67.

respect and ensure respect for this body of law. Indeed outside pressure may significantly reinforce this effect[136].

Kalshavan states that such outside pressure may come from public opinion, often inspired by the reports and comments in the media. It can also assume the shape of (discrete or public) representations by third parties: government or regional or universal intergovernmental organizations. After all, as members of the international community of states and in many instances as parties to the multilateral treaty (e.g. one of the Geneva conventions of 1949) that is being infringed, they all have an equal interest in seeing the law respected. Article 1[137] gives expression to this idea when it states that all contracting states "undertake to respect and to ensure respect" for the convention in all circumstances". In the words of ICI such an obligation does not derive only from the conventions themselves, but from the general principles of humanitarian law to which the conventions merely give specific expression as was seen in the Nicaragua vs. United States[138].

4.5.2 Individual responsibility

As in the case of collective responsibility for violations of the law of armed conflict, the idea of individual liability for war crimes is of fluctuating application goes, if found it's high-water mark though obviously one sided persecution and punishment of war criminals of the axis powers.

The Hague conventions of 1899 and 1907 on land warfare are silent on the matter of individual criminal liability for violations of the appealed regulations. This is not to say, though, that such individual liability would have been that against the intentions of the contracting parties: on the contrary, the competence of states to punish their nationals or those of the enemy for the war crimes they might have committed had long since developed into an accepted part of customary law, so much so that it was not felt to require expenses confirmation by treaty[139].

Obviously, a competence to deal with particular crimes is an entirely different matter than an obligation to do so. As regards war crimes, a customary obligation to this effect could be construed at most, if at all with respect to a states nationals. It is tempting to need at least a partial confirmation of this obligation in the closing words of Article 56 of the Regulations

[136] Ibid pg 67 UN Charter Article.
[137] Common to Four Geneva Conventions.
[138] (1986) Judgement of 27 June Part 220.
[139] Frits Kalshovan , Constraints on the waging of war (1987) pg 68.

on land warfare, where it is provided that specified acts such as the description of historic monuments or works of art and science in occupied territory , are "forbidden, and should be made the subject of legal proceedings." Be this as it may, a general obligation to prosecute individuals other than a state's nationals definitely did not exist and neither was it created by the conventions on land warfare of 1899 and 1907.

A specified duty for states to take legislative measures for the repression of certain infrastrations was laid down for the first time in the Geneva wounded and sick convention of 1906 and the next year, at the second Hague Peace Conference, a similar provision was incorporated in the Hague Convention (x) for the adoption to Maritime Warfare of the principles of the Geneva Convention. In 1929, the idea was developed somewhat further in the Geneva wounded and sick convention is adopted by the same conference remained silent on the matter of individual criminal liability[140].

In 1949, finally, elaborate provision on the obligations of states to provide for penal sanctions and the prosecution of offenders were introduced in all four Geneva Conventions. The Article in question makes a distinction between grace branches and other infrastructures. Each convention contains a precise definition of the acts constituting grave breaches of those particular conventions.

Articles 50, 51,130 and 147 of the First to Fourth conventions. The definitions comprise such acts as the willful killing, torture or in human treatment of protected persons with fully causing them great suffering or serious injury to body or health, their unlawful deportation and the taking of hostages.

Each contracting state is obliged to ensure that its legislation provides "effective penal sanctions for persons committing or ordering to be committed, any of the grave breaches" defined in the conventions. It is also under the obligation to search for persons alleged to have committed or to have ordered to be committed, such grave breaches" it shall bring such persons, regardless of their nationality, before its own courts unless if prefers to hand (them) over for trial" to another contracting state which has made out a prima facie case[141].

Articles 49, 59, 129 and 146 of the first to fourth conventions oblige contracting states to "take measures necessary for the suppression of al other infractions of the conventions. The

[140]Ibid.
[141]Ibid 69.

character of the latter measures has been left entirely open; they may, for instance, be of disciplinary order.

To date, the practical effect of these provisions has proved less than satisfactory. Few states have enacted legislation specifically providing penal sanctions for the perpetrators of grave breaches as defined in the conventions. In the Netherlands, for instance, the legislature confined him to providing penal sanctions for any act amounting to a violation of the laws and customs of war; while the law makes the penalty dependent on the gravity of the crime; the various levels of gravity are not in any way related to the definitions of grave breaches in the conventions. Then quite a few states take the position that their existing criminal law is entirely adequate to cope with the prosecution of grave breaches; other states again do not even take the trouble of answering request for information[142].

