

MONITORING OF THE HUMANITARIAN SITUATION AS THE WAR GOES ON IN THE SOMALIA AND PARTS OF THE NORTH EASTERN KENYA

INTRODUCTION

The main objective of this monitoring report is to investigate and ultimately judge whether the Kenya Defence Forces (KDF) and their allies in the war on Al-shabaab in Somali has violated laws that governs the conduct of the armed conflict which is fundamental to the civilized worlds: laws that are designed to protect people from the barbarity of war. This is the branch of the international law called international humanitarian law. It is a branch of the international laws which outlines the military target, the types of weapons that can be used, and the proportionality during the time of war.

An *indicia* of a civilized country is adherence to these laws, not only by *pious* words but through actions. To act outside these laws, to disobey these laws, to flout these laws is to become *hostis humani generis*- an enemy of all mankind. In days past "enemies of all mankind" were slave traders and pirates¹. They could be brought to justice wherever found. Today such enemies include those countries and individuals who violate the fundamental laws that protect the peace and limit war.

These laws are contained and protected in treaties that the Kenya has signed, for example the Geneva Convention of 1949 on Prisoners of War. They are reflected in what is called customary international law. This law has arisen over hundreds if not thousands of years. All the countries must obey it. However, it is of great necessity to assess how the situation came about

RATIONALE/JUSTIFICATION OF THE WAR

The Kenya war on Al shabaab in somali can be defended from the Municipal law angle but majorly from the international law both inherent in the doctrine practice within customary international law. If the international law under the signed treaties protecting the security and maintaining peace is to be interpreted as it is, Kenya has never *intervened* in somali, it has never *invaded* somali but is just persuing a criminal of non state actor across the border with the consent and joint support of Somali as both defended in the extended interpretation of the international maritime law, the international law of a hot pursuit of a criminal of a non state actor across the border or the preemptive self defence during the time of eminent threat to a state sovereignty or security of a nation. However, the analysis can be reduced to be a mere *incursion of consent* by a foreign army to persue a criminal accross border by military means.

The Kenya Defence Force war in somali against Al Shabaab can be eventually defended from two major background arguements of laws: *the right to self defence*; and *the right of hot pursuit in international law*.

Going by the liberal interpretation of the *right to self defense*, under the United Nations Charter - Article 51, “Nothing in the present Charter shall impair the inherent right of individual or collective 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 the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of 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.”²

Kenya as a member of the United Nations has taken measures from the borrowed argument that Al shabaab as an armed criminals from Somali, a group declared under the international law as the terrorist in nature, has crossed border and conducted a criminal activity of abducting its tourist visitors and getting away with them to demand ransom or kill them. Kenya has extended the interpretation of the law on sovereignty and self defense under the UN Charter to categorize this as an armed attack by a criminal of non state actor and by this virtue, Kenya government with all the conferred authority under the international law has the obligation to take any necessary action, both military and non military to pursue these criminals even across the border of their hiding with the consent of the host states with an aim to destroy the group or arrest them for charges under the international criminal justice procedures.

However, because Kenya has not declared a war with Somali as a State, the government is not compelled under the international law to report this to UN Security Council but only to observe all the necessary measures and rules of procedure and conduct of armed conflict within the international humanitarian law protected by the Geneva Convention of 1949 and its additional protocols to make sure that all human rights are protected and observed to the latter point under the U.N declaration on Human Rights of 1948. All that Kenya need to do in this regard is to request the consent of Somali government where these criminals are hiding before the incursion. In a situation where the conflict has grown to a bigger multitude and the crime also seem to be categorized as a threat to the international security and peace, then the UN Security Council can be consulted to intervene in terms of supporting this.

Under the argument of *the right of hot pursuit of international law*, the debate begins with the question whether the nations can pursue criminals of non state actors across borders on land with the extended interpretation of the international law of hot pursuit to justify the *incursion* operation. The hot pursuit raid has emerged from different angles as a norm in the international armed conflict arena. This is as a result of the borderless nature of the enemies or the criminals of today in the class of terrorists, drug traffickers, pirates and with the issue of some states’ inability or unwillingness to deal with such crimes.

