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COMMENTS ON SOME RULES APPLICABLE TO ARMED CONFLICTS UNDER INTERNATIONAL HUMANITARIAN LAW

Uluslararası İnsancıl Hukukun Silahlı Çatışmalara Uygunalabilir Bazı Kurallarına İlişkin Yorumlar

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ABSTRACT

International law is the set of rules governing international relations, and much of these rules focus on the use of force in international relations. Another set of rules directly related to the use of force is International Humanitarian Law (IHL), which is a branch of international law and deals with the protection of fundamental human rights during armed conflict. The main aim of this study is to underline some important discussions in IHL framework and make some comments that explain the vague parts of them. The study is important for at least two main reasons. First, this study will be guiding to the Turkish Armed Forces personnel who have been carrying on military operations in Syria on the basis of legitimate self-defense right since August 2016. Of course, the outcomes of the study will be applicable to any other armed conflicts. Although Turkey often undertakes cross-border armed operations, there are quite a few studies found in the field of IHL by Turkish academics. The second aim of the study is to contribute to the field of IHL. For these purposes, four basic issues were discussed here. Once the relationship between jus ad bellum and jus in bello is dealt with, it will be referred to the definition of "unlawful combatant" and the consequences of this definition. Third, the article will focus on the prisoners of war statutes of the fighters of the parties who do not recognize each other as sovereign states. Finally, it will be explained in which cases those, who are lawful combatants and would not be held accountable for killing enemy troops on the battlefield, will be responsible for violent acts.

ÖZ

Uluslararası hukuk, uluslararası ilişkileri düzenleyen kurallar bütünüdür ve bu kuralların büyük bir kısmı uluslararası ilişkilerdeki kuvvet kullanımı üzerinde yoğunlaşmıştır. Bununla doğrudan ilgili bir diğer kurallar bütünü de uluslararası hukukun bir dalı olan ve silahlı çatışma sırasında temel insan haklarının korunmasıyla ilgilenen Uluslararası İnsancıl Hukuk (UIH)'tur. Bu çalışmanın temel amacı, UIH çerçevesinde süregelen bazı önemli tartışmaların altını çizmek ve bunların muğlak kısımlarını açıklayan yorumlar getirmektir. Çalışma iki açıdan önem arz etmektedir. Birincisi, bu çalışma, Türk Silahlı Kuvvetleri'nin Ağustos 2016'dan bu yana meşru müdafaa hakkı temelinde Suriye'de devam eden operasyonları yürüten personele yol gösterici olması açısından önemlidir. Elbette çalışmanın çıktıları bütün diğer silahlı çatışmalar için de uygulanabilir olacaktır. Türkiye sıklıkla sınır aşan silahlı çatışmaların tarafı olmasına karşın, Türk akademisyenler tarafından UIH alanında ortaya konulan oldukça az eser bulunmaktadır. Çalışmanın ikinci amacı da, UIH alanına bir katkı yaratacak olmasıdır. Bu amaçlarla, çatışmada dört temel mesele ele alınmıştır. Jus ad bellum ve jus in bello arasındaki ilişki ele alındıktan sonra, "yasadışı savaşçı" tanımına ve bu tanımın neticelerine değinilecektir. Üçüncü olarak, birbirlerini egemen devletler olarak tanımayan tarafların savaşçılarının savaş esiri statüleri üzerinde durulacaktır. Son olarak, yasal savaşçı durumunda bulunan ve savaş alanında düşman askerini öldürdüğü için sorumlu tutulamayacak kimselerin hangi hallerde şiddet içeren eylemlerden sorumlu olacağı konusu açıklanacaktır.

1. INTRODUCTION

The international political system illustrates an anarchic environment because there is not any formal authority to regulate the affairs, and therefore, every state is equally sovereign in the system. Such a system is vulnerable to conflicts of interest which often lead to armed conflicts. Therefore, it is no surprise that "the rules concerning the use of force form a central part of the international legal system" (Värk, 2003: 27). However, wars do not anymore take place in limited zones where only soldiers fight each other. Developments in weapon technologies have extended battlefields to cities and villages, and endangered civilians. Fortunately, there have been efforts to set clear limits on the conduct of military operations of which the four Geneva Conventions of 1949 are well-known.

