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The Just War Theory and Human Rights Violations: What Does International Law Tell?

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Abstract: *War and Peace are the two important topics of international law. Both the terms, despite polar apart in their nature are the subject matter of international law. As war is inevitable and cannot be reduced to zero; hence, international law tries to lay rules for the justification of war and its conduct. However, a just war becomes unjust when it causes disproportional civilian casualties. Humans become the target of war, whether just or unjust. On one hand, the UN Charter gives equal rights to all the humans without any discrimination and on the other hand, it considers the declaration of a just war as a prerogative of the UN Security Council only. However, states take unilateral actions and violate both the principle of proportionality and fundamental human rights. This analytical study discusses the Just War Theory and its impacts on fundamental human rights, in light of the international humanitarian law.*

Key Words: Just War, Jus ad Bellum, Jus in Bello. International Law, International Humanitarian Law

Introduction

St. Augustine is considered as the founder of Just War Theory in Western political philosophy. Augustine was both a Doctor of the Church and Neo-Platonist; he combined the Christian theology with Greek philosophy, to provide moral justification to declare war and to conduct it justly. War being inevitable needs moral delimitation, in terms of when to declare war and how to conduct it. The works of Augustine though not specifically discuss the just war theory as a theory, his just war understanding is rather the part of his politico-religious philosophy. However, his characterization of war, in terms of war ethics provided a fair ground for latter philosophers like Thomas Aquinas, to present a theoretical framework for the conduct of a Just War (Mattox, 2006). Thomas Aquinas encapsulated three criteria for a just war i.e. (i) war must be declared by a sovereign authority (ii)just cause and (iii) rightful intention. Latter theorists added two more criteria, in terms of (i) last resort and (ii) proportionality for gauging a war as just or unjust (Allhoff, Evans & Henschke, 2013, p1). These five criteria make a war a just war, under two concepts i.e. *Jus ad Bellum* and *Jus in Bello*.

Jus ad Bellum is the pre-war criteria for making a war morally just. Before going to war, the prerequisite is to provide moral justification for the declaration of a just war. If war becomes the last resort, its intended, purpose is to ensure peace, and if a sovereign authority declares it, then it qualifies to become a just war. Before going to war, pre-conditions, compelling and encouraging a state to declare war, come under the term *Jus ad Bellum*. As the part of international law, "*Jus ad Bellum* is the area of law that regulates the conditions under which a state may resort to war or to force in general" (Henderson, 2009, p3). However, war brings destruction, in terms of lives and properties. This destruction disturbs civilian population and violates their fundamental rights, both in terms of their lives and personal properties. Rationalists and empiricists specify two different sources for defining a situation or condition. Rationalists stress on the subjective and individual-based explanation of a situation, while empiricists emphasize on the objective and sense-based explanation of a situation. A situation for one party may fulfill the preconditions of a just war, but for the other party, it may not fulfill the preconditions. Due to individual differences, homogenous rules cannot specify preconditions for a war. In addition, even declaring a just war and targeting a just target can cause unjust and disproportional destruction for the people. The US attack on Iraq and Afghanistan could be just wars from the American's point of view; however, they were unjust from the others' viewpoints, not only in

terms of differences over the preconditions of these wars but due to the disproportional and collateral damages it caused to the civilian population also.

Jus in Bello specifies the rules for the conduct of war. If *Jus ad Bellum* is concerned about the justice of war, then *Jus in Bello* is concerned about the justice in war. One specifies the preconditions of war, while the other specifies rules for the conduct of war. *Jus in Bello* is that part of international law, which regulates the conduct of war of the belligerents (Henderson, 2009). Might is right is as old as man himself, which functions on the principle of 'the end justifies the mean'. To tame the 'might' domain of the states, it becomes necessary to fit it in their rightful 'right' domain. To ensure this, Western political philosophy tried to provide a legal &theoretical framework, in terms of *Jus ad Bellum* and *Jus in Bello*, to reduce the might domain of the states and to define it in terms of their right of defence and survival (Kolb, 1997). However, international law is not yet in a position to surpass the Municipal Law or law of the land. States act and react in the international system, keeping in view their own interests and their own rules of engagement. States follow the principle of the 'end justifies the mean. They do not follow the rules of war. States consider each step, whether pacific or antagonistic as based on reason and hence, based on justice. They go to war according to their own understanding, interests, rules and customs. Just war stipulates the causes of a just war and in turn regulates how to engage in a war, nevertheless, it cannot limit the violations of fundamental human rights. The 20th and 21st century just wars and just targets show less respect for international law and more violations of human rights. This analytical study discusses the just war theory and its impacts on human rights, in the light of international law.