The phrase, as interpreted in its modern extended incarnation, provides legal room for states to cross into other states to pursue non-state actors. These actors as has been mentioned before—be they terrorists, rebels, pirates, warlords, or drug barons—have

² Charter of the United Nations of , Article 51, Done at Francisco, 1945.

committed a crime on the territory of the pursuing state and have then fled to another for safety. Some governments interpret the phrase more broadly to justify larger cross-border incursions or even limited air strikes.

In similar instances around the world, Turkey, as an example, invoked the phrase repeatedly to justify its cross-border incursions against Kurdistan Workers Party (PKK) camps in northern Iraq. Colombia used the phrase to provide legal justification for its February 2008 raid against FARC rebels holed up in Ecuador. During the early phases of the war in Iraq, a few officials in Washington suggested that U.S. forces carry out raids or launch air strikes against Islamic militants holed up across the border in Syria.

Of course, such cross-border attacks are nothing new in international relations, from when U.S. forces pursued Vietcong guerrillas in Cambodia to attacks by Rwanda's Tutsi-led military on Hutu militants across the border in Congo. Stretching further back, the U.S. military didn't think twice about crossing into Mexico to chase down Pancho Villa in 1916, in response to his raid of New Mexico.

Under certain circumstances, "hot pursuit" can be a necessary and legitimate response to violent non-state actors, provided the response is immediate, proportional, and a means of last resort. Yet the principle should complement, not replace, other legal channels.

The element of *hot pursuit* finds its international legal strength in the Maritime international convention of the high sea of 1958 done at Geneva on 29th April, 1958 and entered into force on 30th September, 1962 under the United Nations treaty series vol, 450 p.11,p.82. Even though, the treaty is more vocal on the crimes at the sea, the extended interpretation allows states to borrow its basis on dealing with criminals of the same nature but on the land, the reason as to why the international law is interpreted horizontally as a system as opposed to vertical nature of interpretation.

In Kenya situation, no body will argue backward on Kenya action on Al Shabaab since the group is a threat to international security and they fall under the terrorist as has been severally declared by the international community, a threat to both Kenya and the rest of the world: this is also a point with reference to the fact that Kenya has all the reasons to ensure political stability given its geographical position with Somali and the operation base of the terrorist Al shabaab. Kenya by both moral obligation and the legal right has full justification to fight Alshabaab to restore peace and security so long as the government of Kenya: the Kenya Defence Force on the ground, air and sea stick to *jus ad bellum* and *jus in bello*.

The only broad concerns and opinions under the globe watch in the process of destroying Alshabaab are as follows:

1. *the breaches of the Human Rights*
2. *Biassses in the war situation*
3. *Assumptions in the war region*
4. *How the past historical injustices reflect to the situation on the ground*
5. *The war situation as it regards the civilian*
6. *The war economy*

1. The U.N declaration on Human Rights of 1948

The Articles 3,4,5 May be seen to suport the actions of Kenya Defence forces yet the same may be infringed by the KDF in furthering their right under Art. 51 of the IHL.

It is these provisions that we set out to look out for and got some reports that when a hand grenade expolded in the Northern border region, the KDF troops together with the Amisom troops indiscriminately rounded the young men, ransacked homes in search for tha Alshabbab militia men whom they understood to enjoy some sympathy from a certain group of small communities who are said to have suffered past Historical Injustices in the hands of the government(read the Wagalla Masacre).² To this extent the KDF has even infringed on the rights of these communities. More so in urtter violation of the Provision of Articles 9,12 and 13. The violations of human rights here are now a serious cause of worry for locals. Acording to another related report by the human rights watch, many men are routinely rounded up and grossly get mistreated.

On January 11, 2012, in the latest of a series of incidents documented³ by Human Rights Watch since October 2011, security forces rounded up and beat residents of Garissa, the provincial capital, in an open field within the enclosure of the local military camp. A Human Rights Watch researcher witnessed the incident. Another worrying case is the fact that the KDF does not allow entry into the camps and into areas where people are held captives. In such a case the KDF wage war against the law itself. They transform the KDF t into a vehicle for civillian and war monitor suppression, and it also summarily dismisses the relief workers effort in trying to deliver humnitarian aid as required of them in such situatuations.