Matters are even worse as far as the obligations of investigation and prosecution are concerned. Since the entry into force of the conventions, in October 1950, virtually no action of this type has been undertaken with respect to suspects other than a state's nationals and even in these cases the usually laborers trials remained are exceptions. Constant propaganda and pressure on the authorities will be required to improve this situation.

The Hague Convention of 1949 for the protection of cultural property of armed conflict, too, contains a much simple provision on sanctions. Article 28[143] obliges contracting states to "take within the frame work of their ordinary criminal legislation, all necessary steps to prosecute and impose penal or disciplinary who commit or order to be committed a breach of the present convention.

4.6 The just wear theory

Throughout history, the just war tradition has developed as a result of contributions from both secular and religious sources. The first just war theorists were theologians and Canon lawyers who stated to develop a theory based on Christian thinking and philosophical reasoning. In modern period however, the just war tradition has also been influenced by secular laws, both domestic and international, as well as from experience of war and practices of statecraft[144].

---

[142] Ibid pg 69.

[143] 1954 Hague Convention.

[144] Loban, David. Preventive war and Human Rights in precemption: Military Action and Moral Justificaiton 3rd edition (2007) pg 92.

In broad sense of the conception, the purpose of the war tradition is to provide guidance for human behavior on different levels and in different situations. It provides a theory for statecraft on how to determine when the use of force is justified and when it is not, it guides military commanders in their decision making on the battle field, and it offers moral guidance when individuals are to consider the question of participation. The just war tradition can be divided different questions: when it is justified to go the war (What in the just war tradition is called and bellum" question) and how war is fought justify. (the in belle question). The ad bellum question has historically been answered by applying a range of criteria that need to be fulfilled in order for a war to be justified: a war must have a just cause; be waged by proper authority and with intention, be undertaken on it there is a reasonable hope of success and it there is a reasonable hope of success and if the total good outweighs the total civil (overall proportionality) be a last resort and be waged for the end or peace. However, the question that must be answered is whether the above requirements are normally followed before a state raise up its areas to fight another[145].

The just cause requirement means that the use of force is only justified f the protection and preservation of values. In the classical interpretation, this made the use of force possible in one or more of the following three situations to n defend the innocent against armed effect, to retake something wrongly taken, or to punish evil. The proper authority requirement limits the right to authorize force to sovereign political entities, that is, those with no superior advantage[146].

The requirement was developed to restrict the resort to force by denying it to local strengthens and armed individuals. Right intention in the just war tradition means that the intent must be in occur with the just cause and not value extension, such as territorial aggrandizement or coercion. Reasonable hope of success , overall proportionally and last resort are for just war tradition in its classical form, all prudential tasks to be applied classical form, all prudential tasks to be applied as additional checks when the above mentioned prerequisite have been met.

The in Bello question circles around two criteria: discrimination and proportionality. This means that international harm noncombatants and needless destruction must be avoided. The just in bellow concerns have historically and thematically been given a secondary role in relation top the adbellum criteria since the question of how to fight a war justify is secondary

[145]Ibid pg 115.
[146]Ibid pg 117.

to the question of how to justify fight the war in the first place. It should be mentioned, however, that the relationship between the in bellow and adbellum concerns is complex and that they cannot be completely separated. For examine it could be argued that for a war to be justified, the means necessary to wage it must also be justified. Even though this study is mainly concerned with adbellum questions, I do for this reason no strict distinction between the two branches of the just war tradition[147].

4.6.1 Can war ever be justified?

Just war theorists, have been criticized for simply assuming that war can be justified war is clearly a terrible thing. It kills maimes and traumatizes innocent people and the wounds if inflicts on the affected societies can take generations to heal. The politest solution to this is the rejection of all reliance so armed force. This position offers several valuable insights, such as a strong general presumption against the use of force, but it also has weakness. Firstly, how without violence, can one respond to violence? If a country lays down arms it becomes vulnerable to both internal and external threats from those who do not share the commitment to abstain from violence. Secondly, how do pacifist thinking account for co0ntemporary issues such as the need to deter certain uses of force and the potential of strategic coercion to ensure absence of international norms? For this and other reasons, pacifism has remained a minority position in most countries[148].

4.6.2 Just war theory and international law

The current international law on the use of force originates from the just war theory. In fat before any international legal system had been developed, the use of force was regulated solely by moral judgments based on the just war doctrine[149]. This made the application of force rather arbitrary and as technical advancements amplified the destructiveness of war, the demand for a more reliable regulation of the use of force grow stronger and stronger. With the enactment of the UN charter this demand was finally met and the use of force was no longer only morally regulated but also legally.