Rationale

Power is both the source of war and peace. The powers of power can either be balanced or be curtailed to bring peace. Realists consider the balance of power as the phenomenal *modus operandi* for bringing peace. Liberals consider international law as a source to curtail the powers of power and to ensure a peaceful international ambiance. Just Theory theorists consider both the *Jus ad Bellum* and *Jus in Bello* i.e. the preconditions of war and the justice in war important sources for curtailing the powers of power and for making might the servant of right. The use of power and force to secure personal interest is the integral part of human history. The killing of Abel by his brother Cain is considered as a touchstone for gauging this tendency of humans (Meron, 2006, p.9). Since that tragedy, the use of power to gain personal benefits is the part of continuous struggle in human history. This tendency trickled down to Civilizations, City-States, Empires and the Modern Nation-State System (Qureshi, 2017). To curtail this tendency of the states, just theory theorists tried to entrap the use of power and force in the legal framework of Just Theory, in terms of *Jus ad Bellum* and *Jus in Bello.*

International Law and Jus ad Bellum/Jus in Bello

As defined above, *Jus ad Bellum* is that part of *Jus Gentium* or international law, which is concerned with the preconditions under which states have the right to go to war or tend to use force against a threat. International law specifies limits on the use of force. The use of force is the prerogative of a sovereign authority only. No other person can order to engage in a war. States in the international system are considered as symbolic persons. Sovereign individuals represent these symbolic persons. These individuals in turn take various steps to defend their respective territories. However, unlike the intra-national ambiance, which is governed by Municipal Law and ordered by a strong central authority, the international society is polycentric and anarchic i.e. without any super-state or central authority to control and order the whole system. In this polycentric morphology, International law gives each state its fundamental right to use its might to serve its right. This right of self-defence is encapsulated in the term *Jus ad Bellum* i.e. "the right to resort to force or the right to wage war" (Kolb & Hyde, 2008, p9).

For collective defence of the international community, Article 43 of the Charter of the United Nations invites all the members of the United Nations "to contribute to the maintenance of international peace and security", in terms of "agreements, armed forces, assistance" and other means. For the self-defense of the member states, Article 51 of the Charter of the United Nations mentions, "nothing in the present Charter shall impair the inherent right of individual (state)". However, the charter of the United Nations supports only collective action against an aggressor or a threat to international peace. Members can engage in a just war, if and only the Security Council in consultation with the members of the United Nations decides to do so. It means that international law i.e. the charter of the United Nations, which is the mother of all the international treaties, agreements and accords, defines a just war, in terms of a collective action against the aggressor or a threat to international peace. Individually, the use of force or declaring a war against a country does not fulfill the preconditions of a just war. As a procedure, the

international law (UN Charter) specifies certain steps as preconditions before using military force against a threat. These steps include the below-cited sequential order.

Determination of the Existence of Threat

Article 39 of the UN Charter assigns this responsibility to the UN Security Council to "determine the existence of threat". It means that states, neither can determine, nor can identify any threat unilaterally or individually. International peace is the responsibility of the UN Security Council, in light of the international law.

Provisional Measures

Article 40 of the UN Charter, states that the Security Council, "in order to prevent the aggravation of the situation" will make impartial "provisional measures" for the pacific settlement of any potential conflict.

Non-Military Measures

Article 41 of the UN Charter mentions that the UN Security Council will decide non-military measures, in terms of breaking economic relations or "severance of diplomatic relations", if the endeavor of pacific settlement fails to hold water.

Use of Force

If provisional and non-military measures fail and the Security Council feels that the use of force is inevitable, then Article 42 & 43 of the UN Charter, assigns this responsibility exclusively to the UNSC, to decide the use of force against an aggressor or a threat to the international peace. Article 43 states that member states, on the call of the UNSC will collectively "contribute to the maintenance of international peace and security". Article 44, 45, 46 & 47, concomitantly assigns the responsibility of the use of force to the United Nations Security Council and Military Staff Committee. The Charter, though delegates some responsibilities for regional arrangements also, it however states, "The Security Council shall at all times be kept fully informed of activities undertaken under regional arrangements" (Article 54). Despite these clear rules of international law, states unilaterally take decisions, keeping in view their national interest, core objectives and their own rules of engagement. International law is not yet in a position to take the position of Municipal Law, governing all the nations individually.