The Geneva convention of 1949 and its additional protocols

Art. 3. was the most important area of interest and to the extent that the monitoring team was keen, the team finds no offence or reasonable offence at the moment to lay a finger on under the article to support any acts of violations in the treaty that can be reported against the High contracting party. In fact the monitoring team established that the areas that were previously under Al-Shabaab rule are now freed and the sick are receiving treatment and the hungry are being fed as guaranteed under *Art. 3 1a, b, and d (2)*.³

The monitoring team however recommends continuous vigilance especially with reference to the reported cases if readings of the additional Protocols are to be

² <http://africanpress.me/2007/10/26/the-wagalla-massacre-23-years-ago-north-eastern-kenya/>

³ Human Rights Watch: *Security Forces Abusing Civilians Near Somalia Border. 2012, p.1 Nairobi.*

³ Art. 6. The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2. of the Geneva Convention and the expanded readings

expanded. This is because no clear explanation is obtainable regarding the whereabouts of the Al-Shabaab followers who are occasionally overpowered and consequently surrender to the KDF. It is not very clear whether there are cases of enhanced disappearance or summary executions contrary to the guarantees under the broad readings anchored under Art 3.

The International Humanitarian Law (IHL)

International humanitarian law is the set of rules which, in time of war, protect⁴ those who are not, or no longer, taking an active part in hostilities, and limit the choice of methods and means of warfare. It applies both in situations of international and non international armed conflict. The main instruments of international humanitarian law are the **Geneva Conventions of 12 August 1949 for the protection of war victims**. These treaties, which are universally accepted, protect the wounded, the sick, the shipwrecked, prisoners of war and civilians who find themselves in enemy hands. They also protect medical duties, medical personnel, medical units and facilities, and the means of medical transport. However, the Conventions leave gaps in important areas, such as the conduct of combatants and protection of civilians from the effects of hostilities. To remedy these shortcomings, two Protocols were adopted in 1977. They supplement, but do not replace, the Geneva Conventions of 1949.

Under the IHL, it is important to look at the Principles of Humanitarian law as follows:

a) **The Principle of distinction**

This principle requires that in a war situation, you must distinguish between the Military Principles and the Humanitarian Principles. It is proper to look at the current case based on what the new provisions of the additional protocols of the Geneva Conventions.

What new provisions do?

Protocol I contain?

Protocol I extends the Geneva Conventions' definition of international armed conflict to include wars of national liberation (Art. 1) and specifies what constitutes a legitimate target of military attack. Specifically, Protocol I:a) **prohibits** indiscriminate attacks and attacks or reprisals directed against :the civilian population and individual civilians (Art. 48 and 51); civilian objects (Art. 48 and 52);

Numerous military manuals, including those of States not, or not at the⁵ time, party to Additional Protocol I, stipulate that a distinction must be made between civilians and combatants and that it is prohibited to direct attacks against civilians. Sweden's IHL Manual identifies the principle of distinction

⁴ International Committee of the Red Cross: **Additional Protocols to the Geneva Conventions of 1949** 01/2003 Geneva

⁵ International Committee of the Red Cross Henckaerts J et al ,*Customary International Humanitarian Law Volume I. Cambridge 2005*p13

as laid down in Article 48 of Additional Protocol I as a rule of customary international law. In addition, there are numerous examples of national legislation which make it a criminal offence to direct attacks against civilians, including the legislation of States not, or not at the time, party to Additional Protocol I. In the *Kassem case* in 1969, Israel's Military Court at Ramallah recognised the immunity of civilians from direct attack as one of the basic rules of international humanitarian law.¹² There are, moreover, many official statements which invoke the rule, including by States not, or not at the time, party to

The military Principles include all the hardware being used by the military such as the army trucks, barracks arsenals of war among others.

Humanitarian Principles are on the other hand, go deeper as to cover churches, schools, shops economic activities of the civilians.

The monitoring exercise finds no reasonable basis to claim outright violation of the the principle of distinction directly. However, when the IHL is given expanded interpretation then there may arise reason to conduct further investigations on the conduct of KDF.