International humanitarian law (IHL) is a set of rules which aims at limiting the effects of armed conflicts. In other words, it protects persons who are not or are no longer participating in the hostilities, and restricts the means and methods of warfare for humanitarian reasons. A big part of IHL is contained in the four Geneva Conventions of 1949, by which almost every state in the world has agreed to be bound (Tomuschat, 2010).

Despite these efforts, civilians still suffer due to illegal acts during armed conflicts such as the terrible events in Syria since 2011. Not only civilians, soldiers are also exposed to illegal treatment. This article aims to underline some very important contentions under IHL for two reasons. First, it will be guiding to the on-going Turkish military operations in Syria, named Operation Euphrates Shield, and any other to reduce the sufferings during armed conflicts. Not that the Turkish army has violated any rules of IHL in that operaton, but there is always such a risk. Second, it will be a contribution to the field of IHL since there may be always an ambiguity and there is little said by the Turkish scholars on this issues.

To achieve these goals, the article is divided in four parts. The first part focuses on the issue of the separation of jus ad bellum and jus in bello where it is argued that illegal acts during an armed conflict does not ipso facto make the armed conflict itself illegal. The second part will briefly explain the term "unlawful combatant" and then present the consequences of defining unlawful combatant as persons who fight without the right to engage in hostilities. Recognition of states is an issue in international law and it is not rare that parties to an armed conflict do not recognize each other. The third part clarifies prisoner of war (POW) status of individuals fighting for a state or would-be state not recognized by the detaining state. The fourth part deals with the issue of whether POWs would be responsible for attacking civilian targets.

It should be noted that the article does not discuss the above-mentioned issues with a specific case although it mentions some of the conflicts to clarify its position better. Instead, the article present a general framework that can be applied to specific cases by other scholars.

2. THE ISSUE ON TAKING JUS AD BELLUM INTO ACCOUNT IN ASSESSING JUS IN BELLO ADHERENCE

Contemporary jus ad bellum prohibits the use of force in international relations (U.N. Charter art. 2(4)). The two exceptions to this norm are the right to individual or collective self-defense (U.N. Charter art. 51) and Security Council enforcement measures (U.N. Charter art. 42). Jus in bello, on the other hand, has its aims on the conciliation of the necessities of war with the laws of humanity by setting clear limits on the conduct of military operations (Blank and Noone, 2013: 4). To invoke jus in bello, it does not matter how or why a conflict starts; once it begins, jus in bello is in effect (Blank and Noone, 2013: 21).

The relationship between jus ad bellum and jus in bello has been considered as one of the inevitable tensions in international law (Moussa, 2008: 965). The tension arises from the question of whom the two separate bodies of law apply to, meaning that why law of armed

conflict (LOAC) does not take into account whether the resort to force was lawful and does apply equally to all the parties without regard to any jus ad bellum considerations. The discussion takes place around "the equal application principle" of LOAC.

According to the equal application principle, jus in bello applies equally to all parties. This principle finds its meaning in Article 2 of the 1949 Geneva Conventions and in the Preamble to Additional Protocol I (Moussa, 2008: 965). Equal application principle simply suggests that LOAC applies equally to all belligerent parties in a conflict, irrespective of the question of how the war began or the relative justice of the causes involved (Roberts, 2008: 932). Since jus ad bellum prohibits the use of force except those situations under the United Nations Charter, the question arises: Why does an aggressor benefit from the law although it is the one who breached the law first?

It could be argued that LOAC should not apply to the aggressor because of ex injuria jus non oritur principle of law (Moussa, 2008: 966). According to the legal meaning of ex injuria non oritur jus, one should not be able to profit from one's own wrongdoing (Alverez-Jimenez, 2012: 441). In other words, it seems unacceptable that an aggressor should benefit from the protections afforded by the laws of armed conflict (Lauterpacht, 1953: 100).