What, then, remain of the original just was ideas in the current legal regulation of the use of force? At first glance, the traditional jus ad bellum requirements seem to be present in the current position law only to a limited extent. In general, the scope of potential situations in which force may be applied has been limited. For instance , narrowed in contemporary law,

[147]Luban David, Preventive war and Human Rights in Presumption: Military Action and Moral Justification 3rd Ed (2007) pg 123.
[148]Ibid pg 128.
[149]Ibid pg 132.

where defense is established as the only justifying cause for the use of force. And the proper authority requirement, which in its, classical version implied that interventions might be justified to uphold internationally recognized standards of justice, has in positive international law developed into restrictive roles on when states may resort to war, including a ban on interventions. The right intention and reasonable hope of success requirements are not explicitly addressed but the aim of peace is greatly stressed. When it comes to the peace proportionality of ends, forces has shifted from a lost benefit assessment to a view where the first use of force is assumed to be the greater evil[150].

A closer look at the link between contemporary law and the traditionally just ware doctrine, however, reveals that the initial notion of development might not be entirely accurate much of what appears to be clear departures form the, original ideas expressed in the just war doctrine is in fact, merely form logical innovations, not necessarily reflecting a true change of direction. An example of this , is a retaliatory second strike, what today is categorized as an act of defense, but previously would have been called punishment of evil. Another is the use of force to retaking of something wrongly explanations, the gap between traditional just war thinking and contemporary law also shrinks when the ambiguous of the international law are considered.

Even though the UN Charter might be outlawing interventions, the right to do so have been defended and practiced by several states which make the exact states of the legal situations somewhat hard to define. The uncertainty of the law and its connection to the traditional just war theory is clearly reflected in the shift form the historical focus on justness to the contemporary emphasis on aggression.

In the 20th Century, the discussion has been dominated by the nation of aggressive and defensive wars as opposed to the previous distinction between juts and unjust wars. The shift was intended to reduce arbitrariness and make it easier to establish when a breach against the international roles of conduct had occurred. However, both the traditional and the modern sets of distinction depended on detraction[151].

If aggression is understood as an initiation of hostilities, regardless of whether this is right or wrong, then it is clear that a just aggressive or defensive, since it does not matter for that

[150]Lubsn, David. Preventive war and Human Rights in Presumption: Military Action and moral justifications 3rd Ed (2007) Pg 144.
[151]Luban, David. Preventive war and Human Rights" in p recemption: Military Action and Moral Justification 3rd Ed (2007) pg 199.

theory who initiates a war. This interpretation, however, is at odd with the one must commonly applied in recent years, according to which an aggressive war is unjust virtually by definition. This normative version limits the scope of aggression to situations in which the initiation of hostilities is referred, has been suggested. In MichaelWatzer's just and unjust wars[152]., he contends that also cases of mere threats, provided that they are serious enough, can constitute aggression. If it is assumed that such threats provide a just cause for resorting to war, this makes it possible, to initiate just war which is more in line with traditional just war theory than contemporary positive law.

[152]Ibid pg 209.

CHAPTER FIVE

RECOMMENDASITONAS AND CONCLUSIONS

Having critically analyzed the law on armed forces and the striking of a balance on humanitarian intervention, it is certain that armed conflicts is not prohibited but certain conditionalties must be met during such conflicts. It is quite uncertain on the legal status of humanitarian intervention and therefore before any state can attack or use force against another state on the ground of humanitarian intervention care must be taken and laid down procedures must put in place to guide such actions the security council must be comprised of may states especially African states who can have a say equal to the big five.

Having looked at the use of force, it is clear that it is prohibited under article z(4) of the UN charter. I have also averred that both forms of force can justified. Consequently, there is a gap between law and moral in the of prentice are humanitarian intervention. It suggestive that customary international should be strengthened and implement to bridge the gap that primatize exists in laws.

The reason why international customary law is necessary is because it reflects the moral conscience of war. It is also important that were the laws and provision there under are in conflict measures should be in place to reconcile them so that they operate in tandem with t5hwe purpose to which they were enacted:

However this should not mean that legitimate acts of the state criminalized.
Legal reforms are hardly a narrow proposal. Attempts on reforming the law have been made on several occasions but so far this little progress. Therefore, the need to expedite such reforms and unnecessary beau racy that bottlenecks such reforms be removed. The need for at least limited exception to the nonintervention principle is nonetheless recognized, even by those who traditionally have opposed such a development, so reform should not be soon as impossible. The question than we need to ask ourselves is on what account is use of force justified?