As *Jus Contra Bellum* or the altogether prohibition/prevention of war is not possible, therefore, attempts are made to strengthen "international humanitarian law or *Jus in Bello* and the law after war or *Jus post Bellum"* (Sayapin & Tsybulenko, 2018, p6). *Jus in Bello* is a Latin word, concerned to that part of *Jus Gentium* or international law, which limits the power of a state during war. This area of *Jus Gentium* specifies rules for controlling the aggressive behaviors and actions of states during war. *Jus in Bello* or International Humanitarian Law (IHL) prohibits the warring parties from targeting the non-combatants and causing disproportional destruction to the enemy state during war. This gives birth to two principles i.e. "the distinction between civilians and combatants & the prohibition to inflict unnecessary suffering" (Kolb & Hyde, 2008, p15). However, recent conflicts show different pictures, in terms of disproportional civilian casualties, collateral damages and destruction of persons and properties. International law clearly mentions "universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (Article 55 of UN Charter). However, states neither respect the *Jus Ad Bellum* part of international law, nor the *Jus in Bello.*

The basic concept of these rules of engagement is to target the combatant only and to avoid the non-combatant and civilian population. Studies suggest that between 2003 and 2011, due to the US-Iraq war of 2003, violence, poor hygienic conditions and infrastructure collapses killed roundabout 461,000 civilians in Iraq (BBC, 2013 online).

Geneva Conventions

After the mass destructions of Second World War, the community of nations started thinking about the humanitarian treatment in wars. Geneva Conventions is a series of treaties, comprised on efforts about the treatment of the prisoners of war, wounded, sick, and civilians. A Convention was held at Geneva on August 12, 1949, for the "Amelioration of the Condition of wounded and sick in the Armed Forces in the Field". This convention is considered as the fourth endeavor for the treatment of wounded and sick. The other three conventions were held in 1864, 1906 and 1929 respectively (ICRC). In 1977, two

"Additional Protocols" were adopted for the "Protection of Victims of International Armed Conflicts (API)" and for the "Protection of Victims of Non-International Armed Conflicts (APII)" (Kolb, 2014, p59). Article 50 of the API, bifurcates the hostile territories into two groups of individuals i.e. the combatants and non-combatants (both civilians and armed forces personnel). Article 50(1) specifically defines civilians as non-military non-combatants. This means, "Civilians individually and collectively, enjoy general protection from attack" (Henderson, 2009, p92). If civilians do not take part in a conflict, they do not deserve to be killed. However, unfortunately, the most affected in any conflict are the civilians, in terms of their lives, their properties and their fundamental rights.

Convention on the Avoidance of Certain Conventional Weapons

The convention of 1980 and its subsequent additional protocols are considered as the most important documents in international law, prohibiting the usage of "Certain Conventional Weapons" (CCW). The 1980 convention is an "Umbrella Treaty", tailed by protocol I, II, III, IV & V, for the "prohibition of specific weapons" ((Kolb, 2014, p62-63). These five protocols successively prohibit the following weapons (Abramson, 2017):

Non-Detectable Fragments

Protocol-I prohibits the usage of those weapons, which convert into non-detectable fragments and cause injuries or kill the victims. However, since 2010, the Indian forces are using Pellet Guns in the Indian Occupied Kashmir. According to the Amnesty International (2018), between July 2016 and February 2017, roundabout 6,221 people faced pellet guns' injuries couples with 782 eye injuries. The Protocol-I prohibits "non-detectable fragments", for being causing difficulty for the "doctors to remove the fragments" (Abramson, 2017 online). However, examining the pellet guns' victims, "doctors, often decide that removing the pellets is too dangerous. They remain lodged into victims' bodies, as permanent as their blindness" (Perrigo, 2018 online).

Landmines

Protocol-II deals with the regulations of mines, in terms of clearing the area, which a government controls. Nonetheless, Landmines & Cluster Munition Monitor (2018), reports 7,239 casualties in 2015, 9,437 in 2016, 7,239 in 2017 and 120,000 between 1999 and 2017, *en masse*.