The Geneva Declaration of 1948. The 1948 Universal Declaration stressed the interdependence of all human rights (civil, political, economic, social and cultural), all inherent in the human person. There has been reports and narrations of civilians who are transporting relief food to Dadaab being manhandled by the soldiers. This must be serious cause for worry regarding a look at the implication of IHL.

b) **The Principle of Proportionality**

This principle check is the proportionality or disproportionality in war situation it checks the use of force proportional to gaining military advantage. It is important to look at whether either of the sides use a force disproportional to the enemy they are facing. For example, it is a violation of the rules of war to use bomb against an opponent who is armed only with a pistol or hand guns. Again to the extent of the monitoring the principle has largely been adhered to.

c) **Principle of Necessity**

This Principle assesses whether it was necessary to go to war. This principle has largely and almost exhaustively been dealt with in the Introduction of *this report*. But it is also important under this principle to check whether the behavior of the military officers is especially in compliance with the *The Vienna convention on the law of treaties of 1969*. Does the KDF shoot even the people who can be arrested and whether they shoot even at groups of people who are just gathered and are shouting?. The monitoring shall go into assessing how this principle is being adhered to in the war front.

d) **The Principle of Humanity**

This Principle requires that you apply the necessary humaneness even as war is going on. You should allow for humanitarian activities to go on. People should access medical care, go to worship places and carry on with their economic activities. The monitoring exercise looked at these activities with the view of establishing sufficient compliance to the *International Refugee Law*. Again it is worth reporting that no sufficient evidence can be adduced so far to demonstrate any violations here

The plight of refugees is fundamentally a human rights issue. Human rights treaties are therefore effective tools to use in the international protection of refugees, particularly the [1984 Convention against Torture](#), which provides for the principle of *non-refoulement* in Article 3. Similarly, prohibitions against torture in the [1966 International Covenant on Civil and Political Rights](#) (Article 5) and the [1950 European Convention for the Protection of Human Rights and Fundamental Freedoms](#) (Article 3) have been invoked to protect refugees from being *refouled*. Elsewhere, the [1969 American Convention on Human Rights](#) promotes the right to seek and be granted asylum in Article 22(7). However to the extent that people who are transporting food and medical reliefs are being rounded up and beaten, there can be arguments about the said refugee law being violated.⁶

This would be in utter disregard to the Art 5 of the Geneva Declaration that states expressly that *No one shall be subjected to torture or to cruel, inhuman or degrading treatment. Especially denying people a chance to move or flee from war ravaged areas to seek security and humanitarian assistance. However, the application and enforcement of the provisions here have some grey areas that need further investigations.*

e) **Superfluous Injury**

Use of weapons that do not cause unnecessary suffering to the civilians and to the environment. The monitoring team checked whether the requirements of this Principle are adhered to. Cases where the military use acids, or chemicals or engages in activities that may result into biological modification of the environment thus render the land unsupportive of certain activities were checked and marked but no substantial violations can be reported

Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating,⁷ Poisonous or other Gases, and of Bacteriological Methods of Warfare, signed at Geneva, June 17, 1925 (League of Nations, *Treaty Series*, vol. XCIV, 1929, No. 2138)

⁶ [Elisa Mason](#), *International Refugee Law*, UK, 2009, p12.

⁷ International Committee of the Red Cross: Draft Additional Protocol the Geneva Convention of August 12, 1949 *Commentary*. Geneva 1979p 149

Convention No. IV concerning the Laws and Customs of War on Land, signed at The Hague on 18 October 1907 (Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907*, New York, Oxford University

Where wars erupt, suffering and hardship invariably follow. Conflict is the breeding ground for mass violations of human rights including unlawful killings, torture, forced displacement and starvation. In conflicts across the globe, governments and armed groups routinely attack civilians and commit war crimes and terrible abuses of human rights. There are demonstrable cases where the Kenya Defence Forces are said to have sunk fishermen's vessels in fear that they are al-Shabaab and went ahead and imposed curfews which have in turn turned to have disastrous results. These and other human rights violations need to be given a look.

Currently there are cases of some overpowered Al-Shabaab followers who are surrendering to the Kenyan Defence Forces. The cost of rehabilitating them and trusting that they may live peacefully with the civilian population may in turn be burdensome and the military may opt to go against the requirements of Amnesty International and execute them or resultant enforced disappearance may be reported.