However, this view should be discarded due to the practical and humanitarian considerations of LOAC. First, the central purpose of jus in bello is to reduce the suffering during armed conflict and victims on both sides are equally worthy of protection (Blank and Noone, 2013: 7). Second, it can never be thought that the parties would respect LOAC if there is not reciprocity in its application (Mousssa, 2008: 967). Therefore, jus in bello would not apply to a war and would not bind the parties. It goes without saying that such a warfare scenario should be rejected on moral and humanitarian grounds. Also, if jus in bello restricts only the aggressor and not the party acting in self-defence, it is unreasonable to assume that either party will respect the principles of international humanitarian law because there is always a controversy that which party is the aggressor (Lauterpacht, 1953: 98). Each party will, of course, argue that they are acting in accordance with jus ad bellum.

Another argument against the separation of jus ad bellum and jus in bello is that a state which is acting in self-defence following an initial act of aggression should be entitled to take measures against the adversary that would not be lawful in other circumstances (Wright, 1953: 374). In other words, this argument makes a distinction between aggressor and defensive parties and provides an excuse for extreme (or otherwise unlawful) acts by defensive that may be unlawful under jus in bello. However, in international policits, there is already way more than enough of a tendency to use the circumstances to justify extreme acts (Roberst, 2008: 932). For instance, the question whether it is desirable to give formal legitimacy for those unlawful acts must be asked when we bear in mind the U.S. atomic bombings in Hiroshima and Nagasaki. Opening the door for some unlawful acts would create a slippery slope effect.

It also should be noted that a violation of jus in bello does not necessarily mean a violation of jus ad bellum as well. In other words, illegal acts during an armed conflict does not make the armed conflict itself illegal. Take the Russian military intervention in Syria. On the invitation of the Assad administarion, Russia sent troops to Syria for the first time on September 30, 2015, and since then has provided the regime troops with air and land support (Siemaszko, 2015). The alleged violations of jus in bello by the Russian air and land forces does not ipso facto mean it violated jus ad bellum as it is argued (Solak, 2016).

In conclusion, the position that the application of jus in bello depends on the legality of the use of force under jus ad bellum has died out (Okimoto, 2012: ¶ 20). The biggest weakness of the arguments against equal application of LOAC derives from the fact that it is always difficult to secure agreement on which side represents justice. Creating a system in which LOAC applies

to only one party would destroy the main purpose of the law, which is to reduce "human" suffering. The tendency now is to favor the position that jus ad bellum and jus in bello are two separate bodies of law although they often overlap.

3. THE CONSEQUENCES OF DEFINING "UNLAWFUL COMBATANT" AS PERSONS WHO FIGHT WITHOUT THE RIGHT TO ENGAGE IN HOSTILITIES

Defining individual status during armed conflict is important because it is that definition which determines whether a person can lawfully engage in hostilities and enjoy the rights under LOAC such as being immune from attack or enjoying the privileges of POW (Blank and Noone, 2013: 211). The terms "combatant", "prisoner of war" and "civilian" are used and defined in international treaties and under LOAC. However, "unlawful combatant" does not appear in them. The term has, however, been used in legal literature (Ex Parte Quirin, 1942). Since the term unlawful combatant is not defined in treaties, the consequences for the applicable protection are not very clear.

Unlawful combatant is, generally, defined as all persons taking a direct part in hostilities without being entitled to do so and who, therefore, cannot be classified as prisoners of war on falling into the power of the enemy (Aldrich, 2002: 892). It should be noted here that the term "unlawful combatant" has a meaning only within the context of the law applicable to international armed conflicts as defined in the 1949 Geneva Conventions and Additional Protocol I (Dörmann, 2003: 47). The law applicable in non-international armed conflicts does not foresee a combatant's privilege (Blank and Noone, 2013:212).

The first consequence of this definition is that unlawful combatants as defined above do not meet the conditions to qualify as POWs under the Article 4A(2) of Third Geneva Convention and thus are not protected by it (the Third Geneva Convention, art. 4(A)). Unlawful combatants, although are subject of capture, are not entitled to POW status (Woolman, 2005: 159; Aldrich, 2002: 892).

Second, unlawful combatants do not have rights as many as a POW would have such as the right to communicate with family on a regular basis, to live in comfortable quarters, freedom from interrogation, and most importantly, the promise of release at the conclusion of combat (Woolman, 2005: 161).

Third, unlawful combatants, unlike lawful combatants, have been tried before military tribunals, but there is no requirement that they will be punished (Woolman, 2005: 161). It is not clear how long unlawful combatants may be detained. Some suggest that they can be detained even after the end of hostilities (Woolman, 2005: 161).