Anti-legal reform argue that any change could undermine the principle of sovereignty and attack global security negatively. They prefer the status quo. This view according to me is misplaced. We live in a dynamic society where change should be within the prescient of the societal expectations therefore it is important that whatever course taken to bring peace and

tranquility and for the benefit, and interest of civilians to me is a positive thinking location that will ensure world order.

War is the most dreadful thing more than any understood evil and it is always easy to start war and very difficult to end it. In view of this, before states can decide to go to armed conflict they must first think and understand the consequences, to this effect I recommend that strict penalties should be in place to punish the aggressor should be in place to punish the aggressor and reward the aggresse.

States who favor doctrines of prevention should seek to establish criteria for when preventive force can be used and convince others to support them. Precedents must be established and once accepted followed to the latter.

With regard to individual and collective responsibilities, it is imperative that states who take part in armed conflict be collectively responsible by ensuring that protected persons well taken care of without adverse distinction on the ground of enemity, malice or any other similar distinction that can be interpreted to undermine the fundamental rights of such persons. On the same footing, every state should put in place procedures and mechanisms to deal with perpetrator of murder, torture, aggression or war crimes so that such perpetrators an individually responsible for the acts of their own. This is not a new suggestion in the sense that other after the 1994 Rwanda genocide, tribunals were set in place to deal with those when are believed or could have been believed to have taken part in such crime in Rwanda.

Consequently, the I.C.J must be given an automous existence in such a way that it is capable of punishing the states that are found to have violated the law of armed conflict. It is important that it is mandated to prescribe punishments and fines that are mandatory for be followed. Its existences should not be what I call "toothless organ "which lacks the teeth to bite as it is now.

The reforms in the UN S.C have a long way to go with few of economic power house taking the overall control. Under the UN charter we understand that there is a provision that allows other states to hold the position for a period of three years. This is quite magnanimous. All states are equal by virtue of being able to send representatives to such high profiled entity hence, it is important that a temporary from on joined to 10 other states to cut across. This proforencial method is one the contributory factors that has brought world instability because other states a faulting why they have to be controlled by the GS. I therefore suggest that there

is need to be liberal by applying the doctrine of equity when it comes to matters dealing with world peace and order lets we run and rumble in a horrific 3rd word.

Dangers are looming, revolutions are taking place across the world, political instabilities are being experienced across the world and terrorists are attacking the innocent human beings, but is the GS doing? They seat in their comfort zones having their parochial interests first while the innocent perishing. It time that GS to wake up and begin discharging their responsibilities philanthropically not holding their interests in one hand and disguising to help in another.

I recommend that we need to do away with the GS veto powers and introduce and introduced a system that expand at least G 10 adding Nigeria, Kenya and south Africa immediately and than 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. I believe that it is time that UN has its own standing military force that is governed and controlled by the UNSC.

5.2 Conclusion.

Now that there is a war in Syria, perhaps I would pose a question, why is Russia, China, France and UIC had to vote the proposition of ensuring that there is a humanitarian intervention. What interest do they have in the on going quagmire in Syria? Are they selling weapons to the Syrian government to continue its sporadic killings of the innocent? Why is Obama not taking a strong stand on the Syrian issue and what is so important between Syria and Libya? I really do not know the answer because I am not versed on Syria but casual reading permits me to assert that the rebellion against Asad in Syria is perpetrated by his insecurity to the common populace. Russia and China seem to be benefiting by selling their weapons to the Syrian government. America is supporting the rebels and is alleged to have started supplying them weapons. I can tell without fear of contradiction that it seems the GS are fighting themselves indirectly because others are pro government and vice versa.

Having laid these prospects out, it makes me understand that there is very little have that any prudent person could possibly support. I predict another case of "humanitarian" law in the service of western imperialism.

With due respect to US and its fellow super powers, I doubt their intentions in their interventions in most of the wars taking place or that have taken place. Why I say this is that where were they when Rwanda was boiling in bloody math? Is it because Rwanda had

nothing to offer them that they found it impractical to help or was it an inadvertent mistake? Think about it.

It can not escape my mind when Rwanda on the fateful evening of 6th April 1964 experienced slaughters and very unsympathetic acts of human beings that to me is a recent deal. A period that left Rwanda paralyzed, handicapped and barefoot that on and until today its recovery is not complete. The US and its cronies has not given the world a definite reason why they folded their hands only to spectate Rwanda falling on its foot. It pains me and someone must take the responsibility to give a convincing reason why all these had to happen under their watch.