The AU Security Architecture

The AU Security Architecture aims at

- 1) Strengthening the capacity of the AU to implement the various elements of the AU Peace and Security Council.
- 2) Strengthening the AU Planning Cell responsible for strategic and military planning of peace support operations
- 3) Strengthening the capacity of the PSD in the areas of financial and administrative management for peace support operations

These 3 concerns have seen Ethiopia to join in the restoration of the Peace process in Somali. Burundi and Rwanda also continue to have their soldiers in the war ravaged area as a measure of ensuring a lasting peace and restoration of normalcy in the horn of Africa. It is worth mentioning that their stay here has been backed by the UN Security Council.

The biases and assumptions of some of the respondents during the Monitoring Exercise

There is an assumption that the refugees are all genuine people seeking humanitarian aid and running away from armed conflict in the Somalia region. This may not be true as some Al-Shabaab sympathisers may disguise themselves and move into the country and wage a war in the midst of the innocent populace.

Another dangerous assumption is that every Somali has potential of being an Al-shabbab. This may not be true and the exercise should look at the extent to which this assumption leads to human rights violation purely on the ground that one is a Somali or a Muslim.

Past Historical Injustices

The past historical injustices may shape the opinion and attitude of the natives in parts of the North Eastern Kenya. It becomes a soft assumption that the communities that suffered under the infamous Wagala massacre may not be supportive of the war as they may be taken to still harbour bitterness against the Kenyan Government.

Refugees Problem and the census factor

International refugee law is part of a larger mosaic of international human⁸ rights law and international humanitarian law. Human rights law constitutes the broad framework within which refugee law provisions should be seen. The International Covenant on Civil and Political Rights has been interpreted to prohibit return to torture. In addition, nearly all of its provisions apply to non-citizens.

Refugees are entitled to two partially overlapping sets of rights: those rights accorded to them as individuals and guaranteed under international human rights standards and national law, and specific rights related to their status as refugees. Two international human rights treaties have a particularly significant role in international refugee law:

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides for protection from

Some other assumptions are that the Somalis see themselves as one people. This may not be true given that the presence of war in the Somalia region has caused a war economy. The war economy has led to emergence of rich Somalis who can buy citizenship documents in Kenya very easily (thanks to the corruption in the Immigration department of Kenya). This is feared to have led to the cancellation of the census results of the North Eastern region. The results were found to be non indicative of natural population growth.

Another threat is that whenever there is a grenade explosion in the North eastern region, then the security officers have to indiscriminately round and harass the Kenyan Somalis. The Kenyan Somalis may in turn treat the Somalia Somalis in a manner so as not to meet the AU Charter on refugees.

⁸UNHCR, Kate J et al, *Refugee Protection Guide International Refugee Law 2001*p28

Finally, another assumption is that all the refugees are genuine people as defined by the AU Charter of the refugees. But this may not be the case as some could be the Militant Alshabaab rebels crossing in to Kenya in disguise so as to further attacks in non-suspecting civilians and Military interests in Kenya.

The Humanitarian NGOs and the War Economy

The relief food distributors have found their relevance in the on-going situation in Somalia. It would be wrong to assume that everyone who goes here wants the war ended. Again the areas that benefit from the war economy may not be willing for an end of the war and may engage in activities that further fuel the violence and attacks to further their interests.

Human Rights reporting

It is assumed by many people that the activities in the war region shall be seen in the media. This may not be true as most of the reporters are several kilometers away from the war fronts and even where they have concrete information, they do not air it unless cleared by the defence forces public relations team.

Somalia being a state

For being a state and not a nation, there is the risk that many people see themselves to be bound by this sense of brotherhood and that any attack on any a Somali by an external force constitutes an aggression to all of them, such a scenario may run against the general assumption that all non Al-shabaab are supportive of the war.

Then the al-shabaab being an amorphous group is not a body that you can decisively deal with. The Kenyan defence forces may think that by destroying their training camps so they are incapacitating them. But this may not be true as some hide within the civilian population and using the same as human shields a serious war crime.

Recommendations

The recommendation is that as the war continues against Al-shabaab, the international communities and the human rights bodies should keep watch so that should there be any violation of the norms and the principles of the international rule of law, then the abusers of the law must be subjected to account.