Also, the alleged offenses would be different. Lawful combatants cannot be prosecuted for lawful acts of war (i.e. killing an enemy soldier) in the course of military operations even if their behavior would constitute a serious crime during peacetime (Dörmann, 2003: 45). Therefore, lawful combatants can only be prosecuted for war crimes under LOAC (Dörmann, 2003: 45). On the other hand, it is generally accepted that unlawful combatants may be prosecuted both for their acts in hostilities and violations of LOAC (Aldrich, 2002: 893).

Since unlawful combatants do not meet the requirements in Third Geneva Convention, they are not protected by it. Then, does international law leave unlawful combatants at the mercy of those detaining them? Fortunately, it does not. The Fourth Geneva Convention was created to protect persons who "at the given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals" (Fourth Geneva Convention, art. 4). However again, it should be accepted as true that the Fourth Geneva Convention does not cover all unlawful combatants, as how it clearly limits its field of application in certain cases. For instance, it does not protect persons who are (1) nationals of the party or power in which hands they are, (2) nationals of

a state not bound by that convention, (3) nationals of a neutral state in the territory of a belligerent state, and (4) nationals of a co-belligerent state with normal diplomatic representation in the state in whose hands they are (Fourth Geneva Convention, art. 4).

Unlawful combatants who are excluded from the Article 4 (of the Fourth Geneva Convention) protections are still protected under Article 75 of the Additional Protocol I. Article 75 provides that "all persons in the power of a party to the armed conflict be treated humanely in all circumstances and that they enjoy the protections listed therein without any adverse distinction based upon race, color, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any criteria of a similar nature."

Therefore, although unlawful combatants as persons who fight without the right to engage in hostilities are not entitled to POW status and enjoy the rights provided by the Geneva Conventions, they still have protections as mentioned above.

4. POW STATUS OF INDIVIDUALS UNDER THE THIRD GENEVA CONVENTION FIGHTING FOR A STATE OR WOULD-BE STATE NOT RECOGNIZED BY THE DETAINING STATE

An individual who lawfully and directly takes part in a conflict is entitled to POW status under the Third Geneva Convention even if the state he is fighting for is not recognized by the detaining state with the requirement that the state he is fighting for is a High-Contracting party to the Convention.

Persons who fall into one of the categories under Article 4(A)(1), (2), (3), (4), (5) and (6) of the Third Geneva Convention are entitled to POW status if the state they are fighting for is a party to the Convention regardless whether the detaining power recognizes that state (Aldrich, 2002: 204). The Geneva Conventions and Protocols require that its provisions should be applied to signatories regardless of recognition policies (Keiko, 2008: 43). The Convention does not provide any exception to POW status of those who meet the criteria under the Article 4. Moreover, Article 2 of the Third Geneva Convention provides that it is applicable in "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." (the Third Geneva Convention, art. 2).

A similar answer should be given to the question of what happens if the detaining state recognizes the state that the individual is fighting for, but does not recognize the government of that state. To examine further, the situation between the Taliban and the United States constitutes a proper example. The United States, like almost all other countries, refused to extend diplomatic recognition to the Taliban. The Taliban is the effective government of Afghanistan, and both Afghanistan and the United States are parties to the Geneva Conventions. Are the Taliban soldiers not members of the armed forces of a party to the conflict? Are they, at least, not members of militias or volunteer corps forming part of those armed forces? Without doubt, any individual falling into one of the categories provided under Article 4 of the Third Geneva Convention should be entitled to POW status. The lack of recognition by the United States of the Taliban as the legitimate government of Afghanistan cannot justify a refusal to consider the captured Taliban soldiers as members of the armed forces of Afghanistan (McDonald, 2002: 208).

The key link that provides an individual the opportunity to gain combatant\POW status is that the individual fights for one of the parties to the conflict. Therefore, fighting "on its behalf" is not necessary to gain combatant\POW status. The term "fighting on its behalf" might create a necessity that an individual should be a member of armed forces of one of the parties. However, this is not always the case. For instance, "inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry

arms openly and respect the laws and customs of war" would be entitled to combatant\POW status (the Third Geneva Convention art. 4). Also, Article 4(2) provides POW status for those who are "members of other militias and members of other volunteer corps, including those of organized resistance movements…." Therefore, for being entitled to POW status, an individual does not have to show a formal strict relation between his organization and the government of that state. The simple fact that that individual is fighting for the state against which the detaining state is fighting is enough to gain combatant\POW status.