Incendiary Weapons

Protocol-III provides for the regulations of flammable weapons, in terms of its prohibition near the civilian population and forests. These weapons are considered as the merciless "means of armed conflict" (IHRC, 2015, P1). International Human Rights Clinic in its report mentions the usage of incendiary weapons in Libya, Syria, Yemen and Ukraine. According to this report, between 1980 and 2015, incendiary weapons have been used in roundabout fifteen international conflicts across the three continents.

Blinding Laser

Protocol-IV proscribes the usage of blinding laser, causing constant blindness.

Explosive Remnants of War

Protocol-V provides to deal with the unexploded munitions. Nonetheless, landmines in war-affected regions are a big threat to civilian population. People unknowingly become the victim of the fate they don't deserve. Afghanistan is ranked as the most landmines, ERW, and Abandoned Improvised Mines (AIM) affected country. Between 2001 and 2018, approximately 20,135 civilian casualties caused due to explosive remnants of war, which include 14,693 injuries and 5,442 deaths. These casualties don't include the catastrophes of other warring means and methods (Fiederlein & Rzegocki, 2019, p 2).

International Humanitarian Law

International Humanitarian Law (IHL) or the Law of Armed Conflicts (LOAC) stresses on the safety of civilian population during armed conflicts. Non-combatant Civilian population always becomes the victim of international wars. World War I caused roundabout 40 million casualties (21 million injuries & 20 million deaths). This gargantuan number of humans' deaths i.e. 20 million deaths included 9.7 million military personnel and 10 million civilians (Gratz, 2011a, p 1). World War II was more dangerous for

both the military personnel and civilian population. This war caused approximately 50 to 60 million casualties, including 45 million civilian deaths (Gratz, 2011b, p 5). Due to the inventions of modern technologies of wars and armed conflicts, collateral damages and human rights violations, in terms of targeting the non-combatants have become common. International law divides the hostile territories into two groups i.e. the combatants and non-combatants. According to the international humanitarian law, warring parties are bound to differentiate between the civilians and combatants (Kolb & Hyde, 2008). Nonetheless, antagonists during armed conflicts give little attention to international humanitarian law or the law of armed conflicts. They instead chase their national interests and give little weightage to human rights violations. In Vietnam War (1954-1975), approximately 2 million civilians were killed (Spector, 2014 Britannica). In the Gulf War (1990-1991), roundabout 10,000 civilians i.e. noncombatants were killed (Paul, 2001 online). According to the Iraq Body Count, between 2003 and 2019, roundabout 184,382-207,645 documented civilian deaths have been reported. In the Afghan War, between 2001 and 2019, approximately 43,074 civilian casualties have been recorded (Crawford & Lutz, 2019, p 1). These civilian casualties show the disproportional nature of recent armed conflicts. Both the dignity/fundamental rights of humans and the observance of International humanitarian law are becoming less important than the core objectives and national interests of the states. States pursue their national interests, even by crushing the lives of the innocent civilians, who neither know nor understand the games of the game's players.

Conclusion

The Just War Theory specifies the rules *of war* and *in war,* in terms of *Jus ad Bellum* and *Jus in Bellow* respectively. International Humanitarian Law demarcates the territories of the warring parties into combatants and noncombatants. Both the just war theory and international humanitarian law lay down frameworks to reduce the number of civilian casualties. Nonetheless, states pursue their own national interests in a world, where both the international law and international organizations keep little weightage, meager influence and powerless power. The UN Charter is the most authentic source of international law. This Charter gives the right of the declaration of just war to the United Nations Security Council only. The Charter further bounds all the members of the United Nations to support the UNSC in its call and action. This shows that just war is a collective obligation of all the members of the United Nations and an individual state cannot declare a just war against a threat, it considers. However, states, instead of following a proper procedure of international law and its observance, take unilateral actions and causing disproportional civilian casualties. The Geneva Conventions, its additional protocols and the convention of 1980 lay down rules for the just conduct of wars and for the non-usage of those weapons, which cause untold civilian casualties. Statistics however show the disproportional consequences of the aggressive behaviors of the states and the usage of forbidden weapons. The community of nations should observe the law of the armed conflicts in true letter and spirit and they should respect the fundamental rights of humans. Human resource is the most valuable resource of the world. Its extermination is a heinous crime, both from the point of view of the international law and international morality. States should strengthen the power of the international law, they should give preference to cooperation over competition and they should transform a world of the all, for the all and by the all.

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