I remember USA acting inconsequently by withdrawing UNAMIR as well as blocking the deployment of UN enforcement effectively leaving Rwandans to the destiny of their fate. I think legally, USA supported and abetted the crimes that took place in Rwanda by abdicating their responsibility of ensuring world peace and order.

Other powerful states such as Russia and France ignored to intervene stating that it was an "Internal Affair ". If they claim that happened in Rwanda was an internal affair why did they intervene in the Libya and Iraq situations. As I have stated earlier, Rwanda had nothing, no oil, no god fields no nothing to other USA and its cronies.

I must be pardoned for saying this if it will hurt. The big brothers are not there to help. They are very greedy unsympathetic and very parochial. They are distinctive on the ground of color, sex, religion or faith and they are racists. They only help you when they know you have something of great benefit to them. They resonate well with recourses' such as oil, gold, diamond and any mineral of similar value. It is therefore important that we stand for who we are and disallow others and princes of sycophancy.

Jump up Danish Institute of International Affairs. Humanitarian Intervention: Legal and Political Aspects. Submitted to the Minister ofForeign Affairs, Denmark, December 7, 1999.

Jump up Simon Chesterman. Just War or Just Peace?Humanitarian Intervention and International Law Oxford: Oxford University iPress, 2001.

Jump up Fernando Teson. "The liberal case for humanitarian intervention." Humanitarian Intervention: Ethical, Legal, and Political Dilemmas. Cambridge: Cambridge University Press, 2003.

Jump up Michael Burton. "Legalizing the Sub-Legal: A Proposal for Codifying a Doctrine of Unilateral Humanitarian Intervention." Georgetown Law Journal 1996: p. 417.

Jump up Independent International Commission on Kosovo. Kosovo Report. Oxford: Oxford University Press, 2000.

Jump up Michael Byers and Simon Chesterman. "Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law." Humanitarian Intervention: Ethical, Legal, and Political Dilemmas. Cambridge: Cambridge University Press, 2003.

Jump up DorotaGierycz. "From Humanitarian Intervention to Responsibility to Protect." Criminal Justice Ethics 2010: pp. 110-128.

Jump up The UK based its legal justification for the no-flight restrictions on Iraq on humanitarian intervention. The US based its on UN Security Council Resolution 678.

Jump up , Hilpold, Peter, 'Humanitarian Intervention: Is there a Need for a Legal Reappraisal?, European Journal of International Law, 12 (2002), pp. 437-46.

Jump up Abiew, F. K., The Evolution of the Doctrine and Practice of Humanitarian Intervention, Kluwer Law International (1999).

Jump up Richard Falk. "Humanitarian Intervention: Elite and Critical Perspectives." Global Dialogue 2005.

Jump up Anne Orford. Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law. Cambridge:Cambridge University Press, 2003.

Jump up Noam Chomsky. A New Generation Draws the Line: Kosovo, East Timor, and the Standards of the West.New York: Verso,2001.

Jump up Tariq AN. Masters of the Universe? NATO's Balkan Crusade. New York: Verso, 2000.

Jump up Henry Kissinger. Does America Need a New Foreign Policy? New York: Simon and Schuster, 2001.

Jump up [A]AidinHehir. "Institutionalizing Impermanence: Kosovo and the Limits of Intervention."Global Dialogue 2005.

Jump up Declaration of the South Summit, 10-14 April 2000 Further reading[edit].

A RIGHTTO INTERFERE. BERNARD KOUCHNER AND THE NEW HUMANITARIANISM by TIM ALLEN and DAVID STYAN.

Nasimi Aghayev, "Humanitare Intervention und Volkerrecht - Der NATO-Einsatzim Kosovo", Berlin, 2007. ISBN 978-3-89574-622-2.

Lepard, Brian, Rethinking Humanitarian Intervention, Penn State Press, 2002 ISBN 0-271-02313-9 Kofi A. Annan, Two Concepts of Sovereignty, Economist, Sep. 18, 1999.

Josef Bordat, "Globalisation and War. The Historical and Current Controversy on Humanitarian Interventions", in: International Journal of Social Inquiry 2 (2009), pp. 1, 59-72.

Mark R. Crovelli, "Humanitarian Intervention and the State" http://mises.org/journals/scholar/crovelli2.pdf.

Military intervention and the European Union, Chaillot Paper No. 45, March 2001, European Union Institute for Security Studies .The Ethics of Armed Humanitarian Intervention U.S. Institute of Peace August 2002 The Argument about Humanitarian Intervention By Michael Walzer