The U.S. war on terror consists a proper example. In Afghanistan, the United States has been in war against both the Afghan government (the Taliban) and Al Qaeda. There is almost no evidence suggesting that Al Qaeda members are incorporated in Taliban military units as part of Taliban armed forces (Aldrich, 2002: 203). However, Al Qaeda members should have been entitled to POW status IF they met the requirement under Article 4(2) of the Third Geneva Convention.

5. THE ISSUE OF WHETHER POWS WOULD BE RESPONSIBLE FOR ANY VIOLENTS ACTIONS

Even if the accused were given POW status, the charges would still be valid. Article 99 of the Third Geneva Convention states that "no prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the detaining power or by international law, in force at the time the said act was committed." Therefore, POWs could be responsible for all the acts that are punishable crimes under international law.

5.1. Murder of The Civilians in A Village

Under article 50 of the First Geneva Convention; Article 51 of the Second Geneva Convention; Article 130 of the Third Geneva Convention; and Article 147 of the Fourth Geneva Convention, it is provided that acts committed against protected persons is one of the grave breaches of the Convention. Under international law, civilian persons and objectives are protected, as Article 15 of the Fourth Geneva Convention as well as many other provides. Also, attacking civilians is clearly prohibited under Articles 51 and 85 of the Additional Protocol I. Therefore, murder of civilians not justified by military necessity is unlawful and punishable under international law.

5.2. Placing of Bombs in A Civilian Bus Station

Under Articles 4 and 5 of the Fourth Geneva Convention, indiscriminate attacks are prohibited. Accordingly, Article 5(b) of the Additional Protocol I provides that "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." A bus station, which is not primarily used for military purposes, is a civilian object and there is no direct military advantage of such an act. Therefore, it is a grave breach of the Convention.

5.3. Wanton Acts of Terrorism

Act of terrorism is another grave breach of the Convention. Article 33 of the Fourth Geneva Convention states that "collective penalties and likewise all measures of intimidation or of terrorism are prohibited." Also, Article 2(d) of the same accepts act of terrorism as one of the act prohibited by the Convention. Similarly, Article 13(2) of the Additional Protocol I provides that "acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." Thus, wanton acts of terrorism constitute grave breaches under international law.

In conclusion, even if the state does not have domestic law regulating those act, the accused can be still prosecuted under international law.

6. CONCLUSION

One must acknowledge that wars are inevitable realities of international relations. However, that acknowledgement should not prevent the international community from setting clear limits on the battlefields. After the huge developments in the weapon industry, those who suffer more than the actual fighters are civilians. Moreover, inhuman treatment towards enemy soldiers is still a reality. Fortunately, we do have IHL that can slow down the war machine in many cases.

This article examined some rules applicable to armed conflicts and made comments that are helpful to slow down that war machine. First, it clarified that jus ad bellum and jus in bello are two separate bodies of international law and one cannot make the other illegal. From that perspective, illegal acts during an armed conflict does not necessarily mean the armed conflict itself illegal because otherwise, it might be possible to argue that an armed conflict is in accordance with jus in bello fits the requirements of jus ad bellum automatically.

Second, the article dealt with the definition of "unlawful combatants" and made comments on the consequences of this definition. One important contention here was that unlawful combatants who are excluded from the Article 4 (of the Fourth Geneva Convention) protections are still protected under Article 75 of the Additional Protocol I, and therefore, they are not at the mercy of those detaining them.

Third, the study dealt with the issues of whether those fighting for a state or would-be state not recognized by the detaining state would gain pow status under the third Geneva convention, and it argues that they should be entitled to POW status if they meet the requirement under Article 4(2) of the Third Geneva Convention.

Finally, the article explained in which cases those, who are lawful combatants and would not be held accountable for killing enemy troops on the battlefield, will be responsible for violent acts. The contention here was that POWs could be held responsible for acts recognized as crimes under international law such as murder of civilians, damaging civilian objects, and acts of terrorism.

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